

REGULATORY COOPERATION IN LATIN AMERICA: THE CASE OF MERCOSUR

MARIANA MOTA PRADO*

VLADIMIR BERTRAND**

I

INTRODUCTION

One of the principle aims of regulatory cooperation is to allow consumers to trust the quality of products in stores, supermarkets, and pharmacies, even if those products have not been designed, produced, packaged, or assembled in the consumer's country. Such cooperation, in turn, permits traders from other countries to enter a new market without incurring the excessive costs involved in adapting to a new regulatory environment. In this sense, regulatory cooperation aspires to be a powerful tool of international trade policy. It purports to increase trade between nations by lowering the costs associated with differences in regulatory environments without increasing the risks for consumers.

As explored in more detail below, regulatory cooperation can take many institutional forms that are the subject of intergovernmental negotiations. The most ambitious form of these institutions aims at regulatory harmonization—the creation of a unified regulatory system between all the members of a trade zone. Regulatory cooperation can, however, rely on other institutional arrangements with less ambitious objectives. It can, for example, purport to achieve mutual recognition—allowing products lawfully sold in one member country of the trade zone to be sold in the other member countries without fully complying with the importing country's domestic regulatory requirements.¹

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* Associate Professor and Associate Dean (Graduate), University of Toronto, Faculty of Law, Canada. We would like to thank Alberto do Amaral Jr., Salo Coslovsky, Michelle Ratton Sanchez, and the organizers and participants of the Symposium on Regulatory Cooperation held at NYU for helpful comments and suggestions. Any potential errors are the authors' sole responsibility.

** BCL (Oxon); JD (Melb); BA (SciencesPo). We would also like to thank the editors of *Law and Contemporary Problems* for their very helpful suggestions in the process of editing this article. Any errors remain, of course, our own.

1. A famous example of (judicially imposed) "mutual recognition" is the *Cassis de Dijon* decision of the European Court of Justice (ECJ). There, a German importer of spirits challenged the refusal of German authorities to allow the importation of French-produced currant liqueur on the ground that its alcohol content was too low to be considered a liqueur for the purpose of a German technical regulation. The Court held that Germany was, in principle, bound by the principle of the common market enshrined in the EC treaty to allow the importation of the liqueur "provided that [it] had been lawfully produced and marketed in one of the Member States." See Case 120/78 Rewe-Zentral AG v.

The academic literature has raised a series of important questions regarding how ambitious regulatory cooperation should be,² what mechanisms can be used to guarantee import safety,³ what governance structures are associated with regulatory cooperation,⁴ and the challenges of allowing countries to exercise regulatory sovereignty while curtailing protectionism and other obstacles to international trade.⁵ These are all important questions, but they all focus on the purpose and design of regulatory cooperation itself.

Instead of engaging with these questions, this article examines the relationship between regulatory cooperation efforts and domestic regulatory structures. This topic has gained increased relevance in the specialized literature in recent years, and scholars have proposed a series of interesting analyses about this complex relationship. Gregory Shaffer, for instance, shows how World Trade Organization (WTO) rules impose constraints that end up directly or indirectly shaping the regulatory state.⁶ Daphne Barak-Erez and Oren Perez look beyond the WTO rules and map the multiple ways in which international rules, regulations, and standards set up by a series of international institutions affect national systems.⁷ Ruth Okediji asks how domestic institutions such as courts and regulatory bodies have created novel structures to comply with the TRIPS Agreement in a manner consistent with their domestic needs and in compliance with the terms of the agreement.⁸ In sum, there is an emerging literature that analyzes the complex interactions between international trade regulation and domestic institutions in general, particularly the regulatory state.

This article offers yet another contribution to this literature by asking to what extent regulatory harmonization and cooperation efforts presuppose and depend upon domestic regulatory institutions. Most of the studies conducted thus far have focused either on the way in which international regulations limit or constrain national regulatory institutions⁹ or on the way in which national

Bundesmonopolverwaltung Für Branntwein 1979 E.C.R 649, at 14 (emphasis added).

2. Michael Trebilcock & Robert Howse, *Trade Liberalization and Regulatory Diversity: Reconciling Competitive Markets with Competitive Politics*, 6 EUROPEAN JOURNAL OF LAW AND ECONOMICS 5 (1998).

3. ALAN SYKES, *PRODUCT STANDARDS FOR INTERNATIONALLY INTEGRATED GOODS MARKETS* (Brookings 1995).

4. See generally CARY COGLIANESE ET AL., *IMPORT SAFETY: REGULATORY GOVERNANCE IN THE GLOBAL ECONOMY* (Cary Coglianese et al. eds., 1998).

5. See generally TRACEY EPPS & MICHAEL J. TREBILCOCK, *RESEARCH HANDBOOK ON THE WTO AND TECHNICAL BARRIERS TO TRADE* (Tracey Epps & Michael J. Trebilcock eds., 2013).

6. Gregory Shaffer, *How the WTO Shapes the Regulatory State* (Soc'y of Int'l Econ. Law Fourth Biennial Global Conference, Working Paper No. 2014/29, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2480664.

7. Daphne Barak-Erez & Oren Perez, *Whose Administrative Law is it Anyway?: How Global Norms Reshape the Administrative State*, 46 CORNELL INT'L L.J. 455 (2013).

8. Ruth L. Okediji, *Legal Innovation in International Intellectual Property Relations: Revisiting Twenty Years of the TRIPS Agreements* (Oct. 1, 2014) (unpublished manuscript presented at the Innovation Law & Policy Workshop at the University of Toronto Faculty of Law) (on file with authors).

9. See Shaffer, *supra* note 6; Barak-Erez & Perez, *supra* note 7.

and international organizations mutually reinforce each other, directly or indirectly.¹⁰ These analyses assume: (1) that there is a regulatory structure or a regulatory state operating in the countries engaged in trade and (2) that these regulatory structures are fully functional.¹¹ These two assumptions, however, are not necessarily accurate in many developing countries. Lack of domestic institutional capacity may have an impact on international processes that depend upon such structures. David Levy Faur and Jacint Jordana have argued that weaknesses in domestic regulatory institutions in Latin America have largely undermined the strength of transnational regulatory networks:

[In] [o]ur study of transnational Latin American regulatory governance in telecoms . . . we find that their presence and functions are more limited than one would expect compared with Slaughter's expectations in her *New World Order* and they also have a long way to go before they become effective instruments for regional development or regional integration as expected by the ambitions of Bruszt and McDermott and probably all of us . . . The constraints over the development of the regional regulatory governance are first of all domestic. These include limited regional identity and weakness of the domestic players (regulatory agencies, business association and government officials).¹²

In the same vein, this article asks what happens to regulatory cooperation efforts when the countries involved lack the regulatory structures necessary to design and implement such regimes. To address this question, this article analyzes the case of Mercosur, an attempt to create a common market in Latin America. More specifically, the article analyzes the efforts to promote regulatory cooperation in Mercosur, mapping the varying strategies adopted since its creation¹³ in three areas: competition law, technical regulations, and sanitary and phytosanitary requirements (SPS) measures.

Mercosur is an interesting case because in its member states' efforts to create a common market, the states sought the most ambitious goal of regulatory cooperation—harmonization.¹⁴ However, Mercosur has not resorted to supranational institutions that create binding rules that are immediately enforceable in member states. Instead, Mercosur's member states have opted

10. ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004).

11. *See, e.g., supra* notes 6–9.

12. Jacint Jordana & David Levi-Faur, *Regional Integration and Transnational Regulatory Regimes: The Polycentric Architecture of Governance in Latin American Telecommunications* 20–21 (unpublished manuscript) (internal citations omitted), http://www.globalreg-project.net/files/9513/3069/8580/jordana_levi_faur_regional_integration_and_transnational_regulatory_regimes.pdf; *see also* Sofia Boza, *Assessing the Impact of Sanitary, Phytosanitary and Technical Requirements on Food and Agricultural Trade: What Does Current Research Tell Us?* 20 (SECO/WTI Academic Cooperation Project, Working Paper 2/2013, 2013), http://www.wti.org/fileadmin/user_upload/wti.org/7_SECO-WTI_Project/Publications/SPS_TBT_on_food_and_agricultural_trade_Sofia_Boza.pdf (intuiting that the success of Chile as a major exporter of agricultural goods is connected with the development of food quality and safety institutions).

13. The Treaty of Asunción was signed in 1990 and marks the beginning of the transition period. Article 1 of the Treaty provides that the Common Market shall be formed by the end of 1994; the Common Market was set up with the signature of the Ouro Preto Protocol. Treaty Establishing a Common Market art. 1, Mar. 26, 1991, 1041 I.L.M. 1044.

14. *Id.* (“The State Parties hereby decide to establish a common market . . .”).

for an institutional arrangement that relies heavily on the existence of functional domestic regulatory institutions. This choice seems particularly interesting when one considers that the existence of robust and functional regulatory institutions varies considerably from country to country in the region.

