The Liberalisation of Trade in Services in MERCOSUR

Submitted for the Degree of Doctor in Philosophy (Law)

by

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June 2008
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I hereby declare that the work presented in this thesis is my own work.

Gabriel Gari
London, 16 June 2008
ABSTRACT

The purpose of this thesis is to examine the legal framework for the liberalisation of trade in services in MERCOSUR with a view to identifying the obstacles that stand against it and shed light on the best course of action for securing a realistic degree of liberalisation. The thesis argues that the Protocol of Montevideo on Trade in Services, the rounds of negotiations of specific commitments on Market Access and National Treatment and the secondary rules for specific service sectors adopted so far, have failed to make any significant contribution to ensuring effective market access conditions for MERCOSUR service suppliers and levelling the playing field to compete against domestic incumbents. It claims that for advancing the liberalisation of trade in services, it is necessary for State Parties to look beyond the negotiation of reciprocal concessions for the removal of existing restrictions, and engage on a long-term strategy aimed at bringing about the gradual convergence of domestic legislation affecting trade in services through regulatory co-operation. It also refers to the need for streamlining the operation of the current institutional system by adopting measures aimed at encouraging existing institutions to exercise their power in a more rule-oriented, transparent, accountable and efficient way, without compromising domestic sovereignty to a level unacceptable for State Parties. However, the thesis suggests that the absence of a matrix of converging national interests on MERCOSUR, and the existence of parallel forums for similar purposes at bilateral, regional and multilateral level, compromises its chances for success and wonders whether the effective integration of service markets could ever be achieved.
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<td>AHAA</td>
<td>Ad-Hoc Arbitration Award</td>
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<td>AHGS</td>
<td>Ad-Hoc Group on Services</td>
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<td>CET</td>
<td>Common External Tariff</td>
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<td>CMC</td>
<td>Common Market Council</td>
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<td>CMG</td>
<td>Common Market Group</td>
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<td>EC</td>
<td>European Community</td>
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<td>ECJ</td>
<td>European Court of Justice</td>
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<td>ECLAC</td>
<td>Economic Commission for Latin America and the Caribbean</td>
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<td>EFTA</td>
<td>European Free Trade Area</td>
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<td>ESCF</td>
<td>Economic and Social Consultative Forum</td>
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<td>EU</td>
<td>European Union</td>
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<td>FCPA</td>
<td>Forum of Consultation and Political Agreement</td>
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<td>GATS</td>
<td>General Agreement on Trade in Services</td>
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<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<td>GS</td>
<td>Group on Services</td>
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<td>IADB</td>
<td>Inter American Development Bank</td>
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<td>IOSCO</td>
<td>International Organisation of Securities Commissions</td>
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<td>JPC</td>
<td>Joint Parliamentary Commission</td>
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<td>LAFTA</td>
<td>Latin America Free Trade Area</td>
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<td>LAIA</td>
<td>Latin America Integration Association</td>
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<td>MA</td>
<td>Market Access</td>
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<td>MCRP</td>
<td>MERCOSUR Committee of Permanent Representatives</td>
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<td>MERCOSUR</td>
<td>Mercado Común del Sur (Common Market of the South)</td>
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<td>MFN</td>
<td>Most Favoured Nation Treatment</td>
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<td>MTC</td>
<td>MERCOSUR Trade Commission</td>
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<td>North American Free Trade Area</td>
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<td>National Treatment</td>
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<td>OAS</td>
<td>Organisation of American States</td>
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<td>PIECAB</td>
<td>Programme for Integration and Economic Cooperation between Argentina and Brazil</td>
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<td>PSA</td>
<td>Partial Scope Agreement</td>
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<td>SWG</td>
<td>Sub-working group</td>
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<td>ToM</td>
<td>Treaty of Montevideo</td>
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<td>TAS</td>
<td>Technical Advice Sector of the MERCOSUR Secretariat</td>
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<tr>
<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development</td>
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<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
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<td>WG</td>
<td>Working Group</td>
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<td>WTO</td>
<td>World Trade Organisation</td>
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### MERCOSUR Cases

*Brazil – Restrictive Measures to Reciprocal Trade, Ad hoc Arbitration Award, Brazil - Application of Restrictive Measures to Reciprocal Trade with Argentina, adopted 28/04/99*

*Brazil – Pork Subsidies, Ad hoc Arbitration Award, Brazil - Subsidies on the Production and Export of Pork to Argentina, adopted 27/09/99*

*Argentina – Textiles, Ad hoc Arbitration Award, Argentina - Safeguard Measures on Textiles from Brazil, adopted 10/03/00*

*Argentina – Poultry, Ad hoc Arbitration Award, Argentina-Application of Anti Dumping Measures on Poultry from Brazil, adopted 21/05/01*

*Argentina – Bicycles, Ad hoc Arbitration Award, Argentina - Access Restrictions on Bicycles from Uruguay, adopted 29/09/01*

*Brazil – Remoulded Tyres, Ad hoc Arbitration Award, Brazil - Prohibition of Import of Remoulded Tyres from Uruguay, adopted 9/01/02*

*Brazil – Phytosanitary Products, Ad hoc Arbitration Award, Brazil - Access Restrictions on Phytosanitary Products from Argentina, adopted 19/04/02*

*Uruguay – Cigarettes, Ad hoc Arbitration Award, Uruguay – Application of an Internal Tax on the Sales of Cigarettes Imported from Paraguay, adopted 21/05/02*

*Uruguay – Processed Wool, Ad hoc Arbitration Award, Uruguay - Application of Incentives for the Export of Processed Wool to Argentina, adopted 04/04/03*

*Brazil – Tobacco Products, Ad hoc Arbitration Award, Brazil - Application of Discriminatory and Restrictive Measures on the Import of Tobacco Products from Uruguay, adopted 05/08/05*

*Argentina – Remoulded Tyres, Ad hoc Arbitration Award, Argentina - Prohibition of Import of Remoulded Tyres from Uruguay, adopted 25/10/05*

*Argentina – Remoulded Tyres, Permanent Review Tribunal Appeal Award 1/2005, Argentina - Prohibition of Import of Remoulded Tyres from Uruguay, adopted 21/12/05*

*Argentina – Remoulded Tyres, Permanent Review Tribunal Clarification Award, Prohibition of Import of Remoulded Tyres from Uruguay, 13/01/06*

*Uruguay – Compensatory Measures, Permanent Review Tribunal Award, Uruguay - Compensatory Measures against Argentina’s Prohibition on the Import of Remoulded Tyres, adopted 8/06/07*

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Amministrazione delle Finanze dello Stato v Simmenthal SpA (Case 106/77) [1978] ECR 629
Arcaro (Case C-168/95) [1996] ECR I-4705
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Bond van Adverteerders & others v The Netherlands (Case 352/85) [1988] ECR 2085
Bundesmonopolverwaltung fur Branntwein (Cassis de Dijon) (Case 120/78)[1979] ECR 649
Commission v Germany (Case 205/84) [1986] ECR 3755
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Corsica Ferries Italia SRL v Corpo dei Piloti di Genova (Case C-18/93) [1994] ECR I-1783
Costa v ENEL (Case 6/64) [1964] ECR 585
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Deliège v Ligue Francophone de Judo et Disciplines Associées (Cases C-51/96 and 191/97) [2000] ECR I 2549
Federación de Distribuidores Cinematográficos v Estado Español et Unión de Productores de Cine y Televisión (Case C-17/92) [1993] ECR I-2239
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Luisi and Carbone (Case 286/82 and 26/83) [1984] ECR 377
Marks & Spencer plc v Commissioners of Customs and Excise (Case C-62/00) [2002] ECR I-6325
Marleasing SA v La Comercial Internacionale de Alimentacion SA (Case C-106/89) [1990] ECR I-4135
Ministère Public v Van Wesemael (Cases 110-111/78) [1979] ECR 5
Omega Spielhallen-UND Automatenaufstellungs-GmbH v Oberbürgermeisterin des Bundesstadt Bonn (Case C-36/02)(2004) ECR I-9609
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Procureur du Roi v Debauche (Case 52/79) [1980] ECR 833
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Sacchi (Case 155/73) [1974] ECR 409
Säger v Dennemeyer & Co Ltd (Case C-76/90) [1991] ECR I-4221
Schmidberger Internationale Transporte und Planzuge v Austria (Case C-112/00) [2003] ECR I-5659
Stichting Collectiève Antennevoorsiening Gouda v Commissariaat voor de Media (Case C-288/89) [1991] ECR I-8339
SPUC v Grogan (Case C-159/90) [1991] ECR I-4685
Svensson and Gustavsson v Ministre du Logement et de l’Urbanisme (Case 484/93) [1995] ECR I-3955
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Van Gend en Loos v Nederlandse Administratie der Belastingen (Case 26/62) [1963] ECR 13
Vander Elst v Office des Migrations Internationales (Case C-43/93) [1994] ECR I-3803
Van Binsbergen (Case 33/74) [1974] ECR 1299
Von Colson and Kamann v Land Nordrhein-Westfalen (Case C-14/83) [1984] ECR 1891
Wagner Miret v Fondo de Garantia Salarial (Case C-334/92) [1993] ECR I-6911
Walrave and Koch v Association Union Cycliste (Case 36/74) [1974] ECR 1405
Webb (Case 279/80) [1981] ECR 3305
Wirth v Landeshauptsadt Hannover (Case C-109-92) [1993] ECR I-6447
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Treaty for the Establishment of a Common Market between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay (Treaty of Asuncion)

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<td>Protocol of Buenos Aires on International Jurisdiction for Contractual Matters</td>
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<td>Protocol on Educational Integration, and Recognition of Diplomas, Certificates, and Studies on Technical Education</td>
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<td>Protocol of Montevideo on Trade in Services in MERCOSUR</td>
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¹ This is not an exhaustive list. It includes only those Protocols and Instruments referred to in this thesis.

### Initial Schedule of Specific Commitments on Services

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<td>Schedule of Specific Commitments on Services - First Round</td>
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<td>Schedule of Specific Commitments on Services - Second Round</td>
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<tr>
<td>Schedule of Specific Commitments on Services - Third Round</td>
<td>10/01</td>
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<td>Protocol of Olivos for the Settlement of Disputes in MERCOSUR</td>
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<td>Schedule of Specific Commitments on Services - Fourth Round</td>
<td>22/03</td>
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<td>Agreement for the Regulation of the Protocol for the Defence of Competition in MERCOSUR (5/12/02)</td>
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<td>Schedule of Specific Commitments on Services - Fifth Round</td>
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<td>Protocol for the Protection and Promotion of Human Rights</td>
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<td>Schedule of Specific Commitments on Services - Sixth Round</td>
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<td>Protocol for the Establishment of MERCOSUR Parliament</td>
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<td>Protocol of Accession of the Bolivarian Republic of Venezuela to MERCOSUR (4/07/06)</td>
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<td>Protocol on Government Procurement in MERCOSUR</td>
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<td>Protocol amending Protocol of Olivos (19/01/07)</td>
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### International Agreements Concluded within the Framework of the Treaty of Asuncion

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<td>International Multimodal Transport Agreement between MERCOSUR State Parties</td>
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<td>Agreement on International Commercial Arbitration in MERCOSUR</td>
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<td>Agreement for the Waiver of Visas between MERCOSUR State Parties</td>
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<td>Protocol of Ushuaia about Democratic Commitment in MERCOSUR, Bolivia and Chile 24/07/98</td>
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<td>17/01/02</td>
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<td>Agreement on Residency Requirements for Nationals from MERCOSUR State Parties, approved by Dec 28/02, 6/12/02</td>
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<td>Agreement for the Creation of MERCOSUR Visa</td>
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<td>Agreement for the Simplification of Business Activities</td>
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<td>27/12/07</td>
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3 This is not an exhaustive list. It includes only those Agreements referred to in this thesis.

4 Common Market Council Decision that "approves" the Agreement.
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<th>Agreement</th>
<th>Date</th>
<th>Other Treaties</th>
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<td>Agreement on a Ninety days length of Stay for Tourists Nationals from MERCOSUR State Parties and Associate State Parties</td>
<td>10/06</td>
<td>Treaty Establishing the European Community</td>
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<td>Agreement about Free Visas for Students and Teachers from MERCOSUR State Parties</td>
<td>21/06</td>
<td>Treaty Establishing a Free Trade Area and Instituting the Latin American Free Trade Association</td>
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<td>Agreement on the Transport of Hazardous Substances</td>
<td>32/07</td>
<td>Treaty of Montevideo Establishing the Latin American Integration Association</td>
</tr>
</tbody>
</table>

Other Treaties

- Treaty Establishing the European Community
- Treaty Establishing a Free Trade Area and Instituting the Latin American Free Trade Association
- Treaty of Montevideo Establishing the Latin American Integration Association
- North American Free Trade Agreement
- General Agreement on Trade in Services
- Agreement Establishing the World Trade Organization
- The General Agreement on Tariffs and Trade ("GATT 1994")
- Vienna Convention on the Law of Treaties
Introduction
What are the chances for an architect based in Montevideo to design buildings in Sao Paulo, for a Brazilian national to hold a majority shareholding in an Argentinian newspaper, for an advertisement company based in Buenos Aires to plan a campaign for an Asuncion’s Mayor candidate, for a driver in Paraguay to buy her car insurance on line from a Brazilian Company, for an Argentinian pension fund to hold assets from Companies listed in the Sao Paulo Stock Exchange or for a Uruguayan resident to open a current account in Brazil? Put this question to individuals from any of the Southern Common Market countries (“MERCOSUR”) and the vast majority would probably agree on the virtual impossibility to carry out any of these transactions.

This should not come as a surprise but for the fact back in 1991 Argentina, Brazil, Paraguay and Uruguay signed in Asuncion, an ambitious sub-regional integration agreement aimed at the establishment of a common market involving the free movement of goods, services and factors of production, the establishment of a common external tariff and the co-ordination of macroeconomic and sectoral policies. Yet, almost two decades after the entry into force of the Treaty of Asuncion, MERCOSUR remains an incomplete free trade area, with a partially implemented Common External Tariff and with no significant degree of co-ordination of State Parties’ macroeconomic policies.

The gap between State Parties’ commitments and State Parties’ conduct has put MERCOSUR in the spotlight. The number of mercosceptics who no longer believe that MERCOSUR is

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3. No better evidence to illustrate this gap than the sheer number of secondary rules adopted by MERCOSUR decision making bodies, which State Parties have failed to incorporate into their national legal systems. Between 1991 and September 2002, the CMC adopted 149 Decisions that needed to be incorporated into Member States’ domestic legal systems, out of which 44 (30%) were incorporated by the four Member States. During the same period, the CMG adopted 604 Resolutions that needed to be incorporated into Member States’ domestic legal systems, out of which 224 (37%) were incorporated by the four Member States. According to the MERCOSUR Secretariat, between January 1994 and September 2002 the MTC adopted 90 Directives that needed to be
capable of securing a deep degree of economic integration among its partners and that it will soon become another pearl on the collar of failed Latin America’s integration attempts is growing. Most worryingly, mercoscepticism has even reached the highest political circles, traditionally imbued by a marked pro-integration optimism.4

The liberalisation of trade in services is not immune to these problems. Notwithstanding the entry into force of the Protocol of Montevideo on Trade in Services, an international agreement akin to the General Agreement on Trade in Services (“GATS”) that provides a general framework for trade in services within the bloc, the conclusion of six rounds of negotiations for the removal of existing restrictions and the adoption of a considerable number of secondary rules for specific service sectors and modes of supply, MERCOSUR is yet to deliver any significant achievement in this area.5 Most barriers to trade in services remain in place and there is still a long way ahead before suppliers and consumers can move freely across national borders.

4 According to a recent poll, 57% of La Nación readers, an Argentinian national newspaper, agreed with a quotation from the President of Uruguay, Tabare Vazquez who claimed that “As it is now, MERCOSUR is useless”. The poll was carried out on 20 April 2006 and received 6513 answers, available at www.lanacion.com.ar.

There are good reasons for studying MERCOSUR disciplines on trade in services. First, it is an under researched topic. MERCOSUR literature has been traditionally focused on trade in goods, grossly overlooking other fundamental freedoms necessary for deep economic integration such as the free movement of services and factors of production. Secondly, the service sector has a strategic importance for the economies of the region, as confirmed by its growing participation on the GDP composition and on the proportion of the labour force occupied in this sector. The potential contribution of efficient services to the economy is also very important as it stems from the greater weight of services in the sectors leading economic growth. Not to mention the growing opportunities for trade in the service sector fuelled by an ongoing technological progress in particular on the information technology sector, structural and organisational changes in modern production and institutional and regulatory changes at the national level, including the withdrawal of the State as service providers under monopoly conditions. Therefore, the cost of not having an open, sound and transparent regulatory framework for the free movement of services within the bloc can no longer be overlooked.

Against this background, the thesis examines the legal framework for the liberalisation of trade in services in MERCOSUR, discusses the reasons for the current state of affairs and proposes some alternatives for unlocking the integration process as far as its deep economic integration objectives are concerned.

6 See Appendix II, MERCOSUR Statistical Information, Tables 2 and 3.
7 On the strategic importance of services see, generally MARÍA JOSÉ ACOSTA, et al., Globalización y Servicios: Cambios Estructurales en el Comercio Internacional (CEPAL, Santiago de Chile 2003) and Berlinsky, ob cit., footnote n5.
8 See Appendix II, MERCOSUR Statistical Information, Tables 11, 12, 13 and 14.
9 Technological development has also dramatically reduced transaction costs on cross-border trade in services, in particular, by reducing the need for physical proximity between the service supplier and the consumer. As Linders notes, the rise in services is concomitant to the rise in the technological complexity of the economy. See GERTJAN LINDERS, Thesis, Methodology and Descriptive Statistics on Services and Services Trade (2001) Netherlands Bureau for Economic Policy Analysis, p 37.
10 Stibora and de Vaal argue that technological development has allowed for the splintering of the production process into various economic units, increasing the "interdependence of industries", which in its turn is raising the demand for "supplier services" for linking and coordinating specialized intermediate suppliers. They also point out that technological development has facilitated the outsourcing of labour intensive processes to outside service suppliers in order to achieve efficiency gains. See JOACHIM STIBORA & ALBERT DE VAAL, Services and Services Trade: A Theoretical Inquiry (Netherlands Economic Institute, Rotterdam 1995) p 8.
11 According to the WTO, during the last seven years (2000 to 2006) trade in commercial services grew at an annual percentage rate higher than 10% (20% in 2004). See International Trade Statistics 2007, p 117.
When it comes to interpret MERCOSUR’s poor results, the analysis goes beyond the black letter of the law, taking into account the underlying socio-economic and political factors conditioning the integration process. Rather than taking State Parties’ political will to achieve deep economic integration for granted, it is argued that there is a divorce between the objectives laid down by the Treaty of Asunción and the national interest of each State Party (particularly Brazil) in the integration process. A divorce which is rooted in one of MERCOSUR’s defining features, namely, the sharp structural asymmetries between its members, and in the lack of a common vision on the type and degree of integration desired that stems therein.12

Beyond a common rhetoric of “economic development with social justice”, “enhancing the living conditions of their people” and the like, each State Party carefully makes its own calculations on the extent to which the cost of observing MERCOSUR commitments is being paid off with proportionate benefits for their national interests. This brings into the equation non-legal factors such as economic, social and political considerations, which have been conditioning the achievement of the objectives laid down in the Treaty of Asuncion since its entry into force. In this vein, results that from a strictly treaty-based perspective should be regarded as a failure, from some State Parties’ national interest perspective could be seen as a desired outcome. Aware of this congenital weakness, the thesis discusses some alternatives for unlocking the current situation and securing a realistic degree of economic integration, not without wondering whether there is a real case for MERCOSUR with so diverse expectations on the integration process.

The thesis begins with an introductory chapter on challenges and legal instruments for the liberalisation of trade in services. First, it identifies the sui generis challenges raised by barriers to trade in services (as opposed to those affecting trade in goods). It then briefly describes the main trade disciplines, policy-making instruments and enforcement mechanisms prescribed by the General Agreement on Trade in Services (“GATS”) and the Treaty Establishing the European Community (“EC Treaty”). The purpose is to illustrate, from a comparative perspective, the menu of options available for the liberalisation of trade in

12 By “structural asymmetries” we mean the sharp differences in population and size of State Parties’ economies and, consequently, the differences in the relevance of MERCOSUR trade for each of its State Parties (See Appendix II, Table 1, 6 and 9). Throughout this book it will be argued that structural asymmetries inhibit the demand for stronger regional institutions and a more rule-oriented integration process.
services focusing on two agreements which have heavily influenced the design of MERCOSUR.

Chapter two examines the MERCOSUR legal system and the institutions responsible for its operation. The liberalisation of trade in services, just as any other integration objective is inextricably linked to the soundness of the institutional and legal settings that underpin the integration process. With this in mind, the chapter begins with an examination of the Treaty of Asuncion, MERCOSUR institutions, the sources of MERCOSUR law and the enforcement mechanisms. It then critically assesses the extent to which the institutional and legal settings have contributed to achieving MERCOSUR objectives and discusses some alternatives for reform.

Chapters three, four and five analyse three specific instruments provided by the MERCOSUR legal system for the liberalisation of trade in services: a set of treaty-based general obligations and disciplines, the negotiation of sector-specific Market Access and National Treatment commitments and a number of secondary rules on specific service sectors and modes of supply.

Chapter three examines the Protocol of Montevideo on Trade in Services, focusing on its general obligations and disciplines, which seek to further the liberalisation of trade in services by compelling State Parties to accord foreign services and service suppliers minimum standards of treatment and to regulate them in accordance with “trade-friendly” standards. The chapter discusses the suitability of modelling a framework agreement for trade in services in MERCOSUR on the basis of a multilateral instrument like the GATS and assesses the general obligations and disciplines’ capacity to liberalise trade in services in light of their scope of application and the institutional framework responsible for their implementation and enforcement.

Chapter four looks at the Protocol’s Programme of Liberalisation, i.e. the rounds of negotiations of specific commitments. It examines the Programme’s legal framework, reviews its implementation and analyses the results achieved so far in light of State Parties’ current schedules of specific commitments. The chapter discusses the rationale for the negotiation of specific commitments as an instrument for the liberalisation of trade in services in the MERCOSUR context.

Finally, chapter five focuses on positive integration, examining the secondary rules on specific service sectors and modes of supply. It critically assesses to what extent secondary
legislation has contributed to the liberalisation of trade in services and puts forward some suggestions for enhancing the quality of MERCOSUR legislative practice.

But there is more to this thesis than a compendium of technical proposals for removing barriers to trade in services tailored for a specific regional bloc. At a time when States across the world are lining up to sign regional trade agreements containing unqualified “within the border” commitments, it is not uncommon to encounter serious gaps between Treaty commitments and States’ conduct. The rhetoric of integration expressed during presidential summits, intergovernmental conferences and the like usually overlook the complexities of deep economic integration and its serious implications on the autonomy of governments to deal with essential governance issues such as public health, financial stability, cultural diversity, protection of the environment and so forth. Based on an in-depth case study, this thesis uncovers the reality behind the black letter of the law and argues that head of States not always mean what they sign.

The research involved a detailed analysis of primary sources of information including MERCOSUR primary legislation (i.e. the Treaty of Asuncion, its Protocols and other agreements concluded within the Treaty of Asuncion’s framework), secondary legislation (Decisions, Resolutions and Directives), arbitration awards issued by ad hoc tribunals and by the Permanent Review Tribunal, minutes of decision making bodies’ meetings, minutes of meetings of auxiliary bodies to the Common Market Group with specific competence on trade in services (Group on Services and Sub Working Groups on Communications, Financial Issues and Transport) and State Parties’ schedules of specific commitments on trade in services under the GATS and under the Protocol of Montevideo. The research also involved a quantitative analysis of these schedules using Hoekman’s method to provide a rough idea of the degree of liberalisation of the various service sectors and make comparisons between State Parties’ specific commitments.¹³

The primary sources of information consulted are written in Spanish or Portuguese, the two official languages of MERCOSUR. There is no such thing as an “official” translation of these documents into English. There are unofficial translations of the Treaty of Asuncion and some

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of its Protocols, but arbitration awards, MERCOSUR secondary rules, minutes of MERCOSUR bodies' meetings and other official documents are only written in Spanish or Portuguese. The author faced the difficult challenge to comment in English about documents written in another language and, when necessary, translate pieces of legislation into English. The task was conducted with extreme care and diligence in order to avoid distorting the meaning of terms of art, although, naturally, mistakes cannot be excluded altogether.

Language barriers aside, it was very difficult to get access to some primary sources of information. Primary and Secondary legislation, arbitration awards and minutes of the decision making bodies are easily accessible from the MERCOSUR's official website. However, key pieces of information are missing, like minutes of the meetings of the High Level Group on MERCOSUR Institutional Reform, minutes of meetings of auxiliary bodies to the Common Market Group with competence on specific service sectors, some annexes to these minutes and, most notably, information about the entry into force of secondary rules.

To overcome this obstacle, the author conducted three field visits to the MERCOSUR Secretariat located in Montevideo, Uruguay, in December 2004, August 2005 and January 2007. I interviewed legal and economic advisers of the Secretariat and got access to valuable information not published on-line. I also conducted an exhaustive search of State Parties' governmental websites, finding some pieces of information not included in MERCOSUR's official website. The reluctance of government officials to fully disclose relevant information about the integration process is symptomatic of a process that remains almost exclusively under the control of diplomats who struggle to understand that the establishment of a common market is not a task to be carried out in secrecy within the corridors of foreign affairs departments.

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14 See, e.g., I.L.M. Materials, translations of MERCOSUR State Parties' communications to the WTO made by the WTO Secretariat and a compilation of various instruments translated by Marta Haines Ferrari in The MERCOSUR Codes (BIICL, 2000).

15 As striking as it may seem, such basic data as to when or if a secondary rule has entered into force, is not publicly available. MERCOSUR officials regard it as "confidential information", presumably because of their concern about revealing which States have not been diligent enough to adopt the necessary measures to incorporate the secondary rule into their legal system.

16 The Secretariat is responsible for administering MERCOSUR’s archives.

17 See Appendix V, Useful Websites about MERCOSUR.

18 This author is not alone in this view. Various academics have harshly criticised the lack of transparency of MERCOSUR institutions. See, e.g. ALEJANDRO DANIEL PEROTTI, ‘Estructura Institucional y Derecho en el MERCOSUR’, (2002) 6 Revista de Derecho Internacional y del MERCOSUR 63, p 108 and RAMÓN TORRENT, ‘Una
The analysis of primary sources of information was complemented with an exhaustive literature review on MERCOSUR law, which yielded interesting findings. There is a vast amount of material on MERCOSUR law published in Spanish, Portuguese and some in English but of a very diverse quality. There are particularly difficult topics such as the relationship between MERCOSUR law and domestic law and the effect of MERCOSUR law on individuals, which the existing literature has struggled to clarify. Some writings add a dose of confusion by analysing the nature of MERCOSUR law using terms of art pertaining to EU law without fully understanding their meaning and the legal context within which they were coined. To make matters worse, MERCOSUR lacks an established jurisprudence capable of providing conclusive answers over divisive legal issues. Finally, despite the vast amount of published material on MERCOSUR law, there is virtually nothing available on MERCOSUR rules and disciplines on trade in services apart from some sectoral analysis of the transport and financial sector.

Chapter I

Challenges and Instruments for the Liberalisation of Trade in Services
A. Are Services “Special”?

For a long time services failed to capture the interest of scholars. Classical economists such as Smith and Marx focused their attention on goods, dismissing the service sector on the assumption it was about “unproductive labour”. Neoclassical economists such as Marshall regarded the differences between goods and services as trivial and lacking in analytical interest. This line of argumentation contends that both goods and services, constitute the output of processes of production aimed at creating economic value through the combination of capital and labour, and both, goods and services compete for the consumer’s income. Therefore, there is no need for a specific economic model to analyse transactions in services. The fact that services must be consumed as they are produced, and thus cannot be put into stock is not, according to this view, a unique characteristic of services. Other goods such as perishable food share the same features. Therefore, from this perspective, services are considered simply as a special kind of good commonly referred to as ‘immaterial goods’.

It was not until the late seventies when Hill’s seminal work challenged the predominant view arguing that services indeed have characteristics that differ fundamentally from goods, and thus belong to quite a different logical category, which deserves separate analytical attention. He admits that both goods and services are transactable, namely, marketable outputs capable

1 See JOACHIM STIBORA & ALBERT DE VAAL, Services and Services Trade: A Theoretical Inquiry (Netherlands Economic Institute, Rotterdam 1995) p 15.
4 See Hill, ob cit, p 315.
5 Ibid.
of being the subject of a transaction between two or more different economic units. However, he contends that there are conceptual differences between transactions on goods and transactions on services related to what exactly is being transacted and how it is being transacted.

For Hill a good is a "physical object which is appropriable and therefore, transferable between economic units," while a service is "a change in the condition of a person, or of a good, belonging to some economic unit, which is brought about as the result of the activity of some other economic unit, with the prior agreement of the former person or economic unit". Based on these definitions, Hill identifies the following differences between transactions on goods and transactions on services.

First, the process of production of a good precedes that of consumption. As Hills puts it: "A good is produced within the supplier unit and initially is added to the supplier’s stock. Subsequently, the good is acquired by the consumer in an exchange transaction which is totally separate from the process of production itself." By contrast, services are consumed as they are produced in the sense that the change in the condition of the consumer unit must occur simultaneously with the production of that change by the supplier. The service supplier works directly on the person (or on the goods belonging to the person) consuming the service. Production and consumption cannot be separated from each other. The mere performance of some activity is not enough if the consumer unit is not affected in some way.

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6 According to Hill, only items that can be produced by a different unit from that which consumes or uses it are transactable or marketable. He gives examples of non-transactable conditions or qualities such as good health, beauty or youth, and non-transactable activities such as eating, drinking or sleeping. As the author points out, this type of activities cannot be performed by one person on behalf of another, hence, there can be no specialized producer units, no industries and no markets. See Hill, ob cit, pp 316 and 326.

7 Ibid p 317.

8 Ibid p 318. The author further distinguishes between services affecting goods: "... changes in the physical conditions of goods brought about by productive activities such as transportation, cleaning, repairs and decoration..." and services affecting persons: "... changes in the physical or mental conditions of persons brought about by activities such as transportation, surgery, communication, education or entertainment.".

9 Ibid p 320.

10 Ibid p 337.

11 It is worth differentiating between simultaneity of production and consumption and physical proximity of provider and consumer. Traditionally, simultaneity of production and consumption required the physical proximity of provider and consumer, like, say, in the case of a haircut or a surgery. Technological innovations are increasingly facilitating the physical separation between provider and consumer. But even when provider and consumer are
Second, the fact that services must be consumed as they are produced means that they cannot be put into stock by suppliers. For instance, medical treatments cannot be stock piled in advance of the illness to which they relate. This is not because services are highly perishable commodities. In fact, as Hill indicates, many services are permanent. The non-storability of services has nothing to do with their physical durability. The non-storability of services is not a physical impossibility but a logical impossibility. Services cannot be put into stock because a stock of changes is a contradiction in terms.

Third, a transaction on goods includes the transfer of the ownership of the good from one economic unit to the other. A transaction on services, by contrast, involves the performance of some activity by one economic unit to the benefit of the other. It does not involve a transfer of ownership. Services cannot be transferred from one economic unit to another. It is not possible for a person to exchange a change in her condition. Therefore, it is wrong to think of services as 'immaterial goods' which can be traded on markets. Yet, services are transactable because they are produced by a different unit from that which consumes or uses it.

By identifying particular characteristics of transactions on services, namely, simultaneity of production and consumption, non-storability and non-transferability, Hill’s work made a

physically separated, the simultaneity of production and consumption remains, for example, a concert in country A, broadcasted live in country B.

Because of the simultaneity of production and consumption, Hill warns that special attention must be paid in order to avoid mistaking the process of production of the service (the activity which affects the person or goods belonging to some economic unit), with the output of that process (the change in the condition of the person or good affected). See Hill, ob cit, p 318.

This characteristic has also been defined as 'joint production'. See Hoekman and Kostecki, BERNARD HOEKMAN & MICHEL KOSTECKI, The Political Economy of the World Trading System. From GATT to WTO (Oxford University Press, Oxford 2001), p 239.

See Hill, ob cit, p 318.

Ibid. p 337.

Ibid. p 322.

Hill strongly criticises the common tendency to regard services as highly perishable commodities. He argues that the benefits of certain services such as education or a surgery can last long after they are consumed. Ibid p 321.

Ibid. p 337.

Hill uses 'ownership' in a loose sense, including not only formal property rights but, more generally, the right to make use or dispose of the object. Ibid. p. 317.

Ibid p 318.
significant contribution towards the identification of logically sound and generally applicable
criteria to clearly demarcate goods from services. More importantly, Hill’s work awakened the
academia to the complexity underlying the nature of services and the need for developing a
special analytical framework to analyse them, which served as a springboard for further
research in this area. 21

Notwithstanding the value of Hill’s contribution, there are still some grey areas for which it
provides no clear answers. For instance, some services can be ‘disembodied’22 from the
physical presence of the supplier and encapsulated in goods such as a CD holding the record
of a live concert. Should these items be considered goods or services? Hill refrained from
analysing these thorny cases and limited himself to stating that “…the classification of
computer programming raises interesting problems”. 23 This was in 1977, when the
information technology revolution still was at its infancy. However, these borderline cases do
not invalidate Hill’s argument about the particularities of services and service transactions,
which, as discussed below, have a direct impact on the structure, contestability and market
failures affecting service markets, and on the way service suppliers compete against each
other.

Indeed, the structure of service markets is characterised by a high level of customisation in
production and diversification in output. This is mainly the result of the simultaneity of
production and consumption that characterises service transactions. Because of their direct
contact with consumers, suppliers can tailor the service to the consumer’s needs at a relatively
lower cost than their counterparts in the goods sector. 24 Unsurprisingly, services are often non-
standardised and the degree of product differentiation is high. 25

The contestability of service markets, namely, the possibility of free entry and free exit of
firms, is limited by various factors. First, the fact that the process of production is
characterised by its flexibility and customisation links success in service industries to

21 See Stibora and de Vaal, ob cit, p 18.
Economy 133.
23 Hill refrained from analysing this thorny issue and limited himself to state that “…the classification of computer
programming raises interesting problems”. See Hill, ob cit, 330. This was in 1977, when the information technology
revolution still was at its infancy. For a more recent analysis on the nature of ‘information goods’ see, Linders,
2001, ob cit, pp 27 to 30.
24 See Stibora and de Vaal, ob cit, pp 9 and 32.
25 See Hoekman & Kostecki, ob cit, p 239.
experience, reputation and learning by doing. It takes time for a firm to acquire any of these attributes, making it much more difficult for newcomers to enter the market. The absence of standardised methods means there is no shortcut to success. Secondly, economies of scale sometimes place incumbent service suppliers in a privileged position to compete against potential new entrants and can constitute an effective barrier to entry as well. Network externalities can also limit the contestability of service markets. Finally, there are sectors where the existence of natural or public monopolies precludes the possibility of contestability altogether.

Service markets are particularly vulnerable to information asymmetries between supplier and consumer. The supplier has an information advantage over the consumer on the quality of the service to be provided because the latter cannot judge the quality of the service beforehand. Unlike goods, services cannot be tested before their purchase. Information asymmetries can generate problems of adverse selection - when low quality services drive out high quality services - and moral hazard - when the quality of services changes over time. Information asymmetries also raise the importance of the firms' reputation on supplier - consumer relations. Good reputation affords market power to incumbent service suppliers and, as it has been noted, can become an entry barrier to potential new entrants.

In terms of competitiveness, non-price factors such as reputation and the capacity to meet consumers' specifications through flexible production and varied supply have a great influence on the way suppliers compete against each other. As Linders puts it, the competitive weapon in service markets is differentiation and customisation. The non-storability character of services prevents service suppliers from competing on the basis of the scale advantages of 'just-in-time' stock-management techniques.

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26 See Stibora and de Vaal, ob cit, p 36.
27 See Sapir and Winter, ob cit, p 277. Network services are those who depend on the use of networks who are not controlled by the service provider such as telecommunications, water distribution or electricity services.
28 Examples of these are railroads and segments of telecommunications. See Sapir and Winter, ob cit, p 277.
29 See Stibora and de Vaal, ob cit, p 32.
30 Ibid p 36.
31 Feketetuky warns that because competitiveness is based on innovation and variety, any international agreement with a narrow definition of services can have protectionist effects. See GEZA FEKETKUTY, International Trade in Services: An Overview and Blueprint for Negotiations (American Enterprise Institute and Ballinger, Cambridge Massachusetts 1988), p 142.
32 See Linders, ob cit, p 47.
33 Ibid. p 39
In summary, service transactions exhibit certain *sui generis* characteristics that determine the stylised configuration, limited contestability, and vulnerability of service markets to information asymmetries, which calls for a degree of regulatory intervention more intense than that required for the orderly functioning of merchandise markets.

**B. Trade in Services**

Trade in goods involves the movement of physical objects from the country of production to the country of consumption, without the need for the concomitant movement of the factors of production involved in their production or the consumer.

Trade in services, by contrast, normally requires the cross-border movement of factors of production or consumers. Thanks to technological progress, there is a growing number of services that can be provided from a distance, with the supplier residing in one country and the consumer residing in another. However, the majority of service transactions require the physical proximity between supplier and consumer, and consequently, the cross-border movement of factors of production or consumers. According to the location of the supplier and consumer, and the degree and type of territorial presence which they have at the moment the service is delivered, it is possible to identify four modes of supply:

1. **Cross-border Trade**

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34 Ibid. p 39.
35 This thesis is focused on *international* economic transactions, therefore, when reference is made to trade, it must be understood as meaning transactions between parties located in different countries, unless otherwise specified.
37 Quantitatively speaking, the proportion of international service transactions involving the movement of factors of production or consumers is larger than that corresponding to long-distance trade in services. In fact, the bulk of international service transactions are channelled through the commercial presence of the supplier in the consumer’s country. The WTO Secretariat estimated trade flows in services for 2005 according to the mode of supply as follows: 35% cross-border supply, 10-15% consumption abroad, 50% commercial presence and 1-2% presence of natural persons. See *International Trade Statistics 2005*.
This mode of supply refers to services delivered by a supplier based in one country to a consumer based in another country. In this case there is no movement of factors of production to the consumer’s place or movement of the consumer to the supplier’s place. Precisely because trade occurs without the movement of factors of production or the consumer, services that can be traded in this way are referred to as “separated services”\(^\text{39}\). Only those services that do not require the physical immediacy of supplier and consumer can be traded in this way. As said, thanks to recent technological innovations, the opportunities for providing cross-border trade have rocketed, particularly in relation to services based on digital information that can be transmitted ‘over the wire’ like marketing intelligence services, call centres and some type of entertainment services. However, the use of this modality of trade is still modest compared to the supply of services via the commercial presence of the supplier in the territory where the consumer is located. Moreover, there are cases where despite the possibility to provide services from a distance, the supplier may still prefer to move to the place of the consumer to be better positioned to compete against local incumbents in a market where a firm’s reputation and its capacity to customize the service to consumer’s needs are of utmost importance.

2. Consumer Movement

This mode of supply involves the movement of the consumer to the country where the supplier is based for the consumption of the service. Classical examples are tourism, health or live entertainment services, where there is no other way for the transaction to take place than for the consumer to travel to the desired location. Activities such as ship repair abroad, where only the property of the consumer "moves", or is situated abroad, are also fall within this mode of supply. There are services that can be traded either by the supplier moving to the place of the consumer or by the consumer moving to the place of the supplier. That is the case, for instance, of educational services, when a lecturer travels to a foreign university to deliver a lecture or when students travel abroad to study in a foreign university.

3. Commercial Presence

This mode of supply refers to services delivered by a supplier’s permanent establishment in the country where the consumer is based. The commercial presence of the supplier involves the permanent transfer of the factors of production used to provide the service to the place of the consumer. Many service companies, typically in banking and telecommunications, choose to establish branches or subsidiaries abroad, not because of the technical impossibility of providing services through other modes, but because of other factors such as lower transaction costs, the need to provide customised services, marketing considerations, easier access to distribution networks and so forth.

According to its ordinary meaning, international “trade” refers to arms-length transactions between parties established in different territories. However, some international trade agreements like the GATS chose to stretch the ordinary meaning of trade, giving to it an artificially broad scope of application so as to include transactions between consumers and foreign service suppliers who are permanently established in the “importing” country. This path was chosen as a second-best alternative to the impossibility to reach an agreement on the liberalisation of foreign direct investments. Other international agreements, by contrast, chose other alternatives. The EC treaty, for instance, limits the meaning of services to activities “temporarily” pursued in the State where the service is provided, but it complements the freedom to provide services with other freedoms including, among others, the freedom of establishment. Similarly, the NAFTA restricts the concept of trade in services to cross-border trade but, at the same time, includes some disciplines on investment.

4. Supplier Movement

This mode of supply involves the temporary movement of the service supplier and the factors of production necessary for the provision of the service to the country where the consumer is based. This mode of supply covers natural persons who are themselves service suppliers, as well as natural persons who are employees of service suppliers. For instance, an orchestra that travels to perform a function abroad, or an employee of an IT consultancy that travels to the client’s country to train its staff to operate new software. Although in this case the parties to the transaction are geographically located in the same place, it still is an international transaction in the sense that it takes place between residents of different countries. Services provided in this way are referred to as non-separated services, precisely because transactions can take place only with the movement of factors of production.

40 EC Treaty, Art. 50.
41 See Sampson and Snape, ob cit, p 179.
These four modes of supply of services are, by no means, mutually exclusive. It is possible, and indeed quite common, for a specific service to be provided by different modes of supply, either simultaneously or subsequently.\(^\text{42}\)

**C. Barriers to Trade in Services**

Trade may be hindered by a wide range of barriers of varying scope, purposes and sources. From “border” barriers, i.e. governmental measures aimed at preventing or making it more difficult for foreign goods or service suppliers to enter into the domestic market for protectionist purposes, to “within-the-border” barriers, namely, governmental measures that apply once foreign goods or services enter the domestic market and which deliberately\(^\text{43}\) or unintentionally\(^\text{44}\) impair the competitive relationship between them and domestic goods or services. Not only governments, but also private actors can hinder the free movement of goods or services across national borders.\(^\text{45}\) Furthermore, general economic factors such as unstable macroeconomic conditions and volatile exchange rates can have serious trade restrictive effects. 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, although such a broad definition includes trade restrictions that would remain beyond the disciplining effect of international trade rules.

“Trade barriers” can be provisionally defined as governmental measures\(^\text{46}\) and practices\(^\text{47}\) that restrict foreign goods’ or services’ access to domestic markets or impair the competitive

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\(^{42}\) For instance, an accountancy firm may set up a subsidiary abroad and provide services via its commercial presence on the territory of its client’s country. At the same time, staff from the headquarters may come to the subsidiary on a temporal basis to work on a specific project; some pieces of advice may be sent directly to clients from the firm’s headquarters via fax or email; and every now and then, clients from the firm may also travel to the firm’s headquarters for, say, training purposes.

\(^{43}\) For instance, domestic regulations on taxes, transport, distribution or advertising that expressly discriminate against foreign goods or services.

\(^{44}\) Even the mere duplication of home and host state regulations can have a discouraging effect on trade by increasing transaction costs.

\(^{45}\) 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.

\(^{46}\) 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.
relationship between foreign goods or services vis-à-vis "like" domestic goods and services within the domestic market, irrespective of whether they have been adopted with a view to protect domestic industries or not. 4849

The main barriers to trade in goods (though by no means the only ones) are tariffs and quotas, i.e. measures imposed at the border for protectionist purposes, which are easily identifiable and easily removable, provided, of course, that there is political will to that effect. By contrast, services are not physical objects that cross State borders, and thus governments cannot rely on border measures such as tariffs and quotas to exert control over this type of trade. Consequently, barriers to trade in services are more disperse and less obvious. 50

First, since trade in services may involve the cross-border movement of capital and persons, it becomes vulnerable to a wider range of governmental measures. For instance, services that require the temporary presence of natural persons on the place of the consumer can be affected by measures that restrict the entry and stay of foreigners such as visas and work permits. Likewise, services that require the physical proximity of supplier and consumer are particularly vulnerable to regulations that restrict the ability of foreign suppliers' right to

47 Governmental practices refer to the way domestic regulations are interpreted, applied and enforced by the competent authorities.
48 This definition is for introductory purposes only. Legal definitions of terms such as "barrier", "restriction" or "obstacle" to trade may vary from one trade agreement to another, depending not only on the treaty provisions themselves but also on the way such provisions are construed by adjudicative bodies.
establish or to invest in local facilities and to operate such facilities.\textsuperscript{51} Services that require the movement of capital such as Financial Services can be affected by capital controls such as taxes to the inflow or outflow of short term investments, multiple exchange rate systems or caps on capital transfers.

As a result, it is necessary for trade disciplines to have a broad scope of application, with a view to tackling any kind of measure that may affect trade in services. This includes not only overt quantitative restrictions or discriminatory measures against foreign services, but also measures affecting the right of foreign service suppliers to provide services on a temporal or permanent basis in the territory of the consumer and, more generally, measures that may affect the cross border movement of persons, capital and information. Considering the close link between the service and the service supplier, it is necessary for the protection against discrimination to cover not only the service itself but also the service supplier. That is not the case for trade in goods, where it suffices to protect the imported good against discrimination but not the producer or the factors of production.

Secondly, service markets are more regulated than merchandise markets and therefore, trade in services is more vulnerable to the so-called "dual regulatory burden problem" whereby foreign suppliers are required to satisfy both home and host state regulatory requirements. Indeed, when a supplier licensed to operate in one country seeks to operate in another country, a regulatory conflict between home state and host state regulations on service suppliers is likely to occur. As Wolf puts it, "markets want to be cosmopolitan; States do not".\textsuperscript{52}

Take for instance a financial undertaking. To be able to operate in any specific market it must first obtain an authorisation from the competent regulator, which is conditioned to the fulfilment of an extensive list of requirements including, \textit{inter alia}, the adoption of a special type of legal entity, prudential requirements and moral and technical requirements of the firm's directors. The firm must fulfil those requirements in all the jurisdictions it wishes to operate. Despite not being informed by a protectionist purpose, the mere duplication of requirements and the corresponding cost faced by firms forced to satisfy them substantially increases the transaction costs of supplying services to foreign markets and discourages trade.\textsuperscript{53}

Consumer protection rules, which tend to reflect local preferences influenced by social,

\begin{footnotesize}
\begin{enumerate}
\item For example, maximum percentage limit on foreign shareholding or on the total value of individual or aggregate foreign investment or requirements to set up joint ventures with domestic companies to operate.
\item Not surprisingly, a survey among service industry operators on the most frequent barriers to trade in services carried out by Price Waterhouse, identified as one of the most relevant barriers non-discriminatory regulations with
\end{enumerate}
\end{footnotesize}
cultural and religious values, touch upon a wide range of issues from selling techniques to advertising and disclosure requirements also contribute to the regulatory conflict problem, increasing transaction costs and discouraging trade.

Thirdly, the higher degree of state intervention on service markets and, in particular, the intense and ongoing relationship between the regulator and industry operators increases the risk of discriminatory governmental practices against foreign suppliers.\textsuperscript{54} Practices such as discriminatory delays in approving licenses or discriminatory enforcement of regulations against foreign suppliers can result in a major obstacle to trade in services. When the foreign supplier operates in competition with state owned companies the risk of discriminatory practices such as predatory pricing\textsuperscript{55}, abuse of dominant position and discriminatory restriction on the access to public transmission and distribution networks is even higher. Accordingly, trade liberalisation policies need to be as comprehensive as possible, concerned not only with the dismantlement of overt protectionist rules but also considering the impact of the wider system for the governance of service markets on trade, in particular, the degree of transparency, impartiality and probity of the administration.

Finally, many service sectors touch upon sensitive public policy interests such as universal access to public utilities, cultural diversity, freedom of information and so forth. The prospects of deregulation and unfettered opening of these sectors to foreign competition generates fears and worries about the impact of liberalisation on the government's capacity to protect those vital public interests. As a result, the liberalisation of trade in services usually faces stronger political resistance than the liberalisation of trade in goods.\textsuperscript{56} Curbing the strong protectionist interests that resist the liberalisation of trade in services requires an extensive and participative debate about its opportunity, scope and pace, with a view to build a broad and discriminatory effects, i.e. that place a far greater burden on foreign suppliers than on domestic suppliers (e.g. a regulation that freezes the total number of companies allowed to sell securities could be highly discriminatory for foreign companies if they were largely excluded in the past). See Feketekuty, Geza, ob cit, p 138.

\textsuperscript{54} In many cases the discriminatory treatment is not written into the published laws and regulations but is a matter of official practice, "the way things have always been done", "general bureaucratic tendency not to approve new activities", etc. See Price Waterhouse's survey cited by Feketekuty, Geza, ob cit, p 141.

\textsuperscript{55} Price control systems over public utilities such as water supply, sanitation, public transport and basic communication services can easily degenerate into a mechanism for abuse and discrimination against the foreign supplier.

\textsuperscript{56} On the particularities of the political economy associated with trade in services see Kelsey, Jane \textit{Serving Whose Interests? The Political Economy of Trade in Services Agreements} (Routledge-Cavendish, 2008) and Hoekman and Kostecki, ob cit, p 248.
solid political consensus about the benefits of the liberalisation process, a debate which cannot be confined to diplomatic forums.

In summary, like trade in goods, trade in services may be obstructed by overtly discriminatory measures against foreign services and service providers, but it may also be hindered by measures affecting the cross border movement of capital, persons and information. Being essentially regulatory in character, barriers to trade in services are less obvious and more dispersed than barriers to trade in goods. The highly regulated character of service markets makes trade in services particularly vulnerable to the dual regulatory burden problem and the risk of discriminatory regulatory practices.

To tackle the regulatory character of services' barriers, trade agreements should include not only disciplines compelling State Parties to accord foreign services and service suppliers minimum standards of treatment (e.g. Market Access and National Treatment standards), but also disciplines compelling them to regulate in a “trade friendly” way (e.g. standards of proportionality, transparency, reasonableness, objectivity, impartiality, due process), understanding regulation in its broadest sense (i.e. adoption, implementation and enforcement of rules). In other words, for the effective liberalisation of trade in services it is not enough to curb discrimination. It is equally necessary to secure a regulatory environment where governmental rules and practices are open, transparent, impartial and no more trade restrictive than necessary.

In the light of the particular vulnerability of trade in services to the dual regulatory burden problem and the high chances of regulatory conflicts, trade agreements seeking to achieve a higher degree of liberalisation, should include mechanisms for the approximation of domestic laws. The trade restrictive effects of regulatory diversity can be addressed in various forms and degrees including, *inter alia*, harmonisation of disparate domestic rules, establishing systems for the mutual recognition of domestic standards, qualifications or licenses or setting up co-operation mechanisms between domestic regulators. The more sophisticated the mechanisms available, the higher the chances of ensuring convergence between highly regulated markets.

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57 It must be borne in mind that it is much more demanding to establish mutual recognition agreements for services than for goods. In the latter case, the host state must only recognise that the good has been lawfully produced, labelled and marketed in the home state, whereas in the former case, the host state not only must recognize that the service provider was lawfully authorized to operate. It must also trust on the home state country's supervision of the service provider on an ongoing basis.
Finally, a broad political consensus on the opportunity, scope and pace of the liberalisation process should be carefully crafted to avoid protectionist interests from derailing the liberalisation process.

D. Instruments for the Liberalisation of Trade in Services: A Comparison between GATS and the EC Treaty

Inter-State co-operation for advancing economic integration and, in particular, the integration of service markets, can be channelled through different types of legal frameworks, more or less deferential to domestic sovereignty. This section briefly describes the main trade disciplines, policy making instruments and enforcement mechanisms of two agreements from which MERCOSUR has borrowed some features: the GATS and the EC Treaty.

It is not difficult to appreciate the marked differences that exist between, on the one hand, a multilateral framework of principles and rules pursuing the liberalisation of trade in services at a global scale and, on the other hand, a regional agreement between a reduced number of like-minded neighbouring countries seeking to establish an ever closer union among its people, involving, among other things “... an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital”. Differences notwithstanding, both agreements seek to facilitate trade in services across national borders, albeit relying on quite different institutional and legal mechanisms.


59 EC Treaty, Art. 3(c).

At the risk of gross oversimplification, they could be considered as the opposite ends of a wide spectrum of possible agreements that sovereign States can enter into with a view to liberalise trade, ranging from those characterised by predominantly intergovernmental features to those characterised by predominantly supranational features.  

Intergovernmentalism and supranationalism are terms hereby used in a loose sense to describe different legal frameworks established by sovereign States for pursuing and managing economic integration. It should be emphasised that both terms will be used to refer to agreements aimed at governing relations between sovereign States. For instance, in terms of policy-making instruments, trade agreements may provide for the establishment of permanent bodies endowed with autonomous rule-making power, and if so, their composition, regulatory competence and decision-making system can be defined in different ways. In terms of whether Community law could serve as a model for a multilateral agreement on trade in services. This paper was published while the GATS was being negotiated.


62 The specialised literature sometimes uses other terminology to refer to the various legal frameworks established by sovereign States for pursuing and managing economic integration. For instance, Cremona refers to a continuum between contractual and constitutional models of integration. She describes the contractual model (e.g. NAFTA, EFTA) as one which provides for the establishment of a free trade area and operates on the basis of treaty-based obligations with minimal institutional structure. Both cooperation and enforcement are intergovernmental in character. Contractual arrangements do not seek to create their own sui generis legal order but operate within the broader framework of international law. The constitutional model (e.g. EC), by contrast, impacts directly on the legal orders of its Member States (primacy of the community legal order over the laws of the member states and direct effect of a whole series of provisions that are applicable to their nationals and the member states themselves) and thus needs to provide a constitutional framework for law-making and law enforcement. See MARISE CREMONA, 'Regional Integration and the Rule of Law: Some Issues and Options', in Robert Devin & Anthony Estevadeordal (eds) Bridges for Development: Policies and Institutions for Trade and Integration (IADB, Washington, D.C. 2003), p 146.

63 Even under a predominately supranational framework such as that laid down by EC Community law, Member States continue to satisfy the established criteria for recognition as independent sovereign States and to be recognized as such by the rest of the world. See EILEEN DENZA, The Intergovernmental Pillars of the European Union (Oxford University Press, Oxford New York 2002), p 6.

64 At one end of the spectrum there are intergovernmental bodies that consist only of government officials appointed by national administrations, with limited regulatory competence and who adopt decisions by consensus. At the other end of the spectrum, trade agreements may provide for a more complex web of supranational institutions including an independent bureaucracy representing the interests of the integration process and entrusted with the right of legislative initiative, a parliamentary institution with members directly appointed by State
enforcement, at one extreme, trade agreements may merely rely on diplomatic mechanisms for the settlement of disputes or, at best, provide for an arbitration procedure for sorting out disputes between States. At the other extreme, trade agreements may stipulate highly sophisticated and strictly law-based mechanisms for the interpretation of treaty provisions and the enforcement of obligations that stem from them. They may provide for the establishment of a supranational court with exclusive competence over the interpretation and application of the treaty, whose rulings are binding for domestic courts. The standing before the supranational court can be open not just to State Parties but also to private persons. Moreover, in certain circumstances private persons may also seek protection from domestic courts of rights conferred on them by the treaty. The enforcement machinery may also include an independent bureaucracy with power to bring actions against State Parties for failure to comply with their international commitments.

The choice for a specific legal framework to govern trade relations between State Parties will depend on the level of economic integration State Parties may want to achieve and the degree of control they may want to have over the scope and pace of the integration process. In some circumstances, State Parties may only be willing to remove overt discriminatory measures to trade and, for that purpose, restrict co-operation within intergovernmental channels. In other circumstances, State Parties may wish to achieve a deeper level of integration and thus they may be prepared to go beyond intergovernmental co-operation, setting up a much more intrusive legal framework capable of providing rights and obligations directly to private parties. The following paragraphs provide a brief description of the trade disciplines, policy-making instruments and enforcement mechanisms laid down by the GATS and the EC Treaty.

1. GATS

The GATS is an agreement that regulates the relations between sovereign States exclusively on a basis of public international law. It aims to reduce barriers and promote the expansion of trade in services under conditions of transparency and progressive liberalisation subject to the need not to undermine the development of developing countries nor the right of Members to regulate in order to meet national policy objectives.65 The agreement expressly refrains from

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65 See GATS, preamble, Art. XIX.1 which refers to the objective of achieving a progressively higher level of liberalisation and Art.XIX.2 which subjects the process of liberalisation to the need to pay due respect for national policy objectives and the level of development of individual Members.
limiting a Member's autonomy to formulate and implement their domestic policy objectives. It does not limit Members' sovereign rights to formulate economic policies (other than by prohibiting discrimination against foreign service providers), because Members do not seek to approximate them. As put it by one commentator, the GATS is a "negative integration contract", where Members' obligations boil down to the fundamental principle not to discriminate against each other.\textsuperscript{66} In his view, the maximum promise to trading partners is national treatment (non-discrimination), namely, a relative standard of treatment which by definition pre-supposes the unilateral formulation of policies.\textsuperscript{67}

1.1 Trade disciplines

GATS' general obligations, informed by the principle of non-discrimination, require Members to accord services and service suppliers of any other Member: a) most favoured nation treatment, i.e. treatment no less favourable than that accorded to "like" services and service suppliers of any other country (unless otherwise specified in a list of exemptions)\textsuperscript{68}; b) market access treatment, which consists on refraining from maintaining any of the measures listed in a closed list of quantitative restrictions in accordance with the terms, limitations and conditions specified in its Schedule\textsuperscript{69}; c) national treatment, i.e. treatment no less favourable than that accorded to is own "like" services and service suppliers in accordance with the conditions and qualifications specified in its Schedule\textsuperscript{70}.

The Agreement's scope of application is defined widely. It applies to any measure adopted by Members affecting trade in services. "Measures" include "any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form"\textsuperscript{71}, "services" refers to "any service in any sector except services supplied in the exercise of governmental authority"\textsuperscript{72} and "trade in services" includes the supply of a service through any of four possible modes of supply (cross-border trade, consumer movement, commercial presence and supplier movement)\textsuperscript{73}. The term "affect" implies a degree of connexion between

\textsuperscript{67} Ibid. p 12.
\textsuperscript{68} GATS, Art. II.
\textsuperscript{69} Ibid. Art XVI.
\textsuperscript{70} Ibid. Art. XVII.
\textsuperscript{71} Ibid. Art. XXVIII (a).
\textsuperscript{72} Ibid. Art. I.3(b).
\textsuperscript{73} Ibid. Art. I.2.
the measure and the supply of a service which has been interpreted broadly, without *a priori* exclusions. According to the Appellate Body ("AB"), this threshold may be satisfied even by measures which are not aimed at regulating or governing the supply of a service but nonetheless "have an effect on" it. To check the effect it is necessary to examine all the relevant facts, i.e. who supplies the service, how such services are supplied, etc.

By contrast, the scope of application of the three main general obligations is subject to important limitations. The GATS does not establish an across-the-board liberalisation of trade in services from the outset. It rather enables Members to choose the scope and pace of the opening of their domestic service markets to foreign competition in accordance with their own considerations. Members may provisionally maintain measures inconsistent with the MFN standard, provided they are included in a list of exemptions and subject to negotiation. In addition, each Member owes the market access and national treatment standards of treatment to services and service suppliers from other Members only in sectors where it has made specific commitments and subject to the conditions and qualifications specified in its schedule.

At the same time, the agreement compels Members to enter into successive rounds of multilateral negotiations, with a view to achieving a progressively higher level of liberalisation. Thus, the rounds of negotiation of specific commitments become a vital instrument in pursuing the liberalisation of trade in services. Such negotiations "must be aimed at promoting the interests of all participants on a mutually advantageous basis and securing an overall balance of rights and obligations, while giving due respect to national policy objectives."

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76 Appellate Body Report, Canada-Autos, para. 165-167.
77 GATS, Art. II.2.
78 Ibid. Annex on Art.II Exemptions.
79 Ibid. Arts. XVI.2 and XVII.1.
80 Ibid. Art. XIX.1.
81 Ibid. Preamble and Arts.XIX.1 and XIX.2.

Although the case law on GATS is still at its infant stage, the available evidence points to a predominantly "trade-friendly" interpretation of the main obligations and its exceptions by both panels and the Appellate Body. As shown below, this is reflected by adjudicative bodies' wide interpretation of the MFN and National Treatment standards (including the banning of both de iure and de facto discriminatory conduct), the narrow interpretation of the agreement's exceptions and the strict limitations imposed on Members seeking to invoke them.

Under Art II (MFN), the obligation to provide "treatment no less favourable" is formulated in a more succinct way than under Art XVII (National Treatment). In the latter case, the provision expressly states that the standard may be breached by according to foreign suppliers either formally identical or formally different treatment to that accorded to domestic suppliers. In the former case, however, no reference is made to this distinction. This has not prevented the Appellate Body from holding that the obligation imposed by Art II is unqualified, meaning that it includes the prohibition of both de iure and de facto discrimination. The prohibition by Article XVII of de iure and de facto discrimination was confirmed in Canada-Autos. On that occasion, the Appellate Body held that even if the measure itself does not make distinctions on grounds of origin but, nonetheless modifies the conditions of competition in favour of domestic suppliers, it is bound to have a discriminatory effect against the foreign service suppliers.

The application of the 'aims and effect' test, which could have otherwise justified discriminatory measures pursuing legitimate policies which are not inherently discriminatory, was expressly rejected in EC - Bananas. The Appellate Body's refusal to consider the possible purposes of a measure (no matter how noble the purpose could be), focusing instead on the analysis of the measure's effect on the conditions of competition between foreign and domestic suppliers, marks a tough stance in favour of free trade. This interpretation leaves no hope to those claiming for a more lenient approach to discriminatory measures that pursue legitimate policy objectives rather than being merely aimed at protecting the domestic industry.

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83 GATS, Art.XVII.2.
Perhaps the most striking ruling adopted so far on GATS' trade disciplines has been that on United States measures affecting the cross-border supply of gambling and betting services, in which the Appellate Body upheld the panel finding that by maintaining the Wire Act, the Travel Act, and the Illegal Gambling Business Act, the US violated GATS Articles XVI. 1 and XVI. 2 (a) and (c). The measures prohibited the supply of internet gambling in a non-discriminatory manner: neither domestic nor foreign suppliers were allowed to supply such services. At the same time, the US schedule included specific market access commitments on gambling and betting services, without qualifying such commitments in any way.

Antigua and Barbuda challenged the measures arguing they amounted to a “total prohibition” on the supply of this type of service, equivalent to a zero number of service suppliers and a zero number of service operations, i.e. quantitative restrictions expressly forbidden by Art XVI. The ruling accepted the plaintiff’s argument that the measures were in violation of art XVI even though they were applied in a non-discriminatory manner. In a surprising move, the interpretation stretched the scope of application of Art XVI to the limit in order to cast its net over both discriminatory and non-discriminatory market access restrictions. Such an interpretation marked a difference with the traditional non-discrimination assessment of domestic measures’ consistency with GATS/GATT standards, resulting in a severe curtailment of a States’ regulatory autonomy. According to this ruling, a State could potentially be proscribed from unilaterally limiting the total number of, say, telecom operators (domestic and foreign) allowed to operate in its territory, or the total number of supermarkets (domestic and foreign) allowed to be located within a specified area. Not surprisingly, the ruling was severely criticised on grounds of being in blatant contradiction with the intent of the founding fathers, the letter and the spirit of the GATS, an agreement which presupposes the unilateral definition of policies. 

88 GATS, Arts. XVI.2a and XVI.2 c.
89 This ruling illustrates the strategic role that adjudicative bodies can play in a liberalisation process. A role sometimes characterised by a dynamic and independent interpretation of trade disciplines, which does not necessarily adopts decisions instrumental to the interests of the political establishment.
The GATS recognises the existence of a closed number of overriding considerations that may be invoked to justify conducts contrary to its provisions, which provide Members with an escape valve in those exceptional circumstances where they face no alternative but to break their international commitments.\footnote{GATS, Arts. XIV and XIV bis.} As said, these exceptions have been interpreted narrowly, requiring the breaching Member to apply them in a strict non-discriminatory fashion. In US – Gambling, the Appellate Body acknowledged that the challenged measures are "necessary to protect public morals or to maintain public order" under Article XIV(a), but found that the US did not demonstrate that—in the light of the existence of the [Interstate Horseracing Act]—the measures were applied consistently with the requirements of Article XIV's chapeau. According to the AB, the way in which the US applied the measures amounted to unjustified discrimination between domestic and foreign service suppliers.\footnote{Appellate Body Report, US – Gambling, para. 292, 339, 352, 354 and 371.}

1.2 Policy making instruments

As a "negative integration contract"\footnote{See Mavroidis, ob cit. p 11.}, the GATS does not seek to approximate Members' economic policies and, accordingly, it does not require the transfer of regulatory competence from domestic to supranational institutions. It nevertheless provides for an institutional framework responsible for overseeing the functioning of the agreement, consisting of the Council for Trade in Services and its subsidiary bodies.\footnote{GATS, Art. XXIV. So far the Council for Trade in Services has established the following subsidiary bodies: Working Party on GATS Rules and Working Party on Domestic Regulation.}

The Council for Trade in Services is a strictly intergovernmental body, its membership is open only to Members' representatives and its decisions are adopted by consensus.\footnote{Agreement Establishing the WTO, Arts. IV.5 and IX.1} It has very limited functions, mainly intended to facilitate the operation of the agreement, such as receiving information by Members about measures taken by any other Member, which are considered to affect the operation of the agreement\footnote{GATS, Art. III.5.}, overseeing regional trade agreements aimed at liberalising trade in services\footnote{Ibid. Art. V.7(a).} or at establishing mutual recognition systems of functions.
education, licenses and experiences; and establishing guidelines and procedures for the negotiation of specific commitments.

