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MERCOSUR: A DIFFERENT APPROACH TO INSTITUTIONAL DEVELOPMENT

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EXECUTIVE SUMMARY

This paper describes MERCOSUR's main institutional features: the organic structure, the creation and implementation of quadripartite norms and the mechanisms designed to resolve trade disputes within MERCOSUR. Likewise, it evaluates the bloc's institutions, identifies weaknesses as well as strategies for improvement. Finally, it examines some proposals for strengthening MERCOSUR's institutions. This document argues that the greater institutionality of the bloc does not represent a condition sufficient to guarantee a deep integration among the countries in the region. It is, however, a necessary condition that should accompany political statements and the definition of common economic-trade policies. This paper contains background on the evolution of MERCOSUR's institutions, as well as prospects for the future of the integration process.

INTRODUCTION

The institutional configuration of the MERCOSUR bloc has been a topic of debate from the very outset of the integration process. If the European experience since the 1950s was the paradigm of what a trade union should be, MERCOSUR challenged some of its organizational and decision-making principles. MERCOSUR has adapted these principles to conform to the needs of an association among developing countries, something never seen before with respect to the proposed objectives and ambitions.

Since the beginning of the process, MERCOSUR's institutional structure has been an intergovernmental one. Decisions were made by consensus and with the presence of all member states, with the goal of making the integration scheme more flexible and gradual. Thus, member governments maintained broad freedom of action without having to comply with the interests and autonomous decisions of a community bureaucracy, detached from the administration and/or internal policy-making process of each country. The dispute resolution format was also centered on this logic, characterized by the search for diplomatic or negotiated answers, rather than solutions based on rules, with an intergovernmental-type institutional design in which those that negotiated or litigated were the States themselves, with individuals maintaining a marginal function.

At the beginning, the combination of low interdependence and the relative concentration of power in just two members (Argentina and Brazil) resulted in limited demands for institutionalization, especially regarding the staff of independent common organizations (Peña, 1997). Unlike the European case, Member States controlled the decision-making process in MERCOSUR. The idea was, on the one hand, to guarantee that agreements could then be carried out in each of the

countries; and, on the other hand, to allow for “Mercosurizing” the respective governmental administrations.

Gradualism in the development of the institutional structure meant that organizations were created only as the process required them. This gradual approach to the creation of common institutions also reduced domestic budgetary strain. The Asunción Treaty established the institutions that would govern MERCOSUR during the transition period (from 1991 to 1994), leaving open the possibility of creating new institutions or modifying the intergovernmental organization.

The Ouro Preto Protocol, signed in late 1994, was based on the same philosophy regarding the institutional framework, and, once again, was temporary. Those politically responsible for the integration process were aware that any “supranational jump” in this preliminary phase of implementation could compromise national macroeconomic stabilization objectives or alter the delicate equilibrium existing between national and collective decision-making powers (Almeida, 2002).

This report will describe MERCOSUR's main institutional aspects: its organic structure, the creation and implementation of quadripartite norms, and conflict resolution mechanisms. The paper will evaluate these institutions, identify weak points where advancements can be made, as well as examine proposals for strengthening the institutions of MERCOSUR.

MERCOSUR'S INSTITUTIONS

The Ouro Preto Protocol (POP) of December 1994 both confirmed the bases and the philosophy of the institutional structure (set up for the transition period by the Asunción Treaty), and introduced some institutional innovations such as the creation of the *Comisión de Comercio del MERCOSUR* (MERCOSUR Trade Commission) and the *Foro Consultivo Económico y Social* (Economic and Social Consultative Forum). The Ouro Preto Protocol would thus define the essence of the institutional structure of today's MERCOSUR, comprised of the following bodies:

1. *Consejo del Mercado Común* (CMC, Common Market Council). The CMC is comprised of the ministers of Foreign Affairs and of the Economy of the four countries. It is the highest-level organization in charge of MERCOSUR's decision-making and it is responsible for overseeing compliance with the strategic objectives laid out in the Asunción Treaty and the Ouro Preto Protocol. The Council meets twice a year, in two-stage sessions: the first involves only the ministers that make up the CMC, and the second includes the presence of the countries' presidents. In spite of being the highest-level organization, the Council has delegated many of its responsibilities to the *Grupo Mercado Común* (GMC, Common Market Group), thus diminishing its ability to generate policies and promote actions aimed at consolidating MERCOSUR (B.Meza, 2001). In practice, the Council's meetings have had political importance in terms of setting grand directions and sending political signals within and outside of MERCOSUR.

