The EU Model and Comparative Regional Integration: How to achieve 'credible commitments'?

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Abstract

In this paper the author will outline some essential characteristics about the EU designed to assure 'credible commitments' and take a look at how other integration schemes, NAFTA and MERCOSUR in particular, have tried to secure 'credible commitments'. The main variables to be discussed include: the degree of completeness of the original contract to start an integration process, the degree of asymmetry among the main participants, the degree of pooling and delegation of authority, and the availability of leadership to overcome collective action problems.

Introduction

Scholars often say that the EU is *sui generis.* There is no other regional organization quite like it. Some aspects of it resemble a federal state, with binding decisions reaching individuals. Other aspects are purely intergovernmental cooperation based on consensus or unanimity. Overall the EU is not a state. It does not have the monopoly of force that sovereign states are supposed to have. But it is more than a typical international organization like the UN. It has created unique supranational institutions (For a more extensive discussion, see Laursen 2011).

Andrew Moravcsik has seen 'pooling and delegation' of sovereignty as essential characteristics of the original institutions created by the European Communities (EC) in the 1950s (Moravcsik 1998). Pooling is the term used for the acceptance of majority voting, in the EU case normally qualified majority voting (QMV), in the Council of Ministers. Delegation refers to the autonomous powers given to the Commission and the European Court of Justice (ECJ) at the outset and subsequently also to the European Parliament (EP). The Commission has an exclusive right of initiative in many areas and it represents the EU externally in a number of policy areas, especially trade. The ECJ makes binding decisions. The EP has increasingly become a co-legislator together with to the Council starting with the

Maastricht Treaty in 1993 and now becoming the general rule after the entry into force of the Lisbon Treaty in December 2009. So a kind of bicameral system has emerged. The EP is directly elected by the people in the member states since 1979. Through these institutions a number of common policies have been developed over the years, starting with trade and agriculture in the 1960s. The creation of a common market (or internal market) with four freedoms: free movement of goods, services, capital and people, was the main goal from the outset, a goal that has largely been achieved, although new issues keep coming up that have to be dealt with. In parallel with the expansion of the functional policy scope the EC/EU expanded geographically from six to 27 members. It is therefore fair to say that the policy and decision making mechanisms of the EC, the so-called Community method, has been rather successful. According to Moravcsik it created 'credible commitments.' It helped the EC/EU overcome so-called 'collective action' problems, problems that exist if the actors, in this case states, are tempted to cheat on agreements or face difficult distribution problems.

It should be admitted that the EU has not always been successful. It has used intergovernmental cooperation to try to develop a Common Foreign and Security Policy (CFSP) and more recently a Common Security and Defence Policy (CSDP), but with limited success. It invented the so-called Open Method of Coordination (OMC) to help create jobs and a more competitive economy through the so-called Lisbon Strategy (2000-2010), again with limited success. Further, it created an Economic and Monetary Union (EMU), without creating 'credible commitments' in the area of fiscal policy, thereby allowing the current sovereign debt crisis to develop. So in these sensitive areas the member states have not been willing to pool and delegate sovereignty, and commitments have not been credible. Member states have been able to defect and free ride.

The lesson from the European experience, however, seems rather clear: if you want credible commitments, one approach is to pool and delegate sovereignty! This should be contrasted with the fact that none of the other integration schemes in the world have used something like the EU's Community method. This then raises the question: Are there other ways of getting 'credible commitments' in a regional integration schemes? Walter Mattli, has argued that leadership can assist states in overcoming 'collective action' problems (Mattli 1999). He argues that Germany has been a leader in Europe, partly by being a 'regional paymaster'. He also finds that the United States played such a role when NAFTA was created. However, in other regions there seems to be a leadership deficit. Brazil could have played such a role in MERCOSUR, and Indonesia could have played such a role in ASEAN, being the biggest states in those two regional settings. But Brazil has a unilateralist tendency, especially

now that it has become one of the emerging BRIC countries, and Indonesia has tended to be inward looking due to poverty and other domestic issues.

ASEAN has taken timid steps in direction of imitating the EU. From 1993 the region has worked to create an ASEAN Free Trade Area (AFTA). From 2003 an ASEAN Economic Community (AEC) is on the agenda and in 2007 a Charter was adopted giving ASEAN stronger institutions, without however taken the big step of real pooling and delegation of sovereignty. The doctrine of not interfering in domestic affairs remains strong.

If we look at the wider East Asia region there is now cooperation between ASEAN and China, Japan and South Korea (known as ASEAN plus Three – APT) as well as regular East Asian summits. In this setting one can wonder whether China will be able to play the leadership role that could assure the objectives of economic integration are realized. But the old rivalry with Japan and the suspicion about China's future role in some states in the region makes that a precarious process and regional cooperation has to some extent been replaced by bilateral agreements.

A third possibility of getting credible commitments has been suggested: a relatively detailed and complete contract with dispute settlement mechanisms. This is the NAFTA approach. Its contract is relatively complete, while the EU, MERCOSUR and ASEAN contracts are relatively incomplete (Cooley and Spruyt 2009). NAFTA's rather complete contract may have contributed to its relative success, but in limited areas and the institution is static compared with some other regional integration schemes. It will take the negotiation of a new treaty to deal with new issues. The EU approach with a 'framework treaty' is more dynamic. It creates the institutions that can develop new policies and reform old ones (Laursen 2010). It therefore appears that MERCOSUR and NAFTA could have been better off if they had adopted something like the Community method with pooling and delegation of sovereignty. Why haven't they? Let's move on and take a closer look at MERCOSUR and NAFTA.

