Relations between regional integration processes: the legal aspects of the Association Agreements between the European Union and South America[1]

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Introduction

The European Union (EU), as a regional block, developed a legal framework to define the application of a common foreign policy towards other states and integration processes around the world. These regulations were geographically-oriented in order to manage different fields of EU interests with partners worldwide.

In this framework, relations with closer states (Maghreb and Mashreq states, former URSS countries) should be outlined with different criteria than relations with other areas, such as the former European colonies (ACPs), emerging economies (BRICs) or related third states (LACs).

The agreements written in international treaties were the instruments defined to arrange these relations with different focus and scopes, and based on factors such as the economic and political pillars, trade and cooperation.

South America proved to be an active region in the formation of integration processes during last decades, and ever since 1960s. First, the Latin America Free Trade Association (ALALC), later the Latin American Association of Integration (ALADI) as the main examples of the continent's global initiatives. Regarding regional groups, it is worth mentioning the Andean Community (CAN), the Southern Common Market (MERCOSUR), and the ambitious Union of South American Nations (UNASUR).

Our main concern is to conclude how South American regional integration blocks could develop relations in a specific legal frame of association agreements and how this fourth generation treaties, developed by the European Union, deal with third countries or groups of countries. More specifically, we are interested in knowing how legally bound regulations formulated in the three different pillars of these Agreements can be for integration processes or member states.

Association agreements: an overview from European Union primary law

Association, from the European Union perspective, is defined as different sorts of processes informed by several community policies –accession process, cooperation and foreign policy or economic and trade interests. A precise mention of association can be found in the European Union Treaties, referred to: a) accession of new members; b)

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special treatment for overseas countries and territories; c) relations with third countries and international organizations.

European Union (EU) primary law foresees the conclusion of agreements with one or more states or international organizations, defining procedures and institutional roles.[2]

This EU primary law establishes different kinds of association processes. First and well known are the association agreements defining specific conditions and deadlines for the countries preparing a possible accession to become members of the EU.[3] Other case in legislation is the association of the overseas countries and territories, maintaining special relations with Denmark, France, the Netherlands and the United Kingdom, focused to promote their economic and social development and to establish close economic relations between them and the Community.[4] Finally, rrelations with third countries are established specifically in the TEC: "The Community may conclude with one or more States or international organizations agreements establishing an association involving reciprocal rights and obligations, common action and special procedures".[5] This regulation is the base for the association between the EU and the European Free Trade Association (EFTA), known as the European Economic Area (EEA) signed in 1994[6] which partially extended the single market four freedoms of movement and set out a trade system designed to ensure respect for competition rules to their Member States –part of these since 1995 are two EU Member States: Austria and Finland.

In the same view, this regulation establishes the EU competence to conclude agreements with third countries or international organizations –outside Europe– in the frame of the Common Foreign and Security Policy (CFSP), and to define bilateral or block relations[7]. A relevant case of these treaties is the Cotonou Agreement[8] which currently provides a general framework for relations with 79 countries from different regions in the world –Africa, Caribbean and Pacific (ACP), focused on creating a cooperation and development partnership between the two regions, following the pillars scheme of the fourth generation agreements: 1. Development cooperation, 2. Economic and trade cooperation, 3. Political dimension.[9]

EU relations with Latin America were also defined in this framework of third countries and international organizations. At first, cooperation agreements were subscribed (first and second generation 80-90), and later -when EU competences, interests and regional conditions were optimal-, with cooperation and political dialogue agreements (third generation 90-00) and association agreements (fourth generation 00) negotiated bilaterally or with regional blocks. So far, Association Agreements have been concluded

[22] European Union, Consolidated Versions of the Treaty on European Union and the Treaty establishing the European Community, Official Journal of the European Union, C 321 E/1, 29 December 2006. Art. 300 European Community Treaty (TEC).
[3] *Ibid*. Art. 49 European Union Treaty (TEU).
[4] *Ibid*. Part Four. Association of the overseas countries and territories TEC.
[5] *Ibid*. Art.310 TEC.
[6] Decision 94/1/EC, ECSC. Official Journal of the European Union, L 1, January 3, 1994.
[7] For a didactic vision on cooperation issues with Latin America, see: Antonio Bonet Madurga (2007), *La cooperación al desarrollo como instrumento de la política comercial de la Unión Europea. Aplicaciones al caso de América Latina,* Documento de Trabajo 27, Intal ITD, p. 3-4.
[8] European Commission, DG Development, "The Cotonou Agreement", in <http://ec.europa.eu/development/geographical/cotonouintro_en.cfm>.
[9] Leda Rouquayrol Guillemette y Herrero Villa S. (2005), *Guide to cooperation between the European Union and Latin America*, Paris, Association CEFICALE, p. 15-32.

with Mexico (2000),[10] Chile (2002)[11] and the Member States of the Central America Integration System (SICA) (2010)[12]; similar agreements are under negotiation with Mercosur and the Andean Community, since the end of 2000 and the beginning of 2010.

