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MERCOSUR: IN SEARCH OF A NEW AGENDA

MERCOSUR's Institutionalization Agenda: The Challenges of a Project in Crisis

Pedro da Motta Veiga

Special Initiative on Trade and Integration

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This study is part of the Initiative's first component.

This study was presented in the conference "MERCOSUR: In Search of A New Agenda", which was held in the Getulio Vargas Foundation in Rio de Janeiro in June 2003. In view of the trends in emerging policies, which point to a renewed interest in furthering the initiative after the turbulence of the 1999-2002 period, the aim of the meeting was to discuss activities in the various areas geared to deepening the integration process. The preparation of the documents and the program were supported by the Inter-American Development Bank's Integration and Regional Programs Department through the Special Initiative on Trade and Integration.

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MERCOSUR: IN SEARCH OF A NEW AGENDA

- MERCOSUR'S INSTITUTIONALIZATION AGENDA: THE CHALLENGES OF A PROJECT IN CRISIS -

Pedro da Motta Veiga *

I. INTRODUCTION

During MERCOSUR's early years, the choice of a low institutional profile seemed essentially correct to most public and private actors, as well as to analysts of the process. The prevailing view within the bloc linked institutional matters to the creation of institutions, and the latter to the proliferation of unruly bureaucracies and the growth of public spending. Previous experiences of integration in South America suggested the advisability of avoiding the segregation of the decision-making levels (the "integration bureaucracies") from the national bureaucracies responsible for implementing the measures. Behind the debate, moreover, it was possible to glimpse the intention and risk of introducing supranationality into an agreement whose biggest member country (not alone) saw it as a matter of honor to preserve a strict "inter-governmentalism".

The prevalence of that outlook, however, hampered a debate that was crucial when the project deepened in the late-1990s, the object of the deepening being the institutionalization of the subregional integration process. Today there is general acknowledgement that MERCOSUR suffers a "democratic deficit", but that circumstance has not spurred perceptions of a need to build institutions, create bureaucratic structures or replicate the European model, which is deemed to be essentially supranational.¹

This is the approach taken by the present study, whose analysis of the crisis in MERCOSUR evidences the importance of institutional factors in understanding the current status of the integration process (Section II). On the basis of that analysis, Section III examines the components of MERCOSUR's democratic deficit, identifies the priority issues on an agenda for institutionalization, and makes some recommendations on how to address that agenda in the areas identified. Section IV presents the study's conclusions.

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¹ See Torrent [2000] on the mistake of assimilating the European model to the idea of supranationality and on the frequent resort in the history of European integration to "absolutely inter-governmental" methods. According to Torrent, many confuse supranationality in rules-making with the judicial control of inter-governmental rules.

II. THE DILEMMAS OF INTEGRATION AND ITS INSTITUTIONAL DIMENSION: A SUMMARY DIAGNOSIS

MERCOSUR: From Innovation to Crisis

An assessment of MERCOSUR's first 12 years should begin by acknowledging that the group's creation represented a break with the history of failed attempts at integration in South America. The form of liberalization adopted by MERCOSUR, based on the universal, automatic and across-the-board elimination of intra-subregional tariff barriers, was distinct from the slow exchange of bilateral, sector-specific tariff concessions that marked previous experiences in the Latin American Free Trade Association (ALALC) and the Latin American Integration Association (ALADI).

The striking increase in intra-MERCOSUR trade up to 1997, a period in which extra-subregional exports also rose substantially, is the most eloquent indicator of the effects of the new form of liberalization adopted by the member countries. Integration thus helped significantly to alter the level of interdependence among the member countries, not only through the growth of trade and investment flows but also by facilitating projects and initiatives based on geographic proximity.

As a means of liberalizing trade and reorienting the national development models and international insertion strategies prevailing in the Southern Cone countries in the late-1980s and early-1990s, the subregional project was based on a tacit agreement between the two biggest partners: the trade-off between preferential access to the Brazilian market and Argentina's alignment with Brazil in foreign policy.

MERCOSUR's current problems date to the period following the transition to the customs union, 1995-1997, which was marked by an increasing divergence of macroeconomic models in the biggest countries, a worsening in the smaller countries' conditions of access to external financing, and the latter's inability to engage effectively in negotiations as complex and contentious as those on the elimination of transborder trade barriers.