The demand for integration, according to rationalist theories of integration, is related to the economic interdependence of the countries in question. One indicator of demand for regional integration is intra-regional trade. The proposition is that the higher intra-regional trade, the more economic actors will demand steps toward more integration (Mattli 1999, Moravcsik 1998). Table 1 shows what happened to intra-regional trade through the 1990s and the beginnings of the 2000s in three regions. In NAFTA and MERCOSUR, intra-regional trade increased relatively substantially in the 1990s. Intra-regional trade fell sharply in MERCOSUR in 2001 and 2002 – because of the Argentine crisis. After having reached 24.8 per cent in 1998, it fell to 11.6 per cent in 2002. No comparable decline was recorded in the other regions. Since 2004 the intraregional trade in MERCOSUR has increased slightly. In

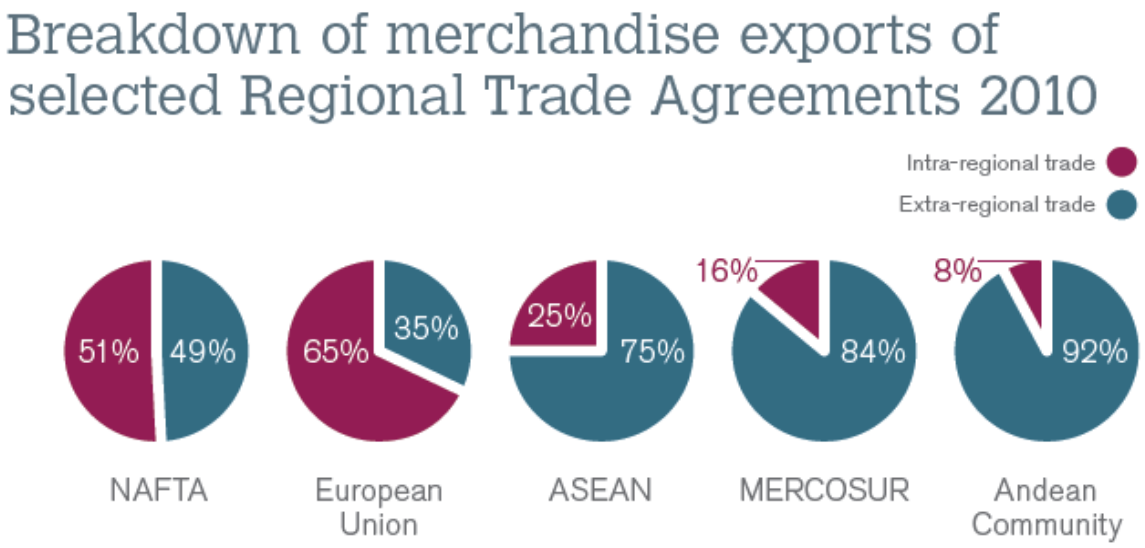
NAFTA it has fallen slightly. In the EU it has remained high. The WTO has the latest figures from 2010 (fig. 1).

Table 1: Intra-regional Export Shares, 1970-2008

	1980	1990	1992	1994	1996	1998	2000	2002	2004	2006	2007	2008
NAFTA	33.6	41.4	43.7	48.0	47.6	51.0	55.7	56.7	55.9	53.9	51.3	49.5
EU	60.8	59.0	59.5	56.8	62.8	62.5	61.6	60.6	60.7	67.4	67.9	67.3
MERCOSUR	11.6	8.9	14.0	19.2	22.7	24.8	20.8	11.6	12.6	13.5	14.9	15.0

Sources: International Monetary Fund, *World Economic Outlook*, October 1999, Table 5.1, 129; The World Bank, *World Development Indicators*, 2004 and 2005, Table 6.5; 2006, Table 6.6; 2009, Table 6.7, and 2010, Table 6.7.

Figure 1:



Source: World Trade Organization, *International Trade Statistics 2011*. Geneva., p. 16.

The Case of NAFTA[1]

I shall first give a brief overview of NAFTA's institutions in view of trying to compare NAFTA's institutional capacity and achievements with those of the EU. NAFTA's institutions should be seen against the background of NAFTA being a rather complete contract, a long and detailed treaty that

[1] This section borrows from the concluding chapter in Laursen 2010, which was partly based on Laursen 2005.

requires less *ex post* implementation than the EU and MERCOSUR based on shorter framework treaties or relatively incomplete contracts (Cooley and Spruyt, 2009).

The main institutions created by NAFTA are the following:

1. *The Free Trade Commission (FTC)*

The Free Trade Commission (FTC) shall "supervise the implementation of the agreement" and "supervise its further elaboration." It also gets involved in resolving disputes regarding the interpretation or application of the agreement and it supervises the various committees and working groups established by the agreement. It consists of cabinet-level representatives from the three member states or their 'designees' and meets normally at least once a year. Meetings are chaired "successively by each Party" (Article 2001; McKinney, 2000, 24).[2]

Each member state has designated a NAFTA coordinator. These coordinators are in charge of day-to-day management and implementation of the agreements.

More than 30 Committees and Working Groups have been established. Important areas of work include: trade in goods, rules of origin, customs, agriculture, subsidies, standards, government procurement, investment, services and cross-border movement of business people. So the agenda goes well beyond tariffs for goods, to include non-tariff barriers to trade (NTBs), services, investment, etc.

NAFTA also has a Secretariat, but in reality it is divided into three national sections located in Ottawa, Washington, D.C., and Mexico City. The mandate of the Secretariat is to assist the FTC and provide assistance to dispute panels and committees established under Chapter 19 of the agreement (Antidumping and Countervailing Matters) and panels established under Chapter 20 (Institutional Arrangements and Dispute Settlement Procedures). The FTC may also direct the Secretariat to support the work of other committees and working groups and in general facilitate the operation of the agreement (Article 2002).

The FTC has been able to accelerate tariff reductions in the mid-90s. It has also contributed to dispute settlement under Chapter 20 which foresees the establishment of an arbitral panel as a third step after consultation and a meeting of the FTC. Most disputes have been solved through consultation.