2. *Grupo Mercado Común* (GMC, Common Market Group). The GMC is made up of four incumbent members and four alternates from each country, from the ministries of Foreign Affairs, Economy, and their respective Central Banks. It is an organization which is executive in nature, charged with regulating the decisions adopted by the Council and managing the proper functioning of the integration process. It is also the organization responsible for negotiations with third countries or regions, under the explicit mandate of the CMC.

In order to carry on its multiple tasks, the GMC surrounds itself with several consultative and negotiating teams in the most diverse disciplines. Formally, these teams are known as Working Subgroups (*Subgrupos de Trabajo*), of which there are currently 14 (communications, institutional aspects, technical rules and regulations, financial affairs, transport, the environment, industry,

agriculture, energy and mining, labour affairs, healthcare, investments, electronic trade, and follow-up of the economic and trade situation) and are made up by officials of the four countries.

Likewise, there are other negotiating forums dependent on the GMC in the form of Specialized Assemblies, Ad Hoc Groups, High-level Groups and Committees. For example, there are 11 Specialized Assemblies, related to such diverse issues as drugs, science and technology, tourism, trade promotion, women's issues, municipalities, infrastructure for integration, cooperatives, cinematographic and audiovisual authorities, family agriculture, and official public defenders.

This multiplicity of auxiliary organizations of a mixed technical-negotiating nature involving officials of nearly all areas of government has resulted in a widespread diffusion of the integration process within the public administration. On the other hand, the great variety of issues, individuals and work programs in various disciplines led to significant coordination problems and an overload of decision-making in the GMC.

3. *Comisión de Comercio del MERCOSUR* (CCM, MERCOSUR Trade Commission). The CCM is made up of four incumbent members and four alternates from each member state. It is responsible for safeguarding the effective application of the common trade policy instruments agreed to at the regional level, and dealing with questions related to intra-regional trade. The CCM is also responsible for developing proceedings for consultations and claims for the resolution of conflicts.

Technical work teams were formed for the follow-up of tariffs and questions tied to the classification of merchandise, to deal with customs aspects, trade norms and disciplines, public policies that distort competitiveness, and the defence of competition and of the consumer. There is also the *Comité de Defensa Comercial y Salvaguardias* (Trade Defence and Safeguards Committee). To a great extent, the Committees suffered problems similar to those seen in the working subgroups dependent on the GMC. The scant application of common disciplines meant that in practice many of the committees found themselves impeded from complying with their objectives. In other cases, the work was moderately effective, but only in non-conflictive aspects.

4. *Secretaría del MERCOSUR* (SM, MERCOSUR Secretariat). The SM, with headquarters in Montevideo was, up to 2003, essentially administrative. Its responsibilities included registering and archiving decisions made by the different organizations, publishing the *Boletín Oficial del MERCOSUR* (MERCOSUR Official Bulletin) and providing operating and logistical support for the meetings of the different negotiating groups. The SM is the only MERCOSUR organization to have a communitary budget – contributed to by the four member states – and a small group of officials exclusively dedicated to the tasks of the Secretariat. In 2003 a small Technical Advisory Sector was created. It could be considered the first step in transforming the Administrative Secretary into a Technical one.

5. *Foro Consultivo Económico-Social* (FCES, Economic and Social Consultative Forum). It is made up of representatives of the different economic and social sectors of the four members, has only consultative functions; the issues considered by the FCES are transmitted to the GMC as “recommendations.” Comprised of an equal number of representatives from each member state, the Forum constitutes, in theory, a channel for civil society participation in the integration process. However, in practice this participation has been reduced to an exchange of opinions on the development of the main aspects of the negotiation agenda.

6. *Comisión Parlamentaria Conjunta* (CPC, Joint Parliamentary Commission). The CPC is made up of a maximum of 64 parliamentarians (16 per member state), selected by their respective Congresses in accordance with internal rules. It is also a consultative organization whose function is to respond to questions or consultations from MERCOSUR executive organizations, and to give its opinion on and propose new norms to be considered by these organizations. The importance of this Commission lies fundamentally in the role it plays (or could play) in assuring the incorporation

of decisions negotiated at the level of MERCOSUR into the respective national laws. However, the performance of this consultation organization has been relatively modest.