This article suggests that Mercosur's reliance on domestic regulatory institutions has proven to be an obstacle to the harmonization process. For instance, neither Uruguay nor Paraguay had a competition authority at the time Mercosur set the goal of harmonizing antitrust legislation.¹⁵ Thus, the harmonization process became largely dependent on the political will of domestic governments to implement and create the necessary regulatory structures. In an attempt to address these shortcomings, the member states of Mercosur seem to be abandoning the aim of promoting harmonization in favor of milder forms of regulatory cooperation with less ambitious objectives. However, it is not fully clear if such a decision will address the basic underlying problem in many countries in the region—a lack of effective and reliable regulatory institutions that can productively engage with and contribute to the international regulatory cooperation process.

This argument should not be viewed as a rejection or even an understatement of the role played by political considerations and economic circumstances. On the contrary, these political and economic factors have played an important role in the way member countries have behaved, and Mercosur has evolved since its creation. Perhaps in a distinctly Latin American fashion, the process of integration within Mercosur has been primarily the result of decisions of the executive branches of the member states.¹⁶ This tendency may have made Mercosur vulnerable to the emergence of electoral and economic contingencies. The economic crisis that spread across the continent at the turn of the twenty-first century has undoubtedly triggered protectionist rather than integrationist responses from member states and has thus slowed down the integration process.¹⁷ Acknowledging this, this article tries

15. See *infra* notes 42–44 and accompanying text.

16. See GIAN LUCA GARDINI, *THE ORIGINS OF MERCOSUR: DEMOCRACY AND REGIONALIZATION IN SOUTH AMERICA* 127 (2010) (“[I]t was precisely the limited nature of the Argentine and Brazilian liberal democracies that allowed the executives to pursue an exclusionary and insular foreign policy that speeded up the integration process.”).

17. See, e.g., Honorio Kume et al., *Identificação das Barreiras ao Comércio no Mercosul: A Percepção das Empresas Exportadoras Brasileiras*, 23 *PLANEJAMENTO E POLÍTICAS PÚBLICAS* (2001); Miguel F. Lengyel & Valentina Delich, *Multiple Paths Toward Regime Building?: SPS Regulation in the MERCOSUR*, in *LEVELING THE PLAYING FIELD: TRANSNATIONAL REGULATORY INTEGRATION AND DEVELOPMENT* 206, 211–12 (Laszlo Bruszt & Gerald A. McDermott eds., 2014); Ricardo Andrés Markwald, *Mercosul: Beyond 2000*, in *THE EUROPEAN UNION, MERCOSUL, AND THE NEW WORLD ORDER* 84 n.37 (Helio Jaguaribe & Álvaro de Vasconcelos eds., 2004); Luís Rodolfo Cruz e Creuz, *A construção da defesa da concorrência no MERCOSUL: uma perspectiva construtivista - cooperação e interesses nas relações internacionais* (2010) (unpublished Masters thesis, Unicamp, Department of International Relations) (<http://www.bibliotecadigital.unicamp.br/document/?code=000774937&go=x&code=x&unit=x>); André Filipe Zago de Azevedo, *Mercosur: Ambitious Policies, Poor Practices*, 24 *BRAZ. J. POL. ECON.* 484 (2004).

to add yet another layer to the analysis—the institutions. This institutional story is meant to complement the political and economic explanations by delving into an important piece of the puzzle in Mercosur’s integration process.

II

THE ROLE OF REGULATORY COOPERATION IN INTERNATIONAL TRADE

A. Why Regulatory Cooperation is Crucial to International Trade

Since the Enlightenment and the writings of Adam Smith and David Ricardo, the orthodox view among trade scholars has been that the development of international trade leads to increases in productivity and economic growth.¹⁸ Although the elimination of tariffs is usually the first move to promote international trade, the elimination of regulatory costs is also fundamental to achieve this goal. The fragmentation of domestic regulatory regimes generates transaction costs as well as production costs because products may need to comply with different requirements in order to be lawfully sold in both the domestic and export markets.¹⁹ Costs also arise for traders when they need to prove that their products are compliant with all relevant standards and regulations.²⁰ These regulatory differences, therefore, impose nontariff barriers to trade (NTBs). A series of such barriers—which can result from technical regulations (known as technical barriers to trade (TBT)), SPS requirements, and requirements related to quality and price control—exist.

This hypothesis has been empirically tested in recent years. A strand of literature has quantified the effects of trade agreements purporting to reduce regulatory fragmentation on trade volume, showing that provisions for regulatory cooperation are correlated with increases in the volume of trade between the parties to the agreement.²¹ Naturally, this does not mean that the overall volume of trade will increase, but merely that trade *between the parties* to the agreement will increase.²² Free trade agreements, and possibly freestanding regulatory cooperation agreements, may create trade diversion—

18. MICHAEL J. TREBILCOCK & MARIANA MOTA PRADO, WHAT MAKES POOR COUNTRIES POOR?: INSTITUTIONAL DETERMINANTS OF DEVELOPMENT 224–31 (2011).

19. On the effect of regulatory fragmentation itself on trade, see, for example, Mauro Vigani et al., *GMO Regulations, International Trade and the Imperialism of Standards* (LICOS Ctr. for Insts. and Econ. Performance, Discussion Paper No. 255/2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1571202.

20. Silja Baller, *Trade Effects of Regional Standards: A Heterogeneous Firms Approach* (World Bank Policy Research, Working Paper No. 4124, 2007).

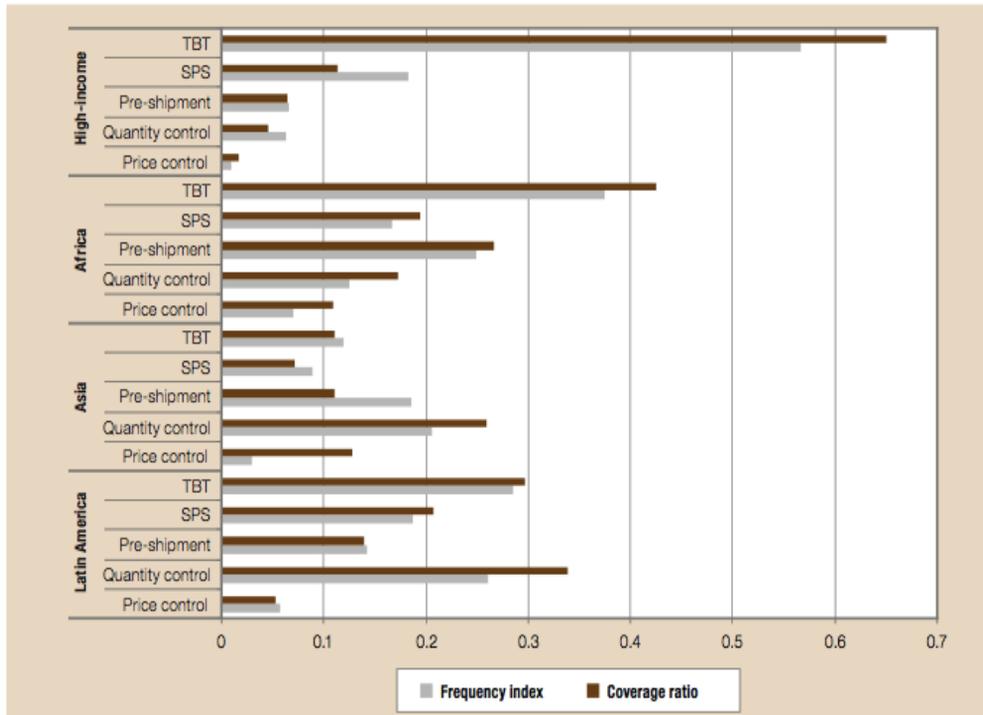
21. See generally Olivier Cadot et al., *North-South Standards Harmonization and International Trade* 6–8 (G-MonD, Working Paper No. 26, 2012), <http://www.parisschoolofeconomics.eu/IMG/pdf/wp26-gmond-north-south-standards-sept2012.pdf>.

22. See, e.g., Baller, *supra* note 20, at 26 (finding “compelling evidence that Mutual Recognition Agreements for testing procedures have a strong impact on both export probabilities and bilateral trade volumes”); Maggie Xiaoyang Chen & Aaditya Mattoo, *Regionalism in Standards: Good or Bad for Trade?* 41 CAN. J. ECON. 838, 860 (2008) (“It is evident that harmonization and mutual recognition can have a positive impact on both the likelihood and the volume of trade within the region and with third countries.”).

that is, transfer the volume of trade that would have occurred with a third party to the other party to the trade agreement.²³

A recent study conducted by the United Nations Conference on Trade and Development (UNCTAD) highlights the prevalence of nontariff barriers in international trade in different regions,²⁴ demonstrating the pressing need to address this issue.

Figure 1: Frequency Index and Coverage Ratios by Chapter (by Region)



Although regulations may potentially generate NTBs, they also concurrently protect fundamental societal interests. For example, technical regulations on food products are necessary to ensure food safety, and the imposition of technical regulations may help states to fight against the consumption of tobacco products.²⁵ The challenge in international trade policy

23. On the potential trade-diversion effect of Mercosur, see Alok K. Bohara et al., *Trade Diversion and Declining Tariffs: Evidence from Mercosur* 64 J. INT'L ECON. 65 (2004); Alexander Yeats, *Does Mercosur's Trade Performance Raise Concerns About the Effects of Regional Trade Agreements?* (World Bank Policy Research, Working Paper No. 1729, 1997).