One particular task assigned by the WTO Agreement to the Council is to develop disciplines on domestic regulation relating to qualification requirements and procedures, technical standards and licensing requirements with a view to ensuring that such requirements do not constitute unnecessary barriers to trade in services, namely, that they are based on objective and transparent criteria, they are not more burdensome than necessary to ensure the quality of the service and, in the case of licensing procedures, they are not in themselves a restriction on the supply of the service. In compliance with this mandate, the Council set up a Working Party on Professional Services (now Working Party on Domestic Regulations), which was originally focused on the development of disciplines in the field of professional services, but now is concerned with the development of generally applicable disciplines. So far, detailed disciplines have been developed for the accountancy sector.

It is important to stress that the legislative capacity of the Working Party on Domestic Regulation is strictly limited. It has no competence whatsoever to harmonise Members' domestic regulations on qualifications, technical standards or licensing requirements. The Disciplines on Domestic Regulation in the Accountancy Sector apply the principles on domestic regulation laid down by Article VI.4 to measures that could affect trade in Accountancy services. For instance, they specify what should be understood as a legitimate objective to introduce trade restrictive regulations (e.g. protection of consumers, quality of the service, protection of professional competence and integrity) and compel Members, inter alia, to ensure that licensing requirements and licensing procedures are pre-established, publicly available and objective. But the Disciplines do not prescribe harmonised standards for the accountancy sector nor do they provide for the review of national standards. They say nothing about the level of professional qualifications or standards for accountants except that they should not be more trade-restrictive than necessary to achieve the legitimate objective they seek. In addition, only those countries that have made specific commitments in the accountancy sector are bound by these disciplines.

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98 Ibid. VII.4.
99 Ibid. XIX.3.
100 Ibid. VI.4.
102 See Disciplines on Domestic Regulation in the Accountancy Sector, (S/WPPS/N/W/21) approved on 30/11/98.
1.3 Enforcement

The mechanism for the enforcement of the rights and obligations of Members under the GATS is limited to a State to State dispute settlement system operated by ad hoc panels and a permanent Appellate Body. Although more rule-oriented than its GATT predecessor, the procedure for the settlement of disputes provided for by the Dispute Settlement Understanding remains heavily reliant on diplomatic negotiations. Its key objective is to restore the overall balance of concessions achieved through negotiations rather than ensure the observance of the law. Remedies are limited to retaliatory measures consisting on the withdrawal of concessions, rather than on mechanisms aimed at forcing the wrongdoer to comply with treaty obligations. It has been suggested that this kind of system allows a WTO Member to "buy" unlawful behaviour provided it is prepared to withstand retaliatory measures proportionate to the nullification or impairment of concessions caused by its conduct to other members. In practice, it is difficult for Members, particularly for developing and least developed countries, to enforce their rights under the agreement. The few cases that have been adjudicated show, however, that domestic measures have been subject to careful scrutinisation to determine their consistency with trade disciplines.

In summary, the GATS pursues a gradual liberalisation of trade in services through the negotiation of specific commitments not to discriminate against foreign services and service suppliers on specific service sectors, without interfering with State Parties' autonomy to formulate their own public policies. The agreement provides for a basic institutional framework of intergovernmental character, responsible for overseeing the implementation of the agreement and the development of common disciplines on domestic regulation but without any competence for the development of common policies on specific service sectors or on any other area affecting trade in services. Finally, the agreement relies on a State to State dispute settlement system for the enforcement of rights and obligations stemming from the agreement.

2. EC Treaty

104 GATS, Art. XXIII, which refers to the Dispute Settlement Understanding.

The EC Treaty and the subordinate legislation adopted therein regulate the relations between sovereign States based on Community law. The legal framework established by Member States for pursuing and managing economic integration is much wider and deeper than that prescribed by the WTO, including a common market, an economic and monetary union and the implementation of common economic policies in a broad range of spheres such as commerce, agriculture, fisheries, transport and competition. Naturally, the width and depth of the legal framework for integration comes along with much more demanding obligations upon Members that go far beyond the duty not to discriminate against each other. Under the EC Treaty, Members agreed to limit their sovereign rights and transfer a significant portion of their regulatory competence on various policy areas to supranational institutions.

2.1 Trade disciplines

The Treaty prohibits restrictions on the freedom to provide services within the Community in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended. The treaty stipulates that “services” encompasses activities normally provided for remuneration in so far as they are not governed by the provisions relating to the other freedoms (goods, capital and persons). The case law has identified a wide range of activities as services, including inter alia broadcasting, construction, education and gambling services. There are no a priori exclusions other than activities connected with the exercise of official authority and Transport Services. Unlike the GATS’ disciplines, the prohibition of restrictions on the freedom to provide services applies across the board, and thus, there is no need for rounds of negotiations of

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106 For the differences and similarities between public international law and Community law see Denza, Eileen, ob cit, pp 5-31.
107 EC Treaty, Art. 49.
108 Ibid. Art. 50.
113 EC Treaty, Art. 45.
114 Ibid. Art. 51.
specific commitments aimed at a progressive sector by sector liberalisation. Member States cannot limit the prohibition's scope of application to specific sectors nor subject it to specific conditions or limitations.

The freedom to provide services covers the right of the supplier to temporarily pursue his activity in the consumer's State\textsuperscript{115}, the right of the consumer to go to the supplier's State\textsuperscript{116} and the cross-border provision of services through technological means without the movement neither of the supplier or the consumer\textsuperscript{117}. Unlike the GATS' trade disciplines, the freedom to provide services does not cover the supplier's right to supply the service through a permanent commercial presence in the consumer's State.\textsuperscript{118} However, the Treaty includes other freedoms that protect the right of nationals of Member States to work\textsuperscript{119} or set-up agencies, branches or subsidiaries in the territory of any Member State.\textsuperscript{120}

The Court of Justice has played a key role on the liberalisation process by interpreting the meaning of prohibited "restrictions" widely. According to the Court, Article 49 entails, in the first place, the abolition of directly discriminatory measures such as laws or regulations that discriminate against a person providing services on account of his nationality or the fact that he is established in a Member State other than the one in which the service is provided including, \textit{inter alia}, a provision of the French Code de Procedure Penal, which limits compensation for victims of crimes to French nationals or to foreigners holding a residence permit\textsuperscript{121}, a Spanish law that grants licences to dub foreign films into one of Spain's official languages, on condition that the distributor also distributes Spanish films\textsuperscript{122}, a Spanish law that limits the right to free admission to national museums to Spanish citizens, foreigners resident in Spain and nationals of other Member States under twenty one\textsuperscript{123}; a Luxemburguese law that limits access to a governmental interest rate subsidy for housing loans, to loans taken

\textsuperscript{115} Case 33/74 Van Binsbergen [1974] ECR 1299.
\textsuperscript{117} Case C-76/90 Säger v Dennemeyer & Co Ltd [1991] ECR I-4221.
\textsuperscript{118} As stated by the ECJ in Case 52/79 Procureur du Roi v Debauve [1980] ECR 833 para. 9, the application of the prohibition of restrictions on the freedom to provide services is subject to the existence of a cross-border element. It does not apply where all the elements of the activity in question are confined within a single Member State.
\textsuperscript{119} EC Treaty, Art. 39.
\textsuperscript{120} Ibid. Art. 43.
\textsuperscript{121} Case 186/87 Cowan v Le Tresor Public [1989] ECR 195.
\textsuperscript{122} Case C-17/92 Federación de Distribuidores Cinematográficos v Estado Español et Unión de Productores de Cine y Televisión [1993] ECR I-2239.
from credit institutions established in Luxembourg\textsuperscript{124}. The only way for Member States to justify directly discriminatory measures is to rely on express treaty derogations\textsuperscript{125}, i.e. Public Policy (excluding economic aims\textsuperscript{126}), Public Security or Public Health, subject to proportionality requirements.

The Court understands that Article 49 also requires the abolition of indirectly discriminatory measures, namely, measures which on their face are nationality-neutral (same burden in law), but which have a greater impact on nationals of other Member States (different burden in fact). In other words, measures which may not be intended to discriminate, but they nevertheless burden non-nationals and non-established persons more heavily than nationals or established persons, or they otherwise have a protectionist effect. On these grounds, the Court found, for example, that although Member States have the unquestionably right to require foreign suppliers of manpower services the possession of a licence, the licensing system must meet two conditions: first, it must not discriminate on grounds of nationality and secondly, it must take into account the evidence and guarantees already furnished by the foreign supplier for the pursuit of his activities in the Member State of his establishment.\textsuperscript{127} Likewise, the Court found that a reduction on piloting tariffs limited to vessels permitted to carry on maritime cabotage indirectly discriminated against foreign undertakings. Even though on its face, the tariff reduction did not discriminate on grounds of nationality, in practice it did because at that time only vessels flying the Italian flag could obtain permission to engage in maritime cabotage.\textsuperscript{128}

More recently the Court has come to the conclusion that Article 49 also prohibits genuinely non-discriminatory measures (i.e. rules which cannot be said to burden established providers of services any less than non-established providers), which are liable to prevent or substantially impede access to the market or exercise of the freedom to provide services.\textsuperscript{129}

\textsuperscript{125} EC Treaty, Art. 46.  
\textsuperscript{126} In principle, economic aims cannot constitute a reason relating to the general interest that can justify a restriction on the freedom to provide services. See, for instance, Case 352/85 Bond van Adverteerders & others v The Netherlands [1988] ECR 5365, para. 33 – 34. Exceptionally, the Court has allowed some largely economic justifications: ensuring the coherence of a scheme of taxation, the effectiveness of fiscal supervision, the preservation of the financial balance of a social security scheme and controlling costs. 
\textsuperscript{129} In earlier cases the Court considered that genuinely non-discriminatory measures did not breach Art. 49 even if they were liable to create market access restrictions (see, e.g. Case 52/79 Procureur dur Roi v Debauve and
For instance, in *Sager v Dennemeyer*, the Court was asked to assess the consistency of national legislation requiring a license to supply patent renewal services, applied on a non-discriminatory basis to foreign and domestic suppliers alike, with Article 49. It held that imposing the licensing requirement on a foreign supplier of patent renewal services established in another Member State where he lawfully provides such type of service constitutes a restriction within the meaning of Article 49. The Court argued that: “By reserving the provision of services in respect of the monitoring of patents to certain economic operators possessing certain professional qualifications, national legislation prevents an undertaking established abroad from providing services to the holders of patents in the national territory and also prevents those holders from freely choosing the manner in which their patents are to be monitored”.

*In Customs v Excise v Schindler*, the Court held that national legislation which prohibits big scale lotteries and lottery operators from promoting their lotteries and selling their tickets, whether directly or through independent agents, constitutes an obstacle to the freedom to provide services prohibited by Article 49. In the Court’s view, the fact that it is applied without distinction on grounds of nationality or place of establishment, does not place the measure outside the scope of Article 49 because it is still liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services. Likewise, in *Alpine Investments* the Court held that a Dutch’s Ministry of Finance decision prohibiting - on a non-discriminatory basis - financial intermediaries from “cold calling” prospective clients, constitutes a restriction prohibited by Article 49, because it restricts the marketing of intra-community services, depriving financial suppliers from a rapid and direct technique for marketing and for contacting potential clients in other Member States.

The fact that the over the years the Court changed its interpretation of the same provision speaks about the dynamism of the case law and confirms the strategic role played by the Court in the liberalisation process. The case law on the free movement of goods, in particular that related to the interpretation of the meaning of “measures of equivalent effect” to quantitative restrictions (Art. 28) provides further evidence about the key role played by the Court, including its significant contribution to the development of the principles of proportionality and functional equivalence, which turned out to be crucial for the establishment of the internal market.

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131 Ibid. para. 14.
134 The prohibition was applied to all firms established in the Netherlands, foreign and domestic alike, and it prohibited cold calling any prospective clients, whether residing in the Netherlands or abroad.
These rulings shift away from a purely discriminatory test, focusing on a market access test to determine the existence of "restrictions". Under Community law, the fact that a domestic measure does not in any way discriminate (in law or in fact) against foreign suppliers does not put the measure outside the scope of Article's 49 prohibition. The key test is the effect of the measure on the establishment or functioning of the internal market. If the measure substantially impedes the ability of persons to provide intra-community services or restricts consumer's access to Community services, it constitutes a restriction prohibited by Article 49.

Naturally, the market access approach strikes down a wider range of barriers, enabling the integration process to reach deeper levels of integration but, at the same time, it is much more intrusive on Member States' regulatory autonomy. It requires the host Member State not just to avoid adopting measures that discriminate against foreign suppliers, but also to recognise the foreign suppliers' right to operate in its territory by the sole fact they comply with the legislation of the Member State in which they are established, without imposing on them further requirements to operate, even when the provision of such services would not normally be lawful under the laws of the host Member State.135

To avoid over intrusiveness on domestic regulatory affairs the Court has recognised - in addition to the express treaty derogations - circumstances where there are imperative reasons in the public interest that may justify a breach of the Article 49 prohibition, subject to proportionality requirements. Reasons already recognised by the Court as overriding reasons relating to the public interest include, inter alia, protection of consumers136, protection of workers137, conservation of the national historic and artistic heritage138, protection of the reputation of financial markets139, protection of fundamental values such as human dignity140.

135 This approach contains the essence of the three 'structural' principles that provide the foundations for the construction of the internal market: home country control, mutual recognition and minimum harmonisation. It must be noted that when the activity concerned is lawful in the home Member State but not in the host Member State (e.g. abortion or gambling services), the Court is much more deferential to the host State when qualifying the lawfulness of imperative reasons of public interest that may be invoked to justify the restriction.

and prevention of gambling and avoiding the risk of crime or fraud\textsuperscript{141}. The Court has applied the public interest requirements with a considerable degree of flexibility. In moral sensitive cases (services legal in the majority of Member States but illegal in some Member States), the Court has afforded Member States a considerable margin of appreciation (\textit{Schindler, Grogan}\textsuperscript{142}) in order to avoid imposing the values of the majority on the minority. In non-sensitive issues it has engaged in a detailed scrutiny of the justifications advanced by the Member State (broadcasting, retransmission of programmes and advertising cases).\textsuperscript{143}

\textbf{2.2 Policy Making Instruments}

As stated above, the purpose of the EC Treaty goes well beyond the removal of restrictions on cross-border trade, establishing a common market and an economic and monetary union which involves the approximation of laws and the development of common economic policies in a broad range of areas. Accordingly, the Treaty provides for a sophisticated institutional system for policy-making and management of the common market characterised by predominantly supranational features, which has been described as "decisional supranationalism".\textsuperscript{144} Community institutions include intergovernmental bodies that co-legislate in co-operation with an independent bureaucracy which has a near monopoly to propose new legislation and a Parliament directly accountable to European citizens. In certain subject areas, decisions may be adopted by qualified majority, ensuring a certain degree of independence for the development of Community law.

The Treaty provides for two main types of secondary legislation instruments for the approximation of laws and the implementation of common policies, i.e. Regulations\textsuperscript{145} and

\begin{footnotesize}
\textsuperscript{141} Case C 275/92 \textit{HM Customs v Excise v Schindler} [1994] ECR I-1389.
\textsuperscript{142} Case C-159/90 \textit{SPUC v Grogan} [1991] ECR I-4685.
\textsuperscript{143} CATHERINE BARNARD, \textit{The Substantive Law of the EU: the Four Freedoms} (Oxford University Press, Oxford 2004).
\textsuperscript{144} See JOSEPH WEILER, 'The Community System: the Dual Character of Supranationalism', (1981) 1 \textit{Yearbook of European Law} 267. Weiler describes the dual character of the Community System in terms of \textit{decisional supranationality and normative supranationality}. "Decisional supranationalism relates to the institutional framework and decision making process by which Community policies and measures are in the first place initiated, debated and formulated, then promulgated and finally executed" p 271. He contends that the responsibilities of the Commission and the way the Council of Ministers work define the decisional supranationalism of the Community law-making process that distinguishes it from other international organisations.
\textsuperscript{145} EC Treaty, Art. 249 states that Regulations have general application, are binding in its entirety and directly applicable in all Member States.
\end{footnotesize}
Directives. A highly structured process must be followed for the adoption of any of these instruments. The legislative initiative belongs to the European Commission, an independent body made up of members chosen "on the grounds of their general competence", which represents and serves no interests other than those of the Community. Member States' national interests are voiced through the Council, while the participation of the European Parliament adds a democratic representation to the process. National parliaments have no direct power over the content of secondary legislation. With the Directives, there is some technical room to decide the "form and methods" to achieve the results required, but no authority is conferred for modifying its content. On matters directly affecting the establishment or functioning of the internal market, the decision making system departs from the principle of consensus, enabling the adoption of decisions according to qualified majorities. Overall, this policy making system requires the transfer of a significant portion of Member States' regulatory autonomy to Community institutions, which carries with it a permanent limitation of their sovereign rights to formulate policies unilaterally on a wide range of areas.

The Treaty expressly mandates the Community Institutions to issue directives in order to achieve the liberalisation of specific service sectors, prioritising those services which directly affect production costs or the liberalisation of which helps to promote trade in goods. In compliance with this mandate a profuse body of directives has already been adopted for the approximation of laws and the elimination of trade barriers in various sectors including, inter alia, Professional Services, Financial Services, Postal Services and Audiovisual Services. In general terms, the purpose of secondary legislation on services has been to achieve a degree of harmonisation of domestic laws necessary and sufficient to secure the mutual recognition of domestic standards, the implementation of single passports and the principle of home state supervision.

2.3 Enforcement

146 Ibid. Art. 249 states that Directives are "binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."

147 Ibid. Art. 251.

148 Ibid Arts. 95 and 251.

149 Ibid Art. 52.

150 Secondary legislation on services is vast. See generally, Directive on Services in the Internal Market 2006/123/EC. In addition, there is a huge number of sector-specific Directives too long to be listed here, available at http://ec.europa.eu/internal_market/top_layer/index_19_en.htm (last visited April 2008).
The EC Treaty provides for highly sophisticated and strictly law-based mechanisms for the enforcement of Community law. The enforcement system is headed by a supranational Court of Justice, completely independent from national administrations. The Court's jurisdiction prevails over any other method of settlement of disputes between Member States.\textsuperscript{151} Community Institutions, Member States and Individuals have \textit{locus standi} before the Court of Justice.\textsuperscript{152} The Commission may bring actions before the Court of Justice against Member States who fail to fulfil obligations under the Treaty.\textsuperscript{153} The Court is endowed with ample power to impose remedies, being entitled to require the failing Member State to adopt any measure necessary to comply with the judgment, including penalty payments.\textsuperscript{154} There is no chance for the wrongdoer to "buy" the failure to comply with its obligations under Community law by withstanding retaliatory measures. The Court has recognised that some treaty provisions or even provisions included in secondary rules have direct effect\textsuperscript{155}, creating individual rights which national courts must protect, regardless of Member States' constitutional provisions relating to the reception of international law in domestic legal systems. Accordingly, individuals can rely on these provisions to bring actions before domestic courts against Member States\textsuperscript{156} or other individuals\textsuperscript{157}. Individuals can also seek damages against Member States for breach of Community law.\textsuperscript{158} The Court has also held that in case of conflict, Community law prevails over domestic law, no matter what the legal rank

\begin{footnotes}
\footnoteref{152} EC Treaty, Arts. 220-245.
\footnoteref{153} Ibid. Art. 226.
\footnoteref{154} Ibid. Art. 228.
\footnoteref{155} The leading case on direct effect is Case 26/62 \textit{Van Gend en Loos v Nederlandse Administratie der Belastingen} [1963] ECR 13, where the Court stipulates that some Community law provisions, which meet certain conditions (clarity, precision, unconditional) confer rights to individuals, which national courts must protect.
\footnoteref{156} On vertical direct effect against the host state see, for instance, Case 33/73 \textit{Van Binsbergen v Bestuur van de Bedrijfsvereniging Metaalnijverheid} [1974] ECR 1299 and Cases 110-111/78 Ministère Public \textit{v Van Wesemael} [1979] ECR 5 and against the home state Case C 384/93 \textit{Alpine Investments BV v Minister van Financiën} [1995] ECR I-1141.
\footnoteref{157} On Art. 49 horizontal direct effect against other individuals or organisations see Case 36/74 \textit{Walrave and Koch v Association Union Cycliste} [1974] ECR 1405, para 18-9 & para 34 and Cases C-51/86 and 191/97 \textit{Deliège v Ligue Francophone de Judo et Disciplines Associées} [2000] ECR I 2549. It must be noted that the direct effect of provisions included in secondary legislation is only vertical, i.e. enables a private party to bring a claim against the State but not against other private party.
\footnoteref{158} Joined Cases C-6/90 and 9/90 \textit{Francovich v Italy} [1991] ECR I-5357.
\end{footnotes}
of the domestic provision.¹⁵⁹ Weiler has described the direct effect and primacy of Community law as "normative supranationalism."¹⁶⁰

In summary, the EC Treaty bestows on individuals and companies an across the board freedom to provide services (along with a right of establishment) within the Community and prohibits Member States from imposing restrictions on them. In the Court's eyes this prohibition includes any kind of restriction, discriminatory or not, liable to impede the ability of persons to provide intra-community services or restrict consumer's access to Community services. In accordance with its purposes, the Treaty also establishes a sophisticated policy-making system for the approximation of laws and formulation of common economic policies, which has produced a profuse body of Community legislation. The operation of the Community system is backed up by a strictly law-based enforcement mechanism, where a supranational Court along with domestic courts control breaches of Community law effectively. Overall, the system ensures a considerable degree of independence of Community law-making and the enforcement process from national governments.

E. Concluding Remarks

This chapter examined the challenges and legal instruments for the liberalisation of trade in services. It identified a series of sui generis challenges raised by barriers to trade in services, which are essentially regulatory in character and thus, less obvious and more dispersed than barriers to trade in goods, scattered all over the regulatory system and more fiercely resisted because of the fact they touch upon sensitive public interests.

Like trade in goods, trade in services may be obstructed by overtly discriminatory measures against foreign services and service suppliers aimed at protecting domestic incumbents. But unlike trade in goods, this type of trade may also be hindered by measures affecting the cross-border movement of capital, persons and information. Trade in services is also particularly vulnerable to the dual regulatory burden problem caused by the disparity of domestic regulations between highly regulated markets, which increases the transaction costs of cross-

¹⁵⁹ See in particular Case 6/64 Costa v ENEL [1964] ECR 585 and Case 106/77 Amministrazione delle Finanze dello Stato v Simmenthal SpA [1978] ECR 629, which ensure that Community Law has priority over any conflicting law of the Member States, including not only ordinary national laws but also national constitutional laws.

¹⁶⁰ See Weiler, J, ob cit., p 271. "Normative supranationalism" is "concerned with the relationships and hierarchies which exist between Community policies and legal measures on the one hand and competing policies and legal measures on the Member States on the other". According to Weiler, the hallmarks of normative supranationalism of Community law are the doctrine of direct effect, supremacy of Community law and the principle of pre-emption.
border operations and discourages trade. Furthermore, due to the intense and ongoing relationship between the regulator and the industry, there are higher risks for governmental discriminatory practices, while the sensitivity of the policy issues at stake fuels strong protectionist interests against liberalisation. Accordingly, for an effective liberalisation of trade in services it is not enough to curb discrimination. It is equally necessary to avoid duplication of regulatory requirements, to secure a regulatory environment where governmental rules and practices are open, transparent, impartial and not more trade restrictive than necessary and to build up a broad political consensus about the need for trade liberalisation.

States can enter into a wide spectrum of possible agreements to further the liberalisation of trade in services. Some of them may include trade disciplines, policy-making instruments and enforcement mechanisms more deferential to domestic sovereignty than others, and thus, capable of ensuring a less advanced degree of liberalisation. In principle, the GATS and the EC Treaty can be viewed as the two extremes of this spectrum. On the one hand, an agreement characterised by predominantly intergovernmental features, which pursues the gradual liberalisation of trade in services through the negotiation of specific commitments not to discriminate against foreign services and service suppliers on specific service sectors, without interfering with State Parties' autonomy to formulate their own public policies. On the other hand, an agreement of a predominantly supranational character, based on an across the board prohibition of any type of restrictions, discriminatory or not, liable to impede the ability of persons to provide intra-community services or restrict consumers' access to community services, with policy-making and enforcement processes relatively independent from Member States. This agreement involves the transfer of a significant portion of domestic regulatory autonomy to Community institutions for the approximation of laws and the formulation of common economic policies.

The analysis of the case law under the GATS and EC Treaty suggested a more dynamic scenario, with adjudicative bodies playing a strategic role in the liberalisation process. In both contexts there are examples of rulings favouring a trade-friendly reading of treaty provisions, which sometimes upsets the political establishment. As the fathers of the agreements, politicians view with contempt rulings such as US-Gambling that stretch the interpretation of treaty provisions beyond what they understand as the limits of State Parties' commitments carefully crafted through diplomatic negotiations.

At the end of the day, the liberalisation of trade and, in particular, the liberalisation of trade in services, requires a redistribution of regulatory competence over cross-border economic
transactions between the host State, the home State and regional bodies (legislative and adjudicative), which admits a wide range of expressions, some more deferential to domestic sovereignty than others. Any group of States willing to integrate their service markets will have to make choices along the following lines: How broad should be the right of a State to impose conditions on those wishing to provide services in its territory? To what extent should the host State be bound to recognise the standards, permissions and licenses issued by the home state? To what extent should it be required to rely on the supervision of the home state over firms operating in its territory? Which issues should be internationalised and which issues should be kept under strict domestic sovereign autonomy? What mechanisms should be established for the enforcement of treaty provisions and secondary rules?

There are no inherently right or wrong answers to these questions. There is a continuum of institutional choices for channelling inter state co-operation that ranges from predominantly intergovernmental to predominantly supranational legal frameworks, rather than binary options between purely intergovernmental or purely supranational models. The policy-making and enforcement mechanisms can always be adjusted for different subject matters according to their political sensitivity, in order to avoid establishing institutional arrangements that compromise domestic sovereignty to levels unacceptable for State Parties. The appropriateness of a specific legal framework for economic integration and, in particular, for the integration of service markets must be judged according to its capacity to foster integration and to discipline protectionist conduct in light of the particular circumstances underlying the integration process.
Chapter II

MERCOSUR Legal System
This chapter examines the MERCOSUR legal system and the institutions responsible for its operation and discusses to what extent they have contributed to achieving MERCOSUR objectives. The chapter is divided into six sections. It begins with a review of MERCOSUR’s background (Section A). It then examines the Treaty of Asuncion (Section B), MERCOSUR institutions (Section C), sources of MERCOSUR law (Section D) and enforcement mechanisms (Section E). Finally, the chapter critically assesses the MERCOSUR legal system and discusses some proposals for reform (Section F), ending with some concluding remarks (Section G).

A. MERCOSUR Background

Regional integration initiatives have a long tradition among Latin American countries, although successful integration has remained elusive.\(^1\) During the XIX Century, military heroes and political leaders such as Andrés Bello and Simón Bolívar fought for the political and economic integration of the newly independent Latin American States, but their efforts succumbed to internal rivalries and external influences. British diplomacy, then a strong advocate of multilateralism, pressed against the conclusion of “protectionist” agreements that could undermine the British Empire’s trade interests in the region.\(^2\) In the late 1890s the Americans came into the scene putting forward the first of a large number of unsuccessful initiatives for integration with their Latin American neighbours.\(^3\) During the first half of the XX Century, there were no significant attempts to pursue regional integration, with most Latin American nations pleased with placing their commodities at good prices in northern markets.

During the post war period, influenced by an inward looking development strategy based on import substitution industrialisation, Latin American countries concluded a first wave of south-south regional agreements.\(^4\) The best known example was the Latin American Free


\(^4\) See in particular the influence of the Latin American school of structuralist economics, with Raul Prebisch as its most prominent representative. As director of the UN Economic Commission for Latin America and the Caribbean,
Trade Association (LAFTA).\(^5\) The underlying rationale to these agreements was to expand national markets as a means for accelerating the industrialisation process, but subject to high levels of external protection. Commonly described as “closed regionalism”, these agreements maintained high tariffs against third countries’ products, imposed restrictions on foreign direct investments and exercised strong interventionism over market functioning.\(^6\) The high transaction costs associated with the adoption of a common external tariff for countries with dissimilar economic structures, and the central allocation of economic activities conspired against their effective implementation. Sooner rather than later the agreements were disregarded amid criticisms of creating inefficiencies and failing to secure an even distribution of results, with smaller partners complaining about the bulk of benefits being reaped by the more industrialised ones.

The 1970s, also referred to as the lost decade, was characterised by financial crises, social upheaval and the emergence of authoritarian regimes, which exacerbated nationalism, fuelled distrust and hostilities and even posted States to the brink of war over territorial disputes.\(^7\) Despite the unfriendly environment for regionalism, by the end of this period eleven Latin American countries signed the Treaty of Montevideo establishing the Latin American Integration Association (LAIA).\(^8\) After LAFTA’s disappointing experience, State Parties to LAIA opted for more modest but realistic integration goals pursued through more flexible integration mechanisms. The LAIA aims at the gradual and progressive establishment of a Latin American Common Market, but as a long-term objective, not tied to pre-set deadlines.\(^9\) For this purpose, the Treaty of Montevideo creates an area of economic preferences\(^10\) providing a legal umbrella under which LAIA members may offer each other tariff preferences\(^11\) and may also enter into different types of agreements in which all members

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Prebisch promoted policies for economic development shaped by his structuralist ideas and the dependency theory.  
\(^7\) See, e.g., the dispute between Argentina and Chile over the Beagle Islands.  
\(^9\) ToA, Art. 1.  
\(^10\) Ibid. Art. 4.  
\(^11\) Ibid. Art. 5.
participate (Regional Scope Agreements) or only some members participate (Partial Scope Agreements). The latter are open to accession to other LAIA members subject to negotiation with a view to facilitating the progressive multilateralisation of preferences.

By the mid 1980s fresh winds were blowing in the southern cone of South America. The return to democracy left behind a decade of totalitarian regimes. Newly elected governments in Argentina and Brazil faced the common challenge to ensure political stability and to resuscitate their wrecked economies. These common challenges paved the way for the resurgence of bilateral integration initiatives. The process was kicked off by the Iguazu Declaration, issued in November 1985 by the then Presidents of Argentina (Alfonsin) and Brazil (Sarney), in which they expressed their desire to strengthen ‘friendship and solidarity ties’ between them, establishing a High level Commission to plan bilateral integration. Various declarations, the establishment of a Programme for Integration and Economic Cooperation (PIECAB) and even a Treaty for Integration, Cooperation and Development followed suit, covering a wide range of issues, well beyond the mere concession of trade preferences, including, inter alia, cooperation on Transport, Energy and Communications.

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12 Ibid. Art. 6.
13 Ibid. Art. 7.
14 Ibid. Art. 9.
16 See Iguazu Declaration, signed on 30 November 1985 available (in Portuguese) at http://www2.mre.gov.br/da/vb_argt_256_733.htm (last visited 23/01/08).
17 See the ‘Argentinian - Brazilian Friendship Act on Democracy, Peace and Development’ signed on 10 December 1986 in Brasilia.
18 The PIECAB was established by the Argentina - Brazil Integration Act signed on 29/07/86.
19 Signed on 29 November 1988 and in force since 29/11/98. The Treaty established a 10 years period for the gradual removal of tariffs and non-tariff barriers to trade in goods and services, and the gradual co-ordination of macroeconomic policies through additional protocols and ad hoc agreements. Available, in Portuguese, at http://www2.mre.gov.br/da/vb_argt_281_758.htm, last visited 23/01/08.
Infrastructure, Co-ordination of Foreign Policy, Defence and Nuclear co-operation, to name but a few.

In July 1990, with two strong advocates of liberal economic principles taking office (Menem in Argentina and Collor de Mello in Brazil), both countries decided to accelerate the pace of the integration process by halving the period for the establishment of a common market - to be ready by 31/12/94 - and by replacing the hitherto product by product tariff reduction strategy with a plan for the general, linear and automatic reduction of the whole tariff range.\(^{20}\) It is at this stage, with the conditions for advancing integration already agreed, that Paraguay and Uruguay put forward a formal request to join in.\(^{21}\) Therefore, MERCOSUR was not an agreement negotiated from scratch by its four members on an equal basis, but rather the result of bilateral negotiations between Argentina and Brazil initiated in the mid 1980s, which took on board Paraguay and Uruguay at the very last minute. The late comers had little opportunity to exert any significant influence during the drafting process of the Treaty of Asuncion to ensure provisions favourable to their national interests.\(^{22}\)

The Treaty of Asuncion was designed in line with new development policies prevalent during the early 1990s. By contrast to the 1960s, these new policies sought to pursue economic growth through private-led, market oriented and outward looking strategies sponsored by international financial institutions.\(^{23}\) Within this new conceptual framework, regional integration agreements were seen as a vehicle for facilitating the insertion of local economies

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\(^{20}\) See Buenos Aires Act signed on 6 July 1990. The commitments under this Act were registered in the LAIA's Secretariat as PSA No 14 on 20/12/90.

\(^{21}\) The first meeting of the Bi-national Working Group for the establishment of a common market was held on 4 September 1990 with the participation of Paraguay and Uruguay as observers. At the meeting these two countries expressed their interest to join the integration process, following the automatic and across the board tariff reduction methodology. Therein, meetings were held on a quadripartite basis. It must be noted that Uruguay had been negotiating with Argentina and Brazil co-operation mechanisms for the Transport sector since 1988.

\(^{22}\) The strong emphasis of the Treaty of Asuncion on the principle of reciprocity of rights and obligations between State Parties, without including significant special and differential treatment provisions for the smaller partners somehow reflects the inability of Paraguay and Uruguay to shape the conditions of the integration process in light of their national interest.

\(^{23}\) These policies were encouraged by International Financial Institutions based in Washington, which used conditionality as a vehicle to promote a package of reforms based on trade liberalisation, liberalisation of inward foreign direct investment, privatisation and deregulation, commonly known as the "Washington Consensus".
into global markets - a strategy commonly known as “open regionalism” - rather than a mechanism for protecting against foreign competition.\(^{24}\)

However, the economic motivations behind the birth of MERCOSUR should not be overestimated. Rather than a private-led process supported by domestic industries desperate to compete against foreign producers and thus actively demanding for the removal of trade barriers, MERCOSUR was very much a government-led process, conducted by high-profile presidents willing to be seen as the fathers of a new era of inter state co-operation. For the larger partners, non-economic considerations such as insurance against military conflict, protection of fledging democracies and political stability, lock in effect of domestic reforms and self-interest of high ranked government officials played a major role in pushing the integration process forward.\(^{25}\)

It has even been suggested that MERCOSUR was born as a result of a tacit trade-off between the two biggest partners: preferential access to the Brazilian market in exchange for Argentina’s alignment with Brazil in foreign policy.\(^{26}\) Probably State Parties’ interest in MERCOSUR is more sophisticated than this, but what there can be no doubt about is that those interests differ and they do so, to a large extent, due to the sharp structural asymmetries between States.\(^{27}\) These asymmetries conspire against the definition of common objectives and common strategies for achieving them. For smaller State Parties, the economic relevance of the bloc is crucial, but for the largest one it is only of marginal importance.\(^{28}\) While smaller State Parties may be willing to pay the price for having strong regional institutions capable of ensuring effective market access, larger State Parties, particularly Brazil, are more likely to support loose regulations and shallow institutions, which do not cut too deep into States’

\(^{24}\) See Devlin & Estevadeordal, ob cit, for a detailed analysis on the differences between “closed regionalism” and “open regionalism”.


\(^{26}\) PEDRO DA MOTTA VEIGA, MERCOSUR’s Institutionalization Agenda: The Challenges of a Project in Crises MERCOSUR: In Search of a New Agenda (BID - INTAL, Buenos Aires 2003), p 3

\(^{27}\) One State Party alone represents over 75% of the bloc’s gross domestic product. See Appendix II MERCOSUR Statistical Information, Tables 1 and 6.

\(^{28}\) This is best illustrated by “trade encapsulation” indexes (ratio of regional exports to total exports). In 1991 this percentage was around 35% for Paraguay, 44.2% for Uruguay, 16.5% for Argentina and just over 7% for Brazil. Compare this with an average of 45% for NAFTA countries and 64% for EC countries. See Appendix II, Tables 8, 9 and 10.
economic policy autonomy. This congenital weakness conditioned and will continue to condition the success of MERCOSUR and therefore must be taken into account as a backdrop for the analysis that follows.

**B. Treaty of Asuncion**

1. **Purpose and Principles**

The Treaty of Asuncion was signed by Argentina, Brazil, Paraguay and Uruguay on 26 March 1991. According to Article 1, the purpose of the Treaty was to establish a common market by 31 December 1994 involving the free movement of goods, services and factors of production, the establishment of a common external tariff and the co-ordination of macroeconomic and sectoral policies.

Despite the complex and demanding tasks necessary for the establishment of a common market and the short period prescribed for its completion, the Treaty only stipulates broadly defined commitments and a flexible, minimalist and intergovernmental institutional structure. Such an imbalance between means and end reflects State Parties’ contradictory attitude to integration, which on the one hand vow to achieve ambitious integration objectives, but on the other hand refuse to delegate sovereignty in favour of community institutions able, through their independent action, to build up the common market.

Close to the end of the five-year transitional period, the status of integration was not anywhere close to a common market. Conscious about their inability to meet their original goal, State Parties opted for rephrasing their integration objectives, focusing on the completion of a

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29 See Kaltenthaler and Mora, ob cit, who analyse the impact that State Parties’ motivations on MERCOSUR had on its institutional development.
31 See above Introduction footnote n 1. For a detailed analysis of the Treaty of Asuncion, see, e.g. RICARDO XAVIER BASALDÚA, MERCOSUR y derecho de la integración (Abeledo Perrot, Buenos Aires 1999).
32 The objective to establish a common market in such a short period of time constitutes a significant innovation compared to previous regional trade agreements signed by State Parties, which were mainly concerned with tariff concessions. For instance, Art. 1 of the ToM aims to establish a common market, but only as a long-term goal subject to a gradual process with no deadlines attached to it.
customs union as an essential step prior to the establishment of a common market, which became an objective subject to negotiation and with no specific deadline attached to it.\(^{33}\)

The Treaty’s full title expressly states that it is an agreement for the establishment of the Common Market of the South, emphasising its instrumental character.\(^{34}\) Its succinct style, with only twenty four Articles that formulate general principles and guidelines instead of detailed provisions has led some commentators to describe it as a “framework agreement”.\(^{35}\) The framework idea suggests that the legal loopholes left by the Treaty would be filled up with secondary legislation adopted at a later stage by decision making bodies. However, this description is somehow inaccurate, because alongside broadly defined lines of action, the Treaty also imposes specific and unconditional obligations on State Parties to eliminate tariffs and non tariff restrictions to intra regional trade.\(^{36}\) In this sense, it seems more precise to describe the Treaty as a legal instrument that oscillates between “directive law”, establishing general legal foundations for an integration programme and “operative law”, including a number of concrete legal commitments of a provisional character.\(^{37}\) In addition, many pieces of “filling up” legislation that have been later adopted are not really secondary legislation but pure public international law, namely, annexes, protocols and amendments to the Treaty of Asuncion.\(^{38}\) In fact, if all its protocols had come into effect, a consolidated version of the Asuncion Treaty would be much larger than the European Community Treaty or even NAFTA.\(^{39}\)

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\(^{33}\) See Dec 13/93 which approves the document “Consolidation of the Customs Union and Transition to a Common Market”. This document formally refers to the “redefinition of the integration process”. It replaces the objective to establish a Common Market by 1/1/95 with the objective to establish a Customs Union by the same date and enumerates a series of measures to be adopted by that date.

\(^{34}\) See SERGIO ABREU BONILLA, MERCOSUR e INTEGRACION (Fundación de Cultura Universitaria, Montevideo 1991), p 47.

\(^{35}\) See Basaldúa, ob cit, p 90.

\(^{36}\) See Annex I Trade Liberalisation Programme.

\(^{37}\) See Abreu Bonilla, S., ob cit, p 47.

\(^{38}\) For a critique on the use of primary law for regulating specific trade issues see below pp 90 – 91.

The preamble to the Treaty indicates that the integration of domestic markets is a vital prerequisite for accelerating State Parties’ economic development with social justice.\(^{40}\) It also refers to the need for State Parties to secure “a proper place in the international community”. A declaration made by State Parties’ Foreign Ministers further elaborates on this point by stating that one of the reasons for signing the Treaty was to increase trade flows and to facilitate the competitive inclusion of their economies into global markets.\(^{41}\)

The preamble also specifies that the expansion of domestic markets through integration must be based on the principles of *gradualism, flexibility and equilibrium*. These principles are also found on the bilateral instruments signed by Argentina and Brazil that preceded the Treaty of Asuncion. The Act for Integration\(^{42}\) which lays down the bilateral Programme for Integration and Economic Co-operation expressly refers to these principles. It provides that integration must be *gradual*, through the completion of consecutive stages, subject to negotiation, implementation and evaluation on an annual basis. It must be *flexible* in order to enable the adjustment of the Programme’s scope, pace and objectives. Finally, it prescribes that integration must be *balanced*, aiming at a progressive equilibrium of exchanges - quantitative and qualitative – through the expansion of trade and that it must foster an intra-sectoral specialisation of domestic economies rather than an inter-sector specialisation.\(^{43}\) Similarly, the Treaty for Integration, Cooperation and Development\(^{44}\) provides in Article 2 that its implementation must be subject to the principles of gradualism, flexibility and equilibrium with a view to effecting the progressive adjustment of individuals and enterprises to the new conditions of competition and economic legislation.

The principle of *gradualism* has been invoked in some trade disputes, to justify State Parties’ lack of compliance with MERCOSUR trade disciplines.\(^{45}\) It has been argued that the provisions of the Treaty have a programmatic character and as such they are subject to further negotiations before becoming binding on State Parties. However, when it comes to tariff reductions, the Trade Liberalisation Programme imposes detailed obligations on State Parties aimed at the complete removal of tariffs and non-tariff barriers by the end of the transition

\(^{40}\) Although the preamble of a Treaty does not contain rights and obligations, it forms part of the context for the purpose of the interpretation of the Treaty. See VCLT Art. 31.2.

\(^{41}\) See Declaration of Ministers No 1, point 4, 26 March 1991.

\(^{42}\) See above footnote n 16.

\(^{43}\) This contrasts with the strategy followed by LAFTA, based on centrally planned policies which aimed, *inter alia*, to promote the development of heavy industry in some countries as opposed to agricultural production in others.

\(^{44}\) See above footnote n 17.

\(^{45}\) See AHAA Uruguay – Processed Wool para. 28 to 31.
period. Ad hoc tribunals have recognised the unconditional binding effect of these obligations, rejecting the argument that gradualism suggests nothing is binding unless expressly agreed by the four State Parties.\textsuperscript{46}

The principle of \textit{flexibility} is clearly reflected by the Treaty's institutional provisions. The drafters of the Treaty, mindful of past integration experiences based on elaborated but rigid and inefficient institutional system, opted for a flexible and minimalist approach, capable of being adjusted to institutional demands as the integration process progressed. In this vein, Chapter II of the Treaty establishes a basic intergovernmental structure of a provisional character, subject to review by the end of the transitional period.\textsuperscript{47}

Article 2 of the Treaty provides that the common market must be based on the \textit{reciprocity} of rights and obligations between States Parties, a concept which suggests the equality or equivalence of commitments.\textsuperscript{48} Article 6 recognises different and specific rates of liberalisation in favour of Paraguay and Uruguay, but only effective during the transitional period. The Treaty does not recognise any State Party a special status of a permanent character. The strict adherence to the principle of reciprocity contrasts with the LAIA's approach which expressly provides for special and differential treatment in favour of countries at a relatively less advanced stage of economic development on a non-reciprocal basis.\textsuperscript{49}

Paraguay and Uruguay always resisted an orthodox interpretation of the principle of reciprocity. Conscious of the sharp structural asymmetries between State Parties they feared, justifiably, that such asymmetries could compromise the objective of securing an even distribution of the costs and benefits of the integration process. Consequently, they have been arguing for a broad understanding of reciprocity, based on the equivalence of concessions as a whole rather than a tit-for-tat approach seeking strict equivalence for every single trade concession. They have also suggested the need for interpreting the principle of reciprocity alongside the principle of balance, which connotes the idea of a harmonious integration process that contemplates the various - sometimes disparate - interests at stake.\textsuperscript{50} Over time, State Parties gradually began to acknowledge that it has been much more difficult for the smaller State Parties than for the larger ones to reap the benefits of economic integration and

\textsuperscript{46} See, e.g., AHAA Argentina - Poultry para. 134 and 139, AHAA Brazil-Remoulded Tyres pp 14 and 19.
\textsuperscript{47} See below Section C.
\textsuperscript{48} See ROBERT O KEOHANE, 'Reciprocity in International Relations', (1986) 40 International Organization 1.
\textsuperscript{49} ToA, Arts. 3d and 9d.
\textsuperscript{50} See Basaldúa, ob cit, p 293.
that it is necessary for trade rules to impose different rights and obligations on State Parties to somehow redress the disparities that exist among them.  

Last, but not least, State Parties agreed from the outset that a strict adherence to democratic values and the protection of human rights constitutes a *sine qua non* condition for participating in the integration process. Although the Treaty of Asuncion itself does not contain any express reference to democratic principles, State Parties issued various declarations and adopted international instruments that refer to the observance of democratic principles and the protection of human rights as an essential component of the integration process prior to and after signing the Treaty.

2. Instruments for the Establishment of a Common Market

The Treaty provides for some instruments for the establishment of the common market to be used during the transition period, namely, a trade liberalisation programme, a common external tariff, the co-ordination of macroeconomic policies and the adoption of sectoral agreements. The following paragraphs examine each of these instruments and briefly discuss what have they have achieved so far.

*The Trade Liberalisation Programme*

The Trade Liberalisation Programme imposed specific obligations on State Parties consisting on progressive, linear and automatic tariff reductions accompanied by the elimination of non-

51 The Preamble of the Protocol of Ouro Preto reaffirms the principles and objectives of the Treaty of Asuncion "mindful of the need to give special consideration to the less developed countries and regions of MERCOSUR". Likewise, the preamble of the Protocol of Montevideo refers to "the need to ensure the increasing participation of less developed countries and regions in the service market", but "on the basis of the reciprocity of rights and obligations". Less ambiguously, the Protocol for the Establishment of MERCOSUR Parliament provides that one of the Parliament's principles shall be the defence for conditions based on a special and differential treatment and a sustainable development, and the promotion of regions at a relatively less advanced stage of economic development. More recently, State Parties have set up a fund to finance projects aimed at promoting structural convergence, competitiveness, and social cohesion, particularly in the smaller economies and less advanced regions, but the budget they provided for such fund is almost insignificant (US$ 100). See Dec 45/04.


53 ToA, Art. 5.
tariff restrictions or measures of equivalent effect, as well as any other restrictions on trade between the States Parties, with a view to the attainment of a zero tariff and the elimination of non-tariff restrictions by 31 December 1994.54

In practice, the Trade Liberalisation Programme achieved mixed results. On the one hand, it contributed to the substantial elimination of tariffs, with more than eighty five percent of intra-regional trade flows benefiting from zero-tariff by the end of the transition period.55 This achievement was coupled with an impressive growth in intra-regional trade, which increased from 1991 to 1994 at an average annual rate of twenty five percent.56 On the other hand, its contribution to the elimination of non-tariff restrictions was much less convincing.

By the end of the transition period, a remaining group of sensitive products which had not yet been liberalised was subject to a final adjustment regime, which basically provided State Parties with additional time to phase them into the tariff free area, namely, four additional years for Argentina and Brazil and five additional years for Paraguay and Uruguay, starting from 1/01/95.57 Hence, formally speaking, since 1 January 2000 MERCOSUR is a free trade area involving the free circulation of goods across national borders. The flipside of the right to the free movement of goods involves the prohibition of custom duties, charges of equivalent effect, non-tariff restrictions such as administrative, financial, foreign exchange or any other measure of equivalent effect by which a State Party unilaterally prevents or impedes reciprocal trade.58

Various arbitration awards have consistently and uncompromisingly recognised the absolute character of the prohibition against applying tariffs and non-tariff restrictions to intra regional

54 ToA, Annex I, Art. 1 refers to State Parties' obligation to eliminate any kind of duties or restrictions applied in their reciprocal trade. Art. 2 defines "duties" including customs duties and any other chargers of equivalent effect and "restrictions" including any measure of an administrative, financial, or foreign exchange character or of any other nature by which a State Party unilaterally prevents or obstructs reciprocal trade, but not including measures taken in the situations provided for by Art. 50 of the Treaty of Montevideo.


58 ToA, Annex I, Art. 2.
trade in goods.\textsuperscript{59} By contrast, decision making bodies adopted various Decisions and Resolutions that provide State Parties with a degree of flexibility for dealing with non-tariff barriers, which does not seem in line with those awards.\textsuperscript{60} In any event, in practice, intra regional trade remains severely curtailed by a wide range of non-tariff restrictions, including import and export restrictions, incentives and other type of domestic policies that distort the conditions of competition, not to mention countless duplications of sanitary and phytosanitary measures, technical regulations and conformity assessment tests.\textsuperscript{61}

\textit{Establishment of a Common External Tariff}

To set up a Common External Tariff (CET) “which encourages the foreign competitiveness of the States Parties”\textsuperscript{62} proved to be a much more arduous task than the dismantling of tariffs to intra regional trade. By the end of the transitional period, State Parties reached only a partial agreement on the CET, covering approximately eighty five percent of products imported into the region.\textsuperscript{63} The CET did not cover Capital goods, Information Technology goods and Telecommunications goods nor sensitive products included in national lists of exceptions, but State Parties agreed on a convergence period towards a customs union to be completed by

\textsuperscript{59} See, e.g., AHAA Brazil - Restrictive Measures to Reciprocal Trade, para. 85: “ [...] The delay of the date for the establishment of the common market does not derogate the obligation agreed by the State Parties to totally eliminate tariffs and non-tariff restrictions, although the obligation is no longer exigible by 31-12-94. After MERCOSUR re-evaluation, the obligation to eliminate tariffs and non-tariff restrictions must be completed by 31-12-99, when the Final Adjustment Regime must be completed.” See also AHAA Argentina – Textiles, p. 20, Argentina - Poultry, para. 134 and 139, and Brazil – Remoulded Tyres, p. 14 which prescribes that the prohibition on imposing non-tariff restrictions or measures of equivalent effect has an absolute character, namely, "that the measure cannot be adopted by a State Party, even if the measure is not aimed at discriminating against the foreign product" and p 19; Uruguay – Cigarettes, p. 5; and Argentina – Blocked Highways para. 104.

\textsuperscript{60} The most recent of a large number of Decisions aimed at dealing with non-tariff barriers is Dec 27/07, which compels State Parties to list the non-tariff restrictions applied to their exports by other State Parties and then invites State Parties to put forward proposals on how to deal with them which should be implemented at the latest by 31/12/2010, for measures applied by Argentina and Brazil and by 31/12/2012 for measures applied by Paraguay y Uruguay.

\textsuperscript{61} See, e.g., JULIO BERLINSKY, 'La integración profunda en el Mercosur; perspectivas desde Argentina, Brasil, Paraguay y Uruguay', in Julio Berlinsky, et al. (eds) 15 Años de MERCOSUR, Comercio, Macroeconomía e Inversiones Extranjeras (Siglo XXI Red MERCOSUR, Buenos Aires 2006), pp 137-200.

\textsuperscript{62} ToA, Art. 5(c).

1/1/2006, which basically provided them with extra time for the adoption of a CET for the excluded products.64

At present, having completed the term for the convergence period towards a CET, MERCOSUR is still not working as a customs union.65 Bitter disagreements remain as to what should be the rate of a CET “conducive to encourage the foreign competitiveness of State Parties’ economies”, in particular in relation to Capital goods, Information Technology goods and Telecommunications goods. As a result, State Parties routinely perforate the CET, sometimes with the MERCOSUR Trade Commission’s (“MTC”) authorisation, sometimes without it. The supposedly “common commercial policy” coexists with a myriad of special free trade zones and ad hoc special customs regimes unilaterally managed by each State Party. And most importantly, the CET is charged on third country’s products every time they cross national borders within MERCOSUR and there is no mechanism in place for the redistribution of the CET’s proceedings.66

Coordination of Macroeconomic Policies and Sectoral Agreements

The other two instruments stipulated by the Treaty for the establishment of a common market are the co-ordination of macroeconomic policies, “which shall be carried out gradually and in parallel with the programmes for the reduction of tariffs and the elimination of non-tariff restrictions…”67 and the adoption of sectoral agreements “in order to optimize the use and mobility of factors of production and to achieve efficient scales of operation”68.

64 See Decisions 13/93, 17/01/94; 7/94, 5/08/94 and 22/94. The measures to be adopted during the convergence period included the following: a) a linear and automatic convergence towards a 14% CET for Capital goods to be completed by Argentina and Brazil in 2001 and by Paraguay and Uruguay in 2006; b) a linear and automatic convergence towards a 16% CET on Information Technology and Telecommunications goods to be completed by all State Parties in 2006; c) Each State Party is allowed for to keep 300 exceptions to the CET until 2001 (Paraguay 399 exceptions until 2006).


66 Several legislative measures have been adopted with a view to establish the functioning of the customs union. Dec 54/04, aimed at the elimination of double charges and the establishment of a mechanism for the redistribution of the CET proceedings is one of the most significant. The Decision envisages a MERCOSUR Customs Code to be in force by 2008. Whether that Decision will enter into force or not is another matter. Back in 1994 the CMC adopted Dec 25/94 approving a Customs Code which never entered into force.

67 ToA, Art. 5(b).

68 Ibid.
No significant progress has been achieved so far on the co-ordination of macroeconomic policies and there is no evidence to suggest that in the near future State Parties will be willing to agree on anything more than the exchange of economic information and the harmonisation of economic statistics. 69 With respect to sectoral policies, the most significant agreements that have been adopted so far are those for the automotive and the sugar sector. State Parties have also adopted agreements for the iron and steel, textiles and leather industries.

In summary, eighteen years after the entry into force of the Treaty of Asuncion, MERCOSUR lacks the essential functioning components of a common market. It remains an incomplete free trade area, with a partially implemented CET and with no significant degree of co-ordination of State Parties’ macroeconomic or sectoral policies.

3. The Treaty of Asuncion and the Latin American Integration Association

State Parties to the Treaty of Asuncion are also parties to the broader Latin American Integration Association (LAIA) established by the Treaty of Montevideo. 70 The preamble to the Treaty expressly states that it must be viewed “… as a further step in efforts gradually to bring about Latin American integration, in accordance with the objectives of the Treaty of Montevideo of 1980”. 71

The Treaty of Montevideo prescribes the MFN treatment for any concession granted by a LAIA Member to another LAIA member or to a third country. 72 But at the same time, the Treaty envisages the possibility for a reduced number of members to confer each other reciprocal concessions on a non-MFN basis by celebrating a Partial Scope Agreement (PSA). 73 PSAs may refer to trade, economic complementarity, agriculture, trade promotion, or other matters such as scientific and technological co-operation, tourism promotion and

69 On the obstacles for an effective co-ordination of macroeconomic policies between State Parties, see, inter alia, FERNANDO LORENZO (COORD), Fundamentos para la Coordinación Macroeconómica en el MERCOSUR (Siglo XXI Red MERCOSUR, Buenos Aires 2006).

70 See above footnote n 7.

71 See ToA, preamble. See also Declaration of Foreign Ministers No 1, which ratifies State Parties’ commitment with the ToM and clarifies that the ToA is a step forward towards the advancement of the objectives of the ToM

72 ToM, Art. 44. Note than on 13 June, 1994, LAIA Members signed an interpretative protocol of art 44 whereby Members are no longer obliged to automatically extend concessions granted to Non-members to other LAIA Members. The purpose of this protocol was to allow Mexico to enter the NAFTA.

73 According to Art. 7 PSAs are those wherein all member countries do not participate. The rights and obligations established by PSAs only bind the signatory member countries and those adhered thereto.
preservation of the environment. The Treaty of Asuncion falls under the category of a PSA on Economic Complementarity\textsuperscript{74} and as such, it is subject to the provisions of the Treaty of Montevideo applicable to this type of agreement.

The Treaty of Montevideo seeks to ensure, in the long-term, the convergence of PSAs into a common market. For this purpose, the right to PSAs is subject to certain conditions, namely, to be open for accession to the other member countries; to contain clauses promoting convergence in order that their benefits reach all member countries; to include provisions on special and differential treatment provisions for less advantaged countries; and to be in force for a period of no less than three years.\textsuperscript{75} In accordance with LAIA's requirements, the Treaty of Asuncion is open to accession, through negotiations, by other LAIA members.\textsuperscript{76} By contrast, the requirement to include provisions on special and differential treatment for less advantaged countries collides with the Treaty of Asuncion provisions on the reciprocity of rights and obligations between State Parties.\textsuperscript{77}

State Parties to the Treaty of Asuncion are also parties to other PSAs concluded under the LAIA umbrella. It is not clear to what extent the participation in others agreements with some objectives overlapping those of the Treaty of Asuncion, helps or hinders the integration process.\textsuperscript{78} What is clear is that for State Parties to the Treaty of Asuncion, MERCOSUR is not the only forum where they negotiate trade concessions. In particular, Brazil and Argentina

\textsuperscript{74} It was registered in the LAIA’s Secretariat as PSA on Economic Complementarity No 18 signed on 29 November 1991.

\textsuperscript{75} ToA, Art. 9. This article also prescribes, the provisions that a Partial Scope Agreement may contain, i.e. clauses promoting convergence so as to extend their benefits to all member countries, tariff reductions, specific rules regarding origin, safeguard clauses, non-tariff restrictions, withdrawal of concessions, renegotiation of concessions, denouncement, coordination and harmonization of policies, among others.

\textsuperscript{76} ToA, Art. 20. So far, Venezuela is the first non-founding member in the process of getting full MERCOSUR membership status. In addition, Chile and Bolivia became associates members to MERCOSUR in June and December 1996 respectively. Associate members seek to establish a free trade area with MERCOSUR but do not aim to agree a CET.

\textsuperscript{77} ToA, art 2.

\textsuperscript{78} ToA, Art. 8 compels State Parties to avoid “affecting the interests of the other State Parties or the aims of the common market in any agreements they may conclude with other LAIA Members during the transition period”. Dec 32/00 stipulates that from 30/06/01 onwards State Parties will not be allowed to sign new preferential agreements or grant new trade preferences in agreements in force under LAIA, unless they have been negotiated by MERCOSUR.
have their own bilateral PSA79 where they negotiate conditions for their bilateral trade, sometimes in line with MERCOSUR objectives, sometimes in stark contrast with them.80

4. The Treaty of Asuncion and the WTO

State Parties to the Treaty of Asuncion are also parties to the World Trade Organisation (WTO). Since Regional Trade Agreements constitute an exception to the Most Favoured Nation obligation, State Parties to the Treaty of Asuncion had to notify the agreement to the WTO and seek its approval. The agreement was notified under the provisions of the Enabling Clause.81 82 83 At present, the Treaty of Asuncion remains under factual examination by the Committee on Regional Trade Agreements but so far no report has been adopted.84

There are additional reasons that make WTO law particularly relevant for State Parties to the Treaty of Asuncion. First, there are various WTO agreements that have been imported into the sub-regional context with minimum or no adjustments at all.85 Secondly, disputes between State Parties regarding the interpretation, application or breach of the Treaty and its Protocols may be subject either to MERCOSUR procedures for the settlement of disputes as prescribed

79 See PSA No 14.
80 One example of a very significant measure that affects MERCOSUR trade but was decided outside MERCOSUR is the recent adoption of the bilateral Mechanism for Competitive Adjustment between Argentina and Brazil. This Mechanism enables each Party to impose safeguards against import surges from the other party. As Torrent notes, this mechanism was adopted under the PSA No 14 rather than under the MERCOSUR umbrella so as not to extend this benefit to the smaller parties. See Torrent, ob cit, p 53.
81 See Decision of the CONTRACTING PARTIES Parties of 28 November 1979 (26S/203) "Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries", commonly known as the Enabling Clause.
83 The US criticised the notification path chosen by MERCOSUR to justify its departure from Art. I (MFN) and requested the agreement to comply with the more stringent conditions imposed by Art. XXIV GATT 1994. See US request on GATT Document L/7029, 5 June 1992.
84 See http://www.wto.org/english/tratop_e/region_e/status_e.xls, last visited 21/01/08.
85 See, e.g., Dec 13/97 "approving" the Protocol of Montevideo on Trade in Services, Dec 11/97 on Antidumping Measures, Dec 17/96 on the application of Safeguard Measures to imports from Third Countries.
by the Protocol of Olivos or, alternatively, to the dispute settlement system of the WTO, provided the parties to the dispute jointly agree on such forum. Finally, to settle the disputes between State Parties, ad hoc tribunals must apply not only the Treaty of Asuncion, its protocols and the rules adopted by its decision making bodies, but also "applicable principles and provisions of international law," which logically include those principles of international economic law developed by the WTO panels and its Appellate Body.

C. MERCOSUR Institutions

The Treaty of Asuncion laid down a provisional institutional structure to administer and implement the treaty during the transition period, to be replaced by a "final" one upon its completion. In December 1994, in compliance with Article 18 of the Treaty, State Parties adopted the Additional Protocol to the Treaty of Asuncion about MERCOSUR Institutional Structure, better known as the Protocol of Ouro Preto (POP), which forms an integral part of the Treaty of Asuncion. The POP sought to upgrade MERCOSUR institutions to the new status of the integration process after the conclusion of the transition period, but keeping the adjustments within the intergovernmental parameters laid down by the Treaty of Asuncion. It established three bodies with decision making power - Common Market Council, Common Market Group and MERCOSUR Trade Commission - and two bodies of a consultative nature - a Joint Parliamentary Commission (now replaced by the MERCOSUR Parliament) and an Economic and Social Consultative Forum plus an Administrative Secretariat. The following paragraphs look at the decision making and non-decision making bodies in greater detail.

86 POL art 1.2.
87 Ibid. Art. 34.
88 On the relationship between MERCOSUR law and WTO law see AHAA Brazil - Pork Subsidies, para. 56 and AHAA Argentina - Poultry, paras. 127 - 130 and 159. Other arbitration awards that refer to WTO case law include, e.g., AHAA Argentina - Remoulded Tyres para. 84.
89 ToA, Arts. 9 to 16.
90 ToA, Art. 18.
92 POP, Art. 48.
93 Ibid. preamble.
94 The POP does not include provisions on adjudicative bodies, but art 43 refers to the Protocol of Brasilia (now replaced by the Protocol of Olivos) for the settlement of disputes between State Parties. The dispute settlement system is examined in section E below.
1. Decision making Bodies

1.1 Common Market Council

The Common Market Council (CMC)\textsuperscript{95} is the highest body of MERCOSUR, responsible for the political leadership of the integration process and the adoption of decisions aimed at ensuring the observance of the objectives of the Treaty of Asunción and the final establishment of the Common Market.\textsuperscript{96} It meets at ministerial level, consisting of Ministers of Foreign Affairs and the Ministers of Finance of the State Parties.\textsuperscript{97} It adopts measures by way of Decisions, which are binding upon the State Parties.\textsuperscript{98} Decisions are adopted by consensus in the presence of all State Parties.\textsuperscript{99}

The Presidency of the CMC is held in turns by State Parties, in alphabetical order, for periods of six months.\textsuperscript{100} The CMC formulates policies and adopts the necessary measures for the establishment of the common market. In this vein, it expresses its views on the proposals submitted by the CMG. It holds MERCOSUR's legal personality and negotiates and signs agreements on behalf of MERCOSUR with third countries and international organisations.\textsuperscript{101} The CMC also performs a supervisory function, having responsibility for monitoring compliance with the Treaty of Asunción, its Protocols and agreements concluded within its framework, but it does not have specific enforcement powers against wrongdoers. Finally, it has the administrative power to adopt financial and budgetary decisions and to appoint the Director of the MERCOSUR Secretariat.

\textsuperscript{95} See, generally, POP, arts 3 to 9 and CMC Internal Regulation approved by Dec 2/98.

\textsuperscript{96} POP, Art. 3.