The members' differing interests and perceptions made it impossible to implement the agenda for consolidation and deepening that was drawn up in December 1995. In general terms, MERCOSUR began to evince a growing gap between agreements on measures and the implementation of those measures, a circumstance with increasingly negative effects on the credibility of the integration process.

From 1998 onwards the levels of interdependence among the MERCOSUR countries stagnated. This spurred incentives for the member countries to adopt unilateral defensive measures, and the differences became increasingly politicized within each country. Hence the sharp deterioration in national perceptions of the effects of integration and its contribution to the member countries' growth.

The adoption of the MERCOSUR relaunch agenda in June 2000 revealed a perception that it was important to reverse the decline through a political initiative to devise a new and positive agenda, one that would help the member countries overcome their conflicts and establish new rules and disciplines. The initiative, however, could not reverse the decline in expectations of the bloc's future. That decline then accelerated as the Argentine crisis worsened.

An "Institutionalist" Reading of the MERCOSUR Crisis

Today it seems clear that the main problems of integration appeared when the process moved beyond its simplest stage from the institutional perspective, and its least contentious phase from the standpoint of the member countries' internal politics. That simple stage coincided with the period of transition to the customs union (1991-1994).

The institutional requirements of the goals set in that stage were minimal: the process was based essentially on an across-the-board and universal tariff reduction mechanism that worked automatically once it was agreed on by national authorities, who made the decision with virtually no input from the private sector. Other goals of the Treaty of Asunción, such as sectoral accords that demanded greater coordination, follow-up and evaluation (and thus were of greater institutional substance) were marginal in this stage.

Although intra-MERCOSUR trade liberalization was not a minor matter for Brazil's MERCOSUR partners, from the domestic political viewpoint all the countries of the subregion were then in the process of opening up to the world. Doubtless this helped mitigate criticisms of the project and lessen its importance as a domestic political posture.

When the transition to the customs union was completed - the negotiation of the common external tariff (CET) and the signing of the Ouro Preto Protocol being the final steps in the process - the bloc's internal agenda shifted focus. Stress was then placed on issues that were not directly related to merchandise trade and the transborder movement of goods. Agenda 2000, adopted in Montevideo in December 1995, formally acknowledged that shift in emphasis.

At the same time, changes were made to in Brazil's industrial policy in 1995: an automotive regime was set up on the basis of strong fiscal incentives, and then "duplicated" at the subnational level through state promotion programs. The Brazilian government's new activism in industrial policy from 1996 onwards was expressed in several initiatives to support some industrial sectors, and in the encouragement given to a public system of export promotion. Among Brazil's MERCOSUR partners, which had less financial or fiscal capacity to implement active policies, this shift in Brazilian policy strengthened their demands to include issues that are not strictly commercial on the bloc's agenda, a posture that faced systematic Brazilian resistance.

The problems involved in tackling matters not directly related to trade are neither exclusive to not typical of MERCOSUR. They were heightened in MERCOSUR, however, because the size asymmetries among the member countries give rise to a highly diverse incentives structure to deepen integration, and because of the nature of Brazil's political commitment to integration. The latter is marked by ambiguity, and by difficulties in meeting the costs of leadership.

Aside from the MERCOSUR experience, the multilateral and preferential negotiations of the 1990s plainly reveal the problems involved in tackling such an agenda, and first of all in identifying the issues that comprise it: the member countries often differ as to the substance of the negotiating agendas, especially when the latters' scope and goals are ambitious.

Agreeing on the non-trade agenda is the same as reaching consensus on the areas of economic, political and institutional diversity that have to be tackled in the negotiations, it being assumed

that such diversity has negative effects on the aims of the project under negotiation. Still to be decided is how such issues will be tackled: tempering the sharpest divergences, seeking convergence or (going further) harmonization, and (going yet further) adopting common regional policies. Once that is agreed, the negotiations would be geared to deciding the kind of policy to govern how different national circumstances would be tackled: liberal, interventionist, social democratic and so on.

The non-trade agenda, by definition, imposes greater institutional demands; domestic politics are more sensitive to it, since much of its focus comprises regulations and laws that are deemed fundamentally internal, that are to be preserved as such, and that are managed by public, private or mixed institutions that conceive of their accountability (when they do so at all) only in highly domestic terms.