Since the 1994 Ouro Preto Protocol, several new MERCOSUR institutions have been established. These include:

7. *Foro de Consulta y Concertación Política* (FCCP, Consultation and Political Consensus-Building Forum). The FCCP is as an auxiliary organization of the CMC. It is comprised of high-level officials from the Foreign Affairs ministries of the member states, and focuses on contributing to the consolidation and expansion of the political dimensions of MERCOSUR.

8. *Meetings of ministers* have been created to foster political dialogue among the highest authorities in charge of the various issues from each of the member countries. Currently, there are thirteen meetings of ministers: those of Economy and Central Bank Presidents, Agriculture, Health, Labour, Mining and Energy, Industry, Tourism, Environment, Justice, Education, Culture, Interior, and Social Development.

9. *Comisión de Representantes Permanentes del MERCOSUR* (CRPM, The Commission of Permanent Representatives of MERCOSUR). The CRPM is made up of MERCOSUR member states' Permanent Representatives and one president. It is one of the last bodies incorporated into the institutional structure. Created in October 2003, this structure is charged with: assisting the Council and the President *Pro Tempore* in all activities required of it; presenting initiatives related to the integration process, external negotiations and the formation of the common market; and strengthening economic, social and parliamentary relations, establishing ties with the Joint Parliamentary Commission, the *Foro Consultivo Económico y Social* (FCES) and ministerial meetings.

10. *Tribunal Permanente de Revisión* (TPR, Permanent Review Court). It was created by the Olivos Protocol and will be discussed later in this paper.

11. *Tribunal Administrativo Laboral* (TAL, Administrative Labour Court). The TAL is a jurisdictional service to resolve administrative complaints made by MERCOSUR Secretariat officials and their employees. This Court is made up of four incumbent members—one from each member state—appointed by the GMC for a two-year period, renewable for another two years.

BOX 1. MERCOSUR's institutions in a nutshell:

The Common Market Council (CMC) is the highest-level group. It is in charge of MERCOSUR's processes, policy execution and decision-making. The Common Market Group (GMC) is in charge of implementing and regulating the decisions handed down by the Council. The GMC has also taken on many administrative responsibilities that were initially the domain of the Council. The MERCOSUR Trade Commission (CCM) organizes consultations and dispute resolution proceedings. The MERCOSUR Secretariat (SM) is the administrative arm of the bloc. It is responsible for documenting all meetings, producing the official bulletin, and providing logistical support for events. It has also recently taken on the task of providing technical assistance to all of the MERCOSUR institutions. The Economic and Social Consultative Forum (FCES) serves as a consulting body to the GMC. It acts as the channel through which civil society can participate in MERCOSUR. Finally the Joint Parliamentary Group (CPC) is another consultative body to MERCOSUR's executive. It gives recommendations on proposed norms and helps integrate MERCOSUR regulations with existing national laws.

MERCOSUR's Institutions in Perspective

A review of MERCOSUR's institutional structure in its first 13 years of existence allows us to identify some lessons that may be of interest in the future. Primarily, the intergovernmental organization with its flexibility and gradual growth has been useful throughout this period of time. These characteristics have permitted the adjustment of the number and powers of the different institutions to suit the needs of an evolving and deepening integration process. Likewise, they served as a medium for processing the continuous changes in the economic and financial situations of member countries, the region, and the world. The limitations encountered in advancing the designing of common policies or in the implementation of agreements are a reflection of the same limitations that member countries encounter when trying to generate long-term policies.

Thus, no supranational structure could have made MERCOSUR "...a more serious, orderly, or predictable structure than are the countries which comprise it" (J. Campbell, 1999). In any event, the effectiveness of the integration process should be evaluated by its ability to generate norms and to implement them, regardless of whether this was achieved via supranational or intergovernmental bodies. Therefore, any movement towards a greater institutionalization of the bloc must consider the characteristics of this alliance and its historical roots, rather than attempt to design institutional responses based on theoretical models. One consequence of the gradual growth of MERCOSUR's institutions is the great diversification of technical organizations and the difficulties in coordinating these increasingly autonomous bodies.

MERCOSUR's institutional organization has also revealed the concentration of legislative, executive and even judicial functions in officials in the national administrations of the four member countries. Even though this concentration of functions is considered to have been positive in terms of supporting the MERCOSUR negotiations, the widening scope of issues and the multiplying tensions and trade conflicts have rendered it insufficient to deal with MERCOSUR's present day realities, especially after the regional crisis initiated in 1999.

