

PROPOSALS FOR THE IMPROVEMENT OF TECHNICAL REGULATIONS IN LATIN AMERICA

ELIMINATING BARRIERS
TO REGIONAL TRADE

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PREAMBLE

Rebuilding trust and credibility between Brazil and its main trade partners is an important concern of the Federation of Industries of the State of São Paulo (Fiesp). When it comes to South American integration, Brazil must take a leading role in the discussion of clear rules for the promotion of the country's competitiveness and participation on equal terms.

The revival of the spirit that encouraged the establishment of the Southern Common Market (Mercosur), that is, open trade across member countries (Argentina, Brazil, Paraguay and Uruguay), requires taking advantage of the current momentum in the region to remove Brazil from its isolation and recover the external market losses caused by the so-called "Custo Brasil" (Brazil Cost) -- constraints placed on industry that make products more expensive.

In this context, Brazil must adopt a more pragmatic approach, focusing its strategy on the country's commercial interests by promoting compliance with regional trade rules. The country must also fight to eliminate export barriers to Brazilian products. It is imperative that the Brazilian regional integration strategy be guided by increased trade between South American countries, for the continuing need of technical cooperation among bloc countries and for the negotiation of new (and modern) international agreements.

Fiesp and the Center of Industries of the State of São Paulo (CIESP) have been actively promoting the battle against regulatory barriers (technical, sanitary and phytosanitary) to Brazilian exports and to expand Brazil's integration with its regional trade partners by engaging in a dialogue with the Brazilian government and providing guidance to their associates. In the wake of these initiatives, the purpose of this document is to recommend a set of proposals to the Brazilian government aimed at modernizing Latin America's regulatory framework by enabling requirement compatibility across countries in the region.

Fiesp and Ciesp, through their Department of Trade and Foreign Affairs (Derex), are always available to guide their members in advocating and promoting their interests, which are, ultimately, the interests of Brazil and of all Brazilians.

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INTRODUCTION

A product may cross several borders before reaching the end consumer. Throughout this long process, a set of technical requirements is usually imposed on the supply chain, demanding that manufacturers adapt their goods or production processes to certain specifications. Regulatory measures, therefore, become increasingly important in the new international trade architecture, to the detriment of the one previously enjoyed by traditional import tariffs.

To comply with requirements imposed by the destination country, production cycle agents incur adaptation costs to meet a set of potentially overlapping instructions, depending on the number of countries involved in a commercial transaction. Moreover, extensive laboratory testing on products for obtaining technical compliance certificates may significantly increase the lead time between production of a merchandise and delivery to its final destination.

In an effort to mitigate cumulative regulatory effects and reduce the cost and time constraints put on producers, countries at different levels of intergovernmental cooperation and dialogue may adopt initiatives to make measures compatible. The goal would be to find a way for countries to successfully implement controls that, concomitantly (i) restate rights and obligations in relation to trading rules already negotiated in fora such as the World Trade Organization (WTO), and (ii) improve the multilateral standardizing framework, while deepening commitments made to overcome technical barriers to trade.

In this sense, it becomes urgent to develop new rules to improve technical regulations in Regional Trade Agreements (RTA) to which Brazil is a party. Given the current relatively stagnant state of regulatory trade negotiations involving Brazil's trading partners in Latin America, it is critical that Brazil and its regional partners engage in modernizing the rules applicable to intra-bloc regulatory convergence. Following the recent Resolution of the Common Market Group (GMC) No. 45/2017, targeted efforts to negotiate rules that streamline the process of formatting technical requirements in the region may result in a business environment marked by the inexistence of regulatory duplication and higher production efficiency and level of investments, without eliminating the mandatory technical regulations' legitimate objectives of protection and safety.

This position paper introduces public policy proposals aimed to improve the regional regulatory framework in regards to the formulation and adoption of technical requirements issued by local governments. By highlighting the position of São Paulo's private sector on this matter, we hope to encourage greater discussion on this important issue. It should be pointed out how crucial it is that advances in the regulatory agenda occur at the same time as discussions on other topics of critical importance for regional trade, such as rule of origin negotiations, e-commerce, government procurement, services, investment and intellectual property.

REGIONAL TECHNICAL REGULATIONS

LATIN AMERICAN INTEGRATION ASSOCIATION (LAIA)

BACKGROUND

About 70% of trade between Brazil and the other 12 country members of the Latin American Integration Association (LAIA) enjoys a full reduction on the import tariff, with ongoing negotiations exploring the establishment of a free trade zone in the region¹. In this sense, regulatory cooperation efforts may contribute to deepen trade relations in the bloc.

The **Framework-Agreement on the Promotion of Trade by Overcoming Technical Barriers**², signed in 1997, became Regional Agreement No. 8 (RA No. 8) and it represents the foundation for efforts made towards regulatory cooperation at LAIA. The RA is run by an Administrative Commission, consisting of representatives from the agreement's signatory countries (articles 16 and 17). This commission has been meeting regularly since 2007 and it has been a forum for the discussion of subjects such as the establishment of a consulting mechanisms among member countries, transparency policies, technical assistance, regulatory convergence and good regulatory and conformity assessment practices.

Although created for the purpose of deepening regional integration, and therefore of private sector interest, the commission lacks **accountability and transparency mechanisms**.

Only government officials have online access to documents from committee meetings as well as important information³, such as the list of attendees, contents of discussion and deliberations. This information remains unavailable to the public, inhibiting its indirect participation in the process and constructive suggestions on how business is being conducted in the fo-

1 BRAZIL. Ministry of Foreign Affairs. Latin America Integration Association (LAIA). Available at: <http://www.itamaraty.gov.br/pt-BR/politica-externa/integracao-regional/690-associacao-latino-americana-de-integracao-aladi>. Accessed on: 07/27/2017.

2 Incorporated in the Brazilian legal system by means of Decree No. 2.697, from July 30, 1998, and published in the Official National Gazette on 07/31/1998. ALADI. Framework-Agreement on the Promotion of Trade by Overcoming Technical Barriers. Available at: <http://www.aladi.org/nsfaladi/textacdos.nsf/fad2db9d1ff5057a03256ace006adf7c/aebda1291322c74f03256ace005255af?OpenDocument>. Accessed on 07/27/2017.

3 Access to documents is restricted at LAIA's Digital Library (<http://koha.aladi.org/cgi-bin/koha/opac-main.pl>) with access limited to national representatives. As indicated in the LAIA's website the files may only be consulted at their physical library in Montevideo (Uruguay).

rum⁴. For example, the 2016 adoption of the **Critical Program on Regulatory Cooperation**⁵ is not available to the public. The opposite pattern is found in meetings of the Southern Common Market (Mercosur) agencies. Mercosur maintains a database of nearly all documents discussed in meetings as well as documents pertaining to their technical group's work programs⁶.

Based on analysis of information available to the public, it is noted that the Administrative Commission's implementation of **RA No. 8** is not compliant with the level of regulatory cooperation desired for the region. Unlike others with similar purposes, which usually hold meetings quarterly⁷, the Commission holds meetings only once a year. Greater contact among technical representatives from different commission members could lead to bringing national regulatory systems closer, thus becoming a more effective tool for the exchange of knowledge and training, in addition to contributing to reduce differences between the regulatory bodies of countries participating in the dialogue. Furthermore, these closer ties could help enable negotiations in the forum and facilitate domestic internalization and implementation of decisions made by each country.

