UNCTAD VIRTUAL INSTITUTE
USP – FLACSO JOINT RESEARCH PROJECT
ANALYSIS OF SOUTH-SOUTH COOPERATION IN TRADE

MERCOSUR in South-South Agreements: In the middle of two models of regionalism

Umberto Celli and Marcus Salles
University of Sao Paolo, Brazil

Diana Tussie and Juliana Peixoto
Latin American School of Social Sciences (FLACSO), Argentina

September 2010

Table of contents

List of tables

List of figures

List of abbreviations

AB	Appellate Body
ACE	Economic Complementation Agreement
ACN/CAN	Andean Community of Nations (*Comunidad Andina*)
ACP	African, Caribbean and Pacific Group of States
ASEAN	Association of Southeast Asian Nations
BIT	Bilateral Investment Treaty
CACM	Central American Common Market
CET	Common External Tariff
CMC	Common Market Council
CRTA	Committee on Regional Trade Agreements
CTD	Committee on Trade and Development
CTG	Council for Trade in Goods
CTS	Council for Trade in Services
CU	Customs Union
DSB	Dispute Settlement Body
ECLAC	Economic Commission for Latin America and the Caribbean
EIA	Economic Integration Area
EU	European Union
FDI	Foreign Direct Investment
FOCEM	MERCOSUR Fund for Structural Convergence and Institutional Strengthening
FTA	Free Trade Area
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GSP	Generalized System of Preferences
GSTP	Global System of Trade Preferences
ISM	MERCOSUR Social Institute
LAIA/ALADI	Latin American Integration Association (*Asociación Latinoamericana de Integración*)
LDC	Least Developed Country
MERCOSUR	Southern Common Market (*Mercado Común del Sur*)
MFN	Most-Favoured-Nation
NAFTA	North American Free Trade Area
NAMA	Non-Agriculture Market Access
PTA	Preferential Trade Agreement
PTIA	Preferential Trade and Investment Agreement
PYMES	MERCOSUR Programme for Small and Medium Enterprises
RTA	Regional Trade Agreement

S&D	Special and Differential Treatment
SACU	Southern African Customs Union
SPS	Sanitary and Phytosanitary Measures
TRIMS	Agreement on Trade Related Investment Measures
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UNASUR	Union of South American Nations (*Unión de Naciones Suramericanas)*
UNCTAD	United Nations Conference for Trade and Development
US	United States of America
WTO	World Trade Organization

Introduction

The objective of this paper is to analyse the Southern Common Market (MERCOSUR) as the case of a regional integration process in transition between different moments: the 1990s neoliberal moment (which concentrated solely on trade liberalization) and the present neo-developmental phase, which now includes structural policies as a new pillar for integration. The pull of each contrasting mindset leads to tensions in both the internal and external agendas. In this analysis, we focus on three specific issues: asymmetries, trade in services and investments. All three have loomed large in the North-South agenda, but as regional agreements make progress and a new mindset emerges they now cast a shadow on South-South relations.

In the case of asymmetries, the internal agenda has shown significant changes towards the new mindset of regionalism. In the external agenda, however, the treatment of asymmetries still falls short in reflecting coherence with the regional political context.

In the case of services and investments, little progress has been made. Regarding services, although MERCOSUR adopted the World Trade Organization (WTO) General Agreement on Trade in Services (GATS) model correctly, negotiations within MERCOSUR have barely advanced. As far as investments are concerned, MERCOSUR does not yet have common rules, either for intra-regional investments or harmonized rules for extra-regional flows.

In the first and second parts of this study, the proliferation of regional trade agreements (RTAs) and their legal framework are analysed, in order to provide a context for the following sections. In the third section, we deal with the legal framework for the management of asymmetries, in order to better understand the dilemmas faced by MERCOSUR in its transition period. In the fourth part, we address the reconfiguration of regionalism in South America, and then proceed to assess the internal agenda of MERCOSUR in the case of services, investments and asymmetries, in order to identify the challenges the regional bloc faces in this regard. In the last part, we switch to the external agenda, focussing on MERCOSUR's trade relations with specific partners (India, the Southern African Customs Union (SACU) and Israel) to reveal a new set of challenges.

Both sets of challenges, those faced by the internal and the external agenda, stem from the tensions between the original neoliberal orientation and the new neo-developmentalist mindset, which goes beyond trade as the sole policy for regional integration.

1 The proliferation of Regional Trade Agreements: Causes and consequences

RTAs involving two or more nations that reduce or eliminate barriers among countries, while maintaining barriers against imports from other nations, are not a new phenomenon. In fact, RTAs flourished in the first half of the twentieth century, with agreements between European, African and South American states, and a large number of agreements were forged between countries with colonial ties, such as the "Commonwealth Preference".[1]

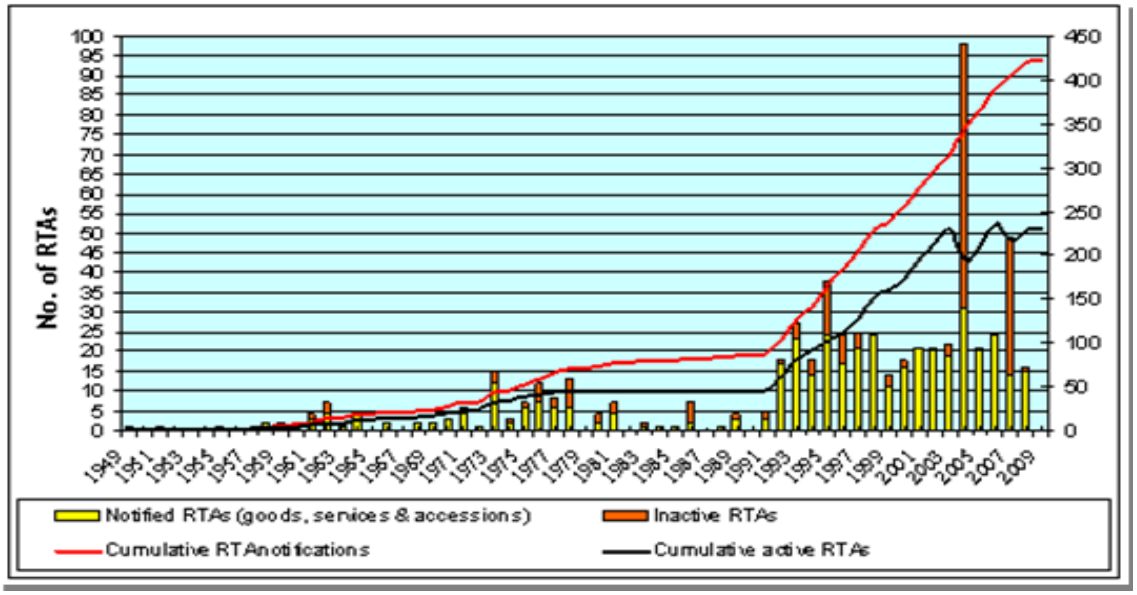
During negotiations on the General Agreement on Tariffs and Trade (GATT)[2] from 1944 to 1946, some agreements similar to RTAs were also negotiated, such as the Benelux, which later became the embryo of the European Union (EU).[3] The framers of the GATT therefore felt that it was necessary to allow room for preferential arrangements while imposing disciplines on the formation of RTAs. To deal with such situations, Art. XXIV was incorporated into the GATT (Jackson, 2002). This provision is analysed in the following sections.

Up until the 1980s, regional and bilateral arrangements were used extensively in Western Europe among countries with close geographical proximity, in a great range of developing countries with close geographical proximity, and in the format of preferences granted between developed countries and from developed to developing countries. By the conclusion of the Uruguay Round, all but three WTO Members – Hong Kong (China), Korea and Japan – were party to at least one of the 62 RTAs in force.[4]

Since the establishment of the WTO, however, the number of RTAs has grown rapidly. During the GATT years, only 124 agreements were notified (Fiorentino *et al.*, 2006). Since then the number has risen to 474 notifications, of which 285 are in force as of August 2010.[5] More importantly, the rate at which RTAs are being negotiated has accelerated since the failed Seattle (1999) and Cancun (2003) Ministerial Conferences, as can be seen in Figure 1.

[1] The "Commonwealth Preference", formerly known as the Imperial Preference, was a proposed system of reciprocally levelled tariffs or FTAs between different Dominions and Colonies within the British Commonwealth of Nations. For more details, see Fram (2006).
[2] Signed in Geneva on 30 October 1947.
[3] The Benelux is an economic union that comprises three neighbouring countries, Belgium, the Netherlands and Luxembourg. In 1944, the three countries established the Benelux Customs Union, which was supplanted by the Benelux Economic Union in 1960. For more details, see Manin (1997).
[4] For more on the history of RTAs, see Lester and Mercurio (2008).
[5] See the WTO RTA database at: http://www.wto.org/english/tratop_e/region_e/region_e.htm.

Figure 1: Evolution of RTA notifications to GATT/WTO



Source: WTO (2010).

There are several reasons for the expansion of RTAs. First, RTAs liberalize trade between natural trading partners, thereby encouraging the trade of goods and services, and stimulate investment in both developed and developing countries. Moreover, it has been argued that RTAs can be negotiated much faster than multilateral agreements, enabling parties to liberalize more quickly than they would through multilateral processes. States can also address specific issues, such as investment, competition, labour standards and the movement of natural persons, among others, which have not yet been subject to multilateral agreements. From this perspective, the resulting achievements in trade liberalization substantially complement the WTO, and thus RTAs could be seen as important *building blocks* for future multilateral liberalization (Lester and Mercurio, 2008). On the other hand, it has also been argued that the proliferation of RTAs is a negative phenomenon for the multilateral process. RTAs would accordingly constitute *stumbling blocks* instead of *building blocks*. From a developing country standpoint, this subject is even more controversial.

The purpose of this section is to contextualize the current phenomenon of the expansion of RTAs in the multilateral trading system and to analyse the main arguments in the international trade literature for the rise of RTAs. To this effect, first, we analyse some economic, geopolitical and institutional causes for the expansion of RTAs; second, we evaluate the possible impacts of RTA proliferation for the multilateral trading system; and finally, we examine their potential impacts on developing countries.

1.1 Multilateral impasses and discontent

In the post Uruguay Round era, concerns about the multilateral trading system have intensified. A number of WTO Members, particularly developing countries, are dissatisfied with the effects of world trade liberalization. In this regard, the degree of liberalization in the agriculture sector has not met their expectations. Continuing subsidies provided by certain developed countries to their farmers have been a major obstacle for certain developing countries in gaining market access to the more advanced economies.[6] The concentration of wealth has increased: 20 per cent of the world's population is now in possession of more than 82 per cent of the world's GDP (IMF, 2010). Additionally, crucial objectives listed in the preamble to the WTO Agreement, such as raising standards of living, ensuring full employment and promoting sustainable development, have not yet been achieved.

In turn, following the collapse of the WTO Ministerial Conferences in Seattle (1999) and Cancun (2003), several developed and high-income developing countries realized that protectionist elements in many countries were slowing the multilateral liberalization process. Thus they established that, in the current climate, bypassing multilateral negotiations and instead focusing on and pursuing their own initiatives in regional and bilateral trade agreements would better serve their interests (Pal, 2004).

At the same time, due to difficulties in negotiating direct investment issues at the WTO, these countries have also entered into many Bilateral Investment Treaties (BITs). According to UNCTAD, in 2005 there were almost 2,500 BITs in force around the world (UNCTAD, 2006). Some trade experts see BITs as a major economic factor in fostering the propagation of regionalism today. In view of the fact that some countries condition the negotiation of RTAs on the existence of investment rules, BITs became a key element for trading states (both developed and developing countries) to gain preferential trade access to large regional markets.[7]

Currently, the four big RTAs – the EU, the North American Free Trade Area (NAFTA), MERCOSUR and the Association of Southeast Asian Nations (ASEAN) – account for close to 65 per cent of world exports and 70 per cent of world imports (ITC, 2008). In other words, only around a third of global trade is regulated under the Most-Favoured-Nation (MFN) principle. While it is not clear in the economic literature whether RTAs promote global trade integration or vice-versa, it is certain that a relationship exists and is increasingly becoming a strategic political decision for developed and developing countries alike (Frankel and Romer, 1999; Rodriguez and Rodrik, 1999; Sachs and Warner, 1995).

[6] World famine has even increased in numerous developing countries. See data available in FAO (2009). The subsidies granted by the US government to its cotton producers is emblematic of the limited benefits brought so far by the WTO Agriculture Agreement.

[7] See OECD (2006). Brazil is one of the greatest exceptions to this trend as, despite having signed a number of BITs, none of them has been ratified. Nonetheless, Brazil accounts for one of the world's highest levels of foreign direct investment.

1.2 Economic advantages

To explain the rapid growth of RTAs since the 1990s, economists have tried to identify the factors that have pushed countries towards regionalism – especially through the traditional explanation of the welfare effects of trade liberalization and the consequent gains from trade at a regional level.

The traditional theory of gains from regional economic integration differentiates between the concepts of trade creation and trade diversion to show the net effects of trade liberalization on a regional basis (Viner, 1950). Essentially, RTAs can lead to trade creation if, due to the formation of the RTA, its members switch from inefficient domestic producers and import more from efficient producers in RTA partner countries. In theory, this situation generates welfare gains from production efficiency and consumption efficiency. On the other hand, trade diversion occurs if, because of the RTA, members switch imports from low-cost production in the rest of the world and import more from higher-cost producers in RTA partner countries. In this case, trade diversion lowers welfare gains not only in the RTA countries but also in the rest of the world (ECLAC, 2005).

A group of economists challenged this assumption and argued that RTAs are likely to be more welfare enhancing because trade diversion can have a benign effect on the member countries, especially if the members are "natural trading partners", that is, if they are geographically close and have very high trade dependence on each other (Summers, 1991; Krugman, 1991; Frankel, 1997).

In this debate, Latin American scholars played a prominent role in the Economic Commission for Latin America and the Caribbean (ECLAC). These scholars maintained that trade diversion was the only way to break through an international structure of commercial dependency of developing country RTA members in relation to the more advanced economies. For Raúl Prebisch and Celso Furtado, trade diversion was imperative and had several beneficial effects for developing countries that engaged in RTAs, including increases in GDP, employment and tax income, among others (Prebisch, 1973; Furtado, 2007; Wionczek, 1966; Bielschowsky, 2000).

In summary, throughout the years the economic arguments regarding the welfare benefits of RTAs have led to a significant increase in their proliferation and they are becoming a geopolitical strategy for both developed and developing countries.

1.3 Geopolitical strategy

RTAs may be a viable substitute for difficult multilateral arrangements. Nations in close geographical proximity often share common interests. They may share elements of culture, religion, language, history, and social and economic systems. But these common elements are not necessary and often do not exist in RTAs, as in the US-Jordan, Mexico-Japan and US-Korea agreements, among others.

In addition, bilateral/regional opportunities may help developing countries to gain from regional integration and stronger economic ties to developed countries, thereby

improving both their trading regimes and rule of law, and implementing the structural reforms necessary to further their integration into the world economy. This could help to further open and liberalize developing countries' economies on the multilateral stage. This perspective, which sees regionalism as a pre-stage to multilateralism, is known as *open regionalism*, whereby RTAs are the building blocks of the multilateral trading system (Correa, 2001).

This geopolitical debate could be seen from another angle. According to Ghosh (2004), developed countries, such as the US and EU, are pushing through RTAs to persuade developing countries to make deeper trade and investment commitments than are now possible in the WTO. On the other hand, certain emerging economies, such as Brazil and India, are stimulating South-South agreements under the UNCTAD Global System of Trade Preferences among Developing Countries (GSTP) to further strengthen the already significant trade flows between them,[8] and possibly to consolidate the idea that trade liberalization mechanisms and commitments among developing countries need to observe certain flexibilities, which ultimately would make them not fully compliant with the MFN clause.[9]

1.4 WTO-plus agreements

The scope and geographical reach of RTAs have expanded significantly in recent years. Apart from merely removing tariffs on intra-bloc trade in goods, the newer agreements tend to have deeper coverage. This new generation of RTAs, especially those comprising developed countries, includes more regional rules on investment, competition and standards, as well as provisions on environment and labour. Most of these new agreements also include preferential regulatory frameworks for intra-bloc trade in services (Pal, 2004).

RTAs often also require negotiations in several areas not fully covered by the multilateral system, such as environment, labour, investment and competition policy, among others. Because of their broader range, the trade-related rules in RTAs are known as *WTO-plus agreements*.[10] In this sense, RTAs are considered laboratories for experimentation. When RTAs supply rules in areas not successfully addressed by the WTO, they fill in the gaps (Matsushita and Lee, 2008).

[8] From 1996 to 2006, South-South trade tripled to total US$ 3 trillion (ICTSD, 2010).

[9] For the purpose of fostering South-South trade, a group of developing countries (22, including Brazil, India and Indonesia) reached an agreement aimed at eliminating duties and other barriers to exports among them on 25 November 2009, during negotiations under the GSTP in Geneva. They agreed to reduce import duties on approximately 70 per cent of manufactured and agricultural products each. After the effective adoption of the agreement, each of the participants must establish a list of products eligible to duty reduction and submit them to other participants for negotiation and assessment. This tariff cut shall not be extended to other countries. ICTSD (2010) notes: "the 'preferential margin' seems to be at least 20 per cent lower than the tariffs level applied in accordance with the WTO MFN. As a practical matter, this means that if India's import tariff on spare car parts from the United States is 10 per cent, the same spare parts imported from Brazil will be 8 per cent".

[10] Although there are some WTO rules and agreements in matters of environment – such as the General Exception in GATT's Art. XX – and investment – through TRIMS – the level of regulation of these topics in some RTAs is much deeper.

For example, if the US and the EU succeed in including environmental and labour standards in their RTAs with both developed and developing countries, such provisions may become commonplace and eventually be included in multilateral agreements. If a certain number of WTO Members agree to abide by environmental and labour standards at the bilateral and regional level, it will be easier to achieve consensus on those issues at the multilateral level (Baldwin and Low, 2009).

Another important and critical factor compelling WTO Members to negotiate RTAs is the fear of exclusion and hence the ensuing impact on market access, especially in a post-crisis scenario. As a result of increased bilateralism and regionalism in recent years, countries that remain relatively inactive on the bilateral front face *de facto* discrimination in many key markets. The result is that world trade is being intensified through RTAs rather than through the WTO MFN principle.

This has become commonplace in the world trading system. It is clear that certain countries have been disadvantaged worldwide and are losing commercial space due to an initial scepticism towards RTAs.[11] With the number of RTAs rapidly increasing and with every major trading nation negotiating RTAs with multiple countries, the phenomenon will increase further.[12]

In 1999, even before the explosion of RTAs which followed the failure of the Seattle and Cancun Ministerial Conferences, the WTO estimated that 57 per cent of world trade in goods was covered by RTAs; therefore, less than half of trade in goods was governed by the MFN principle, the cornerstone of the WTO system (Fiorentino *et al.*, 2006).

It now seems unlikely that any country will take a stand against bilateralism; there are simply too many RTAs in force or under negotiation. Refusing to negotiate RTAs would only serve to distance a country from the contemporary dynamics of international trade (Estevadeordal *et al.*, 2008).

Some economists believe that this exclusion from markets, or disadvantage versus competitor nations, is the main reason driving the growth of RTAs. This reasoning is commonly called the "domino effect" of regionalism: the more nations join RTAs, the greater the need for non-partners to negotiate RTAs just to maintain their international trade competitiveness (Baldwin, 1994).

On the other hand, it has also been highlighted that RTAs have the potential to threaten the sustainability of the multilateral trading system. RTAs, by their very nature, are inimical to the MFN principle of the WTO and weaken the predictability of the entire multilateral trading system.