Lastly, the participation of civil society and of the member Parliaments during these years has been limited and their recommendations have had minimal practical effect. Unlike other integration experiences, the private sector and legislative representatives have not managed to become relevant forums of consultation for MERCOSUR institutions, nor have they substantively contributed to promoting the integration initiative within their respective societies.

MECHANISMS FOR CREATING AND IMPLEMENTING MERCOSUR NORMS

There have been great difficulties in implementing MERCOSUR norms, largely due to complexities with respect to the incorporation of norms into internal juridical systems. Without guarantees as to when the regulations created by the quadripartite institutions begin to exert legal effects on persons, the predictability of the process and the rule of law are weakened, directly affecting its credibility. An agile and transparent mechanism to incorporate MERCOSUR norms and to make them operative has not yet been attained, nor has a system guaranteeing the hierarchy of these norms over national ones. In this context, it is worth analyzing, on the one hand, the Constitutions of the member states and their prescriptions regarding the integration processes, and, on the other hand, the proceedings created in MERCOSUR for norms approved by it to become operative. Recent advancements in this area are addressed in this section.

a. Constitutional asymmetries

There are constitutional limitations to permitting the establishment of a regime adequate to the development of a MERCOSUR "communitary law." The Argentine Constitution (reformed in 1994) grants international treaties a supremacy over national laws and authorizes the signing of treaties

that delegate powers and responsibilities to supranational organizations. In the case of Paraguay, its 1992 Constitution also grants supremacy to treaties and allows for the existence of a supranational juridical order. Brazil and Uruguay, in turn, have no provisions for granting supremacy to treaties with respect to national laws, and there is just one reference to Latin American integration (Brazil).

The question is whether these differences necessarily require reforms in the Brazilian and Uruguayan Constitutions to overcome the problems linked to the hierarchy of MERCOSUR norms, or if these can be moderated by political decisions in pursuit of the integration process. In each country there are opinions by prestigious jurists that assure that a dynamic interpretation of the Constitutions' texts would permit assuming integration commitments that would overcome the current asymmetries. In Uruguay, for example, even when the Supreme Court of Justice has normally accepted the thesis that "the law outside the treaty which is irreconcilable with it presumes its derogation", we note that recent doctrine has supported the opposite view (Labandera Ipata, 1998). In Brazil's case, meanwhile, some authors consider that the sole paragraph of Article 4 of its Constitution, dealing with Latin American integration, constitutes a sufficient foundation for the establishment of a MERCOSUR Community Law.

b. Mechanisms for the incorporation and implementation of MERCOSUR regulations

There is no unique mechanism for the incorporation of MERCOSUR regulations and for making them operative. Firstly, it is necessary to make a distinction between the original law and the derived law. The original law is made up of those instruments held by the member states within the framework of the Asunción Treaty. Their entering into effect is subject to the constitutional dispositions of its members for international treaties (which require legislative approval and ratification by the Executive Powers). Derived law, on the other hand, is that arising from MERCOSUR's institutions with decision-making capacity and is made up of decisions of the CMC, resolutions of the GMC and directives of the CCM. In accordance with the intergovernmental nature of the MERCOSUR integration process, these are directly linked to the governments, making them obligatory. But they do not possess the "direct effect" characteristic of certain European Community norms have, and only once they are internalized by the four member states do their effects extend beyond the governmental border, to apply to individuals (Floreal González, 1999).

With the Ouro Preto Protocol (POP) maintaining the intergovernmental nature of institutions, and with the observation of difficulties in the internalization of norms, greater precision in this area became necessary, emphasizing the obligatory nature of the norms and the need to incorporate them into internal juridical systems.

It is important to bear in mind that the obligation, in this case, is linked to the commitment of incorporation into internal law. The way to comply with this commitment in each State will depend on the constitutional system. In some cases it will be necessary to adopt a law, in others a decree, a *portaría*, a resolution, or a mere official letter. Moreover, incorporation is just one necessary condition, but is not in itself sufficient for a norm to come into force. Effectively, article 40 of the POP has created a "*sui generis*" system which replaces the concept of "immediate applicability" of the European model with that of "simultaneous coming into force" via the following procedure: a) incorporation by each country into its internal law and notification to the MERCOSUR Secretariat; b) once the four incorporations have occurred, the SM will notify all the countries of this; and c) simultaneous coming into force within 30 days of the SM's notification.

This solution, created in light of the intergovernmental nature of the MERCOSUR organizations, is far from satisfactory. Only about 45% of approved MERCOSUR regulations come into force. It is clear that the proceedings foreseen in article 40 are subject to numerous exceptions and have not been enough to guarantee that the agents of the four countries be subject, at the same time, to the same rights and obligations (Cozendey, 2001).

