
Special issue: *The European Union's External Action: Views from the Outside*

Research article

The Mercosur and European Union relationship: an analysis on the incorporation of the Association Agreement in Mercosur

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Submission date: 16 October 2020; Acceptance date: 22 March 2022; Publication date:
11 May 2022

How to cite

J. Mata Diz, 'The Mercosur and European Union relationship: an analysis on the incorporation of the Association Agreement in Mercosur' [2022] 6(1): 1. *Europe and the World: A law review* [19]. DOI: <https://doi.org/10.14324/111.444.ewlj.2022.01>.

Peer review

This article has been peer-reviewed through the journal's standard double-anonymous peer review, where both the reviewers and authors are anonymised during review.

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Open access

Europe and the World: A law review is a peer-reviewed open-access journal.

Abstract

This article analyses the Mercosur–European Union Association Agreement (AA) from a non-European perspective. It covers the Mercosur normative system, more specifically the part that deals with the incorporation of international laws and treaties into the regional legal system. First, it seeks to explain the nuances behind the announcement made by the States Parties to the AA in June 2019, seeking to contextualise the time frame for the development of the negotiations and the subsequent signing of the AA. Next, two important aspects for the effectiveness of the agreement are analysed: the procedure for incorporating the rules adopted by Mercosur Members, with reference to the provisions currently in force and applicable to Mercosur Members as a result of the agreements signed by them; and the difficulties associated with the procedure. Finally, the pillars on which the negotiations were initially conducted are discussed, with special

attention to political dialogue, trade and cooperation, and the sustainable development considerations that are present in the AA. By adopting a non-European perspective, this article presents the issues related to Mercosur's internal normative system for the incorporation of international norms and regulations, that is, the agreement itself, and the procedure for its entry into force and possible obstacles to its implementation. It is concluded that, despite all the efforts made to finalise the negotiations, there is a clear and indisputable uncertainty regarding the effective application of the agreement.

Keywords Mercosur; European Union; Association Agreement; incorporation procedure; effectiveness; sustainable development

1. Introduction

In June 2019, representatives of Mercosur and the European Union (EU) announced the end of negotiations of the EU–Mercosur Association Agreement (AA), which had been under discussion since the 1990s, and presented what was in theory the final version. This launched significant debate about its effects since the AA is an association between two regions that are considered significant for international trade. Treaties of this type – between two regions – are not common and the agreement, originally signed in 1998, became the first of its kind under the World Trade Organization (WTO) multilateral system. In addition, it could bring Europe closer to South America, given that it is a treaty between two independent blocs that have equal legal status and that it is grounded on the rule of law, not political and economic power.

Studies of the procedures for the incorporation of the agreement into the internal legal order of Mercosur and the EU (given the legal specificities of each intraregional system regarding the application of international norms) have shed new light on the phenomenon of the domestic incorporation of regional norms by members of supranational structures (i.e. Mercosur's Member States). In particular, they examine the mechanisms for the incorporation and subsequent application of an agreement that must respect the legal orders of both regions, which is key to understanding the effectiveness of the AA. This involves questions concerning not only the competences of the EU,¹ but also Mercosur's rules on the incorporation of its norms into the domestic legal systems of its Members. This system of incorporation of norms, which will be explained further below, is based on the so-called principle of simultaneous validity, which differs substantially from the system adopted in Europe. Such a principle establishes that, as a condition for a norm to be valid at the Mercosur level, it is mandatory that it be adopted beforehand by all Member States in accordance with their respective domestic internal procedures. No mandatory rule or deadline governs this procedure. Based on the foregoing, it can be seen at the outset that the main difference between the two blocs is that the EU has an independent system for the validity of its norms, while Mercosur is mainly intergovernmental, that is, a norm only becomes effective after all Members have adopted it.

This article is therefore focused on a pivotal aspect of the effectiveness of the AA, namely Mercosur's procedure for the incorporation of international norms. It will attempt to shed some light on the main obstacles that could prevent the agreement from coming into force and its subsequent application. The article also offers a brief contextualisation of the negotiations surrounding the agreement, which may help the reader to understand how the AA, following the 'ups and downs' of the entire decision-making process of the negotiations, came to have the wording and format it has today. Subsequently, the structure of the AA, including its pillars, is presented, so that a correlation between its effectiveness – once it comes into force – and its content can be established.

Before the article analyses AA itself, the historical background is explained. Mercosur, created by the Treaty of Asunción (TA) in 1992, is made up of Argentina, Brazil, Paraguay, Uruguay and Venezuela. It comprises a regional integration bloc whose initial objectives established in the Treaty were the creation of a common market within a maximum period of 10 years, as stipulated in the Ouro Preto Protocol

¹ Since this article adopts a non-European perspective, the issue of EU competences will not be covered.

(OPP).² Mercosur has always tended to experience setbacks that have prevented it from reaching a common market phase, and it has thus retained a classic regional integration format whereby no supranational institutions are constructed or legislation having a direct effect is adopted.

Even though Mercosur has decision-making bodies (Common Market Council – CCM; Common Market Group – GMC; and Mercosur Trade Commission), there has been no transfer of powers or competences in respect of the exercising of the powers granted to them in the 1992 foundational Treaty. This lack of supranational structure has hampered its progress towards a common market, as will be seen below.

Mercosur's history, in fact, has been characterised by long periods of instability and inertia due to the volatility of foreign policies adopted by its Members. There is no political (or legal) action that effectively guarantees the reaching of a common market stage. Moreover, it is unlikely that this will ever be achieved unless Mercosur creates its own specific institutions and norms, even if such norms and institutions are ultimately backed up by its Member States.

One specific issue regarding Mercosur relates to the legal nature of its internal procedures. Even though its objective is to form a common market, with the four inherent fundamental freedoms and the required institutions to uphold them (both from structural and normative aspects), Mercosur is still in an incomplete customs union phase, with no transfer of powers and competences to its regional bodies. It means that Mercosur finds itself in a 'grey' zone,³ where no effective rights inherent in a regional integration process exist, thus differing from European law, which possesses a clear supranational nature.

2. The negotiation and the problem of the 'final draft'

This section provides a brief analysis of the development of the negotiation of the AA. First, however, it is worth pointing out that, despite multiple rounds of negotiations over more than 20 years, the document delivered as final is still a 'work in progress'. Moreover, as can be seen in a disclaimer found on the website of the European Commission itself,⁴ this version of the document is for information purposes only since it is still subject to change.

Analysis of the negotiations, even if preliminary, is necessary to understand how an agreement that had been negotiated for more than 20 years was signed by the Parties without there being a final document. This is because it can still undergo technical, legal and linguistic amendments during the 'legal scrubbing' phase, as will be explained below.

The absence of a final text brings into question whether the agreement will enter into force and signals that there may still be a need for further rounds of negotiations regarding non-trade-related aspects (e.g. issues pertaining to sustainable development). Thus, the entry into force of the AA will be dependent on the Parties agreeing on certain provisions that have not yet been subject to specific regulation, such as issues pertaining to public procurement and services, as well as issues of a more political nature, as the chapter on Sustainable Development and Trade (TSDC) illustrates.⁵ This chapter's ambiguous provisions still lack clear regulations and enforcement rules and procedures, which would be necessary before it could, at least in theory, become valid and enforceable. This seems to be in line with predictions made by Members of the European Parliament who commissioned the 2019 'Study Analysis of the agreement between the European Union and . . . Mercosur'. Their view was that 'one thing is clear, the MEU agreement is not up to the task', which is at variance with the usual line of reasoning hailing the agreement as a seminal moment.⁶

² Available at <http://www.sice.oas.org/trade/mrcsr/ourop/ourop_e.asp> accessed 15 October 2021.

³ CF Del Pozo, *Derecho de la Unión Europea* (4th edn, Dijusa Ed. 2002) 58.

⁴ 'The texts are published for information purposes only and may undergo further modifications including because of the process of legal revision. . . . These texts are without prejudice to the final outcome of the agreement between the EU and Mercosur.' <<https://trade.ec.europa.eu/doclib/press/index.cfm?id=2048>> accessed 28 May 2020.

⁵ See European Parliament resolution of 7 October 2020 on the implementation of the common commercial policy – annual report 2018 <https://www.europarl.europa.eu/doceo/document/TA-9-2020-0252_EN.html> accessed 1 December 2020, which explains the need to clarify the content of the sustainable development and social rights protection clauses.

⁶ L Ghiotto and J Echaide, *Analysis of the Agreement between the European Union and the Mercosur* (Anna Cavazzini MEP, The Greens/EFA 2019).

