

## **The Impact of Mercosur's Sanitary and Phytosanitary Regime on its Members' Institutional Dynamics**

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### **Introduction**

International competitiveness in agri-business today is strongly determined by the capacity of building competitive advantages based on food quality and safety and the certification of management of quality standards<sup>2</sup>. In the food chain, while the development of safety standards is mandatory, quality standards are voluntary. It is not the same to implement food safety systems such as GMP, SSOP, HACCP<sup>3</sup>, that guarantees that consumption is safe, than to implement quality systems such as ISO 9000, total quality and continuous improvement, that are qualities that satisfy consumer's explicit or implicit expectations. In any event, however, to the food industry, food safety is the work area also of the quality management and both fields builds upon and nurture from, essentially, technological innovations for competitiveness<sup>4</sup>.

In this line, the role of sanitary and phytosanitary (SPS) standards in agri-business has changed: from a technical instrument to reduce homogenous' commodities market transaction costs to become a competitive instrument in differentiated products markets<sup>5</sup>. In effect, traditional SPS standards' objective was to homogenise and standardize commodities in order to generate scale economies. The change from mass markets to differentiated markets and niche markets for consumers with high purchasing power induced the change towards SPS standards to develop and differentiate markets and to use standards as strategic instruments to market access, coordination of the quality and safety of the food system and definition of market niches for

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<sup>1</sup> Researchers at FLACSO-Argentina. Presented at IPSA, San Pablo, Brazil, 2011 and discussed at two IADB meetings (Florence, 2011 and Washington, 2012). Paper financed grace to the WTO Chair at FLACSO Argentina.

<sup>2</sup> Jatib, Inés (2003) "Food Safety and Quality Assurance Key Drivers of Competitiveness" in *International Food and Agribusiness Management Review*, Vol 6, issue 1.

<sup>3</sup> GMP: Good Manufacturing Practices; SSOP: Sanitation Standard Operating Procedures, that in turn is the base to implement HACCP); HACCP: Hazard Analysis and Critical Control Points

<sup>4</sup> Jatib, *ibid*.

<sup>5</sup> Reardon et al (2001) "Global Change in Agrifood Grades and Standards: Agribusiness Strategic Responses in Developing Countries" en *International Food and Agribusiness Management Review*, 2 (3/4) 421-435, Elsevier Science Inc.

those products. On the demand side, this change is supported by rich consumers with varied and sophisticated tastes and on the supply side, is supported by production, processing and distribution of technologies that allows for product differentiation and market extension and segmentation<sup>6</sup>.

Developing countries responses to this phenomenon has been varied: on the one hand, multinational firms have created private standards and also private certification, label and branding systems; on the other hand, medium size firms press governments to adopt similar public standards to their developed export markets; and finally, small firms try to collectively work with public agencies and NGOs to create standards and certification processes that would allow them to access exports' market, causing an institutional change in non tradable products markets <sup>7</sup>.

How have governments in emerging economies responded? In general, governments have set up standards such as el HACCP o ISO 9000 to some exports to some destinations while non tariffs barriers have augmented in the form of food safety's requirements. The dilemma for governments seems to be that if they do "inclusive" standards of local firms, they would not incentive the adjustment of the SPS standards to the more dynamic source of demand (global market). But, if governments create or accept higher standards, more "exclusive", they risk allowing only few firms to access global market. Probably, in addition, privatization of standards will continue just because it gives competitive advantages in a very competitive market. This is an additional challenge to governments.<sup>8</sup>

Against this backdrop, how has Mercosur dealt with those challenges? How has impacted Mercour' norms and institutional dynamics on its members regulatory architecture? These are the two central questions this paper will discuss within the perspective proposed by Bruszt and McDermott<sup>9</sup>.

In effect, Bruszt and Mc Dermott have argued that "divergent paths of domestic institutional development are products largely of the Transnational Integration Regimes (TIRS)"<sup>10</sup>. Through

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<sup>6</sup> Reardon, *ibid.*

<sup>7</sup> Reardon, *ibid*

<sup>8</sup> Reardon, *ibid*

<sup>9</sup> Laszlo Bruszt and Gerald A. Mc Dermott (2008) "Transnational Integration Regimes as Development Programs", Center for European Studies Central and Eastern Europe. Working Paper Series 67, November.

<sup>10</sup> Bruszt and Mc Dermott, *ibid*, p.1

the examination of two cases, namely the European Union accession process in the field of SPS measures and the NAFTA experience on SPS matters, the authors provide evidence on how institutional capacities' building is an experimental process in which a variety of public and private actors must coordinate their resources and information<sup>11</sup>. In this line, does Mercosur nurture and/or influence and/or determine its members' institutional dynamics in the SPS field? To what extent? How? Is Mercosur a learning instance for local actors?

To elaborate on those questions, this paper presents a brief description of Mercosur's objectives, achievements and weakness; then, it reviews Mercosur's institutional dynamics for SPS' norms negotiation and creation; furthermore, it presents Argentina's institutional dynamics on the SPS field (main actors, public agencies, institutional dynamics); and, in the concluding section, it analyses the interaction between Mercosur instances and norms and Argentina's domestic institutional instances dealing with the question of transnational regimes and domestic institutional dynamics.

### **1. Mercosur in brief**

Since the creation of Mercosur in 1991, South America has drastically changed its economic, political and social profile and policies: from indebted to lenders countries, from negative to positive rates of growth, from the Washington consensus model to a more local model of development, etc. Mercosur has also been part of these changes although remaining – for sure in the political discourse and social imaginary - as a strategic regional project towards the creation of a common market.