Thus it is no coincidence that MERCOSUR's stagnation became apparent when efforts were made to discuss issues that are not strictly commercial and that involve policies regarded as domestic by the member countries. Despite the ever more evident crisis, intra-MERCOSUR negotiations did not cease and efforts to expand the agenda of issues covered by integration had two outcomes that damaged the project's credibility. First, in fields related to the operation of the customs union, the rules adopted and their outcomes were seldom consistent with "GATT-plus" agreements. Second, new measures were adopted with theoretical application to different areas of the member countries' economic, social and political life, irrespective of their relevance to the integration process.

In other words, a sense of how important the various issues really are in the current stage of integration was lost, and on matters that are important for integration the member countries opted for superficial commitments that add little "real substance" (Torrent [2002]) to the commitments already assumed in multilateral institutions.

The integration process, moreover, lost focus (Bouzas [2002]). This led to a chaotic expansion of the agenda, a circumstance that coincided with a widening of the gap between what was agreed and what was implemented at the subregional level. This is evident in the incomplete transposition into domestic law of the agreements and protocols signed by the member countries. The members significantly resist being made subject to disciplines, and the level of compliance with agreed rules is modest: pragmatism and emergencies nourish each other, and leave space for unilateralism. Thus MERCOSUR became remote from a rules-based integration model such as NAFTA or the European Union (EU), and lived with a growing deficit in the implementation of agreed measures.

A broad and unfocused agenda, combined with a widening deficit in implementation, has caused the subregional integration process to lose relevance for public and private actors in the member countries. How should these features of MERCOSUR be understood? Two factors are important in explaining what happened:

- the "environmental" conditions and preconditions of the integration process; and
- the integration methodology or "technique" used.

As to the first set of factors, note that the member countries' differences of size and economic structure lead to what might be termed asymmetrical interdependence among them. The smaller

countries have a greater dependence than the bigger partners on neighboring countries' markets; they are much more affected by the economic policy decisions of the larger countries than the other way round. Hence each country has substantially different incentives to include certain issues on the agenda: in principle the bigger countries have fewer incentives to include issues that reduce national autonomy in economic policy-making, while the smaller countries tend to support such proposals.

Brazil's attitude to MERCOSUR plainly evidences the perception that the limits to the integration-related cession of sovereignty should be defined by national goals that take primacy (in terms of political priorities) over the goals of the subregional project, and that those national goals should not be affected by MERCOSUR. In Brazil's case, in fact, the natural industrial development project is maintained intact in the hegemonic matrix of foreign policy at the MERCOSUR level, and is not even combined with elements of a subregional industrial project. In the negotiations with Brazil's MERCOSUR partners, the national development project was systematically expressed as a process of competition and conflict, and almost never as a matter of cooperation.

Hence, in Brazil, "the great obstacle ... to a real 'investment' in the MERCOSUR project is the ambiguity with which, apart from the rhetoric of the pro-integration discourse, the various sectors of society and government regard MERCOSUR". Much of the Brazilian elite, viewing MERCOSUR as a "political contingency, one option among others", not only avoids thinking of the bloc as "part of the Brazilian project" but also hampers "the as-yet incomplete assimilation in the four member countries of a truly regional approach" (Botafogo Gonçalves [2002]).

As Smouts [1998] observes, "regional constructions ... seem to be a response to the perceived need for new political arenas ... towards which social forces can direct expectations that the nation-state is unable to meet". In other words, regionalism emerged as part of that "search for a relevant field of action" or for a new "field of meaning" in the face of the nation-state's erosion in the globalization process.

It is at least open to discussion whether MERCOSUR developed in response to the erosion of the economic, political and symbolic power of its member countries or (if that is what happened) that integration policy-makers were able to draw conclusions about that erosion and properly translate them into an agenda that makes the regional sphere a field of action and political meaning for the Southern Cone's various social forces.

If the erosion of the national sphere and the ascendancy of the regional sphere as a preferred field of action are particularly important for deep integration projects, the onset of those processes in MERCOSUR and the fact that they are only important for some public and private actors (transnational companies, for instance) help explain the difficulty of translating the intentions of deep integration (as expressed in MERCOSUR's constitutive treaties) into agreements and policy initiatives.²

² Even in the area of environmental preconditions or conditions, it should be recalled that during MERCOSUR's twelve years Brazil and Argentina have experienced periods of substantial economic disequilibrium and some severe crises. MERCOSUR was not at the root of those crises but these circumstances lessen the incentives to discuss issues that involve the cession of economic sovereignty, apart from focusing concerns on the economies' external vulnerability, investors' perceptions and the continuation of external financing flows.