2.1. A brief timeline of the negotiations

The first contacts between the Parties took place in 1994, when the (then) European Community (EC) and Mercosur began the process towards a third-generation agreement,⁷ with the objective of establishing a wide-ranging and diverse interregional dialogue. In 1995 the Framework Agreement was signed, but official negotiations only began in 1999 after it was ratified and the negotiating directives adopted by the European Commission. In 2000 this interregional agreement became the starting point for negotiations for the creation of a Free Trade Zone.

The above-mentioned negotiating directives contained general provisions to promote the strengthening of bi-regional ties through three main levels (or pillars): (i) political dialogue, which included the values and objectives of both regions (democracy, fundamental rights and the enforcement of a multilateral system); (ii) commercial relations aiming to boost trade volumes between the two regions; and (iii) cooperation, represented by the strengthening of Mercosur's institutions and the support of the EC for other processes of regional integration. As to political dialogue, there was nothing more than a statement establishing that dialogue was to take place between officials and parliamentarians. Regarding trade, the objective was free trade in goods and services – to be implemented over a 10-year time frame – and to eliminate all forms of discrimination between the Parties.

The AA promises a bloc that could become a common market comprising about 800,000 people,⁸ able to promote economic and social development, while being grounded on principles of sustainability and environmental protection. Its main innovation is found in the third pillar, which creates the concept of advanced cooperation, consisting of a combination of traditional methods applied to trade and development agreements (exclusively focused on trade in goods and/or services) and cooperation methods that also include political dialogue between, cooperation among and development of the Parties, therefore including non-trade-related provisions. According to Ghiotto and Echaide, cooperation was a means to bring about modernisation to Mercosur countries' bureaucratic systems through measures such as exchange of information, technical assistance, training programmes, roundtables, and so on.⁹

In the first five years following the 1999 negotiating directives, the discussions were linked to agricultural negotiations in the WTO. However, from a multilateral perspective, the failure of the 1999 Millennium Seattle Round stalled the negotiations as it would be necessary to wait until the 2001 Doha Round for negotiations to continue.¹⁰ To circumvent this obstacle, regardless of the WTO, negotiations were launched in 2000 between Mercosur and the EC through the then recently created Bi-regional Negotiations Committee.¹¹

From the onset of negotiations, it became evident that there would be difficulties, especially given the great differences in economic development between the two blocs, each having extremely divergent interests, objectives and expectations. While Mercosur wanted to gain access to European agricultural markets, the EC sought the liberalisation of trade in services and government procurement (with a particular emphasis on Brazil), foreign direct investments in the region, and the acceptance of new intellectual property rights.¹²

These differences were the origin of a large number of the problems that appeared later, both in the discussion of the various topics of the agreement (goods, services, investments, government

⁷ P Leblond and C Viju-Miljusevic, 'EU Trade Policy in the Twenty-First Century: Change, Continuity and Challenges' (2019) 26 *Journal of European Public Policy* 1836. According to them 'recent trade agreements such as CETA, TTIP, CPTPP and USMCA are referred to as "third-generation" agreements. In comparison, the GATT and its successive negotiations rounds is a "first generation" agreement, limited to reducing tariffs and quotas, while the North American Free Trade Agreement (NAFTA) is a "second generation" agreement because it also includes provisions to address beyond-the-border barriers to trade and investment, but more limited in scope than today's agreements.'

⁸ According to government representatives, the agreement is currently the most significant trade agreement in the world. For Mercosur, it will provide access to the European market with lower or even zero-rate tariffs and the opportunity to reach 500 million prospective consumers across the EU. On the other hand, the agreement could give the EU commercial access to the most developed region in South America.

⁹ Ghiotto and Echaide (n 6).

¹⁰ A Makuc, G Duhalde and R Rozemberg, *La negociación MERCOSUR-Unión Europea a veinte años del acuerdo marco de cooperación: Quo vadis?* (Inter-American Development Bank 2015) <<https://publications.iadb.org/handle/11319/7126>> accessed 30 August 2020.

¹¹ The Bi-regional Negotiations Committee was created at the first meeting of the Cooperation Council.

¹² Makuc, Duhalde and Rozemberg (n 10).

procurement, intellectual property, etc), as well as in the content of the offers that were presented between 2001 and 2004 covering trade liberalisation. Furthermore, although negotiations took place as if both Parties were equal and obliged to engage in commitments of equal magnitude or importance in all areas of the negotiations, the scenario that was being formed showed an imbalance in rights and obligations in favour of the economically stronger Party.

The failure of the Doha Round at the Cancun ministerial summit in August 2003 concerning broad agricultural liberalisation was the prelude to the suspension of the AA negotiations in 2004. While the EC, like the US, made no significant concessions in this area, it did not waive its onerous demands on developing countries regarding access to markets for industrial goods and public procurement, protection of investment and intellectual property rights, and trade facilitation. This agrarian protectionism on the part of the EC and the US led developing countries to pronounce as regards the Doha Agenda that '[n]o agreement at all is better than a bad agreement'. This fact – suspension of the Doha negotiations – together with other factors linked to associated components,¹³ interrupted negotiations for the agreement in October 2004.

Another factor that impacted negotiations was the accession of 10 new EU countries from Central and Eastern Europe in May 2004. Most of these new EU Member States had relatively less developed economies and several of them, such as Poland, were important agricultural producers. This, combined with the change in power at the level of the European Commission in November 2004, is another example of the linked factors. As to the essence of the negotiations, the offers exchanged by both Parties satisfied the interests of neither.

The complexity of these negotiations, and the lengthy periods of time devoted to them, go hand in hand with important historical moments for the EU, with the accession of new Members and their consequent influence on European foreign and trade policy (e.g. Poland and Hungary). Additionally, the impact of the amendments introduced by the Treaty of Lisbon, especially those pertaining to the delimitation of supranational competences, should not be forgotten. On the international stage there were also additional complexities brought about by the possibility of a new reconfiguration of multilateral trade organisations, especially the WTO, and the creation of new paradigms as a response to the failures of the multilateral trade system.

Still, within the framework of MEU relations, it is noteworthy that, from 2004 until 2009, only political-level meetings were held to reaffirm the Parties' interest in continuing the negotiations. According to Sanahuja and Rodríguez, this period could be described as one 'of mutual disinterest'.¹⁴ Nonetheless, some global events took place that would again alter the expectations of the Parties: the already mentioned failure of the Doha Rounds, the international economic crisis, and the consolidation of China as a global power, among others. These external factors affected the negotiating dynamics and help explain how the priority that each of the Parties gave to the agreement varied. Another important development was the onset of the 2007–8 international financial crisis, which caused the world economy to enter into recession, with the EU being one of the most affected regions.

The crisis and its consequent impact on global export volumes pushed the European Commission to seek the resumption of negotiations with Mercosur. This was in line with a shift in the European Commission's overall commercial policy, whereby it seemed to give priority to trade-related aspects, sidelining the other two levels (political dialogue and cooperation). As pointed out by Bosse-Platière and Rapoport, it was clear that the EU was targeting different free trade agreement (FTA) partners, giving preference to economic aspects of trade agreements – rather than purely political ones – thus improving mutual market access and boosting the EU's economy.¹⁵

¹³ For example: (a) a shift in the political preference of Mercosur, which came to prefer a South-South model, thus prioritising South American countries (e.g. the Andean Community and Chile) and African countries as preferential trading partners. This was a paradigm shift since traditionally the external relations of Mercosur, and its Member States, have always been focused on the traditional developed north (notably the US and Europe); (b) political differences among Mercosur Member States that caused important crises such as the devaluation of the *Real* in the 2000s and the consequent impact on the incipient macroeconomic policy and competition between States Parties; and (c) the need to improve Mercosur's institutional framework, thus allowing for the creation of a future common market.

¹⁴ JA Sanahuja and JD Rodríguez, 'Veinte años de negociaciones Unión Europea – Mercosur: Del interregionalismo a la crisis de la globalización' [2019] Documentos de Trabajo <https://www.fundacioncarolina.es/dt_fc_13/> accessed 30 August 2020.

¹⁵ I Bosse-Platière and C Rapoport, 'Negotiating and Implementing EU Free Trade Agreements in an Uncertain Environment' in I Bosse-Platière and C Rapoport (eds), *The Conclusion and Implementation of EU Free Trade Agreements* (Edward Elgar Publishing 2019) 14 <<https://www.elgaronline.com/view/edcoll/9781788974790/9781788974790.00009.xml>> accessed 30 August 2020.