An Assessment

The coexistence of four national legal systems—which maintain their autonomy and, therefore, adopt peculiar ways of creating and removing laws—is complex, regardless of the intergovernmental nature of MERCOSUR. This complexity, however, has not mitigated the perception that the accumulation of non-incorporated rules is one of MERCOSUR's main institutional flaws. There have been many problems in this area, mainly the tendency to approve a large number of norms, which are subsequently submitted to a new internal approval process at the time of their incorporation.

Another obstacle is that, although there are only three types of norms in MERCOSUR: decisions of the CMC, resolutions of the GMC and directives of the CCM, each of them can acquire different characteristics. This may be due to the specific issue, the need for incorporation, the effects, the national organizations involved, etc. A systematization of the regulations, which would in some way allow us to foresee its reach, has never been undertaken. Also, each member adopts its own modality to internalize the same norm. Thus, some are able to adopt it via an administrative act, whereas others require the approval of a law, with different lengths of time required in each case. In practice, when a member incorporates a MERCOSUR norm into its legal system, the norm goes into effect in the member's territory immediately, but has to wait for incorporation by the other countries for the effects of the norm to have regional reach.

The process by which a norm is incorporated into national legal systems was improved in 2002. Common Market Council Decision 20/02 attempted to overcome part of these implementation problems. A kind of “quarantine” was created into which norms would enter until conditions existed to ensure their incorporation. It calls for internal consultations and the written manifestation of the four member states, after which they can proceed to the incorporation of the norm by means of acts of the Executive Power or by being sent to Parliament for consideration.

This system was further improved in 2004 by Decision 22/04, which considers the possibility of speeding up procedures for the application of MERCOSUR norms that do not require legislative approval in the Member States, establishing that for this type of Decision, Resolution and Directive the members will adopt a national mechanism, according to the following guidelines:

- Carry out the internal consultations set by Decision 20/02 prior to the adoption of the norms;
- Once the norms have been approved by the MERCOSUR institutions and the copies certified by the MERCOSUR Secretariat have been received by the Ministries of Foreign Affairs, the member states have to publish them in their respective official bulletins, 40 days prior to the date foreseen for their going into effect;
- After the information has been officially communicated and published the norm is considered part of the national legal system.
- The MERCOSUR norms included in this procedure, as of their going into effect, will leave without validity national norms opposed to them having equal or lesser hierarchy.

In order to deal with cases where norms require parliamentary approval, an Inter-institutional Agreement was made between the Common Market Council (CMC) and the Joint Parliamentary Commission (CPC) in October 2003. The CMC here took on the commitment of consulting the CPC on those issues requiring legislative approval for their incorporation into the Member States' juridical orders. For its part, the CPC took on the commitment of internalizing MERCOSUR regulations.

MERCOSUR's Institutional Landmarks

- 1991 – **Treaty of Asuncion**: signed by the four founding members, Argentina, Brazil, Paraguay and Uruguay it is the legal document that forms the basis of Mercosur.
- 1991 – **Brasilia Protocol on Dispute Settlement**: it introduces an arbitration mechanism for dispute settlement, a first in regional integration schemes in Latin America.
- 1994 – **Ouro Preto Protocol**: considered to be Mercosur's constitution, it recognizes the legal existence of the bloc under international law, lays out most of the current make-up of Mercosur, and gives it authority to negotiate agreements with third parties.
- 2002 – **Olivos Protocol on Dispute Settlement**: building on previous protocols, it creates a Permanent Tribunal as well as a post-decision control mechanism for Mercosur.

THE RESOLUTION OF DISPUTES IN MERCOSUR

An initial sketch of the current system for the resolution of disputes was found in Annex III of the Asunción Treaty. It established a very simple mechanism for understanding the tensions and conflicts that could arise among the Member States, in terms of the application of the different provisions contained in the Treaty. In this stage, complaints by individuals were not foreseen, nor were controversies arising as a consequence of the application of derived law, or the problems of interpretation or non-compliance. The procedure contemplated only diplomatic negotiations via three successive instances: direct negotiation between the involved Member States, intervention by the GMC and submission to the Common Market Council. The GMC and CMC could only make non-binding recommendations.

