

The Integration Law in MERCOSUR

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Abstract: This article summarizes the most relevant aspects of the most advanced integration process in South America: The Common Market of the South or MERCOSUR. It is described from origins of MERCOSUR, its organizational structure, its economic-commercial and political evolution and its legal-institutional dimension to its external relations and participation in multilateral negotiations. It also describes the progress related to the process of social and citizen integration and the measures that MERCOSUR has adopted to face the challenges of the coronavirus pandemic.

Keywords: Integration law; MERCOSUR; Common Market; South America; integration process.

1. Introduction

The Southern Common Market (or MERCOSUR, according to the Spanish acronym) is a regional integration process initially created by Argentina, Brazil, Paraguay, and Uruguay. Later, Venezuela also joined MERCOSUR (however currently suspended) and Bolivia, which is still in the process of accession to MERCOSUR.

MERCOSUR is an open and dynamic process. Since its creation, its main objective has been to promote a common space that generates trade and investment opportunities through the competitive integration of national economies into the international market. However, and despite its name, it is not currently a common market, but an imperfect customs union because some products duty's must be paid.

MERCOSUR has entered into multiple agreements with States or groups of States, granting them, in some cases, the status of Associated

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States, for example, with Chile, Peru, Ecuador and Colombia, among others. They participate in activities and meetings of the bloc and have trade preferences with the States Parties. MERCOSUR has also signed commercial, political and cooperation agreements with several diverse nations and organizations on the five continents.

Since its inception, MERCOSUR has promoted the principles of Democracy and Economic Development as fundamental pillars of integration, as well as an integration with a human face. This Common Market has also made agreements in terms of immigration, labor, cultural, and social matters, among others that are relevant to its inhabitants.

Its territory has an area of 14,869,775 km² where various continental and maritime ecosystems coexist². MERCOSUR contains one of the largest biodiversity reserves in the world and one of the most important freshwater reserves on the planet (Guaraní Aquifer).

Its population exceeds 295,007,000 inhabitants with a great diversity of peoples and cultures³. It is the fifth largest economy in the world⁴, having great energy resources, both renewable and non-renewable.

The main products this market exports to the world are soybeans, oil, iron, corn, and soybean meal. And the main export destinations are Asia (48%), the European Union (17%), and North America (14%).

The official languages are Spanish and Portuguese, and since 2006, the Guaraní language.

The MERCOSUR emblem, approved in 2002, contains the four stars of the constellation named Southern Cross on a curved green line above the word MERCOSUR/MERCOSUL, meaning the horizon. The Southern Cross has always been the main guiding element of the southern hemisphere and symbolizes the optimistic course of this regional integration organization.

2. Origins of MERCOSUR

Less than a decade after the first efforts towards integration in Europe began, during the 1950s, Latin American countries decided to follow a similar path, being stimulated by insightful information coming from the Economic Commission for Latin America and the Caribbean (ECLAC or CEPAL according to the Spanish acronym). The creation of the Latin American Free Trade Association (LAFTA or ALALC according to the Spanish acronym), through the signing of the Treaty of Montevideo I in

² Fuente: CEPAL 2012 – IGN

³ Fuente: CEPAL 2014

⁴ Fuente: World Economic Outlook Database – FMI (2014)

1960, marked a crucial moment in the history of integration in Latin America (Caichiolo, 2020).

It is important to highlight Latin American Integration Association (ALADI according to the Spanish acronym) as the largest Latin American integration group. ALADI's thirteen member countries together represent 20 million km² and more than 510 million inhabitants.

The "Treaty of Montevideo", signed on August 12, 1980, is the constitutive and regulatory legal framework. Among its general principles, this treaty established: pluralism in political and economic matters; the progressive convergence of partial actions towards the formation of a Latin American common market; flexibility; differential treatments based on the level of development of the member countries; and multiplicity in the forms of agreement of trade instruments. As central axes of action, this treaty incorporated: the promotion and regulation of reciprocal trade, economic complementation and the development of economic cooperation actions that contribute to the expansion of markets. It has also incorporated a comprehensive support system in favor of countries with relatively less economic development, to determine differential measures in the different mechanisms and regulations.