Since an agreement with Mercosur would constitute an alternative for greater access to dynamic markets, especially Brazil, the negotiations were reopened in 2009. Despite harsh criticism at the domestic level,¹⁶ the joint understanding¹⁷ reached at the IV EU–Mercosur Summit inaugurated a new paradigm on the part of the EU and a new form of international setting in which Latin America and the Caribbean were once again on the European agenda. Therefore, as stated above, the EU shifted its focus to partners considered strategic, adopting a system of multilevel negotiations (agreements with countries and regions) covering predominately trade-related aspects and as such establishing new forms of association without the political and cooperation levels. This shift on the part of the EU is accurately described by Bosse-Platière, whereby new FTAs represent a paradigm shift as they were targeting highly competitive industrialised or emerging countries. In 2006 the key economic criteria for FTA partners had been market potential (economic size and growth) and the level of protection against EU export interests (tariff and non-tariff barriers). This approach was strengthened in 2015 with the inclusion of a recommendation that the negotiation of FTAs with major trade actors (i.e. the US, Canada and Japan) be prioritised.¹⁸

From 2010 onwards, there was a new stage of negotiations between Mercosur and the EU, but with outcomes being produced at two different speeds: the fast development of regulatory frameworks on the one hand, and the slow-motion preparation of offers on the other.¹⁹ During the eight rounds of negotiations²⁰ there was no exchange of offers, although some limited progress was made in regulatory aspects (services, public purchases, customs and facilitation of trade, intellectual property, rules of origin). In addition to there being no exchange of offers and eventual disagreements regarding policies, the evolution of the negotiations would be significantly impacted by the announcement by the European Commission of the suspension, from 2014 onwards, of trade concessions under the Generalized System of Preferences (GSP)²¹ for several upper-middle income countries, including Argentina, Brazil, Uruguay and Venezuela. From a regional perspective, this announcement would function as an element of pressure to push Mercosur into expediting negotiations for the creation of the FTA.

It took newly elected governments in the region (Temer in Brazil and Macri in Argentina) to set the wheels in motion. Mercosur abandoned its intention of achieving a more balanced agreement, and, with the election of new President Jair Bolsonaro, Brazil set aside its historical claims in order to make the conclusion of the agreement attainable. Thus, after 20 years and many rounds of negotiation, including many ups and downs, on 28 June 2019 a 'final' document was concluded. However, serious doubts remain in relation to the 'final version' presented, as well as the consequences arising from its subsequent application, as will be discussed below.

2.2. Is it a final agreement or only a draft?

It is important to highlight that the AA is still a draft, not a final and enforceable official document. It is subject to technical and legal revision (known as 'legal scrubbing'); therefore, despite the announcement of the end of the negotiations, some issues remain subject to talks and possible changes. Experience points to the fact that significant changes ought to occur during the scrubbing phase, especially to provisions on sensitive topics that have not been drafted in detail, such as public procurement and sustainable development. Finally, before entering into force the agreement must be reviewed and ratified by the competent domestic authorities of the Parties.

¹⁶ A group of European countries, led by France, opposed the reopening of the negotiations. They were critical of this taking place without evaluation of the possible impacts on the EU economy, including the agricultural sector.

¹⁷ '2. At the occasion of the relaunch of the negotiations for an EU Mercosur Association Agreement, the Heads of State and Government recalled their importance in view of reaching an ambitious and balanced agreement between the two regions, which would deepen relations and offer great political and economic benefits to both sides.' <<https://alternoscomunicaciones.files.wordpress.com/2013/10/sommet-mercotur-2010.pdf>> accessed 7 April 2022.

¹⁸ Bosse-Platière and Rapoport (n 15).

¹⁹ Makuc, Duhalde and Rozemberg (n 10).

²⁰ The eight rounds were: July 2010 (Buenos Aires), October 2010 (Brussels), December 2010 (Brasília), March 2011 (Brussels), May 2011 (Asunción), July 2011 (Brussels), November 2011 (Montevideo), March 2012 (Brasília) and October 2012 (Brasília). See JB Mata Diz and RDA Luquini, 'As Relações Exteriores Do Mercosul: Análise Das Negociações Com a União Européia' (2011) 9 *Universitas: Relações Internacionais* 103.

²¹ The GSP is a preferential tariff system which provides tariff reductions on various products. GSP differential tariffs could be imposed by a nation on various countries depending upon factors such as whether it is a developed country or a developing country.

Since the announcement of the end of the negotiations and the signing of the draft by the Parties, there have been no other changes (technical, legal or linguistic) to the text of the AA (as of August 2020). Following the announcement there has been political reaction against its coming into force (such as in the Dutch Parliament; Angela Merkel's speech; and the annual report of the European Parliament,²² which points out that the agreement contains a binding chapter on sustainable development that must be applied, implemented and fully assessed, as well as specific commitments on labour rights and environmental protection, including the implementation of the Paris climate agreement and the relevant implementing rules, and emphasises that the AA cannot be ratified as it stands), which is explicitly linked to the issue of sustainable development and compliance with certain provisions pertaining to it, which will be further analysed below.

From a purely legal perspective, given the absence of specific information regarding the other two pillars (political dialogue and cooperation) and non-trade-related aspects, the announcement is more political than technical in nature.

As seen above, the final draft underwent a long and exhausting negotiation process before the final version that is the subject of this article was arrived at. Despite the length of time taken, it does not contain the political dialogue and cooperation pillars that were part of the original mandate, while the second pillar – trade – contrary to what has been announced by the press and by some experts, is not final. There are important issues that are still pending, such as the non-tariff barriers to some products, the possible expansion of the list of exceptions, and, finally, compliance with standards that go beyond a purely tariff issue, but which affect the exchange of goods, such as compliance by Mercosur producers with measures proposed in the European Green Deal.²³ According to a report published by the London School of Economics in December 2020, in addition to the tariff barriers, there are numerous and high non-tariff barriers affecting trade. They include sanitary and phytosanitary (SPS) measures as well as technical barriers to trade (TBTs). Multiple regulations exist that affect the trade in services in all provision modes, specially related to the movement of natural persons as well as Foreign Direct Investment (FDI).²⁴

The difficulty in talking about a draft lies precisely in the unpredictability of its outcome concerning the effects of future measures that have not been fully worded yet. From a Mercosur perspective there is a fear that trade is not the only element to characterise the agreement, since, in principle, trade aspects cannot be completely detached from non-trade ones. For example, the strict environmental standards and guidelines that must be observed by EU Member States would also have to be observed by Mercosur producers, without any financial support. Apparently, these 'greening' expenditures will be borne by Mercosur alone. From the EU perspective, if this agreement concentrates solely on trade issues, it could represent a fracture in the EU trade model, since the apparent difficulty in approving the AA and its subsequent entry into force, mostly due to a non-trade-related agenda (i.e. discussions regarding the degree of environmental protection), may lead to a dissociation between the trade- and non-trade-related aspects, thus representing a departure from the three pillars mandated by the EU.

Furthermore, as regards the political and cooperation pillars, in the event they are not consigned to the sidelines, as mentioned in the preceding paragraph, there is an important asymmetry in terms of access to European funding and aid. Not all third countries are able to access such funding effectively given the strict criteria adopted and the difficulty that foreign companies face in complying with them. In addition, it should be noted that the European funding includes a wide range of subsidies, grants and loans for companies based in the EU (or incorporated therein – the so-called *societatis europeas*) that help them to comply with the strict criteria adopted by the EU. In principle, such subsidies, grants and loans do not apply to non-European companies. Thus, environmental standards can have negative consequences for fair trade, especially when considering market access by non-EU producers, due to the lack of equal treatment and opportunities among all players.

²² European Parliament resolution of 7 October 2020 on the implementation of the common commercial policy – annual report 2018 (2019/2197(INI)), number 35. <https://www.europarl.europa.eu/doceo/document/TA-9-2020-0252_EN.html> accessed 1 December 2020.

²³ For further information on the European Green Deal, see <https://ec.europa.eu/commission/presscorner/detail/en/fs_19_6714> accessed 30 May 2020.

²⁴ The London School of Economics and Political Science, 'Sustainability Impact Assessment in Support of the Association Agreement Negotiations between the European Union and Mercosur' (2020) Final Interim Report.

Obviously, a political agreement is not a treaty since it still requires additional steps, any of which could prevent its final adoption.²⁵ First, its final wording must be finalised before it is translated into all official EU languages. Then it should be signed by the Parties and undergo the appropriate validation mechanisms – which are not yet clear and can only become clear once the full content of the agreement is known to all. Therefore, two important points emerge: (i) the fragmented and heterogeneous way in which the negotiations were carried out, resulting in a document still subject to revisions and amendments, making it impossible to state that it is final; and (ii) the paradigm shift of the EU with regard to the formation of new strategic partnerships and the adoption of agreements of an exclusively commercial nature, disregarding the political and cooperation levels, which, unfortunately, means the exclusion of important issues for the international fora, such as sustainable development.