In all of the association cases the EU acts as an international actor and exercises different fields of competence defined in the treaties. These competences are important to define the role of community institutions and the liability of the EU as a person of international law.

Another important subject in the frame of the interregional relations is the legal capacity of each part to act as a legal person of international law. In the case of the EU this is a complicated issue because of the nature of the integration process. Since the Treaty of Rome (1957), the EEC had legal personality which established rights and obligations under international law. With the creation of the EU, the Maastricht Treaty (1992) maintained the legal personality to the European Community EC -as the supranational pillar of the structure- but the EU itself have not possessed any legal personality, being represented for the EC institutional framework and the member states in any agreement involving the Common Foreign and Security Policy (CSFP) –the intergovernmental pillar. With the Treaty of Lisbon (2009), this problem was solved including a clause to confer a legal personality to the EU in the TEU.[13]

The EU institutional structure has an important role in the definition of Association Agreements. Mainly, the European Commission is in charge of suggesting and preparing negotiations with one or more states or international organizations, and in a second stage directly manages and concludes negotiations with its services –General Directorates and other specialized services for political dialogue, cooperation and trade. The Council is in charge of analyzing recommendations from the Commission and to authorize the start of negotiation process. In this case, the most important steps come from this organ which has to take a unanimous decision to conclude and sign any agreements, with the previous formal consent from the European Parliament. Member states have to approve and ratify these agreements if there are issues included subject to shared competences with the EU, and to its observance as far as the agreements bind community institutions and member states.

The Lisbon Treaty (2009) created new functions to represent the EU foreign policy: The EU President and the High Representative for Foreign Affairs and Security Policy (HRFA)[14].

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[10] Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part - Final Act – Declarations, in: <http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=431>.

[11] Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part - Final act, in: <http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=438>.

[12] Not yet enter into force.

[13] See: Art. 49 TEU. On the legal personality we suggest to read: Philippe de Schoutheete and Sami Andoura (2007), The legal personality of the European Union, in *Studia Diplomatica*, Vol. LX: 2007, No. 1.

[14] Arts. 15-18 TEU.

There are no changes in the structure established in the TEC to conclude agreements referred to the common trade policy.[15] However, with the new EU legal personality, the Treaty on the functioning of the European Union (TFEU) makes a difference between community and national competences: before, it was not admitted to conclude an agreement including rules exceeding internal competences. Now the exercise of the conferral competences does not have impact on the existing delimitation of competences between the EU and the member states and does not imply harmonization of national rules if there are excluded from the Treaties.[16]

If the EU does not have new competences different to those conferred to the European Community, the TEC delimitation will be maintained, for instance, in the case of exclusive competences of the EU, such as monetary and common trade policies.

The inclusion of the HRFA as a new institutional actor in the frame of the external action makes a difference from the original structure defined by the TEC, however this role is co-played with the European Commission in issues like presenting proposals or recommendations to the Council in the case of agreements related to foreign policy or common security.

In this new regulation, there is a specific reference to international agreementes in Title V TFEU, including the new EU role as an international actor with legal personality. The process defining roles for each institution is better explained with the Lisbon Treaty reform, but essentially is similar to the one described before in the TEC. Nevertheless, the TFEU defines the roles of the HRFA as the initiative to propose agreements in the case of foreign affairs and security issues.

It is clear that the role of the Commission was limited with this reform, that now it cannot even negotiate or conclude agreements for foreign policy and security, if the Council has not made a formal delegation. The European External Action Service (EEAS) as the office or the HRFA will have all the responsibilities regarding negotiation and conclusion of agreements.

The Council is a winner with this reform because its role is strengthened, with more capacity to manage the negotiation process and, at the same time, the Parliament maintains its role, with no change from what was defined in the TEC. The agreements bind institutions and member states.