[2] The NAFTA Secretariat has a tri-national web site at www.nafta-sec-alena.org (last accessed 29 January 2012). It has links to the text of the NAFTA, status reports of panel reviews and panel decisions and reports. There are also links to the three national sections of the Secretariat where additional information can be found.

Chapter 19 – antidumping and countervailing duties – does not foresee consultations or involvement of the FTC before the establishment of an arbitral panel (McKinney, 2000, 31).

In 2010 the Status Report on Dispute Settlements on the NAFTA website lists 191 cases. The USA was applying the system most often with 129 cases, 84 against Canada and 45 against Mexico. Canada followed with 41 cases against the USA and three against Mexico. Finally, Mexico had 15 cases against the USA and three against Canada.[3]

Let's add that NAFTA also has provisions on dispute settlement on financial issues (Chapter 14) and foreign investment (Chapter 11).

If we compare the FTC with the EU Commission it is clear that the FTC has very limited competences. As McKinney observes, "It has no physical location and no staff members of its own." He goes on to say:

> As its name indicates, the Free Trade Commission was established to deal primarily with trade facilitation matters as they arise in the context of the NAFTA agreement. It was neither intended nor designed to deal with the broader issues of economic integration as those that the European commission regularly addresses. The European Union has chosen to pursue a deeper level of economic integration than have the countries of North America, and a more elaborate institutional structure is required (McKinney, 2000, pp. 31-32).

In reality it is not enough to compare the FTC with the European Commission. When it comes to interpretation of the treaty and dispute settlement it is more correct to compare it with the ECJ. And some decisions made by the FTC, for instance acceleration of liberalization, are more correctly compared with those made by the Council of Ministers in the EU. So it is a rather mixed kind of institution seen from the EU perspective.

However, it is also important to say that NAFTA is more than a pure free trade area (FTA). It deals with tariffs as well as technical barriers to trade (TBTs), government procurement, investments, services, competition policy and intellectual property. And, as we shall see, side agreements on labour and environmental policies were added before US ratification. Miles Kahler has talked about a "GATT-plus" agenda including "issues of deeper integration, behind-the-border issues such as investment regimes, regulation of services, and environmental and labour standards" (Kahler, 1995, 82).

[3] http://www.nafta-sec-alena.org/en/StatusReportResults.aspx (accessed April 2010)

2. Commission for Labour Cooperation

NAFTA was negotiated during the administration of President George Bush in 1991 and signed on 17 December 1992. During the election campaign that year Bill Clinton had expressed some reservations about NAFTA and he promised to negotiate supplementary agreements on labour and environmental issues if elected. These side agreements were negotiated from March until August 1993, when the agreements were signed. After ratification by Canada, USA and Mexico NAFTA went into effect on 1 January 1994 (McKinney, 2000, 7-13).

One of the supplementary agreements was the North American Agreement on Labour Cooperation (NAALC). It establishes the Commission for Labour Cooperation which is formed of a Council of Ministers and a tri-national Secretariat. The Council consists of the three labour ministers or their representatives. It meets at least once a year in regular sessions. The Secretariat, now located in Washington, D.C., after originally being in Dallas, Texas, supports the Council of Ministers and undertakes labour-related research and public information.[4]

The NAALC lists seven objectives, including 'to improve working conditions and living standards' and 'to promote compliance with, and effective enforcement by each Party of its labor law.' It also sets out 11 labour principles which it will promote 'to the maximum extent possible.' These are the following:

a. Freedom of association and protection of the right to organize
b. The right to bargain collectively
c. The right to strike
d. Prohibition of forced labour
e. Labour protections for children and young persons
f. Minimum employment standards
g. Elimination of employment discrimination
h. Equal pay for women and men
i. Prevention of occupational injuries and illnesses
j. Compensation in cases of occupational injuries and illnesses
k. Protection of migrant workers.[5]

[4] The home page of the Commission for Labor Cooperation is: www.naalc.org (last accessed 29 January 2012)
[5] Http://www.naalc.org/english/objective.shtml (last accessed 29 January 2012)

Each of the three member countries has a National Administrative Office (NAO) within their labour ministry. One function of the NAO is to receive so-called 'public communications' regarding labour law practices in another NAALC country. Each NAO has its own domestic procedures for dealing with such communications and deciding which action to take. If a submission is accepted the next step is consultation with the other NOAs on the issue. The NAO will normally gather information, possibly conduct a hearing. This will be followed by a public report. If the issue remains unresolved at this stage there will be ministerial level consultations. For some issues an Evaluation Committee of Experts (ECE) may be appointed. Exempt from this possibility are issues concerning freedom of association, right to bargain collectively and right to strike. The ECE is independent, normally consisting of three labour law experts. It will make recommendations. The parties may request a special session of the Council of Ministers. Efforts of mediation or conciliation may be tried. The final possibility, if the matter concerns child labour, minimum wages or occupational safety and health, is panel arbitration. Interestingly enough an arbitral panel can be convened by a two-thirds vote. Such a panel will have five members. It will make a recommendation on how to settle the dispute. If this does not solve the issue there is the possibility of a monetary assessment and should the offending country refuse to pay the monetary assessment the complaining party is authorized to suspend NAFTA benefits (McKinney, 2000, 34-41).

A summary of these so-called 'public communications' dated March 2004 lists 28 cases. 17 concerned Mexico, nine the USA and two Canada. Most of the cases concerned freedom of association/rights to organize. There were also many cases concerning occupational safety, minimum employment standards, right to bargain collectively and employment discrimination, and a few cases concerned protection of migrant workers and right to strike. Five submissions were not accepted for review. 14 led to ministerial consultations ending with an agreement on implementation of a joint declaration. No cases had gone further.[6]

As Mc Kinney has said:

> While monetary enforcement assessments and trade sanctions exist as possible methods of enforcing the terms of the NAALC for some issues, their use for that purpose is highly unlikely. The road to having a matter considered by an arbitral panel

[6] Http://www.naalc.org/english/pdf/pcommtable_en.pdf. (Last accessed 29 January 2012)). No more recent summary is available on the NAALC website.

