

NOTES

SWEEPING PROTECTIONISM UNDER THE RUG: NEOPROTECTIONIST MEASURES AMONG MERCOSUR COUNTRIES IN A TIME OF TRADE-LIBERALIZATION

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I. INTRODUCTION

Recent years have seen momentous changes throughout the Western Hemisphere and the world in the liberalization of trade policies and the opening of foreign markets. In Latin America this change has been manifested through a mass exodus from inward-looking policies characterized by import-substitution, industrialization, and nationalization, to the opening of markets like a parting of the Red Sea—leading to a economically stable promised land. Steps towards integration have been taken by way of several Latin American countries becoming members of the General Agreement on Tariffs and Trade (“GATT”). However, the general ineffectiveness of GATT, and a fear of being unable to compete with other North-South agreements in Europe and Asia¹ has led to a notable increase in the number and quality of regional trade agreements. Agreements such as the Andean Pact and Mercosur (Argentina, Brazil, Paraguay, Uruguay) represent the evolution to subregionalization, which could some day be the catalyst to multilateral trade throughout the Western Hemisphere.

Nevertheless, in this time of open markets, visibly booming trade, and optimism towards free trade throughout the Americas there continues to exist bountiful evidence that Latin American countries are still clinging to protectionism. Undisputedly, markets of Latin America have grown tremendously and trade between these countries has significantly increased. Yet, Latin America is still a long way from being a region of truly free trade due to the continued practice of protectionist measures made manifest in a

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¹ Emilio J. Cardenas, *The Regional Approach to Hemispheric Integration: A Modular Road Towards Free Trade*, 1 SW. J.L. & TRADE AM. 49, 62 n.8 (1994).

mélange of mediums.

Against this background, an analysis of trade policies in Latin America will be undertaken, examining how far trade liberalization has come, where it currently stands and what lies ahead. Specifically, this note will study Mercosur as an example of a regional free-trade organization and as an emerging Customs Union. Further, it will analyze measures taken by the trade union and by the member countries to facially lower trade barriers while simultaneously working to keep other trade barriers in place. This note will argue that although Mercosur countries have taken tremendous steps toward trade liberalization, substantial evidence of residual protectionism still exists.

Finally, this note will evaluate how such protectionist measures have affected these trade regions and agreements, and how they may affect the future of Latin American trade. In making this evaluation, the note will address the possibility of hemispheric free trade in light of the Free Trade of the Americas agreement.

II. HISTORICAL AND LEGAL BACKGROUND

Commencing in the 1950s, integration in trade policy among Latin American countries could generally be characterized by a high level of tariff and non-tariff protection barriers accompanied by other protectionist measures designed to exclude extra-regional imports.² These barriers were erected to protect national industries from foreign competition while promoting self-sufficiency in meeting the demands of the country and, to some degree, the region. Accordingly, increases in trade were to come about through the creation and allocation of industries nationally and regionally, while simultaneously and purposefully constructing barriers against outside industrialized countries (which often included that country's major trading partners).³

Instead of fostering economic self-sufficiency and promoting regional growth, these import-substitution policies were the cause of unproductive

² See Emilio J. Cardenas, *supra* note 1, at 50.

³ See Jason R. Wolff, *Putting the Cart Before the Horse: Assessing Opportunities for Regional Integration in Latin America and the Caribbean*, 20-SPG FLETCHER F. WORLD AFF. 103 (1996). For example, 1950's Peronista Argentina looked to import-substitution, high external tariffs, and nationalization of industry to provide national stability and growth.

industries and ineffective markets.⁴ In the wake of disappointment, Latin American countries attempted to purge past dogmas and move towards more market-oriented policies. This attempt was evidenced in the signing of various treaties including the Treaty of Montevideo that created the Latin American Free Trade Association ("LAFTA").⁵ Other agreements included the Andean Pact (1969),⁶ the Caribbean Common Market ("CARICOM") (1973),⁷ and the 1980 Treaty of Montevideo establishing the Latin American Integration Association ("LAIA").⁸ Although these agreements successfully reduced tariffs on non-competitive goods, leading to slight increases in intra-regional trade, these pacts were insufficient steps towards integration because their basic grounding was in protectionist policies.⁹ Despite the treaties, Latin American states continued to shelter domestic trade.¹⁰ In fact, LAFTA and the other initial agreements and attempts at creating trade were merely extensions of import substitution policies from the national to the regional level. These inceptive agreements not only proved to be economically flawed, but were "quickly co-opted to protectionist interest who had opposed economic liberalization at the national level" from the beginning.¹¹ In 1980, LAIA began to re-launch integration through a legal model that established a multilateral system through unilateral negotiations, which

⁴ See Cardenas, *supra* note 1, at 51.

⁵ See Montevideo Treaty Establishing a Free-Trade Area and Instituting the Latin American Free-Trade Association, Feb. 18, 1960, Arg.-Bol.-Braz.-Chili-Colom.-Ecuador-Mex.-Para.-Peru.-Uru.-Venez., reprinted in Amos J. Peaske, INTERNATIONAL GOVERNMENTAL ORGANIZATIONS 1090 (revised 3rd ed., 1974) [hereinafter LAFTA Treaty].

⁶ See The Agreement on Andean Subregional Integration, May 26, 1969, 8 I.L.M. 910 (1969); The agreement was originally signed by Bolivia, Chile, Columbia, Ecuador and Peru within context of LAFTA to establish a common program in the Andean states for the regulation of foreign investment. See Wolff, *supra* note 3, at 126 n.20.

⁷ See The Treaty Establishing the Caribbean Community, July 4, 1973, 12 I.L.M. 1033 (1973) (entered into force Aug. 1, 1973) [hereinafter CARICOM]. CARICOM replaced the Caribbean Free Trade Association ("CARIFTA"), as a more intensive effort toward regional integration, seeking economic integration of member states in the form of a region-wide common market, through strengthening and coordinating economic and trade relations among member states and through the equitable sharing of benefits. See Wolff, *supra* note 3, at 126 n.21.

⁸ See Treaty of Montevideo Establishing the Latin American Integration Assoc., Aug. 12, 1980, 20 I.L.M. 672 [hereinafter LAIA].

⁹ See Marta Haines-Ferrari, *Mercosur, A New Model of Latin American Economic Integration?*, 25 CASE W. RES. J. INT'L L. 413, 414 (1993).

¹⁰ *Id.* at 417.

¹¹ Wolff, *supra* note 3, at 104.

initiated bilateral and multilateral discriminatory economic blocks.¹² It was under this framework that countries such as Argentina, Brazil, and Mexico began to establish bilateral agreements according to national policies, while preserving sovereign governance over their own foreign economic policy.¹³ Nonetheless, LAIA continued to implement LAFTA's import-substitution policies regionally and countries continued to favor world market linkages.¹⁴ Both of these factors contributing to the failure to form regional areas of economic preference.¹⁵

Frustration with the currently held policies, increased debt as a result of the oil crisis' halt on exports, and a broadened technological gap all contributed to Latin America's inability to compete in the world market.¹⁶ It was within this context that Latin American countries began to search for an enlightened, more innovative solution.¹⁷ Two of the atoning countries, Argentina and Brazil, sought to reshape development strategies and overcome international economic marginalization by redefining their relationship with one another. With a strategy to increase and enhance domestic production through integration, these countries set out to create a new framework to widen commercial linkages and develop faltering commercial networks.¹⁸

A. Mercosur Background

The Asuncion Treaty, as signed by Argentina, Brazil, Paraguay and Uruguay on March 24, 1991, posited the establishment of a Southern Common Market (MERCOSUR) by December 31, 1994.¹⁹ The agreement was the outcome of previous regional trade agreements which had taken place in Latin America, including a series of sectoral protocols between Argentina and Brazil such as the Declaration of Buenos Aires and the

¹² See Haines-Ferrari, *supra* note 9, at 418.

¹³ See *id.*

¹⁴ See *id.*

¹⁵ See *id.*

¹⁶ See *id.* at 418-19.

¹⁷ See *id.* at 419. See also Emilio J. Cardenas, *supra* note 1, at 51 (attributing the Latin American shift from protected integration to regional trade to 1) a major shift in development practices; 2) frustrations with GATT; and 3) a substantial increase in intra-regional investments).

¹⁸ See Haines-Ferrari, *supra* note 9, at 419-20.

¹⁹ See Treaty of Asuncion Establishing a Common Market among Argentina, Brazil, Paraguay, & Uruguay, Mar. 26 1991, 30 I.L.M. 1041 [hereinafter Treaty of Asuncion].

Agreement on Argentine-Brazilian Integration (better known by its Spanish and Portuguese acronym, "PICAB").²⁰ The primary goal of PICAB was to bolster each country's economy through increased bilateral trade.²¹ This economic boost was to be accomplished through the creation of "common economic space" which adhered strongly to the principles of gradualness and flexibility.²² The Argentine-Brazilian Program for Economic Integration was to be implemented in annual stages through integrated projects that detailed the integration process for capital goods and had different programs for products such as automobiles and wheat.²³ The agreement also set out to harmonize foreign trade policies in relation to third-party countries with the objective of expanding trade.²⁴ The failure to harmonize disparate economic policies, however, proved tariff reduction to be insufficient, leading to the reinstatement of protectionist barriers.²⁵

The PICAB was supplemented by the Treaty of Integration and Economic Cooperation²⁶ which sought to transform Argentina and Brazil into a customs union by the year 1999.²⁷ This was to be accomplished by following the same principles of gradualness and flexibility on one hand and economic equilibrium and symmetry on the other. The treaty established a two-phase term for instituting the market. This two-phase term was designed to gradually reduce non-tariff barriers and customs duties,²⁸ coordinate economic policies, and adopt intergovernmental systems.²⁹

Although these agreements helped somewhat to increase and diversify trade between the two countries, they did not bring the desired economic or political stability. Lack of common independent institutions for the implementation of tariff and non-tariff dismantlement proved to frustrate the

²⁰ See Argentina-Brazil: Agreement on Argentine-Brazilian Economic Integration, July 29, 1986, 27 I.L.M. 901 [hereinafter 1986 Argentina-Brazil Integration Treaty].