As an immediate precedent in the creation of MERCOSUR is the Argentine-Brazilian integration with the signing of the "Iguazú Declaration" between Presidents Alfonsín of Argentina and Sarney of Brazil in 1985. A bilateral approach started within the framework of the democratic impulse that was beginning in the region, along with seeking understanding and cooperation to encourage mutual development and growth.

In 1986, both countries signed the "Friendship Act" in Brasilia, in which Uruguay participated to promote economic cooperation between the three countries. Seven months later, Presidents Alfonsín and Sarney signed three additional Protocols related to Culture, Public Administration, and the creation of a Common Currency.

In February 1988, a tripartite meeting was held in Uruguay where the wish to integrate Uruguay into the integration process initiated by Argentina and Brazil was announced "in the degrees and modalities to be agreed upon later". In April 1988, the "Alborada Act" was signed between Uruguay, Argentina, and Brazil for the exchange of automobiles and their car parts. Later, Argentina and Brazil signed the "Integration, Cooperation and Development Treaty" to consolidate integration and economic cooperation.

This integrating process was confirmed with the "Buenos Aires Act" of 1990, signed by Presidents Carlos Menen and Fernando Collor. They promoted the idea of establishing a Common Market between Argentina and Brazil. At the end of 1990, Argentina and Brazil signed and registered in

ALADI an “Economic Complementation Agreement” in which the pre-existing bilateral trade agreements were deepened.

The clear political decision of Argentina and Brazil to carry out the binational integration process was transferred to the other two countries: Uruguay and Paraguay. Finally, on March 26, 1991, Argentina, Brazil, Paraguay, and Uruguay signed the “Treaty of Asunción”, giving rise to MERCOSUR, open to the other ALADI member states joining.

3. Economic-commercial and political evolution

The original signatory countries are State Parties: Argentina, Brazil, Paraguay, and Uruguay.

Venezuela was the first country to join the constitutive treaty in 2006. Its formal incorporation was in 2012 when, at the Presidents’ Summit in Mendoza, the suspension of Paraguay was decided (*after the summary impeachment to which Paraguayan President Fernando Lugo was subjected*), being that State whose Congress had not ratified its accession. By Resolution of August 5, 2017, the accession was suspended in all the rights and obligations inherent to its status as States Parties, which will cease when the full restoration of democratic order is verified.

Bolivia has been in the process of accession since 2015.

Associated States are those ALADI members that have entered into partial scope agreements with the bloc and have also expressed their intention to obtain that status, such as Chile, Colombia, Ecuador, and Peru.

Those countries which have entered into agreements with MERCOSUR within the framework of Section 25 of the 1980 Treaty of Montevideo may also be Associated States, as in the case of Guyana and Suriname.

To be Associated States, a country must join the 1998 “Protocol of Ushuaia on Democratic Commitment”, in force since 2002. As such, those countries participate as guests in the meetings of the MERCOSUR governing bodies.

MERCOSUR was born with the objective of establishing a Common Market, according to the scope established by the Treaty of Asuncion in the following terms:

“The free movement of goods, services and productive factors among countries, by means of the elimination of customs duties and non-tariff restrictions on the movement of goods and any other equivalent measure, among others.

The establishment of a common external tariff and the adoption of a common trade policy in relation to third States or set of States and the coordination of positions in regional and international economic trade forums.

The coordination of macroeconomic and sectoral policies among the States Parties: of foreign trade, agricultural, industrial, tax, monetary, exchange and capital, services, customs, transport and communications among others that are agreed, in order to ensure adequate conditions of competition among States Parties.

The commitment of the States Parties to harmonize their legislation in the concerning areas, to achieve the strengthening of the integration process.”

These economic objectives are extended over the legal grounds belonging to the Treaty of Asuncion, which states the intention of accelerating the processes of economic development with social justice, reaffirming its political intention to lay the foundations for a closer union among its peoples.