As said, Mercosur foundational treaty – Tratado de Asunción (TA) – was signed in 1991. Mercosur was of a kind of “open regionalism” endeavour, meaning in Latin America that it was not intended to build up a trade fortress nor was it part of an import substitution policy. Accordingly, Mercosur trade liberalization among its members (Argentina, Brazil, Uruguay and Paraguay) proceeded very fast and with few exceptions: in four years (1991-94) liberalization was almost complete and by 1999 even tariffs of the few items included in a list of exceptions were brought down to 0%. In addition, in 1994, Mercosur successfully negotiated – although never fully implemented - a common external tariff. Trade in agriculture was completely liberalized among its members with the only exception of sugar: no special calendars or

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<sup>11</sup> Bruszt and Mc Dermott, *ibid*, p. 3

safeguards nor list of excluded products.

After the successful liberalization process among members, Mercosur found extremely difficult to deep its economic integration process. In part due to divergent economic policies with Brazil (Argentina kept fixed the convertibility of its currency to US dollar while Brazil devaluated in January 1999) in part by the Argentinean crash of 2001-2002. In addition, after 1995, Mercosur members were unable to implement the custom union, intra trade declined and members begun to create norms at Mercosur level that were never internalized into the domestic legal systems, and thus never became operative. Mercosur then became more a discourse than an operative transnational legal system.

When regional economic growth started up (2003 and on) and motivated by the airs of renovation of its political leaders, Mercosur was re-launched at the Asuncion Summit with the participation of Venezuela and Bolivia as guest countries. This re launching stressed the need to deepen the “political Mercosur”. Accordingly, the Mercosur agenda was build upon issues such as the democratic compromise, protection of human rights, etc. Actually, the Mercosur agenda is often worked upon as “Political Mercosur”, “Productive Mercosur” and “Social Mercosur”. As for intraregional trade, for the period 2003-2009, Mercosur accounts for a significant growth of intraregional trade (although not as dynamic as trade to other extra regional partners and with the caution note that, from the point of view of Argentina, with a 7 years deficit with Brazil).<sup>12</sup>

Finally, in terms of Mercosur’s institutional architecture, the literature usually describes it as “soft” or “flexible” as a way to highlight the fact that there are not organs with permanent Mercosur’s officials<sup>13</sup>, that all organs are formed by governmental delegates and that decisions are made by unanimous consensus. In effect, Mercosur has three main decision instances and in all of them it is necessary the consensus of all members to take a binding decision, ie. to create a norm. Although Mercosur institutional setting has been modified, the heart of the decision making process has remained: all members’ consensus for binding decisions and the need of all Members’ “internalization or incorporation” of Mercosur norms at the domestic level in order to become operative.

In terms of dispute settlement, the original system was GATT-like (instead of being inspired in

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<sup>12</sup> Statistical Report Fundación Exportar (2009) “Informe Estadístico Intercambio comercial Argentina –Mercosur”. Diciembre. Available at [http://www.exportar.org.ar/informes\\_estadisticos.html](http://www.exportar.org.ar/informes_estadisticos.html)

<sup>13</sup> Except for a minimal staff the Mercosur Secretariat in Montevideo.

the European Union or the Andean Pact, i.e including permanent tribunals). Mercosur's treaty on dispute settlement foresees consultations and claims before the Common Market Council (CMC) and Common Market Group (CMG) and if no solution is found at those instances the case can be submitted to an ad hoc arbitral tribunal. In 2002, some changes were made to the dispute settlement system through the Olivos Protocol: a permanent tribunal was set up as a second instance that also can, if requested, give non binding opinions, among others.

## **2. Mercosur institutional architecture and dynamics**

Mercosur higher political organ is the Common Market Council (CMC), which is in charge of giving to the integration project its political direction; the executive organ is the Common Market Group (CMG), which has created, under its aegis, technical support instances: sub-working groups (SGT, according to its Spanish acronym) and technical committees (CT, according to its Spanish acronym). In addition, when the custom union was achieved in 1994, authorities decided to create the Mercosur Trade Commission (MTC) to deal with issues derived of the custom union's implementation. All these organs have the power to take binding decisions, ie. create norms. A norms' organ origin is denoted by their technical name. Formally, CMC binding decisions are "Decisions", CMG binding decisions are "Resolutions" and MTC binding decisions are "Directives" Most SPS norms are Resolutions.

The legislative process in Mercosur has three stages: elaboration /negotiation of the norm within technical groups; approval of the project as regional norm at the CMG or CMC (depending norms' content); and, incorporation to the domestic legal system by an administrative or legislative act (depending the domestic juridical system's requirement). Mercosur has regulated in a quite detailed way the process of norm formation and approval at Mercosur level (CMC Decision 20/02), it has mandated their internalization to the domestic legal system (Ouro Preto Protocol), it has established that regional norms are not operative until internalized by all members; but it has not created specific mechanisms or instances designed to jointly monitor how members implement regional norms at the domestic level. In addition to constitute a problem for Mercosur's transparency and information disposal to take more informed decisions, the lack of a monitoring instance makes more difficult the gathering of information on the impact of the transnational regime on their members. We will go back to this point again.

Thus, although there are three organs which can create norms through binding decisions (CMC,

GMC y la MTC), most norms are the result of technical work at the technical bodies. There has not been a case whereas, for instance, the CMG has changed the technical content of an SPS norm.