²¹ See Thomas Andrew O'Keefe, *An Assessment of Mercosur's Present Legal Framework and Institutions and How They Effect Mercosur's Chances of Success*, 6-AUT INT'L L. PRACTICUM 14 (1993).

²² See Haines-Ferrari, *supra* note 9, at 419.

²³ See Argentina-Brazil Integration Treaty, *supra* note 20.

²⁴ See *id.* at 903.

²⁵ See Haines-Ferrari, *supra* note 9, at 420.

²⁶ See Agreement on Argentine-Brazilian Integration, Nov. 29, 1988, 27 I.L.M. 901 [hereinafter 1988 Argentine-Brazilian Common Market Treaty].

²⁷ See Haines-Ferrari, *supra* note 9, at 420.

²⁸ See 1988 Argentine-Brazilian Common Market Treaty, *supra* note 26, at art. 1.

²⁹ *Id.* at arts. 4, 5.

anticipated changes and growth.³⁰

In July of 1990, the newly elected presidents of Argentina and Brazil, Carlos Menem and Fernando Collor de Mello, signed the Act of Buenos Aires which undertook to establish a bilateral common market beginning in 1995.³¹ The general guidelines for the common market called Mercosur (or Mercosul in Portuguese) were laid out in the ALADI Economic Complementation Accord No. 14 signed in December 1990.³² Fearful of exclusion from a common market comprised of their two biggest trading partners, Paraguay and Uruguay joined in the Mercosur proceedings. The process of forming a bilateral market culminated in the signing of the Treaty of Asuncion by the four countries on March 24, 1991.³³ The Treaty went into force in November 1991.³⁴

The Asuncion Treaty designed Mercosur to work on the principle of reciprocity, achieving integration through a set of "coordinated, progressive automatic reductions of customs tariffs, the elimination of non-tariff barriers and other restrictions to trade, a common external tariff, and macroeconomic policy coordination."³⁵ Mercosur initially targeted free-trade zones, then customs unification, and finally a common market where, in addition to customs unification, the free transfer of labor and capital across member-nations' borders was to be made possible.³⁶

In June 1996, Mercosur took its first steps towards widening its range, as Chile entered into the Mercosur market by signing a free trade agreement.³⁷ Later that year, at the Common Markets semi-annual presidential meeting, Bolivia followed suit.³⁸ In line with the Mercosur concept, nearly all of the trade for both Bolivia and Chile was to be tariff-free within ten years, with the exception of sensitive items which were to remain protected for up to eighteen years.³⁹

³⁰ See Haines-Ferrari, *supra* note 9, at 421.

³¹ See O'Keefe, *supra* note 21, at 14.

³² See *id.*

³³ See Treaty of Asuncion, *supra* note 19.

³⁴ See *id.*

³⁵ Evelina Teubal de Alhadeff, *Argentina-Brazil: Agreement on Argentine-Brazilian Integration*, Introductory note, 30 I.L.M. 1041 (1991).

³⁶ See *Objectives of the Mercosur*, (visited Oct. 2, 1997) <<http://www.americasnet.com/mauritz/mercosur/english/page03.html>>.

³⁷ See *Now They Are Six*, THE ECONOMIST, Dec. 21, 1996, at 52.

³⁸ See *id.*

³⁹ See *id.*

In light of a history of shots and misses, the drafters of Mercosur sought to create a system in which problems plaguing previous attempts at free trade could be avoided. The process of economic regional integration which was adopted by the member countries of Mercosur was a multi-stage plan which was to be implemented over several transitory periods.⁴⁰ Each period was to implement a more drastic step towards liberalization of trade between the member countries.⁴¹

In the primary stage of Mercosur the parties were to adopt general rules of origin, a system for settlement of disputes and safeguard clauses to prevent sharp fluctuations in certain market areas.⁴² This first stage of economic integration was an imperfect and awkward free trade association, which existed from the date of the execution of the agreement until December 31, 1994. The initial stage or "trade-opening program" called for the end of duties and other non-tariff restrictions on trading between Argentina and Brazil by December 31, 1994, and by December 31, 1995 for trade with Uruguay and Paraguay.⁴³ "Duties" include custom rights and any tariffs on foreign trade, whether fiscal, monetary, exchange or otherwise, other than charges and like measures corresponding to the approximate cost of services rendered.⁴⁴ Other restrictions were to include any "administrative, financial, foreign exchange or other measures by which a state unilaterally prevents or impedes reciprocal trade."⁴⁵ To accomplish this end, projects were designed to lift import duties according to a progressive, direct, and automatic schedule which moved towards 100 percent tariff reduction at a rate of two percent every four months until the end of the transitory period.⁴⁶

The tariff reduction schedule was not to apply to all products in the member-state trading, as each nation was allowed to have a list of exemptions on products and items considered to be "sensitive."⁴⁷ The lists of exemptions by each state was varied, ranging from a carefully selected list

⁴⁰ See *Objectives of the Mercosur*, (visited Oct. 2, 1997) <<http://www.americasnet.com/mauritz/mercosur/english/page03.html>>.

⁴¹ See *Trade Opening Program*, (visited Oct. 2, 1997) <<http://www.americasnet.com/mauritz/mercosur/english/page05.html>>.

⁴² See *id.*

⁴³ See *id.*

⁴⁴ See *id.*

⁴⁵ Treaty of Asuncion, *supra* note 19, at art. 3.

⁴⁶ See *id.* at art. 4.

⁴⁷ See *Trade Opening Program*, *supra* note 41.

of 394 items protected by Argentina, to a smaller list of 324 items, hastily put together by Brazil, to a super-inclusive Uruguayan list of 940 items.⁴⁸ Each list was to be reduced ten percent upon entering the agreement and by an additional twenty percent at the end of each calendar year for the remainder of the first period.⁴⁹ It is important to note that both the tariff reduction schedule and the schedule to reduce the number of exemptions were, for the most part, followed according to the mandated timetables.⁵⁰ Upon entering the next stage, however, another list of exceptions was filed by each of the countries.⁵¹

Along with protection for "sensitive" goods through exemption from the tariff lists, the Treaty of Asuncion also provided safeguard clauses whereby each member state could, during the transition period, impose a temporary quota restriction on the continued importation of a good from another member state when there was a sudden, dramatic increase in that good caused by practices such as dumping.⁵² These temporary quotas were allowed to protect a domestic market from harm or threatened damage caused by the importation of a certain product. In considering whether damage or a potential for harm to a product existed, an examination was conducted on a variety of aspects, including production levels and use capacity, employment levels, market share, extent of trade between nations involved, and the performance of imports and exports in relation to non-member states.⁵³ The protected product would also benefit from the lifting of duties and other conditions established in the program for the opening of trade.⁵⁴

The language of Annex No. IV of the Treaty of Asuncion makes clear, however, that a quota would not be imposed when sudden, dramatic increases in importation were due to the exporter's use of better technology or a shift in consumer preference.⁵⁵ In no case would the safeguard clauses

⁴⁸ See ROBERTO DROMI, CODIGO DEL MERCOSUR 271 (Fundacion Centro de Estudios Politicos y Administrativos 1996).

⁴⁹ See *Trade Opening Program*, *supra* note 41.

⁵⁰ See O'Keefe, *supra* note 21, at 14.

⁵¹ See Ministry of Economy and Public Works and Services of Argentina, *Taxation Framework*, p.2 (visited Oct. 2, 1997) <<http://www.mecon/ar/invest/taxation.htm>>.

⁵² See *Safeguard Clauses*, (visited Oct. 2, 1997) <<http://www.americasnet.com/mauritz/mercosur/english/page06.html>>.

⁵³ See DROMI, *supra* note 48, at 278.

⁵⁴ See *Safeguard Clauses*, *supra* note 52, at 1.

⁵⁵ See DROMI, *supra* note 48, at 278.

extend past December 31, 1994, as the sole purpose was to aid in this transition period.⁵⁶

1. 1995: Customs Union

To differentiate the first stage from the second, it is essential to distinguish the concepts of intra-zone and extra-zone trade. Intra-zone trade is trade developed exclusively within the limits of the block, i.e. that which involves member countries only.⁵⁷ On the other hand, extra-zone trade refers to that between the trading block and the rest of the world.⁵⁸ Hence, the first stage of trade integration, the free trade organization, involved only intra-zone trade, without effecting the tariff level that each country in the Mercosur maintained with the rest of the world.

The second stage of the integration set out to create a Customs Union between the member countries. This involved an undertaking by each of the member countries to replace their own particular tariff structure with a structure common to the entire block.⁵⁹ An extra-zone common tariff structure was adopted by the four countries; that is, the level of protection upon imports was to be uniform for all the countries in the Mercosur.⁶⁰ The common external tariff ("CET") was set at eleven different levels from zero to twenty percent for most items.⁶¹

By establishing a common external tariff towards all products originating in extra-zone countries, the countries of Mercosur set out to strengthen the external competitiveness of member countries. A common external tariff also served to nullify the need for any intra-zone tariffs. That is, the tariff was designed to prevent leakages of products that could be imported through the country that offered lower tariff protection.

As previously noted, all four of the countries brought with them a list of goods which were temporarily excepted from tariff arrangements including

⁵⁶ *Id.* at 278.

⁵⁷ See Ministry of Economy and Public Works and Services of Argentina, *supra* note 51.

⁵⁸ *Id.* at 2.

⁵⁹ *Id.* at 2.

⁶⁰ *Id.* at 2.