A concrete result from the discussions conducted by the Administrative Commission which should be highlighted is the establishment of a notification mechanism in 2012⁸ by which institutions that are in charge of coordinating the actions thereof and representing each country in matters pertaining to Regional Agreement No. 8 (called *Focal Points*) have committed to notify other member of LAIA's General Secretariat every time they send notifications to the World Trade Organization (WTO) about technical regulations, standards, projects and conformity assessment procedures. Most countries are known to use the mechanism, despite the lack of penalties in case of noncompliance. Since the mechanism was created, Brazil has made more than 300 such notifications⁹.

4 After searching LAIA's website, we found that a significant number of documents is available online, as currently described on the website itself, but access is restricted exclusively to government representatives. Attempts to access said information, if available, were not successful through the usual search and navigation mechanisms available on the website itself.

5 Adopted by Decision No. 1/16 at the IX Meeting of the Administrative Commission of Regional Agreement No. 8, held in Montevideo (Uruguay), on June 22 and 23, 2016.

6 See Document Manager. Available at: <https://gestorweb.mercosur.int/>. Accessed on 07/28/2017.

7 Mercosur's Work Subgroup No. 3 -- a forum concerning technical regulations -- meets on average on a quarterly basis, and the World Trade Organization (WTO)'s Committee on Technical Barriers holds formal meetings three times a year in addition to holding a number of informal meetings (in 2016, nine dates were reserved for the latter purpose). Check the dates on: https://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm.

8 Adopted at the IV Meeting of the Administrative Commission of Regional Agreement No.8. ALADI. Comércio Exterior. Normas e regulamentos técnicos. Available at: <http://www.aladi.org/sitioALADI/NormasyReglamentosTecnicosP.html>. Accessed on 7/28/2017.

9 Among party states to the agreement, Paraguay shows the highest discrepancy in the amount of notifications sent to LAIA (21) and to the WTO (65). Source: ALADI. **Standards and Technical Regulations**. Available at: <http://www.aladi.org/sitioAladi/NormasyReglamentosTecnicos.html>. Accessed on 7/31/2017;
WORLD TRADE ORGANIZATION. **Technical Barriers to Trade Information Management System**. Available at: <http://tbttims.wto.org/>. Accessed on 07/31/2017.

It should be noted, however, that this forum is not open to private sector participation. Not only does the agreement fail to state such provisions regarding this possibility, but there is also a complete lack of opportunities for such interactions, whether through formal meetings or informal discussions. Ongoing discussion in the Administrative Commission are further restricted by the fact that they are strictly intergovernmental. Despite the impact of government policies on the region's industrial production, there are very few opportunities for the private sector to engage in the promotion of regulatory cooperation, inhibiting the development of actions that could effectively represent production interests¹⁰.

For all the above, although the Administrative Commission of Regional Agreement No. 8 is an important forum for the discussion of measures and actions towards regional regulatory cooperation, its potential as a tool to strengthen the integration of member states that are party to the agreement is currently underused.

PROPOSALS

Recognizing the importance of both Regional Agreement No. 8 and its Administrative Commission for LAIA's regulatory integration process, the Federation of Industries of the State of São Paulo (Fiesp) and the Center of Industries of the State of São Paulo (Ciesp) argue for:

- **Greater transparency** in the work conducted by the Administrative Commission of Regional Agreement No. 8 by disclosure of the minutes from the meetings, work documents and ongoing and future projects, particularly those involving Brazil, and by implementing an online platform accessible to the public, developed and updated regularly by LAIA's General-Secretariat.
- Increase in the frequency with which the Administrative Commission of Regional Agreement No. 8 holds (formal and informal) meetings to promote greater engagement of countries in the exchange of information on regulatory cooperation, in the establishment of mutual assistance agreements and in diminishing current technical differences between countries.
- **Greater participation of the private sector**, directly impacted by Commission discussions, by developing a communication channel between national governments and their respective private sectors. This should allow access to meeting agendas and serve as a tool for the introduction of materials, such as, among others, technical opinions, research and reports on the progress of regional regulatory convergence as well as recommendations for future jobs.

10 The benefits gained by the participation of the production sector can be found in the work developed by the Pan American Standards Commission (Copant), a non-governmental institution that has had positive outcomes in the harmonization of technical standards throughout Latin America. Copant has greatly benefitted from private sector input in their discussions.

SOUTHERN COMMON MARKET (MERCOSUR)

BACKGROUND

Brazil, as one of the creators and co-founders of the Southern Common Market (Mercosur), has benefitted from advancements in regional trade promotion. Tariff reduction efforts applicable to most goods circulating among the partners have had a major role in Brazil's higher regional share. In 2016, around 11% of total Brazilian exports were shipped to full members of the bloc, 84% of which consisted of manufactured goods¹¹. Nevertheless, deepening of regional integration requires improvement in cooperation efforts that go beyond tariff discussions.

In order to promote the free circulation of goods and production factors and to eliminate non-tariff restrictions to trade, a forum was created, within the structure of Mercosur, for the specific purpose of fostering **technical regulatory harmonization**¹² among its members, the **Work Subgroup No. 3** on Technical Regulations and Conformity Assessment (SGT No. 3), subordinated to the Common Market Group (GMC)¹³, the activities of SGT No. 3 are conducted through ad hoc Technical Commissions and Work Groups coordinated by Focal Points nominated by country members (Picture 1). In Brazil, this is the role of the National Institute of Metrology, Quality and Technology (Inmetro)¹⁴.

11 Sources: Comex Vis online database, from the Brazilian Ministry of Development, Industry, and Foreign Trade (MDIC).

See: MDIC. **COMEX Vis**: continents and blocks. Available at: <http://www.mdic.gov.br/comercio-exterior/estatisticas-de-comercio-exterior/comex-vis/frame-bloco?bloco=mercossul>. Accessed on 07/28/2017.

12 Article 1 of the 1991 Treaty of Asuncion (incorporated in the Brazilian legislation) through Decree No. 350, from November 21, 1991, published in the Official National Gazette on 11/22/1991-BRAZIL, indicates the party states' commitment to harmonize their national legislations in the relevant areas to strengthen the regional integration process. Presidency of the Republic. Office of the Chief of Staff. **Decree No. 350**, from November 21, 1991. Enacts a treaty for the establishment of a common Market among the Argentinian Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay [Mercosur Treaty]. Available at: http://www.planalto.gov.br/ccivil_03/decreto/1990-1994/d0350.htm. Accessed on 07/28/2017).

13 MERCOSUR. GMC Resolution No. 29/95, of January 1, 1995. GMC Structure. Available at: http://gd.mercosur.int/SAM/GestDoc/PubWeb.nsf/OpenFile?OpenAgent&base=SAM\GestDoc\DocOfic0Arch.nsf&id=832579C700726F0D8325775000639A9E&archivo=GMC_1995_RES_020_PT_Estutura%20GMC.doc. Accessed on 08/17/2017.