In the SPS field, technical bodies are:

- Sub Working Group N 8 –SGT 8- Agriculture. This Group is formed by delegates from each country (named “national coordinators” or simply “coordinators”). The SGT 8 is in charge of harmonizing norms: once the norm is drafted at a CT, the SGT 8 “elevates” the norm to the CMG for treatment and for approval
- The Plant Protection Committee (in Spanish, Comité de Sanidad Vegetal, one of the CT working under the aegis of the SGT 8). This CT is formed by delegates from the Direction of Plant Protection and Quarantine of each country and its main task is to suggest plants’ import requirements. It receives the support of another permanent group: the Group on Plant Quarantine.
- The Animal Health Committee (in Spanish Comité de Sanidad Animal, another CT working under the aegis of the SGT 8). This Committee is formed by delegates from the Direction of Animal Health of each country. Its main task is to suggest the requirements for animal’s imports both among Mercosur members and from third countries.

As said, CMC Decision 20/02 establishes the general regime for the negotiation and approval of Mercosur norms. However, in practice (at least in SGT N° 8 practice) some stages are not observed in order to speed up the decision making process. In effect, once the SGT 8’s Technical Committees (Animal or Plant) agrees in a norm’s project and derivate it to the SGT8, coordinators at the SGT 8 (1) verify the translation of the norm (Spanish and Portuguese), (2) check out for possible legal or trade issues that may justify a norm revision before sending it for approval, and 3) establish a deadline as well as the kind of act required to internalize it in each country.<sup>14</sup>

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<sup>14</sup> It is noteworthy that the SGT 8 does not “decide” the kind of act (administrative or legislative) needed in each country to internalize the regional norm. The SGT 8 takes note of what each country member delegate says is needed to internalize the norm in their respective country.

In turn, the domestic consultation instance foresaw in Dec 20/02 takes place, in practice, only for few days (shorter than foresaw). This is so because formal consultation to national agencies occurs in the lapses between the project has been sent from the Technical Committee for approval to the SGT and the following SGT 8 meeting. Even if each semester the meeting's schedule is set up to give enough time to perform a long consultation instance, in practice, technical committees and SGT 8 meetings occur few days apart, so consultations cannot be as long as foresaw in Dec20/02.

In addition, it is not observed the so called "second domestic consultation". Projects "elevated" to the GMC for approval are often analyzed in the GMC preparatory meeting, which is the day before the formal meeting. In this preparatory meeting, all projects, from all SGT's are checked out and if no objection is placed, projects will be approved.

This could give the impression that Mercosur' norms creation process is detached from national instances and influence. Well on the contrary, specific national consultation instances are not so crucial because Mercosur delegates are national officers whose main work is at the national level within national structures. So, each officer is, basically a national officers that participates on a regional instance with soft decision power (formally decision power is still two levels up: not in the SGT but in the CMG). So, in the creation of regional norms process there is a direct impact and participation of national officers which are part of national ministries, secretaries, health protection services, etc, all agencies that carry forward SPS national policies. It is worth noting at this point that there is no such a thing as Mercosur's SPS policy, except for the mandate not to obstruct trade unjustifiably and eventually to harmonize norms if required. We will go back to this point in the next section.

Finally, the need to strengthen Mercosur's institutional architecture, in particular its norm's creation and implementation mechanism, has been widely documented both by academics and official Mercosur's documents.<sup>15</sup> The main problem remains the gap between created norms and

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<sup>15</sup> Ver, entre muchos otros, Bouzas, R. y Fanelli, JM (2001) *Mercosur: integración y crecimiento*. Fundación OSDE, Buenos Aires; Pena C. & Rozemberg, R (2005) "MERCOSUR ¿una experiencia de desarrollo institucional sustentable?". *Revista de Comercio Exterior e Integración*, marzo, pp. 45-62. <http://cei.mrecic.gov.ar/revista/02/parte%203-2.pdf>; Czar de Zalduendo, Susana, "La institucionalización en los acuerdos regionales: el caso del MERCOSUR", en Basevi, Giorgio, Donato, Vicente y O'Connell, Arturo, (comps.) *Efectos reales de la integración regional en la Unión Europea y el MERCOSUR*, Ed. de la Universidad de Bologna, Buenos Aires, p. 109 y ss. 2003; Dreyzin de Klor, Adriana y Fernández Arroyo, Diego, "Avances y fracasos de los esquemas subregionales latinoamericanos. El caso del MERCOSUR", en *Suplemento mensual de Derecho Internacional Privado y de la Integración*, Diario Jurídico elDial: [www.eldial.com](http://www.eldial.com), Ed Albremática; FESUR (2004): *Desafíos*

internalized norms (created and implemented commitments). To aggravate the “incorporation issue”, Brazil interprets that norms are valid in its territory once incorporated in its domestic legal order while Argentina interprets that the norm is not valid even if passed at the domestic level until the other three countries have passed the norm at their domestic level and communicated it to the Mercosur Secretariat. So, Brazil basically applies Mercosur norms internalized in its legal order even if the other members have not yet put them in place. Other problems refer to the lack of available information about norms’ status (this information is provided by delegates in CMG’s meetings but included in a restricted annex of the meeting’s Act).

