Characteristics of the Institutional Structure and legal Nature of Mercosur

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Abstract. This article examines and analyzes the motives that have become the driving force behind economic integration known as MERCOSUR (Southern Common Market), which is a regional trading bloc with an economic, political and social integration project for Latin America. The article examines the prerequisites for economic integration between the countries of Latin America and its features. Special emphasis is placed on the structure of the Southern Common Market, the main areas of activity and the legal aspect of the functioning of internal institutions and decision-making process. For this, more attention is paid to several documents. First of all, this is the Treaty of Asunción, which Argentina, Brazil, Paraguay and Uruguay signed in 1991, thus creating MERCOSUR. Additionally, author investigated the subsequent the Protocol of OuroPreto, which was signed in 1994 and laid the institutional foundation for the Southern Common Market.

The author came to the conclusion that the application of the MERCOSUR law is one of the main problems of this integration project due to the legal nuances of each MERCOSUR member country. Also, the lack of supranational institutions of MERCOSUR, which are entrusted with the supervision of the observance of the MERCOSUR law, can be ranked among the main gaps in the legal status of the Southern Common Market.

Keywords: Latin America, MERCOSUR, economic integration, institutional structure, legal character.

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Introduction

Latin America has almost the same experience of economic integration in terms of duration as Western Europe. The first attempts at integration in the region until the early 1990s were mostly unsuccessful. In the mid-1980s, the new but fragile democratic regimes focused on consolidating the liberal democratic order and solving the deep financial and socio-economic problems of the region that hindered the deepening of democracy by adopting an economic model in which a rapidly growing market was the focus. This allowed a number of countries to obtain the economic resources necessary to implement their large-scale political plans within the regions [Davydov, 2020]. As a result, several diverse civilizational political projects have appeared on the South American continent. These include: UNASUR (Union of South American Nations, since 2004), MERCOSUR (South American Common Market, since 1991), ALBA (Socialist Alliance of South American and Caribbean Countries since 2004) CELAC (Community of Latin American and Caribbean States since 2010) and many others. MERCOSUR turned out to be the most stable of the projects listed above.[Gorbachev, 2020]. The future member countries of the Commonwealth, Argentina and Brazil, since 1985, have taken numerous steps towards the process of economic integration, culminating in the creation of a Common Market of the Southern Cone countries (Mercado Común del Sur, MERCOSUR) in 1991. In addition to Argentina and Brazil, Uruguay and Paraguay, which signed the Treaty of Asunción (Tratado de Asunción)[2], also initially joined the composition,where they agreed to establish a common market, that is, a common external customs tariff and the absence of any internal tariffs [Gabriela, 2016].

MERCOSUR, based on an international treaty that creates new intergovernmental institutions, the purpose of which is: the creation of a customs union and a common market associated with four freedoms – the freedom of movement of goods, services, capital and labor. As such, this intergovernmental structure that emerged in the Latin American integration project is definitely not limited to the free trade Association. The strategic goal of MERCOSUR, as an integration association, was stated as guaranteeing the economic growth of its participants by increasing the intensity of mutual trade, effective use of investments, the result of which should be an increase in the international competitiveness of the participating countries.

[2]Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay. URL: http://www.sice.oas.org/trade/mrcsr/TreatyAsun_e.asp#e(accessed 27.11.2020).