> is a long and tortuous one. Multiple opportunities and incentives are provided to settle the dispute before that stage (McKinney, 2000, p. 46.)

The established system thus depends on consultations between domestic institutions. Only in exceptional cases, for a narrow range of disputes, can binding arbitration be used and such a step can be decided by a two-thirds majority vote in the Council of Ministers. This slight element of 'pooling of sovereignty', as mentioned, is not very likely to be used.

The fact that a majority of complaints have concerned Mexico has also produced some bad feelings in Mexico. And the fact that the system does not foresee remedial action has also allowed scepticism in the labour movement to continue. But McKinney is right in underlining the 'significantly different histories, distinctive labour movements, and contrasting legal traditions' of the three member states (McKinney, 2000, 50-51). It is also worth to remember that the development of social or labour market policy has progressed slowly in the EU.

3. Commission for Environmental Cooperation

The second side agreement negotiated by the Clinton Administration is the North American Agreement on Environmental Cooperation (NAAEC). Environmental groups in the United States were worried because Mexico had lower environmental protection than the United States. They feared a 'race to the bottom'. Labour unions feared that capital might migrate to Mexico because of lower environmental standards. Including an agreement on environmental cooperation thus was a way to improve chances of ratification (McKinney, 2000, 90).

NAAEC establishes a Commission for Environmental Cooperation (CEC).[7]

The CEC is composed of a Council, a Secretariat and a Joint Public Advisory Committee (JPAC). The Council meets at the ministerial level at least once a year. The Secretariat, in Montreal, is an independent body. The JPAC is composed of 15 members, five from each member state, appointed by their respective governments. It acts independently and advises the Council.

According to Article13 of the NAAEC the Secretariat may prepare a report on any matter within the scope of the agreement. According to Article 14 the "Secretariat may consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its

[7] The home page is at: www.cec.org. (Last accessed 29 January 2012).

environmental law." According to Article 15 "the Secretariat shall prepare a factual record if the Council, by a two-thirds vote, instructs it to do so." Further, "The Council may, by a two-thirds vote, make the final factual record publicly available." However, there are no provisions for arbitration or sanctions as a result of such submissions from individuals or NGOs (McKinney, 2000, 99). Since 1995 the Secretariat has received 79 submissions under Article 14. The country distribution was the following: Canada 29, Mexico 40, and USA 10. Many of the submissions have been terminated as either not having merit or not being valid according to the criteria set forth in the agreement. In about 15 cases factual records have been published (McKinney, 2000, 105).[8] At least the procedure allows citizens to play a whistle-blower role.

Potentially more important is Part V of the agreement, which allows for complaints from a member state about "a persistent pattern of failure" by another "Party to effectively enforce its environmental law" (Article 22). If the Parties cannot solve the issue "the Council shall convene." If the Council does not resolve the issue "the Council shall, on a written request of any consulting Party and by a two-thirds vote, convene an arbitral panel to consider the matter. The condition is that the issue is trade related (Article 24). The dispute settlement panel will have five members. It will produce first an initial report, and, after input from the parties, a final report, which will be published. If this does not solve the issue the panel may be reconvened. It may then impose a monetary enforcement assessment. In case the party fails to pay the fine suspension of NAFTA benefits becomes a possibility, which involves rising of tariffs.

However, in 2000 McKinney concluded:

> … the process involved in sanctioning countries for a persistent failure to apply their environmental laws is by design highly convoluted, with multiple opportunities for the accused country to escape the sanctions. The clear intent is for environmental disputes among the member countries to be settled through consultation and cooperation. No disputes have yet been filed under Part V, and the likelihood that they will be seems remote. No private party access exists under Part V of the NAAEC, that is, consultations that begin the dispute settlement process under Part V of the agreement must be initiated by a NAFTA member government. Informal consultations among the member governments will likely

[8] For latest figures, see http://www.cec.org/Page.asp?PageID=1226&SiteNodeID=210 (accessed 29 January 2012).

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preclude the more formal proceedings of the Part V dispute settlement process (McKinney, 2000, 109).

The decisive difference between NAFTA and the EU appears clearly here. There is no delegation of powers to supranational bodies like the European Commission and the ECJ. The possibility of delegation to panels under Part V of the environmental agreement has not been used.

Although the NAAEC foresees votes in the Council by two-thirds majority votes, and thus 'pooling' of sovereignty, this possibility has not been used. In the EU, if a Member States fails to implement the *acquis communautaire* it is usually the Commission that starts proceedings, not another member state, although a member state could do so in principle.

4. Border Environment Cooperation Commission and North American Development Bank

Whereas the institutions mentioned so far are tri-national the two remaining institutions concern only the USA and Mexico. The Border Environment Commission (BECC) and the North American Development Bank (NADB) have been created to deal with environmental problems along the US-Mexican border. The former has its headquarters in Ciudad Juarez in Mexico and the latter in San Antonio, Mexico. The BECC runs technical assistance programmes and issues certification for projects seeking financial assistance through the NADB.[9]

According to the 2009 joint status report from the BECC and NADB the BECC's Technical Assistance programme had then allocated US$36.68 million to 292 environmental infrastructure projects related to water, sewage and municipal waste in 149 communities on both sides of the border. The NADB had authorized US$23.74 million in grant funding to 229 institutional strengthening and project development studies for 119 border communities.[10] Total NADB financing as of September 30, 2011, was 1,219.4 million US dollars, $473.1 million going to the USA and $746.3 million going to Mexico.[11]

It is worth noting that the USA and Mexico contribute equal amounts to the budget of the BECC and they have also contributed equally to the NADB's capital.