### 3. SPS policy in Mercosur

Before getting into the nitty-gritty of Mercosur’s SPS dynamics, it must be noted that at least three of its members, namely Argentina, Brazil and Uruguay have quiet good sanitary services since they are very efficient and global food and agricultural exporters. Thus, these countries are usually reluctant to set apart their national practices and standards. Also, it may be worth to stress that in the SPS field, particularly in relation to SPS rules or disciplines (as different from standards), the WTO has been (and it is) very influential on Mercosur’s SPS framework norm and Mercosur’s members. Accordingly, this section will review first Mercosur dynamics at the regional level in respect to national politics (tackling down the issue of standards) to move then to the impact and role of the WTO SPS Agreement on Mercosur (tackling down the issue of rules).

The Asuncion Treaty foresees the creation of a common market, establishing to that end that members should achieve free circulation of goods, services and productive factors. Free circulation of goods, a central pillar of the economic integration process, would be achieved, according to the treaty, by the elimination both of tariff and non tariff barriers or equivalent restrictions.

The TA considers restrictions (or non tariff barriers) to any administrative, financial or any measure through which the State impedes or difficult, by an unilateral decision, reciprocal trade (art. 2, Annex I).<sup>16</sup> Such a wide definition (elimination of all restrictions) was afterwards fine

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institucionales para el MERCOSUR.: las relaciones entre estados, instituciones comunes y organizaciones de la sociedad.  
[http://www.redmercosur.net/encuentro2004/ouro\\_preto\\_10\\_anos\\_despues/Desafios\\_institucionales\\_MERCOSUR.pdf](http://www.redmercosur.net/encuentro2004/ouro_preto_10_anos_despues/Desafios_institucionales_MERCOSUR.pdf).

<sup>16</sup> The only exceptions are measures of the type of Article 50 of the Montevideo Treaty, foundational



tuned to recognize some type of trade restrictions that are not prohibited but would need some kind of harmonization to facilitate trade. In this line, in the SPS field, Mercosur went from a full to a narrowed harmonization process.

In effect, in the Mercosur beginnings, the harmonization strategy included the elaboration of a “Mercosur Code”. The idea was to harmonize each and all of the operative sanitary and phyto sanitary norms in all and each Mercosur member. However, this strategy was revised because of the technical complexity to carry it forward. So it was replaced by another strategy: countries only would harmonize those regulations that are strictly necessary to facilitate intra trade. The need to harmonize may arise then from the volume of trade at stake or due to other difficulties. Actually, there is no ex ante harmonization but ex post export.

As said, within Mercosur institutional structure, the SGT 8 is the Working Group in charge of harmonizing sanitary and phyto sanitary norms. Norms will regulate both intra regional trade as well as imports’ requirements from non Mercosur members. In those norms, sanitary and phytosanitary requirements are established according to the origin and destiny of the product. Another kind of norms are vertical norms, such the ones elaborated in the Food Committee Evaluation (part of the SGT 3, “Technical Regulations and Evaluation of Conformity) in respect to food innocuousness (additives to food, food packaging, microbiological requirements in some milk products, tinctures, etc). Another way to classify SPS Mercosur norms is the one proposed by Leavy and Saez (2010): framework norms (such as Dec. 6/96 which is the WTO SPS Agreement), horizontal norms (such as resolution CMG 19/93 “List of Additives”) and vertical norms (such as Res. CMG 102/96 “Approval of Peaches’ Sub-standard”).

According to several Mercosur officers interviewed, Mercosur member countries are very reluctant to harmonize norms because they consider current practices and standards successful.<sup>17</sup> Therefore, the SPS harmonization process is small: just what is needed to keep intra Mercosur trade flowing. As far as Mercosur norms mainly deal with intra bloc trade, and Brazil is the main destiny of intrabloc trade, Brazil acts as an importer and attempts to use its local legislation. In a sense, the SGT 8 job seems to be “mercosurizar” Brazilian legislation. In the plant health protection area though, it seems that national phyto sanitary experts took the

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treaty of ALADI. ALADI is an umbrella used in Latin America to do preferential arrangements among its members without the obligation of including the substantial trade (as Article XXIV GATT) and without NMF. All Mercosur members are ALADI members.

<sup>17</sup> As a counter example of a soft harmonization it could benoted the successfull negotiation of the Laboratorial Good Practices Guide.

Mercosur as an opportunity to work together and advance technically a lot.<sup>18</sup> By contrast, it has been remarked several times during the interviews that Brazilian, Uruguayan and Argentinean veterinarians and experts work closely with their export markets rather than between them. In effect, since Mercosur member's main exports market are out of Mercosur, they have to work looking others' standards (the European Community mainly).

At this point, it seems that the story is more about national influence and control over Mercosur's movements than Mercosur, as a distinct entity, tailoring national standards and practices or even providing a space for mutual learning. In addition, Leavy and Saez make the point of the influence of international organizations over Mercosur's SPS standards.

In effect, according to Leavy and Saez (2010) after reviewing the Animal Health Technical Committee working, they highlight that: the Animal Health Technical Committee works in permanent contact with the World Organization of Animal Health (OIE) as much as that in terrestrial animals illness usually the Committee limits itself to establish OIE standards; norms production at the Animal Health Committee has developed towards unifying standards for intra bloc trade and imports from third parties using OIE standards; however, as not all countries have the same sanitary status, it is not always possible to refer to the OIE standards. In this sense, when the OIE standard would impede intra Mercosur trade, Mercosur members at the Mercosur level create norms with an "escape clause" by which countries may allow imports to proceed even if they not meet OIE standards. In addition, these authors also point out the importance in the SPS field, animal health in particular, of solving the issue of the incorporation of norms (timely) and more importantly, the question that while Brazil considers a norm valid once passed at the domestic level, the other members do not. They remark that in terms of SPS standards it could happen that members allow in different conditions imports.