In this sense, the public policies included in the Social MERCOSUR show progress in comparative terms with economic integration, since now, it has only reached an *imperfect customs union*, given that some products must pay customs duties.

When the States Parties commit themselves to the constitution of a common market, their objective is, among others, the free circulation of goods, services and productive factors through the elimination of customs duties, non-tariff restrictions and the harmonization of regulations, standards and technical regulations.

The Common External Tariff was adopted in 1994. Its function has consisted of having a coordinated tariff policy for most products against third States, thus favoring intra-regional trade.

It was agreed that MERCOSUR States Parties could maintain a List of Exceptions to the Common External Tariff, which should contain a certain number of items of the MERCOSUR Common Nomenclature temporarily exempted from the general Common External Tariff regime. The current exceptions are for the Capital Goods, IT and Telecommunications Goods, Automobile and Sugar Sectors.

The MERCOSUR Customs Code was approved during the Presidents' Summit in San Juan, Argentina, in 2010. This code determines a single customs territory, with no difference between the introduction or departure of goods from any MERCOSUR port and/or airport. Once this code enters into force, it will allow the application of common customs regulations, provide legal certainty and transparency to operators in the region, unify the treatment granted to merchandise and optimize customs services, complying with the objective of the World Trade Organization (WTO): the expedition of the International Trade. The MERCOSUR Customs Code has been conceived as a “framework” Code which establishes principles and institutes in customs matters that will be applied in all land,

maritime and air areas of the States Parties. One of the essential points is the removing of the collection of the double common external tariff.

4. Legal-institucional dimensión

The Integration Law includes:

A. *The constitutive, original, or primary law*: Consisting of treaties that provide the integration process general framework. It establishes the objectives and the means to achieve them, the organs of the scheme and their powers. It also includes supplementary, additional, or modifying treaties or agreements. The conditions of validity of these norms are ruled by international law, especially by the law of treaties, both from customary and conventional sources (Vienna Convention on the Law of Treaties of 1969).

The MERCOSUR legal sources in this regard are:

1. The “Treaty of Asuncion” its protocols and supplementary instruments, such as the “Protocol of Ouro Preto on the institutional structure of MERCOSUR” of 1994, the “Protocol of Brasilia for the solution of disputes” of 1991, today replaced by the “Protocol of Olivos for the settlement of disputes” in MERCOSUR of 2002.

2. The agreements entered into within the “Treaty of Asuncion” and its protocols framework, such as the “Las Leñas Protocol of cooperation and jurisdictional assistance” of 1992, the “Buenos Aires Protocol on international jurisdiction in contractual matters” of 1994, and the “Agreement on international trade arbitration” of 1998, among others. Joining the “Treaty of Asuncion” by a State *ipso iure* implies acceptance of each of these protocols.

B. *Derivative or secondary law* made up of the rules derived from the bodies or institutions of MERCOSUR. It is not conventional law. Its validity is determined by the primary rules. It exists in a hierarchy lower than that of original law.

They are the norms that emanate from the MERCOSUR bodies with decision-making capacity such as the decisions of the Common Market Council, the resolutions of the Common Market Group and the directives of the Trade Commission, according to the organic structure which will be discussed below.

In 1994, in Ouro Preto City (Brazil) the “Protocol of Ouro Preto” was signed, an instrument that provides MERCOSUR with legal status and creates its new institutional structure for the period after January 1, 1995.

Currently, MERCOSUR institutional structure has been defined by the “Protocol of Ouro Preto”; the “Constitutive Protocol of the MERCOSUR Parliament” of 2005; and the “Protocol of Olivos”, which created the “Permanent Review Tribunal”, based in Asunción city.

Regarding the decision-making mode of the MERCOSUR bodies, it is achieved by *consensus*, requiring all the States Parties countries presence. For this procedure, the bodies are usually divided into two large groups, according to their prevailing capacity (decision-making, consultative or other):

1. Decision-making Bodies (with decision-making capacity)

1.1. The Common Market Council

It is the highest body responsible for the political leadership and decision-making aimed at ensuring compliance with the objectives established in the Treaty of Asuncion. It also exercises the ownership of the MERCOSUR legal personality agreed by the “Protocol of Ouro Preto”.