From the point of view of Mercosur, this format of strategic partnerships based on purely trade-related aspects still demands a certain level of compliance regarding non-trade-related standards. That is, after a long period of negotiations whose focus also included political and cooperation aspects, the so-called ‘exclusively commercial’ format creates uncertainties regarding the future of the AA, especially when non-trade-related aspects (e.g. sustainable development) seem to be gaining traction and momentum globally. In other words, the EU’s stance in focusing on ‘exclusively’ trade-related agreements may seem, from an outside perspective, to be a ‘magic formula’ to hide or bypass the very standards created by the EU itself.

3. The problem of agreement incorporation and the legal system of Mercosur

It is evident that the legal nature of Mercosur is different from that of the EU. The latter has been granted exclusive competences to act in certain fields, including powers to cover economic aspects and to negotiate provisions dealing with the establishment of common markets with third parties, which on different occasions has led to an ‘extension’ of the implicit competences exercised by the EU. Conversely, Mercosur is an intergovernmental international organisation that has not delegated to its institutions general (or specific) authority to exercise competences relating to the functioning of common markets as it is still in an incomplete customs union stage. In other words, as Mercosur does not have its own supranational institutional structure, there is no normative and institutional competence allowing the entry into force of norms without their being incorporated by Member States, according to the respective procedures established by national laws. There is no prospect of Mercosur undergoing any legal and structural changes in the near future.

Mercosur does not have its own institutional system endowed with decision-making authority ‘detached’ from that of the States, nor does it have a supranational legal system based on the principles of primacy, immediate applicability and direct effect – principles that are well known to Europeans. In addition, there is no common institutional system, with its own powers, independent from Member States. Unlike in the EU, there is no provision for transfer of powers and competences either in the TA²⁶ or in other rules, resolutions, guidelines or decisions adopted by Mercosur bodies.²⁷ Therefore, it can be argued that the AA is intraregional and not bi-regional or interregional, and, as such, even if the AA recognises the differences between internalisation procedures, the nature of each within its territorial scope of application (supranational in the EU and intergovernmental in Mercosur) can result in asymmetric legal conditions (imposed by the different legal regimes adopted by the respective regions), as will be further analysed below.

The primacy principle allows norms originating from regional institutions to prevail over domestic ones, including those having a constitutional nature,²⁸ thus it encompasses an important difference

²⁵ A Malamud, ‘MERCOSUR and the European Union: Comparative Regionalism and Interregionalism’ in A Malamud (ed), *Oxford Research Encyclopedia of Politics* (Oxford University Press 2020) <<https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-1085>> accessed 30 August 2020.

²⁶ Available in English at <<http://www.sice.oas.org/trade/mrcsr/mrcsrtoac.asp>> accessed 15 October 2021.

²⁷ The TA provides for the following types of norms: Decisions of Council of the Common Market, Resolutions of the Common Market Group and Directives of the Council of Common Market. Norms are classified by the type of person issuing them (*ratione personae*), not by their subject matter (*ratione materiae*).

²⁸ The prevalence of Community norms over domestic constitutional ones has been widely debated by European scholars and addressed by the European Court of Justice.

vis-à-vis Mercosur since norms issued by the latter lack such prevalence. Finally, together with the immediate applicability (although restricted to certain matters or subjects within the EU) and the direct effect principles, primacy determines the degree of integration achieved by the EU and impacts the powers granted by the States to it.

In the context of Mercosur integration, scholarly debates on this topic do not provide a definitive answer since there is a lack of consensus. Furthermore, given the insufficiencies of the TA and the incomplete 'attempt at correction' by the drafters of the OPP, this question is far from being resolved.²⁹ The founding Treaty (Asunción) establishes in its Article 1,³⁰ combined with Article 16, the legal basis to put in place the internalisation tools for Mercosur norms. As with Mercosur's institutions, the lack of reference in the TA to specific methods for the integration of norms can be attributed to the prudence of Member States' governments, which expressed the position of Mercosur's founding fathers in favour of a more flexible and reserved position. With the advent of the OPP, represented by Chapters IV and V, specific requirements for the internalisation of norms were established. As a result, a procedure for such internalisation was designed but without adopting the supranational assumptions contained in EU law, which, in some respects, has caused a weakening in the application of and compliance by Member States with Mercosur's norms.³¹

Indeed, there are opposing positions on internalisation: on the one hand there are those who advocate for the application of EU Law principles to Mercosur norms, based on Articles 40 and 42 of the OPP, as well as in guiding principles contained in the TA; and, on the other hand, there are those who deny any link between Mercosur and EU Law principles.³²

Regardless, Article 40 of the OPP establishes that Mercosur's legal system possesses three main characteristics: (i) the mandatory nature of its norms, (ii) their simultaneous validity, and (iii) the existence of a procedure for the 'incorporation' of such norms. They are therefore mandatory for Member States, which must make every effort to incorporate the norms. By assuming their simultaneous validity, the system sets out a unique method whereby norms can draw their validity from two different levels, the domestic and the regional, in the latter case only after being duly incorporated by all Member States. As such, the simultaneous validity presupposes a platform on which a unique system is built, based on an incorporation procedure set by each Member State, but whose enforceability is at its core, and compliance with which is diminished by problems posed by Member States and their respective incorporation systems.³³

Simultaneous validity, as a technique to fill in the gap of supranational effectiveness and enforceability, was addressed in the IV Arbitration Award. Given the importance of this ruling, the following excerpt will be quoted in its entirety:

(115) It is true that the OPP also provides that the rules issued by the decision-making bodies will be mandatory (art 42) and that CCM decisions will be mandatory for Mercosur State Parties (MSP) (art 9), while article 38 of the Protocol itself determines the MSP's own commitment to adopt in their respective territories all necessary measures to ensure compliance with the rules issued by the decision-making bodies.

(116) The resulting regime, however, is not inconsistent or contradictory, but responds to the concept called the doctrine 'of simultaneous validity' – as opposed to the immediate application – based on which the different provisions of the OPP are combined and harmonized in a system whereby standards are mandatory for MSPs since their approval, but

²⁹ JB Mata Diz, *Mercosur: origen, fundamentos, normas y perspectivas* (Juruá 2007).

³⁰ 'The commitment by States Parties to harmonize their legislation in the relevant areas in order to strengthen the integration process.'

³¹ Mercosur's weakness lies, precisely, in the absence of a system that determines the conditions for the effective incorporation and application of regional norms and rules as well as agreements executed outside its territory (and that are deemed to be from a primary source). The existing arbitration reports, as well as the documents issued by Mercosur and the analysis of the incorporation procedure, demonstrate the need to establish clearer rules regarding the competence of Member States, term of validity, uniform application, etc. See also Mata Diz (n 29).

³² See G Caetano, RM Perina and Á Coronel, *La Encrucijada política del Mercosur: parlamentos y nueva institucionalidad* (CLAEH 2003) 54.

³³ Mata Diz (n 29).

whose validity only occurs simultaneously for all MSPs once everyone has complied with the procedure of article 40.³⁴

Furthermore, Article 42 of the OPP uses somewhat inaccurate and ambiguous wording, whereby it establishes that the norms issued by Mercosur institutions will be mandatory and 'when necessary, they must be incorporated into the domestic legal systems'. The first part of Article 42 is not problematic as it covers the mandatory nature of Mercosur's norms,³⁵ but the second part, since it states that certain norms must necessarily be incorporated, while others do not have to be, creates a great deal of uncertainty due to its dual nature.³⁶ As to the latter, an intrinsic supranational characteristic would have to be present – which has not yet been achieved – and as such it would indicate that the norms emanating from Mercosur's institutions would not need to be incorporated into the respective domestic legal systems as foreseen by public international law, therefore prevailing their immediate applicability.