At the same time that norms' substantive harmonization is minor, Mercosur has not generated any common or unified control or information system in respect to SPS. In effect, Mercosur has not developed any kind of regional animal and plant health surveillance system (a mechanism allowing putting together essential information regarding pests diseases, detect or prevent changes in their behaviour in order to recommend after scientific research, appropriate measures to be taken for their prevention and control, etc). Neither has Mercosur developed an harmonized or equivalent food control system among the four Mercosur members (a kind of a

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<sup>18</sup> Particularly it was mentioned the figure of Felipe Canale (from Uruguay)

regional unit of risk analysis). In addition, Mercosur does not have specific norms for the HACCP system (there is only Resolution 80/96, “Technical Regulation on the Hygienic conditions and manufacturing good practices on manufacturing food firms” that takes as base the Codex Alimentarius norms)<sup>19</sup> and it is worth noting that Mercosur countries differ in their implementation of the HACCP. Finally, the same can be said for sanitary services auditing proceedings at Mercosur level. Although there is a proposal of a Guide of Auditing Proceedings to be used as a model by animal and plant sanitary health, food innocuousness services, it has not been adopted by Mercosur members. The idea of the Guide would be that Mercosur countries could evaluate the efficacy and equivalence of sanitary programs using the same methodology.<sup>20</sup>

As a half a way wrap-up, it is fair to say that SPS policy is still defined at the national level and standards and practices are brought and powerfully defended by national officers in Mercosur meetings. National delegates composing Mercosur organs are reluctant to change its national standards and procedures. In addition, as intra bloc trade is directed mainly to Brazil, Mercosur’s chore activity seems to be making compatible national legislations to Brazilian’s. As for standards needed to access Mercosur external partners, national officers do not use Mercosur instances to share or coordinate information to lower transactions costs or as a learning instance. Mercosur has not either built up regional instances to share information or coordinate activities such as surveillance, monitor, auditing or control of pests’ diseases, food safety, etc. However, a slight tendency to some kind of transnational construction (as different from the simple aggregation/amalgamation of national practices) could be noticed in initiatives such as the above mentioned Guide of Good Practices for Laboratory or the case of the Permanent Veterinary Committee (that depends of the Consejo Agropecuario del Sur).

At the beginning of this section we mentioned that it would be interesting to distinguish between Mercosur interaction in terms of SPS standards’ issues from the question of “rules, principles or SPS disciplines”. While in the case of standards, national dynamics is dominant in

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<sup>19</sup> The norm explicitly refers to the Codex Alimentarius, in particular to its “Código Internacional Recomendado de Prácticas: Principios Gerais de Higiene dos Alimentos, CAC/VOL. A, Ed. 2 (1985) and other Codex documents

<sup>20</sup> Proyecto UE- Mercosur de cooperación para la armonización de normas y procedimientos veterinarios y fitosanitarios, inocuidad de alimentos y producción agropecuario diferenciada. This is an extensive 2 year project that has worked over Mercosur SPS main strengths and weakness. In this paragraph in particular, we benefited of four projects reports: one on the HACCP, another on common auditing procedures mechanisms, and the other on common surveillance systems. Both authors of this paper have worked on six reports: Monitoring, Transparency, Institutional Dynamics Practical Guide, Accesion, Negotiation and Coordination of National Positions. All Reports cited at the Bibliography section.

terms of SPS policies, there is small influence of Mercosur as transnational regime over national norms and there is high influence of international standard bodies such as the OIE and medium influence the Codex Alimentarius, in the case of SPS disciplines, it seems that the WTO is an important and almost unique actor.

In effect, few years after the creation of Mercosur, in 1995, the WTO (and the SPS Agreement) took stage. Mercosur was notified to the WTO as a regional agreement under Article XXIV of the GATT (custom union) and thus it is not a WTO member. All Mercosur members are individually WTO members and so they have signed individually the SPS agreement also; However, Mercosur has made the SPS Agreement a Mercosur norm. In effect, Decision CMC 6/96 is the SPS Agreement.

From the array of consequences that the SPS signature brought about, two stands as significant for this paper. First, the SPS Agreement challenged the regional project as far as it has given a minimum set of rules more articulated and deeper than those available at the regional instance and as it has provided a forum to debate, negotiate and eventually solve conflicts on SPS matters. Second, although the SPS Agreement's obligations have been taken in individual bases and their implementation is on individual bases, these obligations could be used to strengthen Mercosur.

Let's see. When the SPS Agreement came into force (1995), Mercosur did not have a SPS norm covering principles as the SPS Agreement does. It is true that it had Decision 6/ 93, *but it was the SPS Agreement* (as it was in 1993!) Later on, in 1996, through CMC Decision 6/93 Mercosur adopted the WTO SPS Agreement as Mercosur norm replacing Dec. 6/ 93, the SPS draft version. Since the SPS Agreement is in force, the dialogue over a lot of SPS issues have moved to the multilateral forum as well as many conflicts have been brought the WTO dispute settlement system. In addition, as the SPS Agreement has become the "floor", the minimum regulatory standard every WTO member must respect, current SPS negotiations at bilateral or regional level have become to be characterized as WTO plus or WTO compatible or WTO standards, etc.<sup>21</sup> Thus, the SPS Agreement has given Mercosur a common and shared legal framework, has opened a new instance where to debate and negotiate SPS issues and has offered a dispute settlement forum.

