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FREE CIRCULATION OF SERVICES IN MERCOSUR: A PENDING TASK

*Gabriel Gari**

I. INTRODUCTION

BY the mid 1980s, fresh winds were blowing in the southern cone of South America. The return to democracy had left behind a decade of military governments. In their effort to recover from the 1980s sovereign debt crisis, countries in the region were beginning to carry out domestic reforms towards more market-based and open economic systems. These new political and economic values encouraged resurgence in integration initiatives.¹ On March 26, 1991, Argentina, Brazil, Paraguay and Uruguay signed the Treaty of Asuncion with the purpose of creating the Southern Common Market, an economic integration agreement involving the free movement of goods, services, and factors of production.²

MERCOSUR's original objective was to establish the common market by December 31, 1994. However, thirteen years later, the free circulation of services is one of the many ambitious goals spelled out in the treaty that is yet to be achieved. During these years, MERCOSUR has proven to be a successful instrument for the removal of border barriers to trade, but quite inefficacious in disciplining trade practices and addressing within-the-border barriers to trade. In the services sector, an area of trade particularly sensitive to within-the-border measures, scant results have been achieved.

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1. Regional economic integration agreements were quite common in Latin America during the 1960s, but MERCOSUR differs significantly from these integration experiences. MERCOSUR was envisaged as an open initiative aimed at facilitating a broad and competitive insertion of its Members into the global markets. The integration initiatives during the 1960s, on the contrary, were among closed economies based on import substitution industrialization models and their objective was to expand national markets into regional markets maintaining high levels of external protection. For a detailed analysis on the differences between "old regionalism" and "new regionalism," see ROBERT DEVLIN & ANTONI ESTEVADEORDAL, WHAT'S NEW IN THE NEW REGIONALISM IN THE AMERICAS? (Inter American Development Bank (IADB), Working Paper No. 6, 2001), available at <http://www/iadb/org/intal/publicaciones/devlin-estevadeordalWP6.pdf>.
2. See Tratado de Asunción [Treaty of Asuncion], Mar. 26, 1991, Arg.-Braz.-Para.-Uru., 30 I.L.M. 1041, available at <http://www.MERCOSUR.org.uy>. The Treaty of Asuncion entered into force on November 29, 1991.

MERCOSUR's poor performance in furthering the liberalization of trade-in services contrasts with the dynamism of the services sector and its increasing importance for the growth and development of the economy.³ By failing to provide the service markets with openness, transparency, and certainty, MERCOSUR is not only unfulfilling its own mandate, but also preventing its Members from reaping the benefits of free trade in this vibrant and promising economic sector.

The purpose of this paper is to examine MERCOSUR's integration process as it relates to services and analyze the hurdles that have prevented MERCOSUR from meeting the necessary conditions for the free circulation of services within the bloc. Section II traces the place of services in MERCOSUR's agenda since its inception until present times. Section III focuses on the regulatory framework for trade-in services and assesses its advantages and disadvantages. Section IV reviews the current status of the services' liberalization program, analyzing Members' specific commitments on market access and national treatment. Section V examines the main obstacles to the liberalization of trade-in services. Finally, section VI looks ahead, providing some hints on how the current status of services' integration can evolve in the medium and long terms.

II. TRACING THE PLACE OF SERVICES IN MERCOSUR'S AGENDA

The negotiations on the liberalization of services are one of the many issues that occupy the complex agenda for the establishment of a common market. Over the last thirteen years, the content of the negotiating agenda has varied along with the different challenges that tested MERCOSUR Members' commitment to the integration process. This section contains a brief review of the place trade-in services has had in MERCOSUR's agenda since its creation. Placing the negotiations on services in a wider negotiation context contributes to the understanding of the overall challenges that need to be addressed by a regional integration process before it can advance into a deeper level of integration involving the free circulation of services. The review will be divided into four periods: (1) transitional period (1991 – 1994); (2) deepening period (1995 – 1998); (3) crisis period (1999 – 2002); and (4) current situation (2003 to present).⁴

3. See WTO, *GATS - Fact and Fiction*, available at http://www.wto.org/english/tratop_e/serv_e/gats_factfiction_e.htm (last visited Sept. 11, 2004). According to the WTO, services is the largest and fastest growing sector of the world economy and for the past two decades trade-in services has grown faster than merchandise trade. *Id.*

4. For a comprehensive analysis of the first three periods, see Roberto Bouzas, *El MERCOSUR Diez Años Después. ¿Proceso de Aprendizaje o Déjà Vu?* [MERCOSUR Ten Years Later. Learning Process or Déjà vu?], 41 *DESARROLLO ECONÓMICO* 179, 180-86 (2001).

A. TRANSITIONAL PERIOD 1991-1994

The transitional period covers the years between March 26, 1991, the date the Treaty of Asuncion was signed, and December 31, 1994, the date the common market should have been in place.⁵ During this period, negotiating efforts were focused on the liberalization of trade-in goods, the implementation of a common external tariff, and the development of an institutional framework. Trade-in services were not a priority and little was achieved in this area.

A trade liberalization program aimed at removing tariffs on trade-in goods was successfully implemented. By the end of the transitional period, more than 85 percent of intra-regional trade flows were benefiting from zero-tariffs.⁶ This achievement was coupled with an impressive growth in intra-regional trade, which increased from 1991 to 1994 at an average annual rate of 25 percent.⁷ Significant advances were also made in the negotiation of the Common External Tariff (CET), albeit the results achieved on this issue were not as successful as the liberalization of tariff barriers to trade. After demanding negotiations, Member States agreed on a CET and a customs code.⁸ The CET covered approximately 85 percent of products imported into the region,⁹ while a degree of flexibility allowed each country to exclude from the CET a list of national exceptions, with the commitment to phase them out within a given term. Finally, two significant steps were taken towards the development of MERCOSUR's institutional framework: (1) the signature of the Brasilia Protocol,¹⁰ establishing a dispute settlement system; and (2) the Ouro Preto Protocol,¹¹ specifying the composition, duties, and decision-making procedures of MERCOSUR's political, administrative, and consultative bodies.

The fact that during this period priority was given to the liberalization of trade-in goods, the negotiation on a CET, and the development of the institutional infrastructure, does not mean that other dimensions relevant to the functioning of a common market were neglected. On the contrary, in June 1992, the Common Market Council (CMC) approved a broad and

5. See Treaty of Asuncion, *supra* note 2, art. 1, 30 I.L.M. at 1044-45.

6. See Bouzas, *supra* note 4, at 182.

7. See Centro de Economía Internacional [Centre for International Economy], *Cuadros Estadísticos MERCOSUR*, at <http://www.cei.gov.ar/html/estadistica.htm#mer> (last visited Sept. 11, 2004) [hereinafter *MERCOSUR's Statistics Tables*].

8. See Common Market Council (CMC) Decision 07/94 of Aug. 4, 1994, available at <http://www.MERCOSUR.org.uy/pagina1esp.htm>.

9. See CARLOS SEPULVEDA & ARTURO VERA AGUIRRE, *MERCOSUR: ACHIEVEMENTS AND CHALLENGES* 11 (IADB, Working Paper No. 222, 1997).

10. See Brasilia Protocol, Dec. 17, 1991, Arg.-Braz.-Para.-Uru., 36 I.L.M. 691, available at <http://www.MERCOSUR.org.uy>. The Brasilia Protocol entered into force on April 24, 1993.

11. See Ouro Preto Protocol, Dec. 17, 1994, Arg.-Braz.-Para.-Uru., 34 I.L.M. 1244, available at <http://www.MERCOSUR.org.uy>. The Ouro Preto Protocol entered into force on December 15, 1995.

ambitious working program¹² covering a wide variety of topics, from technical standards to industrial relations and social security issues. Detailed tasks were assigned to eleven Sub Working Groups (SWG) and one Ad Hoc Group on institutional aspects.

Trade-in services was one of the seven topics that SWG No. 10 "Coordination of Macroeconomic Policies," had to deal with. A commission on trade-in services, formed under the umbrella of SWG No. 10, was assigned the task of reviewing the domestic legal systems of each Member State and proposing an agreement for the regulation of trade-in services by December 1993. By then, the agreement was not finished, but some progress was made on certain sector-specific service areas, for instance, the adoption of some measures that aimed at harmonizing financial regulations.¹³ In addition, Members signed two protocols on the promotion and protection of investments with a view to disciplining investment policies – one on intra-zone investments¹⁴ and another one regarding investments from third countries.¹⁵

B. DEEPENING PERIOD 1995 - 1998

The deepening period covers the years between two contrasting hallmarks in MERCOSUR's history. On the one hand, the entry into force of the CET in January 1995, highlighted the strength of the integration process, at a time when its credibility was at one of its highest levels. On the other hand, in January 1999, the Brazilian's currency devaluation represented the most serious breach of a Member's political commitment to the integration process so far, which brought MERCOSUR's credibility to one of its lowest levels.

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12. See Las Leñas Schedule, approved by CMC Decision 01/92 of June 24, 1992, amended by CMC Decision 01/93 of July 1, 1993, *available at* <http://www.MERCOSUR.org.uy/pagina1esp.htm>.
 13. See CMC Decision 08/93 of Jan. 17, 1993, *available at* <http://www.MERCOSUR.org.uy/pagina1esp.htm> (describing the harmonization of capital markets' regulations); CMC Decision 10/93 of Jan. 17, 1993, *available at* <http://www.MERCOSUR.org.uy/pagina1esp.htm> (describing the adoption of Basle Standards for the financial system); CMC Decision 12/94 of Dec. 16, 1994, *available at* <http://www.MERCOSUR.org.uy/pagina1esp.htm> (describing the adoption of Principles of Consolidated Global Banking Supervision for the banking system).
 14. See Protocolo de Colonia para la Promoción y Protección Recíproca de Inversiones en el MERCOSUR [Colonia Protocol on the Reciprocal Promotion and Protection of Investments in MERCOSUR], approved by CMC Decision 11/93 of Jan. 17, 1994, *available at* <http://www.MERCOSUR.org.uy> [hereinafter Colonia Protocol]. This Protocol has not yet entered into force. So far, it has only been ratified by Argentina. Law No. 24891 of Nov. 5, 1997 (Arg.), published by the Official Bulletin on Dec. 9, 1997.
 15. See Protocolo Sobre la Promoción y Protección de Inversiones Provenientes de Estados No Partes [Protocol on the Promotion and Protection of Investments from Third Countries], approved by CMC Decision 11/94 of Aug. 5, 1994, *available at* <http://www.MERCOSUR.org.uy/pagina1esp.htm> [hereinafter Protocol on Third Countries' Investments]. This Protocol has not yet entered into force. So far it has been ratified by Argentina, Law No. 24554 of Sept. 13, 1995 (Arg.), published in the Official Bulletin on Oct. 18, 1995, and by Uruguay, Law No. 17531 of July 30, 2002 (Uru.), published in the Official Bulletin on Aug. 16, 2002.