MERCOSUR. GMC Resolution No. 13/06, of June 22, 2006. Negotiating agenda for Work Subgroup No. 3 "Technical Regulations and Conformity Assessment". Available at: [http://gd.mercosur.int/SAM%5CGestDoc%5Cpubweb.nsf/0A040C2315FC9CD90325817F0066F96F/\\$File/RES_013-2006_PT_PautaNegociadoraSGT3.pdf](http://gd.mercosur.int/SAM%5CGestDoc%5Cpubweb.nsf/0A040C2315FC9CD90325817F0066F96F/$File/RES_013-2006_PT_PautaNegociadoraSGT3.pdf). Accessed on 08/17/2017.

14 The list of all National Coordinations from SGT No. 3 are available at: http://www.inmetro.gov.br/barreirastecnicas/lista_coord_nacionais.asp.

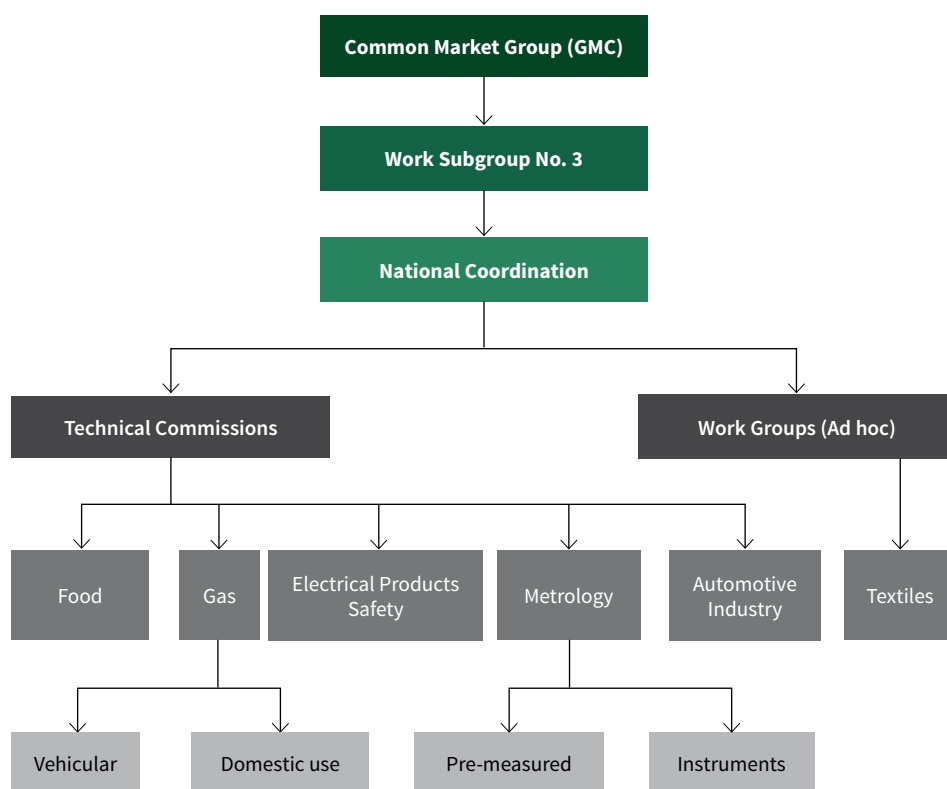


Figure 1. Current structure of Work Subgroup No. 3 on Technical Regulations and Conformity Assessment (SGT No. 3).

The harmonization of technical regulations, the main purpose of the Work Subgroup, is an ambitious type of convergence that faces challenges imposed by the bloc's own nature and structure. To be implemented, it requires the adoption of common technical standards and regulations for the same subjects, based on the general principles and guidelines set out in the WTO Technical Barriers to Trade Agreement (TBT), as well as in international standards, regulations, guidelines and recommendations. Good international regulatory practices should also be considered in this process¹⁵. The challenges to this type of initiative involve not only a need to increase the commitment of party states with an agenda of regulatory cooperation, but also the advancement of Mercosur's institutional structures and processes, including greater transparency and inclusion of the private sector.

We can divide the historical evolution of SGT No. 3's production of new regulations and the

¹⁵ According to items 3.4, 4.2 and 4.3 of the GMC Resolution No. 45/2017. MERCOSUR. **GMC Resolution No. 45/2017**, from December 19, 2017. Procedures for Elaboration, Revision and Revocation of Mercosur Technical Regulations and Mercosur Conformity Assessment Procedures. Available at: http://www.inmetro.gov.br/barreirastecnicas/pdf/acordos/RES_045-2017_Revogacao_revisao_e_elaboracao_de_RTM_Mercosul.pdf. Accessed on: 02/07/2018.

revision of existing ones into three stages. In the first one, between 1991 and 2000, the period corresponding to the establishment and strengthening of Mercosur, the Subgroup was intensely productive. This was the peak of the bloc's normative production relating to regulatory matters, marked by an annual average of 15 new regulations and 6.6 revisions. The second stage, between 2001 and 2010, showed significant change within the framework of regulatory activity, with the number of new regulations lagging behind the number of revisions (averages of 3.7 and 4.3, respectively). Finally, starting in 2011, there is an even lower number of new regulations (annual average of 0.3) compared to a predominant number of revisions (annual average of 1.2), suggesting that Work Subgroup No. 3 activities have stalled, compromising the process of regional technical regulatory harmonization. (Figure 2)¹⁶.

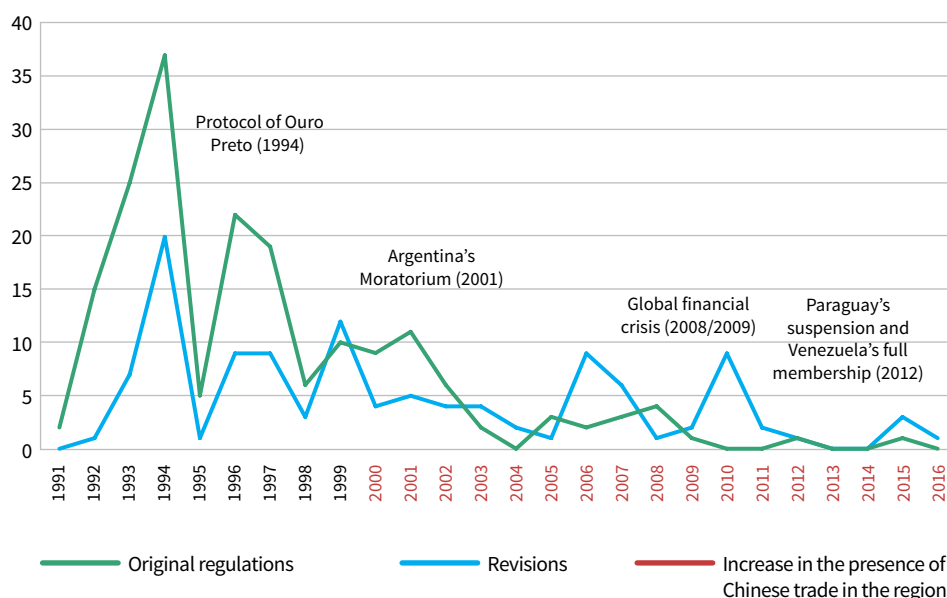


Figure 2. Production and revision of harmonized technical regulations by Work Subgroup No. 3 on Technical Regulations and Conformity Assessment (SGT No. 3) for the Southern Common Market (Mercosur). Source: Punto Focal/Argentina.