MERCOSUR's dominant methodology or technique of integration also made it difficult to accept the challenges of deepening the process. MERCOSUR's founding treaties are as ambitious in their goals as they are vague about the means and timeframes for attaining those goals. Hence, although negotiation and enforcement of the protocols and agreements signed in areas such as defense of competition seek to respond to the integration agenda, in the end the latter is defined by the political and economic circumstances within which the process develops.

MERCOSUR was conceived as a deep integration project that would evolve, but it lacks "rules for rule-making". In a process that is meant to evolve, it is crucial to define rules for making (and implementing) rules, or the momentum of integration might be subordinated to political considerations inspired mainly by unfavorable conditions and by particular national contingencies. In that context the evolutionary model of integration really serves only those countries that retain the freedom to adopt unilateral policies and regulations, regardless of the latter's effects on intra-subregional trade and the member countries' economies.

The procedure for rule-making was also negatively affected by the fact that, despite the growth of economic interdependence among its members, MERCOSUR failed to determine a method for the political handling of national diversity. As Kahler [1993] notes, integration processes spawn different solutions to this matter, from the model based on institutional rivalry or mutual recognition to the (symmetrical and asymmetrical) harmonization of policies or the management of trade. In the EU, institutional rivalry was an appropriate solution in light of the members' shared belief that all the members of the Union "apply variants of the European model of production, which offers a high level of protection (and considerable political power) to labor". In this context, institutional rivalry was more acceptable "because the implicit limits of that rivalry were clear" and were shared by all members. Even so, institutional rivalry demanded a certain amount of international institutionalization "to ensure that institutional rivalry, relatively free in some policy fields, was more restricted in others".

Harmonization prevailed in NAFTA, an agreement between countries with very different traditions and diverse social and political preferences, countries that are highly unequal in terms of political and economic power. The process, however, was shaped by policies that characterize the preferences of the United States. In this case, asymmetrical harmonization preserved the hegemony of the agreement's model of liberal policies; along with the agreement and access to the bigger economies, the smaller members "buy" a policy model.

MERCOSUR, however, seems to have been unable to find a political solution for this kind of dilemma, combining managed trade measures with an institutional rivalry that lacks implicit rules and does not enjoy legitimacy among the member countries. It might be suggested, of course, that this situation partly reflects the contradictions in the revision of national development models, which amounts to a review of paradigms and policy preferences. Nonetheless, it should be acknowledged that the inability to find a political solution to the matter of regulatory and institutional diversity heightens uncertainty about (and the unpredictability of) the rules of the game in the integration process.

The absence of a legitimately recognized means of managing differences helps explain the difficulties of negotiating an agenda of policies and disciplines, even for the more superficial expressions of integration such as the free trade area or the customs union.

Because of such differences, integration is only modestly effective in influencing the behavior of public and private actors, relative to the situation that prevailed before MERCOSUR was established. MERCOSUR's existence and the constraints arising from subregional commitments are of little importance for the various actors as they devise and apply public and private policies and strategies.

In MERCOSUR, integration's low level of effectiveness is evident in the norms and provisions relating to the operation of a free trade area and in the disciplines and policies typical of a customs union. This problem predates the definition of the integration "model" and is largely independent of that definition: it is a matter of making rules that are pertinent to integration, implementing them, and enforcing them.

III. MERCOSUR: FROM THE INSTITUTIONAL DEFICIT TO THE INSTITUTIONALIZATION AGENDA

The previous section's analysis of the origins and worsening of the crisis in subregional integration aids understanding of the importance of the institutional dimension in that deterioration. It also suggests that integration's institutionalization agenda should be central to any effort to reverse the present situation.

As noted, in MERCOSUR's initial phase (1991-1994) the project had a very low institutional profile, not only because the member countries preferred that but also because of the prevailing tariff-reduction method, which was at the core of the process in that period. The credibility of the decisions was conferred by the universal and automatic nature of intra-MERCOSUR liberalization, as well as by the national governments' political commitment to the process. Subregional integration was viewed within the member countries as part of a deep and irreversible shift in the members' international insertion strategies, as symbolized by programs to liberalize trade with the rest of the world.