⁶¹ Reid, Michael, *A survey of Mercosur: What Mercosur has Done*, THE ECONOMIST, Oct. 12, 1996, available in__ 1996 WL 11247185.

the common external tariff.⁶² For example, Brazil maintains a thirty percent tariff, apart from the CET, on personal computers.⁶³ Further exceptions were provided for information technology and telecommunications. Each of these industries was to have a maximum tariff of sixteen percent, converging by 2006. In addition, Brazil and Argentina maintain differential external tariffs on capital goods until January 1, 2002.⁶⁴

Therefore, as of January 1995, all of the tariffs which existed in the Mercosur universe could be catalogued as follows: goods subject to the common external tariff; goods excepted from the common external tariff; goods subject to the system of final adequacy; capital goods, informatics and telecommunications; and goods subject to special trade policies.⁶⁵

Goods Subject to the Common External Tariff. These are goods which shall be imported in accordance with the CET reduction plan and shall be subject to tariffs ranging from zero to twenty percent within the Mercosur trading block.⁶⁶

Goods Excepted from the Common External Tariff. Each country was permitted to specify certain goods to which a special tariff for extra-zone trade would apply.⁶⁷ This may be above or below the CET.⁶⁸ Argentina, Brazil, and Uruguay were allowed to specify 300 items exempted from the CET, while Paraguay was able to maintain 390 exceptions.⁶⁹ Exceptions to the CET generally consist of items deemed to be sensitive or otherwise competitively deficient, such as automobile parts in Brazil.⁷⁰

Goods Subject to a System of Final Adequacy. The system of final adequacy, as agreed upon by the member countries, aims to limit the intra-zone trade liberalization of certain groups of goods in an effort to facilitate the adequacy of some products to the new conditions set up for the intra-

⁶² *Id.* (noting that each country was allowed to exempt 300 items (390 for Paraguay), whose tariffs will converge through annual increases or decreases to the CET by 2001 (2006 for Uruguay and Paraguay)).

⁶³ *Id.*

⁶⁴ Haracio A. Giger A. Naon, *Sovereignty and Regionalism*, 27 LAW AND POL'Y INT'L BUS. 1073, 1095 (1996).

⁶⁵ See Ministry of Economy and Public Works and Services for Argentina, *supra* note 51, at 2-3.

⁶⁶ See *id.* at 12.

⁶⁷ See *id.* at 3.

⁶⁸ See *id.*

⁶⁹ See Dromi, *supra* note 48, at 1424.

⁷⁰ See *id.*

regional trade.⁷¹ As a result, the goods subject to this special regulation, whether or not they are considered to originate in Mercosur, are subject to payment of tariffs for intra-Mercosur trade.⁷² This provision was to remain in effect until December 31, 1998.⁷³

Goods subject to the system of final adequacy or adaptation to the Custom Union were specified by each country, by virtue of their "sensitive" nature.⁷⁴ Argentina presented 221 products, Brazil 29, Paraguay 249, and Uruguay 1,018.⁷⁵ These products were selected from those which were excluded by each country from the CET and from those goods that were set aside under the safeguard clauses.⁷⁶

Capital Goods, Informatics, and Telecommunications. Excluded from the CET are capital goods.⁷⁷ These goods should converge in a lineal and automatic manner toward a common tariff of fourteen percent by January 1, 2001.⁷⁸ Paraguay and Uruguay are to do this by January 1, 2006.⁷⁹ Informatics and telecommunications goods are to converge lineally and automatically on a common external tariff of fourteen percent by January 1, 2006.⁸⁰

Goods Subject to Special Trade Policies. It is worthwhile to note that there are other areas such as the sugar, textile, and automobile industries which are subject to special rules of trade, apart from the CET.⁸¹ The commercialization of these goods within the Mercosur is supposed to be tariff-free for products originating in the four member countries. Furthermore, a certificate of origin is required for circulation from one country into another.⁸² Goods subject to these special trade policies will be discussed in more depth later in the note.

⁷¹ See Ministry of Economy and Public Works and Services of Argentina, *supra* note 51, at 3.

⁷² *See id.*

⁷³ *See id.*

⁷⁴ See Maria De Aguinis, *Can Mercosur Accede to Nafta? A Legal Perspective*, 10 CONN. J. INT'L L. 597, 617 (1995).

⁷⁵ *See id.*

⁷⁶ *See id.*

⁷⁷ See Ministry of Economy and Public Works and Services of Argentina, *supra* note 51, at 3.

⁷⁸ *See id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

As a result of the harmonized tariff schedule or nomenclature that was put into place, along with its exceptions, the amount of intra-regional tariff free trade has greatly increased. In the summer of 1994, the amount of intra-zone trade conducted at zero-percent tariffs was about ninety percent, while the CET had successfully been applied to approximately eighty-five percent of the products under the Mercosur nomenclature.⁸³

The existence of a group of goods that were excepted from the CET made it necessary to establish classes of origin for the intra-zone trade. Annex No. II of the Treaty of Asuncion details the provisions for determining the origin of a product which, in turn, determines its status within the intra-zone trading regime and thus, its ability to take advantage of the intra-regional free trade structure of Mercosur.⁸⁴ Basically, for a good to obtain special trading status it must be native; a product fully manufactured with materials originating in one of the Mercosur countries.⁸⁵ A good may also be classified as native, and thus qualifying for preferential tariff treatment, if the good, despite being manufactured with materials not originating in the member countries, has been sufficiently transformed within the Mercosur region so as to take on a "new identity."⁸⁶ This "new identity" places the product in a tariff position different from that of the pre-manufactured materials.⁸⁷ For a good to take upon a "new identity" sufficient to be considered as originating in Mercosur, the good must undergo "a transformation." "Transformation" usually requires that the item undergo something more than merely being assembled, packaged, or marked.⁸⁸ A good will also pass as a native good if the cost of the good plus insurance and freight charges at the port of destination (the "c.i.f." value) of the third party country

⁸³ Horacio A. Grigera Naon, *Sovereignty and Regionalism; Symposium: Free Trade Areas: The Challenge and Promise of Fair vs. Free Trade; Panel V: Regionalism and the Transfer of Sovereignty*, 27 LAW & POL'Y INT'L BUS. 1073, 1096 (1996).

⁸⁴ See O'Keefe, *supra* note 21, at 15.

⁸⁵ See *General Origin Regulations* (visited Oct. 2, 1997) <<http://www.americasnet.com/mauritz/mercosur/english/page08.html>>.

⁸⁶ See O'Keefe, *supra* note 21, at 15.

⁸⁷ See *General Origin Regulations*, *supra* note 85.

⁸⁸ See O'Keefe, *supra* note 21, at 15; Article 1(b)(iii) of Annex II of the Asuncion Treaty, excludes all goods whose operation simply involves "assembly, packaging, division into lots or volumes, selection and classification, marking, the putting together of assortments of goods or other equivalent operations or processes". *Id.* See also, Agreement Among the Governments of Argentina, Brazil, Paraguay, Uruguay and the United States, 30 I.L.M. 1034, 1038 (1991) [hereinafter Mercosur-U.S. Agreement].

materials does not exceed fifty percent of the cost of the goods at the moment it is placed on a carrier and shipped to the buyer (the "f.o.b." export value).⁸⁹ Thus, the good will be considered as originating so long as the extra-zone material does not exceed fifty percent of its value upon completion. In the case of capital goods eighty percent of the Mercosur added value shall be a requirement of origin.⁹⁰ While a fifty percent origin requirement is arguably liberal compared to the origin requirements of other trading blocks, it is nonetheless effective to protect regional goods from extra-zone competition. Thus, by classifying a good as extra-zone based upon its composition, states can effectively apply the CET to that item, raising its relative price compared to an item classified as intra-regional and thus exempt from the CET and presumably less expensive.

The rules of origin established in the Treaty of Asuncion are not set in stone. Article 3 of Annex II states that each of the member countries may establish, by mutual consent, specific requirements of origin which shall prevail over general classification requirements.⁹¹ In determining the specific requirement of origin, a state is to consider among other factors the origin of the preponderant raw material and the parts or components which essentially characterize the product.⁹² By allowing each state to establish individual rules at certain times, the Treaty of Asuncion permits a certain degree of protectionism to be maintained or, alternatively, readily facilitates recourse to protectionist measures.

In addition to the previous provisions taken in advance of the Customs Union, within the Mercosur countries there exist special custom and free trade zones. These are mentioned only to note that there are certain enclaves within the country's general customs territory wherein rules different from those applicable to the general customs are in force.⁹³ Activities developed within the special customs zones (the "AAE" or Areas Aduernas Especiales) are subject to general tax regulations, which are more favorable than those applicable to the rest of the national territory.⁹⁴ Goods entering from the AAE and the free trade zones into the general customs territory are subject

⁸⁹ See Mercosur-U.S. Agreement, *supra* note 88 at Annex II, Article 2, at 1039.

⁹⁰ See *General Origin Regulations*, *supra* note 85.

⁹¹ See Mercosur-U.S. Agreement, *supra* note 88, at 1038.

⁹² *Id.*

⁹³ Ministry of Economy and Public Works and Services of Argentina, *supra* note 51, at 4.

⁹⁴ *Id.*

to the payment of the CET, or if exempted from such, the national tariff in force, as if it were an extra-zone import.⁹⁵ The only special custom zones accepted by Mercosur are the Tierra del Fuego in Argentina and Manaus in Brazil.⁹⁶ These two zones may continue normal operations until 2013.⁹⁷ These zones are particularly important because they facilitate different rules and can be used by the member countries to shelter certain market areas from intra-zone competition.

2. *Common Market*

The final stage in the Mercosur integration process is to become a common market, much like the European Union. The Customs Union, with the establishment of the CET, was designed as a step towards this ultimate goal. A common market encompasses the free circulation of goods and services and the settlement of a common tariff for foreign products. Furthermore, a common market includes the free circulation of capital and labor along with the coordination of policies to assure competitive conditions among the countries.⁹⁸ While the implementation of the Customs Union has contributed towards the ultimate goal of a common market, achieving this end will be far more difficult than the steps taken thus far. As will be discussed below, the achievement of a common market will depend largely on the ability and willingness of each of the member states to let go of individual protectionist policies. This step will be much more laborious than those previously taken because much remains to be done to cross the bridge from a Customs Union to a common market with true free trade.