Association Agreements: the instrument of foreign affairs policy with trade and cooperation for development objectives

These agreements are the way through which the EU uses Foreign Policy to become an international actor. Similar agreements have been in use since the beginning of the European Economic Community (EEC) in 1957 to promote cooperation and assistance with the former colonies of Member States. With time and changing conditions in the world, these agreements evolved into a most sophisticated form, including three pillars since the Maastricht Treaty: Political Dialogue, Cooperation for Development, and Free Trade; and were addressed to other geographical areas, as Latin America and Asia.

[15] Art. 133 TEC.
[16] Art. 207, Paragraph 6, TFEU with regard to the former Art. 133, Paragraph 6, TEC.

In the beginning, the main goal of these agreements was to strengthen the economic and trade relations with countries in Africa, the Caribbean and Pacific regions ACP through the creation of special regimes to improve access to the European market and, at the same time, to develop living conditions and share development strategies.

With the negotiation of different kinds of agreements with other regions (i.e. Latin America in the beginning of the 1980s), and the start of a foreign policy of the European Economic Community (EEC), and later of the EU, cooperation become an important instrument for the growing European Community external relations at the supranational level.

The need to link cooperation for development with other important policies, previously identified at the foreign affairs stage that policy makers thought would be useful to position the EU as an international actor,[17] allowed the inclusion into the political dialogue of a pillar to discuss the implementation of common policies and positions at the level of international forums, and why not, to get mechanisms to fortify geopolitical visions (i.e. shared responsibility with the traffic of illicit drugs).

Another subject directly linked with cooperation was the Trade pillar. In the ACP Agreements a mechanism was included to improve the conditions of life of the people in developing countries. Better trade conditions and opportunities, clear national and foreign investment rules, and improved job creation and labor conditions would result in an elevation of income for families.

Since the Maastricht Treaty, the inclusion of a Trade pillar created the new fourth generation of Association Agreements. In this case, the principle was to consider trade as a mechanism that allowed deals with developing countries in conditions of reciprocity, according to the General Agreement on Tariffs and Trade GATT and later with the World Trade Organization WTO rules.

The Trade pillar was designed for the EU officials as a Free Trade Agreement, in the terms used and in the conditions of negotiation, and presented as part of the cooperation for development policy to the third country counterparts. In some places these FTAs were not well received by some countries as a part of a EU foreign affairs and development policy, because of their conditions of reciprocity, which ended some concessions established in unilateral Generalized System of Preferences GSP and also, some failed negotiations of FTAs with other partners in inequality of conditions -i.e. the Free Trade Area of the Americas with the US.

These fourth generation agreements sought to establish closer relations with the EU partners in the world and to increase and support the regional integration initiatives developed in other continents. In fact, the mandate of the EU Council was to negotiate with regional blocks instead of with countries, which in practice is useful, and could mean: fewer signed agreements, with a high level of harmonization in negotiated terms and subjects, economies in the quantity of negotiation teams that will participate and, in

[17] For an interesting explanation on the EU as international actor, see: Miriam Gomes Saraiva (2004), *The European Union as an international actor and the Mercosur countries*, presented at 2004 meeting of the Latin American Studies Association, Las Vegas, Nevada, in <http___www.giga-hamburg.de_dl_download.php_d=_english_content_ilas_elas_pdf_lasa_2004_saraiva>.

other fields, the possibility to deal with other integration processes and to offer cooperation to exchange best practices to improve their integration model.

In practice, a quick check of the EU negotiation process in Latin America shows that the reality is quite different. There are just two cases of Association Agreements signed with countries (Mexico, Chile). Three others were started at different times (between 1995 and 2007), namely, the integration processes with Mercosur, the Andean Community, and the Central American Integration System, but these either stopped or remain in process with a wide variety of problems, mostly having to do with negotiations around the Trade pillar.

With the ACP countries, the negotiation has had a different scope as far as the application of cooperation for development policy, characterized by special treatment and trade preferences. This is different from the application of external relations framework used with the other regional blocks. In this case, for those countries the negotiation as a block is necessary to obtain more and harmonized benefits from their European counterpart, and is related to the longer tradition of relations started with the Yaoundé Agreement in 1963, followed with Lomé in 1975 and Cotonou in 2000.

It is clear that Association Agreements are the implementation instrument of cooperation for development as part of a foreign affairs policy, with two visions: One of external relations that will be applied to third countries and other specifically focused to more development goals with the ACP countries.