The Brasilia Protocol, approved in December 1991 and went into effect in April 1993 replaced this Annex. The Brasilia Protocol constitutes an important innovation with respect to previous regional integration schemes in Latin America by introducing for the first time a neutral arbitration mechanism for conflict resolution. The Protocol increases powers and responsibilities of the dispute settlement mechanism to include disputes arising from the interpretation, application or non-compliance of the provisions contained in the Treaty of Asuncion, in the agreements held within its framework, in the Decisions of the CMC and the Resolutions of the Common Market Group. Later, the Ouro Preto Protocol incorporated the Directives of the Trade Commission.

In order to evaluate if a disagreement might fit into the framework of the Brasilia Protocol, it is only necessary to verify the existence of objective facts linked to these motives, without the need for analyzing and/or proving real or potential harm that such non-compliance could cause. In disputes between member states, the system has three stages: the first two take place at the diplomatic level and begin with direct negotiations between the countries involved and, in the event this is unsuccessful, with the intervention of the quadripartite Common Market Group, which has conciliatory functions and the ability to issue recommendations. For the third stage, an Ad Hoc Arbitration Court is created, comprised of three arbiters. Of these three, two are selected at the requests of the parties, according to national lists presented by the countries *ex ante*, and the third, who presides over the Court, is selected via common agreement. Its ruling is binding and not subject to appeal (only for explanatory purposes). Preventative measures follow, and, in the event the decision is not complied with, compensatory measures can be authorized (e.g., the suspension of concessions). It should be pointed out that this is the only area in which the strict rule of consensus does not apply in the making of decisions, since the Court's decision is adopted by majority rule, and in which states are allowed to take unilateral, retaliatory measures.

The Complaints Procedure

As previously mentioned, the Trade Commission is responsible for dealing with trade conflicts. In that sense, the Annex to the Ouro Preto Protocol established a general procedure for the submission of complaints to the CCM, either brought forward by the States themselves or by individuals. This procedure does not constitute a first stage in the dispute resolution system, but is rather another alternative for resolving conflicts that, unlike the system mentioned previously, has the Trade Commission and not the GMC as the initiator. If, however, a conflict cannot be resolved by this procedure, there is the possibility of going directly to arbitration. The matters that can trigger a complaint are the same as those established in the ordinary mechanism of the Brasilia protocol, provided they are within the jurisdiction of the CCM.

In this instance, the parties are the National Sections (*Secciones Nacionales*) represented at the CCM of the member state making the complaint and the one receiving the complaint. If the issue is not resolved in the first meeting of the quadripartite CCM, the convocation of a Technical Committee is foreseen to present a judgment (or, if there is no consensus in the technical organization, the conclusions of each one of the experts). If even after this the CCM is unable to reach an agreed upon solution, it must be passed on to the GMC. Lastly, if the problem is not resolved in this instance, there is the possibility of going to arbitration.

A total of 17 complaints were presented between 1995 and August 2004, related to tariff and non-tariff restrictions, tax discrimination, the non-incorporation of MERCOSUR norms, the sugar sector and export rights. None of these has concluded satisfactorily for the parties involved, with some passing on to the controversy resolution mechanism of the Brasilia Protocol. One of the main problems is that the officials participating in the Technical Committees are unable to make their opinion independent from the mandate of their government.

In December 2002 CMC Decision 18/02 was approved, establishing rules for this complaint procedure. This norm represents a step forward to the extent that it attempts to provide greater transparency in the acceptance of complaints brought forward, and uniformity in the procedure's application.

The Consultation Mechanism in the Trade Commission

Before the Ouro Preto Protocol went into effect -and thus, its Complaint Procedure-, the Trade Commission designed a mechanism of "Consultations" to resolve differences arising from the increase in trade flow. The use of this mechanism quickly turned into a permanent issue on the agendas of meetings of the CCM, with the rules continuing to evolve until the issuing of CCM Directive 17/99, which establishes requirements for consultations, procedures to follow, time restrictions, etc.

Here, unlike with the Complaints, the procedure never extends beyond the orbit of the CCM. That is, via this procedure, the GMC never has to take the case. The Directive clearly establishes that the application of this mechanism does not at any time impede a Member State from turning to the General Procedure for Complaints or to the Controversy Resolution Procedure. A total of 497 consultations were presented between 1995 and 2004, the majority of these during the first years; while in 1995 there were 128 presentations, there were only 17 in 2002 and 21 in 2003. The themes involved in the consultations are quite varied, including non-tariff barriers (technical regulations, sanitary and phytosanitary measures, import licenses, etc.), tariff barriers, tax discrimination, regimen of origin, trade disciplines, and unilateral tariff modifications, among others. The countries that use this mechanism the most are Argentina and Brazil. Most of the consultations dealt with non-tariff and the most consulted about sector is agri-food.

