



THE LAW OF **MERCOSUR**

Edited by Marcílio Toscano Franca Filho,
Lucas Lixinski and María Belén Olmos Giupponi

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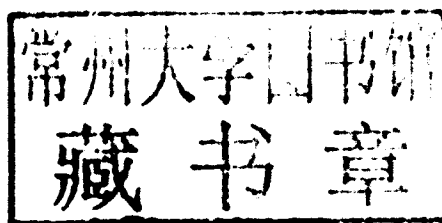
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THE LAW OF MERCOSUR

The Law of MERCOSUR presents both an overview and in-depth analysis of one of the world's most important and increasingly influential economic organisations. The book comprises both a series of first-hand analyses of MERCOSUR by experts from countries in the MERCOSUR bloc, and also discussions from other parts of the world looking at MERCOSUR as global actor of ever-increasing importance. The book is divided into three main parts: the first analyses the key institutional legal aspects of MERCOSUR, looking at its history, the general theory of economic integration, and basic aspects relating to the functioning of MERCOSUR; the second examines specialised topics, including the regulation of the environment, human rights and the energy market in MERCOSUR; and in the third part the editors offer a translation of core MERCOSUR instruments, with the objective of furthering understanding of the economic bloc. Original in its conception, the book aims to fill a major gap in the English-language literature by offering a comprehensive and in-depth analysis of the Law of MERCOSUR, and it is hoped that it will become essential reading for those practitioners and academics who are interested not only in MERCOSUR, but in economic integration generally, in international trade, and in the regional aspects of the phenomenon of globalisation.

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Any book is a collective endeavour that far exceeds the number of people ultimately credited. With that in mind, we would like to acknowledge the vitally important roles of some of those whose contributions have helped to shape this book.

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We must also thank our authors, who believed in the project and have contributed chapters that create a coherent whole, ultimately greater than the sum of its parts.

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Abbreviations

MERCOSUR

CCM	Council of the Common Market
CDC	Commission for the Defence of Competition
CMG	Common Market Group
CPC	Joint Parliamentary Commission (Comissão Parlamentar Conjunta)
CRPM	Commission of Permanent Representatives
FOCEM	MERCOSUR Fund for Structural Convergence
MTC	MERCOSUR Trade Commission
POP	Ouro Preto Protocol
PRC	Permanent Review Court
SIMDEC	Common Information System about Consumer Protection and Defective Products
TA	Treaty of Asunción

European Union

CFSP	Common Foreign and Security Policy
ECF	European Cohesion Fund
ECJ	European Court of Justice
ECL	European Competition Law
ERDF	European Regional Development Fund
EU	European Union

International Organisations and Treaties

ALADI	Latin American Integration Association (Asociación Latinoamericana de Integración)
ALALC	Latin American Free Trade Association (Asociación Latinoamericana de Libre Comercio)
ALBA	Bolivarian Alliance for the Peoples of our America
APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of South East Asian Nations
CACM	Central American Common Market
CAN	Andean Community
CARICOM	Caribbean Community
CCG	Cooperation Council for the Arab States of the Gulf
CRTA	GATT Committee on Regional Trade Agreements
DSB	WTO Dispute Settlement Body
DSU	WTO Dispute Settlement Understanding
ECHR	European Convention on Human Rights
ECLAC	Economic Commission for Latin America and the Caribbean
ECOWAS	Economic Community of West African States
EFTA	European Free Trade Association

FTAA	Free Trade Area of the Americas
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICSID	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
ILO	International Labour Organization
NAFTA	North American Free Trade Agreement
OAS	Organisation of American States
REMA	Special Conference on the Environment
SADC	Southern African Development Community
SICA	Central American Integration System
STJ	Brazilian Superior Tribunal of Justice
TJCA	Andean Court of Justice
TRIPS	Agreement on Trade-related Aspects of Intellectual Property Rights
UNASUR	Union of South American Nations
UNCTAD	UN Conference on Trade and Development
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

Other Terms

AHEG	ad hoc expert group
BIT	bilateral investment treaty
DTA	double taxation agreement
FCA	framework cooperation agreement
FDI	foreign direct investment
GDP	gross domestic product
MFN	most-favoured-nation
NCA	national competition authority
NTU	national technical unit
NUTS	nomenclature of territorial units for statistics
OCA	optimum currency area
PTA	preferential trade agreement
RTA	regional trade agreement
TNC	transnational corporation

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Introduction to the Law of MERCOSUR

MARCÍLIO TOSCANO FRANCA FILHO, LUCAS LIXINSKI AND
MARÍA BELÉN OLMOS GIUPPONI

MERCOSUR (also known as MERCOSUL, Mercado Común del Sur, the Common Market of the South) is one of the most important regional economic integration processes in the world. Its four Member States (Argentina, Brazil, Paraguay and Uruguay) comprise some of the most important economies in the Western hemisphere (Brazil, for instance, is the eighth largest economy in the world,¹ and prospective Member State Venezuela² is a leading oil and gas producer). Today, MERCOSUR has a total population of over 250 million people, an area of 12.7 million square kilometers and GDP of more than a trillion dollars (approximately 76 per cent of the entire South American GDP).³ Moreover, since the successful privatisation processes and economic stabilisation plans in Brazil and Argentina in the 1990s, there has been a growing demand for foreign direct investment in the Southern Cone. Therefore, MERCOSUR is a topic of great concern to all those interested in the regulation of international trade.