\textsuperscript{97} POP, Art. 4. As Torrent notes, State Parties opted for having plural representation before decision making bodies with a view to ensure the direct involvement of high ranked government officials responsible for economic and finance issues and thus avoiding a purely diplomatic design of integration policies with little influence on domestic policies. However, the author rightly notes that this plural representation opens the possibility for inter-ministerial disputes within national representations that could run against the efficacy of MERCOSUR bodies in adopting decisions, in particular when compromises over divisive issues are necessary. See Torrent, ob cit, p 70.

\textsuperscript{98} POP, Art. 9.

\textsuperscript{99} Ibid. Art. 37.

\textsuperscript{100} Ibid. Art. 5.

\textsuperscript{101} Ibid. Art. 8.iii and iv.
The CMC meets whenever it deems appropriate, and at least once every six months with the participation of the Presidents of the States Parties. Delegations to the CMC meetings can consist of government officials only, although, depending on the agenda, representatives from international organisations or group of countries and even representatives from the State Parties' social and economic sectors may also be invited to attend.

The CMC established various bodies to provide assistance with particular aspects of the integration process, including, inter alia, a number of specialised Ministerial Meetings, the MERCOSUR Commission of Permanent Representatives and the Forum for Consultation and Political Agreement.

Ministerial Meetings provide a forum for Ministers or other high ranked officials to discuss and analyse policy issues within their sphere of competence with a view to strengthening cooperation and coordination of State Parties' policies. They must operate in accordance with the purposes, principles and institutional modalities laid down by the Treaty of Asuncion and its Protocols. Ministerial Meetings express themselves via Agreements which must be approved by the CMC. Meetings of Ministries of Finance and Presidents of Central Banks must take place at least every six months. The CMG participates and coordinates those meetings, controls the implementation of the measures adopted and puts forward their Agreements and Draft Decision proposals to the CMC. At least one member from the CMG participates in other Ministerial Meetings, except those with competence on non-economic or commercial issues which are followed up by the Forum of Consultation and Political Agreement. Currently there are fourteen Ministerial Meetings functioning.

102 Ibid. Art. 6. According to Torrent, considering the extension of the agenda, the frequency of CMC meetings is too low, in particular for an integration process that was supposed to be filled up by "secondary legislation". See, Torrent, ob cit, p 61.
103 CMC Internal Regulation, Art. 7.
104 Ibid. Art. 12.
105 Ibid. Art. 10. In practice, it is common to invite representatives from international organisations such as ECLAC, IADB and so forth, but private sector representatives have never been invited to attend CMC meetings.
106 POP, Art. 1, Art. 8 vi and vii.
107 CMC Internal Regulation, Art. 17.
109 The Ministerial Meetings include the followings: Ministries of Finance and Central Banks, Ministries of Education, Ministries of Justice and Ministries of Labour (since 1991), Ministries of Agriculture (since 1992).
The MERCOSUR Committee of Permanent Representatives (MCPR) consists of the permanent representatives of the State Parties for MERCOSUR and a President. It assists the CMC and the MERCOSUR rotating presidency on any tasks that may be requested by any of them. It attends CMC meetings and Ministerial meetings. It operates in Montevideo, with the logistical and technical support provided by MERCOSUR Secretariat. Due to budget restrictions, the activities of the MCPR are very much limited to the activities of its president, who has been focused on the dissemination and promotion of MERCOSUR (within and outside the bloc) and on lobbying State Parties for the incorporation of selected MERCOSUR rules of particular relevance for the integration process.

The Forum of Consultation and Political Agreement ("FCPA") consists of State Parties’ high ranked foreign affairs officials. It is responsible for examining and coordinating MERCOSUR political agenda, including the examination of international issues of common political interest relating to third countries and international organisations. It formulates recommendations to the CMC for the implementation of MERCOSUR political agenda, which must be adopted by consensus and prepares draft Presidential Communications on areas within its competence. It must follow up the Ministerial Meetings with competence on non-economic or commercial issues (Education, Justice, Culture, Home Affairs, Social Development) and the Specialised Meetings on Drugs, Women, Legal Aid, Public Prosecutors and High Authorities on Human Rights. At least one member of the Forum must participate in these meetings. Finally, the Forum must also coordinate with the CMG on political issues to be included in the CMC agenda and must participate in the GMC meetings that consider these issues.

1.2. Common Market Group

Ministries of Culture and Ministries of Health (since 1995), Ministries of Home Affairs (since 1996), Ministries of Industry (since 1997), Ministries of Mining and Energy and Ministries of Social Development (since 2000), Ministries of the Environment and Ministries of Tourism (since 2003), Ministries of Science and Technology (since 2005).

10 Created by Dec 11/03, 6/10/03.
11 Dec 11/03, Art. 4.
12 See first MCPR Report on the MCPR activities during the first semester of 2006.
13 Created by Dec 18/98.
14 See FCPA Internal Regulation approved by Dec 23/03.
15 Dec 2/02, Art. 3.
16 FCPA Internal Regulation, art 3.
The POP describes the CMG as MERCOSUR executive body\textsuperscript{117}, although the accuracy of this expression is questionable in light of the fact that in addition to its executive functions the CMG is also an active legislative body.\textsuperscript{118} It consists of four members and four alternates for each country, appointed by their respective governments including representatives of the Ministries of Foreign Affairs, Finance and Central Banks and it is co-ordinated by the Ministries of Foreign Affairs.\textsuperscript{119} It adopts measures by way of Regulations that are binding upon State Parties\textsuperscript{120} and it also proposes draft Decisions to the CMC.\textsuperscript{121} Regulations are adopted by consensus in the presence of all State Parties.\textsuperscript{122}

The GMC executive functions include organising the meetings of the CMC and preparing the reports and studies that may correspond\textsuperscript{123}, as well as taking the measures necessary for implementing the Decisions adopted by the CMC.\textsuperscript{124} It can negotiate agreements with third countries and adopt financial and budgetary resolutions, but within the limits of a mandate set by the CMC.\textsuperscript{125} It supervises the MERCOSUR Secretariat, approving its budget and the annual statement of accounts.\textsuperscript{126} It also approves the rules of procedures of the MTC and of the Economic and Consultative Forum.\textsuperscript{127} But the GMC also has its own policy-making functions. It may draw up working programmes to ensure progress towards the establishment of the common market and express its views on any proposals or recommendations submitted to it by other MERCOSUR bodies within their sphere of competence.\textsuperscript{128} Finally, the GMC must monitor, within the limits of its competence, compliance with the Treaty of Asuncion, its Protocols and agreements signed thereunder.\textsuperscript{129}

\textsuperscript{117} POP, Art. 10.
\textsuperscript{118} See generally POP, arts 10 to 15 and CMG Internal Regulation.
\textsuperscript{119} POP, Art. 11. Article 12 stipulates that when drafting specific measures in the performance of its tasks, the CMG may call on representatives from other MERCOSUR institutional bodies or other authorities or public entities.
\textsuperscript{120} POP, Art. 13.
\textsuperscript{121} POP, Art. 14 ii. In practice, most Decisions adopted by the CMC are originated by CMG proposals rather than by the CMC's self-initiative.
\textsuperscript{122} POP, Art. 37.
\textsuperscript{123} Ibid. Art. 14 xi.
\textsuperscript{124} Ibid. Art. 14 iii.
\textsuperscript{125} Ibid. Art. 14 vii and ix.
\textsuperscript{126} Ibid. Art. 14 viii, xii, xiii.
\textsuperscript{127} Ibid, Art. 14 xiv.
\textsuperscript{128} Ibid. Art. 14 v and vi.
\textsuperscript{129} Ibid. Art. 14 i. Like the CMC, it has no specific enforcement powers against wrongdoers.
The GMC holds ordinary meetings at least every three months and extraordinary meetings at any time at the request of any State Party. Meetings take place on each State Party on a rotating basis.\textsuperscript{130} State Parties' delegations to CMG meetings must consist of government officials only.

The CMG may establish, modify or abolish auxiliary bodies in compliance with its duties.\textsuperscript{131} These bodies provide the CMG with the technical input necessary for the adoption of policy measures pertaining to specific issues. The CMG uses this power on a regular basis, having already created a wide range of auxiliary bodies to support its activities, including Groups, Ad hoc Groups, Sub-working groups and Specialised Meetings.\textsuperscript{132} Auxiliary bodies to the GMC consist of government officials only and also adopt decisions by consensus. They may issue Recommendations to the CMG adopted by consensus with the presence of all State Parties.\textsuperscript{133} They must meet at least one time per semester.\textsuperscript{134}

1.3 MERCOSUR Trade Commission

\textsuperscript{130} Ibid. Art. 13 and CMG Internal Regulation, Art. 5.

\textsuperscript{131} POP, Art. 14 v.

\textsuperscript{132} Auxiliary bodies to the CMG include four Groups (Government Procurement in MERCOSUR, Services, MERCOSUR Secretariat's Budget, Support for small and medium enterprises), twelve Ad-hoc Groups (Concessions, Consultation and Coordination for WTO Negotiations, External Relations, Sanitary and Phytosanitary, Sugar, Farming and Livestock Biotechnology, Cigarettes' Trade, Border Integration, MERCOSUR Customs Code, Productive Integration in MERCOSUR, Bio fuels, MERCOSUR domain), fourteen Sub-working groups (Communications, Institutional Aspects, Technical Regulations and Conformity Assessment, Financial Issues, Transport, Environment, Industry, Agriculture, Energy, Labour and Social Security, Health, Investments, E-Commerce and Mining), fifteen Special Meetings (Family-based Agriculture in MERCOSUR, Cinematographic and Audiovisual Authorities in MERCOSUR, Drug Prevention, Science and Technology, Social Communications, Cooperatives, Legal Aid, Infrastructure for Integration, Youth, Gender, Public Prosecutors, Governmental bodies for internal controls, Common Trade Promotion, Tourism, Governmental bodies for nationals living abroad), one Commission (Labour and Social Issues), two Committees (Automobiles and Technical Co-operation) one Technical Meeting (Incorporation of MERCOSUR Rules) and one Consultative Forum for Municipal, Provincial, and State Authorities, a Macroeconomic Monitoring Group.

\textsuperscript{133} CMG Internal Regulation, Art. 21. For further details on its decision making process see above Ch V, Section B.

\textsuperscript{134} Dec 59/00, Art. 13.
The MTC is the body responsible for assisting the CMG to monitor the application of the common trade policy instruments agreed by the State Parties in connection with the operation of the customs union, as well as to follow up and review questions and issues relating to common trade policies, intra-regional trade and trade with third countries. It consists of four members and four alternates for each State Party and is co-ordinated by the Ministries of Foreign Affairs. The MTC adopts Directives, which are binding upon State Parties. Like the other decision making bodies, decisions are taken by consensus with the presence of all State Parties; however, the MTC Internal Regulation introduces some flexibility to this rule.

The MTC must consider and rule upon requests submitted by the States Parties related to the application of and compliance with the common external tariff and the common trade policy. It must adopt decisions relating to the administration and application of the CET and other instruments of the common trade policy agreed by the State Parties and it must also report to the CMG on the development of the application of the common trade policy instruments, on the consideration of requests received and on the decisions made with respect to such requests. The MTC also operates as a consultation forum where State Parties can consult with each other on issues within the MTC’s sphere of competence and may also

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135 See POP, arts 16 to 21 and MTC Internal Regulation approved by Reg. 61/96. This body was not included in the provisional organisational structure laid down by the Treaty of Asuncion. It was originally set up by the CMC in an irregular way since the CMC did not have power to create new bodies with decision making power.

136 The main common trade policy instruments are the common external tariff, rules of origin, non-tariff restrictions, unfair trade practices, defence of competition, special trade regimes, automotive regime and sugar regime.

137 POP, Arts. 16 and 19 i, iii, iv, v, x.

138 POP, Art. 17. It is up to each State Party to choose its representatives before the MTC. They are usually mid-rank civil servants from the Ministries of Foreign Affairs and the Economy and from the Customs Authorities.

139 POP, Art. 20.

140 Art 13 MTC Internal Regulation prescribes that in the case of absence of representatives from one State Party, the Directives and the proposals agreed by the delegations present in the meeting shall be adopted ad-referendum the absent State Party agreement and shall be considered approved if within 30 days after the meeting, the absent State Party does not formulate objections to its adoption. Therefore, although the consensus rule remains, it is not necessary for Directives to be adopted with the presence of all State Parties. Art. 14 stipulates that Directive proposals which do not secure consensus or are not able to be considered due to lack of quorum must be submitted to the CMG for its consideration.

141 POP, Art. 19, ii.


perform a quasi-adjudicative role, considering complaints referred to it by the National Sections of the MTC lodged by State Parties or individuals.\textsuperscript{144}

It holds ordinary meetings at least once a month and extraordinary meetings whenever so requested by the CMG or any of the State Parties.\textsuperscript{145} Meetings may take place with the presence of at least three State Parties.\textsuperscript{146} Both ordinary meetings and follow up meetings take place in Montevideo at the premises of the MERCOSUR Secretariat.\textsuperscript{147}

The MTC may set up technical committees necessary for the adequate performance of its duties.\textsuperscript{148} Technical Committees consist of members appointed by each State Party. Each MTC National Section gives the MTC Rotating Presidency a list of the national coordinators for each Committee. Their role is focused on the administration and compliance with specific common trade policy instruments. To this end, they compile information, produce technical opinions and undertake other technical advisory duties as requested by the MTC.\textsuperscript{149} Technical Committees do not have decision making power, but they can submit Recommendations and Opinions to the MTC Rotating Presidency.\textsuperscript{150} They adopt reports, Recommendations and Technical Opinions by consensus, but if consensus is not reached they must still submit the

\textsuperscript{144} See Annex to the POP and Dec 18/02. For further details on the consultations and claims procedure before the MTC see below Section E.

\textsuperscript{145} POP, Art. 18 MTC Internal Regulation, Art. 9. According to Dec 30/03, 16/12/03, from 2004 onwards the MTC must also hold follow up meetings between ordinary meetings on a regular basis, the objective being to strengthening the continuity of its tasks.

\textsuperscript{146} MTC Internal Regulation, Art. 11.

\textsuperscript{147} Dec 30/03, art 3.

\textsuperscript{148} POP, Art. 19 ix. Originally ten technical committees were established although currently there are seven technical committees in place: Tariffs, Nomenclature and Tariff Classification (deals with the Common External Tariff, nomenclature and tariff classification issues); Customs Issues (deals with customs control and administration and customs valuation issues); Trade Rules and Disciplines (deals with rules of origin, foreign trade zones, export incentives and special importation regimes); Public Policies that Distort Competition (identifies public policy measures that distort competition with a view to harmonise or eliminate them); Defence of Competition (entrusted with the task of creating and monitoring the implementation of an instrument for the defence of competition); Trade Defence and Safeguards (entrusted with the task of creating a common regulatory framework on unfair trade practices and safeguards against third countries) and Consumer Protection (entrusted with the task of creating a common regulatory framework for consumer protection).

\textsuperscript{149} MTC Internal Regulation, Art. 17.

\textsuperscript{150} Ibid. Art. 17.
different opinions to the MTC for its consideration.\textsuperscript{151} They must meet at least one time per semester.\textsuperscript{152}

2. Non Decision Making Bodies

2.1. MERCOSUR Parliament

The MERCOSUR Parliament is the newest of MERCOSUR institutions.\textsuperscript{153} It replaced the Joint Parliamentary Commission (JPC) established by the POP.\textsuperscript{154} Its purpose is to represent the interests of the peoples of MERCOSUR, to promote and defend democracy, freedom and peace; to advance the sustainable development of the region, respecting the cultural diversity of its people; to ensure the participation of private actors in the integration process and to contribute with the consolidation of the Latin American integration process.\textsuperscript{155}

The Parliament’s duties include monitoring and legislative tasks. Its monitoring duties are defined broadly, including monitoring compliance with MERCOSUR rules\textsuperscript{156}, monitoring the observance of democracy and human rights in State Parties\textsuperscript{157} and monitoring the integration process and the role played by other MERCOSUR bodies. For this purpose, the Protocol entrusts the Parliament with a wide range of powers to seek information from decision making bodies, but it does not confer powers on it to approve, disapprove or block in any way their decisions.\textsuperscript{158}

\textsuperscript{151} Ibid. Art. 19. For further details on its decision making process see supra Ch V, Section B.
\textsuperscript{152} Dec 59/00, art 13.
\textsuperscript{153} See Protocol for the Establishment of MERCOSUR Parliament, signed on 9 December 2005 (Dec 23/05). The Protocol has been ratified by all State Parties, but in Uruguay, the Supreme Court of Justice is currently considering an action for the annulment of the Act of Parliament that ratified the Protocol (Ley No 18.063) on grounds of its incompatibility with the Constitution.
\textsuperscript{154} See POP, Arts. 22 to 27. The JPC consisted of equal number of members of parliaments representing the State Parties appointed by the respective national parliaments and it was responsible for speeding up the internal procedures to ensure the prompt entry into force of the rules adopted by MERCOSUR bodies and to assist, as required, with the harmonisation of legislation to advance the integration process.
\textsuperscript{155} PMP, Art. 2.
\textsuperscript{156} Ibid. Art. 4.1
\textsuperscript{157} Ibid. Arts. 4.2 and 4.3.
\textsuperscript{158} The Parliament's monitoring powers include the power to request reports and opinions from MERCOSUR bodies on issues relating to the integration process (Art. 4.1); power to invite, through the CMC Rotating Presidency, representatives from MERCOSUR bodies to inform about or assess the development of the integration process (Art. 4.5); power to receive a delegation from the State Party holding MERCOSUR Rotating
The MERCOSUR Parliament’s legislative role includes three different types of actions. First, it must work in conjunction with national parliaments with the aim of ensuring compliance with MERCOSUR objectives, in particular with those relating to legislative activity. The main objective here is for the MERCOSUR Parliament to liaise with national parliaments with a view to speed up the entry into force of MERCOSUR rules that require an act of parliament to take effect within national legal systems. Secondly, the Protocol imposes on MERCOSUR decision making bodies the duty to consult the MERCOSUR Parliament prior to adopting secondary rules that would require approval from national parliaments for their incorporation into national legal systems. The Parliament’s opinion is not binding on the decision making body proposing the rule, who may decide to adopt it disregarding such opinion. If that is the case, the entry into force of the rule remains subject to the normal procedure applicable to MERCOSUR rules in general. Thirdly, contrary to what is the essence of a parliamentary institution, the MERCOSUR Parliament simply has the right to propose draft rules to the CMC, in particular rules dealing with the harmonisation or mutual recognition of State Parties’ national legislation. But this is completely different from the co-decision procedure established by the EC Treaty because the CMC is not bound in any way to adopt the presidency at the beginning and end of its tenure for the presentation of a report about the activities planned / executed during the period (Arts. 4.6 and 4.7); power to receive from MERCOSUR Secretariat a report on the execution of its budget on an annual basis (Art. 4.19); power to receive, examine and, eventually, to forward to the decision making bodies, petitions from individuals of the State Parties relating to MERCOSUR bodies’ actions or omissions (Art. 4.10); and power to request consultative opinions to the Permanent Review Tribunal (Art. 4.13).

Ibid. Art. 4.15.

Ibid. Art. 4.12 stipulates that before adopting a rule that requires parliamentary approval, MERCOSUR decision making bodies must request an opinion from MERCOSUR Parliament, which must be issued within 90 days following the request. If the draft rule is approved in accordance with the Parliament’s opinion, the Executive Power in each State Party must submit the rule for the approval of the national parliament within 45 days of its adoption by the MERCOSUR decision making body. The Protocol requires national parliaments to implement a special procedure for the consideration of MERCOSUR rules adopted in accordance with MERCOSUR’s Parliament opinion. Such procedure should not be longer than 180 days. If the national parliament rejects the rule, it must be re-sent to the Executive who, in its turn, will present it on the corresponding MERCOSUR body for its reconsideration.

Ibid. Art. 4.12.

Parliament’s proposed draft rules. The CMC simply has to report back to the Parliament informing about the way the proposal is being dealt with.\textsuperscript{164}

Until 31 December 2010, the MERCOSUR Parliament shall consist of 18 members for each State Party appointed by their domestic parliaments.\textsuperscript{165} From 2011 onwards the members of MERCOSUR Parliament shall be elected directly by State Parties’ citizens through direct, universal and secret vote in accordance with a criterion for citizenship representation which has not yet been defined.\textsuperscript{166} The Parliament will meet on ordinary sessions at least once a month in Montevideo.\textsuperscript{167} Decisions will be adopted by simple, absolute, special and qualified majorities.\textsuperscript{168} The Parliament will decide on its budget, but during the transition period until 31/12/10, the Parliament’s budget will be financed by State Parties in equal parts.\textsuperscript{169}

In substance, the Parliament’s monitoring and legislative powers are strictly limited and do not alter the intergovernmental character of the law-making process laid down by the POP, which concentrates the decision making power on bodies consisting of government officials only. On paper, the “parliament” label, which brings to mind ideas of citizenship participation, decision making and accountability, seems to be disproportionate to the powers effectively conferred on this particular institution. But it remains to be seen how this novel institution will perform and what impact it could have on the integration process.

2.2. Economic-Social Consultative Forum

The Economic-Social Consultative Forum (ESCF)\textsuperscript{170} is a consultative body representing the economic and social sectors. It consists of equal numbers of representatives from each State Party.\textsuperscript{171} Each ESCF National Section is free to choose the organisations representing the social and economic sectors. The organisations chosen must be truly representative and of a

\hspace{1cm}\textsuperscript{164} Ibid. Art. 4.13.
\textsuperscript{165} Ibid. second transitional provision.
\textsuperscript{166} Ibid. Art. 5.1.
\textsuperscript{167} Ibid. art 17.
\textsuperscript{168} Ibid, sixth transitional provision prescribes that until the end of the first transition stage, Parliament’s opinions for the purposes of Art. 4.12 must be approved by special majority, i.e. two thirds of the total number of MERCOSUR Members of Parliament.
\textsuperscript{169} Ibid. seventh transitional provision.
\textsuperscript{170} POP, arts 28 to 30 and ESCF Internal Regulation approved by Res 68/96.
\textsuperscript{171} POP, Art. 28.
national character. In general, each National Section consists of trade unions and business organisations.

The ESCF functions are defined broadly, including, issuing its views on MERCOSUR internal issues or on the relationship between MERCOSUR and third countries, monitoring the social and economic impact of integration policies, fostering the participation of the civil society on the integration process and promoting MERCOSUR "real" integration and disseminating its socio-economic dimension.

ESCF structure consists of a Plenary Session and an Administrative Co-ordination. Each ESCF National Section is entitled to nine delegates and nine substitutes to the Plenary Session. The ESCF Plenary Session expresses its views by way of Recommendations to the CMG, which are adopted by consensus of all National Sections. Recommendations may be issued by self-initiative or as a result of a consultation by the CMG or other MERCOSUR bodies, but as the name suggests, they are not binding on the CMG. When the Plenary Session meets to consider a consultation by the CMG and does not reach an agreement, all different views must be submitted to the consulting body.

The ESCF Plenary Session holds at least one ordinary meeting per semester. It must approve the ESCF budget, but so far it has not been approved. In the meantime, the organisations that form each National Section are responsible for their own functioning costs. It is the only MERCOSUR body that does not receive any kind of financial support from State Parties' governments. The National Section that hosts the Plenary Session meeting must bear the costs of its organisation.

In practice, the ESCF has failed to channel the civil society's views about the integration process to MERCOSUR decision making bodies, which, in its turn, have never consulted the

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172 ESCF Internal Regulation, Arts. 3.1 and 3.2.
173 Ibid. Art. 2.
174 Ibid. Arts. 5 to 8.
175 Ibid. Arts. 9 to 11.
176 Ibid. Art. 6.
177 POP, Art. 29.
178 ESCF Internal Regulation, Art. 2.1
179 Ibid. Art. 16.
180 Ibid. Art. 23.
ESCf nor have taken into account the few Recommendations the ESCf has issued. On the contrary, the ESCf has been more a vehicle of ex post communication of decisions already adopted by MERCOSUR decision making bodies than an instrument of ex ante participation.

2.3. MERCOSUR Secretariat

The MERCOSUR Secretariat was originally envisaged by the Treaty of Asuncion to perform purely administrative duties for the CMG. The POP assigned the Administrative Secretariat new responsibilities including, inter alia, serving as the official archive for MERCOSUR documentation; publishing and circulating the decisions adopted within the framework of MERCOSUR including the publication of the MERCOSUR Official Gazette; providing logistical support for the meetings of MERCOSUR bodies; reporting to State Parties about the measures taken by each member to incorporate the decisions adopted by MERCOSUR bodies in national legal systems; and performing any other tasks requested by the CMC, CMG and the MTC. The POP stipulates that the Secretariat must have a budget that must be funded by equal contributions from the State Parties. The Secretariat drafts the proposed budget and submits it for the CMG approval. The Secretariat is headed by a Director appointed by the CMC for a non-renewable two-year period.


182 See Roberto Bouzas, et al., In-depth analysis of MERCOSUR integration, its prospectives and the effects thereof on the market access of EU goods, services and investment (Observatory of Globalization, Universidad de Barcelona, Barcelona 2002), p. 11.

183 ToA, Art. 15.

184 For further details of the Secretariat's monitoring role see below Section E, numeral 1.

185 POP, Art. 32.

186 POP, Art. 45.

187 POP, Art. 32 VII and 14 VIII.

188 POP, Art. 33.
In 2002, the CMC adopted a Decision initiating a process for the transformation of the Administrative Secretariat into a Technical Secretariat. The Decision’s preamble refers to the need for a technical body able to act from a common perspective and from there contribute to the consolidation of MERCOSUR. It also acknowledges that the transformation of the Secretariat must be gradual, in light of the evolution of the integration process and of the availability of human and material resources.

The modifications introduced by the CMC Decision consist on the creation of a Technical Advice Sector (TAS), consisting of four experts entrusted with the following duties: a) provide technical advice to MERCOSUR decision making bodies at their request; b) monitor the evolution of the integration process and produce bi-annual assessment reports to this effect, which should identify - from a common perspective – regulatory deficiencies and other specific obstacles to the integration process, and suggest proposals to address these obstacles to the decision making bodies; c) carry out studies of general interest for the integration process, subject to the CMC approval and d) control the consistency of draft rules proposed by auxiliary bodies with existing rules.

The limited significance of the step taken for the establishment of a much needed technical bureaucracy independent from national administrations is clear. The TAS has no power to carry out studies on its own initiative or to make unsolicited recommendations to the decision making bodies. It has no financial autonomy and the size of its budget is ludicrously small for the tasks assigned to it. Furthermore, the CMG has recently decided to suspend the consistency control of draft rules assigned to the Secretariat and not resume it until an exhaustive assessment and further regulation of its procedure is carried out. Not to mention

189 See Dec 30/02.
190 Ibid. preamble.
191 Ibid. preamble.
192 Ibid. Annex I. As for the legal consistency control, the TAS’ legal opinion is not binding on decision making bodies and the absence of an opining does not preclude MERCOSUR decision making bodies from adopting Decisions, Regulations or Directives.
194 For the first budget approved by the CMG for the 1997 fiscal year State Parties contributed on equal parts to a total sum of US$ 980,887 (Res 67/96, 21/6/96). For the 2007 fiscal year, State Parties contribution amounted to US$ 980,896 (63/06, 24/11/06), which means that ten years later the contributions remained the same in absolute terms.
195 See minutes of GMC XXIX extraordinary meeting, point 8.
the fact that the first technical report produced by the TAS remained in the MERCOSUR website for no more than a couple of months until the decision was taken to remove it. Since then technical reports have not been made public.

In summary, the POP established bodies with decision making power but such bodies consist of government officials only who adopt decisions by consensus. Subsequent institutional reforms relating to the transformation of the Administrative Secretariat into a Technical Secretariat and to the replacement of the JPC by the MERCOSUR Parliament did not alter the intergovernmental patterns of the decision making system. Rhetoric aside, State Parties are not willing to give up their capacity to exert strict control over the scope and pace of the integration process. However, the process of institutional development has not yet concluded. The POP envisages the possibility for State Parties to convene a diplomatic conference for the purpose of reviewing MERCOSUR institutional structure. Although this conference has not yet been convened, in December 2005 the CMC set up a high level ad hoc group consisting of representatives from State Parties with the task of preparing a proposal for a substantial reform of MERCOSUR institutional structure, which is currently under negotiations.

D. Sources of MERCOSUR Law

The Protocol of Ouro Preto lists three sources of MERCOSUR law: "The Treaty of Asuncion, its protocols and the additional or supplementary instruments"; "The agreements concluded within the framework of the Treaty of Asuncion and its protocols"; "The Decisions of the
Council of the Common Market, the Resolutions of the Common Market Group and the Directives of the MERCOSUR Trade Commission adopted since the entry into force of the Treaty of Asuncion.\textsuperscript{201} The expressions “Original Law,” \textsuperscript{202} or “Primary Law,” \textsuperscript{203} are used to refer to the rules mentioned by numerals I and II of Article 41 POP, and “Derived Law” or “Secondary Law”\textsuperscript{204} to refer to the rules mentioned by numeral III.

Most commentators agree that Article 41 POP does not prescribe an exhaustive enumeration of legal sources, arguing that, should it be necessary, there is nothing that prevents the interpreter of MERCOSUR law from resorting to international custom, as evidence of a general practice accepted as law; general principles of international law and awards from ad hoc tribunals or the Permanent Review Tribunal (“PRT”).\textsuperscript{205} In addition, the Protocol of Olivos stipulates that disputes must be settled on the basis of the rules mentioned by Article 41 POP, as well as the principles and rules of international law applicable to the subject matter unless the parties have agreed for the Tribunal to decide the case \textit{ex aequo et bono}.\textsuperscript{206} The following paragraphs examine the characteristics of MERCOSUR primary law and secondary law.

1. Primary Law

MERCOSUR primary law consists of the Treaty of Asuncion, its protocols, additional or supplementary instruments and other agreements concluded within its framework.\textsuperscript{207} All of these instruments are treaties, that is, international agreements concluded between States in

\textsuperscript{201} Ibid. Art. 42 iii.


\textsuperscript{204} These are merely doctrinal classifications, which, to some extent have been recognised by the case law (e.g. see AHAA Brazil – Pork Subsidies, para. 53). However, some authors suggest other classifications. For instance, Olavo Batista speaks about “internal” and “external” sources (see Olavo Batista, ob cit, p 59), whereas Haines-Ferrari refers to numerals I and II of Art. 41 as “sources of conventional character” and numeral III as “sources of unilateral character”. See MARTA HAINES FERRARI, The MERCOSUR Codes (BIICL, London 2000), p 46.

\textsuperscript{205} See, in this vein, Basaldúa, ob cit, p 668.

\textsuperscript{206} See Protocol of Olivos, Art. 34. The arbitral awards themselves do not set a binding precedent but in practice arbitrators rely heavily on previous decisions. Also, it is not uncommon for arbitrators to refer to the case law of the WTO, Andean Court of Justice and of the ECJ.

\textsuperscript{207} POP, Art. 41 i, ii.
written form. As such, their conclusion, entry into force, observance, application and
interpretation is governed by international law.208

These agreements confer rights and impose obligations on State Parties at international law, and
must be performed by them in good faith.209 However, for these instruments to be given effect in
national law they must follow the procedure prescribed for the reception of international law
prescribed by each State Party's constitution, which normally requires an act of the national
Parliament.210 Some of these international instruments have been “approved” by Decisions of
the CMC, but this is nothing more than an unnecessary formality, since it is not the CMC but the
State Parties themselves who negotiate and conclude the agreements, with the CMC simply
providing a forum for its negotiation.211 State disputes that may arise as a result of the
interpretation or application of MERCOSUR primary law, must be dealt with through the
arbitral procedure provided for by the Protocol of Olivos.212

In terms of its subject matter, MERCOSUR primary law includes, first of all, those agreements
that establish the objectives of MERCOSUR, its principles and the main institutions for the
governance of the integration process, namely, the Treaty of Asuncion, the Additional Protocol
on MERCOSUR Institutional Structure (Protocol of Ouro Preto), the Protocol of Olivos for the
Settlement of Disputes on MERCOSUR, and the Protocol on the establishment of the
MERCOSUR Parliament. All these instruments have been ratified by all State Parties and are
currently in force.

However, MERCOSUR primary law is not limited to those agreements laying down the
constitutional foundations of the integration process. It also includes various international
instruments focused on a wide range of issues of a particular character. First, there are those
additional and supplementary instruments to the Treaty of Asuncion directly related to its
economic integration objectives, which contain specific trade disciplines on particular issues

208 See in particular the Viena Convention on the Law of the Treaties (VCLT).
210 For an exhaustive analysis of State Parties' constitutional requirements for the reception of international law see
ALEJANDRO DANIEL PEROTTI, Habilitación constitucional para la integración comunitaria: estudio sobre los Estados
del MERCOSUR (Konrad Adenauer Stiftung, Montevideo 2004).
211 See, for instance, the Protocol of Colonia for the Reciprocal Promotion and Protection of Investments in
MERCOSUR "approved" by Dec 11/93.
212 See below Section C.
such as intellectual property, services, investment, competition and government procurement. Secondly, there are a number of agreements concluded within the framework of the Treaty of Asuncion, which are focused on non-economic aspects of the integration process, such as education, culture, judicial affairs, security, defence and environmental protection. Finally, there are some international agreements particularly relevant for private persons that address specific issues arising from cross-border transactions such as conflict of laws and international arbitration.

The use of primary law for regulating specific trade disciplines and other non-constitutional aspects of the integration process is incorrect. It has been rightly pointed out that primary law should be reserved for laying down the objectives of the integration process, institutional arrangements to bring integration forward and manage it, and the permanent values informing the integration process; whereas the details about specific trade disciplines or co-operation agreements on non-trade matters should be regulated through secondary law. To "constitutionalise" issues such as the MERCOSUR Customs Code or the various Protocols on the mutual recognition of educational degrees, is unnecessarily costly and inefficient because it confers an undesirable level of rigidity to legislation that deals with specific and changing circumstances.

2. Secondary Law

MERCOSUR secondary law consists of "Decisions" of the CMC, "Resolutions" of the CMG and "Directives" of the MTC adopted since the entry into force of the Treaty of Asuncion.

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214 See, e.g., various agreements on co-operation and reciprocal assistance between domestic judicial authorities on civil and criminal affairs such as extradition or interim measures, or the various protocols on the mutual recognition of primary and secondary education and university degrees.


216 See Torrent, ob cit, pp 58-59.

217 See also Ch V, where the use of primary law for regulating matters on specific service sectors is also criticised.

218 POP, Art. 41 iii.
The intergovernmental character of decision making bodies confers State Parties direct control over the development of secondary law. 219

The Protocol stipulates that secondary rules shall be binding upon State Parties. 220 At the same time it provides that "when necessary secondary rules must be incorporated in the domestic legal systems through the procedures provided for in each country's legislation". 221 For those rules that must be incorporated into domestic legal systems, the Protocol stipulates a three-step procedure to ensure their "simultaneous entry into force". 222 First, once the rule has been adopted by the decision making body, each State Party has to take all the necessary measures for its incorporation into their domestic legal systems and notify the MERCOSUR Secretariat accordingly. 223 Secondly, when all State Parties have reported this incorporation, the Secretariat notifies this fact to each State Party. 224 Finally, the MERCOSUR rule enters into force simultaneously in the States Parties thirty days after the date of the communication made by the MERCOSUR Secretariat. Within this period, State Parties must publish the entry into force of the MERCOSUR rule in their respective official journals. 225

The above provisions touch upon two complex and controversial legal issues that lie at the heart of any integration agreement, namely, the reception of secondary rules on domestic legal systems and their applicability to natural and legal persons. Not surprisingly, these provisions have spurred extensive litigation before MERCOSUR ad hoc tribunals and domestic courts. At

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219 To put it in Weiler’s terms, there is no element of “decisional supranationality” as in the community pillar of the EU. See above Ch I, footnote n 144.
220 POP, arts 9, 15, 20, 38 and 42.
221 Ibid. Art. 42.
222 Ibid. Art. 40. Officially, the rationale for the so-called doctrine of “simultaneous entry into force” is to protect the diligent State Party who completes the incorporation process quickly and therefore has to apply the more onerous MERCOSUR rule to its own citizens, from finding itself in a disadvantageous position compared to those less diligent States which have failed to incorporate such rule. A more cynical understanding of this provision suggested by Torrent claims that its objective is simply to confer State Parties a second opportunity to veto MERCOSUR rules (the first being at the time of its adoption through the consensus rule). The author points out that this second veto exacerbates MERCOSUR decision making bodies’ irresponsible legislative practice, because governmental officials know that no matter what they agree at the MERCOSUR level, should they wish to change their mind afterwards they can always do so simply by not incorporating the rule into the national legal system. See Torrent, ob cit, p 52.
223 Ibid. Art. 40 i).
224 Ibid. Art. 40 ii).
225 Ibid. Art. 40 iii).
the doctrinal level, opinions differ sharply. The following paragraphs examine these two issues in further detail.

As mentioned, Article 40 provides that "... when necessary secondary rules must be incorporated in the domestic legal systems through the procedures provided for in each country's legislation". There is no difficulty in inferring from the "when necessary" expression that not all secondary rules need to be incorporated into domestic legal systems. It remains to be clarified which ones must be incorporated into domestic legal systems and, more importantly, where should one look at for an answer, namely, at MERCOSUR law or at State Parties' national legal systems.

Some secondary rules have been adopted with a view to clarify the point. Decision 23/00 anticipates two hypotheses in which the incorporation is not necessary: a) when all State Parties agree that the rule in question refers to the organisation or internal functioning of MERCOSUR. In this case, the norm must expressly indicate that it does not need to be incorporated into State Parties' legal system and the rule will enter into force upon its adoption; b) when there is a domestic rule that contemplates the MERCOSUR rule on identical terms. In this case, the State Party must communicate the existence of that rule to the Secretariat, within the term prescribed for the incorporation of the rule and the Secretariat will inform the other State Parties accordingly. Decision 20/02 further specifies that in order to ensure uniformity, State Parties must incorporate the entire text of the MERCOSUR rule.

226 At one extreme, there are those who claim that MERCOSUR law – both primary and secondary – has a purely international character and therefore, if it is to become enforceable in national territories it must be incorporated into the domestic legal systems in accordance with the State Parties' constitutional requirements for the reception of international law (see, e.g. Haines Ferrari, ob cit, p 48; Olavo Baptista, ob cit, p 61, Perez Otermin, ob cit, p 118). At the other extreme, there are those who have argued in favour of the direct applicability and direct effect of MERCOSUR secondary law in national legal systems (in this author's view, the strongest argumentation in this line is provided by PEROTTI, 'Estructura Institucional y Derecho en el MERCOSUR', (2002), 6 Revista de Derecho Internacional y del MERCOSUR 63.

227 POP, Art. 42.

228 The practice of using secondary rules to clarify the meaning of treaty provisions is, to say the least, questionable.

229 See, e.g., Decisions relating to the MERCOSUR Agenda such as Dec 26/03, 16 Dec 2003 establishing MERCOSUR Working Programme for 2004 -2006 or Decisions and Regulations establishing or modifying auxiliary bodies to the CMC or the CMG.

230 Dec 23/00, Art. 5 a).

231 Ibid. Art. 5 b) on its version given by Dec 20/02, Art. 10.

232 Dec 20/02, Art. 7.
also prescribes that it is for the State Parties acting together to decide in which cases the MERCOSUR rule, by reason of its nature or content, needs only to be incorporated by one or some State Parties in accordance with art 42 POP.\textsuperscript{233}

Ad hoc arbitration awards have so far confirmed the indirect applicability of secondary rules and the need for their incorporation into domestic legal systems to have effect on private parties. For instance, in Brazil – Pork Subsidies the ad hoc tribunal held that Decision 10/94 is not directly applicable to the CONAB system, but requires to be implemented and therefore cannot be invoked as creating specific rights and obligations.\textsuperscript{234} In the same vein, in Argentina - Textiles, the ad hoc tribunal held that secondary rules do not enter into force until they have been incorporated by all state Parties in accordance with Article 40.\textsuperscript{235} In Argentina - Poultry, the ad hoc tribunal followed previous interpretations, but also suggested that State Parties become bound to incorporate secondary rules upon their adoption.\textsuperscript{236} It justified the lack of direct applicability in the following terms: “MERCOSUR decision making bodies have an intergovernmental nature, which in itself excludes the possibility for the direct and immediate applicability of their rules in each of the State Parties.... The direct applicability of MERCOSUR rules would not have been compatible with some of State Parties’ constitutional regimes....”\textsuperscript{237} The award also held that it falls to each State Party to decide when and how it is necessary to incorporate a secondary rule.\textsuperscript{238} It submitted that the answers to the “when” and “how” will depend on State Parties’ constitutional systems, the interpretation of which corresponds to each State Party, since they have not delegated this power to MERCOSUR decision making bodies.\textsuperscript{239} Similar considerations were put forward in the Brazil - Phytosanitary Products\textsuperscript{240} and in Uruguay - Cigarettes, where it was held that both MERCOSUR primary and secondary rules must be incorporated into national legal systems in accordance to the procedures established by State Parties’ constitutions.\textsuperscript{241}

\textsuperscript{233} Ibid. Art. 12.
\textsuperscript{234} See AHAA Brazil – Pork Subsidies, para. 76.
\textsuperscript{235} See clarification to AHAA Argentina - Textiles, p. 2. The Award, however, acknowledges the Argentinian submission that in practice, a secondary rule enters into force in a State Party when incorporation measures have been adopted and published in the official journal, regardless of whether other State Parties have incorporated the rule or not.
\textsuperscript{236} AHAA Argentina - Poultry, para. 114 – 119.
\textsuperscript{237} Ibid. para. 114.
\textsuperscript{238} Ibid., para. 119.
\textsuperscript{239} Ibid. para. 119.
\textsuperscript{240} AHAA Brazil – Phytosanitary Products, para. 7.3, 7.5, 8.2.
\textsuperscript{241} AHAA Uruguay - Cigarettes, p. 5.
The Protocol prescribes that, once adopted; secondary rules shall be binding upon State Parties\textsuperscript{242}, whereas at the same time, it conditions their entry into force to the adoption by State Parties of the necessary measures for their incorporation into their domestic legal systems.\textsuperscript{243} The harmonious interpretation of these provisions is not straightforward. The Protocol leaves two important issues open for further consideration. First, what are the normative implications of a secondary rule that has been adopted by a decision making body but has not yet been incorporated into national legal systems and who is bound by them, and secondly, at what point do secondary rules reach private parties, i.e. when can natural and legal persons rely on those rules and seek protection for the rights conferred by them from domestic courts.

In the course of litigation proceedings some State Parties have suggested that a secondary rule that has not been incorporated into national legal systems is merely a “programmatic commitment”\textsuperscript{244} or a “baseline for further negotiations”\textsuperscript{245} without any binding effect on State Parties. But various arbitration awards have rejected these claims, arguing instead that unincorporated rules do have relevant normative implications at international law, albeit for State Parties only. In Argentina - Poultry the ad hoc tribunal held, on the one hand, that secondary rules are binding upon State Parties since the moment they are adopted, compelling them to adopt the necessary measures for the incorporation of secondary rules into their national legal systems.\textsuperscript{246} The State Party who fails to comply with this obligation is liable at international law to those State Parties that did comply with it.\textsuperscript{247} The complying States can seek compensatory measures by resorting to the dispute settlement procedure.\textsuperscript{248} On the other hand, the Tribunal held that the rule enters into force and thus its provisions become applicable to natural and legal persons upon completion by all State Parties of the incorporation requirements stipulated by Article 40.\textsuperscript{249} This interpretation was confirmed in Brazil - Phytosanitary Products\textsuperscript{250} and in Uruguay - Cigarettes.\textsuperscript{251}

\textsuperscript{242} POP, Arts. 9, 15, 20, 38 and 42.
\textsuperscript{243} Ibid. Art. 40 i.
\textsuperscript{244} See Brazilian defence in relation to the nature of Dec 10/94 in AHAA Brazil - Pork Subsidies, para. 26.
\textsuperscript{245} See Argentinian defense in relation to Dec 11/97 in AHAA Argentina - Poultry para. 53.
\textsuperscript{246} Ibid. para. 116-118.
\textsuperscript{247} Ibid. para. 116-118.
\textsuperscript{248} Ibid. para. 116-118.
\textsuperscript{249} Ibid. para. 116 – 118. It seems that the Tribunal used the word “applicable” to refer to the application of the secondary rule to natural and legal persons.
\textsuperscript{250} AHAA Brazil - Phytosanitary Products, para. 7.5-7.8.
\textsuperscript{251} AHAA Uruguay - Cigarettes, p 5.
The Protocol does not specify a term within which the incorporation process must be completed. Occasionally, this loophole is filled up by the secondary rule itself, which expressly states a term for this purpose. Some State Parties have argued that when the secondary rule does not stipulate a term, it falls within each State Party’s discretion to decide when to adopt the measures necessary for their incorporation. But this argument was rejected by the ad hoc tribunal in *Brazil – Phytosanitary Products* based on the principles of good faith and reasonableness, suggesting that when the rule does not provide a term for its incorporation State Parties must incorporate it within a reasonable period of time.252

In summary, so far, the prevailing interpretation is that secondary rules are not directly applicable in national legal systems. For them to make their way into national legal systems, State Parties must adopt the necessary measures except for the two situations mentioned by Decision 23/00 above.253 Unless the secondary rule stipulates otherwise, it is for each State Party to decide whether it is necessary to incorporate it or not in light of the requirements of its own legal system.254 With respect to the applicability of secondary rules to natural and legal persons, the dominant understanding suggests that unincorporated rules are binding at international law upon State Parties,255 but they cannot apply to private parties until all State Parties comply with the incorporation and publishing requirements prescribed by Article 40.

252 AHAA Brazil – Phytosanitary Products, para. 8.6 and 8.16.

253 The type of measures that must be taken may vary depending on the content of the measure and the State Party’s constitutional arrangements. If under the State Party’s constitution, the rule’s content falls within the sphere of competence of the Executive Branch – say for instance, rules on the harmonisation of technical regulations or sanitary and phitosanitary measures - the adoption of a Decree a Ministerial Resolution or any other regulatory act of administrative nature will suffice for incorporating that rule in the national legal system. If, by contrast, under the State Party’s constitution, the rule’s content falls outside the sphere of competence of the Executive Branch, then the parliament’s intervention will be necessary. It is for each State Party to decide the procedure for incorporating MERCOSUR rules into its national legal system.

254 According to Perez Otermin, ob cit, p 118, this mechanism does not differ from the traditional mechanism applied for the entry into force of treaties.

255 This contrast sharply with the doctrine of direct effect that characterises Community law according to which certain provisions included in community legislation can give rise to rights and obligations upon private persons directly, i.e. without the need to be implemented by national law. Private persons may seek protection of such rights before domestic courts, who are bound to protect them. Traditionally, the ECJ has recognised direct effect to those provisions whose wording is precise, clear and unconditional. The leading case in this matter is Case 26/62 Van Gend en Loos v Nederlandse Administratie der Belastingen [1963] ECR 13.
These considerations stem from State Parties' practice and some arbitration awards that have touch upon these issues, but they are not set in stone. Many interpretative questions remain unanswered.\textsuperscript{256} Considering the highly complex and controversial nature of these issues, and the precarious nature of the current consensus\textsuperscript{257}, it is not unreasonable to expect future changes on what so far constitutes the dominant interpretation about the nature of MERCOSUR law. It remains to be seen to what extent the recent implementation of a procedure entitling domestic courts to request Consultative Opinions from the PRT on the interpretation of MERCOSUR law, can introduce certainty to this situation.\textsuperscript{258}

E. Enforcement of MERCOSUR law

The relevance of effective enforcement mechanisms for the success of regional integration cannot be emphasised enough.\textsuperscript{259} This is particularly pertinent for Latin American countries,

\textsuperscript{256} For instance, the problems that arise at both domestic and regional level when some but not all State Parties fulfil the incorporation and publication requirements prescribed by Art. 40 POP.

\textsuperscript{257} The majority of the doctrinal studies contend that MERCOSUR law has a purely international character but, as mentioned above, there are studies of high calibre that suggest there is no reason for not to recognising in MERCOSUR law the attributes of direct applicability, primacy and direct effect, which characterise EC Community law. See Perotti, above footnote n. 223.

\textsuperscript{258} There is already some evidence to suggest changes in the traditional interpretation of the nature of MERCOSUR law. In its first (non-binding) Opinion, the PRT considered that MERCOSUR rules incorporated into national legal systems prevail over other internal rules. The PRT's argumentation is focused on the nature and purpose of MERCOSUR law, freeing itself from the legal obstacles that stem from national legal systems which have traditionally prevented interpreters from recognising this attribute to MERCOSUR law. It was a decision adopted by majority rather than by the unanimity of arbitrators, but nevertheless, constitutes an unprecedented breakthrough towards the recognition of MERCOSUR law's special attributes, different from purely public international law. See Opinion 1/2007, 3/04/07.

\textsuperscript{259} As Peña notes, the effectiveness of legal rules is critical for an integration process for two reasons: a) with respect to internal relations, an effective rule-based system protects the reciprocity of national interests necessary for the long-term sustainability of the agreement. It is the alternative to power-based systems, where the balance of national interests is always at risk of being derailed in favour of the more powerful partners; b) with respect to external relations, when rules are observed, a message is conveyed to outsiders (i.e. companies, investors and third countries) that State Parties' commitment to merge their markets and to act as a bloc is for real. This enhances the external credibility on the integration project and facilitates the achievements of its goals (the attraction of foreign investments, enhanced bargaining power when dealing with third countries, etc.). See FELIX PÉRA, Consensual Integration Alliances: The Importance of Predictability and Efficacy in the MERCOSUR Institutional Experience Jean Monnet/Roberth Schuman Paper Series (Jean Monnet Chair - University of Miami, Miami 2003).
which have a strong record in setting up impressive integration agreements, which gradually become irrelevant due to lack of enforcement.\textsuperscript{260} MERCOSUR is not immune to this risk. On the contrary, there are worrying signs such as the huge incorporation gap of secondary rules and State Parties’ disregard to some arbitral awards that raise questions about its viability and credibility.\textsuperscript{261}

MERCOSUR enforcement mechanisms include an intergovernmental dispute settlement system based on consultations, direct negotiations and, when necessary, arbitration procedures aimed at solving disputes between State Parties regarding the interpretation, application or breach of the Treaty of Asuncion, its Protocols and secondary rules adopted therein. The dispute settlement system deals with State Parties’ rights and obligations at international law, apply international law principles and limit the standing to initiate legal actions to State Parties only.\textsuperscript{262} Private persons do not have direct access to the dispute settlement system. The system does not provide mechanisms for dealing with disputes between a State Party and a MERCOSUR body or disputes between MERCOSUR bodies themselves. The POP assigns decision making bodies the duty to monitor compliance with MERCOSUR law within their sphere of competence, but it does not entrust them with any kind of enforcement power to bring actions against those State Parties that have failed to comply with their commitments.\textsuperscript{263} In other words, there is no supranational machinery responsible for the enforcement of MERCOSUR law.

MERCOSUR law seeks not only to regulate States but also private persons. However, to reach private persons, MERCOSUR law must be incorporated into national legal systems. Once MERCOSUR rules are duly incorporated into national legal systems, the domestic enforcement machinery can be activated. It is then and only then that a private person may base a claim in, and be granted relief from, the domestic courts of a State Party against another private person or the State itself on the basis of the incorporated MERCOSUR rule.\textsuperscript{264} Of course, the enforcement

\textsuperscript{260} Echandi has eloquently argued that dispute settlement mechanisms have been more important to the success of Latin American regional integration agreements than the establishment of supranational decision making bodies. See ROBERTO ECHANDI, 'Regional Trade Integration during the 1990s: Reflections of Some Trends and Their Implication for the Multilateral Trading System', (2001) 3 Journal of International Economic Law 367.


\textsuperscript{262} The Protocol of Olivos contains some provisions regarding claims by private persons which, as explained below, are a far cry from conferring them complete \textit{locus standi} before an international tribunal.

\textsuperscript{263} POP, Arts. 8.1, 14.1 and 19.1.

\textsuperscript{264} Note the difference with the doctrine of direct effect developed by the ECJ, by which the private party may base her claim before a domestic court \textit{directly on the international norm}, without the need for its incorporation into the national legal system.
of the MERCOSUR rule - now purely internal law - will be subject to the same interpretation rules and procedural requirements applicable to the enforcement of any other domestic rule, unless the domestic legal system provides otherwise.\footnote{Under the Argentinian Constitution (Arts. 31, 75 par 22 and 24) and Paraguayan Constitution (Arts. 137, 141, 143-145), treaties are, generally speaking, recognised as having a higher status than ordinary legislation. By contrast, the Brazilian and Uruguayan courts have consistently denied the primacy of treaties over domestic rules, holding that, in case of conflict between a treaty and a legislative act adopted after the ratification of the treaty, the latter prevails. See the case law to this respect in PEROTTI, Habilitación constitucional para la integración comunitaria: estudio sobre los Estados del MERCOSUR. But also see the first (non-binding) Opinion issued by the PRT (Opinion 1/07), which understands that MERCOSUR rules incorporated into national legal systems prevail over other national rules.} In this vein, the most common obstacles against an effective enforcement of MERCOSUR rules are hierarchical considerations (conflicts between the MERCOSUR rule and domestic rules of higher hierarchy) and temporal considerations (conflicts between MERCOSUR rule and subsequent domestic rules).\footnote{See, generally, SECRETARÍA DEL MERCOSUR, Primer Informe Sobre la Aplicación del Derecho del MERCOSUR por los Tribunales Nacionales (2003) (Secretaría del MERCOSUR, Foro Permanente de Cortes Supremas del MERCOSUR y Asociados, Fundación Konrad Adenauer, Montevideo 2005) and SECRETARÍA DEL MERCOSUR, Segundo Informe Sobre la Aplicación del Derecho del MERCOSUR por los Tribunales Nacionales (2004) (Secretaría del MERCOSUR, Foro Permanente de Cortes Supremas del MERCOSUR y Asociados, Fundación Konrad Adenauer, Montevideo 2006).} It stems from the above considerations that the incorporation of MERCOSUR rules into national legal systems is crucial for the efficacy of the MERCOSUR legal system. The following paragraphs examine the mechanisms available for encouraging State Parties to incorporate MERCOSUR rules into their national legal systems. It then examines the mechanisms for the settlement of disputes between State Parties. The section concludes with a brief examination of the recently implemented system for requesting Consultative Opinions from the PRT on the interpretation of MERCOSUR law and considers the extent to which this mechanism could enhance compliance with MERCOSUR law.

1. Enforcement of the Obligation to Incorporate Secondary Rules

State Parties have recurrently failed to adopt the necessary measures to ensure the prompt incorporation of secondary rules into national legal systems in accordance with the requirements prescribed by Article 40 POP, provoking a wide incorporation gap.\footnote{See Introduction, footnote n2.} The lack of incorporation of secondary rules hits directly at the efficacy of the MERCOSUR legal system. It prevents
MERCOSUR law from penetrating national legal systems, aborting its applicability to natural and legal persons. Even when secondary rules confer specific rights on private persons, they cannot invoke them before national courts unless and until they have been duly incorporated into the national legal system.

State Parties that fail to comply with the incorporation requirements are liable at international law to those States that comply with them.\textsuperscript{268} Theoretically, State Parties can resort to the arbitration procedure and seek compensatory measures against the wrongdoers for breach of their international commitments, but in practice this never happened. Neither MERCOSUR institutions nor private parties can bring actions against the wrongdoers.\textsuperscript{269} This limits the possible mechanisms for addressing the incorporation gap to the adoption of preventive measures and the implementation of non-binding monitoring actions, both of which are examined below.

Over the years, several measures have been adopted to prevent the further widening of the incorporation gap.\textsuperscript{270} The main strategy has been to establish consultation requirements prior to the adoption of secondary rules with a view to avoid adopting instruments that could later on face incorporation difficulties. One of the most relevant measures adopted to this effect is Dec 20/02, which established an internal consultation requirement to be fulfilled within each State Party prior to the decision making bodies' adoption of MERCOSUR rules.\textsuperscript{271} The purpose of this consultation procedure is to confirm the opportunity for adopting the rule, to ensure the proposed rule is consistent with State Parties' domestic legal system, to establish the procedure necessary for its incorporation and the term within which the incorporation must be completed.

\textsuperscript{268} AHAA Brazil-Phytosanitary Products, para. 7.8.

\textsuperscript{269} Again, theoretically, if the State that has failed to incorporate the secondary rule is a State other than her State of residency, the private party could request her National Section to the CMG to initiate arbitral proceedings against thewrongdoer but, so far, this has never happened. Arguably, the private party that resides in the territory of the State that has failed to incorporate the secondary rule, could explore whether the domestic legal system provides any remedial action for individuals against damages caused by a State's violation of its international obligations. By contrast, in the EC context, there is no doubt about the right of private persons to seek compensation against the Member State that has failed to comply with Community law. See Joined Cases C-6/90 and 9/90 Francovich v Italy [1991] ECR I-5357.

\textsuperscript{270} See, inter alia, Decisions 3/99, 23/00, 55/00, 20/02, 56/02, 8/03, 22/04, 31/04; Resolutions 23/98 and 56/02 and PMP, Art. 4.12.

\textsuperscript{271} Some commentators have argued that it is not valid to create through secondary legislation a system for prior internal consultations, which was not envisaged by the POP. See JORGE FERNANDEZ REYES, Curso de Derecho de la integración (Universidad de Montevideo, Montevideo 2006), p 255.
Dec 20/02 establishes that a draft proposal can only be adopted after each State Party has informed the decision making body, in writing, what measures is going to take for the incorporation of the proposed rules and within which term. Similarly, the recently adopted Protocol establishing the MERCOSUR Parliament imposes on MERCOSUR decision making bodies the duty to consult the MERCOSUR Parliament prior to adopting secondary rules that would require approval from national parliaments for their incorporation into national legal systems.\textsuperscript{272}

The second mechanism provided by the MERCOSUR legal system for encouraging State Parties’ to observe their obligation to incorporate secondary rules into national legal systems consists on non-binding monitoring and transparency duties assigned by the POP to the MERCOSUR Secretariat. The POP stipulates that the Secretariat must publish the MERCOSUR official journal\textsuperscript{273} and must “regularly inform State Parties about the measures taken by each country to incorporate in its legal system the decisions adopted by MERCOSUR decision making bodies”.\textsuperscript{274} Dec 23/00 further stipulates that the Secretariat must elaborate a league table with information received from State Parties’ national sections about the measures adopted for the incorporation of MERCOSUR rules into national legal systems.\textsuperscript{275} The Decision also provides that the Secretariat must update the table on a monthly basis and that the CMG shall include in the agenda for ordinary meetings – as a matter of the highest priority - the analysis of such league table.\textsuperscript{276} In practice, the efficacy of these non-binding monitoring actions has been nullified by the lack of resources allocated to the Secretariat to discharge its duties and by the reluctance of government officials to disclose information about incorporation.\textsuperscript{277}

The preventive measures and non-binding monitoring actions adopted so far are very cautious not to move away from the system of indirect applicability of MERCOSUR rules.\textsuperscript{278} They leave State Parties’ autonomy to decide how secondary rules must be incorporated into their legal systems intact, without even prescribing a common term within which State Parties must complete the incorporation process, but only requiring each State Party to self impose an

\textsuperscript{272} PMP, Art. 4.12.
\textsuperscript{273} POP, Art. 32 ii. Due to lack of funds, in 2004 the publication of the Official Journal has been discontinued.
\textsuperscript{274} POP, Art. 32.4.
\textsuperscript{275} Dec 23/00, Art. 4.
\textsuperscript{276} Ibid. Art. 7.
\textsuperscript{277} See above introduction, footnote n11.
\textsuperscript{278} State Parties are currently negotiating a Protocol stipulating the direct applicability of secondary rules that do not require parliamentary approval for their incorporation into national legal systems, but so far no agreement has been reached on this matter. See Dec 07/03.
incorporation term. There is no evidence to suggest these measures have been effective. The incorporation gap is far from being bridged and the debate on how to solve the problem is nowhere near reaching a consensus.

2. Disputes between State Parties

The MERCOSUR system for the settlement of disputes between State Parties has evolved from a purely diplomatically-based scheme to a more rule-based one. The Treaty of Asuncion sketched a basic system based on direct negotiations between the State Parties to the dispute and, when necessary, intervention of the CMG as a conciliator. State Parties agreed to adopt a permanent system before the end of the transition period. By the end of 1991 State Parties adopted the Protocol of Brasilia. The new system included an ad hoc arbitration procedure for dealing with those cases where direct negotiations and conciliation failed to settle the dispute. The Protocol of Brasilia remained in place until 2002, when it was replaced by the current

279 The exception being the 180 days term for the incorporation of rules relating to technical regulations, standards and conformity assessment procedures as prescribed by Res 56/02, Annex, Art. 4 b). Additionally, on some occasions, the CMC or the CMG may prescribe specific terms within which State Parties must incorporate the norm into their legal systems. See, for instance, Res 21/99, 10/06/99 stipulating a 30 days term for the incorporation of a Resolution concerning postal services between cities situated in border areas.


282 ToA, Annex III.
dispute settlement system established by the Protocol of Olivos ("POL"). Its main innovations with respect to its predecessor include the establishment of a Permanent Review Tribunal that hears appeals from the ad hoc tribunals and the extension of the latter's jurisdiction over the period of compliance with the award.

2.1 Arbitral Procedure

The arbitral procedure provided for by the POL applies to all disputes between State Parties regarding the interpretation, application or breach of MERCOSUR law. The POL includes a "choice of forum" provision for those disputes that can also be submitted to the dispute resolution system of the WTO, or other preferential trade systems of which State Parties may individually be members. In these cases, the party making the claim must choose to submit to one forum or the other, without prejudice to the fact that the parties may, by mutual agreement, choose the forum.

State Parties involved in a dispute must, first of all, try to resolve it through direct negotiations. If direct negotiations are unsuccessful, they may resort either directly to the arbitral procedure or to the CMG. The CMG, acting as a conciliator, will assess the situation, hear the parties and, if it deems necessary, request the assistance of specialists. It will then formulate recommendations for a solution to the dispute, which are not binding upon State Parties. If the dispute cannot be resolved by the intervention of the CMG, any party to the dispute may communicate to the Secretariat of the PRT its intention to resort to the arbitral

284 POL Art. 1.1. Dec 26/05 introduces slight variations to the arbitral proceedings specified by the POL for disputes arising as a result of the interpretation of an international agreement adopted by a Ministerial Meeting.
285 Ibid. Art. 1.2 and, Regulation PO, Art. 1. This contrasts with the ECJ's exclusive jurisdiction on the interpretation of Community law (EC Treaty, Art. 292). Some bilateral trade disputes between Argentina and Brazil have been heard before WTO panels rather than by MERCOSUR ad hoc Arbitral Tribunals. See, for example, Panel Report, Argentina – Poultry; Mutually Agreed Solution, Argentina – Cotton; and Request for Consultations, Brazil – Anti – Dumping Measures on Resins.
286 The duplicity of forums increases the risks of contradictory rulings on similar (but not identical) disputes such as the Poultry dispute between Argentina and Brazil, which was judged by both a MERCOSUR Arbitration Panel, which rejected the claim (AHAA Argentina – Poultry) and a WTO panel which condemned the defendant (Panel Report Argentina – Poultry).
287 PO, Art. 4.
288 Ibid. Art. 6.
289 Ibid. Art. 7.
procedure. The Secretariat notifies this to the other party or parties concerned and to the CMG. It will also provide administrative support to the arbitral tribunal throughout the proceedings.

The arbitration procedure is held before an ad hoc tribunal, consisting of three arbitrators, one appointed by each State Party and the third by mutual agreement between them. State Parties recognize the jurisdiction of the Tribunals as binding, ipso facto and with no need for a special agreement between them. Each Tribunal establishes its own rules of procedure taking into account the model of procedural rules approved by the CMC. The Tribunal must deliver its decision within sixty days from the date of appointment of its chairperson. This period may be extended by thirty days. Any of the parties to the dispute may appeal the award before the PRT. Only matters of law raised and the legal interpretation developed in the arbitration award can be subject to an appeal. An arbitration award made in equity (ex aequo et bono) cannot be appealed.

Arbitral awards must be adopted by a majority vote of the arbitrators and the reasons for the award must be provided. It must be signed by all the arbitrators. A dissenting arbitrator may not explain his/her vote, and the deliberations will be confidential and closed to the parties. An arbitral award is binding on the parties to the dispute and they are required to comply with it.

In order to ensure compliance with the arbitral award, the Protocol of Olivos provides for the application of temporary compensatory measures (i.e. the suspension of concessions or other equivalent obligations). The claimant State may adopt such measures for a period of one year.