24. U.N. Conference on Trade and Dev., *Non-Tariff Measures to Trade: Economic and Policy Issues for Developing Countries*, U.N. Doc. UNCTAD/DITC/TAB/2012/1 (2013).

25. See, for example, the recent imposition by countries as diverse as Australia and Uruguay of technical regulations requiring that cigarettes be sold only in unappealing “plain packages” in order to discourage, for public health reasons, the consumption of tobacco. It is worth noting that the Australian legislation has been challenged in the WTO by numerous countries, notably on the basis of Article 2.1 of the Agreement on Technical Barriers to Trade. Agreement on Technical Barriers to Trade,

is, therefore, to guarantee the protections offered by these rules and norms, while minimizing obstacles to trade.²⁶

B. Forms of Regulatory Cooperation

A series of instruments of regulatory cooperation have been designed to address this challenge, including harmonization of technical regulations, harmonization of conformity-assessment procedures, mutual recognition or equivalence of technical regulations, mutual recognition or equivalence of conformity-assessment procedures, and information exchange and transparency.²⁷ A recent study shows that mutual recognition of conformity-assessment procedures is the most common instrument in free trade agreements, whereas harmonization of technical regulations is the second most common.²⁸

These instruments are, of course, very different. As briefly mentioned in the introduction, harmonization proceeds from an ambitious goal. It seeks to create one common set of regulations applicable to all members of the trade zone. The harmony brought to the regulatory environment brings with it legal certainty for traders and may, in some circumstances, bring about more equitable competition between producers in different countries in the trade zone.²⁹ But harmonization assumes that all members of the trade zone, through intergovernmental or expert-led negotiations, are capable and willing to agree on this common set of rules. This agreement may, however, prove much more difficult than anticipated. Some regulations are culturally sensitive, thus making compromises on these regulations harder to reach.³⁰ More importantly for our purposes, even when there is substantive agreement on some topics, institutional machinery to establish and enforce these norms is required. One solution is to establish supranational institutions, but these are expensive and

Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1868 U.N.T.S. 120, 121 [hereinafter TBT Agreement].

26. So much is acknowledged by the preamble of the TBT Agreement itself: “No country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal, or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate.” TBT Agreement, *supra* note 25, pmbl.

27. Debra P. Steger, *Institutions for Regulatory Cooperation in ‘New Generation’ Economic and Trade Agreements*, 38 LEGAL ISSUES OF ECON. INTEGRATION 109, 109 (2012).

28. Roberta Piermartini & Michele Budetta, *A Mapping of Regional Rules on Technical Barriers to Trade*, in REGIONAL RULES IN THE GLOBAL TRADING SYSTEM 250, 272–273 (Antoni Esteveadeordal et al. eds., 2009).

29. Take, for example, chemical products in toys. The enactment of one set of rules will enable toy traders to access the markets of all the countries in the trade zone without incurring any adjustment costs for each market. It will also ensure that toy traders from the zone do not gain unfair advantages from the more relaxed, or irresponsible, attitude of their domestic government in relation to those particular standards.

30. In the case of Mercosur, an example of sociocultural difference as an obstacle to harmonization can be found in the attempts to harmonize labor relations and social security regulations. See MIGUEL A. SARDEGNA, *LAS RELACIONES LABORALES EN EL MERCOSUR*. Buenos Aires: Ediciones La Rocca, 1995.

complex. If the rule-making and rule-enforcing institutions are not supranational, the effort is most likely to rely on a specific and functional domestic institutional setup, as discussed in greater detail in the next section.

In contrast, mutual recognition is often considered a way of “sidestepping the political and bureaucratic nightmare of harmonization.”³¹ Unlike harmonization, mutual recognition does not require the creation, implementation, and enforcement of new standards and regulations common to all members of the zone. The principle of mutual recognition is that products that are lawfully sold in one member state of the trade zone can be freely marketed in all other member states of the zone, even if they do not strictly comply with the latter’s regulations.³² This means that the principle of mutual recognition does not require, at least on its face, complex negotiations to create a common standard; instead, it merely proclaims the general principle that regulations in each and every country of the trade zone are equivalent and therefore cannot prevent the development of trade.

C. Governance Structures of Regulatory Cooperation

Although much attention has been paid to these different instruments of regulatory cooperation, Debra Steger shows that the success of regulatory cooperation efforts is likely to depend not only on the instrument chosen, but also on the institutions that are designed to create and enforce such instruments.³³ In the aforementioned report, UNCTAD identifies three types of institutional arrangements to address issues related to NTBs:

1. Supranational institutions, which may have a leading role in preparing and enforcing a consistent or, at least, nondiscriminatory regulatory environment;
2. Regional agreements that can serve as “a political anchor for reform-minded politicians with reformist agendas” to promote domestic reforms; and
3. Regional institutions that operate as forums for discussion where member countries meet to debate and advance the cause of harmonizing technical-regulation.³⁴

For UNCTAD, the European Union (EU) is a perfect example of the first situation, whereas the North American Free Trade Agreement (NAFTA) is a good example of the second, and the Association of Southeast Asian Nations (ASEAN) is of the third.³⁵ Steger also distinguishes between preferential trade agreements that do not have institutions, such as NAFTA, and those that do

31. Gareth Davies, *Is Mutual Recognition an Alternative to Harmonization?: Lessons on Trade and Tolerance of Diversity from the EU*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 265, 266 (Lorand Bartels & Federico Ortino eds., 2006).

32. Trebilcock & Howse, *supra* note 2, at 50.

33. Steger, *supra* note 27, at 126.

34. U.N. Conference on Trade and Dev., *supra* note 24, at 58.

35. *Id.*

have institutions, such as the EU and ASEAN.³⁶ Regarding the latter, however, she calls attention to the range of different institutional arrangements that may be implemented.³⁷ For instance, the EU's institutional setup is significantly different from the creation of joint regulatory agencies, that is, institutions that promote joint accreditation and harmonization systems. An example of the latter is the Australia–New Zealand Food Authority, created under the auspices of the Australia–New Zealand Closer Economic Relations Trade Agreement.

Each of these institutional arrangements is certainly important for regional integration as well as regulatory cooperation and harmonization efforts. However, some of these arrangements are more dependent on functional domestic institutions than others. To analyze the extent of this dependence, it is necessary to separate the rulemaking and the enforcement process. The rulemaking process is the point at which norms will be decided upon and will be a process independent of domestic institutions if supranational rulemaking institutions are given responsibility for it. Conversely, if rules are to be created by intergovernmental institutions, the process will largely depend on the ability of domestic regulatory institutions to participate in that rule-making process. And even if the rule-making process is fairly independent from domestic institutions, the enforcement process may not be. The system can be dependent on national institutions for the enforcement of supranational norms. The EU reflects the arrangement that is less dependent on functional domestic institutions, whereas NAFTA is an example that is highly dependent on functional domestic institutions. The other arrangements thus fall somewhere in between.

The following parts of this article will explore the degree to which the institutional arrangements adopted by Mercosur are dependent on functional domestic regulatory institutions to achieve Mercosur's initial, and ambitious, goal of regulatory harmonization.

III

THE NEED FOR FUNCTIONAL DOMESTIC REGULATORY INSTITUTIONS TO ACHIEVE EFFECTIVE REGULATORY COOPERATION

Mercosur largely follows the pattern of international trade law in general when it comes to its treatment of domestic regulatory structures. Regulatory cooperation in Mercosur—whether through harmonization or mutual recognition—is mandated.³⁸ The problem is that this mandate implicitly assumes the existence of functional domestic regulatory structures, and it therefore does not have mechanisms to deal with the cases in which this assumption may not hold. Or, and perhaps more accurately, Mercosur law—and one may argue that this is the case for other regulatory cooperation efforts in international trade

36. Steger, *supra* note 27, at 110–16.

37. *Id.*

38. Treaty Establishing a Common Market, *supra* note 13, art 1, at 1044–45.

law more generally—presupposes and relies extensively on the existence of functional regulatory institutions within the state parties to trade agreements.

The question is what happens when these institutions do not exist or are not fully functional. To answer this question, a better understanding of the relationship between efforts to promote regulatory cooperation and their dependence on domestic institutions is necessary. The case study of Mercosur unpacks this complex relationship between regulatory cooperation efforts and domestic institutions. The following sections delve into the efforts of regulatory cooperation in Mercosur on both competition policy and technical regulations.

A. Competition Policy

The founding treaty of Mercosur establishes an ambitious goal: the “common market shall involve . . . the co-ordination of macroeconomic and sectoral policies . . . in order to ensure proper competition between the State Parties; [and] [t]he commitment by State Parties to harmonize their legislation in the relevant areas in order to strengthen the integration process.”³⁹ However, unlike the founding treaties of the EU,⁴⁰ the Treaty of Asunción does not include a competition chapter nor does it create a regional competition authority. The creation of regional competition authorities may be an appropriate response to the lack of expertise, independence, and resources at the domestic level, which tends to weaken national competition authorities in developing countries.⁴¹ However, Mercosur has not decided to follow this path, resulting in a series of difficulties that have forced member states to progressively adjust their expectations regarding how much can be achieved on this front.

In short, the efforts of Mercosur to promote regulatory harmonization in the field of competition policy have failed. The initial focus on harmonization of competition laws, brought about by the Fortaleza Protocol, was not achieved because it required regulatory capabilities that at least some of the members simply did not possess.