In each case, Association Agreements define the framework where relations will be developed for both parts with some mechanisms and rules to start up the Political Dialogue and Trade pillars. For the cooperation for development pillar there are definitions of the areas and subjects where the parties agreed to work, but in any way mechanisms and sources of funds are defined in other kinds of technical instruments, prepared by the services of the EC Institutions as the Commission and the Council.

In this logic, Association Agreements are the instrument to legalize interregional relations -between the EU and countries or blocks, through the creation of secondary legislation defined in traditional diplomatic instruments that govern different fields and establish different levels of commitments to the parties. In the same logic, the scope of commitments depends on the competences that each party has as legal entities of international law. The effects of these instruments on regional integration process …are enhanced when they can lead to social and economic actors, mainly in the business world, to promote exchanges and common activities between them.[18]

Different scope of competences and obligations in the negotiation of Association Agreements with South America

One of the main problems in the negotiation of agreements with the EU is to define clearly who will negotiate the treaty. In the case of states and international organizations, it is clear who is negotiating and what will be negotiated only by using the definition of legal personality and competences in international public law.

[18] Ramon Torrent (2006), "Una aproximación a la anatomía del MERCOSUR real", en Julio Berlinski (coord.), *et al*., *15 años de MERCOSUR: comercio, macroeconomía e inversiones extranjeras*, Red de Investigaciones Económicas del MERCOSUR, Montevideo, p. 24.

For some scholars and practitioners of EU affairs this point could be clear and unnecessary to explain, but for most people –even negotiators-, the way this works is not clear, meaning what the EU *modus operandi* to negotiate agreements is. In fact, the condition of the EU as a regional integration process determines some differences with a conventional international organization.[19]

For a better comprehension of this EU *modus operandi* to negotiate agreements before the entry into force of the reforms included in the Treaty of Lisbon, we will follow the statements of Torrent (2005), who identifies four different modes:[20]

Mode 1. The EC can act itself on subjects defined as exclusive competences.
Mode 2. The member states can act sovereignly, out of the EU frame in the subjects that have competences.
Mode 3. The member states can act in common in the EU frame, in their fields of competence.
Mode 4. The EC and the member states can act each one exercising their own competences jointly managed.

Even if each mode has a clear definition, we would like to make some precisions on the scope of some modes: Mode 1 does not exclude that the EC can act individually in matters of non-exclusive competence.

Mode 3 has been used to apply the Common Foreign and Security policy (CFSP) and in the frame of the accession negotiations to the EU was so effective, including the action of the institutional mechanisms (Commission, Council). Before the Lisbon Treaty, this mode could define the legal personality of the EU to be an international actor.

Mode 4 admitted the participation of the member states and EC at the World Trade Organization (WTO). Negotiation and application of agreements is jointly managed by the EC and member states, as shared competences.[21]

With the Treaty of Lisbon reform, establishing an international legal personality to the EU and the end of the three-pillar structure of the EU, the *modus operandi* will remain like this:

Mode 1. The EU can act itself on subjects defined as exclusive competences.
Mode 2. The member states can act sovereignly, out of the EU frame in the subjects that have competences.
Mode 3. The member states can act in common in the EU frame, in their fields of competence.
Mode 4. The EU and the member states can act each one exercising their own competences jointly managed.

[19] For an exhaustive analysis, see: Miriam Gomes Saraiva (2004), p. 2-7.
[20] Ramón Torrent, "Las relaciones Unión Europea – América Latina en los últimos diez años: El resultado de la inexistencia de una política. Un análisis empírico y esperanzado", UNU-CRIS Occasional Papers 0-2005/10, Brugge, p. 8-11.
[21] Art. 4.1 TFEU defines shared competences: the EU and Member States are authorized to adopt binding acts in these fields. However, Member States may exercise their competence only in so far as the EU has not exercised, or has decided not to exercise, its own competence.

We agree with what Torrent (2005) stated on how mode 3 will be partially merged with mode 1 as a result of the legal personality transformation from the EC to the EU, however, it will persist for the accession negotiations and to deal with some CFSP issues, because there are no new political competences conferred to the EU by the Treaty of Lisbon reform.

Regarding Association Agreements with Latin America, mode 4 has been used to negotiate trade and cooperation pillars, as far as the EC/EU has competences in these fields. The political dialogue pillar has been negotiated in mode 3; in this case the EU do not have a real competence conferred by the Treaties as the CFSP is intergovernmental managed by the member states in the EU frame.