During this period, more attention was paid to services and some steps towards its liberalization were taken. In 1997, the parties signed the Montevideo Protocol, a general agreement on the regulation of trade-in services in the bloc,¹⁶ and initiated the negotiations on specific market access and national treatment commitments. The following year, three more steps towards the liberalization of services were taken. First, the incorporation of four Annexes to the Montevideo Protocol with sector specific provisions were added: (1) Annex on the Movement of Natural Persons Supplying Services ; (2) Annex on Financial Services ; (3) Annex on Land and Waterway Transport Services; and (4) Annex on Air Transport Services .¹⁷ Second, Member States concluded their list of initial commitments on market access and national treatment.¹⁸ And finally, the creation of the Group of Services, an institutional upgrade, which reflected the importance that services were slowly gaining in the integration agenda.¹⁹

Notwithstanding the above-mentioned achievements, the priority of MERCOSUR's agenda during this period was placed elsewhere. Having removed most of border barriers to trade and being motivated by the region's economic performance during its initial phase of integration, MERCOSUR Members were willing to advance into a deeper level of integration. The negotiating agenda shifted from border barriers to trade, to a wide range of within-the-border measures with a view to consolidate and improve the custom union and to bring MERCOSUR closer to the establishment of a common market.²⁰ It soon became apparent for MERCOSUR Members how costly this stage would be.

The tasks to agree on the removal of tariffs on intraregional goods and to implement a CET were not easy for MERCOSUR Members, but aided

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16. See Protocolo de Montevideo Sobre el Comercio de Servicios del MERCOSUR [Montevideo Protocol on Trade-in Services in MERCOSUR], approved by CMC Decision 13/97 of Dec. 15, 1997, available at <http://www.MERCOSUR.org.uy/pagina1esp.htm> [hereinafter Montevideo Protocol]. This Protocol has not yet entered into force. The Protocol will enter into force once it has been ratified by at least three member countries. So far it has been ratified by Argentina, Law No. 25623 of July 17, 2002 (Arg.), published in the Official Bulletin Aug. 8, 2002, and Brazil, Decreto Legislativo 335/2003 of July 24, 2003, published in the Union's Official Bulletin on July 25, 2003. See *infra* Section III for a detailed analysis of this agreement.
 17. See CMC Decision 09/98 of July 23, 1998, available at <http://www.MERCOSUR.org.uy/pagina1esp.htm>.
 18. These lists were based on the commitments agreed by the Member States with the WTO, although with some minor improvements such as Brazil's inclusion of information services. See MERCOSUR 1999-2000 64 (IADB-INTAL, Report No. 6, 2000), available at <http://www.sice.oas.org/geograph/south/intal.pdf> (2000) [hereinafter MERCOSUR REPORT No. 6].
 19. See CMC Decision 31/98 of July 23, 1998, available at <http://www.MERCOSUR.org.uy/pagina1esp.htm>; see also CMG Res. 73/98 of Dec. 12, 1998, available at <http://www.MERCOSUR.org.uy/pagina1esp.htm> (detailing the structure and mode of functioning of the Group; it also includes an annex, which sets the guidelines for the negotiations on specific commitments).
 20. See MERCOSUR's Working Programme 1995-2000, approved by CMC Decision No. 9/95 of Dec. 12, 1995, available at <http://www.MERCOSUR.org.uy>.

by a special adjustment regime for sensitive products in a context favored by the region's positive economic performance, they managed to turn those tasks into attainable goals. However, when the negotiating agenda turned to the removal of non-tariff barriers to trade and to the harmonization of measures with trade distorting effects, little progress was made,²¹ revealing that MERCOSUR Members were not ready to forfeit the necessary degree of their economic and regulatory autonomy to address these challenges. The fast deterioration of the global economic situation²² made things even more difficult, by mounting pressure over MERCOSUR Members to opt for individual strategies in lieu of MERCOSUR's disciplines. By the end of the deepening period, the results achieved were disappointing. What started as an ambitious plan fuelled by growing expectations and confidence in the integration process, ended with an acute devaluation of MERCOSUR's largest partner's currency.

C. CRISIS PERIOD 1999-2002

In the year 2000, a "re-launching program" for MERCOSUR was approved, including a series of measures aimed at addressing the integration process' weaknesses.²³ Attention was focused on five main areas: (1) macroeconomic coordination; (2) CET; (3) market access; (4) fair competition; and (5) institutions. Negotiations on services continued, but it became clear that more basic challenges should have been sorted out before the free circulation of services in the region could be possible.

One of MERCOSUR's most serious deficits that the crises revealed was the lack of macroeconomic coordination among its Members. The economic prosperity of MERCOSUR's first years prevented the consequences of this problem from being unfolded. It was when the crisis erupted, at a time of growing economic interdependence, that the lack of macroeconomic coordination became apparent,²⁴ inflicting serious damages to the integration process. To address this problem, a series of measures were approved, including the creation of a Macroeconomic Monitoring Group, the exchange of economic information, and the harmonization of economic statistics.²⁵ In addition, Members agreed on a plan for macroeconomic convergence in the region, establishing common

21. See, e.g., the signature of the *Protocolo de Defensa de la Competencia en el MERCOSUR* [Protocol to Safeguard Competition in MERCOSUR], approved by CMC Decision 18/96 of Dec. 16, 1996, at <http://www.MERCOSUR.org.uy> [hereinafter *Competition Protocol*]. This protocol has not yet entered into force. It has been ratified by Brazil, Decreto No. 3602 of Sept. 18, 2000, published in the Union's Official Bulletin on Sept. 19, 2000.

22. See e.g., South East Asian Crisis in 1997, and Russian Crisis in 1998.

23. See CMC Decisions 22/00, 23/00, 24/00, 25/00, 26/00, 27/00, 28/00, 30/00, 32/00, of June 30, 2000, available at <http://www.MERCOSUR.org.uy>.

24. See, e.g., differences in the exchange rate regimes of the two largest partners of the bloc.

25. See CMC Decision 30/00 of June 29, 2000, available at <http://www.MERCOSUR.org.uy>.

goals on inflation, fiscal, and current account deficits.²⁶ The deepening of the crisis in the following years prevented the plan from being fully implemented.

Another problem, which already existed, but was exacerbated during the crisis, was the Members' anticompetitive practices including, among others, discriminatory subsidies and other incentives to domestic production and unfair use of trade remedy mechanisms. The re-launching program included a series of decisions aimed at disciplining MERCOSUR Members' public policies and trade remedy measures distorting competition.²⁷ In 2002, the World Trade Organization (WTO) agreements on Subsidies and Countervailing Measures and on Anti-dumping were incorporated into MERCOSUR's legal system.²⁸ In addition, several measures were adopted to buttress the implementation of the CET, enhance market access conditions for goods originating in the region, and improve the agreement's institutional framework.

With respect to services, the focus was placed on the negotiation of specific commitments on market access and national treatment. Member States participated in three rounds of negotiations and launched the fourth one in April 2002. During the first round of negotiations, no significant improvements were made. The first list of specific commitments barely improved Member's initial commitments.²⁹ In order to boost negotiation results, the Group of Services issued a second set of negotiating guidelines aimed at reducing the number of unbound³⁰ commitments and introducing more transparency to the commitments already undertaken.³¹ Some results were achieved, but by the conclusion of the third round of negotiations, Members' schedules of specific commitments continued to include a significant amount of unbound entries, and restrictions on market access and national treatment were not accurately specified. Moreover, four years after it was signed, the Montevideo Protocol had not yet entered into force.³²

26. This plan was approved by a declaration of the Presidents of MERCOSUR, Bolivia (Associate Member of MERCOSUR since March 1997), and Chile (Associate Member of MERCOSUR since October 1996) in December 2000.

27. See CMC Decision 28/00 of June 30, 2000 (Commercial and Competition Defence), available at <http://www.MERCOSUR.org.uy>; CMC Decision 66/00 of Dec. 16, 2000 (Common Commercial Defence), available at <http://www.MERCOSUR.org.uy>.

28. See CMC Decision 13/02 of July 5, 2002, available at <http://www.MERCOSUR.org.uy>; CMC Decision 14/02 of July 5, 2002, available at <http://www.MERCOSUR.org.uy>.

29. See MERCOSUR REPORT No 6, *supra* note 18, at 64.

30. In a country's list of specific commitments, an unbound entry for a specific services sector means that the country reserves its right to pass regulations against the market access or national treatment principles.

31. See CMG Res. 36/00 of June 28, 2000, available at <http://www.MERCOSUR.org.uy>.

32. See *supra* note 16.

D. CURRENT SITUATION

In 2003, the region's economic situation showed some signals of recovery,³³ and new administrations took over in Brazil and Argentina. The Brazilian President, Luiz Inácio Lula da Silva, and the Argentinean President, Néstor Kirchner, both supported by left wing parties, have jointly emphasized the importance of the social dimension of the integration process and their vision of MERCOSUR as an instrument to increase their bargaining power in the negotiations with third countries on the conditions for the insertion of their economies into the global market.³⁴ While it is still premature to assess the impact of this new political scenario on the integration process in general, and on the liberalization of services in particular, a review of MERCOSUR's Working Program 2004 – 2006³⁵ can shed light on which direction the integration process is now heading.