1. The Failure of Regulatory Harmonization in Competition Law: The Demise of the Fortaleza Protocol

In 1996, the Protocol on the Protection of Competition (known as the Fortaleza Protocol)⁴² together with its annex on sanctions⁴³ became the main

39. *Id.*

40. Consolidated Version of the Treaty on the Functioning of the European Union arts. 101, 102, 106–108, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

41. See Marco Botta, *The Role of Competition Policy in the Latin American Regional Integration: A Comparative Analysis of Caricom, Andean Community and Mercosur 3* (Oct. 21–22, 2011) (paper presented at the IX Annual Conference of the Euro-Latin Study Network on Integration and Trade) (on file with authors).

42. Protocolo de Defensa de la Competencia del MERCOSUR, Decisión CCM No. 18/96 (1996), http://www.mercosur.int/t_ligaenmarco.jsp?contentid=4823&site=1&channel=secretaria.

43. Comisión de Comercio del Mercosur, Reunión XX, Acta 02/97 (1997).

instruments promoting regulatory harmonization of competition laws among Mercosur member countries. Regarding the governance structure, the Protocol establishes a complex bureaucratic procedure and complicated political structure to control mergers and acquisitions and to sanction anticompetitive behavior. At the top level, there is a Competition Committee, where decisions are all made by consensus, thus giving veto power to member states when their national interests are affected. To counter this risk, the representatives of the states in the committee were supposed to also be members of the national competition authorities—the idea was that these representatives would be independent from their governments. The enforcement system designed by the Protocol relied on national competition regulators to carry out the investigations into anticompetitive conduct and to impose sanctions. In sum, the competition-governance structure of Mercosur was entirely dependent on functional and independent domestic competition authorities.

To some extent, the Fortaleza Protocol was stillborn. On the one hand, the governance structure adopted may have increased the chances of success of the regional instrument because it was politically more palatable than a supranational body. On the other hand, the heavy reliance of the enforcement mechanisms on domestic institutions seems to be a very real contributor to its failure. Crucially, at the time of the Protocol's signature, half of the member states, Uruguay and Paraguay, did not have any form of domestic competition legislation nor, a fortiori, a competition regulator.⁴⁴

Of course, the negotiators of the member states may have designed the Protocol hoping that it would induce those countries to reform their competition laws. And, to some extent, the Protocol may indeed have created some impetus for reform, notably in Paraguay, where the Wasmosy administration circulated draft competition legislation in 1996.⁴⁵ Brazil also passed a new competition law in 1994,⁴⁶ and Argentina did the same in 1999.⁴⁷ However, over time it became clear that the negotiators were overly optimistic. The Paraguayan Parliament only enacted the first competition legislation in the country's history in June 2013.⁴⁸ Uruguay only introduced a competition law in 2007,⁴⁹ and though the competition authority created by this law, the

44. U.N. Conference on Trade and Dev., *supra* note 24; Botta, *supra* note 41, at 12–13.

45. M. Rowat, M. Lubrano and R. Porrata, Jr., 'Competition Policy and Mercosur' World Bank Technical Paper No. 385 (1997), at 60–70.

46. Ley No. 8.884, de 6 junho de 1994 DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 11.6.1994 (Braz.).

47. Law. No. 25.156, de 25 de agosto de 1999, de Defensa de la Competencia (modified by Decreto No. 396/2001) (Arg.), <http://www.wipo.int/wipolex/es/details.jsp?id=100>; F. Peña, *Una Política de Competencia Económica en el MERCOSUR*, BOLETÍN LATINOAMERICANO DE COMPETENCIA 17 (2001).

48. Ley No. 4956, de 25 junio de 2013, de Defensa de la Competencia (Para.), http://www.mic.gov.py/mic/site/comercio/pdf/conacom/Ley_4956.pdf; R. Hall, *Paraguay Enacts First Ever Competition Law*, GLOBAL COMPETITION REV. (2013), <http://globalcompetitionreview.com/news/article/33715/paraguay-enacts-first-ever-competition-law/>.

49. Daniel Hargain, *Nueva Ley de Defensa de la Competencia*, BOLETÍN LATINOAMERICANO DE COMPETENCIA, Septiembre 2007, at 102; Botta, *supra* note 41, at 14.

Commission of Promotion and Protection of Competition, was implemented in 2009, it is under the control of the Ministry of Economy and Finances, rather than being independent.⁵⁰ Tavares de Araujo has argued that the significant delays in competition law reforms means that “[w]hen the protocol was signed, Brazil was the only country that had the proper instruments to enforce the regional disciplines.”⁵¹

Brazil has largely been lauded for the quality of its competition legislation and the independence, at least formally, of its regulatory bodies.⁵² It has been described as “the most advanced [national competition authority] in the region.”⁵³ The combination of the quality of the Brazilian regulator and of Brazil’s quick ratification of the Protocol could have allowed Brazil to take a leadership role in Mercosur. However, Brazil never took up the task of promoting competition law reforms in the other member states, and it also refused to collaborate with Argentina. Botta reports that senior Brazilian competition officials distrust their Argentinean counterparts for the lack of independence of the Argentine regulatory agency.⁵⁴

2. Reducing the Ambition: Mutual Recognition

Although the lack of functional regulatory domestic institutions is not the only factor that can potentially explain the failure of the Fortaleza Protocol, it is certainly an important contributing one. The lack of domestic institutions remains relevant when the harmonization goal is replaced by the goal of regulatory cooperation. This happened in 2004 when member states signed an Agreement on Cooperation for the Application of its National Competition Laws.⁵⁵ Although this agreement establishes a regime of cooperation completely independent from any Mercosur institution, it still relies heavily on domestic institutions. Having recognized in its preamble the centrality of cooperation,⁵⁶ the agreement institutes two mechanisms designed to further the “defence of competition” in Mercosur:

1. National competition agencies may refer cases of anticompetitive practices occurring in another Mercosur country but that have an impact in its

50. Ley No. 18.159, de 30 julio de 2007, de la Promoción y Defensa de la Competencia, Publicada D.O. No. 27288 (Uru.), <http://www.parlamento.gub.uy/leyes/AccesoTextoLey.asp?Ley=18159&Anchor=>.

51. José Tavares de Araujo Jr., *Toward a Competition Policy in Mercosur* 4, Apr. 23–24, 2001 (note prepared for the Inter-American Development Bank’s Infrastructure and Financial Markets Division and Multilateral Investment Fund Competition Policy in Infrastructure Services Conference, 2001), http://www.sedi.oas.org/DTTC/TRADE/PUB/STAFF_ARTICLE/tav01_merc_e.asp.

52. Botta, *supra* note 41, at 14.

53. *Id.*

54. *Id.*

55. Mercado Común del Sur [MERCOSUR], *Entendimiento Sobre Cooperación Entre las Autoridades de Defensa de la Competencia de los Estados Partes del Mercosur Para la Aplicación de sus Leyes Nacionales de Competencia*, MERCOSUR/CMC/DEC No. 04/04 (2004) (on file with authors).

56. *Id.* pmb1.

territory to the competition agency of that country; and⁵⁷

2. National competition agencies are to take into account the interests of other member states when dealing with anticompetitive practices.⁵⁸

The decision also provides for more informal discussions between officials of national domestic competition agencies but does not, rather surprisingly, provide for any time frame for those discussions.⁵⁹

This agreement was followed in 2005 by the Agreement on Cooperation among Member States for the Control of Mergers and Acquisitions in the Region.⁶⁰ The aspiration of this agreement is very similar to the earlier one. It recalls the importance of “cooperation” while making no mention of Mercosur institutions to foster such cooperation.⁶¹ The agreement sets rules relating to both the exchange of information in merger-and-acquisition cases and also the coordination of responses to those cases.⁶² In other words, this agreement assumes that Mercosur members have functional domestic regulatory institutions in the field of competition law and relies completely on their existence in order for responses to be effectively carried out.

This system of cooperation showed early signs of success. The Brazilian regulator, the Administrative Council for Economic Defense (*Conselho Administrativo de Defesa Econômica*, or CADE), made use of the mechanism when it handled the proposed acquisition of the glass-reinforcement and composite-fabrics assets of Saint-Gobain by Owens Corning in 2006 through 2007.⁶³ In this case, the head of CADE decided to notify the competition regulators of the three other Mercosur countries of his decision and made explicit reference to Decision 15/06.⁶⁴

This early success, however, has not been replicated. Thus, the need to strengthen the regulatory cooperation mechanisms is clear. These reforms were inspired by the acknowledgment by some high officials that “leaner” forms of regulatory cooperation were more appropriate in the Mercosur context.⁶⁵ Tavares, a high official in Brazil, argued that Brazil and Argentina should engage in bilateral cooperation outside the formal boundaries of the Fortaleza Protocol following the models of cooperation between the EU and the United States or Australia and New Zealand.⁶⁶ This, he argues, would enable Brazil and Argentina to gain the “practical knowledge engendered by this experience”

57. *Id.* at art. IV.

58. *Id.* at art. I(1).

59. *Id.* at art. VIII.