3. *Administration*

Although the Treaty of Asuncion and Oero Puerto Protocol do establish the basis for the institutional Mercosur structure, practically speaking, Mercosur's implementation lies with the individual member states. Oversight

⁹⁵ *Id.*

⁹⁶ See *Free Trade Zones*, (visited Oct. 2, 1997) <<http://www.americasnet.com/mauritz/mercosur/anglign/pate07.html>>.

⁹⁷ See *id.*

⁹⁸ Mirko Schlossberg, *Proceedings of the Eighth Annual Conference on Legal Aspects of Doing Business in Latin America: Developing Strategies, Alliances, and Markets: Mercosur Update*, 10 FLA. J. INT'L L. 1, 60 (1995).

of the administration and implementation of the Mercosur is to be carried out by the Common Market Council and the Common Market Group, both of which began functioning at the outset of the transition phase.⁹⁹ At the outset, these agencies were to function merely as temporary administrators until more definitive institutional structures having super-national authority were established; instead, they have remained the central administrative arm of Mercosur.¹⁰⁰

The highest-level agency is the Common Market Council (the "Council"), which is responsible for compliance with the objects and time frames set forth in the Treaty of Asuncion.¹⁰¹ The Council is comprised of the Ministers of Foreign Relations and Economics of each of the member states.¹⁰² Although the primary objective of the Council is to oversee the implementation of Mercosur policy, it possesses minimal executive power to enforce its directives.¹⁰³

The executive body of the Mercosur is the Common Market Group (the "Group"), which consists of four individuals from each member state who represent their respective Ministries of Foreign Relations, Economy (or its equivalent responsible for industrial policy, foreign commerce, and/or economic coordination), and the Central Bank.¹⁰⁴ The basic duties of the Group are to procure compliance with the Treaty of Asuncion and to adopt resolutions which implement the decisions made by the Council.¹⁰⁵ The Group is also empowered to initiate practical measures for trade opening, coordination of macroeconomic policies, and negotiation of agreements with non-member states and international agencies.¹⁰⁶ For example, under the direction of the Council, the Group implemented the adoption of the CET by a 1994 resolution.¹⁰⁷

The Group also has the authority to organize, coordinate, and supervise Work Subgroups and to call special meetings to deal with issues of

⁹⁹ *Institutional Structure*, (visited Oct. 2, 1997) <<http://www.americasne.com/mauritz/mercosur/english/page04.html>>.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See O'Keefe, *supra* note 21, at 16.

¹⁰³ See *Institutional Structure*, *supra* note 99.

¹⁰⁴ See *id.*

¹⁰⁵ See *id.*

¹⁰⁶ See *id.*

¹⁰⁷ See DROMI, *supra* note 48, at 1423.

interest.¹⁰⁸ These work-groups are directly subordinate to the Group and carry out the function of conducting studies on specific Mercosur concerns and submitting these results for the consideration of the council.¹⁰⁹ Current groups seek to address such areas as commercial and custom matters, technical standards, coordination of macroeconomic policies, and various other areas.¹¹⁰ The work of the groups can be classified as either preparatory, which includes the requesting of participation of representatives from the private sector, or conclusive.¹¹¹ This leaves the actual decision making to the official representatives of the member states.¹¹²

While the structures are quite extensive and, compared to other such regimes, arguably superior, the administrative structure of Mercosur has contributed to some of the backlash in policies. Because the member countries have refused to yield substantial powers to the Mercosur administrative bodies, implementation of the agreement remains with the national governments and, thus, is subservient to nationalistic interests and concerns.¹¹³

4. Taxation Framework

Although the first steps toward economic integration have been taken by way of tariff harmonization for all members of the block, this tariff harmonization requires only that the same tax level be levied on extra-zone imports. However, tariff harmonization does not require a harmonization of the taxes that each country applies in terms of self-determination.¹¹⁴ Consequently, unequal conditions, such as different taxation structures within each member country, can and has led to a significant degree of difficulty between member states. For example, under these circumstances each subregional producer must be more sensitive to variations in its own costs and sales prices because internal taxation in each subregion represents cost increases or income reductions to that producer.¹¹⁵ The use of internal

¹⁰⁸ See *Institutional Structure*, *supra* note 99.

¹⁰⁹ See *id.*

¹¹⁰ See *id.*

¹¹¹ See *id.*

¹¹² See *id.*

¹¹³ Jorge M. Guira, *Mercosur as an Instrument for Development*, *NAFTA: L. BUS. & REV. AM.*, Summer 1997, at 53, 84.

¹¹⁴ Ministry of Economy and Public Works and Services of Argentina, *supra* note 51.

¹¹⁵ *Id.* at 4.

direct taxes and indirect taxes such as the value added tax, taxes on gross revenue, and assumption taxes present inevitable difficulty as well as a potential way to protect interests. Each country can use this variance to effectively discourage imports through increased pricing or increased headaches to producers and exporters.

5. *Antidumping and Countervailing Laws*

The use of antidumping and countervailing duties to prevent or remedy unfair trade policies has been an important issue in multilateral and regional trade negotiations. Some view the use of such measures as a way to remedy unfair trade practices such as dumping, a term used for the sale of goods on a foreign market at a price which is less than that at which the product is sold on the seller's domestic market.¹¹⁶ Another view taken is that antidumping measures and countervailing duties are politically motivated contingency protection measures, designed to protect certain areas from outside competition.¹¹⁷ According to GATT Article VI, antidumping measures may be applied against an imported good where it is being dumped on the foreign market thus causing or threatening to cause "material injury to an established industry . . . or [to] materially retard[] the establishment of a domestic industry."¹¹⁸ Similarly, a countervailing duty may be applied to an imported good to offset the effects of a foreign subsidy where the subsidy causes, or threatens to cause, injury to the domestic industry or the potential development of such industry.¹¹⁹

The constitution of Mercosur calls for the adoption of a common commercial policy in regard to third party states whereby the member countries promise to inhibit imports whose prices are influenced by illegal practice such as dumping or unfair subsidies.¹²⁰ Under Decision 3/92, member countries are required to formulate written complaints of these practices against the particular importer or the area of industry, giving sufficient proof of the existence of dumping and the danger or threat of

¹¹⁶ Gilbert R. Winham & Heather A. Grant, *Antidumping and Countervailing Duties in Regional Trade Agreements: Canada-U.S. FTA, NAFTA and Beyond*, 3 MINN. J. GLOBAL TRADE 1, 4 (1994).

¹¹⁷ *See id.*

¹¹⁸ *Id.* at 4.

¹¹⁹ *See id.*

¹²⁰ *See* DROMI, *supra* note 48, at 1187.

danger the importers are presenting.¹²¹ The Common Market Group addresses the problem through a series of inquiries after which it may reject the complaint or, alternatively, grant permission to the state to implement anti-dumping or countervailing measures by way of national legislation.¹²² While the use of such measures are legal under both GATT and the Mercosur code, they can be and, in fact, are used primarily as protectionist measures.

III. PROTECTIONISM IN MERCOSUR

It is undisputed that through the implementation of the provisions of the Treaty of Asuncion and subsequent measures, the Mercosur countries and even Mercosur as a trade regime have shed a significant degree of their protectionist clothing, thus exposing themselves to the scorching rays of the world market competition. The countries of Mercosur, however, have not entered into the market without protection, as each country has applied its own degree of protectionist sunscreen, with levels of protection ranging from a M.P.F. ("market protection factor") of 15 to a M.P.F. of 50. Although great strides have been made towards the liberalization of the markets of the Mercosur countries, policies and obstacles still remain which undeniably smell of protectionism. The test of how liberal the markets have become is not to look at what has been accomplished but rather what remains to be done.

A. *Mercosur as a Regional Protectionist Fortress*

The primary goal of Mercosur is to work towards a common market in which each country eliminates intra-zone trade barriers (including free circulation of services and labor between member states) while upholding the CET to all extra-zone trade.¹²³ As explained previously, Article I of the Treaty of Asuncion stated that by the end of 1994, the Mercosur countries should have had coordinated macroeconomic policies on, *inter alia*, foreign trade, agriculture, industry, capital, services, customs, transportation, and

¹²¹ See *id.* at 1188.

¹²² See *id.* at 1188-89.

¹²³ See *Objectives of Mercosur* (visited Oct. 2, 1997) <<http://www.americasnet.com/mauritz/mercosur/english/page03.html>>.

communication, fiscal, monetary, and exchange rate policies.¹²⁴ None of these goals were completely accomplished by the target date of December 31, 1994.¹²⁵ Instead, what came into operation on January 1, 1995 was an imperfect customs union, with the introduction of a CET being applied to eighty-five percent of the items found in the Mercosur nomenclature.¹²⁶ Despite the fact that full implementation of the CET is postponed until at least the year 2006, the current use of a common external tariff of sixteen percent while the internal trade faces a tariff of zero percent, has the effect of encouraging intra-regional trade while discouraging trade with those countries outside Mercosur.¹²⁷ This argument was raised by World Bank economist Alexander J. Yeats in a recent report entitled—*Does Mercosur's Trade Performance Justify Concerns About the Global Welfare Reducing Effects of Regional Trade Arrangements? . . . YES!*.¹²⁸ The storm that greeted the report prompted The Bank not to release it. However its content was leaked to the media.¹²⁹ In the report, Yeats alleges that Mercosur distorts efficient trade patterns and reduces regional well-being by promoting trade in internationally non-competitive local manufacturers within Mercosur while discouraging the entry of better and “more efficient” goods from outside the block.¹³⁰ Because the use of the CET actively discriminates against those countries not lucky enough to be in the local club, it has the potential of sheltering the region from the competition of world markets, thus creating an enlarged protectionist fortress reminiscent of that erected by individual states in the not so distant past.

While Article I of the Treaty of Asuncion established the basic percentage rate and the reduction schedule of the CET, the CET is not set in stone. In fact, under the agreement each member state is permitted to charge a tariff of up to thirty-five percent on a very limited number of imports; these tariffs are merely required to be reduced to below twenty percent by 2001.¹³¹

¹²⁴ See Thomas O'Keefe, *Potential Conflict Areas in any Future Negotiations Between Mercosur and the NAFTA to Create a Free Trade Area of the Americas*, 14 ARIZ. J. OF INT'L & COMP. L. 304, 308 (1997).