The wide coverage of this working program reflects the current leaders' emphasis on a holistic approach to the integration process.³⁶ The economic-commercial section is focused on: (1) the coordination of macroeconomic policies; (2) a complete implementation of the CET (without lists of exceptions, avoiding double levies, and with a regional mechanism for tariff revenue collection and distribution); (3) the removal of non-tariff barriers to trade, and (4) the disciplining of anti-competitive practices. The social section includes measures on a wide range of issues, from judicial cooperation to human rights protection, with particular emphasis on the promotion of civil society participation in the integration process. The institutional section covers plans to: (1) discuss the creation of a MERCOSUR Parliament; (2) complete the transformation of the Administrative Secretariat into a Technical Secretariat; and (3) approve a mechanism to introduce the direct effect system for MERCOSUR norms. Finally, the Working Program 2004–2006 contains measures aimed at promoting regional cooperation strategies for the provision of public goods, which is a dimension of the integration process that so far has been over-

33. See *MERCOSUR's Statistics Tables*, *supra* note 7. The volume of MERCOSUR's intraregional trade for 2003 was US\$ 25,646 million, a 25% increase in relation to 2002 (US\$ 20,462m) but still 38% below its 1997 level (US\$ 41,074m).

34. See Embassy of Brazil in London, *Buenos Aires Consensus*, available at <http://www.brazil.org.uk/page.php?cid=1654> (Oct. 16, 2003). A declaration by the Brazilian and Argentinean presidents expressing their common views on several issues ranging from economic and social policies to regional integration and international affairs. Considering its content, the name of the declaration seems to be not only a way to reaffirm the political coincidences among the presidents, but also to underscore their disagreement with the economic policies associated with the Washington Consensus. The emphasis on the social dimension of integration is also reflected on the MERCOSUR's Joint Presidential Communications of June 18, 2003 and August 15, 2003.

35. See CMC Decision 26/03 of Dec. 16, 2003, available at <http://www.MERCOSUR.org.uy>.

36. It is important to clarify that MERCOSUR has never been a purely economic arrangement, including from its inception political, cultural, social, and environmental aspects of integration.

looked. The areas for cooperation that the program covers are scientific and technological cooperation, physical infrastructure, and energy integration.

Despite its breadth, the Working Program 2004–2006 does not include specific measures on trade-in services.³⁷ In December 2003, the fourth round of negotiations concluded in this sector, and the fifth round was launched. Compared with previous rounds, the results of the fourth round of negotiations reveal that some progress has been made, not only in terms of the increased number of bound commitments, but also in terms of the enhanced transparency of the schedules. The schedules now specify the measures that limit the application of market access and national treatment principles with more precision.³⁸ In addition, an agreement for the creation of a MERCOSUR visa, establishing common rules to facilitate the temporal movement of natural persons supplying services, has been approved.³⁹ However, bearing in mind that MERCOSUR's ultimate goal is the free circulation of services, the current state of affairs is far from satisfactory. Furthermore, the legal uncertainty derived from the Members' failure to ratify the Montevideo Protocol and to incorporate in their domestic jurisdictions the CMC's Decisions approving the results of the rounds of negotiations overshadows the results achieved.

In summary, this short revision of MERCOSUR's first thirteen years of existence illustrates the connections between the liberalization of trade-in services and the integration process as a whole. To meet the conditions for the free circulation of services is something that not only depends on the results of the negotiation rounds on services, but more importantly, on the Members' capacity to secure open and stable markets and fair competition conditions within the bloc. So far, Members have encountered serious difficulties to make progress in either of these two areas.

III. THE REGULATORY FRAMEWORK FOR TRADE-IN SERVICES

The main instrument for the regulation of trade-in services in MERCOSUR is the Montevideo Protocol on Trade-in Services and its four annexes on the movement of natural persons supplying services, financial services, land and waterway transport services, and air transport services.⁴⁰

Comparative analyses of international agreements have shown a variety of options to regulate trade-in services and to advance its liberaliza-

37. There is only one minor reference to trade-in services in a section discussing measures on competition policy.

38. See *infra* Section IV for a detailed review of current schedules of specific commitments.

39. See CMC Decision No. 16/03 of Dec. 15, 2003, available at <http://www.MERCOSUR.org.uy>.

40. See Montevideo Protocol, *supra* note 16.

tion.⁴¹ Stephenson's findings show that while all agreements contain general rules and disciplines for trade-in services and specific provisions for the liberalization of such trade, they may differ in their scope of application, in the approach adopted by them towards the liberalization of trade-in services, and in the depth and coverage of the rules and disciplines governing trade-in services.⁴² The Montevideo Protocol will be reviewed against this backdrop, comparing the path chosen by MERCOSUR Members with other options that could have been taken, with a view to assess its suitability for promoting the liberalization of trade-in services in the bloc.

A. SCOPE OF APPLICATION

The structure and content of the Montevideo Protocol are based on the General Agreement on Trade-in Services (GATS). Like GATS, the Protocol's scope of application covers "measures adopted by Member States affecting trade-in services" in MERCOSUR.⁴³ Its rules and disciplines apply to the four possible modes of service supply: (1) cross-border; (2) consumption abroad; (3) commercial presence in the consuming country; and (4) presence of natural persons.⁴⁴ In addition, the Protocol's rules and disciplines apply to all service sectors with the exception of those governmental services that are not supplied on a commercial basis or in competition with one or more service suppliers.⁴⁵ This initial broad definition of the Protocol's scope of application spelled out in its first two articles is subsequently subject to important limitations on the modes of supply and service sectors covered by both.

The application of the Protocol's rules and disciplines on mode of supply three – commercial presence – is further limited by provisions included in the Colonia Protocol on the Promotion and Reciprocal

41. See Sherry M. Stephenson & Francisco Prieto, *Evaluating Approaches to the Liberalization of Trade-in Services: Insights from Regional Experience in the Americas*, in *TRADE POLICY FOR DEVELOPING COUNTRIES IN A GLOBAL ECONOMY: A HANDBOOK* (2001); Sherry M. Stephenson, *The Growing Participation in Multilateral Services Liberalization by Latin America and the Caribbean*, in *LATIN AMERICA: ITS FUTURE IN THE GLOBAL ECONOMY* 165 (Patricia Rich ed., 2001) [hereinafter Stephenson Growing Participation]; Sherry M. Stephenson, *A Comparison of Existing Services Trade Arrangements within APEC*, in *IMPEDIMENTS TO TRADE-IN SERVICES—MEASUREMENTS AND POLICY IMPLICATIONS* 287 (Christopher Findlay & Tony Warren eds., 2000) [hereinafter *A Comparison of Existing Services Trade Arrangements within APEC*]; SHERRY M. STEPHENSON, *DEEPENING DISCIPLINES FOR TRADE-IN SERVICES: TRANSPARENCY, DOMESTIC REGULATION AND RECOGNITION*, OAS Trade Unit Studies (2001) [hereinafter *DEEPENING DISCIPLINES FOR TRADE-IN SERVICES*]; Free Trade Area of the Americas - FTAA, *Provisions on Trade-In Services in Trade and Integration Agreements of the Western Hemisphere*, available at http://www.ftaa-alca.org/ngroups/ngsv/publications/english/srv_toc.asp (Oct. 25, 1999).

42. See *A Comparison of Existing Services Trade Arrangements within APEC*, *supra* note 41, at 288.

43. See Montevideo Protocol, *supra* note 16, art. I.

44. See *id.* art. II, § 2.

45. See *id.* art. II, § 3(b)-(c).

Protection of Investments in MERCOSUR.⁴⁶ In this instrument, each Member State has included a list of sectors where they reserve their right not to afford national treatment to foreign investors coming into their territories.⁴⁷

The application of the Protocol's rules and disciplines on mode of supply four – presence of natural persons – is further limited by provisions included in the Annex on Movement of Natural Persons Supplying Services. First, the Annex excludes from the reach of the Protocol's rules and disciplines all those measures affecting natural persons seeking employment in other Members' markets⁴⁸ and those measures regarding citizenship, residence, or employment on a permanent basis.⁴⁹ In addition, the Annex insulates from the Protocol's rules and disciplines the Member States' right to regulate the entry of natural persons into their territory.⁵⁰ These two provisions constitute a step backwards in the process of advancing the liberalization of trade-in services by preventing the Protocol from disciplining one of the most important modes of supply of services. As a consequence, business services and other dynamic sectors where services are mainly provided by natural persons will be prevented from reaping the benefits of free trade-in services. Highly trained professionals will not be able to access foreign markets and consumers' options will continue to be limited to local service providers.

With respect to the service sectors covered, there is an additional limitation to the Protocol's scope of application that has to do with the government procurement of services. The Protocol exempts Member States from observing their most favorable nation, national treatment, and market access obligations when it comes to "... laws, regulations, or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale."⁵¹ Considering the economic relevance of governments' demand for services, this provision introduces an important constraint on the Protocol's capacity to advance the services' liberalization process. That is the reason why the article also calls Member States to negotiate an agreement on Government Procurement and to apply its disciplines to the pro-

46. The commercial presence mode of supply involves a foreign services supplier setting a branch or a subsidiary in the territory of another Member. This operation is closer to a direct investment transaction than to an arm's length trade transaction. Therefore, for the purpose of determining the scope of application of the national treatment principle it is necessary to complement the provisions of the Montevideo Protocol with the provisions of the Colonia Protocol. *See id.*; *see also* Colonia Protocol, *supra* note 14, arts. 2-3, Annex 1, art. 1.

47. *See* Colonia Protocol, *supra* note 14, Annex 1, art. 1.

48. It must be noted that it is not at all easy to draw the borderline between natural persons seeking employment and natural persons seeking to provide services.

49. *See* WTO, *Services Agreement: Annex on Movement of Natural Persons Supplying Services Under the Agreement*, § 2, available at http://www.wto.org/english/tratop_e/serv_e/8-anmvnt_e.htm (last visited Sept. 11, 2004).

50. *See id.* § 3.

51. *See* Montevideo Protocol, *supra* note 16, art. XV, § 1.

curement of services.⁵²

Finally, the broad definition of the Protocol's scope of application contained in its first two articles is also curtailed by the provisions governing the Protocol's approach towards the liberalization of trade-in services, which are analyzed in the following section.

B. APPROACH TOWARDS THE LIBERALIZATION OF TRADE-IN SERVICES

A comparative review of trade-in services agreements reveal that there are two main ways to approach the liberalization of such trade: (1) the "positive list" or "bottom-up" approach; and (2) the "negative list" or "top-down" approach.⁵³ The scope of coverage of fundamental principles for the liberalization of trade-in services most favored nation, national treatment, and market access over modes of supply and service sectors depend, to a large extent, on which of these approaches is chosen.