The interpretation given by the II Arbitration Award³⁷ indicates that the provisions of Article 42 should be considered as a means for the incorporation of norms, that is, 'the article requiring recourse to domestic laws does not aim at clarifying the cases in which it shall be "necessary" to incorporate Mercosur norms, but only to identify through which "procedures provided for by the legislation of each country" such incorporation must be made'.³⁸

To clarify the controversies arising from the section of the OPP dealing with the incorporation of norms, a few decisions were approved on the subject.³⁹ Without question, the most important ones were the following:⁴⁰

- Decision MERCOSUR/CCM/Dec. n° 23/00: it states that in 'accordance with the provisions of the Ouro Preto Protocol, Decisions, Resolutions and Directives are binding on State Parties and, when necessary, must be incorporated into domestic legal systems'.⁴¹ It also provides some novel elements to possibly settle certain ambiguities in the OPP when it sets the conditions for a waiver of the obligation to incorporate, as follows:
 - (a) the States Parties jointly understand that the content of the norm relates to the internal functioning of Mercosur. This understanding will be made explicit in the text of the rule as per the following wording: This rule (Directive, Resolution or Decision) does not need to be incorporated into the legal system of the States Parties, since it covers aspects of the organization or functioning of Mercosur. These rules will come into effect upon approval;
 - (b) the content of the rule was already contemplated in the domestic legislation of the State Party. In this case, the National Coordination will make the notification provided for

³⁴ Brazil v Argentina, 21 May 2001 (compatibility of obligations with anti-dumping measures against exportation of whole chickens). The full text of the arbitral award is available in Spanish at <http://www.sice.oas.org/dispute/mercosur/ind_s.asp> or in Portuguese at <http://www.sice.oas.org/dispute/mercosur/ind_p.asp> accessed 16 April 2022.

³⁵ 'In general, the rules derived from Mercosur shall be compulsorily incorporated into the legal systems of the Member States, that is, they represent a prescriptive obligation to the states' (Justo Nascimento, 2004, 51).

³⁶ Mata Diz (n 29).

³⁷ '54. . . . This Treaty clarifies that the rules issued by the Mercosur bodies (Council of the Common Market, Common Market Group and Mercosur Trade Commission) will be mandatory and, when necessary, should be incorporated into the national legal systems through the procedures provided for by the legislation of each country (art 42).' Argentina v Brazil, 27 September 1999 (compatibility of obligations with pork production subsidies). The full text of the arbitral award is available in Spanish at <http://www.sice.oas.org/dispute/mercosur/ind_s.asp> or in Portuguese at <http://www.sice.oas.org/dispute/mercosur/ind_p.asp> accessed 16 April 2022.⁵⁵ The fact that certain standards require subsequent implementation does not mean that they lack value, but that States have an obligation not to frustrate their application, as well as the fulfilment of the purposes of the Treaty of Asunción and its complementary Protocols' (free translation of Argentina v Brazil, 27 September 1999 (compatibility of obligations with pork production subsidies), available in Spanish at <http://www.sice.oas.org/dispute/mercosur/ind_s.asp> or in Portuguese at <http://www.sice.oas.org/dispute/mercosur/ind_p.asp> accessed 16 April 2022).

³⁸ AD Perotti, 'Tercer laudo arbitral del MERCOSUR. Una buena excusa para hablar de Salvaguardias y del Derecho Regional' (2000) 5 Revista de Derecho del Mercosur 234.

³⁹ Mata Diz (n 29).

⁴⁰ These decisions are original Mercosur norms adopted by the Common Market Council, composed of the Heads of State and Government of the Parties, being mandatory and binding on all States. The problem resides, once again, in the absence of incorporation mechanisms that ensure that all States will adopt this standard within a certain period and enforcing it uniformly. Finally, in case of a non-compliance with the preceding obligations, it is noted that the absence of a court or a dispute settlement system does not help in the promotion of greater systemic effectiveness.

⁴¹ Decision approved by the CCM on 30 June 2000.

in Article 40 (i) pursuant to the terms of Article 2 of this Resolution, indicating the existing domestic rule that contains the Mercosur provision in question.

The above quotation illustrates the originality of the Decision, as it determines the operative generality and the exceptions to it, that is, all rules that come from Mercosur institutions need to be incorporated into domestic legal systems, except as otherwise provided therein. This, in turn, confirms that the need to internalise is the general rule.

- Decision MERCOSUR/CCM/Dec. n° 20/02: establishes a procedure to improve the method of incorporating Mercosur norms by stating that there is an obligation to apply such norms in an integral way in the domestic legal systems. This can be clearly seen in the following text:

In order to achieve uniformity in the incorporations to be made by each State Party, in accordance with the provisions of article 40 of the Ouro Preto Protocol, the norms issued by the decision-making bodies of MERCOSUR that are approved as of 6/30/2003 must be incorporated into the legal systems of the States Parties *in full*.

Moreover, item 8 of this decision, in an effort to reinforce incorporation rules and procedures, establishes that Member States must prepare their national laws to make them comply with Mercosur norms once they are approved. This possibility is complemented by Article 12, which provides that if a State, due to the nature and content of the regulation to be incorporated, must follow the procedure foreseen in Article 42, the legal act in question shall contain wording to that effect.

- Decision MERCOSUR/CCM/Dec. n° 08/2003: this decision determines a procedure for the revocation of Mercosur norms, establishing that the ‘entry into force of the last approved MERCOSUR rule will imply the revocation of *all related prior ones*’.⁴²
- Decision MERCOSUR/CCM/Dec. n° 22/04:⁴³ this decision represents an important milestone in the construction of a regulatory system informed by the direct applicability principle, whereby it determines that certain norms are not required to be duly incorporated.⁴⁴ It is a relevant step in the recognition that Mercosur enforceable legal acts may be valid domestically irrespective of their being internalised. Another issue raised due to inadequate incorporation procedures refers particularly to the term of such incorporation. In this decision, unfortunately, the tribunal only addressed the claims filed by the Parties, thus rendering a favourable decision to Argentina, and ordering Brazil to incorporate the norms that were the subject of the claim within 120 days. However, the decision was never intended to be used or applied *erga omnes*.

Therefore, the facts are not consistent with the most optimistic doctrine regarding immediate applicability at the level of Member States, especially if one takes into account the number of Mercosur norms that have not yet been incorporated domestically. Furthermore, the different incorporation techniques adopted by Mercosur States do not allow a more extensive interpretation than that established in the OPP. In this regard, it suffices to highlight the issue posed by Brazilian constitutional incorporation rules as an example of the difficulties that will arise.⁴⁵

Regarding the primacy principle, there is no explicit recognition in Mercosur’s constituent treaties determining the prevalence of Mercosur norms over domestic ones. Article 38 of the OPP could be

⁴² Emphasis added.

⁴³ This was an arbitration proceeding established to solve a controversy between Brazil and Argentina regarding phytosanitary measures not duly incorporated by Brazil. It states that ‘the obligatory nature of the rules, although limited by the requirement of simultaneous validity, is not absent. It is a legal obligation for each State . . . to adopt all necessary measures to ensure, in their respective territories, compliance with the norms issued by the MERCOSUR bodies (OPP, art 38)’.

⁴⁴ In order for a regulation to be deemed to be valid, once it is approved by Mercosur institutions and a copy certified by Mercosur’s Secretariat is duly received by the Ministry of Foreign Affairs, it must be published in the respective official gazettes, in accordance with the domestic procedures of each State Party, 40 days before the date set forth for its entry into force, and such publication of Mercosur rules in the official gazettes will imply the incorporation of the rules into the domestic legal orders, pursuant to art 40 of the OPP.

⁴⁵ Brazil has adopted an incorporation system that requires, after ratification of the President, approval by the two chamber of the Brazilian National Congress (Senate and House of Representatives) and after such Congress approval the President must sign the bill into law, pursuant to arts 49 and 84 of the Brazilian Constitution. In addition to this complex procedure, the ‘hierarchy’ of treaties remains disputed. There is jurisprudence in the sense that treaties, even after converted into law, are ordinary rules and as such can be revoked by subsequent laws. JB Mata Diz, ‘El sistema de incorporación de normas en el MERCOSUR: la supranacionalidad plena y la vigencia simultánea’ (2005) 10(2) *Ius et Praxis* 227–60 <<http://www.revistaiepraxis.cl/index.php/iepraxis/article/view/541>> accessed 15 October 2021.

interpreted as a commitment assumed by Member States to adopt the necessary measures to apply the legal acts issued by Mercosur, but the OPP's programmatic content does not guarantee full primacy of the regional norms over domestic ones.⁴⁶

In this sense, norms are mandatory for Member States, and even though they may not have entered into force simultaneously, there is a determination as to their validity, which creates a positive obligation (an obligation to act/do), expressed as a duty to domestically incorporate such rules, and a negative obligation to not adopt measures that, due to their very nature, would oppose the norms approved but not yet incorporated. Luiz Olavo Baptista best expresses this doctrine's rationale as follows:

