



# The implementation of sustainable development in regional trade agreements

A case study on the European Union and MERCOSUR

Fabiano de Andrade Corrêa

Thesis submitted for assessment with a view to obtaining the degree of Doctor of Laws of the European University Institute

Florence, April 2013 (submission)



European University Institute  
**Department of Law**

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This thesis has been submitted for language correction.

## **Thesis abstract**

This thesis addresses the implementation of sustainable development in the legal frameworks of regional integration agreements (RIAs). Sustainable development is reaffirmed as one of the main priorities of the international community, while poverty eradication and the integration of socio-environmental concerns into all governance levels remain the most pressing challenges to its implementation. Furthermore, the role of law is considered fundamental for sustainable development, but there remains a lack of analysis of how legal frameworks are effectively advancing this objective, particularly at the regional sphere.

In this regard, the thesis focuses on the laws and policies of two of the most important RIAs in force, the European Union and MERCOSUR, with a twofold objective: 1) to analyze how RIAs can provide enabling legal frameworks for the promotion of sustainable development, going beyond trade liberalization and serving as a building block between multilateral goals and their implementation at the national level; 2) to provide case studies of norms and policies developed at the regional level addressing a) poverty eradication and social justice within their internal spheres; b) trade policies and instruments that more effectively integrate socio-environmental objectives. The research undertaken also has a comparative element that enables the consideration of whether the EU, a more developed regional organization, can provide lessons to MERCOSUR in advancing these specific issues.

The conclusions show that the legal frameworks of RIAs can facilitate the effective translation of sustainable development goals into concrete norms and policies, bridging the divide between a multilateral system of standard-setting with low implementation power and national states with weakened capacity to deal independently with these issues. The RIAs studied have been developing procedural innovations such as 'impact assessment' instruments, substantive innovations, such as regional development funds aiming to promote social cohesion internally, and trade instruments that integrate development concerns in their external relations, such as preferential trade systems (GSP) linked to socio-environmental issues and trade agreements that include 'trade and sustainable development' chapters. It also provides evidence that, despite their institutional differences, the development of sustainable development laws and policies within the EU has followed a path that can provide valuable insights for MERCOSUR. Finally, the thesis argues that, despite the tensions that might arise between the implementation of these regional measures and the multilateral trade system rules, regional action might be a way to cope with the difficulty of reaching a global agreement while also more adequately reflecting local concerns. The challenge is to assure coherence and consistency with the international goals but, given the importance of promoting a more sustainable development process, this is a task worth pursuing.

**Keywords:** international law; sustainable development; trade; regional integration agreements; regional development policy; principle of integration; sustainability impact assessment (SIA); European Union; MERCOSUR.



## Acknowledgments

The process of undertaking the research and writing this thesis has been a long and complex one. The decision to embark in this process has been motivated both by my wish to understand more about international law, its importance and usefulness, and also to know more about the world and how I could contribute to improving it. In this process, I have also learned a lot more about myself and my place and value in the world, and I am very grateful to have made that decision. It has been a privilege to study at the European University Institute and take part in its unique environment that mixes tradition and multiculturalism, innovative thinking and a very high academic level. These issues have contributed to the great experience that I had and will always be a part of who I am.

I could not have completed this process without the support received from several people. First of all, I want to thank Professor Marise Cremona, my supervisor, who has helped me to believe I could complete this thesis and has given me support and freedom to undertake a research that combined interdisciplinary and pragmatic perspectives that are very peculiar to the EUI. Being able to do my thesis beyond the dogmatic perspectives that are common in most law schools was very important for me, as a lawyer who has actually always wanted to be a diplomat. I will always admire Professor Cremona for her great knowledge and wisdom, and also for the person that she is. I also want to thank other professors who were very important to my studies: Prof. Ernst-Ulrich Petersmann, who helped me a lot to define my research topic and believed it was an important one; and Professor Adriana Dreyzin de Klor, from University of Cordoba, in Argentina, who was, during her visiting time at the EUI in 2010, of fundamental help for my project and the South-American perspective that I did not want to lose, and also supported a lot the working group of Comparative European – Latin American studies that I coordinated during that time. Finally, I want to thank all the staff of the Global Governance Program, a unique and very interesting initiative with which I had the opportunity to become quite involved, and profited greatly from all the very interesting activities they have organized.

I have also met wonderful people at the EUI who became great friends and an important part of my experience in Firenze - and hopefully a part of my life. Even though it is difficult to name everyone, a special thanks to Andreas Scordamaglia, Bahar Baser, Mike Mariathan, Moritz Hartmann, Samantha Ribeiro and Tamara Popic for all the nice moments we shared over these years! Thanks also to Lucas Lixinski, whose incentive and support was very important in my decision to apply to the PhD program. Being at the EUI and participating in its environment has also provided me with opportunities to take part in several interesting initiatives, like the Rowing Club and Theater Group, which were very gratifying experiences. Special thanks to all the folks at the Theater Group and Andrea Savelli, our *regista*, for the great moments we had together. Thanks also for all staff of the Language Service for all I have learned from them.

I also would like to thank my work colleagues at the International Development Law Organization, for all that I have learned from them. I started working at IDLO towards the end of my forth year at the EUI, and even though the workload has made me delay the completion of the thesis, all that I have been able to experience has also given me a greater depth of understanding, and a more pragmatic view of all the issues that I had been analyzing from an academic perspective. Being able to participate in events such as Rio+20, and work in the

implementation of projects that were directly related to my research topics was very important for me.

Last but not least, I owe a great deal to my family and friends in Brazil, especially my parents Fernando and Regina and my brother and best friend Luciano, who have always stood by my side and supported my decision to go abroad and pursue my ambitions in life. Staying away from them has always been the most difficult part of this experience, perhaps even more than the research itself. At the same time, knowing that they are there for me, no matter what, has also given me the strength and courage to embrace this adventure. Thank you very much for being who you are and being part of my life!

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### **Introduction**

Gathered at the United Nations Conference on Sustainable Development / Rio+20 in June 2012, the Heads of State and Government and high-level representatives of the United Nations renewed the international community's commitment to sustainable development as one of its main, if not its most important objective in order to ensure the promotion of an economically, socially and environmentally sustainable future for our planet and for present and future generations. In addition, the eradication of poverty has been declared the greatest global challenge facing the world today, and an indispensable requirement for sustainable development. Therefore, the need to mainstream sustainable development at all governance levels, integrating economic, social and environmental aspects and recognizing their interlinkages to achieve sustainable development in all its dimensions has been highlighted as the most important task to be faced in this challenge. The question remains, though, as to how to perform this gigantic feat? Attempting to answer this question from a legal perspective is the overarching aim of this thesis.

#### **1. Background: the 'global governance' challenge**

*"For me, global governance describes the system we set up to assist human society to achieve its common objectives in a sustainable manner, that is, with equity and justice. Growing interdependence requires that our laws, our social norms and values, our mechanisms for framing human behavior be examined, debated, understood and linked together as coherently as possible. This, in my view, is the prerequisite for genuinely sustainable development in economic, social and environmental terms". ('Global governance in the steps of William Rappard', Pascal Lamy, Secretary General of the WTO, speech delivered on March 15th, 2010.)'*

The global governance challenge is the background of this thesis, and the quote above summarizes much of the framework that underlies the analysis it aims to promote. The use of the expression 'global governance' has become widespread and commonly designates a system of rules, policies and values that go beyond the traditional forms of government in order to regulate and pursue the common objectives of humanity, such as environmental protection, peace, and the global economic system (including trade, investment, the monetary

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and financial systems).<sup>1</sup> But global governance is not just considered as a system, it is also, and perhaps above all, a challenge related to several issues.

The transformations occurring gradually in the system of international relations due to global phenomena such as globalization and interdependence have impacted on different aspects of the international scenario. Not only have information and communications systems become globalized, but so have the challenges related to our everyday lives, a change visible in our growing interdependence. We are increasingly noticing the local effects of global problems, and global effects of local problems. For instance, global economic problems such as the recent financial crisis have highlighted the interconnectedness of global economies, especially in the post-liberal market economy era. In addition, global social problems are increasingly interconnected, as poverty seems to be a persistent and challenging problem which leads to all sorts of other problems: health problems and epidemic diseases; security problems, as poverty tends to lead to conflict, also related to economic problems; environmental problems, as poverty impacts negatively on pollution; migration problems; and difficulty in the implementation and protection of human rights, representing global moral standards that are not globally enforced. Additionally, global environmental problems that often have local origins and global impacts, such as pollution and GHG released into the atmosphere, do not respect boundaries; deforestation and destruction of ecosystems affect the local and global climate – such as in the case of the Amazon; commodities problems and provision of food and natural materials (timber, minerals, oil/gas) as non renewable resources leading to food security and energy supply challenges. Finally, a problem that might lead to an increase in all the others- the population boom: according to the UN,<sup>2</sup> by the end of the century the planet might hold more than 10 billion individuals, which would pose a serious challenge to sustainable development for us all. Above all, the global governance challenge represents a challenge of justice: a challenge to achieve more equity within the international community, based on solidarity and the equitable redistribution of rights, duties, benefits and burdens.

These changes towards globalization and interdependence have led to the creation of new concepts that aim to explain and respond to such challenges. Several of them concern what

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<sup>1</sup> See for an earlier reference EO Czempiel/ J Rosenau, *Governance without government: order and change in world politics*, Cambridge University Press, 1992; also D Held, A McGrew (eds.), *Governing Globalization: Power, Authority and Global Governance*, Cambridge: Polity Press, 2002; AM Slaughter, *A New World Order*, Princeton University Press, 2004; T. G. Weiss, 'Governance, Good Governance and Global Governance: conceptual and actual challenges', *Third World Quarterly*, Volume 21, Issue 5, 2000.

<sup>2</sup> <http://www.un.org/apps/news/story.asp?NewsID=38253&Cr=population&Cr1>

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are nowadays considered as *global public goods* due to their interest to all peoples, such as peace, a clean environment and a fair international trade system;<sup>3</sup> others are considered as common goals of the international community, such as the promotion of a sustainable development process, which involve several interconnected issues.<sup>4</sup>

Such global phenomena are also related to a change in the institutional and political scenario, in which a gradual shift away from the traditional idea of an international society of nations and towards that of an international community has taken place. This has altered the balance of international relations, weakening the role of the state as the main actor in international relations and favoring the emergence of new actors, blurring the lines between the internal and external affairs of states and the international scenario, and generating a process of diffusion of power - which implies a change in the notion of power and in the distribution of power among actors.<sup>5</sup> The paradox of a globalized and interdependent international community with global challenges and common objectives is the lack of a formal global governance structure to deal with such issues. On the other hand, there is one instrument that aims to fulfill this role, which is international law.

## 2. A changing International Law: evolution in purpose, scope and structure

In the present scenario, the role of international law has also changed. Public international law (IL) refers to the body of rules and norms that govern the interaction between states, as well as other international persons.<sup>6</sup> The rationale for the existence of such a system can be explained in three different ways: IL works as the law of nations, given the interest of states to follow similar rules or apply like standards in their domestic legal order, such as in international commercial transactions; second, in a ‘Grotian’ sense, it is justified due to states’ interest in reciprocally limiting their own liberties so as to respect sovereignty and justify non-interference in internal matters; third, and most importantly, it is instrumental to states and other actors as a means of promoting common international goals.<sup>7</sup>

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<sup>3</sup> I. Kaul, et al., *Global public goods: international cooperation in the 21st century*, Oxford University Press, 1999.

<sup>4</sup> One example is the establishment of sustainable development as the first priority of the United Nations for 2011, in a speech delivered by Secretary-General Ban Ki Moon, February 2011, <http://www.un.org/apps/sg/sgstats.asp?nid=5034>.

<sup>5</sup> C. Arenal, ‘La nueva sociedad mundial y las nuevas realidades’, *Cursos de Derecho Internacional y Relaciones Internacionales*, Bilbao, Servicio Ed. de la Universidad del País Vasco, 2002.

<sup>6</sup> C. Joyner, *International law in the 21st century: rules for global governance*, Rowman & Littlefield 2005, p. 4.

<sup>7</sup> M. Janis, *International Law*, Wolters Kluwer, 2008, p. 8

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This threefold justification for the existence of International Law runs parallel to the transformations which have occurred in international relations, to which this system of rules attempts to respond. Firstly, IL has changed in regard to the actors to which it attributes legal personality and which affect its functioning. States have been regarded as the major actors with rights and duties in international relations since the ‘Peace of Westphalia’ treaties in 1648, in a world that -until recently- was dominated by an ‘international society’ of states. Nevertheless, the state of world affairs has changed, and to appreciate the current situation one must consider other actors operating in the international sphere and affecting the development of international rules. Among the actors with recognized international legal personality, states are still foremost, but international organizations, multinational corporations, non-governmental organizations and even individuals - to different extents – are part of what is now referred to as the ‘international community’. Thus, while IL is still made majorly by and addressing states, as the international relations that connect all states have changed, IL has evolved from a system that merely safeguards the pacific coexistence of states to one that tries to guide states and other relevant actors in the promotion of different objectives that emerge at the international level. The interaction of these actors in the international community has necessitated vast and often rapid changes in international legal rules to keep pace with these new realities.<sup>8</sup>

Secondly, IL has seen a considerable evolution in scope, which has been expanded from the safeguarding of co-existence and sovereignty to the regulation of common objectives such as peace, human rights, security and environmental protection. This has led to the creation of specialized branches that aim to regulate such common goals. Despite the existence of general norms of IL in the form of custom and *jus cogens*, the international system is thus not a uniform, general body of norms, but marked by special, transnational, legally grounded relationships called regimes: these are defined in international relations theory as implicit or explicit principles, norms, rules and decision-making procedures around which actors’ expectations converge in a given area.<sup>9</sup> These regimes have evolved based on the common concern regarding specific issues, such as the protection of the oceans and the environment, the creation of an international trading system, the enforcement of human rights, etc. In

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<sup>8</sup> C. Joyner, op. cit. p. 24.

<sup>9</sup> S. Krasner, ‘Structural Causes and Regime Consequences: Regimes as Intervening Variables’, in S. Krasner, *International Regimes*, Cornell University Press.

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practice, they comprise rules of IL, international agreements, international organizations and compliance mechanisms, and coordinated, cooperative regulation of activities in the respective areas of concern.<sup>10</sup> While this specialization in different branches has enabled IL to progress and reach consensus among actors in relation to specific areas, it has also led to debates about fragmentation and collision among these regimes, which can at times jeopardize the progress of the system as a whole and the achievement of broader objectives going beyond the specific rationale of each regime.<sup>11</sup> This is the case regarding the promotion of sustainable development, as will be discussed below. Regimes are therefore understood here in a broad sense, including rules, norms and principles affecting the behavior of concerned actors in the processes of international relations, and considering a notion of governance, as opposed to a more traditional vision of government and rigid notions of regulation.

Thirdly, IL nowadays not only aims to produce binding legal rules that create obligations through the traditional form of treaty-making between states, but also works through what has been deemed ‘soft law’ in order to codify the conduct or opinion of states and other actors regarding desirable paths to follow on specific matters. Despite their lack of binding power, these ‘halfway normative measures’ are considered an important development which enables governments to assume uncustomary obligations that are usually too ambiguously formulated to be deemed as acceptable hard law; they also permit the formulation of quasi obligations in a precise and constrictive form that would not be acceptable under a binding treaty. In this way, these norms are understood to contribute to solidifying the international legal order.<sup>12</sup>

Considering the transformations which have occurred in the international scenario and within the structures of IL, the question of the ultimate purpose of IL also emerges, especially when one considers the issues of fragmentation. In this regard, it is argued that IL has entered into a ‘post-ontological era’, and that the most important questions that must be answered about IL now concern three fundamental issues related to its purpose and functioning: effectiveness, enforcement and, most importantly, fairness. While the first two are justified due to the problems in the functioning of IL as a system that is at times too complex and does not

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<sup>10</sup> C. Joyner, op. cit, 27-28.

<sup>11</sup> See, in this regard, M. Koskenniemi, *Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law*, Report of the study group of the International Law Commission, United Nations General Assembly, A/CN.4/L.682, 2006.

<sup>12</sup> C. Joyner, op. cit, 27-28.

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deliver expected results, the justification of the fairness inquiry is related to the very overreaching objective that IL should pursue, and this justification is given on substantive and procedural grounds: the fairness of IL will be judged first by the degree to which the rules satisfy the participants' expectations of justifiable distribution of costs and benefits, and secondly by the extent to which the rules are made and applied in accordance with what the participants perceive as a right process; these two aspects of fairness -substantive, as distributive justice, and procedural, as a right process – can sometimes be conflicting. The procedural aspect is related to the legitimacy of law; the substantive, to its effectiveness in dealing with the problems that IL is supposed to regulate – ever wider in scope, as the international (or now increasingly transnational) community evolves and changes. Legitimacy and justice are thus two aspects of fairness, with a procedural or moral perspective, which combine in order to clarify this new and important goal that international law should aim for, which is to achieve fairness at the global level.<sup>13</sup>

Within this system, it is argued that sustainability is emerging as a core value of the international community and therefore has also been progressively encompassed by IL as a guiding principle.<sup>14</sup> As will be seen in the coming chapters, the pursuit of fairness is also central to the concept of sustainable development which, as will be argued, has become a guiding principle for and one of the main objectives of the international community. The means through which IL has attempted to deal with this concept are also related to fairness in many ways, in its substantive and procedural aspects. Nevertheless, the lack of a central authority to implement an overarching objective/principle such as sustainable development leads to a problem of implementation.

The argument of this thesis is that a sub-level of governance, the regional level, might provide an effective way of resolving this problem by working as a bridge between global goals and challenges and their implementation at the national level. The legal aspect of this argument is the extent to which the legal frameworks of regional integration blocs – ultimately regional trade agreements – have integrated sustainable development, and how this integration has been done.

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<sup>13</sup> T. Franck, *Fairness in International Law and Institutions*, Oxford University Press, 1998, p. 5-24.

<sup>14</sup> N. Schrijver and the Hague Academy of International Law, *The evolution of sustainable development in international law: inception, meaning and status*, Martinus Nijhoff, 2008.

### **3. Focus of the thesis: the implementation of sustainable development in regional trade agreements**

The changing framework of international relations has favored the establishment of new forms of ‘global governance’ during the last century, notably in the period after World War II, which witnessed the creation of several multilateral organizations whose scope was to promote better responses to global challenges, such as the United Nations, the ‘Bretton Woods Institutions’ and the World Trade Organization, dealing with issues such as environmental, social and economic governance. In addition to IOs, other less institutionalized forms of governance have emerged, such as the G8 and the G20, gatherings of states that meet to provide ‘*ad hoc*’ solutions to issues such as financial governance; other types of government networks are also recognized as being part of the governance system.<sup>15</sup>

In parallel to these attempts to provide multilateral governance, regional integration agreements have also proliferated and have become a consolidated phenomenon worldwide.<sup>16</sup> Regional blocs started fundamentally with the creation of free trade areas, but the scope of regionalism has evolved over time to encompass other policy objectives such as environmental protection and social cohesion. Moreover, several regional blocs have developed a stronger external dimension and started to play a role as global actors, performing an innovative form of governance recognized as ‘interregionalism’.<sup>17</sup>

In this regard, the agendas of regional blocs have also included issues such as the promotion of sustainable development. This can be said to be the case for the European Union, considered nowadays as the most advanced project of regional integration, and which has incorporated sustainable development as a guiding principle in its legal system and as an objective for its internal and external policies. In addition, the bloc supports the idea that regional integration is a means of promoting this goal worldwide, which can be perceived in its relations with other actors, such as the ‘Common Market of the South – MERCOSUR’. MERCOSUR also aims to promote sustainable development, although in a much less

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<sup>15</sup> A.M. Slaughter, *op cit*.

<sup>16</sup> A. Winters, *Regional integration and development*, World Bank; Oxford University Press, 2003, notes that regional integration has been one of the major developments in international relations, especially during the last decade, with virtually every country in the world nowadays being part of at least one regional or multilateral integration scheme; in addition, there is a trend towards deeper levels of integration and the regulation of issues other than trade, such as security, development and environmental issues.

<sup>17</sup> F. Söderbaum. ‘The EU as a global actor and interregionalism’.

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straightforward way: having been created with the goal of establishing a common market, but having as rationale the promotion of development with social justice, this evolving integration project also promotes several issues which are relevant to the goals of sustainability.

This thesis aims to provide a legal perspective on the links between regional integration and sustainable development, and an analysis of the extent to which regional integration projects can be a tool for the promotion of this objective/principle. Taking a legal perspective, the thesis considers there to be a gap between the international and national spheres: international norm making and standard setting institutions with weak enforcement power, and national authorities unable to act independently and efficiently implement the international agreements. The thesis then aims to explore the argument that regional integration can be a means of promoting sustainable development through the creation of legal frameworks which bridge between the national and international spheres, promoting not only economic growth through trade liberalization but also rules and policies that go beyond trade matters and integrate social justice and environmental protection. RIAs can be, in this sense, building blocks for global development governance, between a weak multilateral system of standard and rule setting with low enforcement and implementation powers, and national states with weakened sovereignty and a lack of capacity to deal independently with these issues. This will be explored by analyzing two regional blocs, the European Union and MERCOSUR, their own policies and objectives, and their relations with each other.

## 4. Methodological remarks

This thesis will be primarily analytical, using primary sources at the international and regional level, as well as literature on international and communitarian law, political science and economics, in order to provide the framework and develop important points on the subject matter. The method is primarily one of teleological interpretation in considering the scope and meaning that was embedded in the rationale of creating the rules under analysis, to understand the problems as a whole and be able to provide critical analysis and, when appropriate, normative proposals for improvement. Furthermore, the interpretation will include a historical analysis that is fundamental in order to understand these underlying objectives and their evolution. The thesis provides an in-depth analysis of how development has evolved as a subject in international law and how sustainable development has become a guiding principle on this matter; also of how the legal and policy frameworks on sustainable development have

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evolved both in the EU and MERCOSUL and how they currently function. The thesis is also normative in assessing how these frameworks could be improved in order to make a stronger contribution to sustainable development, and also how initiatives in either bloc could inspire better regulation in the other.

The decision to focus more heavily on the implementation of sustainable development in relation to the positive action taken by the regional blocs rather than from a more jurisdictional perspective, such as through the case law of different judicial bodies, can be justified for two reasons. Firstly, on the basis of a belief that the development needs and, furthermore, the implications of the principle of sustainable development, as will be argued, should be achieved by the positive action of stakeholders rather than by corrective means, such as litigation. Courts certainly have a fundamental role to play in the interpretation and advancement of legal norms that have soft law origins such as the principle of sustainable development. Nevertheless, its implementation requires action, not only correction. Secondly, because there is a gap in the literature concerning the implementation of sustainable development from this perspective, particularly relating to regional blocs, and the thesis aims to fill this gap.

## 5. Structure of the thesis

The thesis is composed of six chapters, divided into two structural blocs. The first bloc, composed of the first three chapters, is more descriptive in nature and aims to provide an analytical framework for the analysis undertaken in the three subsequent chapters. Nevertheless, it has also an analytical component in the sense that it aims to stress one particular view regarding the global governance of sustainable development and to make a statement about what this represents based on document and literature review, but also on the personal views of the author, having worked for an international organization for some months after the writing of a large part of the thesis and been privileged to attend relevant international events, such as Rio+20. This first section ultimately pinpoints the failures in the implementation of sustainable development and suggests that regional integration blocs can provide a valuable alternative for implementing these commitments within their governance structure.

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The second bloc, composed of chapters 4 to 6, takes a more pragmatic view in analyzing selected policies of the EU and MERCOSUR regarding the creation of legal and institutional frameworks which promote issues linked to sustainable development. Chapters 4 and 5 provide a historical view on how these policies have evolved, how they currently function, how they are linked and how they can be assessed, taking into consideration the points made in the first three chapters; moreover, a comparative analysis between the two blocs is carried out, aiming to identify issues which can be taken as the best examples – especially considering that the EU has come a greater distance in developing a legal/institutional structure and MERCOSUR, in many ways, seems to be taking similar steps. Nevertheless, the aim here is not to present the EU as a model of integration or otherwise, but rather, by identifying useful insights, to make constructive criticism and suggest lessons that can be learned and courses of action, taking into account the – in the author's view – inflexible geopolitical, socio-economic and cultural differences between the two blocs.

### **6. Brief outline of the chapters:**

**Chapter 1** addresses the integration of sustainable development in international law. Firstly, the conceptualization of development outside the legal sphere is discussed, showing its evolution from an idea of economic growth, centered on the state, to one of the enhancement of human welfare, centered on the individual. International law has encompassed these issues, and a new branch of law dealing specifically with issues related to development has been recognized. 'International Development Law' firstly attempted to foster development through international economic relations, particularly regarding issues related to developing countries, and then gradually evolved towards human development in the form of human rights. This movement later merged with the environmental movement, bringing about the idea of sustainable development which was encompassed by international law in a twofold manner: firstly as a growing body of principles in the intersection of three regimes of IL: international economic law, international environmental law and international human rights law; secondly, as an interstitial norm, guiding decision and rule making. This norm became a guiding notion for international law in the field of development, but faces an implementation challenge, which will be further discussed in Chapter 2.

**Chapter 2** discusses how the lack of a coherent regime in international law to implement sustainable development poses a challenge for the achievement of its two main objectives:

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intra-generational equity, focusing particularly on poverty reduction and social cohesion, and the integration of sustainable development into norms and policies. International law is still marked by different regimes which influence development, although two particular regimes could be pointed out: the international development cooperation regime and the special provisions related to development in the international trade regime. Nevertheless, these regimes face challenges in implementation and effectiveness, and a discussion regarding the role that RIAs can play is presented. Firstly, the legal basis of establishing RIAs as sub-regimes of the GATT/WTO is presented, then the rationale of expanding RIAs towards positive policies and the promotion of other policy areas, and finally the role that they play in international relations.

**Chapter 3** presents the framework of the EU and MERCOSUR projects of integration, emphasizing that these two blocs have as a common core objective the formation of a common market – something the EU has already completed and deepened, while MERCOSUR still faces challenges in its implementation. Nevertheless, these two projects have been able to reach beyond the trade sphere, creating a legal framework enabling them to establish norms and policies related to the promotion of sustainable development. One underlying question that this Chapter aims to address, by providing an analytical framework which will inform the case study in Chapter 6, is whether -and to what extent- the EU can be considered a model for MERCOSUR, not in its institutional structures, but rather in the way it created norms and policies to pursue the shared goal of promoting sustainable development.

**Chapter 4** addresses regional integration and regional development, aiming to demonstrate how RIAs can work for the promotion of development within their internal borders, being expressions of the principle of equity – in its aspect of distributive justice and social cohesion. This is addressed through a case study of the regional policy of the EU and the structural fund of MERCOSUR. The aim is to analyze how the regional policy of the EU has been transformed over the years to encompass the (also evolving) strategies of the bloc regarding development and other issues, and how sustainable development has been included in this regard. Furthermore, comparative analysis is undertaken involving the newly created initiative in MERCOSUR, which could provide interesting insights regarding both development strategies and the functioning of the blocs as a whole.

**Chapter 5** analyzes regional integration and international development by showing how regional blocs are entering into a third stage of evolution and are also playing a role in international relations. The chapter analyzes the trade and development policies of the EU, which started with a limited common commercial policy and evolved towards a comprehensive trade policy linked to overarching external action objectives, using sophisticated instruments, which also led to the creation of an independent, but interrelated, development cooperation policy. The focus of the analysis though is a case study of five of the EU's major trade agreements, and how they have been integrating sustainable development through procedural and substantive measures, respectively 'sustainability impact assessment' procedures and the progressive inclusion of 'trade and sustainable development chapters'. The agreements analyzed are the EU-Chile Association Agreement, the EU-CARIFORUM Economic Partnership Agreement, the EU-South Korea Free Trade Agreement, the EU-Central America Association Agreement, and the EU-Peru/Colombia Free Trade Agreement. In addition, an analysis of the incipient common commercial policy of MERCOSUR is presented, showing that while the project still focuses much more on trade liberalization, without a strong normative basis such as that of the EU, some development concerns are being integrated into its wide net of trade agreements, such as special and differential treatment according to the developmental level of the party, technical cooperation measures, as well as an incipient system of trade preferences for the least developed countries.

**Finally, Chapter 6** presents an extended case study analyzing the relationship between the EU and MERCOSUR, and how sustainable development concerns are integrated in it. The core of the analysis is the negotiation of the Association Agreement between the two parties, which, when research began, the author had hoped would be signed by the time of submission. Nevertheless, the assessment of the parties' relationship and the negotiation process, including the SIA undertaken by the EU and also taking stock of the case studies undertaken in Chapter 5, allow some conclusions to be drawn in the sense that the EU's relationship with MERCOSUR, while marked by different strategies related to the integration of sustainable development, is also influenced by clashes with political strategies and challenging issues related to the multilateral sphere. This case study is thus instrumental in bringing up more general considerations about the implementation of sustainable development in regional trade agreements, and also the value of regions as building blocks for the creation of regulatory regimes that implement broader international goals in a more specific context – or interregionalism.

## **Chapter 1. Sustainable development and International Law**

The Introduction of this thesis provided a discussion of how sustainable development became a mainstream goal of the international community. Moreover, it highlighted the changing rationale of International Law (IL) as a body of rules and norms governing the interaction between states, as well as between other international actors.<sup>1</sup> This rationale can be explained in three different ways: IL works as the law of nations, given the interest of states to follow similar rules or apply like standards in their domestic legal orders, such as in commercial transactions; secondly, in a ‘Grotian’ sense, it is justified due to states’ interest in reciprocally limiting their own liberties in order to respect sovereignty and justify non-interference on internal matters; thirdly, and most significantly, states have found it helpful as a means of achieving common international goals.<sup>2</sup>

This threefold justification for the existence of IL runs parallel to the transformations which have occurred in international relations, to which this system of rules attempts to respond. Firstly, IL has changed in regard to the actors to which it attributes legal personality and which affect its functioning, and while it is still made majorly by and addressing states, it has also evolved from a system that merely safeguards the pacific coexistence of states, to a system that tries to guide states and other relevant actors in the different objectives that emerge at the international level. Secondly, IL has seen a considerable evolution in scope, expanding from the safeguarding of co-existence and sovereignty to the regulation of common objectives such as peace, human rights, security and environmental protection. Thirdly, IL nowadays not only aims to produce legal rules that create obligations through the traditional, state led form of treaty-making with binding power, but also works increasingly through ‘soft law’ in order to codify the conduct or opinions of different actors regarding desirable paths to follow. In this way, these norms are understood to contribute to solidifying the international legal order.<sup>3</sup>

Bearing these observations in mind, IL is more instrumental than ever to the international community in the globalized, interdependent international relations that characterize the international scenario, as a system of norms and procedures that aim to regulate common

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<sup>1</sup> C. Joyner, *International law in the 21st century: rules for global governance*, Kluwer Law, 2005, p. 4.

<sup>2</sup> M. Janis, *International Law*, Wolters Kluwer, 2008, p. 8.

<sup>3</sup> C. Joyner, *op. cit.*, 24.

goals and objectives. Within this system, sustainability is emerging as a core value of the international community, and therefore has also been progressively encompassed by IL as a guiding principle.<sup>4</sup> Nevertheless, despite the growing body of norms and principles and the proliferation of regimes regulating different aspects of international relations, the globalized world lacks both a centralized global governance system and an authority with implementation powers. This can be observed in the subject matter which is the focus of the next section, the promotion of development as a common goal of the international community.

This chapter addresses the conceptualization of sustainable development in international law. The aim here is not to critique the concept of sustainable development, but rather to provide a normative basis for the discussion of the implementation of this concept in the following chapters. There is a significant body of literature dealing with this *problematique*, and the goal of this thesis is not to engage in the debate as to whether sustainable development is a positive or negative concept, but by assessing the existing legal instruments, literature and current state of the international debate, to make a positioning statement of what sustainable development means and how it should be viewed within the legal sphere. In order to do so, this chapter firstly establishes an analytical framework that will be fundamental to the subsequent chapters, examining the concept of development broadly, as well as how sustainable development was created as a guiding principle in this field. Secondly, it addresses how IL encompassed the promotion of sustainable development as an objective of the international community. Finally, it makes the arguments that, while not fully recognized as a customary norm of international law, the normative elements of sustainable development clearly make it an objective and a guiding principle of the international community, and that implementation is currently the main challenge to this principle.

### **1. Introduction: the concept of development**

The promotion of development is an objective that interests the whole of the international community, given both the wide range of interconnected issues that influence it and the distribution of its effects. In this regard, IL has encompassed issues related to the promotion

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<sup>4</sup> N. Schrijver and the Hague Academy of International Law, *The evolution of sustainable development in international law: inception, meaning and status*, Martinus Nijhoff, 2008.

of development as a common goal. Nevertheless, the concept of development emerges not from legal but rather from economic theories, and in order to analyze IL in relation to development, it is firstly necessary to clarify what this concept means in a broad sense.

It is argued that the concept of development has evolved over time from a 'traditional view' towards a more 'modern view'. Each of these approaches leads to a different understanding of the relationship between the concept of development and the ways in which it is regulated by IL, and these differences are said to revolve around three main points:<sup>5</sup> (i) whether development is purely an economic issue or should be viewed more holistically so that other issues, such as human rights and environmental protection, are seen as integral parts of the development process; (ii) the central subject of this process and the role that the state should play;<sup>6</sup> and (iii) the conceptualization of IL itself. Both of these approaches to the concept of development are briefly addressed below.

### 1.1 The traditional view of development

Development has traditionally been associated with economic growth and, for a long time, was treated as an issue separate from other problems in society and understood primarily as an economic process pursued through specific economic policies and projects. Social, environmental and political implications were recognized, but treated as externalities. According to this view, the state, as the actor with decision-making responsibility for the broader aspects of projects or policies, is the key subject of the development process, and there is a sharp distinction between national and international law, since this view of development is consistent with traditional notions of sovereignty. By treating social, political and environmental factors as externalities, this perspective implicitly defines the scope of state sovereignty in regard to other actors in development, making clear that decisions relating

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<sup>5</sup> D Bradlow, 'Differing conceptions of development and the content of International Development International Development Law', *South African Journal on Human Rights*, Vol. 21, No. 1, 2005.

<sup>6</sup> More specifically, whether the state should have the primary role in decision-making relating to development policy and projects and also about the scope and nature of the responsibilities of the various actors involved in the planning, construction and operation of development projects and in the design and implementation of development policy: the state, which approves development projects and makes and implements development policy; project sponsors, who may be the private sector, the public sector or the state itself; project contractors, which includes those public and private sector institutions which provide the financing, goods and services for the design, construction and operation of development projects and for the implementation of development policies; and individuals and communities that are directly or indirectly affected, in both positive and negative ways by particular policies and projects and their representatives.

to the social, political and environmental consequences of development should be taken by the sovereign and that those decisions should be respected by other actors.

This classic view of development has been losing ground over the past few decades, as the changes in international relations have undermined its basic premises through the emergence of relevant actors other than states, the interconnectedness and interdependence of economic growth with other issues and the fact that other forms of regulation besides the classic forms of international law are necessary -and already widely used- in global governance, thus calling for a more comprehensive view of the development process.

### 1.2 The modern view of development

Modern theories have expanded the concept of development and promoted a holistic approach, integrating development with social, cultural, political and environmental issues. Economist Amartya Sen is the most prominent figure of this movement, and his revolutionary work, recognized by the Nobel Prize in Economics, had great impact on the conceptualization of development. He understands *development as freedom*, and the expansion of people's freedom as the primary end and the principal means of development. Freedom is understood as the expansion of people's capabilities to achieve the kind of lives they envision for themselves; as a goal, it empowers people by enhancing their capabilities; as a means, it fosters development because of the instrumental effectiveness that particular kinds of freedoms have in promoting freedoms of other kinds.<sup>7</sup>

According to Sen, in the conceptualization of development as freedom, highlights seven features: (i) it must go beyond economic growth: although income growth is an important means to expand freedom, poverty is seen not only as the lack of economic power, but also as the deprivation of capabilities; (ii) freedom is seen as an inclusive process that encompasses political, economic and social aspects; (iii) the individual is seen as the main subject of the development process (even though main responsibilities are given to states), and empowering people by enhancing their freedom should be a basic step to development; (iv) it establishes a system of goals and rights in the development process; (v) it tries to establish a middle path

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<sup>7</sup> A Sen, *Development as freedom*. 1999, Oxford University Press, p. 1-54. The author highlights five different types of 'instrumental freedoms' that have an important role to play in enhancing the capabilities of a person: political freedom, economic facilities, social opportunities, transparency guarantees and security. He also states that there is empirical evidence that these freedoms are mutually reinforcing.

between the concept of free market versus state authority, and between the ideas of efficiency and equity; (vi) it highlights the importance of public participation of all actors involved in and affected by development policies; and (vii) it highlights the importance of democracy as the only way of representing the interests of all the actors involved.

This approach differs greatly from the traditional angle, having a narrower view of the state's role and emphasizing the empowerment of the individual as the central element of development, which represents important progress in the sense of having a comprehensive vision of all aspects that influence the development process. Nevertheless, critics suggest that although Sen succeeds in elaborating a more adequate concept of development, he fails to provide the means to implement these changes into the social structures and processes that inhibit its realization.<sup>8</sup> A similar conclusion can be reached regarding IL relating to development which, as will be seen below, ultimately faces a challenge of implementation.

## 2. Development and International Law

IL has long been concerned with the regulation of international economic relations, including issues broadly defined as relating to development and actors involved in the development process. In this regard, literature has recognized a new branch of law - international development law (IDL) - which deals with the rights and duties of actors involved in the development process.<sup>9</sup> Notwithstanding, as there is no general consensus about the concept of development, a 'traditional' and a 'modern' model of IDL are recognized, according to traditional or modern conceptions of the development process. 'Traditional IDL' focuses on economic growth and deals with international economic law issues, and the 'modern model of IDL', based on a more holistic vision of human development, includes economic, environmental and social areas of international law.<sup>10</sup> As will be argued below, these notions are bound nowadays by the emergence of the principle of sustainable development as an objective and a guiding principle.

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<sup>8</sup> B Chimni, 'The Sen Conception of Development and Contemporary International Law Discourse: Some Parallels', *The Law and Development Review*, 2008.

<sup>9</sup> Which shall not be confused with the 'law and development movement' initiated in the United States in the 1960s, the guiding assumption of which was that law is central to the development process – mainly the rule of law, and which aimed at improving development and generating social and political change through legal reform, at the national level.

<sup>10</sup> D Bradlow, *op cit*.

## 2.1 International economic law and development

Based on traditional views of development, IDL initially focused on international economic issues as a branch of International Economic Law (IEL), dealing with legal aspects of international trade, finance and investment that related to the challenges faced by developing countries.<sup>11</sup> After World War II, a movement inspired by Latin-American theorists aimed to generate new legal rules relating to core international economic issues, attempting to change the situation of economic dependence of the (in many cases newly politically independent) developing countries. It was, to some extent, a reaction to the fundamental principles of international law that were considered harmful to more fragile economies, such as *pacta sunt servanda* and property rights, said to keep developing countries stuck in a *status quo* of unjust colonial relations. The main motivation behind these measures was the demand for equity in dealings with the international economic system in a post-colonial era, in which the political realities changed and this had to be mirrored by changes in the economic structure. However, the idea of equity had a differentiation inherent to it, being, in a way, a paradox, to the extent that initially sovereignty and equality were extremely important for newly created developing countries that wanted to safeguard their independence from former colonies. Nevertheless, it became clear that treating countries whose internal socio-economic situations and ability to participate in international economic relations differed so greatly as equals was not ultimately just. Thus, a claim for differentiation began to emerge on the basis of treating countries differently based on their differing development levels.<sup>12</sup>

These efforts were reflected in several initiatives taken at the international level, such as the proposal to establish a ‘New International Economic Order’<sup>13</sup> and the proclamation of a right to economic self-determination.<sup>14</sup> Specifically in the area of trade, a specialized body was created within the United Nations to deal with trade related development issues, the United

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<sup>11</sup> AH Qureshi, AR Ziegler, *International economic law*. Sweet & Maxwell, 2007.

<sup>12</sup> D Bradlow, *op cit*.

<sup>13</sup> Declaration on the Establishment of a New International Economic Order, UNGA Res. 3201, which states that States ‘shall correct inequalities and redress existing injustices’ and ‘make it possible to eliminate the widening gap between the developed and developing countries’. The ideas of the NIEO never became binding obligations, though, given the disagreements between the developing and developed countries.

<sup>14</sup> Charter of Economic Rights and Duties of States, UNGA Res 3281, UN Doc. A/9631 (1975), which calls for the establishment of a new international economic order designed to remove major hurdles to economic development in developing countries.

Nations Conference on Trade and Development (UNCTAD),<sup>15</sup> which promoted the definition of a norm exempting developing countries from the reciprocal obligations of trade liberalization (the ‘enabling clause’), institutionalizing “special and differential treatment” (SDT) provisions agreed in the GATT and leading to the establishment of the Generalized System of Preferences (GSP, analyzed further in Chapter 2). In relation to investment, issues such as nationalization, compensation, the treatment and responsibilities of investors and the resolution of disputes between investors and host states were among the main concerns. Finally, in the international financial area, the main issues concerned rules on access to capital, debt renegotiation, the operations of the ‘Bretton Woods Institutions’ and foreign aid.<sup>16</sup>

In this traditional form of IDL, issues outside the economic sphere such as the social, environmental, cultural and political aspects of development have limited roles and are seen as externalities.<sup>17</sup> These norms of IEL are usually based on binding international treaties and legal obligations that address states as beneficiaries, and as those responsible for implementation.