The Montevideo Protocol adopts the positive list approach on market access and national treatment.⁵⁴ According to this approach, Member States are required not to maintain or adopt measures that limit the access of foreign services or foreign service suppliers to the domestic market in the areas where specific market-access commitments are undertaken. In the same vein, each Member is obligated not to treat the service and service suppliers of another Member any less favorable than its own service and service suppliers in the areas where specific national treatment commitments are undertaken. It is up to each Member State to define the scope of its list of specific commitments. Therefore, the scope of application of these two fundamental principles for services liberalization is constrained to the service sectors where specific commitments are undertaken. This approach to services' liberalization differs from the negative list approach. In this case, all parties to an agreement undertake the obligation to grant market access and to accord national treatment to all foreign services and foreign services suppliers in all sectors, unless otherwise specified in a list of exemptions or non-conforming measures that are set out in an annex.

In theory, both approaches could lead to the same degree of liberalization. In practice, however, the positive list approach entails a much more conservative path.⁵⁵ By advancing the liberalization of services through the negotiations on specific commitments, Member States can save themselves from the difficult task of having to identify at the beginning of the negotiation process all those service sectors that, due to their strategic

52. See *Protocolo de Contrataciones Públicas del MERCOSUR* [Protocol on Government Procurement in MERCOSUR], Dec. 15, 2003. This Protocol has not yet entered into force.

53. See *A Comparison of Existing Services Trade Arrangements within APEC*, *supra* note 41, at 288.

54. See Montevideo Protocol, *supra* note 16, art. VII.

55. See Stephenson & Prieto, *supra* note 41, at 1, for more details on the advantages and disadvantages of the positive list approach and the negative list approach.

relevance, would not be wise to liberalize. It also protects the scope of Member States' policy options with regard to services that could be developed in the future. The positive list approach is also applied by the GATS, while the negative list approach is applied, among others, by the North America Free Trade Agreement (NAFTA) and by the bilateral free trade agreements between each NAFTA Member and third countries.⁵⁶

From a multilateral perspective, the use of a positive list in a regional agreement can be problematic. Because regional agreements represent a departure from the most favored nation treatment principle, multilateral trade agreements have set strict standards for their approval with the aim of minimizing the negative impact of this departure on the world trading system. Article V of GATS establishes that WTO Members can enter into regional agreements with the purpose of liberalizing trade-in services, provided that the agreement "has a substantial sectoral coverage" and provides for the absence or elimination of "substantially all discrimination."⁵⁷ By choosing the positive list approach, it is less likely that the Montevideo Protocol will be able to raise the liberalization of trade-in services to a level that meets Article V's standards within a "reasonable time-frame."⁵⁸

In addition, it is debatable whether a positive list approach is appropriate for a regional integration agreement that aims to establish a common market involving the free circulation of services. The fact that some Member States have chosen the negative list approach in the bilateral agreements they have entered into with third-world countries,⁵⁹ makes MERCOSUR's positive list choice even more questionable.

C. SPECIFIC RULES AND DISCIPLINES

General principles, such as market access and national treatment, are not sufficient to secure the liberalization of trade-in services. Barriers to trade-in services pervade domestic legal systems and are difficult to identify. For an effective removal of these barriers and to provide service markets with predictable, certain, and transparent conditions, it is also necessary to resort to specific rules and disciplines. That is why, apart from the general principles of non-discrimination and market access,

56. See e.g., Free Trade Agreement between the Government of the United States of America and the Government of the Republic of Chile, June 6, 2003, *available at* http://www.sice.oas.org/Trade/chiusa_e/chiusaind_e.asp; Free Trade Agreement between the Government of Canada and the Government of the Republic of Chile, Dec. 5, 1996, 36 I.L.M. 1079; Tratado de Libre Comercio Mex.-Bol., Jan. 1, 1995, *available at* http://www.sice.oas.org/trade/mexbo_s/mbind.asp.

57. See General Agreement on Trade in Services (GATS), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, art. V, § 1(a)-(b), 33 I.L.M. 1125, 1168 [hereinafter GATS].

58. *Id.* art. V, § 1(b)(ii). Regional integration agreements should meet WTO standards within ten years of their signature.

59. See Tratado de Libre Comercio entre Uruguay y Mexico, Nov. 15, 2003, art. 10-06, § 2, *available at* http://www.sice.oas.org/Trade/mexurufta_s/mexuruind_s.asp.

trade-in services agreements include provisions that seek to improve the amount and quality of information on services' regulations, to discipline Member States' right to regulate services, and to promote mutual recognition agreements on standards or other criteria for the authorization, licensing, or certification of services suppliers. The following paragraphs look at the main specific rules and disciplines contained in the Montevideo Protocol.

1. Transparency

The provision and consumption of services tend to be permeated by several laws, decrees, and administrative procedures dealing with issues that range from technical standards to licensing requirements. The lack of information on these regulations can act as a *de facto* market access barrier. Foreign service suppliers are particularly vulnerable to this problem. The lack of direct effect of MERCOSUR norms makes things even more difficult for them, because as well as collecting information on domestic regulations, they have to check whether MERCOSUR norms that are relevant to their service sector have been incorporated into Member States' domestic legal systems. Thus, prompt access to accurate information on services' regulations is vital to secure open and transparent conditions for services markets. Like most agreements on trade-in services, the Montevideo Protocol contains some provisions to deal with this problem.

According to article VIII, each Member State is under the obligation to publish, before they enter into force, all measures affecting trade-in services. In addition, each Member has to inform the MERCOSUR Trade Commission (MTC) at least once a year, about the adoption of new regulations or the amendment of existing ones that affect trade-in services, as well as establishing inquiry points to provide other Members with specific information on services' regulations. The implementation costs of these provisions are quite significant because of the breadth of measures that may affect trade and the paucity of systematized information about them. To date, little has been achieved in this area. Information technology and, in particular, the Internet, are tools that can improve this situation at a relatively low cost.

2. Domestic Regulation

The services sector is usually the most regulated sector of the economy and regulations can create unnecessary barriers to trade or discriminate among service providers. Therefore, in order to secure transparent and predictable conditions for service transactions, and for promoting an effective liberalization of trade-in services, it is essential to discipline Member States' right to regulate the services market. For this purpose, all agreements on trade-in services include provisions that set standards on how States can exercise their right to regulate the services market. The scope of application of these standards and their degree of specificity varies. The Montevideo Protocol's provision on domestic regulation repro-

duces article VI of GATS, although there are some differences.⁶⁰

First, the Protocol's provision on domestic regulation places a general duty on each Member to ensure that all measures of general application affecting trade-in services are administered in a "reasonable, objective, and impartial manner."⁶¹ This is a horizontal commitment, contrary to GATS' provision, where the scope of application of this duty is restricted to sectors where specific commitments are undertaken.

Like GATS' provision, the Protocol requires Members to implement independent tribunals or procedures where affected service providers can bring their case to review administrative decisions affecting trade-in services.⁶²

In those cases where any kind of authorization is required for the supply of a service, Member States must inform applicants of their decision and of the status of their application when so requested.⁶³ Again, this is a duty stricter than its GATS parallel because its scope of application is not restricted to sectors where specific commitments are undertaken.

Measures related to qualification requirements and procedures, technical standards, and licensing requirements must comply with a set of more specific standards including, *inter alia*, that such requirements "are based on objective and transparent criteria," that they "are not unnecessarily onerous for assuring quality of service," and in the case of licensing procedures, that they "do not constitute in themselves restrictions on the provision of services."⁶⁴

Finally, the Protocol includes a provision that aims to strike the difficult balance between each Member's right to regulate services in order to meet their national policy objectives and the overall agreement's objective to advance the liberalization of services in the bloc. This provision allows each Member to introduce new regulations on services, including provisions on market access and national treatment, provided that they do not nullify or impair their commitments derived from the Protocol and from their list of specific commitments. A decision of the CMC has subsequently specified this criterion by automatically exempting MERCOSUR Members from market access restrictions and national treatment limitations that could be included in future regulations of currently unregulated service sectors.⁶⁵

In sum, article X is a powerful tool to discipline Member States' domestic regulatory practices, which can have unpredictable consequences on the integration process. Once the Montevideo Protocol and the

60. See Montevideo Protocol, *supra* note 16, art. X.

61. See *id.* art. X, § 1.

62. See *id.* art. X, § 2.

63. See *id.* art. X, § 3.

64. See *id.* art. X, § 4.

65. See CMC Decision No. 11/01 of Dec. 21, 2001, available at <http://www.MERCOSUR.org.uy>.

Olivos Protocol⁶⁶ enter into force, the MERCOSUR's Permanent Review Tribunal could be called to review a Member's right to regulate the services market, constrained only by quite broad standards of review. As a result, a non-political body may end up dealing with politically sensitive issues on a purely technical basis. While this could be an effective mechanism to advance the liberalization of services, it also entails the risk to create an imbalance of power between MERCOSUR's political and non-political bodies, especially in an integration process where every step that has been taken demanded intense political negotiations.⁶⁷

3. *Recognition*

Differences between countries in their standards or criteria for the authorization, licensing, or certification of service suppliers are commonplace. These differences can constitute an obstacle to trade-in services, as they prevent a service provider qualified in one jurisdiction from supplying services in another jurisdiction where the qualification is not recognized. To avoid this problem, countries enter into mutual recognition agreements by which each party to the agreement recognizes the education or experience gained, requirements met, or licenses granted to service providers in the territory of other parties to the agreement. These agreements facilitate trade-in services among the parties to the recognition agreement, but they work 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.⁶⁸ Thus, for advancing the liberalization of trade-in services, it is necessary not only to promote mutual recognition agreements between countries, but also to discipline each country's recognition practice in order to avoid discriminatory arrangements.

The Protocol addresses this problem in article XI. According to this provision, each Member State is entitled to recognize unilaterally or through an agreement the education or experience obtained by a service provider in the territory of any other Member State or in a third State, without being under the obligation to extend that recognition to other Member States. However, to avoid the recognition of qualifications from constituting a means of discrimination between countries, each Member

66. See *Protocolo de Olivos para la Solución de Controversias* [Olivos Protocol for the Settlement of Disputes], Feb. 18, 2002, 42 I.L.M. 2, available at <http://www.MERCOSUR.org.uy> [hereinafter *Protocolo de Olivos*]. This Protocol has not entered into force. It has been ratified by Brazil, Decreto Legislativo No. 712/2003 of Oct. 14, 2003 (Braz.), published in the Union's Official Bulletin on Oct. 15, 2003; by Uruguay, Law No. 17629 of Apr. 30, 2003 (Uru.), published in the Official Bulletin on May 6, 2003, and by Argentina, Law No. 25663 of Oct. 18, 2002 (Arg.), published in the Official Bulletin on Oct. 21, 2002.