60. MERCOSUR, *Entendimiento Sobre Cooperación Entre las Autoridades de Defensa de la Competencia de los Estados Partes del Mercosur Para el Control de Concentraciones Económicas de Ámbito Regional*, MERCOSUR/CMC/DEC No. 15/06 (2006) (on file with authors).

61. *Id.*

62. *Id.* at art. IV.

63. Botta, *supra* note 41, at 13.

64. Ato de Concentração No. 08012.001885/2007-11 de 28 de julho de 2008, D.O.U. (Braz.).

65. Tavares de Araujo, *supra* note 51, at 4.

66. *Id.*

necessary to reform the Fortaleza Protocol and to assist Uruguay and Paraguay in putting in place the required technical assistance.⁶⁷ And there were important domestic changes in at least one member country, Uruguay. The two Mercosur agreements signed in 2004 and 2005 were shortly followed by the creation of competition legislation and a competition regulator in the country in 2006 and 2007, respectively.⁶⁸

In 2010, Mercosur's Council for the Common Market (CCM) revoked the Fortaleza Protocol and its annex on sanctions and, in its place, enacted an Agreement on Protection of Competition in Mercosur.⁶⁹ As explained above, the previous model created a complex bureaucratic procedure and political process: member states would collect the information and submit the cases for analysis and decision by the Competition Committee, which was made up of representatives of all member states and made decisions by consensus. In contrast, the new model is based on consultations among the competition authorities of member states. It abandons the idea of harmonizing the antitrust norms applicable to all member states and relies instead on cooperation and coordination, strengthening the two agreements on cooperation signed in 2004 and 2006.⁷⁰

Although this new agreement looks promising, it still heavily relies on functional domestic regulatory institutions. Due to this reliance, much uncertainty remains on how the agreement will evolve. The agreement still remains to be internalized by all member states, except Argentina.⁷¹ Internalization requires that each country enact the terms of the agreement as enforceable norms in the domestic sphere—either as a statute, executive decree, or regulation, depending on the country.

B. Technical Barriers to Trade

The story to be told in relation to cooperation on TBT is somewhat less clear cut than the story on competition policy. On its face, regulatory cooperation in this field has indeed yielded positive results. As this section demonstrates, those achievements cannot cloud the fact that the mechanisms of regulatory cooperation in Mercosur have, to a large extent, failed to appreciate the consequences of the lack of functional regulatory structures in at least some member states.

67. *Id.* at 5.

68. *Id.*

69. MERCOSUR, *Acuerdo de Defensa de la Competencia del Mercosur*, MERCOSUR/CMC/DEC No. 43/10 (2010) (on file with authors).

70. Luís Rodolfo Cruz e Creuz, *Há Novos Ventos na Defesa da Concorrência no Mercosul*, CONSULTOR JURÍDICO (Sept. 15, 2011), <http://www.conjur.com.br/2011-set-15/novos-ventos-defesa-concorrancia-ambito-mercossul>.

71. Updated information on internalization of Mercosur norms is available at ESTADO DE RATIFICACIONES Y VIGENCIAS DE TRATADOS Y PROTOCOLOS DEL MERCOSUR Y ESTADOS ASOCIADOS. For 2010 decisions, see http://www.mercosur.int/innovaportal/v/2376/2/innova.front/decisiones_2010.

Similarly to competition policies, the Treaty of Asunción placed regulatory harmonization of TBT measures⁷² as one of the cornerstones of the economic integration project.⁷³ However, in contrast to competition policy, there has been some significant progress in this area: Mercosur has enacted a number of technical rules that have, in turn, been internalized by the member states. The achievements of Mercosur in this field can be attributed to two institutions: Sub-Working Group 3 (SGT 3) on Technical Standards created in 1991 under the auspices of the Common Market Group and later, from 1997 onwards, by the Association for Standardization (AMN).

SGT 3 was coordinated by each country's institution responsible for measurements, standards, and production quality.⁷⁴ In accordance with the obligations imposed by the WTO Agreements,⁷⁵ SGT 3 has often created technical regulations on the basis of international standards formulated by international organizations such as ISO/IEC, Codex Alimentarius, and also on the basis of international norms created by international organizations, such as the United Nations.⁷⁶ This process, which adheres to the WTO TBT Agreement, requires Mercosur countries to use international technical standards as a basis for their domestic technical regulations "except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued."⁷⁷ In practical terms, this requires the member states to engage in complex considerations of the ends pursued (for example, the level of acceptable risk for the purpose of the protection of human health), as well as the means to achieve those ends (for

72. The TBT Agreement defines technical regulation as a "[d]ocument which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method." TBT Agreement, *supra* note 25, annex 1. Technical regulations may take varying forms: prohibitions or restrictions of imports for objectives set out in the TBT Agreement (e.g., import authorization for firearms); tolerance limits for residue and restricted use of substances (e.g., sulphur content in Champagne exceed X mg/l); labeling, marking, and packaging requirements (e.g., wine must carry a label indicating the alcoholic content); production or post-production requirements (e.g., milk must be stored below a particular temperature); product identity requirements (e.g., a product can only be identified as "chocolate" if it contains a minimum of 30% cocoa); product quality or performance requirements (e.g., concrete must resist up to 200 bar of pressure). U.N. Conference on Trade and Dev., *supra* note 24, at 90–93 (providing illustrative list).

73. Treaty Establishing a Common Market, *supra* note 13, art. 1, at 1045.

74. In Brazil, this institution was the Instituto Nacional de Metrologia, Normalização e Qualidade Industrial (INMETRO); in Argentina, the Secretaría de la Competencia, la Desregulación y de la Defensa del Consumidor; in Paraguay, the Instituto Nacional de Tecnología, Normalización y Metrología (INTN); and in Uruguay the Laboratorio Tecnológico del Uruguay (LATU).

75. See MARINA FOLTEA, INTERNATIONAL ORGANIZATIONS IN WTO DISPUTE SETTLEMENT: HOW MUCH INSTITUTIONAL SENSITIVITY? 245–79 (2012) (chapter entitled "The World Health Organization and the Codex Alimentarius Commission").

76. See INMETRO, Mercosul e Barreiras Técnicas, <http://www.inmetro.gov.br/barreirastecnicas/mercoul.asp> (last visited Jan. 6, 2015). This became mandatory in 2000 when the TBT Agreement was formally incorporated into Mercosur's legal framework by Decision CCM 58/00, which adopts the TBT Agreement for the MERCOSUR and, therefore, incorporates its processes.

77. TBT Agreement, *supra* note 21, art. 2.4.

example, what level of chemical components is required to achieve that objective).

In sum, the process of regulatory cooperation in SGT 3 relied heavily on the existence of functional domestic institutions. Rather surprisingly, perhaps, and in reliance on the participation of the national bodies of the member states, SGT 3 informally established subcommissions responsible for specific economic sectors.⁷⁸ Results appeared soon thereafter. In 1991, the Common Market Group (GMC) established standards for the automotive industry⁷⁹ and industrialized canned food as a result of the work of these commissions.⁸⁰ By the end of the transition period, in 1995, SGT 3 was responsible for fifty percent of the norms enacted by the GMC.⁸¹

These achievements are, to a large extent, nothing more than a can't-see-the-forest-for-the-trees problem. Indeed, in contrast to norm production, ratification and internalization of the technical standards was slow and, in some cases, never happened.⁸² For instance, only in 2002 did Brazil ratify a GMC Resolution enacted in 1995 (Resolution n.23/1995) regarding mutual recognition of pharmaceutical products registered in one Mercosur country.⁸³ A 1996 resolution to create a harmonized registry for medical products⁸⁴ was never ratified by any member countries and was replaced by a new one in 2000. Uruguay's government estimated that only half of the 1,024 norms approved by the bloc by 1999 had been incorporated in the domestic legal orders of the member states by 2000.⁸⁵ Similarly, in 2001, a survey of 4,494 Brazilian companies operating in the footwear, steel, and poultry industries indicated that nontariff barriers—in particular, TBT and SPS measures—were the most important obstacles to trade.⁸⁶ This has been a significant obstacle for trade in Mercosur.

The 1997 creation of the AMN has also yielded positive results for Mercosur. The AMN assumed the role previously performed by the Mercosur Standardization Committee.⁸⁷ It has three objectives: (1) harmonization of national standards, (2) alignment of the positions of the members in

78. Adriano Braga de Melo & Fernando Goulart, *A Eliminação de Barreiras Técnicas no Mercosul* 5 (INMETRO Subgrupo de Trabalho, Paper No. 3, 2003), <http://www.inmetro.gov.br/inovacao/artigos/docs/3.pdf>.

79. Grupo Mercado Común, Acta 04/91, Res. 9/91, "Normas Técnicas Armonizadas sobre Requisitos de Seguridad, Ruidos y Emisión de Vehículos" ["Car Safety, Noise and Emissions"] (1991).

80. Grupo Mercado Común, Acta 04/91, Res. 10/91, "Norma MERCOSUR sobre Rotulado de Alimentos Envasados" ["Labeling of Packaged Food"] (1991).

81. Braga de Melo & Goulart, *supra* note 78, at 6.

82. THOMAS ANDREW O'KEEFE, *LATIN AMERICAN AND CARIBBEAN TRADE AGREEMENTS: KEYS TO A PROSPEROUS COMMUNITY OF THE AMERICAS* 182 (2009).