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[9] The website of the BECC is at www.cocef.org and the website of NADB is at www.nadb.org. (Last accessed 29 January 2012).

[10] Available at: http://www.cocef.org/files/document_244.pdf (Last accessed 29 January 2012).

[11] Summary Status Report, at http://www.nadb.org/pdfs/FreqUpdates/SummaryStatusReport.pdf (Accessed 29 January 2012).

NAFTA's achievements

Space does not allow for a detailed account of NAFTA's achievements. The official view is positive. NAFTA has created the world's largest FTA and created more trade and foreign direct investments (FDI). During its first 10 years of existence trade among the three member countries doubled, from US$306 billion in 1993 to almost US$621 billion in 2002. In the case of Mexico, the poorest member country, trade increased even more than for the United States and Canada. Mexican exports to the US grew by 234 percent and exports to Canada grew by 203 percent.[12]

Also FDI more than doubled between the three member countries, from US$136 billion to US$299.2 billion between 1993 and 2000.

The official view is also that environmental protection and respect for basic labour standards have been strengthened by NAFTA's side-agreements.

Economic growth 1993-2003 was 38% for the United States, 30.9% for Canada and 30% for Mexico. And it is claimed that productivity rose 28% in the United States, 23% in Canada and 55% in Mexico.[13]

Some NGOs, however, have been much more critical in their assessment of NAFTA. The US Public Citizen for instance says that "NAFTA contained 900 pages of one-size-fits-all rules to which each nation was required to conform all of its *domestic* laws – regardless of whether voters and their democratically-elected representatives had previously rejected the very same policies in Congress, state legislatures or city councils." Further,

> … NAFTA is really an investment agreement. Its core provisions grant foreign investors a remarkable set of new rights and privileges that promote relocation abroad of factories and

[12] "NAFTA: A Decade of strengthening a dynamic relationship" downloaded from: http://www.ustr.gov/Trade_Agreements/Regional/NAFTA/NAFTA_at_10/Section_Index.html (Accessed April 2010, no longer available, but available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/nafta10.aspx?lang=en&view=d , accessed 29 January 2012).

[13] NAFTA: A Decade of Success" downloaded from: http://www.ustr.gov/Document_Library/Fact_Sheets/2004/NAFTA_A_Decade_of_Success.html (Last accessed 29 January 2012)

jobs and the privatization and deregulation of essential services, such as water, energy and health care.[14]

Without going further into claims and counter-claims it seems that most observers agree that NAFTA has created both trade and investments. However, as one should expect, the gains have not been evenly distributed, and there have been losers. NAFTA itself has not created mechanisms to deal with distribution issues, apart from the special programmes for the Mexican-US border area. It is also fair to say that the records of the side agreements on labour and environment have been disappointing. According to Armand de Mestral "all three governments have been hostile and defensive in response to complaints." And in the case of the NAALC "measures were seldom taken following a complaint" (de Mestral 2011, 656).

If the measuring rod is the declared goal of trade liberalization as it is outlined in the treaty NAFTA must be judged to be a success. It is also fair to say, as Mattli does, that the United States played a leadership role in the early 1990s at least. The success must partly be explained by the precision and detail in the treaty that left little reason for *ex post* politicking. However, the relatively complete contract and lack of institutions to deal with *ex post* decisions also mean that NAFTA is not equipped to deal with many new and current challenges (see also Morales 2010). It is not a dynamic institution that can deal with new challenges the way the EU has done with a degree of success. We get a similar assessment from a leading Canadian scholar, who recently concluded that NAFTA "has not realised its potential." He blames the free trade format itself "as well as the unwillingness of the parties to go beyond the free trade format and their refusal to deal with new trade and security issues within NAFTA" (de Mestral 2011).

Table 2 : Descriptive summary of NAFTA

Nature of agreement	**Institutional capacity**	**Leadership**	**Achievements**
Law treaty (relatively precise and complete contract): Specific policy rules in	Under the general NAFTA: No pooling, some delegation in respect to dispute-settlement	Some US leadership at the outset No institutional leadership	FTA-Plus: Goods, services, investments, competition

[14] Quoted from the organization's website: www.citizen.org/trade/nafta/ (Last accessed 29 January 2012).

the treaties	Under the labour and environmental agreements: Some pooling, but not employed in practice; Some delegation of authority to panels, but used sparingly No redistribution		Important increases in intra-NAFTA trade and FDI Cooperation on labour and environmental issues: Relatively minor effects so far

Source: Compiled by the author. See also Laursen 2005a.

The Case of MERCOSUR[15]

The Southern Common Market (MERCOSUR) was founded by Argentina, Brazil, Paraguay and Uruguay by the Treaty of Asunción of 21 March 1991 (MERCOSUR, 1991a). The preamble said that expansion of domestic markets, through integration, was a vital prerequisite for accelerating economic development. More specifically the purpose was to establish a common market. This would involve

> The free movement of goods, services and factors of production between countries through, inter alia, the elimination of customs duties and non-tariff restrictions on the movement of goods, and any other equivalent measures;
> The establishment of a common external tariff and the adoption of a common trade policy in relation to third States or groups of States, and the co-ordination of positions in regional and international economic and commercial forums,
> The co-ordination of macroeconomic and sectoral policies between the States Parties in the areas of foreign trade, agriculture, industry, fiscal and monetary matters, foreign exchange and capital, services, customs, transport and communications and any other areas that may be agreed upon, in order to ensure proper competition between the States Parties;
> The commitment by States Parties to harmonise their legislation in the relevant areas in order to strengthen the integration process (Article 1).

[15] This section borrows from Laursen 2010 as well as Laursen 2009.

This can be summarized as first of all adding up to a customs union with a common trade policy. Beyond that the goal was also a common market which would be based on co-ordination of policies in specific areas, including money, as well as harmonization of legislation. This might take MERCOSUR towards an economic union. But were the commitments credible?