67. See CLAUDE E. BARFIELD, *FREE TRADE, SOVEREIGNTY, DEMOCRACY: THE FUTURE OF THE WORLD TRADE ORGANIZATION* (2001), for an insightful analysis of the tensions between decision-making bodies and dispute settlement bodies in trade agreements.

68. See *DEEPENING DISCIPLINES FOR TRADE-IN SERVICES*, *supra* note 41, at 22.

State must give any other Member the opportunity to demonstrate that the education and experience obtained in their territory could be recognized on the same footing as others.

The Protocol aims not only to discipline Member States' recognition practices, but also to promote the use of mutual recognition agreements as a means of advancing the liberalization of services. For this purpose, the Protocol relies on the efforts made by professional bodies in cooperation with governmental agencies. Each Member State is committed to encourage these bodies to develop mutually accepted standards and criteria for the provision of professional services and to make proposals to the CMG on mutual recognition in this area. The CMG would in its turn adopt those recommendations, previously examining their suitability and consistency with the Protocol.

So far, a first step to advance the mutual recognition of professional qualifications with a view to grant temporal licenses to professional service providers has recently been taken. The CMC has approved a set of guidelines to assist professional bodies to reach mutual recognition agreements on professional qualifications and help them to develop common rules on temporal licenses for professionals from one Member State to provide services on the territory of any other Member State.⁶⁹ The CMC Decision also sets some minimum requirements that should be met for issuing temporal licenses, such as: (1) the need of a services contract; (2) the professional's obligation to restrict its professional activities to what is stated in the contract; (3) the implementation of a common ethical code for each profession; and (4) a limit for the license term to a maximum of two years.⁷⁰

In addition, Member States had already approved some mutual recognition agreements on certificates, diplomas, and studies at primary, secondary, and university levels for the purpose of promoting educational integration rather than for advancing services integration.⁷¹ For instance,

69. See CMC Decision No. 25/03 of Dec. 15, 2003, *available at* <http://www.MERCOSUR.org.uy>.

70. Relying on professional bodies is not the only way to promote mutual recognition agreements. The regional authorities themselves can also pass regulations by which Members are under the obligation to recognize licenses, certificates, and professional degrees issued in the territory of other Members. MERCOSUR seems to have chosen the middle path between these two alternatives, relying on non-governmental bodies but also setting minimum standards for the mutual recognition agreements. For more details and examples between these two alternatives, see *DEEPENING DISCIPLINES FOR TRADE-IN SERVICES*, *supra* note 41, at 18.

71. See Protocol on Educational Integration and Recognition of Primary and Secondary Level Certificates and Studies of a Non Technical Character, approved by CMC Decision 4/94 of Aug. 5, 1994, *available at* <http://www.MERCOSUR.org.uy>; Protocol on Educational Integration, and Recognition of Diplomas, Certificates, and Studies on Technical Education, approved by CMC Decision 7/95 of Aug. 5, 1995, *available at* <http://www.MERCOSUR.org.uy>; Protocol on Educational Integration on the Recognition of University Degrees for the Purpose of Undertaking Postgraduate Studies in MERCOSUR Universities, approved by CMC Decision 8/96 of Dec. 17, 1996, *available at* <http://www.MERCOSUR.org.uy> [hereinafter Protocol on Educational Integration on the Recognition of University].

the Protocol on the Mutual Recognition of University Degrees expressly states that the recognition is for the sole purpose of undertaking post-graduate studies in MERCOSUR Universities.⁷²

In summary, there are some features of the Montevideo Protocol that will probably impair its capacity to promote an effective liberalization of trade-in services once it enters into force. The first feature is the limitation on its scope of application, which leaves the provision of services by natural persons and government procurement of some type of services aside from its disciplines. Its bottom-up approach towards the liberalization of services is also questionable in the context of an agreement that aims to establish a common market where the free circulation of services should be the rule and not the exception. The Protocol also sets strict standards that aim to discipline Member's regulatory practices. However, the impact of these standards will largely depend on the effectiveness of the dispute settlement system rather than on the Protocol itself. .

IV. THE SERVICES' LIBERALIZATION PROGRAM

The Montevideo Protocol includes a liberalization program that compels Member States to enter into successive annual rounds of negotiations with a view to liberalize trade by progressively incorporating service sectors and modes of supply into their schedules of specific commitments. According to this program, the liberalization of trade-in services must be completed within ten years of the date the agreement enters into force.⁷³ The round of negotiations started in 1999, and so far, four rounds of negotiations have been concluded. The fifth round, which was launched in December 2003,⁷⁴ is currently under way.

The results of the negotiations are contained in each Member States' schedule of specific commitments. Each schedule contains the Member's commitments on market access and national treatment in relation to each of the four modes of service supply for each service sector.⁷⁵ One can estimate the level of liberalization for each service sector by counting the

72. See Protocol on Educational Integration on the Recognition of University, *supra* note 71, art. 1.

73. See *supra* note 58.

74. See CMG Res. 52/03 of Dec. 10, 2003, available at <http://www.MERCOSUR.org.uy>.

75. The schedules of commitments are divided in two columns - market access and national treatment. For each specific service sector there are eight entries, one for each mode of supply in the market access column and one for each mode of supply in the national treatment column. Entries can be UNBOUND (the country does not undertake any commitment with respect to that mode of supply), BOUND with limitations (the country undertakes the commitment to grant market access or national treatment to that mode of supply, except for specific situations mentioned in the schedule), and BOUND without limitations. The non-limited BOUND commitments are recorded in the schedule as NONE entries. Each NONE entry means the countries' bound commitment not to adopt market access limitations or national treatment limitations for a specific mode of supply.

number of non-limited bound commitments (NONE entries).⁷⁶ The most recent Member States' schedules have been analyzed according to this method. Table 1 summarizes these findings.

Each Member's schedule includes a horizontal limitation that affects the provision of services via the presence of natural persons. Members' commitments regarding this mode of supply are unbound, except for measures concerning the temporary entry and stay of senior personnel like managers, executives, or specialists. Therefore, the four Members reserve their right to introduce measures on the provision of services by natural persons against market access and national treatment principles.

Brazil's and Paraguay's schedules include a horizontal limitation that affects the provision of services via the commercial presence of service providers from one Member in another Member's territory. The limitation specifies that foreign service suppliers wishing to supply a service as a juridical person in their territory must be organized as a legal entity foreseen by their domestic laws. In addition, the Brazilian schedule states that to be eligible for remittances, foreign service suppliers established in Brazilian territory must be registered with the Central Bank of Brazil.

The following paragraphs examine the specific commitments on various service sectors. The data shows important asymmetries regarding the levels of liberalization, not only among Members themselves, but also among service sectors within each Member's schedule.

A. PROFESSIONAL SERVICES

In Argentina, the level of liberalization of professional services is moderately high (63 percent), but any person seeking to provide professional services in this country must obtain recognition of their professional degree, enroll in the relevant college, and establish a registered office in the country. In Brazil, the level of liberalization in this services sector is relatively high as well (52 percent), although its schedule includes some limitations for the provision of legal and accounting services by foreign professionals. In Uruguay, the level of liberalization of professional services is moderate (39 percent), and like in Argentina, foreign service providers must obtain recognition of their professional degree by the rel-

76. BERNDARD M. HOEKMAN, TENTATIVE FIRST STEPS - AN ASSESSMENT OF THE URUGUAY ROUND AGREEMENT ON SERVICES (World Bank, Policy Research Working Paper No. 1455, 1995), available at http://econ.worldbank.org/files/14610_wps1455.pdf. In particular, see pages 14-16. Hoekman pioneered quantitative methods for the estimation of the level of services liberalization. Stephenson has applied this method to assess the degree of services liberalization achieved in the GATS 1994 schedules of countries in the Western Hemisphere. See DEEPENING DISCIPLINES FOR TRADE-IN SERVICES, *supra* note 41, at 169-70. Basically, this method consists of looking at the schedules and giving a value of "1" for an entry of NONE for the same sub-sector and mode of supply scheduled for both market access and national treatment. Eight NONE entries, means that there is no measure in force that limit the foreign service suppliers' market access rights or national treatment rights, whatever the mode of supply they employ. Hence, that specific service sector is completely liberalized (100%). The fewer the number of NONE entries, the lower the level of liberalization for that service sector.