[11] Although MERCOSUR's policy, especially driven by Brazil and Argentina, has until recently placed much more emphasis on multilateral negotiations, members now seem to be willing to embark on regional negotiations to regain access to the markets of countries, including in South America, that have entered into RTAs with the US, EU and China, among others.

[12] For more on the influence of RTA expansion over non-members, see Estevadeordal *et al.* (2008).

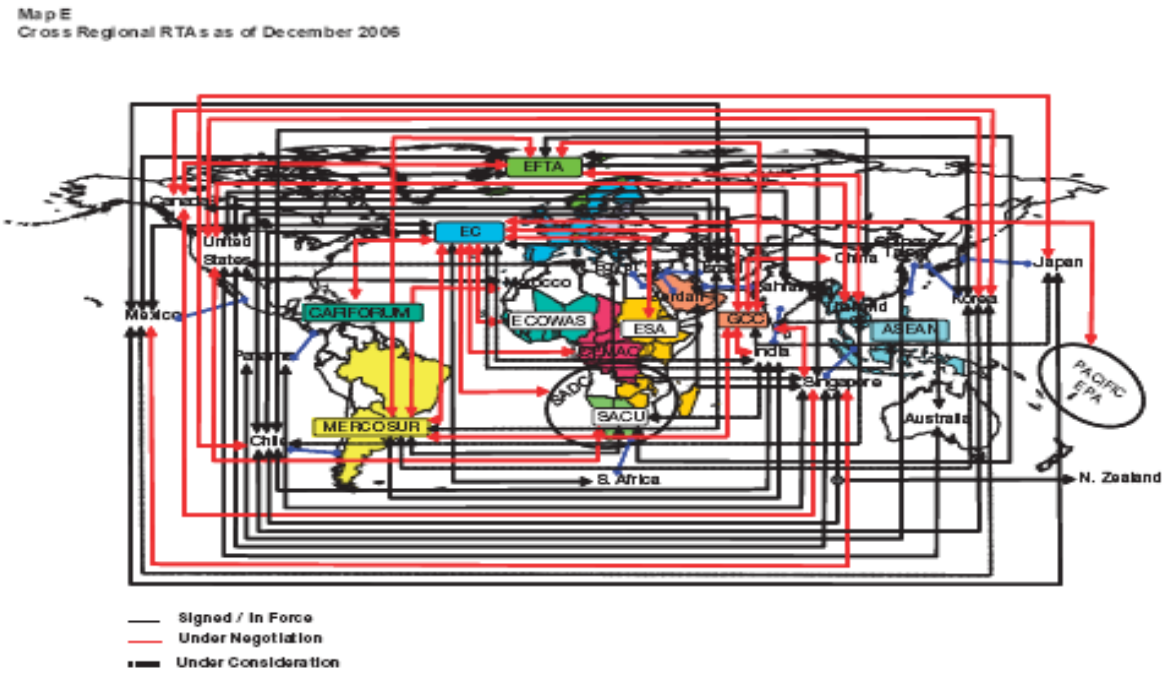
If the number of RTAs continues to multiply, critics contend that the entire foundation of the multilateral system could be weakened. The dividing line between the positive aspects of RTAs and the negative ones is fuzzy indeed.

1.5 The "spaghetti bowl" of rules

From the perspective of the multilateral trading system, another major problem created by the expansion of RTAs is the complexity resulting from the multiplicity of trade agreements in force. Each RTA contains different conditions and obligations that apply to different countries and contexts, a situation that can lead to confusing and conflicting obligations. The variety of standards and rules may erect obstacles to trade facilitation by increasing administrative complexity and creating a "web" of different regulations arising from fragmentation of international trade law within the countries' jurisdictions.

This is a major concern for the international trading community that was referred to by Bhagwati (2000) as a "spaghetti bowl", given the variety of rules and standards in force simultaneously around the world. The map in figure 2 illustrates this scenario.

Figure 2: Cross-regional RTAs



Source: WTO (2006).

A question inevitably arises: Is the world trading system moving away from a non-discriminatory multilateralism towards a more fractured, fragmented system, founded on bilateralism and regionalism? From what is currently emerging, the answer could clearly be "yes". In any event, this in turn begs the question as to whether the growth

of discrimination is a fixed end game or a phase during which trade negotiations are carried out elsewhere but ultimately feed back into the WTO, as Baldwin and Low (2009) suggest.

Compared with multilateral trade negotiations, bilateral and regional trade negotiations for RTAs are generally easier. An RTA is a preferential trading system in which each participant provides concessions to other participants in one way or another. In this sense, an RTA is essentially a discriminatory system *vis-à-vis* outside parties (Jackson, 2002).

The number of RTAs makes one wonder whether in fact RTAs are the rule and the multilateral trading system is the exception. In any event, the uncontrolled proliferation of bilateral and regional agreements may cause erosion of the WTO disciplines and place the effectiveness of the multilateral trading system in jeopardy. In other words, the proliferation of RTAs is a challenge for the future role of multilateral governance. Faced with the fact that there are so many RTAs (and therefore a fragmentation of trade rules) and that multilateral trade negotiations are becoming increasingly difficult, the WTO must learn to live with RTAs. In this regard, an important task for WTO Members is to ensure that WTO disciplines are effectively applied to prevent RTAs from being too exclusive and discriminatory in relation to outside parties.

While RTAs set forth new rules not covered in the WTO and, in this way, can contribute towards the liberalization of trade, this liberalization is partial and preferential, in that it applies only to the RTA participants. This has a mixed impact on the multilateral trading order. It liberalizes trade at least partially where the WTO cannot do so and, in this sense, may increase liberalization of world trade more than would otherwise be the case. However, due to the inequality of conditions among WTO Members arising from the formation of RTAs, trade may be diverted from its most natural flow. Whether advantages engendered by an RTA outweigh its disadvantages depends on the particular conditions of the RTA in question.

Can increased bilateralism and regionalism coexist indefinitely with the multilateral system? The answer to this question is likely to be provided, in part, by the WTO's Committee on Regional Trade Agreements (CRTA) and Dispute Settlement Body (DSB). It is expected that both will be more active in monitoring and enforcing WTO rules on RTAs. As we will see below, a key problem is that the meaning of the relevant provisions is far from clear.

1.6 Consequences for developing countries

Over and above these systemic implications, the core question is whether liberalization through RTAs opens windows for development.

Generally, developing countries may be disadvantaged in negotiating RTAs with developed countries in view of the differences between their economic and human

resources[13] and political influence. In multilateral trade negotiations, developing countries can form coalitions with other developing countries and present a united front *vis-à-vis* developed countries. While negotiating RTAs, however, developing countries, generally speaking, may not be able to rely on such a "collective approach". Consequently, they may be subject to the overwhelming bargaining power of their major trading partners. Another risk for developing countries when negotiating bilateral RTAs is that developed countries may impose high standards on issues like environmental protection and foreign direct investment.

Additionally, powerful developed countries may engage in a "divide and conquer" strategy. The position of developing countries is especially vulnerable in bilateral trade negotiations since developed countries may exploit their superior bargaining power to impose conditions favourable to them and unfavourable to their developing country counterparts. One such condition would be to further reduce the manoeuvring room (or policy space) of developing countries, already substantially diminished by the WTO Agreement on Subsidies and Countervailing Measures, to stimulate their domestic industries' competitiveness through subsidies.

On the other hand, it should also be noted that the goal of expanding RTAs is not to dismantle the multilateral trading system. It is more pragmatic. Nations realized that RTAs would shield them against future protectionist incursions into their particular trading relations because their partners will be legally bound to the commitments expressed in the RTAs. Thus, even if their trading partners are later tempted to succumb to political pressure to increase protectionism, they will be legally prohibited from doing so. This reasoning is particularly persuasive for developing countries to the extent that such agreements guarantee access to large markets and protect smaller nations against any future protectionist actions by larger nations seeking to reverse liberalization.

In brief, an RTA should be considered in the overall context of the economic development objectives of developing countries, and be regarded as a means to improve the economic conditions of developing countries and not an end in itself. The ability of developing countries to adopt trade-related development policies should be preserved even after signing an RTA (Matsushita and Lee, 2008).

Although MERCOSUR is not necessarily a consequence of the last 10-year period of unprecedented RTA proliferation, it has been strongly influenced by the new rules, issues and subjects brought about by that phenomenon. The South American regional integration process has undergone several changes to its institutional and legal structure, liberalization mechanisms and objectives. Instruments and mechanisms aimed at reducing asymmetries between its members were also incorporated into its legal framework. The question arises as to whether MERCOSUR complies with relevant WTO rules.

On the other hand, the lack of a consolidated and consistent pattern and/or model for negotiating RTAs, as evidenced by the recently-negotiated MERCOSUR-Israel and

[13] The lack of human resources in terms of adequately trained negotiators sufficient in number to handle RTAs and WTO negotiations simultaneously is indeed a great disadvantage and a major challenge for developing countries.

MERCOSUR-India RTAs, seems to be one of the major challenges for the bloc in the second decade of the 21st century. The question arises as to whether MERCOSUR will evolve to become a South-South trade cooperation paradigm.

The above two questions are addressed in the following chapters.

2 The WTO legal framework of Regional Trade Agreements

The purpose of this chapter is to describe and analyse the WTO legal framework regulating Regional Trade Agreements. First, we address the legal status of RTAs as an exception to GATT's cornerstone provision – the Most-Favoured-Nation rule. Second, we assess the modalities of several RTAs according to their WTO classification, their main aspects and definitions. Third, we analyse the legal requirements for RTAs under WTO rules, specifically GATT Art. XXIV, the Enabling Clause, and GATS Art. V. Finally, we discuss the surveillance mechanism for the RTAs notified to the WTO, focusing on the evaluation of MERCOSUR under the mechanism, as well as some relevant DSB views concerning MERCOSUR in this respect.

2.1 Regional trade and the MFN rule

The MFN rule is one of the oldest and most important obligations in the area of international economic law. It means that a country must treat other countries at least as well as it treats any "most favoured" country. This rule has been the cornerstone of the multilateral trading system since its earliest days (Lester and Mercurio, 2008). It is regulated by GATT Art. I, paragraph 1 as follows:

> "With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties"

One of the most relevant and increasingly controversial exceptions to the MFN rule is GATT Art. XXIV and its equivalent for services, GATS Art. V.[14] These provisions authorize the concession of trade preferences – in terms of goods and services respectively – through the formation of Customs Unions (CUs) and Free Trade Areas (FTAs).

[14] Apart from the exception for RTAs, there are also exceptions referring to heath, environment, public morals, as well as exceptional treatment for developing and least-developed countries.

The concept of a trading preference is instrumental for understanding the relationship either between RTAs and the MFN principle or between the General System of Preferences (GSP) and other unilateral, non-generalized preferential schemes and MFN.

By definition, a *positive* preference is a trading advantage being offered to one or more territories. It is preferential and therefore conflicts with MFN because the treatment is not being likewise accorded to *all other* WTO Members. The same conflict occurs with a *negative* preference, under which the MFN treatment being accorded to all other parties is denied to one or more of them.

Historically, MFN has been viewed as a means of protecting the interests of smaller and weaker territories in the trading system, since their lack of commercial policy power would otherwise invite less preferential treatment when they could not impose reciprocal conditions on their larger trading partners, or be included in preferential systems that larger and more powerful GATT contracting parties could establish. At the same time, MFN has also been viewed as an instrument favouring larger producing territories, since it guarantees a right of access to other territories' resources, including smaller and weaker territories in the trading system. Both elements are present in the historical justifications for MFN (Tenier, 2003).

With MFN established in the GATT, the question of its practical scope of application in global commercial policy depends upon how broadly or how narrowly the exceptions to MFN are drafted and subsequently how they are applied in commercial practice. The overall impact of MFN in the system depends upon the resulting legal architecture that is established between the principle and the exceptions that are allowed by which to deviate from it in the establishment of RTAs and other preferential systems. This relationship between MFN and RTAs is understood by examining both the substantive rules, as well as the institutional controls that are provided to ensure compliance.[15]

While the GATT RTA exception in Art. XXIV for CUs and FTAs is not the only exception to MFN, it is probably the most important "rule and exception" relationship in the multilateral trading system, since it serves to define the role and functioning of the system itself in international trade.

The rise of RTAs, with their inherent discriminatory qualities, led many to question whether they might undermine the multilateral trading system. This resulted in the formation of the WTO Committee on Regional Trade Agreements, which was established in 1996 to examine individual RTAs and consider whether they were systematically compatible with multilateralism (Baldwin and Low, 2009).

[15] The GATT *rationale* in commercial policy practice was to generally prohibit the use of quantitative restrictions in international trade (GATT Art. XI) in favour of the use of tariff duties (import taxes) as the permitted form of legal economic protection (GATT Art. II). The GATT then established that the tariff duties of the contracting parties would operate according to MFN (GATT Art. I). Thus, any benefit or privilege that is accorded by any GATT party to any other state or territory would be required to immediately and unconditionally extend that same benefit to all other GATT contracting parties (Jackson, 2002).

Not all RTAs are alike. The literature has varied over time and has been very imprecise in describing and differentiating them.[16] According to the WTO, RTAs can be classified as FTAs, CUs, Preferential Trade Agreements (PTAs) or Economic Integration Area (EIAs).[17] Under this typology, the status of notifications of RTAs to the WTO as of August 2010 was the following.

Table 1: Number of RTAs in force by legal basis

Legal Basis	**Total**
GATT Art. XXIV (FTA)	158
GATT Art. XXIV (CU)	15
Enabling Clause	30
GATS Art. V	82
Total	**285**

Source: WTO RTA database (2010).

Table 2: Number of RTAs in force by modality

	Enabling clause	**GATS Art. V**	**GATT Art. XXIV**	**Total**
Customs Union	6	-	15	21
Economic Integration Agreement	-	82	-	82
Free Trade Agreement	9	-	158	167
Preferential Trade Agreement	15	-	-	15
Total	**30**	**82**	**173**	**285**

Source: WTO RTA database (2010).

2.2 GATT Article XXIV

Art. XXIV of the GATT establishes the basis for allowing RTAs as an exception to the MFN requirement. Under Art. XXIV, there are two types of RTAs: FTAs and CUs.

An FTA is an arrangement through which members establish the obligation to eliminate tariffs and non-tariff barriers for products imported from other FTA members. In short, an FTA is an area in which there are no tariffs or non-tariff barriers on "substantially all the trade" between the constituent countries, but each country is free to establish its own tariff and non-tariff barriers with respect to the rest

[16] See, for example, Balassa's (1961) classic taxonomy of stages of regional integration.
[17] See the WTO RTA database for classification, criteria and reports associated with RTAs at: http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx.

of the world. Approximately 70 per cent of the RTAs that have been notified to the WTO are FTAs (Neumann, 2009).

An FTA is defined by Art. XXIV: 8(b) of GATT:

> "A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories."

In a Customs Union, there are again no tariffs on trade within the participating countries, but for each product category there is a common tariff applied by each country *vis-à-vis* the rest of the world. This is usually referred to as the Common External Tariff (CET). About 8 per cent of RTAs currently in force are CUs, including MERCOSUR, the Andean Pact, the Central American Common Market (CACM) and the Southern African Customs Union.

A CU is defined by Art. XXIV: 8(a) of GATT:

> "[A] customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that:
> (i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and,
> (ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the Members of the union to the trade of territories not included in the union."

Art. XXIV establishes four basic rules with which WTO Members must comply in order to establish an RTA with regards to trade in goods. The first is a procedural requirement: (1) to *notify the WTO* of the RTA for a subsequent review by the CRTA. The second and third rules are substantive in nature: (2) *an external trade requirement*, which obliges RTA members not to raise the overall level of protection and make access for products more onerous than that before the RTA, and; (3) *an internal trade requirement* that establishes the obligation to liberalize substantially all trade between members of the RTA. The last rule, (4) *reasonable period of time*, determines the maximum length of time for finalizing the implementation of the RTA.

During the Uruguay Round, negotiators agreed to consolidate their understanding of the interpretation of Art. XXIV provisions in a document entitled “The Understanding on the Interpretation of Article XXIV of the GATT 1994” (henceforth, “the Understanding”). It forms the basis for interpreting Art. XXIV, and its provisions

need to be read side by side with Art. XXIV paragraphs, due to the level of detail they provide. Reference to the Understanding is made as appropriate below.[18]

Rule 1: Obligation to notify

WTO Members desiring to enter into an RTA covering trade in goods must notify the Council of Trade in Goods of their intention, which transfers the notification to the CRTA to examine the RTA for its compatibility with WTO rules. The dynamics of these examinations are further analysed below.

The question arises as to whether the notification must be presented before or after the formation of an RTA: Must it be *ex ante* or *ex post*? The majority of RTAs have been notified to the GATT/WTO after their successful completion. This seems to violate the spirit of Art. XXIV: 7(a) of the GATT. What was originally intended to be an *ex ante* review has become an *ex post* review (Thortensen, 2002).

Rule 2: External trade requirement

The second rule – the external trade requirement – changes under Art. XXIV:5 depending on whether the RTA is an FTA or a CU.

According to Art. XXIV: 5(b), when entering into an FTA, parties may not alter their external protection in such a manner as to adversely affect non-FTA parties. The rationale for this rule is simple: FTAs are meant to facilitate trade liberalization; therefore, an FTA must be structured in terms of removing trade barriers between FTA participants instead of increasing trade barriers with non-participants.

This same requirement is more complicated when it comes to a CU. According to Art. XXIV: 5(a) two main requirements must be fulfilled: (i) not to raise the overall level of external protection above a certain threshold; and (ii) to make compensatory adjustments when the customs duties in some CU participants have been raised to create harmonized external tariffs.

Rule 3: Internal trade requirement

The internal trade requirement is unquestionably one of the most controversial provisions of Art. XXIV. Paragraphs 8(a) and (b) provide for the elimination of duties and other restrictive regulations of commerce with respect to "substantially all the trade" between members of RTAs.

[18] According to its Preamble, the Understanding on the Interpretation of Art. XXIV was required, *inter alia,* to "reinforce the effectiveness of the role of the Council for Trade in Goods in reviewing agreements notified under Art. XXIV, by clarifying the criteria and procedures for the assessment of the new or enlarged agreements, and improving the transparency of all Art. XXIV agreements," and "the need for a common understanding of the obligations of Members of paragraph 12 of Art. XXIV." Art. XXIV: 12 establishes that each "contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories".

Throughout the years, members have not been able to agree on the meaning of "substantially all the trade" or "other restrictive regulations of commerce". The task of defining operationally the rule of liberalizing "substantially all the trade" has been very difficult since the 1960s, both for GATT/WTO working groups and the Appellate Body (AB) and during Ministerial negotiations.[19]

Rule 4: Reasonable period of time

The forth rule is settled in Art. XXIV: 5(c) of GATT and the Understanding. In GATT there is a term requirement that any interim agreement referred to in subparagraphs (*a*) – for a customs union – and (*b*) – for an FTA – shall include a plan and schedule for the formation of such a CU or FTA within a reasonable period of time. To clarify this article, the Understanding established that a "reasonable period of time" shall be construed as not more than ten years.

2.3 Regional trade and development: the Enabling Clause

The relation between RTAs and development was never clear in the early days of GATT. In fact, the relation between trade and development as a whole was only formed in legal terms in the multilateral trading system in 1965, with the insertion of Part IV of GATT, entitled "Trade and Development".[20]

Under Part IV, a fundamental principle of the multilateral trading system was created: the principle of *non-reciprocity*. It was just a matter of time until this principle was extended to RTAs involving developing countries.