Recent Innovations in Conflict Resolution

In addition to the aforementioned regulation of the Annex to the Ouro Preto Protocol on Complaints before the CCM, the Olivos Protocol (PO) was approved in February 2002, which provides rules

regarding the resolution of controversies in MERCOSUR. Without a doubt, this is MERCOSUR's main achievement of the last few years regarding institutional matters. While maintaining the same philosophy and practice as the previous scheme, the PO introduces some innovations such as forum selection; the establishment of a post-decision control mechanism; and the creation of a Permanent Review Court and other provisions associated with a more uniform interpretation of MERCOSUR regulations. Moreover, the PO foresees a shortening of procedure times. Effectively, in the case of controversies between states, only direct negotiations between the members involved will be obligatory, with GMC intervention becoming optional, thus shortening the time for acceding to the arbitration stage.

1. *Forum Selection:* The PO contains explicit provisions regarding the need for selecting the forum before which the conflicts will be settled. The Brasilia Protocol did not account for this aspect, which, for example, has permitted that in light of the application of antidumping measures by Argentina regarding the importation of Brazilian poultry, Brazil first raise the complaint with Argentina within the scope of the Brasilia Protocol and then, not having had its expectations satisfied, it raised the issue to the World Trade Organization's (WTO) Dispute Settlement Body. With respect to this, the PO establishes that if a controversy can be submitted either to the controversy resolution system of MERCOSUR or to that of the WTO, the plaintiff state must select one of these mechanisms, permanently waiving access to the other forum.
2. *Post-ruling control:* The second relevant aspect is strengthening the obligatory nature of the final ruling and the applicable measures looking to guarantee the carrying out of the decisions. Although the Brasilia Protocol already established the principle of the obligatory nature of rulings, and contemplated possible temporary compensatory measures, the Olivos Protocol develops specific mechanisms for ensuring this compliance.

It is clear that whatever the nature of the dispute, the cases in which the Courts can adopt "self-executing" measures to ensure compliance with its ruling are exceptional. In the experience of MERCOSUR, of the nine decisions, only one acted in "full jurisdiction" and decided to revoke the measure in question. In the others, the action of the governments always appears as something necessary for the execution of decisions. A clear procedure is important in order to avoid that the spirit and the reach of the rulings is misrepresented at the time of their practical application.

In this regard, the PO establishes that the post-ruling face could be used in order to control the effective implementation of the ruling, as well as to examine possible compensation that the complaining State can adopt when the ruling is not fully implemented (PO establishes certain limits and conditions for this compensation). In other words, the intention of the PO is to avoid an increasing number of cases in the arbitrary face of the dispute and in the retaliatory measures that Parties can adopt.

3. *Permanent Review Court and the uniform interpretation of regulations:* The Olivos Protocol's third important innovation relates to the search for a uniform interpretation of MERCOSUR regulations. One of the main criticisms directed at the functioning of ad hoc Courts has been that these do not allow for the construction of true community jurisprudence. Furthermore, the regulations created by the negotiating process are not only subject to the different interpretations made by the different instances, but also by those which judges of member states may make (once the MERCOSUR regulations are internalized, they form part of the national legal systems and fall under the jurisdiction of local Courts).

This lack of procedures for ensuring a uniform interpretation of the MERCOSUR regulations makes maintaining of the principle of equality of the member states more difficult. In order to preserve this equality the law that governs the relations between them must have the same value and produce equal effects in all the countries (Zalduendo, 2002). Even when the most efficient means of overcoming these questions is via a kind of supranational Justice Court, the

innovations introduced by the Olivos Protocol will permit, via more informal procedures, movement toward uniformity in the interpretation of the bloc's norms.

Among those innovations, the following are worth mentioning:

- a greater stability in the arbitrators presiding the Ad Hoc Courts, the idea being that utilizing the same arbitrators in different disputes could facilitate uniform interpretations;
- the creation of a Permanent Review Court, with the ability to resolve the juridical review cases brought before it. Its decision will be of a definitive nature and is only subject to the filing of a motion for clarification.