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290 Ibid. Art. 9.1
291 Ibid. Art. 9.2.
292 Ibid. Art. 9.3
293 Ibid. Art. 10.
294 Ibid. Art. 33.
295 Ibid. Art. 51.2 and Dec 30/2004. Broadly speaking, the procedure must ensure that each party has full opportunity to be heard and to present its arguments and evidence and that the proceedings must be expeditious.
296 Ibid. Art. 16.
297 Ibid. Art. 17.1
298 Ibid. Art. 17.3
299 Ibid. Art. 25.
301 See PRT Award, Uruguay - Compensatory Measures.
from the date the award becomes res judicata. Compensatory measures should in principle be taken in the economic sector that constitutes the object of the dispute, but if they prove to be ineffective they may be applied in another economic sector. The claimant must inform the defendant fifteen days in advance of the application of the measures.

The ad hoc tribunals and the PRT must decide the dispute on the basis of MERCOSUR law and the applicable principles and provisions of international law. The Tribunals may also decide "ex aequo et bono" if the parties so agree.

The POL delegates to the CMC the authority to establish an expeditious mechanism to settle disputes between State Parties as to technical aspects regulated in common trade policy instruments and a special procedure to deal with exceptionally urgent cases that may cause irreparable damage to the Parties.

Claims by Private Persons

Chapter XI of the POL includes some provisions that enable private persons to bring claims against a State Party in relation to the application of legal or administrative measures that have a restrictive or discriminatory effect, or have the effect of unfair competition, in violation of MERCOSUR primary or secondary law.

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302 Ibid. Art. 31.1.
303 Ibid. Art. 31.2. See Ch I, footnote n 105 on the possibility provided by the WTO DSU to "buy" unlawful behaviour.
304 Ibid. Art. 31.3
305 Ibid. Art. 34. Arbitration awards include, inter alia, references to the principles of pacta sunt servanda (AHAA Brazil – Restrictive Measures to Reciprocal Trade, para. 56 and AHAA Brazil – Phytosanitary Products, para. 8.11), good faith (Clarification to AHAA Brazil – Phytosanitary Products, para. III), proportionality (AHAA Brazil – Remoulded Tyres, p. 15) and reasonableness (AHAA Brazil – Remoulded Tyres, p. 15). It is fair to say that ad hoc tribunals have also refused to apply certain principles of public international law on grounds of their incompatibility with an economic integration agreement. Such is the case of the principle of estoppel (AHAA Brazil- Restrictive Measures to Reciprocal Trade, para. 21 and PRT appeal award Argentina Remoulded Tyres, para. 23) and exceptio non adimpleti contractus (AHAA Uruguay – Cigarettes, p. 5-6, AHAA Uruguay – Processed Wool, para. 63 and 65).
306 Ibid. Art. 34.2
307 Ibid. Art. 2.1
308 Ibid. Art. 24. This procedure has been established by Dec 23/04.
309 Ibid. Art. 39.
The private person must address the complaint to the National Section of the CMG of the State Party where the claimant has its habitual residence or its place of business. The petition must include evidence showing the damage suffered or the threat of damage, and the effective violation of a MERCOSUR rule. The National Section of the CMG has absolute discretion to decide whether it brings the claim forward or not. If it decides to bring the claim forward, it must request direct consultations with the National Section of the State Party against which the complaint is made, with the aim of finding an immediate solution to the matter raised. If consultations end without reaching a solution, the claim must be forwarded directly to the CMG.

The CMG can reject the claim if it concludes that there are insufficient grounds to sustain it. If the claim is accepted, the GMG convenes a group of three experts, one of whom must not be a national of the States Parties to the dispute. The private person and the States involved have the right to be heard and to submit evidence at a joint hearing.

The conclusions of the panel of experts must be issued within thirty days of their designation, a period which cannot be extended. If, in their opinion, the claim is without merits, the CMG must conclude the proceedings. Conversely, if the decision is in favour of the claimant, the State Party who sponsored the claim or any other State Party has the right to request the adoption of corrective measures within fifteen days. If the request is not met, the claimant State can then resort directly to the arbitral procedure.

In other words, Chapter XI does not confer unconditional *locus standi* on private persons. What private persons can do is to submit a claim to the relevant National section of the CMG, but the latter is not bound to bring the claim forward. Only if it decides to do so, will the private person be able to present evidence in a hearing before a panel of experts. This is not part of the arbitral proceedings, which is strictly limited to State Parties only. Moreover, Chapter XI only works in

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310 Ibid. Art. 40.1.
311 Ibid. Art. 40.2.
312 Ibid. Art. 41.1.
313 Ibid. Art. 41.2.
314 Ibid. Art. 42.1.
315 Ibid. Art. 42.2.
316 Ibid. Art. 42.3.
317 Ibid. Art. 49.
318 Ibid. Art. 44.1.
319 Ibid. Art. 44.1.
favour of those private persons who want to challenge a measure adopted by a State Party other than the State where they live or have their place of business. But it does not provide any solution for those private persons who want to challenge measures adopted by the State where they actually live or have their place of business.  

So far, only ten arbitration awards have been issued under the Protocol of Brasilia, and six under the Protocol of Olivos, four of which were made by the PRT. Certainly not impressive figures for an integration process fraught with controversies and a dispute settlement system with more than fifteen years in existence. If anything, they confirm State Parties' preference for sorting out their disputes through ongoing diplomatic negotiations, with the involvement, when necessary, of the highest political authorities, instead of submitting their disputes to legal adjudication. During the early stages of the integration process, the diplomatic approach contributed to settle conflicts in a quick and cost-effective way, but in the long run, when conflicts got more complex and the enthusiasm for trade liberalisation began to peter out, the "presidential diplomacy" strategy ended up over exposing top political leaders and ultimately damaging their credibility. Yet, State Parties continued to be extremely reluctant to forfeit control over the management (or mismanagement) of their trade disputes.

2.2 Claims Procedure before MERCOSUR Trade Commission

In addition to the duties relating to monitoring the implementation of the common trade policy, the POP assigns to the MTC a quasi-adjudicative role, namely, to hear claims referred to it by the National Sections of the MTC originated by State Parties or private persons, which fall within its sphere of competence. The consideration of these claims does not prevent the complainant party from taking action under the POL.


321 The argument that the small number of arbitration awards confirms the efficacy of the system in preventing disputes can be easily rebutted by looking at the sheer number of consultations brought before the MTC that remain unresolved.


323 POP, Art. 21.
The procedure for submitting a claim is set out in the annex to the POP, as specified by Dec 18/02.\textsuperscript{324} States or private persons must bring the claim before the National Section of the MTC, which submits the matter to the Chairperson of the MTC for the dispute to be included in the next meeting’s agenda.\textsuperscript{325} If no decision is taken at that meeting, the MTC submits the claim to a technical committee, which issues a joint opinion or, failing this, individual conclusions by its members within thirty days.\textsuperscript{326} Private persons can request the national section of the MTC authorisation to present their case before the technical committee.\textsuperscript{327} The MTC must take into account the opinion of the technical committee when it decides the matter in the next meeting following its reception.\textsuperscript{328}

In case no consensus is reached to settle the dispute in the MTC, the matter is then submitted to the GMC with the different proposed alternatives, as well as with the technical committee’s opinion, to be decided within a thirty days term.\textsuperscript{329} If a consensus is reached in favour of the complaining State, the defendant must implement the measures approved by the MTC or by the CMG, within the term fixed for that purpose.\textsuperscript{330} When no consensus is reached or if the time expires without implementation, the claimant State may resort to arbitration proceedings.\textsuperscript{331}

2.3 Consultations Procedure before MERCOSUR Trade Commission

Directive 17/99 stipulates a procedure by which a State Party may address consultations to any other before the MTC on issues that fall within the MTC’s sphere of competence.\textsuperscript{332} It is an amicable procedure aimed at preventing disputes rather than settling them, based on dialogue and exchange of technical information between government officials that are experts on the issues at stake. It is not a compulsory stage of the dispute settlement process and by no means precludes the right of a State Party to bring a claim before the MTC or to resort directly to the

\textsuperscript{324} See also the procedure for the urgent consideration of non-tariff barriers by the MTC provided by Res 21/05.
\textsuperscript{325} Annex POP, Art. 2.
\textsuperscript{326} Ibid. Art. 3. Dec 18/02, Art. 5 stipulates that technical committees shall consist of government officials appointed by the State Parties.
\textsuperscript{327} Dec 18/02, Art. 7.
\textsuperscript{328} Ibid. Art. 3.
\textsuperscript{329} Ibid. Art. 5.
\textsuperscript{330} Ibid. Art. 6.
\textsuperscript{331} Ibid. Art. 7.
\textsuperscript{332} See Directive 17/99.
arbitral procedure. In practice, the consultations' mechanism is widely used, although there is no hard evidence to suggest that it has made an effective contribution to prevent disputes.

3. Consultative Opinions to the Permanent Review Tribunal

The possibility to establish a procedure for requesting Consultative Opinions from the PRT was originally envisaged by the Protocol of Olivos and subsequently implemented by the CMC. Its objective is to develop a uniform, consistent and coherent interpretation and application of MERCOSUR law. Similar procedures are provided for by many other integration treaties. There is compelling evidence suggesting that the establishment of this type of procedure allows regional tribunals to play a key role in shaping the scope and effect of regional law.

Under the MERCOSUR system there are two types of institutions entitled to request Consultative Opinions from the PRT. First, all State Parties acting together and MERCOSUR decision making bodies may request a Consultative Opinion from the PRT “on any legal issue” relating to MERCOSUR primary and secondary law. Secondly, State Parties’ high courts or tribunals may also request a Consultative Opinion from the PRT, but only on the interpretation of those areas of MERCOSUR primary or secondary law connected to cases being heard by them. The PRT must issue an opinion in writing within forty five days of receiving the

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333 Ibid. Art. 11.
335 POL, Art. 3.
336 See Dec 37/03 (Regulations of the POL); Dec 30/05 (Rules of Procedure of the PRT) and Dec 02/07 (Rules of Procedure for the Request of Consultative Opinions).
337 See, e.g., Andean Court of Justice, European Court of Justice, Central American Court of Justice and the Caribbean Court of Justice.
338 Perhaps the best known example in this matter is the ECJ preliminary rulings regarding primacy and direct effect. These two unique features of Community law, which are key for its effectiveness, are entirely case-law made.
339 For a thorough analysis of the Consultative Opinion Procedure see ALEJANDRO DANIEL PEROTTI, Tribunal Permanente de Revisión y Estado de Derecho en el MERCOSUR (Marcial Pons, Madrid - Buenos Aires 2008).
340 POL Regulations, Art. 3.1
341 Ibid. Art. 4.1. By way of comparison, the ECJ has jurisdiction to issue preliminary rulings concerning not only the interpretation of the Treaty, but also the validity and interpretation of acts of the institutions of the Community and of the European Central Bank (EC Treaty, Art. 234).
request. It must decline to issue an opinion when there is a pending procedure for the settlement of disputes on the same matter. The opinions must be published in the MERCOSUR official journal. So far, the PRT has issued only one Consultative Opinion.

The Rules of Procedure for the Request of Consultative Opinions do not compel domestic supreme courts to request a consultative opinion from the PRT, but rather delegates to them the discretionary authority on this matter. Therefore, it will be for each State Parties' Supreme Court to decide whether and how consultative opinions should or could be requested.

The Rules of Procedure also stipulate that PRT's opinions do not have binding effect upon the domestic court that requests it. The PRT confirmed the lack of binding effect of its opinions, and at the same time exhorted decision making bodies to amend this situation. In its first opinion, the PRT held that it only has authority to interpret the MERCOSUR norm, but it corresponds to the domestic court to apply it to the facts of a particular case and when applying the MERCOSUR law, the domestic court is not bound by the PRT's interpretation.

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342 Ibid. Art. 7.
343 Ibid. Art. 12.b.
344 Ibid. Art. 13.
346 Dec 02/07, Art. 1. This contrasts sharply with other comparative regimes. For instance, the EC Treaty prescribes that when issues about the interpretation of Community law arise before domestic courts or tribunals against whose decisions there is no judicial remedy under national law, that court or tribunal must bring the matter before the ECJ. See EC Treaty Art. 234.
347 In its first opinion, the PRT severely criticised this provision. It rightly pointed out that domestic courts' unfettered discretion to decide whether and how consultative opinions should or could be requested runs against the main purpose of this procedure, which is ensuring a uniform interpretation of MERCOSUR law. One arbitrator – voting in dissidence - declared the inapplicability of Arts. 1, 6 and 11 of the Rules of Procedure for the Request of Consultative Opinions. See Opinion 1/2007.
348 So far, the only supreme court that has regulated the procedure for the request of consultative opinions has been the Uruguayan Supreme Court of Justice, by Acordada No 7604 24/08/07. This norm enables all domestic courts to request Consultative Opinions from the PRT via the Supreme Court of Justice. The latter must check whether the request meets all the procedural requirements stipulated in the norm and, if so, the Supreme Court must pass on the request to the PRT (emphasis added).
349 Regulations of the POL, Art. 2.
351 Ibid. p 4.
Finally, the Rules of Procedure stipulate that the expenses incurred in delivering Consultative Opinions (Arbitrators’ fees, travel and accommodation costs; administration costs, etc.) requested by Supreme Courts must be paid for by the State of the Supreme Court that requests the Opinion.\textsuperscript{352} The PRT rightly pointed out that this financing system is seriously flawed because, among other reasons, the Opinions will benefit the entire MERCOSUR legal system and all those that interact within it, not just the domestic court that requests them.\textsuperscript{353} It has also been prescribed that each State Party must make an initial contribution of fifteen thousand dollars to this effect.\textsuperscript{354} The irisory amount proposed to finance what should be the core mechanism for shaping the scope and effect of MERCOSUR law needs no further comment.

The way the Consultative Opinion procedure has been designed and the means stipulated for financing its implementation speak quite clearly about State Parties’ feeble commitment to strengthening integration of the legal system. MERCOSUR badly needs a Tribunal with authority to have the last say on the interpretation of its rules, but in light of the above considerations, it is fair to say that the Tribunal will face serious difficulties in discharging its functions. It would be desirable that the reluctance in diplomatic circles to support the PRT could be counterbalanced by the readiness of domestic courts to seek guidance from the PRT on the interpretation of MERCOSUR law.

**F. Critique of MERCOSUR Legal System and Proposals for Reform**

The MERCOSUR legal system and the institutions responsible for its operation have a strong intergovernmental bias at both policy-making and enforcement level. Decision making bodies consist of government officials only who adopt decisions by consensus, there is no technical bureaucracy independent from national administrations, and to reach private persons, MERCOSUR law must be incorporated into national legal systems. There is no supranational enforcement machinery. Once MERCOSUR rules make their way into national legal systems, they become subject to State Parties’ domestic enforcement machinery like any other domestic rule, while disputes between State Parties are sorted out through arbitration.

The underlying rationale for this minimalist institutional choice is, according to some commentators, essentially practical: haunted by the poor results of past integration experiences, State Parties opted for assigning the formulation of integration policies to decision making

\textsuperscript{352} Dec 02/07, Art. 11.

\textsuperscript{353} PRT Opinion 1/07, p. 12.

\textsuperscript{354} Dec 2/07, Art. 11.
bodies consisting of hands-on national administrators rather than to “integration bureaucracies” de-linked from domestic policy-makers. It was assumed that this option should result in the formulation of more realistic integration policies, with greater chances of being implemented at national levels, providing State Parties with a flexible and cost-effective mechanism for adjusting the integration process to its ongoing challenges.

Though flexible and cost-effective, an integration process directly led by government officials also has shortcomings. Political establishments tend to have short-term perceptions about the benefits of integration and are more easily captured by protectionist lobbies. When difficult times arrive, the adherence to the common project is quickly diluted and national administrations face few restrictions in resorting to unilateral defensive measures. That was exactly what happened in MERCOSUR in the late 1990s. During the initial stages of the integration process, at a time when economic interdependence was low and there was a strong consensus in favour of opening domestic economies to foreign trade, this institutional model proved to be quite effective. But once the tariff elimination process concluded giving way to more sensitive and complex barriers to economic integration, and the economic context deteriorated, the efficacy of the institutional system rapidly deteriorated. Since then, MERCOSUR institutions have repeatedly failed to deliver effective solutions for its core problems, i.e. the proliferation of non-tariff barriers that obstruct the functioning of the free trade area and unilateral actions that conspire against the implementation of a common trade policy.

State Parties reacted half-heartedly against the growing ineffectiveness of MERCOSUR institutions, introducing some ad hoc reforms, most notably, a half-way transformation of the Administrative Secretariat into a Technical Secretariat, the establishment of a new arbitral procedure including a Permanent Review Tribunal with jurisdiction to hear appeals and to issue Consultative Opinions on the interpretation of MERCOSUR law and, more recently, the replacement of the Joint Parliamentary Commission with a MERCOSUR Parliament. These reforms did not alter the predominantly intergovernmental patterns of MERCOSUR policymaking and enforcement processes. But more importantly, they did not manage to reverse the growing gap between State Parties’ commitments and State Parties’ conduct.

355 See Bouzas and Soltz, ob cit, p 101.

356 The paradigmatic example of a unilateral measure adopted to cope with the financial crisis that hit the region in the late 1990s was the Brazilian’s currency devaluation of January 1999. This measure turned the conditions for intraregional trade upside down in favour of Brazilian exports. There was little other State Parties could do, particularly Argentina, which at that time had the Peso pegged to the dollar by law.

357 Bouzas and Soltz, ob cit, p 103.
Most commentators agree that there is an institutional imbalance between MERCOSUR predominantly intergovernmental institutional structure and its objective to establish a common market. What remains under discussion is the path that should be taken to address this problem. Questions about the right institutional choice for MERCOSUR remain open: what is the best policy-making structure? How should the interface between regional policy-making and domestic-policy making be defined? Which is the most appropriate mechanism for ensuring State Parties’ compliance with MERCOSUR law?

Part of the specialised literature suggests the need for a major institutional overhaul aimed at replacing MERCOSUR’s predominantly intergovernmental institutional framework by a supranational one. For instance, Gonzalez Floreal argues that it is necessary to set up a permanent body, independent from national governments with the exclusive function of formulating policies to improve the functioning of the customs union. To avoid proliferation, the author argues, such body could be created by reforming the MTC, which could continue to assist the CMG but independently of governments and with purely technical functions in proposing initiatives and in following up policies.

The problem with proposals aimed at the supranationalisation of MERCOSUR institutions is their lack of political feasibility. Due to the sharp structural asymmetries between State Parties, it is highly unlikely that Brazil would be willing to pay the costs of supranational institutions in terms of sovereignty curtailment in exchange for the type of benefits supranationality can offer, i.e. an independent voice representing the interests of the integration process in the policy-making structure, stronger capacity to discipline State Parties’ unlawful behaviour, better conditions for accessing other State Parties’ markets and so forth. The costs for Brazil to subject itself to powerful centralised institutions, capable of constraining domestic policy makers’


359 See Floreal Gonzalez, ob cit.; Labandera Ipata, ob cit. and Martínez Puñal, ob cit.
360 Floreal Gonzalez, ob cit.
flexibility and discretion are too high considering the modest benefits expected in return. In other words, MERCOSUR's dilemma is that demands for stronger institutions are weak, and the regional leader does not seem willing to supply the conditions necessary for accommodating such demands, limiting the choices available for reform.

In light of these circumstances, this thesis suggests that the way forward should avoid grandiloquent reforms aimed at a "supranationalisation" of MERCOSUR institutions, focusing instead on streamlining the operation of the current system. The underlying idea is that there is still plenty of room - within the boundaries of a predominantly intergovernmental approach to integration - for improving the efficacy and efficiency of existing policy-making and enforcement mechanisms. The measures suggested below are geared to improve the functioning of decision making bodies; strengthen the role of the Secretariat and empower individuals' participation in the integration process. But they are mindful not to undermine MERCOSUR decision making bodies' capacity to exert direct control over the scope and pace of the integration process. They rather suggest institutional re-arrangements and procedural requirements that should encourage MERCOSUR institutions to exercise their power in a more rule-oriented, transparent, accountable and efficient way.

1. Improving the functioning of decision making bodies

To start with, the CMC, CMG and MTC are resourceless bodies that meet every now and then, composed of overburdened government officials that combine their ordinary domestic tasks with their participation in these international bodies. The first and most obvious way to improve

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361 See Appendix II MERCOSUR Statistical Information Table 9. For a detailed analysis of Brazilian interests on MERCOSUR see P DA MOTA VEIGA, 'Brazil in MERCOSUR: Reciprocal Influences', in Riordan Roett (ed) MERCOSUR: Regional Integration, World Markets (Lynne Rienner, London 1999).


363 Other authors that argue in favour of strengthening the current institutional system and put forward proposals to this effect include Torrent, R, ob cit; Celina Pena & Ricardo Rozenberg, Una Aproximación al Desarrollo Institucional del MERCOSUR: sus Fortalezas y Debilidades Documento de Divulgación 31 (INTAL, Buenos Aires 2005); FESUR, Desafíos Institucionales para el MERCOSUR. Las Relaciones entre Estados, Instituciones Comunes y Organizaciones de la Sociedad (FESUR, Montevideo 2006).

364 See, in addition to these measures, the proposals for improving MERCOSUR legislation, suggested in Ch V, Section E.
their capacity to deliver sound and timely policies is by allocating more administrative, human and technical resources to support their activities. At the very least, each State Party should establish a team of governmental officials solely dedicated to support the activities of these bodies and to liaise with their counterparts in between the bodies’ meetings.

Secondly, while the CMC is the highest body of MERCOSUR, the CMG and the MTC are not simply auxiliary bodies to the CMC. They too have autonomous regulatory power for adopting rules within their sphere of competence. In other words, there is a “polycentric” system for the adoption of rules365, which can lead to overlaps and inconsistencies. The problem is exacerbated by the lack of a procedure for the judicial review of MERCOSUR rules. Some commentators have suggested concentrating the rule-making authority in the CMC’s hands to counteract the disadvantages that stem from a plurality of legal production centres. This, they argue, should also enhance the legitimacy of MERCOSUR secondary rules which would be adopted only by a ministerial level body rather than by middle-ranked unaccountable bureaucrats, and should encourage a more active participation of Ministers in the integration process since they would become directly responsible for all MERCOSUR rules.366 Of course, to prevent backlogs, this proposal should be accompanied by measures aimed at increasing the CMC’s working capacity, including more resources and higher frequency of meetings.

Thirdly, the risk of inconsistent policy outcomes is aggravated by the elevated number of auxiliary bodies that operate, rather autonomously, under the umbrella of each decision making body. Formed by public officials with direct responsibility for specific policy areas, auxiliary bodies were originally created to provide decision making bodies with technical support, and to facilitate the implementation of MERCOSUR rules falling within their sphere of competence. But the difficulty in reaching consensus at the decision making level left auxiliary bodies without clear political mandates.367 As a result, many of them have taken the initiative in suggesting a working agenda for their specific sector and proposing draft rules to the decision

365 Da Motta Veiga claims there is an “inflation” of structures with the power to make rules”. See Da Mota Veiga, ob cit, p 12.

366 Torrent, ob cit, p 69.

367 For instance, Bouzas et al suggest that “At the startup of MERCOSUR, the GMC and the activities of the SGTs stimulated personal knowledge and mutual trust among national officials, contributing to the development of motivation and team spirit. Consequently, they helped to the advancement of negotiations and their acceptance by national agencies. Since the mid-1990s, however, the effectiveness of the GMC decreased as a result of the increasing number of questions that found neither a “political” solution at a higher level nor were solved at SGT’s “technical” level”. See Bouzas, et al., In-depth analysis of MERCOSUR integration, its perspectives and the effects thereof on the market access of EU goods, services and investment p 10.
making body, which normally approves them without putting too much effort in consolidating the different proposals received. What makes matters worse is the fact that there are various auxiliary bodies with overlapping competences and there are not proper mechanisms in place for co-ordinating their activities. This has resulted in a rather chaotic development of secondary rules, led by the most active auxiliary bodies, which are not necessarily those with competence on strategic areas for the economic integration process. To tackle this problem it is necessary to streamline the number and competence of auxiliary bodies, improve the co-ordination mechanisms between them (or at least observe existing procedures) and, above all, adopt a single and coherent working programme at the highest political level that allocates tasks and responsibilities to each auxiliary body in a clear, detailed and consistent manner.

2. Strengthening the MERCOSUR Secretariat

Intergovernmental institutions and a technical Secretariat are not incompatible. On the contrary, a strong technical body with the capacity to issue an independent and non-binding opinion about the main concerns of the integration process can make a valuable contribution to intergovernmental decision making bodies.

Consultations between auxiliary bodies are normally channelled through the CMG according to the following procedure: the pro-temporary president of one auxiliary body requests the CMG to forward a consultation to another auxiliary body. That body then considers the consultation and prepares a reply. The reply must be channelled back to the consulting body through the CMG.

Pena y Rozenberg note that the multiplicity of auxiliary bodies involving officials of nearly all areas of government has resulted in a widespread diffusion of the integration process within the public administration. The great diversification of these increasingly autonomous technical bodies led to significant coordination problems. See CELINA PENA & RICARDO ROZENBERG, MERCOSUR: A Different Approach to Institutional Development Focal Policy Paper (Focal, Ottawa 2005), p 3.

See a quotation from Didier Opertti, former Uruguayan Minister for Foreign Affairs: “to those of us who have been involved with MERCOSUR..., we get the sensation of participating in a game somewhat automatized in decision making in which technical will in many cases acquires a marked autonomy or a certain dimension of its own that carriers along with it the risk of distancing it, or even of divorcing it, from the political will” (cited by Pena y Rozenberg, footnote n 360, p 7.

See Dec 59/00 and Resolutions 36/00 and 05/01.

The CMC has already adopted a number of working programmes, but they have failed to fill in this vacuum. For instance, the working programme for 2004-2006 (Dec 26/2003) lists a number of objectives in a wide range of areas but does not establish any kind of priorities among them. The working programme does not seem to articulate policy measures in a coherent fashion, but rather seems to merely collate in one piece of paper a number of independent working agendas unilaterally suggested by different auxiliary bodies.
Government officials tend to see the integration process from the narrow lenses of national administrations’ interests, and decide accordingly. As a result, policy-making is driven by competing short-termed domestic demands, rather than by co-operative efforts towards long-term common goals. Not surprisingly, policy outcomes tend to be little more than the least common denominator of competing national interests on a specific issue at any given moment. The views of an independent technical body can contribute to unlock this vicious circle. By looking at the big picture from an independent standpoint, a technical body is better positioned for identifying actions that are damaging the integration process and suggesting the best courses of action to address them.

One need not go all the way on to the creation of an EC Commission type of body, which monopolises the right of legislative initiative. It is perfectly possible to maintain intact the right of intergovernmental bodies to regulate and, at the same time, have a strong Technical Secretariat with power to make recommendations to decision making bodies. As mentioned, State Parties already adopted some measures aimed at transforming the Administrative Secretariat into a Technical Secretariat, but their obsession for having an absolute control over the integration process, prevented them from introducing significant changes.

To strengthen the MERCOSUR Secretariat, first of all, it is necessary to fully implement the measures that have already been adopted to this effect as prescribed by Decision 30/02, reversing the CMG’s decisions to suspend the Secretariat’s consistency control of draft rules and to prohibit the dissemination of the reports produced by the TAS. In addition, decision making bodies’ duty to consult the Secretariat about the consistency of proposed rules with existing rules, should be replaced by a more comprehensive consultation requirement contemplating the merits of adopting the rule. While the Secretariat’s opinion should not have binding effects, it should be made public ensuring its technical input is known by the general public and not just by the government officials that happen to be sited at the decision making bodies at any given time.

The Secretariat’s duty to monitor State Parties’ actions taken to incorporate MERCOSUR rules into their national legal systems should also be enhanced, without the need to go all the way on to confer specific enforcement powers. For instance, it should be possible to entitle the Secretariat to require information about incorporation directly from any domestic regulators, without the need to go through State Parties’ diplomatic channels. The Secretariat should also have absolute independence to produce and publish reports about incorporation, giving an impartial and accurate view about how State Parties are or are not complying with their obligations.
Last, but not least, the Secretariat should have absolute discretion to set up a research agenda in those areas it deems of maximum concern for the integration process. It should be allowed to carry out the research activities with independence, including the right to consult various stakeholders and the right to widely disseminate the relevant findings. To be able to carry out all these tasks, the budget of the Secretariat should be substantially increased and perhaps minimum thresholds limiting the discretion of budgetary decisions should be introduced, for instance, a percentage of State Parties' GDP.

3. Empowering the role of individuals

As mentioned above, given MERCOSUR underlying socio-economic and political circumstances, State Parties' intergovernmental approach to integration seems to be a reasonable institutional choice. However, strictly intergovernmental policy-making and enforcement processes may lead to an undesirable degree of decision making bodies' impermeability to individuals’ concerns, referred to as “government encapsulation”. The more impermeable decision making bodies become to the general public, the higher the risk of being captured by specialist interest groups, or, at least, of failing to adopt the right policy measures in the interest of the general good. Moreover, in the long-run, an integration process led only by government officials, typically foreign affairs diplomats, behind closed doors will struggle to get support from the general public, and private persons, who ultimately should be the leading actors of an integration process, may simply lose interest in it.

The MERCOSUR legal system already contemplates some degree of participation for private persons in the policy-making and enforcement processes. Below some measures are suggested to expand this participation, empowering the role of individuals in the integration process without modifying the predominantly intergovernmental patterns of these processes.

First, decision making bodies should encourage the participation of private parties in the policy-making process by opening some of their meetings to the public. It is a possibility already envisaged by law although in practice it is rarely used. More importantly, it is crucial to

373 See Bouzas and Soltz, ob cit, p 103.
374 For additional ideas on how to empower the role of the individual and the civil society in the integration process see FESUR, .
375 For instance, the CMC may, depending on the agenda, invite representatives from social and economic sectors to attend its meetings (Dec 2/98, Art. 10). Auxiliary bodies to the CMG and Technical Committees that operate under the MTC umbrella may decide, by consensus, to call representatives from the private sector to attend their
increase the level of transparency of decision making bodies’ activities. This requires, among other things, to adopt elemental but still stubbornly resisted measures such as the publication on the MERCOSUR website of all the minutes of decision making’ and auxiliary bodies’ meetings, annexes, policy documents and any other relevant information that may correspond. Also any initiative aimed at bringing the debate on integration outside diplomatic rooms, should be welcomed.

Secondly, at the enforcement level, the arbitral procedure contemplates the possibility for private persons to request government officials to bring claims on their behalf, although, as mentioned above, government officials have absolute discretion to decide whether or not to bring the claim forward. There are mechanisms that could be adopted to enhance the protection of private persons’ interests without going all the way to conferring on them locus standi to bring actions against State Parties. For instance, the discretion of National Sections to the CMG to decide whether or not to pursue private persons’ claims could be limited by objective standards. Say that when the claim refers to a “manifest violation” of a MERCOSUR provision, government officials should be bound to bring the claim forward or, at least, they should provide the private person with a full explanation for the reasons not to do so. Also, the possibility to confer on private persons the right to submit amicus curiae to the Tribunal hearing an inter-State dispute should be explored.

The procedure to request Consultative Opinions from the PRT should also play a pivotal role in the protection of private persons’ interests, even without the need to go all the way to confer on the PRT power to annul MERCOSUR rules. But for this to be possible it is essential to implement this procedure in accordance with the suggestions issued by the PRT in its first Opinion, namely, when the issue about the interpretation of MERCOSUR law reaches the highest court, the request for consultation should be compulsory and the opinion should have binding effects on the requesting domestic court. In addition to these procedural requirements, State Parties should provide the PRT with the resources necessary to discharge its functions.

More generally, an effective protection of private persons’ interests is directly linked to the understanding of MERCOSUR law by the legal profession, judges and other legal operators. Therefore it is necessary to promote wide reaching training programmes on MERCOSUR law with a view to creating a cadre of legal operators trained in this area.
Finally, when discussing measures for strengthening MERCOSUR institutional system it is important not to overlook the fact that, to some extent, its faults reflect the weakness of domestic institutions. As Campbell has rightly put it: “no supranational structure could have made MERCOSUR a more serious, orderly, or predictable structure than are the countries which comprise it”. Therefore, the proposals put forward above aimed at streamlining the operation of the current system should be accompanied by credible efforts aimed at enhancing the soundness of domestic institutions and improving domestic regulatory practices in terms of transparency, impartiality and due process.

G. Concluding Remarks

This chapter examined the MERCOSUR legal system and the institutions responsible for its operation and discussed to what extent they have contributed to achieving MERCOSUR objectives, including, inter alia, the establishment of a common market involving the free movement of services.

Generally speaking, institutions are necessary for formulating integration policies and for implementing them, including, when necessary, forcing wrongdoers to abide by their commitments. They constitute a horizontal matter that cut across all dimensions of an integration process. The success of the liberalisation of trade in services, just like any other dimension of the integration process, is inextricably linked to the soundness of the institutional and legal settings which underpin it. This is valid for any kind of institutional architecture, whether it consists of predominantly intergovernmental or supranational arrangements.

State Parties to MERCOSUR opted for a minimalist and predominantly intergovernmental institutional structure. Decision making bodies consist of government officials only who adopt decisions by consensus, there is no technical bureaucracy independent from national administrations, and to reach private persons, MERCOSUR law must be incorporated into national legal systems. There is no supranational enforcement machinery. Once MERCOSUR rules make their way into national legal systems, they become subject to State Parties’ domestic

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376 See Appendix II MERCOSUR Statistical Information, Tables 4 and 5.
377 Cited by Pena and Rozenberg, above footnote n 360, p 3.
378 For an objective and comparable measurement of the quality of State Parties’ rules and institutions see their scores according to the World Bank Index on Governance and Institutional Quality available at http://go.worldbank.org/VZOP230230.
enforcement machinery like any other domestic rule, while disputes between State Parties are sorted out through arbitration.

During its early stages, MERCOSUR’s lean institutional framework satisfied the demands of an integration process characterised by a low level of economic interdependence, concerned with border issues (i.e. the elimination of tariffs) and operating in a low contentious environment. But since the tariff elimination process concluded, giving way to more sensitive and complex barriers to economic integration, MERCOSUR institutions have repeatedly failed to deliver effective solutions for its core problems. Eighteen years after the entry into force of the Treaty of Asuncion, MERCOSUR remains an incomplete free trade area, with a partially implemented CET and with no significant degree of co-ordination of State Parties’ macroeconomic policies.

There is an institutional imbalance between MERCOSUR predominantly intergovernmental institutional structure and its objective to establish a common market. But, at the same time, the sharp structural asymmetries between State Parties block any possibility to introduce supranational features to existing policy making and enforcement mechanisms. It has been suggested that the best -if not the only- path available for overcoming this institutional dilemma is to focus on streamlining the way the current system operates.

It is not controversial to suggest that there is plenty of room for improving the efficacy and efficiency of existing policy-making and enforcement mechanisms without the need to go beyond a predominantly intergovernmental approach to integration. In this vein, a series of measures have been suggested for improving the functioning of decision making bodies, strengthening the role of the MERCOSUR Secretariat and empowering individuals’ participation in the integration process. All the measures proposed are mindful not to undermine MERCOSUR decision making bodies’ capacity to exert direct control over the scope and pace of the integration process. They rather suggest institutional re-arrangements and procedural requirements that should encourage them to exercise their power in a more rule-oriented, transparent, accountable and efficient way.

State Parties are currently engaged on negotiations to reform MERCOSUR institutions but unfortunately, such negotiations are being carried out behind closed doors. It is difficult to anticipate the exact outcome of these negotiations, but lessons from past reform experiences should serve as a warning not to be terribly optimistic. Today, the tension between, on the one hand, the need for a more rule-based system, grounded in sound legal principles to deepening the integration process and, on the other hand, the lack of incentives for the largest country of the bloc to subject itself to anything more than an international framework for diplomatic co-
operation, remains as valid as it was eighteen years ago. Moreover, in the years to come, the achievement of MERCOSUR objectives, including the successful liberalisation of trade in services will no doubt continue to be conditioned by this tension.
Chapter III

The Protocol of Montevideo on Trade in Services
This chapter examines the Protocol of Montevideo on Trade in Services, focusing on the analysis of its general obligations and disciplines. The Protocol’s Programme of Liberalisation and the rounds of negotiations of specific commitments are analysed in Chapter IV. The chapter is divided into six sections. First, it reviews the background to the Protocol (Section A). It then analyses the Protocol’s purpose and scope of application (Section B), its obligations and general disciplines (Section C), the institutional provisions (Section D) and its annexes (Section E), ending with some concluding remarks (Section F).

A. Background

State Parties to the Treaty of Asuncion originally envisaged the establishment of a common market to be in place by 31 December 1994.1 No matter the variety of objectives spelled out by the Treaty, for State Parties the immediate priority was to ensure the liberalisation of trade in goods. Such priority stems from the Treaty itself, which included an entire annex specifying in great detail State Parties’ obligations relating to the elimination of tariff and non-tariff barriers, but made no reference whatsoever to mechanisms for the liberalisation of the movement of services and factors of production or the co-ordination of macroeconomic policies.

Despite not being the main concern, the liberalisation of trade in services did occupy a place in the MERCOSUR agenda since the initial stages of the integration process.2 In June 1992, the Common Market Council approved a broad and ambitious working programme3 for the transition period, which scheduled the adoption of a wide variety of measures necessary for the effective functioning of the common market by 31 December 1994. Some of those measures were aimed at advancing the liberalisation of trade in services either by way of negotiating general obligations and disciplines or by way of harmonizing legislation or adopting mutual recognition agreements for specific service sectors.

The working programme entrusted a Commission on Trade in Services created under the umbrella of Sub-working group No 10 - Coordination of Macroeconomic Policies with the task

1 ToA, Art. 1.
2 Annex V to the Treaty of Asuncion established ten Sub-Working Groups (“SWGs”) auxiliary to the CMG “for the purpose of co-ordinating macroeconomic and sectoral policies”. Some of those SWGs were responsible for the co-ordination of policies in specific service sectors like SWG4 on Fiscal and Monetary Policies Relating to Trade with competence on the liberalisation of Financial Services, SWG5 on Inland Transport, SWG6 on Maritime Transport and SWG9 on Energy Policy. Prior to the signature of the Treaty of Asuncion Argentina, Brazil and Uruguay were already negotiating co-operation mechanisms on the transport sector.
3 See “Las Leñas Schedule”, approved by Dec 01/92, amended by Dec 01/93.
of drafting a framework agreement on trade in services by December 1993. Notwithstanding the efforts made, the agreement was not completed on time. The Commission’s institutional status was upgraded to an Ad Hoc Group on Services (“AHGS”) and the mandate for the conclusion of the framework agreement was extended until September 1996, but it was not until November 1997 that the Protocol of Montevideo (“PM”) was adopted. Seven additional months were necessary for completing the drafting of the sectoral annexes to the Protocol and for the negotiation of State Parties’ initial schedules of specific commitments. One reason put forward by a diplomat involved in the drafting process to explain the delay in adopting a framework agreement in trade in services was the novelty of the issue and the lack of experience on how to deal with it.

During the drafting stage, the AHGS faced difficulties in co-ordinating their work with other auxiliary bodies to the CMG with competence on specific service sectors such as the SWGs on Communications, Transport and Financial Issues. Some of these auxiliary bodies had been working in parallel to the AHGS for a long time on topics that necessarily required some degree of co-ordination. Overall, the co-coordination between the AHGS and other SWGs and Specialised Meetings with competence on specific service sectors was jeopardised by the structure and modus operandi of the auxiliary bodies to the CMG.

It took a considerable time for State Parties to ratify the Protocol of Montevideo, its Annexes and their initial schedules of specific commitments. The Protocol finally entered into force on 7

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4 See Res 38/95 laying down the negotiating mandate for the AHGS. The mandate expressly stipulated the need for the Protocol to meet the requirements prescribed by the GATS for the adoption of regional trade agreements on trade in services. GATS Art. V prescribes that regional trade agreements liberalising trade in services must have substantial coverage and must provide for the absence or elimination of substantially all discrimination between or among the parties in the sectors covered by the agreement.


6 See Dec 09/98 Annexes to the Protocol of Montevideo and Initial Schedule of Commitments.

7 See MARIO ANTONIO MARCONINI, 'Estado Actual de las Negociaciones en Materia de Comercio de Servicios en el MERCOSUR', in, Origen en el Comercio de Servicios, Banco Central del Uruguay, (Montevideo 11 y 12 de noviembre 1996). p 63.

8 For instance, the drafting of the Protocol’s disciplines on mutual recognition required to take into account the work carried out by auxiliary bodies involved on the development of mutual recognition agreements of university degrees such as the Specialised Meeting of Ministries of Education. Similarly, the decision whether or not to include sector specific annexes to the Protocol and to discuss the content of such annexes required a joint effort between the AHGS and the various SWGs with competence on specific service sectors.

9 See above Ch II, Section F, Numeral I.
December 2005. During the period between the adoption of the Protocol and the date it entered into force, State Parties conducted six rounds of negotiations of specific commitments although the results have not been incorporated into State Parties’ legal systems. In compliance with Article V:7 of the GATS, the entry into force of the Protocol was officially notified to the Council of Trade in Services on 5 December 2006, and is currently under examination by the Committee on Regional Trade Agreements.

Most of the Protocol’s provisions are a replica of the GATS’ provisions. However, aware of the differences between the Protocol’s objectives and the GATS’ objectives, the draftsmen modified some GATS provisions creating GATS-plus disciplines, while a small group of GATS provisions were not incorporated into the Protocol at all. The draftsmen also looked at the North American Free Trade Agreement’s (“NAFTA”) provisions on domestic regulations and on mutual recognition. But notwithstanding the similar objectives pursued by MERCOSUR and the European Community to establish a common market, the draftsmen did not consider the EC Treaty’s provisions on the liberalisation of the free movement of services.

Like the GATS, the structure of the Protocol of Montevideo rests on three pillars: a) a set of general concepts, principles and rules that apply to all measures affecting trade in services, b) a set of annexes containing specific rules on the movement of natural persons supplying services and on specific service sectors, and c) State Parties’ schedules containing specific commitments on Market Access, National Treatment and additional commitments.

10 So far the Protocol has been ratified by Argentina (Ley 25623, 17 July 2002, published by the OJ 8 August 2002, Instrument of Ratification deposited 8/10/02), Brazil (Decreto Legislativo 335/2003, 24 July 2003 and Decreto Legislativo 926/2005, 15 September 2005, Instrument of Ratification deposited 7/11/05) and Uruguay (Ley 17885, 20 December 2004, Instrument of Ratification deposited 2/08/05). According to Art. XXVII.1, the Protocol shall enter into force thirty days after the deposit with the Government of the Republic of Paraguay of the third instrument of ratification. When three countries deposit the ratification instruments before the Paraguayan Government, the Protocol will enter into force. This occurred on 7 December 2005.

11 So far, Argentina (Ley 25623) and Uruguay (Ley 17885) have incorporated their initial schedules of specific commitments, while Brazil has incorporated its schedule of commitments approved by the first round of negotiations (Decreto Legislativo 926/2005). State Parties have pledged their best efforts to observe those commitments included in the schedules of specific commitments not yet incorporated into their legal systems. See minutes GS meeting 01/99.

12 See WTO Document S/C/N/388, 18 December 2006.

13 See WTO Document WT/REG/M/48 containing the minutes of the CRTA meeting held on 29/12/07 which states that all the necessary data relating to the Protocol has been received and the factual presentations are currently being drafted or had been sent to the parties for comment.

14 EC Treaty, Arts. 49 to 55.
Finally, it is important to bear in mind that by the time the Protocol of Montevideo was signed, State Parties were already party to a number of agreements with third countries aimed at the promotion of trade, development of infrastructure and international co-operation in specific service sectors such as tourism, telecommunications, education and, above all, transport. Many of these agreements were concluded as Partial Scope Agreements under the LAIA umbrella between one or more parties to MERCOSUR and other LAIA Members. The Annexes on Land and Water Transport and on Air Transport Services contain provisions expressly stipulating that the entry into force of the Protocol shall not affect these agreements.

B. Purpose and Scope of Application

1. Purpose

According to Article I, the purpose of the Protocol is to promote free trade in services within MERCOSUR, which, if interpreted in isolation, suggests a parallelism between its purpose and that of the GATS. However, there are qualitative differences between them that must be clarified from the outset.

As mentioned, the GATS, like all the other WTO's multilateral trade agreements, is primarily concerned with the elimination of discriminatory treatment in international trade relations. It aims to promote the expansion of trade in services under conditions of transparency and progressive liberalisation, an objective qualified by the need not to undermine the right of Members to regulate in order to meet national policy objectives. As a “negative integration contract” the GATS does not require Members to forfeit their sovereignty on the formulation of economic policies simply because it does not seek to approximate them.

Like the GATS, the Protocol of Montevideo seeks to consolidate in a single instrument a set of general rules and principles with a view to promote free trade in services and to ensure the

15 See Annex IV to minutes AHGS meeting 04/96. This annex includes a list of bilateral and plurilateral agreements concluded separately between one or more parties to MERCOSUR and other countries. The list identifies nineteen PSAs on specific service sectors concluded under the LAIA umbrella, although many of them are co-operation agreements which do not confer market access or national treatment preferences.

16 See below Section E, Numeral 3.

increasing participation of less developed countries and regions in the services market.\textsuperscript{18} But that is where the similarity of purposes between the two ends. Placing the Protocol of Montevideo in its broader context helps to understand the particularities of its purpose as compared to those of GATS.

First, as a preferential trade agreement between four WTO members, the Protocol must comply with the GATS' conditions for economic integration, which essentially require from preferential trade agreements to have "substantial sectoral coverage" and to provide for the elimination of "substantially all discrimination".\textsuperscript{19}

Secondly, and more importantly, the Protocol constitutes an integral part of the Treaty of Asuncion\textsuperscript{20}, an agreement that seeks a degree of economic integration that goes beyond the elimination of discrimination on international trade relations, which certainly cannot be described as a "negative integration contract".\textsuperscript{21} The Protocol seeks the progressive liberalisation of trade in services as part of a broader process whose ultimate goal is the establishment of a common market.\textsuperscript{22} As a result, the use of provisions extracted from a "negative integration

\textsuperscript{18} Although the two instruments refer to the need to encourage the participation of less developed countries in trade in services, there are differences between the two in the way they formulate this objective. The GATS includes a specific provision (Art. VI) relating to the adoption of special measures aimed at facilitating the participation of developing countries in trade in services. During the drafting stage of the Protocol, Paraguay advocated, unsuccessfully, for the inclusion of a provision equivalent to Art. VI GATS. In the end, State Parties only agreed to include a reference to 'the need to ensure the increasing participation of less developed countries and regions in the services market' in the preamble of the Protocol, subject to reciprocity. Indeed, the latter part of the preamble's recital ("on the basis of reciprocal rights and obligations") water downs the impact that such reference could have on the development of an effective special and non-reciprocal treatment in favour of less developed countries and regions.

\textsuperscript{19} GATS, Art. V. For an assessment of the Protocol of Montevideo compliance with this provision see WALDEMAR HUMMER & ANDREA SCHMID, 'Liberalizacao do Comercio de Servicicos no MERCOSUL e na Comunidade Andina à luz do Artigo V GATS', in Waldemar Hummer (ed) MERCOSUR y UNION EUROPEA (Marcos Lerner Editora, Córdoba, Argentina 2008).

\textsuperscript{20} PM, Art. XXVII.1.

\textsuperscript{21} See Mavroidis, ob cit, p 11.

\textsuperscript{22} The Protocol's preamble first recital refers to the Treaty of Asuncion and the free movement of services. The second recital refers to the importance of liberalizing trade in services for "... expanding the customs union and for the gradual creation of the Common Market". Similarly, the Protocol's Programme of Liberalisation prescribes that State Parties must hold rounds of negotiations of specific commitments aimed at the progressive inclusion of sectors and sub sectors "until the completion of the Programme of Liberalisation within ten years from the entry
contract” in the context of a more ambitious integration agreement creates several inconsistencies which are analysed below.

2. Scope of Application

This section analyses the various provisions that define the boundaries of the Protocol of Montevideo’s scope of application. The broader the service sectors and types of measures subject to the agreement’s scope of application, the stronger its capacity to liberalise trade. By contrast, a priori exclusions of service sectors or narrow definitions of “measures” affecting trade in services constrain the agreements’ capacity to liberalise trade.

2.1 Services

Like the GATS, the Protocol of Montevideo stipulates that “services” include any service in any sector, except services supplied in the exercise of governmental authority but does not define the meaning of “services”. The lack of a legal definition for services may create interpretative difficulties in deciding whether or not a particular activity falls within the scope of application of the Protocol, in particular when it comes to classify services embodied in goods as a medium for their delivery, such as TV serials or films included in magnetic support devices for their distribution. Should they be subject to rules on trade in goods or to rules on trade in services? The increasing capacity to digitalise information powered by the information technology revolution will certainly keep lawyers busy in finding answers to that and similar cases in the near future.

into force of the Protocol, i.e. until the elimination of Market Access and National Treatment restrictions on all service sectors. See PM, Art. XIX.1.

23 GATS Art. II.3 (b). NAFTA does not provide a legal definition of services. The EC treaty, by contrast, does include a definition of services in Art. 50, albeit a residual one: “Services shall be considered to be ‘services’ within the meaning of this Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.” It then provides particular examples of services: “‘Services’ shall in particular include: (a) activities of an industrial character; (b) activities of a commercial character; (c) activities of craftsmen; (d) activities of the professions.”

24 In US-Gambling the defendant argued that gambling fell under the “sports” category of the Services Sectoral Classification List (a sector where it had undertaken no commitments) and not under the “Other recreational services (except sporting)” category (a sector where it had undertaken commitments). In order to make a decision, the Appellate Body looked at the context of the Treaty, examined its object and purpose and reviewed GATS Members’ subsequent practice in the application of the Treaty.
2.2 Services Provided in the Exercise of Governmental Authority

Like the GATS, the Protocol of Montevideo expressly excludes from its scope of application "services provided in the exercise of governmental authority"\textsuperscript{25}, meaning services that are supplied "...neither on a commercial basis nor in competition with one or more service suppliers"\textsuperscript{26}. It is not immediately clear whether such expression covers public services such as health, education, basic utilities or postal services. A careful interpretation is necessary because of the possible implications of such expression on Governments' autonomy to design, implement and enforce public policies in these politically sensitive sectors.

Analysing the GATS, Krajewsky contends that it is likely for the expression "services provided in the exercise of governmental authority" to be interpreted narrowly and, consequently, for most public services to fall within the GATS scope of application.\textsuperscript{27} In support of his statement, Krajewsky argues that for defining the meaning of "services provided in the exercise of governmental authority" the agreement relies on the economic basis and circumstances under which the service is supplied rather than on the characteristics of the supplier or the nature of the service itself.\textsuperscript{28} Therefore, the fact that the service supplier is a public authority or that there is a public interest at stake, is not sufficient to bring the service in question outside the scope of application of GATS disciplines. It is the circumstances in which the service is supplied that matters and such circumstances are extremely narrow, encompassing only very few type of services.\textsuperscript{29} In other words, the majority of services, even when provided by public authorities, are supplied on a commercial basis or in competition with one or more service suppliers, and thus fall under the scope of application of GATS disciplines.\textsuperscript{30}

\textsuperscript{25} Compare GATS, Arts. I.3 (b) with PM, Art. II.3 (b).
\textsuperscript{26} Compare GATS, art 1.3 (c) with PM Art. II.3 (c).
\textsuperscript{28} Ibid. p 353.
\textsuperscript{29} By contrast, Krajewsky points out that in the Annex on Financial Services "services supplied in the exercise of Governmental authority" are defined by reference to the supplier (central bank, monetary, or other public authority) and the nature of the service itself (social security) rather than the circumstances under which the service is supplied. See ibid p 355.
\textsuperscript{30} For instance, Krajewsky considers that public services supplied through public private partnerships include a profit-seeking element and therefore would fall under the scope of application of GATS disciplines. Similarly, it could be argued that public education also falls within the GATS scope of application since it is supplied "in
So far, no disputes have arisen between State Parties in relation to the interpretation of the meaning of services provided in the exercise of governmental authority. It is nonetheless a complex issue. A too protectionist interpretation may insulate poor performing public service suppliers from the fresh competition that implementation of the Protocol's disciplines bring along with, precisely when they are most needed. By contrast, a too liberal interpretation could unduly constrain domestic regulatory authorities' capacity to address market failures affecting sensitive sectors for the population such as basic public utilities like water distribution and sanitation.

2.3 Trade in Services

Like the GATS, the Protocol applies to measures adopted by the States Parties affecting "trade in services". For the purpose of the Protocol, trade in services means the supply of a service according to any of four possible modes of supply: cross-border supply, consumption abroad, commercial presence and presence of natural persons. The four modes of supply are essentially defined on the basis of the origin of the service supplier and consumer, and the degree and type of territorial presence which they have at the moment the service is delivered.

The GATS draftsmen knew that no effective liberalisation of international service transactions could be achieved if service providers were to be prevented from establishing themselves in foreign markets on a permanent basis, but, at the same time, they were constrained by the lack of consensus for the adoption of a multilateral agreement for the liberalisation of investments. As an alternative, they opted for a broad definition of trade in services, including the supply of services through the commercial presence of the foreign supplier in the territory of any other State Party as a modality of trade in services.

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31 Compare GATS art 1.2 with PM, Art. 11.2.
32 PM, Art. 11.2
33 See above Ch I, Section B.
34 GATS, Art. XVII.1 (c) defines "commercial presence" as "... any type of business or professional establishment inter alia through the constitution, acquisition or maintenance of a juridical person, as well as through branches and representative offices located within the territory of a State Party for the purpose of supplying a service".
The Protocol’s draftsmen, by contrast, did not face such limitation since State Parties had already agreed to establish a common market involving the free movement of goods, services and factors of production. Moreover, at the time the Protocol of Montevideo was adopted, MERCOSUR already had in place instruments for the promotion and protection of investments.\textsuperscript{35} Nonetheless, the Protocol’s draftsmen chose to incorporate the GATS’ unusually broad definition of trade in services into the Protocol. As a result, the MERCOSUR legal system includes overlapping regulations on investments stemming from different agreements, which undermine its clarity and consistency.\textsuperscript{36}

There is no doubt that rules for disciplining measures affecting the right of establishment are a necessary component of a legal framework aimed at ensuring the effective liberalisation of trade in services. However, the method chosen by the Protocol’s draftsmen to protect the right of establishment is questionable because of the inconsistencies it generates. It would have been more suitable to establish specific provisions for the protection of the right of establishment along with a set of different provisions for the protection of the freedom to supply services, similar to what is provided by other regional integration agreements.\textsuperscript{37}

2.4 Measures Affecting Trade in Services

As mentioned, barriers to trade in services, contrary to tariffs or quotas, are within-the-border measures, embedded in domestic regulations scattered all over the legal system, which do not necessarily pursue a protectionist purpose, are not always easy to identify and whose trade

\textsuperscript{36} See the Protocol of Colonia for the Reciprocal Promotion and Protection of Investments in MERCOSUR or the Protocol of Buenos Aires for the Promotion and Protection of Investments Originating from States Non-Parties of MERCOSUR.

\textsuperscript{37} For instance, the Protocol of Colonia allowed State Parties to maintain temporary exceptions to their national treatment obligations in specific sectors. Some of the sectors that State Parties chose to exclude from the disciplines of the investment protocol refer to service sectors such as Insurance (Argentina); Health Assistance, Sound Broadcasting Services, Telecommunication Services, Financial Services and Construction (Brazil); Telecommunications, Audiovisual Services, Postal Services (Paraguay); Electricity, Brokerage Services, Railway Transportation, Telecommunications, Broadcasting, Press and Audiovisual Media (Uruguay). By contrast, these service sectors are included in State Parties’ schedules of specific commitments, which form an integral part of the Protocol of Montevideo.

\textsuperscript{37} See the EC Treaty, which contains, on the one hand, a set of standards for the protection of the right of establishment (Arts. 43 – 48) and, on the other hand, a set of standards for the protection of the freedom to provide services (Arts. 49 – 55). Similarly, NAFTA also contains specific disciplines for cross-border trade in services distinct from those for investment.
restrictive effect is difficult to measure.\textsuperscript{38} Therefore, to provide an effective protection of the freedom to provide services, international rules and disciplines should address the widest possible spectrum of measures directly or indirectly affecting trade in services. That is precisely what the Protocol does: it provides a broad definition of "measures" and establishes a loose relationship between such measures and trade in services.

First, the Protocol defines "measures" broadly, including "any measure adopted by a State Party, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form".\textsuperscript{39} Measures adopted by State Parties may fall within the Protocol’s scope of application, regardless of their hierarchy (e.g. constitutional provisions, statutes, administrative decisions, etc.), their effects (e.g. a statute having general effects or an administrative decision affecting an individual company) or their nature (e.g. substantive rules or procedural rules).\textsuperscript{40} The Protocol clearly states that not only measures affecting the sales transaction itself fall under its scope of application, but also measures affecting:

(i) "the supply of a service";  
(ii) the purchase, payment or use of a service;  
(iii) access to services which the States Parties prescribe shall be offered to the public in general and use thereof for the purpose of supplying a service;  
(iv) the presence of persons from a State Party in the territory of another State Party in order to supply a service, including commercial presence.\textsuperscript{42}

Secondly, the Protocol specifies that the regulatory authorities bound by the treaty include not only Central authorities but also, state, provincial, departmental or local authorities and non-

\textsuperscript{38} See above Ch I, Section C.  
\textsuperscript{39} PM, Art. XVIII (a).  
\textsuperscript{40} In Argentina - Blocked Highways, para. 116, 123 and 175 the Ad-hoc tribunal considered that the failure of the Argentinian Government to adopt measures to prevent or discipline the block of international motorways by environmental activists is incompatible with its international obligations to ensure the free circulation of goods and services stemming from the Treaty of Asuncion and the Protocol of Montevideo. Thus, "measures" includes both positive actions and omissions to adopt prescribed conduct. The award also made it clear that there are circumstances where a State Party can violate its commitments under MERCOSUR law, not just as a result of its own actions but also as a result of private parties' conduct.  
\textsuperscript{41} PM, Art. XVIII (b) specifies that the supply of a service includes the production, distribution, marketing, sale and delivery of a service.  
\textsuperscript{42} Ibid. Art. II.1.
governmental bodies in the exercise of delegated powers. The inclusion of non-governmental bodies exercising delegated regulatory powers as subjects bound by the Protocol’s disciplines is quite relevant in light of the growing number of independent regulatory agencies as a result of reforms inspired by a “regulatory state” model and because in many service sectors it is common for the government to delegate regulatory power to the industry itself, e.g. for the regulation of the Professions or the conduct of business of financial intermediaries.

Thirdly, the Protocol prescribes that to fall within its scope of application, it is sufficient for the measure to “affect” trade in services. The cause and effect relationship is not qualified by any specific standard, which means that provided a connection between the measure and trade in services is established, the measure will fall within the Protocol’s scope of application, regardless of the scale of its impact on trade flows.

The breadth of the definition enables the Protocol to cast its net over a wide range of “measures” that may affect trade in services. However, as it is shown below, it is important to bear in mind that the scope of application of some of the Protocol’s disciplines is narrower than the scope of application of the Protocol itself. Most notably, State Parties are bound to observe the National Treatment and Market Access standards of treatment only in those service sectors where they have undertaken specific commitments and subject to the terms and limitations specified in their schedules of commitments.

2.5 Subjects Benefitting by the Protocol’s Rules and Disciplines

As in any preferential trade agreement, each State Party is bound to accord the standards of treatment prescribed by the Protocol only to service suppliers from the State Parties to the

43 Ibid. Art. II.3. In Argentina - Blocked Highways para. 156, the ad hoc tribunal rejected the Argentinian argument that put forward issues relating to the division of competence between federal and provincial authorities to justify its inaction with respect to the demonstrations that blocked international motorways. In this vein, the Tribunal clearly stated that any action or omission of a governmental body is attributable to the State, no matter the administrative rank of that body and regardless of the division of competences between governmental bodies within such State.

44 See in Uruguay, e.g., the recent creation of an independent regulator for the Telecommunication Sector by Law 17296 on 21 February 2001 and an independent regulator for the energy and water sectors by Law 17.598 on 13 December 2002.

45 In the GATS context see EC—Bananas, para. 220. The Appellate Body held that the term “affecting” implies a loose degree of connection between the measure and the supply of a service, including measures which are not aimed at regulating or governing the supply of a service but nonetheless “have an effect on” it.
Agreement. Conversely, State Parties may refuse to accord such preferential treatment to service suppliers coming from third countries. For that purpose, the Protocol includes rules that identify who are the service suppliers entitled to the preferential treatment provided by the Protocol, which are an equivalent to the rules of origin on trade in goods.

According to Article XVII, each State Party is entitled to deny the benefits of the Protocol to service suppliers in another State Party if it demonstrates that the service is supplied by “a person from a country that is not a MERCOSUR State Party”. Contrary to GATS, the Protocol subjects the denial of benefits to notification and the holding of consultations.46

Articles XVIII (i), (j) and (k) define “natural” and “legal persons”. According to Article XVIII (i), “natural persons” are those who reside in the territory of any State Party and who, under the law of that State Party, are nationals of that other State Party or have the right of permanent residence in that State Party. According to Articles XVIII (j) and (k), “legal persons” are those who are constituted or organised in accordance with the law of any of the State Parties, which have their seat there, and are engaged in or plan to engage in substantive business operations in the territory of that State Party or any other State Party. Contrary to GATS, the Protocol does not require ownership or control conditions as an additional criterion for determining the origin of a legal person.47 In other words, the Protocol’s rules of origin are more flexible than those of GATS, covering any company which has invested within the territory of State Parties, no matter who are they owned by, as long as they are registered there and have a real economic presence. This broad approach contributes to minimise the potential trade diverting impact the Protocol may have on trade in services with third countries.48

In summary, the scope of application of the Protocol of Montevideo is defined broadly. By casting its net over a wide range of measures affecting trade in services, it appears that the Protocol is well suited for removing trade barriers and promoting free trade in services. However, the scope of application of its two main disciplines – the National Treatment and

46 See PM, Art. XVII in light of GATS, Art. XXVII.

47 The GATS stipulates that for a legal person to be entitled to the preferential treatment prescribed by the agreement, it not only needs to satisfy the constitution and real seat requirements. It must also be “owned” or “controlled” by persons from a GATS Member. In this vein, a legal person is “owned” by persons of a Member if more than fifty per cent of the equity interest in it is beneficially owned by persons of that Member. A legal person is “controlled” by persons of a Member if such persons have the power to name a majority of its directors or otherwise to legally direct its actions. See GATS, Art. XXVIII(n).

48 See SHERRY STEPHENSON, Can Regional Liberalization of Services go further than the Multilateral Liberalization under the GATS? (OAS, Washington, D.C. 2002), p 11.
the Market Access standards - is limited to those service sectors where State Parties have undertaken specific commitments. As a result, the capacity of the Protocol to liberalise trade in services will largely depend on the successful completion of the rounds of negotiations, which determine the scope of application of the Protocol’s main obligations.

C. Obligations and General Disciplines

General obligations and disciplines further the liberalisation of trade in services by compelling State Parties to accord foreign services and service providers minimum standards of treatment and to regulate in a more ‘trade friendly’ way, fostering more open, transparent and non-discriminatory domestic laws. As such, they provide adjudicative bodies with a legal basis to review whether domestic measures are in conformity with the treaty or not.49

1. Most Favoured Nation Treatment

The Most Favoured Nation standard (“MFN”) is a principle of non-discrimination. Contrary to what its name suggests, its purpose is not to accord a more favourable treatment to a specific nation over the others. On the contrary, its purpose is to maintain equality of treatment by ensuring that each State will be treated at all times as favourably as the State which is most favoured.

Under Article III of the Protocol, State Parties must extend immediately and unconditionally to services or service suppliers of all other State Parties “treatment no less favourable than that accorded to like services and service suppliers of any other country”. In other words, a State Party cannot accord preferential treatment to services or service suppliers from certain State Parties but refrain from according such treatment to services or service suppliers from other State Parties. It can neither make the provision of preferential treatment subject to reciprocity provisions whereby preferential treatment to foreign service suppliers is granted only if the trading partner grants similar treatment to domestic service suppliers.50 Contrary to GATS51, the Protocol does not allow derogations to the MFN standard.

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49 As already stated, by specifying the normative content and scope of application of the treaty’s general obligations and disciplines, adjudicative bodies can play a strategic role in defining the scope and pace of the liberalisation process. See Ch I, Section D, Numerals 1.1 and 2.1 for evidence about the strategic role played by adjudicative bodies in the GATS and EC context.

50 PM, Art. III.
The MFN standard is one of the cornerstones of the multilateral trading system. Arguably, the very existence of a multilateral trading system depends on its capacity to ensure the observance of the MFN standard, precluding the emergence of discriminatory practices that could break the system into pieces. For a sub-regional agreement aimed at the establishment of a common market though, the obligation not to discriminate prescribed by the MFN standard is just one element of a complex web of negative and positive obligations. For instance, State Parties to the Treaty of Asuncion agreed not just to eliminate discrimination between each but to adopt a common trade policy in relation to third States and to co-ordinate sectoral policies in specific service sectors such as Transport and Communications.