In the specific context of the European Union, for instance, a relationship agreement between the two integration blocs is under way, and the completion of this agreement (which will establish the biggest free trade area in the world and the first free trade agreement between two customs unions) makes understanding MERCOSUR vital to all those working with EU external policy. Similarly, MERCOSUR is currently one of the biggest stakeholders in free trade in the Americas, and the fact that the FTAA (Free Trade Area of the Americas) negotiations were stalled precisely because of MERCOSUR⁴ is further evidence that, for the advancement of free trade in the continent, MERCOSUR must be properly understood.

Finally, MERCOSUR offers an interesting model for comparative integration studies, as it by no means aims at becoming a complex integration process such as the European Union, while at the same time aiming at being more than the NAFTA. This intermediary position occupied by MERCOSUR makes it an important process to be analysed world-wide.

¹ According to World Bank statistics ranking the GDP of 186 countries. See World Bank, Gross Domestic Product 2008, available at <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf>.

² Venezuela signed a membership agreement on 17 June 2006, but before becoming a full member its entry must be ratified by the Paraguayan Parliament.

³ See Justin Vogler, 'South America: Towards Union or Disintegration?', *Open Democracy*, 20 July 2006, available at www.opendemocracy.net/democracy-protest/union_disintegration_3756.jsp.

⁴ See International Center for Trade and Sustainable Development, 'FTAA Negotiations Encounter Hurdles', *8 Bridges Weekly Trade News Digest*, 12 February 2004, available at <http://ictsd.net/i/news/bridgesweekly/5876/>.

MERCOSUR is therefore an increasingly important player in world affairs, and one that requires attention. This book aims precisely at that, while at the same time filling a gap in English-language literature on the legal regime of this integration process.

The book is divided into three main parts. The first part, comprising nine chapters, deals with the general legal issues of MERCOSUR. The following 13 chapters form the second part, which deals with specialised legal themes within MERCOSUR. And the third part is a document annex with English translations of the four most important instruments of MERCOSUR: the Treaty of Asunción (the foundational instrument of MERCOSUR), the Las Leñas Protocol (on judicial cooperation in civil, commercial, labour and administrative matters) the Ouro Preto Protocol (on the institutional set-up of the bloc), and the Olivos Protocol on dispute settlement (which replaced the earlier Brasília Protocol).

The first part opens with a chapter by Andrés Malamud looking at the theories on why states get together and form regional economic integration blocs, and using these theories to explore the origins and the early development of MERCOSUR. Adriana Dreyzin de Klor, a former high member of the MERCOSUR Secretariat, then explains the institutional structure of MERCOSUR, which has seen many changes over the years. It is noteworthy in this sense that the Treaty of Asunción did not provide for the institutional make-up of the bloc, and that this was first regulated by the Ouro Preto Protocol. As MERCOSUR evolved, however, the structure of the Ouro Preto Protocol has been changed by the reformulation, for instance, of the dispute settlement mechanism, and the creation of the MERCOSUR Parliament, which formed a great moment of the process of the 'relaunching' of MERCOSUR that started in 2000.

María Belén Olmos Giupponi, one of this book's editors, then looks at the sources of law in MERCOSUR, which do not derive from a single body, and, depending on their source, can be applied with or without the need for subsequent ratification. MERCOSUR norms, in some cases, must not only be implemented in national legislation, but they must also go through the formal ratification process of regular international treaties. Nadine Susani then looks at the issue of dispute settlement, which has evolved from ad hoc arbitration panels under the Brasília Protocol towards a system where, even though decisions are still taken by ad hoc panels, there is a permanent body to which states can appeal the decision of the arbitrary panel. This also has a mandate to give advisory opinions, which has already been put to the test, with satisfactory results.

The following chapter, on economic freedoms, is authored by Felix Fuders. This is perhaps the core chapter from the perspective of trade law, as it analyses the rules that enable the functioning of the bloc. He draws heavily on the European Union as a model for MERCOSUR, which has been a political and legal fact since the creation of the bloc in 1991. He argues that MERCOSUR is much closer to the achievement of the common market than many believe (common belief is that MERCOSUR has so far only reached the stage of an imperfect customs union). Even though he admits MERCOSUR looks up to the EU model for inspiration (and even outright imitation at times), he also highlights that MERCOSUR has been much more advanced than the European Union in regulating exceptions to market freedoms based on reasons of public health and environmental protection, which is overall a laudable development.