Until 1979, the year in which the Enabling Clause was established, several developing countries resorted to Part IV of GATT to justify RTAs that were not consistent with Art. XXIV. The main rule not observed by these RTAs between developing countries, due to the high asymmetries in the intra-trade area, was Art. XXIV: 8(a) and (b), which demanded the liberalization of "substantially all the trade". The non-reciprocity principle provided the basis for RTAs involving developing countries' liberalization to be carried out in "substantially part of the trade" – the part that benefits developing countries (Feuer and Cassan, 1985).

The Enabling Clause, formally known as "Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries", was adopted on 28 November 1979 as part of the Tokyo Round, which had begun in

[19] Most recently, Australia submitted a proposal in the Doha Round negotiations to conceptualize "substantially all the trade" as a quantitative component and proposed it as 95 per cent of all six-line tariff lines listed in the Harmonized System (Lester and Mercurio, 2008).

[20] The integration of Part IV to GATT was the result of a worldwide movement of developing countries which had identified that the continued dependence of a number of LDCs on the exportation of a limited range of primary products would maintain these countries in a condition of under-development. Under this perspective – known as Dependency Theory – there was a need to provide in the largest possible measure more favourable and acceptable conditions of access to world markets for these countries, thus permitting an expansion of world trade and demand and a dynamic and steady growth of the real export earnings of these countries, so as to provide them with resources for their economic development.

1973. It represented the systematic legalization of commercial preferences, under the principle of Special and Differential Treatment (S&D). The Enabling Clause comprises: (a) the Generalized System of Preferences; (b) non-tariff measures in GATT instruments; (c) global or regional arrangements among developing countries, and (d) special treatment for the least developed countries (LDCs).

According to the WTO's official classification, an RTA notified under the Enabling Clause is defined as a Preferential Trade Agreement. A PTA is a type of RTA in which countries offer preferential access to goods, and possibly services, to their partners. Preferential access need not necessarily cover all goods, nor entail the complete removal of tariffs where preferences are granted. PTAs therefore need not offer symmetric access across the partner countries.[21]
PTAs have two main characteristics: (i) they are based on the principle of non-reciprocity, which allows developing countries not to reduce tariffs to the same extent as the developed countries; (ii) according to the principle of S&D, the concessions granted by developed countries to developing countries in a PTA are not automatically extended to other WTO Members.

A PTA is defined by paragraph 2(c) of the Enabling Clause:

> "Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another".

As highlighted by Manin (1997), a paradigmatic example of a PTA can be seen in the EU's trading relationships with the African, Caribbean and Pacific Group of States (ACP) under the Lomé and Cotonou agreements. Under these agreements, the EU granted preferential access on most exports by ACP states, while ACP states retained their tariffs on EU exports.[22]

Paragraph 3 of the Enabling Clause defines the conditions for these RTAs to be considered in compliance with GATT/WTO rules:

> "Any differential and more favourable treatment provided under this clause:
> *(a)* shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties;
> *(b)* shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation basis;
> *(c)* shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries".

[21] The term PTA is sometimes used erroneously to include the more ambitious FTA and CU concepts. Art. XXIV of the GATT in principle forbids PTAs that fall short of being FTAs or CUs.
[22] For more about EU's external trading relations see Manin (1997). For the complete text of the Lomé and Cotonou agreements see: http://ec.europa.eu/development/geographical/regionscountries_en.cfm.

Finally, according to the general GATT principle of transparency, paragraph 4 establishes the obligation to notify the agreement to the CRTA.

2.4 Integration beyond trade in goods: GATS Article V

Rules for RTAs that refer to trade in services were established under GATS. According to GATS, these RTAs are called Economic Integration Areas.

An EIA is defined by GATS Art. V(b) as an agreement that has substantial sectoral coverage and provides for the absence or elimination of substantially all discrimination, in the sense of Art. XVII, between or among the parties, in the sectors covered by GATS, through the elimination of existing discriminatory measures, and/or prohibition of new or more discriminatory measures.

Essentially similar to Art. XXIV of GATT, Art. V of GATS establishes four basic rules with which WTO Members must comply in order to establish an EIA:

Rule 1: Obligation to notify

WTO Members that wish to approve or modify an EIA must notify the Committee on Regional Trade Agreements, through the Council for Trade in Services (CTS), to which the members of the EIA must provide any information the CTS finds relevant in the process of examining its compliance with GATS rules.

The controversy about when this notification must occur is similar to the interpretation of Art. XXIV of the GATT: Shall the notification be *ex ante* or *ex post*? The rule in Art. V:7(a) sets forth that the notification be done promptly. There is no precise definition of this term. Some maintain that it should respect a term of 90 days – the same as that established under Art. XXVIII of GATT for giving notification of any modification to schedules. The CTS and WTO Members have still not resolved the issue.[23]

Rule 2: Intra-RTA trade requirements

Art. V:1 defines the obligations that must be observed in terms of intra-RTA trade for the RTA to be considered an EIA in compliance with WTO rules. The article regulates internal trade on services through two basic concepts: "substantial sectoral coverage" (in Art. V:1(a)) and "elimination of substantially all discrimination" (in Art. V:1(b)).

According to the footnote of GATS Art. V:1(a), the concept of “substantial sectoral coverage” is understood in terms of a number of sectors, volume of trade affected and modes of supply. However, the concept of the “elimination of substantially all discrimination” has no clarification or official interpretation.

[23] To see the actual debate on the interpretation of the RTA rules, see the documents of the Negotiating Group on Rules (NGR) at: http://www.wto.org/english/tratop_e/region_e/region_negoti_e.htm.

The central uncertainty around this paragraph is the meaning of "substantially all" and consequently the possibility of implementing discriminatory measures in an EIA. To what extent are these exceptions allowed? This remains an open question and there is no relevant WTO jurisprudence in this regard (Thortensen, 2001).

Finally, another important aspect related to internal trade under an EIA refers to the observance of the national treatment principle in terms of trade in services. Art. V:6 governs the extension of national treatment to legal entities originating in a Member other than the EIA parties. The rule is not conclusive about the national establishment conditionality and also refers to the fact that the enterprise in question engages in "substantial business operations", another vague concept that has not been clarified by the CTS.

Rule 3: Trade requirements vis-à-vis non-Members

In this regard, there are two requirements, provided under GATS Art. V:4 and 5: (1) the agreement shall not increase or restrict trade with non-RTA signatories in sectors or subsectors that are not original to parties of the EIA; (2) if an adjustment of a Member's list of commitments is necessary because it joined the EIA, the Member shall provide notification of these modifications within 90 days.

Rule 4: Reasonable length of time

As analysed above, Art. V:I(b) determines that any EIA should enter into force within a reasonable timeframe. Some Members argue that the timeframe for EIAs is the same as for FTAs and CUs, established in Paragraph 3 of the Understanding of Art. XXIV, namely that the reasonable timeframe should not be longer than ten years.

Rule 5: Agreements involving developing countries

Finally, GATS Art. V:3 contains important provisions addressing developing countries. It distinguishes between two types of agreement: those that comprise developed and developing Members (V:3(a)) and those that comprise only developing Members (V:3(b)).

2.5 WTO surveillance of RTAs

During the GATT years, the examination of agreements was conducted by individual working parties. The establishment of the Committee on Regional Trade Agreements in February 1996 by the WTO General Council, as the single body responsible for examining RTAs, helped streamline the examination process and provided a forum for the discussion of crosscutting systemic issues which are common to most, if not all, agreements. The CRTA's two principal duties are to examine individual regional agreements and to consider the systemic implications of RTAs for the multilateral trading system and its relationship to them.

RTAs falling under Art. XXIV are notified to the Council for Trade in Goods (CTG), which adopts the terms of reference and transfers the agreement to the CRTA for

examination. The notification of agreements falling under the Enabling Clause is made to the Committee on Trade and Development (CTD). RTAs covering trade in services, whether concluded by developed or developing WTO Members, are notified to the Council for Trade in Services.

In 2006, the General Council established, on a provisional basis, a new transparency mechanism for all RTAs. It provides for the early announcement and notification of any RTA to the WTO. Accordingly it allows Members to consider the notified RTAs on the basis of a factual presentation by the WTO Secretariat.

The procedures of the new transparency mechanism, according to the 2006 General Council Decision (WT/L/671), are the following:

Early Announcement: Members participating in new negotiations aimed at the conclusion of an RTA should inform the WTO Secretariat of such negotiations. Members which are parties to a newly signed RTA should send to the Secretariat information on the RTA, including its official name, scope, date of signature, any foreseen timetable for its entry into force or provisional application, relevant contact points and/or website addresses, and any other relevant unrestricted information.

Notification: The notification of an RTA by Members should take place as early as possible, in general no later than the parties' ratification of the RTA or any party's decision on the application of the relevant parts of an agreement and before the application of preferential treatment between the parties. Parties should specify under which provision(s) of the WTO agreements the RTA is notified and provide the full text and any related schedules, annexes and protocols.

Procedures to Enhance Transparency: The consideration by Members of a notified RTA shall be normally concluded within one year after the date of notification. The WTO Secretariat will draw up a precise timetable for the consideration of the RTA in consultation with the parties at the time of the notification.

Factual Presentation: The WTO Secretariat's factual presentation, as well as any additional information submitted by the parties, is to be circulated in all WTO official languages so that Members' written questions or comments on the RTA under consideration can be transmitted to the parties through the Secretariat.

Subsequent Notification and Reporting: Any changes affecting the implementation of an RTA, or the operation of an already implemented RTA, should be notified to the WTO as soon as possible after changes occur. The parties should provide a summary of the changes made, as well as any related texts, schedules, annexes and protocols, in one of the WTO official languages and, if available, in electronic format.

Preparation of Factual Abstracts: Article 22(b) of the transparency mechanism calls for a factual abstract to be prepared by the Secretariat to present the features of RTAs for which the CRTA has concluded the "factual examination".

The status of examinations as of August 2010 is the following:

Table 3: Status of examinations of RTA notifications

	Enabling Clause	GATS Art. V	GATT Art. XXIV	Total
Factual Presentation in preparation	7	25	63	95
Factual Presentation on hold	0	3	0	3
Factual Presentation distributed	4	33	50	87
Factual Abstract in preparation	8	5	10	23
Factual Abstract distributed	3	16	32	51
Report adopted	1	0	17	18
No report	8	0	0	8
Grand total	31	82	172	285

Source: WTO RTA database.

2.6 MERCOSUR's assessment under WTO rules

In 1992, MERCOSUR was notified to the former CTD, which established a working party in 1993 with the following objective:

> "To examine the Southern Common Market agreement (MERCOSUR) in the light of the relevant provisions of the Enabling Clause and of the General Agreement, including Article XXIV and to transmit a report and recommendations to the committee for submission to the contracting parties, with a copy of the report transmitted as well to the council. The examination in the working party will be based on a complete notification and on written questions and answers" (GATT/AIR/3545, 1994).

From a regional perspective, MERCOSUR was negotiated as Economic Complementation Agreement (ACE) No. 18 under the Latin American Integration Association's (LAIA) framework.[24] As a broader RTA, LAIA has been in force since 1980 and was notified to the GATT when the Enabling Clause came into force (GATT/ L/5342, 1982). MERCOSUR's legal status at the time of its notification in 1992 was as a sub-regional RTA falling under Art. XXIV, to the extent that its purpose was to form a Customs Union under the Enabling Clause (LAIA's legal basis under GATT) (GATT/L/0744, 1992).

Sometime later, prior to assessing MERCOSUR's compliance with WTO rules, the CTD decided that such an RTA would need to simultaneously fulfil the requirements of both the Enabling Clause and the provisions of Art. XXIV (WT/COMTD/5/Rev.1, 1995).

[24] LAIA's signatories are Argentina, Bolivarian Republic of Venezuela, Bolivia, Brazil, Chile, Colombia, Cuba, Ecuador, Mexico, Paraguay, Peru and Uruguay. The legal texts and agreements signed under LAIA are available at: http://www.aladi.org/nsfaladi/textacdos.nsf/vaceweb.

After four CTD meetings, MERCOSUR's preliminary evaluation – called a factual examination – was concluded in 2006. According to Prazeres (2008):

> "The large amount of rules and exceptions, as well as the implementation deficit, were important factors which delayed the conclusion of this elementary phase […]. During the debates, the maintenance of the automobiles and sugar regimes – set aside from the trade liberalization rules – motivated most of the questions and replies".

One of the concluding documents of this phase was the publication in 2005 by the WTO Secretariat of MERCOSUR's weight average tariff rates and customs duties (WT/CMYD/1/Add15, 2005). This report is central to the RTA's examination because it comprised a comparative evaluation of trade barrier levels before and after the RTA came into force.[25]

In MERCOSUR's case, the factual evaluation was favourable, as the table below demonstrates.

Table 4: MERCOSUR's weight average tariff rates and customs duties

	Pre-Customs Union	1995 applied tariff rates	CET 2006
Weighted average tariff rates (per cent)	12.5	12.0	10.4
Average customs duties (million US$)	4,768	4,545	3,945

Source: WTO Secretariat (2005).

Having concluded the factual examination based on the new transparency mechanism procedures described in section 3.5 above, the CTD is currently examining MERCOSUR's compliance with Art. XXIV and the Enabling Clause, and is due to complete its assessment shortly with the presentation of a full report.

More recently, MERCOSUR was notified to the WTO pursuant to Art. V of GATS (WT/S/C/N/388, 2006) and is still in the stage of preparing its factual presentation to be submitted to the CRTA (WT/REG/20, 2009).

The CRTA has been criticized for its ineffectiveness.[26] Its lack of dynamism and objectivity in assessing RTAs is seen as its major problem: it has been unable to fill the vital gap in setting rules and directions for RTA proliferation. The difficulties experienced by the CRTA were recognized in its own 2009 report:

[25] In fact, at the final CTD meeting after this report, MERCOSUR's member delegations argued that, if the Secretariat, used the pre-Asunción Treaty years (1991) instead of the pre-CU years (1992 to 1994), MERCOSUR's evolution would be much higher. In this period, the weighted average tariff rates were over 18.34 per cent in Argentina, 20.73 per cent in Brazil, 14.09 per cent in Paraguay and 23.40 per cent in Uruguay (WT/COMTD/1/Add.16, 2006).

[26] It must be stressed that such inefficiency is partly due to the vagueness of GATT (Art. XXIV and Enabling Clause) and GATS provisions related to the formation and rules of RTAs.

> "Although considerable progress has been made in the preparation of factual presentations, the Committee continues to experience some difficulties in adhering to its work programme. This is due to a number of factors: delays in the receipt of statistical data from parties, data discrepancies in Members' submissions, and delays in the receipt of comments from parties. The Secretariat is working actively with the parties concerned in an effort to overcome these difficulties" (WT/REG/20, 2009).

In any event, the transparency mechanism in force since 2006 has permitted a more extensive dialogue between RTA parties and the CRTA. As can be seen in the procedures around MERCOSUR's consideration under WTO law, it has had a reasonable communication with the CRTA, which improved the CRTA's ability to conclude its assessment of whether MERCOSUR rules are WTO compatible or not. Nevertheless, the fact remains that, after almost 20 years since its notification, the examination of MERCOSUR has not yet been concluded. Therefore, there is still no official and definitive WTO conclusion as to MERCOSUR's legality under RTA rules.

2.7 Relevant WTO jurisprudence on RTAs for MERCOSUR

While the CRTA has thus far failed to effectively analyse the almost 500 RTA notifications received, the WTO Dispute Settlement Body, through the Panel and the Appellate Body, has made a few – but significant – rulings regarding the compatibility of RTAs with WTO rules.

The leading WTO case on RTAs is *Turkey-Textiles* (DS34), in which some clarification on Art. XXIV provisions was provided. Additionally, the legal implications of the CRTA review procedure and the competence of the DSB to analyse the compatibility of notified RTAs were also addressed.

The case concerned a claim lodged by India against Turkey, which had imposed quantitative restrictions on Indian textiles alleging that they were necessary to fulfil its obligations under the European Community (EC)-Turkey Customs Union Agreement.[27] In Turkey's view, since the EC maintained its own set of quotas on India's textile products, the imposition of quotas was required as per paragraph 8 of Art. XXIV, which provides that CU members must apply substantially the same duties and other regulations of commerce to the trade of non-members. The panel found, however, that these quotas were not covered by the WTO Agreement on Textiles and hence were inconsistent with GATT Art. XI (*General Elimination of Quantitative Restrictions*).

Moreover, according to the panel, Art. XXIV could never be used to validate an exception for an unlawful quantitative restriction. The panel's finding was not upheld by the Appellate Body. The AB ruled that, in principle, Art. XXIV could be used to validate any GATT article violation provided that two conditions were met: "(i) that

[27] For the EC-Turkey agreement, see: http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/turkey/.

the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraph 8(a) and 5(b) of Art. XXIV;" and "(ii) the party must demonstrate that the formation of customs union would be prevented if it were not allowed to introduce the measure at issue". It is incumbent on the interested party to prove the need for any such measure.

As stated by UNCTAD (2008: 70):

> "This leading case has a significant impact on the legal security of RTAs in all those cases where there has been no definitive report or recommendation from the CRTA as to the compatibility of an RTA with Article XXIV, as well as GATS Article V. In essence, the burden of proof has been altered where previously regional parties held that once notified, if the consensus procedures of paragraph 7 did not result in a negative recommendation, the RTA was essentially legally secure from any later challenges. Arguably, the reverse is true now. In the failure to obtain a positive recommendation from the GATT and GATS specific councils, a regional member invoking its Article XXIV defence must be in the position (with the burden of proof) to demonstrate that its agreement is lawfully qualified under WTO law in a panel proceeding".

This was the first dispute submitted to the DSB for the analysis of the legality of a notified RTA, whose evaluation has yet to be concluded. This is exactly the current status of MERCOSUR. Another reason for conferring importance to this case for an analysis of MERCOSUR is the double condition test set out by the DSB. These criteria were applied by the DSB on both cases that involved MERCOSUR: the 1998 *Argentina-Footwear* case and the 2002 *Brazil-Retreated Tires*, which are examined below.

In the *Argentina-Footwear* case (DS121), regarding safeguard measures within the scope of RTAs, the DSB addressed the issue of their compatibility with WTO rules. In 1998, the EC questioned the legality of the definitive safeguard measures imposed by Argentina over the import of footwear originating from all WTO Members except MERCOSUR countries. Argentina alleged that, according to GATT Art. XXIV and the Agreement on Safeguards,[28] it was authorized to exclude MERCOSUR's members from these restrictions in view of their CU commitments.

However, the EC raised the issue that, when Argentina's investigation took place, it had also taken into consideration imports from MERCOSUR. Argentina decided to exclude those imports from the application of safeguard measures only at a later stage.

[28] The specific legal basis of this case is the footnote of Art. 2 of the Agreement on Safeguards, which states: "A customs union may apply a safeguard measure as a single unit or on behalf of a member State. When a customs union applies a safeguard measure as a single unit, all the requirements for the determination of serious injury or threat thereof under this Agreement shall be based on the conditions existing in the customs union as a whole. When a safeguard measure is applied on behalf of a member State, all the requirements for the determination of serious injury or threat thereof shall be based on the conditions existing in that Member State and the measure shall be limited to that Member State. Nothing in this Agreement prejudges the interpretation of the relationship between Art. XIX and paragraph 8 of Art. XXIV of GATT 1994".

Moreover, the EC and other third parties, such as Indonesia and the US, argued that these definitive safeguard measures were not imposed by the CU, i.e. MERCOSUR, but solely by Argentina, which would prevent them from being based on Art. XXIV and the WTO Agreement on Safeguards. Indonesia and the US went even further by arguing that MERCOSUR had not been notified under Art. XXIV, as its members have chosen to give notification only under the Enabling Clause. Therefore, in their view, MERCOSUR would not be eligible to invoke the status of a CU under Art. XXIV and the footnote of Art. 2 of the Agreement on Safeguards.