¹⁶ Statistical data on Mercosur's Technical Regulations were taken from information available in the Argentinian Focal Point website for matters related to the TBT Agreement. Available at: http://www.puntofocal.gov.ar/mercotur_sgt_metrologia.htm. Accessed on 07/28/2017.

However, divergences in the SGT No. 3's normative production are not exclusively chronological. It is also noticeable in terms of negotiated and regulated matters. The Subgroup is subdivided into thematic Commission and Work Groups whose purpose is to deliberate on regional negotiation processes¹⁷. However, some sectors of the economy are underrepresented in this structure. Furthermore, the groups differ largely in their level of activity. The Food Commission produced about 65% of all new technical regulations and 65% of all revisions approved by Mercosur, with its latest regulation being approved in 2017. Meanwhile, the Automotive Industry Commission was responsible for 13% of all new regulations, 16.4% of all revisions, and it has not had any regulatory projects approved since 2002 (Figure 3).

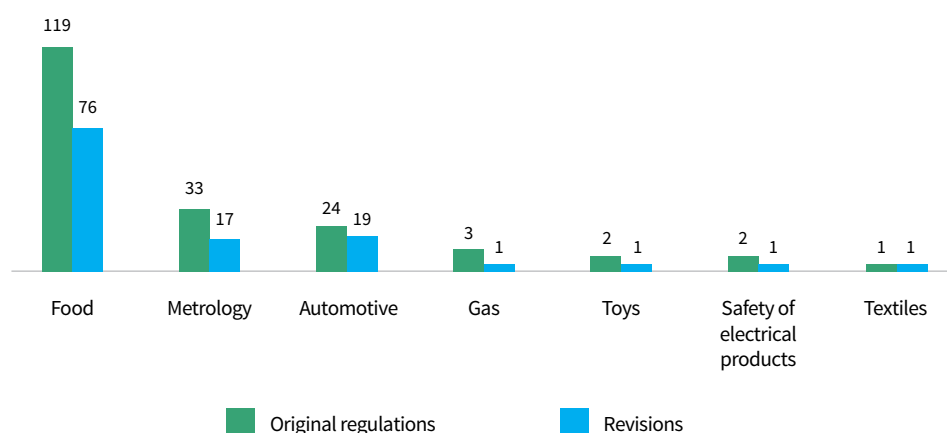


Figure 3. Normative production for Work Subgroup No. 3 on Technical Regulations and Conformity Assessment (SGT No. 3) between 1991 and 2016, by Commission. Source: Punto Focal/Argentina¹⁸

There are several conjunctural and structural factors that could explain the current state of Mercosur's regulatory cooperation framework.

From a conjunctural standpoint, international political and economic issues have contributed to a contraction of the regional integration process. This is particularly noticeable in the member states change in political will to advance cooperation in several work areas, including technical harmonization. Starting at the establishment of the bloc, the following issues are highlighted: Argentina's moratorium statement in 2001, followed by the adoption of currency control measures that lasted until 2015; increased Chinese share in international trading and presence in Mercosur throughout the 2000's¹⁹; the surge of the financial crisis between 2008

¹⁷ Mercosur's institutional structure can be searched at: http://www.mercosur.int/innovaportal/file/3878/1/estructura_noviembre_es.pdf. Accessed on July 19, 2017.

¹⁸ Last accessed on 05/08/2017.

¹⁹ Between 2001 and 2010, the amount of Chinese exports to Mercosur increased in 1,415%. China's total participation in the bloc's imports rose from 3% to 13%, making China jump from eighth to second largest supplier of goods to the bloc. (Source: Comtrade online database. Available at: <https://comtrade.un.org/>. Accessed on 07/31/2017).

and 2009, followed by a downturn in global trade²⁰; Paraguay's membership suspension following President Fernando Lugo's impeachment; and Venezuela's inclusion as a full member of the bloc, which increased the number of players at the negotiating table and, consequently, made the process of reaching a consensus on regulatory harmonization more complex.

From a structural standpoint, the very decision-making rule established by the bloc members is a key elements limiting the promotion of Mercosur's regulatory convergence. The goal of the bloc's regulatory discussions, as determined by legal mandate, is to prepare harmonized regional technical regulations²¹. The need for a consensus in the adoption of regional technical regulations encourages the picking and choosing of regulated subjects prioritizing the standardization of products that represent the most immediate interest of these countries. This is particularly true when national regulatory bodies already have enforceable regulations for the subjects addressed. Although legitimate, this trend helps to undermine the progress of negotiations, enabling the furtherance of conditions and incentives to impose mutual contingencies and changes to the agenda²².

Assuming that changes to the consensus rule are limited, the first barrier to deepening Mercosur's regulatory integration is the actual goal of legal harmonization across member states. In this sense, despite the obstacles imposed by the process, SGT No. 3 activities have been guided towards the production of a unified code of technical regulations and conformity assessment for Mercosur. Their purpose is not only to align the members in terms of levels of societal protection and security, but also to converge technical specifications to the extent that their compatibility should facilitate effective compliance with those levels. Consequently, discussions within work subgroups (such as SGT No. 3) tend to be very detailed, requiring ample time for negotiations among the states.

The processes could be streamlined if the Subgroup negotiations were focused on the definition of essential product requirements (individually or in groups). That is, the text agreed upon should be limited to the identification of risks associated with the product or product performance and/or to the establishment of goals for the protection of the environment, human, an-

20 Since the financial crisis, the ratio of trade growth to world output growth remained around 1:1, below the historical average of (1.5:1). WORLD TRADE ORGANIZATION. Trade recovery expected in 2017 and 2018, amid policy uncertainty. Available at https://www.wto.org/english/news_e/pres17_e/pr791_e.htm. Accessed on 07/28/2017.

21 MERCOSUR. GMC Resolution No. 13/06, June 22, 2006. Negotiating guidelines for Work Subgroup No. 3 "Technical Regulations and Conformity Assessment". Available at: [http://gd.mercosur.int/SAM%5CGestDoc%5Cpubweb.nsf/0A040C2315FC9CD90325817F0066F96F/\\$File/RES_013-2006_PT_PautaNegociadoraSGT3.pdf](http://gd.mercosur.int/SAM%5CGestDoc%5Cpubweb.nsf/0A040C2315FC9CD90325817F0066F96F/$File/RES_013-2006_PT_PautaNegociadoraSGT3.pdf). Accessed on 08/17/2017.

22 See case study on negotiations of the Electrical Products Safety Commission. FERMAM, Ricardo K. S. The process of elaboration of technical regulations Mercosur: the case of negotiations on electrical products. *Rev. bras. polit. int.* [online], 2006, v. 49, n. 1, pp. 117-130. ISSN 1983-3121. Available at: <http://dx.doi.org/10.1590/S0034-73292006000100006>. Accessed on 07/28/2017.

imal or plant life or health, such as, special guides concerning their physical and mechanical properties, flammability level, chemical and electrical properties, hygiene, radioactivity, etc.