83. *Id.*

84. Grupo Mercado Común, Acta 02/96, Res. 37/96, "Registro Armonizado de Productos Médicos" ["Harmonized Registry for Medical Products"] (1996).

85. *Informe MERCOSUR*, Inter-American Development Bank 74 (1999–2000).

86. Kume et al., *supra* note 17.

87. Braga de Melo & Goulart, *supra* note 78, at 7.

international standardization bodies, and (3) promotion and mutual recognition of certification systems.⁸⁸ The AMN is an independent nonprofit private entity, separate from the structure of Mercosur, and it is entitled to work in cooperation with Mercosur as long as its composition includes national standardization bodies of all member states.⁸⁹ In other words, like the SGT 3, the AMN relies heavily on the participation of functional domestic regulatory institutions. In terms of standard production, the AMN remains active, setting up voluntary standards and possessing the power to propose the incorporation of these into the mandatory norms enacted by the GMC.⁹⁰

It must be acknowledged that, in recent years, some countries have made significant progress toward the implementation of Mercosur technical regulations. This is especially the case for the smaller countries—Uruguay and Paraguay. As of November 2011, seventy-seven technical regulations were in force in Uruguay. Of this total, forty-eight percent of the rules adopted implemented Mercosur standards.⁹¹ Similarly, in Paraguay, there has been recent implementation in 2006, 2008, and 2010, but en masse:

Paraguay has incorporated MERCOSUR's regulations on TBTs by means of Decree No. 8.064/06, which contains 76 GMC resolutions on foodstuffs, toys and metrology, *inter alia*; Decree No. 12.085/08, containing 23 GMC resolutions on the labeling of textiles, foodstuffs and pre-packaged goods, *inter alia*; and Decree No. 4.432/10, which incorporates a GMC resolution on the definition of alcoholic beverages.⁹²

Although the number of regulatory enactments by Uruguay and Paraguay is impressive, it is important to remember that both countries took a long time to internalize the rules enacted.

In this case there may have been functional regulatory institutions in most, if not all, member countries that allowed for such recent progress. TBT measures seem to illustrate something important about domestic institutional capacity, which is the focus of this article's analysis. The national administrative capabilities were particularly heterogeneous at the beginning of the harmonization efforts, and this may have contributed to this slow pace and lack of internalization. Indeed, Argentina and Brazil already had a multitude of strong domestic institutions in 1991,⁹³ whereas Uruguay and Paraguay had only

88. MERCOSUR, MERCOSUR/GMC/81/00 (2000) (on file with authors).

89. Cooperation Agreement between Mercosur and AMN, Arts. 3–4, <http://www.amn.org.br/Paginas/Paginas/5?url=Documentos>.

90. O'Keefe, *supra* note 82, at 182.

91. See WTO TRADE POLICY REVIEW BODY, TRADE POLICY REVIEW REPORT BY THE SECRETARIAT: URUGUAY, WT/TPR/S/263, at Table III.1 (Mar. 21, 2012) [hereinafter URUGUAY TRADE POLICY REVIEW].

92. WTO TRADE POLICY REVIEW BODY, TRADE POLICY REVIEW REPORT BY THE SECRETARIAT: PARAGUAY, WT/TPR/S/245, at 56 (Mar. 23, 2011) [hereinafter PARAGUAY TRADE POLICY REVIEW].

93. In Brazil, a national system of metrology, normalization, and industrial quality was established in 1973. Since then, the system has included two regulatory institutions in charge of 'technical matters': the National Institute of Metrology, Standardization and Industrial Quality (INMETRO) and the National Council of Metrology, Normalization and Industrial Quality (CONMETRO). In Argentina, the national system of norms, quality, and certification, which includes regulatory institutions such as

a bare bones structure at the time (Laboratorio Tecnológico del Uruguay and Instituto Nacional de Tecnología, Normalización y Metrología, respectively).

In recent years, significant changes have been implemented to the point that Paraguay and Uruguay have finally acquired the capacity to engage meaningfully in the process of regulatory cooperation. Paraguay restructured the Instituto Nacional's governance structure in 2005.⁹⁴ This reform also created a national system of notification and information on technical regulations and conformity-assessment procedures.⁹⁵ This system allows Paraguay to comply with the notification, transparency, and information obligations under the WTO TBT Agreement and to coordinate and define positions for negotiations at the international; regional, through Mercosur; and bilateral levels. The results are visible: until 2006 Paraguay had made no notifications to the WTO Committee on TBT, but since then the country has made thirty-two notifications. Paraguay also created the Technical Committee on Technical Barriers to Trade in 2009.⁹⁶

Similarly, Uruguay created the National Quality Institute in 2005, which governs conformity assessments,⁹⁷ and the Uruguayan Standardization, Accreditation, Metrology and Conformity Assessment Scheme in 2010.⁹⁸ These changes may be connected to and partially explain the recent surge of internalization of Mercosur technical regulations in these two countries. The recent inclusion of Venezuela as a new member in the trade bloc⁹⁹ is likely to provide an opportunity to test this hypothesis empirically.

The strengthening of domestic institutions, it may be suggested, have proved more efficient than other attempts to overcome the lack of domestic implementation of Mercosur technical regulations. One such attempt is that of mutual recognition agreements among member countries, such as the one signed between Brazil and Argentina on toy safety and quality certification.¹⁰⁰ Similar to the other arrangements discussed in this article, this type of agreement depends on the existence of functional domestic regulatory institutions, which was not a problem in this case as both Argentina and Brazil

the Argentine Institute of Normalization and Certification (IRAM) and the Argentine Organization of Accreditation (OAA), was only created by decree in 1994. IRAM, however, had been established as early as 1937.

94. See REPUBLICA DEL PARAGUAY, LEY N° 2575/2005: DE REFORMA DE LA CARTA ORGANICA DEL INSTITUTO NACIONAL DE TECNOLOGIA Y NORMALIZACION (INTN), http://www.intn.gov.py/intn/sites/default/files/paginas_archivos/carta-organica-intn.pdf (last visited Jan. 6, 2015).

95. Dec. No. 6.499/05, 18 octubre 2005 (Para.).

96. Dec. No. 1.765/09, 3 abril 2009 (Para.).

97. Ley No. 17.930, de 17 de diciembre de 2005, Publicada D.O. 23 de diciembre de 2005 (Uru.).

98. URUGUAY TRADE POLICY REVIEW, *supra* note 91, at 70, (indicating that under Decree No. 89/010 of Feb. 26, 2010, the governing body of the Uruguayan Standardization, Accreditation, Metrology and Conformity Assessment Scheme is composed of representatives of several ministries including Industry, Energy and Mining, Economy and Finance, Livestock, Agriculture and Fisheries, and of the Planning and Budget Office (OPP)).

99. *Venezuela Joins Mercosur Trading Bloc*, BBC (July 31, 2012), <http://www.bbc.com/news/world-latin-america-19069591>.

100. de Azevedo, *supra* note 17, at 598 (providing a nonexhaustive list).

had such institutions in place. But this type of mechanism also depends on the political will of the countries involved and has therefore encountered two problems. First, some member countries may decide not to sign the mutual recognition agreement. Second, such agreements can be unilaterally suspended, which happened to the Brazil–Argentina agreement when Argentina suspended it in November 2009.¹⁰¹

A second attempt at strengthening the domestic institutional structures has been memoranda of understanding or agreements on technical cooperation. These agreements, like mutual recognition agreements, rely heavily on the existence of functional regulatory institutions in at least one of the member countries signing the agreement. Brazil has established such agreements with Argentina, Bolivia, Paraguay, Uruguay, and Venezuela.¹⁰²

A third attempt to strengthen domestic institutions has been the creation of voluntary standards by AMN, which evolved into de facto rules in the industry. Indeed, by 2009, AMN had established 550 voluntary norms for products to be sold within Mercosur.¹⁰³ These are technical standards, however, and the GMC has not been fast enough at incorporating them into the system as technical regulations. Significantly, despite their voluntary nature, these AMN standards tend to be followed by industry players. This does not detract from the importance of transforming those nonbinding standards into binding regulations to ensure that all players in the industry play by the same rules. In an attempt to address this, in 2010, the member states of Mercosur launched negotiations to make revising Mercosur technical regulations a more fluid and regular process.¹⁰⁴ This new mechanism to enact technical regulations theoretically does not rely directly on functional domestic regulatory institutions, but it does in the case of Mercosur, because, as explained earlier, the AMN depends on the participation of national institutions.

IV

THE COMPLEX ROLE OF DOMESTIC REGULATORY STRUCTURES IN REGULATORY COOPERATION PROCESSES

The previous part shows a clear contrast between competition policy and technical regulations in Mercosur: cooperation in competition policy faced many more obstacles than in the field of technical regulations. Concurrently, competition authorities were either nonexistent or newly created institutions in many countries, in contrast with those in charge of technical regulations. This seems to support the view that the absence of functional domestic regulatory institutions in the members of a trade zone may significantly hamper efforts to

101. Res. No. 894, 11 Noviembre 2009, B.O. 23/11/2009 (Arg.).

102. WTO TRADE POLICY REVIEW BODY, TRADE POLICY REVIEW REPORT BY THE SECRETARIAT: BRAZIL, WT/TPR/S/283, at 63 (May 17, 2013) [hereinafter BRAZIL TRADE POLICY REVIEW].