Referring to who negotiates and whose are the parties from the EU side we conclude that before the reform of the Treaty of Lisbon there were 27 member states and the EC institutions as parties dealing with different kind of terms included in the Association Agreements. But as the Commission has a negotiation mandate from the Council in the practice is the unique actor visible at the negotiation process, representing the whole 28 parties.

With the reform of Lisbon, there are not real changes to this situation as we perceived in the above *modus operandi* schema, and as we stated, there are not new political competences conferred by the Treaties to the EU in the frame of the CFSP, so the member states will continue to be parties in each Association Agreement negotiated after December 2009. A real change will be the negotiator defined by the Council, regarding the competences of the HRFA on foreign policy and security affairs. But the Commission will remain to negotiate the trade pillar of the Association Agreements, from our point of view the most important of the three pillars.

These reflections on negotiations, parties and different level of competences of the EU and the member states, let us to think about how legally binding are regulations included in the different pillars of the Association Agreements.[22]

In the frame of exclusive and non-exclusive competences joining EU institutions and member states, the negotiation of trade and cooperation pillars will result in legally binding regulations, establishing commitments to the parties, clearly defining legal obligations, and can be implemented, interpreted and applied for institutions belonging to the parties –EU institutions, member states, parties defined by the counterparts; and with a definition of a mechanism to resolve disputes and the possibility to maker further rules. We consider this kind of regulations as a case of hard law.[23]

In the case of the joint exercise of competences between EC/EU and member states in foreign affairs, applied for the definition of the scope at the political dialogue pillar,

[22] We follow statements on soft law and hard law from: David M. Trubek, Patrick Cottrell, and Mark Nance (2005), *"Soft Law," "Hard Law," and European Integration: Toward a Theory of Hybridity*, University of Wisconsin-Madison, in <http://eucenter.wisc.edu/OMC/Papers/EUC/trubeketal.pdf.>

[23] We applied the legalization definition from: Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter y Duncan Snidal, *International Organization*, No. 54 (Summer), quoted by Aimee Kanner Arias, European Union – Latin American Relations after Lima and Lisbon, Miami-Florida European Union Center of Excellence, Vol. 5, No. 6, Miami, 2008, p. 3-4.

clauses will be binding for the parties with limited commitments in the application of common obligations, and reduced opportunities to be implemented, interpreted and applied. This kind of soft law does not need a mechanism to resolve disputes, but further rules could be created, if the parties agree to negotiate new commitments with a different range of application.

The three pillars in Association Agreements produce different levels of legalization, subject to the frame of competences belonging to the States or Regional blocks involved in the negotiations.

For Association Agreements as a result of EU legislation, legalization refers to the capacity that different communitarian institutions (Commission, Council, and Parliament) have to establish rules or commitments, its scope and the definition of institutional role to negotiate.

This explanation will be clarified checking different legalization issues in each pillar. In the case of the political dialogue, dealing with CFSP application at the level of EC/EU and member states intergovernmental foreign affairs competences, there are twenty eight parties involved in negotiation working in the EU frame, even if there is one negotiator (Commission or Council delegate).

The number of parties involved in this pillar is one or the complex points of the negotiation. The other one is the level of complexity to define twenty-seven national interests intergovernmental coordinated plus the interest of the EC/EU to negotiate an agreement. In the case does not exist a real competence, but a sum of competences from different actors, and the result are "atypical" acts –defined by the Communitarian Law specialists, that are expressed in declarations, conclusions, recommendations, resolutions… considered as non binding regulations… or different kind of "predefined mechanisms" that are not considered in a juridical sense.

As for the cooperation pillar, this is a case of non-exclusive competences where EC/EU can act individual or coordinated with member states; to apply the cooperation for development policy defined in the Treaties independently from the national cooperation policies of each member state. The EC/EU institutions (Commission, Council) establish the content and scope of these clauses that will be negotiated with the other pillars by the same negotiation team (Commission or defined by the Council).