¹²⁵ See *id.*

¹²⁶ See *id.*

¹²⁷ See Jeb Blount, *Protectionism, Latin Style*, Mercosur Trade (visited Sept. 1997) <<http://www.latintrade.com/march97/protectionism.html>> at 1.

¹²⁸ See *id.* at 2.

¹²⁹ See *id.*

¹³⁰ See *id.* at 1.

¹³¹ See O'Keefe, *supra* note 21, at 15.

Accordingly, tariffs have occasionally been increased by the member countries. In November of 1997, the presidents of Brazil and Argentina mutually agreed to raise the CET by three percent.¹³² While this move was primarily a national decision by Argentina, it applied across the region and has caused many to question the "open regionalism" of Mercosur towards the rest of the world.¹³³

Furthermore, recent World Bank research has shown that Mercosur as a region imposed additional barriers against imports from non-members above and beyond the CET resulting in a trade distortion.¹³⁴ These external barriers encouraged companies in the Mercosur countries to make capital intensive goods which could have been bought less expensively outside the region.¹³⁵ Mercosur officials, however, have contended that such research was incorrect, faulting the "heavy influence by the car-industry sector in which Argentina and Brazil have indeed imposed high barriers to imports of automobiles from third countries."¹³⁶ They label these as the exception, rather than the Mercosur rule.¹³⁷

Mercosur's attempts to broaden the regime might dispel some suspicion of Mercosur's status as a protectionist fortress of regional trade. However, simply because Mercosur is looking at new members does not necessarily signify that it is more amiable to non-members. Despite its size, Mercosur as a region has the potential to shut out the rest of the world and hide behind regional protectionist bunkers through the use of the CET and other tariff and non-tariff measures. This is arguably as easy as raising a percentage rate, which has been done and can be done again, if the bombardment of world competition becomes too vexatious.

B. Protection by the Individual States

The allegation that Mercosur as a region has become a fortress which diverts trade from the outside world is questionable. That Mercosur, as a group of individual states, is still riddled with national protectionist policies

¹³² See *The Free-Trade Winds Die Away*, THE ECONOMIST, Nov. 22, 1997, at 35, available in 1997 WL 17832371.

¹³³ See *id.*

¹³⁴ See *Finance and Economics: Murky Mercosur: Trade Agreements*, THE ECONOMIST, July 26, 1997, available in 1997 WL 8136899.

¹³⁵ See *id.*

¹³⁶ See *id.*

¹³⁷ See *id.*

may be more accurate. Despite remarkable steps taken in lieu of trade liberalization, each member state has, in its own way and to its own degree, held on to (or implemented) its own individual policies designed to protect its national market. This selective protectionism has been implemented either by use of the existing Mercosur agreement, by way of exceptions to both the common external tariff and remaining inter-region tariffs, or by other non-tariff measures. Shifting products in and out of the CET, unilateral application of tariffs, use of quotas, applying individual rules in place of Mercosur rules, national tax systems and penalties, and numerous forms of red tape are among the various methods used by each of the Mercosur countries to protect national interests and markets.

For instance, Brazil, the dominant member of Mercosur, has truly championed the liberalization of trade and the opening of markets. Nevertheless, Brazil, perhaps more than the other countries, has on numerous occasions resorted to the use of various safeguarding measures to protect certain sectors of its economy since the signing of the Treaty of Asuncion. As previously mentioned, under the Treaty of Asuncion each country was allowed to exempt certain products from the CET (Argentina, Brazil, and Uruguay listed 300 items, Paraguay listed 399 items) and intra-region tariff system (goods subject to final adequacy).¹³⁸ As Brazil has proven, however, the CET (or, for that matter, the rules established under Mercosur) is in no way unchangeable. By taking advantage of the relative ease with which it may move an item in and out of the tariff structures, Brazil has exposed the soft underbelly of the trade agreement. In July 1994, for example, Brazil raised tariffs on the imports of toys from twenty percent to seventy percent.¹³⁹ The seventy percent tariff was in effect for a two-hundred day period which conveniently covered the peak seasons for such products, including the Latin American holiday Children's Day and Christmas.¹⁴⁰ "The rise in the tariff on toys was imposed under international rules that allow such a safeguard if a national industry suffers severe damage from a sudden rise in imports."¹⁴¹ Regardless of the legal backing,

¹³⁸ See *supra* p. 398.

¹³⁹ *Protectionist? What, Us? Brazil's Modern Protectionism*, ECONOMIST, Aug. 3, 1996 available in 1996 WL 11246995 [hereinafter *Protectionist? What, Us?*].

¹⁴⁰ See *id.*

¹⁴¹ *Id.* Currently the tariff on toy imports is at sixty-three percent, which is, in all likelihood, a direct response to business leaders fear of a "US economic invasion." Anthony Faiola, *Brazilians Wary of U.S. Trade Pact; Businesses Fear Dropped Barriers Could Damage Recovering Economy*, WASH. POST, Oct. 16, 1997 at A24.

the willingness and ability to unilaterally impose duties on imports stands as strong evidence of the continued presence of protectionist policies.

In addition, by moving items in and out of the CET set by Mercosur, the governments of Brazil (and the remaining countries) have also contrived to raise duties on import wines, peaches, paper, and gypsum.¹⁴² In a time where tariffs are supposedly being lowered, Brazil has and continues to put up various barriers, showing a reluctance towards full liberalization of trade. This reluctance is partly based on a sensitive economy, a growing trade deficit, and fears that the U.S. and other outside countries will either run Brazilian companies into extinction or come between the regional partners in Mercosur.¹⁴³ The legitimacy of such fears not only supports their hesitancy to move ahead, but also stands as a witness that protectionist sentiment is in no way a thing of the past.

Nowhere has this concept been found to be more true than in the automobile industry. For example, in 1996 Brazil imposed rules requiring extra duties of up to seventy percent upon cars imported into Brazil from firms without manufacturing plants in Brazil.¹⁴⁴ Firms with manufacturing plants within Brazil were allowed to continue importing at thirty-five percent.¹⁴⁵

Although concessions were made and Brazil conceded to exempt Mercosur-made cars from the increased tariff, these are small steps in a time of great talk. This has resulted in requirements that, until the year 2000, firms with plants in Argentina and Brazil must balance their overall trade of cars and components between the two countries (goods go duty-free provided they have sixty percent Mercosur content).¹⁴⁶ This solution was largely the

¹⁴² See *Protectionist? What, Us?*, *supra* note 139. The notion that the tariffs raised by Brazil on such items are to be regarded as protectionist measures is generally undisputed. The 1994 tariff increase on toys came as a result of previous decreases on imported toys which almost completely destroyed the Brazilian toy industry. More than 520 domestic toy factories were forced to close within 24 months and more than 15,000 workers lost their jobs. The unilateral tariff increases reflect a general Brazilian sentiment towards trade liberalization; Brazil is not ready. While many of the larger corporations are enjoying unprecedented success from a liberalized market and an ability to trade more freely, many small and medium size industries are urging political leaders to be cautious. See Faiola, *supra* note 141, at A24.

¹⁴³ See Faiola, *supra* note 141, at A24.

¹⁴⁴ See Michael Reid, *A Survey of Mercosur: Business Gears Up-Multi-Nationals are Leading the Way in the Wider Market But Local Firms are Joining Them*, THE ECONOMIST, Oct. 12, 1996, available in 1996 WL 11247180.

¹⁴⁵ See *id.*

¹⁴⁶ See *id.* at 1.

result of a compromise between the two countries, however plants with firms only in Argentina have a quota for exports to Brazil as well as a thirty-five percent tariff.¹⁴⁷ Thus, Brazil conceded to throw a half-step backwards into its two steps forward.

Similarly, automakers in Argentina recently petitioned the government to modify plans for a common Mercosur auto regime by retaining quota norms in an effort to protect regional producers from imports.¹⁴⁸ This petition came in response to a recent agreement by the Mercosur countries regarding the auto regime, setting a common, quota-free import tariff of thirty-five percent during a four year transitional phase beginning in 2000.¹⁴⁹

Additionally, in response to concerns over fiscal and balance-of-payments deficits in developing countries after the Mexican crisis, Argentina imposed a general three percent duty on imports from outside Mercosur, and raised its tariffs on capital goods and telecom equipment.¹⁵⁰ Likewise, Chile's entry into Mercosur was accompanied by an offshore tariff set at a flat eleven percent rate while other Mercosur countries follow rates ranging from zero to twenty percent.¹⁵¹

By effectively manipulating the current tariff structure according to their will and pleasure, Mercosur countries can talk the talk without having to completely walk the walk. Instead of the great and obvious barriers of the past, Brazil and the other Mercosur countries use unilateral tariffs as selective protectionism to safeguard their market and industries from outside competition.

Another tool used to protect the markets has been the use of quotas (which, if classified as a "Safeguard Quota" under the rules of Mercosur, were not to be used past December 31, 1994, but they appear to be permissible for extra-zone trade). For example, in June 1994, "Brazil announced that for three years it would impose quotas on textile imports from China, Taiwan, South Korea, Hong Kong, and Panama."¹⁵² These quotas were likely imposed to shield an industry, already considered sensitive

¹⁴⁷ *See id.*

¹⁴⁸ *Argentine automakers press government to retain quotas under new Mercosur Regime*, AFX, Dec. 22, 1998, available in 1998 WL 23085075 [hereinafter *Quota Retention*].

¹⁴⁹ *See id.*

¹⁵⁰ *What Mercosur has done, Survey & Seminars on Brazil* (visited Sept. 9, 1997) <<http://www.demon.co.uk/Itamaraty/mercosur02.html>>.

¹⁵¹ *Mercosur, Historical Background* (visited Oct. 20, 1997) <http://www.americasnet.com/mauritz/mercosur/english/page02.html>>.