Here we have to remember that MERCOSUR is very incomplete contract compared with NAFTA. At the same time it also aims to go much further than NAFTA.

Nowadays MERCOSUR is often referred to as an incomplete customs union. So there is still a long way to the ultimate declared goal. This calls for a lot of *ex post* politics involving both issues of efficiency and distribution.

Institutional Setup

The Treaty of Asunción established two main institutions (Article 9):

(a) The Council of the Common Market
(b) The Common Market Group.

The Treaty specified that "The Council shall be the highest organ of the common market, with responsibility for its political leadership and for decision-making to ensure compliance with the objectives and time-limits set for the final establishment of the common market" (article 10). As to composition it was specified that "The Council shall consist of the Ministers of Foreign Affairs and the Ministers of the Economy of the States Parties." It would meet "at least once a year with the participation of the Presidents of the States Parties" (Article 11). A rotating presidency was foreseen (Article 12).

As for the Common Market Group, it was defined as "the executive organ" and it would have "powers of initiative." It would propose specific measures for applying the treaty, monitor compliance and "take the necessary steps to enforce decisions adopted by the Council" (Article 13). It would be composed of four members and four alternates from each member state, representing the Ministry of Foreign Affairs, Ministry of Economy or its equivalent and the Central Bank (Article 14).

The treaty also established an "administrative secretariat" in Montevideo to service the Common Market Group (Article 15).

How were decisions to be made by the two institutions, the Council and Common Market Group? By "consensus" it was stipulated (Article 16). So there was no pooling of sovereignty.

Was there delegation of sovereignty? No. The organizational structure established by the Treaty of Asunción did not foresee autonomous supranational institutions like the European Commission or the European Court of Justice (ECJ). The established organs were purely intergovernmental.

The Treaty of Asunción specified a transition period until 31 December 1994. By then "the final institutional structure of the administrative organs of the common market, as well as the specific powers of each organ and its decision-making procedures" should be determined (Article 18).

The Protocol of Ouro Preto of 17 December 1994 added more institutions and was more specific (MERCOSUR, 1994). It listed six organs (Article 1):

I. The Council of the Common Market (CCM)
II. The Common Market Group (CMG)
III. The MERCOSUR Trade Commission (MTC)
IV. The Joint Parliamentary Commission (JPC)
V. The Economic-Social Consultative Forum (ESCF)
VI. The MERCOSUR Administrative Secretariat (MAS).

The first three in the list were referred to as "inter-governmental organs with decision-making powers" (Article 2). The first one would make binding *Decisions*, the second one would make binding *Resolutions*, and the third one would make binding *Directives or Proposals* (Articles 9, 15 and 20).

The new MERCOSUR Trade Commission would be composed of four members and four alternates from each State Party, to be coordinated by the Ministries of Foreign Affairs (Article 17). It would monitor, propose, analyse and also take some decisions (Article 19). Further, it would "be responsible for considering complaints referred to it by the National Sections of the Mercosur Trade Commission and originated by State Parties or individuals, whether natural or legal persons" (Article 21). So it would have some functions similar to those of the European Commission without getting its independence as well as a judicial function without approaching anything resembling the ECJ.

The Joint Parliamentary Commission would represent the parliaments of the States Parties. It would have an equal number of members representing each State Party, to be appointed by the respective national parliaments. It would be able to make recommendations (Article 22-26). It was not given any real political, budgetary or legislative powers. It was a weak body compared with the

European Parliament, which also started out as a consultative assembly, but which was gradually empowered over the years, to become a real co-legislative body when co-decision was introduced by the Treaty of Maastricht in 1993.

The Economic-Social Consultative Forum would represent “the economic and social sectors”. It would be able to make recommendations (Article 28 and 29).

The MERCOSUR Administrative Secretariat would provide operational support, “providing services to the other Mercosur organs” (Article 31). It would be headed by a director (Article 33). It would have a budget, “funded by equal contributions from the State Parties” (Article 45).

The Protocol of Ouro Preto also gave “legal personality” to MERCOSUR (Article 34).

An annex to the Protocol established a General Procedure for Complaints to the MERCOSUR Trade Commission. If consensus cannot be reached in the MERCOSUR Trade Commission the case goes to the Common Market Group. If no consensus can be reached there, the case might go to an Arbitration Tribunal, as foreseen in the Brasilia Protocol for the Solution of Controversies, adopted on 7 December 1991 (MERCOSUR, 1991b).

The Protocol of Brasilia foresaw three possible steps: direct negotiations, participation of the Common Market Group and arbitration. If the first two were not successful an ad hoc Arbitral Tribunal could be established. It would have three members and make binding decisions (Article 21). The Protocol of Brasilia also had a section on private party complaints. Private parties would have to “file their complaints with the National Section of the Common Market Group of the State Party wherein they maintain their usual residency or which is the headquarters of their business” (Article 26). Private parties thus did not have direct access to the dispute settlement mechanisms.

Between 1994 and the beginning of the 2000s there were various additional institutional changes, none of them radical. This is a list summarising these changes given by one source (Pena and Rozemberg, 2005):

- Consultation and Political Consensus-Building Forum (1998). This body is composed of high-level officials from Foreign Ministries. Its aim is to consolidate and expand the political dimension of MERCOSUR.
- Meetings of ministers. This allows sectoral meetings of ministers, such as industry, agriculture, environment, education, etc.

- Commission of Permanent Representatives of MERCOSUR. Created in October 2003 this body assists the Council and the President *Pro Tempore* in all activities required of it. It is composed of a Permanent Representative from each member state as well as one president.
- Permanent Review Court. It was created by the Olivos Protocol in February 2002 (MERCOSUR, 2002).
- Administrative Labour Court. This body deals with complaints by MERCOSUR Secretariat officials and their employees.