By limiting their role to the definition of protection objectives and product inherent risks, harmonized standardization acts would not become obsolete in face of new technological developments and, consequently, would require fewer revisions. The technical specifications that could enable compliance with these requirements, in turn, could be standardized upon Mercosur's request and under its oversight.

It should also be said that Mercosur maintains a partnership with a regional standardizing association consisting of National Standardizing Bodies from the bloc member states, namely, the Mercosur Standardization Association (AMN)²³. AMN has twenty-eight sector committees and six special committees in charge of developing Mercosur standards²⁴ (which may be ordered by SGT No. 3 to eventually use them as harmonized technical regulation projects²⁵). For this purpose, the body most relevant in producing standards for the preparation of domestic and regional regulations could have a more significant role in the process of regional harmonization by taking charge of the formulation of technical specifications to complement the basic technical regulations defined by bloc member states. Although voluntary, compliance with these harmonized specifications could lend an assumption of compliance with previously established essential safety requirements.

In order for this model to work, however, a new process of interaction between Mercosur countries and AMN would need to be established. Although the negotiation of technical specifications would no longer fall under the auspices of SGT No. 3 in this new model, national governments would continue to have a role in the process. In fact, they would be responsible for requesting harmonized standards and for specifying the crucial harmonized regulations and requirements to be taken into account in such standards²⁶.

23 FOREIGN TRADE INFORMATION SYSTEM. CMC Decision No. 06/04, from July 7, 2004. Agreement of Cooperation between Mercosur and Mercosur Association of Normalization. Available at: <http://www.sice.oas.org/Trade/MRCSRS/Decisions/dec0604p.asp>. Accessed on 07/31/2017.

24 Thus far 623 harmonized standards have been prepared. Available at: ASOCIACIÓN MERCOSUR DE NORMALIZACIÓN. Overview. Available at: http://www.inmetro.gov.br/barreirastecnicas/pdf/acordos/RES_045-2017_Revogacao_revisao_e_elaboracao_de_RTM_Mercosul.pdf. Accessed on 02/06/2018.

25 According to item 4.4 of the GMC Resolution No. 45/2017. MERCOSUR. GMC Resolution No. 45/2017, from December 19, 2017. Procedures for Elaboration, Revision and Revocation of Mercosur Technical Regulations and Mercosur Conformity Assessment Procedures. Available at: http://www.inmetro.gov.br/barreirastecnicas/pdf/acordos/RES_045-2017_Revogacao_revisao_e_elaboracao_de_RTM_Mercosul.pdf. Accessed on: 02/07/2018.

26 Currently, a domestic government request for a set of standards to AMN means that a requirement will be drafted that could eventually serve as a substrate for the subsequent formatting of a harmonized regulation. However, the suggestion made herein is that the process is reversed, that is, that the AMN should be given the task of preparing standards within the technical guidelines applicable to the essential requirements previously discussed by Mercosur.

During the preparatory stages, Mercosur countries could ensure that international standards are used as a reference, provided they are coherent, transparent, open, consensual, voluntary and efficient²⁷. Furthermore, Mercosur would be able to determine whether the harmonized standards met the original request, verifying whether compliance with such voluntary requirements could lend an assumption of conformity to the previously established essential requirements.

Given the likelihood of a lack of consensus in the preparation of harmonized essential requirements and standards of technical specification, depending on the type of product or industry in question, negotiations should look for alternatives to the regulatory model proposed. In this sense, new and more flexible instruments of regulatory cooperation could include measures of mutual or unilateral recognition of technical requirements, harmonization based on international standards, among others.

Whichever strategy Mercosur adopts, it is imperative that the bloc modernizes its regulatory operations and negotiating guidelines in order to streamline regional procedures of mandatory technical requirement convergence.

Finally, within a context that demands greater communication across governmental bodies and guidelines for the recognition of systems and procedures, it is essential to highlight the importance of an effective discussion on **conformity assessment** systems, structures and activities by Mercosur members - without compromising the level of trust among states.

Hence, regulatory efforts are needed to transform the conformity assessment mechanism into a tool to facilitate the implementation of harmonized technical requirements in support of the balance required to ensure product quality and safety and the desire to eliminate obstacles to the free circulation of goods across countries. This means that, in certain cases, an assessment should be made to determine the possibility of giving domestic producers a choice between different methods of conformity assessment, in accordance with legal requirements governing the product in question.

It is critical, for example, that discussions take into account the entire set of options available for the conformity assessment of a product, and that it consistent with the operational risks involved and the availability of harmonized regulations. Thus, not only should the definition of

27 According to Annex 4 (Decision by the committee on principles for the development of international standards, guides and recommendations with relation to articles 2, 5 and Annex 3 to TBT Agreement) of the Second Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade. WORLD TRADE ORGANIZATION. Triennial reviews. Available at: https://www.wto.org/english/tratop_e/tbt_e/tbt_triennial_reviews_e.htm. Accessed on 07/31/2017.

an appropriate mechanism not become an obstacle to trade, but national structures should also be respected when conformity assessment measures are applied.

In this sense, member states should be responsible for choosing which bodies will assess product conformity and the latter should be liable to lose this privilege if shown that they lack the technical qualifications required to perform the task. Such bodies must have the technical skills to carry out conformity assessments in an independent and unbiased manner. Possible negotiations amongst states on the mutual recognition of conformity assessment procedures shall aim to ensure that product analyses are issued by bodies that have been designated and accredited to perform the conformity assessment activities required by countries.

It is also important to consider the use of regional or international accreditation arrangements in recognizing the competency of bodies skilled at determining a product compliance with the harmonized requirements. In the event that no cooperation arrangements are made with accredited bodies and no mutually recognized agreements exist across conformity assessment bodies, an opportunity should be given to institutions local to bloc countries to prove their ability to conduct conformity assessment and to approve and certify products. In the event that a Mercosur member state refuses to acknowledge the results presented by a conformity assessment body accredited by a bloc partner, such refusal should be presented with a supporting justification.

Moreover, accreditations must be based on compliance with uniform guidelines that seek to ascertain the technical qualifications of the recognized bodies to carry out conformity assessments.

Market surveillance measures should complement conformity assessment measures. In the event that noncompliance by those who produced the guidelines listed in the regional harmonized requirements is verified, preference should be given to the rigorous treatment of the identified goods, in terms of penalties previously provided under the law. Additionally, accredited bodies responsible for conformity recognition should undergo licensing reassessment. The development of capacity-building and technical support tools across countries should also be discussed.

A second challenge to the improvement of regulations in terms of technical regulation is in regards to the conducting of the draft regulations proceedings.

Since the creation of SGT No. 3, member delegations, who reserve the right to examine the matter in more detail, can assess draft regulations and present their opinions on requests for new projects and revisions during the meetings, which take place after the formal proposal

submissions. However, over the years, this process has been characterized by difficulties involving negotiations on new or ongoing issues.