IV. ROUND OF NEGOTIATIONS ON SERVICES - MERCOSUR MEMBER'S SCHEDULES OF SPECIFIC
COMMITMENTS - DECEMBER 2003

	Argentina				Brazil				Paraguay				Uruguay			
	No. of Sub Sectors (*)	No. of NONE entries (#)	Level of Liberalization (+)	No. of Sub Sectors (*)	No. of NONE entries (#)	Level of Liberalization (+)	No. of Sub Sectors (*)	No. of NONE entries (#)	Level of Liberalization (+)	No. of Sub Sectors (*)	No. of NONE entries (#)	Level of Liberalization (+)	No. of Sub Sectors (*)	No. of NONE entries (#)	Level of Liberalization (+)	No. of Sub Sectors (*)
Professional Services	14	35	63%	11	23	52%	11	0	0%	14	22	39%				
Computer and related services	1	3	75%	1	3	75%	1	3	75%	1	3	75%				
Other Business Services	33	68	52%	31	64	52%	31	19	15%	40	80	50%				
Postal Services	1	0	0%	1	0	0%	1	0	0%	1	0	0%				
Courier Services	1	3	75%	1	3	75%	1	0	0%	1	2	50%				
Telecommunications	19	56	74%	18	54	75%	18	26	36%	19	23	30%				
Audiovisual Services	5	5	25%	6	0	0%	6	0	0%	7	2	7%				
Constructing Services	5	10	50%	5	10	50%	5	5	25%	5	10	50%				
Distribution Services	4	12	75%	6	12	50%	6	6	25%	5	10	50%				
Educational Services	7	6	21%	7	21	75%	5	7	35%	5	5	25%				
Environmental Services	4	3	19%	4	2	13%	4	0	0%	4	0	0%				
Insurance Services	19	17	22%	19	15	20%	19	4	5%	19	21	28%				
Other Financial Services	17	36	53%	17	0	0%	17	0	0%	17	10	15%				
Health Related and Social Services	3	6	50%	3	3	25%	4	4	25%	3	3	25%				
Tourism and Travel Related Services	4	12	75%	3	1	8%	4	11	69%	3	9	75%				
Recreational, Cult., & Sport. Services	19	47	62%	4	1	6%	4	5	31%	5	3	15%				
Maritime Transport Services	14	18	32%	6	7	29%	6	1	4%	7	4	14%				

TABLE CONTINUED

	Argentina			Brazil			Paraguay			Uruguay		
	No. of Sub Sectors (*)	No. of NONE entries (#)	Level of Liberalization (+)	No. of Sub Sectors (*)	No. of NONE entries (#)	Level of Liberalization (+)	No. of Sub Sectors (*)	No. of NONE entries (#)	Level of Liberalization (+)	No. of Sub Sectors (*)	No. of NONE entries (#)	Level of Liberalization (+)
Internal Waterways Transp. Services	14	21	38%	5	6	30%	6	1	4%	7	5	18%
Air Transport Services	8	9	28%	5	2	10%	1	0	0%	5	0	0%
Rail Transport Services	5	6	30%	5	11	55%	1	0	0%	5	0	0%
Road Transport Services	9	11	31%	5	11	55%	5	4	20%	5	0	0%
Other Transport Services	4	0	0%	7	1	4%	3	0	0%	7	3	11%
Total	210	384	46%	170	250	37%	159	96	15%	185	215	29%

Source: MERCOSUR Member's Schedules of Specific Commitments Approved by CMC Decision 22/03, December 15, 2003 at <http://www.MERCOSUR.org.uy>, last visited May 24, 2004.

(*) Most Service Sectors are divided into sub sectors. This column specifies the number of sub sectors each service sector is divided into. For most service sectors the number of sub divisions is almost identical in each Member's schedule. The exception is Argentina's schedule on Recreational, Cultural and Sporting Services and on Transport Services. The number of sub divisions for these service sectors is larger than that find on the other Member's schedules.

(#) This column specifies the number of "NONE" entries for each service sector on both the market access AND the national treatment column. Following Hoekman's method, a value of "1" is given for a "NONE" entry for the same mode of supply in both the market access AND national treatment column. See *supra* note 76.

(+) This column indicates the ratio of "NONE" entries on both the market access AND national treatment column over the total number of possible market access AND national treatment entries. The number of possible market access AND national treatment entries for each service sector is estimated by multiplying the number of sub sectors by four. The information contained in Table 1 must be complemented with cross-sector limitations included in the schedules' horizontal commitments section. This section includes limitations on market access and/or national treatment referred to in one or more modes of supply that are applicable to all service sectors.

evant professional body or institution. Finally, Paraguay has not undertaken any binding commitment in this sector (0 percent).

B. COMMUNICATION SERVICES

The postal services market is virtually closed in the four countries. Brazil's schedule includes limitations on the market access column, and Argentina, Paraguay, and Uruguay have not yet undertaken binding commitments in this service sector. The provision of Audiovisual Services is very restricted as well. For instance, every country has domestic regulations on radio and television transmission services that are against their market access (state owned companies have preference over others on the assignation of frequencies) and national treatment (television and radio companies must be owned by the nationals of each country) commitments. Contrarily, Courier Services enjoy a high level of liberalization in all countries but Paraguay.

The level of liberalization of telecommunication services is characterized by important asymmetries among Member States. It is in Argentina where telecommunications enjoy the highest level of liberalization. In the rest of the countries, the level of liberalization is significantly lower. In Brazil for example, the number of NONE entries on market access and national treatment is extremely high. However, this is overshadowed by a horizontal limitation on market access and national treatment for all basic telecommunication services that require from each service provider a license from ANATEL. The licenses are granted only to juridical persons duly constituted according to the Brazilian legislation and provided that the majority of quotas or shares with voting rights belong to natural persons with residence in Brazil. In Paraguay and Uruguay, the level of liberalization of value added services (electronic mail, electronic data interchange, etc.) is moderately high, but the basic telecommunication services are provided under monopoly conditions by state-owned enterprises.

C. ENVIRONMENTAL SERVICES

Along with postal services, environmental services including sewage, refuse disposal, and sanitation services, are among those least liberalized. State-owned enterprises under monopoly conditions or through local government authorities tend to provide these services. In some situations, private contractors are allowed to enter this market under concession regimes, but competition in this sector tends to be highly restricted.

D. FINANCIAL SERVICES

In Argentina, financial services enjoy the highest level of liberalization. There are, however, differences in the level of liberalization among financial services' sub-sectors. Insurance services tend to be more restricted than banking and other financial services. Nevertheless, there are no limitations for the commercial presence of foreign insurance service provid-

ers, something that finds no parallel in any other Member State.⁷⁷ Regarding banking and other financial services, Argentina's schedule does not include limitations either to the commercial presence of foreign service suppliers or to the consumption of financial services abroad.

In Uruguay, the level of liberalization of financial services is low. The Uruguayan schedule includes horizontal limitations on the commercial mode of supply of this kind of services. To operate in the Uruguayan financial market, service suppliers need to obtain prior authorization from the financial authorities. The authorization may be rejected on precautionary grounds, including the current state of the market. In addition, bank applications are subject to quantitative limitations established by law.⁷⁸ Table 1 indicates a higher level of liberalization for insurance services (28 percent) than for banking and other financial services (15 percent). However, it must be noted that Uruguayan commitments on insurance services remain unbound, except for services auxiliary to insurance (including broking and agency services), where the NONE entries are concentrated.

In Brazil and Paraguay, the level of liberalization of financial services is very low. In fact, hardly any bound commitment can be found in their schedules. In addition, both countries include horizontal limitations to the commercial mode of supply of financial services. In Brazil, for instance, the commercial presence of foreign financial service suppliers is subject to prior authorization by the Executive Branch by means of a presidential decree. All financial companies must be incorporated under Brazilian law in the form of a "sociedade anônima." Moreover, financial service providers other than insurance service suppliers may be required to fulfill specific conditions, and all members of senior level management must be permanent residents in Brazil.

In summary, current schedules of specific commitments reveal that four rounds of negotiations on the liberalization of the service sector have yielded significant results. Progress has been made not only in terms of the increased number of bound commitments, but also in terms of the enhanced transparency of the schedules, which now specify with more precision the measures that limit the application of market access and national treatment principles. Compared with the country's lists of specific commitments at the multilateral level, the four regional schedules comprise a deeper commitment towards the liberalization of services.⁷⁹ That does not mean that the degree of liberalization already achieved is sufficient. On the contrary, it stems from the previous analysis that a lot

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

78. Every year, the number of licenses for the operation of new banks cannot be more than 10% higher than the authorizations granted during the previous year.

79. The differences vary among countries, but in general, the regional schedules cover more service sectors, include more NONE entries in both the market access and national treatment columns, and contain less unbound commitments.

of work is yet to be done for the complete liberalization of services in the region.

First, the four Members must make serious efforts to remove barriers to the provision of services by foreign individuals in another Member's territory. To date, mode four of supply remains out of the scope of market access and national treatment principles in all service sectors for the bulk of service suppliers. A limitation like this is at odds with an agreement that aims to establish a common market. Some measures have recently been taken to remove barriers to the free circulation of persons, but there is still a long way to go to grant full market access and national treatment to foreign individuals willing to supply services in other Member's territories.

Second, there are worrying asymmetries among Member States in the level of commitments towards the liberalization of services. This trend undermines the liberalization program, which aims at "promoting the interests of all participants on a mutually advantageous basis and to securing an overall balance of rights and obligations."⁸⁰ Therefore, future-negotiating rounds should focus on trying to reverse this tendency. While Paraguay is the country that has the lowest level of liberalization, the major contribution must come from Brazil, because no substantive liberalization on trade-in services will be possible unless the largest economy in the region is fully committed to it.

Third, there are service sectors in the four Member States where little or no advances have yet been made in terms of their liberalization. Most of these services are either provided directly by the State or with the participation of private contractors, but under strictly regulated conditions. As a consequence, the agreement fails to provide for a substantial sectoral coverage, and thus fails to meet WTO standards for regional integration agreements.

V. OBSTACLES TO THE LIBERALIZATION OF TRADE-IN SERVICES

This section looks at the main obstacles to the liberalization of trade-in services in MERCOSUR. First, this section examines some common obstacles present in any services' liberalization process. The analysis then focuses on two MERCOSUR-specific obstacles: (1) the asymmetries among its Members; and (2) the institutional framework.

A. COMMON OBSTACLES TO ANY SERVICES' LIBERALIZATION PROCESS

All negotiations on services face some common obstacles. Services are a relatively new issue in the trade agenda, and there is little experience among trade negotiators on how to deal with them. The lack of information on the potential economic impact of services' liberalization restrains

80. See Montevideo Protocol, *supra* note 16, art. XIX, § 1.

trade negotiators from making commitments beyond the status quo. In addition, negotiators face serious difficulties to determine when a given exchange of specific commitments on services is broadly equivalent.⁸¹ Unlike explicit border barriers to trade-in goods like tariffs or quotas, barriers to trade-in services are more complex and less transparent. Measures that may affect trade-in services tend to be scattered all over the legal system, in the form of laws, decrees, administrative procedures, and so forth. These measures are not codified and in many cases, even the domestic regulators are not fully aware of all of them. Combined together, novelty, complexity, lack of transparency, and lack of information constitute a serious obstacle to advance the liberalization of services.

Apart from the above, probably one of the most important common factors in slowing the pace of the liberalization process is the nature of the issues at stake in any negotiation on services. Some services like financial, transport, and business services lie at the heart of the economic system. Others like health care, education, and water supply are responsible for the basic needs of ordinary people. Governments frequently resort to the regulation of services in order to meet their national policy objectives and, therefore, are more reluctant to entering into international agreements that limit their policy-making ability. As a consequence, one should expect negotiations on trade-in services to be more difficult, time consuming, and conservative than negotiations on trade-in goods.