A series of chapters in part I of the book then puts MERCOSUR into perspective. Samantha Ribeiro looks at how the MERCOSUR and WTO legal regimes interact. She analyses an instance in which a case presented before MERCOSUR was subsequently

'appealed' before the WTO (a problem of forum shopping corrected by the Olivos Protocol), as well as a case in which the same issues, but involving different parties, have been brought before the MERCOSUR arbitral system and a WTO panel. She concludes that MERCOSUR tends to operate in a relationship of subordination towards the WTO, which is not a positive feature, even if an inevitable one as things stand.

Marcílio Toscano Franca Filho, also an editor of this book, then looks at the issue of interregional relations, or, to put it differently, MERCOSUR's external relations towards other international actors. The chapter is focused primarily on EU-MERCOSUR relations, which are by far the best developed ones, but it also looks at how MERCOSUR interacts with other systems within Latin America. The importance of MERCOSUR's external relations must not be underestimated, not only for its trade effects, but also for its spillover effects in opening up the way for the expansion of MERCOSUR regulation in other areas, as we will see below.

Phillipe de Lombaerde, Frank Mattheis and Charlotte Vanfraechem engage in the effort of studying comparative integration, wondering what lessons, if any, MERCOSUR legislators and policy-makers can learn from looking at other regional integration blocs. Through an extensive review of the literature on the topic of comparative integration, the authors conclude that comparative integration studies is a valuable tool, as it helps determine in which direction MERCOSUR may be headed based on the development of scenarios similar to those of MERCOSUR in other parts of the world.

Martha Lucía Olivar Jiménez, concluding the first part of the book, then analyses the relationship between MERCOSUR law and general international law. One of the questions one should ask while reading her contribution is to what extent, if any, MERCOSUR law (or economic integration law, for that matter) constitutes a self-contained regime. Her conclusion is that MERCOSUR is greatly dependent upon general rules of general international law, and that, while some legal autonomy has been sought for MERCOSUR in order to strengthen the integration process, ultimately MERCOSUR is subject to general principles and rules of international law, independently of whether they have been expressly incorporated in MERCOSUR legal instruments.

The second part of the book discusses more specialised topics of law in MERCOSUR, and areas of law in which MERCOSUR was not originally meant to venture, but which became necessary for the success of the integration process. Carmem Tibúrcio looks at the topic of cooperation in civil judicial matters in MERCOSUR, perhaps one of the most successful experiments in regional law-making. The instruments on the matter have been for the most part incorporated by all Member States, and are a vital part of the functioning of International Private Law in the region.

Alessandra Macedo Franca analyses the issue of environmental protection in MERCOSUR. This is one of the areas in which the external relations dimension of MERCOSUR has positively influenced law-making, because, as she points out in her text, it was partly the signing of agreements between MERCOSUR and other countries and regional integration processes that spurred the need for the development of environmental law and policies within Member States, as well as the harmonisation of national legislation in favour of a common regional standard.

Hugo Roberto Mansueti's contribution focuses on labour and social security regulation in MERCOSUR. This is an important topic because it is partly the expression of the

fundamental economic freedom of circulation of workers. This topic gains even more significance as MERCOSUR considers bringing the MERCOSUR Socio-Labor Declaration to the status of binding MERCOSUR law.

Another member of the MERCOSUR Secretariat, Jamile B. Mata Diz, contributes to this book by discussing the issue of taxation in MERCOSUR. In her chapter, she argues that the harmonisation of tax law in the Member States is essential for the progressive development of the bloc, especially as tax regimes are a determinant factor in attracting foreign investment and increasing political confidence in the integration process.

The following chapter, by Diego Fraga Lerner, focuses on the promotion of foreign direct investment in MERCOSUR, both from the perspective of promotion of investment within the bloc, and also from the perspective of promoting external investment in MERCOSUR, as well as the role of MERCOSUR as an investor. Given the growing economic importance of MERCOSUR, the bloc has slowly moved from being solely a receiver of foreign investment to increasingly become an investor. The expansion of the bloc, as well as the increasing cooperation with other regional blocs, enhances the need for clear regulation of this matter, as this regulation may act as an important catalysing agent in the economic strengthening of the bloc.

With this idea in mind, Lúcio Fêteira looks at the regulation of competition within MERCOSUR, arguing that the prospects for specific regulation in the bloc are less than ideal, and that this lack of decisiveness in competition law has been harming the pace of integration in the region. In a different vein Félix Vacas Fernández looks at the regulation of intellectual property in the bloc, which is quite an advanced area of harmonised regulation among MERCOSUR Member States, and an important staple for the advancement of integration.