### **2.2 A shift towards ‘human development’**

More recent economic theories, like Sen’s work, have expanded the concept of development and advocated a holistic approach, integrating social, cultural, political and environmental issues into the development agenda. A ‘modern’ approach to IDL reflects these ideas, aiming to promote norms and policies that are economically, environmentally and socially concerned with the rights and responsibilities of developing and industrialized states towards each other and to other actors in the international scenario.<sup>18</sup> These norms are, nevertheless, usually expressed through ‘soft law’ documents that are not binding, as opposed to the more usual ‘hard law’ instruments that characterize ‘traditional IDL’. This can be taken as a sign that this expansion in the conceptualization of development, while achieving a rhetorical consensus and representing a shift in the discourse of the international community regarding the

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<sup>15</sup> The United Nations Conference on Trade and Development (UNCTAD) was established in 1964 as a ‘permanent intergovernmental body to deal with trade, investment and development issues, especially regarding developing countries and assist them in their efforts to integrate into the world economy on an equitable basis’ (official website information, see: [www.unctad.org](http://www.unctad.org)).

<sup>16</sup> D. Bradlow, op cit.

<sup>17</sup> This can be perceived, for instance, in the debate regarding the discussion of environmental or human rights issues at the WTO and the inclusion of sustainable development in the preamble of the Marrakesh Agreement.

<sup>18</sup> D. Bradlow, op cit

desirable paths to follow, has not convinced states to accept binding obligations to implement such duties.

The foundations of this approach were laid down in the Universal Declaration of Human Rights, which recognizes that human rights comprise both civil and political rights (Articles 1 to 21), and economic, social, and cultural rights (articles 22 to 28), and expresses a commitment to the realization of a “*just international and social order*” (Article 28); the UN Charter, according to which there must be cooperation for the achievement of these goals (Arts. 1 and 55), and in the international covenants regarding fundamental civil, political, economic, social and cultural rights as binding and inalienable rights of the individual.<sup>19</sup>

This view was later expressly encompassed by international law through the Declaration on the ‘Right to Development’ (DRD) in 1986 by the UN General Assembly.<sup>20</sup> The DRD describes development as a “*comprehensive economic, social, cultural and political process that aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom*” (emphasis added). Article 1 reaffirms this broader concept by stating that “*the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized*”. By defining development as a process but also as a human right with many interconnected aspects, the DRD transposed into international law the concerns generated by the modern vision of development, such as those raised by Sen’s work.<sup>21</sup>

Four main ideas can be extracted from the DRD: (i) the right to development is a human right, and human rights in general are reaffirmed as a means and as a condition to the realization of such rights, considering that “*all human rights and fundamental freedoms are indivisible and interdependent*”; (ii) the human right to development is a right to a process of development in

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<sup>19</sup> The International Covenant on Civil and Political Rights, ICCPR and the International Covenant on Economic, Social, and Cultural Rights, ICESCR.

<sup>20</sup> Declaration of the ‘Right to Development’, UNGA Resolution 41/128, December 4th 1986. The DRD was not adopted by unanimity, but by a vast majority, the United States being the only country to vote against its approval, with abstention from six European countries.

<sup>21</sup> In fact, it is argued that there is a parallel between modern IDL and Sen’s vision of development; see B. Chimni, at 7 above.

which all human rights and fundamental freedoms can be fully realized; (iii) the meaning of exercising these rights implies the participation of all the individuals concerned in the decision-making and the implementation of the process, which should be transparent and accountable, and that individuals must have equal opportunity of access to the resources for development and receive fair distribution of its benefits; (iv) finally, this process creates a system of rights/goals and obligations, distributed on duty-holders: individuals are holders of both rights and obligations, having the right to participate in the development process and decision-making of their community, and the obligation to contribute to this process, implying a moral duty to respect other individuals' rights; states have the responsibility to realize the process of development through appropriate development policies at the national level; at the international level, states and other international actors are obliged to cooperate in order to promote the realization of the development process on the basis of solidarity and equity. In addition, the DRD is founded on the notion that the right to development implies a claim to a social order based on equity and justice: while not denying the importance of income and output, which enhance the expansion of resources and the opportunities for development, the development process must be realized in a manner that ensures fair distribution and equality in terms of access to these resources and that expands the fundamental freedoms of individuals; it thus proposes a qualitatively different approach, in which considerations of equity and justice are primary determinants of development.<sup>22</sup>

The DRD is a soft law document, thus not legally binding, but it paved the way towards global recognition of this new approach.<sup>23</sup> Some years later, the right to development was unanimously proclaimed as a human right in the 1993 UN World Conference on Human Rights and its Vienna Declaration of Human Rights,<sup>24</sup> which reaffirmed it as “*a universal and inalienable right and an integral part of fundamental human rights*”. Despite the (rhetorically) universal support for the right to development, several questions may be raised regarding this ‘rights approach’ to development. For instance, doubts remain as to whether granting individual rights is the best means of addressing problems of collective action such as development, particularly when the lack of a binding instrument to enforce a human right

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<sup>22</sup> A. Sengupta, ‘On the Theory and Practice of the Right to Development’, (2002) *Human Rights Quarterly* 24, The Johns Hopkins University Press, 837-889.

<sup>23</sup> In fact, it should be highlighted that the main opponent to this approach was the United States of America, which voted against the DRD. See, in this regard, S Marks, ‘The Human Right to Development: between rhetoric and reality’, *Harvard Human Rights Journal* 17, 2004.

<sup>24</sup> Vienna Declaration and Program of Action, UNGA Declaration 157/23, Article 10.

means justiciability is also lacking.<sup>25</sup> On the other hand, some positive aspects may also be highlighted, such as the consideration of the right to development as the “*sum of all other human rights*”, building bridges and working for the integration of the different categories of human rights so as to connect the rights of individuals, peoples and developing countries, while still allocating the responsibility of implementation to national states, which in turn can request assistance from the international community, thus creating a system.<sup>26</sup>

Regardless of the debate about the adequacy of a ‘rights based approach’ to development and the lack of binding instruments obliging countries to follow developmental standards, the modern vision of development has a normative content which has influenced IDL towards a change in the structure of global governance, fostering a commitment to place the individual at the center of development law and policy making, by promoting all human rights that secure freedom – the idea of social justice. In addition, while the state is maintained as the main actor responsible for implementation in relation to its own citizens, this conception of development also determines the enhancement of an international system of cooperation for development, through support for the development of other states and their citizens. In the influence of this normative shift lies the relevance of these documents, in the building of political support and international consensus towards coordinated action. In fact, this rights based approach has been losing space to a softer way of promoting common development goals, in line with the new roles ascribed to IL, as addressed in the introduction to this Chapter.

### 2.3 A move towards ‘sustainability’

In parallel to this holistic approach to the development debate, concerns related to environmental protection and the need to ensure that the development process is carried out within the limits of the Earth’s natural resources has gradually become another mainstream concern. The environmental agenda over time exerted strong influence on the development debate, and ultimately led to the conception of sustainable development. In fact, many of the

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<sup>25</sup> See, in this regard, S Marks and B Andreassen (eds.), *Development as a Human Right – Legal, Political and Economic Dimensions*, (Intersentia 2010); particularly the chapter by Marks, in which he highlights the fact that, despite the disagreement regarding the legal recognition of the RTD, the normative input that it gave to the elaboration of norms and policies at the international level should be more in focus – page 98. For a more critical approach, J Grugel, ‘Do rights promote Development?’, *Global Social Policy*, 2009, pp. 79-98.

<sup>26</sup> N. Schrijver and the Hague Academy of International Law, *The evolution of sustainable development in international law: inception, meaning and status*, Martinus Nijhoff, 2008.

central ideas of sustainable development were initially related to environmental concerns as opposed to economic interests, but gradually expanded to encompass social justice issues too, thus enlarging the scope of the concept from environmental sustainability to the sustainability of the (human) development process.

During the post-WWII period the conservation of natural resources gained strength as a concern of the international community, but environmental issues became the focal point on a large scale for the first time only in the 1972 United Nations Conference on the Human Environment (UNCHE).<sup>27</sup> The main outcome of the conference was a statement of principles, the ‘Stockholm Declaration on the Human Environment’,<sup>28</sup> which expressed the idea that “*the protection and improvement of the human environment is a major issue which affects the well being of peoples and economic development throughout the world*”. Among the Stockholm principles, some became consolidated in IL over time: principle 14, which recognizes the “*need to reconcile the conflicts between the needs of development and the need to protect and improve the environment*”, and principle 21, which declares that “*states have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction*”, which became a duty not to damage the environment, even if in a transboundary context.

In addition to the recognition of human impact on the environment, the conference had two other important outcomes: the creation of the UN Environmental Program (UNEP) in 1972,<sup>29</sup> aiming to coordinate environmental policies worldwide, and in 1983, the creation of the World Commission on the Environment and Development (WCED),<sup>30</sup> with a mandate to

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<sup>27</sup> D. Bodansky, *The art and craft of international environmental law* (Harvard University Press 2010) notes that even though it was not the first major conference focusing on the environment, it was the first to receive high levels of political attention and popular interest; it was the first major UN theme convention; in addition, developing countries were brought into the debate, which had previously been conducted by developed states. See also J. Brunnée, ‘The Stockholm Declaration and the Structure and Processes of International Environmental Law’, in 2009) in A. Chircop, T. McDorman, (eds.), *The Future of the Ocean Regime Building: Essays In Tribute To Douglas M. Johnston*, pp. 41-62, Kluwer Law, 2008.

<sup>28</sup> Declaration of the United Nations Conference on Human Environment, UNGA A/CONF.151/26, available at <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>.

<sup>29</sup> UNGA Resolution 2997 (XXVII) 1972.

<sup>30</sup> UNGA Resolution 38/161, 1983. The mandate of the WCED was stated as: “(a) To propose long-term environmental strategies for achieving sustainable development to the year 2000 and beyond; (b) To recommend

propose ways of action. In 1987 the WCED published the report ‘Our Common Future’,<sup>31</sup> providing the most widely known definition of sustainable development as “*development that meets the needs of the present without compromising the ability of future generations to meet their own needs; it contains two key concepts: the concept of needs, in particular the essential needs of the world’s poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organization on the environment’s ability to meet present and future needs; and as a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations*”. Moreover, in Annex 1 to the report, a set of proposed general principles, rights and responsibilities were outlined, among which was the statement that all human beings have a right to “*an environment adequate for their health and well being*”, and that states have a duty to “*ensure that conservation is treated as an integral part of the planning and implementation of development activities and provide assistance to other States, especially to countries of the global South, in support of environmental protection and sustainable development*”. This influential report led the UN to recognize that sustainable development “*should become a central guiding principle of the organization itself, of governments and enterprises*”,<sup>32</sup> and the concept was further developed through a series of international conferences that were fundamental to the creation of IDL norms and instruments.

A second global conference of much bigger proportions was convened in 1992 with sustainable development as its focus, the UN Conference on Environment and Development in Rio de Janeiro, Brazil (UNCED). The UNCED had three main outcomes: the first was the ‘Rio Declaration’,<sup>33</sup> another non-binding instrument that nevertheless placed sustainable development as a recognized principle within the international political agenda. Building on

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ways in which concern for the environment may be translated into greater co-operation (...) and lead to the achievement of common and mutually supportive objectives which take account of the interrelationships between people, resources, environment and development; (c) To consider ways and means by which the international community can deal more effectively with environmental concerns; (d) To help to define shared perceptions of long-term environmental issues and of the appropriate efforts needed to deal successfully with the problems of protecting and enhancing the environment, a long-term agenda for action during the coming decades, and aspirational goals for the world community;”

<sup>31</sup> Report of the WCED to the UNGA, recognized by UNGA Resolution 42/187, available at <http://www.un-documents.net/wced-ocf.htm>.

<sup>32</sup> UNGA Resolution A/RES/42/187.

<sup>33</sup> Rio Declaration on the Environment and Development, UN Report A/CONF.151/26. Afterwards, the GA issued a resolution endorsing the declaration and the Agenda 21, urging the international community to take the provisions into account and calling for a follow up of the agreements, UNGA Resolution A/RES/47/190.

the Stockholm declaration, it proclaimed that *human beings are the center of concern for sustainable development* and also laid out a series of principles that should guide this objective and “a new and equitable global partnership (...) to implement it”. The Rio principles expressed a series of substantive and procedural measures to be taken at all levels of governance. Among these, the following may be seen in terms of substantive measures: Principle 4, determining that environmental protection should be an integral part of the development process; Principle 5, supporting international cooperation to combat poverty worldwide; Principles 6 and 7, supporting special considerations to developing countries and ‘common but differentiated responsibilities’; Principle 8, determining the change of unsustainable patterns of production and consumption; Principle 11, determining the enactment of effective environmental legislation and Principle 13, asking for the development of law relating to environmental liability; and Principles 15 and 16, determining a precautionary approach to environmental issues and the ‘polluters pay’ principle. Principle 10, requiring means of enabling public participation in decision-making and access to justice; and 17, calling for the use of environmental impact assessment procedures may be seen in terms of procedural measures. ‘Agenda 21’, a plan of action envisioning measures to implement these commitments globally, regionally and locally complemented the Rio Declaration.<sup>34</sup>

The other two major outcomes of the conference were two international binding agreements, the Convention on Biological Diversity (CDB) and the United Nations Framework Convention on Climate Change (UNFCCC). These documents, while expressly mentioning sustainable development as a rationale and an objective, don’t give a substantive definition of the meaning of the concept. Thus, beyond the mainstreaming of the concept of sustainable development, the significance of the Rio Conference lay in the shift in focus away from human impact on the environment towards the recognition of environmental protection and the advancement of development as equally important objectives. This highlighted a shift in the ecological movement itself, from the idea of ecological conservation, to acceptance of the fact that human interference with nature is inevitable, and thus prescribing ways in which this relationship can be balanced in order to secure environmental sustainability. Nevertheless, critics have pointed to two of the summit’s main failures: firstly, the fact that social development and poverty tended to be seen as part of the process of economic development,

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<sup>34</sup> Agenda 21, UNGA Document A/CONF/151.26.

and that human rights, including social, economic, and cultural rights were not clearly a part of the program.<sup>35</sup> In addition, no binding agreement was reached in relation to the enforcement or implementation of these commitments. The ‘UN Commission on Sustainable Development’ (CSD)<sup>36</sup> was created to follow up by monitoring and reporting on the implementation of the agreements at the local, national, regional and international levels, but the model adopted with Agenda 21 left the task of elaborating national strategies of sustainable development to the states themselves, leading to divergent and incoherent implementation and no enforcement authority at the global level. This model still influences the governance of sustainable development, as is further discussed below.

### 2.4 An integrated approach to development

Despite these critical aspects, after the Rio Declaration sustainable development became a mainstream concept on the political agenda and the scope of the subsequent international debates reflected this more holistic vision of development, including economic, environmental and social aspects. At the same time, from the end of the 1990s an emphasis on poverty eradication and inequality – the social justice sphere - gained strength, together with concerns about the implementation and coordination aspects of agreements.

In the year 2000, the UN hosted the 55<sup>th</sup> Session of the General Assembly, called the ‘Millennium Summit’, whose final document, the Millennium Declaration<sup>37</sup> included a commitment *to making the right to development a reality for everyone and to freeing the entire human race from want*”,<sup>38</sup> but also went beyond that, establishing a framework for an ambitious global strategy to address developmental needs. The declaration can be divided into two main parts: section I established a set of fundamental values and principles that should guide *“international relations in the twentieth-first century”*, including the principles of the UN Charter and also the values of freedom, equality, solidarity, tolerance, respect for nature and shared responsibility among the nations of the world for economic and social development, peace and security; subsequent sections II to VIII seek to *“translate these shared values into actions”* by identifying key objectives: peace, security and disarmament

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<sup>35</sup> M.C. Cordonier Segger, *Sustainable development law: principles, practices and prospects*, Oxford University Press, 2004, p. 29.

<sup>36</sup> Section IV, Chapter 38, article 38.11.

<sup>37</sup> UNGA Resolution A/RES/55/2, <http://www.un.org/millenniumgoals>.

<sup>38</sup> Article 11.

(section II); development and poverty eradication (section III); protection of the ‘common environment’ (section IV); promoting human rights, democracy and good governance (section V); protection of the most vulnerable peoples in the world (section VI); meeting the special needs of Africa (section VII) and strengthening the UN system (section VIII).

In 2001 the Secretary General presented a report<sup>39</sup> stating that the international community had just emerged “*from an era of commitment and must now enter an era of implementation, in which it mobilizes the will and resources needed to fulfill the promises made*”, and a “*road map to set out in detail how these commitments could be fulfilled*”. After consultations between members of the UN and representatives of leading international organizations such as the IMF, OECD and the World Bank, targets and respective indicators were identified with a view to developing ‘millennium development goals’, having section III of the Millennium Declaration, on ‘development and poverty eradication’, as a main reference. A plan of action was established through a framework of eight main goals (further subdivided into 18 targets with indicators of assessment), which became known as the ‘Millennium Development Goals’ (MDGs). These are (i) to eradicate extreme poverty and hunger; (ii) to achieve universal primary education; (iii) to promote gender equality and empower women; (iv) to reduce child mortality; (v) to improve maternal health; (vi) to combat HIV/AIDS, malaria and other diseases; (vii) to ensure environmental sustainability; and (viii) to develop a global partnership for development.<sup>40</sup>

While the Millennium Declaration and the MDGs are also ‘soft law’ documents, thus not creating legally binding obligations for States, extensive links can be seen between the MDGs and human rights provisions, and in fact each of the Goals is connected to one or more human right.<sup>41</sup> Thus, given the fact that the MDGs represent political commitments, whereas human rights provisions are legally binding obligations, the promotion of the MDGs can also be viewed as a form of reinforcing human rights, being thus relevant to the development process, and human rights enforcement can be viewed as a form of pursuing these goals. As has been argued, “*if this Declaration is read together with other instruments that are now regarded as the International Bill of Rights, like the Universal Declaration of Human Rights, the Covenant on Civil and Political Rights, and the Covenant on Economic, Social, and*

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<sup>39</sup> UN GA Resolution A/RES/56/326, paragraphs 1 to 11.

<sup>40</sup> Annex to the Resolution 56/326, pages 55 to 58.

<sup>41</sup> See, for instance, the document ‘Human rights and the Millennium Development Goals: making the link’ published by the United Nations Development Program, available at [www.undp.org](http://www.undp.org).

*Cultural Rights, and if it is seen as a document on human rights evolving from the process of the human rights movement, it can be given an interpretation that can be most helpful for its realization”.*<sup>42</sup>

In addition, the MDGs have been extremely influential in relation to the definition of the development agenda since their creation. Although progress towards the MDGs’ 2015 target is lagging severely behind,<sup>43</sup> they are considered fundamental in the shaping of “*international development debates by institutionalizing the consensus on ending poverty, reshaping ‘development’ to mean ending poverty – rather than transforming economic structures and creating capacity for sustainable growth - and helping define poverty as multidimensional deprivation, including dimensions such as education, health and environment*”.<sup>44</sup> Furthermore, they have led to the organization of several subsequent conferences and the negotiation of increases in development aid expenditure and coordination, financial and technical cooperation, trade liberalization and debt relief.<sup>45</sup>

The implementation of Agenda 21 and the principles of the Rio Declaration, together with the MDGs process, were reaffirmed at another major international conference, the World Summit on Sustainable Development (WSSD) held in Johannesburg, South Africa in 2002. This conference had the objective of taking stock of progress and was attended by several thousand participants from governmental and non-governmental spheres, demonstrating the importance of the topic on the political agenda. Despite its proportions, the WSSD was criticized for being ultimately political and not resulting in conceptual changes of comparable significance to those at previous summits: Stockholm and Rio represented shifts of paradigm at a global level, the former by setting the environment as a major concern, the latter by setting the environment and development (not ‘or’ development) as equal goals; furthermore, the MDGs

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<sup>42</sup> A Sengupta, op. cit.

<sup>43</sup> The MDG Declaration set the year 2015 as the deadline for the achievement of the targets, but, as can be seen from the last ‘MDG Progress Chart’ (a periodic report published by the UN, available at <http://www.un.org/millenniumgoals/reports.shtml>), in most cases “progress is insufficient to reach the target if prevailing trends persist”. See also the ‘MDG monitor’, [http://www.mdgmonitor.org/browse\\_goal.cfm](http://www.mdgmonitor.org/browse_goal.cfm).

<sup>44</sup> S Fukuda-Parr, *Should global goal-setting continue, and how, in the post-2015 era?* DESA Working Paper No 117 ST/ESA/2012/DWP/117, July 2012, pp 2-3.

<sup>45</sup> Among these, the most important ones are: The International Conference on Financing for Development, held from 18-22 March 2002 in Monterrey, Mexico by the UN to address financing for development as a way to implement the MDGs and the Paris Declaration on Aid Effectiveness 2005 and its follow up meetings.

In relation to the Mexico conference, although there was no real expectation of a binding commitment, there were some important outcomes: one was the recognition of the goal to increase ODA level to 0.7 per cent of GDP; in addition, there was a general sense in developing countries’ delegations of the importance of good governance practices in addition to receiving development aid.

had emphasized poverty eradication. In addition, the conference produced no binding agreement or new institution.

The main relevance of WSSD, though, lies in the fact that its outcome document, the Johannesburg Declaration, sent the political agenda on sustainable development back to its origins, highlighting that the sustainability of the development process should be reinforced at local, national, regional, and global levels based on “*the interdependent and mutually reinforcing pillars of sustainable development — economic development, social development and environmental protection. Poverty eradication, changing unsustainable patterns of production and consumption, and protecting and managing the natural resource base of economic and social development are overarching objectives of, and essential requirements for, sustainable development*”.<sup>46</sup> Thus, the WSSD documents focused on an integrated environmental, social and development agenda, with strong attention paid to poverty eradication and human rights – building upon the objectives of the MDGs. Moreover, the format of the implementation plan was much more comprehensive than Agenda 21, inclusive of new focal areas, cross-cutting issues, cooperation and funding commitments.<sup>47</sup>

All of these documents form the normative basis of the ‘modern IDL’, which focuses first of all on ‘human development’, having the individual as the main subject of the development process, as opposed to state centered notions of development. Furthermore, modern IDL is based on a holistic vision of the development process, emphasizing the need to integrate economic and social development and environmental protection. Thus, modern IDL is formed by norms within the international economic law, international environmental law and human rights law regimes, expanding the traditional scope of IDL. However, the question remains as to how to effectively implement the integration of these areas of law.

### **2.5 The status of sustainable development in international law**

Despite its normative appeal and its widespread recognition, there is no binding definition of sustainable development in IL, as most of the documents referring to its meaning at the international level are ‘soft law’. This leads to debate regarding its legal status as a principle of international law and concerning its potential implications, and also poses a challenge, as

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<sup>46</sup> Declaration and JPOI

<sup>47</sup> MC Segger, op cit, pg. 28-31.

the regimes that exist in international law relating to the economic, environmental and social spheres have no original, explicit rules for the balancing of other objectives.

- i) The aim of International economic law is primarily to promote economic development objectives, for example, the rationale behind the international trade system is to liberalize trade, but it also includes investment, the international financial system, competition and economic integration law.
- ii) The aim of International Social Law is primarily to protect the individual by safeguarding human rights, based on the UDHR (customary IL), but also comprising the ICCPR and ICESCR (binding law) and other soft law declarations such as the DRD; Labor law in the form of ILO conventions and International humanitarian law such as the Geneva conventions of 1949 and additional protocols of 1977; and international social development agreements on specific sectors such as food, water, population and development, housing, women's rights, and health. In this field, instruments are usually resolutions and declarations that are not legally binding, since some are areas considered to fall under national sovereignty.
- iii) Finally, international environmental law aims primarily at the preservation, protection and conservation of the environment, but also on its 'sustainable use'. These objectives are pursued through a series of principles, some of which are recognized as customary international law and others which remain as 'soft law', with some embedded in multilateral environmental agreements (MEAs). Among these, the 'climate change' regime built around the UNFCCC, the 'biodiversity regime' built around the CDB, the 'ozone layer regime' built around the Montreal Protocol and others feature as prominent areas.

As these areas of law and their sub-regimes have different rationales, and in the absence of an international body that performs a governance function, the existence of a norm prescribing the integration of objectives is of great importance. While the doctrine still rejects sustainable development as a formal principle of international law, some defend it as a recognized customary norm.<sup>48</sup> In the middle ground stand others who defend it as a different kind of norm which became part of international law operating in different ways, even if without a binding character. Nico Schrijver, recognizing that international law functions as a system of values and norms but also as a regulatory framework for the conduct of States, international

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<sup>48</sup> V Lowe, 'Sustainable development and unsustainable arguments', in A. Boyle and D Freestone (eds.) *International law and sustainable development: past achievements and future challenges*, Oxford, 1999, pg. 64, is probably one of the most skeptical commentators, noting that sustainable development can hardly be seen as a norm or a set of norms, which nevertheless do have potential and influence, especially in adjudication.

organizations, transnational corporations and citizens, considers that sustainability is emerging as a core value of the international community, and functions not only in a declaratory and programmatic way, but also by providing the instruments of law that can be used to produce more action-oriented programs and rules: *“in the field of sustainable development, international law often functions, at a high political level, as an instrument to record agreed basic principles and prudent courses of action in a legal document, more than to codify what is occurring in accordance with a generally accepted ‘opinio juris’ in the practice of States and international organizations”*.<sup>49</sup>

Going further, Marie Claire Cordonier-Segger argues that, although it is not possible to consider sustainable development as a binding principle or a customary norm of international law - the lack of normative certainty and absence of justiciable standards of review suggesting that states are bound by a legal obligation to develop sustainably - neither it is accurate to describe it as only a vague policy goal, devoid of normative value. She suggests that sustainable development in international law can be understood in a twofold manner: firstly, as a growing body of law, an emerging area of international law in its own right, given the substantive amount of legal instruments that are based on its normative assumptions or were created to implement them (or both); ‘sustainable development law’ is a set of substantive and procedural norms at the intersection of international economic, social and environmental law, which helps to reconcile these separate fields. In addition, it can be considered as a different type of norm in its own right, as a ‘meta-principle’ acting upon other existing principles and rules, exercising a type of interstitial normativity, requiring the reconciliation and balancing of the conflicting interests of economic growth, environmental protection and social justice for present and future generations: *“The substantive aspect of this interstitial norm is the requirement that all three sets of priorities be reflected in the substantive outcomes of a given dispute or conflict. Viewed in this way, SD helps to curb the worst social and environmental excesses of nations in economic development activities; it coordinates the internalization of otherwise externalized objectives. It can exert an immense gravitational pull when used by States as they negotiate treaties, or by judges as they seek ways to reconcile other conflicting norms and principles”*.<sup>50</sup> In addition, she suggests that, despite the fact that much can be gained from a more coherent concept of sustainable development, this is not by all means negative: firstly, because soft law instruments are easier to negotiate in comparison to binding

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<sup>49</sup> See, in this regard, N. Schrijver, op cit.

<sup>50</sup> MC Codornier-Segger, op cit, pp. 45-50 and 368-71.

instruments, and this helps in achieving consensus and setting the path to action; and secondly, because the changing nature of international law is accommodating the changes in international relations, wherein several types of actor apart from states may exert influence, thus this kind of standard setting, through UN summits for instance, allows for the participation of various sectors of society, as was the case in the UNCED and WSSD.

Despite the lack of consensus regarding its legal status, the importance of sustainable development, as both an objective and a guiding principle recognized by and widely spread within the international community, and encompassed by international law is apparent based on just one of its capacities— that as an instrument with which to pursue the common goals of the international community. Sustainable development is an objective of achieving a balance between the competing spheres of the development process; and a guiding principle that encompasses a set of substantive and procedural tools with which to do this.

In an attempt to clarify the legal aspects of what sustainable development implies, the International Law Association (ILA) created a committee to work on the legal aspects of sustainable development, and in 2002 the committee released the ‘New Delhi Declaration on the Principles of International Law Related to Sustainable Development’.<sup>51</sup> The declaration begins by stating, in the preamble, that “*sustainable development is now widely accepted as a global objective and that the concept has been amply recognized in various international and national legal instruments, including treaty law and jurisprudence at international and national levels and that it should be integrated into all relevant fields of policy in order to realize the goals of environmental protection, development and respect for human rights*”. It then provides a list of seven principles that work at the intersection of international economic, environmental and social law, some firmly established as principles of international law, others less recognized or emerging as international norms, which provide legal tools to implement the commitments to sustainable development. These principles are listed below, not in their original order but according to the relevance attributed to them within the scope of this thesis, and the role they play in dealing with sustainable development’s main challenges. In this regard, the two most relevant principles are equity and integration:

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<sup>51</sup> ILA Resolution 3/2002: *New Delhi Declaration Of Principles Of International Law Relating to Sustainable Development* , in ILA, Report of the Seventieth Conference, New Delhi (London: ILA, 2002), available at: <http://www.ila-hq.org>.

i) Principle 2: Equity - inter and intra generational. Both sub-principles of equity are central to the attainment of sustainable development, particularly given that its main challenge is considered to be the eradication of poverty. *Intra-generational equity* refers to the right of all peoples within the current generation to fair access to the Earth's natural resources and, in the context of sustainable development, is related to the right to development, thus including the duty to cooperate for the eradication of poverty as well as the duty to cooperate for global sustainable development and the attainment of equity in relation to the development opportunities of people in developing countries. It implies that while it is the primary responsibility of the State to aim for conditions of equity within its own population and to ensure the eradication of poverty as a minimum, all States which are in a position to do so have a further responsibility, as recognized by the Charter of the United Nations and the MDGs, to assist other states in achieving this objective. Thus, it supports the international system of development cooperation. *Inter-generational equity* refers to rights of future generations to be able to meet their own needs for survival, just as the current one does, and to enjoy a fair amount of the common goods, and is thus expressed by the sustainability component of the principle. Even if these duties – to provide development cooperation and ensure the rights of future generations – have not achieved the status of binding legal obligations, equity as a principle of justice is, on the other hand, both a fundamental goal and principle of IL, as discussed in the first section of this Chapter, and an intrinsic component of the sustainable development concept.

Duncan French<sup>52</sup> states that justice itself as a goal of the international community and of international law is more ancient than the idea of sustainable development and, as a means of elucidating fairness in human interaction, is not necessarily reliant upon or measured by the sustainability of mankind's use of the natural environment. Nevertheless, the issues of global justice and sustainable development are increasingly being considered as mutually supportive objectives, as “a society cannot be sustainable if it is not just”. In fact, the idea of development itself contains notions of justice, at national and international levels: fairness within a society and solidarity between societies globally. In addition, many of the ideas that are central to sustainable development incorporate belief in justice/fairness: equity, common but differentiated responsibilities, cooperation, and thus justice should frame the pervading discussions in the field. He argues that the interplay between equity, fairness and

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<sup>52</sup> D French, *Sustainable development and the instinctive imperative of justice in the global order*, in French (ed.) 'Global Justice and Sustainable Development', Brill, Leiden/Boston, 2010.

sustainability is central to the discourse on how justice and sustainable development interact, and that there are four ways in which this interaction takes place: firstly, in the consideration of the environment as something to be distributed, which requires fairness; secondly, in the consideration of justice as functional for the purpose of sustainability: fair societies achieve sustainability more easily, even if it is not always a win-win relationship and trade-offs have to be made, highlighting the subordinate nature of justice to sustainability; thirdly, in the idea of justice for the environment, taking it as something to be protected for its own sake; finally, the consideration of sustainability as a condition for justice: justice is primarily an anthropocentric concept, but must be viewed in the context of ecological sustainability given the interdependence of man and nature.

Justice is often mentioned as referring only to the equitable application of norms and objectives. Nevertheless, this is just one element of a much more complex understanding of the relationship between global justice and sustainable development. In this regard, French stresses three relevant types of justice:

1. Corrective justice: the basis for differentiated treatment of unequal parties;
2. Distributive justice: the basis for intra-generational justice, divided into four different approaches: (i) at the micro level, bearing the costs of changing to sustainable patterns, and the costs of implementation of global commitments in developing countries by developed countries; (ii) macro redistribution, as changes occur in the international relations system to allow more inclusivity in the distribution of wealth and power; (iii) environmental redistribution, implying a change to more sustainable production and consumption patterns, above all in developed countries; and (iv) intergenerational distribution.
3. Finally, procedural fairness: requirements that decision-making must be reasoned, transparent and inclusive. This aspect has an inherent tension: a fair outcome will not necessarily be a consequence of a fair process or vice-versa, but while procedural justice alone cannot ensure substantive justice, it can greatly assist in the ownership and legitimacy of the outcome reached, such as happens in ‘impact assessment procedures’.

Thus, it can be inferred that global justice requires the implementation of the normative imperatives contained within the principle of sustainable development, and that the principle itself relies on justice considerations as a basis for its rationale. Given these considerations, the principle of equity can be claimed as the most important normative component of

sustainable development, making a strong case for IL and particularly IDL to actively engage in creating the mechanisms to implement these goals.

ii) Principle 7: integration and interrelationship of human rights and social, economic and environmental objectives. This principle reflects the interdependence of the social, economic, financial, environmental and human rights aspects of principles and rules of international law relating to sustainable development, as well as the interdependence of the needs of present and future generations. It requires all levels of governance – global, regional, national, sub-national and local – and all sectors of society to integrate these aspects as an essential element for the achievement of sustainable development.

The ILA itself considered integration to be the backbone of sustainable development, and in fact the remaining principles listed below have significance within the context of integrating the concerns they represent at all policy levels. Integration is thus, like equity, a major normative element of sustainable development, and is also related to its objectives, but less in the sense of having a concrete goal (like a more just society or the eradication of poverty, within a country or globally) and more in the sense of moving towards the obligation to give equal consideration to all aspects of development at every level of governance and decision-making.

From a systematic perspective, the integration element of sustainable development essentially requires different streams of international law to be treated in an integrated manner. This has implications, for instance, as a harmonizing influence on the effects of the fragmentation of international law, discussed above, in the resolution of conflicts.<sup>53</sup> In addition, integration has a role to play not only in the corrective, dispute settlement side of the implementation of sustainable development, but also in its positive side, i.e. in the design and implementation of rules and policies. In this regard, integration can take place through several different means, such as procedural ‘impact assessment’ instruments that aim to integrate sustainability concerns *ex-ante* the decision of a policy measure, in its implementation and follow up; and also through substantive measures aiming to integrate the often separate economic, environmental and social objectives of a legal measure or policy.

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<sup>53</sup> C. Voigt, *Sustainable development as a principle of international law: resolving conflicts between climate measures and WTO law*, Martinus Nijhoff, 2009, p. 306-308.

Thus, the principles of equity and integration are considered in this thesis as the two main normative elements and objectives of the overarching principle of sustainable development. The remaining principles of the ILA Declaration are instrumental to the achievement of these goals:

Principle 1: The duty of States to ensure sustainable use of natural resources. This is a relatively well-established principle, recognizing that states have the sovereign right to manage their own natural resources pursuant to their own environmental and developmental policies, as well as the responsibility to ensure that activities within their jurisdiction or control do not cause significant damage to the environment of other states or of areas beyond the limits of national jurisdictions. States have a duty to manage natural resources, including those within their own territories or jurisdictions, in a rational, sustainable and safe way so as to contribute to the development of their peoples, and to take the needs of future generations into account in determining the rate of use of natural resources.

Principle 3: the common but differentiated attribution of responsibility to all actors involved in the development process, mainly states, according to their level of development. This principle implies that all states have a duty to cooperate in the achievement of global sustainable development and the protection of the environment. International organizations, corporations (particularly transnational corporations), non-governmental organizations and civil society should cooperate and contribute to this global partnership. Corporations also have responsibilities pursuant to the polluter-pays principle. The differentiation of responsibilities, while principally based on the extent to which a state has contributed to the emergence of environmental problems, must also take into account the economic and developmental situations of the state. The special needs and interests of developing countries and of countries with economies in transition, particularly with regard to the least developed countries and those affected adversely by environmental, social and developmental considerations, are recognized.

Developed countries bear a special burden of responsibility in reducing and eliminating unsustainable patterns of production and consumption and in contributing to capacity-building in developing countries, *inter alia* by providing financial assistance and access to environmentally sound technology. In particular, developed countries should play a leading

role and assume primary responsibility in matters of relevance to sustainable development. One example is the differentiated obligations of the parties in the UNFCCC/Kyoto regime.

Principle 4: the precautionary approach to human health, natural resources and ecosystems. This commits states, international organizations and civil society to avoid human activity which may cause significant harm to human health, natural resources or ecosystems, even in light of scientific uncertainty, including: (a) accountability for harm caused (including, where appropriate, state responsibility); (b) planning based on clear criteria and well-defined goals; (c) the use of ‘impact assessment procedures’ to consider all possible means of achieving an objective (including, in certain instances, not proceeding with an envisaged activity); and (d) in respect of activities which may cause serious, long-term or irreversible harm, establishing an appropriate burden of proof in relation to the person or persons carrying out (or intending to carry out) the activity. Precautionary measures should be based on up-to-date and independent scientific judgment, should be transparent and should not result in economic protectionism. Transparent structures should be established which involve all interested parties, including non-state actors, in the consultation process. Appropriate review by a judicial or administrative body should be available. While the principle of prevention, based on known risks, is more firmly established in international law, the precautionary principle, although used in several legal instruments, has less recognition.

Principle 5: public participation and access to information and justice. This is considered a condition for responsive, transparent and accountable governments, as well as for the active engagement of equally responsive, transparent and accountable civil society organizations, including industrial concerns and trade unions, and requires effective protection of the human right to hold and express opinions and to seek, receive and impart ideas. It also requires a right of access to appropriate, comprehensible and timely information held by governments and industrial concerns on economic and social policies regarding the sustainable use of natural resources and the protection of the environment, without the imposition of undue financial burdens upon those applying for such information and, with due consideration for privacy and for protection of business confidentiality, requires access to effective judicial or administrative procedures in the state where the measure has been taken to bring such a measure and to claim compensation.

Principle 6: good governance. This commits states, international organizations and other authorities to the following: (a) to adopt democratic and transparent decision-making procedures and financial accountability; (b) to take effective measures to combat corruption; (c) to respect the principle of due process in their procedures and to observe the rules of law and human rights; (d) to implement a public procurement approach according to the WTO Code on Public Procurement. It requires also gender equality, corporate social responsibility and socially responsible investments as conditions for the existence of a global market aiming to achieve the fair distribution of wealth among and within communities.

These principles, while not definitive in conceptualizing the obligations and rights stemming from sustainable development, have been influential in the conceptualization of ‘sustainable development law’.<sup>54</sup> As stated by Duncan French, *“international law can play a constitutive as well as an instrumental role. It possesses an inherent capacity to clarify the nature and extent of wider political objectives. It can convert political compromise into a normative outcome, thus furthering political consensus and reinforcing societal values. The principles of sustainable development (...) can be interpreted, to a greater or lesser extent, as supporting this process. Whether they are primarily considered as substantive, procedural or adjudicatory (...) such principles are undoubtedly influencing the legal understanding of sustainable development, despite being, for the most part, inchoate”*.<sup>55</sup>

This character of sustainable development as an interstitial norm is exemplified in its portrayal in a number of international judicial decisions.<sup>56</sup> Reference should first of all be made to the International Court of Justice. In earlier cases, such as *New Zealand v. France Nuclear Tests Case* (1995), the Court pronounced that its Order was “without prejudice to the obligations of states to respect and protect the natural environment”. In its Advisory Opinion to the UN General Assembly on *The Legality of the Threat or Use of Nuclear Weapons*, the Court made reference to Principle 24 of the Rio Declaration on Environment and

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<sup>54</sup> For a more detailed analysis of the sub-principles of sustainable development, see MC Segger, op cit., pgs. 95-171; and H. C. Bugge and C. Voigt, *Sustainable development in international and national law: what did the Brundtland report do to legal thinking and legal development, and where can we go from here?* Avosetta series, 2008, pp. 141-162.

<sup>55</sup> D French, *International Law and Policy of Sustainable Development*, Manchester University Press 2005, pg. 72.

<sup>56</sup> The decisions referred to here were selected on the basis of their relevance to the topic of sustainable development and, given length constraints, only a short summary and relevant information will be provided. For a more comprehensive review and other relevant decisions, see especially the Reports of the International Law Association’s conferences on sustainable development, 2002, 2004, 2006, 2008 and 2010, available at [www.ila-hq.org](http://www.ila-hq.org).

Development (on protection of the environment in times of armed conflict), and proclaimed that “[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is part of the corpus of customary international law relating to the environment”.<sup>57</sup>

In its judgment in the case concerning the *Gabcikovo- Nagymaros* project between Hungary and Slovakia (1997) however, the Court placed emphasis and elaborated more substantively on both the right to development and sustainable development.<sup>58</sup> In this case, Hungary and Slovakia were in contention about an agreement which had been reached to build a dam on the Danube River, and which was then considered to be terminated by the former on environmental grounds. The Court considered that Hungary had no legal right to terminate the agreement and that Slovakia was entitled to continue building the dam. What is interesting in relation to the present topic, however, was the attention paid by the Court to the relevance of sustainable development as a norm of environmental law that, even if developed after the signature of the agreement, brought new obligations to the parties, such as that of continuing assessment of the impact of the project on the river: *“Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind - for present and future generations - of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile development with protection of the environment is aptly expressed in the concept of sustainable development. For the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the operation of the Gabcikovo power plant. In particular they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river. It is not for the Court to determine what shall be the final result of these negotiations to be conducted by the Parties. It is for the Parties themselves to find an agreed solution that takes account of the objectives of*

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<sup>57</sup> ILA Report 2002, [www.ila-hq.org](http://www.ila-hq.org).

<sup>58</sup> Case concerning the *Gabcikovo-Nagymaros Project* (Hungary/Slovakia), ICJ Reports 1997. Records available at: [www.icj.cij.org](http://www.icj.cij.org), para 140-141, emphasis added.