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<sup>21</sup> See for instance free trade/economic association agreements signed by the European Union with Mediterranean or ACP partners and the "Chapter SPS" says that the compromise is to respect and enforce WTO standards.

Secondly, we have mentioned that the SPS could be used or may induce Mercosur to coordinate more its policies and procedures. How? Beyond the obvious case of negotiations (Mercosur coordinates its negotiating position at the WTO in almost all areas), let's illustrate with one of the SPS Agreement pillars: the transparency principle.

According to the transparency principle, WTO members must notify, as early as possible, SPS draft measures to be taken if they differ from international standards and affect a considerable portion of trade.<sup>22</sup> The idea is that early notification would allow other members to comment on it and eventually, would allow for modifications if the norm will unjustifiably obstruct trade. This obligation does not distinguish norms' origin. It makes no difference if the norm has been created at the regional or domestic level: ie. if Argentina applies a norm, Argentina has the obligation to notify it whether it is a Mercosur norm that has been internalized whether it is a local norm that never went through the Mercosur legislative process.

However, Mercosur does not have a particular system or process to jointly or in a coordinated way notify regional (SPS) norms. Thus, Mercosur SPS norms are notified by each member. As a consequence, each country has notified different norms at different stages, according to their interpretation of the SPS obligation. In effect, some countries have notified norms once they are created at the regional level by the CMG while other members have notified them once they were internalized. In addition, members have not notified the same norms. There is no one norm out of all notified norms by Mercosur members to the WTO notified by all four members. As said, notification is divergent. According to notifications done to the WTO since its creation, 1995, until June 2009, Argentina has notified 126 measures, Brazil: 538; Paraguay 22; and Uruguay 13.<sup>23</sup> In this case, the WTO obligation could be used as a pressure to better coordinate Mercosur notification procedures.<sup>24</sup>

Incredibly enough, although the SPS Agreement is the axis of Mercosur SPS legislation (in terms of principles), WTO issues are not widely managed by SPS national officers (exception made to international units within ministries). This is so because the WTO does not impose

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<sup>22</sup> International standards are considered those made by the World Organization of Animal Health (OIE), Codex Alimentarius and the Secretariat of the International Plant Protection Convention (IPPC).

<sup>23</sup> Proyecto UE- Mercosur. Report "Monitoring Mechanisms. The case of SPS measures in Mercosur". Miguel Lengyel et al. April, 2010.

<sup>24</sup>

standards (the Codex does, the OIE does but not the WTO...) and so veterinarians, for instance, rarely know or read the SPS Agreement before or when they are drafting a regulation. But they know very well Mercosur as well as the “three sisters”<sup>25</sup>.

#### 4. SPS policy in Argentina

As said, Argentina has a good sanitary and fitosanitary status. In terms of animal health, Argentina does not have any of the five main diseases affecting the world. In effect, Argentina is free of BSE, of avian influenza, of the Newcastle disease, of swine fever, and free of foot and mouth disease (without vaccines in the Patagonian region and with vaccine north of Colorado River). Of course there are many programs in implementation phase for other diseases (SENASA, 2010)<sup>26</sup>

Among the strengths of the SPS Argentine system, it has been underlined that State agencies implement policies oriented to up date and adopt norms, proceedings and institutions; that there is a medium participation in international bodies; that there are programs oriented to up grade food quality and inocuity according to market and consumer’s exigencies; that there are programs oriented to tackle down plagues and crucial diseases; and that the participation of the private sector in programs to combat diseases that undermine competitiveness is significant (Baez, 2008).

As for weaknesses, it has been noted that there are some duplicity of actions among public agencies (SENASA and INAL, for instance); that there is not (yet) a medium and/or long term strategic plan for the SPS area; that there is a limited budget and it is unevenly distributed between plant and animal health (as in SENASA); and that there is scarce sistematizad SPS information (Gloria Baez, 2008).

In terms of SPS policy’s institutional ambit, while SPS policy is mainly competence of the Ministry of Agriculture, Livestock, Fisheries and Food Secretariat, MINAGRI according to its Spanish acronym, due to the fact that MINAGRI has not developed yet an integral SPS policy (and/or presented as such) SENASA, MINAGRI’s dependant technical agency, constitutes the most influential institutional instance as the “SPS standards setter”.

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<sup>25</sup> Three sister organizations are the Codex Alimentarius, the OIE and the IPPC.

<sup>26</sup> <http://www.senasa.gov.ar/contenido.php?to=n&in=583&io=6426>, visited 03/29/11

Although MINAGRI is in the process of elaborating the Federal and Participative Agri-food and Agribusiness Strategic Plan, 2010/2016 (PEA according to its acronym in Spanish), up to now SPS issues are treated within each sector, not as an overall package of actions and instruments geared to an explicit SPS objective or vision. In effect, PEA 2010-2015 would be the result of a participative process of policy formulation started up by MINAGRI in 2010. Participants were: 53 faculties of agricultural veterinary and economic sciences, belonging to 45 public and private universities; 120 business associations; 200 representatives of the social economic sector; 300 provincial representatives; International organizations (FAO, IICA, UNDP, ECLAC); INTA, SENASA, PROSAP, INASE, INV., ONCCA; Agricultural Women; Family Agriculture Youth, and Agrotechnical Schools.<sup>27</sup> Up to now, 3 out of the 8 steps has been accomplished, namely the Instrument 1 (Strategic Direction of the Plan, which includes the definition of the Plan's Vision, Strategic Issues and Objectives) and Instrument 2 (Prospective Scenarios), and Instrument 3 (Actual Situation: a diagnosis). However, and as said before, SPS issues does not constitute a separate chapter but are developed under the different sectors' problematique.