At the time the Protocol of Montevideo was adopted, State Parties were already part of various bilateral and plurilateral agreements on transport and communications, many of which are still in force. Even after the Protocol was signed, some State Parties continue to adopt measures which arguably are not in conformity with the MFN standard. Therefore, it seems that the MFN standard still has an important role to play in compelling State Parties to refrain from according preferential treatment to certain services or service suppliers and to negotiate the convergence of those bilateral and plurilateral agreements including preferential treatment for services or service suppliers.

2. Market Access and National Treatment

The Protocol does not define Market Access, but circumscribes it by reference to a list of six types of measures that State Parties may neither maintain nor adopt (in those service sectors where specific Market Access commitments have been made): a) measures restricting the number of service suppliers; b) measures restricting the total value of services transactions; c) measures restricting the total number of service operations or the total quantity of service output; d) measures restricting the total number of natural persons that may be employed in a particular service sector or by a service supplier; e) measures regarding the specific type of

51 Under GATS, Art. II.2, Members are allowed to maintain measures inconsistent with the MFN standard, which were in force at the time the agreement entered into force. Such measures should, in principle, not last longer than ten years after the entry into force of the Agreement.
52 See above footnote n 15.
53 See, for instance, the Free Trade Agreement between Uruguay and Mexico, signed in 2004 including a chapter on preferential treatment in services. Uruguay obtained a waiver from the other State Parties to sign this agreement. See also various bilateral agreements between Argentina and Brazil on residency and circulation of persons and on digital television.
legal person or joint venture through which a service supplier may supply a service and f) measures that limit the participation of foreign capital. The adoption of these measures is not absolutely prohibited. Even in those service sectors where specific commitments have been undertaken, a State Party wishing to adopt any of the measures listed by Article VII.2 may do so by recording the inconsistent measure in its schedule of specific commitments.

The national treatment standard ("NT") compels State Parties to accord to services and service suppliers of any other State Party treatment no less favourable than that accorded to its own 'like' services and service suppliers in respect of all measures affecting the supply of services. The provision is clear in stating that what matters is not just what the measures says, but whether or not the measure impairs the conditions of competition in favour of domestic incumbents. Conditions of competition may be impaired not only by measures that accord to domestic suppliers a treatment more favourable than that accorded to foreign suppliers (i.e. de iure discrimination), but also by measures that despite formally according an identical treatment to both domestic and foreign suppliers, in practice, they discriminate against the latter because they face greater difficulties to comply with them (i.e. de facto discrimination).

Together with the MFN standard, the NT standard reinforces the principle of non-discrimination on trade relations with a view to prohibiting any kind of discrimination against services or service suppliers on grounds of nationality or ownership. While the MFN standard prohibits discrimination as between services or service providers from different exporting countries, the NT standard prohibits discrimination as between domestic services or service providers and like foreign service or service provider.

While the Market Access standard relates to market entry conditions, NT refers to standards of treatment relevant after market entry. The purpose of the NT standard is to promote non-discriminatory conditions of competition among services and service suppliers, irrespective of nationality or ownership. The NT standard cuts deeper into State Parties' policy autonomy, disciplining its fiscal, transportation and cultural policies, to name just a few. However, its liberalisation capacity is diminished by the fact that, like the Market Access standard, its scope of application is constrained to those service sectors included in each State Party's

54 PM, Art. IV.2.
55 Ibid. Art. VII.2(b).
56 PM, Art. V.1.
57 PM, Arts. V.3 and V.4.
58 Appellate Body Report, Canada-Autos, para. 10.307 and 10.308.
schedule of specific commitments and subject to the terms, limitations and conditions set out therein. 59

The Protocol, following the GATS model, does not impose an across-the board obligation to accord Market Access and National Treatment to service suppliers from other State Parties. State Parties are bound to observe these standards of treatment only in those service sectors included in their schedules of specific commitments. This positive list approach enables State Parties to choose the service sectors they want to include in their schedules and to specify the terms, limitations and conditions to their specific Market Access and National Treatment commitments. At the same time, the Protocol compels State Parties to hold annual rounds of negotiations aimed at the gradual inclusion of sectors, sub sectors, activities and modes of supply of services in the schedules of specific commitments until the completion of the Programme of Liberalisation of Trade in Services in MERCOSUR within a maximum period of ten years from the entry into force of the Protocol. 60

3. Transparency

Transparency standards can make a significant contribution towards the liberalisation of trade in services. A more transparent rule-making process provides State Parties 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 their decisions and, ultimately, it encourages better regulation and greater compliance. Transparency also facilitates foreign service providers' access to updated information about domestic regulations currently in force that affect trade in services. 61

The Protocol compels State Parties to observe the following transparency disciplines: a) to publish promptly national measures and international agreements that pertain to or affect trade in services; b) to keep the MERCOSUR Trade Commission ("MTC") updated on regulatory changes that may affect significantly trade in services 62; c) to respond promptly to requests by

60 PM, Art. XIX.1.


62 See also Res 24/94 forcing State Parties to disclose draft rules aimed at regulating new technologies to their counterparts and Dec 11/01, Art. 1 forcing State Parties willing to regulate on sectors not yet regulated to
any other State Party on any of its measures that may affect trade in services. The Protocol also enables State Parties to notify the MTC of any measure taken by any other State Party, which allegedly affects the operation of the Protocol. State Parties are entitled not to comply with the transparency disciplines in those circumstances where the disclosure of information ‘would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of public or private enterprises’.

4. Domestic Regulation

As mentioned, barriers to trade in services are more complex and less obvious than barriers to trade in goods. Every legal system includes a wide range of domestic regulations that may affect trade in services, which do not necessarily pursue an explicit protectionist purpose, most notably, but not limited to, licensing requirements and qualification standards. Trade in services may also be affected not only by the regulations themselves, but also by the way they are implemented and enforced. The Protocol includes a sophisticated provision on Domestic Regulation aimed at minimising the impact of domestic rules and domestic regulatory practices on trade in services. The provision includes both substantive and procedural requirements, each one of which deserves separate examination.

Requirements for the Administrations of Measures of General Application

Article X.1 prescribes that State Parties must ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner. Contrary to GATS, the Protocol does not limit the scope of application of this requirement to sectors where specific commitments have been undertaken. This requirement is particularly relevant for the liberalisation of trade in services, which is frequently obstructed not only by discriminatory rules per se but also by the discriminatory application of non-discriminatory rules such as discriminatory delays in dealing with governmental approvals, licenses and clearances; discriminatory access to data collected by the government and discriminatory

exonerate their counterparts from the Market Access or National Treatment restrictions that the new regulation may include.

63 PM, Art. VII.
64 Ibid. Art. VII.
65 Ibid. Art. IX.
66 Ibid. Art. X.
enforcement of regulations against foreign service providers can result in a major obstacle to trade in services.\(^{68}\) 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'.\(^{69}\)

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

Service markets tend to be heavily regulated and in some sectors service industries operate under the close supervision of administrative agencies, which are usually endowed with extensive powers to control their business and the market in which they operate.\(^{70}\) In order to minimise the risk of a discriminatory exercise of administrative powers, the Protocol requires State Parties to observe minimum procedural standards for the adoption of administrative decisions affecting trade in services, which ultimately should encourage more sound and even-handed administrative practices.

Article X.2 prescribes that State Parties 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".

*Specific Requirements for the adoption of Technical Standards, Qualification and Licensing Requirements*

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\(^{68}\) See below, Ch V, footnote n55 about the contradictions incurred by different Brazilian consulates in Argentina about the interpretation of the Agreement for the Simplification of Business Activities.


\(^{70}\) In the financial sector, for instance, firms must obtain a licence prior to operate and the regulator is entitled to suspend or withdraw the licence on prudential grounds, it may also conduct investigations into the financial health of the undertaking and request the adoption of contingency measures. Similarly, utilities regulators may fix administrative prices for tariffs, impose fines for anticompetitive behaviour or request the service provider to ensure the universal access to the service it provides.
In many sectors, service suppliers must first obtain a licence or satisfy technical or qualification requirements before being allowed to operate. Technical standards, qualifications and licensing requirements can be used as effective entry barriers to preclude foreign suppliers from competing in a particular market. In order to prevent their protectionist use, the Protocol prescribes an open list of standards that they must meet, 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."

These standards are far more demanding than the non-discriminatory standards of treatment seen above (MFN, NT, Market Access). To meet these standards it is not only necessary to avoid discrimination, but also to regulate in the least trade restrictive way. For instance, the necessity test allows for the review of the appropriateness of the regulatory means employed to secure the quality of a service in the light of their trade restrictive costs. This opens the door to go beyond a discriminatory test and to strike down measures that, despite being indistinctly applicable in character, may nonetheless create more trade restrictions than necessary to attain their regulatory goals.

Again, as opposed to GATS, the Protocol does not limit the scope of application of these standards to sectors where specific commitments have been undertaken, which constitutes a relevant "GATS plus" step, placing the Protocol ahead a strictly non-discrimination agreement, at least in relation to technical standards, qualifications and licensing requirements.

Strangely enough, Article X.5 provides that each State Party may provide for adequate procedures to verify the competence of professionals of any other State Party. The effective liberalisation of Professional Services is inextricably linked to the harmonisation or mutual recognition of professional qualifications. Therefore, it should be an obligation for State

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71 PM, Art. X.4.

72 The relationship between, on the one hand, the specific requirements for technical standards, qualification and licensing requirements and, on the other hand, State Parties' specific sector commitments was widely discussed during the drafting stage. Paraguay was one of the State Parties most reluctant to accept the universal application of these regulatory standards. See minutes AHGS meetings held during 1996 and 1997.
Parties to establish adequate procedures to verify the competence of professionals of any other State Party, rather than just an option.  

5. Recognition

There is an unavoidable tension underlying the recognition of qualifications, experience or licenses obtained by service suppliers abroad. On the one hand, State Parties want to set their own standards for the recognition of qualifications, experience or licenses obtained outside their territory. On the other hand, the proliferation of mutual recognition agreements containing different standards can create significant obstacles to trade in services. Article XI of the Protocol seeks to manage this tension in two ways: first by qualifying the exercise of State Parties' right to recognize foreign qualifications, experience and licenses and secondly, by encouraging the development of mutually acceptable standards.

Article XI.1 allows State Parties to recognize unilaterally or through an agreement the education, licenses, registration or certifications obtained by a service provider in the territory of any other State Party or in a third State, without compelling them to extend that recognition to other State Parties. At the same time, to avoid mutual recognition practices from constituting a means of discrimination against service suppliers with non-recognised education and experience, the provision prescribes that each State Party must give any other State Party the opportunity to demonstrate that the education and experience obtained in their territory could be recognized on the same footing as others.

Article XI.2 compels State Parties to encourage the competent authorities in their respective territories to work together with a view to developing mutually acceptable standards and criteria for the practice of relevant services and professions and to make recommendations on mutual recognition to the CMG.

Article XI.3 suggests areas where mutually acceptable standards and criteria may be developed including, inter alia, education, examinations, experience, conducts and ethics, professional development and renewed certification, protection of consumers, nationality,

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73 GATS, Art. VI.6 prescribes that each Member shall provide for adequate procedures to verify the competence of professionals of any other Member.

74 Mutual Recognition Agreements facilitate trade-in services among the parties to the agreement, but works to the disadvantage of service providers from third countries, for whom it becomes more difficult to access the service market of the parties to the agreement.

75 PM, Art. XI.1 is based on NAFTA, Art. 1210.2.
Finally, Article XI.4 imposes on the CMG the obligation to consider the recommendations made by the competent authorities and analyse their consistency with the Protocol within a reasonable period of time, and, if suitable, adopt them as binding disciplines for State Parties.

6. Defence of Competition, Government Procurement and Subsidies

The Protocol of Montevideo does not include specific disciplines for trade in services on the defence of competition, government procurement and subsidies, but refers to MERCOSUR general disciplines in those areas. At the time the Protocol was adopted, the MERCOSUR legal system already included a Protocol on the Defence of Competition, but there were no common disciplines on Government Procurement or Subsidies.

The first MERCOSUR instrument on Government Procurement was adopted in 2003 and subsequently replaced by the current instrument in 2004. The Protocol of Montevideo excludes the application of the MFN, NT and Market Access standards to the laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes. However, the scope of application of the Protocol on Government Procurement covers the procurement of goods and services and expressly refers to the observance of the disciplines established by the Protocol of Montevideo. The rules and

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76 So far, there are negotiations under way for the mutual recognition of professional standards (See above Ch V. Section C Numeral 1.2 ). In addition, various instruments have already been adopted on the mutual recognition of certificates, diplomas, and studies at primary, secondary, and university levels (See e.g. Protocol on Educational Integration and Recognition of Primary and Secondary Level Certificates and Studies of a Non Technical Character, approved by Dec 4/94; Protocol on Educational Integration, and Recognition of Diplomas, Certificates, and Studies on Technical Education, approved by Dec 7/95; Protocol on Educational Integration on the Recognition of University Degrees for the Purpose of Undertaking Postgraduate Studies in MERCOSUR Universities, approved by Dec 8/96.)

77 PM, Arts. XII, XV and XVI.

78 See Protocol of Fortaleza for the Defence of Competition in MERCOSUR “approved” by Dec 18/96 of Dec. 16, 1996. This protocol entered into force on 8 Sep 2000, thirty days after the deposit of the second instrument of ratification with the Government of Paraguay. It has been ratified by Brazil, Decreto Legislativo No 6, 15 Feb 2000 and by Paraguay Ley No 1143, 15 Oct 1997.


80 PM, Art. XV.1.

81 Protocol on Government Procurement, Art. 2.5.
disciplines included in the Protocol on Government Procurement apply only to those service sectors mentioned by State Parties’ lists included in Annex III to the Protocol. The application of these rules and disciplines is also subject to the limitations on Market Access and NT included in State Parties’ schedules of specific commitments annexed to the Protocol of Montevideo.  

In 2002 MERCOSUR adopted the WTO Agreement on Subsidies and Countervailing Measures relating to trade in goods, but so far no specific disciplines on subsidies relating to trade in services have been adopted. Like in the GATS, a State Party which considers that it is adversely affected by a subsidy of another State Party may request consultations with that State Party, who must accord sympathetic consideration to the consultation.

7. Exceptions to Obligations and General Rules

The Protocol of Montevideo recognises the existence of overriding considerations that may justify conduct contrary to its provisions. The grounds for invoking a general exception can be one or more of the following: a) those ‘necessary to protect public morals or to maintain public order; b) those ‘necessary to protect human, animal or plant life or health”; c) those ‘necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Protocol’; d) those ‘inconsistent with national treatment standard, provided that the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of the other State Parties; and e) those ‘inconsistent with MFN standard, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the State Party applying the measure is bound.” The word ‘necessary’, which qualifies the first three grounds for exceptions, rightly limits their use to those situations where there is no other less trade-restrictive alternative but to adopt the non-conforming measure to protect the non-trade interests at stake.

To prevent abuses, the chapeau of Article XIII sets the standards that State Parties must observe when applying the exceptional measures, namely, that the measures must not be applied “in a manner which would constitute a means of arbitrary or unjustifiable discrimination where like

82 Ibid.
83 See Dec 14/02 of July 5, 2002 which adopts the WTO Agreement on Subsidies and Countervailing Measures as part of the MERCOSUR legal system.
84 PM, Art. XVI.2.
85 Ibid. Art. XIII.
provisions prevail between countries”, or a “disguised restriction on trade in services”. Thus, measures inconsistent with the Protocol’s obligations and general disciplines must satisfy a two-tier test. First, a provisional justification by reason of characterisation of the measure under one or another of the particular exceptions, and secondly, a justification that the manner in which the measure is applied satisfies the requirements of the chapeau.

The security exceptions provide an escape valve to treaty obligations when complying with them goes against State Parties’ security interests or State Parties’ obligations under the United Nations Charter. Contrary to Article XIII, the chapeau of Article XIV does not set any standard to be observed by State Parties invoking the exceptions contained in it. In this sense, it is easier for State Parties to justify an exception on security grounds than, say, on public morals or environmental grounds. By contrast, the Security Exceptions’ provision places on State Parties invoking them, the duty to inform the MERCOSUR Trade Commission of the measures adopted and of their termination. This duty is not required from State Parties adopting non-conforming measures justified on general exception grounds.

The Protocol of Montevideo is an integral part of the Treaty of Asuncion. In its turn, the Treaty of Asuncion is part of a broader regional integration framework established by the Treaty of Montevideo, which has its own provision on exceptions. There is no doubt that State Parties to

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86 Comparative integration experiences indicate that the risk of using lawful exceptions for unlawful purposes is high. Both EU case law and WTO case law are fraught with cases where defendant States adopted trade restrictive measures based on lawful exceptions but applied them in a discriminatory way against foreign products or services or as a disguised restriction on trade between Member States.

87 In the GATS’ context see Appellate Body Report, US-Gambling; in the GATT’s context see, e.g., Appellate Body Report, US-Shrimp.

88 PM, Art. XIV.

89 ToM, Art. 50 reads as follows:

“No provision under the present Treaty shall be interpreted as precluding the adoption and observance of measures regarding:

a. Protection of public morality;
b. Implementation of security laws and regulations;
c. Regulation of imports and exports of arms, munitions, and other war materials and, under exceptional circumstances, all other military equipment;
d. Protection of human, animal and plant life and health;
e. Imports and exports of gold and silver in bullion form;
f. Protection of national treasures of artistic, historical or archeological value; and
g. Exportation, use and consumption of nuclear materials, radioactive products or any other material used for the development and exploitation of nuclear energy.”

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the Treaty of Asuncion may rely on Article 50 of the Treaty of Montevideo to justify measures incompatible with the obligations on the free movement of goods stemming from the Treaty of Asuncion. No ruling has yet confirmed whether State Parties could also rely on the same provision to justify non-conforming measures with the obligations prescribed by the Protocol of Montevideo. In any case, the question has relevant legal consequences, first, because Article 50 of the Treaty of Montevideo includes some grounds for exceptions such as the 'protection of national treasures of artistic, historical or archaeological value', which are not included in the Protocol. Secondly, because the chapeau of Article 50, unlike Article XIII of the Protocol, does not include any standard to be observed when invoking the exceptions it prescribes, suggesting a more liberal approach for State Parties' use of such exceptions.

By contrast to GATS, the Protocol makes no reference to restrictions to safeguard the Balance of Payments or to emergency safeguard measures. During the drafting stage of the Protocol, State Parties discussed the possibility to include these two exceptional mechanisms finally decided not to do it. In relation to the Balance of Payments exception, it was argued that State Parties had not agreed such a mechanism for trade in goods and there was no reason to adopt a different view for trade in services. In relation to safeguards, it was argued that the Protocol already included a mechanism allowing State Parties to modify or suspend their specific commitments and opted for relying on that mechanism alone to deal with unexpected surges on the import of services that could pose threats to domestic service industries.

D. Institutional Provisions

As mentioned, the Protocol of Montevideo is not a stand alone agreement but an integral part of the Treaty of Asuncion. Accordingly, it does not stipulate a particular set of institutions for the implementation and enforcement of its obligations and general disciplines, but relies on the existing MERCOSUR institutional framework. The following section examines the role

90 See ToA, Annex 1, art 2 (b) and AHAA Brazil – Phytosanitary Products para. 9.6.
91 PM, Art. XX. The convenience of adopting this provision was also discussed at length. Argentina, for instance, argued against its adoption. See minutes GS meeting 03/96.
92 During the drafting stage, State Parties discussed the possibility to create a new body with the exclusive responsibility for assisting with the implementation of the Protocol and the possibility to establish a specific procedure for consultations on service relating issues, but they finally decided to entrust the functions relating to the implementation and enforcement of the Protocol’s obligations and general disciplines to existing MERCOSUR institutions.
of MERCOSUR institutions in relation to the implementation and enforcement of the obligations and general disciplines prescribed by the Protocol of Montevideo.93

1. Common Market Council and Common Market Group

The Protocol assigns the CMC and the CMG different tasks relating to the implementation of its Programme of Liberalisation for advancing the liberalisation of trade in services through the negotiation of specific commitments on Market Access and National Treatment.94 The CMG is responsible for calling and supervising the rounds of negotiations of specific commitments, a task now delegated to the Group on Services95, while the CMC is responsible for approving the results of the negotiations as well as any modification or suspension thereof.96 The CMG is also responsible for receiving notifications and the results of the consultations on the modification and/or suspension of specific commitments97, examining proposals on mutual recognition of standards and criteria for the practice of relevant activities and professions in the service sector, developed by governmental bodies and/or associations and professional entities98 and for evaluating, on a periodical basis, the development of trade in services in MERCOSUR99.

2. MERCOSUR Trade Commission

The MTC bears the overall responsibility for overseeing the implementation of the Protocol.100 For this purpose, the Protocol assigns the MTC a variety of tasks: “a) to receive information provided, at least annually, by State Parties relating to the modification or adoption of new laws, regulations or administrative guidelines, which significantly affect trade in services;101 b) to hear allegations formulated by any State Party relating to measures

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93 See Ch II for a detailed analysis of MERCOSUR institutions.
94 See Ch IV for a detailed analysis of the Programme of Liberalisation of Trade in Services.
95 PM, Art. XXII.1(a) and Res. GMC N.º 31/98.
96 Ibid. Art. XXI.
97 Ibid. Art. XXII (b).
98 Ibid. Art. XXII (c).
99 Ibid. Art. XXII (d).
100 During the drafting stage, State Parties discussed the possibility to create a new body with the exclusive responsibility for assisting with the implementation of the Protocol, but in the end they decided to assign this task to the MTC.
101 PM, Arts. XXIII a) and VII.1.
taken by another State Party, which allegedly affects the operation of the Protocol;\(^{102}\) c) to receive information about measures adopted by State Parties under Article XIV for the protection of essential security interests;\(^{103}\) d) to receive information from the States Parties on actions that might constitute abuse of a dominant position, or a practice distorting competition, and to bring it to the attention of the national bodies responsible for implementing the Competition Protocol;\(^{104}\) e) to hear questions and claims transmitted by States Parties relating to the implementation or interpretation of, or non-compliance with, this Protocol or the commitments undertaken in the Schedules of Specific Commitments, applying the mechanisms and procedures in force within the MERCOSUR;\(^{105}\) and f) to perform other services-related tasks that the CMG may assign.\(^{106}\)

So far, no procedures have been established for State Parties to inform the MTC, at least annually, about the modification or introduction of new regulations affecting trade in services or to inform the MTC about measures adopted under Article XIV. It is unlikely that these procedures will be set up in the near future and no high expectations should be placed on the MTC’s role as the overall guardian of the Protocol. The MTC meets on average once a month, has no resources and is already overloaded by its responsibilities relating to assisting the CMG with the supervision of the application of the common trade policy. However, as is explained below, State Parties already began to use the MTC as a forum to request consultations from other State Parties relating to measures allegedly breaching the obligations stemming from the Protocol.

3. Dispute Settlement

The settlement of disputes that may arise between State Parties relating to the application, interpretation or non-fulfilment of the commitments established by the Protocol of Montevideo is entrusted to the procedures and mechanisms for dispute settlement provided by the MERCOSUR legal system, most notably, the arbitral procedure prescribed by the Protocol of Olivos.\(^{107}\) In addition, State Parties may present claims before the MTC relating to the implementation or interpretation of, or non-compliance with the Protocol or the commitments

\(^{102}\) Ibid. Arts. XXIII a) and VII.5.
\(^{103}\) Ibid. Art. XXIII.b).
\(^{104}\) Ibid. Art. XXIII.c).
\(^{105}\) Ibid. Art. XXIII.d).
\(^{106}\) Ibid. Art. XXIII.e).
\(^{107}\) Ibid. Art. XXV.
undertaken in the schedules of specific commitments and domestic courts may request Consultative Opinions from the Permanent Review Tribunal relating to the interpretation of the Protocol of Montevideo and the schedules of specific commitments that form part of it.

The effectiveness of the dispute settlement system is limited by various factors including, amongst others, the lack of standing for private persons, the lack of effective remedies to redress the consequences derived from the violation of MERCOSUR law and State Parties' marked preference for diplomatic means over arbitral proceedings to settle disputes. Notwithstanding these limitations, the capacity of the dispute settlement system to force State Parties to comply with their obligations stemming from the Protocol's general obligations and disciplines and with their schedules of specific commitments should not be underestimated.

In terms of claims brought before the MTC, Argentina requested consultations from Brazil in relation to domestic legislation that allegedly breaches Brazil's specific commitments on Advertising Services. Indeed, law 10.454, 13/05/02 creates a tax on advertisements which imposes differential rates according to the origin of the advertisement. Argentina alleged this is in breach of Brazil's unrestricted Market Access and National treatment commitments on the cross-border supply of Advertising Services. Brazil replied that the measure was adopted to promote the development of the national cinematographic industry and that it is currently reviewing the compatibility of this measure with its commitments under the Protocol. So far, further actions followed suit.

In terms of the arbitral procedure, in Argentina - Blocked Highways the ad hoc tribunal confirmed the binding effect of the Protocol of Montevideo on State Parties. The award holds, amongst other things, that the free movement of services, particularly Transport and Tourism, were affected by the persistent and continuous blocking of motorways that link Uruguay and Argentina caused by environmental activists on the Argentinian bank of the River Uruguay. Furthermore, the award prescribes that the failure of Argentinian authorities to adopt the necessary measures to prevent or at least to put an end to those blockings of

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108 Ibid. Art. XXIII. d).  
110 See Consulta No 01/07 presented at the MTC meeting 03/07, 9/05/07.  
111 See AHAA Argentina - Blocked Highways, para. 105. For a very similar case in the EC context see Case C-112/00, Schmidberger Internationale Transporte und Planzüge v Austria, [2003] ECR I-5659 and, more recently, C-341/05, Leval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, [2007] ECR I.  
112 AHAA Argentina - Blocked Highways, para. 111-114.
motorways is not compatible with State Parties' commitment to secure the free movement of goods and services across their territories.113

The award rejects the Argentinian argument that the Protocol of Montevideo only compels State Parties not to adopt governmental measures that affect the free movement of services. Instead, it holds that the authorities of a State Party 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 State Parties, which also involves the obligation to adopt the necessary means to secure such commitment.114 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 that custom duties, charges of equivalent effect and other restrictions on regional products are absolutely prohibited.115

The evidence stemming from the arbitration awards suggests that when a dispute reaches the arbitration stage, the competent ad hoc tribunal looks at the claim carefully and examines the compatibility of the challenged measure with the MERCOSUR legal system in light of a broad understanding of State Parties' free trade commitments, whether expressed or implied by the law applicable to the dispute.116 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 State Parties' measures and practices incompatible with MERCOSUR law, end up being challenged before a MERCOSUR ad hoc tribunal.117

In terms of Consultative Opinions, the procedure for requesting them has entered into force very recently and so far the PRT has issued only one Opinion which is not related to the Protocol of Montevideo.118 However, as it stems from comparable integration experiences, the

113 Ibid. Tribunal's decision, second consideration.
114 Ibid. para. 117 - 118.
115 AHAA Uruguay - Cigarettes, p 14.
116 On previous awards on trade in goods' disputes, arbitration tribunals have applied tests to assess the conformity of domestic measures with international free trade commitments that go beyond the discriminatory test, including, e.g. reasonableness (Brazil-Renovated Tyres, p 15), proportionality (Brazil-Renovated Tyres, p 15) and power deviation (Argentina - Poultry, para. 161, 163 and 168).
117 See above Ch II, Section E, Numeral 2.
consultative mechanism plays a vital role in developing a uniform interpretation of the law of integration and there is no reason to suggest the PRT may not contribute with the interpretation of the obligations and general disciplines prescribed by the Protocol of Montevideo.

In summary, instead of establishing a new set of institutions with exclusive competence on trade in services, the Protocol’s draftsmen chose to rely on the existing MERCOSUR institutional framework for the implementation and, eventually, the enforcement of its obligations and general disciplines. Thus, the capacity of the Protocol to liberalise trade in services is inextricably linked to the efficacy of MERCOSUR institutions, whose design and performance is not optimal.119 However, in line with MERCOSUR gradual and flexible approach to its institutional development, the Protocol leaves the door open for future amendments in order to meet the institutional demands of an evolving integration process.120

E. Annexes

The balance between general rules and principles on trade in services and annexes including special rules for specific service sectors raises a number of difficult questions: for which service industries should sector specific annexes be included? How detailed should the annexes be? How should the relationship between the general framework and its annexes be established?

On the one hand, innovative business practices such as financial conglomerates are blurring the boundaries between service sectors, there are many measures affecting trade in services in various service sectors such as authorisation requirements that share common characteristics, and there are reasons of consistency and legal succinctness that call for a horizontal regulatory framework with general obligations and disciplines. On the other hand, the “services” label encompasses a wide range of industries, raising different types of regulatory challenges which are difficult to tackle by only using a common set of rules and principles.121

119 See above Ch II, Section F.
120 PM, Art. XXVI.
121 For instance, for network service industries (e.g. telecommunications, energy and water supply), it is important to ensure reasonable and non-discriminatory conditions for the access to and use of networks. For Professional Services it is necessary to ensure that qualifications are based on objective and transparent criteria and not used as a means for arbitrary discrimination. For Financial Services, the regulatory framework requires to carefully balance the liberalisation of trade with the need to ensure the stability of the system and the protection of investors.
A too general framework may not provide an effective mechanism for tackling the disparity of barriers that undermine trade in different service sectors. By contrast, a complete sectoralisation of disciplines may overlook the common regulatory challenges that underlie all service sectors, increasing the transaction costs to implement, administer and enforce a series of unconnected sector-specific regulatory frameworks.

Delegates to the AHGS sought inspiration from the annexes to the GATS and consulted the auxiliary bodies to the CMG with competence on specific service sectors to evaluate whether the need for a sector specific annex was justified or not. Eventually, they agreed on three broad guidelines for drafting the annexes. First, that the overall purpose of the sectoral annexes should be to facilitate the application of the Protocol's obligations and general disciplines to specific service sectors by clarifying the meaning and scope of those obligations and general disciplines in light of the specificities of the service sector in question. Secondly, that special care should be taken to avoid adopting provisions that could end up creating difficulties for the interpretation of the provisions of the Protocol. Thirdly, that sector specific provisions should aim at ensuring the compatibility of the Protocol with those existing legal instruments on specific service sectors that State Parties were already part of.

The drafting of the Annexes evidenced the problems of co-ordination between the AHGS and other auxiliary bodies with competence on specific service sectors. These problems delayed the drafting process and forced the AHGS to request the CMG for an extension of its mandate. Seven additional months were necessary to complete the annexes. The Protocol includes annexes on the movement of natural persons supplying services, Financial Services and Air Transport Services that save for minor differences reproduce the text of the GATS' annexes for these specific sectors. It also includes an Annex on Land and Water Transport Services, which finds no parallel on the GATS. The annexes constitute an integral part of the Protocol.

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122 See minutes AHGS meeting 04/97.
123 Ibid.
124 Ibid.
125 SWG1 on Communications viewed favourably the idea to have an annex for telecommunications, radio and television transmission services and postal services. A text for the annex was drafted but in the end delegates to SWG1 could not reach a consensus on its final version. See minutes AHGS meeting 05/98. The absence of an annex on Telecommunications is an important shortcoming, because there are particular challenges that affect the conditions of competition in this sector that require from specific regulatory disciplines to address them. Later on,
1. Annex on Movement of Natural Persons Supplying Services

The Annex on Movement of Natural Persons Supplying Services applies to “measures affecting natural persons who are service suppliers of a State Party, and natural persons of a State Party who are employed by a service supplier of a State Party, in respect of the supply of a service.”

First, the Annex clarifies that the Protocol only covers the temporary and not the permanent movement of natural persons. To this end, it excludes “measures affecting natural persons seeking access to the employment market of a State Party” and “measures regarding citizenship, residence or employment on a permanent basis” from the Protocol’s scope of application.

Secondly, the Annex seeks to balance the promotion of trade in services supplied by the movement of natural persons with State Parties’ interest in preserving their autonomy to regulate at will on the entry and stay of foreigners in their territory. To this end, the Annex shields a State Party’s right to regulate “the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across its borders”, from the Protocol’s obligations and general disciplines. At the same time, it stipulates that the right to regulate

Argentina, Brazil and Uruguay included in their schedule of specific commitments a GATS-like annex on Telecommunications in the form of an additional commitment.

126 PM, Art. XXV.

127 Annex Movement Natural Persons, Art. 1. This Annex reproduces the GATS’ Annex on Movement of Natural Persons Supplying Services. The only difference is Art. 5, not contemplated in the GATS’ Annex, which refers to the applicable law to labour-related situations affecting natural persons from one State Party supplying services in the territory of another State Party. During the drafting stage, State Parties analysed the implications of the Protocol on existing agreements between State Parties aimed at facilitating business activities, e.g. the Arg-Brazil one. They considered the possibility to include a provision stipulating that those agreements should remain in force until the entry into force of State Parties’ schedules of specific commitments, previous registration of those agreements in the schedules. See minutes AHGS meeting 03/98. In the end, the provision was not included. Neither is the ARG-BRA Agreement on the Facilitation of Business Activities recorded in the Argentinian or Brazilian schedule of specific commitments.

128 Ibid. Art. 2.

129 Ibid. art 4.
on these issues must not be exercised "in such a manner as to nullify or impair the benefits accruing to a State Party under the terms of a specific commitment". 130

Thirdly, the Annex stipulates that State Parties may negotiate specific commitments relating to the movement of natural persons supplying services. 131 It is up to each State Party to define the desired degree of liberalisation of the movement of natural persons supplying services. They do so by undertaking a horizontal commitment applied to all the service sectors covered by a schedule of specific commitments. The horizontal commitment specifies with respect to which categories of natural persons the State Party will be bound by the Protocol’s Market Access and National Treatment standards of treatment. The State Party may specify in its schedule the terms and conditions that qualify its Market Access and National Treatment commitments in relation to those categories of natural persons. 132

Finally, the Annex expressly stipulates that the law that applies to regulate labour-related situations affecting the supply of services by natural persons of one State Party in the territory of another State Party is the law of the place in which the service is supplied. 133

2. Annex on Financial Services

The Annex on Financial Services, which applies to "measures affecting the supply of financial services", 134 seeks to clarify the meaning and scope of application of some of the Protocol’s obligations and general disciplines for Financial Services. 135

130 Ibid.
131 Ibid. art 3.
132 For a detailed analysis of State Parties’ commitments on the movement of natural persons supplying services see Ch IV, Section C, Numeral 1.
133 Annex on the Movement of Natural Persons, Art. 5. The reference to the law of the place where the contract is provided is not included in the GATS’ Annex on Movement of Natural Persons Supplying Services.
134 Annex on Financial Services, Art. 1.
135 Save for minor textual and structural changes, it reproduces the GATS’ Annex on Financial Services. The Annex was drafted by the SWG4 on Financial Issues. During the drafting stage, the Brazilian delegation proposed to include a provision addressing the particularities of the concept of legal person in the financial sector. The proposal did not get through into the final text of the Annex but State Parties decided to continue working on the harmonization of concepts relating to the commercial presence of foreign financial service providers a State Party. See AHGS meetings 3/98 and 5/98.
First, the Annex specifies the scope of application of the Protocol in relation to Financial Services by providing sector-specific definitions of "services", "service suppliers" and "services supplied in the exercise of governmental authority".

Secondly, the Annex introduces sector-specific limitations to State Parties' transparency duties prescribed by Article VIII of the Protocol relating to the disclosure of sensitive financial information in possession of public entities. Indeed, in addition to the general limitations prescribed by Article IX of the Protocol, the Annex specifies that State Parties are not under the obligation to disclose information relating to the affairs and accounts of individual customers or any confidential information or proprietary information in possession of public entities.

Thirdly, the Annex expressly shields State Parties' right to adopt or maintain reasonable measures for prudential reasons from the Protocol's obligations and general disciplines. This provision, commonly known as the "prudential carve out", preserves State Parties' autonomy to regulate for prudential reasons as they see fit, regardless of the Protocol's obligations and general disciplines. On the one hand, "prudential measures" are broadly defined, including measures aimed at "protecting investors, depositors, participants in the financial market, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier" as well as measures aimed at ensuring "the solvency and liquidity of the financial system". On the other hand, the right to regulate for prudential reasons is limited by a standard of reasonableness and by the need not to use prudential measures as a means of avoiding commitments or obligations undertaken by the State Parties under the Protocol.  

136 The concept of financial service supplier is broader than the general concept of service supplier under the Protocol because it covers not only persons already engaged in the supply of Financial Services but also persons wishing to supply a financial service. Compare PM, art XVIII (f) with Annex on Financial Services, art 5(b). The extension of the scope of application of the Protocol's disciplines to the activities of "would be" financial service suppliers is a relevant tool to ensure effective market access because it means that promotional activities such as mailing distribution and cold calls for the purpose of building a client portfolio from scratch are also covered against discriminatory practices. In the context of EC law, a ruling of the ECJ expressly protects the right of would be financial service suppliers to engage on cross-border promotional activities of its financial products and services. See C-384/93 Alpine Investments BV v Minister van Financiën [1995] ECR I-1141.  

137 Annex on Financial Services, para 1(b) and 1(c).

138 Ibid. Art. 2.  

139 Ibid. Art. 3.  

140 Ibid. Art. 3(a).  

141 Ibid.
Fourthly, the Annex includes a provision with sector-specific disciplines on State Parties’ right to recognise prudential measures of other State Parties, which complement the general disciplines on mutual recognition prescribed by Article XI of the Protocol. This provision enables each State Party to recognise prudential measures of another State Party without breaching the MFN standard of treatment. 142 The recognition can be made unilaterally, through harmonisation or in accordance with an agreement or arrangement with the State Party concerned. 143 If the recognition is made unilaterally, the State Party must afford other interested parties the opportunity to show that its own prudential measures also are worthy of the same recognition. 144 If the recognition is made on the basis of an agreement, the State Party must afford other interested parties the opportunity to negotiate their accession to the agreement or to negotiate a comparable agreement. 145 The provision also compels State Parties to notify promptly, and at least annually, to the CMG and the MTC agreements or arrangements on the mutual recognition of prudential measures. 146

Finally, the Annex compels State Parties to continue working on the harmonisation of prudential regulations and on the exchange of information on Financial Services. 147 This provision acknowledges and further encourages the development of secondary rules on Financial Services, which started long before the adoption of the Protocol of Montevideo, led by the Sub-working group on Financial Issues. 148

3. Annexes on Land and Water Transport and on Air Transport Services

At the time the Protocol of Montevideo was signed, State Parties were already part to various multilateral and bilateral transport agreements. 149 The purpose of the Annex on Land and

142 Ibid. Art. 3(b).
143 Ibid.
144 Ibid. art 3(c).
145 Ibid. Art. 3(d).
146 Ibid. art 3(e).
147 Ibid. art 4.
148 For further details on secondary legislation on Financial Services see Ch V, Section C, Numeral 2.
149 See, amongst others, the Agreement on International Road Transport between Argentina, Bolivia, Brazil, Chile, Paraguay, Peru and Uruguay, signed on 1 January 1990; Agreement on Waterway Transport on Paraguay - Parana Waterway signed by Argentina, Brazil, Paraguay and Uruguay in Las Leñas, 26/06/92 and registered before LAIA as a PSA; International Multimodal Transport Agreement between MERCOSUR State Parties, approved by Dec 15/94, 17/12/94 also registered before LAIA as a PSA, and various bilateral maritime and
Water Transport is to ensure, at least temporarily, that the Protocol of Montevideo does not affect the rights and obligations stemming from those multilateral and bilateral agreements. In this vein, the Annex expressly states that State Parties' specific commitments on Transport Services shall not affect those multilateral and bilateral agreements signed prior to the entry into force of the Protocol. The Annex also includes a review clause that assigns the CMG with the task of examining on an annual basis its implementation and assessing the progress made in bringing those instruments into conformity with the objectives and principles of the Protocol.

Likewise, the purpose of the Annex on Air Transport Services is to ensure, at least temporarily, that the Protocol of Montevideo does not affect the rights and obligations stemming from bilateral, plurilateral and multilateral agreements signed by the State Parties relating to Scheduled, Non-scheduled and Ancillary Air Transport Services in force at the time the Protocol entered into force. Further provisions specify in greater detail which type of Air Transport Services agreements shall not be affected by the Protocol. In relation to dispute settlement, the Annex specifies that State Parties can only resort to the MERCOSUR dispute settlement system only when no other specific settlement mechanism has been decided upon by the State Parties concerned. The Annex also includes a review clause and leaves the door open for possible amendments that could be necessary for adjusting the Protocol to measures adopted by Multilateral Conventions on Air Transport Services.

In summary, the annexes to the Protocol constitute the first attempt to strike the difficult balance between general and sector specific disciplines for the liberalisation of trade in services in MERCOSUR. As mentioned, the Protocol relies heavily on the GATS' structure, with three out of its four annexes reproducing GATS' annexes in almost exact terms. Unavoidably, the importation of multilateral sector-specific disciplines on trade in services waterway transport agreements between State Parties on both passenger and freight transportation. See also, above, footnote number 15.

150 Annex on Land and Waterway Transport Services, Art. 2.
151 Ibid. Art. 3.
152 Ibid. Art. 4.
153 Ibid. Art. 5.
154 Annex on Air Transport Services Art. 2.
155 Ibid Arts. 3 and 4.
156 Ibid Art. 5.
157 Ibid Art. 6.
158 Ibid Art. 7.
into a sub-regional agreement generates problems of compatibility that affect the overall coherence of the MERCOSUR legal system. Most notably, it is difficult to reconcile an adamant protection of State Parties' regulatory autonomy on the entry and stay of foreigners in their territory with the long-term objective to establish a common market involving the free movement of services and persons. Equally difficult is to reconcile the broad protection of State Parties' right to regulate for prudential reasons (and the potential disparity of prudential requirements that the exercise of this right may generate) with the objective to eliminate all obstacles to trade in services and to ensure effective access of foreign suppliers to the domestic market. Finally, the draftsmen of the Protocol failed to include annexes prescribing more rigorous disciplines that go beyond the non-discrimination test in order to tackle sector-specific regulatory challenges affecting sectors such as Telecommunications or Professional Services. As the integration process deepens, it will be necessary to amend these annexes in search of a combination of general and sector specific disciplines more suitable for the needs of a common market.  

F. Concluding Remarks

This chapter examined the Protocol of Montevideo on Trade in Services, focusing on the analysis of its general obligations and disciplines. It discussed the suitability of modelling a framework agreement for trade in services in MERCOSUR on the basis of a multilateral instrument like the GATS and assessed the general obligations' and disciplines' capacity to liberalise trade in services in light of their scope of application and the institutional framework responsible for their implementation and enforcement.

The Protocol was designed in light of the GATS, adopting most of its provisions without modifications. Like the GATS, the Protocol seeks to further the liberalisation of trade in services by compelling State Parties to accord foreign services and service suppliers minimum standards of treatment (e.g. Market Access and National Treatment standard) and to regulate in accordance with trade-friendly disciplines (e.g. transparency; reasonable, objective and impartial administration of measures affecting trade in services; objective and impartial review of administrative decisions; technical standards, qualification and licensing requirements no more trade restrictive than necessary). Also, like the GATS, the Protocol provides for a Programme of Liberalisation, based on the negotiation of reciprocal

159 PM, Art. XXVI stipulates that the Protocol may be revised, "taking account of the development and regulation of trade in services in MERCOSUR, as well as the progress made in relation to services in the World Trade Organization and other specialized forums."
concessions, which accords State Parties the right to control the scope and pace of their liberalisation commitments.

The Protocol entered into force just over two years ago and there is still little evidence available to assess its performance. The analysis of the black letter of the law reveals blatant contradictions between, on the one hand, a "negative integration contract" primarily concerned with the elimination of discrimination and mindful not to interfere with State Parties’ right to regulate and, on the other hand, an integration process whose ultimate goal is the establishment of a common market involving, amongst other things, the free movement of goods, services and factors of production and the co-ordination of macroeconomic and sectoral policies.

In practice, however, there appears to be no urgency for major reforms, at least not for the short and medium term. There is no evidence to suggest that the Protocol’s protection of State Parties’ right to regulate is obstructing a liberalisation process that is still in its infancy. On the contrary, the Argentina – Blocked Highways award suggests that, if properly enforced, the Protocol’s general obligations and disciplines could still make a valuable contribution to the liberalisation of trade in services within the bloc. But two conditions are necessary for this to be possible: a) a successful completion of the rounds of negotiations of specific commitments, which determine the scope of application of the Protocol’s main obligations and b) a sound institutional framework, capable of enforcing those obligations and disciplines effectively.

In the long run, provided economic interdependence intensifies, a thorough reform of the Protocol will be unavoidable with a view to reconcile its narrow concern about the elimination of discrimination and its excessive deference to domestic sovereignty with MERCOSUR’s objective to establish a common market involving, inter alia, the free movement of services.
Chapter IV

Negotiation of Specific Commitments on Trade in Services
This chapter examines the rounds of negotiations of specific commitments conducted under the umbrella of the Protocol's Programme of Liberalisation and assesses its contribution to the liberalisation of trade in services in MERCOSUR. The chapter is divided into five sections. First it analyses the main legal features of the Programme and discusses the rationale for advancing the liberalisation of trade in services through the negotiation of specific commitments in the MERCOSUR context (Section A). It then reviews the implementation of the Programme (Section B), examines State Parties' current schedules of specific commitments (Section C) and assesses the results achieved so far (Section D) ending with some concluding remarks (Section E).

A. The Legal Framework

Following the GATS model, Part III of the Protocol establishes a Program of Liberalisation on Trade in Services, i.e. a mechanism for advancing trade liberalisation through the negotiation of specific commitments on Market Access and National Treatment. The Programme is based on a "positive list" approach consisting of a gradual liberalisation strategy by which State Parties set out in national schedules of commitments the sectors which they wish to make specific commitments on Market Access and National Treatment. At the same time, the programme compels State Parties to hold successive rounds of negotiations aimed at the progressive inclusion of sectors, sub-sectors, activities and modes of supply of services in their schedules, as well as the reduction or elimination of trade-restrictive measures, with a view to ensure effective market access.

The Protocol stipulates that negotiation rounds must be held on a yearly basis until the completion of the Programme within a period no longer than ten years from the Protocol’s entry into force. Upon the conclusion of each negotiation round, new concessions are recorded in each State Party's schedule of specific commitments, which by virtue of Article VII.4 must be annexed to the Protocol and form an integral part thereof.

The Program of Liberalisation is governed by the principle of reciprocity which provides that negotiations must be aimed at promoting trade in services on the basis of the reciprocity of rights and obligations, advancing the interests of all participants on a mutually advantageous

1 PM, Art. VII.2.
2 Ibid. Art. XIX.1.
3 Ibid. Art. XIX.1.
basis and securing an overall balance of rights and obligations. During the drafting stage of the Protocol, Paraguay advocated, unsuccessfully, for the need to qualify the principle of reciprocity in light of the special needs of less developed countries and regions, including a provision authorizing differences in the level of commitments. In the end, State Parties only agreed to include a reference to “the need to ensure the increasing participation of less developed countries and regions in the services market” in the preamble of the Protocol, subject to reciprocity. Clearly, the latter part of the reference - “on the basis of reciprocal rights and obligations” - water downs the impact it may have on the development of a genuinely special and non-reciprocal treatment in favour of less developed countries and regions.

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

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

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4 See PM preamble and Art. XIX.1. It must be noted that it is much more difficult to apply the principle of reciprocity in the context of services than in the context of goods because of the inherent difficulty to estimate the value of concessions in services. Accurate information about the value of concessions is an essential requirement for enabling negotiators to engage in a reciprocal bargaining process.

5 During the drafting stage of the Protocol Paraguay unsuccessfully advocated for the inclusion of provisions providing special and differential treatment contemplating Paraguay’s developmental needs and, in particular, the regulatory asymmetries that exist between Paraguayan legislation and other State Parties’ legislation on services.

6 PM, preamble, third recital.

7 Ibid. Art. XIX.4.

8 Ibid.
macroeconomic and sectoral policies, including services sectoral policies like transport and communications.

The second limitation refers to the State Parties' right to modify or suspend their specific commitments during the Programme's implementation. Article XX of the Protocol enables a State Party to take back something it has given in past negotiations, but only at a price and after due notice. The right to suspend or modify specific commitments can only be exercised in exceptional circumstances and its effects are subject to the principle of non-retroactivity in order to protect acquired rights. In addition, the State Party wishing to suspend or modify its commitments must notify the CMG and duly justify its decision. It must also hold consultations with affected State Parties, with a view to reach an agreement on the specific measures to be applied and their period of application.

During the drafting stage of the Protocol, State Parties discussed extensively the opportunity of importing this provision into the Protocol. Argentina in particular expressed its reservations about the compatibility of a provision of this kind with the MERCOSUR legal system. In the end, State Parties not only decided to include this provision in the Protocol, but they did so adopting a more flexible version, which imposes less stringent conditions for the exercise of the right to modify or suspend commitments than those stipulated by Article XXI of the GATS. In practice, all State Parties have already exercised their right to modify their schedules of commitments.

The Protocol entrusts the CMG with the task of calling and supervising the rounds of negotiations of specific commitments. The CMG has delegated this task to the Group on Services ("GS"), one of its auxiliary bodies. The CMG is also responsible for receiving

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9 Ibid. Art. XX.1.  
10 Ibid. Art. XX.2.  
11 See minutes GS meetings 03/96, 05/96, 02/97, 03/97, 04/97.  
12 See minutes GS meeting 03/96.  
13 For instance, it does not require a period of at least three years after a commitment has entered into force before it can be modified. In addition, unlike GATS Art. XXI, the Protocol's provision does not specify the details that compensatory agreements must meet nor the consequences stemming from the failure to reach a compensatory agreement with affected Members. On the other hand, contrary to GATS, the Protocol does not include a provision on safeguard measures.  
14 See below footnotes n 46 and 79.  
15 PM, Art. XXII (a).  
16 Res. 31/98.
notifications and the results of the consultations on the modification and/or suspension of specific commitments. The CMC is the body responsible for approving the results of the negotiation rounds as well as any modification or suspension thereof.

For their entry into force, the schedules of specific commitments must be incorporated into national legal systems in accordance with the procedures provided for in each State Party. All State Parties consider that parliamentary approval is required for the incorporation of their schedules of specific commitments into their national legal systems. So far, only Argentina, and Uruguay have completed the incorporation process for their initial schedules of specific commitments and Brazil for the schedule of commitments approved by the first negotiation round. State Parties have nevertheless pledged to make their best efforts to observe the schedules of specific commitments which have not yet been incorporated into their legal systems.

One of the main reasons invoked in favour of importing a GATS's style Program of Liberalization for the opening of services markets is its gradualism. Indeed, the Programme's positive list approach enables each State Party to control, within its ten years time frame, the scope of its liberalisation commitments and the pace of the liberalisation process, according to the particular strengths and weaknesses of its various service sectors. Peña, for instance, claims that this approach is in line with the principles of gradualism, flexibility and balance that have guided MERCOSUR integration process from its very beginning. She argues that the Program is particularly useful for State Parties that are starting out with dissimilar degrees of regulatory development of their various service sectors, facilitating a gradual convergence of liberalisation commitments.

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17 PM, Art. XXII (b).
18 PM, Art. XXI.
19 PM, Art. XXVII.3.
20 See minutes GS meeting 01/04.
21 See minutes GS meeting 01/99.
23 Ibid. p 155.
Political economy reasons suggest that the opening of services markets should be gradual\(^2\), in particular for a fledgling integration process conditioned by unstable macroeconomic circumstances and sharp structural and policy asymmetries among participant States. What remains questionable is whether the choice for a GATS-style Program of Liberalization based on rounds of negotiations over positive lists of specific commitments constitutes the best alternative for securing the gradualism that MERCOSUR’s liberalisation process needs.\(^2\) The following reasons question the wisdom of this choice.

First, the GATS does not provide for a specific degree of integration for its Members. Its objective is to achieve “progressively higher levels of liberalisation”\(^2\). The Treaty of Asuncion, by contrast, provides for a specific type and depth of integration, namely, the establishment of a common market involving, amongst other things, the free circulation of services.\(^7\) Therefore, in the MERCOSUR context, it is fair to ask whether the liberalisation of trade in services (up to a common market degree) should be a matter subject to negotiation or rather an implementation issue.

Secondly, a comparative review of other integration agreements reveals the existence of a variety of strategies that can be followed in order to secure the gradualism of the liberalisation process. For instance, during the European Community’s early stages of integration, various programs were designed and implemented for the progressive abolition of restrictions to the movement of services.\(^2\) These programs were elaborated on the basis of a common understanding that the ultimate objective was the establishment of a common market. They consisted on the adoption or removal of a detailed list of measures subject to a binding

\(^2\) See, for instance, HOEKMAN & KOSTECKI, 2nd ed The Political Economy of the World Trading System. From GATT to WTO (Oxford University Press, Oxford 2001) , p 238. The authors contend that because of the sensitivity of the public policy issues at stake, the liberalisation of trade in services tends to be more resisted than the liberalisation of trade in goods and thus, require a gradual and carefully negotiated liberalisation process, more palatable to domestic constituencies.

\(^2\) Torrent criticises this GATS-style Programme of Liberalisation on the ground that the negotiations of specific commitments focus exclusively on market access and national treatment restrictions, overlooking regulatory issues which are the key challenge for the liberalisation of trade in services. See TORRENT, in , p 44.

\(^2\) GATS, Art. XIX.1.

\(^7\) Tol, Art. 1. In line with this provision, the first recital of the Protocol’s Preamble reaffirms that “... pursuant to the Treaty of Asuncion the Common Market implies, among other commitments, the free movement of services in the enlarged market.”

\(^2\) See, e.g., 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 1982. See also the Commission White Paper for the Completion of the Internal Market COM (85) 310 Final, 14 June 1985.
timetable. Gradualism was secured by fixing the deadlines for the adoption of the liberalizing measures in accordance with their implementation costs. Another alternative is the "negative list approach" followed by NAFTA and NAFTA-type agreements, whereby parties to the agreement commit themselves from the outset to grant Market Access and to accord National Treatment to all foreign services and services suppliers in all sectors unless otherwise specified in a closed list of exemptions or non-conforming measures, set out in an annex. In this case, what State Parties may have to negotiate is the phase out of the exceptions rather than the phase in of positive commitments on Market Access and National Treatment.

Finally, apart from the difficulties faced by negotiators in measuring the value of concessions for reciprocal bargaining purposes, the logic underlying the negotiation of specific commitments tends to prioritize short-term interests and individualistic negotiation strategies over long-term interests and co-operative actions towards the establishment of a common market.

B. The Negotiation Rounds

The negotiation rounds on specific commitments started in 1998, soon after the Protocol of Montevideo was approved (December 1997), but long before the Protocol entered into force (December 2005). Between 1998 and 2006, State Parties participated in six negotiation rounds. The seventh round has been already launched although not yet concluded. The negotiation modalities and procedures closely follow those used at the multilateral level.

1. Initial Commitments

29 See EC Treaty Art. 15: "When drawing up its proposals with a view to achieving the objectives set out in Art. 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 [...]".

30 For a comparison on the advantages and disadvantages of the "positive list" and the "negative list" approach see Stephenson & Prieto, 'Evaluating Approaches to the Liberalization of Trade in Services: Insights from Regional Experience in the Americas', in ,p 1.

31 For example, negotiations are conducted by way of exchanging request and offer lists, service sectors are classified according to the WTO Secretariat's Services Sectoral Classification List (See WTO Secretariat's Document MTN.GNS/W/120). Where it is necessary to refine further a sectoral classification, State Parties rely on the UN Provisional Central Product Classification (See Statistical Papers Series M No.77, Statistical Office of the UN, NY, 1991). Specific commitments are inscribed in State Parties' schedules in accordance with WTO Guidelines for the Scheduling of Specific Commitments (See WTO Document S/L/82, 28/03/2001).
Negotiations for the initial commitments took place between January and July 1998. State Parties agreed to take their GATS schedules of commitments as a baseline for the negotiations with a view to broaden their scope and depth. During this period, no substantive exchanges of request and offer lists took place and, as a result, the initial schedules of specific commitments approved in July 1998 repeated, in general terms, State Parties’ GATS schedules of commitments.

2. First Round

The first negotiation round took place between January 1999 and June 2000. The negotiation mandate exhorted State Parties to broaden the scope and depth of their GATS’ commitments by way of inscribing commitments on new sectors and modes of supply and by progressively eliminating the limitations to the commitments already inscribed in their schedules. It called State Parties to ensure, that new commitments reflect, to the extent possible, the current status of their domestic legislation. The negotiation mandate was broadly drafted, without specifying specific negotiation targets or deadlines.

32 Res 67/97.
33 Ibid. Art. 4.
34 Argentina was the only State Party to make a conditional offer to deepen its GATS specific commitment on Data Transmission Services subject to reciprocal concessions from other State Parties. Since no counter-offers were made, Argentina withdrew its offer. See minutes GS meeting 06/98.
35 See schedules of specific commitments approved by Dec 9/98.
36 See minutes GS meeting 04/99.
38 Ibid. Art. 3. Even if it includes restrictions on market access and national treatment, recording current legislation in a schedule of commitments constitutes an important liberalisation step because of its “lock in effect”, i.e. binding State Parties not to introduce new limitations to trade in services in the future. It also contributes to the transparency of the process by preventing gaps between bound commitments and applied commitments. In the GATS context, it is an extended practice to record in the schedule commitments that are more restrictive than the current legislation. State Parties do this in order to preserve some manoeuvring room for future negotiations, namely, to make “new” offers without having to adopt fresh de-regulatory measures. During the drafting stage of the Protocol, Argentina suggested to include, as a GATS plus standard, i.e. a provision prohibiting State Parties to include in their schedules of specific commitments terms, limitations or conditions more restrictive than those stipulated by their current legislation (See Annex V to minutes GS meeting 07/97). The proposal was not approved, although the objective to consolidate the status quo was reintroduced by this negotiation mandate, not as a legal obligation but as an exhortation to State Parties to observe it “to the extent possible".
State Parties exchanged request and offer lists\textsuperscript{39}, most of them relating to the Telecom sector. Brazil presented a "new offer" in accordance with its new telecom legislation.\textsuperscript{40} Other State Parties rejected the offer arguing it included new restrictions relating to Mobile Services, Private Leased Circuit Services and Paging. As a result, Brazil resorted to Article XX of the Protocol and notified to the CMG the modification of its initial schedule of commitments relating to this sector.\textsuperscript{41}

Professional Services also attracted a number of requests but no offers were made. Brazil submitted requests to other State Parties for concessions on various professional services, but they were rejected. The argument put forward was that Brazil's horizontal restrictions on Mode 4 (movement of natural persons providing services) limited the value of its own commitments on Professional Services, where Mode 4 is one of the most relevant modes of supply. At this stage it became clear for State Parties that the negotiation of specific commitments was not an efficient method for tackling restrictions on the movement of natural persons. The asymmetries between their regulations prevented State Parties from exchanging concessions and as a result they began to consider the possibility to resort to the development of secondary legislation instead of further negotiations.\textsuperscript{42}

The exchanges of request and offer lists yielded meagre results.\textsuperscript{43} Most requests for concessions were denied on similar grounds: the need for further consultations at domestic level, the lack of a domestic regulatory framework in place for the sector concerned, the need to wait until the culmination of a domestic regulatory reform processes under way or the lack of reciprocal concessions from the requesting State. Only a limited number of new concessions were made including Argentina's fresh commitments on General Construction Work for Civil Engineering and on Life, Accident and Health Insurance Services and Paraguay's and Uruguay's improved commitments on marginal telecom sub-sectors.

3. Second Round

\textsuperscript{39} See State Parties' request lists and reply letters on various annexes to minutes GS meetings 01/99, 02/99, 03/99 and 04/99.

\textsuperscript{40} General Telecommunications Act No. 9472, 16 July 1997.

\textsuperscript{41} See Brazil's notification to the CMG on Annex VII to the minutes CMG XXXXVII Ordinary Meeting, Buenos Aires, 4-5 April 2000.

\textsuperscript{42} See, in particular, Brazilian reply to other State Parties' requests, Annex IV to minutes GS meeting 04/99.

\textsuperscript{43} See schedules of specific commitments approved by Dec 1/00.
The second negotiation round took place between January and December 2000.\(^{44}\) In light of the meagre results achieved during the first round, State Parties adopted the Guidelines for Deepening Specific Commitments on Services, which contained precise and time-framed negotiation targets.\(^{45}\)

The Guidelines called State Parties to consolidate in their schedules, within a two-years time frame, the status quo of their domestic legislation on sectors and sub-sectors already regulated which included restrictions to Market Access and National Treatment\(^{46}\); to clarify the "unbound" entries included in their schedules\(^{47}\); to include in their schedules autonomous liberalisation measures\(^{48}\) and to eliminate existing Market Access and National Treatment restrictions on the commercial presence of foreign service suppliers (Mode 3) for all service sectors\(^{49}\).

By the end of the negotiating period, State Parties managed to make moderate progress on the consolidation of the status quo of their domestic legislations relating to most business services, with the exception of some sensitive sectors.\(^{50}\) They made little progress on the clarification of "unbound" entries and they did not begin to record autonomous liberalisation measures in their schedules on an ongoing basis. Nor did State Parties manage to make any progress on the elimination of restrictions to the commercial presence of foreign service suppliers. On this latter point, they began the task of listing all the existing restrictions but they did not even manage to complete the inventory process because of a lack of consensus on

\(^{44}\) Res 85/99.
\(^{46}\) Res 36/00.
\(^{47}\) Ibid. Art. 1.
\(^{48}\) Ibid. Art. 2.
\(^{49}\) Ibid. Art. 3. The automatic inclusion of autonomous liberalisation measures on the schedules of commitments, known as the "ratchet effect", constitutes a GATS plus commitment, but until now, State Parties have not been recording autonomous liberalisation measures in their schedules of commitments on an ongoing basis.

\(^{50}\) Ibid. Art. 6. In compliance with this provision, the GS adopted a working programme including the following tasks: a) listing all restrictions on Market Access and National Treatment on Mode 3, to be completed by December 2000; b) setting up a timetable for the elimination of Market Access and National Treatment restrictions other than those included in State Parties' constitutions, to be completed by 2002; d) setting up a timetable for the elimination of Market Access and National Treatment restrictions included in State Parties' constitutions, to be completed during 2003.

\(^{50}\) See schedules of specific commitments approved by Dec 56/00. State Parties' commitments remained unbound for all modes of supply in the following business service sectors: Medical relating services, Research and Development services, Investigation and Security Services and Services incidental to Agriculture, Hunting and Forestry, Fishing, Manufacturing, Mining and Energy Distribution.
the methodology to be used. At least, the initial listing attempts served to illustrate that many restrictions to the commercial presence of foreign suppliers were embedded in legislative acts and even in constitutional provisions.

The Guidelines also instructed the Group on Services to draft terms of reference for the adoption of secondary legislation on the movement of natural persons supplying services.\(^\text{51}\) This mandate kicked off a legislative action plan which led to the adoption of international agreements such as the MERCOSUR Visa Agreement and secondary legislation on the temporary provision of professional services.\(^\text{52}\)

4. Third Round

The third negotiation round took place between January and December 2001. The negotiation mandate called for a restricted multisectoral negotiation round on a limited number of sectors\(^\text{53}\) and for the completion of the process of consolidation of the status quo and the clarification of “unbound” entries initiated during the previous round.\(^\text{54}\)

State Parties exchanged requests and offers but despite some moderate progress they failed to complete the restricted multisectoral round of negotiations. They neither managed to make significant progress on the consolidation of the status quo or the clarification of “unbound” entries.\(^\text{55}\) Amongst other difficulties, State Parties failed to agree on a common methodology on what type of measures should be recorded in a schedule and how should they be recorded.

\(^\text{51}\) Res 36/00, Art. 4.
\(^\text{52}\) See below Ch V, Section C, Numeral i.
\(^\text{53}\) Business Services, Distribution Services, Educational Services and Tourism and Travel Related Services. The idea of restricted multisectoral negotiations was put forward by Brazil. In its view, by narrowing down the sectors where requests and offers could be made, should increase the chances of successful exchanges. Brazil also suggested to subject the residual sectors not liberalised through the restricted multisectoral negotiations to a compulsory “adjustment” regime or liberalisation period to be completed within a specific period of time to be agreed.
\(^\text{54}\) Res 76/00, 7/12/00.
\(^\text{55}\) See schedules of specific commitments approved by Dec 10/01, 20/12/01. The new schedules replaced State Parties’ previous commitments on Business Services, Communication Services (except Telecommunications), Construction and Related Engineering Services, Distribution Services, Educational Services, Environmental Services, Health related and Social Services and Tourism and Travel related Services, while horizontal restrictions on Modes 3 and 4 and specific commitments on Telecommunications and Financial Services remained unchanged.
Discrepancies amongst State Parties were particularly relevant in relation to the scheduling of "unbound" entries and on the classification of sub-sectors corresponding to the Telecommunications and Financial Services sectors.\textsuperscript{56} To unblock the situation a Decision was adopted stipulating a harmonised methodology on how to record commitments in the schedules.\textsuperscript{57} State Parties continued the inventory process of restrictions to the commercial presence to foreign service supplier, but failed to agree on a time schedule for their elimination.