Economic integration in Latin Americaand the creation of MERCOSUR

The first attempt at economic cooperation in Latin America is considered to be the creation of the Latin American Free Trade Area (ALALC), which united Argentina, Brazil, Bolivia, Venezuela, Colombia, Mexico, Paraguay, Peru, Chile, Uruguay and Ecuador. It was not very successful, and in 1980, 20 years after its creation, the community was transformed into the Latin American Integration Association (ALADI). The development of the integration process developed within the framework of this cooperation was aimed at socio-economic support of the region, and its long-term goal was the gradual and progressive creation of a single Latin American market. The new agreement was flexible and allowed to conclude trade agreements only between 2-3 countries, but the free trade zone was not created in this way. Macroeconomic imbalances, such as budget deficits. The decline in external investment flows and hyperinflation experienced by Argentina and Brazil forced other countries to switch to a protectionist regime. Moreover, weak authoritarian regimes faced with a serious socio-economic crisis were unable to undertake regional integration initiatives [Vervaele, 2005: 391]. Thanks to the growing political rapprochement between Argentina and Brazil since the late 70s of the twentieth century (this is evidenced by the signing of several agreements on issues such as energy supply, nuclear energy, and the arms industry), the course on economic integration continues to strengthen on the continent. In the second half of the 1980s, this led to more intensive negotiations between Brazil and Argentina, initiated in 1985 by Argentine President Raul Alfonsin (years of government: 1983 – 1989). At that time, these two countries were the main players on the continent, regarding the formation of a regional community that was intended to further deepen the integration process, compared to ALADI.

A year later, in 1986, the countries signed the Program of Integration and Economic Cooperation Argentina– Brazil (Program de IntegraciónyCooperaciónEconómica Argentina-Brasil, PICE), which was built around negotiations on industry agreements covering such areas as manufacturing, food, technological cooperation, as well as metallurgy, nuclear industry and automotive [Cason,2010]. In 1988, Argentina and Brazil accelerated the process of rapprochement by signing an Agreement on Integration, Cooperation and Development (Tratado de Integracion, Cooperacion y Desarrollo), the purpose of which was to form a common market over the next ten years [Bueno, Luis, 2014]. In 1990, Uruguay, which had previously been reluctant to join the process, preferring to support bilateral trade agreements, joined PICE2.

The favorable economic conditions of the mid-1980s deteriorated due to the failure of domestic macroeconomic policy and external constraints imposed by their external debt. By 1990, both Argentina and Brazil were in a deep economic crisis, which further slowed progress towards

economic integration, but some of the main objectives of the agreements were implemented. Argentina's growing trade deficit and the decline in exports of food and industrial raw materials, which formed the basis of the agreements, amounted to only 353 million. In 1988, compared to 431 million US dollars in 1980 [Manzetti, 1990: 122]. Faced with internal opposition from Congress and interest groups, Brazilian President Alfonsin and Brazilian President Jose Sarney (years of government: 1985 – 1990) found it increasingly difficult to maintain the pace of integration. As political instability in both countries increased, it became increasingly difficult for both presidents to overcome internal resistance to further rapprochement. The top-down integration approach described in the PICE policy document was the result of decisions taken by the political elites of both countries, which immediately led to strong opposition from business, which was affected by these processes [Manzetti, 1994: 104]. Thus, the economic and political issues that arose prevented further rapprochement until the presidential elections and the formation of new administrations in Argentina and Brazil.

Many concerns about the future of integration in the region were quickly dispelled when, in 1989 and 1990, respectively, after the inauguration of Argentine President Carlos Saul Menem (years of government: 1989 – 1999) and Brazilian President Fernando AfonsoCollor de Melo (years of government: 1990 – 1992). In July 1990, Menem and Collor de Melo signed the Buenos Aires Act, which called for the creation of a common market by the end of 1994. This marked the beginning of a new stage of relations due to the expansion of the scale and institutionalization of integration. Both countries now sought integration in the context of unilateral trade liberalization and structural adjustment programs [Vervaele, 2005]. Soon after, first Uruguay and then Paraguay found it possible to join the Buenos Aires Law. Their entry was caused by specific reasons. For Uruguay, trade liberalization between Argentina and Brazil could negatively affect preferential access of goods to the Argentine and Brazilian markets (preferential treatment operated on a non–reciprocal basis). For Paraguay, it is a political factor when, after a long–term military-political regime, membership in MERCOSUR was considered as an important element of the country's democratization [Roman, 2020]. As a result, on March 26, 1991, the Foreign Ministers of Argentina, Brazil, Paraguay and Uruguay signed the Asuncion Treaty, which created MERCOSUR and called for the creation of a common market by December 1994. The Southern Cone Common Market inherited and institutionalized the Buenos Aires Act of 1990. The agreement lists four instruments for the formation of a Common Market: a trade liberalization program, a single external tariff, coordination of macroeconomic policy, and the adoption of sectoral agreements.