The Ouro Preto Protocol gives to Decisions, Resolutions and Directives a mandatory character, but it establishes that its implementation will be in the form foreseen by the rules and norms of the Member States. The obligation of member states is placed on implementation. It is about an obligation of means: pre-existing legislative instruments allowing it and being within the sphere of its constitutional competences, the Executive Power has the legal and obligatory obligations emanating from the Treaty, to implement them through decrees without delay.⁴⁷

Likewise, there are authors who, based on EU Law, favour the supremacy of Mercosur norms, assuming a position of recognising such supremacy due to the very legal nature of integration, and seeking, through a teleological interpretation, to analyse primacy based on the essence of the agreement signed by the Member States. These include, in particular, authors from Argentina, whose constitution establishes that international acts rank *pari passu* to it. In this sense, Perotti argues that

[m]aking the normative force of Mercosur laws dependent on domestic provisions that eventually recognize some legal validity to such laws, not only confuses the nature and essence of community law, but furthermore, since it is impossible to achieve the same legal basis in all Member States, with which the regional law would be fundamentally different, in a greater or lesser extent, to those provided for by domestic orders, therefore violating the principle of equality between the Parties, without forgetting to say that this breaches the requirement of uniformity both in its application as in its interpretation.⁴⁸

Regarding direct effect, it should be emphasised that it is impossible for an individual to resort directly to arbitral tribunals, which implies a significant obstacle to the recognition of this axiom under Mercosur's legal system. Within Mercosur, there is argument for the existence of direct vertical effect given that common rules have consequences for individual and legal persons, creating a plethora of regulations, which cover not only state activities, but also the behaviour of citizens and legal entities alike. However, the problems posed by the absence of regulatory instruments allowing individuals to have direct access to arbitral tribunals reveal a paradoxical situation: when they establish rights and obligations, Mercosur rules must be complied with by Member States and their residents, but the latter do not have rights to file a petition before an arbitral body and, in some cases, when the violation or non-compliance is perpetrated by their own government, such individuals must rely solely on domestic judges. Thus, differences between the domestic legislation of Member States give rise to distinct legal outcomes, undermining legal certainty and full regulatory compliance by individuals.

Some discussion is therefore important to clarify the procedure for the incorporation of international acts, such as agreements and treaties, into the legal systems of Mercosur Member States and the binding structure of the regional legal system. If the final draft signed by Mercosur and the EU becomes a final treaty, how will it become legally effective and enforceable?

If the agreement enters into force in the EU, but not simultaneously in all five Mercosur countries, some questions could be raised regarding its validity and effectiveness. Brazil, Argentina, Paraguay, Uruguay and Venezuela do not have a homogeneous procedure for the domestic incorporation of

⁴⁶ *ibid.*

⁴⁷ LO Baptista, *O Mercosul, suas instituições e ordenamento jurídico* (LTr 1998). See also M Böhlke, *Integração regional & [e] autonomia do seu ordenamento jurídico* (Juruá 2007) 236–7. *Informe del Ministerio de Relaciones Exteriores, Comercio Internacional y Culto. Auditoria de Gestión sobre el circuito operativo de Información del MERCOSUR. Res. n° 39/03. Auditoria General de la Nación, Argentina, 2003*, especially the part of the recommendations which states that 'Art 40 of the OPP sets the obligation to publish national norms only once all States communicate their respective incorporations into their respective domestic legal systems'.

⁴⁸ Perotti (n 38).

international acts, therefore if the agreement is duly incorporated by Argentina, but not by Brazil, how can the problem of simultaneous validity be solved pursuant to the terms of the OPP? This issue regarding the incorporation procedure itself would affect the AA more drastically since this would be the first Mercosur agreement with a region as large as the EU, which would require a more complex incorporation mechanism given the broad nature of the agreement (trade- and non-trade-related aspects), as well as the competences of Member States (individually considered) for each of the topics covered in the AA, despite it being presented as a single document.⁴⁹

In other words, there will exist different obligations in force between MEU countries until they all incorporate the treaty into their own national legal orders. While for the EU, an agreement that is truly commercial in nature⁵⁰ may come into force after being duly approved by the competent European institutions (Council and European Parliament),⁵¹ the situation in Mercosur is more fragile. If a Member State incorporates the treaty into its domestic legal system, in theory such a treaty could enter into force for that State, while no effective 'simultaneous validity' takes place in relation to all other Mercosur Members, that is, there would exist an atypical situation whereby the treaty is bi-regional in nature, but comes into force only in one State, due to its incorporation system, and not in others, therefore becoming an 'individual-interregional treaty'.

Therefore, two peculiar aspects are apparent when analysing the EU and Mercosur when it comes to the procedures for the entry into force of international agreements (or any other types of international legal norm).

The first aspect refers to the procedure for giving legal effect to the agreement by Member States and by the regional organisation itself. (i) The incorporation procedure adopted by the EU has specific requirements based on the powers granted to community institutions, especially those dealing with trade. The entry into force in the EU must take place in full compliance with the terms and conditions established under European regulations. While there may be political statements and positions contrary to the entry into force of the agreement, there is a predetermined path for an international act to be adopted or not by the EU. (ii) The procedure adopted by Mercosur is considered equivalent to the traditional and classical incorporation procedure adopted for any other international law, whereby each Member State determines the respective form of incorporation into its domestic legal system (approvals by national parliaments or equivalent bodies, control by constitutional courts, etc) without specific conditions for the entry into force (weather conditions, measures to ensure its effective application, etc).

The second refers to the enforcement of the agreement once in force and its position (hierarchy) in relation to other domestic laws, since in the EU it is in effect law, and thus the primacy principle must be duly observed, without the possibility of such norm being challenged on constitutional or other domestic laws grounds. Conversely, Mercosur does not apply the primacy principle, thus processes regarding incorporation, enforcement and effectiveness of common regional norms lose their strength and remain the subject of long-standing discussion in classical international law regarding incorporation theories: monist or dualist.

4. The content of the agreement and the structure of the pillars

In order to understand the difficulties related to the entry into force of the AA and, consequently, its effectiveness, the structural aspects on which the agreement is based must also be mentioned. The

⁴⁹ In 2004 Mercosur signed a free trade agreement with the Andean Community of Nations (Colombia, Ecuador and at that time Venezuela), but that represented an unfolding of the relations forged within the scope of the ALADI (Latin American Integration Association/Asociación Latinoamericana de Integración/Associação Latino-Americana de Integração). Therefore, there is no way of comparing it with the MEU agreement, not only for the parties involved but also for the variety of topics contained in the AA.

⁵⁰ Another possible way to look at the AA is as being construed as a piece of soft law, while it awaits the necessary incorporation by Member States, especially its non-trade-related aspects. As pointed out by Wessel, the 'absence of "legally binding force" is indeed a common way of distinguishing soft law from hard law. As has been argued elsewhere, however, this characteristic is confusing and does not do justice to the fact that these norms (as law) form part of the legal order and that they commit the actors involved.' B Van Vooren and RA Wessel, *EU External Relations Law: Text, Cases and Materials* (Cambridge University Press 2014).

⁵¹ Leblond and Viju-Miljusevic (n 7) state that art 207(1) of the Treaty on the Functioning of the European Union establishes that 'all aspects of external trade – including services, commercial aspects of intellectual property and foreign direct investment are under exclusive EU competence'.

pillar structure adopted by the EU in the AA – trade, political dialogue, and cooperation – represents, as mentioned above, an innovation when contrasted with traditional agreements having an exclusively commercial nature.

In addition to the difficulties associated with EU competences to sign agreements that contain non-trade-related provisions, such agreements, which encompass topics relevant to both Parties and seek to reinforce common values such as democracy, rule of law, minority rights and labour conditions etc, present a challenge to establishing concrete, effective and enforceable clauses to make their application feasible and practical. Moreover, measures to assess compliance with such provisions can be extremely difficult to put in place.

Thus, each of the pillars must be examined, albeit briefly, to understand the difficulties inherent in their effectiveness once the AA comes into force. Once again it should be emphasised that non-trade-related issues can be considered more ‘sensitive’ than trade-related ones, given the complexity of the very formulation of provisions that can be regulated in a specific and detailed manner and the range of possible measures to address potential future non-compliance.

The existence of clear provisions and pre-set auditing and compliance mechanisms is key, particularly in those areas where there may be disagreement between the Parties, especially when it comes to issues related to the environment, minority rights and labour conditions.

4.1. The political dialogue pillar

Although ‘interregionalism’ is traditionally linked to ‘low politics’ as opposed to ‘high politics’,⁵² EU–Mercosur relations are characterised by an overarching ambition that transcends distinctions between low and high politics. Moreover, although each pillar will be discussed separately below, there is overlapping ground, indeed a spill-over situation, which will also be addressed.