5. Fourth Round

The fourth negotiation round took place between April 2002 and December 2003. During 2002 the region was hit by a severe financial crisis, particularly in Argentina and Uruguay, which forced State Parties to focus on tackling their internal problems at the expense of integration matters.\textsuperscript{58} The negotiation mandate called, once again, for the completion of the restricted multisectoral round and the process of consolidation of the status quo and clarification of "unbound" entries.\textsuperscript{59}

The negotiation round was supposed to be completed by the end of 2002, but lasted until December 2003. By the end of the round, all State Parties added to their schedules commitments on Recreational, Cultural and Sporting Services and Transport Services.\textsuperscript{60} Brazil also added to its schedule commitments on Postal Services, Audiovisual Services and Environmental Services. However, the new commitments did not include preferential concessions for MERCOSUR service providers, but merely consolidated the status quo of domestic legislation. Overall, the new schedules of commitments provided for broader coverage and greater clarity but, again, State Parties did not manage to complete the process of consolidation of the status quo and clarification of unbound entries for all service sectors and no progress was made on the elimination of existing restrictions on Market Access and National Treatment for any service sector.

\textsuperscript{56} The lack of compatibility between the classification of sub-sectors in the Telecommunications and Financial Services, made it particularly difficult for State Parties to compare their commitments and to engage on reciprocal bargaining.

\textsuperscript{57} Dec 11/01, Art. 2.

\textsuperscript{58} Not surprisingly, MERCOSUR bodies' activity was drastically reduced. The Group on Services was not an exception to this trend, meeting only once in 2002 compared to a previous average of five to six meetings per year.

\textsuperscript{59} Res 13/02.

\textsuperscript{60} See schedules of specific commitments approved by Dec 22/03.
During this round, another stumbling block on the negotiation process emerged. Considering that State Parties were at the same time engaged on negotiations with external trading partners (MERCOSUR – FTAA, MERCOSUR – EU), Brazil refrained from consolidating the current status of its legislation and fully disclosing information relating to the unbound entries – in particular on the Financial Services sector - on its MERCOSUR schedule on the basis that that could weaken MERCOSUR’s negotiation position vis-a-vis the EU or in the context of the FTAA negotiations.\(^6^1\)

6. Fifth Round

The fifth negotiation round took place between January and December 2004. As usual, the negotiation mandate called State Parties to conclude the process of consolidation of the status quo and clarification of “unbound” entries for all service sectors and modes of supply.\(^6^2\) It also instructed the Group on Services to submit to the CMG proposals for the elimination of Market Access and National Treatment restrictions and for the harmonisation of the regulatory framework in specific service sectors, including a methodology and a timetable for the completion of such tasks.\(^6^3\) For the first time an express reference to positive integration appears in a negotiation mandate, clearly suggesting an acknowledgment by diplomats about the limitations of the negotiation of specific commitments as an instrument of liberalisation.

In compliance with the mandate, State Parties put forward different proposals on how to move forward. The wide differences between the proposals revealed the lack of a common sense of direction amongst State Parties on how to advance on the liberalisation of trade in services. Argentina proposed to focus on the elimination of Market Access and National Treatment restrictions to MERCOSUR service providers on a limited number of service sectors.\(^6^4\)

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\(^6^1\) See minutes GS meeting 02/03.

\(^6^2\) Res 52/03, Art. 3.

\(^6^3\) Ibid. art 2.

\(^6^4\) See Argentina’s Proposal (Annex III, minute GS meeting 01/04). The proposal suggests focusing on the elimination of MA and NT restrictions on the Advertising, Audiovisual, Financial Services and Telecommunications sectors. It provides a number of examples of measures imposed by Brazil that restrict Market Access or National Treatment on the Advertising and Audiovisual sectors. In terms of actions to be taken, the proposal suggests, as a first step, that each State Party should review their own legislation and list all domestic measures including restrictions on MA and NT, differentiating between restrictions included in decrees or other regulations of an administrative nature and restrictions included in legal or constitutional provisions. As a second step, the Executive Power in each State Party should eliminate the restrictions contained in regulations of an administrative nature and
Paraguay supported Argentina’s proposal with some qualifications, most notably, that the process of eliminating restrictions had to be sensitive to the existing regulatory asymmetries between State Parties’ legal systems. Brazil, by contrast, proposed to focus on the development of secondary legislation relating to very specific issues. In its turn, Uruguay suggested a combination of actions aimed at the elimination of restrictions and the harmonization of regulations on sectors of strategic importance for the overall economic integration of State Parties’ economies.

In the end, it was decided to take actions aimed at both, the elimination of existing restrictions and the harmonisation of regulations in specific service sectors. The type of actions that followed appear to indicate that State Parties simply opted for accumulating individual proposals instead of amalgamating them in a coherent action plan with clear priorities for any one action over the other. On the one hand, State Parties carried out an inventory of all the Market Access and National Treatment restrictions included in their legislation irrespective of the service sectors and modes of supplied affected, classifying them according to their legal nature. Like previous inventory exercises, the findings confirmed that only few restrictions were embedded in regulations of an administrative nature, the bulk of them being included in statutes or constitutional provisions. On the other hand, State Parties worked towards the harmonisation of rules relating to the registration, establishment and functioning of companies and the movement of business persons, drafting an “Agreement for the Facilitation of Business Activities in MERCOSUR”, which was submitted to the CMG for its consideration.

submit to congress proposals to amend statutes or constitutional provisions that restrict Market Access or discriminate against MERCOSUR service providers.

65 See Paraguayan comments on Argentina’s Proposal on the Liberalisation of Specific Service Sectors. For instance, Paraguay held that it was currently discussing proposals for regulating the advertising and audiovisual sectors, which prevented them from adopting new commitments on those sectors. See Annex VI to minutes GS meeting 02/04.

66 Brazil suggested focusing on the harmonisation of rules governing the registration of companies or professional bodies’ memberships in those service sectors where foreign companies or foreign professionals were facing difficulties. It also suggested to work on the harmonisation of rules relating to Real Estate Services, Sporting Services (in particular the harmonisation of quotas for foreign sportsmen on collective sports), and on the mutual recognition of the contractual records of civil-engineering construction companies. See Brazilian Proposal on the Harmonisation of Regulatory Frameworks, Annex V to minutes GS meeting 01/04.

67 Uruguayan Proposal on Services, Annex V to minutes GS meeting 02/04.

68 See CMG mandate to the GS to minutes GMC LIV ordinary meeting.

69 See State Parties’ lists of restrictions in Annex IV to minutes GS Meeting 03/04.

70 See below Ch V, Section C, Numeral 1.
State Parties made some progress on the clarification of “unbound” entries corresponding to the Financial Services. They also improved the clarity, precision and comparability of their horizontal commitments on Mode 4 by accommodating them to a common classification of types of natural persons supplying services used in the GATS context.

During this round, Argentina, Paraguay and Uruguay exercised their right conferred by Article XX of the Protocol to modify specific commitments contained in their schedules as a result of the introduction of new legislation and notified the modifications to the CMG. The negotiation round concluded, as planned, in December 2004.

7. Sixth Round

The sixth negotiation round took place between January 2005 and July 2006. Once more, the negotiation mandate called State Parties to conclude the process of consolidation of the status quo and clarification of “unbound” entries and “to make progress” on the elimination of restrictions on all service sectors and modes of supply. It also instructed the Group on Services to submit to the CMG proposals for the harmonisation of domestic regulations and for the harmonisation of horizontal commitments, in particular, horizontal commitments on Mode 4.

For the third time since the launch of the negotiation rounds in late 1997, State Parties exchanged requests and offer lists for the elimination of Market Access and National Treatment restrictions contained in their domestic legislation. On this occasion, State Parties prepared comprehensive and detailed lists, requesting the removal of restrictions or the

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71 See Annex VIII to minutes GS meeting 03/04.
72 See Communication from Argentina, Bolivia, Brazil, Chile, Colombia, India, Mexico, Pakistan, Peru, Philippines, Thailand and Uruguay on Categories of Natural Persons for Commitments under Mode 4 of GATS, 17 February 2005 (Document TN/S/W/31).
73 See Annex XXXVII - MERCOSUL/LVI GMC/DI Nº 28/04, LVI meeting of the CMG, November 2004 including notifications from Argentina (modifying commitments on services relating to Maintenance and Repair of Vessels); Paraguay (introducing new horizontal restrictions on international money transfers) and Uruguay (modifying commitments on Pharmacy Services).
74 See schedules of specific commitments, approved by Dec 29/04, 16/12/04. Paraguay’s new schedule replaces horizontal commitments on Mode 4 and specific commitments on Financial Services and Maritime Services. Uruguay’s new schedule replaces horizontal commitments on Mode 4.
75 Res 33/04, Art. 2.
76 Ibid. Art. 3.
clarification of unbound entries in almost every service sector. The exchange of request and offer lists contributed to the elimination of a small number of restrictions by Brazil, Paraguay, and Uruguay, however, in general terms, it failed to brake through domestic regulatory barriers and to secure a preferential treatment for MERCOSUR service providers. As in previous occasions, State Parties declined to make concessions arguing the lack of reciprocal concessions from the requesting State or the fact that the sector where concessions were requested was not yet regulated or regulatory reforms were under way.

Although some progress was made on the harmonisation of a common criterion for the scheduling of commitments on particularly complex sectors and modes of supply, State Parties did not complete the process of consolidation of the status quo and clarification of "unbound" entries. Current schedules of commitments still include "unbound" entries for all or some modes of supply in various service sectors.

Finally, State Parties continued to analyse the possibility to harmonise rules relating to specific service sectors. Discussions were focused on the harmonization of rules relating to the registration of companies and the establishment of mutual recognition systems for real estate companies and for the contractual records of civil-engineering construction companies. Overall, discussions remained on a purely exploratory level and apart from exchanging ideas and sharing information on domestic regulations in these areas, no concrete actions were

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77 See State Parties’ request lists included in Annex IV to minutes GS meeting 03/05.

78 The new schedule introduces a slight relaxation of the requirements to obtain a licence from ANATEL to provide Telecom Services. On Legal Services, the new schedule removes the prohibition to Brazilian or foreign lawyers whose place of residence is not Brazil to register at the Brazilian Bar. On the Placement and Supply Services of Personnel, the new schedule removes the restriction, which limited the commercial presence to firms formed by Brazilian national partners. On Freight Transportation - Road Transport Services, the requirement of a percentage of capital with voting rights owned by Brazilian nationals for the establishment of a commercial presence is reduced from 80% to 50%.

79 The new schedule eliminates the restrictions on Market Access for the commercial presence of foreign service providers on Mobile Phone Services.

80 In the previous schedule, commitments on Photographic Services were disaggregated on 8 sub-sectors up to 5 digits of the CPC classification. In the new schedule, commitments are divided in two sub-sectors: photographic services (no restrictions on MA and NT for all modes of supply except for the horizontal commitment notes) and specialised Photographic Services (unbound on MA and NT for all modes of supply).

81 See, e.g., State Parties' commitments on Research and Development Services, Investigation and Security Services, Services incidental to Fishing, Mining and Energy Distribution, Postal Services, Educational Services, Health Related and Social Services, News Agency Services, Air Transport Services.
taken. The negotiation round concluded in June 2003, six months later than the deadline prescribed by the negotiation mandate.\textsuperscript{82}

8. Seventh Round

The seventh round was launched on 21 June 2007, calling State Parties to negotiate new schedules of specific commitments, which should be approved by the CMC during the first semester of 2008.\textsuperscript{83} This is the first round to be launched after the entry into force of the Protocol of Montevideo on 7 December 2005, which formally triggered the ten years term for the completion of the Programme of Liberalisation.\textsuperscript{84} The CMC instructed the CMG to formulate a negotiation mandate for the seventh round of negotiations and to develop an action plan for the completion of the Programme of Liberalisation by December 2007.\textsuperscript{85}

The GS is currently preparing the negotiation mandate for the seventh round and the action plan for the completion of the Programme of Liberalisation, based on a report submitted to the CMG in December 2006.\textsuperscript{86} The report contains the GS’s view on the challenges and obstacles to advance on the liberalisation of trade in services in MERCOSUR and proposes some lines of actions to complete the Programme within the prescribed term. The report’s proposals revolve around two main ideas. First, the need for a renewed political mandate, at the highest level, supporting the liberalisation process. The report clearly states that a strictly technical approach to the liberalisation process is insufficient to handle the political implications that the liberalisation process brings along with.\textsuperscript{87} Second, that in order to ensure an effective liberalisation of trade in services it is necessary to move beyond the negotiation of specific commitments. In this vein, the report highlights the importance of regulatory co-operation among domestic regulators, the harmonisation and mutual recognition of domestic regulations, and initiatives aimed at the promotion of trade an investment in services based on the competitive advantages of the different service sectors.\textsuperscript{88}

C. The Current Status of Commitments

\textsuperscript{82} See Dec 01/06.
\textsuperscript{83} Res 16/07, 21/06/07.
\textsuperscript{84} PM, art XIX.1.
\textsuperscript{85} See Dec 30/06 and 24/07.
\textsuperscript{86} See Annex VII to minutes GMC LXVI ordinary meeting.
\textsuperscript{87} Ibid.
\textsuperscript{88} Ibid.
This section examines State Parties' current schedules of specific commitments, which arguably offer a snapshot of the current degree of liberalisation of trade in services within the bloc. Schedules specify the sectors and sub-sectors where commitments have been consolidated. For each service sector or sub-sector there are eight entries: one entry for each mode of supply (cross-border supply, consumption abroad, commercial presence and presence of natural persons) under a Market Access column and one entry for each mode of supply under a National Treatment column. Schedules also include a third column reserved for "Additional Commitments" not subject to scheduling under the Market Access or National Treatment columns.

The level of commitment in a specific sector for each mode of supply can range from a full commitment to a commitment with limitations or no commitment at all. A full commitment on Market Access means the State Party does not maintain for that mode of supply any of the types of measures listed in Article IV. A full commitment on National Treatment means the State Party accords to foreign services and service suppliers' conditions of competition no less favourable than those accorded to its own like services and service suppliers. Full commitments are recorded in the schedule with a 'NONE' entry, which stands for no restrictions. The fewer the number of 'NONE' entries, the lower the level of liberalization for that service sector. A State Party can also make commitments with limitations, inscribing in the schedule a concise description of the measure inconsistent with Articles IV or V it wishes to maintain. Finally, a State Party may opt not to consolidate any commitment whatsoever for a specific mode of supply, i.e. to remain free to adopt measures inconsistent with Articles IV or V. The absence of commitments is recorded in the schedule with an 'UNBOUND' entry.

The State Parties' schedules of specific commitments approved by the last round of negotiations was analysed using Hoekman's method with a view to provide a quantitative

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89 See schedules of specific commitments approved by Dec. 1/06.
90 Ibid. Art. VI. Additional commitments could be, e.g., commitments relating to qualifications, standards or licensing matters.
91 Ibid. Art. VII.1.
92 Ibid. Art. V.
estimation of the degree of liberalisation in the various service sectors.\textsuperscript{94} The data gives a rough idea about the degree of liberalisation achieved and allows for making comparisons between States Parties’ specific commitments. It has to be borne in mind, however, that Hoekman’s method does not take into account the effect of horizontal limitations included in the schedules, which affect all service sectors.

Since the current schedules have not been incorporated into national legal systems, they are not legally binding upon State Parties. Nevertheless, State Parties have pledged to make their best efforts to observe the commitments consolidated in their schedules.\textsuperscript{95}

1. Horizontal Limitations

Schedules of specific commitments include a horizontal section where State Parties may record restrictions on Market Access or National Treatment for one or more modes of supply, which are applicable to all sector-specific service sectors.

All State Party’s schedules include a horizontal limitation on the entry and temporary stay of natural persons supplying services (Mode 4). Restrictions on Mode 4 take the form of a commitment to allow the entry of only certain categories of natural persons and only for limited periods of time. In other words, each State Party specifies the categories of natural persons allowed to come into their territory to supply services and for how long they can stay. This type of limitation constitutes a significant restriction on the liberalisation of trade in services, in particular for those service sectors where the presence of natural persons constitutes the main modality for the supply of the service, such as Professional Services.

During the negotiation rounds, State Parties unsuccessfully tried to remove the restrictions on Mode 4 through the exchange of requests and offers. The only achievement so far has been an approximation of their horizontal commitments on Mode 4 to a reference document, which prescribes a common set of categories of natural persons providing services and a common set of market access conditions for them.\textsuperscript{96} The political sensitivity underlying issues relating to the right to regulate the entry and stay of foreigners and the asymmetries between State Parties’ domestic regulations on this issue emerged as obstacles too difficult to overcome simply by the negotiation of reciprocal concessions. State Parties realised that the way

\textsuperscript{94} See Appendix III Degree of Liberalisation of Service Sectors by State Parties – July 2006.

\textsuperscript{95} See above Ch III footnote n11.

\textsuperscript{96} See above footnote n78.
forward required setting up a common regulatory framework on the movement of natural
persons across national borders and launched a number of legislative initiatives in this
direction.\textsuperscript{97}

The Argentinian, Brazilian and Paraguayan schedules include the following horizontal
limitations on the commercial presence of foreign service suppliers (Mode 3): no
commitments on Market Access and National Treatment in relation to the acquisition of land
in border areas (Argentina and Paraguay); foreign service suppliers wishing to supply a
service as a legal person in Brazil or Paraguay must be organized as a legal entity foreseen by
domestic legislation; on state-owned enterprises subject to privatisation, the government
reserves its right to retain shares with special voting rights and to give employees preferential
treatment for the acquisition of shares (Paraguay); foreign capital invested in Brazil must be
registered with the Brazilian Central Bank for the purpose of authorising transfer of funds.
The Central Bank establishes special procedures for the remittances and transfer of funds
abroad.

In addition, the Brazilian schedule stipulates that the national congress is considering the
adoption of a regulatory framework for electronically deliverable products, which could
include restrictions on the cross-border supply of services (Mode 1) and on the consumption
of services abroad (Mode 2). Therefore, sector-specific commitments on Modes 1 and 2 could
be affected once the bill under consideration is adopted and enters into force.

2. Professional Services

Paraguay has not undertaken any commitment on Professional Services. Its schedule simply
indicates that the national congress is considering a bill on Professional Services and that once
the statute is approved commitments will be adopted, recording the restrictions on Market
Access and National Treatment that may correspond.

By contrast, Argentina, Brazil and Uruguay have consolidated commitments covering all the
Professions included in the Services Sectoral Classification List. At first glance, such
commitments appear to indicate a relatively high level of liberalisation of Professional
Services. However, an in-depth examination of the schedules unveils a much more fragmented
scenario.

\textsuperscript{97} See below Ch V, Section C, Numeral 1.
First, the Argentinian and Uruguayan schedules include a horizontal limitation applicable to all the professions indicating that the persons seeking to provide professional services must first obtain recognition of their professional degree, licensing with the relevant professional association in the host State and establish legal domicile in the country. The fact that the Brazilian schedule does not include this type of horizontal reference does not mean absence of qualifications, licensing and professional membership requirements. It simply indicates that from the Brazilian perspective only restrictions or discriminatory measures against foreigners must be recorded in the schedules but not purely domestic regulatory measures such as those relating to qualifications and licenses to provide Professional Services.  

Secondly, State Parties have not consolidated commitments on Mode 4 - probably the most relevant mode of supply of Professional Services - except as indicated in the horizontal section. In general, State Parties allow the presence of foreign independent professionals in their territories but subject to specific requirements and only during a limited period of time.

Thirdly, the Uruguayan and, in particular the Brazilian schedule, include specific Market Access and National Treatment restrictions for the provision of certain professional services, including nationality requirements, commercial presence requirements and prohibition of foreign investment.

98 During the sixth negotiation round Brazil expressly requested Argentina and Uruguay to remove from their schedules the horizontal limitations relating to qualifications, licensing and professional membership requirements, arguing they were purely domestic regulatory measures and not Market Access or discriminatory measures against foreigners.

99 For instance, Argentina's schedule indicates that independent professionals may enter the country by request submitted by a natural or juridical person established in Argentina, to perform professional or technical activities, whether or not remunerated. The maximum period of residence granted to the foreigners that enter the territory to perform professional activities is 15 days, which can be extended for 15 additional days. When the professional is hired to supply services to a natural or juridical person established in Argentina, under a written labour or civil service contract the initial maximum period of stay is 1 year. This period can be extended indefinitely for equal periods as long as the status of hired worker remains.

100 For instance, the Uruguayan schedule includes nationality and residency requirements for the provision of Legal Documentation and Certification Services and a quantitative restriction on the establishment of Pharmacies. Similarly, according to the Brazilian schedule, foreign lawyers cannot represent parties in court but they may provide consultation services on their own legal system previous registration with the Ordem dos Advogados do Brazil (i.e. Brazilian law society). For the provision of Accounting, Auditing and Taxation Services, the commercial presence of the service provider is required and non-residents cannot participate in legal persons controlled by Brazilian nationals. An entity wishing to hire the temporary service of foreign engineers or architects must, at the same time, hire a Brazilian assistant to work alongside the foreign professional during the term of the contract. The
During the last negotiation round, Argentina, Paraguay and Uruguay unsuccessfully requested Brazil to remove most of its Market Access and National Treatment restrictions affecting the Architecture and Engineering professions. The inability to remove even overt Market Access and National Treatment restrictions against MERCOSUR service providers, clearly illustrates the limitations of the request and offer approach for advancing the liberalisation of Professional Services. What State Parties (except Paraguay) have achieved so far through the negotiation of specific commitments is, at best, the partial consolidation of the status quo of their Professional Services’ legislation. This is far from sufficient to provide foreign professionals with effective market access in other State Parties. For this to be possible, in addition to the removal of specific Market Access and National Treatment restrictions, it is essential to develop a common regulatory framework addressing, amongst other things, the mutual recognition of qualifications, standardised licensing procedures and professional bodies’ membership policies.

3. Telecommunication Services

Specific commitments on Telecommunication Services are characterized by important asymmetries among State Parties, with a relatively high level of liberalisation in Argentina and a significantly lower level of liberalisation in the other three State Parties.

In Argentina, the privatisation of the state-owned telecom company along with the dismantlement of the monopoly regime that occurred during the early nineties paved the way for the establishment of a fairly open telecom market. This is reflected in Argentina’s schedule, which does not include horizontal limitations nor specific measures restricting market access or discriminating measures against foreign service providers. The schedule does not

participation of foreign capital on entities providing Medical, Dental, Midwifery and Nursing services is prohibited, while foreign Doctors, Dentists, Midwives and Nurses can only provide services to the Brazilian Government on a temporary basis.

101 It is important to highlight that it is extremely difficult to include in a schedule of specific commitments a comprehensive inventory of all domestic measures including market access and national treatment restrictions on trade in services. A detailed schedule should always include at least a reference to the most notorious restrictions. However, in heavily regulated sectors such as the professions, the task becomes increasingly difficult. For instance, a review conducted by the Uruguayan government on domestic regulations affecting trade in services, identified ten statutes and seven decrees including provisions governing the provision of Professional Services which were not even referred to in the Uruguayan schedule. See Annex IV to minutes GS meeting 03/04. Therefore, the schedules' contribution to transparency and to the lock in effect of current legislation is limited.
refer to the administrative authority’s power to restrict the number of suppliers per operating area in some telecom sub-sectors (Mobile Services, Paging, Trunking) in light of present and future needs. However, an eventual decision of the authority to restrict the number of suppliers would affect domestic and foreign service providers alike.

Brazil also conducted a regulatory reform aimed at eliminating the state monopoly on the telecom sector which involved an amendment to the constitution in 1995 and the adoption of a new Telecommunications law in 1997. The new regulatory framework established a regulatory body (ANATEL) and privatised the federal telecom companies. Accordingly, the Brazilian schedule does not include Market Access or National Treatment restrictions on any mode of supply for the provision of any type of telecom services. However, the impact of its sector-specific commitments is watered down by two important horizontal limitations. First, the Executive Branch is entitled by law to establish limits regarding foreign participation in the capital composition of telecommunications service providers. In addition all service suppliers need to obtain a license to operate from ANATEL. The schedule stipulates that licenses shall be granted only to suppliers duly constituted according to Brazilian legislation, which requires head office and management located in the Brazilian territory and ownership of the majority of the voting shares by natural persons resident in Brazil or companies duly constituted according to the Brazilian legislation, which requires head office and management located in the Brazilian territory.

The Paraguayan schedule includes a horizontal note stipulating that each telecommunication service provider in Paraguay requires a government licence granted by CONATEL according to a transparent and non-discriminatory procedure. The licenses are granted exclusively to legal persons incorporated in Paraguay, with headquarters and representation in the Paraguayan territory and with at least fifty per cent of their capital owned by Paraguayan nationals. The schedule also prescribes that assemblies, facilities and maintenance for the sectors and sub sectors committed have to be done by professionals and companies registered with CONATEL. On Telephone Services, Paraguay has not consolidated commitments on any

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102 See Emenda Constitucional n°. 8 de 1995, e com a Lei n°. 9295, de 19 de julho de 1996 (Lei Mínima).
103 See - Lei n°. 9472, de 16 de julho de 1997.
104 Argentina and Paraguay requested, unsuccessfully, the removal of this horizontal limitation. Brazil argued that the regulatory regime prevents the Executive Branch from exercising its power in a discriminatory fashion. It also argued that the Executive Branch did not exercise its power during the privatisation process of fix and mobile telephone services and that the current participation of foreign capital in the telecom sector is significant.
105 Comisión Nacional de Telecommunicaciones, established by Ley No 642 de Telecommunicaciones, 25 May 1995.
mode of supply. By contrast, on Value-added Services (electronic mail, electronic data interchange, etc.) it has made commitments on all modes of supply, subject to the horizontal limitations already mentioned.

Uruguay has consolidated commitments without restrictions on all modes of supply for most Value-added Services (electronic mail, electronic data interchange, etc.), but Basic Telecommunication Services are provided under monopoly conditions by a state-owned enterprise (ANTEL). During the last negotiation round, Argentina and Paraguay requested Uruguay to assume an additional commitment stating that in case of privatisation or deregulation of the sector, MERCOSUR service providers will be subject to a National Treatment standard, but the request was not met.

The Argentinian, Brazilian and Uruguayan schedules include a reference document with additional commitments on basic Telecommunication Services. The document includes commitments on minimum domestic regulatory disciplines relating to the prevention of anti-competitive practices, interconnection with a dominant supplier, universal service, public availability of licensing criteria, independence of the regulatory body and minimum criteria for the allocation and use of scarce resources (e.g. frequency bands, numbers and rights of way, etc.).

Overall, after six rounds of negotiations, the telecom sector remains fragmented, without any kind of preferential treatment accorded to MERCOSUR suppliers or consumers. Even though all State Parties have liberalised or are in the process of liberalising the telecom sector, the reforms have been entirely domestic, rather than co-ordinated or, at least, encouraged by MERCOSUR negotiations.

4. Financial services

Financial Services are highly regulated industries. Not surprisingly, State Parties' commitments on all modes of supply of Financial Services are conditioned by horizontal limitations aimed at preserving their regulatory autonomy for the adoption of prudential measures, which, overall, provide for a low level of liberalisation. Commitments on the cross-border supply or the consumption abroad of Financial Services are limited by measures

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106 Based on the WTO Reference Paper for Telecommunication Services adopted on 24 April 1996.
controlling the cross-border transfer of funds. Commitments on the supply of services by a service supplier of a State Party through the commercial presence in the territory of any other State Party are subject, amongst other conditions, to the incorporation of the foreign company into the domestic legal system, the constitution of the company according to a particular type of legal person and the need to obtain an authorisation to operate from the competent authority, which normally enjoys wide discretion to decide whether or not to allow newcomers to the market. Commitments on the supply of services by the presence of natural persons providing services remain unbound except for those specific categories of natural persons indicated in the horizontal section.

On Insurance Services, State Parties' commitments on the cross-border supply and consumption abroad remain unbound for most types of services with the exception of commitments on Maritime and Aviation Transport Risk Insurance, Reinsurance and Retrocession and some Services Auxiliary to Insurance. By contrast, the provision of most types of Insurance Services through the commercial presence of the foreign service provider is allowed — or more precisely, it is required by all State Parties, albeit subject to strict horizontal limitations. Finally, State Parties have not yet made commitments on the

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107 For instance, Brazil's schedule indicates that each cross-border transfer of funds and assets must be registered with the Central Bank. As a general rule, transfers are permitted when a rule allows the specific operation or upon individual authorization. Residents acquiring assets abroad must inform the Central Bank ("Banco Central do Brasil") and the Federal Revenue and Customs Secretariat ("Secretaria da Receita Federal").

108 The Uruguayan schedule stipulates that any Financial Services supplier wishing to engage in operations in Uruguay may not do so without prior authorizations from the competent authorities. Applications to operate may be rejected on precautionary grounds, including economic considerations such as the current state of the market.

109 Paraguay only liberalised the cross-border supply and consumption abroad of Retrocession and Reinsurance Services. Argentina, Brazil and Uruguay also liberalised the cross-border supply and consumption abroad of Maritime and Aviation Transport Risk insurance and some Services Auxiliary to insurance such as Consultancy Services (Argentina), Consultancy, Actuarial, Auditing Services, Broking and Agency Services (Brazil and Uruguay). In Uruguay, for the competent authority to allow the insurer to deduct the reinsurance or retrocession placed abroad, the foreign companies that provide the service must be registered. Brazil also allows the placing of insurance abroad against risks not covered within the country. However, the placing of insurance and reinsurance abroad will be made, exclusively, through the competent agency (IRB-Brasil Resseguros). Guarantee reserves corresponding to insurance and reinsurance effected abroad shall remain retained in Brazil.

110 The Argentinian Schedule expressly indicates that it is prohibited to insure abroad any insurable interest subject to national jurisdiction, including persons and goods, which must be covered only by companies established in Argentina. Similarly, the Uruguayan schedule expressly requires the commercial presence of the service provider for most type of insurance.

111 The Uruguayan schedule stipulates that in order to have a commercial presence in Uruguay, enterprises must be incorporated as public limited companies with registered shares, subject to the limitations laid down by the
presence of natural persons providing services, a mode of supply particularly relevant for the provision of services auxiliary to insurance like Broking and Agency Services. Labour Risk Insurance is the least liberalized of all. In Uruguay it can only be provided by a state-owned company under monopoly conditions, while Brazil and Paraguay have made no commitments on any mode of supply for the provision of this type of insurance.

On Banking and other Financial Services, there are significant asymmetries between State Parties' commitments. The Paraguayan schedule provides for the lowest level of liberalisation. Its commitments remain unbound on all modes of supply for all type of services with the exception of Acceptance of Deposits and Lending Services, where there are no restrictions on the commercial presence of foreign service suppliers other than the need to obtain authorisation from the Central Bank. The presence of branches of foreign banks is allowed, although incorporated firms must adopt the form of public limited companies with their capital represented by nominative shares.

The Brazilian schedule limits the scope of its commitments to certain type of financial institutions and stipulates that each of them may perform only those activities permitted by Law, the National Monetary Council (Conselho Monetário Nacional - "CMN"), the Central Bank (Banco Central do Brasil - "BACEN") and/or the Securities Commission (Comissão de Valores Mobiliários - "CVM"). It further stipulates that management staff of senior level must be permanent residents in Brazil and that representative offices may not engage in commercial business.

Brazilian commitments on the cross-border supply remain unbound for almost all type of Banking and other Financial Services except for Financial Advice Services, which are completely liberalised. Commitments on consumption abroad are subject to horizontal limitations on the cross-border transfer of funds for most type of services with the exception of Settlement and Clearing Services for Financial Assets and the Provision and Transfer of Financial Information, which remain unbound. The commercial presence of foreign service suppliers is subject to important limitations. In particular, the establishment of subsidiaries or agencies of foreign financial institutions is subject to prior authorisation by means of a Presidential decree, which is issued on a case by case basis. Specific conditions may be existing legislation. Similarly, the Paraguayan schedule stipulates that for the provision of insurance services, firms must be set according to Paraguayan legislation and duly authorised to operate by the competent authority. For some services, the firms' legal representatives and managers must reside in Paraguay. The Brazilian schedule stipulates that the commercial presence of foreign service providers is subject to prior authorization by the competent authority.
requested from interested investors. Authorisation by means of a Presidential decree is also required for the increase in foreign capital on authorised institutions or for the participation of natural or legal persons domiciled abroad on national financial institutions.

Argentina excludes financial operations carried out by the Government and State companies, from the commitments specified in its schedule. Its commitments on cross-border supply remain unbound for almost all type of Banking and other Financial Services except for Financial Advice Services and for the Provision and Transfer of Financial Information, which are completely liberalised. Commitments on consumption abroad, by contrast, are liberalised for all type of Banking and other Financial Services although the outflow of capital is subject to strict controls by the Central Bank. The commitments on the commercial presence of foreign service suppliers are also quite open, with no specific Market Access or National Treatment restrictions on any type of services, other than the usual requirements of prior authorisation from the competent authority (Central Bank or National Securities Commission).

Uruguay imposes no restrictions on the cross-border supply of Banking Services although it has not consolidated its commitments on this form of supply for Securities-related Services, Foreign Exchange Brokering, Asset Management and Settlement and Clearing Services. Uruguay neither imposes restrictions on the consumption abroad of Banking and Investment Services except for Settlement and Clearing Services, where commitments remain unbound. Banks wishing to become established in Uruguay must be incorporated as Uruguayan public limited companies with registered shares or as foreign banks' branches. The authorisation for establishment of branches or agencies of companies organised abroad is subject to the requirement that their bylaws or regulations do not prohibit Uruguayan citizens from being part of their management, administrative board, board of directors, or any other senior post, job or position in the institution within the territory of Uruguay. The commercial presence of banks is subject to the following quantitative limit: in any one year the number of authorizations for the operation of new banks to operate may not exceed ten percent of the number operating in the year immediately preceding. Representatives of foreign financial institutions must register themselves on the Central Bank.

112 The Central Bank control over the outflow of capitals by non-residents has been tightened since 2002 as part of a wide range of new measures aimed at recovering the financial system from the financial crisis that hit the country in 2001.
In summary, it stems from the above findings that State Parties’ financial service markets are partitioned by a wide range of discriminatory measures (e.g. caps on the total amount of foreign equity participation, local residence requirements, prohibition of consumption abroad, etc.) and non-discriminatory measures (e.g. licensing, authorisation or type of legal entity requirements).

5. Transport Services

State Parties’ schedules are fraught with Market Access and National Treatment restrictions on all type of Transport Services. The negotiation rounds have not managed to remove existing restrictions, but at least they have contributed to consolidate the status quo of domestic legislation affecting Transport Services. In addition, State Parties are also part to a wide range of bilateral, plurilateral and multilateral agreements signed prior to the entry into force of the Protocol of Montevideo, which remain unaffected. The Protocol’s Annexes on Land and Waterway Transport Services and on Air Transport Services expressly state that the agreements concluded prior to the entry into force of the Protocol shall not be affected by State Parties’ specific commitments on Transport Services. In other words, the negotiation rounds have managed neither to remove existing restrictions nor to secure the convergence of State Parties’ commitments with third countries.

On Maritime and Waterway Transport Services, the Argentinian, Brazilian and Uruguayan schedules include Market Access restrictions on Maritime Cabotage Transport and Inland Waterway Transport (reserved for vessels flying the national flag). The Brazilian schedule also includes restrictions on transport of governmental cargo (reserved for vessels flying the national flag) and on the transport of petroleum of national origin and its derivates (subject to a national monopoly). Similarly, the Paraguayan schedule specifies that the whole of maritime and inland waterway transport for import and export freight is reserved for vessels flying the Paraguayan flag.

113 For studies on barriers to transport integration see, e.g., RICARDO J SANCHEZ & GEORGINA CIPOLETTA TOMASSIAN, Identificación de obstáculos al transporte terrestre internacional de cargas en el Mercosur (CEPAL, Santiago de Chile 2003); AZITA AMJADI & ALAN WINTERS, Transport costs and “Natural” integration in MERCOSUR (World Bank, Washington D.C. 1997) and NEWTON DE CASTRO & PHILIPPE LAMY, Aspectos institucionais e regulatórios da integração de transportes do Mercosul (IPEA, Rio de Janeiro 1996).

114 For a vessel to fly the Brazilian flag, it is necessary that the captain, the engineer and 2/3 of the crew to be Brazilian nationals.
On *Air Transport Services*, State Parties have not consolidated commitments on any mode of supply for both freight and passenger transportation. On Maintenance and Repair of Aircraft Services, the Argentinian schedule includes no restrictions on any mode of supply, while the Brazilian schedule stipulates that foreign service suppliers must require a presidential authorisation to operate.

On *Rail Transport Services*, the Argentinian schedule stipulates that opportunities for the supply of freight and passenger transportation services are subject to tendering processes. Selected bidders must provide the service under concession regimes which specify the conditions under which the service must be provided. The Brazilian schedule specifies that governmental authorization is required for the provision of these types of services and that the granting of new authorizations is discretionary. Uruguay and Paraguay have not consolidated commitments on any type of Rail Transport Services.

On *Road Transport Services*, Uruguay has not consolidated any commitments on any mode of supply. Argentinian, Brazilian and Paraguayan schedules specify that for the provision of Freight and Transport Services, firms must be incorporated under domestic legislation. The three schedules refer to the Agreement on International Road Transport and specify the main requirements for the provision of international Transport Services that stem from that Agreement (e.g. more than half of the capital and voting rights of the firm must be owned by nationals from the State party to the Agreement, which issues the license to operate). Argentinian and Paraguayan schedules reserve the provision of local freight transportation for local firms. Brazilian and Paraguayan schedules stipulate that the provision of passenger Transport Services is subject to governmental authorization and that the issues of licenses are discretionary and may be limited. On Road Freight Transportation, the Brazilian schedule restricts the commercial presence of suppliers to firms incorporated as public limited companies according to Brazilian legislation and where at least 50% of the voting rights are owned by Brazilian nationals and management positions are occupied by Brazilian nationals.

On *Pipeline Transport Services*, Paraguay has not consolidated commitments on any mode of supply, while Brazil has not consolidated commitments on the transport of hydrocarbon products. The Argentinian and Uruguayan schedules specify that Pipeline Transport Services must be provided under concession regimes, subject to the conditions stipulated on the licenses to operate.

6. Other Services
In other type of services, State Parties’ commitments vary significantly according to the type of service in question. On the one hand, there are services completely liberalised where most or all State Parties apply no Market Access or National Treatment restrictions on any mode of supply except as indicated on the horizontal limitations. That is typically the case for Courier Services\textsuperscript{115}, Distribution Services\textsuperscript{116}, Tourism Services\textsuperscript{117} and some types of Business Services\textsuperscript{118}. On the other hand, there are services where none or most State Parties had either failed to consolidate commitments on any mode of supply or maintain significant Market Access and National Treatment restrictions against foreign service providers. That is typically the case for Postal Services\textsuperscript{119}, Audiovisual Services\textsuperscript{120}, Environmental Services (including Sewage, Refuse Disposal, and Sanitation Services)\textsuperscript{121}, Educational Services\textsuperscript{122} and some types

\textsuperscript{115} All State Parties but Paraguay have consolidated the liberalisation of all modes of supply except Mode 4.

\textsuperscript{116} Argentina, Brazil and Uruguay have made commitments with no restrictions on any mode of supply for almost all type of Distributional Services except Wholesale Trade Services and Retailing Services of fuel and fuel related products. The Uruguayan schedule also includes restrictions on the commercial presence of foreign Commission Agents and on the establishment of new commercial premises occupying great surfaces. Paraguay, by contrast, has made no commitments on the cross-border supply and on the movement of natural persons providing services, whereas it did made unrestricted commitments on the consumption abroad and on the commercial presence of foreign service providers except for Wholesale Trade Services.

\textsuperscript{117} Argentina, Paraguay and Uruguay have consolidated commitments without restrictions on all modes of supply with the exception Paraguayan Market Access and National Treatment restrictions to the commercial presence of foreign providers of Travel Agencies and Tour Operators Services. Brazil, by contrast, has consolidated fewer commitments limited by some restrictions. On Hotel and Restaurants, the Brazilian government provides fiscal incentives for Brazilian firms located in specific regions and for firms with the majority of capital of Brazilian origin, which constitutes a discriminatory measure against the commercial presence of foreign service suppliers. On Travel Agencies and Tour Operators and Tourist Guide Services, Brazil imposes no restrictions on the commercial presence of foreign suppliers, but has not made commitments on the other modes of supply.

\textsuperscript{118} See Computer and Related Services, Management Consulting Services, Market Research and Public Opinion Polling Services, Placement and supply of Personnel Services, Photographic Services and Convention Services.

\textsuperscript{119} Argentina, Paraguay and Uruguay have not consolidated commitments on any mode of supply, while Brazil has consolidated current restrictions on Market Access, which accord to the "Uniao" exclusivity on the provision of pick-up, transport and delivery of letters, postcards, grouped correspondence and telegram services.

\textsuperscript{120} All State Parties’ schedules include restrictions on Market Access (e.g. quotas on foreign films, preferences for state owned companies on the assignation of TV and radio frequencies) and National Treatment (e.g., nationality requirements for TV and radio companies, nationality requirements for film producers or requirement to set up partnerships with local producers) affecting one or more modes of supply.

\textsuperscript{121} All State Parties include Market Access restrictions to the commercial presence of foreign service suppliers. According to State Parties’ schedules, this type of services is usually provided by state-owned enterprises under monopoly conditions. In some cases, local government authorities allow private contractors to enter the market under concession regimes but, overall, trade tends to be highly restricted.
of Business Services\textsuperscript{123}.

D. Critique of the Negotiation Rounds

Sections B and C above provided a detailed description of the evolution of the negotiation process and its achievements over the last nine years. This section critiques the results achieved so far and discusses the efficacy of the negotiation of specific commitments as an instrument for the liberalisation of trade in services.

One benchmark that can be considered for making a value judgment about the results achieved so far by the Protocol’s Programme of Liberalisation are State Parties’ GATS schedules of specific commitments, which back in 1998 were taken as the baseline for starting the negotiations under the Protocol’s umbrella.\textsuperscript{124} A comparison of State Parties’ MERCOSUR commitments with their GATS’ commitments clearly illustrates that the former are far more advanced than the latter in terms of coverage, depth and transparency.\textsuperscript{125} The following comments are valid for all State Parties’ schedules. First, contrary to GATS schedules, MERCOSUR schedules include commitments on almost all sectors of the Service Sector Classification List.\textsuperscript{126} Secondly, MERCOSUR commitments are much closer to State Parties’ current status of domestic legislation than the GATS commitments.\textsuperscript{127} In other words,

\begin{itemize}
  \item State Parties have either not consolidated commitments on any mode of supply or have subject their commitments to strict horizontal limitations.\textsuperscript{122}
  \item See Research and Development Services, Investigation and Security Services and Services incidental to Fishing, Mining and Energy Distribution.\textsuperscript{123}
  \item For an analysis of State Parties’ GATS commitments see JULIO BERLINSKY, ‘GATS Commitments and Policy Issues of MERCOSUR and NAFTA Countries’, in Fernando Lorenzo & Marcel Vaillant (eds) MERCOSUR and the Creation of the Free Trade Area of the Americas (Woodrow Wilson International Centre for Scholars, 2003). For a comparison between GATS commitments and MERCOSUR commitments up to the fourth round of negotiations see DA MOTA VEIGA, ‘El MERCOSUR frente a los acuerdos y negociaciones sobre servicios e inversiones’, in .\textsuperscript{124}
  \item This statement is valid whether one takes as a benchmark State Parties’ original GATS commitments or current GATS commitments. In fact, State Parties made little changes to their GATS’ concessions since the launch of multilateral negotiations in 2000.\textsuperscript{125}
  \item For instance, MERCOSUR schedules include commitments on Postal Services, Audiovisual Services, Educational Services, Environmental Services and Health Services, which are not included in the GATS schedules.\textsuperscript{126}
  \item For instance, on Road Transport Services, Brazil’s GATS schedule includes a cap on the commercial presence of foreign equity, equivalent to 20% of the voting rights, whereas under its MERCOSUR schedule the cap is equivalent to 50% of the voting rights in line with what the legislation actually prescribes. On top of that,
they consolidate the status quo of domestic legislation leaving no buffer zone between the commitment and the legislation, what in goods parlance is known as the gap between the "bound" and the "applied" tariff. Finally, commitments under the MERCOSUR schedules are recorded in a much more precise way, providing more information about the nature of existing Market Access and National Treatment restrictions and following a consistent methodology, which increases the degree of transparency of existing restrictions and facilitates the comparisons between State Parties' commitments.

At first sight, the MERCOSUR – GATS comparison appears to indicate that the Protocol's Programme of Liberalisation has been a resounding success. However, a closer examination of MERCOSUR current schedules of commitments clearly reveals that the results achieved so far are simply not good enough. The disappointment increases if one bears in mind the advantages of a negotiation forum of four neighbouring developing countries over a multilateral forum of over one hundred and forty nations.

To put it crudely, six rounds of negotiations spanning over the last nine years achieved no more than the (partial) consolidation of the status quo of State Parties' domestic legal systems, failing miserably to eliminate the discriminatory measures embedded in those systems and ensure a preferential treatment for MERCOSUR services and service suppliers. Moreover, the main advantage of the consolidation of the status quo of domestic legislation, i.e. the "lock in" effect that prevents State Parties from adopting more restrictive measures than those recorded in their schedules, is watered down by the fact that current schedules of commitments have not yet entered into force. As things stands today, the observance of the commitments recorded in the schedules depends on a sort of 'gentleman's agreement' between State Parties.\(^{128}\)

State Parties' schedules of specific commitments are clogged with Market Access and National Treatment restrictions. Local residency requirements, nationality requirements, commercial presence requirements, economic needs tests, quantitative restrictions on service providers, foreign ownership restrictions, discriminatory financial incentives, monopolies and restrictions on the cross-border transfer of funds are just some of a long list of overt protectionist barriers that State Parties did not agree to disapply to MERCOSUR service suppliers. There is a plethora of measures which, at least on their face, are not discriminatory.

\(^{128}\) See above Ch III footnote n11.

MERCOSUR commitments are far more disaggregated on sub-sectors and sub-sub-sectors up to seven and eight digits of the UN's Central Product Classification.
such as licensing or qualification requirements, which have, nonetheless serious trade restrictive effects. On top of that, there are strong asymmetries in the level of commitments between State Parties', sectors and modes of supply. The landscape that stems from State Parties' schedules is one of fragmentation between domestic service sectors, whether that is Professional Services or Financial Services, Telecommunications or Transport.

State Parties' schedules of commitments include some sectors which are naturally more open to foreign competition (and not opened to foreign competition as a result of the negotiations) such as Computer and Related Services, Management Consulting Services, Courier Services and Tourism, but even in these sectors trade is affected by severe restrictions on the movement of natural persons supplying services included as horizontal limitations in all State Parties' schedules.

The evidence is conclusive in signalling the failure of the rounds of negotiations of specific commitments in making any significant contribution to the elimination or reduction of Market Access or National Treatment restrictions against MERCOSUR services or service suppliers. It also suggests various reasons that explain the inefficacy of the Protocol's Programme of Liberalisation as an instrument for the liberalisation of trade in services and cast a shadow of doubt about the negotiability of barriers to trade in services.

First of all, trade negotiators have a very constrained manoeuvring room to make concessions over measures affecting trade in services, because, as it has been revealed, such measures are on many occasions embedded in statutes or even in constitutional provisions. By any standards, it is unreasonable to assume that a tiny group of medium-rank diplomats that meet every now and then could succeed in bringing forward the necessary changes for removing such restrictions. Clearly, the only way to remove them is through fully fledged legal reform processes led by national parliaments.

Secondly, the bargaining of reciprocal concessions on National Treatment and Market Access restrictions is constrained by the fact that it is very difficult to measure the value of concessions. For instance, has the offer to lift a cap on foreign equity participation on domestic banks a value comparable to, say, an offer to remove nationality requirements on media company owners? Another problem linked to this one is the lack of knowledge or sufficient information to make decisions about complex regulatory systems. This requires lengthy and cumbersome consultation processes that seem incompatible with the modus

\[\text{129 See Appendix III Degree of Liberalisation of Service Sectors by State Parties – July 2006.}\]
operandi of trade negotiations, which are characterised by intense exchanges of requests and offers over a short period of time.

A third problem that has been identified is the degree of regulatory asymmetries between some State Parties' service sectors. For instance, the fact that Paraguay does not have a regulatory framework for Professional Services comparable to that of other State Parties has put this State off making commitments that could constrain its right to introduce regulations in the future.

Finally, the evidence confirmed that the logic underlying the negotiation of specific commitments tends to prioritise short-term interests and individualistic strategies over long-term interests and co-operative actions necessary for the establishment of a common market. It happened on a number of occasions during the negotiation rounds that some State Parties offered to eliminate or reduce restrictions in certain sectors or modes of supply but, ultimately, they decided to withdraw their offers on the grounds that they were not matched by comparable offers from other State Parties. Similarly, Brazil refrained from consolidating the current status of its legislation and fully disclosing information relating to the unbound entries – in particular on the Financial Services sector – on its MERCOSUR schedule on the basis that that could weaken MERCOSUR's negotiation position vis-a-vis the EU or in the context of the FTAA negotiations.

During the negotiation rounds, State Parties themselves became aware of the limitations of the request and offer of concessions to advance the liberalisation of trade in services, in particular on sectors such as Professional Services, where the real challenge lies more on the mutual recognition of qualifications and licenses to operate than on the removal of Market Access or National Treatment Restrictions. These limitations lead State Parties to start looking at positive integration as an alternative path to further the liberalisation of trade in services.

E. Concluding Remarks

This chapter examined the rounds of negotiations of specific commitments conducted under the umbrella of the Protocol's Programme of Liberalisation and assessed its contribution to the liberalisation of trade in services in MERCOSUR. The analysis provided compelling evidence suggesting that barriers to trade in services cannot be removed by diplomatic means alone.
To begin with, an argument was put forward questioning, on grounds of principle, the suitability of the negotiation of reciprocal concessions as a mechanism for the liberalisation of trade in services in MERCOSUR. There is no doubt about the need for a gradual opening of domestic service markets to foreign competition, in particular when the process occurs in a context conditioned by unstable macroeconomic circumstances and sharp structural and policy asymmetries among participant States. It is equally clear that the Programme’s "positive list" approach guarantees such gradualism by according to each State Party the right to choose the sectors and the conditions under which they are prepared to observe the agreement’s main obligations (National Treatment and Market Access). It was argued, however, that a GATS' like Programme was not the best option for securing the gradual unfolding of the liberalisation process that MERCOSUR needs. First, State Parties to the Treaty of Asuncion, by contrast to GATS Members, already agreed, from the outset, to establish a common market involving the free movement of services across national borders, without a priori limitations. Secondly, as comparative integration experiences show, there are better alternatives for securing a gradual liberalisation process. Finally, the logic underlying the negotiation of specific commitments tends to prioritise short-term interests and individualistic strategies over the long-term interests and co-operative actions necessary for the establishment of a common market.

The analysis of State Parties’ current schedules of specific commitments confirmed the Programme’s inefficacy as an instrument for the liberalisation of trade in services. Six rounds of negotiations spanning over the last nine years achieved no more than the (partial) consolidation of the status quo of State Parties’ domestic legal systems, failing miserably to eliminate the discriminatory measures embedded in those systems and ensure a preferential treatment for MERCOSUR services and service suppliers. Moreover, the main advantage of the consolidation of the status quo of domestic legislation, i.e. the “lock in” effect that prevents State Parties from adopting more restrictive measures than those recorded in their schedules, is diluted by the fact that current schedules of commitments have not yet entered into force.

The findings pointed at various factors explaining the inefficacy of the Protocol’s Programme and casting a shadow of doubt about the negotiability of barriers to trade in services: a) the trade negotiators’ constrained manoeuvring room to make concessions over measures affecting trade in services. Most restrictions are embedded in statutes or even in constitutional provisions, meaning that they are far beyond the reach of what diplomats can offer in the context of a negotiation process; b) the difficulty to measure the value of concessions necessary for enabling the exchange of requests and offers; and c) the lack of sufficient
information to make decisions about complex regulatory systems, which requires lengthy and cumbersome consultation processes.

On 21 June 2007, the seventh round of negotiations was launched. This is the first round to be launched after the entry into force of the Protocol of Montevideo on 7 December 2005, triggering the ten years term for the completion of the Programme of Liberalisation. But in light of the findings, a successful and timely completion of the Programme of Liberalisation by December 2015 is highly unlikely. There is no evidence to suggest that State Parties' governments have the political will to push forward the necessary reforms to remove from their legislation those Market Access and National Treatment restrictions that hinder trade in services with their partners. Instead, they should aim at completing the process of consolidation of the status quo, with a view to ensuring that each schedule of specific commitments records - in an exhaustive and detailed fashion - all discriminatory restrictions embedded in State Parties' domestic legislation. It seems more realistic to aim at the consolidation of the status quo, which prevents the introduction of future discriminatory measures against MERCOSUR service suppliers, than at the complete removal of existing restrictions.

Ideally, State Parties should also commit themselves to a schedule of reforms for the adoption - in the medium or long term - of those measures necessary for removing Market Access and National Treatment restrictions from domestic legislation. But for this to be possible it is necessary to ensure a more active involvement of national parliaments on the negotiations and, above all, secure a renewed political mandate, supporting the liberalisation process at the highest possible level. However, there is no evidence to suggest that high political circles would be prepared to provide this kind of support.

Even assuming a best case scenario, where State Parties consolidate in their schedules the status quo of domestic legislation for all service sectors and modes of supply and commit themselves to future legal reforms aimed at the elimination of overt Market Access and National Treatment restrictions, this will not be sufficient for ensuring effective market access conditions for MERCOSUR service suppliers and levelling the playing field to compete against domestic incumbents. To secure an effective degree of liberalisation, more subtle barriers to trade such as discriminatory practices and the trade restrictive effects caused by the overlap of indistinctly applicable regulatory requirements should also be addressed. This requires more advanced legal mechanisms that go beyond State Parties' commitment not to discriminate against foreign service suppliers including, inter alia, harmonisation or mutual
recognition initiatives and co-operation mechanisms between domestic regulators. That is precisely what the next chapter looks at.
Chapter V

Secondary Legislation on Services
This chapter focuses on the liberalisation of trade in services through positive integration. It examines MERCOSUR secondary rules on specific service sectors and modes of supply, discusses their contribution to the liberalisation of trade in services and puts forward some suggestions for improving the quality of MERCOSUR legislation. The chapter is divided into six sections. First, it analyses the concept of positive integration (Section A). It then outlines the process for the adoption of secondary rules in MERCOSUR (Section B), examines the secondary rules that have been adopted so far on specific service sectors and modes of supply (Section C) and critically assesses the legislative practice on services (Section D). Finally, some suggestions for better regulation are put forward (Section E), ending with some concluding remarks (Section F).

A. What is Positive Integration?

The dichotomy “negative integration” and “positive integration” first appeared in the economic literature to illustrate different modalities for the liberalisation of trade. In 1954, focusing on the European Communities, Jan Tinbergen described “negative integration” as the removal of discrimination and restrictions on the circulation of goods between member states and “positive integration” as 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.¹ Pinder adapted Tinbergen’s terminology to the evolution of the European Community, using ‘negative integration’ to refer to the removal of discrimination and ‘positive integration’ to refer to the formation and application of coordinated and common policies in order to fulfil economic and welfare objectives other than the removal of discrimination.² Pelkmans uses “negative integration” to refer to the “removal of discrimination in national economic rules and policies under joint and authoritative surveillance”, and “positive integration” to refer to the “transfer of public market-rule-making and policy-making powers from the participating polities to the union levels”.³

¹ See JAN TINBERGEN, International Economic Integration (North Holland, Amsterdam 1954), p 75. Tinbergen’s examples of positive integration include the institution in charge of the redistribution of incomes between countries, or the regulation of unstable markets such as the common agricultural policy.
The legal literature also employs this dichotomy when referring to the different type of legal instruments used for the liberalisation of trade. On European law, for instance, Weatherhill differentiates ‘negative harmonization,’ which he understands as the elimination of obstructive national laws through judicial rulings, from ‘positive or legislative harmonization,’ by which he refers to the introduction of community rules to govern a particular area in partial or total replacement for national rules. 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 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.” Ortino introduces a more subtle categorisation that differentiates between ‘judicial positive integration’ and ‘legislative positive integration’ or positive integration strictu sensu, according to the body responsible for defining or implementing the integration instrument in question. The literature on WTO law also refers to negative and positive integration.

To put it simply, positive integration refers to the adoption of rules by treaty-based decision making bodies endowed with rule-making power. Commentators usually refer to these rules as ‘secondary legislation’ or ‘derived law’ as opposed to treaty provisions, which are referred to as ‘primary legislation’ or ‘original law’. It must be noted that not all regional trade

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5 See JACQUES ZILLER, The Challenge of Governance in Regional Integration. Key Experiences from Europe (European University Institute, Florence 2005), pp 36-37.
6 Under “judicial positive integration”, the author includes those general principles (non-discrimination, reasonableness, etc.) imposed by the transnational legal system on its Members, for whose definition or implementation recourse to the judiciary is indispensable. Under “legislative positive integration” the author includes secondary legislation adopted at the transnational level which is “… sufficiently detailed to avoid having to recourse, at least on a constant basis, to adjudicative bodies for their implementation. See FEDERICO ORTINO, Basic legal instruments for the liberalisation of trade: a comparative analysis of EC and WTO law (Hart, Oxford 2004), p. 25.
agreements include built in mechanisms for the creation of new rules that can further specify treaty-based commitments. Some agreements simply lay down State Parties rights and obligations in the treaty itself and the only way for changing those rights and obligations is by going through the treaty amendment procedure governed by public international law.

The composition, regulatory competence and decision making system for the adoption of secondary rules may vary from treaty to treaty. Different models involve different degrees of transfer of regulatory power from domestic to regional bodies. When State Parties want to exert strict control over the development of secondary rules they tend to opt for decision making bodies consisting on government officials, who adopt rules by consensus. By contrast, other models like the EU include the participation of non-governmental actors in the rule-making process and envisage the possibility of adopting decisions through qualified majority voting. Another important variation is the way in which secondary rules make their way into national legal systems. Sometimes they are directly applicable in domestic legal systems whereas in other contexts State Parties must adopt specific measures for their incorporation into their national legal systems.

The possibility to adopt secondary rules provides State Parties with a flexible and cost-effective mechanism for adjusting their commitments to the ongoing challenges of the integration process. This is particularly relevant for trade in services, where the regulatory framework must be regularly adjusted in accordance with the permanent changes and innovations the service sector is subject to. In particular, positive integration offers an unrivalled mechanism for tackling the trade restrictive effects caused by the diversity of domestic regulations affecting the production, distribution, marketing, sale or delivery of services. There are many ways and degrees in which secondary legislation can be used for handling regulatory diversity, ranging from the harmonisation of disparate domestic rules to the mutual recognition of domestic standards, qualifications or licenses or the setting up of co-operation mechanisms between domestic regulators.

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8 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 liberalisation of trade in goods." See GIANNI CAMPOGRANDE & CLAUS-DIETER EHLEMMANN, 'Rules on Services in the EEC: A Model for Negotiating World-Wide Rules?' in Ernst-Ulrich Petersmann & Hilf Meinhard (eds) The New GATT Round of Multilateral Trade Negotiations - Legal and Economic Problems (Kluwer Law, 1991), p 490.
By providing a mechanism for tackling the trade restrictive effects caused by "lawful" but disparate domestic regulations, positive integration paves the way for reaching a level of integration deeper than that resulting from the mere removal of overt discriminatory measures. However, its contribution to the liberalisation of trade will ultimately depend on the capacity of the institutional framework laid down by the treaty to ensure the right amount of intervention of regional institutions on domestic affairs, the timely and complete implementation of secondary rules by State Parties and the effective protection of the individual rights created by them.

B. MERCOSUR Legislative Process

The MERCOSUR legislative process is of a predominantly intergovernmental nature, conferring State Parties strict control over the development of secondary rules. As mentioned in Chapter II, MERCOSUR institutions include three intergovernmental bodies with decision making power: the CMC which adopts Decisions, the CMG which adopts Resolutions and the MTC which adopts Directives. All these bodies consist of government officials only and adopt decisions by consensus in the presence of all State Parties.

The legal basis for the CMC and the CMG to adopt secondary rules is not defined with precision and clarity. The Treaty of Asuncion refers, rather vaguely, to the State Parties’ commitment to “harmonize their legislation in pertinent areas to strengthen the integration process” but it does not give further indications about which areas should be considered “pertinent” to harmonise. The Protocol of Ouro Preto enumerates in a more clear and detailed way the duties and powers of the CMC and CMG, which contributes to further specify the scope of their regulatory competence, but it still fails to specify with precision on what areas they must (or must not) regulate. By contrast, the duties of the MTC are more specific and clearly defined, leaving less room for misunderstandings about its scope of regulatory competence. Treaty provisions neither include any standard relating to the

9 "Lawful" measures meaning measures that are in conformity with the basic standards of treatment prescribed by international trade agreements, i.e. market access, national treatment and most favoured nation treatment.
11 POP, Art. 37.
12 ToA, Art. 1.
13 POP, Arts. 16 and 19.
opportunity for adopting secondary rules or the extent to which secondary rules could interfere with the autonomy of domestic regulators.  

The right of legislative initiative lies exclusively in the hands of decision making bodies. While the CMC is the highest body of MERCOSUR, the CMG and the MTC are not simply auxiliary bodies to the CMC. They too have autonomous regulatory power for adopting rules within their sphere of competence. In other words, there is a plurality of legal production centres, which can lead to overlaps and inconsistencies.

The CMC receives initiatives or recommendations to adopt Decisions from the MCPR, the FCES (through the CMG), the FCPA (through the CMG), the CMG and the Parliament. The CMC is not bound to follow the initiatives or recommendations received, but it may be bound to express its views on them, depending on the body that submits them. For instance, the CMC must "express its views" on proposals submitted by the CMG and on the Agreements submitted by Ministerial Meetings. In addition, when it receives a draft Decision from the Parliament, the CMC is under an obligation to report back to the Parliament every six months on how it is dealing with such proposal.

The CMG receives recommendations to adopt Resolutions from the various Sub-working groups, specialised meetings, groups and ad hoc groups operating under its umbrella. It also receives recommendations from the FCES, draft Decisions (to be forward to the CMC) from

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14 By way of comparison, under EU law, the regulatory competence of community institutions is rigorously shaped in accordance with the principles of attributed competence, subsidiarity and proportionality. See EC Treaty, Art. 5, and Protocol on the Application on the Principles of Subsidiarity and Proportionality, Treaty of Amsterdam, 1997 O.J. (C 340) 1.
15 See above in Ch II, Section E the proposals suggested for minimising this risk.
16 The MCPR may present initiatives to the CMC on matters relating to the integration process, MERCOSUR external negotiations or the establishment of the common market. See Dec 11/03 Art. 4(a).
17 See FCPA Internal Regulation, Art. 3(f) and Dec 2/02 Art. 5.
18 POP, Art. 14.11.
20 POP, Art. 8.V.
21 Ibid. Art. 8.VI and CMC Internal Regulation Art. 17, which stipulates that the Ministerial Meetings will express themselves through Agreements that must be approved by the CMC (emphasis added).
22 PMP, Art. 4.13.
23 CMG Internal Regulation, Art. 21.
24 POP, Art. 29.
the FCPA\textsuperscript{25}, and draft Resolutions on customs and trade matters from the MTC\textsuperscript{26}. Like the CMC, the CMG is not bound to follow these recommendations, but it must express its views on any proposals or recommendations submitted to it by other MERCOSUR bodies, within their scope of competence.\textsuperscript{27} In its turn, the MTC receives opinions and recommendations from the various Technical Committees that operate under its umbrella, but it is not bound to follow them.\textsuperscript{28}

Once adopted by the competent decision making body, Decisions, Resolutions and Directives are binding upon State Parties.\textsuperscript{29} However, they are not directly applicable in national legal systems. To make their way into national legal systems, State Parties must adopt the necessary measures to implement them.\textsuperscript{30}

Finally, the MERCOSUR legal system does not provide any specific mechanism for the judicial review of the decisions adopted by the CMC, CMG or the MTC on grounds of infringement of their regulatory competence, omission of procedural requirements, misuse of power or infringement of any other treaty provision or secondary rule governing the exercise of the decision making power conferred to them.\textsuperscript{31}

**C. Analysis of Secondary Legislation on Services**

\textsuperscript{25} Dec 2/02, Art. 5.
\textsuperscript{26} POP, Art. 19.VII.
\textsuperscript{27} Ibid. Art. 14.VI.
\textsuperscript{28} MTC Internal Regulation, Art. 17.
\textsuperscript{29} POP, Arts. 9, 15 and 20.
\textsuperscript{30} See Ch II, Section D, Numeral 1.
\textsuperscript{31} In the EC context, by contrast, the ECJ plays a key role in controlling the validity of Community measures. Community institutions, Member States, legal persons and individuals have standing before the ECJ to challenge the validity of Community Measures. See EC Treaty, Arts 230 – 233.
The MERCOSUR legal system already includes a voluminous body of secondary rules. The bulk of them consist of Resolutions aimed at the harmonisation of technical, sanitary and phytosanitary regulations. There are, however, a considerable number of rules concerning specific service sectors or horizontal service matters. The legislation on services also includes a number of international agreements concluded within the framework of the Treaty of Asuncion which have been “approved” by Decisions of the CMC. But, as already mentioned, this is nothing more than an unnecessary formality, since it is not the CMC but the State Parties themselves who have negotiated and concluded these agreements. Strictly speaking, these agreements are not secondary law but primary law.