It is made up of the Ministers of Foreign Affairs and the Ministers of Economy of the States Parties, and at least once a semester this body has the participation of country presidents.

It is announced through *Decisions*, which are “mandatory” for States Parties.

1.2. The Common Market Group

It is the MERCOSUR executive body, guardian of the Treaty, it must ensure its compliance. It holds the power of regulative initiative when proposing draft Decision to the Common Market Council.

It is made up of 4 regular members and 4 alternate members from each country, representing: The Ministry of Foreign Affairs, the Ministry of Economy or their equivalents (areas of Industry, Foreign Trade and/or Economic Coordination) and the Central Bank.

Its legal acts take the form of *Resolutions*, which are "mandatory" for member countries.

1.3. The MERCOSUR Trade Commission

It is the body whose main mission is to *assist the Common Market Group in the field of trade policy*, ensuring the application of the common trade policy instruments agreed by the States Parties for the customs union operation, as well as reviewing related issues and matters in terms of common trade policies with intra-MERCOSUR trade and with third countries.

The Trade Commission M is made up of 4 regular members and 4 alternate members for each of the States Parties and is coordinated by the Ministries of Foreign Affairs.

The arising legal acts can be of two types: *Directives* that are mandatory for States Parties, and *Proposals* that are addressed to the Common Market Group on new regulations or amendments of existing ones as regards trade matters.

2. Advisory bodies (or without decision-making capacity)

2.1. The MERCOSUR Parliament (or PARLASUR)

It is the peoples' representative body, advisory, independent and autonomous, made up of Eps' representatives. This body does not have decision-making powers, it is conceived to play a strong political role, as a body representing the ideological and political plurality of the States Parties' peoples.

It has the power of *legislative initiative*, sharing this attribution with the Common Market Group. The MERCOSUR PARLIAMENT proposes projects of MERCOSUR standards for consideration by the Common Market Council, which must report on their treatment every six months.

The MERCOSUR Parliament works with a single camera and must conduct at least one regular session per month. Countries must ensure adequate representation by gender, ethnicity, and region. It stipulates that the number of parliamentarians for each country will be "proportional to the population", since the MERCOSUR Parliament does not represent the States.

For its integration, the "*Political Agreement for the MERCOSUR consolidation*", established the "attenuated proportionality" formula, setting the bases for the definitive parliamentary integration. From January 1, 2015 and until this year, all parliamentarians would be elected by simultaneous vote, forming Parliament: Brazil with 75 members, Argentina with 43, Paraguay and Uruguay with 18 members each.

To date, Argentine and Paraguayan legislators have been elected by popular vote, that is, two of the five members have complied with the Mercosur treaties and legislation.

To make decisions, there are 4 different types of majorities for issues of different complexities: simple, absolute, special, and qualified. The MERCOSUR Parliament is expressed through: Opinions, Draft regulations, Preliminary Draft Regulations, Declarations, Recommendations, Reports, Provisions.

2.2. The Economic-Social Consultative Forum

It is a consultative body – not a decision-making body – in which various sectors of the economic and social life of each of the States Parties are represented. It speaks through Recommendations addressed to the Common Market Group.

2.3. The Administrative Secretariat of MERCOSUR:

It is an operational body that provides the other MERCOSUR bodies with support and assistance tasks that are necessary for their proper functioning. The Administrative Secretariat of MERCOSUR has its permanent headquarters in Montevideo, Uruguay. The Administrative Secretariat of MERCOSUR is the bloc official archive, publishes and

disseminates the adopted standards, coordinates translations, and edits the MERCOSUR official bulletin, among other activities. It is headed by a director, a national of one of the States Parties, chosen by the Common Market Group on a rotating basis, after consulting the States Parties and appointed by the Common Market Council. Their mandate is 2 years, having no re-election.