*the Treaty, which must be pursued in a joint and integrated way, as well as the norms of international environmental law and the principles of the law of international watercourses.”*

The opinion of Vice-President Judge C.H. Weeramantry became famous for its straightforward support of sustainable development. He found it necessary to clarify his reasoning in voting the way he did – with the majority – since he did not agree with the justifications given in the judgment. He begins by stating that *“had the possibility of environmental harm been the only consideration to be taken into account in this regard, the contentions of Hungary could well have proved conclusive. Yet there are other factors to be taken into account - not the least important of which is the developmental aspect (...). The Court must hold the balance even between the environmental considerations and the developmental considerations raised by the respective Parties. The principle that enables the Court to do so is the principle of sustainable development. The Court has referred to it as a concept in paragraph 140 of its Judgment. However, I consider it to be more than a mere concept, but as a principle with normative value which is crucial to the determination of this case. Without the benefits of its insights, the issues involved in this case would have been difficult to resolve. (...) Moreover, this is the first occasion on which it has received attention in the jurisprudence of this Court. When a major scheme, such as that under consideration in the present case, is planned and implemented, there is always the need to weigh considerations of development against environmental considerations, as their underlying juristic bases - the right to development and the right to environmental protection - are important principles of current international law. (...) It is clear that a principle must be followed which pays due regard to both considerations. Is there such a principle, and does it command recognition in international law? I believe the answer to both questions is in the affirmative. The principle is the principle of sustainable development and, in my view, it is an integral part of modern international law. It is clearly of the utmost importance, both in this case and more generally. I would observe, moreover, that both Parties in this case agree on the applicability to this dispute of the principle of sustainable development. (...) Their disagreement seems to be not as to the existence of the principle but, rather, as to the way in which it is to be applied to the facts of this case (Reply of Hungary, para. 1.45). The problem of steering a course between the needs of development and the necessity to protect the environment is a problem alike of the law of development and of the law of the environment. Both these vital and developing areas of law require, and indeed assume, the existence of a principle which harmonizes both needs. To hold that no such principle exists in the law is to*

*hold that current law recognizes the juxtaposition of two principles which could operate in collision with each other, without providing the necessary basis of principle for their reconciliation. The untenability of the supposition that the law sanctions such a state of normative anarchy suffices to condemn a hypothesis that leads to so unsatisfactory a result. Each principle cannot be given free rein, regardless of the other. The law necessarily contains within itself the principle of reconciliation. That principle is the principle of sustainable development. This case offers a unique opportunity for the application of that principle, for it arises from a Treaty which had development as its objective, and has been brought to a standstill over arguments concerning environmental considerations. (...) Other cases raising environmental questions have been considered by this Court in the context of environmental pollution arising from such sources as nuclear explosions, which are far removed from development projects. The present case thus focuses attention, as no other case has done in the jurisprudence of this Court, on the question of the harmonization of developmental and environmental concepts.” Furthermore, he recognizes the right to development as a consolidated part of human rights, and states that: “after the early formulations of the concept of development, it has been recognized that development cannot be pursued to such a point as to result in substantial damage to the environment within which it is to occur. Therefore development can only be prosecuted in harmony with the reasonable demands of environmental protection. Whether development is sustainable by reason of its impact on the environment will, of course, be a question to be answered in the context of the particular situation involved. It is thus the correct formulation of the right to development that that right does not exist in the absolute sense, but is relative always to its tolerance by the environment. The right to development as thus refined is clearly part of modern international law. It is compendiously referred to as sustainable development.” In addition, he refuses the view of sustainable development as merely a concept, and went a few steps further: “the principle of sustainable development is thus a part of modern international law by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community. The concept has a significant role to play in the resolution of environmentally related disputes. The components of the principle come from well-established areas of international law - human rights, State responsibility, environmental law, economic and industrial law, equity, territorial sovereignty, abuse of rights, good neighborliness - to mention a few. It has also been expressly incorporated into a number of binding and far-reaching international agreements, thus giving it binding force in the context of those agreements. It offers an important principle for the resolution of tensions*

*between two established rights. It reaffirms in the arena of international law that there must be both development and environmental protection and that neither of these rights can be neglected”.*<sup>59</sup>

The judgment became a landmark in this field, both for the recognition of sustainable development as an interstitial norm, and for the different level of recognition as a principle of international law, giving parameters to help to balance the development and environmental considerations of a project, as well as for entailing obligations which were not envisaged in the agreement, such as the need to continuously carry out assessments of the impact of the project on the environment. On the other hand, the Court refused to determine what precise obligations the parties were under in this regard. Thus, despite the absence of an international body responsible for the enforcement and implementation of these obligations, criticisms were raised due to the Court’s hesitation in taking a bolder step and acting as the center of international guidance in the field.

More than ten years later, another prominent judgment brought these issues back to the Court’s attention, but the way in which they were tackled did not change substantively. In the ‘Pulp Mills Case’ (Argentina/Uruguay), the Court was called upon to resolve a dispute concerning the installation of a pulp mill on the banks of the Uruguay River, which separates the two countries.<sup>60</sup> In 1975, Argentina and Uruguay concluded the Statute of the River Uruguay, the purpose of which was the establishment of joint mechanisms for the optimal and rational utilization of the river. The Statute established a Commission for the management of the river, the Administrative Commission of the River Uruguay. Argentina complained that the pulp mills authorized by Uruguay on the Uruguayan side of the river would cause environmental damage to the river and to Argentine territory. The Court decided that Uruguay had breached a procedural obligation contained in the 1975 Statute, namely the obligation to inform the Commission and Argentina of planned activities involving the river. The Court also decided that Argentina had failed to prove that significant environmental damage would occur. Therefore, the operation of the mill could continue. This decision is particularly interesting given the considerations of the Court on three aspects:

(i) the scope of the concept of sustainable development: The 1975 Statute of the River

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<sup>59</sup> Case Slovakia v Hungary, page 88 and following, emphasized.

<sup>60</sup> Case concerning Pulp Mills on the Banks of the Uruguay River (Argentina/Uruguay), ICJ Reports 2010.

Uruguay does not mention sustainable development as one of its objectives. However, as the treaty includes provisions for the prevention of pollution and the protection of the aquatic environment, the Court seems to interpret ‘optimal and rational utilization’ as similar to sustainable development: “*The Court considers that the attainment of optimum and rational utilization requires a balance between the Parties' rights and needs to use the river for economic and commercial activities on the one hand, and the obligation to protect it from any damage to the environment that may be caused by such activities, on the other*”. The Judgment also explicitly refers to sustainable development in the Court’s analysis of the relationship between the procedural and substantive obligations contained in the 1975 Statute of the River Uruguay. Argentina asked the Court to find that Uruguay had violated the procedural obligations established in the Statute of the River Uruguay and that a breach of the procedural obligations implied also a breach of the substantive obligations. It is in relation to this argument that the Court addressed sustainable development, invoking the principle to stress that there is no necessary link between procedural and substantive obligations, because the reconciliation between environmental protection and the attainment of economic development may take different forms, and that it is up to the Parties to choose which form of reconciliation best accommodates their particular interests, as they had agreed in their Statute. The Court decided that Uruguay had violated its obligation to inform and notify, but that this violation did not mean it had violated its obligation to protect the river. This shows that the Court did not view sustainable development as an operative rule of international law on the basis of which, and in the absence of other rules, it could decide on the legality or illegality of State behavior. This is not to say that sustainable development could not have a normative role to play in the interpretation and application of other rules of law. But it seems that the ICJ itself was not willing to evaluate whether a particular type of development was indeed sustainable as such. The international legal system lacks a central authority capable of imposing such public interest rules on states. In the context of this case, this explains why the Court, in the absence of an agreement between the Parties, did not have sufficient power to establish a system of risk management, which the Parties had neglected to include in the 1975 Statute of the River Uruguay. The Statute of the River Uruguay contains procedural and substantive obligations in relation to the protection of the river, but the Parties did not agree that the violation of the procedural obligations would entail *ipso facto* prohibition from continuing with the planned activities.

(ii) the need to perform impact assessment procedures. The 1975 Statute included no

obligation to assess environmental impact when a planned activity is liable to cause harm. The parties' obligation was to inform and notify each other about activities likely to cause harm to the river environment. However, the Court found that an environmental impact assessment to fulfill the obligation of precaution was a necessity, and also considered it a requirement under general international law in relation to activities that pose a risk of environmental harm. Nevertheless, it recognized that the scope and content of an environmental impact assessment must be determined by each State.

(iii) Finally, another relevant point was the Court's refusal to be a 'risk assessment body'. Argentina interpreted the 1975 Statute as establishing a framework for cooperation between the Parties in which the International Court of Justice would play the role of final decision-maker should the Parties fail to reach agreement. The Court refused to assume this role, and while some of the Judges considered that the Court had missed an opportunity to approach an environmental dispute in a forward-looking and prospective manner, the Court did not engage in this capacity of, without clear indications from the Parties, allowing the environmental concerns of one Party to become a temporary veto to all development objectives and the use of a shared watercourse.<sup>61</sup>

Despite these interesting points, this judgment seems to reaffirm that, even ten years after the views expressed in the Hungary/Slovakia Case, the Court is still unwilling to present a more bold or normative argument for the implementation of sustainable development considering the procedural obligations it entails, such as the due balancing of development and environmental issues, and the need to exercise integrative instruments, such as impact assessment procedures. Nevertheless, the Court does not determine the substantive content of such norms; this must be done at the national level. Even though the interpretations of sustainable development in these cases were careful, and did not portray the principle as a mandatory rule, there was little hesitation in stating that this norm exerts a type of normativity, imposing obligations on the parties involved and guiding decision-making by raising considerations that would not otherwise have been raised.

Sustainable development emerges from these instruments and decisions as a concept that encompasses two main normative assumptions: a horizontal/policy dimension that has

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<sup>61</sup> ILA Report 2010.

reoriented the relationship between development and the environment, prescribing that the development process should be carried out in a way that allows for economic development while also assuring environmental protection and social justice - placing the individual as the main subject of the development process through human rights; in addition, the inter-generational/temporal dimension, represented by the 'sustainability' component, translated as the need to ensure the rights of future generations to meet their needs, just like the current one. These normative assumptions also have two major related normative goals: to promote equity and the eradication of poverty, and the integration of socio-environmental considerations into all governance levels. In this regard, despite the criticism and the uncertainty regarding its legal status, it is in this capacity for guidance that the significance of sustainable development can be fully perceived, both as an objective, in achieving balance between the competing spheres of the development process, and as a guiding principle encompassing a set of substantive and procedural tools recognized by and widely incorporated into IL.

### **3. The way forward? An implementation challenge**

The global governance for sustainable development was reviewed in another major conference in 2012, also held in Rio de Janeiro, known as Rio+20. It marked not only the 20<sup>th</sup> anniversary of the UNCED in 1992, but also marked 40 years since the Stockholm Conference of 1972, the beginning of a series of international conferences. These international conferences have been fundamental to international law-making, and also to the creation, dissemination and mainstreaming of the concept of sustainable development within the international community, as analyzed above. Rio+20 represented the continuation of this process, aiming to take stock of what had been achieved and to draw the international community's attention to the urgent need to review and reset the agenda towards sustainable development. At the same time, it also witnessed the diminishing ability of the international community to reach binding common targets, continuing the trend towards more soft, action-plan oriented outcomes.

The objective of the Conference was to secure renewed political commitment to sustainable development, to assess the progress and the remaining gaps in the implementation of the outcomes of the major summits on sustainable development, and to address new and emerging challenges, focusing particularly on two: to promote a move towards a 'green

economy in the context of sustainable development’, and the ‘institutional framework for sustainable development’.<sup>62</sup> The road to Rio+20 was marked by skepticism and disagreement. In relation to the agenda, despite the widespread criticism after the conclusion of the Conference, the preparatory works had anticipated only a modest outcome in terms of binding commitments, so in this regard it was not surprising. Further, the two focal points of the Conference reflected this disagreement: (1) a transition to a green economy in the context of sustainable development; and (2) the institutional framework for sustainable development. Rather than creating common ground for agreement, these themes are themselves controversial.

The ‘green economy’ is a concept which was launched by UNEP in 2008 as an economic model to improve human well-being and social equity, while significantly reducing environmental risks and ecological scarcities: *“In its simplest expression, a green economy is low carbon, resource efficient, and socially inclusive. In a green economy, growth in income and employment should be driven by public and private investments that reduce carbon emissions and pollution, enhance energy and resource efficiency, and prevent the loss of biodiversity and ecosystem services. (...) The key aim for a transition to a green economy is to eliminate the trade-offs between economic growth and investment and gains in environmental quality and social inclusiveness. The main hypothesis (...) is that the environmental and social goals of a green economy can also generate increases in income, growth, and enhanced well-being. (...) The concept of a green economy does not replace sustainable development; but there is a growing recognition that achieving sustainability rests almost entirely on getting the economy right. (...) Investments in renewable energy, for example, will have to pay special attention to the issue of access to clean and affordable energy. Payments for ecosystem services, such as carbon sequestration in forests, will need to focus more on poor forest communities as the primary beneficiaries. The promotion of organic agriculture can open up opportunities, particularly for poor small-scale farmers who typically make up the majority of the agricultural labor force in most low-income countries, but will need to be complemented by policies to ensure that extension and other support services are in place. (...) A green economy must not only be consistent with that objective (the MDG poverty eradication), but must also ensure that policies and investments geared towards reducing*

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<sup>62</sup> UNGA Resolution A/RES/64/236, March 31<sup>st</sup> 2010.

*environmental risks and scarcities are compatible with ameliorating global poverty and social inequity”.*<sup>63</sup>

The green economy agenda implies a departure from many accepted practices in key sectors of the economy, recognizing that ‘business as usual’ economic practices cannot respond to global challenges such as climate change, loss of biodiversity and the remaining inequality around the world. The UNEP report thus proposes a new kind of economic development for both developed and developing countries, which involves *greening* eleven key sectors of the economy: agriculture, fisheries, water, forests, energy, manufacturing, waste, buildings & construction, transportation, tourism, and cities. It also proposes innovative solutions to complex challenges that are fundamentally linked to the manner in which economic development is framed and guided by policymakers. The basic premise is that economic development that is coupled with improved human well-being and environmental protection will result stable economic growth. Numerous actors have important roles in this process of change, especially businesses and the private sector. Governments and policy-makers can play a key role in ‘kick-starting’ financing for the green economy, as well as in creating and implementing laws and policies that will guide and support the transition to a green economy in each sector.<sup>64</sup> This concept is thus both ambitious and promising in its aim to promote sustainable development through a new economic model by helping to build an economic system based on environmental sustainability while still providing livelihood opportunities. In this regard, it is seen as a better alternative for international cooperation, in comparison to development aid, as it aims to build an economic system that can work for the sustainable development of all nations. At the same time, it is highly controversial, given (i) that there is no clear definition of what it means, its scope being very broad; (ii) the unclear relationship with sustainable development, and the fear of a return of focus to the economic sphere; (iii) the fear that it might lead to ‘green protectionism’ and new conditionalities in ODA and investment patterns. In this regard, there is a division between UNEP and the developed countries -including the EU- and the developing countries -especially amongst the G77 members- on how to deal with the GE concept.<sup>65</sup>

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<sup>63</sup> UNEP, *Towards a Green Economy: Pathways to Sustainable Development and Poverty Eradication*, 2011 [www.unep.org/greeneconomy](http://www.unep.org/greeneconomy).

<sup>64</sup> In this regard, see International Development Law Organization – IDLO and Centre for International Sustainable Development Law - CISDL, *Green Economy for Sustainable Development: Compendium of Legal Best Practices*, 2012.

<sup>65</sup> K. Jakob et al, *Green Economy Discourses in the Run Up to Rio 2012*, Environmental Policy Research Centre, Freie Universität Berlin, FFU Report 07-2011.

Considering the institutional framework, several proposals have been discussed, such as: (i) how to strengthen the existing environmental treaties by promoting more precise goals and dynamic voting procedures, such as qualified majority; (ii) bridging the existing treaty frameworks mainly in order to enhance the environmental and social spheres in the economic governance frameworks such as the WTO and financial institutions; (iii) filling the regulatory gaps in international governance on key points such as green technologies, food, water and energy; (iv) upgrading the status of UN bodies such as UNEP and the UNCSO to the level of more specialized agencies like UNICEF or UNDP and strengthening their relevance and powers, particularly considering the participation of governmental ministries other than environmental in the deliberation processes of such bodies; (v) fostering new regulatory tools at the national level, based on best practices; (vi) strengthening cooperation, especially regarding adaptation to the already inevitable effects of climate change.<sup>66</sup>

Other issues also raised concerns, such as the absence of a more ambitious mandate in terms of binding commitments; the momentum, given that Rio+20 took place in the context of the international financial crisis, in which the resources earmarked for social and environmental issues face challenges; and the timing of the Conference coinciding with the G20 Summit in Mexico,<sup>67</sup> which many international leaders chose to attend instead of flying to Rio de Janeiro, and which stole some of the media attention during that period. These factors might indicate that, notwithstanding the international community's alleged commitment towards promoting sustainable development as a holistic objective and greening the global economy, the 'traditional' economic and financial aspects of development still occupy the highest priority on the agenda.

Despite the controversial issues noted above, Rio+20 was still the largest conference ever organized by the UN. Some 100 Heads of State and government, along with approximately 50,000 representatives from non-governmental organizations, the private sector and civil society were present. The magnitude of these numbers is not only of statistical relevance, but is also a testament to the extent to which the main topic of the Conference, sustainable development, has become widespread within all social sectors on a global scale. In fact, the Rio+20 gathering was a three-layered process, representing different ways in which

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<sup>66</sup> Policy Brief 3, Earth System Governance Project.

<sup>67</sup> The 7th Summit of the G20 was held in Los Cabos, Mexico, from June 18–19, 2012, focusing on the promotion of growth and jobs. See: <http://www.g20.org>.

governments and international organizations, the private sector and civil society participated in shaping the global agenda and providing ways forward:

### i) the UN Global Compact Corporate Sustainability Forum

Launched in 2000, the United Nations Global Compact is both a policy platform and a framework for engaging companies in sustainability and responsible business practices. As a multi-stakeholder leadership initiative, it seeks to align business operations and strategies with ten principles in human rights, labor, environmental and anti-corruption issues. With 8,700 corporate signatories in 135 countries, it is the world's largest voluntary corporate responsibility initiative.<sup>68</sup> In this regard, the Global Compact convened the 'Rio+20 Corporate Sustainability Forum: Innovation and Collaboration for the Future We Want', from 15-18 June 2012, seeking to "bring greater scale and quality to corporate sustainability practices, as a critical contribution to sustainable development" and also "as a showcase for innovation and collaboration (...) designed to be a launching ground for widespread action". The Forum had around 2,500 participants and featured over 100 sessions focusing on six themes: energy and climate; water and ecosystems; agriculture and food; social development; urbanization and cities; and economics and finance.

The Forum Outcome document, presented to the UN Secretary-General, outlined leading corporate practices in the mentioned areas, as well as an appendix of approximately 200 commitments to action announced by corporate leaders, representing both individual and collective action in social, economic and environmental areas. Further, innovative policy initiatives were developed including, for example: the endorsement by 200 CEOs of Brazilian companies of 'Business Contributions to the Promotion of a Green And Inclusive Economy', which laid out 10 commitments to be made by the end of 2012; the launch of a new corporate policy framework to assist companies in the development, implementation and disclosure of policies and practices related to ecosystems and biodiversity; the launch of a 'Social Enterprise Investment Framework', designed for large corporations, institutional investors and governments interested in incubating and scaling up for-profit start-ups and small enterprises with social and environmental missions; the announcement by 16 companies and other stakeholders in the food and agriculture sectors that they will lead the development of

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<sup>68</sup> See: <http://www.unglobalcompact.org>.

global voluntary business principles on good practice and policy for sustainable agriculture; the endorsement of over 70 businesses, governments and international organizations with regard to the ‘Green Industry Platform’, an initiative to mainstream environmental and social considerations into corporate operations through efficient use of energy and raw materials, innovative practices and applications of new green technologies; the introduction of a global Water Action Hub, the world’s first online platform uniting companies, governments, civil society organizations and other stakeholders on water management projects; a commitment by five stock exchanges – NASDAQ OMX, BM & FBOVESPA (Sao Paulo, Brazil), the Johannesburg Stock Exchange, the Istanbul Stock Exchange and The Egyptian Exchange – representing over 4,600 companies, to promote sustainable investment – a first step towards broader sustainability disclosure and performance by listed companies; and a Declaration for Higher Education Institutions, endorsed by over 260 major business schools and universities around the world, committing to incorporate sustainability issues into teaching, research, and their own management and organizational activities.<sup>69</sup> These announcements represent the growing recognition of the role that the private sector – including finance – can play in building a green economy and being active and supportive of governments in the pursuit of sustainable development.

### ii) The ‘People’s Summit of Rio+20 for Social and Environmental Justice’

The ‘People’s Summit of Rio+20 for Social and Environmental Justice’<sup>70</sup> was a major gathering of civil society groups that happened in parallel to the main UNCSD events. It was attended by around 20,000 people from around the world, organized into five major plenaries: 1 – Rights, Social and Environmental Justice; 2 – In defense of common goods and against commodification; 3 – Food sovereignty; 4 – Energy and Extractive; and 5 – Work: For Another Economy and New Paradigms for Society. As its outcome, the Summit produced a Final Declaration, which argued in favor of the “defense of the commons, against the commodification of life”.<sup>71</sup> While some of the arguments put forward in the plenary discussions and even in the final document might seem somewhat vague or utopian, the major positive outcome of the Summit has been the fact that it represents the extent to which the

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<sup>69</sup> Overview and Outcomes of the Corporate Sustainability Forum, available at: [http://www.unglobalcompact.org/docs/news\\_events/upcoming/RioCSF/RioCorpSustForum\\_Outcome\\_21June12.pdf](http://www.unglobalcompact.org/docs/news_events/upcoming/RioCSF/RioCorpSustForum_Outcome_21June12.pdf).

<sup>70</sup> The official website of the People’s Summit is: <http://cupuladospovos.org.br/en>.

<sup>71</sup> Available at: <http://cupuladospovos.org.br/wp-content/uploads/2012/07/FinalDeclaration-ENG.pdf>.

discussion of sustainable development, and the need for whole societal change that it implies, has also become disseminated within civil society and above all within youth groups, who are ultimately those that will have to deal with these issues in the future.

### iii) The UNCSd

The UNCSd itself was also an event of significant proportions, involving several layers of activities. At its core was the gathering of Heads of State and country delegations which aimed to provide decisions on the main topics of discussion; these plenary sessions were circumvented by a myriad of activities taking place outside the negotiation rooms, involving ‘side events’ organized by States, International Organizations, NGOs, and Media/activists, that illustrate the widespread and massive interest and momentum that Rio+20 had generated.<sup>72</sup> The focus of the analysis here, though, will be the outcome document, as an instrument of soft law and decision-making.

The Outcome Document of Rio+20, named ‘The Future We Want’, was adopted by unanimity even before the end of the Conference, and was later endorsed by the General Assembly.<sup>73</sup> It consists of a 53-page text divided into six main sections: 1 – Our Common vision: a statement of principles and values by UN Members; 2 – Renewing Political Commitment: statements that take stock and reaffirm the processes that led towards Rio+20; 3 – Green Economy in the context of sustainable development: this was the first of the two themes of Rio+20 and the common vision and means of implementation of this objective are

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<sup>72</sup> More than 500 on-site side events organized by Governments, Major Groups, Organizations from the UN system and other International Organizations took place during the Prepcom period, (13-15 June), the Sustainable Development Dialogue Days (16-19 June) and the Summit (20-22 June). Among these, of special mention are the Sustainable Development Dialogues, organized by the Government of Brazil in collaboration with the UN, which were an innovative mechanism of promoting civil society inputs to the conference, something new in the history of UN Conferences. The Dialogues created a participatory process for representatives of civil society that aimed to bring a number of Recommendations to the Heads of State and governments, to be presented at the Round Tables during the High Level segment of the Conference. They gathered 100 panelists in 10 panels focused on key themes on the international agenda for sustainable development: (1) unemployment, decent work and migrations; (2) sustainable development as an answer to the economic and financial crises; (3) sustainable development for fighting poverty; (4) the economics of sustainable development; (5) forests; (6) food and nutrition security; (7) sustainable energy for all; (8) water; (9) sustainable cities and innovation; and (10) oceans. The debates had an average audience of over 1,300 people, representing the final point of a process of consultation that began in April and gathered thousands of participants in open discussions over the Internet. Over 63,000 people from 193 countries cast nearly 1.4 million votes, and a total of 100 recommendations were discussed by the panelists, from which 30 were selected. See: <http://www.uncsd2012.org/index.php?page=view&nr=596&type=13&menu=23>.

<sup>73</sup> UN Document A/66/L.56, UNGA 66th Session, July 24th 2012. Available at: <http://www.uncsd2012.org/thefuturewewant.html>.

discussed in this section; 4 – Institutional Framework for Sustainable Development: the second theme of Rio+20 is discussed in relation to the three dimensions of sustainable development; 5 – Framework for action and follow up: several cross-cutting key areas of action for sustainable development are discussed, namely poverty eradication, food security and nutrition and sustainable agriculture, water and sanitation, energy, sustainable tourism, sustainable transport, sustainable cities and human settlements, health and pollution, promotion of full employment, decent work for all and social protection, oceans and seas, Small Island Developing States (SIDS), Least Developed Countries (LDCs), Landlocked Developing Countries, Africa, regional efforts, disaster risk reduction, climate change, forests, biodiversity, desertification, land degradation and drought, mountains, chemicals and waste, sustainable consumption and production, mining, education, gender equality and women's empowerment, and also the establishment of 'Sustainable Development Goals' by 2015; 6 – Means of Implementation: presents areas for implementing the issues above through finance, technology transfer, capacity building, trade and voluntary commitments.

'The Future We Want' is a typical 'soft-law' document, mainly containing action plans with vague commitments, which is evidenced by the language commonly used: there is wide use of action verbs such as (we) acknowledge, emphasize, invite, recognize, reaffirm, welcome and urge, and very few stronger statements such as 'we determine' or 'we request'. While it reaffirms "the importance of freedom, peace and security, respect for all human rights, including the right to development and the right to an adequate standard of living, including the right to food, the rule of law, gender equality, the empowerment of women and the overall commitment to just and democratic societies for development" (para. 8), and values such as "democracy, good governance and the rule of law, at the national and international levels, as well as an enabling environment" are affirmed as essential for sustainable development (para. 10), when dealing with specific issues, the language used is less assertive. Some of the main provisions of the Outcome Document are summarized below, starting with the decisions taken with respect to the two main focal points of the Conference: the green economy and the institutional framework for sustainable development.

### a) The green economy in the context of sustainable development

The Outcome Document did little to clarify the contours of this concept, although it did try to address the two main concerns of most stakeholders: the conceptual ambiguity related to

sustainable development, especially regarding how it is to be a tool and not a replacement of one; and also the economic/commercial implications of the adoption of the green economy as a main policy goal, namely the fear of green protectionism and new green conditionalities. The language used is vague, affirming that “there are different approaches, visions, models and tools (...) to achieve sustainable development” and that “(...) we consider green economy in the context of sustainable development and poverty eradication as one of the important tools available for achieving sustainable development and that it could provide options for policymaking but should not be a rigid set of rules.” Nevertheless, it expressly states that green economy policies should be consistent with international law, should effectively avoid unwarranted conditionalities and unilateral actions outside national jurisdiction and should not constitute a means of arbitrary or unjustifiable discrimination or disguised restriction on international trade (paras. 56-58). Finally, in a more action-oriented fashion, it invites the UN, in cooperation with donors and international organizations, to coordinate and provide information upon request on, inter alia, “toolboxes and/or best practices in applying policies on green economy in the context of sustainable development and poverty eradication at all levels”; “models or good examples of policies on green economy in the context of sustainable development and poverty eradication”; “Methodologies for evaluation of policies on green economy in the context of sustainable development and poverty eradication” (para 66). This represents less than was expected by some stakeholders, such as the European Union, which had released a ‘Green Economy Roadmap’<sup>74</sup> including timetables and indicators that are not reflected in the text. Despite these downsides, such as not providing a legal statement of the concept of the green economy, the Outcome Document supported a less imposing and more cooperative approach in implementing green economy policies, which are certainly fundamental in dealing with key issues such as the modification of production and consumption patterns and the transition to a more sustainable lifestyle, also requiring the participation of all relevant stakeholders from public, private and civil society sectors.

### b) Institutional Framework for Sustainable Development

There were many issues on the table concerning what could be done to strengthen the international framework for promoting sustainable development, all of which have not been

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<sup>74</sup> Available at: <http://www.uncsd2012.org/index.php?page=view&type=510&nr=240&menu=20>.

tackled.<sup>75</sup> Two decisions deserve to be highlighted though: the decision to create a High Level Forum to replace the Sustainable Development Commission (SDC), with the power to deliberate, coordinate and resolve, with the potential to provide more coherence in the global progression towards sustainable development. It is expected that the Forum will be convened for the first time at the 68<sup>th</sup> Session of the General Assembly, in 2014 (paras. 84-86). Moreover, an improvement process for the United Nations Environment Program (UNEP) has been introduced in order for it to have universal membership, a regular United Nations budget and greater powers, such as those required for coordination of the environmental pillar and for managing operational aspects and schedules (para. 87). Furthermore, it was agreed to establish an intergovernmental process to create a sustainable development financing strategy based on innovative mechanisms (para. 255). Finally, it requested the UN to identify options for a facilitation mechanism that promotes the development, transfer and dissemination of clean and environmentally sound technologies (para. 273). This is a fundamental issue for which a multilateral solution has still not been found,<sup>76</sup> despite its relevance in several spheres such as in the mitigation of climate change, in adaptation strategies for developing countries and in green economy policies, so the fact that the Secretary General was requested to make recommendations in this regard for the 68th Session of the General Assembly at least provides the process with a timeline.

### c) The decision to establish ‘Sustainable Development Goals’ (SDOs)

Building on the Millennium Development Goals (MDGs), another relevant decision was the determination of a process leading to the definition of the SDOs, which had to start in 2012 and would be presented to the Sixty-Eighth Session of the General Assembly in 2014 by means of a Resolution (paras. 245-251). The MDGs, despite their unbinding nature, have served as a framework for development efforts since their creation over a decade ago, setting global and national priorities at all levels that have led to progress in many countries, particularly towards the goals of eradicating poverty and improving access to primary education.<sup>77</sup> Thus there were high expectations before the Summit in relation to the SDGs and

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<sup>75</sup> See, in this regard, Policy Brief 3, Earth System Governance Project, available at: <http://www.ieg.earthsystemgovernance.org/news/2011-09-27/policy-brief-institutional-framework-sustainable-development>.

<sup>76</sup> In this regard, see A. Latif, *Intellectual Property Rights and Green Technologies from Rio to Rio: An Impossible Dialogue?*, Policy Brief No. 14, International Centre for Trade and Sustainable Development, 2012.

<sup>77</sup> For an updated report on the implementation of the MDGs, see <http://www.undp.org/content/undp/en/home/librarypage/mdg/mdg-reports/>.

some of the proposals that were made, such as the original Zero Draft text, and later the proposals brought by Colombia (with Peru and the United Arab Emirates) and the European Union, which detailed a list of key priority areas. In this regard, it was disappointing that the Outcome Document did not propose thematic areas or principles that should underpin the development of the SDGs. However, the recently published report by the UN System Task Team to the UN Secretary-General on the 'Post 2015 Development Agenda' addresses this issue, recommending that both the goals and targets should be organized along key dimensions: economic, social, environmental and peace and security, and that this should be aligned with the Rio+20 outcomes.<sup>78</sup> One should bear in mind that these are slow decision-making processes, also remembering that some time was needed before the eight MDGs were agreed, so it remains to be seen how the matter will evolve over the next months.

### d) Voluntary Commitments

Finally, another initiative worth mentioning was the establishment of a mechanism for the registry of voluntary commitments (recognized in para. 283). As part of the action-based and participatory orientation of the Conference, stakeholders were invited to make commitments focusing on delivering concrete results for sustainable development on a voluntary basis. All commitments had to be specific, measurable, funded, new (or an extension of an existing commitment) and needed to cover at least one of the areas of sustainable development established for this purpose, and will be monitored by the UN as regards their implementation. By the end of the Conference, over 700 voluntary commitments were announced by governments, UN system & IGOs, the private sector, civil society and NGOs, representing more than US\$500 billion in action towards sustainable development.<sup>79</sup> These voluntary commitments have been compiled into an online registry managed by the Rio+20 Secretariat, aiming to initiate a new bottom-up approach towards the advancement of sustainable development. As mandated by the Conference outcome, this registry of

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<sup>78</sup> United Nations System Task Team on the Post-2015 UN Development Agenda Review of the contributions of the MDG agenda to foster development: lessons for the Post 2015 UN Development Agenda (New York, 2012), available from <http://www.un.org/millenniumgoals/beyond2015.shtml>. For assessments of the uneven progress towards the MDGs, see The Millennium Development Goals Report 2011 (United Nations publication, Sales No. E.11.I.10), available from: [http://www.un.org/millenniumgoals/11\\_MDG%20Report\\_EN.pdf](http://www.un.org/millenniumgoals/11_MDG%20Report_EN.pdf).

<sup>79</sup> Examples include: planting 100 million trees by 2017; greening 10,000 square km of desert; saving 1 Megawatt-hour of electricity per day; empowering 5,000 women entrepreneurs in green economy businesses in Africa; establishing a Masters program on sustainable development practice; developing an Environmental Purchasing Policy and Waste Minimization & Management strategy; recycling 800,000 tons per year of PVC by 2020, etc.

commitments will continue to welcome registrations and to deliver information as to the follow-up processes.<sup>80</sup>

Rio+20 was thus not only an intergovernmental conference, but also an international gathering of unprecedented proportions focusing on the issue of sustainable development. The evaluation of these outcomes, however, has been uneven. Exemplifying the thinking of several leaders that participated in the Summit, Mr. Nassir Abdulaziz al-Nasser, UNGA President, declared that “[b]y adopting this resolution today, we are opening a new chapter. Rio+20 is not an end but a new beginning” and that “Rio in 1992 and Johannesburg in 2002 put sustainable development on the map, but Rio+20 has defined a new vision of development for the future, which will be equitable and inclusive and will take into account the limits of our planet.”<sup>81</sup> On the other hand, there has also been severe criticism, especially in the media, with some commentators arguing that the Summit could be called ‘Rio minus 20’ instead.<sup>82</sup> In fact, in response to the Outcome Document, more than a thousand interest groups signed a petition entitled *The Future We Don’t Want*.<sup>83</sup> Nevertheless, such negative impressions could be indicative of a misguided focus, both regarding the scope of the Outcome Document, and also regarding the function of international gatherings of this kind.

As discussed above, IL nowadays has a lot to do with setting common goals of the international community, even if through ‘soft law’ documents which, despite their non-binding character, have set the agenda and path for action over the years. Despite the fact that the Outcome Document contains no major binding commitments, it – together with the substantive participation at the Summit – does renew a series of commitments for the sake of sustainable development. In this regard, it is important to consider that goals like sustainable development are not achieved by legal rules alone: without the existence of political will in the implementation of the goals that it represents there is no chance of securing any lasting reform. Thus legal commitments are not a substitute for a wholesale societal change.<sup>84</sup> The

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<sup>80</sup> For more information, see: <http://www.uncsd2012.org/voluntarycommitments.html>.

<sup>81</sup> See: <http://www.un.org/News/Press/docs/2012/ga11264.doc.htm>.

<sup>82</sup> Commentators such as Kumi Naidoo, Greenpeace International Executive Director, declared that *Rio+20 “has turned into an epic failure. It has failed on equity, failed on ecology and failed on economy”*, and Jim Leape, international director general of World Wildlife Fund, protested, “*It’s pathetic. It’s appalling. If this becomes the final text the last year has been a colossal waste of time*”; further, as many as 100,000 activists and students joined a protest in Rio after the release of the final document to express their discontent. See: <http://reason.com/archives/2012/06/21/rio-20-earth-summit-greens-fail-to-get-t>.

<sup>83</sup> An online petition is open for signature, currently featuring more than 2.000 signatures in August 2012, see: <http://www.ipetitions.com/petition/the-future-we-dont-want/>.

<sup>84</sup> D. French, *Global Justice and Sustainable Development*, 2010.

quality – and numbers – of participation of youth, women and older people; the voluntary commitments; the concern about accountability and education; civil society taking the lead; the opportunities and challenges presented by the implementation of existing binding legal international documents, these elements make ‘The Future We Want’ a document which should be seen as a point of departure for future action.

Furthermore, regarding the use of international conferences or the arguable failure of multilateralism as a system of international decision-making, represented by the lack of binding commitments at major events such as Rio+20 or the Conference of the Parties of the United Nations Framework Convention on Climate Change (COPs), or even the stalemate in the conclusion of the Doha Round of the World Trade Organization, one should consider that these issues coexist with the emergence of a different framework for coordination within the international community, one in which ‘soft law’ forms of agreement and new actors such as regional and local organizations and the private sector are becoming increasingly relevant. This is illustrated by the numerous events that took place at the Rio+20 Conference. Ambitious and binding agreements on a global scale are nowadays very difficult to achieve, largely because of the increased complexity of the matters at stake and the emergence of several centers of power. This does not mean that multilateralism is no longer of use. On the contrary, conferences such as Rio+20 are now much more than just meetings of governments, but rather a multitude of parallel events, discussions and presentations by various segments of civil society, business sectors and subnational governments, like municipalities and states, and the actions and commitments made by these new actors are more ambitious for, as well as being fundamental to, the complex process of making development a more sustainable process.

In this new context, as another commentator has argued, a new multilateralism is being presented as an ongoing process: multi-institutional multilateralism, in which the potential to provide coordination and the power of the media for mainstream issues in the global agenda are fundamental.<sup>85</sup> The UNCSD might not have provided a unanimous solution to what future we want as a global society, but it provided a solid foundation on which international law can be built as an instrument to enable us to overcome our common challenges. The main challenge now is to implement all these provisions.

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<sup>85</sup> LF do Amaral, *A Era do Multilateralismo Multi-institucional*, in Pontes 8:4 (2012), International Centre for Trade and Sustainable Development Geneva, available at: <http://www.ictsd.org>.

#### 4. Concluding remarks

Some conclusions can be drawn from the issues discussed in this chapter. The background to the analysis made here was formed by the changes occurring in the international scenario, which imposed modifications in the means of conduct of international relations, and also in international law, which regulates relations amongst the international community and the achievement of its common goals. Nowadays, in a context of globalization, interdependence and global challenges, several types of actor coexist with states in the international community, new ways of promoting global governance have emerged, and issues that were previously seen as pertaining to the national sphere of regulation have now become common goals at the international level. In this framework, the international community has taken the promotion of development as a common objective.

The concept of development has evolved, being nowadays increasingly understood as a process of human development or of enhancing human capabilities and promoting opportunities, while promoting the balance between economic growth, environmental protection and social justice through substantive means, through legislation and policies, and procedural means, through access to justice and information, public participation and impact assessment. In this process, the individual is supposed to be at the center, both as the subject/holder of human rights and as an active participant through public participation and access to justice. While international organizations and other actors play an important role in the development of normative standards, the state is still seen as the main actor responsible for the implementation of development policies. In fact, the state is committed to a double role: to promote development policies and provide for the welfare of its population at the national level and, as part of the international community, to support a fair global system and provide assistance to the least developed countries in their efforts. In this regard, while much has been said about the loss of national sovereignty, some retain the view that it is still a fundamental cornerstone of international relations, but must now be viewed in an improved way, such as the idea of a responsible sovereignty, both to individuals and to the environment.<sup>86</sup>

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<sup>86</sup> See, in this regard, AM Slaughter, *A new world order*, in which she proposes that a more effective global governance could be achieved not by the strengthening of supranational or intergovernmental governance institutions, but rather by the improvement of an existing 'network of government officials', thus keeping the

The role of IL in this process is still ambiguous. As stated in the introduction, one of the major roles ascribed to IL nowadays is the promotion of the common goals of the international community, taking into account the fairness of global relations. Development was encompassed by law in this regard, in a first place, as an objective to provide rules that would respond to the needs of economic development and to the claims of a fairer international system (the traditional IDL). Furthermore, a more normative type of international law has gradually developed, aiming to promote human development, in the sense of promoting human rights and safeguarding the environmental sustainability that is fundamental to human life (modern IDL).

In this framework, sustainable development has emerged as a concept that encompasses two main normative dimensions: a horizontal/policy dimension represented by the reorientation of the idea of development, prescribing that the development process should focus on the needs of human beings and the realization of human rights, rather than solely on the promotion of the economic development of the state; and an inter-generational/temporal dimension that determines the need to make this process sustainable, allowing for economic development while also assuring environmental protection and social justice and ensuring the rights of future generations to meet their needs for a decent life, just as the current one does. It works thus as a guiding principle that orients the balancing of these - still competing - objectives.

The status of sustainable development as a customary norm of IL in its own right is still disputed, however, as there is no binding definition of sustainable development and its 'founding instruments' and plans of implementation are 'soft law'. At the same time, it certainly exists as a principle with normative content exerting influence in IL, be it in the drafting of legal instruments at all levels of governance, or in the resolution of disputes. In this regard, an 'international law of sustainable development' is highlighted by several scholars as a system of substantive and procedural principles of international law that work at the intersection of the international economic, environmental and social regimes, working to promote this goal and this integration of objectives.

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state as the basis of international relations, for reasons of accountability, democratic legitimacy and implementation. In regard to a renewed idea of sovereignty, Inge Kaul proposes a concept of 'responsible sovereignty', I Kaul, *Global Public Goods*.

This poses a challenge of implementation, above all regarding the policy and rule-making sphere – as distinct from the adjudication element of the functions performed by this principle, since most of the sub-principles forming ‘SD law’ are well shaped or are in the process of being shaped by legal debate. This challenge is in a way a paradox: on the one hand, as stated by Segger, *“if globalization is to be harnessed and channeled toward sustainability, collective, binding principles and instruments are essential; IL is needed in order to govern the intersections between conflicting global priorities and norms in this area, to ensure a balanced outcome; The emerging law of sustainable development law (...) provides ways to address these critical challenges”*.<sup>87</sup> On the other hand, she states that sustainable development is *“a social and political construct, not a scientific blueprint that can be applied in the same way in each set of circumstances”*.<sup>88</sup> Moreover, as stated by French,<sup>89</sup> goals such as sustainable development and global justice are *“not achieved by legal rules alone: it is the existence of political will in the implementation of any understanding of justice that will be pivotal in securing any lasting reform. Thus, a legal framework may be a necessary element of justice, but not a substitute for a wholesale societal change, and, even though justice and sustainable development might lack normative precision, they are not devoid of a fundamental core, which states could use if they so wish.”*<sup>90</sup>

These observations, read together with the insights from the ICJ judgments quoted above, lead to the conclusion that the widespread claims that sustainable development has become an ‘umbrella concept’ encompassing almost anything and has thus lost its relevance, are wrong. There is a clear idea of what sustainable development implies, the problem seems to rest in how to enforce and implement it, given that implementation is to be decentralized by the states. In this regard, there is no fixed ‘recipe’ as to how, for instance, environmental laws should be drafted, or how procedural guarantees of public participation and access to justice are to be safeguarded within the national legal framework. The question then is how to build blocs from the national systems towards the achievement of multilateral/international goals.