¹⁵² *See Protectionist? What, Us?*, *supra* note 139.

due to strong competition from Argentina, from further threatened danger.¹⁵³

The use of such measures is compounded by the fact that Mercosur as a region appears to tolerate such actions. By allowing a country to individually raise trade barriers through the imposition of tariffs preempted by Mercosur tariff schedules, Mercosur provides a roundabout way for its member countries to continue sheltering certain products. Indeed, the ability possessed by each of the countries to raise tariffs unilaterally or to move products in and out of the CET and the intra-region tariffs implies that strands of protectionism are running throughout the liberalization efforts of both the countries and the region. Unless uniform rules established under the Treaty of Asuncion are strictly enforced, Mercosur as a region will further incubate the protectionist sentiment of its member countries that is already alive and thriving on its own.

1. Other Ways and Means, Non-tariff Measures

Since "protectionism" has become a dirty word in Latin America, particularly among Mercosur proponents, many Latin American countries seek ways to protect their economy so that no one can call them protectionists, at least under treaty obligations. By way of non-tariff measures, Mercosur countries continue to safeguard sensitive areas without name-calling. Of the non-tariff measures, the most popular include licensing, paratariffs, anti-dumping or countervailing measures, and variable levies.¹⁵⁴ Other non-tariff measures against imports include: reference prices, customs valuation procedures, supplementary and even discriminatory charges on imports, technical barriers, and government procurement procedures.¹⁵⁵

Traditional non-tariff measures ("NTM's") "were typically broad based licensing systems, affecting all imports and supported by strict foreign-exchange controls."¹⁵⁶ By requiring nearly all imports to have a prior license, authorities used the license applications to check on the expected level of imports.¹⁵⁷ The applications provided a comprehensive administra-

¹⁵³ *Id.*

¹⁵⁴ See Sam Laird, *Latin American Trade Liberalization*, 4 MINN. J. GLOBAL TRADE 195, 206 (1995).

¹⁵⁵ See *id.* at 206.

¹⁵⁶ See *id.* at 205.

¹⁵⁷ See *id.*

tive control by which imports could be quickly curtailed when required.¹⁵⁸ In Brazil, non-automatic licensing by way of local content regulations and export-performance requirements have been effective in controlling imports.¹⁵⁹ For example, at a time where Brazilian imports were at U.S. \$20.9 million, the percentage of imports subject to non-automatic licensing was nearly twenty-one percent.¹⁶⁰ Undoubtedly, this had the effect of discouraging imports that fell subject to such requirements, and thus protected certain national goods.

As noted, the decrease in tariff and non-tariff measures has led to an increase in the substitute means by which markets are protected. As tariff and non-tariff barriers have fallen, there has been an increase in the use of anti-dumping and countervailing actions. These actions are designed to protect markets from unfair trading practices such as dumping or strong subsidization, but are frequently used as protectionist mechanisms.

Although anti-dumping has not been used by the Mercosur states any more than it has been used among other Latin American countries or even the United States, it is, nonetheless, a tool by which protectionist policies have been forwarded. In fact, the Brazilian Government recently set out to attempt to solve anti-dumping claims by Argentinean manufacturers against a Brazilian steel exporter whose alleged dumping activities were adversely affecting Argentinean laminated products.¹⁶¹

In addition, there has been a general move in Latin America away from volume-control measures towards greater use of price control and monitoring measures. Mercosur countries have used price systems as a way of protecting certain sensitive products.¹⁶² For example, Uruguay has made great use of reference price systems and minimum export prices.¹⁶³ By establishing lower price references for local goods, Uruguay sought to encourage consumption of national goods over the higher-indexed foreign product. Unfortunately, these systems worked to distort consumption and production behaviors in a detrimental fashion.¹⁶⁴

¹⁵⁸ See *id.* at 206.

¹⁵⁹ See *id.*

¹⁶⁰ See *id.* at 208.

¹⁶¹ See *Gazeta Mercantil, Brazil and Argentina to Settle Disputes in Mercosur Court*, Chemical Business Newsbase Nov. 23, 1998, available in 1998 WL 2187192.

¹⁶² See Laird, *supra* note 154, at 208.

¹⁶³ See *id.*

¹⁶⁴ See *id.*

Another non-tariff measure used to protect domestic markets is the use of supplementary and discriminatory charges on imports. These ad valorem or specific charges, applied to imports include: consular charges; port charges often unrelated to port costs; stamp taxes; statistical taxes that do not always produce timely statistics;¹⁶⁵ and freight taxes levied on the freight costs of imports.¹⁶⁶ These supplementary charges, although unrelated to tariffs, often have the same guardian effect as tariffs, as the ad valorem incidence of supplementary charges can exceed the ad valorem incidence of the tariff itself.¹⁶⁷ In Brazil, for example, the tax incidence of the Industrialized Products Tax and the Merchandise Circulation Tax ("ICMS") amounted to one hundred percent of an automobile in 1995 while the customs duty was a remarkably lower fifty percent.¹⁶⁸ Indeed, there is still a wide range of trade-related taxes and charges throughout the Mercosur region, including some domestic taxes applied discriminatorily against imports.¹⁶⁹ These charges are not tariffs, but have the same effect, making the import more expensive than the local item on the local market. An example can be found in Mercosur's associate member, Chile, where Scotch whiskey, an imported product, is nearly thirty percent more expensive than Pisco, the locally made spirit.¹⁷⁰ This price disparity is due to domestic liquor tax structures favoring local production over imported liquors.¹⁷¹ As long as these charges and taxes can be unilaterally and indiscriminately applied by the member states, conflicts between the states will be inevitable. How the members of Mercosur choose to deal with these will depend largely upon

¹⁶⁵ See *id.* at 209. Taxes and charges levied at the frontier, other than tariffs, also have become a large scale issue. These first surfaced when Argentina unilaterally increased the statistical tax from three percent to ten percent even against other Mercosur Members. See *id.* at 219.

¹⁶⁶ See *id.* at 210.

¹⁶⁷ See *id.*

¹⁶⁸ See *id.* The breakdown of the supplementary charges related to the following: 1) port services, 50% of the cost of services; 2) the port improvement tax, 3% of the c.i.f. value; 3) the merchant marine renewal tax, 25% of the c.i.f. value on the first landing and 20% on subsequent landings; 4) an import license fee, 1.8% of the f.o.b. value; 5) a syndicate fee, 2.2% of the c.i.f. value; 6) a brokerage fee, 1% of the c.i.f. value; 7) a fee for printing forms, a flat US \$17; 8) an administration commission, 1.5% of the c.i.f. value; 9) a 5% airport tax; 10) a fee for handling charges; and 11) a social benefits contribution of 10% of warehouse charges. See *id.*

¹⁶⁹ See *id.* at 219.

¹⁷⁰ See Blount, *supra* note 127.

¹⁷¹ See *id.*

their willingness to abandon such measures and move away from protectionism towards truly liberalized trade.

In addition, technical barriers are often used to keep out-of-date articles from being sold in developing countries when they can no longer be sold by the exporters of industrialized countries in their home market.¹⁷² A country can effectively use the technical restriction of classifying an item as out-of-date, to promote protective purposes. Use of out-of-date classification has been directed primarily against the import of goods from other Latin American countries but it is rarely effective against a technologically superior country.

2. *Administrative Shortcomings*

While Mercosur makes explicit provisions for consultations regarding economic policies, there nonetheless exist administrative deficiencies.¹⁷³ Many of these inefficiencies are due to the member states' reluctance to yield full administrative control to a supranational Mercosur body.

It is important to emphasize that the Treaty of Asuncion lacks a fully developed institutional structure capable of effectuating a fully functioning common market.¹⁷⁴ The Treaty of Asuncion merely laid down the general, broad guidelines for establishing such a common market, and left the specifics to later agreements which were to be signed by the member states.¹⁷⁵ While many of these shortcomings have been addressed, there still remain several gaps in legal structure of Mercosur, due to the states' reluctance to surrender power to Mercosur, which contributes to national protectionist sentiments held by each member country.

Critics agree that the weakness of Mercosur's institutions, combined with the relative economic and political instability of the dominating country, Brazil, have made the goal of a common market unattainable, at least in the short run.¹⁷⁶ This lack of administrative strength both affects and is affected by protectionist policies. Because the relatively weak administrative

¹⁷² See Laird, *supra* note 154, at 210.

¹⁷³ See Cherie O'Neal Taylor, *Dispute Resolution as a Catalyst for Economic Integration and an Agent for Deepening Integration: NAFTA and MERCOSUR?*, 17 NW. J. INT'L L. & BUS. 850, 850 (1996-97).

¹⁷⁴ See Haines-Ferrari, *supra* note 9, at 425.

¹⁷⁵ See O'Keefe, *supra* note 21, at 14.

¹⁷⁶ See Kenneth W. Abbot & Gregory W. Bownan, *Economic Integration in the Americas, "A Work in Progress,"* 14 NW. J. INT'L & BUS. 493, 499 (1994).

bodies do not have the power to execute the regulations and policies established under Mercosur, Mercosur must rely completely upon the executory powers of each state and, consequently, the willingness of each state to enforce these measures. In addition, the unwillingness of each state to cede sufficient administrative powers to a Supranational Mercosur body can most likely be traced to a general nationalistic sentiment.

Though opinions differ, it is generally held that it is necessary to pass national laws, directives, or resolutions to give legislative or regulatory effect to the mandates of Mercosur in the party state's territories.¹⁷⁷ Only the Paraguayan Constitution of 1992 and the Argentinean Constitution, as modified in August 1994, recognize the transference of competency and jurisdiction to the suprastate Mercosur organization.¹⁷⁸ This was to only be applied under equal and reciprocal conditions with the rest of the party states. Although Mercosur countries have, for the most part, been resolute in the implementation of legislation, the ability for a state legislature to reject Mercosur legislation manifests strong sentiment that Mercosur standards will apply secondarily to national laws.