1. Secondary Legislation on the Movement of Natural Persons Supplying Services

Not long after launching the rounds of negotiation on specific commitments, State Parties became aware of the difficulties inherent in the removal of barriers to the free movement of natural persons supplying services. The asymmetries between domestic regulations and the political sensitivity associated with the right of entry and stay of foreigners soon proved to be obstacles too difficult to overcome through diplomatic negotiations. The limited progress achieved by the negotiation rounds prompted a legislative action plan by which the CMG entrusted the Group on Services with the task of developing the terms of reference for secondary rules aimed at facilitating the movement of natural persons supplying services. In compliance with the CMG mandate, the Group on Services prepared three draft rules on the movement of natural persons supplying services: the Agreement for the Creation of a

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32 By the end of 2007 MERCOSUR decision making bodies had adopted 500 Decisions, 1,257 Resolutions and 190 MTC Directives. However, the following must be borne in mind: a) these figures include many “rules” that are merely administrative decisions with no regulatory value whatsoever (e.g. designation of arbitrators, approval of the MERCOSUR Secretariat’s budget, etc.); b) they do not take into account the fact that many rules have been repealed by subsequent ones and c) they do not take into account whether the rules have been incorporated by State Parties into their national legal systems. As mentioned, there is a significant gap between adopted rules and those which are actually in force. See above Introduction footnote n7.

33 For a critique on the use of primary law for regulating on specific trade disciplines and other non-constitutional aspects of the integration process see above Ch II, Section D, Numeral I.

34 Even after six rounds of negotiations, State Parties’ specific commitments on the presence of natural persons supplying services are currently restricted to a limited number of categories of natural persons and subject to strict limitations on the maximum period of time the foreign service provider is allowed to stay in the host State.

35 Res 36/00 Art. 4 instructs the GS to draft the terms of reference for the negotiation of secondary legislation on the free circulation of natural persons supplying services.
MERCOSUR Visa, the Mechanism for the Temporary Provision of Professional Services and the Agreement for the Simplification of Business Activities, which are considered below. 36

1.1 Agreement for the Creation of a MERCOSUR Visa

The Agreement for the Creation of a MERCOSUR Visa 37 seeks to harmonise rules concerning the issuing of visas for certain categories of natural persons supplying services. 38 Though limited, the categories of natural persons that can benefit from this agreement is wider than those included in State Parties’ schedules of specific commitments.

The length of stay granted under this agreement is subject to a maximum period of two years, which, generally speaking, is more beneficial than that stipulated by State Parties’ schedules of specific commitments. 39 According to the agreement, the issuing of the Visa will not be subject to economic needs tests, proportionality requirements in terms of nationality or remuneration or any type of previous authorisation. 40 In addition, the Agreement stipulates a

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37 See Dec 16/03, 15/12/03 “approving” the Agreement for the Creation of a MERCOSUR Visa. This is not a Dec of the CMC. It is an international agreement concluded within the framework of the Treaty of Asuncion. According to Art. 10, the Agreement will enter into force 30 days after the date of deposit of the fourth instrument of ratification with the Government of the Republic of Paraguay. So far, it has been approved by Paraguay (see Ley N° 2556, 31/03/2005) and Uruguay (See Ley No 18110 de 16 de abril de 2007), whereas it is still under consideration by the Argentinian and Brazilian parliaments. It must be highlighted that there was a previous attempt to create a MERCOSUR Visa in 2000 but it never entered into force (See Dec 48/00 “approving” Agreement for the Waiver of Visas between MERCOSUR State Parties).

38 The Agreement is aimed at Executives, Managers, Directors, Legal Representatives, Scientists, Researchers, Professors, Artists, Sports Men, Journalists, Specialists and Professionals, who are nationals from a State Party, wishing to supply services for remuneration on a temporary basis on the territory of another State Party.

39 Agreement for the Creation of a MERCOSUR Visa, Art. 2.1.

40 Ibid. Art. 2.3.
harmonised list of requirements for the issuing of the visa\textsuperscript{41}, but it does not lay down a common procedure nor does it limit the amount that can be charged for issuing a visa. It merely compels State Parties to implement the quickest and cheapest procedure possible.\textsuperscript{42}

1.2 Mechanism for the Temporary Provision of Professional Services

The market for professional services is partitioned by domestic regulations including nationality or residency requirements, compulsory professional membership requirements and, for some professions, even quantitative restrictions.\textsuperscript{43} Foreign professionals wishing to provide services in the territory of other State Parties must either apply for the recognition of their qualifications (tying their destiny to the unilateral and undisputable will of the host state’s authorities) or face the cost of re-training locally. On top of that, there are significant asymmetries on the degree of development and regulatory strategies for governing the professions among State Parties. Not surprisingly, the negotiation rounds yielded no significant results on the liberalisation of professional services beyond the consolidation of the status quo of domestic regulations. It became apparent that if any progress was to be achieved in this area, it should be through positive integration.

The Protocol of Montevideo compels State Parties to encourage the competent authorities and professional associations in their respective territories to work together with a view to developing mutually acceptable standards and criteria for the practice of relevant services and professions and to make recommendations on the mutual recognition of licences, registers and certificates to the CMG.\textsuperscript{44} In addition, some professional bodies have been lobbying for the development of a regulatory framework ensuring effective market access for foreign professionals.\textsuperscript{45} These two factors have particularly influenced the development of secondary legislation on professional services.

\textsuperscript{41} Ibid. Art. 3.
\textsuperscript{42} Ibid. Art. 4.
\textsuperscript{44} PM, Art. XI.2.
\textsuperscript{45} See the Commission for the integration of the Agronomy, Architecture, Engineering, Geology and Surveyance Professions in MERCOSUR. It consists of representatives from State Parties’ professional bodies responsible for controlling and supervising the supply of this type of Professional Services. It is an entirely private initiative, which has been lobbying MERCOSUR decision making bodies since 1991 for the harmonisation of national legislations.
In 2003, as a result of intense work carried out by the Group on Services with a significant input from professional bodies, the CMC adopted a Mechanism for the Temporary Provision of Professional Services. This Mechanism consists of three separate instruments: a) Guidelines for the adoption of framework agreements on the mutual recognition of professional bodies and for the development of common disciplines on the issuing of temporary licenses for the supply of professional services (Annex I); b) Functions and Powers of Information and Management Focal Centres (Annex II); c) Functioning of the System (Annex III). None of these instruments includes rules related to specific professions. Together they lay down a regulatory framework for the future development of licensing systems and supervision mechanisms for the temporary provision of professional services within MERCOSUR.

The mechanics of the system can be summarised as follows. First, it is necessary to set up a Working Group ("WG") consisting of representatives from professional bodies or national authorities responsible for regulating the profession in question. The WG must request the Group on Services to be recognised as such. Once recognised, the WG should draft a mutual recognition agreement by which the host professional body is responsible for monitoring the foreign professional while he or she provides temporary services in its territory. The WG must also draft common disciplines for the issuing of temporary licenses for the supply of professional services. Both the mutual recognition agreement and the disciplines must be drafted in accordance with the guidelines laid down by Annexes I of the “mechanism”. Once drafted, the agreement and the disciplines must be submitted to the Group on Services which, after revision, will submit it to the CMG for approval. Once both instruments are approved by the CMG, a professional from State Party A should be able to provide services on a temporary basis on State Party B. It is for the professional bodies to issue the licenses and to monitor the professionals’ compliance with the professions’ standards and regulations while providing services abroad.

46 Dec 25/03. 15/12/03. So far, only Uruguay has incorporated this Decision into its domestic legal system (See Ley 18.105 de 5 de enero de 2007). Delegates to the Group on Services from Argentina and Brazil have stated that Dec 25/03 is being considered by their parliaments. The Paraguayan delegation informed that the incorporation of such norm does not require parliamentary approval. See minutes GS meeting 04/06.
Compared to most MERCOSUR secondary rules, the characteristics of the Mechanism for the Temporary Provision of Professional Services are quite original in the sense that it involves the direct participation of professional bodies on the development and implementation of the regulatory standards applicable to the temporary provision of professional services. This should result in more accurate rules capable of addressing the particular demands of each profession for ensuring high standards of protection without creating unnecessary barriers to trade in services. It should also elicit the market participants’ sense of ownership of the regulatory framework that applies to them, enhancing its legitimacy and thus, fostering better compliance.

Notwithstanding the fact that the Mechanism for the Temporary Provision of Professional Services has not yet entered into force, the Group on Services has already received a number of requests for the creation of Working Groups from various professions, which indicates the degree of interest shown by some of the professions in the liberalisation of professional services. 47

1.3 Agreement for the Simplification of Business Activities

The purpose of the Agreement for the Simplification of Business Activities48 is to remove obstacles to the establishment of businessmen from one State Party on the territory of another State Party. Its main provision starts with a grandiloquent sentence “Businessmen who are nationals from the State Parties shall be entitled to establish themselves in the territory of any other State Party for the purpose of carrying out their activities…”, whose legal impact is subsequently curtailed by the following caveat “… without any other restrictions than those stemming from the host State Party’s legislation applicable to the activity in question.”49

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47 So far, the following groups have requested their official recognition by the CMG: Commission for the integration of the Agronomy, Architecture, Engineering, Geology and Surveyance Professions in MERCOSUR; MERCOSUR Committee on NUTRICIONISTAS; MERCOSUR Council on Nurses; MERCOSUR Confederation of Estate Agencies; MERCOSUR Conference on the Regulation of Chemistry Professions and Integration Group on Accounting, Economy and Administration (in spanish Grupo de Integración del MERCOSUR -Contabilidad, Economía y Administración- GIMCEA.)

48 See Dec 32/04 “approving” the Agreement for the Simplification of Business Activities. Again, this is not a Decision of the CMC. It is an international agreement concluded within the framework of the Treaty of Asuncion. It came into force on 27 December 2007 being ratified by Argentina (Ley 26105, 6/09/06), Brazil (Decreto Legislativo 298/07, 29/10/07) and Uruguay (Ley 18069, 11/12/06).

49 Agreement for the Simplification of Business Activities, Art. 1 (Author’s translation).
Thus, like many other secondary rules, it fails to provide for any meaningful degree of harmonisation or at least co-ordination between disparate domestic regulations.

State Parties commit themselves to speed up the procedures for the issuing of residency permits, working documentation and identity cards for foreign businessmen and to grant foreign businessmen national treatment in relation the procedures for the setting up of companies.\textsuperscript{50} They also commit to co-operate towards the harmonization of their domestic legislation with a view to enable businessmen from one State Party to carry out their activities in the territory of another State Party.\textsuperscript{51} In addition, the agreement provides for a partial harmonization of \textit{non-personal} requirements that immigration authorities can (and cannot) request for the application of business visas or residency permits for the purpose of carrying out business in the host State.\textsuperscript{52} But it clearly states that it is for each State Parties' legislation to determine the \textit{personal} documentation necessary for the issuing of visas.\textsuperscript{53}

Another characteristic of the Agreement is the fact that it was modelled in accordance to a pre-existing—almost identical—areement between Argentina and Brazil for the facilitation of business activities\textsuperscript{54}, clearly suggesting that the development of MERCOSUR legislation follows the results of bilateral negotiations previously conducted by the two larger partners outside MERCOSUR.\textsuperscript{55}

\textsuperscript{50} Ibid. Art. 3.

\textsuperscript{51} Ibid. Art. 4.

\textsuperscript{52} For instance, for issuing an investor visa, the immigration authorities cannot require the applicant to certify a deposit of more than USD 30,000 in the host State.

\textsuperscript{53} Ibid. Art. 4, last paragraph.


\textsuperscript{55} It is interesting to note the difficulties already faced by Argentina and Brazil in implementing the bilateral Agreement. As it stems from Annex IV to minutes GS Meeting 02/04, the Argentinian delegation claimed that different Brazilian consulates in Argentina and elsewhere interpreted the Agreement in different ways. They also claimed that the consulates gave contradicting information on the procedures and on the requirements for the application of business visas and for the setting up of companies in Brazil by foreigners and that they even requested requirements expressly forbidden by the bilateral agreement. In addition, the Argentinian delegation complained that the procedure for requesting the business' and investor's visas were cumbersome, lengthy and costly. These difficulties illustrate how difficult it is to set up a workable regulatory framework that effectively facilitates market access and fair conditions of competition between foreign and domestic service providers. Clearly, the passing of legislation aimed at harmonizing disparate domestic regulations is not enough. No matter
1.4 Additional Rules on the Movement of Natural and Legal Persons

The MERCOSUR legal system includes some other rules aimed at facilitating the movement of natural persons in general, not just for the purpose of supplying services. Most of these rules have been developed by the Meeting of Home Affairs Ministries and provide for a minimum degree of harmonisation of State Parties’ immigration rules concerning residency requirements and the issuing of visas for study and tourism purposes. The scope of the preferences conferred by these rules to MERCOSUR nationals as compared with the treatment accorded by State Parties to third country nationals is minimal. It is nevertheless worth mentioning these rules, not necessarily because of their practical relevance but perhaps as evidence of the lack of co-ordination between two policy-making bodies (Group on Services and Meeting of Home Affairs Ministries), with overlapping competences, which work independently from each other.

The Group on Services is currently working on the preparation of proposals for the harmonisation of domestic services’ regulatory frameworks in the following areas: a) proposal for the harmonisation of rules and procedures concerning the setting up and registration of companies; b) proposal for an agreement on the mutual recognition of construction companies’ records for the purpose of participating in tenders at a MERCOSUR level, and c) proposal for a mutual recognition agreement for the temporary provision of Real Estate Services.

Finally, it is important to bear in mind that in parallel to the Group on Services’ activity, Brazil and Argentina have recently set up their own bilateral law-making forum extra MERCOSUR (a “high level group” consisting of representatives from the Ministries of

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56 See, amongst others, Agreement about Free Visas for Students and Teachers from MERCOSUR State Parties approved by Dec 21/06; Agreement on a Ninety days length of Stay for Tourists Nationals from MERCOSUR State Parties and Associate State Parties approved by Dec 10/06; Agreement on Residency Requirements for Nationals from MERCOSUR State Parties, approved by Dec 28/02.

57 See Annex X to minutes GMC LVIII ordinary meeting, 9/06/05.

58 This initiative is negotiated with an active participation of the Commission for the integration of the Agronomy, Architecture, Engineering, Geology and Surveyance Professions in MERCOSUR.

59 This initiative is negotiated under the Dec 25/03’ umbrella with an active participation of the MERCOSUR Confederation of Real Estate Agencies.
Foreign Affairs, Justice, Home Affairs, Finance, Education, Labour and Health) aimed at 
analysing and developing an action plan for the establishment of the free movement of 
persons between Argentina and Brazil within a ten years term. This provides further 
evidence that the largest partners pursue their own agenda outside MERCOSUR and agree on 
certain issues, which later on may or may not be incorporated in the MERCOSUR decision 
making bodies' agenda.

2. Secondary Legislation on Financial Services

Policy making on financial integration corresponds to SWG4 on Financial Issues, an auxiliary 
body to the CMG, whose ultimate goal is the establishment of a common market on banking, 
insurance and capital markets. SWG4 consists of representatives from State Parties' central 
banks and financial regulators. Its structure consists on a national coordination and four 
Commission and Commission on the Prevention of Money Laundering and the Financing of 
Terrorism.

2.1 Secondary Legislation on Investment Services

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60 See Protocol for the establishment of a High Level Group for the implementation of the free movement of 
persons between Argentina and Brazil, done in Puerto Iguazú, Argentina on 30/11/2005, available at 
http://www2.mre.gov.br/dai/bamt40156638.htm (in Portuguese). This agreement has been concluded as part of 
the commemoration of the 20th anniversary of the Iguazú Declaration.

61 See above Ch I, Section B, Numeral 3.

62 SWG4 on Financial Issues was created by Res 20/95. Previous to that, financial issues were dealt by SWG 4 on 
Monetary and Fiscal Policy Related to Trade, established by the Treaty of Asuncion, Annex V.

63 The purpose of the Commission on the Prevention of Money Laundering is to develop appropriate legal 
instruments for preventing the hiding of assets obtained from illegal activities and combating the financing of 
terrorism. Though praiseworthy, these objectives have nothing to do with market integration and it is difficult to find 
on the Treaty of Asuncion or the Protocol of Ouro Preto a legal basis to legislate on this area. Nonetheless, thanks 
to the Commissions' work, MERCOSUR decision making bodies have been actively legislating in this area. So far 
they have created the “Task Force” group for the exchange of experiences and methodologies on the prevention 
and combat of money laundering within MERCOSUR (Res 82/99); adopted a co-operation agreement between 
central banks (Dec 40/00), and approved a set of minimum regulatory guidelines to be implemented by State 
Parties' Central Banks for the same purpose (Res 53/00).

64 Minutes of the meetings of the SWG4 and of its various Commissions as well as their annual working plans are 
Responsibility for the development of policies for the integration of capital markets lays on the Capital Markets’ Commission, which consists on representatives from each State Party’s securities regulatory agencies. Its long-term goal is to lay down the regulatory conditions necessary for the establishment of a regional capital markets. This goal has been on MERCOSUR’s agenda since the very beginning of the integration process, but other priorities and the intrinsic difficulty inherent in the harmonization of securities regulations have prevented policy makers from making any substantive progress on this issue.

Decision 8/93, not yet in force, provides for a minimum degree of harmonisation of securities regulations, covering the following topics: issuing of securities, mutual investment funds, stock exchanges and brokers, payment, execution and custody systems. In relation to the public offering of securities, the scope of application of the norm is limited to international operations executed within MERCOSUR with securities issued by companies incorporated in any of the State Parties, although it also recommends State Parties to apply its provisions to domestic securities operations. According to this Decision, a company registered in a State Party that wishes to sell its securities in any other State Party must first register as an issuer with the relevant authority of the host State Party. In addition, it must register the particular security it wishes to market prior to sale. The Decision lists the requirements that the issuer must satisfy for the host regulatory agency to authorise its registration and approve the offer. The list of minimum requirements is not exhaustive, leaving the door open for the host regulatory agency to request additional requirements if it so wishes. The Decision also stipulates that domestic legislation must provide for minimum standards of protection of shareholders, including right of information, right of preference and right to withdraw. Finally, the Decision lays down minimum corporate governance and disclosure of information requirements for the operation of mutual investment funds at a regional level and encourages State Parties to negotiate the harmonisation of regulations on the supervision of these entities.

65 Res 8/91 conveying representatives from State Parties' for the negotiation of consultation and technical assistance mechanisms on securities regulations with a long-term objective to facilitate the establishment of a regional capital market.
66 Dec 8/93 on Minimum Regulations on Capital Markets, complemented by Dec 13/94 on the harmonisation of disclosure of information requirements for capital markets.
68 Ibid. Annex, Art. 1.2.
69 Ibid. Annex, Arts. 1.1.2 and 1.2.3.
70 Ibid. Art. 1.4.
71 Ibid. Art. 2.
Decision stipulates that they must act under the direct or indirect supervision of the appropriate governmental regulator in each State.\(^\text{72}\)

In addition to the adoption of Decision 8/93, the Capital Markets Commission has been negotiating the regulatory conditions necessary for the establishment of a common capital markets. Various initiatives have been considered (e.g. a framework agreement for clearing and settlement of investment transactions, adoption of minimum requirements for the issuing of prospectuses based on IOSCO principles, establishment of a common market for public securities, etc.), but so far none of them has been crystallised on new secondary rules.\(^\text{73}\). At least the Capital Markets Commission provided a forum for hands-on regulators from each State Party to discuss with their counterparts best regulatory practices and exchange information about changes to their domestic regulations on a regular basis.\(^\text{74}\)

Parallel to the Capital Markets Commission, there is a separate SWG on Investments.\(^\text{75}\). This body is responsible, inter alia, for analysing the difficulties faced by State Parties for the ratification of the Protocol of Colonia for the Reciprocal Promotion and Protection of Investments in MERCOSUR\(^\text{76}\) and the Protocol of Buenos Aires for the Promotion and Protection of Investments Originating from Third Parties\(^\text{77}\) and to analyse the influence of portfolio investment and foreign direct investment on the restructuring of firms in the regional market and to make recommendations to this effect. Despite the obvious overlap between the sphere of competence of the Capital Markets Commission and the SWG on Investments, they work independently from each other and there are no formal mechanisms in place to facilitate the co-ordination of their work.

\(^{72}\) Ibid. Art. 3.2.

\(^{73}\) The European experience illustrates the scale of complexity and sophistication of the regulatory arrangements necessary for the functioning of a truly integrated capital markets, in particular, the multilevel governance system established by the Lamfalussy Report. See Final Report of the Committee of Wise Men on the Regulation of European Securities Markets, Brussels, 15 February 2001.

\(^{74}\) See the Commission’s working programme for 2007 available at www.bcb.gov.br/?MERCOSUL. Basically, it is focused on the exchange of statistical information on the operation of capital markets, information on new regulations and examination of regulatory asymmetries. The agenda includes only one legislative initiative under negotiation, i.e. the adoption of minimum requirements for the issuing of prospectuses based on IOSCO principles.

\(^{75}\) See SWG12 created by Res 13/00, amended by Dec 59/00.

\(^{76}\) See above Ch II, footnote n210.

\(^{77}\) Ibid.
2.2 Secondary Legislation on Banking Services

The development of policies for the integration of banking services falls within the Commission on the Financial System’s remit. Its overall purpose is to review State Parties’ regulations on the banking industry, identify regulatory asymmetries and make recommendations for their harmonisation, with a view to facilitate market access and ensure fair conditions for competition between foreign and domestic banks. The task involves harmonising not only a wide range of disparate domestic banking regulations but also disparate supervisory practices and standards responsible for their supervision and enforcement.

The Commission’s capacity to put forward proposals to harmonise banking rules has been constrained by the political sensitivity and complexity underlying this type of rules. In addition, there are deep asymmetries between State Parties’ regulations relating to banking secrecy and other legal provisions protecting the confidentiality of information about financial undertakings’ operations. Moreover, some State Parties’ banking legislation, in particular the Brazilian and Uruguayan legislation, include overt market access restrictions against the commercial presence of foreign service providers, which are still in place notwithstanding six rounds of negotiations.

The scale of the obstacles against the harmonisation of banking rules has led the Commission to play down its objectives. Instead of aiming at the establishment of a fully fledged harmonised banking system, the Commission put forward proposals merely aimed at compelling State Parties to align domestic legislation to international principles and standards widely accepted by the international financial community.

Decision 10/93 compels State Parties to align their banking legislation to the International Standards on Capital Adequacy developed by the Basle Committee. At the time the Decision

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78 Includes a sub-commission on Accounting Statements working towards the harmonisation of financial undertakings’ accounting statements.


80 See above Ch IV, Section C, Numeral 3. See also Otaviano Canuto & Gilberto Tadeu Lima, 'Regulação bancária no Mercosul', in Renato Baumann (ed) Mercosur avanços e desafios da integração (IPEA/CEPAL, Brasilia 2001).

81 Dec 10/93 has been incorporated by all State Parties.
was adopted, there were significant disparities between State Parties’ prudential regulations on capital adequacy. By 1999 all State Parties managed to incorporate these standards into their banking legislation, reducing the degree of regulatory disparities between domestic banking rules. Similarly, to address asymmetries regarding credit risk ceilings, limits on credit concentration and classification of debtors and provisions for bad debts, Resolution 1/96 compels State Parties to align their banking legislation to the basic principles and rules developed by the international financial community.\textsuperscript{82}

In terms of supervisory practices, Decision 12/94 compels State Parties to ensure that their supervisory authorities comply with the principles on consolidated supervision recommended by the Basle Committee, which basically encourage co-operation and exchange of information between home and host supervisors.\textsuperscript{83} Finally, Resolution 20/01, not yet in force, compels State Parties to align their banking legislation to the Rules on Transparency of Information of Financial Services recommended by the Basle Committee to tackle, at least partially, the obstacles against more substantive co-operation between supervisory authorities stemming from the asymmetries of domestic regulations on the protection of the confidentiality of financial information.\textsuperscript{84}

Currently, the Commission does not have harmonisation plans in the agenda for any specific banking regulation. By contrast, it is focused on assessing the implementation by domestic supervisory authorities of the Core Principles for Effective Banking Supervision; examining and discussing the possible implementation of the new international standards on capital adequacy (Basel II); assessing State Parties’ legislation on disclosure of information requirements relating to financial products; monitoring the evolution of State Parties’ banking markets, updating State Parties about changes to their banking legislations, and exchanging experiences on the supervision of the banking industry including the realisation of joint training events.\textsuperscript{85}

2.3 Secondary Legislation on Insurance Services

Responsibility for the integration of insurance markets belongs to the Insurance Commission.\textsuperscript{86} Two sub-commissions operate under its umbrella: the sub-commission on

\textsuperscript{82} Res. 1/96 has been incorporated by all State Parties.
\textsuperscript{83} Dec 12/94 has been incorporated by all State Parties.
\textsuperscript{84} So far, no State Party has incorporated this Resolution into its domestic legal system.
\textsuperscript{85} See the Commission on Financial Systems' working plan for 2007 available at www.bcb.gov.br/?MERCOSUL
\textsuperscript{86} Created by Res 7/92.
solvency margin and the sub-commission on Reinsurance Services. Over the past years, the Insurance Commission’s work has been focused on the harmonisation of domestic rules on the right of establishment of foreign insurance undertakings, the development of co-operation mechanisms between State Parties’ insurance supervisory authorities and the establishment of a compulsory motor insurance and a multimodal transport operator’s insurance.

With respect to the harmonisation of domestic rules on the right of establishment of foreign insurance undertakings, the Insurance Commission drafted the Framework Agreement on Market Access Conditions for Insurance Undertakings with Emphasis on Branches, which has not yet entered into force. The Agreement’s core provision on market access provides as follows:

"State Parties shall not establish market access restrictions or restrictions that undermine competition between companies or branches authorised to operate in the same business sector, other than authorisation requirements to operate or to expand the company’s business activities included in State Parties’ domestic legislations". (emphasis added).

This is one of the few secondary rules on services that include an express prohibition on imposing market access restrictions against the establishment of foreign suppliers’ branches, but its contribution to the liberalisation of insurance services, provided it comes into effect, will be limited by the nature of the caveat to such prohibition. Indeed, the market access prohibition is subject to the authorisation requirements to operate or to expand the company’s business activities included in the host State legislation, which deprives the prohibition from any meaningful liberalisation effect. Insurance companies established in one State Party wishing to operate in the territory of another State Party, will still have to request authorisation from the host State authority, and, meet the requirements included in the host State legislation.

The agreement goes on to lay down a list of common requirements that the host regulatory authority must request from the applicant to issue an authorisation to operate. The degree of harmonisation secured by the norm on this issue is limited. For some requirements, such as

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87 See Dec 9/99 “approving” the Framework Agreement on Market Access Conditions for Insurance Undertakings with Emphasis on Branches. This is an international agreement concluded within the framework of the Treaty of Asuncion. So far, no State Party has ratified it.

88 Framework Agreement on Market Access Conditions for Insurance Undertakings with Emphasis on Branches, Art. 11.1 (Author’s translation.)
the technical and moral qualifications of the undertaking’s managers and controlling shareholders, the norm expressly delegates their specification to the host State’s legislation, achieving no harmonisation at all.99 For other requirements, the agreement lays down a minimum threshold, achieving a partial degree of harmonisation. For instance, on solvency margin requirements, the agreement prescribes that insurance companies must certify the ownership of a minimum amount of capital to be authorised to operate and must keep it at all times during its operations in accordance with the form, limits and terms laid down by the host States’ legislation.90 At the same time, the agreement prescribes that for branches the minimum capital to operate must be USD 500,00091. This is complemented by a “ceiling provision” prohibiting State Parties from conditioning the authorisation to operate on additional economic or financial requirements other than those prescribed by the agreement.92.

In terms of supervision, the agreement compels the regulatory authority where the company’s head office is based to keep the regulatory authority where the branch operates informed about any issues that may affect the head company’s authorisation to operate.93

In terms of co-operation for the supervision of insurance undertakings, the Insurance Commission drafted the Cooperation Agreement between Supervisory Authorities of Insurance Companies from MERCOSUR State Parties, approved by Decision 8/99.94 According to this agreement, State Parties’ supervisory authorities undertake the commitment to supervise in their respective territories the organisation, management, internal control, risks, solvency margin, reinsurance and in general, all significant aspects relating to the solvency and stability of MERCOSUR’s insurance business groups. The agreement expresses the supervisory authorities’ commitment to co-operate with each other by exchanging the information necessary for the supervision of the insurance undertakings, subject to the standards of confidentiality that may apply in accordance to each State Party’s legislation. The supervisory authorities express their commitment to exchange lists of companies authorised to operate in the domestic market at least once a year. They also commit to exchange information relating to the insurance market, insurance regulations and supervision policies

99 Ibid. Arts. III 6 e) and f).
90 Ibid. Art. V.1.
91 Ibid. Art. V.2. This amount is currently under review by the sub-commission on solvency margin. But what is not under review is the right of the host state regulator to require the foreign supplier to certify the holding of assets in the host State’s territory to meet local solvency margin requirements.
92 Ibid. Art. X.
93 Ibid. Art. VII.
94 See Dec 8/99 approving the signature of the Co-operation Agreement between Supervisory Authorities of Insurance Companies from MERCOSUR State Parties.
and to exchange experiences and techniques on the supervision of insurance undertakings on a regular basis. Overall, the agreement merely provides for a series of programmatic commitments without imposing rights or obligations on States, domestic regulatory agencies or individuals. At least, however, the co-operation between supervisors is a topic well established in the financial integration agenda and the Commission on Insurance provides a forum for supervisors to meet on a regular basis and to continue discussing ways for improving the quality of co-operation.95

Finally, the Commission contributed to the adoption of Resolutions establishing compulsory motor vehicle insurance96 and multimodal transport operator’s insurance.97 Resolution 120/94 imposes an obligation on the owner or driver of a motor vehicle registered in one State Party to be covered against third party civil liability when entering into the territory of another State Party98 and lays down the general conditions for such type of insurance.99 It specifies in great detail the risks that the insurance must cover, the terms of the insurance and the amount to be insured.100 It also specifies the characteristics of the insurance policy certificate.101 Similarly, Resolution 62/97, not yet in force, prescribes the conditions that must be met by the multimodal transport operator’s insurance against civil liability caused by damages to the freight. It specifies in great detail the risks covered, the terms of the insurance and the amount to be insured.

These two Resolutions share some characteristics which clearly differentiate them from other secondary rules on services. First, the legislator goes far beyond the harmonisation or co-ordination of disparate domestic rules. It regulates directly on individuals’ rights and obligations by compelling certain individuals to be covered against certain risks in a certain

95 More recently, the Insurance Commission has prepared a draft Decision that compels State Parties to ensure that their supervisory authorities comply with the Insurance Core Principles on Insurance Supervision prescribed by the International Association of Insurance Supervisors, which has not yet been adopted by the CMC. See Insurance Core Principles and Methodology, IAIS, available at www.iasweb.org.
96 See Res 120/94, partially modified by Res 63/99, on the owner’s or driver’s insurance against civil liability in respect of damages caused during an international trip by a vehicle registered in one State Party to persons or objects not carried by the vehicle. It has been incorporated by all State Parties.
97 See Res 62/97, 13/12/97 on the conditions of the multimodal transport operators’ insurance against civil liability caused by damages to the freight. This Resolution has not yet entered into force. So far, it has only been incorporated by Argentina and Brazil.
99 Ibid. Annex I.
100 Ibid.
101 Ibid. Annex II.
way and, by implication, enhancing third parties protection against road accidents. Secondly, these Resolutions create clear, specific and unconditional obligations. However, they cannot apply to private persons until State Parties adopt the necessary measures for their incorporation into their national legal systems.

The Insurance Commission’s current working programme\textsuperscript{102} includes on the agenda the renegotiation of the solvency margin prescribed by art 5 of the Agreement on Market Access Conditions for Insurance Undertakings with Emphasis on Branches; the revision of Res 120/94 on compulsory motor insurance; the implementation by domestic supervisory authorities of the Insurance Core Principles on Insurance Supervision; monitoring the evolution of State Parties’ insurance regulations and accounting principles and monitoring the performance of insurance markets. Barriers to the cross-border provision of insurance services, which have remained untouched despite six negotiation rounds, are not on the Commission’s agenda.

3. Secondary Legislation on Communication Services

The development of secondary rules on communication services falls within the sphere of competence of Sub-working 1 on Communications (“SWG1”), an auxiliary body to the CMG created in 1995, with policy-making competence in postal services and telecommunication services.\textsuperscript{103} SWG1 consists of representatives from State Parties’ postal and telecom regulatory agencies and includes four commissions: Commission on Postal Issues, Commission on Public Telecommunication Services, Broadcasting Commission and Commission on Radio Communications.\textsuperscript{104}

3.1 Secondary Legislation on Postal Services

\textsuperscript{102}Available at www.bcb.gov.br/?MERCOSUL, last visited 07/07/07.

\textsuperscript{103}SWG1 on Communications was created by Res 20/95. Previous to that, there was a Commission on Telecommunications operating under the umbrella of SWG3 on Technical Regulations, established by the Treaty of Asuncion, Annex V. This Commission started working on the harmonization of technical regulations concerning telecommunications in 1992.

\textsuperscript{104}Minutes of the meetings of SWG1 are available at www.anatel.gov.br/COMITES_COMISSOES/CBC/MERCOSUL/DEFAULT.ASP (in Portuguese or Spanish).
Postal markets are highly regulated in all State Parties, with competition restricted or even prohibited by legal or constitutional provisions.\footnote{See SUBGRUPO DE TRABAJO NO 1, Estudio sobre el Establecimiento de un Mercado Único de Servicios Postales en la Región del MERCOSUR (MERCOSUR, Montevideo 2002), available at www.cnc.gov.ar/cit/pdf/libroverde_esp.pdf, last visited 09/01/08.} The negotiation rounds yielded no significant progress on the liberalisation of this sector.\footnote{See above Ch IV, Section C, Numeral 3.} Against this regulatory background, there is not much that should be expected from a commission consisting of one or two government officials from each State Party that meets twice a year. Like in many other service sectors, the liberalisation of Postal Services will not be possible unless domestic parliaments are directly involved in the liberalisation process.

Notwithstanding its limited manoeuvring room, the Commission on Postal Issues pursues an ambitious agenda. It aims to harmonise disparate domestic postal regulations, improve the postal services’ quality standards, facilitate the interconnection between domestic postal networks and foster the growth of the industry by sharing know-how and experiences on the technology applicable to Postal Services.\footnote{See Res 32/04, negotiation mandate for SWG 1.} So far, the Commission on Postal Issues has managed to secure the approval of four secondary rules (two of them not yet in force) on three peripheral aspects to the operation of this service sector: a) two Resolutions harmonising the procedures for postal exchanges between cities situated on border areas with a view to speed up the service and reduce its cost\footnote{See Resolutions 29/98 and 21/99, 10/06/99, both incorporated by all State Parties.} b) a Resolution harmonising quality standards for the delivery of letters of up to twenty grams within specified areas\footnote{See Res 49/07 10/12/07, not yet incorporated by State Parties.}, and c) a Resolution harmonising the transport conditions and custom control procedures of post parcels transported by coach.\footnote{See Res 28/05 so far, only incorporated by the Republic of Paraguay.} Clearly, the liberalisation impact of these measures is minimal, but at least the mere existence of the Commission on Postal Services provides a forum where specialised regulators can meet and share information and experiences and gradually advance the harmonisation of measures affecting the operation of this sector, even when it is about measures of minimal impact for the operation the sector.

3.2 Secondary Legislation on Telecommunications

In spite of the wave of privatisations that took place during the nineties and early 2000, the telecoms market remains partitioned, amongst other factors, by a duplication of licensing
requirements, the existence of administrative agencies’ entitled to restrict the number of
telecom suppliers, the lack of interconnection and interoperability of national networks and
pervasive access restrictions to such networks. Not surprisingly, State Parties’ schedules of
specific commitments failed to include any kind of preferential treatment for MERCOSUR
service providers. In Brazil, the largest market of the bloc, the Executive Power may
establish limits on the participation of foreign capital on telecom operators. So far, the
Commissions responsible for telecom policy-making have not managed to put forward
significant regulatory proposals capable of overcoming these hurdles and paving the way for
the integration of telecom markets.

The Commission on Public Telecommunication Services is closer to an experience-sharing
and monitoring forum than to an active policy-making body capable of developing a common
telecommunications policy and the integration of domestic telecommunications markets. Its
main tasks include: a) compilation, monitoring and exchange of information relating to
taxation, fares and mechanisms for determining the price of public telecom services; b)
compilation of information about the performance of telecom markets; c) permanent exchange
of information about State Parties’ legislation on the telecom sector, with a view to its future
harmonisation; d) development of a mutual recognition agreement on State Parties’
conformity assessment standards for the quality assessment of telecommunications’
equipment and e) harmonisation of principles concerning the interconnection of public
networks.

Although this Commission has managed to secure the approval of a reduced number of
secondary rules, none of them deal with the core regulatory barriers that currently block the
liberalisation of Public Telecommunication Services in MERCOSUR. Clearly, there is still
a great deal of work to be done to ensure the effective liberalisation of this sector.

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111 See above Ch IV, Section C, Numeral 3.
112 Ibid.
113 See Res 32/04, negotiation mandate for SWG 1.
114 Ibid.
115 See Res 66/97, which lays down basic principles on the interconnection of telephone networks for the provision
of Public Voice Telephone services in border areas; Res 43/93 modified by Res 25/94, which prescribes some
specifications on digital interfaces for the transmission of digital information with a view to facilitate interconnection
between digital networks, Res 06/06, which lays down some general provisions on the use of basic telephone
services and data on integrated control areas; and Res 44/99, which harmonises the telephone numbers for
emergency services in the MERCOSUR area.
The Broadcasting Commission is focused on the co-ordination of the allocation of frequency bands to broadcasters with a view to ensure an optimal use of the radio frequency spectrum and to avoid interferences, particularly on border areas. The Commission has contributed to the adoption of some co-ordination agreements, which have been successfully incorporated into State Parties' legal systems. The Commission plays an active role in monitoring State Parties' implementation of these agreements. It also serves as a forum for the exchange of information about State Parties' administration of frequency bands for various broadcasting systems: audio (AM/FM), TV (VHF/UHF), digital TV systems, digital audio broadcasting and satellite broadcasting.

Similarly, the Commission on Radio Communications is concerned with the harmonisation of technical and administrative procedures relating to the assignment of frequencies and usage of frequency bands by telecom operators other than broadcasters (mobile phone service providers, paging and trunking service providers, maritime mobile services, terrestrial stations, etc.). The goal of the Commission is also to ensure an optimal use of the radio frequency spectrum and to avoid interferences, particularly in border areas. The Commission managed to secure the adoption of quite a few Resolutions aimed at harmonising the technical features of radio stations, the frequency on which they are allowed to operate, the administrative procedures for the allocation of frequencies and so forth. The majority of these Resolutions have been successfully incorporated into State Parties' legal systems.

SWG1 is also responsible for developing and enhancing the telecommunications' infrastructure at a regional level and fostering State Parties' co-operation on technological

116 See Res 17/94 harmonising the use of frequency bands by various telecommunications services; Res 6/95 co-ordinating the allocation and use of channels by broadcasting TV stations operating on VHF on border areas and Res 15/00, which lays down a procedure for the consideration of broadcasters' applications operating in border areas which require the co-ordination between State Parties' for the allocation of frequencies.

117 See, inter alia, Res 90/94, co-ordinating satellite earth stations; Res 146/96, Mutual Recognition Agreement of licenses for mobile radio stations used by transport undertakings; Res 60/01, Handbook harmonising the technical and administrative procedures for the co-ordination of frequencies of terrestrial stations; Res 19/01, Handbook harmonising the procedures for the co-ordination of frequencies used by mobile phone services; Res 68/97 and 69/97 adopting a common frequency band for the provision of paging services in MERCOSUR; Res 68/97 and 69/97, adopting a common frequency band for the operation of trunking systems; Res 71/97, adopting a Multichannel, Multipoint Distribution System for MERCOSUR; Res 30/98, Provisions co-ordinating the operation of radio channels assigned for maritime mobile services on VHF; Res 23/99, Handbook harmonising the procedures for the co-ordination of frequencies used by paging systems; Res 06/02, Allocation of frequencies for mobile radio stations.
research and development. Though not of a legislative nature, these tasks are nevertheless important for ensuring the effective integration of telecommunications markets, in particular, for the interconnection and interoperability of national telecommunications networks. However, like the rest of the auxiliary bodies to the CMG, SWG1 lacks any kind of resources to support this kind of activity and, as a result, State Parties have not managed to implement any infrastructure or research and development project concerning the telecommunications industry.

There is one secondary rule in particular that is worth highlighting. It concerns State Parties' right to regulate "new technologies". The purpose of this rule, which has just recently entered into force, is to force the disclosure of proposals for new regulations as early as possible on the understanding that the earlier a State Party's rule-making plans on new technologies are known by its counterparts, the easier it will be to avoid regulatory disparities and, if necessary, to reach harmonisation or mutual recognition agreements. Considering that the information technology revolution is fuelling a constant innovation of telecommunications services, which requires a permanent update of their regulatory framework, an adequate implementation of this secondary rule should be able to promote, in the long term, the convergence of State Parties' regulations on new technologies. Based on recent State Parties' practices, however, there is no evidence to suggest that this will be the case.

One of the most recent examples that illustrate the weakness of SWG1 to shape a common policy on Telecommunications is the way State Parties have chosen their digital TV systems. In December 2005, Brazil signed a bilateral agreement with Argentina aimed at

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118 See Res 32/04, negotiation mandate for SWG 1.
119 See Res 24/94, 3/08/94. This norm entered into force on 18/11/06.
120 See, inter alia, Synchronous Digital Hierarchy, Asynchronous Transfer Mode, Mobile Digital Systems, Intelligent Networks, High Definition TV.
121 In the same vein, Dec 11/01 prescribes that when a State Party decides to regulate on sectors currently not regulated it shall exonerate the other State Parties from the Market Access or National Treatment restrictions that the new regulation may include. Also note 8.3 PM, which requires State Parties to inform promptly and at least annually the introduction of any new, or changes to existing laws, regulations, administrative guidelines, which it considers affect significantly trade in services.
122 There are three main digital TV systems, the Japanese (ISDB), the European (DVB) and the American (ATSC). The choice for any of them will have huge economic and regulatory implications far beyond the broadcasting industry, including the manufacturing and trade of telecommunications' equipment, the mobile phones industry and other industries which provide services using digital information.
encouraging co-operation between the two parties on the development and implementation of a single terrestrial digital TV system, outside SWG1, leaving the smaller MERCOSUR State Parties no chance to participate at all. By June 2006, Brazil unilaterally decided to opt for the Japanese standard, regardless of Argentina's considerations. Since digital technology requires a certain scale, Brazilian choice will no doubt reduce other State Parties' range of options, in particular the smaller neighbours' one.

4 Secondary Legislation on other Service Sectors

SWG5 on Transport is probably one of the most active auxiliary bodies to the CMG, responsible for harmonising State Parties' transport legislation, minimising the asymmetries associated with the transport sector, and identifying and promoting projects on transport infrastructure and road interconnection. SWG5 has contributed to the adoption of various rules on Transport Services, most of them already incorporated into State Parties' legal systems, covering issues relating to multimodal transport, transport of hazardous substances, access to the transport profession, road transport safety, vehicles' inspection and civil liability on road transport. Yet, this is a far cry from the regulatory changes necessary for ensuring the effective liberalisation of Transport Services and the co-ordination of transport policies mandated by Article 1 of the Treaty of Asuncion.

Because of their particularity, it is worth pointing out the main features of some pieces of MERCOSUR legislation on Transport Services. For instance, the Agreement on the Transport of Hazardous Substances in MERCOSUR stipulates an extremely detailed and exhaustive regulatory framework for the transport of hazardous substances. Its purpose, however, is not to combat the trade restrictive effects of disparate domestic regulations with a view to facilitate the liberalisation of Transport Services, but to lay down minimum safety standards.

124 See above Ch IV, Section C, Numeral 5.
125 See Agreement on the Transport of Hazardous Substances, "approved" by Dec 32/07 and registered in LAIA Secretariat as PSA No 7. Despite the Decision "approving" this instrument, it is a fully fledged international agreement concluded by the State Parties within the framework of the Treaty of Asuncion and, more broadly, under the Treaty of Montevideo's umbrella.
capable of ensuring a high level of protection for the people and the environment. The agreement imposes clear, specific and unconditional obligations and responsibilities on the manufacturer of vehicles, equipment and products, the transport operator, the person that hires the transport service and even on the addressee of the freight. It also includes a list of sanctions that must be applied should any of these individuals infringes the provisions of the agreement. In other words, it is an international instrument directly aimed at regulating the conduct of individuals rather than the conduct of States.

On Energy Services, by contrast, secondary rules' patterns are completely different from those described above. The CMC adopted two Decisions approving two memorandums of understanding (Memorandum of Understanding on Electric Exchanges and Electric Integration in MERCOSUR and the Memorandum of Understanding on Gas Exchanges and Gas Integration) prepared by SWG9 on Energy. The provisions of these memorandums are exclusively addressed to State Parties. They prescribe broadly defined standards of treatment to be observed by State Parties with a view to facilitate trade in energy. For instance, the Memorandum of Understanding on Electric Exchanges and Electric Integration in MERCOSUR compels State Parties inter alia, to avoid the use of subsidies, administrative price fixing and discriminatory measures that could impair competitive conditions on the electric market; to allow distributors and wholesale consumers of electrics energy to freely chose their own suppliers regardless of their location; to avoid discriminating between energy producers and consumers on grounds of their geographical location and to ensure companies' effective access to distribution networks.

On Education and Health, the MERCOSUR legal system includes some Protocols and secondary rules, but in neither of these two sectors has the legislative practice been solely, or even primarily driven by the purpose of tackling barriers to trade in services. On Education, the Meeting of Education Ministers has been actively negotiating international instruments whose overall purpose is to facilitate the harmonisation between State Parties' educational systems, encourage the exchange and co-operation between educational institutions, promote high standards of education and promote awareness about the relevance of the integration process. As a result, MERCOSUR legislation includes various Protocols to the Treaty of

126 The Agreement compels State Parties to upgrade their domestic regulations on a regular basis in line with the latest international safety standards stipulated by the United Nations' Recommendations on the transport of hazardous substances.

127 See Dec 10/98.

128 See Dec 10/99.

129 See Dec 13/98 approving the Triennial Plan and Measures for the Education Sector.
Asuncion on the mutual recognition of certificates, diplomas, and studies at primary, secondary, and university levels negotiated by the Meeting of Education Ministers.

Finally, on Health, SWG11 has been concerned with the harmonisation of regulations and the co-ordination of State Parties' actions on health issues with a view to "...promote the protection of people's life and health and to eliminate obstacles to regional trade". The multifunctionality of this mandate is clear, but the way to make the necessary trade-offs is not. Trade liberalisation is just one component of a broader mandate that may well justify the adoption of rules aimed at raising health protection standards even at the expense of further liberalisation. So far, a few number of secondary rules have been adopted focusing on setting minimum standards for the provision of certain medical services and on the adoption of measures aimed at the establishment of a common registry for health professionals, with a view to facilitate the free movement of health professionals within MERCOSUR.

D. Critique of Secondary Legislation on Services

So far, the contribution of secondary legislation to the liberalisation of trade in services has been limited. The following paragraphs provide a critique of MERCOSUR legislative practice relating to services, first from a cross-sectoral perspective and secondly from a sector-specific perspective.

In terms of their purpose, there are rules primarily aimed at promoting trade liberalisation (e.g. rules prohibiting market access barriers, harmonising standards and procedures, co-coordinating domestic disparities through mutual recognition agreements, establishing cooperation mechanisms between financial regulators), that stand along with rules which, at best, seek to establish some trade-offs between free trade and non trade values (e.g. the

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130 See Res 06/05, negotiation mandate for SWG11.
131 See, e.g., Regulation 42/00, harmonising technical regulations concerning the authorisation and functioning of haematology centres; Res 25/04, stipulating minimum requirements for the authorisation of mobile units for the provision of emergency services; Res 65/06, stipulating general guidelines concerning the authorisation and functioning of units providing intensive care services.
132 See Res 27/04 complemented by Res 66/06 on the harmonisation of the minimum information to be gathered for the registration of health professionals in MERCOSUR.
133 Dec 9/99.
134 Dec 8/93.
135 Dec 25/03.
136 Dec 08/99.
protection of human health or safety standards on road transport\textsuperscript{137}) or which simply pursue purposes not even remotely connected with the liberalisation of trade (e.g. rules aimed at combating financial crime\textsuperscript{138} or promoting high standards of education\textsuperscript{139}).

In terms of the opportunity to regulate and the extent to which regulate, MERCOSUR decision making bodies failed to follow consistent patterns, adopting rules which prescribe for broadly defined commitments (e.g. memorandums of understanding by which State Parties agree on broad principles and standards of treatment to be accorded foreign service providers\textsuperscript{140}), that stand along with rules providing for a detailed and substantive degree of harmonisation of domestic rules\textsuperscript{141}. Similarly, there are rules addressed to State Parties that stand along with rules that stipulate clear, specific and unconditional rights and obligations on individuals.\textsuperscript{142} These examples reveal the lack of a common criterion about the extent to which secondary rules should interfere with the autonomy of domestic regulators.

In terms of the rules' subject matter, the evidence suggests a rather unfocused and eventful legislative practice, which follows no priority criteria, regulating either service sectors with comparatively low trade relevance or relevant sectors but addressing peripheral issues with low liberalisation impact.\textsuperscript{143}

In terms of the nature of the rules, it must be noted that many of them are not actually secondary rules but primary rules, i.e. international agreements concluded between States in written form and governed by international law.\textsuperscript{144} As such, they are subject to the more cumbersome requirements at public and domestic law for the entry into force of international

\begin{itemize}
\item \textsuperscript{137} See Agreement on the Transport of Hazardous Substances.
\item \textsuperscript{138} Dec 40/00.
\item \textsuperscript{139} Dec 13/98.
\item \textsuperscript{140} Dec 10/98.
\item \textsuperscript{141} Res 38/2004.
\item \textsuperscript{142} See Res 120/94.
\item \textsuperscript{143} The lack of political leadership on policy-making has been eloquently described by the following quote from Didier Oppertti, former Uruguayan Ministry of Foreign Relations: "For those of us who have been involved with MERCOSUR, we get the feeling of participating in a game somewhat automatized in decision making in which technical will in many cases acquires a marked autonomy or a certain dimension of its own that carries along with it the risk of distancing it, or even of divorcing it, from the political will" (cited by Pena and Rozenberg, ob cit, p 7).
\item \textsuperscript{144} See, e.g., Agreement for the Creation of a MERCOSUR Visa, Agreement for the Simplification of Business Activities, Framework Agreement on Market Access Conditions for Insurance Undertakings, Agreement on the Transport of Hazardous Substances.
\end{itemize}
obligations. This is not good legislative practice because it confers an undesirable level of rigidity to legislation that deals with very specific and changing circumstances.\textsuperscript{145}

With respect to their \textbf{implementation}, the majority of secondary rules and international agreements referred to have been successfully incorporated into State Parties' legal systems and are currently in force or in the process of being incorporated. However, incorporation does not equate to effective implementation. Incorporation merely requires a discrete action to incorporate the MERCOSUR rule into the domestic legal book, e.g. passing on a decree or, less frequently, adopting an act of parliament. Implementation, by contrast, requires from an ongoing effort by all domestic regulatory agencies with competence on the subject matter, to ensure that the rule's provisions are observed in a timely, effective and impartial way.\textsuperscript{146}

There is evidence to suggest that secondary rules on trade in services are not being effectively implemented.\textsuperscript{147}

\textbf{Secondary rules on the movement of natural persons} have contributed only to a very limited extent to liberalise the movement of service suppliers across national borders. Though moderately harmonised, visa requirements for the supply of services are still in place and the stay of foreigners abroad continues to be subject to limited periods in accordance with the host State's legislation. Similarly, secondary rules adopted so far do not accord companies a fully fledged right of establishment, but merely provide some mechanisms to simplify the procedures for their registration abroad. As they currently stand, secondary rules on the movement of natural persons are not anywhere close to limiting State Parties' right to regulate the entry of stay of foreigners and the establishment of foreign companies in their territory.

\textsuperscript{145} See above Ch II, Section D, Numeral 1.

\textsuperscript{146} In the EC context, the ECJ has issued various judgments stating that Member States' obligation to implement EC Directives does not end with the adoption of legislative measures but that the obligation also binds all the agencies (administrative, adjudicative, etc.) responsible for their implementation on an ongoing basis. See, \textit{inter alia}, cases C-14/83 von Colson and Kaman [1984] ECR 1891; C-106/89 Marleasing [1990] ECR I-4135; C-168/95 Arcaro [1996] ECR I-4705; C-334/92 Wagner Mirel [1993] ECR I-6911; Case C-62/00 Marks & Spencer v Commissioners of Customs and Excise [2002] ECR I-6325.

\textsuperscript{147} See, e.g., the two reports on the application by domestic courts of MERCOSUR law prepared by the MERCOSUR Secretariat. They include plenty of examples of rules incorporated by State Parties which are subsequently disapproved by domestic courts. For instance, the Uruguayan Executive Power successfully incorporated the Agreement on Multimodal Transport by adopting Decree 299/995, 08/08/95, published on the OJ 29/08/95. However, two years later, the "Tribunal de lo Contencioso Administrativo" (highest court for judicial review actions) adopted an interim measure suspending the application of the Decree (See TCA ruling N° 237/97, 2/4/97). See also the contradictions incurred by Brazilian consulates in Argentina about the interpretation of the Agreement for the Simplification of Business Activities, above, footnote n55.
The Mechanism for the Temporary Provision of Professional Services, which provides for a *sui generis* regulatory framework aimed at allowing members of certain professions to obtain a license to provide services abroad for limited periods of time, could be an exception. Since this mechanism has not yet entered into force, it remains to be seen how it will work in practice.

Secondary rules on Financial Services have failed to sort out the dual regulatory burden problem faced by banks, insurers, investment funds, stock exchanges, brokers and other investment service providers wishing to operate at a MERCOSUR level. They have neither been able to tackle market access restrictions against the commercial presence of foreign service providers or the cross-border supply of services, which, more than a decade after the creation of SWG4 on Financial Issues remain intact. On top of that there has been no progress whatsoever on the liberalisation of the movement of capital, a crucial prerequisite for an effective liberalisation of Financial Services. SWG4's major achievements are to align - or at least encourage the alignment - of State Parties' domestic legislation to principles and standards developed by international financial setters and to set up a forum where State Parties' financial regulators meet on a regular basis and update each other about regulatory changes introduced to their financial systems and exchange information and experiences concerning financial regulation and supervision of financial undertakings.148

Finally, secondary rules on Telecommunication Services are mostly focused on narrow technical issues with low liberalisation impact such as the co-ordinated allocation and joint administration of frequency bands, particularly in border areas. But they achieved nothing in terms of addressing more systemic obstacles to the establishment of a common telecom market such as the lack of interconnection of national networks, access restrictions to networks, duplication of licensing requirements, the possibility to impose quantitative restrictions on foreign ownership of telecom service providers and even monopolies on public telecommunication services. The scale of the measures necessary for developing a modern

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and efficient telecommunications' infrastructure at a regional level and establishing a common regulatory framework for an integrated telecoms market is far beyond what SWG1 has done or could eventually do. Recent unilateral decisions by the bloc's largest partner on key policy issues have revealed the limited incidence that SWG1 has on State Parties' telecommunications policy. Resolution 24/94, which compels any State Party to disclose proposals for the regulation of new technologies to its partners, should be able to promote convergence of regulations in this area. The norm has entered into force in November 2006, so it remains to be seen how effective will it be in fostering the harmonisation of regulations on new technologies, but based on State Parties' recent conduct there is not much room for an optimistic forecast.

E. Proposals for Improving Secondary Legislation on Services

The following paragraphs put forward some proposals for improving the quality of MERCOSUR legislation that complement the more general suggestions aimed at streamlining the operation of MERCOSUR institutions put forward in Chapter II.149 The measures hereby proposed, like those suggested in Chapter II, seek to improve the transparency, accountability and efficiency of the existing legislative process within the boundaries of the predominantly intergovernmental character of MERCOSUR institutional framework.

1. Regulatory Co-operation

The limitations of secondary legislation on services specified supra must not overshadow one important achievement, namely, the establishment of an extensive network of auxiliary bodies with competence either on specific service sectors150 or on horizontal issues cutting across all service sectors.151 These bodies convene hands-on regulators from State Parties, who meet together on a regular basis, update each other about regulatory changes and exchange information and experiences, joint seeking best regulatory practices for the service sector or horizontal issue that falls under their sphere of competence.

The strategic importance of these auxiliary bodies for the effective liberalisation of trade in services is crucial. It has been mentioned that barriers to trade in services are essentially

149 See above Ch II, Section E.
150 See SWG1 Communications, SWG4 Financial Issues, SWG5 Transport, SWG9 Energy, SWG11 Health, Specialised Meetings on Tourism and on Film and Audiovisual Authorities.
151 SWG3 Technical Regulations, SWG6 Environment, SWG12 Investment, Specialised Meetings on E-commerce and on Regional Infrastructure, Group on Public Procurement, Technical Committee 7 on Consumer Protection.
regulatory in character and thus, more complex and less obvious than barriers to trade in goods. The highly regulated character of service markets means that trade in services are particularly vulnerable to the dual regulatory burden problem and the risk of discriminatory regulatory practices. As it was shown in Chapter IV, these types of barriers cannot be removed by diplomatic negotiations alone. Instead, a long-term effort of regulatory cooperation is necessary to address the trade restrictive effects of regulatory diversity and bring about a gradual convergence of domestic legal systems.

Of course, the functioning of these auxiliary bodies is far from perfect. They are under-resourced and have serious co-ordination difficulties, to name just a few problems. But perhaps the most important thing that is currently missing is a clear political signal from all State Parties recognising these forums as valid instruments for regulatory co-operation on services, specially if one takes into account the existence of parallel bilateral forums between Argentina and Brazil. From a theoretical perspective, regulatory co-operation is called to play a strategic role in the liberalisation of trade in services and therefore no effort should be spared in supporting the role that these auxiliary bodies could play.

2. Definition of Decision Making Bodies’ Regulatory Competence

The lack of a clear and precise definition of decision making bodies’ regulatory competence and the absence of clear standards about the opportunity to legislate and the extent to which secondary rules should interfere with the autonomy of domestic regulators, increases the risk of adopting excessively intrusive rules. It also opens the door for legislative hyperactivity, i.e. the adoption of too many rules, whose connection with the agreement’s core objectives becomes increasingly blurred.

To minimise these risks, it is essential to define with greater precision the legal basis for decision making bodies to adopt legislation, introducing clear standards on what subject

152 See above Ch II, Section E, Numeral 2.1.

153 This problem has not been unheard in the EC context, even with a treaty providing a much more precise allocation of regulatory competences as between domestic and regional bodies and a specific mechanism for controlling the validity of community measures. Weatherhill notes this difficulty when analysing the reasons underlying harmonisation efforts. In theory, the process of generating common rules should be primarily aimed at advancing market integration, but in practice, the author notes, the legal basis authorising harmonisation has been ‘borrowed’ to pass non-market common rules in the fields of consumer protection, environmental protection and labour market regulation. See Weatherhill, ob cit, p 11. The leading case in this area is C-376/98 Germany v Parliament and Council (Tobacco case) [2000] ECR I-8419.
matters decision making bodies can regulate, for what purpose and to what extent, i.e. clearer rules on the allocation of regulatory competence as between domestic and regional decision making bodies. This should be done by way of amending the POP.\textsuperscript{154} Now, it is much easier to suggest this idea than to implement it. The decision of who should regulate what is an extremely delicate one. If State Parties get it wrong it may undermine the efficacy (too deferential to domestic regulatory autonomy) or the legitimacy (too intrusive) of the integration process. For the purpose of this thesis, suffices to highlight the need for a more accurate definition of decision making bodies’ regulatory competence.\textsuperscript{155}

3. Control of Legislative Practice

As mentioned, the MERCOSUR legal system does not provide any specific mechanism for controlling the validity of the decisions adopted by the CMC, CMG or the MTC. Clearly, the status of the integration process is not yet ripe for the establishment of an independent adjudicative body to have the last say on policy measures adopted by MERCOSUR decision making bodies.\textsuperscript{156} However, the PRT, the Secretariat and the MERCOSUR Parliament could and should play a more active role in controlling decision making bodies’ legislative practice, without the need to go all the way on to confer any of these bodies the right to annul or block the adoption of secondary rules on legal or merit grounds. As it is explained below, it is simply a matter for these institutions to exercise the powers they were conferred.

3.1 Permanent Review Tribunal

\textsuperscript{154} The drafting of a proposal to amend the POP in these lines would be benefited by reviewing the EU debate on subsidiarity during the 1990s, which led to the amendment of Art. 5 of the EC Treaty and the adoption of the Protocol on the Application on the Principles of Subsidiarity and Proportionality, Treaty of Amsterdam, 1997 O.J. (C 340) 1.

\textsuperscript{155} Rollo and Winters’ reflections on whether the EU subsidiarity model could be exportable to the WTO are quite useful to illustrate the underlying complexities and political sensitivities of this issue. See JIM ROLLO & ALAN WINTERS, ‘Domestic Regulation and Trade: Subsidiarity and Governance Challenges for the WTO’, in WTO/World Bank Conference on Developing Countries in a Millennium Round 1999).

\textsuperscript{156} This view is not undisputable. FESUR’s report on MERCOSUR institutional challenges suggests the need for establishing an annulment procedure against secondary rules adopted in contravention of primary law provisions, although it does not specify how this procedure should look like. See FESUR, Desafíos Institucionales para el MERCOSUR. Las Relaciones entre Estados, Instituciones Comunes y Organizaciones de la Sociedad (FESUR, Montevideo 2006).
Domestic courts can request the PRT an Opinion on the interpretation of MERCOSUR law.\textsuperscript{157} Although the PRT's Opinions are not binding and its jurisdiction is limited to interpreting MERCOSUR rules and not to considering their validity, they could nevertheless contribute to controlling decision making bodies' legislative practice. Indeed, in its first Opinion, the PRT has asserted jurisdiction to declare the inapplicability of a secondary rule to the case at issue when it "manifestly contradicts" MERCOSUR primary law.\textsuperscript{158} The Tribunal further distinguished between the Opinion itself, which has no binding effect for the domestic court that requested it, and a declaration of inapplicability which should be binding on MERCOSUR institutions.\textsuperscript{159} The Tribunal argued that giving the relevance of a declaration of inapplicability, it is "absolutely necessary" for it to have binding effects on MERCOSUR decision making bodies. To deny this effect, the Tribunal claimed, could have serious institutional implications.\textsuperscript{160}

The PRT's Opinion contains, no doubt, a strong message in favour of the rule of law. It takes a bold step by setting objective and rule-based limits to decision making bodies' rule-making power. It makes a strong point reminding these bodies that their rule-making power is not absolute but subject to the rules and standards laid down by MERCOSUR primary law. Here we have clear evidence that the PRT could exert an effective control of MERCOSUR legislative practice without the need for any kind of treaty amendments. Now, it remains to be seen how effective can the PRT's Opinions be in shaping that legislative practice. So far, a year after the Opinion was adopted, the CMC has not amended Decision 02/07, nor has it taken any other type action signalling an acknowledgment of the Tribunal's Opinion.

\textbf{3.2 MERCOSUR Secretariat}

\textsuperscript{157} See above Ch II, Section E, Numeral 3.

\textsuperscript{158} See Opinion 1/2007, p 10. The Opinion severely criticised the Rules of Procedure for the Request of Consultative Opinions approved by Dec 02/07 and the Tribunal reserved its right to declare the inapplicability of a secondary rule to the particular case at issue when it "manifestly contradicts" primary law. However, in the operative part of the ruling, only one arbitrator, voting in dissidence, declared the inapplicability of arts 1, 6 and 11 of the Rules of Procedure for the Request of Consultative Opinions with binding effect. It must be noted that a couple of months later this arbitrator resigned as a result of a bitter row with MERCOSUR diplomats over the PRT's budget and the appointment of the PRT's Secretary. See article published on line in EL Pais (Uruguayan newspaper) on 18 October 2007 at www.diarioelpais.com.uy.

\textsuperscript{159} Ibid, p 13.