The Permanent Review Court is without a doubt the greatest innovation of the Olivos Protocol. Even though the Brasilia Protocol foresaw the Ad Hoc Courts as single instances (with the likely intention of ensuring rapid conflict resolutions) experience showed that not only did the procedure turn out not to be so dynamic, but also that an instance of appeal would be required both to allow for possible review of decisions and to unify the interpretation of the "diffuse" regulations and the application of the MERCOSUR judicial set of instruments.

Four of the five arbitrators making up the Permanent Review Court can remain in their positions up to a maximum of six years, while the fifth will be designated for a 3-year period. This will contribute to a more homogeneous interpretation of common laws.

Lastly, a procedure was approved in July 2004 for dealing with exceptional, urgent cases on dispute matters (foreseen in article 24 of the Olivos Protocol) allowing the Member States to directly resort to the Permanent Review Court, provided the controversies deal with differences related to perishable or seasonal goods. To this end, a mechanism was created permitting that in a period of nine consecutive days the Permanent Review Court issue a decision on the case and order the appropriate urgent measure.

LOOKING TOWARD THE FUTURE

Throughout its relatively brief existence, the integration process has often been criticized for its degree of institutionality, particularly in relation to its rule of law, the low level of implementation of MERCOSUR law, and for its dispute resolution system. The problems faced by the "real" MERCOSUR – which involve a decrease in the volumes and in the quality of the commercial flows, absence of advance in topics of the internal agenda, and the withdrawal of numerous commitments and/or implemented agreements – appear to limit any institutional initiative that is overly ambitious. This said, this paper advances some proposals for overcoming some of the challenges discussed in this document.

The Structure

One of the main critiques has had to do with the intergovernmental nature of MERCOSUR by which the member countries decided to retain power to create norms and exercise control over MERCOSUR institutions through their official representatives. Thus, difficulties in the elaboration of common policies at the technical levels, or disagreement on the approval of different resolutions or decisions on the political sphere, as well as problems with the effective implementation of approved norms, have tended to be blamed on the bloc's institutional weaknesses.

The lack of an independent technical body is, undoubtedly, one of MERCOSUR's clearest institutional deficits. The creation of working subgroups or technical committees with national officials was not effective beyond the transition period with respect to the designing of quadripartite instruments. Constructing an independent technical body could turn out to be a necessary condition in order to overcome current limitations, but not enough, because its recommendations

are not binding and therefore are subject to the member states' representatives' political decisions. In any event, a new MERCOSUR technical body might just contribute to the preparation of negotiations with third countries and regions, and to the presentation of technical proposals on issues of the internal agenda where common interests exist.

A preliminary sketch of this is found in the initiative of transforming MERCOSUR's Administrative Secretariat into a Technical Secretariat via the formation of an advisory group that provides support to existing bodies, carries out the follow-up and evaluation of the integration process, conducts studies of interest and oversees the legal consistency of the norms issued by its structure.

The question of the voting mechanism is also a matter that calls for analysis. While there is no doubt that the conditions do not yet exist for changing the current rule of consensus – with the presence of all the member states–, it should be recognized that this very question has prevented progress in key areas. As a first step, alternatives could be analyzed to speed up the decision-making process, at least in those questions that are not considered central or sensitive.

Approval and implementation of MERCOSUR norms

The procedure for the internalization of MERCOSUR regulations can continue to be improved, advancing toward the direct application of approved quadripartite norms. Likewise, steps must be taken so that the treatment of the “MERCOSUR dimension” can be equivalent in the legal systems of all members. For now, the norms and the incorporation of them must be better publicized so that the private sector has accurate and timely information with respect to its rights and obligations within MERCOSUR.

Resolution of controversies

Many of the latent themes in this area appear to have more to do with normative insufficiency or ambiguity and with the lack of incorporation of the norms than with the *ad hoc* nature of current arbitral procedures. The Olivos Protocol and the establishment of a Permanent Review Court represent important advancements in this matter, without having altered the *ad hoc* essence of arbitral procedures. However, within this scheme, aspects such as the enforcement of arbitral decisions can be improved. It would be worthwhile to find new mechanisms allowing for an increase in the “cost of non-compliance” such as the application of fines or the generalization of retaliatory measures to all member states. Furthermore, the consultative mechanism foreseen in the PO needs to be established, and channels for the access of individuals to the system of dispute resolution improved.

These proposals for institutional development tackle those aspects where greater weaknesses are identified while avoiding the creation of “superstructures.” The greater institutionality of the bloc does not represent a condition sufficient to guarantee a deep integration among the countries in the region. It is, however, a necessary condition that should accompany political statements and the definition of common economic-trade interests.

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