These regulations are subject to the terms of the Arts. 177-181 TEC or 208-211 TFEU and to the coordination, complementarity and coherence principles established in Art. 4, Paragraph 4 TFEU. In this case there are a clear primary legislation that creates further regulations, subject to the level of competences and principles defined in the Treaties. From the point of view of some practitioners, cooperation agreements concluded by the EC institutions in the past (second and third generations) do not include clauses creating any concrete obligations for the Community.[24]

These clauses are legally binding to the parties, with general commitments regarding their interests during the negotiation, defining the cooperation scope, some facts and

[24] Ramon Torrent (2005), p. 41. We suggest to see for the scope of cooperation regulations: Judgement of December 3, 1996, Portugal v Council (C-268/94, ECR I-6177).

actions, but avoiding precisions in the issues, that allow the parties to be discretional in the implementation, interpretation and application.

The creation of further specific normative is the mechanism to define the range and actions to be implemented by the EC/EU, regulated by secondary legislation as the Geographic cooperation Regulations that include financial commitments.[25] In the practice there are no reference in the regulations to link rules, scope and content with the clauses of actual concluded cooperation agreements.

In the case of trade pillar, this is an exclusive competence of the EC/EU, which limits to follow the negotiation mechanisms defined in the Treaties, and the institutional framework will be in charge to define issues, negotiate and conclude the negotiation. As in the case of cooperation, there are a clear and defined primary legislation as a result of an exclusive competence of the EC/EU.

The logic of this pillar follows the WTO principles and rules, and in the specific case of interregional relations, to the terms of the free trade agreements in the frame of Art. XXIV GATT-1994, defining three approaches of legal rules: a) market access rules; b) uniform rules and c) non discrimination rules.[26]

The content of trade pillar clauses refers to goods, services, investments and public procurement, with the interest to protect intellectual property, define effective competence policies, include accords for sanitary and phytosanitary rules and a mechanism to resolve disputes.[27]

All these clauses are legally binding to the parties establish commitments, define accurately the issues to be regulated and can be implemented, interpreted and applied for institutional frames of the parties that deal with exclusive competences. The regulation is subject to a mechanism to resolve disputes and further new legislation could be created to regulate the scope of the different issues at the agreement.

In the practice we agree with Kanner (2008) statements to define the scope of legalization in the relation between the EU and the Andean Community (CAN), that are not regulated by a hard law regime, nor by a complete inexistence of legalization, but it is in the middle of those two ideal types, established under soft law agreements.[28]

From our point of view this statement is applicable to the general legalization schema in the frame of EU Association Agreements with States and regional blocks in Latin America, but in the political dialogue and cooperation for development pillars are subject most frequent to soft law clauses, and trade pillar contains clauses subject to hard law criteria.

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[25] We suggest to see for Geographic Regulations: Regulation (EC) No. 2112/2005, November 21, 2005 on access to Community external assistance for the period 2007-2013; Regulation (EEC) No. 443/92, February, 25, 1992 on financial and technical aid and economic cooperation with developing countries in Latin America and Asia.

[26] Ramon Torrent (2006), "Una aproximación a la anatomía del MERCOSUR real", in Julio Berlinski (coord.), *et al*., *15 años de MERCOSUR: comercio, macroeconomía e inversiones extranjeras*, Red de Investigaciones Económicas del MERCOSUR, Montevideo, p. 19.

[27] Félix Peña (2009), "Acuerdo de Asociación Global Interregional para la creación de una Zona de Asociación Global", Barcelona, CIDOB, Parlamento Europeo, p. 3.

[28] Aimee Kanner (2008), p. 6.

Association Agreements and integration process in South America

The EU decided to negotiate Association Agreements with regional integration process in South America at the end of 90s and during the first decade of XXI century. In 2000 an agreement with Mexico was concluded and in 2002 additionally another with Chile.

With regard to the regional integration process in South America we consider the two blocks that officially started Association Agreements negotiations with the EU: Andean Community (CAN) in 2007 and Mercosur in 2000.[29] For this analysis we considered Association Agreements as a creation of EU primary law and as a proposal to the South American integration blocks.

In the case of CAN and Mercosur both are legal persons of International Public Law, and in this condition of international organizations, can conclude international commitments in the frame of its competences and the objectives defined in foundational treaties. In both cases their objectives are focused to the creation of economic integration mechanisms between member states, through a common commercial policy.

The CAN institutional framework is more complex, with the definition of the Andean Integration System (SAI) at the Cartagena Treaty (1996). Instead the Ouro Preto Protocol (1994) defined an institutional structure comprise by six main organs, with the possibility to establish more if necessary to fulfill Mercosur objectives.

The existence of a supranational system of Andean Community Law and the capacity to formulate an intergovernmental common foreign policy for issues of subregional interest established at Cartagena Treaty, difference the CAN to the Mercosur.