\textsuperscript{160} Ibid.
As mentioned, Dec 30/02 entrusted the TAS, inter alia, with the task of controlling the consistency of draft rules proposed by auxiliary bodies with existing rules. The Decision stipulates the consistency control is not compulsory, meaning that the decision making body can adopt the proposed rule without that control or even against the TAS recommendations. What is worse, the CMG has recently decided to suspend the consistency control procedure and not resume it until an exhaustive assessment and further regulation of its procedure is carried out.

In line with the considerations put forward in Chapter II aimed at Strengthening the MERCOSUR Secretariat, the need for the full implementation of the TAS’ consistency control procedure is hereby reinforced. Moreover, the possibility to replace the consistency control with a more comprehensive consultation requirement, whereby the Secretariat could also have a say on the merits of adopting any given draft rule, should also be considered. In addition, the TAS should also contribute to improve the drafting style of secondary rules. In particular, the TAS could help in drafting better preambles, capable of establishing the underlying rationale of the rule, its legal basis and its connection with the overall objectives of the integration process in a clearer and detailed way. Hopefully, this exercise should force decision making bodies to think more carefully why they are adopting a particular rule and should discourage the adoption of rules whose purposes fall squarely outside the Treaty of Asuncion’s remit.

3.3 MERCOSUR Parliament

The MERCOSUR parliament has some monitoring powers over the CMC, CMG and MTC. None of these monitoring powers are expressly designed to control the validity of MERCOSUR rules. Nor do they confer on the Parliament any power to modify rules that have been found to be adopted in violation of other MERCOSUR rules. However, by introducing some degree of decision making bodies’ accountability to the Parliament, they confer the latter the right to express its views, among other things, on how MERCOSUR legislation is being developed.

161 See above Ch II, Section C, Numeral 2.3.
162 Ibid.
163 Ibid.
164 See above Ch II, Section E, Numeral 2.2.
165 Ibid.
166 See Ch II, Section C, Numeral 2.1.
An open and transparent institution such as the Parliament, closer to the interests of MERCOSUR people, and thus less likely to be co-opted by specific domestic protectionist lobbies, should be able to air a more independent voice on what should constitute best legislative practices. It could also put pressure on decision making bodies to take into account the PRT's Opinions. It is therefore very important to have in place a strong Parliament, which actively uses its monitoring powers over the decision making bodies.

4. Regulatory Techniques

4.1 Making Use of Primary and Secondary Law

The review of secondary legislation on services has revealed quite a few examples of using primary law for regulating issues other than institutional arrangements. It is vital for rule-makers to understand the different purposes of primary and secondary law and to use them accordingly, namely, reserving the former for the regulation of constitutional aspects of the integration process and the latter for regulating more specific trade issues and non-trade cooperation matters.167

4.2. Cost-Benefit Analysis, Consultation and Transparency

The current process for the adoption of Decisions or Regulations is not supported by any kind of consultation requirements, impact assessment studies, cost-benefit analysis, audit or post-regulation evaluation. This contrasts with the complexities inherent in seeking the convergence of highly regulated markets such as financial markets or telecom markets. But it is something which should not come as a surprise since the decision making bodies and their auxiliary bodies only meet a couple of times during the year, they are not staffed by full-time personnel, and they lack any kind of resources to support the legislative activity. Thus, an obvious way to improve the quality of the legislative practice is, as already mentioned, to allocate more administrative, human and technical resources to support the activities of decision making bodies and their auxiliary bodies.168 In addition, the Secretariat should also play a key role in providing decision making bodies with technical support for better

168 See above Ch II, Section E, Numeral 2.1.
regulatory practices. An impartial and technical body is the best placed institution for undertaking consultations, cost-benefit analysis, impact assessments and other technical studies, but again, its capacity to make any significant contribution depends on its budget, which until now, is insignificant.\(^{169}\)

Efforts should also be made to bring the rule-making process outside diplomatic enclosures, encouraging the participation of industry representatives and the wider civil society. The input from the industry is vital for the regulation of complex and changing environments. A fluent participation of the civil society on the law-making process contributes to short distances between the regulator and the regulatees and elicits a sense of ownership of secondary rules, which should result in better compliance and a strengthened legitimacy of the integration process as a whole.\(^{170}\)

The MERCOSUR legal system already contemplates some degree of participation for private persons in the policy-making process, which should be strengthened.\(^{171}\) For instance, on some SWGs (particularly Transport and, to a lesser extent Telecommunications and Finance) there is a well established practice, which allows industry representatives to participate during the preparatory stage of the meetings until the deliberative stage begins. This practice should be further encouraged and extended to all auxiliary bodies with competence on specific service sectors. In addition, it is vital to increase the overall transparency of the rule-making process by making as much information as possible available to the public about the date, venue and agenda of auxiliary bodies' meetings.

The evidence suggests that when given the opportunity, the industry and the wider civil society are ready and willing to participate on the rule-making process. The best example is that of the Mechanism for the Temporary Provision of Professional Services, which allows for the participation of professional bodies on the development and implementation of the regulatory framework applicable to the temporary provision of professional services. As mentioned, although the Mechanism has not yet entered into force, various professional bodies have already expressed their interest in participating.\(^{172}\)

\(^{169}\) See above Ch II, Section C, Numeral 2.3.


\(^{171}\) See above Ch II, Section E, Numeral 2.3.

\(^{172}\) See above footnote n45.
4.3 Comparative Regulatory Practices

It is worth looking at other regulatory experiences outside MERCOSUR for lesson-drawing purposes provided, of course, that the particularities of the institutional, political, economic and cultural settings underlying each integration process are not overlooked. In this vein, a review of the EU regulatory experience, the most advanced and successful integration process so far, is unavoidable. Under the community pillar the EU regulatory practice evolved, broadly speaking, from rather basic top-down policymaking and enforcement mechanisms to more sophisticated multilevel governance arrangements that involve ongoing co-operation among national regulators and supervisors. Since the MERCOSUR legal system is unfamiliar with the hallmark features of Community law (primacy, direct effect and, eventually, direct applicability), it is worth also considering the EU regulatory experience on the other two pillars. Because these two pillars deal with more politically sensitive and complex areas, the policymaking process is influenced by a stronger intergovernmental approach, closer to MERCOSUR's own institutional settings. A regulatory technique used in this area that should be carefully considered for lesson-drawing purposes is the Open Method of Coordination.

Another experience to bear in mind is the EU/US Framework Agreement for Advancing Economic Integration, which provides a mechanism for EU/US consultations on trade.

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173 See in particular the work done by the European Commission on "Better Regulation" at http://ec.europa.eu/governance/better_regulation/index_en.htm, last visited April 2008. The website includes a vast amount of information about the EC's strategy to improve the regulatory environment in Europe. Also, for a good summary of the EU approach to regulation see FRANK VIBERT, Regulation in the European Union RIIA: MERCOSUR Working Group Paper (Royal Institute of International Affairs, 2002).


175 For a thorough analysis of the intergovernmental pillars of the EU see EILEEN DENZA, The Intergovernmental Pillars of the European Union (Oxford University Press, Oxford New York 2002).

competition and regulation. The aim in the regulatory area is to encourage early and regular consultations and to share regulatory approaches, without interfering on each others regulatory autonomy. 177

4.4 Difference between Rules and Administrative Decisions

Decisions, Resolutions and, to a lesser extent, Directives are used for both legislative and administrative purposes. For instance, the CMC follows the same procedure for, say, approving the contents of a training programme on MERCOSUR law 178 than for approving a strategic plan for overcoming asymmetries between State Parties. 179 By any standard, this is not good regulatory practice. It gives the impression that decision making bodies are actively legislating when, in fact, the majority of the “rules” adopted are simply administrative decisions disguised as legislative measures. From an organizational perspective, there is no need to add administrative issues to decision making bodies’ already stretched agendas. Neither it is reasonable to subject the adoption of administrative decisions to the same procedural requirements as those necessary for the adoption of legislative acts, i.e. the need for consensus and the presence of representatives from all State Parties. In other words, it is necessary to create new decision making categories different from Decisions, Resolutions or Directives, subject to more flexible procedures, for the adoption of administrative decisions. 180

E. Concluding Remarks

This chapter was focused on the analysis of the liberalisation of trade in services through positive integration. It examined MERCOSUR secondary rules on specific service sectors and modes of supply and the process for their creation and implementation. It discussed secondary legislation’s contribution to the liberalisation of trade in services and put forward some suggestions for enhancing the quality of MERCOSUR legislative practice.

As mentioned, positive integration provides State Parties to an integration process with an unrivalled instrument for addressing the more subtle barriers to trade liberalisation such as the restrictive effects caused by the duplication of non-discriminatory but disparate domestic

178 Dec 35/07.
179 Dec 33/07.
180 See Perotti and Ventura, ob cit, p 25.
regulations. Thus, in principle, positive integration should pave the way for reaching a level of integration deeper than that attainable by the negotiation of reciprocal concessions, which, at best, can result in the removal of overt discriminatory measures.

In practice, however, positive integration has contributed only to a limited extent to the liberalisation of trade in services. Various rules have been adopted on the movement of natural persons, Financial Services, Telecommunications, Transport, Energy, Health and Education, but the analysis suggests a rather unfocused and eventful legislative practice, which follows no priority criteria, focusing on peripheral issues with low liberalisation impact. Decision making bodies failed to follow consistent regulatory patterns in terms of the opportunity to regulate or the extent to which secondary rules should interfere with the autonomy of domestic regulators. As it stands today, MERCOSUR body of secondary rules on services is nowhere near to providing an effective regulatory framework capable of dealing with the dual regulatory burden problem and the risk of discriminatory regulatory practices that affects most service sectors.

There is, however, an important achievement that must not be overlooked, namely, the establishment of an extensive network of auxiliary bodies with competence either on specific service sectors or on horizontal issues cutting across all service sectors. Barriers to trade in services are essentially regulatory in character and, as it was shown in Chapter IV, they cannot be removed by diplomatic negotiations alone. Instead, a long-term effort of regulatory cooperation is necessary to address the trade restrictive effects of regulatory diversity and bring about a gradual convergence of domestic legal systems. These auxiliary bodies, which convene hands-on regulators from State Parties, meet together on a regular basis, update each other about regulatory changes and exchange information and experiences, joint seeking best regulatory practices, should play a strategic role in the liberalisation of trade in services and therefore no effort should be spared in supporting their role. In particular, a clear political signal from all State Parties recognising these forums as valid instruments for regulatory cooperation is needed.

This chapter also put forward other proposals to improve the overall quality of MERCOSUR legislative practice. They complement those put forward in Chapter II and like them seek to improve the transparency, accountability and efficiency of the existing legislative process within the boundaries of the predominantly intergovernmental character of MERCOSUR institutional framework. The proposals include, inter alia, suggestions for strengthening the role of the PRT, the Secretariat and the Parliament in controlling decision making bodies' legislative practice; amending the POP with a view to define the regulatory competence of
decision making bodies with greater precision and clarity; and introducing more sophisticated regulatory techniques.
Conclusions
The liberalisation of trade in services is a good example to illustrate how complex and demanding it is to achieve deep economic integration among States. Unlike tariffs or quotas, barriers to this type of trade are essentially regulatory in character, and thus, less obvious and more dispersed. Apart from typical protectionist measures (e.g. quantitative restrictions and discriminatory measures against foreign suppliers), service markets are highly regulated, which means that those suppliers wishing to operate abroad must face the cost of complying with a whole range of regulatory requirements (licenses, prudential requirements, qualifications and technical standards, etc.) twice. The various modalities for trade in services (cross-border supply, commercial presence, consumer movement, supplier movement) can be affected not only by regulations on services but also by measures restricting the cross-border movement of capital, persons or information. Furthermore, due to the intense and ongoing relationship between the regulator and the industry that characterises many service sectors, there are higher risks for governmental discriminatory practices. Also, the possibility of opening some service sectors to foreign competition generates anxieties among people because of the nature of the public interest issues at stake (financial stability, cultural diversity, access to health or education, etc.), fuelling strong protectionist interests.

Comparative integration experiences show that States willing to advance economic integration among them and, in particular, to integrate their service markets, can choose from a wide range of institutional alternatives. There is a continuum of choice for channelling inter-state cooperation that stretches from predominately intergovernmental to predominantly supranational legal frameworks, rather than binary options between purely intergovernmental or purely supranational models. In theory, the more policy-making and enforcement power that is transferred from domestic to regional institutions, the higher the chances for achieving deeper levels of economic integration. But in practice, each integration process is underlined by ad hoc socio-economic, political and even cultural circumstances that constrain the extent to which regulatory autonomy can be redistributed between domestic and regional bodies.

At the multilateral level, the GATS is yet to deliver any meaningful result in the opening of service markets. At the regional level, only the European Union has managed to achieve a noticeable degree of integration. But even in the EU, with the most advanced institutional framework for regional integration designed so far, there is still much work to be done to ensure an internal market on services, encompassing all service sectors and modes of supply.1 Rather than one-size-fits-all formula, the key for success appears to consist on setting up a

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The legal framework for inter-state co-operation capable of securing a realistic degree of liberalisation without compromising domestic sovereignty to a level unacceptable to State Parties.

For MERCOSUR, success remains elusive. Eighteen years after the Treaty of Asuncion launched an ambitious integration process aimed at the establishment of a common market, MERCOSUR can be described, at best, as an incomplete free trade area, with a partially implemented common external tariff and with no co-ordination of macroeconomic policies. There is a worrying gap between State Parties' commitments and State Parties' conduct, which is undermining the bloc's credibility and raising concerns about the possibility that MERCOSUR could soon become another pearl on the collar of failed Latin American integration initiatives. The degree of trade liberalisation achieved is just moderate for trade in goods and almost negligible for trade in services. Most barriers to trade in services remain in place and there is still a long way ahead before suppliers and consumers can move freely across national borders.

Against this background, this volume examined the legal framework for the liberalisation of trade in services in MERCOSUR, discussed the reasons for the current state of affairs and proposed some alternatives for unlocking the integration process as far as its deep economic integration objectives are concerned.

A careful examination of primary sources of information revealed that none of the three instruments specifically provided by the MERCOSUR legal system for facilitating trade in services has made any significant contribution to improving the current fragmentation between domestic service markets.

The Protocol of Montevideo on Trade in Services does not provide the ideal regulatory framework for trade in services within the bloc. It is an instrument almost entirely modelled according to the GATS, with very minor adjustments. The import of a multilateral agreement for the establishment of the free movement of services at the sub-regional level creates inconsistencies that affect the overall coherence of MERCOSUR law. A "negative integration contract"2 primarily concerned with the elimination of discrimination and mindful not to interfere with State Parties' right to regulate, becomes an integral part of an agreement whose ultimate goal is the establishment of a common market involving, amongst other things, the

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free movement of goods, services and factors of production and the co-ordination of macroeconomic and sectoral policies.

It is difficult to reconcile the Protocol's adamant protection of State Parties' regulatory autonomy on the entry and stay of foreigners in their territory with the long-term objective to establish a common market involving the free movement of service suppliers. Equally difficult is to reconcile the broad protection of State Parties' right to regulate financial markets for prudential reasons (and the potential disparity of prudential requirements that the exercise of this right may generate) with the objective to ensure effective market access to foreign suppliers and a levelling playing field to compete against domestic incumbents. There are also clear overlaps and inconsistencies between the Protocol's regulation of the commercial presence of foreign service suppliers and other instruments specifically designed for the protection of investments. Having said that, it is also fair to say that the Protocol's general obligations and disciplines are broadly defined and thus, if properly enforced, could still make a valuable contribution to the liberalisation of trade in services.

The rounds of negotiations of specific commitments failed to remove Market Access and National Treatment restrictions embedded in domestic legal systems. Clearly, MERCOSUR commitments are more advanced than State Parties' GATS commitments in terms of coverage, depth and transparency. Yet, the results achieved at MERCOSUR level are simply not good enough. Six rounds of negotiations spanning over the last nine years achieved no more than the partial consolidation of the status quo of State Parties' legislation, including Market Access and National Treatment restrictions, without getting anywhere close to securing a preferential treatment for MERCOSUR service suppliers. There is no evidence to anticipate a successful and timely completion of the Programme of Liberalisation by December 2015. On the contrary, there is compelling evidence pointing at the inefficacy of diplomatic negotiations as a mechanism for the removal of barriers to trade in services.

There are various factors that limit the efficacy of the negotiation rounds. For instance, trade negotiators' manoeuvring room to make concessions over measures affecting trade in services is severely limited since most restrictions are embedded in statutes or even in constitutional provisions. Contrary to what happens in the goods context, where the value of, say, a ten per cent reduction on the tariff on an industrial good is self-explanatory for all interested parties, in the services context, it is very difficult to objectively measure the value of a trade concession such as, say, the removal of collateral requirements to authorise foreign insures to operate in the domestic market. Also, trade negotiators do not always have enough information available to make decisions on complex regulatory issues, forcing them to go
through lengthy and cumbersome consultation processes. Last, but not least, the logic underlying trade negotiations tends to prioritize short-term interests and individualistic strategies over the long-term interests and co-operative efforts necessary for the establishment of a common market.

The contribution of secondary legislation to the liberalisation of trade in services has also been limited. Various rules have been adopted on the movement of natural persons, Financial Services, Telecommunications, Transport, Energy, Health and Education, but the analysis suggests a rather unfocused and eventful legislative development, which follows no priority criteria, focusing on peripheral issues with low liberalisation impact. Decision making bodies failed to follow consistent regulatory patterns in terms of the opportunity to regulate or the extent to which secondary rules should interfere with the autonomy of domestic regulators. As it stands today, the body of secondary rules on services is nowhere near of providing an effective regulatory framework capable of dealing with the dual regulatory burden problem and minimising the risk of discriminatory regulatory practices that affect most service sectors.

Having diagnosed the current situation, it seems pertinent to ask about the reasons for the current state of affairs and consider what can be done about it. Part of the specialised literature blames the institutional framework for MERCOSUR’s underachievement and calls for a major institutional overhaul aimed at replacing MERCOSUR’s predominantly intergovernmental framework by a supranational one, including the creation of an EC Commission type of permanent body, independent from national governments with policy making and enforcement powers.3

This line of argumentation rightly points out that there is an imbalance between a predominantly intergovernmental institutional structure and deep integration objectives such as the establishment of a common market. State Parties opted for a minimalist institutional structure. Decision making bodies consist of government officials only who adopt decisions by consensus, there is no technical bureaucracy independent from national administrations, and to reach private persons, MERCOSUR law must be incorporated into national legal systems. There is no supranational enforcement machinery. Once MERCOSUR rules make their way into national legal systems, they become subject to State Parties’ domestic enforcement machinery like any other domestic rule, while disputes between State Parties are sorted out through arbitration.

3 See Ch II, footnote n357.
Originally, it was assumed that conferring policy-making competence to hands-on government officials rather than to integration bureaucracies de-linked from domestic policy makers should result in the formulation of more realistic integration policies, increasing the chances for their effective implementation at national levels, and providing State Parties with a flexible and cost-effective mechanism for adjusting the integration process to its ongoing challenges. During its early stages, MERCOSUR’s lean institutional framework satisfied the demands for an integration process characterised by a low level of economic interdependence, concerned with border issues (i.e. the elimination of tariffs) and operating in a low contentious environment. But since the tariff elimination process was concluded, giving way to more sensitive and complex barriers to economic integration, MERCOSUR institutions have repeatedly failed to deliver effective solutions for its core problems.

For instance, MERCOSUR institutions have failed to bridge the growing gap between the secondary rules adopted by decision making bodies and those rules effectively incorporated into State Parties’ legal systems. The lack of incorporation hits directly at the efficacy of the MERCOSUR legal system. It prevents MERCOSUR law from penetrating national legal systems, aborting its applicability to natural and legal persons. Even when secondary rules confer clear, precise and unconditional rights to private persons, they cannot be invoked before national courts unless and until they have been duly incorporated into the national legal system.

In the same vein, the dispute settlement system is a far cry from what should be an effective enforcement mechanism capable of preventing State Parties from violating their commitments. So far, only ten arbitration awards have been issued under the Protocol of Brasilia, and six under the Protocol of Olivos, four of which were awarded by the Permanent Review Tribunal. Certainly not impressive figures for a dispute settlement system with more than fifteen years in existence, particularly when one takes into account the proliferation of non-tariff barriers and unilateral actions that continue to distort intra-regional trade. If anything, these figures confirm State Parties reluctance to forfeit control over the management (or mismanagement) of their trade disputes to a rule-based adjudicative mechanism.

There is no doubt about the weakness of the institutional framework, however, it does not necessarily follow from this that the institutions themselves are the cause for MERCOSUR

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failures, let alone that their supranationalisation could be of any use to solve MERCOSUR problems.

The institutional deficit must be understood in the context of an integration process characterised by the sharp structural asymmetries between State Parties. Brazil represents over eighty percent of the region's GDP and for the last eight years the ratio of MERCOSUR exports to its total exports has been under eleven percent. Since access to its partners' markets is just of marginal importance for its national interest, Brazil is understandably not willing to pay the price associated with supranational institutions in terms of sovereignty curtailment. The costs for Brazil to subject itself to powerful centralised institutions, capable of constraining domestic policy makers' discretion are too high in light of the modest benefits expected in return. In this context, results that from a treaty-based perspective could be regarded as a failure, from a narrower State Party's national interest perspective could be seen as the desired outcome. An intergovernmental structure, according government officials strict control over the scope and pace of the integration process and a relatively weak dispute settlement mechanism fits much nicer with Brazilian interests, than strong regional institutions and a strictly rule-based policy-making and enforcement mechanisms.

Not surprisingly, Brazil has always favoured plans for widening MERCOSUR's agenda (e.g. welcoming new members like Venezuela, a country who is moving in a direction opposite to trade liberalisation and to all the liberal reforms necessary for enabling economic integration) rather than deepening it. Outside MERCOSUR, Brazil has been at the forefront in sponsoring grandiloquent integration initiatives fraught with rhetoric but shallow on binding commitments such as a South American Free Trade Area, then a Community for South American Nations (2005), and most recently a Council for South American Defence and a Union of South American Nations (2008). Moreover, one should not forget that MERCOSUR was mainly the result of bilateral negotiations between Argentina and Brazil. Paraguay and Uruguay joined the negotiations at the very last minute, and since then they have had no opportunity to exert any significant influence on the management of the integration process. The existence of formal negotiation forums parallel to MERCOSUR, where Argentina and Brazil negotiate conditions for their bilateral trade, sometimes in line with MERCOSUR.

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5 See Appendix II MERCOSUR Statistical Information, Tables 1 and 9.
5 See, e.g., the LAIA Partial Scope Agreement number 14 and the Protocol for the establishment of a High Level Group for the implementation of the free movement of persons between Argentina and Brazil.
objectives, sometimes in stark contrast with them\textsuperscript{7}, raises questions about the very need of an agreement like MERCOSUR, at least as an instrument for economic integration.\textsuperscript{8}

There are powerful economic and political factors that condition the performance of any integration process and MERCOSUR is not an exception to this rule. The legal system and its institutions can contribute to unravel a pre-existing integration dynamic, but such integration dynamic cannot be generated by law. It must be built over a matrix of converging national interests, where the benefits of integration for each State Party should outweigh its costs. But for MERCOSUR it has always been problematic to find this matrix of converging national interests. State Parties' interests in MERCOSUR differ and so do the demands for the formalisation of the integration process. In other words, while the black letter of the law speaks about the common objective to establish a common market, co-ordinate macroeconomic policies and harmonize domestic legislations, it is not apparent that MERCOSUR means what it claims.

In light of the particular economic and political circumstances underlying the integration process, the best – if not the only- path available for reform is to streamline the operation of the current institutional system. There is plenty of room for improving the efficacy and efficiency of existing policy-making and enforcement mechanisms without the need to move away from a predominantly intergovernmental approach to integration. The idea is to introduce minor institutional re-arrangements and procedural requirements aimed at fostering a more rule-based, transparent and accountable framework for the development of policy measures and the enforcement of trade disciplines without compromising domestic sovereignty to a level unacceptable for State Parties.

In this vein, a series of measures have been suggested for improving the functioning of decision making bodies (e.g. concentrate the rule-making power on the Common Market Council’s hands\textsuperscript{9}, streamline the number and competence of auxiliary bodies and adopt a single working programme at the highest political level, that sets goals and allocates tasks to policy-making

\textsuperscript{7} See, e.g., the Mechanism for Competitive Adjustment between Argentina and Brazil, which enables State Parties to use safeguards against imports, above, Ch II, footnote n79.

\textsuperscript{8} There are, of course, reasons other than economic integration that may justify the case for inter-state cooperation between MERCOSUR members that are not questioned here such as co-operation on infrastructure development, research and innovation, judicial matters and home affairs and so forth.

\textsuperscript{9} RAMÓN TORRENT, 'Una Aproximación a la Anatomia del MERCOSUR Real', in Julio Berinsky, et al. (eds) 15 Años de MERCOSUR, Comercio, Macroeconomía e Inversiones Extranjeras (Siglo XXI Red MERCOSUR, Buenos Aires 2006), p 47.
bodies in a clear, detailed and coherent way), strengthening the role of the MERCOSUR Secretariat (e.g. decision making bodies’ duty to consult the Secretariat about the merits of new legislative initiatives; Secretariat’s right to make non-binding recommendations to decision making bodies and to receive a reply from them with their views about those recommendations; specific powers to request information from State Parties about incorporation of secondary rules; independence to set a research agenda in accordance with the most problematic challenges of the integration process; more resources, etc.) and empowering individuals’ participation in the integration process (increase the degree of transparency of the decision-making process, confer on individuals the right to attend meetings of decision making bodies and to air their views; strengthen the role of the Economic and Social Consultative Forum; limit government officials’ discretion to decide whether or not to pursue a private person’s claims before MERCOSUR tribunals; full implementation of the right to request Consultative Opinions from the Permanent Review Tribunal on the interpretation of MERCOSUR law, introduce private persons’ right to submit amicus curiae during the inter state dispute settlement process and more training on MERCOSUR law).

In addition, some proposals were put forward specifically aimed at improving the transparency, accountability and efficiency of the existing legislative process, also within the boundaries of a predominantly intergovernmental institutional framework. The proposals include, inter alia, suggestions for strengthening the role of the Permanent Review Tribunal, the Secretariat and the Parliament in controlling decision making bodies’ legislative practice; amending the Protocol of Ouro Preto with a view to define the regulatory competence of decision making bodies with greater precision and clarity; and introducing more sophisticated regulatory techniques.

Finally, considering the strategic role that adjudicative bodies play in an the integration process, no efforts should be spared in supporting the functioning of MERCOSUR ad hoc tribunals, the Permanent Review Tribunal and, in particular, in ensuring the full implementation of the mechanism for requesting Consultative Opinions from the Permanent Review Tribunal. All this should be complemented with the provision of sufficient human, technical and financial resources to support the activities of both decision making and adjudicative bodies.

The measures aimed at strengthening the role of the Secretariat, the Permanent Review Tribunal and the individuals are crucial for maintaining the credibility of MERCOSUR’s deep economic integration objectives. Otherwise, it is difficult to see how a common market could be built exclusively from the ministries of foreign affairs’ corridors. While currently there is
no room for big-bang reform plans seeking to implant EC-type institutions, there is of course room and need for a gradual opening of MERCOSUR institutions to the direct participation of individuals, instead of relying exclusively on government officials’ intermediation.

One of the best placed institutions for shaping this much needed reform is the Permanent Review Tribunal and, in particular, its jurisdiction over Consultative Opinions on the interpretation of MERCOSUR law requested by domestic courts. In its first Opinion, the Tribunal already stated that in case of conflict, MERCOSUR rules incorporated into national legal systems prevail over other internal rules. It remains to be seen whether the Tribunal will be able to lead a “silent revolution” like that carried out by the European Court of Justice through the adoption of hallmark decisions such as of Van Gend en Loos or Cassis de Dijon. At least there is a mechanism in place for private persons to seek an interpretation of MERCOSUR law directly from an impartial body, independent from the short-term concerns of national administrations.

Bearing in mind that the integration of service markets requires a sophisticated institutional framework, the chances for success are slim. But there is still plenty of room for improving the efficacy and efficiency of the existing instruments specifically designed for this purpose. In this vein, State Parties should focus their efforts on three main areas for advancing – to the extent possible - the degree of trade liberalisation: consolidation of the status quo, gradual convergence of State Parties’ legal systems through regulatory co-cooperation and promotion of an open debate about the implications of the liberalisation of trade in services.

I Consolidation of Status Quo

State Parties should aim at completing the consolidation of the status quo of domestic legislation on their schedules of specific commitments, with a view to ensuring that each schedule records - in an exhaustive and detailed fashion - all Market Access and National Treatment restrictions on trade in services for all service sectors and modes of supply. Once the consolidation of the status quo is completed and becomes binding, State Parties should attempt to negotiate a schedule to introduce - in the medium or long term - those reforms necessary for removing the Market Access and National Treatment restrictions embedded in statutes or constitutional provisions. Certainly, a commitment to introduce reforms in the medium or long term should be more palatable to domestic constituencies than a commitment to grant immediate concessions for MERCOSUR service suppliers. In addition, it would constitute a significant step towards the liberalisation process, sending a clear message to
economic agents about forthcoming changing of circumstances and giving them time to adjust their behaviour accordingly.

II Gradual convergence of State Parties' legal systems through regulatory co-operation

In parallel to the negotiation rounds, State Parties should also embark on a long-term effort towards regulatory co-operation aimed at bringing about a gradual convergence of domestic legislation affecting trade in services. Regulatory co-operation can contribute to gradually smooth out disparities between domestic rules through the ongoing dialogue and mutual understanding between hands-on regulators with competence on specific service sectors. MERCOSUR institutional structure already includes a network of auxiliary bodies to the Common Market Group with competence on specific service sectors that should take the lead in carrying out this task. The idea is to maintain appropriate mechanisms for domestic regulators to meet with their national counterparts on a regular basis with a view to exchanging information and experiences, ensuring consistent application of rules, consulting each other about the merits of introducing regulatory changes and jointly seeking best regulatory practices.

Regulatory co-operation should enable State Parties to identify and understand their regulatory disparities and, eventually, it should prompt legislative initiatives aimed at harmonising them. Initially, minimum harmonisation initiatives encouraging the alignment of domestic rules to international standards should be prioritised over maximum harmonisation or sophisticated mutual recognition agreements. This sort of soft liberalisation approach may look fainthearted considering the scale of the challenges ahead, but in the long run it can be more effective than vain attempts to negotiate ambitious short-term commitments to deregulate service markets which State Parties will, more likely than not, fail to implement.

To maximise synergies between auxiliary bodies and avoid overlaps and inconsistencies, it is necessary to formulate a single and coherent policy agenda on trade in services identifying short, medium and long-term objectives for each service sector, setting priorities between them according to the costs and expected outcomes of the liberalisation process. It seems reasonable to prioritise efforts in those sectors where there are less regulatory asymmetries or where there is a strong interest in their liberalisation such as Advertising, Distributional Services, Information Technology Services, Tourism and the cluster Architectural – Engineering – Construction Services. It is equally important to pay attention to strategic sectors whose liberalisation may contribute to reduce production costs and promote trade in goods such as Transport, Telecommunications and Finance. Finally, policy-makers should try
to improve existing rules aimed at facilitating the movement of natural persons providing services, with a view to providing individuals and small and medium enterprises with tangible opportunities for experiencing the benefits of the liberalisation process.

III. Promotion of an open debate about the implications of the liberalisation of trade in services

Last, but not least, it is necessary to promote an open debate about the costs and benefits of the liberalisation of trade in services. Despite its strategic economic importance and its wide potential implications for the majority of people, trade in services in MERCOSUR remains an arcane topic which conveys little interest. So far, this issue has been mostly dealt within diplomatic circles, with some input from sector-specific regulators. Save from some exceptions, the services industry has not been actively participating in the design of policy measures on trade in services and the civil society tends to react against liberalisation with anxiety and fear. The academic community has done little to contribute to the understanding of the potential costs and benefits of the liberalisation process.

Successful liberalisation will not be possible unless this situation is reversed and a broad consensus about the need for the liberalisation of trade in services is forged. To go for it, the civil society at large must be convinced that there is a case for the liberalisation of trade in services. It must be borne in mind that State Parties will have to undergo major legal reforms which will not prosper unless the public is duly informed about the need for them. Thus, it is imperative to promote an open debate about the implications of the liberalisation of trade in services for the society at large. One way in which this could be done is by seeking a closer involvement of the MERCOSUR Parliament on the process. Members of the MERCOSUR Parliament are also members of domestic parliaments and therefore could act as conduits to place the topic on the domestic political agenda.

To finalise, it is worth mentioning two factors that could, to a limited extent, facilitate the liberalisation of trade in services. The first one is the bloc's negotiations with third parties. MERCOSUR is already engaged in negotiations for the establishment of free trade areas with many countries and regional blocs, including with the EU and India. A fruitful negotiation process with third parties could act as a catalyst for the completion of the customs union, including the removal of main barriers to trade in services, since third parties will condition their concessions to MERCOSUR on its functioning as an effective customs union. It is difficult to predict though how these negotiations will evolve. Negotiations with the EU, the
most significant third party, are frozen waiting for the results of the Doha round at the multilateral level.

The second factor that could facilitate the liberalisation of trade in services in spite of MERCOSUR's fragile institutional framework is the information technology revolution. In this vein, it is not unreasonable to foresee a medium-term scenario where new inventions will continue to bring down costs for cross-border transactions, creating new trade opportunities on service sectors which not long ago were considered non-tradable. Such changes could facilitate the circumvention of existing regulatory barriers to trade in services and force a de facto liberalisation, although, needless to say, technology advances alone will not suffice to ensure effective market access conditions for MERCOSUR service suppliers and levelling the playing field to compete against domestic incumbents.

Whatever the way in which these factors may influence MERCOSUR's future development, there must be no doubt about the complexities of liberalising trade in services. The establishment of a regulatory framework capable of securing the free movement of suppliers and consumers of services across national borders is an extremely demanding task. The challenge is even more difficult in a context where regional institutions are weak and domestic regulatory practices are far from perfect in terms of transparency, impartiality and due process. MERCOSUR will require far more than the ten years period prescribed by Article XIX of the Protocol of Montevideo before suppliers and consumers of services can move freely across national borders. And still it is not unreasonable to wonder whether this objective could ever be achieved. At the end of the day, perhaps MERCOSUR State Parties do not mean what they claim.
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Appendixes
### Appendix I Decisions Common Market Council

<table>
<thead>
<tr>
<th>Number</th>
<th>Date</th>
<th>Title</th>
<th>Entry into Force</th>
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<td>04/91</td>
<td>17/12/91</td>
<td>Approves CMG Internal Regulation</td>
<td>17/12/91</td>
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<td>01/92</td>
<td>27/06/92</td>
<td>Las Leñas Working Programme</td>
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<tr>
<td>01/93</td>
<td>01/07/93</td>
<td>Amends Las Leñas Working Programme</td>
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<td>8/93</td>
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<td>Minimum Regulations for Capital Markets</td>
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<td>Adoption of Basle Rules</td>
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<td>13/93</td>
<td>17/01/94</td>
<td>Consolidation of the Customs Union and</td>
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<td>Basle Principles on Consolidated Supervision</td>
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<td>Harmonisation of Disclosure of Information</td>
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<td>Safeguard Regime on Imports from Third Countries</td>
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<td>Authorities of Insurance Companies from MERCOSUR State Parties</td>
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<td>Co-operation Agreement between Central Banks for Combating Money Laundering</td>
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<td>59/00</td>
<td>Restructure of auxiliary bodies to the CMG and MTC</td>
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<td>Duty to Exonerate State Parties from Restrictions Included in New Regulations</td>
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<td>02/02</td>
<td>Co-ordination between CMG and FCPA</td>
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<td>Adopts the WTO Agreement on Subsidies and Countervailing Measures</td>
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<td>Regulation of Claims before the MTC</td>
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<td>Incorporation of MERCOSUR Rules</td>
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<td>Transformation of MERCOSUR Administrative Secretariat into a Technical Secretariat</td>
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<td>Direct Applicability of MERCOSUR Rules into National Legal Systems</td>
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<td>Procedure for the Derogation of MERCOSUR Rules</td>
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<td>MERCOSUR Commission of Permanent Representatives</td>
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<td>Approves FCPA Internal Regulation</td>
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<td>Mechanisms for the Temporary Provision of Professional Services</td>
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<td>MERCOSUR Working Programme for 2004 - 2006</td>
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<td>Regulation of MTC</td>
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<td>37/03</td>
<td>Regulation of the Protocol of Olivos</td>
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<td>Model Regulations for the Functioning of Ad-Hoc Arbitration Tribunals</td>
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<td>31/04</td>
<td>Incorporation of rules relating to the MERCOSUR Common Tariff Classification and Common External Tariff</td>
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<td>45/04</td>
<td>Structural Funds</td>
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<td>54/04</td>
<td>Elimination of double charges and establishment of a mechanism for the redistribution of the CET's proceedings</td>
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<td>21/05</td>
<td>MERCOSUR Institutional Reform</td>
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<td>26/05</td>
<td>Special Procedure for Disputes relating to Ministerial Agreements</td>
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<td>Action</td>
<td>Description</td>
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<td>-----------------------------------------------------------------------------</td>
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<td>30/05</td>
<td>8/12/05</td>
<td>Rules of Procedure of the PRT</td>
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<tr>
<td></td>
<td></td>
<td>Instructs CMG to formulate a negotiation mandate for the seventh round &amp; to</td>
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<tr>
<td></td>
<td></td>
<td>develop an action plan for the completion of the Programme of Liberalisation</td>
<td></td>
</tr>
<tr>
<td>30/06</td>
<td>15/12/06</td>
<td>by December 2007</td>
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<tr>
<td>02/07</td>
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<td>Rules of Procedure for the Request of Consultative Opinions</td>
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<td>27/07</td>
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<td>Non Tariff Restrictions</td>
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</table>

Source: MERCOSUR Secretariat ("-": not in force; "?": no information available)
Appendix II MERCOSUR Statistical Information

1. General Data

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<tr>
<th>Year 2006</th>
<th>Argentina</th>
<th>Brazil</th>
<th>Paraguay</th>
<th>Uruguay</th>
</tr>
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<tbody>
<tr>
<td>Population (millions)</td>
<td>39.1</td>
<td>189.3</td>
<td>6.0</td>
<td>3.3</td>
</tr>
<tr>
<td>Surface area (thousand sq. km)</td>
<td>2780</td>
<td>8515</td>
<td>407</td>
<td>176</td>
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<tr>
<td>GDP (current US$ millions)</td>
<td>214241</td>
<td>1067472</td>
<td>9275</td>
<td>19308</td>
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<tr>
<td>Exports of goods and services (% GDP)</td>
<td>25</td>
<td>14.7</td>
<td>49.2</td>
<td>29.9</td>
</tr>
<tr>
<td>Trade to GDP ratio (2004-2006)</td>
<td>44.3</td>
<td>26.4</td>
<td>114.3</td>
<td>59.1</td>
</tr>
</tbody>
</table>

Source: World Bank/WTO

2. GDP Composition (%)

<table>
<thead>
<tr>
<th>Year 2006</th>
<th>Argentina</th>
<th>Brazil</th>
<th>Paraguay</th>
<th>Uruguay</th>
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<tbody>
<tr>
<td>Agriculture</td>
<td>8.4</td>
<td>5.1</td>
<td>21.0</td>
<td>9.2</td>
</tr>
<tr>
<td>Industry</td>
<td>35.6</td>
<td>30.9</td>
<td>18.3</td>
<td>32.4</td>
</tr>
<tr>
<td>Services</td>
<td>56.0</td>
<td>64.0</td>
<td>60.7</td>
<td>58.4</td>
</tr>
</tbody>
</table>

Source: World Bank

3. Structure of the Total Employed Population, by Sector of Economic Activity

<table>
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<tr>
<th>Year 2006</th>
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<th>Brazil</th>
<th>Paraguay</th>
<th>Uruguay</th>
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<tbody>
<tr>
<td>Agriculture</td>
<td>0.8</td>
<td>18.6</td>
<td>31.1</td>
<td>4.6</td>
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<tr>
<td>Industry</td>
<td>23.7</td>
<td>21.6</td>
<td>16.1</td>
<td>22.0</td>
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<tr>
<td>Services</td>
<td>75.5</td>
<td>59.8</td>
<td>52.8</td>
<td>73.4</td>
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</table>

Source: ECLAC

4. Rule of Law

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<th>Paraguay</th>
<th>Uruguay</th>
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</thead>
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<tr>
<td>Citizens compliance with the law(^{10})</td>
<td>16.7</td>
<td>20.8</td>
<td>10.5</td>
<td>44.5</td>
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<tr>
<td>Confidence in the Judiciary(^{11})</td>
<td>26.0</td>
<td>40.9</td>
<td>29.1</td>
<td>51.4</td>
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<tr>
<td>Impartial Courts(^{12})</td>
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<td>3.6</td>
<td>1.5</td>
<td>5.2</td>
</tr>
<tr>
<td>Judicial Independence(^{13})</td>
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<td>2.8</td>
<td>1.6</td>
<td>4.9</td>
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<td>Efficiency of the Legal Framework(^{14})</td>
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<td>3.1</td>
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<td>Corruption Perception Index(^{15})</td>
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<td>2.6</td>
<td>6.4</td>
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<td>Civil Liberties(^{16})</td>
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<td>1</td>
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<td>Intellectual Property Protection(^{17})</td>
<td>2.9</td>
<td>3.5</td>
<td>2.3</td>
<td>3.9</td>
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</tbody>
</table>

Source: IADB based on various sources identified in footnotes

\(^{10}\) Percentage of persons surveyed that believe that citizens comply with the law very much or a fair amount - Latinobarometro

\(^{11}\) Percentage of persons surveyed that have a lot or some confidence in the judiciary - Latinobarometro

\(^{12}\) The indicator is normalized from 0 to 10. Higher values indicate more impartial courts - Index of Economic Freedom

\(^{13}\) The judiciary in your country is independent from political influences of members of government, citizens or firms: 1 = no, heavily influenced; 7 = yes, entirely independent - World’s Economic Forum’s Executive Opinion Survey.

\(^{14}\) Survey to Business Executives (1 = is inefficient and subject to manipulation; 7 = is efficient and follows a clear, neutral process) - World’s Economic Forum’s Executive Opinion Survey

\(^{15}\) The (CPI) ranks countries in terms of the degree to which corruption is perceived to exist among public officials and politicians. Scale ranges from 10 (highly transparent) to 0 (highly corrupt). Composite Index - IADB

\(^{16}\) Civil liberties, conceived of as freedoms to develop views, organizations and personal autonomy apart from the state, are measured on a one-to-seven scale, with one representing the highest degree of freedom and seven the lowest - www.freedomhouse.org

\(^{17}\) Survey to business executives. Intellectual property protection in your country is: 1 = weak or nonexistent; 7 = equal to the world’s most stringent. World Economic Forum’s Executive Opinion Survey.
5. Ease of Doing Business

<table>
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<th>Uruguay</th>
<th>United States</th>
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<td>Time (days)</td>
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<td>152</td>
<td>74</td>
<td>43</td>
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<td><strong>Dealing with licences</strong></td>
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<td>Time (days)</td>
<td>338</td>
<td>316</td>
<td>292</td>
<td>234</td>
<td>40</td>
</tr>
<tr>
<td><strong>Trading Across borders</strong></td>
<td></td>
<td></td>
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<tr>
<td>Documents for export (number)</td>
<td>9</td>
<td>8</td>
<td>9</td>
<td>10</td>
<td>4</td>
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<td>Time for export (days)</td>
<td>16</td>
<td>18</td>
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<td>24</td>
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<tr>
<td>Cost to export (US$ per container)</td>
<td>1,325</td>
<td>895</td>
<td>720</td>
<td>925</td>
<td>960</td>
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<tr>
<td>Documents for import (number)</td>
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<td>7</td>
<td>10</td>
<td>10</td>
<td>5</td>
</tr>
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<td>Time for import (days)</td>
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<td>24</td>
<td>33</td>
<td>23</td>
<td>5</td>
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<tr>
<td>Cost to import (US$ per container)</td>
<td>1,825</td>
<td>1,145</td>
<td>900</td>
<td>1,180</td>
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<td><strong>Enforcing Contracts</strong></td>
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<td>Procedures (number)</td>
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<td>32</td>
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<td>Time (days)</td>
<td>590</td>
<td>616</td>
<td>591</td>
<td>720</td>
<td>300</td>
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<tr>
<td>Cost (% of debt)</td>
<td>16.5</td>
<td>16.5</td>
<td>30</td>
<td>16.2</td>
<td>9.4</td>
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<tr>
<td><strong>Closing a Business</strong></td>
<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Time (years)</td>
<td>2.8</td>
<td>4</td>
<td>3.9</td>
<td>2.1</td>
<td>1.5</td>
</tr>
<tr>
<td>Cost (% of estate)</td>
<td>12</td>
<td>12</td>
<td>9</td>
<td>7</td>
<td>7</td>
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<tr>
<td>Recovery rate (cents on the dollar)</td>
<td>36</td>
<td>12</td>
<td>15</td>
<td>43</td>
<td>77</td>
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<tr>
<td><strong>Ease of Doing Business Rank</strong></td>
<td>101</td>
<td>113</td>
<td>110</td>
<td>89</td>
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</table>

Source: World Bank

6. Merchandise Trade – Main Indicators

<table>
<thead>
<tr>
<th>Year 2006</th>
<th>Argentina</th>
<th>Brazil</th>
<th>Paraguay</th>
<th>Uruguay</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Merchandise Exports, fob (million US$)</strong></td>
<td>46569</td>
<td>137807</td>
<td>1906</td>
<td>3953</td>
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<tr>
<td>Breakdown in economy’s total Exports</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Agricultural products</td>
<td>45.8</td>
<td>28.8</td>
<td>83.0</td>
<td>64.9</td>
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<tr>
<td>Fuels and mining products</td>
<td>19.5</td>
<td>19.2</td>
<td>1.1</td>
<td>4.6</td>
</tr>
<tr>
<td>Manufactures</td>
<td>31.7</td>
<td>49.8</td>
<td>15.9</td>
<td>29.4</td>
</tr>
<tr>
<td><strong>Merchandise Imports, fob (million US$)</strong></td>
<td>34158</td>
<td>95853</td>
<td>5879</td>
<td>4757</td>
</tr>
<tr>
<td>Breakdown in economy’s total Imports</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Agricultural products</td>
<td>4.1</td>
<td>6.2</td>
<td>6.8</td>
<td>11.1</td>
</tr>
<tr>
<td>Fuels and mining products</td>
<td>8.6</td>
<td>24.3</td>
<td>13.5</td>
<td>29.0</td>
</tr>
<tr>
<td>Manufactures</td>
<td>86.5</td>
<td>69.1</td>
<td>79.7</td>
<td>60.0</td>
</tr>
</tbody>
</table>

Source: WTO

![Graph of MERCOSUR Merchandise Trade 1991 – 2006]

Source: Centro Economia Internacional

8. Merchandise Trade Encapsulation

![Graph of Merchandise Trade Encapsulation]

Source: Centro Economia Internacional

9. Merchandise Trade Encapsulation by Country (Regional Exports / Total Exports)

![Graph of Merchandise Trade Encapsulation by Country]

Source: WTO
10. Merchandise Trade Encapsulation – (Regional Exports / Total Exports) Comparison between Agreements

![Graph showing comparison between NAFTA, MERCOSUR, and EU merchandise trade encapsulation.]

Source: WTO

11. Commercial Services Trade – Main Indicators

<table>
<thead>
<tr>
<th>Year 2006</th>
<th>Argentina</th>
<th>Brazil</th>
<th>Paraguay</th>
<th>Uruguay</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commercial Services Exports (million US$)</td>
<td>7542</td>
<td>17946</td>
<td>735</td>
<td>1259</td>
</tr>
<tr>
<td>Breakdown in economy's total Exports</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Transportation</td>
<td>18.9</td>
<td>19.2</td>
<td>13.2</td>
<td>34.4</td>
</tr>
<tr>
<td>Travel</td>
<td>43.9</td>
<td>24.0</td>
<td>12.3</td>
<td>47.5</td>
</tr>
<tr>
<td>Other commercial services</td>
<td>37.3</td>
<td>56.8</td>
<td>74.4</td>
<td>18.1</td>
</tr>
<tr>
<td>Commercial Services Imports (million US$)</td>
<td>8222</td>
<td>27149</td>
<td>405</td>
<td>863</td>
</tr>
<tr>
<td>Breakdown in economy's total Imports</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Transportation</td>
<td>27.8</td>
<td>24.2</td>
<td>61.9</td>
<td>49.1</td>
</tr>
<tr>
<td>Travel</td>
<td>38.1</td>
<td>21.2</td>
<td>22.5</td>
<td>24.7</td>
</tr>
<tr>
<td>Other commercial services</td>
<td>34.1</td>
<td>54.6</td>
<td>15.6</td>
<td>26.2</td>
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</tbody>
</table>

Source: WTO

12. MERCOSUR - Trade in Commercial Services with the world (including MERCOSUR countries – millions of US$)

![Graph showing MERCOSUR commercial services trade with the world from 1991 to 2007.]

Source: WTO
13. MERCOSUR - Exports of Commercial Services with the world (including MERCOSUR countries - millions of US$)

Source: WTO

14. MERCOSUR Imports of Commercial Services with the world (including MERCOSUR countries - millions of US$)

Source: WTO
Appendix III Degree of Liberalization of Service Sectors by State Parties\(^\text{18}\)

July 2006

<table>
<thead>
<tr>
<th>Service Sector</th>
<th>Argentina</th>
<th>Brazil</th>
<th>Paraguay</th>
<th>Uruguay</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Business Services</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Professional Services</td>
<td>63%</td>
<td>52%</td>
<td>0%</td>
<td>54%</td>
</tr>
<tr>
<td>Computer and related services</td>
<td>75%</td>
<td>75%</td>
<td>75%</td>
<td>75%</td>
</tr>
<tr>
<td>Research and development services</td>
<td>50%</td>
<td>42%</td>
<td>0%</td>
<td>50%</td>
</tr>
<tr>
<td>Real Estate services</td>
<td>25%</td>
<td>75%</td>
<td>25%</td>
<td>75%</td>
</tr>
<tr>
<td>Rental / Leasing services without operators</td>
<td>44%</td>
<td>50%</td>
<td>38%</td>
<td>50%</td>
</tr>
<tr>
<td>Other Business Services</td>
<td>55%</td>
<td>54%</td>
<td>14%</td>
<td>48%</td>
</tr>
<tr>
<td><strong>Communication Services</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Postal Services</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
</tr>
<tr>
<td>Courier Services</td>
<td>75%</td>
<td>75%</td>
<td>0%</td>
<td>50%</td>
</tr>
<tr>
<td>Telecommunications</td>
<td>74%</td>
<td>75%</td>
<td>36%</td>
<td>30%</td>
</tr>
<tr>
<td>Audiovisual Services</td>
<td>25%</td>
<td>0%</td>
<td>0%</td>
<td>11%</td>
</tr>
<tr>
<td><strong>Constructing and Related Engineering Services</strong></td>
<td>50%</td>
<td>50%</td>
<td>25%</td>
<td>50%</td>
</tr>
<tr>
<td><strong>Distribution Services</strong></td>
<td>75%</td>
<td>50%</td>
<td>38%</td>
<td>50%</td>
</tr>
<tr>
<td><strong>Educational Services</strong></td>
<td>21%</td>
<td>75%</td>
<td>35%</td>
<td>25%</td>
</tr>
<tr>
<td><strong>Environmental Services</strong></td>
<td>19%</td>
<td>13%</td>
<td>0%</td>
<td>10%</td>
</tr>
<tr>
<td><strong>Financial Services</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Insurance</td>
<td>24%</td>
<td>20%</td>
<td>7%</td>
<td>41%</td>
</tr>
<tr>
<td>Banking and other Financial Services</td>
<td>53%</td>
<td>26%</td>
<td>0%</td>
<td>43%</td>
</tr>
<tr>
<td><strong>Health Related and Social Services</strong></td>
<td>50%</td>
<td>25%</td>
<td>25%</td>
<td>25%</td>
</tr>
<tr>
<td><strong>Tourism and Travel Related Services</strong></td>
<td>75%</td>
<td>25%</td>
<td>69%</td>
<td>75%</td>
</tr>
<tr>
<td><strong>Recreational, Cultural, &amp; Sporting Services</strong></td>
<td>62%</td>
<td>15%</td>
<td>31%</td>
<td>15%</td>
</tr>
<tr>
<td><strong>Transport Services</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Maritime Transport Services</td>
<td>32%</td>
<td>29%</td>
<td>8%</td>
<td>25%</td>
</tr>
<tr>
<td>Internal Waterways Transport Services</td>
<td>38%</td>
<td>30%</td>
<td>4%</td>
<td>18%</td>
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<tr>
<td>Air Transport Services</td>
<td>28%</td>
<td>10%</td>
<td>0%</td>
<td>0%</td>
</tr>
<tr>
<td>Rail Transport Services</td>
<td>30%</td>
<td>55%</td>
<td>0%</td>
<td>15%</td>
</tr>
<tr>
<td>Road Transport Services</td>
<td>31%</td>
<td>55%</td>
<td>17%</td>
<td>0%</td>
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\(^{18}\) The degree of liberalisation is measured according to Hoekman's method. Hoekman's method gives a value of "1" for an entry of 'NONE' on both the Market Access and the National Treatment columns. Then, it calculates the ratio of 'NONE' entries on both the Market Access and National Treatment columns over the total number of possible entries for each service sector or sub-sector. The quantitative data gives a rough idea about the degree of liberalisation of the various service sectors and allows for making comparisons between States Parties' specific commitments. It has to be borne in mind, however, that Hoekman's method does not take into account horizontal limitations for specific modes of supply which are applicable to all service sectors.
## Appendix IV Minutes of MERCOSUR bodies’ Meetings

<table>
<thead>
<tr>
<th>Common Market Council</th>
<th>Ordinary Meetings I (17/12/91) to VI (25/10/07)</th>
<th>Extraordinary Meetings I (6/08/96) to ()</th>
</tr>
</thead>
<tbody>
<tr>
<td>Common Market Group</td>
<td>Ordinary Meetings I (18/04/91) to LXXI (15-16 April 2008)</td>
<td>Extraordinary Meetings I (12/03/93) to XXXII (16/12/07)</td>
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<tr>
<td></td>
<td>2/96 (9-10 June 1996)</td>
<td>7/97 (26-27 November 1997)</td>
</tr>
<tr>
<td></td>
<td>5/96 (5-6 November 1996)</td>
<td>2/98 (13-16 April 1998)</td>
</tr>
<tr>
<td></td>
<td>1/00 (29-30 March 2000)</td>
<td>1/05 (6-7 April 2005)</td>
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<td>2/00 (14-16 June 2000)</td>
<td>2/05 (21 May 2 June 2005)</td>
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<td>3/00 (2-4 August 2000)</td>
<td>3/05 (24-25 October 2005)</td>
</tr>
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<td>4/00 (9-11 October 2000)</td>
<td>4/05 (21-23 November 2005)</td>
</tr>
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<td>5/00 (20-22 November 2000)</td>
<td>1/06 (25-27 April 2006)</td>
</tr>
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<td>1/01 (12-14 March 2001)</td>
<td>2/06 (28-30 June 2006)</td>
</tr>
<tr>
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<td>2/01 (6-8 June 2001)</td>
<td>3/06 (16-18 August 2006)</td>
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<td>3/01 (6-9 August 2001)</td>
<td>4/06 (25-27 October 2006)</td>
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<td>4/01 (1-4 October 2001)</td>
<td>1/07 (25-27 April 2007)</td>
</tr>
<tr>
<td></td>
<td>5/01 (19-23 November 2001)</td>
<td>02/07 (4-6 September 2007)</td>
</tr>
<tr>
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<td>1/02 (18-20 March 2002)</td>
<td>03/07 (12-14 November 2007)</td>
</tr>
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<td>1/03 (11-12 March 2003)</td>
<td>1/08 (23-24 April 2008)</td>
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<td>1/02 (13-17 May 2002)</td>
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<td>2/02 (28 Oct – 1 November 2002)</td>
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<td>4/96 (25-29 November 1996)</td>
<td>2/03 (4-8 August 2003)</td>
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<td>2/00 (1-5 August 2000)</td>
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<td>3/00 (6-10 November 2000)</td>
<td>2/07 (10-14 December 2007)</td>
</tr>
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<td>1/01 (16-20 April 2001)</td>
<td>1/08 (12-16 May 2008)</td>
</tr>
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<td></td>
<td>2/01 (6-8 June 2001)</td>
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<table>
<thead>
<tr>
<th>Sub Working Group 4</th>
<th>Financial Issues</th>
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<tr>
<td>1/94 (9-11 March 1994)</td>
<td>1/02 (9-11 October 2002)</td>
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<td>2/94 (8-10 June 1994)</td>
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<td>1/95 (20 October 1995)</td>
<td>1/04 (12-14 May 2004)</td>
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</tr>
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<td>1/96 (8-10 April 1996)</td>
<td>2/04 (20-22 October 2004)</td>
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</tr>
<tr>
<td>2/96 (6-8 November 1996)</td>
<td>3/04 (8-12 November 2004)</td>
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<td>1/97 (28-30 August 1997)</td>
<td>1/05 (8-10 June 2005)</td>
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<td>2/97 (17-19 November 1997)</td>
<td>2/05 (9-11 November 2005)</td>
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</tr>
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<td>1/98 (4-6 May 1998)</td>
<td>3/05 (28 Nov – 2 December 2005)</td>
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</tr>
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<td>1/00 (26-28 April 2000)</td>
<td>2/07 (20-22 November 2007)</td>
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</tr>
<tr>
<td>1/01 (9-11 May 2001)</td>
<td>1/08 (12-16 May 2008)</td>
<td></td>
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<td>2/01 (21-23 November 2001)</td>
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<tr>
<th>Sub Working Group 5</th>
<th>Transport</th>
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<tr>
<td>1/96 (13-15 March 1996)</td>
<td>1/02 (13-17 May 2002)</td>
<td></td>
</tr>
<tr>
<td>2/96 (22-24 May 1996)</td>
<td>2/02 (28 Oct – 1 November 2002)</td>
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</tr>
<tr>
<td>4/96 (25-29 November 1996)</td>
<td>2/03 (4-8 August 2003)</td>
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<td>1/97 (17-21 March 1997)</td>
<td>3/03 (10-14 November 2003)</td>
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<td>1/04 (12-16 April 2004)</td>
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</tr>
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<td>1/98 (16-18 June 1998)</td>
<td>1/05 (18-22 April 2005)</td>
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<td>2/99 (2-3 September 1999)</td>
<td>1/06 (8-12 May 2006)</td>
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</tr>
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<td>1/00 (29-31 March 2000)</td>
<td>2/06 (25-29 September 2006)</td>
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</table>

**Minutes of MERCOSUR bodies’ Meetings on line**

- CMC: [www.mercosur.int](http://www.mercosur.int)
- CMG: [www.mercosur.int](http://www.mercosur.int)
  [www.conatel.gov.py](http://www.conatel.gov.py)  
  [www.ursec.gub.uy/R_internacionales/r_internacionales.htm](http://www.ursec.gub.uy/R_internacionales/r_internacionales.htm)
- SWG 4: [www.bcb.gov.br/?SGT4ESPANHOL](http://www.bcb.gov.br/?SGT4ESPANHOL)
  [www.dintran.gov.py/](http://www.dintran.gov.py/)  
  [www.dnt.gub.uy](http://www.dnt.gub.uy)
Appendix V Useful Websites

Name | URL
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MERCOSUR official Sites
Main Official Site | www.mercosur.int
MERCOSUR Presidency | www.presidenciaudemercosur.org
MERCOSUR Parliament | www.parlamentodelmercosur.org

State Parties' Governmental Agencies
Ministry of Foreign Affairs (Argentina) | www.mrecic.gov.ar
Ministry of Finance and Production (Argentina) | www.mecon.gov.ar/cnce
Central Bank (Argentina) | www.bcra.gov.ar
House of Representatives (Argentina) | www.hcdn.gov.ar
House of Senators (Argentina) | www.senado.gov.ar
Ministry of Development, Industry and Foreign Trade (Brazil) | www.mrdc.gov.br
Ministry of Foreign Affairs (Brazil) | www.mre.gov.br
Central Bank (Brazil) | www.bcv.gov.br
House of Representatives (Brazil) | www2.camara.gov.br
House of Senators (Brazil) | www.senado.gov.br
Ministry of Foreign Affairs (Paraguay) | www.mre.gov.py
Ministry of Industry and Trade (Paraguay) | www.mic.gov.py
Central Bank (Paraguay) | www.bcp.gov.py
House of Representatives (Paraguay) | www.camdiv.gov.py
House of Senators (Paraguay) | www.senado.gov.py
Ministry of Foreign Affairs (Uruguay) | www.mreec.gub.uy
Ministry of Finance (Uruguay) | www.mef.gub.uy
Central Bank (Uruguay) | www.bcu.gub.uy
Parliament (Uruguay) | www.parlamento.gub.uy
Commission for MERCOSUR (Uruguay) | www.mercosur-comisec.gub.uy

Research Centres / Academic Networks
Centro de Economia Internacional | www.cei.gov.ar
Centro de Investigaciones para la Transformación (CENIT) | www.fundcenit.org.ar
Instituto Torcuato Di Tella (ITDT) | www.idgt.edu
Instituto de Estudios Para el Desarrollo Industrial | www.ie.ufribr
Instituto de Economia, Universidad Federal do Rio de Janeiro | www.eco.unicamp.br/indexie.html
Instituto de Economia, Universidad de Campinas | www.funce.com.br
Fundacao Centro de Estudos do Comercio Exterior | www.nupri.pr.gov.br/nupri/nupri_
Nucleo de Pesquisa em Relacoes Internacioanais, University of Sao Paulo | f.htm
Instituto de Pesquisa Economica Aplicada (IPEA) | www.ipea.gov.br
Centro Brasileiro de Relacoes Internacionais | www.cebri.org.br
Brazilian Institute of International Trade Law and Development | www.idcid.org.br
Facultad Latinoamericana de Ciencias Sociales | www.flacso.org
Observatorio Politico Sul Americano | http://observatorio.iuperj.br/index.
Consejo Latinoamericano de Ciencias Sociales | www.somosact.org
Latin American Trade Network (LATN) | www.latn.org.ar
Observatorio de las Relaciones Union Europe America latina | www.obreal.unibo.it/Home.aspx
Instituto de Relaciones Internacionales - Univ Sta Catarina | www.iribr.com/
Instituto de Integracion Latinoamericana | www.iil.org.ar
Instituto de Comercio Internacional | www.fundacionbankboston.com.ar
Chaire Mercosur

- Instituto de Comercio Internacional - Fundacion Standard Bank
- Consejo Argentino para las Relaciones Internacionales
- RAU Mercosur
- Red Mercosur de Investigaciones Economicas
- Centro de Analisis y Difusion de la Economia Paraguaya
- Centro de Formacion Para la Integracion Regional
- Centro de Investigaciones Economicas
- Departamento de Economia, FCS, Universidad de la Republica
- Instituto de Economia, Universidad de la Republica
- Centro Latinoamericano de Economia Humana
- The National Law Centre for Inter-American Free Trade
- The Dante B. Fascell North South Centre, University of Miami
- Centre for Study of Western Hemispheric Trade, Texas A&M International University

Multilateral Organisations

- Economic Commission for Latin America and the Caribbean
- Latin American Economic System
- Interamerican Development Bank - Integration & Trade Division
- Institute for the Integration of Latin America and Caribbean
- Latin American Integration Association

Business Organisations

- Exportar.Ar
- Federacao das Industrias do Estado do Sao Paulo
- Union Industrial Paraguaya
- Camara de Industrias del Uruguay
- Camara Uruguaya de Tecnologias de la Informacion.
- Union de Exportadores del Uruguay
- Camara Nacional de Comercios y Servicios
- Camara Mercantil de Productos del Pais
- Asociacion Rural del Uruguay

Databases

- MERCOSUR instruments
- Legislative Database (Argentina)
- Legislative Database (Brazil)
- Latin American Network Information Centre
- MERCOSUR Statistics
- Uruguayan NGOs
- Economist Intelligence Unit

Indexes / Statistical Indicators

- MERCOSUR Trade Statistics
- WTO Trade Statistics
- World Development Indicators (WB)
- Doing Business Indicators (WB)
- Indicators Governance & Institutional Quality (WB)
Enterprise Surveys (WB)
IADB Statistical indicators
Global Competitiveness Report
Index of Economic Freedom
Corruption Indexes - Transparency International
Centre for Global Development
UNDP Report on human development
MERCOSUR News
MERCOSUR ABC
Mercosur Press
Abeceb.com - consultora eco sobre comercio regional

www.enterprisesurveys.org
www.iadb.org/research/data.cfm?language=en&parid=2
www.weforum.org
www.heritage.org/index/
www.transparency.org/
www.cgdev.org/section/topics/dataset

www.mercosurabc.com.ar
www.mercopress.com
www.abeceb.com