As the transition ended and the bloc began to address an agenda that is typical of deeper integration, the need for institutionalization grew; MERCOSUR's policy-makers, however, made no adequate response. They failed to capitalize on the periods of economic boom and policy convergence, and they made no qualitative leaps in the process. In periods of difficulty and divergence there were no proper mechanisms to stabilize the situation and manage conflict.

Awareness that MERCOSUR has an institutional deficit emerged gradually, and thus far has prompted two important initiatives: the signing of the Protocol of Olivos, and the transformation of the Administrative Secretariat into the MERCOSUR Technical Secretariat. More generally, it led to a decline in Brazilian resistance to tackling institutional issues on the subregional agenda.

The Institutionalization Agenda: Frame of Reference and Political Precondition

MERCOSUR's "institutional deficit" is linked here to the project's lack of credibility; the inefficiency of its system for making rules; the weakness of the mechanisms to "oblige" the member countries to comply with agreed rules; and the impact of these characteristics on the effectiveness of subregional commitments and the relevance of those commitments for the activities of public and private actors in the member countries.

From this perspective, institutionalization is not a matter of creating institutions but of conferring credibility on the subregional system for making and implementing rules (Torrent [2000]): this should be the goal of integration's institutionalization agenda.

The institutional issue is a horizontal matter - that is, it is relevant to all the areas of negotiation in MERCOSUR. The trade agenda, for example, is infused by the institutional agenda: the thinking behind rules-making, and the credibility and effectiveness of what has been agreed, depend on the nature of integration's institutional apparatus.

The importance of the institutional issue is heightened in MERCOSUR's current crisis; inertia in this area has very negative effects, and for the integration process it is a matter of reversing the decline. A completed institutional apparatus could decisively help reverse that trend.

It would be false, however, to believe that MERCOSUR's institutional apparatus can be completed in a political "vacuum". On the contrary, MERCOSUR's institutional problems stem from its structural characteristics (the small number of members and the size asymmetries among them), as well as from the nature of the member countries' (starting with Brazil) political commitment to integration. That commitment, too, is affected by size asymmetry.

In this sense the backdrop to MERCOSUR's institutionalization agenda is essentially political, and the project's (political) problem is answering the following question: how can subregional integration help solve the member countries' main economic and social problems?

Hence the reformulation of the matrix of common interests (Bouzas [2002]) needed to give MERCOSUR new impetus cannot be based (as it was at the start of the integration process) on a trade-off between the biggest countries' national interests (access to the Brazilian market *versus* an increase in Brazil's political capital as a result of Argentine alignment with Brazilian foreign policy). Rather, it should be based on the trade-off between the individual interests of the member countries and the subregional project. In this model, MERCOSUR helps each country meet its national goals in a less costly and more effective manner, and in exchange the countries increasingly pool economic sovereignty so that MERCOSUR can work in this way.

In other words, it is not simply a matter of regaining high levels of "political will" for MERCOSUR in the member countries. It is a question of "connecting" each country's domestic politics and subregional integration in such a way that integration increasingly affects policy-making in the member countries, making it internally and externally costly for them either to defy subregional agreements or obstruct intra-MERCOSUR negotiations.

As Bouzas and Soltz [2001] note: "the progress made in European integration can only be properly understood as the outcome of national political decisions to obey rules produced through certain procedures (in which intergovernmental institutions, such as the Council of the EU, have played a basic role)".

This kind of political dynamic should be induced and consolidated in MERCOSUR, which entails taking a series of steps in the following areas: (i) structuring national executives to be able to tackle integration issues; (ii) the structured participation of legislatures and civil society in discussions of the issue; and (iii) the institutional organization of the intra-MERCOSUR negotiations (see below).

This proposal is not willfully *naïve*: the impact on institutionalization of such structural factors as the asymmetry of size and structure will continue to be felt. Thus the outcome of efforts to rebuild the MERCOSUR matrix of common interests will only become apparent gradually, in a context still marked by the lack of credibility of well-intentioned but ineffective previous policies.

It seems indisputable, however, that MERCOSUR cannot develop along the lines of a deep integration process without devising a new matrix of common interests, one different from that

underpinning the bloc's creation. Equally plain is that such a matrix will not be devised without greater interaction between domestic policies and the integration agenda. Recovering and deepening the legitimacy of integration among national societies is a political precondition to the implementation of the institutionalization agenda.