Led by Brazilian Pro Tempore Presidency, in the second half of 2017, a set of amendments was drafted for the elaboration, revision and revocation proceedings of technical regulations in Mercosur, resulting in new guidelines to promote fast track of draft regulations proceedings²⁸. These amendments are necessary changes for the improvement of technical regulations in the region, since the new provisions on the negotiation proceedings may increase the predictability degree of procedures and expedite the due addressing of member states requests.

Nevertheless, it must be remarked that SGT No. 3 and its dependent agencies have, on average, quarterly meetings²⁹, which may generate lags in the negotiation process. The low frequency of meetings, added to the set course deadline for treatment of cases of dissent³⁰, create new incentives for countries to implement national requirements in areas characterized by lack of progress in harmonization at the regional level. Alternatively, in some cases, countries unilaterally review previously harmonized measures (Figure 4).

28 See GMC Resolution No. 45/17. Among the changes effected, the role of the GMC in the definition of a course of action is highlighted in cases where a topic is raised by the National Coordinators for its analysis, which should take place within a pre-established deadline. In addition, an automatic review mechanism of harmonized measures has been put in place, starting every five years, as of 180 days after its approval by the GMC.

29 MERCOSUR. CMC Decision No. 59/00, December 14, 2000. Restructuring of the bodies dependent on the Common Market Group and the Mercosur Trade Commission. Available at: http://www.mercosur.int/innovaportal/file/7523/1/dec_059-2000_pt_reestructuracion-de-los-rganos-depend-gmc-e-ccm_ata-2_00.pdf. Accessed on 08/17/2017. The decision stipulates that Common Market Group-dependent bodies meet ordinarily at least once per semester.

30 Indeed, GMC Resolution No. 45/17 creates incentives to reduce delays in discussions involving the drafting, revision and revocation of technical regulations in Mercosur. The need for member countries to express their positions within the formally stipulated maximum deadlines, added to the establishment of a linear and progressive flow for the processing of requests, represent concrete improvements in the treatment of regulatory production in the region. Nevertheless, negotiations aimed at the harmonization of technical regulations by member countries will require that a set of minimum steps (laid down by the aforementioned Resolution) are satisfied so that they can be concluded. In this sense, increasing the frequency of meetings can be beneficial to proper implementation of the effected changes.

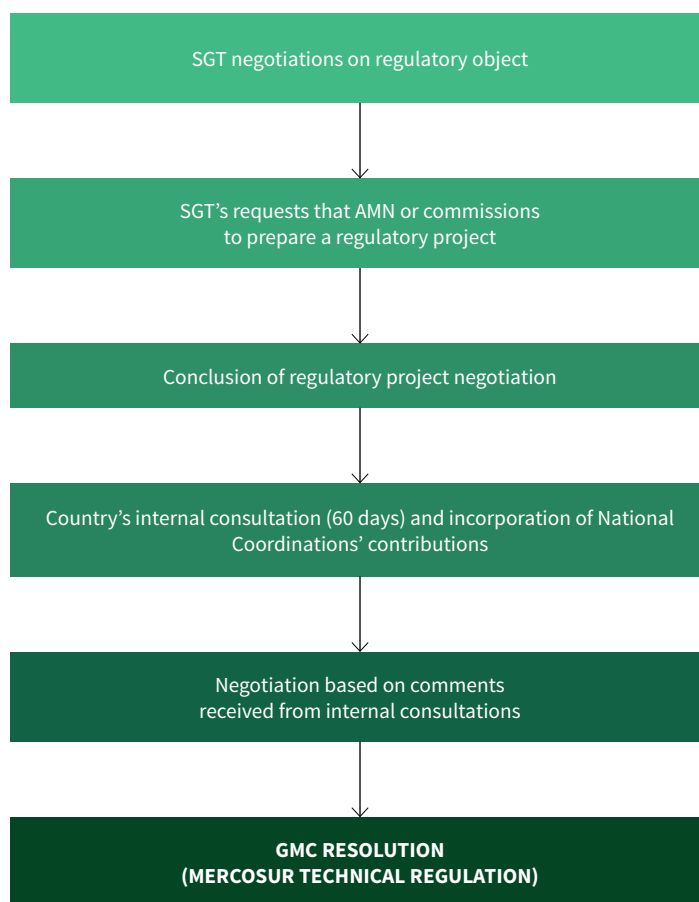


Figure 4. Process for the preparation of technical regulations in the Southern Common Market (Mercosur). AMN = Mercosur Standardization Association; SGT = Work Subgroup.

The communication deficit between government and private sector on the issue of harmonization is also a barrier to the development of a regional regulatory framework. Currently, the private sector takes part in the process indirectly through “preparatory meetings” held by the commissions, “internal consultations”³¹ and AMN committees. However, not only are preparatory meetings not mandatory but, when held, the mechanisms for inclusion of the private sector are not clear³², considering that participation requires permission by all members of the bloc³³. Internal consultations, on the other hand, are compulsory and are held over a period of 60 days. They are the only opportunity available for submission of comments on the harmonized regulatory project. The National Coordinations of SGT No. 3 that are in charge of organizing and conducting the subgroup’s activities³⁴ decide whether or not to include the comments received in the final proposal that will be sent to SGT to be assessed by the other states.

After the negotiation stage, other challenges to the implementation of harmonized technical regulations arise, such as aspects related to the enforcement of measures adopted in the bloc and to technical skill disparities (which are not limited to political will).

In this respect, it has been found that member states have not been compliant with the **simultaneous enforcement mechanism**³⁵ established by the Protocol of Ouro Preto, which has created obstacles to the regulatory integration of the bloc (Picture 5). One of the requirements imposed by the simultaneous enforcement mechanism was that member states should incorporate the harmonized regulations to their national legislation and notify Mercosur’s Administrative Secretariat. The mechanism is a formal condition for the regional enforcement of all requirements for the purpose of unifying of obligations across states.

31 MERCOSUR. GMC Resolution No. 45/2017, from December 19, 2017. Procedures for Elaboration, Revision and Revocation of Mercosur Technical Regulations and Mercosur Conformity Assessment Procedures. Available at: http://www.inmetro.gov.br/barreirastecnicas/pdf/acordos/RES_045-2017_Revogacao_revisao_e_elaboracao_de_RTM_Mercosul.pdf. Accessed on: 02/07/2018.

32 Pursuant to article 26 of CMC Decision No. 04/91. FOREIGN TRADE INFORMATION SYSTEM. CMC Decision 04/91, from December 17, 1991. Rules of Procedure for the Common Market Group. Available at: <http://www.sice.oas.org/trade/mrcsrs/decisions/DEC491p.asp>. Accessed on 07/31/2017.

33 Pursuant to article 16 of CMC Decision No. 59/00. FOREIGN TRADE INFORMATION SYSTEM. CMC Decision No. 59/00, from December 14, 2000. Restructuring of the bodies dependent on the Common Market Group and the Mercosur Trade Commission. Available at: <http://www.sice.oas.org/Trade/MRCRSR/Decisions/dec5900.asp>. Accessed on 07/31/2017.

34 The National Coordinations of SGT No. 3 are carried out by bodies representing each of the bloc’s member states; in Brazil, the National Coordination of SGT No. 3 is carried out by Inmetro.