2.4. The Permanent Review Tribunal

Body created by the Protocol of Olivos for the dispute resolution. It is a court of *permanent availability*. Its members, once appointed, “*must be available to act when summoned*”. It is based in Asunción, Paraguay.

It is made up of five arbitrators: four of whom are nationals of each of the States Parties and last two years in their functions, renewable for two periods. Each States Parties selects one regular arbitrator and one substitute arbitrator. The fifth arbitrator is chosen unanimously from a list of eight arbitrators (two for each one of the States Parties) and the appointment is for a three-year period, not renewable unless otherwise agreed by the States Parties.

The Permanent Review Tribunal adopts decisions by majority, and together with the MERCOSUR Parliament they give indications of supranationality to the process. Within the framework of its competence, the Permanent Review Tribunal: 1) directly understands disputes between States Parties, 2) resolves exceptional and urgent measures, 3) processes and decides on appeals for review, in the field of disputes among States Parties and 4) issues advisory opinions.

The Common Market Council, the Common Market Group, and the Trade Commission M (bodies with decision-making power) are intergovernmental in nature. They are composed only of government representatives who decide by consensus. This allows national governments to maintain control of the process, for two reasons:

1 - due to the failures of some previous ambitious Latin American experiences that tended to supranationality and

2- due to budgetary concerns of the States Parties governments that lead them to avoid incurring excessive expenses to administer the plan.

Technically, the MERCOSUR bodies cannot be considered to be a community since there is no waiver or transfer of sovereign powers. Its institutions do not have their own or autonomous powers, but rather have organic and functional dependency as they are composed of representatives of the States. They express the will and national interest of the State they represent.

The MERCOSUR dispute settlement system is regulated by the “Protocol of Olivos” and complemented by the Buenos Aires Protocol on disputes among individuals. It presents the following questions:

1. The incorporation of the “forum choice”, allowing the forum free choice.

2. The optional intervention of the Common Market Group that contributes to the institutional consolidation of the bloc by empowering the parties to directly initiate the arbitration procedure, without having to previously exhaust the “institutional solution”.

3. The creation of the Permanent Review Tribunal, which constitutes one of the most important modifications established by the “Protocol of Olivos”.

4. The establishment of advisory opinions to the Permanent Review Tribunal, as a mechanism of jurisdictional collaboration that allows any States Parties internal judge -of any jurisdiction and venue (federal or provincial)- to be faced with a case in which the interpretation or application of a MERCOSUR norm, or its validity, refer to the Permanent Review Tribunal -through the Supreme Court- a request explained its scope and meaning; without the intervention of the Foreign Office. They are not mandatory, nor are they binding on the consulting national judge.

The established procedure is public and contradictory, and only States Parties can intervene. Individuals, both natural and legal persons, can only file a claim with the National Section of the Common Market Group, when their interests are affected as a result of decisions taken by the States Parties, contrary to the regulations issued by MERCOSUR bodies. Thus, in the “Protocol of Olivos”, their access to jurisdiction is still prohibited, although the private claim procedure may also become an intergovernmental issue to be solved by arbitration.

The procedure foresees different modalities to which the parties may resort in various instances, depending on the conflict nature:

1. Diplomatic solution: direct negotiations.

2. Institutional Solution: the intervention of the Common Market Group.

3. Arbitration solution: the intervention of the Ad Hoc Court.

4. The Review Procedure: the intervention of the Permanent Review Tribunal against the award of the Ad Hoc Arbitration Court, any of the parties to the dispute may file an Appeal for Review before the Permanent Review Tribunal within a period not exceeding fifteen days from the corresponding notice. The recourse is only limited to the questions of law dealt with in the dispute and to the legal interpretations developed in the Ad Hoc Arbitral Court’s decision.

5. External relations and participation in multilateral negotiations

The Common Market Council has the power to negotiate and sign agreements on behalf of MERCOSUR, with third countries, groups of

countries and international organizations. These functions can be delegated by express mandate to the Common Market Group, in accordance with the procedures established in current regulations.