MERCOSUR negotiations on services are not immune to these common obstacles. First, there is little research on the impact of services' liberalization on the economies of the bloc.⁸² Second, a complete inventory of all the measures affecting trade-in services in the region has yet to be made.⁸³ Third, to be able to deal with the complexities of trade-in services, negotiators need more training in this area.⁸⁴ Finally, the amount of resources devoted to negotiate trade-in services is far from sufficient. As a result, the process of services' liberalization remains in the hands of blindfolded negotiators. In addition, the level of govern-

81. See Stephenson & Prieto, *supra* note 41, at 280.

82. See, e.g., Julio Berlinsky, *Negotiations of Trade-in Services: Countries of MERCOSUR, NAFTA and the European Union*, at 20, available at <http://www.redMERCOSUR.org.uy/www/Berlinski%20WWICS-RED.ppt> (Aug. 4, 2003) (paper presented at a WTO-CEI Seminar); Julio Berlinsky, *La Liberalización del Comercio de Servicios en los Países del MERCOSUR*, in *EL DESAFÍO DE INTEGRARSE PARA CRECER 73* (Daniel Chudnovsky & José María Fanelli eds., 2001); Julio Berlinsky, *GATS Commitments and Policy Issues of MERCOSUR and NAFTA Countries*, FTAA BRIEFINGS (6), available at <http://www.redMERCOSUR.org.uy/brief6eng.pdf> (July 2003); MÁRCIO DE OLIVEIRA JR., *UMA ANÁLISE DA LIBERALIZAÇÃO DO COMÉRCIO INTERNACIONAL DE SERVIÇOS NO MERCOSUL* (IPEA, Doc. No. 727, 2000), available at http://www.ipea.gov.br/pub/td/td_2000/td0727.pdf.

83. Stephenson has already remarked the need of developing a comprehensive inventory of the legal measures affecting services trade in Latin American Countries. See Stephenson *Growing Participation*, *supra* note 41, at 174.

84. See, e.g., Free Trade Area of the Americas - FTAA, *FTAA: National Trade Capacity Building Strategies*, at http://www.ftaa-alca.org/TAssistance_e.asp (last visited Sept. 11, 2004).

ment intervention in some economies of the region is still significant.⁸⁵ This raises the sensitivity of the issues at stake, and thus, the reluctance of Members to undertake more ambitious commitments on the liberalization of services, particularly when it comes to those services that are directly provided by the state under monopoly conditions.⁸⁶

B. ASYMMETRIES AMONG MERCOSUR MEMBERS

Asymmetries among the parties to an integration agreement increase the risk of an uneven distribution of the costs and benefits of the integration process among those parties. If this risk is not avoided and the integration process fails to generate equitable welfare gains for all the participating parties, the incentives to remain within the agreement will probably be affected. The problem of asymmetries is particularly acute among MERCOSUR Members. The fact that so far, MERCOSUR Members have encountered serious difficulties to address the consequences that stem from these asymmetries constitutes in itself an obstacle to the liberalization of services. The analysis of the impact of these asymmetries on the integration process falls beyond the limits of this paper and has been studied elsewhere.⁸⁷ However, considering the relevance of this obstacle for the success of the integration process, including the negotiations on trade-in services, some references are made on the characteristics of the asymmetries among Member States and on the measures that have been implemented to address them.

Structural asymmetries are those based on factors “that shape the economies’ ability to benefit from increased market integration,”⁸⁸ including, among others, “economic size, factor endowments, per-capita income levels, the degree of flexibility of goods and factors markets and the level of economic development.”⁸⁹

The depth of structural asymmetries among MERCOSUR Members is quite significant. For instance, the population of Brazil is five times larger than the population of Argentina, thirty times larger than the population of Paraguay, and fifty times larger than the population of Uruguay. Bra-

85. According to the Index of Economic Freedom - 2004, the scores for Government Intervention in the Economy are “mostly free” for Uruguay (2.0) and Argentina (2.0), “mostly unfree” for Paraguay (3.0), and “repressed” for Brazil (4.0). The scale goes from 1 to 5, where 1 is the best and 5 is the worst in terms of economic freedom. Heritage Foundation, *2004 Index of Economic Freedom*, at <http://www.heritage.org/research/features/index/countries.html> (last visited Sept. 11, 2004).

86. Apart from Argentina, which has conducted a broad privatization process during the 1990s, in the other countries of the bloc, many service sectors are directly provided by the state under monopoly conditions.

87. See ROBERTO BOUZAS, *MECHANISMS FOR COMPENSATING THE ASYMMETRICAL EFFECTS OF REGIONAL INTEGRATION AND GLOBALISATION: LESSONS FROM LATIN AMERICA AND THE CARIBBEAN -THE CASE OF MERCOSUR* (IADB, 2003), available at <http://www.iadb.org/sds/doc/SOCPonenciaBouzasENG.pdf> (document presented at the IADB seminar “Confronting the Challenges of Regional Development in Latin America and the Caribbean”).

88. *See id.* at 3.

89. *See id.* at 3.

zil alone accounts for over 65 percent of the regional economic output, while the combined output of Uruguay and Paraguay accounts for less than 4 percent.

There is evidence showing that, as a result of the structural asymmetries, it has been more difficult for the smaller partners of the bloc to reap the benefits from the integration process.⁹⁰ In addition, because the performance of their economies depend to a large extent on intra regional trade flows, smaller partners are quite vulnerable to regional economic recessions. Being unable to seize the export opportunities that come with a regional trade agreement and facing an increased vulnerability to regional shocks does not seem to provide smaller partners with sound motivations to advance the integration process into a deeper stage, including the free circulation of services. This does not mean that smaller partners are, as a matter of principle, against advancing into deeper levels of integration. On the contrary, they share strong commercial interests in the region, and thus have enough incentives to be part of an agreement that, in theory, provides their goods and services with preferential access to the larger partners' markets. However, they are understandably more reluctant to take more ambitious measures under circumstances where the costs stemming from structural asymmetries outweigh the potential benefits of increased market access opportunities.

Structural asymmetries also contribute to erode the larger partners' interest in the bloc. For instance, for Brazil, the economic relevance of other Members' markets is much lower than the relevance its own market represents for the other Members.⁹¹ Therefore, when it comes to the negotiation of more ambitious forms of integration, Brazil will find it less attractive than the other Members to agree on measures that restrict its domestic regulatory autonomy in exchange for better market access conditions at the regional level.

Despite the seriousness of the structural asymmetry problem,⁹² MERCOSUR's tradition has been more about emphasizing the reciprocity of obligations among Members, rather than granting special and differential treatment for disadvantaged Members and regions.⁹³ Recently,

90. See Fernando Masi & Gustavo Bittencourt, *Las Economías Pequeñas en el MERCOSUR: Evolucion y Perspectivas de Desarrollo*, in *EL DESAFIO DE INTEGRARSE PARA CRECER* 375-398 (Daniel Chudnovsky & Jose Maria Fanelli eds., 2001). The authors claim that smaller partners failed to exploit fully MERCOSUR's export opportunities. Instead of exporting products with dynamic comparative advantages, their export sectors are concentrated on products with static comparative advantages.

91. From 1994 to 2001, the average percentage of exports to the region out of its total exports was 14% for Brazil, 32% for Argentina, 47% for Uruguay, and 54% for Paraguay. See *MERCOSUR's Statistics Tables*, *supra* note 7.

92. There are structural asymmetries not only among countries, but also among regions within the same country. See Bouzas, *supra* note 87, at 7-8.

93. There are very few references to special and differential treatment in MERCOSUR Agreements. See Treaty of Asuncion, *supra* note 2, arts. 1, 6-7, Annex I, 30 I.L.M. at 1044-45, 1046, 1050-53. These provisions provide Paraguay and Uruguay with little extra time to complete the trade-in goods liberalization pro-

however, the issue of structural asymmetries seems to have gained momentum,⁹⁴ and several measures on special and differential treatment have been proposed.⁹⁵ It is untimely to predict whether any of these proposals will be finally implemented and how effective they could be. Whatever their results, Members will have to face the tough political hurdle of deciding who should be the major contributors and who should be the major recipients of these measures.⁹⁶

Policy asymmetries are basically those that stem from different national public policy preferences. The lack of adequate coordination between the Members of a regional agreement on their public policy choices can generate negative cross-border spillovers. For instance, disparities on Members' public sector incentives distort trade flows and investment locations producing efficiency losses. In the same vein, disparities on macroeconomic policies can undermine competitive conditions within the bloc. As a reaction against the spillovers, affected Members tend to implement protectionist measures. The deeper the level of interdependence among the economies of the region, the more damaging the effects of the cross-border spillovers on the integration process, and thus, the less attractive the integration process becomes for its Members.

MERCOSUR history is fraught with policy asymmetry examples, from competitive public incentive regimes for foreign investments to incompatible stabilization programs. Despite the efforts made, this problem remains largely unsolved.⁹⁷ Macroeconomic coordination efforts are still at a preliminary stage. Neither the two Protocols on foreign investment aimed at disciplining Members' investment incentive regimes, nor the Protocol to Safeguard Competition aimed at disciplining public policies with distorting effects on competition, have entered into force. These asymmetries and the unsuccessful attempts to discipline them have undermined two key conditions for the success of an ambitious integration process – market access and fair competition.

gramme. The Montevideo Protocol does not include provisions on special and differential treatment. There is only a reference in the Protocol's preamble to "the need of growing participation of countries and regions less developed," but this phrase is immediately followed by another one which emphasises the need to promote trade-in services on a reciprocal basis. See Montevideo Protocol, *supra* note 16, pmbl.

94. See, e.g., Ext/Act CMC Meeting No. 01/03 of Oct. 6, 2003, available at <http://www.MERCOSUR.org.uy>; Act CMC Meeting No. 02/03 of Dec. 15, 2003, available at <http://www.MERCOSUR.org.uy>.