The DSB confined itself to analyzing specifically matters of the Agreement on Safeguards and avoided addressing directly the compatibility of MERCOSUR with Art. XXIV and the Enabling Clause. According to the panel:

> "Argentina, on the facts of this case, cannot justify the imposition of its safeguard measures only on non-MERCOSUR third country sources of supply on the basis of an investigation that found serious injury or threat thereof caused by imports from all sources, including imports from other MERCOSUR member States" (WT/DS121/R, 1999).

The AB upheld the panel's findings that:

> "Based on the Agreement on Safeguards, a safeguard measure must be applied to the imports from "all" sources from which imports were considered in the underlying investigation, Therefore, Argentina's investigation was found inconsistent with the agreement since it excluded imports from MERCOSUR from the application of its safeguard measure while it had included those imports from MERCOSUR in the investigation" (WT/DS121/AB/R, 2000).

Although the DSB has not examined MERCOSUR under the WTO's legal framework on RTAs, this can be deemed a landmark ruling for MERCOSUR for two reasons. First, and most important, is the implicit conclusion by the DSB that MERCOSUR, although formally notified under the Enabling Clause, is, *de facto* and *de jure*, an RTA falling under Art. XXIV. The DSB did not state this expressly, but when it analysed MERCOSUR under the Agreement on Safeguards, it implicitly extended the rights and obligations of Art. XXIV to the CU notified under the Enabling Clause.

Therefore, the argument by the US and Indonesia was not taken into consideration. From this case on, it is valid to say that if Art. XXIV is the "gender" of RTAs, the agreements falling under the Enabling Clause are "species". The rules of Art. XXIV apply to all RTAs, even those notified under the Enabling Clause.

A second and also crucial consequence of this decision is that it was a major push forward in the evolution of MERCOSUR's common trade policy. From there on, MERCOSUR was compelled to establish a common trade defence policy, conducted by the CU and not by individual member states.

The second DSB case concerning MERCOSUR was the *Brazil-Retreated Tires* dispute (DS332). Although it gave the DSB an opportunity to assess MERCOSUR's

compliance with RTA rules, it did not do so and, once again, avoided making an objective and definitive decision over MERCOSUR's legality.

This case, initiated in 2002 by the EC against Brazil, involves matters of environment and public health combined with regional integration. Essentially, it is concerned with a Brazilian trade policy that banned imports of retreated tires from all over the world, while it allowed the import of such tires that originated from MERCOSUR.

According to the EC, the measure was a violation of the MFN and represented a quantitative restriction of its exports, which is incompatible with WTO rules. Brazil alleged that the import of huge quantities of retreated tires had severe environmental impacts in Brazil and that the quantitative restrictions were justified under GATT Art. XX (b) *General Exceptions*:

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: […] (b) necessary to protect human, animal or plant life or health".

At the same time, Brazil's line of defence had to combine these arguments with its obligations under MERCOSUR to justify its discriminatory treatment. Here, the main argument was that Brazil was simply following a decision under MERCOSUR's own dispute settlement system, which had determined that the country should eliminate all barriers on imports of retreated tires from MERCOSUR. For this reason, Brazil had modified its trade policy for retreated tires and allowed tyre imports only from MERCOSUR partners.

The DSB, in the end, condemned Brazil's measure by invoking the rationale of the *Turkey-Textiles* case, even though the decision was not based on Art. XXIV. Although it understood that Art. XX's rationale is necessary for international trade, according to the double test set by *Turkey-Textiles*, the "specific measure cannot constitute an unjustified or arbitrary discrimination between countries with the same conditions" (WT/DS332/AB/R, 2007).

The AB maintained that the measure constituted "an unjustified or arbitrary discrimination" because the justification was not related to the objective of the measure – the protection of human, animal or plant life or health. If Brazil continued to import retreated tires from MERCOSUR, this objective would be undermined. Art. XX's rationale was not met. The AB's main findings were that:

> "In our view, the ruling issued by the MERCOSUR arbitral tribunal is not an acceptable rationale for the discrimination, because it bears no relationship to the legitimate objective pursued by the Import Ban that falls within the purview of Article XX(b), and even goes against this objective, to however small a degree. Accordingly, we are of the view that the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination" (WT/DS332/AB/R, 2007).

The DSB thus once again based its ruling on an exception rule – Art. XX – and did not analyse MERCOSUR under Art. XXIV.

Reference should also be made to another dispute brought to the DSB, which, despite not being ruled based on Art. XXIV, established further guidelines for interpreting the Enabling Clause and is therefore relevant for MERCOSUR, namely the *EC-GSP* case (DS246).

The panel was established in 2003 to assess India's complaint against EC regulations granting differentiated tariff preferences to developing countries under a GSP framework. India sustained that, under the European GSP, there were five specific subsystems, each with different tariff preferences and respective beneficiaries. India challenged specifically the EC Drug Arrangement alleging that it failed to comply with the MFN principle to the extent that some developing countries received additional tariff benefits and others did not. Essentially, the DSB was requested to rule on the validity of the MFN principle in a GSP scheme.

The main provision of the Enabling Clause invoked by India was footnote 3 of paragraph 2, which states that:

> "Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences [shall be established observing] generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries".[29]

According to India, the discrimination against it under the European GSP scheme was inconsistent with the Enabling Clause.

The AB interpreted this provision of the Enabling Clause based on the preamble to the WTO, by which, first, "there is a need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth of international trade *commensurate* with the needs of their economic development"; and, second, WTO Members shall "enhance the means for doing so in a manner consistent with their respective needs and concerns at *different* levels of economic development" (Marrakesh Agreement, 1994: Preamble).

The DSB ruled that, although the preamble to the WTO allows for differential treatment according to the different levels of Members' economic development, such treatment should be granted pursuant to objective and positive standards. The DSB condemned the European GSP by ruling that:

> "The term "non-discriminatory" in footnote 3 does not prohibit developed-country Members from granting different tariffs to products originating in different GSP beneficiaries, provided that such differential tariff treatment meets the remaining conditions in the Enabling Clause. In granting such

[29] The Enabling Clause, formally known as the "Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries", was adopted on 28 November 1979 as part of the Tokyo Round.

> differential tariff treatment, however, preference-granting countries are required, by virtue of the term "non-discriminatory", to ensure that identical treatment is available to all similarly-situated GSP beneficiaries, that is, to all GSP beneficiaries that have the "development, financial and trade needs" to which the treatment in question is intended to respond" (WT/DS246/AB/R, 2004).

Although the *EC-GSP* case is not directly related to MERCOSUR, it constitutes relevant jurisprudence since it was also legally founded in the Enabling Clause. The DSB ruling concerning this dispute may be a fundamental guideline for future MERCOSUR regulations, especially when establishing preferential arrangements with specific developing countries under the South-South agreements framework, such as the MERCOSUR-SACU and MERCOSUR-India agreements, which are analysed in section 5 below.

Two major conclusions can be drawn from this section. One refers to the lack of official and definitive statements about MERCOSUR's compliance with WTO law. Both the CRTA and the DSB had the possibility to express their opinions on the matter but failed to do so. As a consequence of this first conclusion, a second and broader conclusion must also be drawn. In more than 400 cases submitted to the DSB only *one* was directly assessed and ruled upon based on Art. XXIV – the *Turkey-Textiles* case.

A key reason for the absence of DSB rulings on RTA rules is the *glass rooftop syndrome* (Prazeres, 2008). This means that a country avoids questioning other countries' RTA initiatives because it is itself involved in a potentially challengeable RTA. Evidence of this is that, since the *Turkey-Textile* case, no WTO Member has questioned another for its involvement in an RTA.

Another structural reason for the absence of objective decisions, be it from the CRTA or from the DSB, is that WTO Members seem unwilling to clarify the interpretation and application of RTA rules because clarification could constrain today's most widespread foreign policy strategy in trade relations: the continuing expansion of RTAs. As Prazeres (2008) notes: "In sum, if the ambiguity of RTA rules does not seem to interest any member, at the same time, it seems to interest all".

Therefore, unless there is a turning point in the WTO's decision making processes – by the CRTA and the DSB – in matters concerning the legal status of RTAs, the worldwide phenomenon of RTA proliferation will continue. This could, in the worst case scenario, ultimately put the entire multilateral trading system in jeopardy. The absence of a clear MERCOSUR status *vis-à-vis* WTO rules is just another loose end in the great spaghetti bowl of RTAs.

3 The legal framework for the management of asymmetries

At the heart of the debate on asymmetries is the tension over trade at large between developed and developing countries. The discussion turns on the flexibilities that developing countries need to make up for the fundamental asymmetry, in order to retain room for development. The debate also hinges on whether trade is a means to an end or an end in itself; and if analysis should be focused on how development occurs, and the role of trade within development processes, rather than an analysis of how trade occurs.

In this debate, the multilateral trading system still manifests very clear indications of the North-South conflict (Tussie, 2000). This is directly reflected by protracted tensions in relation to asymmetries between developed and developing countries, in terms of S&D, the Enabling Clause and the GSTP, as described below.

However, the actions in the multilateral system for reducing North-South asymmetries do not necessarily help reduce asymmetries among Southern countries. This is the case with regard to the promotion of South-South agreements through the Enabling Clause. While these South-South agreements are one of the "remedies" for building up economic prowess and thus reduce asymmetries, they in turn sow the seed that reproduces asymmetries within Southern partners, unless offsetting mechanisms are incorporated into the process.

In this chapter, we analyse the multilateral framework for the management of asymmetries, in order to reveal the context in which MERCOSUR is developing its internal and external agenda on asymmetries.[30]

3.1 The management of asymmetries under the GATT

At its inception, developing countries that joined the GATT did so on the basis of sovereign determination; they were considered equal partners in the multilateral trading system, at least under the 1948-1955 GATT (Kessie, 2000). The only provision available to developing countries was Art. XVIII, which enabled them to derogate from their scheduled tariff commitments or implement non-tariff measures, such as quotas, in order to promote the establishment of certain industries in their territories, that is, the protection of infant industries (Singh, 2005).

From then on, the number of developing countries participating in the GATT increased, also increasing awareness and accumulating pressure for more flexible rules that accounted for the asymmetries of the system. Thus, S&D, understood as preferential treatment in favour of developing countries in every aspect of their trade relations, was born as a result of the coordinated diplomatic efforts meant to correct what they felt were inequalities in the post-1945 system (UNCTAD, 2000). This development paradigm, pioneered by Latin American countries, India, Egypt and later supported by a wide array of countries from Asia and Africa, was based on their need to improve trading terms, reduce dependence on the exportation of primary products,

[30] Sections 3.1 and 3.2 are based on Peixoto Batista (2010).

correct volatility and imbalances in their balance of payments and promote industrialization by offering protection to infant industries and export subsidies, among other objectives.

In the years that followed, several S&D provisions were introduced to the GATT, firstly through the amendment of Art. XVIII in the GATT Review Session of 1954-55. The new item (Art. XVIII: B) offered flexibilities to developing countries so as to cope with difficulties in their balance of payments. Later, in 1965, the Kennedy Round introduced another measure of S&D in the drafting of Part IV to GATT, exempting developing countries from the requirement to offer reciprocity in trade negotiations. Additionally, over this period many developing countries joined the GATT under Art. XXVI, which enabled them to evade the commitment to bind tariffs as part of their accession agreements.[31]

Flexibilities related to negotiations on market access were deepened through the incorporation of the non-reciprocity provision (Art. XXXVI: 8) in Part IV of GATT in 1964. Furthermore, a waiver was granted in 1971 for the Generalized System of Preferences.

In the Tokyo Round of 1973-1979, developing countries' efforts to consolidate the special treatment in their favour resulted in the Enabling Clause. In addition, the protocol on trade-related negotiations among 16 developing countries was introduced in the GATT, as a waiver to Art. I (MFN). The management of asymmetries thus reached the core of the multilateral trading system in 1979 (Decision L/4903). It is worth noting that this achievement is closely related to the actions of the Group of 77 (G77) and UNCTAD. In fact, with the help of UNCTAD, developing countries summarized their position on the Tokyo Round and rephrased the battle, led especially by Brazil, Egypt, India and the former Yugoslavia. Since then, the treatment of asymmetries has been carried out in different *fora*. The precedent of the Enabling Clause and the treatment embodied in the GATT/WTO remained the foundations from which developing countries attempted to defend their interests in trade negotiations.

3.2 The shift towards the WTO and the current Doha Round

The Marrakesh Agreement that established the WTO turned out to be an unbalanced package. The greater participation of developing countries was not linked to more favourable results (Tussie and Lengyel, 1999). The outcome of the Uruguay Round was markedly uneven in favour of developed countries and dealt a hard blow to the treatment of asymmetries in WTO rules. There was no consensus among developing countries for the adoption of a general "umbrella" framework for S&D provisions, although there were few chances for resistance at a time when the Soviet empire was crumbling and the neoliberal agenda was gaining momentum. Developing countries were torn between accepting the rules and obligations resulting from negotiations or remaining outside the organization (Tempone, 2007). As a matter of fact, the single

[31] Such was the case of Argentina, which joined the GATT at the end of the Kennedy Round, when negotiations at UNCTAD were still in full swing.

undertaking caused developing countries and developed countries to assume very similar undertakings, based on rules widely biased in favour of the conditions for competition in developed countries (Fukasaku, 2000). These became standard benchmarks.

The treatment of asymmetries was changed though a restricted concept of S&D;[32] it was a reflection of the unwillingness on the part of developed countries to continue granting special treatment at large, particularly to middle-income countries. This is evidenced by the express implementation of graduation mechanisms, similar to what was already being done unilaterally to GSP beneficiaries. The focus was then shifted towards LDCs, as already contemplated in the general framework of the multilateral system, under Art. XI: 2 of the WTO Agreement.

Clearly, the WTO's evolution towards the inclusion of "beyond-the-border" issues was not accompanied by a similar evolution of the instruments to deal with them. In most cases, texts contain vague, ambiguous and general S&D provisions. In the agreements currently in effect, the only S&D provisions that clearly establish rights and obligations enforceable under the DSB are those related to longer transition periods for implementation and flexibility with some obligations and procedures, in addition to certain provisions on technical assistance.[33]

This is not enough if one considers the significant implications of multilateral trade rules for developing economies. There are no S&D provisions capable of overcoming the anti-development impacts of several provisions in multilateral agreements, such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the Agreement on Trade Related Investment Measures (TRIMS) and the Agreement on Subsidies, which at times seem to invert the reasoning and grant special treatment to developed countries.[34] In short, the main idea behind the treatment of asymmetries through S&D seems to involve merely affording room for adjustment and implementation of the new, controversial rules; a far cry from a genuine concern for development.

However, that debate, which seemed to be running on borrowed time, regained relevance in the years following implementation of the Marrakesh agreements (1994), when many developing countries became fully aware of how biased the Uruguay Round agreements were in favour of developed countries. For their part, the US and EU wanted to continue moving forward in the advancement of the Marrakesh Agreements, and with that in mind proposed a new round. Developing countries, on the other hand, unhappy with the outcome of the Uruguay Round that did little for their development needs, accepted the offer, subject to the prior exclusion of such

[32] Regarding the difference between S&D before and after the Uruguay Round see Whalley (1999).
[33] For considerations on the binding effect of S&D provisions, see Kessie (2000). Additionally, other authors have classified the S&D provisions contained in the Marrakesh agreements: see Fukusaku (2000), Hoeckman (2005) and Kleen and Page (2004), among others. In turn, the WTO has also established a classification. For WTO jurisprudence on binding provisions in WTO agreements, see, for example, the *India-US* dispute regarding Art. 15 of the Antidumping Agreement (DS206, 7.111).
[34] Some examples of the referred bias in the special treatment afforded to developed countries include quotas on textiles, agricultural subsidies, the agreement on subsidies (where the subsidies allowed are adequate for industrialized countries). or the restrictions on the competition policy allowed under TRIPS (Singh, 2005).

issues as employment, and under the condition that the mandate of the new round should be as comprehensive as possible in including their interests and development needs.[35]

Thus, the Doha Development Round was launched in 2001 at the Doha Ministerial Conference, in the aftermath of the 9/11 terrorist attacks. Paragraph 44 of the resulting Doha Declaration provided that S&D provisions are part of WTO Agreements and that particular attention will be paid to them, in an effort to reinforce them and make them more accurate, effective, and operational.

From then on, S&D progressed along two related paths. The first one involved the commitments already undertaken in the Uruguay Round and their development, which in practice meant an important restriction in the S&D universe of application and their beneficiaries. The other path revolved around the declarations and negotiations underway in the Doha Round.

Regarding the commitments already undertaken in the Uruguay Round – such as the Agreement on Subsidies and Countervailing Measures, TRIMS and TRIPS – an increasing restriction on the flexibilities available to developing countries has been observed. In fact, the S&D provisions under the Uruguay Round have been subject to an increasingly restrictive interpretation and have failed to have the expected impact on the development agenda. Those agreements have a tendency to restrict, in practice, S&D provisions for LDCs and, to a lesser extent, other developing countries, though less so for the larger developing countries, emerging economies and middle-income countries.[36]

Moreover, in the negotiations currently under way, the initial S&D agenda in the Committee on Trade and Development (in special session) when the Doha Round was launched was ample and comprehensive, including:

- The mandatory or non-mandatory nature of provisions and their consequences;
- S&D principles and objectives;
- Technical and financial assistance and capacity building;
- Incorporating S&D into the WTO's legal structure.

However, this agenda is currently limited to the implementation of measures in favour of LDCs, a surveillance mechanism, and some S&D proposals for specific agreements, while all other aspects that were being discussed at the CTD at the beginning of the round seem to have been lost along the way.[37]

Developing countries, meanwhile, especially those excluded from the benefits of general flexibilities at the WTO, are trying to find ways to keep resorting to measures that, on one hand, recognize the existing asymmetries between developed and developing countries, and, on the other, allow them to maintain their development strategies in order to reduce these asymmetries. In fact, in the Doha Round

[35] Steinberg (2002).
[36] For details regarding specific agreements see Peixoto Batista (2005).
[37] See the WTO CTD reports from 2002 to 2008, available at: http://docsonline.wto.org.

negotiations, developing countries – with the help of their new coalitions, such as the NAMA 11, G-20, G-33 and G90 etc. – have been fighting for flexibilities on each issue of critical importance to them, such as agriculture and Non-Agricultural Market Access (NAMA), and have thus obtained certain flexibilities matching their respective trade interests (Narlikar, 2003; Tussie and Narlikar, 2004; Uzquiza, 2009; Diego-Fernández, 2008).

The negotiation of the flexibilities on these modalities responds to a liberalization criterion of "less than full reciprocity" in the more general requirements of the Doha Development Round, and the balance between agriculture and NAMA set forth in Paragraph 24 of the Hong Kong Ministerial Declaration in 2005. Of course, each country or group of countries is negotiating its particular and additional flexibilities. That is the case of MERCOSUR, for instance, which is negotiating a list of exceptions that will not be included in its tariff reduction.

3.3 South-South arrangements: the Global System of Trade Preferences

As noted above, one of the most important achievements related to the management of asymmetries is, undoubtedly, the 1979 "Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries", known as the Enabling Clause. The Enabling Clause comprises: (a) the Generalized System of Preferences; (b) non-tariff measures in GATT instruments; (c) global or regional arrangements among developing countries; and (d) special treatment for LDCs. For the purpose of this paper, special attention will be paid to item (c), which covers South-South arrangements.

First of all, it is worth noting that the Enabling Clause authorizes preferential trade arrangements among developing countries and LDCs as a departure from the MFN principle. This exception to the general rule allowed developing countries to continue old regional integration initiatives and build new ones that were not fully fledged FTAs or CUs as required by the more stringent criteria of Art. XXIV – such as LAIA, the Andean Community of Nations (CAN) and MERCOSUR[38]– as well as global initiatives, such as the GSTP.