The Institutionalization Agenda: Problems and Proposals

An institutionalization agenda is necessary for MERCOSUR in terms of both a minimalist strategy for completing the process and of a deep integration project that is explicitly and formally driven by MERCOSUR.

The stress on each of the agenda issues would certainly vary according to the perspective underlying the analysis, but the matter cannot be evaded or skirted. The agenda presented below takes as its reference a strategic project of deep integration, but many of the measures proposed are necessary even in a less ambitious scheme. Whatever the premise, the institutionalization agenda should address three priority areas.

- First, the system for making rules: nature of the legislation, decision-making structure and the interaction between domestic policy-making mechanisms and subregional decision-making;
- second, the mechanisms for implementing subregional rules, or the norms that "oblige" the member countries to comply with the commitments assumed in MERCOSUR; and
- third, the rules' "focus" or substance.

The System for Making Rules

The "structural" issue in this area is that MERCOSUR is based on a treaty with ambitious goals, but with modest instruments for meeting them. In this it differs from NAFTA, which features detailed provisions in its various chapters and is conceived as a finished project. It is also different from the Treaty of Rome, which is not meant to be seen as a completed legal framework but which has much greater detail than the Treaty of Asunción on the commitments assumed and the rules for applying its own norms and disciplines.

In MERCOSUR, the founding treaty served as a "framework agreement" and the bulk of community legislation was to be secondary. In this sense MERCOSUR is close to the European approach, but with the crucial difference that in MERCOSUR's case the system for producing secondary legislation did not work well.

This should come as no surprise. The legal dynamics of integration are vulnerable to the fluctuating political interests of the member countries (especially the bigger countries) if those dynamics arise from the production of *ad hoc* secondary legislation without devising and adopting community instruments that give momentum to the process, and without *a priori* obligations that commit the members to produce such rules. Given the size asymmetries among the member countries, and the nature of Brazil's commitment to MERCOSUR, it would have been surprising if events in this area had unfolded other than as they did.

As shown below, these circumstances are unquestionably exacerbated by failings in the system for implementing the agreed rules, but that system springs from a policy option related to the "architecture" of integration.³

A second issue in this area concerns MERCOSUR's institutions and its decision-making process. There is an "inflation" of structures with the power to make rules: the Common Market Council makes decisions, the Common Market Group adopts resolutions, and the MERCOSUR Trade Commission adopts directives, although the latter two bodies also support the institutions that are immediately above them in MERCOSUR. Moreover, both the Common Market Group and the Trade Commission have their own technical groups, which further reduces the transparency of the negotiations' organizational structure.

Third, the scant interaction between the integration agenda and the domestic policy agendas, especially in Argentina and Brazil, has limited the participation of legislatures and even of integration-related civil society organizations. Among politicians and opinion-makers, these circumstances are conducive to an attitude of passive support for or tolerance of MERCOSUR. Such a posture might have been helpful in the bloc's early years, but it is no longer enough in a process of institutionalizing integration that (as shown) entails closer links between the domestic and subregional agendas.

Finally, the situation described in Section II has spurred, among other things, the option of retaining non-intergovernmental support for the project within very narrow limits. The only institution that can be regarded as non-intergovernmental is the MERCOSUR Administrative Secretariat, which has never had any authority to make and implement rules. The recent decision to make this the Technical Secretariat is very positive, but it should be complemented with other measures that allow the Secretariat to play a real technical role in drawing up proposals and in seeking solutions that serve the interests of all the MERCOSUR countries.

This survey of problems in the field of rules-making prompts some recommendations geared to gradually surmounting the difficulties identified:

- (i) Although excessive emphasis on primary legislation can make the legal framework of an integration process too rigid, this component should be strengthened in MERCOSUR because the undue flexibility of the project's current "evolutionary" architecture seems to be incompatible with the goals of deep integration. In this regard it is advisable to negotiate and implement a new founding treaty to upgrade and consolidate MERCOSUR's primary legislation in greater detail than the Treaty of Asunción. The same should be done to much of what is now seen - often wrongly (Bouzas, Motta Veiga and Torrent [2002]) - as MERCOSUR's secondary legislation, such as the protocols on investment, services trade and competition policy, as well as the norms on consolidating and deepening the customs union. This treaty would have to be revised and updated in a few years, when MERCOSUR faces new challenges, but the negotiation of a large package of agreements in different issue areas, and the consolidation of

³ It is reasonable to argue that this was the only politically feasible option and that it precisely reflects the effects of the size asymmetry among the countries in MERCOSUR's legal structure. However, it is hard to believe that MERCOSUR can be consolidated and deepened without changing the legal architecture.

what has been negotiated in a basic treaty, are essential to give institutional and economic credibility and predictability to the integration process.