95. In October 2003, Paraguay (Anexo V - MERCOSUR/XXIV CMC/DT N° 01/03), Uruguay (Anexo V Reservado - MERCOSUR/IV CMC EXT/DT N° 12/03), and Argentina (Anexo VI Reservado - MERCOSUR/ IV CMC EXT/ DTs N° 13/03 y 14/03), submitted proposals on the treatment of asymmetries. On December 15, 2003, the CMC approved Recommendations 04/03 and 5/03, on the treatment of asymmetries. Finally, MERCOSUR's Working Programme 2004–2006, approved by CMC Decision 26/03 of Dec. 16, 2003, available at <http://www.MERCOSUR.org.uy>, includes the task to study the creation of a structural adjustment fund.

96. See Bouzas, *supra* note 87, at 23.

97. For a detailed analysis on allocation cross-border spillovers and macroeconomic cross-border spillovers and on the measures implemented with a view to address their consequences, see *id.* at 12-22.

Structural and policy asymmetries among MERCOSUR Members are two huge obstacles to the establishment of a common market. The integration process will not be able to advance into a deeper level, including the free circulation of services, unless effective mechanisms to compensate structural asymmetries and to discipline policy asymmetries are put in place.

C. THE INSTITUTIONAL FRAMEWORK

The transaction costs of negotiating, implementing, and enforcing commitments aimed at removing barriers to trade-in services are quite significant. The more ambitious the commitments are in liberalizing trade-in services, the higher their transaction costs. Research on the relationship between the institutional framework of regional integration agreements and the level of liberalization of trade-in services has revealed that some institutional features are more effective than others in reducing those transaction costs. They are thus more effective in allowing the parties to the agreement to reach deeper commitments on services.⁹⁸ According to Stephenson's findings, the type of institutional framework that tends to be more effective in minimizing the transaction costs is characterized by several factors: (1) a significant amount of domestic power deferred to supranational authorities; (2) a majority voting system; (3) direct effect on domestic jurisdictions of rules passed by regional authorities; and (4) a strong dispute settlement system.⁹⁹

By contrast, MERCOSUR's institutional framework is characterized by: (1) a strong intergovernmental bias; (2) a decision system based on consensus; (3) lack of direct effect of MERCOSUR regulations on the domestic jurisdiction of its Members; and (4) a relatively weak dispute settlement system.¹⁰⁰ Essential instruments to secure the free circulation

98. See *A Comparison of Existing Services Trade Arrangements within APEC*, *supra* note 41, at 22-25.

99. See *id.* at 23. Trebilcock and House argue in the same line as Stephenson. They state that because of constant changes to both the technological and regulatory framework of the service sector, the negotiation for the removal of obstacles to trade-in services needs to be carried within a genuine supranational organization, capable of facilitating ongoing negotiations and adjustment commitments. See MICHAEL J. TREBILCOCK & ROBERT HOUSE, *THE REGULATION OF INTERNATIONAL TRADE* 306 (Routledge, 2d ed. 1999).

100. MERCOSUR's institutional framework is formed by three intergovernmental bodies with decision making power: (1) the CMC, responsible for the political leadership of the integration process; (2) the CMG, responsible, among other duties, for monitoring compliance with the Treaty and for taking the necessary measures to enforce the decisions adopted by the CMC; and (3) the MERCOSUR Trade Commission, responsible for assisting the CMG to monitor the application of the common trade policy instruments in connection with the operation of the customs union. The decisions of the three bodies are binding upon MERCOSUR Members and are taken by consensus in the presence of all of them. However, those decisions have no supra-national authority and Members have to take all necessary measures, in their respective territories, to ensure compliance. See *Ouro Preto Protocol*, *supra* note 11, art. 40, 34 I.L.M. at 1256. The Protocol of Olivos has significantly improved the previous dispute settlement system, *inter alia*, by creating a Permanent Review Tribunal. However, access to the dispute settlement

of services have not entered into force¹⁰¹ and there is a significant “implementation gap”¹⁰² of MERCOSUR’s regulations in Members’ domestic legal systems. Despite the work in progress aimed at strengthening it,¹⁰³ MERCOSUR’s institutional infrastructure is not yet suitable to deal with transaction cost intensive issues like services.

There is a general assumption that parties to trade agreements design institutional frameworks whose gains, in terms of reducing discriminatory and non-discriminatory barriers to trade, exceed their costs.¹⁰⁴ From this perspective, MERCOSUR’s institutional framework may not be the most adequate for advancing the liberalization of services, but it fits into each Member’s costs and benefits equation. Structural and policy asymmetries, differences in the degree of dependence of each Member’s economy on the region, and differences in each Member’s incentives to remain in the bloc, are all factors that support the claim for a flexible institutional framework, which grants each Member a strong control over the integration process. Unless these factors change, it is unlikely that MERCOSUR’s institutional framework will evolve into one more appropriate for a common market involving the free circulation of services.

VI. THE WAY AHEAD

This paper examined MERCOSUR’s negotiations on services since its inception until present time. The analysis revealed that after thirteen years, MERCOSUR Members have failed to put in place the necessary conditions for the operation of a common market involving the free circulation of services. During this period, a regional regulatory framework for trade-in services was approved and Members entered into successive rounds of negotiations aimed at removing barriers to trade-in services. In addition, common rules on two vital areas for an effective liberalization on trade-in services—investment and government procurement—were also approved. However, an in-depth examination of these measures exposed their limitations. The instruments on services, investment, and government procurement have not yet entered into force, and the results of the negotiation rounds have been overshadowed by the different levels of commitments undertaken by each Member State.

The analysis also revealed that apart from some common difficulties to all negotiations on services, such as lack of information and inexperience in dealing with new and complex trade issues, there are other reasons for

system continues to be restricted for States only. See *Protocolo de Olivos*, *supra* note 66, art. 1, 42 I.L.M. at 2-3.

101. See, e.g., Colonia Protocol on Investment, Montevideo Protocol, Protocol to Safeguard Competition, Protocol on Government Procurement.

102. See Bouzas, *supra* note 4, at 180.

103. See MERCOSUR Working Program 2004–2006, *supra* note 95.

104. See DEEPENING DISCIPLINES FOR TRADE-IN SERVICES, *supra* note 41, at 23 (citing Joel P. Trachtman, *The Theory of the Firm and the Theory of the International Economic Organization: Toward Comparative Institutional Analysis*, 12 Nw. J. INT’ L. & BUS. 470 (1996/1997)).

the scant progress made on the liberalization of services. These reasons are associated with MERCOSUR's difficulties in moving beyond an agreement focused on the removal of border barriers to trade-in goods. To advance into a deeper level of integration involving the free circulation of services, it is essential that markets operate under open, transparent, certain, and fair trade conditions. Despite the efforts that have been made to address the situation, MERCOSUR's market conditions remain affected by within-the-border barriers to trade, unfair trade practices, and incentive regimes that distort investment locations.

In theory, the way ahead would be to strengthen MERCOSUR's institutional framework to the point where it can discipline those Members' practices that impair market access and distort competition. In practice, however, MERCOSUR Members, particularly Brazil, are reluctant to lose the degree of flexibility that comes with more powerful regional institutions. One way to unlock the situation would be for Members to find incentives to agree on more ambitious measures of integration, including creating institutions with supranational authority whose benefits could outweigh the costs associated with the partial loss of regulatory autonomy.

MERCOSUR's external relations are one area that has the potential to revitalize Members' interest in the regional agreement, and thus, pave the way to advance into a deeper form of integration. The external agenda is expanding steadily and MERCOSUR is currently engaged in several negotiations with individual countries and regional blocs. There are, of course, internal differences on how to conduct the negotiations, but it is clear to all MERCOSUR Members that by negotiating as a bloc, rather than negotiating separately, they can maximize their bargaining power and increase the probability of obtaining better deals.

Another area that may provide Members with an incentive to pay prices commensurate with deeper integration is that of public goods such as infrastructure, research and development, environmental protection, and so forth. The case for regional cooperation in the provision of public goods is not difficult to justify. Such cooperation can generate large benefits by reducing costs and avoiding unfair enrichment situations that force all Members to contribute to the provision of goods that benefit the region as a whole. In the past, Member States have been involved in some regional infrastructure projects in the waterway and land transport areas, but the emphasis has been on trade, leaving regional cooperation on public goods as an under-exploited dimension of the integration process. MERCOSUR's Working Program 2004–2006 contains references to regional cooperation on science and technology, physical and energy infrastructure, and on the joint promotion of exports in third-world countries, which if effectively implemented, may act as a catalyst for a deeper integration.

Aside from the potential of MERCOSUR's external relations and cooperation projects on the provision of public goods to stimulate Mem-

ber's interest in the integration process, there are other factors that can contribute to facilitate the liberalization of trade-in services in the bloc.

The first factor is the domestic law reform processes. With differences in their intensity, the four MERCOSUR Members are involved in law reform processes at the domestic level, which range from the privatization of state owned enterprises, to the streamlining of administrative regulations that interfere with the operation of markets. The impact of these reforms on the liberalization of trade-in services will vary according to their depth and scope of coverage, but in general, they will contribute to open new sectors to the services market and to reduce regulatory barriers to trade-in services.

The second factor is the WTO's authority to discipline integration initiatives. It is in the interest of the world trading community to preserve an open multilateral trading system and to prevent regional blocs from creating new forms of discrimination in international trade relations. Therefore, when entering into regional agreements, WTO Members must comply with WTO standards on regionalism. Article five of GATS indicates that regional agreements must have "substantial coverage" and provide for the elimination of "substantially all discrimination." If MERCOSUR Members failed to observe these standards they could be forced to expand the agreement's scope of coverage or to amplify their liberalization commitments. So far, the WTO has been reluctant to discipline Members' regional integration strategies, but the WTO does have the power to do so, and as a consequence, the power to contribute to the liberalization of services within regional agreements. Accordingly, this factor should not be overlooked.

The final factor that can contribute to facilitate the liberalization of trade-in services is the economy's own dynamics. The relevance of the services sector for the operation of the economic system, and thus, the demand and supply of services are growing steadily, fostered by a complex combination of factors, from technological developments to outsourcing practices. These factors are stronger than any interest to resist the liberalization of services, and in the long run, the economic need for trade-in services will probably override those interests.

In summary, the free circulation of services in MERCOSUR continues to be a pending task, and it is unlikely that significant changes will take place in the short run. It is debatable, however, as to what may happen in the medium or long-term. While there are strong forces calling for the liberalization of trade-in services, it is not clear whether MERCOSUR Members will be ready to pay the costs for the implementation of a more ambitious institutional infrastructure necessary for the operation of a common market.