Another area where an inadequate structure has been troublesome is the integration of the economic sectors. As with similar insufficiencies in administration, structural weaknesses, perhaps caused by the member states reluctance to yield power and control to Mercosur, have led to troubling circumstances in which states have reverted to trade refuge.¹⁷⁹ As previously mentioned, there is potential hazard within the economic sector or within those enterprises that have been competing beyond their national borders yet inside the borders of the common market.¹⁸⁰ The danger is that these companies may destroy each other unless means to harmonize them are implemented. Without question, increased competition among industries presents a threat to those businesses which cannot compete. It also presents a catalyst for retreat to protectionist policies.

For example, competition between Brazilian and north-center Argentine sugar and further competition between Argentine wheat and that of Parana, Brazil has spawned unilateral action by national governments seeking to

¹⁷⁷ Ana Maria De Aguinis, *Can Mercosur Accede to NAFTA? A Legal Perspective*, 10 CONN. J. INT'L L. 597, 603 (1995).

¹⁷⁸ See Cherie O'Neal Taylor, *supra* note 173, at 871 n.98.

¹⁷⁹ See Raul Anibal Etcheverry, *The Mercosur: Business Enterprise Organization and Joint Ventures*, 39 ST. LOUIS U. L.J. 979, 986 (1995).

¹⁸⁰ *Id.* at 986.

defend local manufacturers.¹⁸¹ Competition in both of these industries came to head in 1997, as the Argentine Congress conditioned the reduction of tariffs on sugar until Brazil stopped subsidizing its sugar alcohol industry.¹⁸² Brazil immediately reacted by threatening to establish additional tariffs on Argentine wheat.¹⁸³ Tensions continued to flare surrounding the recent Rio de Janeiro Summit where first attempts failed to produce an agreement on free sugar trade.¹⁸⁴ When an agreement which gave Brazil a ten percent reduction of the Argentine tariff was ultimately met, angry Argentine sugar producers accused their government of going back on their own policy and giving preference to Brazil.¹⁸⁵ Such nationalistic policies to inter-regional trade are an impediment to Mercosur progress and show that protectionist sentiment is a viable force within the region.

3. Red Tape

Above and beyond the use of tariff and non-tariff measures exists a lack of structural harmonization, which is perhaps a more realistic indicator of how strong a force protectionism remains within the region. Each country has its own degree of red tape that importers must cut through in order to facilitate trade with other member countries.

For example, a Brazilian firm wishing to export chickens to Argentina must first obtain a certificate of sanitation from Brazil's health ministry.¹⁸⁶

¹⁸¹ See *id.* at 986.

¹⁸² See *Argentina and Brazil Clash Over Sugar Policy*, MERCOPRESS, Sept. 13, 1997, at 1. Argentinean law provided for a non-bloc tariff on sugar from Brazil due to heavy subsidization to the tune of \$3 billion a year stimulating sugar production and helping to make Brazil the world's largest exporter of sugar and one of the world's largest producers. See *id.*; see also Marcela Valente, *Trade-Latam: Argentine Sugar Producers Defend Tariffs*, INTER PRESS SERVICE, Dec. 15, 1998, available in 1998 WL 19901993.

¹⁸³ *Argentina and Brazil Clash Over Sugar Policy*, *supra* note 182, at 1. Sugar and wheat were not the only problem. In the months preceding the December 1998 summit, Argentina threatened to raise taxes on some Brazilian products, such as steel, due to claimed dumping practices by Brazil. See *Mercosur Summit Prepares to Open as Trade Spats Continue*, AGENCE FRANCE-PRESSE, Dec. 6, 1998, available in 1998 WL 16654132.

¹⁸⁴ See *Argentina, Brazil Fail to Agree on Free Sugar Trade*, XINHUA ENGLISH NEWSWIRE, Dec. 8, 1998, available in 1998 WL 19500469. Argentina had recently placed a twenty-two percent tariff on Brazilian sugar to combat Brazilian subsidies. See *id.*

¹⁸⁵ See Valente, *supra* note 182.

¹⁸⁶ See Michael Reid, *A Survey of Mercosur: The Road to a Single-Market, Mercosur Needs Less Red Tape But More Common Rules*, THE ECONOMIST, Oct. 12, 1996, available in 1996 WL 11247185.

However, upon reaching the border, the chickens must again be inspected by both of Argentina's health and agriculture ministries.¹⁸⁷ These inspections, depending on the presence of such officials, can take up to two days, which are days that come off the products shelf-life.¹⁸⁸ The Brazilian firm might also have to pay Argentina's value added tax.¹⁸⁹ Furthermore, if the firm is selling to an import wholesaler, it would have to pay neither in Argentine or Brazilian currency but in U.S. dollars, which could require a tenuous currency exchange at a Brazilian bank.¹⁹⁰

Red tape is not, however, unique to Argentina. In Brazil importers can wait up to six months for a sanitary certificate.¹⁹¹ Similarly, the Brazilian government recently announced plans to impose health-based restrictions on the importation of such goods as food, chemicals, and pharmaceuticals.¹⁹² Such news was met with disapproval by other Mercosur countries who criticized such a measure as being against free trade principles.

In addition, due to inadequacies of infrastructure, the IDB has found that in the Mercosur countries a journey of 100 kilometers (sixty-two miles) that crosses any frontier costs forty percent more than one that does not.¹⁹³

While most large firms have been able to find ways around these problems, smaller companies have had to deal with these inadequacies, and have not seen any real benefits of trade liberalization. It is the failure to coordinate these procedures and provide answers to such problems that reflects an unwillingness to concede trade control to Mercosur. Failure to introduce a single customs document and rules of mutual recognition, whether due to reluctance or just languorousness, is a telltale sign that the countries of Mercosur maintain protection over their markets. By failing to harmonize, or by implementing additional procedures and charges, the countries continue to forward such measures designed to shield products and markets from outside competition.

Coupled with unharmonized procedure, there has been a lack of coordination among each member's policies. While Argentina, Paraguay, and Uruguay are members of the Interamerican Convention on Conflicts of Laws

¹⁸⁷ See *id.*

¹⁸⁸ See *id.*

¹⁸⁹ See *id.*

¹⁹⁰ See *id.*

¹⁹¹ See *id.*

¹⁹² See *Brazil to Impose Restrictions on Some Mercosur Imports*, AFX NEWS SOURCE, Oct. 27, 1998, available in 1998 WL 15905400.

¹⁹³ See Reid, *supra* note 186.

Regarding Business Companies and as such have less stringent requirements for business registration,¹⁹⁴ Brazil, who is not a member of this pact, demands federal authorization for a foreign enterprise or branch (whether belonging to Mercosur or not) to do business in its territory.¹⁹⁵ The treatment given to enterprises of "Brazilian" origin is different than that which applies to any foreign enterprise, be it from the Mercosur or from other regions.¹⁹⁶ Lack of coordination among such policies coupled with a general inability to enforce uniformity allows Brazil to protect various enterprises. For example, the Brazilian constitution grants a certain monopoly to the "Brazilian enterprises" in activities such as accession to public credit and promotion systems.¹⁹⁷

While free practice of economic activity is ensured independently from government authorization, exceptional cases exist under Article 121 of the Brazilian Constitution extending preferential treatment to different types of Brazilian enterprises.¹⁹⁸ In the acquisition of goods or services, the government must give preferential treatment to the Brazilian enterprises of national capital as determined by law.¹⁹⁹ Brazilian enterprises of national capital are those enterprises under permanent effective control of physical persons domiciled or residing in the country or of entities of domestic public law.²⁰⁰ Furthermore, under Article 173, certain economic activities are kept under national jurisdiction when national security reasons or a

¹⁹⁴ In fact very few formalities are required from countries abroad to perform isolated acts. See Etcheverry, *supra* note 179.

¹⁹⁵ See *id.* at 988.

¹⁹⁶ *Id.* at 988; Brazilian Enterprises are defined as "those created under Brazilian Law and with their central office and administration in the country." *Id.* at 990; Brazil also applies the combined definition of creation to the site of management and the site of creation. By adding the requirement of nationality, it distinguishes the Brazilian enterprise and the partners of nationality, see *id.* at 990.

¹⁹⁷ See *id.*

¹⁹⁸ See *id.*

¹⁹⁹ See *id.* at 991. The Brazilian Constitution draws a distinction between a "Brazilian Company of Domestic Capital," in which the ownership of the majority of the voting shares and rights is held by Brazilian residents, and a Brazilian Company of Foreign Capital. See, Ester Nunes, *Brazilian Country Update: A Review of the New Order*, 20 FLA. J. INT'L L. 1, 63 (1995).

²⁰⁰ Effective Enterprise control means that such persons or entities hold the majority of the company's capital with the right to vote or the right to exercise the power of decision to manage its activities. See Etcheverry, *supra* note 179, at 990.

fundamental interest for the community are at stake.²⁰¹ These measures allow Brazil to control certain economic areas without relinquishing control to Mercosur. Thus, Brazil, not Mercosur, is granted the right to plan the economic policy of the country.²⁰²

Mercosur also lacks provisions to open up trade in services.²⁰³ Particularly, Mercosur needs region-wide financial services to take on such important areas as the harmonization of tax and of macroeconomic policies (which thus far have extended no further than the exchange of information).²⁰⁴ In the area of banking this is made particularly evident. While the central banks of the member countries have held preliminary talks regarding harmonizing bank regulatory systems, and finance officials have discussed tax regimes, the differences between the systems of each country continue to create hurdles to which few have endeavored to surmount.²⁰⁵ This can be seen in Brazil's middling effort to accept banks from other Mercosur countries.²⁰⁶ Although Brazil has allowed other banks to enter, it has yet to allow a full-scale financial opening or a freeing of trade in services and will be unlikely to do so until its stabilization program and economic reforms are consolidated.²⁰⁷ In addition, Mercosur rejected a Chilean request to include trade in services in its association agreement.²⁰⁸

Furthermore, as mentioned previously, Mercosur still lacks a viable mechanism for dispute resolution.²⁰⁹ The 1991 Mercosur agreement drew up a procedure which called for disputes to be submitted to an ad hoc arbitration tribunal under the control of the Common Market Group.²¹⁰ However, this has yet to be adequately tested. In practice, most disputes between member countries have been settled politically by the Mercosur

²⁰¹ See *id.* at 991. See also Nunes, *supra* note 199, at 62 (noting that the Brazilian Constitution restricts foreign participation in areas such as exploration and production of petroleum, cabotage, and shipping of merchandise, newspapers, magazines, television and radio networks, fishing industry, post office, telephone and telegraph, aerospace, banking, mining, and insurance).