In fact, as noted by Brazilian diplomat and MERCOSUR expert Paulo Roberto de Almeida [Kaltenthaler, Mora, 2002: 74], the Common Market of the Southern Cone is the culmination and institutionalization of the bilateral integration process that began many years ago.

Features of economic integration

The Asuncion Treaty, as mentioned earlier, provided for the gradual abolition of import tariffs until the end of December 1994. Paraguay and Uruguay were given an additional year to change their own legislation to comply with the ideas of the common market and to reconcile trade contradictions (which was originally a barrier to signing the Treaty). During the transition period (1991-1994), several high-level meetings were held to agree on a common external tariff rate (20%) and to relieve tensions that arose as a result of asymmetry between the participating countries. Despite repeated conflicts, mainly between Argentina and Brazil over anti-dumping obligations, the Presidents have repeatedly stated their commitment to strengthening this process. In the period from 1991 to 1998, the integration process developed rapidly. In a very short time, since January 1995, the main points of the mutual trade liberalization program were implemented, which provided for an automatic and universal reduction of customs duties by 7% per year, starting from the date of signing the Asuncion Treaty. As a result, 90% of goods were completely exempted from tariff and other barriers to trade, and the remaining 10% of goods (semi-finished products, some consumer goods, as well as machinery and equipment in the trade of Paraguay and Uruguay) were included in the national exclusion lists, having received special conditions for tax tariffing (sugar, machinery products) [Fedorchuk Mac-Eachen, 2021]. Trade within MERCOSUR increased by 26%, and the share of intraregional trade of MERCOSUR countries increased from 8% to 21% over the same period [Markwald, Machado, 1999: 63-64]. For Brazil, whose exports to MERCOSUR partner countries grew by an average of 37% per year, the Common Market of the Southern Cone began to be regarded as an important market from a business point of view. Consequently, there was a certain incentive to continue the process, despite recurring structural problems, such as asynchronous macroeconomic cycles, lack of harmonization of macroeconomic policy and lack of a permanent institutional framework [Desiderá, 2018][3].

The Council of the Common Market (Consejo del Mercado Común, CMC), according to Articles 3, 8 of the Agreement, consisting of Ministers of Foreign Affairs and Ministers of Economy, has become the main body of the association, having received the right to make decisions on MERCOSUR issues and qualifies as the highest political body. The Common Market Council is

[3]Protocol of OuroPreto. Additional Protocol to the Treaty of Asunción on the Institutional Structure of MERCOSUR. URL:http://www.sice.oas.org/trade/mrcsr/ourop/ourop_e.asp (accessed 27.11.2020).

responsible for achieving the objectives of the Asuncion Treaty. It consists of the Ministers of Foreign Affairs and Economy (or their equivalents), it is authorized to make all decisions concerning integration policy in order to achieve the goals and implement the provisions of the founding treaty, organize new meetings of ministers, hold meetings of heads of State and makes extensive use of this competence. In addition to meetings of Ministers of Agriculture and Industry, meetings of Ministers of Justice, Internal Affairs and Social Affairs are now also held. The General Market Council meets if necessary or at least once a semester. The chairmanship is carried out in turn every semester. The Council's decisions are binding on all participating countries. It is authorized to conclude agreements on behalf of MERCOSUR with third States, groups of countries and international organizations.

The Grupo Mercado Común (GMC) Common Market Group, which is enshrined in articles 10, 14 of the OuroPreto Agreement, consisting of representatives of the Ministry of Foreign Affairs, the Ministry of Economy and central banks (or their equivalents), became the main executive body of the association. The Group consists of four permanent and four non-permanent members from each State, it manages all working groups, special groups and specialized meetings on agriculture, harmonization of technical standards of products, the environment, financial services, border control and tourism. The group may also include representatives of other departments, they meet if necessary and under the conditions established by the regulations. The main task of this body is to take the necessary measures to implement the decisions taken by the Council of the Common Market, as well as to define a program of actions that guarantee the promotion of the development of the common market. In addition, the Common Market Group organizes meetings of the Common Market Council, prepares reports and conducts research at the request of the latter. The Common Market Group approves the internal regulations of the Trade Commission, the Socio-Economic Advisory Committee, as well as the Center for the Promotion of the Rule of Law.