- (ii) MERCOSUR's organizational structure also needs improving, so as to make the decision-making process more transparent and credible.⁴ Above all, the bloc's leading political body, the Common Market Council, should be strengthened by means of measures such as:
 - (a) an increase in the number of Council meetings to offer political guidance to intra- and extra-MERCOSUR negotiations, to intensify discussion, and to seek solutions to pending problems: and
 - (b) the concentration of decision-making authority in the Council's hands. Such a measure has two advantages: first, it would confer greater legitimacy on the decisions taken, avoiding the "inflation" of measures and decision-making bodies; and second, it would foster the participation of the governments and their ministries in the integration process, making them responsible for the decisions they take in this sphere.
- (iii) Strengthening the member countries' political commitment to integration should also be encouraged through institutional measures. A first such step would be to pay further attention to the thinking behind Brazil's appointment of a Representative of the Presidency for MERCOSUR. The idea would be to create a similar post in all the member countries and set up inter-ministerial integration chambers in each executive, whose executive secretariat would be under the control of that Representative.
- (iv) The member countries' parliaments should be encouraged to participate. This is neither simple nor risk-free, but it cannot be postponed if integration is to have greater credibility in the member states and if the domestic and integration agendas are to be more closely linked. There are also efficiency reasons for such participation. Improving the implementation of integration-related decisions will demand greater parliamentary participation in the process; such involvement in MERCOSUR decision-making could facilitate the creation of more flexible mechanisms for the transposition of subregional agreements into national law.
- (v) The transformation of the Administrative Secretariat into a Technical Secretariat removes a "taboo" in MERCOSUR, but this is not enough. It is essential to strengthen the Secretariat as a body that makes "regional" technical proposals in the various negotiating areas. These proposals should complement the "national proposals" and end the latter's monopoly on policy-making and system-building in MERCOSUR. The Technical Secretariat should be a channel for the subregional technical rationale in MERCOSUR; its human, technical and financial resources should be increased so that it can play that crucial role in the coming years.

The System for Implementing Rules

MERCOSUR's acknowledged problems in implementing rules comprise the most visible facet of its institutional deficit: "the meager mechanisms for transposition gave rise to a process that is slow, unequal and dependent on goodwill, on sectoral pressures, and on the legal and administrative

⁴ This and the following paragraphs are based to a large extent on Bouzas, Motta Veiga and Torrent [2002]. Many of the recommendations herein are attributable to Prof. Ramón Torrent of the University of Barcelona.

obstacles facing each government ... Of the 1,128 norms issued by MERCOSUR's decision-making bodies between 1991 and 2000, 741 have to be transposed into domestic law. By the end of 2000, however, only 34% of them (254) had been transposed fully (in the four countries)" (Bouzas and Soltz [2001]).

The problems of implementation stem in large part from the formal rule for implementing rules, as laid down in Article 40 of the Protocol of Ouro Preto. This states that, for MERCOSUR's legal measures to enter into force (to be obligatory for the member countries), they must be transposed by the four members and communicated to the Administrative Secretariat. Article 40 was justified by the need to guarantee the simultaneous application of MERCOSUR norms in the four countries, and thus obviate new regulatory asymmetries. Nonetheless, it has made the effectiveness of the decisions taken by MERCOSUR's political bodies dependent on domestic mechanisms and interests, which often use this circumstance as an informal means of vetoing or blocking measures. The outcome is well known: "having been adopted by the MERCOSUR bodies, the norms enter a kind of limbo where they can remain indefinitely, awaiting the end of the transposition process (Bouzas, Motta Veiga and Torrent [2002]).

Apart from the formal implementation problems, another aspect of the gap in this area is the frequency and ease with which the member countries defy agreed rules by taking unilateral measures; they seek to legitimize these later through waivers in MERCOSUR's decision-making bodies.