From a legal perspective, there is no international regime set up to deal specifically with the promotion of development or to implement the goals of the sustainable development principle. The most important regime in this regard is the international economic regime, and

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<sup>87</sup> Op cit, pg. 369.

<sup>88</sup> Ibid, pg. 5.

<sup>89</sup> Op cit.

<sup>90</sup> D French, op cit.

within it, the trade regime based on the WTO and its legal rules. This system is well grounded in binding agreements and enforced at the international level. On the other hand, these regimes are still relatively closed to the inclusion of objectives of other regimes, as is evident in discussions of environmental or human rights issues at the WTO. In addition, international regimes of environmental and social law – including human rights, labor law, etc. – have been created. These regimes are based on a less concrete framework in relation to the economic regime, as some of the sub-regimes are based on binding instruments, while others work on the basis of international standards developed by international organizations and implemented on a voluntary basis by states. Moreover, none of those regimes has a development rationale as such: the promotion of human rights serves the purpose of putting the individual at the center of the development process, while effective environmental legislation serves the purpose of assuring the protection of the environment, which is not per se -at least not at this point- a human right, but rather a collective right of all mankind. Furthermore, the procedural aspects aim to assure means of enabling society's contribution to the process through access to judicial remedies and public participation, thus incorporating the reality that development is a process rather than a goal that can be achieved and maintained, and thus needs to be constantly updated and discussed by the members of society, at all levels of governance. Finally, an incipient regime of development cooperation can be observed, which nevertheless is based much less on binding obligations and targets than on national or regional foreign policy making.

It is within the framework analyzed above that this thesis aims to discuss the role of the regional sphere in the promotion of development. Regional blocs are fundamentally agreements that aim to create trade liberalization schemes, to greater or lesser extents, and have a development rationale of promoting an increase in trade as a means of promoting economic development and welfare. Gradually, as these regional blocs have evolved, other issues have been included in the mandate, as will be discussed in the forthcoming chapters. In this regard, regional blocs are a part of the international economic regime, as the WTO regulation foresaw the formation of regional agreements which would form part of the multilateral. In addition, the regional sphere is also seen as a means of implementing the internationally agreed goals of sustainable development. Agenda 21, the JPOI and the Rio+20 Outcome Document mention the regional level as an important part of their implementation plans, as a fundamental sphere of governance. Given the weak capacity of centralized standard-setting and feeble capacity of enforcement at the international level, regulation at a

## Chapter 1

regional level might work more easily to fill this gap, by building legal frameworks that encompass issues from the international agenda and transform them into binding goals in the regional sphere.

The next Chapter analyzes sustainable development implementation through two international regimes, the development cooperation regime and the trade regime, as well as how regional integration agreements might provide an alternative governance level for the promotion of this objective.

## **Chapter2. Regional integration and development: the rationale and legal framework**

This chapter aims to analyze the relationship between regional integration and development, and the justification of regional integration agreements as relevant governance frameworks for the promotion of sustainable development, particularly relating to the implementation of its two most important principles: equity and poverty eradication; and integration of economic development, environmental protection and social justice.

This analysis will start by examining the international governance framework for sustainable development, specifically the two most important international regimes for the promotion of this objective: the development cooperation system, as an expression of the principles of equity and solidarity; and the international trade system which, being the most important regime aimed at the promotion of development, is also the most important framework in which the integration of sustainable development should occur. The argument will be made that these regimes still face serious drawbacks relating to the implementation of sustainable development, and that regional integration can be an alternative means to fill this gap. Therefore, the rationale of establishing regional blocs is addressed, together with the role they might play as a sphere of governance, considering their role in establishing a legal framework that refers to, but goes beyond, the multilaterally agreed legal arrangements.

### **1. Introduction: a global development regime?**

As discussed in the introductory part of Chapter 1, IL has evolved from a set of rules aiming to safeguard a peaceful existence for the nations of the world, to a more complex set of regimes that not only aim to promote those objectives, but also to regulate the promotion of the common objectives of the international community. In this context, one of the main challenges of IL is to promote more fairness within the international community, a goal that should intersect all others. At the same time, development has become an important goal to be jointly promoted by the international community and the promotion of this objective has been encompassed by IL in different ways. Further, a normative statement of what the development process should be(come) has been inscribed by IL in the principle of sustainable development, which has emerged as one of the most important and widely diffused ideas of our time and, while not attaining the status of a binding norm of IL, has been recognized as legally

significant and as a principle aimed, at its core, precisely towards IL's main challenge: the promotion of fairness, both intra and intergenerational.

Despite the fact that IL has encompassed the promotion of development as an objective of the international community, and that sustainable development has emerged as a normative principle providing objectives and tools to achieve this end, no international regime has been set up specifically to pursue this goal. There are other regimes that focus on the promotion of issues related to what development is understood to mean, such as international economic relations including trade and finance, an international human rights regime and an international environmental regime, each with their own rationale and specific sub-regimes; in addition, a sort of regime could be observed for the promotion of development cooperation. Further, while considered a principle having normative influence in international law, sustainable development as it now stands represents no binding or specific obligations.

Considering this lack of an institutionalized (sustainable) development regime, the rule-setting, implementation and enforcement of development objectives and norms are decentralized, between the multilateral institutions and governance frameworks that produce those norms, and the national state, as the actor ultimately responsible for implementation using its own system of governance. This poses several problems: on the one hand, the number of international organizations and other actors which are involved with development initiatives or have an impact on development is considerable. These organizations perform the task of setting international standards and normative visions of what development should be, but this system lacks coherence, enforcement and predictability. At the same time, leaving the implementation to states creates a paradox: developing countries, which are the main beneficiaries of development policies but are also responsible for their implementation locally, often have limited resources and lack the capacity to undertake the development measures envisioned; this decentralized implementation leaves room for incoherence and inobservance of these commitments. Moreover, many of IDL's desired effects as an international development regime gravitate towards the ideas of improving 'development status' or granting special treatment to developing countries, but the definition of this category of countries is not very clear.

In this regard, three main types of international regime related to the promotion of development will be highlighted in this chapter, identifying the role of the main international

actors involved in the development agenda, the type of influence and regulation they provide and the type of development model that is emphasized in these regimes: (i) the incipient regime of international development cooperation, led by the UN, the World Bank and the OECD. This regime is based on the international framework established to enable developed countries to provide assistance to developing countries – especially the least developed (although ‘South-South cooperation’ has recently increased, changing this scenario); (ii) the international economic regime, particularly the international trade regime, which provides an institutionalized framework for the promotion of economic growth -and its growing relationship with broader definitions of development; and finally, (iii) the role of regional integration agreements, both as sub-sections of the trade regime, and in their role of gradually encompassing issues related to the promotion of broader (sustainable) development goals

## **2. The International Development Cooperation System**

The provision of what is understood as development cooperation, be it in the form of technical or financial aid, is a widely diffused custom within the international community. The USA was among the first nations to offer development aid in the period after WWII, but nowadays there are several donors that operate either in a bilateral or multilateral framework. More recently, however, a type of regime organizing the provision of aid internationally has been set up. This system is based on some norms which define who is to give assistance and who is entitled to benefit, as well as the quantity and quality of the aid. Further, the rationale of this regime seems to be concerned with the improvement of the development status of developing countries, especially those least developed among them. Despite these elements, these norms are mostly soft-law commitments and great flexibility can be observed. There follows an analysis of the main actors involved and the progress achieved so far in this regime.

### **2.1 The United Nations**

The UN is the foremost international organization of our time and the main multilateral engine for creating international rules. According to Art. 1 of the UN Charter, the purposes of the organization are: 1. to maintain international peace and security; 2. to develop friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal

peace; 3. to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all, without distinction as to race, sex, language, or religion; and 4. to be a center for harmonizing the actions of nations in the attainment of these common ends. In addition, Art. 55 states the objectives of international economic and social cooperation that should be promoted by the UN: a) higher standards of living, full employment, and conditions of economic and social progress and development; b) solutions to international economic, social, health, and related problems, and international cultural and educational cooperation; and c) universal respect for, and observance of, human rights and fundamental freedoms for all, without distinction as to race, sex, language, or religion.

As can be inferred, the UN is first and foremost a peace and security organization, which nevertheless has created a system that promotes development. Based on the decentralized approach put forward by Art. 56, separate organizations were set up to deal with the different issues listed, such as health, education and culture, agriculture, finance, etc. But institutional decentralization did not facilitate the adoption of a common approach to the development issue. On the contrary, the lack of coordination on development within the whole UN system became a major concern and, partially in response, the United Nations Development Program (UNDP) was created to coordinate efforts at the level of recipient countries.<sup>1</sup> Based on this framework, the UN plays two important roles: norm and standard setting in the different regimes of international law, having been a central organizer of the ‘human development’ concept expressed in the right to development, as well as in the formulation of the concepts and rules of sustainable development; and in the creation of the human rights and environmental law regimes. In this field, the UN plays a role in standard setting through concepts, guidelines, recommendations, agreements etc.; furthermore, in monitoring the implementation of these standards, which is in most cases delegated to member states; and in the conceptualization of developing countries.

### i) The UN and rule making

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<sup>1</sup> K de Feyter, ‘World Development Law – Sharing Responsibility for Development’, Intersentia, 2001 p. 80-102.

Formal consideration of IL rules within the UN falls primarily to the General Assembly (UNGA) which, while not possessing explicit authority to create or enforce legal norms without the consent of member states, contributes to prescriptive IL by the adoption of resolutions concerning issues under the UN Charter. Within the UNGA, two main bodies are used to promote development and codification, the 6<sup>th</sup> Committee and the International Law Association (ILA). The 6<sup>th</sup> Committee is entrusted with legal issues of concern to the UNGA, and can make reports on these topics, draft international conventions, etc. The ILA is composed of a wide group of international jurists and is entrusted with the codification of IL, functioning as a study and composition group to discuss, design and draft IL that is then submitted for debate in the UNGA and presented to the international community for consideration, often as multilateral agreements.<sup>2</sup>

UNGA Resolutions, while non-binding, have greatly influenced IL in different ways: they have frequently served as bases for subsequent treaties signed under UN auspices, largely due to their bold and assertive quality; they have contributed to clearly defining certain general principles of IL for state practice; they have been used by developing countries as vehicles to introduce new concepts to the international community, with the aim of eventually attaining the status of general principles of IL; they can function as instruments to distill and crystallize the international community's consensus regarding a customary norm into a tangible form. State practice then becomes the main factor determining whether the content gives rise to new norms or remains merely a recommendation for action.<sup>3</sup> In addition to providing rules of IL through the UNGA, other branches of the UN play a role in developing norms, such as UNEP and ILO, while others still are involved in monitoring, reporting, and proposing new means of action, such as the UNCSD.

### ii) Defining a 'developing country'

The UN plays a relevant role in defining the concept of 'developing countries'. Even though there is no general consensus about this concept and no binding definition, the UN definition is most widely used. Being that the UN has been the most prominent actor promoting development as an objective of the international community, it seems natural that it is also charged with evaluating how its members relate to the concept of development that has been

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<sup>2</sup> See [www.hq-ila.org](http://www.hq-ila.org).

<sup>3</sup> C. Joyner, *International law in the 21st century: rules for global governance*, Kluwer Law, 2005, p.86-95.

established. Various UN bodies are involved in the development process,<sup>4</sup> but the Committee for Development Policy is in charge of issuing the standards of development. This is a subsidiary body of the Economic and Social Council (ECOSOC) which draws up a list of 'least developed countries' (LDCs) to be reviewed every three years. The criteria used for this definition is comprehensive, using a combination of indicators and attempting to assess the various aspects of development, while also opening up the possibility for countries to upgrade from the categories, according to their performance in the period observed.

The initial criteria for designating a country as 'least developed' was established in 1971, and required a low per capita gross domestic product (GDP) and structural impediments to growth. The presence of these impediments was indicated by manufacturing having a small share of total GDP (at the time under the assumption that a high level of industrialization was a structural characteristic of developed or 'advanced' countries), as well as by a low literacy rate (indicating the extent of development of the country's human capital). A number of improvements to these criteria have been made since then. In its latest triennial review of the list of Least Developed Countries in 2006, the CPD used three criteria for identification: a low-income criterion, based on a three-year average estimate of the gross national income (GNI) per capita (under US\$745 for inclusion, above \$900 for graduation); a human capital status criterion, involving a composite Human Assets Index (HAI) based on indicators of: (a) nutrition: percentage of population undernourished; (b) health: mortality rate for children aged five years or under; (c) education: the gross secondary school enrolment ratio; and (d) adult literacy rate; as well as an economic vulnerability criterion, involving a composite Economic Vulnerability Index (EVI) based on indicators of: (a) population size; (b) remoteness; (c) merchandise export concentration; (d) share of agriculture, forestry and fisheries in gross domestic product; (e) homelessness owing to natural disasters; (f) instability of agricultural production; and (g) instability of exports of goods and services. To be added to the list, a country must satisfy all three criteria. In addition, since the fundamental meaning of the LDC category, i.e. the recognition of structural handicaps, excludes large economies, the population must not exceed 75 million. To become eligible for graduation, a country must reach threshold levels for graduation for at least two of the aforementioned three criteria, or

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<sup>4</sup> In 1997, the UN established the 'UN Development Group', which unites the 32 UN funds, programs, agencies, departments, and offices that play a role in development, and whose "objective is to deliver more coherent, effective and efficient support to countries seeking to attain internationally agreed development goals, including the Millennium Development Goals". See <http://www.undg.org/>.

its GNI per capita must exceed at least twice the threshold level, and the likelihood that the level of GNI per capita is sustainable must be deemed high.<sup>5</sup>

Moreover, since 1990 the UNDP has been publishing an annual report which has established a system of classification for developed and developing countries and focuses on ‘human development’ -the Human Development Report (HDR)- with an assessment of four composite indices for human development— the Human Development Index, the Gender-related Development Index, the Gender Empowerment Measure, and the Human Poverty Index, and provides data for analysis and policy recommendations. This initiative attempts to measure all aspects of development that the UN has stated in its documents, such as the MDGs.<sup>6</sup>

### iii) Building consensus

Despite being present in the customs of countries and international organizations, development cooperation has been included in international law in instruments that were elaborated under the UN in order to coordinate and qualify the process. Among these, the first achievement was reached in 1970 when the UN General Assembly adopted a Resolution<sup>7</sup> including the goal that “[e]ach economically advanced country will progressively increase its official development assistance to the developing countries and will exert its best efforts to reach a minimum net amount of 0.7% of its gross national product at market prices by the middle of the Decade.” This Resolution overcame an impasse that had lasted a decade within UNCTAD, the OECD and the World Bank to establish an internationally agreed threshold for development assistance, and the definition was tightened in 1972 by the addition of a minimum level of grant element that loans would have to meet to qualify as ODA.<sup>8</sup>

Later on, the 1990 UNGA Declaration on International Economic Cooperation<sup>9</sup> proclaimed a “strong commitment to a global consensus to promote urgently international economic co-

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<sup>5</sup> Information retrieved from the website of the CDP: <http://www.un.org/esa/policy/devplan>. Particularly in relation to the ‘least developed countries’ (LDCs), special support measures have been taken both from the aid donor community, including bilateral donors and multilateral organizations, as well as from the special treatment accorded to them by certain multilateral and regional trade agreements. See, in this regard, CDP’s Handbook on the Least Developed Country Category, available at: <http://www.un.org/esa/policy/devplan/cdppublications/publications.htm>

<sup>6</sup> Information retrieved from the website of the UNDP: <http://hdr.undp.org/en>.

<sup>7</sup> UNGA Resolution 2626 (XXV), 24 October 1970, paragraph 43.

<sup>8</sup> OECD, History of the 0.7% ODA Target, <http://www.oecd.org/dataoecd/16/38/45539274.pdf>.

<sup>9</sup> UNGA Declaration A/RES/S-18/3, May 1<sup>st</sup> 1990.

*operation for sustained growth of the world economy and, in particular, to the revitalization of economic growth and development of the developing countries so as to realize the basic right of all human beings to a life free from hunger, poverty, ignorance, disease and fear”, affirming that “the international community has a responsibility to give strong support to the efforts of the developing countries to solve their grave economic and social problems through the creation of a favourable international economic environment”.* The Declaration was important to the extent that it stated standard principles, such as a more open international trading system; stable commodity prices; reduction of debt and increased development aid; and added new emphasis on developmental thinking, mentioning human rights, good governance issues, and the creation of a sound national and international environmental policy, but it didn’t lead to any binding commitments.

The Millennium Declaration reaffirmed the support for an international framework for development cooperation in Goal 8 and its proclaimed global partnership for development, reaffirming the goals of having 0.7% of the total number of OECD countries receiving ODA and 0.15% classified as LDCs, but also establishing a determination of: a proportion of ODA to basic social services (basic education, primary health care, nutrition, safe water and sanitation); a proportion of ODA that is unallocated; a proportion of ODA for the environment in small, developing island states; and a proportion of ODA for the transport sector in landlocked countries. Subsequent international documents were based on this framework, chiefly the 2002 Monterrey Conference on financing for development and the 2005 Paris Declaration on Aid Effectiveness, which enshrined five principles to maximize efforts: ownership, alignment, harmonization, results and mutual accountability. This framework has since been guiding the international system of development cooperation.

## **2.2 The international economic institutions**

The ‘Bretton Woods’ institutions and the OECD play key roles in standard setting, implementation and aid delivery for development. A brief examination of the role played by each of them is conducted below.

### **i) The ‘Bretton Woods Institutions’**

The two major financial institutions, called the Bretton Woods institutions after the US city where the agreement establishing them was signed in 1944, are the IMF and the World Bank group. Although they became specialized agencies of the UN after an agreement signed in 1947, their functioning differs from other UN agencies, both in the independence of their activities from the central UN bodies and in their membership regulation, which is based on quotas or respective contribution rather than on equal membership.

a) The World Bank Group is the biggest lending institution worldwide, but in its own words, is “*not a bank in the ordinary sense but a unique partnership to reduce poverty and support development*”. It is composed of four main bodies: the International Bank for Reconstruction and Development (IBRD), which counts 185 member countries -nearly all of the countries in the world; The International Development Association (IDA)<sup>10</sup> which has 168 members; the International Finance Corporation, which has 181 members; the Multilateral Investment Guarantee Agency, with 173 members; and the International Centre for the Settlement of Investment Disputes, which has 143 members.

The WB uses classification as a means of deciding its loan policy,<sup>11</sup> and this is done according to four income groups, established on a yearly basis: low income countries with GNI per capita of US\$975 or less; lower middle income countries with GNI per capita of between US\$976 and US\$3,855; upper middle income countries with GNI per capita of between US\$3,856 and US\$11,905; and high income countries with GNI per capita above US\$11,906. The Bank decides its lending policy according to this classification. The IBRD aims to reduce poverty in middle-income and creditworthy poorer countries, while the IDA focuses exclusively on low income countries, and while IDA loans are concessional, interest-free loans and grants for programs aiming to boost economic growth and improve living conditions, IBRD loans are non-concessional. In providing financial assistance, the Bank

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<sup>10</sup> IDA is the body of the WB that works with the needs of poor countries. It complements the World Bank's other lending arm — the International Bank for Reconstruction and Development (IBRD) - which serves middle-income countries with capital investment and advisory services. The IDA is responsible for providing long-term, interest-free loans to the world's poorest countries, and its loans address primary education, basic health services, clean water supply and sanitation, environmental safeguards, business-climate improvements, infrastructure and institutional reforms. These projects are intended to pave the way towards economic growth, job creation, higher incomes and better living conditions.

<sup>11</sup> IDA Articles of Agreement, art. V, section 1. Use of Resources and Conditions of Financing: (a) The Association shall provide financing to further development in the less-developed areas of the world included within the Association's membership, available at [www.worldbank.org/ida/](http://www.worldbank.org/ida/).

”focuses on achievement of the Millennium Development Goals that call for the elimination of poverty and sustained development”.

b) The International Monetary Fund’s mandate differs from that of the WB in the sense that its efforts are not concentrated in the ‘developing world’. Nevertheless, it is the main international agency overlooking financial and monetary issues and, in this regard, is also involved with international efforts to achieve the MDGs, contributing “to this effort (MDGs) through its advice, technical assistance, and lending to countries, as well as its role in mobilizing donor support. Together with the World Bank, it assesses progress toward the MDGs through an annual Global Monitoring Report”<sup>12</sup>.

## ii) The OECD

The main operation of the Organization for Economic Co-operation and Development (OECD) in relation to development issues is the work of the ‘Development Assistance Committee’ (DAC) which, since 1969, has been the OECD’s forum for major development aid donors that “*work together to increase the effectiveness of their common efforts to support sustainable development*”.<sup>13</sup> According to the DAC website, the DAC List of ODA Recipients shows all countries and territories eligible to receive aid from its members. These consist of all low and middle-income countries, except G8 members, EU members and countries with a set date for entry into the European Union. Membership of the OECD does not affect eligibility to receive ODA, as several OECD members have been on the DAC list for many years and continue to receive ODA, but no DAC members are on the list. The DAC revises the list every three years and countries that have exceeded the high-income threshold for three consecutive years at the time of the review are removed. The list presents countries and territories in groups: LDCs, as defined by the United Nations; and all other ODA recipients, according to their Gross National Income (GNI) per capita as reported by the World Bank. The DAC ODA list is designed for statistical purposes, helping to measure and classify aid and other resource flows originating in DAC countries. According to the OECD, this list is not designed as a guide to eligibility for aid or other preferential treatment, but most

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<sup>12</sup> See, in this regard, D. Driscoll ‘The IMF and the World Bank: how do they differ?’ available at: [www.imf.org/external/pubs/ft/exrp/differ/differ.htm](http://www.imf.org/external/pubs/ft/exrp/differ/differ.htm).

<sup>13</sup> OECD website, [www.oecd.org](http://www.oecd.org); for the DAC list, [www.oecd.org/dac/stats/daclist](http://www.oecd.org/dac/stats/daclist).

of its Member States nevertheless use the list as the basis for their development cooperation policies.<sup>14</sup>

In the early 1990s the DAC began to consider the coherence of development policies, and since then progress has been made in analyzing policy coherence for development, with several reports having identified the constraints on coherence, yet a framework within which to evaluate progress and fine-tune the methodology for assessing policy convergence remains to be completed. The OECD regularly evaluates the aid from DAC members through a peer review process (using experts from other countries), based on country reports made every four years. Since the early 1990s these reviews have taken policy coherence into account and, using examples of ‘good practices’, have presented recommendations to members for optimizing coherence. Progress has been examined with regard to three stages in improving policy coherence for development: (i) set objectives, make political commitments to improve the coherence of foreign policy towards developing countries and define strategic orientations. Most DAC countries have already moved beyond this stage. The EU, the Netherlands and Sweden have placed policy coherence at the center of a global approach to development; (ii) develop the mechanisms for coordinating policies and establishing a dialogue between ministries with a view to increasing synergy and reducing incoherence. The progress made by DAC countries in this field varies. Quite a diverse range of mechanisms have been set up, ranging from simple, informal coordination to systematic analysis of the implications of bills of law on development; (iii) control, analyze and inform the public and elected officials.<sup>15</sup>

Despite the fact that development cooperation has made some progress in reducing poverty, improving literacy rates and battling certain diseases, several difficulties still mark the system. The MDGs are still out of reach, the amount of ODA still falls short of the objectives set by the UN and furthermore, much of what is counted as ODA does not go towards poverty reduction. Increasing the effectiveness of aid requires a genuine political commitment from the parties involved in development so as to transform the rationale behind North-South

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<sup>14</sup> For example, the EU; see EU Consensus 2005 in Chapter 4.

<sup>15</sup> G. Perroulaz et al., ‘Trends and issues in international development cooperation’, *Revue internationale de politique de développement* 1/2010, [http://poldev.revues.org/142\\_](http://poldev.revues.org/142_)

relations, and increasing the coherence of donor countries' policies is still a condition for reaching development goals.<sup>16</sup>

### 2.3 South- South Cooperation

One distinctive characteristic of the development cooperation system is that, since the 1990s, a group of emerging developing countries, which for a long time had been targets of development cooperation, have also started to become donors. According to the UN, *“developing countries have the primary responsibility for promoting and implementing South-South cooperation, not as a substitute for but rather as a complement to North-South cooperation, and in this context reiterating the need for the international community to support the efforts of the developing countries to expand South-South cooperation”*. In 1974, the UNGA<sup>17</sup> endorsed the establishment of a special unit within UNDP to promote technical cooperation among developing countries. With the endorsement of the Buenos Aires Plan of Action (BAPA) for Promoting and Implementing Technical Cooperation among Developing Countries by the General Assembly in 1978, the Special Unit was strengthened in order to fulfill its primary mandate: to promote, coordinate and support South-South and triangular cooperation globally and within the United Nations system.<sup>18</sup>

Later, by Resolution 58/220 of 23 December 2003, the General Assembly decided to declare 19 December as United Nations Day for South-South Cooperation, and endorsed the BAPA. The Assembly also urged all relevant United Nations organizations and multilateral institutions to intensify their efforts to effectively mainstream the use of South-South cooperation in the design, formulation and implementation of their regular programs and to consider increasing their allocations of human, technical and financial resources supporting South-South cooperation initiatives.

One example of multilateral effort in this regard is the fund called the Facility for Poverty and Hunger Alleviation, established by India, Brazil and South Africa (the so called IBSA countries) as a group of major developing countries, which *“facilitates the execution of human development projects to advance the fight against poverty and hunger in developing*

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<sup>16</sup> Ibid.

<sup>17</sup> Resolution 3251 (XXIX), 1974.

<sup>18</sup> UN Special Unit for South-South Cooperation: <http://ssc.undp.org/content/ssc/about/Background.html>.

*countries” and has as its main objectives to “alleviate poverty and hunger in nations of the South; to develop best practices in the fight against poverty and hunger by facilitating the execution of replicable and scalable projects in interested countries of the global south; to pioneer and lead by example the South-South cooperation agenda; to build new partnerships for development.” It operates “through a demand driven approach. Governments requesting support by this fund initiate discussions with focal points appointed among IBSA countries’ officers around the world. These focal points submit proposals to the IBSA board of directors for review. If a proposal receives favorable review, UNDP’s Special Unit for South-South Cooperation, which acts as the fund manager and board of directors’ secretariat, initiates contact with a potential executing agency to advance a project formulation, and to facilitate the project’s implementation. IBSA projects are executed through partnerships with UNDP, national institutions or local governments. Important concerns of IBSA partners in the design of their projects include capacity building among projects’ beneficiaries, build-in project sustainability and knowledge sharing among Southern experts and institutions.”<sup>19</sup>*

## **2.4 Remarks**

It is apparent that a regime has been set up in order to regulate the provision of international development cooperation. This regime works through a set of norms, some more concrete than others:

i) a definition of goals: broadly speaking, development cooperation is to aid countries which are less developed in order to overcome their handicaps. While the international community has made a commitment at the UN to pursue the MDGs through an enhanced ODA system, the countries that are to benefit from this system are defined on soft terms: the UN defines what constitutes a LDC; the WB has additional development classification; these parameters are used as guidelines for the majority of donors united at the OECD forum, which is nevertheless a non-binding standard, as development cooperation is one of the issues that most countries consider as an important matter of sovereignty and is strongly influenced by political factors, despite the rhetorical commitments made at the international level.

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<sup>19</sup> <http://tcdc2.undp.org/IBSA/Default.aspx>.

ii) In addition, there is also a prevalent economic component in the consideration of what developmental needs are to be addressed by ODA, as GNI per capita is one of the most important factors determining ODA recipients. Although there are several ways in which donors aim to condition ODA, such as through environmental and social standards set by the WB and the OECD on financial and technical aid, this is still only one side of the problem, as it addresses the remedies provided, but does not set more refined criteria for selecting the recipients and thus considering other handicaps apart from economic disadvantage.

iii) Finally, there is a commitment on how much is to be delivered: a commitment that 0.7% of developed countries' GDP should be donated as ODA, but this is a soft law norm that has not been fulfilled to date – ODA levels are currently at an average of 0.4%, as reported by the OECD.

Based on this soft framework, development cooperation is still falling behind in delivery of its promises, and despite the fact that, for the first time, an international consensus has been reached that human development should be the primary objective of aid, defined through the MDGs and reinforced at the International Conference on Financing for Development in Monterrey, Mexico, where an agreement was reached to make aid one of the building blocks of a new 'global partnership' for poverty reduction, the designation of development aid remains a markedly political issue within the constituencies of each donor country. Furthermore, in spite of the commitment of most developed countries to the '0.7% of GNI' rule, the contributions still do not meet the cost of the world's development challenges. The US\$129 billion committed in 2010 was 76% of the estimated cost of achieving the MDGs. Developed countries have consistently failed to meet their stated pledges, including those of the G-8 at Gleneagles in 2005 (to increase aid by US\$50 billion a year by 2010), the European Union (to increase aid from 0.43 percent of gross national income to 0.56 percent) and the United Nations (the long-standing target of 0.7 percent of gross national income). In this regard, the 'Human Development Report' of 2005 highlighted that while international aid could be one of the most effective weapons in the war against poverty, representing an investment as well as a moral imperative, pointing to the need for it to be renovated and reshaped, particularly regarding three conditions for effective aid: sufficient quantity; better

quality (delivered on a predictable, value for money basis with low transaction costs); and country ownership.<sup>20</sup>

### **3. The integration of sustainable development within the international trade regime**

International trade can have a significantly positive effect on economic growth and development. The notion that trade – free trade, unencumbered by government restrictions – is welfare-enhancing is one of the most fundamental doctrines in modern economics, dating back at least to Adam Smith and David Ricardo. But the subject has always been marked by controversy because the issue facing most countries is not a binary choice of autarky (no trade) or free trade, but rather a choice from a spectrum of trade regimes with varying degrees of liberalization.<sup>21</sup>

The international trade regime and its framework organization, the WTO, are not respectively a development regime or a development organization, but their main objective, the progressive liberalization of international trade, is one of the major factors of economic growth and has had an important impact on the development process. The signature of the GATT in 1947 was a landmark in international economic relations – alongside with the Bretton Woods institutions created some years earlier, it marked the transition from a politics-based to a rule-based international trade system. The rationale of the GATT though was not to liberalize trade completely, but rather to achieve a compromise between the parties in order to achieve ‘freer trade’.

As commentators have stated, the ‘terms of trade theory’ is most the accepted founding rationale for trade agreements not in the domestic sphere but in international externalities: trade is of interest to all nations, and unilateral tariff-setting leads to a prisoner’s dilemma-type situation: in a trade negotiation, parties will aim to reduce tariffs to the politically optimum level, and reciprocity is the driving force; reciprocal tariff reductions take place to internalize the externalities related to tariff imposition and to guarantee market access. The GATT followed this rationale: it was an international negotiation to exchange reciprocal tariff concessions. At the time, there was an International Trade Organization project which never

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<sup>20</sup> UNDP, Human Development Report 2005, International Cooperation at a crossroads: aid, trade and security in an unequal world, 2005, available at [www.hdr.undp.org](http://www.hdr.undp.org).

<sup>21</sup> J. Stiglitz, Fair Trade for All, Oxford University Press, 2005.

came into being, and in the absence of the ratification of the ITO, only the GATT entered into force, functioning as a *de facto* trade organization until the WTO was established in 1995. The GATT set out the regime for goods trading around some basic rules: (i) discipline in both trade and domestic instruments, given that both affect trade; (ii) the discipline of trade instruments regard the negotiation of tariff binding, which is reciprocal, and the prohibition of quantitative restrictions (import and export) and export subsidies; regarding tariffs, all members are required to apply them in a non-discriminatory way, which is known as the most-favored nation principle (MFN); (iii) members are required not to discriminate between domestic and foreign products which are alike through domestic instruments, which is known as the national treatment principle (NT); (iv) there are some exceptions to those rules, such as in the cases of dumping, and also in the cases listed in art. XX, discussed further below. Thus, the GATT was about reducing the one form of protection of domestic production that it allows, the tariffs applied by member states. It is thus a negative integration contract, as members are free to unilaterally define their policies that might affect trade – or in fact development, apart from what has been negotiated, such as environmental, social or competition policies.<sup>22</sup>

After the signature of the GATT, seven rounds of negotiations occurred before the eighth GATT round — known as the Uruguay Round — was launched in September 1986 in Punta del Este, Uruguay. The Final Act concluding the Uruguay Round and officially establishing the WTO regime was signed on April 15, 1994 during the ministerial meeting at Marrakesh, Morocco, and hence is known as the Marrakesh Agreement. The GATT remained as the WTO's umbrella treaty for trade in goods, but its *acquis* was also incorporated as a result of the Uruguay Round negotiations; however, it is not the only legally binding agreement included via the Final Act at Marrakesh; about 60 agreements, annexes, decisions and understandings were adopted. The agreements fall into a structure with six main parts: The Agreement Establishing the WTO; Goods and investment — the Multilateral Agreements on Trade in Goods including the GATT 1994 and the Trade Related Investment Measures; the General Agreement on Trade in Services (GATS); the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS); Dispute settlement (DSU) and Reviews of governments' trade policies (TPRM). Thus the advent of the WTO expanded the areas regulated by the trade system.

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<sup>22</sup> P Mavroidis et al., *The Law of the World Trade Organization (WTO): Documents, Cases and Analysis*, Thomson/West, 2010, p. 44-60.

In addition, the WTO to a greater extent acknowledged its own impact on development issues, and when it was established as the main result of the Uruguay Round, the preamble of its Constitutive Agreement stated that, besides the openness of the global market, the WTO should aim to guarantee sustainable development and promote “*positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth of international trade commensurate with the needs of their economic development*”.<sup>23</sup> While the goal of sustainable development has been expressly incorporated, WTO law is not concerned with a comprehensive ordering of the ‘development process’, but rather more restrictively with the regulation of a particular economic activity – international trade – which indeed has far-reaching implications as an important component of the ‘development process’, but is nevertheless only a single component thereof, among several.<sup>24</sup> This is significant in the consideration of the WTO as a development regime, and partially explains the difficulties of integrating new development issues, such as environmental concerns. Nevertheless, there are several aspects of WTO law that are in some way related to development.

### 3.1 The ‘legalization’ of development at the WTO

The ‘legalization’ of development at the WTO, that is, the creation of legal rules concerning development as an issue to be addressed through WTO law, apart from providing a rule-based regime for international trade as one of the motors of the world economy and thus being a catalyst for development, can be interpreted in two ways. The first relates to the introduction of legal norms concerning special and differential treatment (SDT) of developing countries in the WTO system. The second concerns the attempts to bring non-traditional development themes such as trade and environment into the WTO’s sphere, that is, making issues such as environmental protection a concern of the organization and thus giving them legal value in trade disputes, for instance.

There are two legal rules establishing exceptions to the general framework of the GATT regime for non-discrimination (MFN): the measures determining SDT to developing

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<sup>23</sup> Preamble of the Marrakesh Agreement establishing the WTO in 1994.

<sup>24</sup> T Broude, Elements of the Principle of Integration in WTO Jurisprudence: Another Look at the Shrimp Cases, Report of the International Law Association Conference in Toronto, 2006.

countries, and art. XXIV, which allows for preferential treatment when countries form a Free Trade Area (as will be explored further below). Regarding SDT provisions, there are around 145 rules in the WTO legal system that establish differentiated treatment for developing countries and are deemed as a development regime within this system, and are grouped together in five categories.<sup>25</sup>

(i) Better access to developed countries' markets, such as the 'enabling clause'. The idea of granting developing countries preferential tariff rates in the markets of industrialized countries was originally presented at the first UNCTAD conference in 1964, and was adopted at UNCTAD II in 1968, with the statement that "*the objectives of the generalized, non-reciprocal, non-discriminatory system of preferences in favor of developing countries, including special measures in favor of the least advanced among the developing countries, should be to increase their export earnings; to promote their industrialization; and to accelerate their rates of economic growth*". This clause led to the establishment of the Generalized System of Preferences (GSP), schemes in preference-giving countries whereby selected products originating in developing countries are granted reduced or zero tariff rates over the MFN rates. In 1971, the GATT parties approved a waiver for Article I of the General Agreement for 10 years in order to authorize the GSP scheme (part IV of GATT on Trade and Development, which includes provisions on the concept of non-reciprocity in trade negotiations between developed and developing countries). Later, the decision was made to adopt the 1979 Enabling Clause, Decision of the Contracting Parties of 28 November 1979 (26S/203), entitled 'Differential and more favorable treatment, reciprocity and fuller participation of developing countries', creating a permanent waiver to the MFN clause to allow preference-giving countries to grant preferential tariff treatment under their respective GSP schemes.<sup>26</sup> These schemes are nevertheless non-contractual and non-reciprocal, and it is the preference-giving country that decides which developing countries will benefit from the preferences.

In addition to the GSP scheme, in 1988 a 'Global System of Trade Preferences among Developing Countries (GSTP)' was established in the framework of the UNCTAD, entering

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<sup>25</sup> A. Alavi, *Legalization of development in the WTO : between law and politics*. Global trade law series Kluwer Law International, chapter 3, 'developing countries special status in the GATT and WTO'.

<sup>26</sup> UNCTAD website: [www.unctad.org](http://www.unctad.org). There are currently 13 national GSP schemes (notified to the UNCTAD): Australia, Belarus, Bulgaria, Canada, Estonia, the European Union, Japan, New Zealand, Norway, the Russian Federation, Switzerland, Turkey and the USA.

into force on 19 April 1989 and notified to the WTO on 25 September 1989. Under this scheme, participating developing countries can grant each other the same kind of SDT treatment. The GSTP received further support in December 2010 with the conclusion of the Sao Paulo Round of negotiations, with 11 countries making commitments on tariff reductions. This will be discussed further in Chapter 5 in the context of the MERCOSUR trade and development policies.

(ii) Relaxation of criteria for developing countries to comply with WTO rules, such as Article 27.2 of the Agreement on Subsidies.

(iii) Rules instructing other members or WTO organs to safeguard the interests of developing countries, such as the dispute settlement bodies, or article 15 of the Antidumping Agreement;

(iv) Transitional periods to implement WTO rules, such as art. 65.2 of the TRIPS Agreement;

(v) Technical assistance to developing countries, such as art. XXV.2 of the GATS.

In general, these provisions have three main functions or general aims: assisting developing countries in increasing their involvement in world trade; assisting developing countries in using the system itself; and enabling developing countries to implement the agreements by recognizing their special needs. Despite the existence of these rules, the ‘development regime’ as identified by Alavi is deemed as unclear, often lacking coherence and binding force, as well as not giving practical advantage to developing countries.<sup>27</sup>

Moreover, there is no official definition of development at the WTO, and furthermore neither the WTO agreement nor the GATT regimes have come up with a precise legal definition for the term ‘developing country’.<sup>28</sup> The organization recognizes as LDCs those countries which have been designated as such by the UN, but the basic method of designating a developing country is ‘self-designation’. According to the WTO, “*there are no WTO definitions of ‘developed’ and ‘developing’ countries. Members announce for themselves whether they are ‘developed’ or ‘developing’ countries. However, other members can challenge the decision of*

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<sup>27</sup> A. Alavi, op. cit.

<sup>28</sup> F. Cui, ‘Who Are the Developing Countries in the WTO?’, *The Law and Development Review*: Vol. 1: No. 1, Article 7, 2008.

*a member to make use of provisions available to developing countries”.*<sup>29</sup> These factors show that, despite the fact that the WTO deals with development issues, from a legal point of view the ‘legalization’ of development, represented in the SDT provisions, is still weak, and that politics still play a strong role in this sphere.<sup>30</sup>

### **3.2 The integration of non-trade issues in the WTO: environmental and social concerns**

Beyond having a special set of rules addressing developing countries, the WTO also has other rules that deal with broader development issues. The preamble to the GATT in 1947 stated that among its objectives were raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand; and developing the full use of the resources of the world and expanding the production and exchange of goods. These goals are related to increased social welfare and aim for economic prosperity. But in 1994 the Marrakesh Agreement’s preamble seemed to have expanded these goals, stating that the organization sought to “*expand the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with [the Parties’] respective needs and concerns at different levels of economic development*”, and additionally, mentioned the “*need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.*” The Doha Ministerial Declaration, drafted in 2001, is even more definitive on the idea of a broader conception of the goals of the trading system. Paragraph 1 recalls the economic prosperity objectives outlined above, referring to trade’s contribution to economic growth, development and employment. Paragraph 2 recalls the Marrakesh objective related to equity, and the need for ‘positive efforts’ focused on developing countries. Paragraph 3 goes further, noting the particular challenges faced by LDCs, and pledging that the WTO will ‘play its part’ in international efforts to address those challenges. Paragraph 6 recalls the Marrakesh objective related to the environment, and goes even further to identify sustainable development as an objective of the members. It asserts that safeguarding an open, non-discriminatory trading system and pursuing sustainable development can and must be mutually supportive.

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<sup>29</sup> See [http://www.wto.org/english/tratop\\_e/devel\\_e/dlwho\\_e.htm](http://www.wto.org/english/tratop_e/devel_e/dlwho_e.htm).

<sup>30</sup> A Alavi, op. cit.