The case of the institutional application of the CAN common foreign policy remains interesting to understand the complexity of this integration process. Even if there are communitarian institutions as Presidential Council, Council of Foreign Affairs Ministers and meeting of high-level officers, the execution of that policy is in charge of the member states governments.

Mercosur have not defined a common foreign policy but a common external commercial policy in secondary legislation (Decision MERCOSUR/CMC/DEC.No. 32/00) where member states maintain the commitment for common negotiations of trade agreements with third countries or blocks, granted tariff preferences.

The application of the commercial policy both in CAN and Mercosur is different. Since 2006 CAN constitute a limited free trade zone, in the case of Mercosur the objective to complete a customs union was partially fulfilled, because of the lack of external tariff collection and a Customs code approval.

CAN and Mercosur primary law conferred the capacity to negotiate and conclude agreements with third countries, regional blocks or international organizations, and at CAN legislation the scope of this “deepen integration” could be developed in the political, social and economic fields.

[29] Félix Peña, “Acuerdo de Asociación Global Interregional para la creación de una Zona de Asociación Global”, Barcelona, CIDOB, Parlamento Europeo, 2009, p. 2-4.

Legal development to the definition of primary and secondary law has a deepen development in CAN than in Mercosur, regarding specific regulations to negotiate agreements with other countries and regional blocks.[30] However is necessary to difference the capacity of each integration process to negotiate agreements as an international organization with the capacity to legally bind each member state in that agreement, as part of the block.

As in the EU, member states at CAN and Mercosur also have sovereign competences to conclude agreements with third countries, regional blocks or international organizations, but EU have a special frame of competences –exclusive or shared, to act in fields like trade and cooperation and to bind member states.

In the case of political dialogue, first pillar at Association Agreements, the CAN has legal capacity to negotiate with the EU and to create legally binding commitments to this institutional framework and member states. As far as CAN common foreign policy does not appears as an exclusive or shared competence, there exist coordination of member states foreign policies that can act in the frame of the CAN as integration process.

Regarding Mercosur there is no evidence of legal normative –primary and secondary, conferring competences in political dialogue to the block. Member states in the frame of the Common Market Council should decide to act under the Mercosur institutional umbrella, coordinating intergovernmental foreign policies. The range of clauses in this case will bind the member states and no regional process institutions.

In the case of the cooperation pillar, EU poses non-exclusive competences and member states also have competences individually in this field. CAN and Mercosur can negotiate cooperation agreements with other international organizations or states with legal international personality. This is a common affair of inter institutional cooperation for regional blocks, that is operated by secondary legislation contained in Geographical strategies and regulations, that benefits only regional institutions –the General Secretary at CAN, for example.

Cooperation issues between EU member states and CAN/Mercosur states deal with bilateral strategies defining the time, scope, budget and projects in some case, that would be developed as part as bilateral commitments.

For the trade pillar, CAN and Mercosur dispose primary and secondary legislation to negotiate but does not implies transfer of competences in the field from member states to the integration blocks. For the CAN there is a case of mixed agreements where states could negotiate trade agreements individually and for the regional process to maintain limited common competences to some specific fields in commerce.

For Mercosur trade negotiations are limited to deal with tariffs or preferential agreements. For any other kind of obligations, member states could act under the common frame –the Common Market Council to define new policies for more

[30] For the negotiations of EU association agreements, CAN specific legislation, see: Andean Community Decision 667. General framework for the negotiations of the Association Agreement between the Andean Community and the European Union, in: http://www.comunidadandina.org/normativa/dec/d667.htm.

commitments as a customs union, otherwise regulations in Association Agreements could get different range: some obligating the Mercosur in subjects negotiated jointly with member states, legally binding for both.

Mercosur does not allow member states to negotiate individually bilateral trade agreements, out of this frame.

Beyond all this schema of relations established by EU Association Agreements, there are another principles and essential objectives defined since the beginning of the interregional relations between EU, CAN and Mercosur: to develop deepen multipolar multilateralism, as a condition to a better governance of the international system; to affirm the idea of integration process between sovereign nations is a contribution to the prevalence of peace, political stability and democracy in each region; to create a good environment to the growth of commerce and investments between regional integration spaces sharing values and interests.