Institutional changes and additions have continued in recent years:

In 2003 the Administrative Secretariat was changed into a technical organ, the MERCOSUR Secretariat (Caetano et al, 2009, 39).

In 2005 a MERCOSUR Structural Convergence Fund was created (INTAL, 2009). Brazil is the main contributor. The main recipients are Uruguay and Paraguay.[16]

In 2007 a Consultative Forum of Cities and Regions was created. It had been decided to create it in 2004 (Caetano et al., 2009, p. 57)

Similarly it was decided in 2004 to create a MERCOSUR Parliament (Parlasur). In 2007 it replaced the Joint Parliamentary Committee. After a first stage, 2007-20010, where each member state will have equal representation of 18 members, a second stage with direct elections and proportional representation, is foreseen for 2011-2014. The Constitutive Protocol foresees a number of functions, including declarations, recommendations and proposals to the Common Market Council. But the Parliament has not been given legislative, budgetary or control powers (Caetano et al., 2009, 63-70).

The establishment of a Permanent Review Court and a Parliament are potentially important innovations. Their powers are not comparable to those of the ECJ and the European Parliament, but they can be seen as steps in the direction of creating better institutions, where a learning process may eventually lead to further changes.

Institutional Capacity[17]

[16] For 2010 figures, see: http://www.mercosur.int/innovaportal/file/655/1/DEC_016-2009_ES_Presupuesto%20FOCEM%202010.pdf (Accessed 29 January 2012).

[17] On this, see also Bouzas, 2002, Bouzas et al., 2002; Bouzas et al., 2008, and Gardini 2011..

In an account by two MERSOSUR experts in 2001 three things were emphasized as the major institutional traits of MERCOSUR as it had crystallized at the turn of the century, just before financial crises tested it:

1. Its strong inter-governmental bias
2. The "incomplete" character of its organs' legal acts, and
3. The absence of an independent jurisdictional body (Bouzas and Soltz, 2001)

The intergovernmental nature of MERCOSUR institutions is made very clear in the Treaty of Asunción and its protocols. Bouzas and Soltz had the following verdict on the Common Market Council:

> Over time, the credibility and effectiveness of CMC meetings diminished. The growing difficulty to iron out differences in lower decision-making layers led to issue-congestion and an over-burdened agenda at the top. The credibility of Presidential summits, that also started as important "signalling" events, also suffered as failures to implement and agree on pending issues mushroomed since the mid-nineties. The regular intervention of the heads of state in trade and policy disputes (christened as "presidential diplomacy") served at critical times to unlock blocked negotiations or de-escalate conflict. However, as implementation and follow-up were usually poor, this method over-exposed top political leaders and ultimately damaged credibility (Ibid., no pagination)

The MERCOSUR Trade Commission added in 1995 would eventually suffer from many of the same problems as the Common Market Council and its subcommittees. Overall, it is clear that intergovernmentalism has difficulties overcoming collective action problems. Bouzas and Soltz put it this way:

> The intergovernmental structure of MERCOSUR made the process flexible and cost-effective at the initial stages. However, it also stimulated governmental (and executive) "encapsulation", limiting the permeability of the decision-making process to non-governmental actors (Ibid).

The legal acts of MERCOSUR have neither immediate applicability nor direct effect. MERCOSUR acts have to be transposed ("internalised") through domestic legislative or administrative acts the same way

traditional international law has to be transposed. This contrasts with the direct applicability of Regulations in the EU and direct effect of most EU legislative acts. In MERCOSUR "the process of transposition has been slow, uneven and highly vulnerable to the good will" of the governments. Efforts to improve transposition in 1998 "had very limited impact upon performance."

Finally, concerning the Brasilia Protocol's Dispute Settlement mechanisms Bouzas and Soltz mentioned especially three problems:

> One has been the possibility of delayed negotiations: if member states agree, they can extend the mandatory fifteen-days term to undertake bilateral negotiations in the CMG almost indefinitely. In practice, this means that the triggering of third-party adjudication procedure can be delayed and replaced by political and diplomatic bargaining.
>
> (….)
>
> A second problem has been that the *ad-hoc* character of the tribunals conspires against the development of a "body of common interpretation".
>
> (….)
>
> Finally, there is the critical issue of enforcement. Although the verdicts of the ad-hoc tribunals are formally final (they are not subject to an appeal procedure) and binding, the practical meaning of "binding" in each member state differs according to the domestic constitutional background (ibid).

It remains to be seen whether the creation of a Permanent Tribunal of Revision in 2004 will be able to deal with the second problem.

A Mattli Inspired Perspective: demand and supply factors in the MERCOSUR

Bouzas and Soltz took a look at MERCOSUR applying the key concepts of Mattli's analytical framework (Bouzas and Soltz, 2001).

Traditionally there has been a low level of interdependence between the member states of MERCOSUR. This explains a relatively low functional demand for integration – and integration institutions. But structural reforms starting in the 1980s have increased economic intercourse between

the member states and the trade liberalisation implemented during the transition period in the early 1990s did have some effect. Intra-region trade increased during the 1990s.

> As unilateral and preferential trade liberalisation, as well as "contagion" effects, raised interdependence the demand for more formal, substantive and centralised institutions began to mount, particularly on the part of smaller countries (Ibid, no pagination).

But there were disagreements on what constituted a "level playing field" and the slow pace of "internalisation" and weak dispute settlement mechanisms aggravated the grievances. "The critical year of 1999 demonstrated the limited institutional resources (rules) to deal with the shock (the sizeable devaluation of the Real)."

> In sum, weak "demand pressures" for regional institutions at the start-up of MERCOSUR helps to account for the "lean" institutional design originally adopted. But this did not prevent member states from taking "hard" decisions and successfully implementing them. The ensuing rapid rise in interdependence was not strong enough to alter one basic feature of MERCOSUR, namely: structurally asymmetric interdependence produced by large differences in size (Ibid).