Despite the written declarations by WTO Members and GATT contracting parties to sustainable development, the actual legal framework did not reflect this commitment and the declared objective of the multilateral system of trade was to contribute to economic prosperity by means of liberalizing trade and ensuring non-discrimination. The revised WTO objectives are broader, aiming at a conception of social welfare that also values equity: if some are missing out on the benefits of economic prosperity, then that is a matter for concern. It also values the environment, as evidenced by the Members' commitment to have the WTO protect and preserve it. However it is not clear where the boundaries lie in the broad social welfare landscape between those areas that the Members consider to be the WTO's mandate, and those areas that they consider important in achieving that mandate, but are also seen as the primary responsibility of others. To help answer this question, it is worth noting the similarities between the objective of sustainable development and the objectives of the WTO. Economic prosperity is a necessary (but not sufficient) prerequisite to sustainable development that meets the needs of the present, and constitutes the *economic leg of the stool*. A commitment to the environment corresponds to the Brundtland Report's provision about sustainability, and constitutes the *environmental leg*, and concern for the particular needs of the poor in developing countries corresponds to the emphasis on the needs of the poor, and most closely resembles the *social leg*. The comparison can be pushed too far, however, particularly in the area of development where the WTO's objectives center on economic development and poverty alleviation. While these are fundamental building blocks of development, they are not its entirety. This is illustrated by reference to the Millennium Development Goals, the first of which relates to poverty alleviation and hunger, but the rest of which include such elements as education, gender equality, health and nutrition, and environmental sustainability. As commented, it would thus be too much to say that the WTO was committed to achieving sustainable development, but rather it would seem that the WTO aims to contribute to the achievement of sustainable development through its activities and within its mandate, to achieve an open, non-discriminatory international regime of trade in goods and services.<sup>31</sup>

The actual legal provision that deals with issues related to sustainable development is GATT Article XX, which lays down the General Exceptions, a number of specific instances in which

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<sup>31</sup> A. Cosbey, 'A sustainable development roadmap for the WTO', International Institute for Sustainable Development, 2009, available at [www.iisd.org](http://www.iisd.org).

WTO members may be exempted from GATT rules. Two exceptions are of particular relevance to development: paragraphs (b) and (g) of Article XX. Pursuant to these two paragraphs, WTO members may adopt policy measures that are inconsistent with GATT disciplines, but necessary to protect human, animal or plant life or health (paragraph (b)), or relating to the conservation of exhaustible natural resources (paragraph (g)). GATT Article XX on General Exceptions consists of two cumulative requirements. For a GATT-inconsistent environmental measure to be justified under Article XX, a member must perform a two-tier analysis proving first that its measure falls under at least one of the exceptions (e.g. paragraphs (b) to (g), two of the ten exceptions under Article XX), and then that the measure satisfies the requirements of the introductory paragraph (the ‘chapeau’ of Article XX), i.e., that it is not applied in a manner which would constitute “a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail”, and is not “a disguised restriction on international trade”.

These rules are nevertheless very broad, and their meaning has been clarified over the years in the case law of the WTO. The first relevant case in this regard was opened before the WTO, under the GATT regime, the US-Tuna and Canada – Unprocessed Herring and Salmon, in which export restrictions justified under environmental conservation were deemed incompatible with art. XX(g) in the absence of similar provisions in the national sphere. Following, the two ‘tuna/dolphin’ cases were the first to test the legitimacy of using environmental issues in production methods as justification for trade restrictions. Here the panel held that the measures at stake (a USA prohibition on the import of tuna from Mexico caught without using devices to prevent the by-catch of dolphins) failed to comply with art. XX(b) and (g), since they did not pass the necessity test and aimed primarily to impose standards on another country, whereas the rationale of the legal rules was to allow trade measures primarily aimed at restrictions within the imposing country; in the second case, while similar, the panel held that art. XX(g) is not restricted to measures located within the territory of the imposing state, but must not be coercive.<sup>32</sup>

With the establishment of the WTO and its Dispute Settlement System, the case-law evolved and began to show a less restrictive application of GATT rules and more environmental sensitivity. In the US-Gasoline case, the Appellate Body (AB) changed the interpretation used

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<sup>32</sup> [http://www.wto.org/english/tratop\\_e/envir\\_e/edis04\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/edis04_e.htm).

by GATT panels with the ‘primary aim’ rationale to a ‘substantial relationship’ between the measure and its alleged goal; it found that the challenged measure was thus related to the conservation of a natural resource – clean air – but at the end denied the justification under art. XX(g) because of discrimination between national and foreign products regarding the choice of baseline.<sup>33</sup> The landmark case though was the US-shrimp/turtle case, which overturned the jurisprudence of the tuna/dolphin case, lending legitimacy to actions against other nations because of refusal to conform to production processes unilaterally specified by another WTO member, which are not considered WTO inconsistent per se; in its interpretation of art. XX(g), the AB found that the term ‘exhaustible natural resources’ must be interpreted in light of new environmental law principles such as sustainable development, as recognized in the preamble to the Marrakesh Agreement; it also prescribed a series of measures to fulfill the chapeau of art. XX: it should not depend so much on the primary aim of the measure, but rather on whether the measure is reasonably related to the ends; however it found the measure at stake to be unjustifiable, given that it had a coercive effect on another member’s policy without taking into account the conditions prevailing there; and also failed to negotiate a cooperative solution before adopting the measure.<sup>34</sup> Significantly, the objective of sustainable development was referred to by the AB in two separate legal instances: first, for the purpose of interpreting the Article XX(g) exception as substantively concerned with environmental protection (para. 129); and second, for the purpose of accepting environmental protection as the basis for a trade restriction that is not "unjustifiable or arbitrary discrimination" under the *chapeau* of Article XX GATT (paras. 152 *et seq.*). In other words, environmental protection for the purpose of sustainable development was adopted as the baseline for examining whether the US legislation was an abuse of the environmental exception, in the sense that it overstepped the ‘line of equilibrium’ between the right of one Member to invoke the exception and the substantive trade rights of other Members (para. 159). This balance of rights and exceptions informed by the objective of sustainable development is concordant with the Principle of Integration: environmental protection is integrated with other development factors, and is not considered in isolation from them.<sup>35</sup>

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<sup>33</sup> Panel Report, United States—Standards for Reformulated and Conventional Gasoline, WT/DS2/R (Jan. 29, 1996); Appellate Body Report, United States — Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R (Apr. 29, 1996).

<sup>34</sup> Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R (May 15, 1998) [hereafter *Shrimps I* Panel Report]; Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998).

<sup>35</sup> T Broude, *op cit.*

Other relevant cases are the ‘Asbestos case’, important in defining the requirement for a measure under art. XXb and the like product definition;<sup>36</sup> and the ‘Brazil/retreated tyres case’, which is relevant due to the interpretation of a measure in light of art. XXb, the assessment of whether discrimination is arbitrary or unjustifiable should be made in light of the objective of the measure, the effects of discrimination being irrelevant.<sup>37</sup> Based on these cases, some points can be made: in the change of take between tuna/dolphin and shrimp/turtle, there seems to be an indication that there is no jurisdictional limitation to measures under art. XX – even though in the latter case the AB did not rule on the art. XX *chapeau*, but on part (g). Regarding the *chapeau* of art. XX, the measure at stake must not be arbitrarily discriminatory in countries where the same conditions prevail – measures must allow comparable effectiveness; there must not be unjustifiable discrimination; no disguised restriction is allowed on international trade.

These decisions show that sustainable development issues have made their way into the WTO legal system, being recognized and relevant as legitimate objectives to be pursued by member states, including in relation to trade policy.<sup>38</sup> Nevertheless, these cases show that the WTO’s rationale is clearly to safeguard the trade regime, which is its ultimate objective; these other goals are justifiable, insofar as they do not represent unnecessary discrimination, but it seems like the actual promotion of sustainable development, and especially its integrative component, would require an even more sensitive interpretation of trade rules. If it is true that the later cases such as shrimp/turtle have shown that the AB recognized the environmental objective of the defendant and deemed the measure at stake unjustifiable given that it could have been achieved in a less restrictive way, the rationale of the regime is to subject the environmental and social aspects of the matter to its trade logic, which is the main goal to safeguard.

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<sup>36</sup> Panel Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R (Sept. 18, 2000); Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Mar. 12, 2001).

<sup>37</sup> Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R (June 12, 2007); Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (Dec. 3, 2007).

<sup>38</sup> See for a broad analysis of these cases and the integration of sustainable development in the WTO, M.C. Cordonier Segger and M. Gehring, *Sustainable Development in World Trade Law*, Kluwer Law International, 2005.

### 3.3 The specialized committees

In addition to directly setting rules concerning broader development issues, the WTO has also created specialized committees that deal with ‘Trade and Environment’ (CTE) and ‘Trade and Development’ (CTD). The CTE was set up by the 1994 Marrakesh Ministerial Decision on Trade and Environment, with a mandate to identify the relationship between trade measures and environmental measures in order to promote sustainable development, and make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system were required, compatible with the open, equitable and non-discriminatory nature of the system. It was given a 10-point mandate foreseeing issues on which it should make “*appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required*”:

1. The relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements;
2. The relationship between environmental policies relevant to trade and environmental measures with significant trade effects and the provisions of the multilateral trading system;
3. The relationship between the provisions of the multilateral trading system and (a) charges and taxes for environmental purposes; (b) requirements for environmental purposes relating to products, including standards and technical regulations, packaging, labeling and recycling;
4. The provisions of the multilateral trading system with respect to the transparency of trade measures used for environmental purposes and environmental measures and requirements which have significant trade effects;
5. The relationship between the dispute settlement mechanisms in the multilateral trading system and those found in multilateral environmental agreements;
6. The effect of environmental measures on market access, especially in relation to developing countries, in particular to the least developed among them, and the environmental benefits of removing trade restrictions and distortions;
7. The issue of exports of domestically prohibited goods;
8. The relationship between the environment and the relevant provisions of the Agreement on Trade in Services;
9. The relationship between environment and the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS); and

10. Relations between the WTO and other organizations, both non-governmental and inter-governmental.<sup>39</sup>

The CTD, apart from dealing with issues such as SDT, aid for trade and notification of regional trade agreements among developing countries, has under Paragraph 51 of the Doha Declaration been mandated to identify and debate the developmental aspects of the negotiations, in order to help achieve the objective of having sustainable development appropriately reflected.<sup>40</sup>

Many of these issues, while affecting trade and WTO policy, are very hard to deal with within the umbrella of the WTO. In a report analyzing the multitude of issues involved in building a 'sustainable development roadmap' for the WTO and making its commitment to this principle effective, the IISD lists a number of issues which should in fact fall within the mandate of the WTO and be pushed further into the framework of the Doha Negotiations, and others in which the WTO should be involved but not take the lead. According to the abovementioned study, regarding the *Trade and Environment issues*, the WTO should take the lead in i) liberalizing trade in environmental goods and services; ii) reducing or eliminating perverse subsidies (such as fisheries and fossil fuel subsidies), and in any cases of necessary amendments to the TRIPS Agreement, to make them compatible with obligations under the CBD; iii) granting observership to MEAs in WTO Committees. The WTO should also attempt, in an exercise to include environment Ministry officials, amongst others, to negotiate agreed understandings or guidance on the rule of WTO law on the subject of discrimination of production and process methods (PPM), and on the precautionary principle. It should ensure that others act to address at least two other items on the trade-environment agenda, but not take a lead role in: i) the cluster of issues that include market access, standards and labeling; and ii) assessing the broad impact of trade on the environment. Regarding Trade and Development, the report considers that the WTO should be an active leader in the areas of trade-related technical assistance, capacity building and trade facilitation. It should spearhead a collaboration that has others surpassing this, engaging in efforts designed to build up trade-related infrastructure, to build productive capacity and to strengthen the domestic institutions that are key to a healthy investment climate (bureaucracy, judiciary, regulatory bodies, etc.). The WTO should explore the development of a system of indicators that would link

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<sup>39</sup> See [http://www.wto.org/english/tratop\\_e/envir\\_e/wrk\\_committee\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/wrk_committee_e.htm).

<sup>40</sup> See [http://www.wto.org/english/tratop\\_e/devel\\_e/d3ctte\\_e.htm](http://www.wto.org/english/tratop_e/devel_e/d3ctte_e.htm).

successful aid for trade to related trade law commitments.<sup>41</sup> Nevertheless, as the majority of those issues are part of the stalled Doha negotiations, their development is technically blocked at the multilateral level. In this regard, considering alternative ways of negotiating these issues, such as at the regional level, has gained even more importance.

### 3.4 Remarks

As can be seen, the organizations outlined above form a governance system that deals with development, and relies on legal and political arrangements to provide both development assistance and development through trade liberalization. The system of development cooperation relies on the commitments made by states at the international level, such as the goal of providing 0.7% of GDP as ODA by 2015, which are often made through soft-law instruments, and are delivered through international agencies whose role is to coordinate governmental action and propose best practices. It is, in this regard, a system much less dependent on legal arrangements than it is on the political decisions of states, even if coordinated by international agencies, and thus the development idea that is promoted is often viewed as politicized. In addition, this system is lagging severely behind on the delivery of its goal of alleviating poverty, amongst others.

The international trade regime is more rule-based and has a clearer developmental vision, which is to support the integration of developing countries into the international trading system and thus promote their economic growth and welfare. Nevertheless, the ambiguous provisions regarding classification of development and the non-binding nature of the provisions of SDT also render this system vulnerable to political influence, as the negotiations of the Doha Round clearly show. Furthermore, its character as a negative integration system, while allowing for social and environmental measures to be adopted, is also proving insufficient to actively promote the contribution that trade could make to sustainable development.<sup>42</sup> As argued by Pertersmann, much more would have to be done to render the international economic regime truly supportive of development, such as defining the WTO objective of ‘sustainable development’ in terms of human rights and empowering ‘WTO

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<sup>41</sup> A Cosby, op cit.

<sup>42</sup> For a thorough study of the integration principle and its application in the WTO system, see C. Voigt, *Sustainable development as a principle of international law: resolving conflicts between climate measures and WTO law*, Martinus Nijhoff, 2009.

citizens' as legal subjects and democratic owners of the WTO legal system.<sup>43</sup> Furthermore, policies for promoting positive liberalization of sectors that are relevant for sustainable development and the transition to a green economy, such as the liberalization of environmental goods and services (further discussed in Chapter 5), are required with urgency in order to make trade work for sustainable development.

#### **4. Regional integration agreements: the rationale and the development component**

Considering the implementation challenges of the existing rules concerning the promotion of development and the ineffectiveness of the regimes discussed above in fulfilling this role, this thesis now aims to discuss another governance level which might fill this gap: the regional sphere. As one commentator points out, *“new forms of region-building are now an inescapable feature of the global political economy. Once viewed primarily as a regulatory frame through which state actors pushed the progressive liberalization of trade and investment (Gamble and Payne 1996; Grugel and Hout 1999), regionalism is increasingly, and more fruitfully, conceptualized as a broader project of governance which aims to refashion the norms and the networks that underpin policy-making and the ways in which authority and legitimacy are exercised in bounded but post-sovereign spaces (Payne 2000; Phillips 2004).”*<sup>44</sup>

The rationale of explaining how regional blocs can be tools to promote development is threefold: regional integration agreements (RIA) are the most institutionalized form of regional cooperation scheme, and are in this regard part of the international economic regime as a sub-form of the international trade framework; the rationale in this case is the promotion of free trade and thus economic development through economic integration, as wider markets and broader scope of competition and innovation resulting from market integration are some of the main engines for economic growth. Moreover, from a legal/policy perspective, the regional sphere of governance is increasingly seen as a means of going beyond the

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<sup>43</sup> E.U. Petersmann, *Constitutionalism and the Regulation of International Markets: How to Define the 'Development Objectives' of the World Trading System?*, European University Institute, Law Department, Working Paper 2007/23; See also E.U. Petersmann, *International Economic Law and 'Public Reason': Why Do Governments Fail To Protect International Public Goods More Effectively?*, European University Institute, Law Department, Working Paper 2010/17, where the author defends the need for multilevel governance and for multilevel constitutional restraints limiting the 'collective action problems.'

<sup>44</sup> J Grugel, *Regionalist governance and transnational collective action in Latin America*, *Economy and Society*, 2006, 35:2, 209 – 231.

multilaterally agreed objectives of the international community, which is expressed through the pursuit of deeper levels of economic integration regarding what is achieved at the WTO, but also the pursuit of goals beyond free trade, including ‘positive integration’ policies and rules on environmental and social areas. Finally, regions are increasingly being seen as relevant actors of global governance, promoting relations not only with other actors but also amongst themselves, in a phenomenon known as interregionalism. Thus, regional integration can be a promising tool in promoting the goals of sustainable development, and the legal aspects of this idea will be briefly discussed below.

#### **4.1 The legal aspects of Regional Integration Agreements in the GATT**

##### **i) Rationale**

As stated above, economic growth is one of the main ways of promoting development, and many countries have pursued the objective of trade liberalization. Although the GATT began with less than 50 member countries, the WTO had 159 members by 2013. Since GATT and WTO agreements commit all member nations to reducing trade barriers simultaneously, this is referred to as a multilateral approach to trade liberalization. An alternative method to achieve trade liberalization includes the formation of preferential trade arrangements, free trade areas, customs unions and common markets. Since many of these agreements involve geographically contiguous countries, these methods are referred to as a regional approach to trade liberalization. Section XXIV of the original GATT allows signatory countries to form free trade agreements and customs unions, despite the fact that preferential agreements violate the principle of non-discrimination. When a free trade area or customs union is formed between two or more WTO member countries, they agree to lower their tariffs in relation to each other but maintain their tariffs against other WTO countries. Thus, the free trade area represents discriminatory policies.

Article XXIV of the GATT specifies the conditions under which countries may violate the MFN clause by forming Regional Integration Agreements. It imposes three principal restrictions: RIAs must not “on the whole” raise protection against excluded countries; must reduce internal tariffs to zero and remove “restrictive regulations of commerce” other than those permitted by other GATT articles; and must cover “substantially all trade.” According to Alan Winters and Maurice Schiff, “the GATT’s logic is essentially mercantilist—stressing

the rights of trading partners to market access—rather than economic, with a focus on the economic costs and benefits of policy. From the mercantilist perspective, the first two conditions make sense. The rule against increasing protection against excluded countries preserves tariff bindings by ensuring that forming an RIA does not provide a wholesale way of dissolving previous bindings. It is supplemented by the requirement that compensation is due to individual partners for tariff increases induced by the RIA if other reductions to keep the average constant do not maintain a fair balance of concessions. Together with the 1994 Uruguay Round Understanding on the Interpretation of Article XXIV, which deals with how to measure tariff barriers for RIAs, these provisions offer reasonable assurances about the barriers facing nonmembers. The condition on reducing internal tariffs to zero helps defend the MFN clause by making it subject to an ‘all-or-nothing’ exception. If countries were free to negotiate different levels of preference with each trading partner, binding and nondiscrimination would be fatally undermined. No member could be sure that it would receive the benefits it expected from negotiating and reciprocating a partner’s tariff reduction. (...)The third condition reinforces this interpretation by requiring a serious degree of commitment to an RIA in terms of sectorial coverage.”<sup>45</sup>

Special measures also address developing countries: the Enabling Clause of 1979 relaxed the conditions for creating RIAs that include only developing countries. It drops the conditions on the coverage of trade and allows developing countries to reduce tariffs on mutual trade in any way they wish and to employ non tariff measures in accordance with criteria which may be prescribed by the GATT members. It then supplements the first condition with the nonoperational requirement that the RIA not constitute a barrier to MFN tariff reductions or cause ‘undue difficulties’ for other contracting parties. The arrangements are based on a contractual relationship between the parties and are required, according to WTO law, to observe reciprocity in trade concessions, whereas the ‘enabling clause’ rationale is based on a unilateral, non contractual basis, in which the preference-giving country is free to select the beneficiaries and no reciprocity is required. This is an important point which has several legal consequences as will be seen, for example, in Chapter 5 in the analysis of the EU trade and development policies, which faced several ‘trade wars’ regarding the instruments developed within these policies.

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<sup>45</sup> A. Winters and M. Schiff, *Regional integration and development*, World Bank/Oxford University Press, p. 247-251.

In this regard, in 1996 the WTO General Council established a Committee on Regional Trade Agreements (CRTA) with the function of analyzing the regional agreements and their systemic implications for the multilateral trading system (WT/L/127). Its objective is to ensure the transparency of RTAs and allow members to pose questions about the consistency of these agreements with WTO rules. The CRTA has the duty to elaborate a report after a factual assessment based on the information provided by the parties to the agreement and on the debate with the other WTO members. However, due to the lack of consensus on the interpretation of WTO rules and the lack of WTO rules concerning RTAs, no report has been finalized under this system.<sup>46</sup>

## ii) Types of economic integration

Based on these rules, different types of economic integration can be achieved, which are progressive in their complexity.<sup>47</sup>

a) Preferential Trade Agreement (PTA): perhaps the weakest form of economic integration. In a PTA countries would offer tariff reductions, though perhaps not eliminations, to a set of partner countries in some product categories. Higher tariffs, perhaps non-discriminatory tariffs, would remain in all remaining product categories. This type of trade agreement is not allowed among WTO members, which are obliged to grant most-favored nation status to all other WTO members. Under the most-favored nation (MFN) rule, countries agree not to discriminate against other WTO member countries. Thus, for example, if a country's low tariff on bicycle imports is 5%, then it must charge 5% on imports from all other WTO members. Discrimination or preferential treatment for some countries is not allowed. The country is free to charge a higher tariff on imports from non-WTO members.

b) Free Trade Area (FTA): occurs when a group of countries agree to eliminate tariffs between themselves, but maintain their own external tariff on imports from the rest of the world. The North American Free Trade Area is an example of a FTA. When the NAFTA is fully implemented, tariffs on automobile imports between the US and Mexico will be zero. However, Mexico may continue to set a different tariff to the US on auto imports from non-NAFTA countries. Because of the different external tariffs, FTAs generally develop elaborate

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<sup>46</sup> For further information see [http://www.wto.org/english/tratop\\_e/region\\_e/regcom\\_e.htm](http://www.wto.org/english/tratop_e/region_e/regcom_e.htm).

<sup>47</sup> M Jovanovic, 'The Economics of International Integration', Edward Elgar, 2006.

'rules of origin'. These rules are designed to prevent goods from being imported into the FTA member country with the lowest tariff and then shipped to the country with the highest tariffs. Of the thousands of pages of text that make up the NAFTA, most of them describe rules of origin.

c) Customs Union: occurs when a group of countries agree to eliminate tariffs between themselves and set a common external tariff on imports from the rest of the world. A customs union avoids the problem of developing complicated rules of origin, but introduces the problem of policy coordination. With a customs union, all member countries must be able to agree on tariff rates across many different import industries.

d) Common Market: establishes free trade in goods and services, sets common external tariffs among members and also allows for the free mobility of capital and labor across countries. The European Union was established as a common market by the Treaty of Rome in 1957, although it took a long time for the transition to take place. Today, EU citizens have a common passport, can work in any EU member country and can invest throughout the union without restriction.

e) Economic Union: typically will maintain free trade in goods and services, set common external tariffs among members, allow the free mobility of capital and labor, and will also relegate some fiscal spending responsibilities to a supra-national agency.

f) Monetary Union: establishes a common currency among a group of countries. This involves the formation of a central monetary authority which will determine monetary policy for the entire group. Perhaps the best example of an economic and monetary union is the United States. Each US state has its own government which sets policies and laws for its own residents. However, each state cedes control, to some extent, over foreign policy, agricultural policy, welfare policy, and monetary policy to the federal government. Goods, services, labor and capital can all move freely, without restrictions among the US states and the nation sets a common external trade policy.

## 4.2 RIAs as a consolidated trend

Based on this framework, several regional blocs have been established over the last few decades, and the increasing number of them has been one of the major developments in international relations in recent years; virtually all countries are now members of at least one bloc. Regional agreements vary widely, but all have the objective of reducing barriers to trade between member countries—which implies discrimination against trade with other countries. At their simplest, these agreements merely remove tariffs on intra-bloc trade in goods, but many go beyond that to cover non-tariff barriers and to extend liberalization to investment and other policies. At their deepest, they have the goal of economic union and involve the construction of shared executive, judicial, and legislative institutions. In addition, the past decade has also witnessed qualitative changes in RIAs. There have arguably been three major developments:<sup>48</sup>

(i) The move from ‘closed regionalism’ to a more open model, in line with prevailing views about national economic policy. Many of the trade blocs that were formed between developing countries in the 1960s and 1970s were based on a model of import-substituting development, and regional agreements with high external trade barriers were used as a way of implementing this model.

(ii) New-wave RIAs (some of which are old agreements which have been resurrected) are generally more outward looking and more committed to boosting rather than controlling international commerce, and recognize that effective integration requires more than simply reducing tariffs and quotas. Many other types of barrier have the effect of segmenting markets and impeding the free flow of goods, services, investments and ideas, and wide-ranging policy measures—going well beyond traditional trade policies—are needed to remove them. Such ‘deep integration’ was first actively pursued in the Single Market Program of the European Union, but its elements are now finding their way into the debate on other regional agreements.

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<sup>48</sup> A. Winters and M. Schiff, *op cit.*

(iii) The advent of ‘North-South’ trade blocs in which high-income countries and developing countries are equal partners, such as the NAFTA or the EU Agreements with its neighbors, as well as the Economic Partnership Agreements signed with African countries.

In addition, two further developments can be highlighted, the increasing number of South-South Agreements, and the phenomenon of ‘interregionalism’, discussed in further detail in Chapters 5 and 6 respectively, in the context of case studies.

#### **4.3 The rationale for regional integration and sustainable development**

From an economic point of view, the incentives for creating regional blocs are ambiguous. As one report of the World Bank highlights, “*whether regional agreements are building blocks or stumbling blocks to open global markets—the terms Jagdish Bhagwati (1991) used—remains a central question*”. Proponents of the stumbling block theory emphasize that:

- (1) RTAs may promote costly trade diversions rather than efficient trade creation, especially when sizable MFN tariffs remain—these tariffs create vested interests to maintain preferential margins in ‘their’ markets;
- (2) the proliferation of regional agreements absorbs scarce negotiating resources (especially in poorer WTO members) and crowd out policy-makers’ attention;
- (3) competing RTAs (especially different North-South combinations) may lock in incompatible regulatory structures and standards, and may result in inappropriate norms for developing country partners; and
- (4) by creating alternative legal frameworks and dispute settlement mechanisms, RTAs may weaken the discipline and efficiency associated with a broadly recognized multilateral framework of rules.

The Building block proponents stress that moving forward in smaller steps is often easier to accomplish, and that it creates a certain reform momentum:

- (1) regional/bilateral agreements can help sensitize domestic constituencies to liberalization and keep the stakes lower to allow for incremental progress on trade;
- (2) expanding the number and coverage of RTAs can erode vested opposition to multilateral liberalization because each successive RTA reduces the value of the margin of preference, thereby reducing the discriminatory impact;

- (3) RTAs are often more about building strategic and/or political alliances or locking in domestic reforms than about actual trade liberalization, and so are not necessarily competitive with multilateral efforts;
- (4) regional arrangements can act as incubators for developing countries' firms/producers to learn to trade with RTA partners without facing full global competition; and
- (5) for some issues, such as regulatory cooperation, RTAs may be a viable and more manageable alternative to the WTO, where 'lowest common denominator' outcomes tend to prevail.<sup>49</sup>

The report analyzed the influence of regional agreements.<sup>50</sup> Among the observed trends, it states that while the number of preferential agreements has increased rapidly, their trade coverage is substantially less than their official span of influence, because many tariffs have come down close to zero, rules of origin restrict preferential access, and many products within agreements are excluded. Nonetheless, RTAs are leading to a more complex trading system and inefficiencies in customs administration; high tariffs in certain regions still risk significant trade diversion. In addition, there are notable differences emerging between North-South bilateral agreements and South-South arrangements. North-South agreements are considerably more ambitious in their content and coverage than South-South arrangements and reach deep beyond the border to include services, protection of investment rules and intellectual property rights. Some conclusions of the report state that (i) there is no strong evidence to support the claim that a preferential trade agreement will be net trade creating or that all members will benefit. Positive outcomes depend on design and implementation. (ii) when embedded in a consistent and credible reform strategy, the key determinant of regional trade agreements' success is low levels of external trade barriers. While many developing countries have reduced tariffs, they remain high in many countries and regions, and the risk of trade diversion remains significant. Further reductions in applied MFN tariffs will be required to ensure that regional agreements are beneficial for those participating in them and to minimize the impact on the countries that are left out. (iii) trade agreements that provide for comprehensive liberalization of trade across all major sectors and nonrestrictive rules of origin are more likely to be successful. Agreements that devote considerable resources to negotiating limited positive lists or large negative lists and detailed product-specific rules of origin limit the scope for gain. (iv) effective implementation is crucial to positive outcomes,

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<sup>49</sup> World Bank, *Global Economic Prospects: Trade, Regionalism and Development*, 2005, p. 133.

<sup>50</sup> Ibid.

yet implementation is compromised by proliferation. If different agreements have different product coverage, different liberalization schedules, and different rules of origin, the ability of agencies such as customs to apply the agreements is severely undermined. The capacity to effectively implement is a crucial issue that countries should consider before signing an RTA. (v) monitoring can play an important role in providing for effective implementation, but often there is insufficient monitoring carried out. Technical reviews are frequently not done, and when reports are made, senior officials fail to act on their recommendations.

Furthermore, the Report concludes that there are several advantages in regional preferential trade arrangements, as they create opportunities to lower trade costs in areas other than tariffs and non-tariff barriers to trade. (i) The potential to expand trade by lowering trade costs other than policy border barriers is great—and it may have a higher payoff for cooperative governmental efforts than reciprocal reductions in border barriers. (ii) Using RTAs as a lever to liberalize services has several advantages. (iii) A corollary lesson is that multilateral liberalization in goods markets is essential for reaping any gains from RTAs that contain new rules. (iv) Finally, RTAs—and other regional cooperation agreements—do offer some important opportunities for countries to collaborate, especially in South-South agreements. To stimulate investment, particularly in services, they might adopt common standards that facilitate cross-border competition in services and investment.

Thus, from an economic point of view, in order to produce gains RIAs must assure (i) effective market access to members, which should represent zero tariffs but often in practice represent lower tariffs regarding the multilateral sphere; (ii) that transactional costs are reduced, and promote integration of infrastructure and logistics and common regulatory frameworks in order to maximize intraregional trade. The development of infrastructure with a regional outlook to improve physical connectivity in its various modalities is today a key aspect for regional integration and global competitiveness, especially in developing regions such as Latin America and the Caribbean (LAC), where there is strong empirical evidence to show that transport costs have a greater impact than tariffs for the region's countries.<sup>51</sup>

Apart from its overall economic effects, from a legal/policy perspective there are incentives to promote regional integration as a means of promoting development. In fact, the success of

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<sup>51</sup> Moreira, Mauricio Mesquita; Volpe Martincus, Christian & Blyde, Juan S. *Unclogging the Arteries: The Impact of Transport Costs on Latin American and Caribbean Trade*. Washington: IDB, 2008.

regional trade liberalization and market integration is at times considered to be dependent on embedding it into a broader legal, institutional, social and political framework supported by citizens and other non-governmental constituencies as socially ‘just’ and supportive of development in a broad sense.<sup>52</sup> According to UNCTAD,<sup>53</sup> ‘regional cooperation among developing countries has the potential to support national development strategies, and to some extent fill the gaps in the global economic governance system. But in order to do so it has to extend beyond trade liberalization to include policy areas that strengthen the potential for growth and structural change in developing countries. Recognizing that multilateral disciplines could lead to a narrowing of national policy space for developing countries, regional economic cooperation can provide some means to help countries cope well with globalization. From this perspective, regional institutions could fill gaps in global economic governance structures. The form that such cooperation takes will depend not only on the specific historical, geographical and political circumstances in a region, but also on the relative weight given to market forces and State intervention – a choice that can influence economic policies at national and global levels.

In addition, UNCTAD highlights that regional blocs have increasingly included provisions aimed at ‘deep integration’, which involves additional elements for harmonizing national policies in line with a reform agenda. A developing country’s motivation for concluding a bilateral agreement with a developed country partner would be to obtain concessions that are not granted to other countries, particularly better market access for its products. Indeed, bilateral North-South FTAs have the potential to provide the developing country partner with considerable new trading opportunities. Such FTAs may also attract more FDI to the developing-country partner. But there can also be potential disadvantages for developing countries, because such FTAs generally demand far-reaching liberalization of foreign investment and government procurement, new rules on certain aspects of competition policy, stricter rules on intellectual property rights, and the incorporation of labor and environmental standards. Moreover, many FTAs oblige developing countries to undertake much broader and deeper liberalization of trade in goods than that agreed under WTO arrangements. Some also involve a form of liberalization of services that differs from what is envisaged in WTO

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<sup>52</sup> E. U. Petersmann, *Justice in International Economic Law? From the ‘International Law among States’ to ‘International Integration law’ and ‘Constitutional Law’*, European University Institute, Law Department, Working Paper 2006/46.

<sup>53</sup> UNCTAD, Trade and Development Report 2007, *Regional Cooperation for development*, available at [www.unctad.org](http://www.unctad.org).

agreements, thus exerting pressure on developing countries to make greater liberalization commitments in this area. However, because they involve reciprocal commitments, FTAs between developed and developing countries eliminate the special and differential treatment that may be granted to developing countries in the context of other agreements.

Globalization and the trend towards greater interdependence as a result of internationalization of investment and production decisions present new challenges. Many of these challenges cannot be dealt with exclusively at the national level and may require similar adaptation in regional institutions, especially as multilateral institutions and policies have failed to adapt. From this perspective, UNCTAD's report concludes that regional cooperation involves a good deal more than the search for common ground on external policies; it also involves the provision of regional public goods and a reconfiguration of policy space. At the same time, new political challenges, including the unequal influence of members, and in particular the ability of stronger members to bypass collective agreements, have to be dealt with.

From a legal perspective, RIAs can be used as a tool to promote more sustainable-oriented action regarding what has been done in the multilateral sphere. In fact, regionalism is pinpointed as a privileged forum for international law-making, since the regional context and the relative homogeneity of the interests or outlooks of actors could ensure a more efficient or equitable implementation of the relevant norms, and the presence of cultural commonalities better ensures the legitimacy of the regulations and that they are understood and applied in a coherent way. Koskenniemi highlights that closeness to context better reflects the interests and consent of the relevant parties, stating that in a matter of legal policy, it may often be more efficient to proceed by way of a regional approach, as is the case with human rights and economic integration regimes.<sup>54</sup>

Marie Claire Cordonier-Segger suggests a list of legal areas in which the establishment of RIAs could support the objective of sustainable development, including procedural and substantive legal provisions. Among the procedural innovations, she lists: (i) environmental, development, human rights or sustainability impact assessments and reviews of trade liberalization policies and draft treaties; (ii) consultations between economic, environmental

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<sup>54</sup> M. Koskenniemi, *Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law*, Report of the study group of the International Law Commission, United Nations General Assembly, A/CN.4/L.682, 2006, section 205, 'Regionalism as a form of international law making', pages 106-115.

and development authorities; (iii) mechanisms to ensure transparency, including in negotiations; (iv) capacity-building and financing mechanisms for social and environmental cooperation related to negotiation and implementation of RTA regimes. In terms of substantive measures that could be included in RTAs in order to promote sustainable development, apart from preambular commitments which favor interpretation of further provisions of the agreement, she lists: (i) provisions which create windows or exceptions from trade rules and thus prevent economic objectives to trump all others, where trade obligations might otherwise constrain regulators and policy-makers, such as general exceptions related to conservation of natural resources, general interpretative statements, specific exceptions in sections of the agreements where trade rules on issues such as SPS, TBT, IPR, services and public procurement might constrain the use of environmental and social measures, and explicit reservations on socially or environmentally sensitive sectors; (ii) provisions which develop ‘value-added’ but parallel social and environmental cooperation strategies, such as parallel agreements or chapters for cooperation on environmental and social matters, development of institutions and common work programs for cooperation in these areas, and report/complaint mechanisms to provide recourse when these rules are violated; (iii) constructive ‘sustainable development’ oriented trade rule enhancement initiatives, such as SPS provisions which improve levels of protection, TBT provisions to improve certification processes and promote mutual recognition, IPR provisions which support biodiversity protection, recognize traditional knowledge and public access to essential medicines, liberalization of environmental services and promotion of investments which deliver on international environmental and social priorities.<sup>55</sup>

In this regard, even though RIAs might have an uncertain economic impact, regional rules might also promote the objectives of sustainable development, particularly by helping to integrate the objectives of economic development with environmental protection and social justice in a more specific and homogeneous context. This might allow states to move beyond the difficulty of establishing binding rules at the multilateral level, and the need to promote concerted action from the national perspective.

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<sup>55</sup> MC Cordonier-Segger, ‘Sustainable Development and Regional Trade Agreements’, in L Bartels and F Ortino, *Regional Trade Agreements and the WTO Legal System*, Oxford University Press, p. 337-339.

## 5. Concluding remarks

The analysis undertaken above demonstrates that the global governance framework for sustainable development is based on a system of international norm-setting, producing rules and standards of conduct, some binding and others representing political commitment and thus with weak enforcement power. The system set up for the implementation of these measures is decentralized and relies primarily on national implementation of agreements and promotion of rights.

The international institutions and regimes do not seem to be responding to the pressing issues that challenge the international community nowadays: the international economic institutions -the IMF and the WB- still fail to carry out reforms that have been on the agenda for a long time, to allow the inclusion of more representativeness of developing countries; furthermore, the levels of ODA are still far below the 0.7% of GDP threshold. In the social sphere, the level of progress which has been made towards the MDGs makes their achievement by 2015 seem impossible at this stage. Finally, in the environmental sphere, the most pressing issue, climate change, is also at a crossroads, with the Kyoto Protocol having expired in 2012 and no consensus for a successor regime seeming likely anytime soon. On the other hand, the reliance on the national sphere for implementation is also problematic, as economic, social and environmental problems are largely transboundary in many ways, given the effects of globalization and interdependence on the former, and the increasing global effects on local environments and vice versa, on the latter.

At the multilateral level though, advancing this integration between regimes with different rationales has been proving difficult: the approach regarding environmental and social issues and the virtual impossibility of reaching an agreement regarding the Doha Development Round show how complex global agreement can be. In this regard, the hypothesis to be developed here is: what role can the legal framework of regional integration agreements play? RIAs are a part of the international trade system – even if not all of them have trade liberalization as the main goal, such as seems the case of the EU (as will be seen in the next Chapter), where the single market was to be a tool towards maintenance of peace and development, and in this regard one of the features of these agreements is, in almost all cases, to promote the integration of the markets through the liberalization of trade. Nevertheless, RIAs are increasingly encompassing issues other than trade, such as social and environmental

policies, and thus creating legal frameworks which embrace a more modern vision of the development process – often explicitly adopting the concept of sustainable development as a guiding principle and even as an ultimate goal.

The sections above have outlined the theoretical framework regarding the establishment of regional integration agreements and the benefits that are considered to arise from it. This thesis is more concerned with providing a legal perspective of the effect of regional integration towards the promotion of development, namely the creation of regional legal frameworks which provide binding norms establishing obligations between the countries concerned, providing governance modes that tend to adapt to regional specificities and needs, while theoretically being compatible with the multilateral trade regime as regards trade and in some cases incorporating notions of development that were established multilaterally. In addition, these legal arrangements might go beyond the promotion of trade liberalization, which is proving to be a difficult task within the WTO and the multilateral trade system, as the debates regarding the inclusion of environmental and human rights as clear objectives of the WTO show.

This section of the chapter has introduced some of the key concepts related to regional agreements. The following section continues by introducing the two regional blocs studied in the thesis, the European Union and MERCOSUR, by briefly describing their evolution, their objectives and the institutional structures of the process of integration. The justification of the choice of these case studies is that these two blocs represent interesting accomplishments and challenges related to the central argument of the thesis, that regional blocs can be a way of promoting development through the formation of legal arrangements that pursue this objective, both by economic integration and by positive measures that go beyond the economic sphere. The EU is an obvious choice for any study on regional integration, as it is considered nowadays to be the most advanced project of integration in force, and has advanced towards the deepest levels of economic integration, achieving political and monetary union, has created several positive policies that promote different goals such as environmental protection and external relations, and has created a solid legal framework that regulates these policies. In these ways, it constitutes a benchmark of what a regional bloc can accomplish, and an analysis of these policies provides both analytical data to evaluate the achievements of these goals, and insights regarding the analysis of other regional blocs.

MERCOSUR is still in the early stages of integration however, as its name suggests, it aims to create a common market. So far, and in spite of the recent crises, this supranational association seems successful, at least compared with the previous initiatives that have been adopted by Latin American countries over the past five decades. As this process of integration advances, the need for other policies in addition to economic integration will arise, and in this regard it also offers an advantage for this research in the differences it has *vis-à-vis* the EU. Indeed, the EU can be characterized as a large supranational association of twenty-seven members, whereas MERCOSUR is comprised of only four members and two associated countries, all of them emerging economies. Moreover, whereas the EU possesses institutional structures which are competent in a number of fields at adopting common policies which are automatically implemented in member countries, the MERCOSUR institutions are for the time being very light and have no autonomous decision-making procedures. All its policies are decided during inter-ministerial meetings and are applied by each state according to its own national rules. A final reason for choosing these two supranational associations is the fact that, since the creation of MERCOSUR in 1991, its members have often been inspired by the previous experiences of the EU, and the latter has also supported MERCOSUR institutions by sharing its know-how on diverse problems in relation to integration. Thus, the approach of the thesis is also to examine whether the EU can provide insight for the further development of MERCOSUR, not necessarily in its institutional structure, but rather in the way it created its framework to make the integration project work for the promotion of sustainable development.

### **Chapter 3 - Regional integration and development: one common goal, two different models**

Considerations made in the previous chapter allow the inference that the rationale of creating RIAs is on the one hand, to establish trade liberalization agreements that are, in a way, a sub-product of the international trade regime – even if they are not always compatible with it in practice. Notwithstanding, this rationale has gradually encompassed the objective of providing a wider regulatory framework allowing the creation of regional governance schemes that also address other regional public goods. From a legal perspective, this thesis aims to analyze whether RIAs establish regimes that address these issues, as well as the role they might play in promoting an objective that is both connected with liberalization of trade and other public goods, namely sustainable development.