MERCOSUR carries out rounds of negotiations to conclude various agreements with third States and regional blocs, among which those held with some member states of ALADI, the European Union, the Pacific Alliance stand out. Other agreements are in negotiation, such as the ones held with Canada, Korea, Singapore, and Lebanon.

On July 24, 2018, the leaders of MERCOSUR and the Pacific Alliance, meeting in Puerto Vallarta, (Mexico) signed a joint declaration and an action plan to promote free trade and integration.

MERCOSUR tries to ensure preferential access to practically the entire European continent.

On June 28th, 2019, in Brussels, Belgium, it was announced that the negotiations for the signing of the “Strategic Association Agreement with the European Union” (had been concluded. It is an unprecedented agreement for both blocs, with which a negotiation process that lasted more than 20 years ends. This Agreement “at first” between MERCOSUR and the European Union would improve the access conditions in goods and services for exports. It allows deepening the political and economic link between both blocs in order to develop a strategic political space that contributes to the consolidation and deepening of the bi-regional relationship, to the formation of a more just world order. However, there are those who argue that it will be almost impossible to achieve because the Agreement must be ratified by each of the Eps’ Parliaments making up both blocs.

On August 23rd, 2019 the negotiations, which started in 2017, for a “free trade Agreement between MERCOSUR and the European Free Trade Association” (according to the Spanish acronym, EFTA), a bloc made up of Iceland, Liechtenstein, Norway, and Switzerland, were concluded in Buenos Aires. The agreement covers tariffs, regulatory issues, services, investments, government purchases, trade facilitation and customs cooperation, technical barriers to trade, sanitary and phytosanitary measures, sustainable development, competition, trade defense, and intellectual property.

6. The process of social and citizen integration

Since its creation, MERCOSUR has gone through different cycles of paralysis and relaunch without substantial changes in its operation or in its regulatory framework. After almost thirty years of integration, some consider it a failed attempt, one of many in the region since the 1960s. As member states suffer political and economic turmoil, they have focused on their recovery before dedicating enough time to be at the forefront of integration.

However, today it faces new challenges, on central aspects that make up its existence such as the customs union and free trade zone: The Common External Tariff, external negotiations, and free intra-zone movement.

Undoubtedly, MERCOSUR is the process with the greatest history and development in South American integration with numberless achievements that have contributed to the consolidation of democracy, respect for the rule of law, human rights and the construction and consolidation of a zone of peace in the region.

In terms of social and citizen integration, the main initiatives have been carried out through the “Strategic Social Action Plan of MERCOSUR”, the “Action Plan for the progressive formation of MERCOSUR Citizenship Statute” and the “Socio-Labor Declaration of MERCOSUR”.

The “Agreement on Residence for MERCOSUR Nationals, Bolivia and Chile” is considered one of the major milestones in the process of social integration of the regional bloc, and it only came into force in 2009. It was later extended by agreement to most of the Associated States (Peru and Ecuador in 2011 and Colombia in 2012).

The Institute for Public Policies on Human Rights (IPPDH according to the Spanish acronym) also stands out, with a view to strengthening human rights as a fundamental tenet of regional identity and integration through cooperation and coordination of public policies.

7. MERCOSUR facing the challenges of the pandemic

The impact of the Covid-19 emergency on health and mobility around the world is unprecedented. The MERCOSUR States Parties and Associated States agreed on a common strategy to combat the coronavirus. They agreed on the importance of looking for mechanisms that allow articulating joint policies to face the economic and social challenges derived from the pandemic. They stressed the need to continue working to reduce asymmetries in the bloc, for which the Fund for the Structural Convergence (FOCEM according to the Spanish acronym) plays a fundamental role. They approved a special fund of US \$16 million assigned, mainly, to improve the testing capacities of their member states, among other trade measures to provide more transparency with respect to trade while the health emergency lasts. They also highlighted the coordination of active surveillance measures and facilitation of the return of citizens and residents of the bloc to their places of origin or residence.

In the same way the pandemic has no borders, the solutions to its health and economic consequences should not have them either. Deepening regional integration is key to generating collective policies that respond to the direct and indirect impacts of the emergency.

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