The Comisión de Comercio del Mercosur (CCM) falls under the Common Market Group, as described in articles 16, 19 of the Agreement. It is a subsidiary intergovernmental body and has competence in specialized economic issues such as competition, procurement, customs, consumer protection, etc. It provides assistance in the implementation of joint commercial policy, the implementation of contracts, in solving customs issues between countries and third countries. And also helps the MERCOSUR Common Market Group to monitor the application of trade and political mechanisms agreed between the member States in order for the Customs Union to work, to monitor the issues of the common MERCOSUR trade policy with respect to third countries. Within

the framework of its powers, the Commission has been granted the right to consider and make decisions on the proposals of the Member State, to consider the establishment of a common customs tariff, as well as other trade policy issues and to make proposals on them to the Common Market Group. The Commission consists of four permanent members and four non-permanent members from each Member State. They also report directly to the Foreign Ministers. The Commission meets at least once a month and, if necessary, at the request of the MERCOSUR Group or any Member State.

Decisions of the Common Market Council and the Common Market Group are taken by consensus and with the participation of representatives of all Member States. The resolutions adopted by the Common Market Group are binding on MERCOSUR member States. Despite the fact that the above-mentioned MERCOSUR governing bodies make decisions that are binding on the participating States, the right of legislative initiative is exclusively in the hands of the MERCOSUR member States [Doctor, 2013].

To coordinate the work of MERCOSUR within the framework of the Common Market Group, an Administrative Secretariat (Secretariat of MERCOSUR, SM) was created, which carries out all the documentary activities of the integration community – stores and registers correspondence, informs involved persons and organizations, makes requests and develops budget drafts, prepares lists of experts and arbitrators, publishes reports. The secretariat is headed by a Director (a citizen of one of the Member States) who has a mandate for 2 years with a ban on re-election.

Simultaneously with the structure of the executive bodies, within the framework of MERCOSUR were formed: the legislative branch, represented by the MERCOSUR Parliament (Parlamento del MercosuroParlasur, PM) and the judicial branch, represented by the Permanent Review Tribunal (TRP). The MERCOSUR Parliament is a representative body of citizens of the MERCOSUR member States was established a little later, in 2005, and began functioning only in 2007, it consists of an equal number of representatives of the parliaments of all member States. The appointment of parliamentarians is carried out by each State in accordance with their internal procedure. Its main task is to facilitate the acceleration of the implementation of the decisions of the authorities and the policy of harmonization of legislation. Although it is not empowered to make decisions, it is an independent body that must prepare a preliminary opinion on decisions, resolutions and directives issued by MERCOSUR, when necessary for their implementation by national legislatures [Dri, 2010]. This body has the following powers: control over compliance with MERCOSUR norms, preservation of democratic governance and respect for human rights, maintenance of public interest

in integration processes, preparation of national standards for the harmonization of legislation of the participating countries, development of institutional relations with the parliament of third countries. The judicial authority of MERCOSUR, established in accordance with the Protocol of Olivos 2002, The jurisdiction of the Court of Audit extends both to the relations between the States parties to the Asuncion Treaty, and to the relations of individuals with the participating country, and between individuals in connection with the application of the provisions of the abovementioned treaty. Disputes to be considered by the court relate to issues such as interpretation, application or non-fulfillment, its protocols and additional agreements signed under this Agreement, as well as disputes that may arise when making decisions, issuing directives and resolutions of the executive bodies of MERCOSUR [Shebanova, 2016]. It is important to note that the competence of the Audit Court extends to socio-economic issues (including labor relations), but also to the sphere of human rights, since this issue falls within the competence of the main and subsidiary bodies of MERCOSUR [Alekseev, Gapeev, 2019]. The court may also consult on issues of integration law. This is enshrined in article 3 of the Olivos Protocol, which determines that the Common Market Council may establish the procedure for requesting an advisory opinion to the permanent Court of Audit, determine the scope of such an opinion and the procedure for its issuance. The advisory opinions of the Audit Court serve as a tool for the harmonization and unification of the national legislations of the integration member States, the formation of a uniform practice of the application of the law of integration, eliminating the possibility that the various national institutions of each member State will interpret the norms in accordance with their often contradictory views.