Some proposals on these matters - one of them (Torrent [2000]) advocates that the member countries adopt procedures similar to fast track in the United States - define norms for the exercise of parliamentary power in ratifying international agreements, which enhances the credibility of the executive's negotiators.⁵ The periodic submission of MERCOSUR activities to the parliaments has the additional advantage of stimulating public discussion of these matters and, from the domestic political viewpoint, facilitating greater commitment to integration on the part of the member countries.

The derogation of Article 40 of the Protocol of Ouro Preto would be another important step in solving implementation problems. In that case MERCOSUR's creation of rules would give rise to immediate obligations for the members (including, when necessary, transposition within a given period), although their individual obligations would only be imposed on completion of the transposition process.

The establishment of a legal framework within which the member countries, in exceptional circumstances, could disregard the agreed rules would be governed by pragmatism. The aim would be to avoid situations in which the rules are broken recklessly, thereby undermining the institutional credibility of integration. These margins of "negotiated flexibility" would be pre-established (as would the exceptional circumstances in which they could be applied), and the member countries could resort to them through a "MERCOSUR procedure" such as their publication in the Official Bulletin of MERCOSUR, even if the measure were immediately applicable. The measure would

⁵ "...their main goal is twofold: a) to get a final parliamentary decision within a pre-established deadline; and b) to guarantee a single decision on the agreement (or the package of agreements) submitted by the executive, preventing the disaggregation of the whole in separate pieces of legislation" (Bouzas, Motta Veiga and Torrent [2002]).

then be assessed by MERCOSUR's decision-making bodies and could be approved or rejected (in which latter case it would have to be withdrawn) by majority vote.

The Focus of the System of Rules

In the implementation of MERCOSUR's institutionalization agenda, the substance and (above all) the priorities of the bloc's negotiating agenda are not neutral. This study stresses the member countries' loss of focus in the negotiations: unable to add "real value" (relative to their WTO commitments) to the obligations assumed and the decisions taken in areas that are crucial to the consolidation of the customs union, MERCOSUR opened up a range of issues that were made subject to decisions and resolutions. It thereby gradually lost credibility among the member countries and private actors.

Future institutionalization initiatives might be fruitless if they are not matched by efforts to focus the negotiating agenda on priority matters that reverse MERCOSUR's loss of credibility, and that are essential for consolidating integration's new matrix of common interests.

The effectiveness of an institutionalization agenda will be maximized by a capacity to "focus" the trade and economic agenda on issues that are pivotal for the customs union, thereby strengthening commitments in these areas, in a very broad founding treaty.

Creating a single customs territory, a precondition of a customs union, and adopting a common trade policy comprise the foremost set of issues on a "pro-institutionalization" agenda.

The negotiation of agreements in the areas of services, investment and government procurement (including, in the former two, the upgrading and completion of the existing instruments) comprise the second set of issues on that agenda.

A regime on state aid, one that is geared to disciplining national policies on support for companies and sectors, and that goes further than the WTO Agreement on Subsidies, is also important to the consolidation of the customs union.

Finally, this agenda calls for shared financing mechanisms for subregional infrastructure projects and/or for the less developed regions within the member countries.

IV. CONCLUSIONS

Given MERCOSUR's structural features as a trade bloc, the integration process must be institutionalized gradually. Initiatives in this area cannot be adopted and implemented in a political vacuum. They depend crucially on changes in the nature and intensity of the member countries' political commitment to MERCOSUR. These changes would give the subregional dimension a new and important role in the formulation and implementation of the member countries' domestic policies.

In practice, MERCOSUR's institutionalization agenda should be implemented gradually not only because of the bloc's structural characteristics but also because of the nature of the measures that comprise the agenda. Many of them depend on complex processes within each member country, including changes in perceptions and habits that are deeply entrenched among public and private actors.

As shown earlier, the institutionalization agenda has three components; each of them has its own particular importance, but there are well-defined and strong links between them. A new and more detailed founding treaty, apart from rebalancing the legal architecture of the integration process (which today rests on secondary legislation) has the advantage of helping give focus to MERCOSUR's agenda: the most significant issues on the agenda would be part of the treaty.

Mechanisms to narrow the gap between agreements reached and rules implemented would oblige the member countries to make those rules effective. Some of the mechanisms proposed herein, moreover, would broaden the debate in the member countries and, in particular, would foster the participation of parliaments - with effects on the system for making (not simply implementing) MERCOSUR rules.

This means that the institutionalization agenda, although resting on three different components, should take account of the need to act on the three fronts simultaneously.

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