In turn, the Nacional Service of Agro-food Health (Servicio Nacional de Sanidad Agroalimentaria, SENASA, by its acronym in Spanish) is the main institution in terms of SPS policy. It was created in 1996 out of the fusion of two other institutions: one in animal health (Servicio Nacional de Sanidad Animal) and the other on vegetal health (Instituto Argentino de Sanidad y Calidad Vegetal).

SENASA main responsibility is to implement nacional policies in the field of animal and vegetal health. It has wide competences: to verify enforcement of norms, supervise food products and application of the Argentine Food Code (Código Alimentario Argentino), imports and exports controls, agri-food products and sub products, agrochemicals, fertilizers, etc.<sup>28</sup> SENASA also designs policies, since it elaborates programs to prevent, diagnose, control and eradicate animal diseases that could affect human health as well as vegetal plagues and diseases. Finally, SENASA also register, habilitates and eventually closes down manufacturing and procesing plants.

Another actor in the SPS field is ANMAT (National Administration of Food, Medicines and Medical Technology). Whithin ANMAT, for food issues, there is the Nacional Food Institute

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<sup>27</sup> See MINAGRI web page. [http://www.minagri.gob.ar/SAGPyA/areas/PEA2\\_English\\_Version/05-Participants/index.php](http://www.minagri.gob.ar/SAGPyA/areas/PEA2_English_Version/05-Participants/index.php)

<sup>28</sup> Institutional information available at the SENASA web-site. See, <http://www.senasa.gov.ar/contenido.php?to=n&in=126&io=2279>

(Instituto Nacional de Alimentos, INAL, by its Spanish acronym) which applies the Argentine Food Code and registers food manufacturers and products. While SENASA supervises only designated products, INAL supervises by default the rest of the food, pharmaceutical and cosmetic industry.

In particular, INAL controls and supervises sanitary and quality conditions of food products, inputs as well as the sanitary conditions of manufacturers, stocking and fraccioning firms and food transportation companies. In addition, it evaluates certain aspects of food authorizations' requests (use of particular inputs, additives, colorings) and can cancel authorizations for imports and exports in relation to food inputs, additives and colorings.

It is noteworthy to say that the Argentine Food Code is the main legislative piece for food control and it is the base of the National System for Food Control, a system composed by the National Food Committee, SENASA and ANMAT and sanitary authorities of all states. Within the system, modifications to the Code can be proposed, standards could be recommended as well as proceedings and deadlines to implement auditing / habilitation of manufacturing plants and/or products, elaboration, conservation, fraccioning and marketing.

## **5. (Preliminary) Reflections**

For sure Mercosur as an integration project is more than a free trade agreement or a custom union. It is a wider political project that is solidly rooted in the political discourse and our societies' imaginaries. When compared with other TIRs, in particular, the European Union, Mercosur is still in diapers in terms of institutional common construction: Mercosur does not have institutional instances properly "mercosureñas" since all its more important and decisive organs are formed by governmental officers that take binding decisions by unanimous consensus (just to name one difference). When Mercosur deals with the European Union, negotiations do not differ too much from trade negotiation with other developed trade partners.

When compared with NAFTA, Mercosur distinguishes itself first and foremost by their membership: all Mercosur countries are developing countries. Given its size and trade relevance, does Brazil plays in Mercosur the role the United States does in NAFTA? No. It is neither an international rule maker nor an actor with a high material sanctioning powers. Being an emerging power or a global player is not the same as being the hegemon. Brazil is the main Mercosur' market in within Mercosur bloc, and, as importing country, pressures to use its SPS



standards at the regional level. However, seen from the other Mercosur's countries, Brazil is neither the only nor the most important market destination and norms within the Mercosur institutional setting are adopted by unanimous consensus, which implies a certain degree of negotiation (and concession) among members, including Brazil.

Bruszt and Mc Dermott propose to use four mechanisms to readily distinguish between TIRs: breadth (refers to the different criteria that the regime principals define as necessary for the participants countries to meet); depth (refers to the emphasis a TIR places on building institutional capacity instead of only policy change); assistance (refers to the amount and type of resources and knowledge, be they financial, social or human resources that the TIR offers the country in order to help the latter build the capacities necessary to undertake the mission at hand); and, monitoring (refers to the TIR's capabilities of acquiring and processing two types of information: the first concerns the degree to which the country is meeting the required institutional criterion or benchmarks. The second concerns why the country may or may not be reaching the expected benchmarks) (Bruszt and Mc Dermott, 2008: XXX).

How does Mercosur look like from this perspective?

- *Breadth and Depth*

Mercosur is half a way between the European Union and the NAFTA case. It is not a common market (yet) but it is more than a free trade area. It covers many other areas than trade, however most of its advancements are in the trade field. As we have seen, in terms of SPS disciplines, the WTO SPS Agreement was "deeper" than Mercosur norms. In relation to standards, Mercosur relies on harmonization among countries. Harmonization's regulations are created as any other Mercosur norm: by national technical experts meeting in regional bodies (Technical Committees mostly) and with the consensus of all members. So standards are the result of a negotiation. However, on the one hand Mercosur uses for intra regional trade and for the most part, international organizations' standards as its own standards (OIE, Codex and IPPC). On the other hand, Mercosur members use their export market's standards (and they do not "mercosurize" those standards or share at a regional instance).