With that in mind, the first pillar – political dialogue – hinges on the crossover between national and international issues to consolidate strategic coordination between the regions. This includes issues such as abiding by the rule of law and due process of law (e.g. conflict resolution); ensuring peace and stability; human rights enforcement; ocean governance; upholding democratic processes and institutions; and combating organised crime (i.e. cybercrime, money laundering, terrorism, arms dealing and drug trafficking). As regards the latter, a distinct relationship has been forged between the EU and the Andean states (Bolivia, Colombia, Ecuador, Peru, Venezuela) to target chemical substances used in drug manufacture.⁵³

The various rounds of negotiation, not only within the scope of Mercosur, but also within the framework of EU–Latin America relations, have always been guided by non-trade-related issues linked to themes deemed relevant for the strengthening of the relationship between both regions. Since the signing of the Framework Agreement, these political issues have been considered an intrinsic part of, and an essential element for, the application of a bi-regional treaty, especially in light of the joint declarations emanating from summits held during the 1990s and 2000s.

In this sense, piecemeal progress was made, first, during the third round of negotiations, namely on the legal wording of the Preamble and on the blueprints for the institutional structure of future accords; then, during the seventh round, when both Parties came to a resolution on the above-mentioned guiding principles and on the breadth and nature of the agreement. After the tenth round, negotiations had been practically finalised and, in 2018, the conclusion of this pillar was announced. Nevertheless, as of December 2019, certain pillars have not been published and may even undergo modifications.

As regards the political dialogue pillar, given the difficulties in establishing the EU’s competence when dealing with mixed agreements (a pure trade agreement is different from mixed one in which there are trade- and non-trade-related aspects, such as the AA) it is possible that the Parties intend only to set rules establishing recommendations or guidance, that is, ‘soft law’, without the need to establish binding clauses dealing with and covering non-trade-related elements.

As discussed by Larik and Wessel,

[d]espite their presumed ‘non-legal’ nature, such international soft legal agreements thus cannot be ignored in the EU legal order. They may form the interpretative context for legal

⁵² Malamud (n 25).

⁵³ Mata Diz and de Almeida Luquini (n 20) 9.

agreements and may even commit the Union through the development of customary law or as unilateral declarations. They are usually described as ‘political commitments’, rather than legal commitments. However, this may be misleading: soft and hard law instruments may both be politically important. Nevertheless, in international instruments, the EU often underlines their non-legal binding nature by reference to their ‘political nature only’.⁵⁴

Of course, the clear inseparability of trade, political dialogue, and cooperation must always be analysed when it comes to agreements of the magnitude of the AA. Establishing that a treaty has an essentially trade-related nature with the aim to facilitate its application by and within the EU (due to issues of competence) cannot be used as an excuse to disregard non-trade aspects. The AA does have non-trade provisions, such as the provisions pertaining to sustainable development, and, thus, they must be taken into consideration when analysing this topic.

Furthermore, it is worth mentioning the EU’s role as a defender of the values and goals expressed in the Treaty of Lisbon (democracy, peace, equality, defence of minority rights, etc).⁵⁵ Such values cannot be simply disregarded when the EU acts outside its territory, especially when such action deals with an agreement between two very disparate regions.

4.2. The trade and commercial pillar

The second pillar, on trade-related aspects, is arguably the backbone of the other two. As specified by the European Commission, the text not only complies with WTO directives,⁵⁶ but also covers corporate and government procurement (i.e. anti-dumping, antitrust and anti-cartel law, bidding and tendering, dispute settlement, mergers and demergers, rules of origin); customs and tariffs (e.g. bilateral and global safeguards, trade facilitation); intellectual property and geographical indications; services and non-services; small and medium-sized enterprises; subsidies; sustainable development and labour rights; and technical barriers to trade (i.e. antimicrobial resistance, genetically modified organisms, health and safety, sanitary and phytosanitary measures).

A theoretical analysis of the AA by the Commission made the following findings:

Mercosur will fully liberalize 91% of its imports from the EU ... The EU will liberalize 92% of its imports from Mercosur’. As reported by the EC: (i) the EU is Mercosur’s chief trade and investment partner; (ii) the former is the biggest foreign investor in the latter’s region; (iii) Mercosur’s exports to the EU totalled €42.6 billion (2018) and the inverse totalled in the same league (€45 billion in 2018).

...

The EU will eliminate duties on 100% of industrial goods ... Mercosur will fully remove duties in key offensive sectors (i.e. actively aggressive sectors that outperform) such as cars, textiles, machinery, chemicals, and pharma. ... For EU machinery, 93% of exports will be fully liberalized.⁵⁷

At best, crossing the Rubicon will streamline profit influx into both regions on a scale never seen before, hence the statement

‘that’s what makes this agreement a win-win deal’ made by the EC’s Presidency in 2019. The trade-off will be handicapping Mercosur’s technological competitiveness, as the agreement

⁵⁴ J Larik and RA Wessel, ‘Instruments of External Action’ in RA Wessel and J Larik (eds), *EU External Relations Law: Text, Cases and Materials* (2nd edn, Hart Publishing 2020) 101–37, 118–19. See also RA Wessel ‘Normative Transformations in EU External Relations: The Phenomenon of “Soft” International Agreements’ [2020] *West European Politics* 1.

⁵⁵ The issue of defending the values and objectives of the EU seems crucial. This subject has been dealt with by the courts. For example, the decision of the European Court of Justice (Case C-585/18, Grand Chamber, 19 November 2019) can be cited and Case C 507/18, especially the Opinion of Advocate General Sharpston, submitted on 31 October 2019 <www.curia.europa.eu>.

⁵⁶ The AA contains various trade-related provisions that are inspired by, or use as guidelines, certain WTO regulations, such as technical barriers to trade; safeguard clauses; tariff barriers, etc. Obviously, the AA reflects specificities of an agreement covering two regions, but overall, it can be said it adopts international standards.

⁵⁷ European Commission, ‘Trade and Sustainable Development – EU–Mercosur Trade Agreement: The Agreement in Principle and its texts’, 2019, European Commission News Archive <https://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_158166.%20Trade%20and%20Sustainable%20Development.pdf> accessed 22 May 2020.

does not deliver on that front (there will be no technology transfer, for example) and the EU already has a head start. The same logic can be applied to services (e.g. telecommunications), non-services and the public procurement market, all of which have largely been sheltered to preserve competitiveness.⁵⁸

A precautionary approach on the part of Mercosur is therefore justified.

Trade and Sustainable Development Chapter

The current TSDC relies on the premise that a trade deal should not come at the expense of the environment and social responsibility and strives towards a measure of predictability in international trade. With that in mind, trade–environment provisions for potential EU partners include: coordination for transport of dangerous goods and substances, including cooperation on environmental emergencies; furnishing figures and expertise used in policy-making (e.g. aquatic ecosystems preservation, agricultural biotechnology, biodiversity and water quality monitoring, deforestation rates, pollutant and greenhouse gases emissions, renewable energy projects); regulation on pesticide and fertiliser usage; sustainable sourcing of commodities (e.g. exploitation of fisheries and marine resources, mining raw materials, forestry – timber regulation curtailing illegal logging, soil erosion and tillage); and upholding multilateral environmental agreements.

By all accounts, this agreement is being championed as seminal, capitalising on the halo effect promoted by authorities on both sides of the Atlantic. Nevertheless, this rhetoric must be taken with a pinch of salt. Even though there are several milestones spanning two decades of Mercosur’s ‘intrinsic’ sustainability agenda, the regulatory framework for regional initiatives has hitherto been non-binding and inadequate. The sustainability clauses, which are there to be used as a due diligence mechanism, a precondition for the trade pillar, are not legally enforceable and therefore they are not enough to make the TSDC comply with the Paris Agreement either. Citing mere *de jure proviso* (unfit to invoke thicker regulation needed for *de facto* compliance) does not lend authority to either Mercosur’s sustainability agenda or the AA, as the European Commission Presidency stated in 2019: ‘each and every country bound – commits itself to the effective implementation of the Paris agreement. This locks countries into commitments taken on stopping deforestation in the Amazon for example.’⁵⁹

The repercussions are inherently local and especially brutal for Brazil. As such, the lack of a legally enforceable TSDC shall be the basis for the perpetuation of the agribusiness’s ruthless expansion model (entailing, that is, human rights infringements), and with it the further endangerment of indigenous peoples’ rights. In fact, the TSDC callously disregards the displacement of these peoples (rife in this expansion model), as there is no provision whatsoever for safeguarding against this. Consigned to legal limbo, the only mention of indigenous peoples in the entire TSDC is in Article 8 under Trade and Sustainable Management of Forests, as if it were solely a question of redressing forced labour. This minimal citation is still more than for animal welfare, since that issue is not even broached in the TSDC:

1. The Parties recognize the importance of sustainable forest management and the role of trade in pursuing this objective and of forest restoration for conservation and sustainable use.
2. Pursuant to paragraph 1, each Party shall: . . . (b) promote, as appropriate and with their prior informed consent, the inclusion of forest-based local communities and indigenous peoples in sustainable supply chains of timber and non-timber forest products, as a means of enhancing their livelihoods and of promoting the conservation and sustainable use of forests.