Claudia Lima Marques then considers the protection of consumers as an important asset for the development of the bloc. She analyses the evolution of consumer protection law and policy in the bloc, arguing that, despite the frustrated efforts surrounding the Santa Maria Protocol on law applicable to consumer transactions, consumer protection in the bloc is gaining momentum, and other initiatives are being undertaken to protect what she refers to as the ‘forgotten protagonist’ of the integration process.

Following the line of protection of weaker parties, Lucas Lixinski, another editor of this book, then examines the issue of human rights protection in MERCOSUR. As is the case with the environment, human rights protection is greatly influenced by MERCOSUR’s external relations. The possibility of promoting human rights norms through trade agreements has been studied elsewhere, to the conclusion that these clauses, even if not inserted into trade agreements necessarily out of humanitarian considerations, still have positive spillover effects and do in fact promote human rights.⁵ Lixinski looks at how human rights concerns and economic freedoms should be balanced in MERCOSUR, and how the human rights discourse is becoming an increasingly larger part of MERCOSUR’s activities, especially with the creation of the Parliament. Human rights promotion becomes an important asset for the advancement of the integration process.

Mario Viola de Azevedo Cunha and Danilo Doneda look at another asset, and examine the character of data protection as an important trade resource in MERCOSUR. They

⁵ See Emilie M. Hafner-Burton, *Forced to be Good: Why Trade Agreements Boost Human Rights* (Springer 2009) (discussing how the European Union’s agreements on cooperation and trade with third parties, by including a human rights clause, have actually helped improve human rights in these third parties).

discuss the lack of specific regulation of this matter within MERCOSUR, and argue that this protection is necessary to enhance market trust and thus give impulse to the integration process overall. Data protection is then a tool for the promotion of development.

And so is the regulation of the energy market. As Venezuela joins MERCOSUR, and new oil reserves are discovered in Brazil, the bloc becomes an energy juggernaut, and the question of regulation of energy markets becomes vital. Hannes Hofmeister takes up the challenging task of looking at this booming area of MERCOSUR, which is still fairly unregulated.

Also focusing on development, Fabiano de Andrade Corrêa looks at the Fund for Structural Convergence (FOCEM, in the Portuguese and Spanish acronyms). In this chapter, he argues that regional integration is a tool for the promotion of development. The MERCOSUR Fund, inspired by similar initiatives at the EU level, aims at reducing asymmetries both among Member States and within each individual Member State, by looking at each region separately. This can develop into a large step towards a less Member State-centric MERCOSUR.

Fabiano de Andrade Corrêa comes back with Lucas Lixinski in the concluding chapter of the book, speculating on 'the legal future of MERCOSUR'. They look at this issue from the vantage points of three emerging challenges to the bloc. The first is the creation of the Parliament, which reorients the institutional structure of MERCOSUR, and can greatly expand its legitimacy and reach, helping guarantee a prosperous political future for the bloc. The second challenge is the expansion of the bloc with Venezuela's accession, which expands MERCOSUR's territory and market, but also raises questions related to Venezuela's political stability, which could threaten the image of the bloc. Finally, one has to take into account the creation of UNASUR, which can be looked at as both a complementary and a competing integration process. As UNASUR attempts to bind together all 12 South American States, it is important to embrace this initiative, while at the same time preserving MERCOSUR's autonomy.

One final note is in order regarding our choice of cover. The painting on the cover is located in a palace in Florence, where the editors of this book met and to which several of the contributors are connected institutionally. This fresco is an illustration of Themis, the Greek Goddess of Justice, and Hermes, the Messenger of the Gods and the God of Trade. MERCOSUR's intellectual territory is a fertile one located between Law and Economy, a space in which a dialogue between Themis and Hermes develops to ensure the fairness of trade. Law and Economy are side by side in MERCOSUR. However, even acknowledging the great strategic value of MERCOSUR for the regional and global economies, this book takes as its basis the essential assumption that MERCOSUR must be, first and foremost, a legal entity, built upon the pillars of loyalty, cooperation and security among Member States. Only the development of an efficient legal structure can guarantee the security and stability necessary to the sustainable development of the bloc's economic activities.

The bottom line of this book is that MERCOSUR is an integration process under construction, but which has great potential and has achieved far more than it is usually given credit for. Throughout these pages, all the authors have tried to demonstrate that MERCOSUR is an important, well-established partner in the international arena. Even though there is still much to be done, the necessary effort is being put into creating the

means for MERCOSUR to fulfil its destiny and consolidate itself as the economic giant it already is. The following chapters will offer the reader the evidence for this belief, and we wish you all an enjoyable read.