²⁰² See Etcheverry, *supra* note 179, at 991.

²⁰³ See Haines-Ferrari, *supra* note 9, at 425-26.

²⁰⁴ See Reid, *supra* note 186.

²⁰⁵ See *id.*

²⁰⁶ See *id.*

²⁰⁷ See *id.*

²⁰⁸ See *id.*

²⁰⁹ See O'Neal Taylor, *supra* note 173, at 860-62.

²¹⁰ See Reid, *supra* note 186.

presidents and private claims have been funneled through the group to national tribunals.²¹¹ Without a tested and politically neutral dispute-settlement mechanism or a Mercosur tribunal, the Mercosur countries effectively discourage investors who undoubtedly lack confidence in the ability to remedy potential problems. The failure to harmonize and unify economic policies and control stands as an obstacle towards the attainment of a true common market and serves as a reminder of the difficulty of abandoning trade policies held tightly for decades past.

IV. CONCLUSION

Most people assert that even in light of such arguably "protectionist" measures, Mercosur has made tremendous headway in terms of opening its markets and shedding protectionist policies. Thomas Andrew O'Keefe renounces accusations that Mercosur is evolving into a protectionist trade fortress by evaluating the progress which has been made.²¹² He claims that the protectionist label is "especially laughable" when viewed in light of the genuinely protectionist policies that were prevalent throughout the region at the beginning of the decade.²¹³ O'Keefe points to Brazilian import duties on personal computers, which were around 103 percent in 1991, and are currently around 30 percent.²¹⁴ Others point to the incredible growth in bilateral trade which has grown from \$1.5 billion in the eighties to over \$14 billion in 1997.²¹⁵

Despite the incontestable merit of these reductions, the true test of whether Mercosur is really a free trade regime will not be found in reductions from 100 percent tariffs to thirteen percent tariffs, but in Mercosur's ability to go from thirteen percent to zero tariffs. It will be interesting to see if Brazil can reduce its tariff on personal computers down to fourteen percent by 2004 when the Mercosur CET on computers takes place. Even O'Keefe, one of Mercosur's greatest proponents, agrees that there exist certain policies pursued by some of the member states which indicate reluctance to fully

²¹¹ See *Controversy Settling Systems* (visited Oct. 2, 1997) <<http://www.americasnet.com/mauritz/mercosur/english/page10.html>>.

²¹² See Thomas Andrew O'Keefe, *The Mercosur Success Story*. (Latin American regional trade agreement), *LATIN FINANCE* 74, Jan. 11, 1997, available in 1997 WL 10930643.

²¹³ *Id.*

²¹⁴ See *id.*

²¹⁵ See *Mercosur News*, (visited Jan 17, 1998) <<http://www.falkland-malvinas.com>>.

open their markets.²¹⁶

The months leading up to and culminating with the December 1998 Rio de Janeiro Summit highlighted this reluctance. Economic difficulties in Asia and throughout the world sent chills throughout Mercosur and contributed to trade disputes and tensions between the Mercosur member nations.²¹⁷ In what the Brazilian press claimed to be a "tariff war" between Argentina and Brazil,²¹⁸ the countries were divided as to whether or not to opt for protectionist policies.²¹⁹ Brazil accused Argentina of secretly selling milk from New Zealand,²²⁰ Argentina claimed Brazil was subsidizing sugar and neither country wanted the other's cars.²²¹ Nevertheless, representatives from both countries attempted to diffuse such accusations by claiming that protectionist measures were a normal response to international difficulties and that these measures would not affect Mercosur trade.²²²

Contrary to Argentina and Brazil's assurances, protectionist sentiment held previous to the December summit was affecting Mercosur trade and continued to affect trade negotiations at the summit. While the countries were able to come to an agreement in some areas, little progress was actually made.²²³ An agreement was reached by the auto industries to begin phasing in free trade through the imposition of a thirty-five percent import tariff on vehicles made outside the trade block during the four year transition period beginning in January 2000.²²⁴ Brazil currently maintains a forty-

²¹⁶ See O'Keefe, *supra* note 212.

²¹⁷ See *Trade Tensions Beset Mercosur*, ABIX (Australasian News Abstracts), Dec. 8, 1998, available in 1998 WL 18225304.

²¹⁸ See Claude E. Erbsen, *Brazil: Trade Dispute Not 'Tariff War' Says Mercosur Won't be Affected*, THE ARIZONA REPUBLIC, Nov. 21, 1998, at A33, available in 1998 WL 7810997.

²¹⁹ See *id.*

²²⁰ See Harold Amos, *South America Free Trade Hits Snags*, AP ONLINE, Dec. 5, 1998 available in 1998 WL 23508442.

²²¹ See *id.*

²²² See *Brazil: Trade Discrepancies Continue with Argentina*, SOUTH AMERICAN BUSINESS INFORMATION, Nov. 18, 1998, available in 1998 WL 21550861 (claiming that the frequent trade disputes between Argentina and Brazil may intensify). In November 1998, Argentina's economic minister complained about poor trade relations with Brazil, claiming that "in terms of trade (they) (were) not at a good moment with Brazil." *Trade Relations With Brazil Not "Good" Says, Argentina Minister*, AGENCE FRANCE-PRESS, Nov. 15, 1998, available in, 1998 WL 16639468.

²²³ See Thierry Ogier, *Small Progress Made on Mercosur Auto Tariffs*, J. COMMERCE, Dec. 11, 1998 at 3A, available in, 1998 WL 20947318.

²²⁴ See *id.*

nine percent tax on imports from manufacturers who do not have a production base within the country.²²⁵ The countries further agreed that no new tax breaks or subsidies will be offered to lure auto-makers into the region without the consent of the other Mercosur members.²²⁶ In addition, Argentina and Brazil signed a memorandum of understanding regarding sugar tariffs. The memorandum allowed Brazil a ten percent reduction on Argentina's tariff.²²⁷

Despite these steps, tensions and hesitancy towards progress remained. Immediately following the agreement, Argentine automakers pressed their government to modify the summit agreement and retain quotas to protect regional producers,²²⁸ and sugar producers criticized the government's decision to allow Brazil a reduction on Argentina's tariff. Apparently, Mercosur countries are still holding on to the protectionist sentiment of the past and are hesitant to move further towards free trade. With regards to the auto sector, it remains to be seen whether the countries will be able to reduce tariffs below the thirty-five percent level as planned. Therein lies the true test.

Moreover, as Mercosur continues to deal with internal "broadening," it is ever faced with the possibility of "widening," particularly in the wake of the Free Trade Area of the Americas (FTAA) to be implemented over the next seven years. As it is generally held that hemispheric trade will come by way of expanding regional blocks rather than through multilateral efforts, Mercosur will indeed play a crucial role in this evolution of free trade.²²⁹ In fact, with the recent growth and apparent strength of the Mercosur block, many argue that any efforts to unite the hemisphere will be by way of other regimes joining Mercosur. For example, Peru and Mexico are presently courting the Secretariat in Montevideo. Moreover, Bolivia and Venezuela, as members of the Andean Pact, have expressed their intentions of joining the project.²³⁰ Some contend that NAFTA will be the core or foundation for eventual free trade throughout the Americas, and Mercosur, while being

²²⁵ See *id.*

²²⁶ See *Global Automotive Report: Four South American Countries Explore Free Vehicle Trade*, THE DETROIT NEWS, Dec. 11, 1998, at B3, available in 1998 WL 23632164.

²²⁷ See Valente, *supra* note 182.

²²⁸ See *Quota Retention*, *supra* note 148.

²²⁹ See Wolff, *supra* note 3, at 114.

²³⁰ See *Roundup*, AFX NEWS, Dec. 11, 1998, available in 1998 WL 23083102; *Mercosur Will Cover All South America by 1998* MERCOPRESS NEWS AGENCY (visited Dec. 11, 1997) <<http://www.falkland-malvinas.com/archive/sni2190697.html>>.

a core for South American Free Trade, by remaining under the dominance and leadership of NAFTA and the U.S., will be merely a pole for hemispheric free trade.²³¹

Nevertheless, Mercosur's ability to champion hemispheric trade as a core or a pole, will depend largely on its ability to take the remaining steps necessary to shake the protectionist sentiment. For example, whether Brazil will likely embrace expansion beyond the current Mercosur group depends largely on its ability to feel more self-confident in light of recent economic instability. Brazil's refusal to integrate trade with such countries as the U.S. might present the possible dilemma for Argentina of choosing between continuing its membership in Mercosur, or attempting to join with the United States and NAFTA.²³² Even if expansion of Mercosur takes place, the remaining protectionist factors presented in this note will still remain an obstacle to true free trade, both within the Mercosur region and with the rest of the world.

Mercosur, as a region has taken tremendous strides towards the liberalization of trade. Nevertheless, there remains a difficult road ahead, laden with hurdles, arguably more difficult to overcome than the notable steps heretofore taken. Like many a twelve-step program, the first step towards overcoming the protectionist problem will be to admit that there is a problem. Once protectionist measures are acknowledged, maybe then can Mercosur tackle the difficult task of becoming a true free trade regime. However, if protectionism continues to be swept under the rug, Mercosur may never realize the full benefit of its trade liberalization efforts.

²³¹ See Richard L. Bernal, *Regional Trade Arrangements and the Establishment of a Free Trade Area of the Americas*, 27 *LAW & POL'Y INT'L BUS.* 945, 950-53 (1996).

²³² See Edward C. Snyder, Comment, *The Menu Revolution in Argentina: Progress Toward A Hemisphere Free Trade Area*, 29 *TEX. INT'L L.J.* 95, 117-18 (1994).