Conclusion

Sometimes scholars and practitioners do not conceive EU association process in a real context. This was the first duty of this paper: understand the legal and political meaning and scope of different types of association defined in the EU Treaties. From this perspective there are association processes regarding new members accession, a specific for the overseas countries and territories and an association addressed to third countries and regional blocks where we find the relations with Latin America.

Traditional diplomatic instruments, containing secondary legislation derivate from constitutive Treaties, grant the association application. These instruments include regulations for different fields subject to exclusive or non-exclusive competences established in primary law, binding the EU as an organization with legal personality of International Public Law, and the member states as part of that international structure.

These international treaties known as Association Agreements legalize the relations negotiated between the EU and the third countries, regional blocks or international organizations.

The Association Agreements are an instrument to apply the CFSP, with cooperation and trade objectives, from two different perspectives: One establishing reciprocal relations for the parties in the agreement, in the scope of external relations that will be applied to the third countries and the other concentrate in the cooperation for development goals focused to the ACP countries.

The EU Treaties establish the institutional framework in charge to define clauses, negotiate and conclude these instruments, and the role of each institution (Commission, Council, Parliament) with the objective to understand who is who in decision-making and definition of the agreements (with who is possible to negotiate…). We conclude that the Lisbon reform increased the number of actors –with the President of the EU and the HRFA, in charge of the EU external affairs, however there are no new competences conferred to the integration process in political issues.

During the research and lecture of different documents from specialists, some statements from Ramon Torrent (2006) were the bases to analyze a different vision of the supranational and intergovernmental character of the EU institutions. In this case we were attired for the two technics to create law in integration treaties: a. introduces rules in the Treaty binding the states, and b. establishes some mechanism in the Treaty to produce new legislation.[31]

From this analysis the constitutive Treaties establish primary law, defining the institutional frame, and the capacity to produce new derivate or secondary legislation, allowing institutions to regulate more accurately the development of different issues at the integration process. Even if this logic could create a debate, constitute a different vision of the normative and institutional issues at the regional integration process.

The relation between competences and negotiation of international agreements at the EU process is a key issue to define the types of *modus operandi* to negotiate this settlement and to understand how the EU structure depends to the competences conferred by the member states. These competences establish the EU capacity as an international actor in the external action at the global world.

This analysis is a guide to comprehend how the EU and member states interact in the negotiation of the agreements; regarding each one of the pillars, we conclude that EU has a limited scope to act as international actor in the CFSP, reflected in the limited level of commitments at the political dialogue pillar, where is necessary a common action to conclude that issues.

It is not the same case in the other two pillars: cooperation and trade, where the EU has different levels of competences –shared and exclusive, that allows to act independently of the member states, however the effectiveness of that actions could be contested.

Effectiveness in this logic would mean: how deep and practical are the clauses contained in each association agreement to achieve defined objectives in the primary and secondary legislation. Legalization concept quoted in the analysis of Kanner (2008) has been a valuable mechanism to measure the scope and compulsoriness of the regulations in every pillar of the agreements.

Results are interesting to establish how in political dialogue there are more commitments corresponding types of soft law not legally binding to the parties. With regard to the second cooperation pillar, clauses in the agreements do not have the same level of definition than geographical regulations, regional or bilateral strategies that defines scope, budget, timing and projects for development causes.

Trade pillar instead is constructed with clear and structured rules, supported by World Trade Organization principles and norms regulating trade at multilateral level, legally binding for the parties and subject to the EU competences in these issues.

For the case of the South American integration process, we analyze the participation in association agreements as an EU creation, with the goal to define the level of commitments that CAN and Mercosur could reach as legal persons of International

[31] Ramon Torrent (2006), p. 17.

Public Law, and participation of member states in the exercise of their sovereign competences.

There are different levels of development at integration processes in South America, in normative issues the CAN shows an interesting Andean community law frame with supranational application –in limited matters, and Mercosur demonstrate from this side some advances to conclude a customs union. However is clear that both integration processes do not have competences conferred in primary legislation to act individually in fields as: foreign affairs, most of the trade issues or cooperation regarding member states.

Negotiation of association agreements with CAN and Mercosur means to deal with processes governed by intergovernmental institutions, where member states will coordinate all the policies to be implemented at most of the levels of integration processes: migration, security, trade in services, infrastructure, projects against poverty,…

Then the logic of the negotiation within blocks will be an intergovernmental logic, where member states define conditions and communitarian institutions will negotiate terms and clauses legally binding for the states and not for the integration framework, in a sort of mixed agreements.