In this regard, this chapter introduces the framework of the two RIAs that will be further analyzed in the next chapters. Here, the aim is to provide an overview of these regional blocs, based on their historical development and the establishment of their objectives, legal and institutional framework, giving particular emphasis to how this framework relates to the promotion of development.

#### **I. The European Union's model of regional integration**

##### **1. Background of the European integration process**

In the post-WWII period, there was a prevailing spirit of internationalism that led to the creation of international organizations such as the United Nations and the International Monetary Fund. In addition, within Europe countries were compelled to cooperate in order to benefit from the financial aid offered by the USA's Marshall Plan. In this context, on May 9<sup>th</sup> 1950, the French Foreign Minister Robert Schuman made a declaration inviting Germany and other European countries to form a common market in coal, iron and steel. The reasons underlying this declaration were both political and economic: the aim was to stimulate economic growth through heavy industries as well as to safeguard peace. In his declaration, Schuman considered that European integration should be progressive and might include other areas of production, as well

as other members. On April 18<sup>th</sup> 1951, France, West Germany, Italy, Belgium, Luxembourg and the Netherlands signed the Treaty of Paris instituting the European Coal and Steel Community (ECSC), which came into force on the 25<sup>th</sup> of July 1952. This Treaty instituted a supranational administration called the ‘High Authority’, which was to control the customs union that had been created for these products. The general policies and objectives of the High Authority were defined by a Council of the Community, composed of a representative from each member state, and by what can be seen as an embryonic European Parliament. There was also a European Court of Justice which was to operate in cases of legal problems arising from the implementation of the laws of the Community.

After the establishment of the ECSC, in 1955 negotiations began with the intention of forming a common market and an atomic energy community, leading to the signature of the Treaty of Rome on March 25<sup>th</sup> 1957 by the six ECSC members, which came into force on the 1<sup>st</sup> of January 1958. The Treaty of Rome led to the existence of three separate but parallel communities: the ECSC for coal and steel; the European Atomic Energy Community (EAEC) for atomic energy; and the European Economic Community (EEC) for the creation of a common market among the six Member states, which agreed to progressively reduce their internal tariffs on all goods in order to reach duty-free trade within the customs union. Here interest will be devoted to the EEC.

### **1.1 A common market**

The Treaty creating the EEC (TEC) laid the foundations of what would later become the EU, and the aim to promote development was already clear. The preamble of the Treaty included a recital stating among the essential objectives of parties “*the constant improvement of the living and working conditions of their peoples*”. Other mentions in the preamble included the “*need for concerted action in order to guarantee steady expansion, balanced trade and fair competition, the wish to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less favored regions*” and the aim to protect *the values of peace and liberty*”. These provisions underlined the aim of creating a community that would also have a rationale of promoting development, understood as the improvement of living standards of the people and the balancing

of levels of development of regions. The Community was designed to be a common market, but this was portrayed in an instrumental way: Article 2 declared that *“the Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member states, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it”*.

The policies formally enshrined in the Treaty in order to achieve the objective of Article 2 were a common agricultural policy (Articles 38 to 47), common trade policy (Articles 110 to 116) and transport policy (Articles 74 to 84). In addition, a provision envisaged the creation of other policies depending on needs, as specified in Article 235, which stipulates that *“if action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take the appropriate measures”*. After the Paris Summit of October 1972, recourse to this Article enabled the Community to develop actions in the field of environmental, regional, social and industrial policy. The development of these policies was accompanied by the creation of a European Social Fund, the aim of which has been to improve job opportunities for workers and to raise their standards of living, and also of the European Investment Bank, to facilitate the Community's economic expansion by creating new resources.

In addition, the fact that the Community would also have an external dimension was already present. The preamble stated the *“desire to contribute, by means of a common commercial policy, to the progressive abolition of restrictions on international trade, and also the solidarity which binds Europe and the overseas countries and (the desire) to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations”*, which was complemented with a provision for association with overseas countries (this issue will be further developed in Chapter 5).

The Treaty provided for the creation of a large institutional structure with a number of powers. In the beginning each Community was administered separately, until the Brussels Treaty of 1965 merged the three executive bodies. Consequently, after 1965 there were only four institutions. Firstly, the Council of Ministers, which was the policy-making body, composed of representatives of the member governments, and was responsible for deciding the main political guidelines for the action of the European Communities. Secondly, the European Commission, which succeeded the High Authority, the executive organ responsible for the implementation of policies decided at the European level, composed of independent administrators nominated by the Council of Ministers. Thirdly, the European Parliament, which represented the interests of the people but had very few powers. Finally, a Court of Justice was to solve legal problems arising from the implementation of European decisions. In the early 1970s, the EC went through a first wave of enlargement. In 1973 three member states of the European Free Trade Area (EFTA) joined the ‘original six’: England, Ireland and Denmark.

### **1.2 A Single Market**

The early 1980s saw a pause in the process of European integration. National economies were still stagnating after the two oil shocks of the 1970s, and the representatives in the Council of Ministers were more concerned with national problems. Moreover, the process of integration itself seemed stalled since the achievements were less considerable than the aspirations aroused by the Treaty of Rome. To counter this trend, the European Commission, which was more independent from local concerns, began to reflect on the need to renew integration. In a ‘White Paper’ produced in 1985, Commissioner Lord Cockfield proposed a program aiming to complete the European internal market by the end of 1992, including a larger transfer of sovereignty from national to European institutions. In addition, the ‘second wave’ of enlargement took place to include Mediterranean countries: Greece acceded in January 1981, followed by Spain and Portugal in January 1986. This new enlargement had a different impact in the Community, since it concerned relatively poor and newly democratic countries and, as will be discussed further in Chapter 3, impacted on the later establishment of a regional development policy.

In this context, the Single European Act (SEA) was signed in February 1986, and entered into force the following year. This treaty revised the existing dispositions in relation to the European Communities, creating one European Community, and included new resolutions for the creation of more political cooperation among member states. The main aim of the SEA was economic: to complete the European internal market, defined as *“an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty”*. It therefore confirmed the necessity to remove all barriers which hindered the ‘four freedoms of movement’, those of goods, services, capital and people. Indeed, in 1985 there were still a considerable number of obstacles to such movement. Non-tariff barriers, such as internal customs formalities and different technical standards, limited the movement of goods. There were distortions in competition because of state aids to industry and protectionism in public procurement practices. The SEA provided for the increased harmonization of national regulations. Each member state was to recognize the others’ rules and to eliminate all contradictions. It also aimed to improve the decision-making procedures within European institutions, abandoning unanimity voting, which had until then prevailed within the Council of Ministers, in favor of a system of qualified majority or normal majority voting for most decisions.

In addition, the SEA introduced several policy changes:

- i) It included provisions on monetary capacity.
- ii) Social policy was already regulated by the EEC Treaty, but the act introduced two new articles in this area, Article 118A, authorizing the Council to act by a qualified majority in the framework of the cooperation procedure to take the minimum requirements with a view to "encouraging improvements, especially in the working environment, as regards the health and safety of workers", and Article 118B of the EC Treaty entrusting the Commission to develop dialogue between management and labor at the European level.
- iii) It established a Community economic and social policy, which will be discussed further in Chapter 3.
- iv) Research and technical development provisions (Article 130F) were included to strengthen the scientific and technological basis of European industry and to encourage it to become more competitive at the international level.

v) Concern for environmental protection at Community level was already reflected in the Treaty of Rome, but the SEA added three new articles (Articles 130R, 130S and 130T of the EC Treaty) which committed the Community “*to preserve, protect and improve the quality of the environment, to contribute towards protecting human health, and to ensure a prudent and rational utilization of natural resources*”. These provisions only authorized the Community to intervene in environmental matters under the principle of subsidiarity, at times when action could be more effectively achieved at Community level than at the level of member states.

vi) Finally, Article 30 provided that member states must endeavor jointly to formulate and implement a European foreign policy.

### **1.3 A European Union**

The Community went through another revolution with the signature of the Maastricht Treaty in 1992, which entered into force in 1993, and came as result of both external and internal events. Externally, the collapse of communism in Eastern Europe and the reunification of Germany led to a commitment to reinforce the Community's international position. Internally, the Member states wished to supplement the progress achieved by the SEA with other reforms. The Treaty was innovative in a number of ways, as it stated that the final aim was to create a European Political Union. To facilitate this political integration, two new pillars were added to the earlier European Community, a common policy for external relations and security matters (the Common Foreign and Security Policy(CFSP)), as well as the harmonization of judicial and home affairs (Community of Home and Judicial Affairs(CHJA)). In addition, it introduced the objective of creating an Economic and Monetary Union (EMU), which later led to the establishment of the Euro, the single currency which has been used since 1<sup>st</sup> of January 1999 in the countries which joined the EMU, although national currencies were definitively abandoned for the Euro only in mid-February 2002.

From an institutional perspective, the Maastricht Treaty also expanded the role of the European Parliament, extending the scope of the cooperation procedure to new areas and creating a new codecision procedure allowing the Parliament to adopt acts in conjunction with the Council. As regards the Commission, the duration of its term of office has been extended from four to five

years with a view to aligning it with that of the European Parliament. Like the SEA, this Treaty extended qualified majority voting within the Council to cover most decisions under the codecision procedure and all decisions under the cooperation procedure. The Treaty on European Union also established the principle of subsidiarity as a general rule, which was initially applied to environmental policy in the SEA. This principle specifies that in areas not within its exclusive powers, the Community shall only take action where objectives can best be attained at Community rather than at national level.

The Maastricht Treaty also brought the first reference, although indirect, to sustainable development in the EU legal framework– coinciding with the UNCED 1992. The new Treaty on the European Union (TEU) stated in Article B that “*the Union shall set itself the following objectives: to promote economic and social progress which is balanced and sustainable, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion*”. In addition, the amendments to the Treaty on the European Community (TEC) included among the EC’s objectives in Article 2, “*to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment*”, and the precautionary principle was written into the article on which environmental policy is founded (Article 174, ex Article 130r, of the EC Treaty). Beyond that, it upgraded action on the environment to the status of a ‘policy’ in its own right and made qualified majority voting in the Council the general rule. The only exceptions are matters such as environmental taxes, town and country planning and land use, where unanimity remains the norm. Furthermore, the Treaty provided for Community policies in six new areas: trans-European networks; industrial policy; consumer protection; education and vocational training; youth; and culture.

The EU went through a new phase of enlargement in January 1995 with the accession of three other EFTA countries: Austria, Finland, and Sweden. Following this event, the EU was once again revised through the signature of the Amsterdam Treaty in 1997. The negotiations which led to the signature of the Treaty aimed to create political and institutional conditions to enable the EU to face the challenges of the future, such as the rapid evolution of the international situation, the globalization of the economy and its impact on jobs, the fight against terrorism, international

crime and drug trafficking, ecological problems and threats to public health. They led to the amendment of both the TEU and the TEC, introducing reforms in four main areas:<sup>1</sup>

- i) freedom, security and justice, related to the rights, interests, and well-being of individual citizens, such as the development of the concept of European citizenship, with additions to the list of civic rights enjoyed by citizens of the Union and a clarification of the link between national citizenship and European citizenship, and a chapter on employment in the TEC;
- ii) effectiveness and coherence of external policy in two sections, an economic one dealing with extending the scope of the common commercial policy to include international agreements on services and intellectual property rights, and a political one on the reform of the common foreign and security policy (CFSP), creating the instruments of the common strategy and improved decision-making thanks to greater use of qualified majority voting in the Council;
- iii) the creation of the post of High Representative for the common foreign and security policy to give the CFSP greater prominence and coherence;
- iv) finally, institutional areas.

#### **1.4 Current outlook: the Lisbon Reform**

An initial attempt to review the EU took place with the drawing up of the Treaty establishing a Constitution for Europe. The aim was to replace the founding Treaties of the EU with a European Constitution, which was signed in Rome on 29<sup>th</sup> October 2004, but did not enter into force since the ratification process failed in several Member states. The most important background event to this reform was the accession of the Eastern countries to the EU in 2004. In July 2007, a new intergovernmental conference was convened in Lisbon to find an alternative to the constitutional Treaty and to proceed with the reforms. The idea of a European Constitution was therefore abandoned and further negotiations took place with the aim of drawing up an amending Treaty. On 13<sup>th</sup> December 2007, the 27 EU Heads of state or government signed the new amending Treaty in Lisbon, which entered into force on 1<sup>st</sup> December 2009. The TL introduced reforms in several areas, among which were:<sup>2</sup>

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<sup>1</sup> [http://europa.eu/legislation\\_summaries/institutional\\_affairs/treaties/amsterdam\\_treaty/a09000\\_en.htm](http://europa.eu/legislation_summaries/institutional_affairs/treaties/amsterdam_treaty/a09000_en.htm).

<sup>2</sup> [http://europa.eu/legislation\\_summaries/institutional\\_affairs/treaties/lisbon\\_treaty/ai0033\\_en.htm](http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0033_en.htm).

i) institutional aspects: among many issues, the decision-making process within the Council was changed, abolishing the old system of weighted voting and introducing a new definition of qualified majority voting for decisions. Furthermore, two new functions were introduced in the EU institutional architecture: the President of the European Council; and the High Representative for Foreign Affairs and Security Policy. Finally, it also abolished the old pillar structure, unified now in the EU, and introduced a new distribution of competences between the EU and Member states.

ii) the introduction of new competence on energy policy, and clarified EU powers in the areas of economic, social and energy policy. It also set as a new objective the creation of a European Research Area.

iii) finally, EU action at international level was increased. Above all, the Treaty of Lisbon aimed to achieve greater coherence and visibility to the EU's Common Foreign and Security Policy, and the EU acquired legal personality, enabling it to negotiate and be a contracting party in international Treaties. In addition, the EU has since been represented globally by the High Representative for Foreign Affairs and Security Policy.

## **2. Specific features of the EU as an integration project**

### **2.1 The EU as an autonomous legal order**

Considering the institutional framework and the policy areas outlined above, it is important to highlight another feature which is fundamental to the EU: the fact that it is a RIA founded on a solid legal framework, and constitutes an autonomous legal order notwithstanding the importance of its political dimension. The EU is driven by a framework of treaties which create rules governing the legal personality, competences and actions of the supranational organization itself, taking many competences from member states, and also rules creating obligations of action by them, either by direct action or through coordination and cooperation. This legal order was established by legislation but was further developed by judicial interpretation. Regarding its legal base, there are currently three sources of European Union law:

- i) primary law: the TEU and TFEU, the amending EU Treaties, the protocols annexed to the founding Treaties and to the amending Treaties, and the Treaties on new Member states' accession to the EU;
- ii) secondary law: Unilateral acts that can be divided into two categories: those listed in Article 288 of the Treaty on the Functioning of the EU -regulations, directives, decisions, opinions and recommendations; and those not listed in Article 288 of the Treaty on the Functioning of the EU i.e. 'atypical' acts such as communications and recommendations, white and green papers. Conventions and Agreements group together: international agreements signed by the EU and a country or outside organizations; agreements between member states; and interinstitutional agreements, i.e. agreements between EU institutions. It is important to highlight that while regulations are binding in their entirety and directly applicable in all Member states, directives must be transposed, notwithstanding the fact that Member states are under obligation to do so and can be held liable for failure in this regard;
- iii) sources of supplementary law: Besides the case law of the Court of Justice, supplementary law includes international law and the general principles of law. It has enabled the Court to bridge the gaps left by primary and/or secondary law.

The central role played by the European Court of Justice (ECJ) should be highlighted. The ECJ's case law has shaped market and political integration, the balance of power between the organs of the EU, the 'constitutional' boundaries between international, supranational and national authority, and the interpretation of community law favoring the objective of the integration project. Comparatively, the ECJ's impact on its legal and political environment rivals the significance of that of the world's most powerful national supreme and constitutional courts. The treaty system has been 'transformed' through judicial rulings, characterized as the 'constitutionalization' of the regime. This transformation proceeded with the consolidation of the 'constitutional' doctrines of direct effect and supremacy of EU legal rules, first announced by the Court in the 1960s in the judgments given on the affairs of *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, a case in 1963 in which the ECJ recognized the direct effect of Community law on national legislative systems; and a further case in 1964, *Costa v. ENEL*,

which established the principle of inherent supremacy of Community law over national law.<sup>3</sup> The importance of the ECJ to the development of EU law has again been apparent in the recent and notorious ‘Kadi Case’, in which it stated that the EU has formed an autonomous legal order.<sup>4</sup>

## 2.2 The EU as a Community of values and a global actor

More than an organization based on a legal framework, the EU has become also a community founded on values, which it aims to promote not only within its borders, but also in the wider world. In this regard, it is considered that the EU exerts a growing normative influence. As one commentator puts it, *“refocusing away from debate over either civilian or military power, it is possible to think of the ideational impact of the EU’s international identity/role as representing normative power. (...) Conceptions of the EU as either civilian or military power, both located in discussions of capabilities, need to be augmented with a focus on normative power of an ideational nature characterized by common principles and a willingness to disregard Westphalian conventions. (...) The constitution of the EU as a political entity has largely occurred as an elite-driven, treaty based, legal order. For this reason, its constitutional norms represent crucial constitutive factors determining its international identity. The principles of democracy, rule of law, social justice and respect for human rights were first made explicit in the 1973 Copenhagen declaration on European identity, although the centrality of many of these norms was only constitutionalized in the TEU. As Alston and Weiler have argued, ‘a strong commitment to human rights is one of the principal characteristics of the European Union (1999, p.6). Von Bogdandy, Lenaerts and de Smijter support this argument when they observe that a ‘most prominent piece of evidence is the European Council’s decision at its Cologne Summit that a human rights charter should be drafted for the European Union because ‘protection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for her legitimacy’ (...) [and] that ‘some thirty years before this decision, the Court of Justice had already confirmed that ‘fundamental rights [are] enshrined in the general principles of Community law and protected by the Court (...). This combination of historical context, hybrid polity and legal constitution has, in the post-cold war period, accelerated a commitment to*

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<sup>3</sup> E. Stein, “Lawyers, Judges, and the Making of a Transnational Constitution.” *American Journal of International Law*, 75: 1981.

<sup>4</sup> Joined Cases C-402/05 P and C-415/05 P, ECJ Press Release 60/08.

*placing universal norms and principles at the center of its relations with the Member state and the world. The EU has gone further towards making its external relations informed by and conditional on, a catalog of norms which come closer to those of the ECHR and the UDHR than most other actors in world politics”* (emphasis added).<sup>5</sup> Manners adds that it is possible to identify, in the EU’s normative basis, five core norms:

- i) peace, found in key symbolic declarations and the TEC preamble;
- ii) liberty, found in the TEC preamble and in the TEU, Article 6; and
- iii) democracy, rule of law and human rights, all found among the founding principles in the TEU preamble and other provisions in the treaties.

In addition, four minor norms within the constitution and practice of the EU can be added, even if these are more contested:

- iv) social solidarity, found throughout the *acquis communautaire et politique* and particularly in the preambles of the TEU and TEC, the objectives of TEU Article 2 and TEC Article 2;
- v) anti-discrimination, found in Article and Title XI of TEC;
- vi) sustainable development, enshrined in Article 2 TEU, Article 2 and 6 TEC; and
- vii) good governance, found more in policy strategies than in legal rules.

Furthermore, he highlights that a normative basis alone does not make the EU a normative power, but rather that this stems from six ways in which the EU diffuses these norms: unintentional contagion to other political actors, both informational contagion such as policy initiatives, or procedural, such as through a cooperation agreement; transference of these norms in the form of financial rewards, economic sanctions or ‘carrots and sticks’ in relationships with other actors; over-diffusion as result of the physical presence of the EU, such as through its delegations in third parties; and cultural filters based on construction of knowledge and the creation of social and political identity in third parties. He concludes that not only is the EU

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<sup>5</sup> I. Manners, ‘Normative Power Europe: a contradiction in terms?’ *JCMS* 40, 2002, pages 235-58.

constructed on a normative basis but that it has also predisposed itself to act normatively in world politics.<sup>6</sup>

This feature of the EU distinguishes it from other regional blocs and shapes its identity, making it a *sui generis* type of international organization, as a supranational union of partially sovereign nations -but not a federation as such- which nevertheless increasingly aims to have an identity and act as a global player, going much further in shaping both its internal governance and also international relations. In this regard, Marise Cremona discusses the roles that the EU can be considered to play, highlighting five particular examples:<sup>7</sup>

- i) the EU serves as a laboratory and model of regional integration, which “*exemplifies not only the potential substantive scope of regional integration but also its character or depth, in particular the rule-oriented nature of its legal order*”;
- ii) an active player in the global market, both in securing the defense of its own markets and producers, and in offensively using its economic power as a lever to open up markets, offering market access in return for reciprocal advantages;
- iii) a generator and exporter of rules and regulatory models, both in introducing its own regulatory norms to specific third countries as part of market-opening or integration strategies, as well as in its participation in multilateral rule-setting within the WTO and other forums; this role is particularly interesting here, as the EU was an active participant in several of the multilateral conferences referred to in Chapter 1, such as the UNCED, and has recently been granted enhanced status of participation within the UN General Assembly: in addition to its former observer status, the EU shall now present the positions of the European Union and its member states as agreed by them, and shall be (a) allowed to be inscribed on the list of speakers among representatives of major groups, in order to make interventions; (b) invited to participate in the general debate of the General Assembly, taking into account the practice for participating observers; (c) permitted to have its communications relating to the sessions and work of the General Assembly and to the sessions and work of all international meetings and conferences convened under the auspices of the Assembly and of United Nations conferences circulated

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<sup>6</sup> I. Manners, *op. cit.*

<sup>7</sup> M. Cremona, *The Union as a Global Actor: roles, models and identity*, *Common Market Law Review* 41, 2004

directly, and without intermediary, as documents of the Assembly, meeting or conference; (d) permitted to present proposals and amendments agreed by the member states of the European Union; (e) allowed to raise points of order but not to challenge decisions of the presiding officer; (f) also allowed to exercise the right of reply regarding the positions of the European Union. The right to vote has not been granted though, but still this is an innovation regarding the status of regional organizations within the UN, and might open the way to similar requests by other RIAs, which has already been envisaged in the relevant UN declaration.<sup>8</sup>

iv) a ‘stabilizer’ in foreign policy both within Europe and internationally, by exporting values such as democracy, by defending international law and multilateral solutions to problems, by promoting a regional approach both in terms of regional integration and of political stability, such as the case of its relationship with MERCOSUR, discussed further in Chapter 6;

v) finally, as a neighbor which uses enlargement as a tool of foreign policy.

As another commentator argues, by performing these roles the EU ultimately seeks both to legitimize its role as a global player and to promote a model of international relations in which RIAs are recognized as relevant actors.<sup>9</sup> These ‘normative’ influences that the EU attempts to exert and its supposed roles will be discussed further in the next chapters through analysis of the EU’s policies and how they integrate sustainable development.

### **3. Sustainable development in the EU legal framework**

#### **3.1 Treaty basis and EU strategies**

The Amsterdam Treaty also gave greater prominence to sustainable development.<sup>10</sup> In the TEU preamble, the 7<sup>th</sup> recital was amended to include that the Member states were “*determined to promote economic and social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and*

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<sup>8</sup> UNGA A/65/L.64/Rev.1, April 2011.

<sup>9</sup> F. Söderbaum et al, ‘The EU as a global actor and the dynamics of interregionalism: a comparative analysis’, *Journal of European Integration*, 27:3, 2005.

<sup>10</sup> In this regard, it should be noted that this impetus to promote sustainable development has been influenced by Finland and Sweden, two Nordic countries with strong environmental concerns that acceded to the EU in 1995. L. Kramer, ‘Sustainable development in EC Law’, in H. C. Bugge and C. Voigt, *Sustainable development in national and international law*, Europa Law Publishers, 2008, p. 377-96.

*of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields”* (emphasis author’s own); Article B was also amended (and renumbered article 2) to include a direct link to sustainable development: *“The Union shall set itself the following objectives: to promote economic and social progress and a high level of employment and to achieve balanced and sustainable development, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion”*. A direct mention of sustainable development thus replaced the earlier indirect reference to ‘sustainable growth’ and emerged as both an objective and a guiding principle of the whole Union. More amendments were made in the TEC: Article 2 stated that *“the Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member states”* (emphasis added). The previous reference to “harmonious and balanced” was thus replaced by a direct mention of sustainable development and its three pillars; in addition, the new Article 6 stated that *“environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development”*. This provision internalized the principle of integration within the EU legal framework.

The innovations introduced by the Amsterdam Treaty show that sustainable development became a guiding principle of EU policies in general, being granted a place in its charter. Nevertheless, no definition of the meaning of sustainable development has been provided in primary law, being found only in policy documents drafted afterwards. A first ‘Sustainable Development Strategy’ for the EU was presented in 2001, complemented in 2005 by the ‘Declaration on the guiding principles for sustainable development’,<sup>11</sup> which reiterated the commitment to sustainable

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<sup>11</sup> Council document 10255/1/05, available at <http://register.consilium.europa.eu>.

development as a key principle governing all policies and activities. The declaration set key objectives and guiding principles to “serve as a basis for the renewed sustainable development strategy, comprising targets, indicators and an effective monitoring procedure, to be adopted before the end of 2005”: the promotion and protection of fundamental rights; – “placing human beings at the centre of the European Union’s policies”; solidarity – intra and intergenerational equity; democracy and access to justice; public participation in decision-making; involvement of social dialogue, corporate social responsibility and private-public partnerships to foster cooperation and common responsibilities to achieve sustainable production and consumption; precaution - preventive action to avoid damage to human health or to the environment; the ‘polluters pay’ principle; coherence between all policies and good governance; and integration of economic, social and environmental considerations in all policies by using instruments such as balanced impact assessment. The document also expressed a commitment to ensure “*that the EU’s internal and external policies are consistent with global sustainable development and its international commitments*”, implying that the EU should promote it internally, integrating sustainable development into all its policies, but also externally, by improving coherence between internal and external policy objectives, and providing development aid and cooperation at the international level; in addition, recognizing that the concept of sustainable development should be consistent in relation to international declarations and agreements.

In 2006 the Council adopted a renewed Sustainable Development Strategy (SDS), proposing seven key challenges and corresponding targets, operational objectives and actions that should guide policy design and implementation: to limit climate change; to ensure a sustainable transport system; to promote sustainable consumption and production patterns; to improve management and avoid overexploitation of natural resources; to promote good public health; to create a socially inclusive society by taking into account solidarity between and within generations; and to promote sustainable development worldwide and ensure that the EU’s internal and external policies are consistent with global sustainable development and its international commitments – meeting the commitments of the EU regarding internationally agreed goals and targets, in

particular those of the Millennium and Johannesburg declarations and related processes such as the Monterrey Consensus, the DDA and the Paris Declaration on Aid Harmonization.<sup>12</sup>

The Lisbon Treaty also reinforced the status of sustainable development within the EU. The preamble of the new TEU maintained the determination to “*promote economic and social progress for their peoples, taking into account the principle of sustainable development*”. In the common provisions part, Article 3(3) states that the “*Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment*. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child” (emphasis added). On the external dimension, Article 3(5) states that, “*in its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter*.” Moreover, in Title V, covering the general provisions on external action, Article 21.2 determines that the Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to, among other issues: (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty; (f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development; and (h) promote an international system based on stronger multilateral cooperation and good global governance.

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<sup>12</sup> Council document 10917/06. In the context of the follow up procedures established, the Commission published a report, COM(2007) 642, available as Council document 14238/07, in which it evaluates progress of the commitments established at the SDS as showing “relatively modest progress on the ground”, but more encouraging initiatives at EU and member state level.

This treaty reform was complemented in 2009 when the Commission presented a review of the 2006 SDS, assessing the stage of implementation of the strategies on the seven keys areas and proposing new focal points. As regards the external agenda, the external dimension of sustainable development was cited amongst other new challenges which are not or are only marginally covered in the SDS, and which should concentrate on climate change and the promotion of the MDGs. Particular areas where attention should be focused include the contribution to a low-carbon and low-input economy and a shift towards sustainable consumption patterns, as well as the strengthening of the international dimension of sustainable development and efforts to combat global poverty. Among the highlighted policies was the mainstreaming of sustainable development externally through tools such as impact assessments of trade agreements - which will be further discussed below.<sup>13</sup>

The solid legal framework and broad strategies have granted the EU a legal basis to pursue sustainable development through a series of different policies. This shows that sustainable development is nowadays both an objective and a guiding principle and that the bloc aims to integrate it into all policy fields. Nevertheless, the definition of sustainable development is provided in policy statements that represent political commitment, but on the other hand are not legally binding and thus might leave space for political bargaining in the implementation phase.

### **3.2 The EU procedural tools of sustainable development: Impact Assessment procedures**

One innovative instrument developed within the EU as a reflex of the introduction of a legal basis and strategies addressing development has been the creation of a procedural instrument understood as being one of the main practical expressions of this principle, the ‘impact assessment’ procedure. ‘Impact assessment’ (IA) is a procedure which produces a statement to guide decision-making, providing decision-makers with information about likely consequences of proposed activities and requiring decisions to be influenced by such findings, while also providing a mechanism of participation for potentially affected stakeholders in the decision-

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<sup>13</sup> European Commission, *Communication from the Commission to the Parliament, the Council, the ECOSOC and the Committee of the Regions, Mainstreaming sustainable development into EU policies: review of the 2006 SDS*, COM (2009) 400.

making process.<sup>14</sup> This type of procedure first emerged in regard to environmental concerns related to pollution control, and was intended to offer a different form of environmental protection in its procedural requirement of analysis before authorization for public or individual projects, instead of substantive measures relying on regulation and compliance. The main idea behind this instrument is to direct change or reorient decision-making towards more environmentally favorable outcomes, essentially contributing to political planning procedures used as a precautionary tool, encouraging consideration of the likely outcomes in advance, being thus an example of the principle of integration of environmental protection.<sup>15</sup>

The ‘environmental impact assessment’ (EIA) is regarded as ‘first generation procedure’, concerned with mitigating the impact of major development projects rather than maintaining the integrity of the environment. A second generation of assessment came in the form of ‘strategic impact assessment’ (SEA), which extended the scope of analysis to plans and programs of public authorities, and aiming to address both the sources and effects of environmental damage. Nowadays a ‘third generation’ procedure is being developed in international environmental law in the form of ‘sustainability impact assessment’ (SIA), extending the scope to full analysis of social, economic and environmental impacts of proposed measures.<sup>16</sup>

This shift in international environmental law, influenced by the concept of sustainable development, was reflected in the scope and functions ascribed to IAs in two main ways: firstly, facilitating the balancing of competing interests - economic, social and environmental - rather than favoring absolute environmental protection, so that environmental concerns are taken into account in decision making but do not necessarily predominate - the idea of environmental management, instead of preservation, is in line with the more efficiency-oriented vision of the ecological agenda nowadays.<sup>17</sup> In addition, the ‘procedural’ aspect indicates the development of

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<sup>14</sup> P Sands, *Principles of international environmental law* (Cambridge University Press, 2003).

<sup>15</sup> J Holder and M Lee, *Environmental Protection, Law and Policy: Text and Materials*, Cambridge University Press, 2007. The principle of integration of environmental concerns on decision making can be seen in several international documents, i.e., Principle 4 of the Rio Declaration and Article 6 of the Treaty of the European Community (now Article

<sup>16</sup> J Holder, *op. cit.*

<sup>17</sup> J Holder, *op. cit.*

new forms of governance that rely less on command-and-control regulation and more on education, persuasion and social learning as means of achieving (sometimes unforeseen) results.<sup>18</sup>

This form of assessment was mentioned in the UNCED in 1992 and the ILA New Delhi Declaration of 2002 as a tool for the promotion of sustainable development, and has been developed in different ways by different actors in the international scenario, being present in several multilateral organizations, as regards their own activities or in the form of non binding guidelines for national policy, or by national states in varying degrees and scopes.<sup>19</sup> The EU had a relevant role in its implementation and further development, in two important steps: firstly, the EU enacted two Directives which created forms of IA directed at its Member states: the ‘Environmental Impact Assessment’ Directive enacted in 1986<sup>20</sup> was the first binding international instrument to provide details on the nature and scope of EIAs, their use, and participation rights in the process, being considered as a first generation process concerned with mitigating the impact of major development projects. Following, in 2001 the Directive establishing a ‘Strategic Environmental Assessment’ procedure was enacted, representing a second-generation process that extended the scope of assessment to include public plans and programs.<sup>21</sup>

A second step was taken when the Commission of the EU established an IA procedure for its own activities, as the fact had been recognized that it was untenable to require Member states’ compliance with the EIA and SEA procedures when the Commission itself did not apply these

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<sup>18</sup> J Holder and M Lee, op cit.

<sup>19</sup> A form of ex-ante impact assessment was first established in the 1969 National Environmental Protection Act in the United States of America (at the national level), and afterwards emerged in a series of non-binding instruments, such as the UNEP Guidelines of 1978 and 1982 and other International Organizations such as the 1985 OECD Council recommendation C(85)104, and the World Bank. The 1987 ‘Brundtland Report’ identifies EIA as an emerging principle of international law, and the 1992 UNCED (Rio Declaration, principle 17) recognized that EIA, “as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority”, while public participation was also referred to in principle 10; Agenda 21 also makes several references, and endorses the need for individuals, groups and organizations to participate in EIA procedures (para. 23.2); the 2002 WSSD confirmed UNCED’s requirements (para. 18e, 34c and 36i of Plan of Implementation). It also appears in international treaties aside from the EU’s, such as 1982 UNCLOS, Article 206; the 1991 UNECE Espoo Convention which focuses on transboundary environmental effects; the 1998 UNECE Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters; and the 2003 UNECE Kiev Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context.

<sup>20</sup> Directive 85/337/EEC, OJ L175, July 1985.

<sup>21</sup> Directive 2001/42/EC, OJ, June 2001.

measures to its own actions.<sup>22</sup> In this regard, in 2002 a new procedure was introduced, with two innovative aspects: it was to be applied to all policy and legislative proposals of the Commission, thus having in theory a considerably more far-reaching scope and impact; moreover, it was based on a ‘sustainable development’ rationale, meaning that it included the economic and social spheres in addition to the environmental one, and created a mechanism for public participation in the procedure.<sup>23</sup>

The legal development of the Commission’s IA procedure followed a different path than the EIA and SIA Directives - which had as legal basis Article 175 of the EC Treaty (the environmental policy) - as it was based on the idea of sustainable development as a guiding principle and objective of the whole Union, and was further developed on the basis of policy guidelines rather than legal instruments. Two main policy documents were behind this idea: the first SDS in 2001, determining the consideration of the effects of policy proposals in their economic, social and environmental dimensions;<sup>24</sup> and the 2002 ‘Better Regulation Action Plan’<sup>25</sup>, setting out initiatives to promote effective and efficient regulation as part of the efforts of the European Institutions and Member states to fulfill the objectives of the Lisbon Strategy set in 2000.<sup>26</sup>

Based on these two policy plans and their requirements, and following up on a model that was being developed by the Commission’s Directorate General for Trade regarding external trade policies since 1999,<sup>27</sup> in 2002 the Commission issued a communication establishing a “*new impact assessment method [that] integrates all sectoral assessments concerning direct and indirect impacts of a proposed measure into one global instrument, hence moving away from the existing situation of a number of partial and sectoral assessments*”, and being “*developed after examining established procedures in Member states and other OECD countries... to combine the best features of Impact Assessment systems in use elsewhere.*” The communication stressed that the IA was a response to the call for regulatory and sustainable development tools, but that it was

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<sup>22</sup> Five years report on the effectiveness of the EIA, European Commission, DG for Environment.

<sup>23</sup> COM (2002)276.

<sup>24</sup> COM (2001)264.

<sup>25</sup> COM (2002)278.

<sup>26</sup> European Council in Lisbon (March 2000).

<sup>27</sup> DG for Trade had since 1999 been developing a ‘sustainability impact assessment (SIA) for major trade agreement negotiations, mainly the Doha Round of the WTO. See <http://ec.europa.eu/trade/analysis/sustainability-impact-assessments>. Trade SIAs will be further discussed in Chapter 5.

*“an aid to decision-making, not a substitute for political judgment”, which would “not necessarily generate clear-cut conclusions or recommendations, but provide an important input by informing decision-makers of the consequences of policy choices”, being “an integral part of the process of designing policy proposals and making decision-makers and the public aware of the likely impacts.”*<sup>28</sup>

In this regard, some important observations should be made: firstly, in relation to the coverage of the procedure, the aim is to allow decisions to be taken based on *“sound analysis of the potential impact on society and on a balanced appraisal of the various policy instruments”*, and thus *“all Commission legislative and all other policy proposals proposed for inclusion in the Annual Policy Strategy or the Commission and Work Program (...) will be subject to the impact assessment procedure, provided that they have a potential economic, social and/or environmental impact and/or require some regulatory measure for their implementation. A second principle is that of the proposals submitted (...), impact assessment will only be required for: regulatory proposals, such as directives and regulations, and in an appropriate form, other proposals such as white papers, expenditure programs and negotiating guidelines for international agreements that have an economic, social or environmental impact. (...) However, certain types of proposal will normally be exempt from the impact assessment procedure”* (emphasis added). For this purpose, the Communication determined a two-step filtering procedure, based on a short preliminary assessment of all work program proposals, and second an extended assessment of the selected proposals.<sup>29</sup> Analyzing these points, it can be concluded that in spite of the aim of submitting all proposals to an IA procedure, the criteria determined that a proposal would be assessed if it had a significant impact and listed possible exemptions, showing a flexibility of application which could lead to political influence on the decision as to whether or not to submit a proposal for assessment.

Secondly, regarding the impact of the findings of the procedure, the Communication stresses that the IA is an aid to the final policy choice, not a substitute for political judgment. In this regard, the procedure should, firstly, make a recommendation regarding *“a preferred basic approach and*

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<sup>28</sup> COM (2002)276.

<sup>29</sup> COM (2002)276, section 3.

*the optimal policy instrument*” to adopt the proposed measure, and focus on improving the effectiveness of the proposal. Finally, the impact assessment reports will be adopted by the Commission as supporting working documents of the services and transmitted together and in parallel with the proposal to the other institutions.<sup>30</sup> It can thus be inferred that the findings of the assessment, while stressing the impact of the proposed measure and searching for the best way to implement it within the available options, are not binding on the concerned decision-making authority, but should rather be taken into account in the final decisions.<sup>31</sup>

The technical procedural aspects were determined through guidelines issued by the Commission, creating an Impact Assessment Board that each year, with the Secretariat-General and Commission departments, screens all forthcoming initiatives and decides on those for which an Impact Assessment is needed, and determines the key analytical and procedural steps to be taken during the process.<sup>32</sup> In addition, the Commission issued a Communication specifically on the public participation dimension, determining a clear element of the consultation process to be carried out, including a summary of the context, scope and objectives of consultation, and steps for the definition of the target groups to be consulted.<sup>33</sup> Since the start of the activities of the IA procedure, a large number of assessments has been carried out and can be consulted on the website created by the Commission.<sup>34</sup>

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<sup>30</sup> COM (2002)276, sections 4 and 5.

<sup>31</sup> As explicitly stated in the guidelines, *“the IA work is a key element in the development of Commission proposals, and the College of Commissioners will take the IA report into account when taking its decisions. The IA supports and does not replace decision-making – the adoption of a policy proposal is always a political decision that is made only by the College.”*

<sup>32</sup> SEC(2005)791, renewed in 2009, SEC(2009)92. The analytical steps are: identify the problem; define the objectives; develop main policy options; analyze the impacts of the options; compare the options; outline policy monitoring and evaluation. The procedural steps are: 1. plan impact assessment roadmap, set up an Impact Assessment Steering Group and involve it in all IA work phases; consult interested parties, collect expertise and analyze the results; carry out the IA analysis; present the findings in the IA report; present the draft IA report together with the executive summary to the Impact Assessment Board (IAB) and take into account the possible time needed to resubmit a revised version; finalize the IA report in the light of the IAB's recommendations; IA report and IAB opinion(s) go into Inter-Service Consultation alongside the proposal; submission of IA report, executive summary, IAB opinion(s) and proposal to the College of Commissioners; transmission of the IA report and the executive summary with the proposal to the other Institutions; final IA report and IAB opinion(s) published on EU website by SG.

<sup>33</sup> COM (2002)704.

<sup>34</sup> See the Commission Impact Assessment Program website, where a list of all impact assessments carried out to this date is available, including all preparatory documents and reports: [http://ec.europa.eu/governance/impact/key\\_docs/key\\_docs\\_en.htm](http://ec.europa.eu/governance/impact/key_docs/key_docs_en.htm).

IA procedures are welcomed by literature as providing integrated analysis and public participation, both crucial to democratically legitimate and more sustainable decision-making. There are, however, several concerns and pitfalls which have been identified by scholars in this move from representative to participatory forms of governance. Firstly, their ‘power to seduce’, namely the chance for the developer to present the project with ‘environmental gloss’, or merely giving the impression of balancing sustainability aspects without being accountable for the outcome of the project/plan, as IAs can also be used as a tool to legitimize a project or program through increased public consultation and participation.<sup>35</sup> Moreover, two main challenges are faced in bringing relevance to the process: firstly, the question of determining which proposals should be assessed, and the scope of the assessment itself; secondly, the fact that the final findings are not binding but have only to be taken into consideration in the final decision, which might undermine their practical effectiveness.