35 Article 40 of the Protocol of Ouro Preto. BRAZIL. Presidency of the Republic. Office of the Chief of Staff. Decree No. 1.901, from May 9, 1996. Enacts an Additional Protocol to the Treaty of Asuncion on the Institutional Structure of Mercosur [Protocol of Ouro Preto], from 12/17/1994. Available at: http://www.planalto.gov.br/ccivil_03/decreto/d1901.htm. Accessed on 07/28/2017.

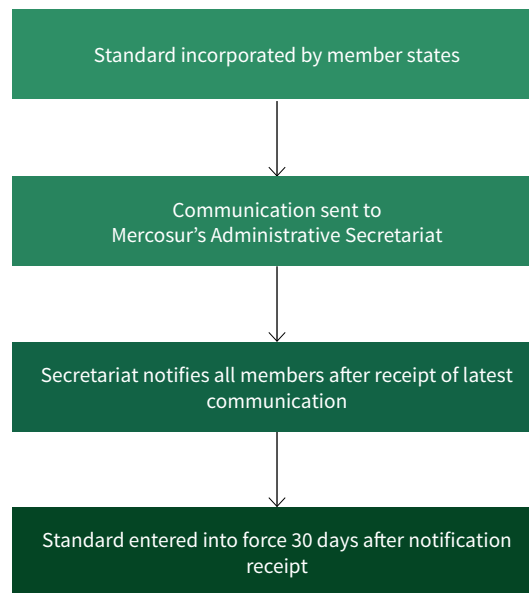


Figure 5. Simultaneous enforcement mechanism. Source: Protocol of Ouro Preto. Prepared by: Derex/Fiesp.

Although regulations enter into force regionally after they are incorporated by all member states, the states have made uncoordinated efforts to implement the provisions agreed upon by the bloc in their legal systems. In Brazil, for example, regulations come into force after they are incorporated and published (unless otherwise specified), regardless of the legal internalization process conducted by other bloc partners. In Argentina, on the other hand, harmonized regulations only come into effect after they become enforceable in the entire region (i.e. after all bloc partners have legally internalized them). In practice, this misalignment may create challenges for the private sector, in particular for exporters, to the extent that it becomes more complex to determine which Mercosur Technical Regulations must be met at each of the bloc's countries.

Table 1 shows a survey of harmonized regulations approved under SGT No. 3 since the 2000s³⁶ and their incorporation status, illustrating some of the enforcement issues observed with respect to Mercosur technical regulations.

³⁶ The data shows all of Mercosur's technical regulations (revisions and original ones) completed since 2000. This interval of time was chosen as a reference due to a lack of information regarding incorporation and enforcement status of the standards previously approved by Mercosur. The categorization was achieved by crossing information available in the Document Manager found in Mercosur's website as well as on the webpages for the National Coordinations of SGT No. 3 of Brazil (http://www.inmetro.gov.br/barreirastecnicas/SGT3_comissoes.asp) and Paraguay (<http://www.snin.gov.py/publico/normapy.aspx>). Accessed on 07/26/2017.

Table 1. Incorporation status of technical regulations produced by SGT No. 3 for Mercosur since 2000. Source: Mercosur.

COMMITTEE/WORK GROUP	NOT ENTERED INTO FORCE			ENTERED INTO FORCE
	Internalized by Brazil but not by other member	Not internalized by any Mercosur Member	Internalized by all members except Brazil	
Food	30	0	2	14
Toys	0	0	0	2
Gas	4	0	0	0
Automotive Industry	0	9	4	0
Metrology	9	0	8	10
Electrical product safety	1	1	1	0
Textiles	2	0	0	0

The amount of time grant to each member state to incorporate harmonized regulations and, consequently, the time it takes for such regulations to become enforceable the bloc, is also a relevant variant in helping us understand how difficult it is to make regional regulatory harmonization a reality. Although legal provisions stipulate that incorporation must be completed within 180 days³⁷, what we see is that, up until 2008, the process of incorporation of general standards in Mercosur took an average of 207 days in Brazil and 439 days in Paraguay³⁸ -- not taking into account standards that were never incorporated. However, not a single body has yet been attributed the task of monitoring the effective incorporation of regulations by member states³⁹.

The implementation of harmonized regulations is further hindered by technical asymmetry across members of the bloc. One way to measure these differences is to verify the number of notifications made to the WTO about the adoption of new technical requirements. While

37 Item 9.1 of the Annex of the GMC Resolution N° 45/2017. MERCOSUR. **GMC Resolution N° 45/2017**, from December 19, 2017. Procedures for Elaboration, Revision and Revocation of Mercosur Technical Regulations and Mercosur Conformity Assessment Procedures. Available at: http://www.inmetro.gov.br/barreirastecnicas/pdf/acordos/RES_045-2017_Revogacao_revisao_e_elaboracao_de_RTM_Mercosul.pdf. Accessed on: 02/07/2018.

38 ARNOLD, C. Empty Promises and Nonincorporation in Mercosur. *International Interactions*, 30 jun. 2016. DOI: 10.1080/03050629.2016.1206391. Available at: <http://tandfonline.com/doi/abs/10.1080/03050629.2016.1206391?journalCode=gini20>. Accessed on 07/28/2017.

39 In the event that a state feels jeopardized, in addition to the subgroup, formal consultations can be made to Mercosur Trade Commission (CCM), pursuant to article 21 of the Protocol of Ouro Preto.

Brazil and Argentina have made, respectively, 836 and 379 such notifications at a multilateral level, Uruguay and Paraguay have only made 15 and 96 notifications, respectively⁴⁰.

This assumed technical skill inequality across countries can make it so that, even when agreed upon, harmonized regulations are never implemented internally by all members and, thus, are never put into effect. On one hand, when technical asymmetries are taken into account in negotiations, this may lead to the development of requirements that have reduced efficacy in the promotion of safety and innovation because they must meet everyone's needs. Consequently, some countries, particularly those with greater expertise, may lose interest in internalizing the regulations. On the other hand, the adoption of ambitious technical regulations that demand knowledge and expertise from countries that do not possess them may hinder their governments' implementation of requirements and compliance by the private sector⁴¹.

Therefore, the exchange of information and technical cooperation and assistance across bloc countries is a priority. The completion and effective implementation of technical cooperation agreements partnered with efforts to foster exchange and advancement activities among members of Mercosur are measures that can address this issue and contribute to the promotion of regulatory convergence.

Additionally, lack of transparency in SGT No. 3 activities and in the status of the regional harmonization process is also an obstacle to development. Mercosur does not have a platform in which information on harmonized technical regulations is centralized⁴².

40 Based on data from the WTO's Technical Barriers to Trade information Management System (online database). Available at: <http://tbtims.wto.org/>. Accessed on 7/3/2017.

41 ARNOLD, C. Empty Promises and Nonincorporation in Mercosur. *International Interactions*, 30 jun. 2016. DOI: 10.1080/03050629.2016.1206391. Available at: <http://tandfonline.com/doi/abs/10.1080/03050629.2016.1206391?journalCode=gini20>. Accessed on 07/28/2017.