The GSTP was established in 1988 as an arena for developing countries to exchange trade preferences, so as to promote trade between them. This idea, however, dates back to over a decade before (1976), at the G77 ministerial meeting in Mexico City. Subsequently, the idea was gradually developed at the G77 ministerials in Arusha (1979) and Caracas (1981). In 1982, in New York, G77 Ministers defined the basic components of the agreement and established a framework for negotiations. In 1984, in Geneva, the G77 began preliminary work on the various aspects of a structural agreement. In 1986, at the ministerial meeting in Brasilia, the provisional structure of the agreement was established and the first round of negotiations was launched. In

[38] As mentioned in Section 2.6 above, the MERCOSUR agreement was submitted for revision under Art. XXIV as well as under the Enabling Clause. This gave legal cover to the host of preferential schemes that used the ALADI umbrella, as explained in Section 2 above.

1988, the final text of the agreement was adopted – which came into force in 1989 – and the first round of negotiations was completed in Belgrade.

According to the Belgrade Agreement, economic cooperation between developing countries is a key element in the strategy of collective self-reliance and an essential instrument for promoting structural changes to contribute to a balanced and equitable process of global economic development. In this sense, the GSTP aims to include all products and commodities in their raw, semi-processed and processed forms. It consists of arrangements on tariffs, para-tariffs, non-tariff measures, direct trade measures (including medium- and long-term contracts) and sectoral agreements, and is reserved for the exclusive participation of developing country members of the G77. In addition, the GSTP shall complement – not replace – economic groupings of G77 member countries, be they regional, sub-regional or interregional groupings (Art. 18, GSTP).

The Belgrade Agreement establishes a Committee of Participants, which is composed of representatives from participating countries, and is charged with the functioning of the GSTP to contribute to the achievement of its objectives.

The GSTP takes into account the limitations on the capacity of developing countries to conduct negotiations. Thus, GSTP negotiations proceed on a step-by-step basis, and can be conducted on a bilateral, plurilateral, or multilateral basis, with a "product-by-product", "across-the-board tariff reduction" or "sectoral" approach. Consequently, the first lists of concessions were quite modest.[39]

During the 1990s, with the sway of neoliberal trade policies and the establishment of the WTO, the GSTP presented modest improvements, which were manifested in the second round of negotiations (GSTP/TEHRAN/2, 1992), though its results were not ratified by the participants.

In the following decade, however, new factors came into play and the GSTP was reborn with new strength by the consolidation of Brazil and India as speakers for the developing world, devoted to highlighting South-South relations in the construction of the new geography of trade. The third round of GSTP negotiations was launched in São Paulo in 2004, during the 11th Session of UNCTAD. In order to encourage participation, the Committee of Participants abolished the MFN clause in the GSTP, which stated that the results of each round were applicable to all the participants in the agreement (Fossati and Levit, 2010).

The GSTP consists of 43 members,[40] although only 22 of them have chosen to participate in the current round of concessions.[41] The São Paulo Declaration (2004)

[39] Approximately 1800 preferences were exchanged, from which 900 were effectively applied (Fossati and Levit, 2010).

[40] Algeria, Angola, Argentina, Bangladesh, Benin, Bolivia, Brazil, Chile, Colombia, Cuba, Ecuador, Egypt, Ghana, Guinea, Guyana, Haiti, India, Indonesia, Iran, Iraq, Lebanon, Malaysia, Mexico, Morocco, Mozambique, Nicaragua, Nigeria, North Korea, Pakistan, Peru, Philippines, Paraguay, Qatar, Romania, Singapore, South Korea, Sri Lanka, Sudan, Tanzania, Thailand, Trinidad and Tobago, Tunisia, Uruguay, Venezuela, Vietnam, (former) Yugoslavia, Zaire and Zimbabwe.

calls for a "package of substantial liberalization commitments on the basis of mutuality of advantages in such a way as to benefit equitably all GSTP participants". In addition, although 22 countries participated in the current round, only 19 finally adopted the agreement.[42] Neither China nor South Africa are current members of the GSTP (ICTSD, 2009). MERCOSUR has been participating as a group since 2006,[43] while India has been a member since the GSTP's beginnings.

In 2008, at the 12th Session of UNCTAD in Ghana, countries acknowledged the importance of GSTP negotiations and committed themselves "to act quickly to conclude the negotiations" (GSTP/CP/SSG/2, 2008). In December 2009, in Geneva, countries adopted the ministerial decision on modalities that established tariff cuts on at least 70 percent of participants' dutiable tariff lines (SPR/NC/MM/1, 2009).

The significance of GSTP trade is a matter of discussion, in which both positive and negative aspects can be detailed. Pessimistic views stress that the market access negotiated under the GSTP is not economically significant in comparison to autonomous liberalization, or to tariff cuts arising from regional agreements or the WTO (Oxfam, 2004). Besides, over half the projected increases in intra-GSTP trade would arise from trade diversion (UNCTAD, 2005).

More optimistic views highlight the GSTP's significant potential, since exports from GSTP members to the rest of the world represent almost 14 per cent of global exports (Fossati and Levit, 2010). Moreover, intra-GSTP exports and imports consist of 18 per cent and 19.4 per cent of GSTP exports and imports to the rest of the world (Fossati and Levit, 2010). In addition, proponents stress that the GSTP represents an actual improvement in market access since the bases for tariff cuts are the applied tariffs, rather than the WTO bound tariffs. UNCTAD (2005) also provides some evidence of the fast growth of intra-GSTP trade; the increasing level of export complementarities among GSTP countries; and the capacity of intra-GSTP tariff cuts to enhance exports among GSTP members within each region, as well as inter-regionally. Also, the volume of trade within the bloc seems to have shifted to capital goods from more basic commodities, and trade within the GSTP has been created, rather than simply diverted, from more efficient sources (Fossati and Levit, 2010; Endoh, 2005).

Regardless of the studies on the limitations of and opportunities under the GSTP, it remains an important stage in the confirmation of the relevance of South-South trade, especially for developing countries to depend less on developed country markets.

Regarding the asymmetries among the developing countries participating in the agreement, the GSTP's benefits are less clear. In the agreements and declarations approved to date, the issue is contemplated differently. Firstly, according to Art. 3(f) of the Belgrade Agreement (1988), the special needs of LDCs shall be clearly

[41] Algeria, Argentina, Brazil, Chile, Cuba, Egypt, India, Indonesia, Iran, Malaysia, Mexico, Morocco, Nigeria, North Korea, Pakistan, Paraguay, South Korea, Sri Lanka, Thailand, Uruguay, Vietnam and Zimbabwe.

[42] Chile, Mexico and Thailand participated in negotiations, but decided not to sign the agreement.

[43] Argentina and Brazil have been members since 1990 and 1991 respectively (Fossati and Levit, 2010).

recognized, concrete preferential measures in their favour should be agreed upon and they will not be required to make concessions on a reciprocal basis.

Besides, Art. 17 (Special Treatment for LDCs) states that LDCs shall not be required to make concessions and shall benefit from all tariff, para-tariff or non-tariff concessions which are multilateralized, and that they can seek technical assistance from the UN in order to identify the export products for which they may wish to seek concessions in the markets of other participants. They may also make specific requests to other participants for concessions and direct trade measures, including long-term contracts.

The GSTP requires that special attention be paid to the application of safeguards regarding exports from LDCs, and establishes a special rule of origin for LDCs (Rule 10, Annex II) with regard to products not wholly produced or obtained in those countries and cumulative rules of origin.

Finally, Annex III encourages participants to adopt additional measures in favour of LDCs: technical assistance and co-operation arrangements designed to assist LDCs in issues such as the establishment of industrial and agricultural projects, formulation of export promotion strategies, training and joint ventures, among others.

In the following years, the special treatment of LDCs was reaffirmed in the São Paulo Declaration launching the third round (2004), the Accra Joint Communiqué (2008) and the 2009 Ministerial Decision on Modalities (SPR/NC/MM/1, 2009). Bearing in mind that this is the first time that actual progress has been observed in GSTP negotiations, a matter pending consideration is whether the special treatment of LDCs will in fact be applied or not. In any case, the GSTP does not generally consider asymmetries among non-LDC developing countries. Considering the diverse economies present in this round of negotiations, this will call for important efforts in cooperation, technology transfer and other measures seeking to prevent concentration and polarization effects once the preferences have been put into practice and if the range of products covered by the GSTP increases.

In summary, it is worth bearing in mind that the GSTP can play a crucial role in the *new geography of trade*, helping to promote trade otherwise neglected in multilateral negotiations and by the same token contributing, to some extent, in levelling the playing field. Furthermore, the agreement contains comprehensive provisions on the special treatment of LDCs that acknowledge non-reciprocity, flexibilities in rules of origin, cooperation to promote exports and the establishment of agricultural and industrial sectors, among others. This does not, however, rule out certain risks related to the asymmetries between non-LDC developing countries. While the GSTP has a gradual (step-by-step) approach, which enables asymmetries to be handled through the exclusion of sensitive sectors, it is not enough to deal with asymmetries as the universe of preferences is broadened.

4 Regionalism in South America and dilemmas whithin MERCOSUR

The South American integration picture has changed considerably in the last twenty years. In a time of rejuvenating regionalisms in South America, some trade integration processes – such as the Andean Community of Nations (ACN) and MERCOSUR – coexist with a set of overarching initiatives throughout the entire subcontinent, in the context of the Latin American Integration Association. Regional institution building has turned into a complex, multi-layered arena where contending political interests compete, a far cry from a crystallized and conceptually neat project in the hands of a single uncontested leader (Tussie, 2009).

The region now faces the challenge of harmonising these phenomena or learning to live with the competing projects. This harmonization depends on high doses of pragmatism enabling the advancement – under a single framework – of more pro-development initiatives coupled with some more liberal ones, so as to continue supporting regional integration as an alternative that adds value to national and bilateral policy options. The picture is in a state of flux, yet it is necessary to observe the latest developments of these initiatives in order to identify possible scenarios and, especially, to understand the relationship between the political overtones of current South American integration and the progress of South-South agreements.

MERCOSUR's internal agenda reflects those dilemmas. This chapter will analyse the array of regional integration initiatives underway with the aim of unveiling the new regional geometry and the challenges that the MERCOSUR internal agenda – on services, investments and asymmetries – has to face in this context.

4.1 Open regionalism initiatives in South America over the last decade

In the 1990s, during the peak of the (neo-) liberal ideas enshrined in the Washington Consensus, regional integration in South America built on previous initiatives so as to adapt them to open regionalism. This wave led to new regional building initiatives. Thus, MERCOSUR was born in 1991, and in addition the Andean Pact was amended and turned into the ACN in 1992. Both initiatives fall under LAIA and have since become the two axes of regional trade integration. They arose at a time that import substitution policies were being unbundled. A feature of these projects was their grand ambition concerning trade in goods and services, investment protection, and the goal of establishing CUs and common markets.

In fact, both initiatives progressed most in terms of trade liberalization (ALADI-MERCOSUR-CAN, 2006). However, although there was an initial success in terms of the political consolidation of alliances and trade within blocs (Botto and Tussie, 2007; Souza *et al.*, 2010), by the mid-1990s both initiatives lost their lustre and faced a number of hurdles. This was worsened by successive crises from the late 1990s: Brazil's currency devaluation in early 1999, Argentina's meltdown in 2001, and crises in Bolivia and Ecuador. The region faced a turning point.

In the case of MERCOSUR, following the 1994 establishment of an FTA, an (imperfect) CU, and the design and implementation of a definite institutional structure

for the bloc, progress became increasingly hard. The CU was not fully completed;[44] commitments lost credibility as they were not internalized after joint approval; and there was a multiplication of inter-sector conflicts that found no institutional channels for resolution. The divergence of macroeconomic policies aggravated tensions and became all too apparent when Brazil devalued its currency in January 1999, while Argentina remained bound to convertibility.

By then, MERCOSUR was showing a decrease in trade flows and investment, and an increase in trade-related disputes. The share of bloc trade in total trade fell steadily from 1997 to 2002 (Souza *et al.*, 2010). The 2002 diagnosis of the bloc was that there was a mismatch between MERCOSUR rules and the reality they were supposed to regulate; that there were no institutions for preventing and forecasting problems that would channel and direct the implementation of "pro-integration" actions, reducing vulnerability to internal political circumstances of member states; that MERCOSUR rules were too soft, particularly in relation to incentives and subsidies; and that there was a lack of effective intermediate stages for dispute resolution and negotiation (Delich and Peixoto Batista, 2010).

Some progress was made toward solving some of these problems, for example through approval of the Olivos Protocol, for the settlement of disputes, and the decision on the free movement of workers. In addition, MERCOSUR approved a decision establishing – since MERCOSUR was a CU with legal entity – that all agreements involving MERCOSUR should be signed by the bloc's four members (Decision 23/2000). However, these initiatives were isolated steps rather than part of a more comprehensive strategy to confront obstacles and deliver a new direction for integration.

The ACN also advanced in the 1990s, achieving full liberalization of the goods market (ALADI-MERCOSUR-CAN, 2006), and some institutional progress. As in the case of MERCOSUR, trade within the Andean region grew more dynamically than world trade in the 1990s (INTAL-IADB, 2005). Furthermore, the institutional structure of the ACN incorporated the Andean Presidential Council and the Andean Council of Foreign Affairs Ministers. Similarly, the Cartagena Agreement board was turned into a General Secretariat.

As in the case of MERCOSUR, by the mid-1990s the ACN stumbled when faced with the challenges of deepening trade integration and adopting the Common External Tariff. The tensions were particularly acute in relation to the negotiation of agreements with developed countries. In this area, disputes accumulated and trade lost steam. As growth rates plunged, so did trade and investment flows (INTAL-IADB, 2005).

Briefly, although the integration initiatives of the 1990s made significant inroads towards the liberalization of trade in goods, they made little progress in trade-related

[44] On 3 August 2010, however, during its 39th Summit held in Argentina, MERCOSUR members seem to have eventually taken the steps towards the consolidation of the CU, which is to be phased in over the next year and a half before fully taking effect in 2012. MERCOSUR members also decided to eliminate by 2012 the double recovery of the CET.

business disciplines, such as rules of origin, sanitary and phytosanitary (SPS) measures, technical rules and regulations and customs procedures. Even less progress was made in disciplines not directly related to trade in goods, such as government procurement, intellectual property and, especially, services and investments. In view of the importance of services and investment rules for the deepening of integration and/or cooperation processes involved in RTAs, we now turn to highlight the ways in which they have been regulated in MERCOSUR.

4.2 Trade in services in MERCOSUR

The Protocol of Montevideo is an integral part of the Treaty of Asunción.[45] The liberalization of trade in services was in the MERCOSUR agenda since the early stages of the integration process. In June 1992, MERCOSUR's Common Market Council approved an ambitious work programme for the transition period, which involved the adoption of a number of measures aimed at the functioning of the common market by the end of 1994. Some of these measures had the purpose of advancing the liberalization of trade in services by way of negotiating general obligations and disciplines, through the harmonization of legislation or by adopting mutual recognition agreements for specific sectors (Gari, 2009: 105). However, it was not until November 1997 that the Protocol of Montevideo was enacted (Decision 13/97). Additional time was required to complete the drafting of the sectoral annexes to the Protocol and for the negotiation of members' initial schedules of specific commitments (Decision 09/98).[46]

The Protocol of Montevideo, an RTA between four WTO Members, was designed in the light of the GATS, adopting most of its provisions without modification. Pursuant to Art. I, the purpose of the Protocol is to promote free trade in services within MERCOSUR. This must be achieved in compliance with GATS' conditions for economic integration, which essentially require preferential agreements to have "substantial sectoral coverage" and to provide for the elimination of "substantially all discrimination". It seeks to consolidate in a single instrument a set of general rules and principles aimed at promoting free trade in services and ensuring the increasing participation of LDCs and regions in the services market.[47]

The Protocol of Montevideo is, on one hand, a "negative integration contract", to use Mavroidis' (2007) term, i.e. primarily concerned with the elimination of discrimination without interfering with members' rights to regulate in accordance with their legitimate policy objectives. On the other hand, it is an integration process whose ultimate objective is to liberalize the services sector.

[45] In turn, as already mentioned, the Treaty of Asunción is part of a broader regional integration framework established by the Treaty of Montevideo (1980).

[46] The Protocol of Montevideo came into force after having been ratified by three MERCOSUR members, namely Argentina, Uruguay and Brazil.

[47] The reference to "the need to ensure the increasing participation of less developed countries and regions in the services market" was included in the Preamble to the Protocol, subject to reciprocity. Indeed, "the latter part of the preamble's recital ("on the basis reciprocal rights and obligations"), waters down the impact that such reference could have on the development of an effective and non-reciprocal treatment in favour of less developed countries and regions" (Gari, 2009: 109 fn.17).

Some scholars maintain that the liberalization process combined with the members' right to regulate (i.e. retain their policy space to implement legitimate public policies regarding services sectors and subsectors) would be a "blatant contradiction" in the context of an integration process like MERCOSUR (Gari, 2009: 140). On the contrary, rather than being a "blatant contradiction" it is a "balance", which is by all means necessary, especially when the asymmetries between MERCOSUR members are taken into consideration.

Under the Protocol, the Programme of Liberalization on Trade in Services contains a mechanism for advancing trade liberalization through the negotiation of specific commitments on market access and national treatment. This mechanism is based on the so-called "positive list" approach, which consists of a gradual liberalization strategy by which members inscribe in their national schedules of commitments the sectors in which they intend to make specific commitments on market access and national treatment.[48]

Under GATS, the "positive list" approach is the mechanism that best fits into the progressive liberalization strategy contained in Art. XIX and is therefore the most appropriate to protect developing countries interests (Celli, 2009: 126). There seems to be no reason to contend that it would not equally be the most appropriate mechanism for the MERCOSUR Programme of Liberalization on Trade in Services, in view, as already highlighted, of the asymmetries between its members.

From a different perspective, Low and Mattoo (2000: 467) underscore the advantages of the "negative-list" approach (i.e. all services are covered and liberalized unless expressly excluded) over that of the "positive-list". In their view, among other reasons, a negative-list approach may generate a greater pro-liberalization dynamic, as governments might be embarrassed by long lists of exceptions. Moreover, such an approach would imply that any new services developed as a result of innovation or technological advancement, or for any other reason, would automatically be subject to established disciplines. They do, however, admit that the argument for this approach based on its potential for liberalization may also be one that makes governments cautious about adopting it.

Developing countries' governments should indeed be cautious about adopting a negative list approach, as it is much more likely to benefit developed countries, which, in the vast majority of cases, possess an organized, systematic and balanced domestic regulatory framework. This, incidentally, constitutes a pre-condition for developing countries to participate more actively in the liberalization process in services. However, the negative listing mechanism has been adopted in numerous RTAs, such as NAFTA, and bilateral agreements, such as Canada-Chile, Chile-Mexico, Bolivia-Mexico and Costa Rica-Mexico, among others.

[48] Pursuant to the Programme, member states must hold successive rounds of negotiations aimed at the progressive inclusion of sectors, subsectors, activities and modes of supply of services in their schedules, as well as the reduction or elimination of trade-restrictive measures in order to ensure effective market access. After seven rounds of negotiations, due to the absence of political will, no more than a partial consolidation of the status quo of member states' domestic legal systems has been achieved so far.

In any event, the Protocol of Montevideo essentially reproduces the main characteristics of GATS, which favour developing countries: flexibility; progressive liberalization through positive lists of specific commitments; and the maintenance of members' policy space to implement policies through the regulation of services sectors and subsectors. As in the case of GATS, the essence of its framework and structure should remain unchanged.