Conclusions

MERCOSUR is an integration association of Latin America aimed at sustainable socio-economic development through the promotion of free trade, movement of goods, population, currency of the participating countries, leading to an improvement in the quality and standard of living for the local population. Having a decentralized organizational structure, it is nevertheless governed by the political elites of the participating States and therefore largely depends on the political and economic cycles that take place in the regions. [Davydov, 2020]. In the short term, this may be an advantage to ensure the political feasibility of the project, but in the medium term it is clearly unprofitable [Gardini, 2011]. Open regional integration is not always easy, and conflicts between States, between private organizations, whether individuals or legal entities, and between individuals and national and/or regional authorities are sometimes an obstacle in the process of developing cooperation between countries. This was observed in Latin America both during the last decades of the twentieth century and in the first decades of the twenty-first century.

The history of Latin American economic integration proves that the member States alone are not able to implement regional integration and that the intergovernmental model is also no longer enough, it is one of the forms of interconnections and interdependencies of regional economies [Heifetz, Chernova, 2020: 36]. This point of view is actually supported by the position that at the present stage globalization has outlived itself, while the idea of strengthening regional and national economic sovereignty, as the personification of an almost forgotten concept of autocratic development, is becoming more and more relevant. Moreover, this does not mean that a strong supranational organization with supranational jurisdiction should be created at any cost and immediately. However, it is important that some kind of general administration be created in which national and regional authorities give the form and content of regional integration through a system of checks and balances. It is also important that an independent body endowed with judicial power can make fundamental decisions regardless of the economic or political interests of the parties. Against this background, it is clear that MERCOSUR is struggling to cope with the contradiction between the goals of the community and not always effective intergovernmental instruments. The position of the Administrative Secretariat is very weak, and the right to introduce bills is exclusively in the hands of the participating States. The entry into force of the MERCOSUR Law is too complicated and too dependent on the internal procedures and programs of the participating States. Due to the non-recognition of the direct effect of the MERCOSUR law, the position of legal entities in domestic legislation remains weak. MERCOSUR legislation also does not provide tools for enforcement by either participating States, MERCOSUR institutions, or legal entities. In other words, the parties that could ensure the autonomy of the MERCOSUR law do not have much freedom of action within the intergovernmental structure.

On the other hand, the achievements of MERCOSUR in the form in which they have been over the past decades are not without meaning. Significant progress has been made in building the Customs Union and the Common Market. These are also areas that have been influenced by arbitral awards that are comparable to the important case-law of the European Court of Justice regarding content and purpose. It is also noteworthy that, despite the still only partial implementation of the Customs Union, significant actions have already been taken in the field of positive integration. At the same time, the free movement of people, services and capital is still in its infancy. It is noteworthy that the harmonization of substantive law was achieved simultaneously with the harmonization of national law enforcement legislation, including the harmonization of punitive sanctions [Doctor, 2013].

In conclusion, it should be noted that, despite numerous unresolved tasks and existing problems, both of an economic and political nature, at the present stage of its development, MERCOSUR is one of the most stable and effective open integration associations in Latin America. Thanks to the reforms carried out in order to improve the institutional structure, the community managed to achieve an equal position for all members of the organization, demonstrated its viability, despite a number of crises that the association has gone through since its creation. Moreover, in times of crisis, the participating countries showed solidarity in resolving political contradictions and in forming a common agenda aimed at gradual and flexible integration, economic growth and development.

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