In addition, some issues are raised regarding the public participation aspects of the IA. Firstly, it is highlighted that participation might actually generate exclusion, given the difficulty in creating institutions and situations in which meaningful public participation can take place: for instance, how to choose and limit the public to be involved? Would inviting only major sensible environmental groups with plentiful resources be truly representative of the ‘public interest’? On the other hand, there are also concerns about the predominance of interest groups like industry, to which environmental groups can be a good counterbalance. Secondly, regarding the choice of the place of the discussion, which should be accessible, and the possibility of using internet-based mechanisms providing online participation, thus having a broader reach. Thirdly, assuring that the framing of the debate is done in language which is clear and accessible to the wider public, since a very technical framing could undermine participation in the discussion. Fourthly, a tension in the sense that public participation can make decision-making and regulatory activity more time consuming and complex, and might lead to incompatible solutions, which in turn simply strengthen the status quo by delaying the proposed measure. Finally, the tendency to rely on quantitative analysis about the baseline, existing conditions, and to thus model possible scenarios, which could mask the subjective opinions and values of those working on the

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<sup>35</sup> J Holder and M Lee, *op. cit.*

assessment procedures, while a more a more qualitative approach could more fully reflect the values and cultures of those affected.<sup>36</sup>

Impact assessment seems like a well established procedural tool within the EU's institutional framework. Nevertheless, its influence seems ambiguous given that there are critical questionable aspects regarding its functioning, and also that the results of the assessment are not binding for the Commission. Therefore, it will ultimately be the political will of authorities to make effective use of IA which will make it a more or less relevant tool, above all taking serious consideration of the impact identified, as opposed to the original idea of the measure envisioned, and also taking on board the recommendations and proposed mitigation measures to be implemented alongside. These issues will be discussed further through the case study presented in Chapters 5 and 6, which will analyze the IA procedure carried out for the negotiations of the EU trade agreements.

#### **4. Concluding remarks**

The EU has come a long way as a project of regional integration. It started with the idea of creating a common market, but even in its initial stage the project had two important features: being based on a strong legal framework, a supranational set of institutions and set of values which influenced its evolution and its actions; and the fact that it always had both an internal and external dimension, even if the latter became further developed as the project evolved. The EU today is a regional bloc that has the achievement of a set of policy goals and having the internal market as one of the instruments as its objectives, and these policies cover a substantial range of issues, both internally and externally. It is a project based strongly on a legal framework, which sees itself as independent from international law, while also interacting with it in several ways, both in incorporating the goals of the international community, but also playing a role in defining the goals of international law and international relations. There are tensions between the legal principles and the political strategies of the bloc and its member states are still present and affect the functioning of the EU and the achievement of its goals. It is a *sui generis* international

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<sup>36</sup> M Lee, 'Public Participation, Procedure and Democratic Deficit in EC Environmental law (2002), *Yearbook of European Environmental law*.

organization, based on a supranational framework having direct effect on member states, which nevertheless retain sovereignty and competences in a wide range of fields, making its functioning a complex task. Finally, it is deemed as an international actor and plays a strong normative role, promoting issues such as sustainable development both internally and through its external relations.

Within this framework, sustainable development achieved a highly relevant place, both as a principle guiding EU action in all spheres of action, but also as an objective of the project itself. The EU has developed a considerable number of provisions that allow it to pursue sustainable development goals within substantive measures, such as integrating environmental considerations into all policy areas, and also to implement it through procedural instruments such as the SIAs. The question remains as to what extent this legal framework basis is in fact being implemented in the practice of relevant EU policies. Answering this question –partially at least- will be the object of the second block of chapters of this thesis, devoted to case studies of regional policy and the common commercial policy.

Given all these features, the EU is considered nowadays to be the most advanced project of regional integration. Thus, it is often portrayed as a model to similar initiatives, such as was the case with the bloc presented in the next section, MERCOSUR.

## **II. The MERCOSUR model of integration**

### **1. Background and main goals of the establishment of MERCOSUR**

The establishment of MERCOSUR only took place in 1991, but regional integration had been on the agenda of Latin America for a long time. Since WWII there had been many attempts at economic integration between the different countries on the continent, the most important ones being the Latin American Free Trade Association (LAFTA) in 1960, replaced by the Latin American Integration Association (LAIA) in 1980, which still works as an umbrella organization for RIAs. In addition, three other RIA had been already established before MERCOSUR: the Central American Common Market (CACM), the Andean Pact and the Caribbean Community (CARICOM).<sup>37</sup> These events, together with the creation of the EU, inspired and paved the way for the creation of MERCOSUR.

In addition, MERCOSUR was a product of the particular socio-political environment in South America in the 1980s, also influenced by the general changes occurring in the international sphere. Firstly, the processes of re-democratization after decades of dictatorship in many of the region's countries, and the need for economic cooperation due to the changes in the economic scenario were determinant factors. The option to create an association founded upon their political systems was one of the reasons why economic integration could not be achieved in the region previously, as the existence of democratic regimes is considered a basic presumption of a new and dynamic phase of the regional process. A debate about the model of integration to be adopted was started, firstly between Argentina and Brazil, the two main players in the Southern Cone, and the choice was made to construct a common economic space that would promote competitive benefits in order to achieve an insertion more adaptable to the international markets. This type of association was the one that responded best to the ambition of those who participated actively in the negotiations.<sup>38</sup> This context was significantly different from the context in which the EU was created, and this is reflected both on the values on which MERCOSUR was founded

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<sup>37</sup> The LAFTA treaty was signed on the 18th of February 1960 and was later replaced by the Latin American Integration Association (LAIA) on the 15th of August 1980. The CACM was created on the 13th of December 1960; the Andean Pact on the 26th of May 1969; and the CARICOM agreement was signed on the 4th of July 1973.

<sup>38</sup> A Dreyzin de Klor, 'The Legal/Institutional Structure of MERCOSUR', in Lixinski et al (eds.), *The Law of MERCOSUR*, Hart, 2010.

-support for democracy and strict intergovernmentalism- and the goals that were envisaged - basically economic integration, although other concerns were also expressed as relating to it.

## 1.2 A common market

In this context, MERCOSUR was created in 1991 by the Treaty of Asunción (TA) signed by Argentina, Brazil, Paraguay and Uruguay. MERCOSUR has the nature of a regional trade agreement, created as an exception to the MFN principle under the discipline of GATT Article XXIV. However, it was first notified to the GATT in 1992 under the ‘enabling clause’, even though the Committee on the Regional Trade Agreements (CRTA) has to this day not issued an official approval. The TA is also registered by the LAIA as the 18<sup>th</sup> Economic Complementarity Agreement (ACE n°18).<sup>39</sup>

The rationale of MERCOSUR was inspired by the success of other regional integration initiatives, mainly the European Union (a more advanced and complex project of integration), as it aimed not only to establish a free trade area, but to form a common market. In addition, an underlying development rationale can be observed in the wording of the TA preamble, which stated that the parties considered that *“the broadening of the current dimensions of national markets through integration is a fundamental condition to accelerate economic development with social justice”*; *“this objective should be achieved through more effective use of available resources, the preservation of the environment, improving physical interconnections, the macroeconomic policy coordination and complementarity of the different sectors of the economy, based on the principles of gradualism, flexibility and balance”*; *“taking into account international developments, particularly the consolidation of large economic spaces and the importance of ensuring adequate international insertion for their countries and expressing that this integration process is an appropriate response to such events”*; *“aware that this Treaty should be regarded as a further step in the effort towards the progressive development of Latin American integration, according to the objective of the Montevideo Treaty of 1980”*; *“convinced of the need to promote scientific and technological development of States Parties and to modernize their economies to expand the range and quality of goods and services to improve the*

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<sup>39</sup> LAIA webpage: <http://www.aladi.org/>.

*lives of its inhabitants”; finally affirming “political will of establishing the basis for ever closer union among its peoples in order to achieve the above objectives”.*

The common market was envisioned in the first articles of the TA. Article 1 stated the objective of the treaty: *“The States Parties hereby decide to establish a common market, which shall be in place by 31 December 1994 and shall be called the ‘common market of the southern cone’ (MERCOSUR). This common market shall involve: The free movement of goods, services and factors of production between countries through, inter alia, the elimination of customs duties and non-tariff restrictions on the movement of goods, and any other equivalent measures; The establishment of a common external tariff and the adoption of a common trade policy in relation to third States or groups of States, and the co-ordination of positions in regional and international economic and commercial forums; The co-ordination of macroeconomic and sectoral policies between the States Parties in the areas of foreign trade, agriculture, industry, fiscal and monetary matters, foreign exchange and capital, services, customs, transport and communications and any other areas that may be agreed upon, in order to ensure proper competition between the States Parties; The commitment by States Parties to harmonize their legislation in the relevant areas in order to strengthen the integration process.”* Article 2 stated that *“the common market shall be based on reciprocity of rights and obligations between the States Parties”*, but this provision was softened by Article 6 which recognized the need to grant differential treatment to the two smaller economies in the bloc, stating that *“certain differentials in the rate at which the Republic of Paraguay and the Eastern Republic of Uruguay will make the transition. These differentials are indicated in the trade liberalization program (Annex I).”*

Thus, it can be said that the logic in creating MERCOSUR was very similar to the EU’s objectives in the Treaty of Rome, and inspired by the achievements of the EU – the indirect reference in the preamble was clear. Nevertheless, in contrast to the broad and ambitious objectives stated in the Preamble, with references to issues such as social justice and environmental protection, the actual scope of the legal competences attributed to the bloc was drafted in a more limited way, with the establishment of the common market as the main objective/task expressed in order to achieve such progress. In this regard, although many authors have attempted to trace parallels with the European Union, the simplicity of the provisions in the

founding treaties of MERCOSUR offer a considerable contrast to the European project which cannot be taken for granted and which has severe consequences for the functioning and rationale of the bloc. From the European Union's inception, the creation of the common market was seen as an instrument for the achievement of "a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member states", to which several policies were assigned, while in MERCOSUR these other goals remained limited to the extent that they related to the common market goal.

### 1.3 The institutional structure

An interim institutional framework was created to start building the regional integration process, establishing parts of the administration and executive organs necessary to perform their functions in this period.<sup>40</sup> During the transitory phase, the regulation of issues by the members of MERCOSUR reflected on their own positions in international relations with respect to the independence and sovereignty of each state, corresponding to a traditional intergovernmental organization. This first period<sup>41</sup> developed into an integrated model of the two political bodies with decisive power, the Common Market Council- the governing body, and the Common Market Group- the executive body, as well as a third body without decision-making capacity: the Joint Parliamentary Commission. As an auxiliary body, an Administrative Secretariat was established with the purpose of supporting the GMC. Likewise, one of the TA annexes included ten Subsidiary Working Groups of the GMC.

In 1994 the Ouro Preto Protocol (POP) was signed,<sup>42</sup> further developing the institutional structure of the bloc, but without advancing towards supranationality, rather establishing expressively the model upon which MERCOSUR was to be based in its intergovernmental model. The POP granted legal personality to MERCOSUR to "*practice all the necessary acts for the development of their objectives, in particular to contract, acquire, or transport immovable and movable*

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<sup>40</sup> TA, Article 9.

<sup>41</sup> The transition emerges from Article 18, but can also be seen in Arts. 3 and 14 of the TA, and numeral 3) of Annex III.

<sup>42</sup> Approved on 17/12/94. In force since 15/12/95.

*goods, compare in discretion, conserve funds and make transfers*”, and also to celebrate agreements of seat.<sup>43</sup> The structure of MERCOSUR after the POP was comprised of the following organs: The CMC and the GMC, mentioned above; The MERCOSUR Trade Commission (CCM); The Joint Parliamentary Commission (JPC); The Socio-Economic Consultative Forum (SECF); and the Administrative Secretariat of MERCOSUR.

MERCOSUR has thus from the outset been a highly political organization and after initial success during the early 1990s, the process started to face difficulties in moving on.<sup>44</sup> Nevertheless, it was not abandoned, and in the year 2000 the member states decided to re-launch efforts on the bloc,<sup>45</sup> committing themselves to the achievement of the initial goals, such as macroeconomic policy coordination and adoption of a common trade policy. Since then, significant progress has been made: the conflict resolution system has been improved with the creation of the ‘Permanent Court of Appeals’;<sup>46</sup> the institutional structure has been reformed, with the addition of new bodies, such as the ‘Commission of Permanent Representatives (CRPM)’<sup>47</sup> and the recently created Parliament; furthermore, an enlargement process began in 2006 for the accession of Venezuela, which was completed in 2012.<sup>48</sup>

#### **1.4 MERCOSUR as a legal order**

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<sup>43</sup> See POP, Cap. II, Article 35.

<sup>44</sup> In this regard, it can be pointed out that currently MERCOSUR has only achieved the status of a customs union, with exceptions and non-tariff barriers still hindering trade flows between Member states, aggravated by the recent financial crisis and the threat of a new protectionist wave.

<sup>45</sup> Series of decisions of the ‘Common Market Group’ signed in Buenos Aires on June 29<sup>th</sup> 2000. See more details in the Institute for the Integration of Latin America and the Caribbean - INTAL Report on MERCOSUR No 6, Buenos Aires, 2000, available at [http://www.iadb.org/Intal/aplicaciones/uploads/publicaciones/i-MERCOSUR\\_Report\\_6.pdf](http://www.iadb.org/Intal/aplicaciones/uploads/publicaciones/i-MERCOSUR_Report_6.pdf)

<sup>46</sup> Established by the ‘Olivos Protocol’, signed in 2002.

<sup>47</sup> Created by CMC Decision 11/2003, this body is a subdivision of the Council and performs the role of being a permanent representation of Member states in the seat of MERCOSUR in Montevideo; it is composed by one representative of each Member state and has among its functions to advise the Council on matters related to the institutional functioning of the bloc and also on its external relations; the president of the commission may also play the role of representative of the bloc in its relations with third parties.

<sup>48</sup> For an extended analysis of the negotiation process of Venezuela’s accessing, see F de Andrade Correa and L Lixinski, ‘The Legal Future of MERCOSUR’, in L Lixinski et al, *The Law of MERCOSUR*, Hart Pub., 2010. In addition, Chile, Colombia, Ecuador and Bolivia are associate countries, and the latter is being considered for full membership.

The establishment of MERCOSUR represented the formation of a legal order.<sup>49</sup> The TA included the basis for this, and over the years the legal personality of MERCOSUR was reinforced, with important changes introduced to the legal framework. As in other integration processes, in MERCOSUR the primary law consists of the founding treaties. These are formally international treaties which must be ratified by the Member states to enter into force, and frequently are called ‘Protocols’ (article 41 POP). MERCOSUR primary law treaties perform a dual function: on the one hand, these agreements have a public international law nature and thus impose obligations on member states. On the other hand, these agreements are also internally applicable to citizens. In addition to that, it must be acknowledged that parallel agreements have been concluded with the associate countries.<sup>50</sup> Among the key instruments integrating the MERCOSUR Primary Law are The Treaty of Asunción and its five Annexes (1991); The Ouro Preto Protocol (1994); The Brasília Protocol on the Resolution of Disputes (1991);<sup>51</sup> The Olivos Protocol for the Resolution of Disputes (2002);<sup>52</sup> and the Protocol establishing the MERCOSUR Parliament (2005).<sup>53</sup> MERCOSUR secondary law is comprised of norms created by the main bodies of the bloc, and it can be said to derive from primary law, in the sense that the allocation of legislative competences and the form that these acts may take are defined in the founding treaties.

The competence to adopt legal acts is shared by different bodies. According to the POP, the three bodies with legislative power are:<sup>54</sup>

i) The CMC: has a clear role with regard to MERCOSUR Primary law, because it has “to supervise the implementation of the Treaty of Asuncion, its protocols, and agreements signed within its context”.<sup>55</sup> Among its legislative functions, it is supposed to rule on proposals

<sup>49</sup> J.A. Vervaele, ‘MERCOSUR and regional integration in South America’, in *International and Comparative Law Quarterly*, Volume, 54 Issue, 2, 2005.

<sup>50</sup> MERCOSUR and Chile signed the ‘Acuerdo de Complementación Económica MERCOSUR-Chile’ on 25<sup>th</sup> June 1996 and MERCOSUR concluded the ‘Acuerdo de Complementación Económica MERCOSUR-Bolivia’ with Bolivia on 17<sup>th</sup> December 1996.

<sup>51</sup> The Brasilia Protocol is available at: [http://www.sice.oas.org/Trade/MRCSR/brasilia/pbrasilia\\_e.asp](http://www.sice.oas.org/Trade/MRCSR/brasilia/pbrasilia_e.asp).

<sup>52</sup> The Olivos Protocol is available at: [http://untreaty.un.org/unts/144078\\_158780/5/7/13152.pdf](http://untreaty.un.org/unts/144078_158780/5/7/13152.pdf).

<sup>53</sup> MERCOSUR/CMC/DEC. N° 23/05. Protocolo Constitutivo del Parlamento del MERCOSUR. The Protocol is available (in Spanish) at: <http://www.parlamentodelMERCOSUR.org>.

<sup>54</sup> Apart from the three bodies mentioned, the institutional setting-up of MERCOSUR is completed by the Economic and Consultative Forum (Forum), the Administrative Secretariat (Secretariat), the Parliament and the Permanent Court of Review.

<sup>55</sup> POP, article 8.

submitted to it by the CMG. Besides, it exercises the legal personality of MERCOSUR and can conclude agreements with third countries or international organizations. Legislative acts emanating from the Council “shall take the form of Decisions which are binding upon the States Parties.”<sup>56</sup>

ii) the CMG: roles include<sup>57</sup> to propose draft Decisions to the CMC; to approve or reject MERCOSUR norms as proposed by the CMC. The decisions of the CMG shall take the form of Resolutions that are binding upon the States Parties.<sup>58</sup> As executive functions, the Common Market Group must take the measures necessary to enforce the Decisions adopted by the Council. It is also necessary to mention that in the international sphere, the CMG can also negotiate agreements on behalf of MERCOSUR with third countries, groups of countries and international organisations when such duty is expressly delegated to it by the Council of the Common Market and within the limits laid down in special mandates granted for that purpose. In these cases, the Common Market Group shall sign the aforementioned agreements. Also when authorised by the Council of the Common Market, the Common Market Group may delegate these powers to the MERCOSUR Trade Commission.

iii) The MTC: Article 20 POP states that decisions of the MTC shall take the form of Directives or Proposals, also binding upon the States Parties.<sup>59</sup>

Therefore, MERCOSUR secondary law consists of these various acts lay down by MERCOSUR bodies, as well as agreements with third countries and international organizations. Similarly to the framework in the EU, within MERCOSUR there are also ‘atypical acts’ or, in other words, acts which originated at different levels, the legal nature of which is not clear,<sup>60</sup> such as the

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<sup>56</sup> POP, article 9.

<sup>57</sup> POP, article 14.

<sup>58</sup> POP, article 15.

<sup>59</sup> Article 16. III of the Ouro Preto Protocol stipulates: “It shall be the task of the MERCOSUR Trade Commission, a body responsible for assisting the Common Market Group, to monitor the application of the common trade policy instruments agreed by the States Parties in connection with the operation of the customs union, as well as to follow up and review questions and issues relating to common trade policies, intra-MERCOSUR trade and third countries. To take decisions connected with the administration and application of the common external tariff and the common trade policy instruments agreed by the States Parties; VI. To report to the Common Market Group on the development and application of the common trade policy instruments, on the consideration of requests received and on the decisions taken with respect to such requests”.

<sup>60</sup> In the European Union, atypical acts are “legal instruments which do not feature in the nomenclature of Article 249 of the Treaty establishing the European Community (EC Treaty)” (See: European Union <http://europa.eu/scadplus/leg/en/lvb/l14535.htm>). Some of these acts are mentioned in the Treaty, such as Rules of Procedure, while others have emerged in practice.

Socio-Laboral Declaration, which was adopted by the Member states as a programmatic document, but was nevertheless frequently interpreted and applied by national courts.<sup>61</sup> Whereas the MERCOSUR primary law is undoubtedly binding and there is no need for the Member states to undertake internal measures, Decisions, Resolutions, and Directives, must be internalized by each individual member state according to their legislative procedures.

The institutional innovation introduced after the re-launching of the process in 2000 can be taken as an additional incentive for the improvement of MERCOSUR's legal system. With the introduction of the Permanent Court of Review through the Olivos Protocol in 2002, the dispute settlement system gained in certainty. Apart from solving disputes between the parties, the Court also has an advisory function, as the Supreme Courts of member states can request legal opinions concerning interpretation of MERCOSUR rules. These opinions, while still relatively few in number, might contribute to the harmonization of the rules and exert influence upon the national laws of member states regarding the application of MERCOSUR law.

Furthermore, the establishment of the MERCOSUR Parliament must also bring modifications to the MERCOSUR legal system.<sup>62</sup> According to the Protocol establishing the Parliament, this body will have advisory as well as normative functions. Article 19 of the Protocol stipulates that the acts that the Parliament can adopt are: opinions; statements; recommendations; reports; and provisions. In this list it is necessary to distinguish between the acts adopted by the Parliament in the legislative process and the drafting of rules to be subsequently adopted by other bodies.<sup>63</sup> Moreover, in an advisory role, it is expected that the Parliament will give advice, prepare reports, and adopt statements and recommendations. With regard to the procedural aspects, the regulation of the MERCOSUR Parliament determines the participation of this legislative body in the law-making process. The Protocol also regulates the procedure to follow when dealing with the intervention of the Parliament and is prescriptive on decisions, resolutions and directives issued

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<sup>61</sup> H.R. Mansueti has examined in detail the implications of the Socio-Laboral Declaration, available (in Spanish) at: <http://200.16.86.50/digital/34/Tesis/Mansueti1-1.pdf>. H. R. Mansueti, *Naturaleza jurídica y proyección institucional de la declaración sociolaboral del MERCOSUR*. Tesis (doctorado) - Universidad Católica Argentina (Buenos Aires). Facultad de Derecho y Ciencias Políticas, 2002.

<sup>62</sup> The European Union provided funding for the installation and functioning of the Parliament. See: European Commission. *MERCOSUR Regional Strategy paper*, available at: [http://ec.europa.eu/external\\_relations/MERCOSUR/rsp/07\\_13\\_en.pdf](http://ec.europa.eu/external_relations/MERCOSUR/rsp/07_13_en.pdf).

<sup>63</sup> See the details of the functions of the Parliament of MERCOSUR at: <http://www.parlamentodelMERCOSUR.org>. The internal organization of the Parliament is regulated by the MERCOSUR/PM/SO/DISP. 07/2009.

by the CMC, the CMG and the MTC, respectively, in the event that they require involvement of national parliaments in the implementation of standards. In addition to these legislative functions, the Parliament may also request an advisory opinion to the Permanent Court of Revision.<sup>64</sup>

Despite these innovations, MERCOSUR's legal framework represents a construction of public international law, differing substantially from the EU model that has formed an autonomous legal order. In addition to the nature of MERCOSUR law, the case law emanating from MERCOSUR bodies has not taken the same approach as the ECJ towards supremacy and direct effect. Nevertheless, two awards in particular are noteworthy. The first, issued in 2005 by the *ad hoc* Tribunal, underlined the different norms to be taken into account in solving a dispute between two different Member states (in light of Article 19 of the Protocol of Brasilia). The Tribunal clarified (on the basis of previous awards) that, apart from MERCOSUR norms, tribunals should apply the norms and principles of Public International Law, but always in accordance with the MERCOSUR legal system. This implicitly recognized that the MERCOSUR legal system is something more than a typical public international legal order.<sup>65</sup> The second, delivered in the case related to the *Prohibition of the importation of remolded tires from Uruguay* in 2005, emphasised the idea of the law of MERCOSUR as an autonomous legal order. In this case, the Court stated that “*notwithstanding the fact that the principles and provisions of international law are included in the Olivos Protocol as one of the laws to be applied (Article 34), its application must be only on a subsidiary (or in the best case supplementary) basis and only where applicable to the case, and never as a direct and first choice, as in the case of a law on integration (MERCOSUR law) or a Community law (such as a recommendation), which is not yet the case with MERCOSUR law due to the absence of supranationality*”.<sup>66</sup>

These awards show that MERCOSUR law has a degree of autonomy from other branches of law. Nevertheless, at its current stage of development, it is difficult to perceive the MERCOSUR legal system as a communitarian law according to the founding treaties (the integration and the

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<sup>64</sup> Protocol establishing the Parliament of MERCOSUR, Article 13.

<sup>65</sup> The award N° 1/2005 is available at: [http://www.sice.oas.org/Dispute/MERCOSUR/laudo10\\_s.pdf](http://www.sice.oas.org/Dispute/MERCOSUR/laudo10_s.pdf).

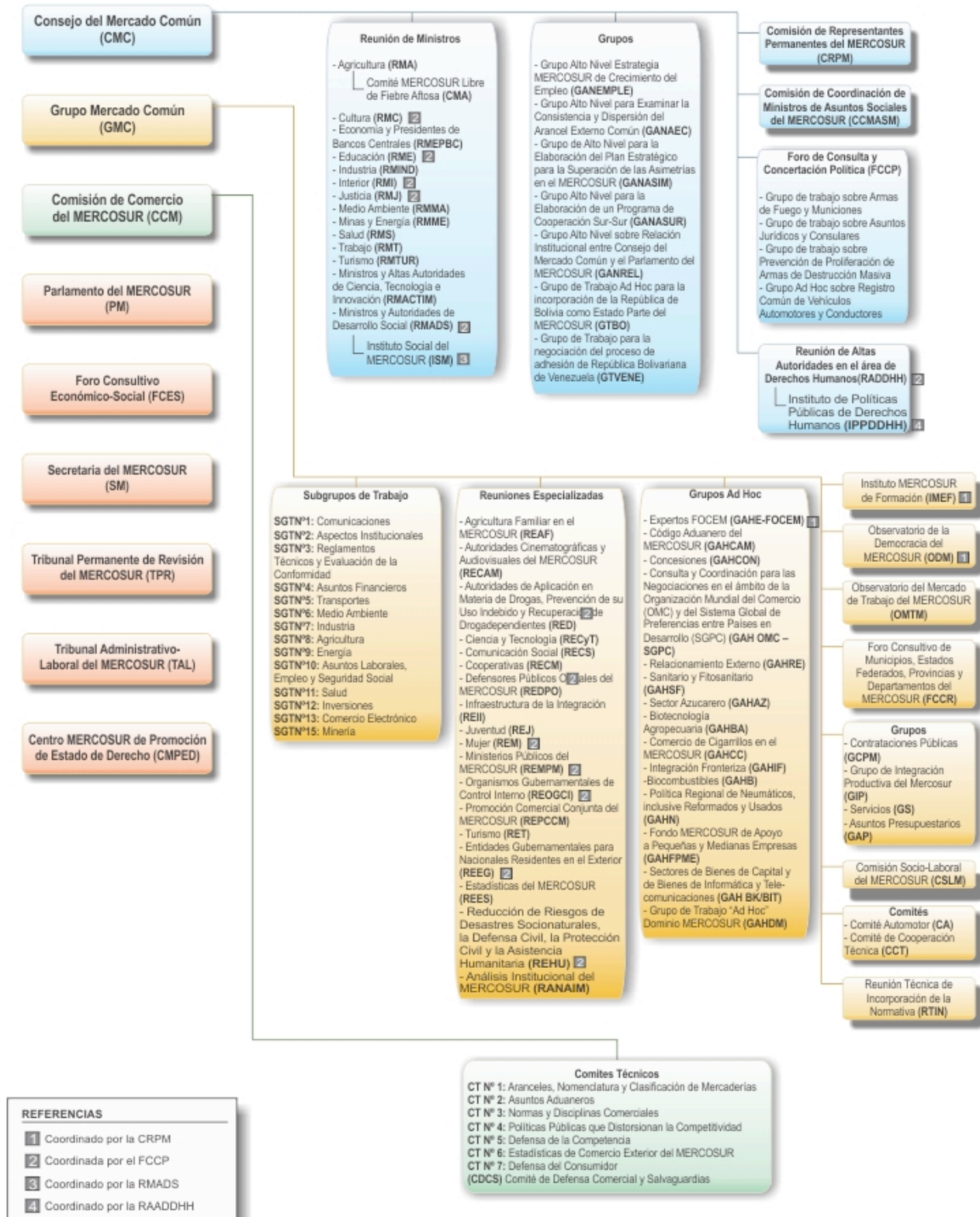
<sup>66</sup> Award issued by the Permanent Review Tribunal constituted in the Appeal Review presented by the Republic of Uruguay to a previous award by the Arbitral Tribunal *ad hoc* adopted on October 25, 2005. See F. Morosini, ‘The MERCOSUR and WTO Retreated Tires Dispute: rehabilitating regulatory competition in international trade and environmental regulation’, *Society of International Economic Law, working paper 42/2008*, available at: <http://www.ssrn.com/link/SIEL-Inaugural-Conference.html>

harmonisation of the internal legislations) in a broader sense. In addition, the POP contains a forum choice clause in Article 1.2, according to which a member state can always choose whether to resort to the MERCOSUR system for dispute settlement or to a different mechanism to which it is a party, such as the multilateral dispute settlement system of the WTO; once the choice has been made and the procedures started, the party cannot resort to a second forum.<sup>67</sup>

In addition to the formal legal order, MERCOSUR also works on the basis of different governance mechanisms, which often function as coordination meetings for national authorities in order to promote development of common policies and approximation of national laws. These mechanisms are known as ‘Working Groups’, Meetings of Authorities, *ad hoc* groups and others, comprising a complex structure which is outlined below:

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<sup>67</sup> For a more detailed analysis of the MERCOSUR legal order, see B. Olmos Giupponi, ‘The sources of Law in MERCOSUR, analysis of the current situation and improvements for the future’, in L Lixinski et al, *The Law of MERCOSUR*, Hart, 2010.



Thus, it can be said that MERCOSUR as a legal order is much weaker in comparison to the EU, given that its norms have neither supremacy nor direct effect over its Member states, that implementation is delegated to states without a strong mechanism of control and that, in addition to the fact that there is no MERCOSUR Court in the model of the ECJ, with authority to make bold interpretations of communitarian law so as to advance the objectives of the bloc, the Member states are allowed to recourse to the WTO DSB instead of MERCOSUR. All this leads to the conclusion that MERCOSUR's legal order, despite existing as a (quasi) autonomous order, is much weaker than the EU's legal order, and this leads the bloc to be a highly political organization.

### 1.5 A community of values?

Despite the formal legal structures' focus on the economic aspects of integration, it can be argued that MERCOSUR is also a community of values. The references to development and social justice in the TA are more general, but one value at least can be cited as fundamental: democracy. The importance of democracy had already been stated in the TA, but this connection became even more evident in 1996 as the bloc played a crucial role in overcoming the first serious attempted *coup d'état* in Paraguay. That incident led to approval of the Ushuaia Protocol on Democratic Commitment in 1998, which contained a 'democratic clause' conditioning membership in MERCOSUR to the existence of fully democratic institutions. This clause stipulates that "*any change in the democratic regime constitutes an unacceptable obstacle to the continuation of the process of integration underway with respect to the affected member state*". For such cases, the clause provides for consultations among member countries and the adoption of measures, including the suspension of rights and obligations for the country whose democratic process has been interrupted.

Nevertheless, the Ushuaia Protocol is criticized for the political character of its provisions, since its clauses do not specify the criteria by which to identify a threat to or rupture in democratic order, leaving this to be determined by the Member states.<sup>68</sup> While this political character is

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<sup>68</sup> ML Olivar Jiménez, 'La Adhesión de Nuevos Miembros AL MERCOSUR: una cuestión fundamental para la evolución de la organización' in E Accioly (ed), *Direito no século XXI* (Curitiba, Juruá, 2008); the author discusses

typical of MERCOSUR arrangements, an example of the controversy it could generate is the recent suspension of Paraguay from membership in 2012 in the concomitant accession of Venezuela.<sup>69</sup>

## 2. Current challenges in MERCOSUR

Having explained the current legal and institutional structure of MERCOSUR, it is also important to highlight that the bloc is facing important challenges which might change these structures and its functioning in the future. In this regard, three main challenges should be mentioned: the challenge of institutional deepening, regarding the role and functioning of the MERCOSUR Parliament; the task of deepening the level of integration of non-economic objectives which - despite the rhetoric- are still stalled, such as environmental protection; and the more important, structural challenge of repositioning, concerning the creation of other governance structures in the continent, chiefly the Union of South American Nations (UNASUR, *Unión de Naciones Suramericanas*) and the Community of Latin American States (CELAC, *Comunidad de Estados Latino Americanos y Caribeños*).

### 2.1 The Challenge of institutional deepening of MERCOSUR: The Parliament

The operation of the Parliament aims in many ways to bridge the ‘democratic deficit’ in MERCOSUR, bringing the bloc and its policy- and law-making closer to the national polities. The objective to be achieved is thus representation, which is intended to happen through direct elections of representatives for positions in PARLASUR. At present, the ‘MERCOParliamentarians’ are still drawn directly from national parliaments (in the proportion of 18 parliamentarians per Member State), with the exception of Paraguay, which elected its representatives in 2008. However, direct elections are scheduled in the near future, and the main issue to be resolved concerns representation. Because MERCOSUR is an asymmetric integration

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whether it should be limited to a threat to the democratic institutions of the country, or also include situations such as breach of fundamental rights obligations by that country.

<sup>69</sup> See, in this regard, D. Ventura, J. Onuki and M. Medeiros, ‘Internalização das normas do MERCOSUL’, *Série Pensando o Direito*, vol. 45. Brasília: Ministério da Justiça, 2012. For a more comprehensive examination of the need to embed other values into MERCOSUR, see D. Ventura and M. Rolim, ‘Os Direitos Humanos e o Mercosul: Uma Agenda (Urgente) para além do Mercado’, in P. Borghers and L. Pires Ferreira Junior, *Direitos Humanos e Direito Internacional*, Juruá, 2006.

process, and there is great disproportion in size and population among its Members, it was not possible to make the number of parliamentarians for each Member State proportional to their corresponding population. A suggestion for simple proportionality would have led Brazil to have well over 50% of the seats in the Parliament, which could have had disastrous political consequences, jeopardizing Brazil's efforts to prove that its size, population and economic power would not undermine the role of other Member states. In the end, the agreed proportions were as follows: 18 parliamentarians each for Paraguay and Uruguay, 26 for Argentina and 37 for Brazil, in the first phase of the institution's functioning; in 2014, the number of parliamentarians for Argentina and Brazil will be increased to 43 and 75 representatives, respectively. This means that no single Member State 'controls the majority' of the Parliament (as Brazil will have 75 parliamentarians out of a total of 154). Even though the idea behind PARLASUR is precisely to prevent the formation of 'national interest blocs', and instead to represent the people of MERCOSUR, there was clear care taken in avoiding one Member State having a majority of seats, addressing any concerns regarding this arrangement.

Furthermore, a second issue to be clarified is its role, as the Parliament is slowly developing into the voice of MERCOSUR, not only inwardly (that is, towards its citizens), but also outwardly. In this sense, it is noteworthy that the Parliament is organized around five Secretariats, and that one of these aims specifically to develop MERCOSUR's 'external relations', be it with third countries, international organizations such as the Organization of American States or the United Nations, or other regional integration schemes, including the EU – there is a EURO-LAT Parliamentary Assembly which gathers representatives of Parliaments of the two regions, and PARLASUR now sends its representatives.<sup>70</sup> Regarding the internal dimension of its activity, the Parliament has already started to fulfill its mandate to become the main forum for MERCOSUR debates. It has established Commissions on the following topics: legal and institutional affairs; economic, financial, commercial, fiscal and monetary affairs; international, interregional and strategic planning affairs; education, culture, science and sports; labor and employment policies, social security and social economics; sustainable development, territorial planning, housing,

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<sup>70</sup> See [http://www.europarl.europa.eu/intcoop/eurolat/default\\_en.htm](http://www.europarl.europa.eu/intcoop/eurolat/default_en.htm). The last meeting was held in Brussels in October 2011, and among the issues taken for discussion was the signature of association agreements between the regions and how these constituencies can act in order to solve the impasses often reached, as it is the case regarding the EU – MERCOSUR negotiations.

health, environment and tourism in the region; citizenship and human rights; internal affairs, security and defense; infrastructure, transportation, energy resources, agriculture, cattle breeding and fisheries; budgetary and internal affairs. The Parliament has thus become a hopeful agent of transformation in MERCOSUR, but the challenge remains to create the conditions which will allow this new institution to meet all of these expectations.

## **2.2 A challenge of substantive deepening: the integration of sustainable development considerations and the incipient and environmental agenda**

The Asuncion Treaty included the protection of the environment in the preamble, and in 1992 a ‘special environmental meeting’ was created to work on this issue. In 1995 this was converted into a working group of the Common Market Council (SGT6) in which Member states inform and evaluate their positions on environmental concerns in the international scenario, aiming to make proposals to safeguard the environment in the context of the bloc, making environmental concerns compatible with the economic and commercial policies.

In this regard, a Framework Agreement on the Environment was signed in 2001, reinforcing the commitments of the parties to the Rio Declaration of 1992 and aiming to promote environmental cooperation and sustainable use of natural resources. In addition, in 2004 a Meeting of the Environmental Ministers of Member states was established in order to create a political channel to the environmental program of the bloc, resulting in, amongst other things, the signature of an ‘Additional Protocol to the Framework Agreement on Cooperation and Assistance on Environmental Emergencies’. Also within the framework of the Meeting of Environmental Ministers, a ‘Declaration on Cleaner Production Processes for MERCOSUR’ was signed in 2003, leading to the issuance of Decision 26/2007 of the Common Market Council regarding a ‘Policy of Promotion of Sustainable Production and Consumption on MERCOSUR’. Based on these documents, the SGT6 created a working plan focused on two axes: promoting sustainable production and consumption measures in priority sectors, especially SMEs, and providing information about those measures to production sectors and consumers.

In spite of these initiatives, environmental protection is still weak at the regional level, and much more effort must be made in order to create stronger levels of regulation, especially considering that the region has one of the greatest biological diversity and natural resources on the planet. The implementation of the Framework Agreement through more specific conventions on important issues for sustainable development, and also the creation of a regional strategy on this issue with both internal and external axes, similar to what has been done at the European Union, would be important and urgent steps to take in order to further integrate an environmental dimension to MERCOSUR.

### **2.3 The Challenge of relevance within a multilayered integration system**

Another important challenge concerns the creation of other governance structures in Latin America recently, namely The Community of Latin American and Caribbean States (Comunidade de Estados Latino-Americanos e Caribenhos – CELAC) in 2010, and the Union of South American Nations (UNASUR) in 2008. These new experiences of integration, while still quite recent and not completely developed, might have important outcomes in the configuration of regional integration in Latin America. The creation of these organizations is significant to the extent that, in addition to the ‘spaghetti bowl’ effect in trade agreements, it can be argued that Latin America seems to be moving towards a multilayered scheme of regional integration, with at least three identifiable layers: political, policy, and trade/economic integration:

#### **i) The CELAC**

The CELAC was created in 2010 as an integration of the two main forums of political consultation in the region, the Rio Group and the *Latin American and Caribbean Summit on Integration and Development* (CALC). It is made up of all 33 countries in Latin America, and that is where its relevance lies: all the countries of the region are involved, including Cuba, but the North American countries -USA and Canada- are excluded, as well as the dependencies of France, the Netherlands, the UK and Denmark. In this regard, it can be said that it aims to reduce the influence of the United States and other ‘northern’ actors on the politics and economics of

Latin America, and to strengthen the influence of relevant regional players, such as Brazil, in what would be an alternative to the Organization of American States (OAS).

The official establishment of CELAC took place in December 2011 at a summit in Venezuela, where a Declaration was approved containing the parties' commitment to the new organization and stating that "*CELAC must move forward in the process of political, economic, social and cultural integration, based on a wise equilibrium between the unity and diversity of our peoples, so that the regional integration mechanism can become the ideal space to express our rich cultural diversity and also the forum to reaffirm the Latin American and the Caribbean identity, our common history and our ongoing struggles for justice and liberty*" (para. 21). In addition, an Action Plan (Caracas Action Plan for 2012) was approved, containing actions to be taken in the following areas: (i) financial crisis and new financial architecture; (ii) complementarity and cooperation between the regional and subregional integration schemes: actions in order to enhance complementarity and avoid overlapping in relation to activities, and enhance dialogue in four main axes: economic/commercial -including trade facilitation, transport and customs procedures, production, social and institutional, and cultural; (iii) energy; (iv) infrastructure and physical integration, telecommunications, and cross-border integration; (v) social development, including promotion of the MDGs at the regional level; (vi) environment, including coordination for Rio+20; (vii) humanitarian assistance; (viii) migration; (ix) culture; (x) technology and communications. All the initiatives have strong political connotations, being based on the formation of groups of experts or ministerial unions, aiming to make recommendations and coordinate policy.

Despite the ambitious action plan, and typically of Latin American integration initiatives, the functioning of the CELAC is still uncertain and is to be observed over time. Nevertheless, the most likely scenario is that, inheriting the competences of its predecessors, the Rio Group and the CACL, CELAC will be a forum of political concertation and cooperation among its members, with the novel element of gathering all Latin American countries, which, despite their diversity, are all developing countries and thus supposedly have common interests to promote through joint initiatives. Furthermore, despite strong criticism from media and some sectors of civil society as yet another integration initiative, CELAC has received support from the governments of the

region, including Brazil, so that it will perhaps establish itself in the future as the upper layer of the new framework of regional integration in the region, the political layer – one commentator having argued that in years to come it could be the Latin American equivalent of the Council of Europe.<sup>71</sup>

ii) The UNASUR

On 23<sup>rd</sup> May 2008, the Heads of State of the 12 South American countries signed the treaty creating the Union of South American Nations. UNASUR was created to fulfill several objectives, included in Articles 2 and 3 of the founding Treaty, which state the general and specific aims of the organizations respectively: Article 2: *“The objective of the South American Union of Nations is to build, in a participatory and consensual manner, an integration and union among its peoples in the cultural, social, economic and political fields, prioritizing political dialogue, social policies, education, energy, infrastructure, financing and the environment, among others, with a view to eliminating socio-economic inequality, in order to achieve social inclusion and participation of civil society, to strengthen democracy and reduce asymmetries within the framework of strengthening the sovereignty and independence of the States”*(emphasis added).