103. O’Keefe, *supra* note 82, at 182.

104. BRAZIL TRADE POLICY REVIEW, *supra* note 102, at 63.

promote regulatory cooperation. At all stages of the regulatory cooperation process, whether in the negotiations of working groups or at the time of implementation, specific and functional forms of regulatory capacities are needed in order for the cooperation effort to be effectively implemented.

It would be too simplistic, however, to claim that the sheer existence of functional domestic regulatory institutions is a guarantee of success for regulatory cooperation efforts. On the contrary, the field of SPS measures in Mercosur suggests that the role of domestic regulatory institutions is somewhat more complex than a straightforward question of *capacity*, that is, the sheer existence of regulatory structures or than *functionality*, that is, agencies that are fully operational. These characteristics are *necessary* in order to engage effectively in regulatory cooperation, but they are not *sufficient*.

The SPS-measures example illustrates that political will plays a significant role in regulatory cooperation efforts. If countries are not willing to, at least partially, cede sovereignty to a supranational body, then the regulatory cooperation process will not only be dependent on the existence of functional domestic institutions but also on the political will of national governments to move forward with the process.

Given the importance of agriculture and the agri-industry in Latin America,¹⁰⁵ SPS measures are of strategic importance within Mercosur. Similar to TBT measures, the Mercosur mandate to generate cooperation among member countries in the field of SPS measures can also be traced back to the Treaty of Asunción.¹⁰⁶ Nevertheless, Mercosur can hardly be said to have been successful in this field.

In its initial phase of development, Mercosur intended to harmonize SPS measures in the region. To further this ambitious plan, Mercosur put in place institutional mechanisms very similar to those already mentioned in the context of TBTs: sub-working groups under the umbrella of the GMC. Sub-Working Group 8 on Agriculture has been, in this regard, particularly instrumental in the development of Mercosur's harmonization agenda. As already mentioned, the role of these sub-working groups is to decide whether a standard—decided upon by a technical committee such as the Animal Health Committee or the Plant Health Committee¹⁰⁷—should be elevated to the GMC for final

105. According to the data published by the MIT Observatory of Economic Complexity, for 2012, three of the top five Brazilian exports are agricultural goods (soybeans, raw sugar, and poultry meat). Three of the top five Argentinean exports are agricultural goods (soybean meal, corn, and soybean oil). Four of the top five Uruguayan exports are agricultural goods (frozen beef, soybeans, rice, and wheat). Nine of top ten Paraguayan exports are agricultural goods (e.g., soybeans, frozen beef, rice). The importance of agriculture is more limited for a newer member of Mercosur, Venezuela, and a potential new member currently being contemplated, Bolivia—two countries that rely extensively on oil and gas. Alexander Simoes, *The Observatory of Economic Competition*, MIT, <https://atlas.media.mit.edu/en/>.

106. Treaty Establishing a Common Market, *supra* note 13, art. 1, at 1045.

107. Lengyel & Delich, *supra* note 17, at 210; Sebastián Leavy & Francisco Fabian Saez, *Debilidades en la Armonización de Medidas Sanitarias y Fitosanitarias en el MERCOSUR 7* (working paper presented at the 47th Congress of the Sociedade Brasileira De Economia, Administração e Sociologia Rural, 2009).

adoption.¹⁰⁸

Although a “Mercosur SPS Code” has never come close to being written, significant progress toward harmonization of SPS measures was made in the initial years of the trade zone. The rules enacted at that time can be divided into the following categories:¹⁰⁹

1. “Framework decisions,” such as the incorporation of the WTO SPS Agreement,¹¹⁰ or a resolution establishing conformity-assessment procedures at the point of destination rather than at the border;¹¹¹

2. “Horizontal decisions” that apply to all products without distinction of the sector of activity, such as Resolution 19/93 of the GMC providing for a harmonized list of additives;¹¹² and

3. “Vertical decisions” dealing with specific sectors of activity such as Resolution GMC 70/93 on butter¹¹³ and Resolution GMC 111/96 on cacao.¹¹⁴

After these initial years, Mercosur changed its strategy. It abandoned the ambitious harmonization agenda after acknowledging that full harmonization was too complicated and time consuming. This shift did not begin at a clear point in time but was introduced progressively.¹¹⁵ This more modest approach has been characterized as a “default strategy.”¹¹⁶ Mercosur member countries would pursue harmonization only when strictly required to permit intrabloc trade. In other words, harmonization efforts would only be conducted when justified by the volume of trade at stake or harmonized regulatory intervention appeared to be the best solution to address a specific issue.¹¹⁷

Similarly to TBT, harmonization of SPS measures has also suffered from weak domestic implementation. First, member states appear to delay implementation, engaging in some degree of cherry-picking when deciding whether and which Mercosur instrument to implement first in their domestic

108. Lengyel & Delich *supra* note 17, at 210.

109. Leavy & Sáez, *supra* note 107, at 14.

110. Decision CCM 6/96 ‘Acuerdo sobre aplicación de medidas sanitarias y fitosanitarias.’

111. Grupo Mercado Común, Acta 06/94, Res. 60/94, “Inspección Fitosanitaria en Puntos de Destino” [“Phytosanitary Inspections at Point of Destination”] (1994); Grupo Mercado Común, Acta 01/96, Res. 2/96, “Regimen de Certification y Verification en Puntos de Origen/Destino” [“Certification and Verification Regiment at Point of Destination”] (1996).

112. Grupo Mercado Común, Acta 02/93, Res. 19/93, “Lista General Armonizada de Aditivos Mercosur” [“General Harmonized List of Additives in Mercosur”] (1993).

113. Resolution GMC 70/93 ‘Reglamento Técnico de identidad y calidad de la manteca.’

114. Resolution GMC 111/96 ‘Requisitos Fitosanitarios para Cacao.’

115. See Grupo Mercado Común, Acta 04/98, Res. 77/98, “Reconocimiento Mutuo de Equivalencia de Sistemas de Control” [“Mutual Recognition of Equivalent Systems of Control”] (1998); Grupo Mercado Común, Acta 03/99, Res. 60/99, “Principios, Directrices, Criterios y Parámetros para los Acuerdos de Equivalencia de los Sistemas de Control Sanitarios y Fitosanitarios entre los Estados Partes del MERCOSUR” [“Principles, Directives, Criteria and Parameters for Agreements on the Equivalence of Systems of Control between the MERCOSUR Member States”] (1999) (demonstrating a shift, which has become clearer recently, toward mutual recognition rather than harmonization, a shift which has become clearer recently).

116. Lengyel & Delich, *supra* note 17, at 212.

117. *Id.*

legal systems. For instance, over a period of time subject to the latest WTO Trade Policy Review, Paraguay focused on implementation of rules regarding plant products and byproducts as well as health-certification requirements for the import of both live animals and genetic material of various species.¹¹⁸ During the same period, Uruguay focused its implementation of Mercosur norms on the standards relating to the equine industry.¹¹⁹

Compounding the obstacles to internalization of norms, there are areas in which the regulatory cooperation efforts have failed to produce any rules. The case of genetically modified organisms (GMOs) is particularly illustrative. Unlike farmers in others countries, those in Mercosur countries have embraced genetically modified crops.¹²⁰ Mercosur, however, has failed to take advantage of this opportunity to produce harmonized safety and quality standards for GMOs at the regional level.¹²¹ GMC required the Ad Hoc Group on Agricultural Biotechnologies to harmonize the domestic regulatory frameworks on biosecurity, analyze the possible coordination of the commercial application of GMOs, and organize consultations toward establishing a common position in the context of international negotiations.¹²² But the results have been disappointing.¹²³ The documents produced by the group—such as a comparison of the domestic legal requirements of GMO production and labeling, and a report on the potential commercial applications of GMOs—have been characterized as descriptive, superficial, incoherent, and lacking in policy prescriptions.¹²⁴

With this picture in mind, academics negatively regard the results achieved by Mercosur in the field of SPS. Lengyel and Delich rightly point out that regulatory cooperation efforts in Mercosur led to very minor substantive harmonization; the situation could be described as one of “outright blockage.”¹²⁵ They ultimately conclude that “it could be fair to say that M[ercosur] SPS policy is still essentially defined at the national level, as domestic standards and practices are brought and powerfully defended by national officers in M[ercosur] meetings.”¹²⁶ Zago de Azevedo also points out that use of SPS measures has been one of the preferred means by which Mercosur countries have protected their domestic agricultural producers.¹²⁷ More specifically, he mentions a survey conducted by Mercosur that identified over eighty-two SPS

118. Paraguay Trade Policy Report, *supra* note 92, at 67.

119. Uruguay Trade Policy Report, *supra* note 91, at 76.

120. Luciano M. Donadío Linares, *La Construcción de la Política de Biotecnología en el MERCOSUR*, 31 REVISTA DERECHO DEL ESTADO 191, 194 (2013).

121. *Id.* at 195–96.