This is especially important in the context of South-South cooperation agreements that are expected to be initiated shortly between MERCOSUR and other developing countries.[49] In this regard, it should be noted that, while a number of countries and or regional blocs entered into numerous FTAs due to the stalemate in the Doha Round negotiations, MERCOSUR – despite certain periods of tension between its members – chose to remain firmly committed to the multilateral trading system. This policy seems now to be gradually changing. Current negotiations, aimed at the formation of, respectively, MERCOSUR-India and MERCOSUR-South Africa FTAs, are a clear signal of such a change.

4.3 Trade and investment in MERCOSUR

In the MERCOSUR framework, there are two Protocols concerning investments: the Protocol of Colonia for the Reciprocal Promotion and Protection of Investments in MERCOSUR (1994) and the Protocol of Buenos Aires for the Promotion and Protection of Investments Originating from States non-Parties of MERCOSUR (1995).

The Protocol of Colonia regulates or deals with intra-regional investments, i.e. investments made by investors from one member country in another member country. A broad concept of investment is adopted. It also contains rules on the entrance and establishment of capital, treatment, protection, the transfer of funds, guarantees and dispute resolution, among others.

The Protocol of Buenos Aires was conceived with the purpose of harmonizing the treatment accorded by members to investments deriving from non-members. Neither of the Protocols are in force due to a lack of ratification by MERCOSUR members (Celli, 2005: 117). The table below shows the current status of the Protocols in each member state.

[49] MERCOSUR signed its first such agreement on services liberalization with Chile, within the LAIA framework, on 27 May 2009 liberalization. Negotiations with Colombia are well in advance.

Table 5: Current status of the protocols in MERCOSUR member states

	Argentina	Brazil	Paraguay	Uruguay
Protocol of Colonia for the Reciprocal Promotion and Protection of Investments in MERCOSUR, 1994 DEC. Nº 11/93	Pending	Pending	Pending	Pending
Protocol of Buenos Aires for the Promotion and Protection of Investments Originating from States non-Parties of MERCOSUR, 1994 DEC. Nº 11/94	Law: 24.554 Deposit: 14 March 1996	Pending	Law: 593 Deposit: 12 Sept 1995	Law: 17.531 Deposit: 11 July 2003

Source: Ministry of Foreign Relations, Paraguay (2010)

Due to the absence of common rules on investments, members have separate BITs with different countries, as detailed in the tables below.

Table 5: Argentina's BITs (57 agreements, 50 in force)

Agreement/Partner(s)	Date of Signature	Entry into Force
Algeria	04 October 2000	28 January 2002
Armenia	16 April 1993	20 December 1994
Australia	23 August 1995	11 January 1997
Austria	07 August 1992	01 January 1995
Belgium-Luxemburg	28 June 1990	20 May 1994
Bolivia	17 March 1994	01 May 1995
Bulgaria	21 September 1993	11 March 1997
Canada	05 November 1991	29 April 1993
Chile	02 August 1991	01 January 1995
China	05 November 1992	01 August 1994
Costa Rica	21 May 1997	01 May 2001
Croatia	02 December 1994	01 June 1996
Czech Republic	21 September 1996	-
Denmark	06 November 1992	02 January 1995
Dominican Republic	16 March 2001	-
Ecuador	18 February 1994	01 December 1995
Egypt	11 May 1992	03 December 1993
El Salvador	09 May 1996	08 January 1999
Finland	05 November 1993	03 May 1996
France	03 July 1991	03 March 1993
Germany	09 April 1991	08 November 1993
Greece	26 October 1999	-
Guatemala	21 April 1998	07 December 2002
Hungary	05 February 1993	01 October 1997
India	20 August 1999	12 August 2002
Indonesia	07 November 1995	-
Israel	23 June 1995	10 April 1997
Italy	22 May 1990	14 October 1993
Jamaica	08 February 1994	01 December 1995

Korea	17 May 1994	24 September 1996
Lithuania	14 March 1996	01 September 1998
Malaysia	06 Setember 1994	20 March 1996
Mexico	13 November 1996	22 July 1998
Morocco	13 June 1996	19 February 2000
Netherlands	02 October 1992	01 October 1994
New Zealand	27 August 1999	
Nicaragua	10 August 1998	01 February 2001
Panama	10 May 1996	22 June 1998
Peru	10 November 1994	24 October 1996
Philippines	20 September 1999	01 January 2002
Poland	31 July 1991	01 September 1992
Portugal	06 October 1994	03 May 1996
Romania	29 July 1993	01 May 1995
Russia	20 November 2000	-
Senegal	06 April 1993	
South Africa	23 July 1998	01 January 2001
Spain	03 October 1991	28 September 1992
Sweden	22 November 1991	28 September 1992
Switzerland	12 April 1991	06 November 1992
Thailand	18 February 2000	07 March 2002
Tunisia	17 June 1992	23 January 1995
Turkey	08 May 1992	01 May 1995
Ukraine	09 August 1995	06 May 1997
United Kingdom	11 December 1990	19 February 1993
United States	14 November 1991	20 October 1994
Venezuela	16 November 1993	01 July 1995
Vietnam	03 June 1996	01 June 1997

Source: OAS SICE (2010).

Table 6: Brazil's BITs (13 agreements, 1 in force)

Agreement/Partner(s)	Date of Signature	Entry into Force
Chile	22 March 1994	
Denmark	04 May 1995	
Finland	28 March 1995	
France	21 March 1995	
Germany	21 September 1995	
Italy	03 April 1995	
Korea	01 September 1995	
Netherlands	25 November 1998	
Paraguay	27 October 1956	06 September 1957
Portugal	09 February 1994	
Switzerland	11 November 1994	
United Kingdom	19 July 1994	
Venezuela	04 July 1995	

Source: OAS SICE (2010).

Table 7: Paraguay's BITs (28 agreements, 26 in force)

Agreement/Partner(s)	Date of Signature	Entry into Force
Argentina	20 July 1967	03 October 1969
Austria	13 August 1993	01 December 1999
Belgium/ Luxemburg	06 October 1992	09 January 2004
Bolivia	04 May 2001	04 September 2003
Brazil	27 October 1956	06 September 1957
Chile	07 August 1995	17 December 1996
Costa Rica	29 January 1998	25 May 2001
Czech Republic	21 October 1998	24 March 2000
Denmark	22 April 1993	
Ecuador	28 January 1994	18 September 1995
El Salvador	30 January 1998	08 November 1998
France	30 November 1978	01 December 1980
Germany	11 August 1993	03 July 1998
Hungary	01 August 1993	01 February 1995
Italy	15 July 1999	
Korea	22 December 1992	06 August 1993
Netherlands	29 October 1992	01 August 1994
Peru	31 January 1994	13 December 1994
Portugal	25 November 1999	03 November 2001
Rumania	21 May 1994	03 April 1995
South Africa	03 April 1974	16 agosto 1974
Spain	11 October 1993	22 November 1996
Switzerland	31 January 1992	28 September 1992
United Kingdom	04 June 1981	23 April 1992
(Exchange of Notes)	17 June 1993	13 June 1997
United States	24 September 1992	19 May 1993
Uruguay	25 March 1976	01 July 1976
Venezuela	05 May 1996	14 November 1997

Source: OAS SICE (2010).

Table 8: Uruguay's BITs (26 agreements, 20 in force)

Agreement/Partner(s)	Date of Signature	Entry into Force
Armenia		
Australia	01 September 2001	
Belgium-Luxemburg	04 November 1991	23 April 1999
Bolivia	03 March 2000	
Canada	16 May 1991	02 June 1999
Chile	20 October 1995	10 February 1999
China		01 December 1997
Czech Republic	26 September 1996	29 December 2000
El Salvador	24 August 2000	23 June 2003
France	14 October 1993	09 July 1997
Germany		29 June 1990
Hungary		01 July 1992
Israel	30 March 1998	07 October 2004
Malaysia	09 August 1995	
Mexico	30 June 1999	07 July 2002

Netherlands	22 September 1988	01 August 1991
Panama	18 February 1998	14 April 2002
Poland	02 August 1991	21 October 1994
Portugal	25 July 1997	03 November 1999
Romania	23 November 1990	30 August 1993
Spain	07 April 1992	06 May 1994
Sweden	17 June 1997	01 December 1999
Switzerland	07 October 1988	22 April 1991
United Kingdom	21 October 1991	
United States	25 October 2004	11 April 2002
Venezuela		18 January 2002

Source: OAS SICE (2010).

As in the case of trade in services, investment provisions will be part of RTAs[50] with developed countries and/or cooperation agreements with developing countries (regardless of their modalities) under the Enabling Clause and/or the GSTP that MERCOSUR might sign in forthcoming years. The question arises as to how MERCOSUR can negotiate such agreements without having common rules on investments, i.e. intra-regional investment rules, and harmonized rules on the treatment accorded by members to investments deriving from non-member. This remains a complex and complicated normative situation.

Members can no longer postpone the ratification of both Protocols.[51] Once they have been ratified, members will be better prepared to negotiate RTAs and South-South cooperation agreements. The greatest challenge, however, will be to negotiate agreements whose investment provisions contain a necessary balance between the need to attract, promote and protect foreign investments while preserving members' policy space to implement industrial policies aimed at their development.

4.4 The "re-launch" of South American integration processes

The loss of steam in South American integration processes came about at the time that serious questions about globalization were being raised in many quarters. While Europeans voted against the Lisbon Treaty, a new mindset seemed to be taking shape, as exemplified by Rodrik's (1997) book "Has globalization gone too far?".

[50] Reference could also be made to the Preferential Trade and Investment Agreements (PTIAs), and notably of Economic Integration Agreements. EIAs today also increasingly address investment issues, thus forming a special category of International Investment Agreements. According to UNCTAD, if they include investment provisions, they are referred to by UNCTAD as Economic Integration Investment Agreements or PTIAs. By the end of 2007, there were 254 such agreements. Investment provisions in PTIAs may be narrow or extensive and may address issues related to promotion, protection, liberalization and other investment-related and significant rules, such as competition policy. In many aspects, therefore, investment provisions in PTIAs are similar to those in BITs. In fact, BITs have influenced the investment provisions of many PTIAs (UNCTAD, 2009: 61).

[51] This will be no easy task either. Under the Protocol of Buenos Aires, for example, disputes are to be solved by the ICSID, to which Brazil is not a party as it did not sign the Washington Convention of 1965.

In this context, the advent of the so-called "New Left" governments in the region played a decisive role in the review of South American integration processes. This seems to have been a regional response to two closely intertwined sets of challenges: that of increasing mass mobilization, and the widespread public opinion against neoliberal reforms. Both reactions reflected strong dissatisfaction with the results of reform strategies for having failed to generate high growth levels, not having included politically excluded groups and for their inability to promote more equitable models of income distribution (Tussie and Heidrich, 2006). This perception of having paid a high price for such modest results gave already existing blocs a new airing.

MERCOSUR and the ACN were thus "re-launched" under the paradigm of the so-called post-commercial or post-liberal regionalism, with a strong pro-development tone, a concern for maintaining policy space and consideration of the distributional impacts of trade liberalization. Additionally, post-liberal regionalism questions the exclusively commercial nature of the preceding integration processes and attempts to include the sectors/players excluded from the process during the 1990s (Rios and Veiga, 2007). The integration agenda must then be extended to include social and political issues, and the trade dimension must comprise such items as structural and policy asymmetries.

Triggered by the boom in economic growth experienced by the subcontinent from 2003, MERCOSUR was then "re-launched" once again at the Asunción Summit held in mid-2003, with Néstor Kirchner and Lula da Silva as heads of government in Argentina (2003-2007) and Brazil (2003-2007) respectively, and with Bolivia, Chile, and Venezuela as guest participants. The *de facto* macroeconomic convergence between the two largest partners – Argentina and Brazil – contributed a good feeling factor to the Summit.

In line with the new paradigm, the Summit resulted in a declaration on the need to deepen the so-called "political" MERCOSUR. This involved moving forward with instruments that would go beyond trade integration, incorporating such issues as democratic commitments, social and labour arrangements, freedoms of residence and work for individuals, employment growth, human rights protection, cultural promotion and the involvement of civil society organizations, among others (Decision 26/03). In terms of the economic/commercial agenda, new initiatives were launched, such as the MERCOSUR Fund for Economic Convergence and Institutional Strengthening (FOCEM), the Programme for Small and Medium Enterprises (PYMES) and the decisions on productive complementation. The process seemed to have finally found a suitable political environment in which to thrive. In this context, concerns about the distributive effects of liberalization led governments to re-consider the direction taken for the treatment of asymmetries between MERCOSUR member states, make it part of the core initiatives in the bloc's economic agenda, as discussed below.

The ACN, in turn, also attempted to go beyond trade-related matters, including in its agenda issues such as the environment, social cohesion, citizen participation and the movement of persons, among others. In 2003, member countries agreed that the bloc's mandate would include the generation of an Integrated Social Development Plan, which was drafted and approved in 2004 (Decision 601). Additionally, the Andean

Integration System involved creating supranational organizations, which reflected the intention to consolidate supranationalism in the Andean bloc and asserted the objective of establishing a Common Market in the short run.[52]

Encouraged by a favourable political climate, MERCOSUR and the ACN signed a memorandum of understanding in 2004 intended to find common ground for the promotion of fuller integration between the two blocs. From its inception, this understanding faced both legal and commercial challenges – in the management of overlapping preferences – and political challenges, such as tension between members of the two blocs.

Regarding preferential treatment, the ACN and MERCOSUR had moved forward in the execution of Partial Scope Agreements under LAIA as early as 2000, wherein trade preferences were established. In 2002, they signed an Economic Complementation Agreement that required the formation of an FTA by December 2003, a deadline that was not achieved. The original idea was to have "bloc to bloc" negotiations between MERCOSUR and the ACN. In time, as differences arose in the ACN, the negotiations gradually turned into bilateral ones (i.e. between MERCOSUR and each of the Andean Community members). These agreements were formalized through the Economic Complementation Agreement under LAIA, and their primary purpose is to incorporate the bilateral preferences already existing among those countries under LAIA, and to later establish a liberalization schedule for remaining products. Notwithstanding these bilateral achievements, the idea of unifying the region under an FTA did not progress.

The lack of political consensus led to tense moments between members of the ACN. In 2006, differing political views about the direction the ACN should take and heterogeneous commercial interests resulted in Colombia and Peru negotiating FTAs with the US. In protest, Venezuela decided to withdraw from the bloc and become a full member of MERCOSUR,[53] which represents an additional challenge for the convergence of the two blocs.

The withdrawal of Venezuela and the execution of the FTAs posed an enormous challenge to the ACN in terms of advancing its integration process. Firstly, Colombia and Venezuela are sub-regional hubs and the trade between them is an engine in the region. On the other hand, the FTAs implied discarding the CET, elimination of the Colombian automotive programme, elimination of the price range used by Peru and the protection of test data in intellectual property, among others. In summary, the execution of FTAs, by deepening trade relations under bilateral agreements, reduced the room for advancement of the regional scheme (Rodrik, 1997).

The arrival of Venezuela in MERCOSUR has not been smooth either. Brazil and Venezuela hold different worldviews and approaches in many aspects concerning their extent of integration and their relationships with the US. On the one hand, President Chavez's views after the attempted coup in 2002, in which opponents tried to overthrow him with the blessing of the US, have become radical and rambunctious;

[52] The initial deadline for the establishment of a Common Market was 2005. Since then, the deadline has been postponed.
[53] Venezuela's Adhesion Protocol to MERCOSUR is pending approval from Paraguay.

he delivers militaristic and highly confrontational tones, primarily based on the idea of building a multipolar world opposed to US hegemony. On the other hand, President Lula da Silva has a multidimensional perspective, based on productive, industrial, and commercial development, and seeks not to confront the US but rather to be an intermediary in a relationship that will not threaten its regional and global aspirations (Serbin, 2003).

4.5 Post-liberal regionalism in South America

With the flow of political renovation in the subcontinent, new projects started to take shape. One such initiative, which was nourished by the arrival of new leaders, is the Bolivarian Alternative (currently Alliance) for the Americas and the Caribbean (ALBA), launched in 2004 by Venezuela's President Chávez and Cuba's President Castro.[54] Based on the principles of solidarity and cooperation in the fight against poverty, the area in which integration has advanced the most among these countries is in cooperating in the areas of health and education.

Another example, and the most interesting for our purposes, is the current building of the Union of South American Nations (UNASUR), which started to take shape at different meetings of South American heads of state in 2000 and 2002. In 2004, South America was formally defined as a different concept from Latin America.[55] At the meeting in Cusco, Peru in the same year, the South American Community of Nations was born, an initiative that was based on such principles as solidarity, cooperation, pluralism, democracy and peace.[56] The Community undertook to build upon the integration processes then underway in the region, mainly ACN and MERCOSUR.

Brazil guided this initiative and, although they all signed the Cusco Declaration, it should be noted that the heads of state of the other three MERCOSUR members – Argentina, Paraguay and Uruguay – did not attend. In addition, in reading the Declaration, it is clear not only that it contains general provisions – as if only certain minimum thresholds had been agreed upon – but also that the goal of integration would be attained through FTAs and infrastructure projects, which have gained relevance as an engine of region building.

Four years later, in May 2008, in Brasilia, Brazil, the South American Community gave way to UNASUR, a body that integrates the entire subcontinent and seeks to develop an integrated area for political, social, cultural, economic, financial, environmental and infrastructure matters. UNASUR's members are Argentina, Bolivia, Brazil, Colombia, Chile, Ecuador, Guyana, Peru, Paraguay, Suriname, Uruguay and Venezuela that convene at annual Presidential summits, semi-annual Ministerial meetings and bi-monthly delegate meetings. A Secretariat presided by a General Secretary) was established in Quito (and a Parliament based in Bolivia is planned.

[54] Bolivia has been a member since 2006, and Nicaragua since 2007.
[55] In other words, Mexico, Central America and the Caribbean were not included in this initiative.
[56] See: http://www.comunidadandina.org/ingles/sudamerican.htm.

Since the beginning, UNASUR has had a strong strategic approach and has placed a strong emphasis on physical and energy-related connectivity in South America. The infrastructure agenda at UNASUR is currently under development, as is the proposal for the Initiative for the Integration of the Regional Infrastructure of South America (IIRSA) – launched in 2000 as a discussion forum for the authorities responsible for transportation, energy and communications infrastructure in the twelve South American countries – to become the executive-technical forum of a Council of Infrastructure and Planning Ministers under UNASUR.[57]

Additionally, UNASUR has important proposals for the region, including a Defence Council and the Bank of the South. The first initiative is a clear indication of the political glue of UNASUR, while the Bank of the South contemplates issues that open new paths for trade and financial integration. Following successive back-and-forth moves, the Bank's Founding Charter was signed by the presidents of Argentina, Bolivia, Brazil, Ecuador, Paraguay, Uruguay and Venezuela. Based in Caracas, the bank will initially operate as a development bank, although some countries, led by Venezuela, are interested in extending its operation to become a regional monetary fund, aiding countries in the event of a balance of payments crisis.

In summary, in South America the RTAs inherited from the 1990s, MERCOSUR and the ACN, now coexist with the new generation of post-trade regional institution building initiatives. Indeed, UNASUR intends to build upon the assets of the two blocs, in addition to giving priority to issues such as energy, infrastructure, the political stability of the region and defence, which are transversal issues for the subcontinent.

Nevertheless, the new framework remains contested. Venezuela and Brazil compete on different grounds and with different styles, so the institutionalization of new projects is still far from stable. Yet the extent of their competition should not be exaggerated. In their dealings with each other, both avoid direct confrontation and have even searched for areas of cooperation. The joint venture between Venezuelan and Brazilian oil companies is a case in point, as is Brazil's provision of arms to Venezuela. In the same way, Brazil and the ALBA governments have avoided antagonizing each other (Tussie, 2009).