42 Official documents from meeting and Mercosur standards can be found in the Document Manager maintained by the bloc's Secretariat (<https://gestorweb.mercosur.int/>). Although a new mechanism has recently been implemented that allows searches by standard and by body, it is still not possible to search specific standards, such as technical regulations and ongoing projects. As an example, the European Union maintains a portal dedicated to WTO's Technical Barriers Agreement (<http://ec.europa.eu/growth/tools-databases/tbt/en/>) and another on harmonized European standards and regulations (<http://ec.europa.eu/growth/single-market/european-standards/>).

The same issue is true regarding the status of new projects and revisions. For example, there is no centralized site for information about the progress of internal consultations, such as a project's submission date to the National Coordinations, the duration of the consultations, and the date when STG received the answers requested⁴³. Also, countries may classify certain documents from regional fora meetings as confidential (a common practice), preventing the disclosure of lists of attendees, and briefings on revisions and project negotiations and, hence, hampering the private sector's interaction with these initiatives.

Finally, although the discussion and simultaneous adoption of compatible technical requirements is an important stage in the process, it is not the only challenge to trade, as additional controls may be imposed on countries when goods reach the border of their destination country. The completion of an exhaustive negotiation on the establishment of harmonized technical requirements may be penalized by means of excessively costly and time-consuming administrative and customs procedures on foreign trade operations across countries.

Some of the most common examples of barriers are: extended deadlines for the approval of import licenses that do not qualify for automatic licensing; requirements imposed in addition to existing previously negotiated ones (even though compliance with them does not increase the level of product safety and/or quality); and, the creation of obstacles to the mutual recognition of conformity assessment results, even when they are scientifically grounded and in compliance with the level of protection determined by the harmonized requirements.

It is, therefore, important that these obstacles are eliminated if we are to maintain the originally sought objectives of integration needed to support intra-bloc trade.

43 According to items 8.1.1 and 8.2 of GMC Resolution No. 45/2017, internal consultations should be held over a period of 60 days after the meeting of the SGT No. 3 in which the project was approved; besides this, the project should be dealt with at the regular meeting following the deadline. GMC Resolution No. 45/2017, from December 19, 2017. MERCOSUR. Procedures for Elaboration, Revision and Revocation of Mercosur Technical Regulations and Mercosur Conformity Assessment Procedures. Available at: http://www.inmetro.gov.br/barreirastecnicas/pdf/acordos/RES_045-2017_Revogacao_revisao_e_elaboracao_de_RTM_Mercosul.pdf. Accessed on: 02/07/2018.

PROPOSALS

Recognizing the importance of SGT No. 3 in Mercosur's process of regulatory integration, Fiesp and Ciesp argue for:

- Reforms in the scope of Mercosur's Work Subgroup No. 3 in order to prioritize the formulation of harmonized technical regulations focused exclusively on essential requirements of quality and safety, as well as of environment and human health protection, for regulated products or family of products in their list of objectives.
- The strengthening of Mercosur Standardization Association by conferring to it the new task of formulating harmonized regional standards that specify and deepen essential mandatory technical requirements, making use, when appropriate, of internationally recognized standards.
- Whenever the formulation of essential requirements and harmonized standards is not possible, we suggest the promotion of measures to facilitate trade in matters regarding regulatory issues. These measures should allow parties to identify potential industries or products for specific and effective market access actions by means of a clear structure and a case-by-case approach that will encourage effective dialogue and the application of tools to foster cooperation, convergence, harmonization and other forms of regulatory advancement in the region.
- More discussions and negotiations geared towards fostering the mutual recognition of bodies, conformity assessment results, and accreditation bodies, with no detriment to an effective level of product safety and harmonized requirements.
- The inclusion of legal provisions that speculate a higher number of meetings for SGT No. 3 in order to foster the exchange of information across member states and the adoption of a more expeditious process of regulatory convergence..
- The establishment of a formal advisory mechanism at Inmetro through which the industrial sector may express its interest in participating in SGT No. 3 meetings as well and introduce opinion about ongoing negotiations during the phase of regulatory formulation.
- Identification of the key needs of each country regarding technical requirements, in the light of the financial conditions and cooperation activities previously carried out, so as to facilitate the incorporation and simultaneous enforcement of Mercosur technical regulations by the established deadline mandated by bloc rule (180 days⁴⁴).

44 As provided in the Annex to Resolution GMC No. 45/17, item 9.1 shows the importance of technical assistance initiatives, since the aforementioned Resolution contemplates the hypothesis of requesting additional time to incorporate the harmonized requirements. **MERCOSUR. GMC Resolution No. 45/2017**, from December 19, 2017. Procedures for Elaboration, Revision and Revocation of Mercosur Technical Regulations and Mercosur Conformity Assessment Procedures. Available at: http://www.inmetro.gov.br/barreirastecnicas/pdf/acordos/RES_045-2017_Revogacao_revisao_e_elaboracao_de_RTM_Mercosul.pdf. Accessed on: 02/07/2018.

- The implementation of cooperation agreements and the adoption of specific measures for technical training on good regulatory and conformity assessment practices (advancement in technical infrastructure, including in sub-areas such as metrology, testing, certification and accreditation), inspection (market surveillance), and transparency (to support the work of National Coordinations).
- Development of an open access online platform to centralize in a single place all information relevant to the status of negotiations (in all of its phases, including internal consultations), incorporation of harmonized regulations by countries, and the implementation of work programs by specialized groups.
- Elimination of inappropriate administrative and custom barriers imposed by border control bodies, usually presented as procedures requiring proof of compliance with harmonized or additional requirements.

CLOSING REMARKS

This document is the first chapter in a series of proposals deemed necessary for the harmonization of technical requirements between Brazil and its economic regional partners. The current paralysis that has affects regional states in regards to the convergence of technical regulations is the fruit of an inflexible legal system and of a lack of both coordinated efforts by local states and incentives to joint regulatory production. Despite persistent talks about the benefits of integration, the current framework is marked by fragmentation and decentralization.

Although limited in scope, the recommendations made herein for the promotion of regulatory harmonization in Latin America are a much-needed step towards reviving regional integration efforts. There efforts should be proportional to the challenges imposed by the international trade agenda. New discussions on measures to define the features of products and production processes and methods creates challenges to domestic governments' ability to control the regulatory process, whose framework, over time, has become thematically broader and more geographically fragmented.

Another relevant aspect in developing a regulatory agenda concerns the growing need for the inclusion of society in the regulatory decision-making process, so as to prevent projects from becoming entirely disconnected from the interest and expertise of the players directly impacted by the measures. A transparent process open to suggestions about the content of the requirements under formulation is essential for the development of a regulatory framework representative of the interests of the country and of its producers.

Whenever possible, it is also preferable to adopt regulations that are grounded in analyses that forecast their impact before and after their adoption. The establishment of objective criteria to problem management and to proposed solutions should also be taken into account by public policymakers.

We believe that there is an urgent need for the effective integration of Brazil and its commercial partners. Latin American governments must prioritize the search for a pragmatic approach that is not detached from a rigorous defense of the safety and health of local communities. While recognizing the importance of the impact of standards that regulate production processes and methods, the alignment of member states in the development of these measures is equally important as it is crucial to leverage trade across these countries and project Brazilian exports to a new level.

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