122. MERCOSUR, MERCOSUR/GMC/13/04 (2004) (on file with authors).

123. Linares, *supra* note 120, at 195.

124. Linares, *supra* note 120, at 196.

125. Lengyel & Delich, *supra* note 17, at 212.

126. *Id.*

127. de Azevedo, *supra* note 17, at 598.

measures in force in 2000 that impeded intrabloc trade.¹²⁸ More recently, Leavy and Fabián Sáez have shown, using the example of apian products, that even GMC decisions are being used by member states to protect their domestic markets through SPS measures, further undermining harmonization efforts.¹²⁹

The case of SPS in Mercosur illustrates why functional domestic institutions are necessary but not sufficient to promote regulatory cooperation. In contrast to competition policy, the relative failure of Mercosur in the field of SPS measures does not seem to be attributable to the lack of domestic regulatory capacity. On the contrary, Brazil, Argentina, and Uruguay each have functional sanitary services to serve the critically important agri-industry.¹³⁰ Nevertheless, those functional regulatory agencies may well be the very reason why regulatory cooperation has been complicated within Mercosur. Lengyel and Delich suggest that Mercosur countries have been reluctant to harmonize SPS measures precisely because the regulators are convinced that their current practices and norms are “sufficient and successful.”¹³¹ Brazil¹³², Argentina¹³³, and Uruguay¹³⁴ have comprehensive SPS-related regulatory systems. Paraguay may be the least equipped of the four, but it always had the regulatory bodies in place and recent reforms have streamlined the system.¹³⁵

Lengyel and Delich’s analysis is consistent with Gardini’s description of the general relationship between the national political systems and the technical experts in the early phases of Mercosur’s development, during which Argentine and Brazilian experts were strictly constrained by their respective national political spheres:

Especially in the early phases of the process, the results of each meeting were reported to and checked with top political authorities, at the ministerial level or even with the president himself. On the Argentine side, there was

no degree of technical freedom during discussion . . . Each little advance was reported to and assessed with the presidents in both countries. The pattern seems to have only slightly changed under the Menem and Collor administrations . . . President Menem incorporated a number of technical experts to his staff and relied upon them to the

128. *Id.* at 598 n.43.

129. Leavy & Sáez, *supra* note 107, at 15–16 (analyzing Resolution GMC No. 23/07 “Requisitos zoosanitarios para la importación de abejas reinas y productos avícolas destinados a los estados partes” and concluding that, at least presumptively, the resolution is inconsistent with the Mercosur SPS framework decision requiring an alignment with international standards).

130. Lengyel & Delich, *supra* note 17, at 211.

131. *Id.* at 212.

132. BRAZIL TRADE POLICY REVIEW, *supra* note 102, at 65.

133. WTO TRADE POLICY REVIEW BODY, TRADE POLICY REVIEW REPORT BY THE SECRETARIAT: ARGENTINA, WT/TPR/S/277, at x (Feb. 13, 2013).

134. URUGUAY TRADE POLICY REVIEW, *supra* note 91, at ix.

135. Paraguay has been equipped with specialized bodies in charge of phytosanitary and sanitary regulation. In recent years, the rather fragmented regulatory SPS network was rationalized with the creation of SENAIVE and SENACSA, respectively responsible for the phytosanitary protection and animal health. Furthermore, Paraguay put in place an interministerial Committee on SPS measures in charge of coordinating Paraguay’s SPS policies. PARAGUAY TRADE POLICY REPORT, *supra* note 74, at 60–61.

extent that they could translate his vision of integration into practical measures. Within these limits, the president gave the experts total political backing... [T]echnical negotiators had all the necessary powers but these had to be strictly exercised within the political directions received.¹³⁶

In conclusion, the development of SPS measures in Mercosur shows that domestic institutional capabilities are a necessary, but not sufficient, requirement to engage in regulatory harmonization and cooperation efforts. Thanks to their historical and more current specializations in agri-industries, most Mercosur countries do have regulators with the capacity to address the challenges of regulatory harmonization. Initially, however, neither those regulators nor their governments were sympathetic to the cooperation efforts. It is striking to realize that the significant slowdown in the progress of regulatory cooperation in this field stopped at the turn of the century. In 1999, shortly after the Brazilian devaluation, the continent started to face significant macroeconomic difficulties and resorted to increased protectionism to appease domestic political pressures.¹³⁷ Although the official harmonization efforts within Mercosur remain stalled, in the last fifteen years there has been an increase in private voluntary standards, which is not attached to or dependent upon government institutions.¹³⁸

The laborious development of SPS measures also illustrates that something more is required to put in place effective regulatory cooperation than simply fixing the weakness of the design of domestic regulatory institutions. In this particular case of Mercosur, the lack of political will of the member countries became a significant obstacle, especially after the macroeconomic crisis.¹³⁹ One could possibly argue that dependence on circumstantial changes in political will can be avoided by delegating the cooperation process to supranational institutions. Although this is true, the process of giving up sovereignty in favor of a supranational institution is, in itself, a complex political process. If countries are unwilling to cede that sovereignty, this may not be an option. At the domestic level, one could suggest that independent regulatory agencies may be more effective at insulating regulatory policies from political, and perhaps populist, concerns. This may be true to a certain extent, because the government can always implement measures to curtail regulatory independence. Moreover, there is no guarantee that regulatory independence will not be coupled with regulatory capture or that the regulatory cooperation process will not be guided by powerful interest groups rather than the concerns of a democratically elected government.¹⁴⁰ Thus, it is not fully clear if regulatory independence would be an appropriate solution to this problem.

136. GARDINI, *supra* note 16, at 123 (footnotes omitted).

137. See Lengyel & Delich, *supra* note 17, at 211–12.

138. *Id.* at 217.

139. GARDINI, *supra* note 16, at 124 (“‘Technification’ of problems may have facilitated consensus on the measures to be implemented, but this technical consensus seems more the product of strong political indications and commitment rather than autonomous technical evaluation or common backgrounds.”).

140. Richard Posner, *Theories of Economic Regulation*, 5 BELL J. OF ECON. 335, 335–58 (1974).

V CONCLUSION

This article tries to shed new light on regulatory cooperation efforts by calling attention to the importance of domestic regulatory structures. Depending on the regional institutional arrangement, domestic institutions may matter more or less to regulatory cooperation. The most ambitious type of cooperation—harmonization—requires states to decide on the institutional design of technical and political fora where decisions will be made. The creation of supranational institutions to drive harmonization efforts is likely to result in a process of harmonization that is highly independent from domestic institutions. However, designing such supranational institutions is not an easy task; they are complex bureaucracies and their implementation can be rather expensive. Moreover, the decisions of supranational institutions have far-reaching consequences on the health of populations and the competitiveness of member countries' economies. Thus, a great deal of political support must be gathered for these supranational institutions to be effectively implemented.

In contrast to this institutional arrangement, the case study of Mercosur illustrates a process of regulatory cooperation dependent upon an arrangement comprised of domestic institutions. Beyond the institutional weaknesses of Mercosur itself, a theme that has been explored by a relatively vast literature,¹⁴¹ Mercosur's failure to successfully implement its full harmonization agenda—at least in competition policy, technical regulations, and SPS measures—may be at least partly due to the inadequacy of domestic institutions in member countries.

Although the cases discussed in this article illustrate the relevance of domestic institutions in regulatory cooperation efforts, they raise a series of interesting questions to be investigated by future research. One of these questions is related to other countries and regions: Is it possible to use this institutional hypothesis to explain failures in other regions of the world? Comparative case studies may shed light on the relative importance of the unique political and economic factors of the Latin American region vis-à-vis the more generalizable institutional hypothesis. Another question relates to the novelty of regulatory functions. Some of the rules on which harmonization has been attempted have existed, in one form or another, for decades in many countries. For other countries, they have not. The contrast between quality control over food, and control of corporate mergers and acquisitions, for instance, illustrates this point. Whereas quality control for food is more intuitive and may be more familiar in most countries, control over mergers and acquisitions is fairly recent and somewhat unfamiliar to many countries. Thus,

141. See, e.g., J. AE. Vervaele, *Mercosur and Regional Integration in South America*, 54 INT'L AND COMP. L. Q. 387 (2005); J. Kleinheisterkamp, *Legal Certainty in the MERCOSUR: The Uniform Interpretation of Community Law* (2000) 6 NAFTA LAW & BUS. REV. OF THE AMS. 5 (2000); C. F. Dri, *Limits of the Institutional Mimesis of the European Union: The Case of the Mercosur Parliament* 1 LATIN AM. POL'Y 52 (2005); W. Fernandez, *El Nuevo Tribunal Arbitral del Mercosur*, ANUARIO DE DERECHO CONSTITUCIONAL LATINO AMERICANO 595 (2006).

the question here is: To what extent does regulatory cooperation depend on long-lasting institutional cultures that inform governmental policies and guide players in the industry but that go beyond the sheer existence of a regulatory body with that specific function?

Though these questions are beyond the scope of this article, they are prompted by this article's contribution to an emerging literature on international trade: some institutional arrangements designed to promote regulatory cooperation at the regional level may be largely dependent on the existence and operation of domestic regulatory institutions, as is the case in Mercosur. When parties to international trade agreements do not have the adequate domestic institutions to comply with their obligations, failure of the entire agreement may ensue. Accordingly, this article pushes for a greater recognition of the importance of these domestic institutions in order to facilitate a more informed conversation about whether and how to effectively address this issue. Any possible lessons or policy prescriptions require further investigation of the questions mentioned above. But this article at least starts this important conversation.