There is no substantial legal incompatibility between the construction of UNASUR and the RTAs of the 1990s. Yet the underlying differences between members point to two risks: on the one hand, that UNASUR may advance towards minimum consensus in the subcontinent and, on the other, that there may be increasing distance between the Atlantic coast (MERCOSUR *plus* Venezuela) and the Pacific coast (ACN *plus* Chile) (Rios and Veiga, 2007; Valladão, 2007). The Pacific coast would continue seeking to strengthen its bonds with Northern countries, while MERCOSUR, led by Brazil, would continue a more pro-development tone towards integration and giving preference to South-South agreements.

A more pacific coexistence of both views should not be ruled out either. If the countries maintain a pragmatic vision on integration processes, it is likely that the

[57] See: http://www.iirsa.org.

regional agenda will continue to proceed anyway, at different speed, more in line with the endogenous dynamic than has so far been the case, and in multiple groups of partners.

In this context, one of the ways to preserve the alignment of smaller partners in the MERCOSUR bloc would be to give more relevance to the management of asymmetries, a longstanding complaint of Uruguay and Paraguay to their larger partners, Brazil and Argentina. The following section will analyse changes in MERCOSUR's internal agenda on the management of asymmetries since the emergence of the new regional mindset.

4.6 Asymmetries within MERCOSUR: from the commercial agenda towards neo-developmentalist concerns

In terms of promoting trade, MERCOSUR has a good record, as detailed above. However, as regards the management of internal asymmetries, most of all the structural ones,[58] MERCOSUR was created in the spirit of LAIA, together with a regional bias: it acknowledges asymmetries and provides some exemptions to the less developed economies, in this case Uruguay and Paraguay.

In fact, Art. 6 of the Treaty of Asunción of 1991 states that members recognize certain differences regarding the timing of implementation for Paraguay and Uruguay, as described in the Trade Liberalization Programme. In the bloc's founding agreement, there is no mention of the word "asymmetry"; S&D is granted by allowing longer timetables for implementation and a larger number of exceptions to the CET. Yet the Treaty of Asunción is a remarkably lean, almost skeletal treaty that set out the trade liberalization programme with few considerations and conditions.

Four years later the preamble to the Protocol of Ouro Preto called attention to the need to afford special consideration to the less developed countries and regions. Nevertheless, bloc asymmetries continued to be addressed by means of *negative policies*, granting smaller economies certain flexibilities in relation to the obligations undertaken (Fossati and Levit, 2010). Those flexibilities include the lists of exceptions, laxer rules of origin regarding extra regional value added for the purpose of granting a MERCOSUR certificate of origin to a product, and temporary admission regimes.

This was the picture during the 1990s and the first years of the new century. Nothing more was to be expected from smaller countries, other than to accept these specific flexibilities and to seek extensions to their lists of exceptions to the CET. These trade measures hardly had an impact on asymmetries. In fact, MERCOSUR has led to greater economic concentration (Calfat and Flores Júnior, 2001).

[58] Asymmetries can be classified as either structural – which originate from differences in economic size, geographic position, factor endowment, infrastructure, institutional quality and the development level of countries – or policy asymmetries, which result from a lack of both policy and institutional convergence and coordination among countries (Bouzas, 2003).

Additionally, according to a study carried out by the *Instituto de Pesquisa em Economia Aplicada*, since the creation of the bloc Brazil has been in surplus *vis-à-vis* the other three members, thus failing to operate as the bloc's buyer of last resort and to prop up the trade-related growth of the smaller partners (Fossati and Levit, 2010). Tension increased during bloc negotiations for an FTA with Bolivia and Chile, because Uruguay and Paraguay feared the dilution of their preferential access to the markets of the bloc's two larger countries for the benefit of the two newcomers.

Moreover, the newcomers to the FTA were not obliged to adopt the CET – as Uruguay and Paraguay were – and therefore did not have to pay the costs associated with the protection of Brazilian (and, to a lesser extent, Argentinean) industrial goods (Rios and Veiga, 2007). As tensions built up, and the international prices of commodities increased, Paraguay and Uruguay were increasingly dissatisfied with the bloc, even threatening to negotiate FTAs with the US, which would represent the dilution of MERCOSUR's CET. This tension was reflected in a decrease in the MERCOSUR share of total exports from Paraguay and Uruguay between 1998 and 2004.[59]

The increasing dissatisfaction of smaller partners in relation to the results of trade integration, and the emergence out of the crisis and severe contraction that hit the region, led to the conception of a regionalism less focused on trade.

When MERCOSUR was relaunched in 2003, its agenda was extended, and the issue of asymmetries slowly gained ground. Gradually, greater attention was paid to positive actions intended to reduce and overcome asymmetries between partners and promote the integration of value chains. With increasing frequency, the agenda included concerns about production structures and excluded sectors, which is reflected in the launch of programmes dedicated to production and social issues: MERCOSUR Social, MERCOSUR Productive Integration, MERCOSUR PYMES and the MERCOSUR Fund for Structural Convergence and Institutional Strengthening (FOCEM) (Holzhacker and Santos, 2007).

Among these initiatives, FOCEM is undoubtedly one of the most relevant. Although massively underfunded, it is a step towards dealing with asymmetries. Its goal is to promote structural convergence, develop competitiveness and promote social cohesion, particularly in relation to smaller economies and less developed regions. It supports the institutional/structural operation and strengthening of the integration process. FOCEM recognizes the asymmetries arising from the divergent size of economies but also from regional inequalities. Indeed, while Brazil is the largest economy in the bloc, having the highest GDP, it has the third lowest GDP *per capita* in the region (followed only by Paraguay) and the Brazilian northeast is among the least developed regions, in terms of both GDP per capita and its score on the human development index (Fossati and Levit, 2010).

The total annual capital of FOCEM is US$ 100 million, of which Brazil contributes 70 per cent, Argentina 27 per cent, Uruguay 2 per cent, and Paraguay 1 per cent.

[59] For data see Fossati and Levit (2010).

Although this is a small figure for the needs of the region in terms of infrastructure and social and economic development, it is an important step towards keeping the bloc together on new terms.

There are other initiatives worthy of note, such as the public-private forums (*foros de competitividad*) dedicated to competitiveness, which should serve to develop value chains, particularly between Brazil and Argentina. The initiative began in the timber and furniture sectors in 2003, and in 2007 a second forum was launched, in the film industry sector.

Other more recent cases include the MERCOSUR Guarantee Fund for Micro, Small and Medium Enterprises (Decision CMC 41/08) and the MERCOSUR Family Agriculture Fund (Decision CMC 06/09). The first fund, amounting to US$ 100 million a year, is intended to guarantee, either directly or indirectly, credit transactions made by micro, small and medium enterprises participating in productive integration activities under MERCOSUR. The second fund, amounting to US$ 300,000 a year, is intended to finance programmes and incentive projects for family agriculture activities under MERCOSUR. Contributions are made *pro rata* to each member country, subject to the same percentages as FOCEM.

Another advance seen in 2008 to grant special treatment to Paraguay and Uruguay is the consolidation of a framework to guide extra-regional negotiations. The framework contemplates some flexibility regarding rules of origin and special tariff quotas for the exports of smaller countries.

Evolution in the social dimension is reflected, for instance, in the creation of the MERCOSUR Social Institute (ISM) (Decision CMC 03/07). The general objectives of the ISM are to contribute to the social dimension as a pillar in the development of MERCOSUR; contribute to reducing asymmetries; provide technical assistance in the design of regional social policies; systematize and update regional social indicators; collect and share good practices in social issues; and identify funding sources. The ISM has started to operate and is slowly building its institutional structure. Once it is operational, the ISM could represent a step towards the harmonization of social policies in the bloc.

In summary, MERCOSUR initially had quite a narrow trade approach as it related to asymmetries between member countries. With a few exceptions, flexibilities reflected longer periods of time for smaller economies to implement new rules. This situation was gradually altered and, in the new context, there is an increasing acceptance that the bloc needs deeper structural measures in order to survive and overcome the risk of unravelling.

In the next chapter, we will analyse whether MERCOSUR’s external agenda on asymmetries reflects those internal changes.

5 MERCOSUR's external agenda on asymmetries: Tensions between two models of South-South agreements

MERCOSUR was born under the aegis of open regionalism. As a regional bloc in transition, MERCOSUR is trying to deal with new challenges in South-South trade relations. The treatment of asymmetries reflects this dilemma.

This section addresses the remedies for dealing with asymmetries in relevant South-South agreements signed by MERCOSUR with the Southern African Customs Union and India. The agreement between MERCOSUR and Israel is also analysed to highlight similarities and differences concerning the treatment of asymmetries. This analysis sheds light on how tensions in MERCOSUR's internal agenda re-emerge and tint the external agenda.

5.1 Agreements between MERCOSUR and extra-regional partners: MERCOSUR-India, MERCOSUR-SACU and MERCOSUR-Israel

In general, preferential agreements involving MERCOSUR and extra-regional developing countries fall under the GATT Enabling Clause. As with the GSTP and MERCOSUR, these agreements seek to increase trade relations between Southern countries, creating new alternatives, reducing dependence on Northern markets and ultimately uniting developing countries to negotiate on more equitable terms.

Nevertheless, there is no guarantee that greater developing country interdependence always leads to mutual benefits. There may be joint gains and losses, or relative gains and distributional losses. This may be particularly accurate in trade arrangements among developing country groupings that have great internal asymmetries (among countries and within countries), as in the case of MERCOSUR (see section 4.6 above). The bloc seeks greater interdependence with extra-regional trade partners, without affecting the trade interests of smaller countries or less developed regions.

The agreements that MERCOSUR has negotiated with India, SACU and Israel are examples of a new vintage. In all three agreements, an FTA is set out as a long-term objective. Although the agreement between MERCOSUR and Israel falls under GATT Art. XXIV – and is not a clear example of South-South trade[60] – it is analysed here in order to identify contrasts between the three agreements.

Of these RTAs, the only one currently in effect is the MERCOSUR-India preferential agreement, notified to the WTO in February 2010 under the Enabling Clause. It is perhaps the most emblematic of the three, as it brings together two huge subcontinents that both have proactive trade diplomacy. This is not a coincidence, as the agreement was signed the same year as UNCTAD XI, in 2004, when the third round of the GSTP

[60] Israel has never been perceived or perceived itself as part of the South. As a core part of the Western security coalition, it has enjoyed multiple trade privileges and has never joined the coalitions of developing countries. In fact, Israel was the first country with which the US (under Reagan) signed an FTA, before the latter turned to regional trade relations, such as the Canada-US FTA.

was launched – one year after the establishment of the agricultural G20, with Brazil and India acting as brokers for the developing world.

The agreement with SACU was also signed in 2004 as part of an encompassing effort to bring the South Atlantic countries together. The agreement with Israel, dated 2007, is the most recent.

The joint analysis of the three agreements aims to highlight similarities and differences concerning the treatment of asymmetries, both at the multilateral level (in the case of MERCOSUR-India and MERCOSUR-SACU, as a tool for strengthening South-South trade) and internally within each agreement (i.e. the manner in which the three agreements acknowledge and deal with asymmetries among signatory countries).

In this regard, certain aspects are worth noting. The MERCOSUR-SACU and MERCOSUR-India agreements recognize the importance of trade promotion and cooperation in strengthening South-South trade. The agreements with India and SACU are more upfront about their ambition to open new avenues of cooperation. In both preambles, they assert that regional integration and trade among developing countries, including through the creation of FTAs, is compatible with the multilateral trading system and contribute to the expansion of world trade, the integration of their economies into the global economy and their social and economic development. This could be considered no more than *desiderata* since neither agreement details the ways in which they are compatible with the WTO or how southern economies would better be integrated in the global economy. Nonetheless, the interpretation of specific provisions in agreements does extend to the preamble, according to Art. 31 of the Vienna Convention. Thus, the preamble does carry weight in the event that differences arise and the agreement must be interpreted.

With regard to trade instruments *per se* – such as antidumping or countervailing measures, safeguards, national treatment, customs valuation, technical barriers to trade, sanitary and phytosanitary measures – these agreements refer to WTO rules as a framework. As a general rule, in the case of trade issues that are also regulated by the WTO, the agreements allow signatories to choose between the dispute settlement provisions in the trade agreement and the DSB. At times, the WTO is even the exclusive *forum* to resolve certain matters, as in the case of the MERCOSUR-India agreement regarding antidumping and countervailing measures.

Provisions on confronting asymmetries differ in each agreement. The agreement with India consists of around 450 products per party, with trade preferences ranging from 10 to 100 per cent. Despite the fact that all parties are champions of S&D, there is no upfront reference to flexibilities for smaller or less developed countries, not even in rules of origin. There are just two specific considerations for Paraguay in the tariff schedules: differential trade preferences in relation to a few agricultural products, in addition to a quota in the Indian market for soybean oil.

The greatest interest for the two small open MERCOSUR economies in the agreement with India is not related to accessing the Indian market but to reducing the high CET

they had to accept as part of the cost of accession to MERCOSUR.[61] The new agreement is an opportunity to redress the trade diversion they have paid so far. A declining tariff on imports from India can enable the establishment of processing industries to export to their MERCOSUR partners. Here they count on laxer rules of origin so that some of the processing activities for the wider MERCOSUR market can become gradually more relevant. In fact, it can almost be assumed that Paraguay and Uruguay have been supporters of these agreements because they allow them to free themselves from the hold of Argentinian and Brazilian businesses that had preferential access to their markets, thanks to the relatively high CET. At any rate, an important feature to note is that this agreement adopts a "tariff quotas approach" to deal with asymmetries.

While in the MERCOSUR-India agreement S&D treatment is left to the fine print of tariff schedules, in the MERCOSUR-SACU agreement such considerations are part of the core principles. This is because SACU comprises Lesotho, Swaziland, Namibia and Botswana, in addition to South Africa, the regional powerhouse. The preamble states upfront that negotiations have taken into consideration the principle of S&D for smaller countries and less developed economies in both blocs.

In addition, in the "Understanding between SACU and MERCOSUR on Conclusion of their Preferential Trade Agreement", the Parties commit themselves to broaden and deepen the agreement, including, among others, the fisheries sector, with priority given to the interests of the smaller members of both CUs.

At the beginning of the agreement, in Art. 6(d), the definition of customs duty excludes the duties levied by the governments of Botswana, Lesotho, Namibia and Swaziland for development of infant industries, pursuant to the SACU agreement. In these cases, there will be consultations whenever those duties affect the preferential exports of Paraguay or Uruguay. That is the case where the S&D treatment granted to SACU's less developed members are protected from nullification in agreements between SACU and non-member countries. It seems that Botswana, Lesotho, Namibia, and Swaziland have no real legal obligation to reduce tariffs if they designate the duties as part of a programme to develop infant industries, unless that reduction affects Paraguay's or Uruguay's exports. However, in those cases, countries have the dispute settlement procedure as a last resort, in case they do not reach "satisfactory solutions".[62]

In addition to the items mentioned, no considerations are contemplated in the rules of origin for Paraguay and Uruguay. Neither have flexibilities been established in relation to safeguard measures, dispute resolution proceedings or in the lists of concessions, consisting of around 950 products, with trade preferences ranging from 10 to 100 per cent.

As observed, neither agreement is wide-ranging. They cover very few items and so are fairly oblivious to asymmetries. They adopt isolated measures to deal with asymmetries instead of counting on an active plan to deal with them. The main

[61] In fact, almost all Indian trade is concentrated with Argentina and Brazil (UNCTAD, 2005).

[62] This expression is taken from the agreement in its original Portuguese version and could be understood as "non-legal" or "diplomatic" solutions.

difference between the two agreements is the way they adopt these isolated measures. The agreement with India seems to protect real export interests from a less developed country (soy exports from Paraguay), while the agreement with SACU protects the interests of SACU's less developed members. These follow SACU's own rules, which naturally do not include Paraguay and Uruguay, though they are nevertheless allowed to initiate consultations in the event that their exports are affected.

While these two agreements are sold as part of a grand strategy to strategically *influence* the global trade process, they make progress with extreme paucity and have so far provided small steppingstones that only cover very small trade flows as far as actual business interests are concerned (e.g. soy exports, processing of raw materials, etc.).

In contrast, the MERCOSUR-Israel agreement is posited as extending opportunities for existing trade flows, rather than presented as a strategic ambition to give way to the new geography of trade. It focuses on binding obligations to liberalize trade, rather than fuzzy rhetoric that seeks to mask the absence of obligations.

The agreement does not include a preamble highlighting the benefits of South-South trade. However, the rules of origin include special considerations for Paraguay and Uruguay in relation to manufactured products. The agreement also contains an annex concerning cooperation intended to develop sectors and industries, through technology transfer and joint projects for the development of new technologies, among others. It calls for particular attention to be given not only to the smaller MERCOSUR economies but also to small and medium enterprises.

In a nutshell, the MERCOSUR-Israel is the agreement that focuses the most on the asymmetries between signatories and goes beyond mere exhortations. While it is driven by a rational economic opportunity, the other two agreements are more strategically oriented and less encompassing at the same time.

As observed, the management of asymmetries in trade agreements involving MERCOSUR does not follow the same pattern observed in the bloc's internal agenda. However, as an integration process in transition, MERCOSUR's external agenda on asymmetries struggles with two models of South-South agreement: one with ambitious *desiderata* in the preambles and few concrete measures, and the other that protects MERCOSUR's smaller economies the most.

Final remarks

While South American regional integration processes, such as MERCOSUR and ACN, are not merely consequences of the last ten-year period of unprecedented RTA proliferation, their institutional and legal structure, liberalization mechanisms and objectives have been adapted to the trends of open regionalism. Whether MERCOSUR's rules are WTO compliant is still pending confirmation by the CRTA. Moreover, WTO jurisprudence on MERCOSUR has failed to deliver a more direct and conclusive position in this respect.

MERCOSUR has made significant progress in the establishment of a free trade zone, especially regarding the liberalization of trade in goods. However, the CU has not been fully completed yet and progress in the design and implementation of a definite institutional structure for the bloc has been increasingly hard to attain. Additionally, certain commitments lost credibility as they were not internalized after joint approval. There has also been a multiplication of sectoral conflicts that have found no institutional channels for resolution so far.

On the other hand, there has been little progress in trade-related business disciplines, such as services and investments. The Protocol of Montevideo essentially reproduces the main characteristics of GATS, which favour developing countries: flexibility; progressive liberalization through positive lists of specific commitments; and the maintenance of members' policy space to implement policies through the regulation of services sectors and subsectors. As in the case of GATS, the essence of its framework and structure should remain unchanged, which is especially important in the context of South-South cooperation agreements that are expected to be initiated shortly between MERCOSUR and other developing countries.

Investment provisions will also be part of RTAs with developed countries and/or cooperation agreements with developing countries (regardless of their modalities) under the Enabling Clause and/or the GSTP that might be signed by MERCOSUR in the forthcoming years. This becomes a crucial issue given that MERCOSUR does not yet have common rules on investment, either for intra-regional investments or in terms of harmonized rules for extra-regional flows.

The loss of steam in South American integration processes, including MERCOSUR, came at a time when serious questions about globalization were raised in many quarters. In this context, the advent of the so-called "New Left" governments in the region played a decisive role in the review of South American integration processes. This seems to have been a regional response to two closely intertwined sets of challenges: that of increasing mass mobilization, and the widespread public opinion against neoliberal reforms. Both reactions reflected dissatisfaction with the results of reform strategies, questioned for having failed to generate high growth levels, not having included politically excluded groups and for their inability to promote more equitable models of income distribution.

This perception of having paid a high price gave existing blocs a new airing, and they were "re-launched" under the paradigm of so-called post-commercial or post-liberal regionalism. This had a strong pro-development tone, a concern for maintaining

policy space and consideration of the distributional impacts of trade liberalization. It became clear, *inter alia*, that the integration agenda should be extended to include social and political issues and that the trade dimension should comprise such items as structural and policy asymmetries.