In other words, MERCOSUR has a fundamental problem of asymmetry. Brazil is by far the biggest country. If weighted voting, as it exists in the European Union, had been adopted in MERCOSUR, Brazil would be able to dominate.

The supply side of the question concerns the extent to which political leaders are willing and capable of responding to demands and challenges. Did the politicians and member state governments succeed in overcoming the "collective action" problems? Did they create "commitment institutions" or did they provide enough leadership to hinder defection and ease distributive tensions.

When Mattli wrote about MERCOSUR in 1999 he said:

> Within MERCSUR Brazil is the dominant economy. It accounts for approximately 75 percent of total MERCOSUR GDP and for 80 percent of its industrial manufacturers. Nevertheless, Brazil has been reluctant to use its economic and political position to

> assume active regional leadership. Whenever short-term national interests have been at stake, Brazil has relegated MERCOSUR to second place. (Mattli, 1999, 160).

For instance, "Brazil has staunchly opposed plans to establish an EU-styled Commission or a supranational court." Further, "it has refused to pay heed to calls for regional redistribution schemes, which may be of little surprise in a country that is used to be one of the world's least equitable distributions of domestic wealth" (ibid). So Mattli's conclusion was a challenge to Brazil: "In the absence of active Brazilian leadership, MERCOSUR is unlikely to develop much beyond today's imperfect customs union" (Ibid., 161).

Bouzas and Soltz arrived at similar conclusions: "Weak "supply" conditions help to account for lean "commitment" institutions and the practical absence of enforceable co-ordination initiatives at the regional level" (Bouzas and Soltz, 2001). "(…) incentives for the larger member state to provide the leadership required (and pay the costs for it) have been very weak".

At the same time, however, it should be admitted that joint presidential leadership has sometimes allowed MERCOSUR to move forward (Malamud, 2003). But that kind of leadership is not the most reliable, especially if one of the member states, Brazil, hesitates.

Whether the recent institutional changes mentioned above will allow MERCOSUR to improve its performance remains to be seen. Intra-regional trade, which fell drastically after 1999, has not yet reached the levels of the mid 1990s. Today it is not only much lower than in the EU and NAFTA but also lower than in ASEAN.

Table 3: Descriptive Summary of MERCOSUR

Nature of Agreement	**Institutional capacity**	**Leadership**	**Achievements**
Framework treaty Specific requirements to establish customs union and common trade policy Coordination and harmonisation foreseen to establish a	No poling or delegation Practically no redistribution Ad hoc dispute settlement tribunals *Recent reforms may gradually improve institutions:*	Weak Brazilian Leadership Weak institutional leadership	Incomplete customs union Weak implementation Major steps needed to achieve the declared goal of a common market

common market Treaty supplemented with protocols	Permanent Tribunal of Revision (2004), opinions not binding Structural Convergence Fund created in 2005 Weak parliament, PARLASUR created in 2006		

Sours: Compiled by the author. See also Laursen 2009.

Some (Tentative) Conclusions

Conclusions based on two-three cases must necessarily be somewhat tentative. But n=3 is better than n=1. I have summarised the findings in tables 2-3 above comparing NAFTA and MERCOSUR with the EU. The argument has been that 'institutions matter'. But it has to be admitted that the ubiquitous question of over-determinations remains (Przeworski and Teune, 1970). Apart from looking at the institutions I have also, albeit in less detail, talked about leadership. Further, the question of asymmetry emerged as a potentially important variable that may explain why MERCOSUR has not chosen a complete contract or supranational institutions to deal with collective action problems.

Among the three integration schemes covered in this analysis the EU and NAFTA have been the most successful, albeit at different levels of achievements. These two organisations approached the question of 'credible commitments' in different ways, but, according to Mattli, leadership was available in both. The EU included 'pooling and delegation' of sovereignty. NAFTA was based on a very detailed treaty, a rather complete contract which reduced *ex post* implementation issues, but also made the organisation more static. So the question is, was it leadership or the different ways of dealing with credible commitments that were decisive for the relative success?

Table 4: (Tentative) Explanatory Conclusions

Case	Independent variables	Intervening variables	Dependent variable
EU	Moderate power asymmetry	Supranational institutions	High degree of achievement of objectives (increasing

	High degree of interdependence Guiding ideas (Monnet)	Incomplete contract Leadership readily available	over time)
NAFTA	High power asymmetry High degree of interdependence Ideas unimportant	Intergovernmental institutions Complete contract US leadership	High degree of achievement of objectives (stationary)
MERCOSUR	High power asymmetry Low degree of interdependence Limited ideational inspiration	Intergovernmental institutions Incomplete contract Limited leadership	Low to moderate degree of achievement of objectives (relatively stationary)

Source: Compiled by the author

MERCOSUR is an incomplete contract. Nor does it have strong commitment institutions. Further, regional leadership has been weak. It has been less successful. Admittedly, demand for integration was also lower in South America than in Europe and North America due to lower degrees of interdependence. MERCOSUR and NAFTA further exhibit greater asymmetries than Europet. So we have to admit that the differences are over-determined. The analytical findings based on the research design outlined in the introductory chapter in Laursen (2010) are summarised in table 4. The main independent variables are power, interests and ideas. The intervening variables are the nature of institutions and availability of leadership. The dependent variable is the degree to which objectives are achieved.

This leaves some important questions for our future research agenda: Why are some regional integration schemes better able to achieve the stated goals than others? There is no doubt in my mind that interdependence and power asymmetries are important structural factors that must be considered in our efforts to find answers. They affect both demand and supply of integration. Further, institutional choice in an integration scheme remains of central importance. Pooling and delegation of sovereignty is the most obvious way of creating credible commitments. There may be an alternative in the form of a relatively precise and complete contract from the beginning. But such an alternative will be more static and less able to adjust to new challenges.

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