- *Assistance*

As recently as 2004, Mercosur created the Fondo para la Convergencia Estructural del Mercosur (FOCEM), a fund destined to equilibrate asymmetries among members. FOCEM is demand driven: countries may submit projects and proposals within four FOCEM Programs, namely, Program for Structural Convergence, Competitiveness Development Program, Social Cohesion Program and Program for the Strengthening the Institutional Architectural and the Integration Process.

Within the Competitiveness Development Program, countries may submit projects regarding products and processes' quality certification and tracking and sanitary control of animals and plants. Members beneficiaries (until the writing of this paper) are mostly Paraguay and Uruguay (Brazil has only one project related to the creation of a Library and Argentina none). Among the 14 projects approved to Paraguay, only one tackles down a SPS issue. In effect, Paraguay has been certified as country free of Food and Mouth Disease (FMD) with vaccines by the OIE. However, the official Laboratory (SENACSA) does not have an area of High Level of Bio security. The project should set up such a Laboratory to Paraguay. Among the 6 projects submitted and approved to Uruguay, none refers to a SPS issue.

- *Monitoring*

Mercosur monitoring instances are scarce. Besides having a classical compliance mechanism (a dispute settlement system based on arbitral panels with consultation as first step) Mercosur have only a mild instance of monitoring: at SGT meetings countries inform the state of art of regional norms not still internalized. However, and as noted, this information is placed in a restricted Annex of the Official Meeting Act, and so the information is not available.

That is to say, in Mercosur if a country does not comply with norms, the affected party may ask for a tribunal and eventually may apply trade sanctions if the offense continues. But there are not mechanisms or instances, mandatory or voluntaries, whereas countries informs about what and how countries are doing or countries are in a way audited by any regional instance.

As we have noted several times in this paper, incredibly enough, Mercosur does not have a regional mechanism or instance to examine or jointly monitor norms' trajectory and impact once approved. Actually, whatever the kind of norm, (Directiva, Resolución o Decisión), once it has

been incorporated to the domestic legal order and is already operative in all countries, as norms' application is done by national agencies, from the point of view of Mercosur as a different institution from their members, there nothing more to do or nothing to be informed about. All the information on the norm's development, implementation (and of course, control or supervision possibility) is lost. In addition, it is unknown at the regional level if finally the norms have been effective in terms of fulfillment of its objective.

In the SPS field in particular, Mercosur did not generate any kind of regional animal and plant health surveillance system (a mechanism allowing putting together essential information regarding pests diseases, detect or prevent changes in their behaviour in order to recommend after scientific research, appropriate measures to be taken for their prevention and control, etc), or a harmonized or equivalent food control system among the four Mercosur members (a kind of a regional unit of risk analysis). In addition, Mercosur does not have specific norms for the HACCP system and the same can be said for sanitary services auditing proceedings at Mercosur level.

Of course, the lack of any monitoring of Mercosur actions has (at least) three consequences: 1) losing the opportunity, as Mercosur, through the exchange of information prevent trade conflicts in frontier 2) count on up dated information in order to better build up informed public policies 3) learn from each other experiences to acquire more effective practices and standards.

- *Coordination*

Compared to monitoring that is inexistent, coordination in Mercosur looks more vigorous.

On the one hand, within Mercosur, coordination largely takes place within intergovernmental working groups and technical's committees (there is no fluid relationship with national agencies neither among Mercosur working groups).

On the other hand, Mercosur members usually coordinates their SPS negotiation position in extra-regional instances. In particular, at the SPS Committee of the WTO is usual to have a Mercosur meeting before the SPS Committee plenary meeting to coordinate positions. However, and as said, Mercosur does not coordinate yet, notification of SPS measures.

<b>Mechanism</b>	<b>SPS in Mercosur</b>
<b>Breadth &amp; Depth</b>	Wide objective: to create a common market Depth: Gap between commitments taken and implemented. In SPS: rules & disciplines at WTO level, standards harmonization limited to just what is needed for trade intra-Mercosur and standards of export market destinations individually complied with.
<b>Assistance</b>	Small and mostly for Paraguay. By project through FOCEM
<b>Monitoring</b>	Ex post compliance Inexistent in any other form
<b>Coordination</b>	Exchange of information at working groups and technical's committees. Some coordination of the bloc vis a vis the WTO (coordination of negotiation positions but not of notification of SPS measures)

Without any doubt Mercosur altered its members' relationship from the same moment it liberalized trade in agriculture completely with the only exception of sugar, with no special safeguards, calendars of whatsoever. However, in terms of SPS Mercosur did not become "the" point of reference nor a place where new policy options are discussed.

Although these reflections are preliminary<sup>29</sup>, as for issues such as rules and disciplines, it seems that the SPS Agreement of the WTO as well as the WTO institutional instances to deal with SPS issues have become the centre of the attention and efforts.

In terms of standards, export market destinations keep leading the way. When intra regional trade is at stake, harmonization proceeds at its minimum level required to keep trade flowing, using as far as possible international standards (and even when we are under those standards, Mercosur would make an exception in order to be able to trade among us with lower standards). When extra-regional trade is at stake, every country manages it individually. Simply said, the

<sup>29</sup> The second version of the paper will include private sector's experience towards Mercosur and a very detailed account of the SPS national decision making process

logic for upgrading in this domain is based in market incentives.

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