Issues such as asymmetries were refreshed by the new wave of post-commercial regionalism. In fact, MERCOSUR initially had a trade-related and quite narrow approach to *ex ante* and *ex post* asymmetries among member countries. This situation was gradually altered and, in the context of a new mindset in the region, there is acceptance that the bloc needs fresh glue to survive and overcome the risk of unravelling.

With regard to MERCOSUR's external agenda on asymmetries, it is striking to note that those agreements involving MERCOSUR and developing countries (India and SACU) – seen as powerful tools to reduce North-South asymmetries by encouraging South-South trade – have so little to say about South-South asymmetries. The agreement that focuses the most on asymmetries among signatories, and goes beyond mere exhortations, is MERCOSUR-Israel. While that agreement is driven by rational economic opportunity, the other two agreements are more strategically oriented and less encompassing at the same time.

In summary, the management of asymmetries in trade agreements involving MERCOSUR does not follow the same pattern observed in the bloc's internal agenda. However, as an integration process in transition, MERCOSUR's external agenda on asymmetries is caught between two models of South-South agreements: one with pompous preambles and few concrete measures; the other, with a North-South bias, which does not include rhetorical speeches, but protects the smaller MERCOSUR economies the most.

This context presents some distinct challenges to MERCOSUR, for it to better negotiate RTAs and South-South cooperation agreements, as well as preserve the alignment of smaller partners within the bloc. Firstly, both MERCOSUR Protocols related to investment should be ratified. However, the greatest challenge will be to negotiate agreements whose investment provisions contain a balance between the need to attract, promote and protect foreign investments, and the need to preserve members' policy space to implement industrial policies aimed at their development. Secondly, MERCOSUR should give more relevance to the management of asymmetries, especially in its external agenda, where provisions undermining the trade interests of Uruguay and Paraguay would be much more difficult to renegotiate than in the internal agenda.

References

ALADI-MERCOSUR-CAN. (2006). "Convergencia comercial de los países de América del Sur hacia la Comunidad Sudamericana de Naciones: Aranceles y Comercio en Sudamérica: análisis de la convergencia hacia el libre comercio". ALADI/MERCOSUR/CAN/04. Latin American Integration Association - Mercado Común del Sur - Andean Community of Nations.

Amaral Júnior, A. and Sanchez, M. R., Eds. (2004). *Relações Sul-Sul: países da Ásia e o Brasil*. São Paulo, Aduaneiras.

Balassa, B. (1961). *The Theory of Economic Integration*. Illinois, Richard Irwin Press.

Baldwin, R. (1994). *A Domino Theory of Regionalism*. Graduate Institute of International Studies. Geneva, Unversity of Geneva.

Baldwin, R. and Low, P. (2009). *Multilateralizing Regionalism: Challenges for the World Trading System*. Geneva, WTO.

Barral, W. and Correa, C., Eds. (2007). *Derecho, desarrollo y sistema multilateral de comercio*. Florianópolis, Fundação Boiteux.

Bhagwati, J. (2000). *The Wind of the Hundred Days: How Washington Mismanaged Globalization*. Boston, MIT Press.

Bielschowsky, R., Ed. (2000). *Cinqüentas anos de pensamento na Cepal*. Rio de Janeiro, Record.

Botto, M. and Tussie, D. (2007). "De la rivalidad a la cooperación: Limites y desafíos de un contacto creciente". In: Hofmeister, W., Rojas, F. and Solís, L.G. *La percepción de Brasil en el contexto Internacional: Perspectivas y desafíos*. Tomo 1, América Latina, FLACSO/Konrad Adenauer Stiftung: 41-77.

Bouzas, R. (2003). "Mecanismos para compensar los efectos de las asimetrias de la integración regional y la globalización: lecciones de América Latina y el Caribe, el caso del MERCOSUR". Paper presented at the "Global y local: El desafío del desarrollo regional en América Latina y el Caribe" Seminar, 22 Mar 2003, Milan, Italy. Available online at: http://www.iadb.org/sds/doc/SOCPonenciaBouzasSPA.pdf.

Caldas, R. E. and Ernst, C. (2003). *ALCA, APEC, NAFTA e União Européia – Cenários para o Mercosul no século XXI*. Rio de Janeiro, Lumen Juris.

Calfat, G. and Flores Júnior, R. (2001). "Questões de geografia econômica para o Mercosul. In: Chudnovsy, D. and Fanelli, J.M. *El desafío de integrarse para crecer. Balances y perspectivas del Mercosur en su primera década*. Buenos Aires, Red Mercosur-Siglo XXI Editores.

Carreau, D. and Juilliard, D. (1998). *Droit International Économique*. 4th Edition. Paris, LGDJ.

Celli, U. (2002). "Os acordos regionais e as regras da OMC". In: Amaral Júnior, A., Ed. *A OMC e o Comércio Internacional*. São Paulo, Aduaneiras.

Celli, U. (2005). "Acordos de Investimentos e Políticas Industriais". In: Dreyzin de Klor, A., Fernández Arroyo, D. P. and Pimentel, L. O., Eds. *Investimento Estrangeiro*. Revista DeCITA Mar 2005, direito do comércio internacional: temas e atualidades. Florianópolis, Editora Fundação Boiteux.

Celli, U., Ed. (2008). *Comércio de Serviços, OMC e Desenvolvimento*. São Paulo, IDCID.

Celli, U. (2009). *Comércio de Serviços na OMC: Liberalização, Condições e Desafios*. Curitiba, Juruá.

Chang, H. (2002). *Kicking Away The Ladder: Development Strategy in Historical Perspective*. London, Anthem Press.

Correa, L. F. (2001). *O Mercosul e a OMC: Regionalismo e Multilateralismo*. São Paulo, LTr.

Delich, V. and Peixoto Batista, J. (2010). "La agenda de integración regional de Argentina post-2001". In: UNCTAD Virtual Institute. *Integración regional en América Latina – desafíos y oportunidades*. Available online at: http://vi.unctad.org/resources-mainmenu-64/digital-library?task=dl_doc&doc_name=547-integracin&option=com_gslink.

Diego-Fernández, M. (2008). "Trade negotiations make strange bedfellows". *World Trade Review*, 7 (02): 423-453.

ECLAC. (2005). "Desvio de comércio provocado pelos acordos bilaterais de países latino-americanos com os Estados Unidos". LC/BRS/R.150. Economic Commission for Latin America and the Caribbean.

Endoh, M. (2005). "The effects of the GSTP on trade flow: mission accomplished?". *Journal of Applied Economics*, 37: 487-496.

Estevadeordal, A., Freund, C. and Ornelas, E. "Does Regionalism Affect Trade Liberalization Towards Non-Members?". CEP Discussion Paper, No 868. London, LSE.

FAO. (2009). "The State of Food and Agriculture, 2009". Food and Agriculture Organization. United Nations publication. Rome. Available online at: http://www.fao.org/docrep/012/i0680e/i0680e00.htm.

Feuer, G. and Cassan, H. (1985). *Droit international du développment*. Paris, Dalloz.

Fiorentino, R., Verdeja, L. and Toqueboef, C. (2006). "The Changing Landscape of Regional Trade Agreements: 2006 Update". Discussion Paper, No. 12. Geneva, WTO.

Fossati, V. and Levit, L. (2010). "El sistema global de preferencias comerciales entre países en desarrollo: Una oportunidad para el comercio exterior argentino". Revista del CEI, no. 17, Apr. Buenos Aires.

Fram, N. (2006). "Decolonisation, the Commonwealth and British Trade (1945-2004)". Stanford, Public Policy Forum.

Frankel, J. (1997). *Regional Trading Blocks in the World Economic System*. Washington D.C., Institute for International Economics.

Frankel, J. and Romer, D. (1999). "Does Trade Cause Growth?". *The American Economic Review*, 89 (3).

Fukasaku, H. (2000). "Special and Differential Treatment for Developing Countries: Does It Help Those Who Help Themseleves?". Working Paper, No. 197. Brugge, World Institute for Development Economic Research, The United Nations University.

Furtado, C. (2007). *A economia latino-americana: formação histórica e problemas contemporâneos.* São Paulo, Companhia das Letras.

Gari, G. (2009). *The liberalization of Trade in Services in Mercosur*. London, Cameron.

Ghosh, J. (2004). "Regionalism, Foreign Investment and Control: the New Rules of the Game Outside the WTO". Available online at: http://www.networkideas.org/feathm/may2004/ft05_RFI_Control.htm.

Hoeckman, B. (2005). "Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment". *Journal of International Economic Law*, 8 (2): 405-424. Oxford University Press.

Holzhacker, D. and Santos, S. G. M (2007). "Poverty and Inequality Reduction in South America: the Role of Regional Cooperation", 4th ECPR Conference, Pisa, 6-8 September 2007.

ICTSD. (2009). "Developing Countries Close to Deal to Boost South-South Trade". *Bridges Weekly Trade News Digest*, 13 (41), 25 November. International Centre for Trade and Sustainable Development. Geneva. Available online at: http://ictsd.org.

ICTSD. (2010). *Pontes*, 4 (20). International Centre for Trade and Sustainable Development. Geneva. Available online at: http://ictsd.org.

IMF. (2010). "World Economic Outlook Update July 2010". International Monetary Fund. Washington D.C. Available online at: http://www.imf.org/external/pubs/ft/weo/2010/update/02/index.htm.

INTAL-IADB. (2005). "Andean Report no. 1, 2002-2004". Institute for the Integration of Latin America and the Caribbean – Inter-American Development Bank. Buenos Aires.

INTAL-IADB. (2009). "MERCOSUR Report, 2008-2009". Institute for the Integration of Latin America and the Caribbean – Inter-American Development Bank. Buenos Aires.

IPEA. (2004). *Como colocar o comércio global a serviço da população*. Institute for Applied Economic Research. Brasília.

ITC. (2008). *ITC Annual Report 2008.* International Trade Centre. Geneva. Available online at: http://www.intracen.org/Corporate/En/Annual_report.htm.

Jackson, J. H. (2002). *The World Trading System: Law and Policy of International Economic Relations*. Boston, MIT.

Jakobsen, K. (2005). *Comércio Internacional e desenvolvimento: do GATT à OMC – discurso e prática*. São Paulo, Fundação Perseu Abramo.

Kessie, E. (2000). "Enforceability of the Legal Provisions Relating to Special and Differential Treatment under the WTO Agreements". Paper presented at the WTO Seminar on Special and Differential Treatment for Developing Countries, 7 Mar, Geneva, Switzerland.

Kleen, P. and Page, S. (2004). "Special and Differential Treatment of Developing Countries in the World Trade Organization". Serie Global Development Studies no. 2, EGDI Secretariat. Ministry for Foreign Affairs, Sweden – Overseas Development Institute.

Krugman, P. (1991). "Is Bilateralism Bad?". In: Helpman, E. and Razin, A., Eds. *International Trade and Trade Policy*. Cambridge, Mass., MIT Press.

Lester, S. and Mercurio, B. (2008). *World Trade Law*. Oxford, Hart.

Low, P. and Mattoo, A. (2000). "Is there a Better Way? Alternative Approaches to Liberalization under GATS". In: Sauvé, P. and Stern, R. M., Ed. *GATS 2000: New Directions in Services Trade Liberalization*. Washington, D.C., The Brookings Institution.

Manin, P. (1997). *Les Communautes Europeennes*. Paris, Pedone.

Matsushita, M. and Lee, Y. S. (2008). "Proliferation of Free Trade Agreements and Some Systemic Issues – In relation to the WTO disciplines and Development Perspectives". *The Law and Development Review*, 1 (1).

Mavroidis, P. (2007). "Highway XVI Re-visited: the Road from Non-Discrimination to Market Access in GATS". *World Trade Review* 6 (1): 11.

Meza, R. B. and Massera, G. (2008). "El retorno del regionalismo: aspectos políticos y económicos en los procesos de integración internacional". Cadernos Prolam/USP, ano 8, vol. 1.

Mota, P. (2004). "A OMC e os Blocos Econômicos Regionais". Cadernos Prolam/USP, ano 3, vol. 2.

Narlikar, A. (2003). *International Trade and Developing Countries: Bargaining coalitions in the GATT & WTO*. London, Routledge.

Neumann, V. T. (2009). "Regional Trade Agreements and the WTO". 7th International Conference on Managment, Enterprise and Benchmarking, Budapest, MEB.

OECD. (2006). "The Interaction Between Investment and Services Chapters in Selected Regional Trade Agreements". Trade Policy Working Paper, No. 55. Organisation for Economic Cooperation and Development. Paris. Available online at: http://www.oecd.org/officialdocuments/displaydocumentpdf/?cote=COM/DAF/INV/TD(2006)40/FINAL&doclanguage=en.

Oxfam. (2004). "Oxfam Background Briefing on South-South Trade and GSTP". Oxford. Available online at: http://www.oxfam.org.uk/resources/policy/trade/downloads/south_trade.pdf.

Pal, P. (2004). "Regional Trade Agreemens in a Multilateral Trade Regime: An Overview". Available online at: http://www.networkideas.org/feathm/may2004/survey_paper_RTA.pdf.

Peixoto Batista, J. (2005). "De Uruguay a Doha: prorrogas, plazos y renegociaciones". Serie Brief LATN, No. 23, October. Available online at: http://www.latn.org.ar.

Peixoto Batista, J. (2010). "Flexibilities for Developing Countries in Doha Round as à la carte Special and Differential Treatment: Retracing Uruguay Steps?". Working Paper, No. 126, LATN. Available online at: http://www.latn.org.ar.

Peixoto Batista, J. and Deciancio, M. (2008). Valor FOB, No. 42, August-September Buenos Aires. Available online at: http://www.flacso.org.ar/rrii/publicaciones/peixoto_deciancio_Banco%20del%20Sur_final.pdf.

Peña, F. (2009). "La integración del espacio sudamericano: la Unasur y el Mercosur pueden complementarse?". Nueva Sociedad, No. 219, January-February. Available online at: http://www.nuso.org.

Prazeres, T. (2008). *A OMC e os Blocos Regionais*. São Paulo, Aduaneiras.

Prebisch, R. (1973). *Transformações e desenvolvimento: a grande tarefa da América Latina*. Rio de Janeiro, Fundação Getúlio Vargas.

Rios, S. P. and Veiga, P. M. (2007). "O regionalismo pós-liberal na América do Sul: origens, iniciativas e dilemas". International Trade Serie, no. 82. International Trade and Integration Division, ECLAC.

Rodriguez, F. and Rodrik, D. (1999). "Trade Policy and Economic Growth: A Skeptic's Guide to the Cross-national Evidence". Working Paper, No. 7081, National Bureau of Economic Research. Cambridge, Massachusetts.

Rodrik, D. (1997). *Has the Globalization Gone Too Far?* Washington D.C., Peterson Institute of International Economics.

Sachs, J. and Warner, A. (1995). "Economic Reform and the Process of Global Integration". Brookings Papers on Economic Activity, 95. Washington D.C.

Serbin, A. (2009). "América del Sur en un mundo multipolar: ¿es la Unasur la alternativa?". *Nueva Sociedad*, 219, January-February. Available online at: http://www.nuso.org.

Singh, A. (2005). "Special and Differential treatment: The Multilateral Trading System and Economic Development in the Twenty-first Century". In: Gallagher K. P., Ed. *Putting Development First: The Importance of Policy Space in the WTO and IFIs*. London and New York, Zed Books.

Souza, A. M., Gonçalves, S. S. and Oliveira, I. T. M. (2010). "Integrando desiguais: asimetrias estruturais e políticas de integração no MERCOSUL". Discussion Paper, No. 1477, IPEA.

Steinberg, R. (2002). "In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO". *International Organisation*, 56 (2).

Stevens, C. (2003). "Special and Differential Treatment". Trade and Development Brief Series, Briefing Paper, No. 2. International Institute for Sustainable Development.

Summers, L. (1991). *Regionalism and the World Trading System*. Wyoming, Federal Reserve Bank of Kansas City.

Tempone, E. (2007). "Los dilemas institucionales de la OMC: comentarios sobre el Informe Sutherland". *Agenda Internacional*, 25 (XIV). Buenos Aires.

Tenier, J. (2003). *Intégrations regionales et mondialisation : complementarieté ou contradiction*. Paris, Documentation Française.

Thortensen, V. (2001). *OMC: As Regras do Comércio internacional e a Nova Rodada de Negociações Multilaterais*. 2nd Edition. São Paulo, Aduaneiras.

Thortensen, V. (2002). "Os acordos regionais e as regras da OMC". In: Amaral Júnior, A., Ed. *A OMC e o Comércio Internacional*. São Paulo, Aduaneiras.

Tussie, D. (2009). "Latin America: contrasting motivations for regional projects". *Review of International Studies*, 35 (1), February: 169-188. Available online at: http://journals.cambridge.org/action/displayIssue?jid=RIS&volumeId=35&seriesId=0&issueId=S1.

Tussie, D. (2010). "Latin America in the World Trade System". In: *Oxford Handbook of Latin American Economics* (forthcoming).

Tussie, D., Botto, M. and Delich, V. (2004). "El MERCOSUR en el nuevo escenario político regional". Mimeo-Flacso. Available online at: http://www.flacso.org.ar/uploaded_files/Publicaciones/botto_delich_tussie_articulonuevasociedad.pdf.

Tussie, D. and Heidrich, P. (2006). "América Latina: ¿Vuelta al pasado estatista-proteccionista o en la senda de políticas de consenso democrático?". *Foreign Affairs en español*, April- June. Available online at: http://www.foreignaffairs-esp.org.

Tussie, D. and Lengyel, M. (1999). "Developing Countries and the WTO: Participation versus Influence". World Bank. Washington D.C.

Tussie, D. and Narlikar, A. (2004). "The G20 at the Cancun Ministerial: Developing Countries and their Evolving Coalitions in the WTO". *The World Economy*, 27, July.

UNCTAD. (2000). "Training Tools for Multilateral Trade Negotiations: Special & Diferential Treatment". Commercial Diplomacy Programme. United Nations publication**.** UNCTAD/DITC/Misc.35. Geneva.

UNCTAD (2005). "GSTP Trade: Current Trends and Implications of Intra-GSTP Tariff Reductions". Power point presentation. Available online at: http://www.unctadxi.org/Secured/GSTP/Articles/GSTPPresentationPuri.ppt.

UNCTAD. (2006). "The Entry into Force of Bilateral Investment Treaties". United Nations, New York and Geneva. Available online at: http://www.unctad.org/en/docs/webiteiia20069_en.pdf.

UNCTAD. (2008). *Virtual Institute Teaching Material on Regional Trade Agreements*. UNCTAD/DTL/KTCD.2008/2. United Nations, New New York and Geneva.

UNCTAD. (2009). "The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries". UNCTAD Series on International Investment Policies for Development. United Nations, New York and Geneva.

Uzquiza, L. G. (2009). "Crisis y estancamiento negociador: cuando el todo es más que la suma de las partes". LATN Working Paper, No. 107, July. Available online at: http://www.latn.org.ar.

Valladão, A. (2007). "The New Tordesillas Line. The Present Great Latin American East-West Divide". OBREAL/EULARO Background Papers, July. Paris.

Vernieres, M. (1998). *Norte y Sul: renovar La cooperación*. Bilbao, Mensajero.

Viner, J. (1950). *The Customs Union Issue*. Carnegie Endowment of International Peace. New York.

Wionczek, M. (1966). *Integração Econômica da América Latina: experiências e perspectivas*. Rio de Janeiro, Cruzeiro.

Whalley, J. (1999). "Special and Differential Treatment in the Millennium Round". *The World Economy*, 22 (8): 1065-1093. Blackwell Publishing.