To that end, the Dialogues Chapter enables the Parties to avoid animal welfare commitments,⁶⁰ consequently encouraging intensive animal farming or industrial livestock production (i.e. factory farming) to cope with increasing demand, while supposedly being undergirded by the EU and World Organisation for Animal Health standards.⁶¹

⁵⁸ Ghiotto and Echaide (n 6).

⁵⁹ European Commission, 2019. ‘EU and Mercosur reach agreement on trade’ – Press Release, European Commission News Archive <<https://trade.ec.europa.eu/doclib/press/index.cfm?id=2039>> and <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_19_3468> accessed 22 December 2020.

⁶⁰ See art 3 of the AA, which reads: ‘Parties will conduct a dialogue that will cover, inter alia: 1. Specific topics on animal welfare that *may affect mutual trade*’ (emphasis added).

⁶¹ Ghiotto and Echaide (n 6).

From a practical perspective, the AA has a chapter called 'Trade and Sustainable Development' where the main measures that must be observed by the Parties are established. The chapter has 18 articles that range from basic aspects such as the recognition of the main international instruments that must guide the entire decision-making process related to the agreement, to dispute settlement mechanisms that will be applied when dealing with the topic of sustainable development.

Article 2 represents the main axis of the chapter by establishing rights and obligations that must be observed by the Parties regarding the level of protection and domestic regulation, embodying a normative provision of mandatory compliance. The use of mandatory and not optional compliance terms results in the hard law character of these provisions.⁶²

There is no doubt that this is a clause whose content is not merely dissuasive, but mandatory. It is not, therefore, a gentleman's agreement clause since, upon entering into force, it presupposes compliance with all other chapters contained in the agreement. There are no idle words in an agreement of such magnitude, therefore this chapter currently represents one of the main challenges for the definitive implementation of the agreement and, therefore, for its effectiveness, given the environmental problems the region, notably Brazil, has been experiencing recently.

4.3. The cooperation pillar

According to the European Commission's Regional Strategy Papers – RSP (2007–13) for Mercosur – part of the Country Strategy Papers (CSPs) – European resources were to be distributed in line with the following three priorities:

- (1) Mercosur's institutionalisation: recasting institutional infrastructure and reducing backlog under the auspices of the Parliament of Mercosur, the Permanent Review Tribunal, and the Secretariat of Mercosur. It is noteworthy that this approach contrasts with that of the Alfonsín and Caputo Government, responsible for framing the embryonic architectural and legal landscapes. Back then, a hands-on approach was nurtured ('dyadic' and intergovernmental diplomacy) striving to mitigate red tape perceived as sclerotic and symptomatic of Mercosur's inception, not only aggrandising state power, but also consolidating presidential control over policymaking and implementation. Therefore, institutions were to be kept to a minimum.⁶³
- (2) Regional Strategy focus: to reach a tariff agreement between both Parties and implement market and production integration, thus boosting trade facilitation (harmonisation of standards) and the regional integration process at large.
- (3) Civil society participation: aiming to expand public awareness of the regional integration process and substantially broaden mutual visibility, in an attempt to confer legitimacy thereon. To further this priority, an educational plan was devised for the Southern Cone (2006–10), including, but not limited to, the inauguration of 10 MEU centres – for joint action in research – in parallel with conferences, consultations, roundtables, seminars, training and workshops. However, it should be noted that, by the end of 2010, no initiative had been taken to encourage the participation of civil society, which had also been established by the RSP.

As in the case of the political dialogue pillar, the conclusion of the cooperation pillar was announced in 2018. However, there is no specific provision in the final draft dealing with this topic. This emphasises, once again, the paradigm shift in the agreements negotiated by the EU, with a strong tendency towards trade agreements, disregarding the other aspects that were previously considered as being essential to the EU (political dialogue and cooperation).

Conclusion

The signing of the AA, after 20 years of complex negotiations, requires specific analysis to assess the obstacles to its effectiveness and entry into force, notably regarding the incorporation of international acts procedure adopted by Mercosur. There is no doubt that the AA sets a precedent for future trade

⁶² As an example, see art 2.2, which establishes that a 'Party should not weaken the levels of protection afforded in domestic environmental or labour law with the intention of encouraging trade or investment'.

⁶³ Malamud (n 25).

agreements, with the potential to catalyse the formulation of trade- but also non-trade-related policies that go beyond traditional agreements.

The ambiguity of the norms relating to incorporation makes the effective application of the agreement even more complicated, since the procedure for simultaneous validity adopted by the OPP demands concerted action by Mercosur Members, so that the AA can come into force concomitantly and in a uniform manner in all its Member States. Therefore, incorporation requires a joint effort by all Members to ensure that the AA does not enter into force on an individual basis, since each Party adopts different national incorporation procedures and no regional requirement for mandatory compliance or adoption has been put in place.

In other words, there will be different 'conflicting' obligations between Mercosur Members and the EU, until all such Members incorporate the agreement into their respective national legal systems. While in the EU the trade pillar may enter into force when approved by the competent European institutions (Council and European Parliament), in Mercosur the situation will be more delicate. If a Member State incorporates the treaty into its domestic law, theoretically this treaty can come into force for that Member, although no effective 'simultaneous validity' occurs in relation to other Members, that is, an atypical situation would exist in which the agreement would be bi-regional in nature but would not be legally effective in all Members of the regional bloc.

In addition, there is an ongoing debate on the provisional application of the agreement, which would take place, precisely, within the framework of the entry into force in a 'unilateral' manner by one of the Parties – in this case one of the Mercosur Members. This would break the traditional scheme of joint negotiation, establishing a new scenario where integration would remain fragmented, further affecting the bi-regional negotiation system started in the 1990s.

However, the issue of incorporation is not only problematic in Mercosur, but also in the EU, given the debate on the EU competences to adopt agreements involving non-trade-related issues, which, in principle, rests outside its exclusive competence.

Furthermore, the pillar structure on which the AA is based requires an analysis of the nature of the agreement in order to demonstrate a clear commercial content. However, there is no way to establish this without touching, albeit collaterally, on non-trade-related aspects such as the environment, social rights, technical standards of product adequacy, etc. The stance adopted by the EU, which has already been adopted in previous agreements (e.g. the EU–Canada Comprehensive Economic and Trade Agreement – CETA), does not exclude, especially at the time of its application (i.e. after its approval and incorporation), the need for relevant debates to address its non-trade-related aspects, which inevitably includes sustainable development and the ambitious strategies and targets set by the EU in the Green Deal.

In this sense, a failure to comply with the provisions of the AA that deal with sustainable development can be considered an obstacle to its entry into force. The current political stance of Mercosur, and especially of Brazil, regarding measures to promote sustainable development and the environment, the continued deterioration of the dialogue among Member States, and the ongoing failure by Europe and Mercosur to achieve common goals, makes the entry into force of the AA quite uncertain.

In conclusion, despite the legal obstacles arising from the Mercosur incorporation system and the uncertainties arising from non-trade-related provisions mentioned above, the AA presents reciprocal economic advantages that should not be disregarded, in addition to a political perspective that will certainly result in the strengthening of bilateral relations between Mercosur and the EU, bringing the two regions closer together based on common interests and objectives.

Acknowledgments

The author thanks the Erasmus + Jean Monnet Actions programme for its support to carry out this research. The European Commission support to produce this publication does not constitute an endorsement of the contents, which reflects the views only of the author, and the Commission cannot be held responsible for any use which may be made of the information contained therein.

Funding

The author is granted an Overseas Senior Visiting Professor Scholarship (European Institute – Universidade de Lisboa), awarded by the Coordination for the Improvement of Higher Education Personnel – CAPES/Print Program – Financing 001.

Declarations and conflicts of interest

Research ethics statement

Not applicable to this article.

Consent for publication statement

Not applicable to this article.

Conflicts of interest statement

The author declares no conflict of interest with this work. All efforts to sufficiently anonymise the author during peer review of this article have been made. The author declares no further conflicts with this article.