Article 3 lists extensive specific objectives, including almost all possible types of issue:

- (a) the strengthening of the political dialogue among Member states;
- (b) the achievement of inclusive and equitable social and human development in order to eradicate poverty and overcome inequalities in the region;
- (c) the eradication of illiteracy, with universal access to quality education and the regional recognition of courses and titles;
- (d) energy integration for the integral and sustainable use of the resources of the region;
- (e) the development of infrastructure for the interconnection of the region;
- (f) financial integration;
- (g) the protection of biodiversity, water resources and ecosystems, as well as cooperation in the prevention of catastrophes and in combating the causes and effects of climate change;

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<sup>71</sup> J.A. Sanahuja, GGP Seminar on Comparing Models of Regional Integration, EUI October 2011.

- (h) the development of concrete and effective mechanisms to overcome asymmetries, thus achieving an equitable integration;
- (i) the consolidation of a South American identity with the aim of attaining a South American citizenship;
- (j) universal access to social security and health services;
- (k) cooperation on issues of migration;
- (l) economic and commercial cooperation;
- (m) industrial and productive integration, with particular focus on the important role that small and medium size enterprises, cooperatives, networks and other forms of productive organization may play;
- (n) the definition and implementation of common or complementary policies and projects for research, innovation, technological transfer and technological production, aiming to enhance the region's own capacity, sustainability and technological development;
- (o) the promotion of cultural diversity and the expression of the traditions and knowledge of the peoples of the region, in order to strengthen their sense of identity;
- (p) citizen participation;
- (q) coordination to strengthen the fight against corruption, the global drug problem, trafficking in persons, trafficking in small and light weapons, terrorism, transnational organized crime and other threats, as well as for disarmament, the non-proliferation of nuclear weapons and weapons of mass destruction, and the elimination of landmines;
- (r) the promotion of cooperation among judicial authorities;
- (s) the exchange of information and sharing of experience in matters of defense;
- (t) cooperation for the strengthening of citizen security;
- (u) sectoral cooperation as a mechanism to deepen South American integration, through the exchange of information, experiences and capacity building.

Despite the long list of objectives, the promotion of commercial integration is not included, with the closest thing being commercial cooperation. In this regard, on the one hand, UNASUR may be considered complementary to MERCOSUR, the main goal of which is to achieve a common market among its members, as distinct from a replacement or competing integration process. On the other hand, as stated above, MERCOSUR has evolved to encompass a series of other goals

which were created based on the rationale that they were necessary to achieve the common market, and in those areas there would be overlap between MERCOSUR's acquired competences and UNASUR's stated competences. Therefore, it is necessary to determine how such overlaps in activity could be coordinated and which particular policies should be dealt with by one or other process.

One criterion would be territorial. With regard to programs that affect states other than those of MERCOSUR, competence should immediately be granted to UNASUR. However, it does not automatically follow that matters involving only MERCOSUR Member states should be addressed by MERCOSUR and not UNASUR. A case must be made for the preference of either integration process. On the one hand, UNASUR offers a much broader explicit mandate, whereas MERCOSUR has often had to rely on 'implied' attributions of competence, or had to justify competence by translating areas of activity into commercial goals. This would not happen in UNASUR, as its extensive list of objectives gives it the competence to pursue numerous goals. Further, programs initiated within UNASUR can much more easily be expanded to the whole continent than programs which commenced within MERCOSUR. Therefore, if a program is of potential relevance to the entire continent, and does not just address the interests of MERCOSUR Member states, there is a persuasive argument for the pursuing of policies and legislation within UNASUR, not MERCOSUR.

These two arguments, however appealing, must nevertheless be counterbalanced by consideration of the structural deficiencies of UNASUR. Firstly, all decision-making within UNASUR must be taken by consensus,<sup>72</sup> which can lead to difficulties on important sensitive matters such as environmental and human rights issues. UNASUR is constituted as an intergovernmental organization, and the lack of any inclination towards supranational competence is yet another indication that strong decision-making may be rather difficult within the organization. Furthermore, UNASUR lacks a dispute settlement system, and disputes are to be resolved by direct negotiations between the parties, or failing that, by referral to the political organs.

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<sup>72</sup> Article 12 of the UNASUR Treaty.

However, UNASUR's clearer mandate, along with its more broad appeal, may in time narrow MERCOSUR's field of activity to commercial goals. This may help MERCOSUR overcome some of its own difficulties, as it is easier to implement legislation that is merely commercial, to become a more effective actor and to regain some of the momentum it has lost due to the economic crises that have affected its Member states. On the other hand, MERCOSUR's pursuit of non-commercial goals has led to the realization that commercial objectives cannot be successfully separated from their environmental, social and general human implications. This means that, while it may be desirable that some of the competences in non-commercial areas currently within the scope of MERCOSUR are transferred to UNASUR, it is by no means desirable (or advisable) that all such competences should be transferred, as this may lead MERCOSUR to lose the broad perspective that trade and commercial policies should be pursued only to the extent that they can promote environmental, social and ultimately human goals.

From a pragmatic perspective, the activities carried out so far might allow the conclusion to be drawn that UNASUR will, for the time being, be a framework for the coordination and the joint development of specific policies. Nine Ministerial Councils (South American Councils) have been created so far, uniting the member states' authorities in specific fields and working towards common policy initiatives in the following areas: Social Development; Fight Against Drugs and Traffic; Health; Education, Culture, Science, Technology and Innovation; Defense; Energy; Economy; Infrastructure and Planning; Elections. Among these, four policy areas seem to have made the most progress:

i) Security: the South American Defense Council was the first to be established and quickly had to deal with a threat of democratic disruption in Bolivia in 2008, its ability to deal with the situation without the interference of outside actors, chiefly the USA, showing that the region is evolving in safeguarding its declared values -like democracy- and that major powers such as Brazil are emerging as effective regional leaders.

ii) Economic and Financial Cooperation: the initiatives developed so far include the creation of a regional development bank, the Banco del Sur, and studies to establish a system of payments in

local currency, discussions in order to create a fund of reserves and coordinate macroeconomic policies in order to avoid capital volatility.

iii) Infrastructure: The first Meeting of the Steering Committee for the South American Council on Infrastructure and Planning (COSIPLAN) was held in April 2011 at Palácio Itamaraty, in Rio de Janeiro. COSIPLAN was established in August 2009, during the UNASUL presidential meeting, when it was decided that the Executive Committee of the South American Regional Infrastructure Integration Initiative (IIRSA) would be replaced by a Ministerial-level Council within UNASUR's institutional structure. With this measure, the Member states aimed to assign greater political support to activities carried out in the infrastructure sector so as to secure necessary investments to execute priority projects. The meeting opened a new stage for the debate on the region's physical infrastructure integration. Progress was achieved in outlining a Strategic Action Plan for the next 10 years and in shaping an Agenda of Priority Projects, which is hoped to induce development. Regional integration of physical infrastructure is one of the priorities of Brazilian foreign policy and one of the most important issues in the multilateral agenda of South American countries since IIRSA was established in 2000. IIRSA was planned as a venue for coordination and exchange of information on infrastructure among the governments of the 12 countries in the region and over the course of 10 years it developed relevant work, with a portfolio of 520 projects, organized along Integration and Development axes.<sup>73</sup> Further considerations on this specific issue will be seen in Chapter 4, regarding the functioning and future of the Fund for the Structural Development of MERCOSUR – FOCEM.

iv) Energy: negotiations are ongoing for the establishment of a South American Energy Integration Treaty under the auspices of the UNASUR's South American Energy Council.<sup>74</sup>

In this regard, while UNASUR has a wide list of competences, including economic cooperation, one possible outcome is that it could, for the meantime, be an organization focused on the creation of common policies within South America. It would thus form a second, more specific

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<sup>73</sup> Brazilian Ministry of Foreign Affairs, available at: <http://www.itamaraty.gov.br/sala-de-imprensa/notas-a-imprensa/conselho-de-infraestrutura-e-planejamento-cosiplan-da-unasul-rio-de-janeiro-28-de-abril-de-2011/?searchterm=iirsa>.

<sup>74</sup> [http://unasurg.org/index.php?option=com\\_content&view=article&catid=81:consejo-energetico-suramericano&id=320:plan-tratado-energetico-suramericano](http://unasurg.org/index.php?option=com_content&view=article&catid=81:consejo-energetico-suramericano&id=320:plan-tratado-energetico-suramericano).

layer of integration in the region. Some of these policies might overlap with those of MERCOSUR, as can be the case with infrastructure, and as will be discussed further in Chapter 4 concerning the FOCEM, which is strongly focused in the development of infrastructure, thus posing a challenge to coherence and complementarity. Nevertheless, as discussed above, there are some criteria such as territoriality and specificity which might help to guarantee that UNASUR and MERCOSUR policy initiatives can be complementary instead of concurrent, at least until greater attention can be devoted to solving this problem.<sup>75</sup>

iii) MERCOSUR: the third layer

MERCOSUR would be a third layer in the multilayered scheme of regional integration in Latin America, being the most specific and complex, and having the core aim to achieve deep economic integration – a common market, with several accompanying policies and governance structures, focusing on the basis of a weak but semi-autonomous legal order and institutional structure, as compared to the wholly political character of CEPAL, and the more political and intergovernmental/international law based system of UNASUR. The legal challenges and possible overlaps that might arise from the functioning of this complex -and possibly incoherent- system of layered regional integration will emerge over time, as these initiatives are rather recent and the approach adopted by member states seems to follow the pragmatic/learn-by-doing method that usually characterizes integration initiatives. One can only hope that the governments of the region seize upon the current momentum of growth and stability -in the midst of the financial crises taking place elsewhere- to make the most out of these initiatives, coordinating political action at the broader level, creating valuable and necessary policy integration initiatives at the South American level and finally advancing in the most specific level of economic integration with social justice and environmental protection in the MERCOSUR sphere.

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<sup>75</sup> For an extended analysis of UNASUR in the South American context, see J.A. Sanahuja, *Post-Liberal Regionalism in South America: The Case of UNASUR*, EUI Working Papers, Rscas 2012/05.

#### 4. Concluding remarks

MERCOSUR emerges as a much simpler project in relation to the EU, but is nevertheless quite a complex governance structure which, on the one hand, has achieved a great deal of economic integration, is organized around a legal framework and comprises different institutions. On the other hand, it still depends on a stronger political/intergovernmental sphere which hinders its evolution towards deeper levels of integration. As has been said, MERCOSUR often seems “more as a permanent negotiation than a convergence of regional standards, that don’t exist”. There are no regional institutions to monitor or enforce regional rules decided in the working groups. In addition to the legal framework, a more flexible networking way of government can be seen, which often acts on the basis of *ex-post* compliance: solving conflicts when they appear, rather than regulating *ex-ante*. This reflects the fact that MERCOSUR has a weaker normative basis, and was not meant to be a rule generator like the EU; the goal was to set up a regional common market, but more through national policy coordination than by the creation of ‘top-down’ decision-making institutions; it was intergovernmental from the beginning, and the institutions created reflect that.

Despite these downsides, MERCOSUR is also a project that aims to promote development. At the same time, more so than the EU, which embraced the concept of sustainable development - and its three pillars- as a core values to be promoted, in MERCOSUR the idea of development is primarily centered on the economic sphere through market integration, with emphasis on ‘social justice’, which is translated into democratic values, and support for intra-generational equity – which will be discussed further in Chapter 4. There is a weak social dimension, such as the FCES, which represents the economic interests of the private sector and of trade unions, not of the people, but the major part of the population is unaware of the on-going changes and of MERCOSUR’s impact on their lives. The environmental sphere is not absent, but has played a much smaller role and has been much less developed within the legal/institutional structure.

Nevertheless, MERCOSUR is a relatively young organization – and the EU is a good example of the amount of time that such a deep level of integration might take to be achieved, and of an ambitious project, which is striving between rhetoric and reality.

## **Chapter 4: Regional integration and regional development: the role of regional development policies in the European Union and MERCOSUR**

Chapter 1 discussed how equity is a central element of sustainable development, particularly considering its most pressing challenges, the alleviation of poverty and the principle of intra-generational equity. Furthermore, as discussed in Chapter 2, the international development cooperation regime, based on the principles of equity and solidarity, still faces many setbacks in terms of effectiveness and coherence at the international level. In fact, the ‘Human Development Report’ of 2005 highlighted that international aid, one of the most effective weapons in the war against poverty, should be thought of as an investment as well as a moral imperative. At the same time, it pointed to the need for it to be renovated and reshaped, particularly regarding three conditions for effective aid: sufficient quantity; better quality (delivered on a predictable, value for money basis, with low transaction costs); and country ownership.<sup>1</sup>

Regional integration agreements might provide a framework for the implementation of the intra-generational equity principle, promoting the goals of social cohesion and poverty reduction and thus delivering on sustainable development objectives. This chapter makes a case study of the policies developed by the European Union (EU) and MERCOSUR related to social cohesion. In the beginning of the regionalist movement, there was a belief that promoting trade liberalization and, in some cases, establishing deeper forms of integration would deliver development as a result of an expanded market and economic welfare. Nevertheless, practice showed that this was not true, and some regional blocs began to establish ‘positive integration policies’ in order to compensate the effects of trade liberalization within the internal market, and to balance their differences in internal levels of development.

The rationale behind the creation of regional development policies is to promote equity among the members of the regional bloc as a form of solidarity, taking into consideration the interdependence of economies and the need to compensate for the backwardness of the least developed regions in order to pursue the bigger objective of securing the proper functioning of

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<sup>1</sup> UNDP, Human Development Report 2005, *International Cooperation at a crossroads: aid, trade and security in an unequal world*, 2005, available at [www.hdr.undp.org](http://www.hdr.undp.org).

the internal market. This rationale was present in both of the regional blocs under analysis in this thesis, firstly in the EU and later on in MERCOSUR, as will be seen below.

## **I. The Regional Development Policy of the European Union**

### **1. Introduction**

Europe's integration process began back in the 1950s, focusing on promoting market integration as a tool for the reconstruction of national economies after WWII, and also safeguarding peace. Nevertheless, the integration project evolved and became more complex, covering fields such as economic and social cohesion and environmental protection, and aiming to promote sustainable development. This can be said to result from the conclusion that the establishment of a common market alone was not enough to solve the developmental challenges faced by member states, and that positive measures had to be taken in order to address internal disparities. This section examines the regional policy of the EU, which is a good example of a solidarity mechanism created to generate economic convergence and foster development within the backward areas of the integration project, minimizing the internal asymmetries and thus strengthening the bloc as a whole. The focus of the analysis will be the main instruments of this policy, the structural funds.

Attention should be paid to other EU policies that are not development policies as such, but are intrinsically related to or directly affect the regional policy: the competition policy and the regulation of the use of state aid by member states, and the common agricultural policy (CAP). Competition policy has been present since the origins of the EU and was an important tool in assuring the completion of the internal market, in the sense that it established rules preventing the grant of state aids that would distort competition, but on the other hand, it had another effect in that it caused greater exposure of regions that had previously been protected economically by such aids. Thus, this policy was in a sense balanced by the regional policy, which aimed to compensate for this greater exposure of regions due to the liberalization of trade and the regulation of state aids.<sup>2</sup> The CAP, on the other hand, is one of the mainstream 'positive' EU

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<sup>2</sup> A. Evans, *The law of EU regional policy*, Richmond 1999. The author discusses the rationale of community policies according to different conceptions of the principle of equality: while the competition policy aims to remove obstacles to the completion of the internal market, being a form of 'negative integration' and following a rationale of

policies, which played a role similar to the regional policy and is considered in fact as a ‘de facto development policy’, with a target is similar to that of the European Regional Development Fund.<sup>3</sup> The CAP had also a financial instrument, the European Agriculture Guarantee Fund (EAGGF), which was for some time part of the ‘structural funds’. Although these policies won’t be analyzed specifically due to length constraints, it is important to consider their existence and effects when addressing the development and the functioning of the regional policy.

## 2. Background of the establishment of the regional policy

The aim to promote development within the Community was a declared objective of the EC since its creation by the Treaty of Rome (TR) in 1957. Two main provisions of the treaty certify this aim: the fifth recital in the preamble stated the will of the contracting parties “*to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less favored regions*”; in addition, Article 2 stated that “*it shall be the aim of the Community, by establishing a Common Market and progressively approximating the economic policies of member states, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its member states*”. It was clear that, in establishing the EEC and a common market, the project was expected to stimulate the development of member states by reducing internal asymmetries and raising living standards within the community.

However, no specific provisions regarding such measures were included. The policies of the EEC as envisaged by the TR, apart from those policies related to the establishment of the common market – including the competition policy, were the CAP, the common transport policy, the creation of the European Investment Bank, the association of overseas countries and, more

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liberal equality, the regional policy is a ‘positive measure of integration’ which aims to correct the negative effects of integration, following a rationale of interventionist equality.

<sup>3</sup> J. Scott, *Development Dilemmas in the European Community: rethinking regional development policy*, Open University Press, UK, 1995, pages 101-103. According to Article 39 TEC, the CAP shall have as objectives: (a) to increase agricultural productivity by developing technical progress and by ensuring the rational development of agricultural production and the optimum utilization of the factors of production, particularly labor; (b) to ensure thereby a fair standard of living for the agricultural population, particularly by the increasing of the individual earnings of persons engaged in agriculture.

interestingly for this section of the paper, the creation of a ‘European Social Fund (ESF) in order “to improve the possibilities of employment for workers and to contribute to the raising of their standard of living” (Article 3(i)).<sup>4</sup> It was not until the 1970s that Community measures were adopted in order to implement a regional development policy. It was expected that the growth associated with the establishment of the common market would be enough to ensure distribution of the benefits of integration and balance regional asymmetries. Practice showed that this did not happen, as the liberalization of trade and the elimination of protectionist instruments -which had previously been used to foster regional growth- made member states more vulnerable to foreign competition, and thus the use of state aid became common, with one country trying to beat the others to attract mobile investment. This posed a risk to the undistorted competition sought through the establishment of the common market, and the need arose for some kind of community assistance to balance different regional policies adopted by member states.<sup>5</sup>

In 1972, at the Conference of Heads of State and Government held in Paris, in the 5<sup>th</sup> point of the final Communication of the session, the parties agreed “*that a high priority should be given to the aim of correction, in the Community, the structural and regional imbalances which might affect the realization of Economic and Monetary Union*”, and requested the European Commission to prepare a report assessing the regional problems and putting forward a proposal to correct them. In response to this, the Commission published in 1973 a ‘Report on the Regional Problems in the Enlarged Community’ (the ‘Thomson Report’), a comprehensive document which studied the regional imbalances of the Community, recognizing “agricultural problem areas” and “areas suffering from industrial change” as areas that should receive assistance.<sup>6</sup> In addition, the political context had the accession of the UK, Denmark and Ireland as a background, and in the latter, above all, there were severe economic imbalances. These factors led to another proposal made by the Commission in 1973, which ultimately led to the adoption of Regulation 724/75 establishing the European Regional Development Fund (ERDF) in 1975.<sup>7</sup>

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<sup>4</sup> Article 123 stated that “In order to improve opportunities of employment of workers in the Common Market and thus contribute to raising the standard of living, a European Social Fund shall hereby be established in accordance with the provisions set out below; it shall have the task of promoting within the Community employment facilities and the geographical and occupational mobility of workers”.

<sup>5</sup> A. Evans, ‘*EU Regional Policy*’, Richmond Law and Tax Ltd., 2005, pages 19-21.

<sup>6</sup> COM 73, May 3<sup>rd</sup> 1973.

<sup>7</sup> Regulation (ECC) 724/75, OJ L073, 21/03/1975.

As there was no specific legal basis concerning a policy on regional development, the measure was justified under Article 235 TEC, which provided for the adoption of Community measures regarding the objective of establishing the common market (Article 2 TEC): “*If any action by the Community appears necessary to achieve, in the functioning of the Common Market, one of the aims of the Community in cases where this Treaty has not provided for the requisite powers of action, the Council, acting by means of a unanimous vote on a proposal of the Commission and after the Assembly has been consulted, shall enact the appropriate provisions*”. The general objectives for the ‘regional policy’ and the creation and regulation of its implementation tools - the structural funds and other financial instruments - were done afterwards through the adoption of regulations by the Council, under a proposal by the Commission and the approval of the Parliament. The regulations were reviewed on a periodic basis, often coinciding with the enlargement processes that took place or other major institutional reforms carried out in the EU, adapting the general goals of the policy in order to align it with the overall aims of the integration project itself, both as the idea of development to be promoted, and as one of the tools envisaged to implement these policy goals.

### **3. Evolution and functioning of the funds**

The rationale for the implementation of the ERDF was that the correction of regional imbalance was considered to be one of the conditions for continuing economic integration.<sup>8</sup> Regulation 724/57 designed the fund to initially be a tool to help member states to develop policies fostering the convergence of poorer regions and permitting, in conjunction with national aids, the progressive realization of economic and monetary union. The most significant aspects, in this sense, were the ideas of complementarity and additionality, expressed in the preamble of the Regulation, according to which “*the Fund’s assistance should not lead Member States to reduce their own regional development efforts but should complement these efforts*”.

There were two categories of projects that could be financed: industrial handicraft and service activities and infrastructure investments. Even though there was no definition of criteria for

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<sup>8</sup> Some authors argue, however, that the purpose of the Fund was not just (or not even principally) about regional development, but also, as noted by Evans (EU Regional Policy, op. cit, p. 13 – 17) a form of compensation to member states for completing the internal market.

eligibility to assistance, Article 3 provided that “*regions and areas which may benefit from the fund shall be limited to those aided areas established by member states (...). When aid from the fund is granted, priority should be given to investments in national priority areas*”. Moreover, there was a determination of quotas to each member state in Article 2, and even though Article 5 stated that the Commission bore responsibility for deciding the fund’s assistance, member states had a great amount of discretion to submit proposals of projects which were not necessarily reflective of the needs of the least favored regions, but rather of their own political bargaining interests. Consequently, the ERDF met with much criticism and skepticism regarding its functioning and the argument was made that the fund was ‘nationalized’, representing an informal instrument of national policy making.<sup>9</sup>

The ERDF Regulation determined the re-examination of its terms before 1978. Thus, Regulation 214/79<sup>10</sup> was soon passed, slightly changing the scenario by amending Article 3 to enable that “*the fund may also, where appropriate, give assistance in regions or areas other than those referred to in paragraph 1, for the solution of problems forming the subject of community action, if the Member State concerned has also given assistance or does so at the same time*”. It was a first step towards a horizontal development policy, further improved in Regulation 1787/84<sup>11</sup> which brought more innovations, the first of these being the end of the quota system, replaced by ‘ranges’ of fund assistance from which member states could benefit. This implied that a Member State was no longer necessarily entitled to receive the whole the amount of its quota, “*depending on the implementation of the priorities and criteria laid down in this regulation*” (Article 4). In addition, the idea of community programs to be financed by the ERDF alongside the national programs was introduced; these community programs should provide “*a better link between the community's objectives for the structural development or conversion of regions and the objectives of other community policies*”, and should have priority regarding the fund’s resources (Article 7).

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<sup>9</sup> J Scott, *op. cit.*

<sup>10</sup> Council Regulation 214/79, *OJ L 35*, 9.2.1979.

<sup>11</sup> Council Regulation 1787/84, *OJ L 169*, 28.6.1984.

### 3.1 From a ‘regional development fund’ to a regional development policy

The institutionalization of a true regional policy was given impetus in the late 1980s, coming out of context of important changes happening within the Community: firstly, the accession of the poorer Mediterranean countries (Greece (1982), Spain and Portugal (1986)) highlighted the regional question in the community context as, for the first time, entire states with large populations were labeled as underdeveloped;<sup>12</sup> secondly, the process of institutional reform for the completion of the internal market reviewed the rationale and the commitment to regional development. The ‘Single European Act’, in force since July 1<sup>st</sup> 1987, introduced a series of reforms. The TEC was amended, creating a new section on “economic and social cohesion” and adding Article 130a, which established a specific legal base for a policy on “economic and social cohesion”: *“In order to promote its overall harmonious development, the Community shall develop and pursue its actions leading to the strengthening of its economic and social cohesion. In particular the Community shall aim at reducing disparities between the various regions and the backwardness of the least-favored regions.”* Thirdly, this policy became a goal that should be observed in the implementation of the common market, as stated by Article 130: *“Member States shall conduct their economic policies, and shall coordinate them, in such a way as, in addition, to attain the objectives set out in Article 130a. The implementation of the common policies and of the internal market shall take into account the objectives set out in Article 130a and in Article 130c and shall contribute to their achievement. The Community shall support the achievement of these objectives by the action it takes through the structural Funds (European Agricultural Guidance and Guarantee Fund, Guidance Section, European Social Fund, European Regional Development Fund), the European Investment Bank and the other existing financial instruments”*. Art 130c laid down the goal envisioned for the ERDF: Article 130: *“(…) intended to help redress the principal regional imbalances in the Community through participating in the development and structural adjustment of regions whose development is lagging behind and in the conversion of declining industrial regions”*.

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<sup>12</sup> J Scott, op. cit., page 20. The accession of these countries to the EC came along with a promise of allocation of funds. See, in this regard, the treaties of accession, available at <http://eur-lex.europa.eu/en/treaties/index.htm>. In addition, in 1985 Regulation 1787/84 was amended by Regulation 3641/85 to include Portugal and Spain in the ‘ranges’ of the ERDF.

Thus, a new Regulation was passed in 1988 establishing a general framework for the operation of all of the structural funds.<sup>13</sup> The main innovation introduced was a list of objectives to be pursued by the funds towards the implementation of a true regional development policy, laying down horizontal criteria for implementation and for the definition of the regions that were eligible for each of the objectives. A ‘coordination Regulation’ was also passed in order to assure the coordinated functioning of the funds.<sup>14</sup> Five objectives were envisioned:

- (1) to promote the development and structural adjustment of the regions whose development was lagging behind. This objective counted for the majority of the available funds, and the Regulation defined regions that could benefit from the assistance as “administrative level NUTS II (4) regions<sup>15</sup> where per capita GDP measured in terms of purchasing power parity is less than 75 % of the Community average, and other regions whose per capita GDP is close to that of regions under 75 % and whose inclusion is justified by special circumstances”.
- (2) to convert the regions, frontier regions or parts of regions (including employment areas and urban communities) seriously affected by industrial decline;
- (3) to combat long-term unemployment; and (4) to facilitate the occupational integration of young people;
- (5) (a) to speed up the adjustment of agricultural structures, and (b) to promote the development of agricultural and rural areas.

Some years later, the new process of reform that led to the establishment of the European Union also impacted on regional policy. The Maastricht Treaty signed in 1992 introduced, apart from political union, other policy competences for the EC, among which the environmental policy, which had an impact on the regional policy. The preamble of the Treaty highlighted the principle of solidarity among member states (4<sup>th</sup> recital), and the amended Article 2 TEC then stated that *“the Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious and balanced development of*

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<sup>13</sup> Council Regulation 2052/88, *OJ L 185*, 15.7.1988.

<sup>14</sup> Council Regulation 4253/88, *OJ L 374*, 31.12.1988.

<sup>15</sup> The Nomenclature of Territorial Units for Statistics (NUTS) was established by the ‘EUROSTAT’ Agency more than 30 years ago in order to provide a single, uniform breakdown of territorial units for the production of regional statistics for the European Union. The NUTS classification has been used in Community legislation since 1988, but it was only in 2003, after three years of preparation, that a Regulation was adopted specifically for this issue: Council Regulation 1059/2003, *OJ L 1 54/1*, 21.6.2003.

*economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among member states*” (emphasis added).

Although the Treaty Articles regulating the policy on economic and social cohesion did not suffer from significant changes, this new treaty structure also marked a new stage in the integration project as a whole. In this regard, a new fund was established by Article 130(d), ‘a Cohesion Fund’ (ECF) which had the objective to help the poorest member states - Spain, Portugal, Greece, and Ireland – providing “*financial contribution to projects in the fields of environment and trans-European networks in the area of transport infrastructure*”. In addition, a new body was created, the Committee of the Regions, consisting of representatives of regional and local bodies, with advisory status, which should be consulted by the Council or by the Commission where this Treaty so provided and in all other cases in which one of these two institutions considered it appropriate, and could issue an opinion “*where it considers that specific regional interests are involved*” (Article 198).

Furthermore, the new treaty framework was also complemented by another policy initiative, The Fifth Environmental Action Program, set up in February 1993, which determined the EU’s environmental agenda for the decade, with two major principles: integration of the environmental dimension in all major policy areas, and replacing the ‘command-and-control’ approach with shared responsibility between public and private stakeholders. The strategy ‘Towards Sustainability’ required a range of instruments, among which support from the available financial instruments of the Union, including the structural funds, was envisaged. In this regard, the regional policy was also seen as a means of promoting the environmental goals of the bloc.

Following these changes, the Regulations were revised in 1993 for the 1994–99 period, and their objectives were slightly modified. A new framework Regulation<sup>16</sup> was passed. It is interesting to note that the principle of sustainable development was at this point incorporated into the regional policy documents: the preamble of the Regulation stated that “[w]hereas the principles and goals of sustainable development are set out in the Community program of policy and action in relation

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<sup>16</sup> Council Regulation 2081/93, and Council Regulation 2082/93, OJ L 193, 31.7.1993.

*to the environment and sustainable development (...); whereas Community policy in the field of the environment is designed to ensure a high level of protection while taking account of the variety of situations in the various regions of the Community; whereas the requirements of environmental protection should form part of the definition and implementation of other Community policies; whereas the member states should therefore supply, in the plans submitted under Objectives 1, 2 and 5 (b), an appraisal of the state of the environment and the environmental impact of the operations envisaged, in accordance with the provisions of Community law in force, as well as the steps they have taken to associate their environmental authorities with the preparation and implementation of the plans”.* In this regard, for the mentioned objectives, the Regulation introduced a requirement that the member states concerned, when applying for assistance from the funds, “*shall submit to the Commission their regional development plan. These plans shall include: a description of the current situation with regard to disparities and development gaps, the financial resources deployed and the main results of operations undertaken in the previous programming period, in the context of Community structural assistance received and with regard to the evaluation results available; a description of an appropriate strategy to achieve the objectives (...), the regional development priorities selected and specific objectives, quantified where they lend themselves to quantification; a priori appraisal of the expected impact, including that on jobs, of corresponding operations with a view to ensuring that they yield medium-term economic and social benefits in keeping with the resources deployed; an appraisal of the environmental situation of the region concerned and an evaluation of the environmental impact of the strategy and operations referred to above in terms of sustainable development in agreement with the provisions of Community law in force; the arrangements made to associate the competent environmental authorities designated by the Member State in the preparation and implementation of the operations envisaged in the plan and to ensure compliance with Community environmental rules” (emphasis added).*

Notwithstanding, no substantive innovations regarding the scope of the policies were introduced, apart from the inclusion of the newly created ECF and the creation of another financial instrument for the fisheries sector.<sup>17</sup> In 1994, following the accession of Austria, Sweden and Finland, an amendment to Regulation 2081/93 was made in order to include these new members

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<sup>17</sup> Financial instrument for fisheries guidance, "FIFG " established by Regulation (EEC) No 2080/93.

in the policies, as well as introducing a new objective: “*Until 31 December 1999, the Structural Funds, the Financial Instrument for Fisheries Guidance (FIFG) and the European Investment Bank (EIB) shall each contribute in an appropriate fashion to a further priority Objective [...] to promote the development and structural adjustment of regions with an extremely low population density ('Objective 6')*”.<sup>18</sup>

### 3.2 Regional policy as part of the Lisbon Agenda

The next revision came with more substantive alterations as part of important institutional and political changes within the EU: the completed accession process of the Nordic countries; the envisioned enlargement to include the eastern countries to be completed within the following years; the signature and entry into force of the Amsterdam Treaty; and the launch of ‘Agenda 2000’ in 1999. These events impacted on regional policy in two important ways: in the stronger environmental dimension and the concern regarding acceding countries with strong developmental inequalities. The new TEC as amended by the Amsterdam Treaty emphasized the overall principle of sustainable development as a goal of all policies and went further, stating that the Union’s financial instruments should work simultaneously and in the long term interest towards economic growth, social cohesion and environmental protection. In addition, Article 6 now required that environmental protection be integrated into the definition and implementation of all policies and activities. This represented an important shift in highlighting the importance of sustainable development in all policies, even though no substantial alteration was introduced to the wording of the provisions on the cohesion policy, apart from the renumbering of articles, from 158 to 162.

Agenda 2000 introduced proposals to “modernize and strengthen the Union” based on three central challenges, among which were the narrowing of “*gaps in wealth and economic prospects between regions*”, together with the modernization of the agricultural model and changes in the optimization of resource spending. These gaps were a concern given the enlargement process to

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<sup>18</sup> Act 11994N/PRO/06, OJ C 241, 29.8.1994, Article 1 (concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, Protocol No 6 - on special provisions for Objective 6 in the framework of the Structural Funds in Finland, Norway and Sweden)

include poorer countries, and the priority given to regional policy grew stronger in this regard. Within this framework, the funds' regulations further strengthened the requirements for the inclusion of the two horizontal themes of environmental sustainability and equal opportunities in the 2000-06 programs, making them more systematic and extensive.

Regulation 1260/1999 was passed laying down the regulations of regional policy for the period. The wording of the Regulation's preamble showed the influence of sustainable development as a goal of the EU: *"Whereas in its efforts to strengthen economic and social cohesion the Community also seeks to promote the harmonious, balanced and sustainable development of economic activities, a high level of employment, equality between men and women and a high level of protection and improvement of the environment; whereas those efforts should in particular integrate the requirements of environmental protection into the design and implementation of the operations of the Structural Funds and help to eliminate inequalities and promote equality between men and women; whereas the Funds' operations may also make it possible to combat any discrimination on the grounds of race, ethnic origin, disability or age by means in particular of an evaluation of needs, financial incentives and an enlarged partnership"*. The most important change in the framework was the reduction of the number of objectives to three, in order to increase the level of concentration and simplify the operation of the funds.<sup>19</sup> The 'structural funds' should so pursue three objectives as stated in Article 1:

Objective 1: to promote the development and structural adjustment of regions whose development is lagging behind, understood as those which average per capita GDP was less than 75% of the European Union average; also covering remote regions and areas eligible under the former Objective 6 (areas with low population density) created by the Act of Accession of Austria, Finland and Sweden. This objective now encompassed 70% of the resources in order to concentrate action on the least developed regions.

Objective 2: unified former Objectives 2 and 5(b), to contribute to the economic and social conversion of regions with structural difficulties other than those eligible for the new Objective 1;

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<sup>19</sup> Council Regulation 1260/99, OJ L 161, 26.6.1999.

and other areas facing the need for economic diversification, areas undergoing economic change, declining rural areas, depressed areas dependent on fisheries and urban areas in difficulty;

Objective 3: (replaced the former Objectives 3 and 4) to gather all the measures for human resource development outside the regions eligible for Objective 1; this objective became the reference framework for all measures taken under the new Title on employment inserted in the EC Treaty by the Treaty of Amsterdam and under the European employment strategy. Moreover, as enlargement was already envisioned towards Eastern Europe, these reforms were also expected to “*ensure that structural policy plays a continuing role in the Union's future enlargement, bringing in the countries of central and eastern Europe*”.<sup>20</sup>

Furthermore, Article 1 stated that “[i]n pursuing these objectives, the Community shall contribute to the harmonious, balanced and sustainable development of economic activities, the development of employment and human resources, the protection and improvement of the environment, and the elimination of inequalities, and the promotion of equality between men and women.” It can be perceived that the inclusion of sustainable development as a cross-cutting objective of the EU had an impact on the regional policy, which should now also work towards the achievement of this objective. The integration of environmental issues as a horizontal theme was articulated around a comprehensive framework, with environmental considerations featuring under most of the main headings addressed by the Regulations: program preparation, content, monitoring, evaluation and information. Thus many programs during this period included projects that related explicitly to environmental sustainability, such as projects promoting eco-industries. This is indicative of a more holistic vision of the EU towards the promotion of development.

At the same time, while the integration of environmental concerns into the regional policy was envisaged as a goal, the concentration of structural funds remained focused on regions lagging

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<sup>20</sup> Communication from the Commission to the European Parliament and the Council of 16 July 2003 on the implementation of the commitments undertaken by the acceding countries in the context of accession negotiations on Chapter 21 - regional policy and coordination of structural instruments [COM(2003) 433].

behind in economic development, as Objective 1 still received the majority of resources. In a report, the Commission published the implementation of the programs in the 2000-2006 period.<sup>21</sup>

Objective 1: focused on basic infrastructure projects (40.2%), with almost half of all investment in this category spent on transport infrastructure (49.9%). More than a third (34.9%) of Objective 1 resources were invested in the productive environment and projects geared at human resources accounted for 22.5% of resources.

Objective 2: the main focus of programs in Objective 2 regions continued to be productive investments, with over half of all financial resources devoted to this category (55.4%). The second most supported field was basic infrastructure, accounting for 29.2% of all Objective 2 resources. In the category of human resources (10.5%), workforce flexibility, entrepreneurial activity, innovation, information and communication technologies were the main fields of investment (31.6%).

Objective 3: ESF program implementation in 2009 continued to focus on the European Employment Strategy, particularly on measures aimed at improving employability in the labor market (30.6% of certified expenditure), lifelong learning (actions developing educational and vocational training represented 22.8% of certified expenditure), social inclusion (20.8%) and equal opportunities (6.5%).

These figures show that, despite the efforts to integrate sustainable development considerations into regional policy, the vast majority of funds still found their way into infrastructure projects. This is not to say that infrastructure is not a relevant issue, on the contrary, as discussed in Chapter 2, infrastructure integration and the ability of countries within a regional project to form value chains among themselves is a fundamental condition for the success of an internal market. In this regard, it must be considered that the regional policy's major efforts were still concentrated in building the foundational conditions for regional development via the internal market and economic integration. The subsequent integration of social and environmental considerations is a gradual step that should follow the economic one.

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<sup>21</sup> COM(2010) 587: 21st annual report on implementation of the structural funds (2009).

### 3.3 The regional policy nowadays

In 2006 the regulation of the regional policy was renovated, both as part of the requirement for a new programming period, and to adapt the policy to the new policy strategies of the EU. Firstly, after the inclusion of sustainable development as a cross-cutting goal in Amsterdam, the definitions and objectives thereof were expressed through ‘Sustainable Development Strategies’ released in 2001 and reviewed in 2006.<sup>22</sup> Furthermore, as part of the political process leading to the signature of the Lisbon Treaty, in 2005 the EU released the renewed Lisbon Agenda, establishing new priorities focused on ‘growth and employment’, and determined that the structural funds were to support these new priorities as part of an overall ‘cohesion policy’.<sup>23</sup>

Thus, a new set of regulations was passed in July 2006 in order to set out the guidelines for the period within the 2007–2013 framework. A framework Regulation was passed laying down the general provisions for the regional policy and the available funds for its promotion,<sup>24</sup> and its rules expressed changes envisioned for the regional policy, among which five important alterations can be highlighted. The first of these is a greater synergy between the objectives of the regional policy and the other political strategies of the EU, which can be seen in the express mention in preamble of the Regulation that the cohesion policy should “*contribute to increasing growth, competitiveness and employment by incorporating the Community's priorities for sustainable development as defined at the Lisbon European Council of (...) March 2000 [Lisbon strategy] and at the Göteborg European Council of (...) 2001*”( the first SDS) (second recital).

Secondly, the resources available for the policy have been significantly increased, now totaling approximately €310 billion for the period between 2007 and 2013 (nearly one third of the EU’s total budget, being the second item on budget allocation), which testifies to the importance that it has achieved within the EU agenda (Article 18.1). In addition, the financial instruments designed to support the regional policy were changed: the preamble stated that “*the Cohesion Fund should be integrated into the programming of structural assistance in the interest of greater coherence*

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<sup>22</sup> See chapter 3.

<sup>23</sup> COM(2005) 330, OJ L 291, 21.10.06.

<sup>24</sup> Council Regulation 1083/2006 OJ L 210, 31/07/2006.

*in the intervention of the various Funds (fifth recital). The role of the instruments providing aid for rural development, namely the European Agricultural Fund for Rural Development (...), and for the fisheries sector, namely a European Fisheries Fund (EFF), should be specified. Those instruments should be integrated into the instruments under the common agricultural policy and the common fisheries policy and coordinated with those under the cohesion policy. The Funds providing assistance under the cohesion policy are therefore limited to the European Regional Development Fund (ERDF), the European Social Fund (ESF) and the Cohesion Fund” (sixth and seventh recitals). In this regard, specific Regulations were passed complementing the framework Regulation in specifying the scope of assistance for each of the three funds.<sup>25</sup>*

Thirdly, the objectives of the policy were maintained at three, but were again changed, as was the way of determining the regions eligible for assistance. Article 3 provides that *“the action taken by the Community under Article 158 of the Treaty shall be designed to strengthen the economic and social cohesion of the enlarged European Union in order to promote the harmonious, balanced and sustainable development of the Community. This action shall be taken with the aid of the Funds, the European Investment Bank (EIB) and other existing financial instruments. It shall be aimed at reducing the economic, social and territorial disparities which have arisen particularly in countries and regions whose development is lagging behind and in connection with economic and social restructuring and the ageing of the population. The action taken under the Funds shall incorporate, at national and regional level, the Community's priorities in favor of sustainable development by strengthening growth, competitiveness, employment and social inclusion and by protecting and improving the quality of the environment”* (emphasis added). To this end, it announces the three objectives to be pursued under the policy:

**1) the Convergence objective, which shall be aimed at speeding up the convergence of the least-developed member states and regions** by improving conditions for growth and employment through increasing and improving the quality of investment in physical and human capital, the development of innovation and of the knowledge society, adaptability to economic and social changes, the protection and improvement of the environment, and administrative

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<sup>25</sup> Council Regulation 1080/2006 for the ERDF, 1081/2006 for the ESF and 1084/2006 for the ECF, OJ L 210, 31/07/2006.

efficiency. This objective shall constitute the priority of the Funds (Article 3). Article 5 defines regions eligible for funding under this objective:

5.1 Regions corresponding to level 2 of the NUTS classification whose GDP per capita, measured in purchasing power parities and calculated on the basis of Community figures for the period 2000 to 2002, is less than 75 % of the average GDP of the EU-25 for the same reference period.

5.2 The member states eligible for funding from the Cohesion Fund shall be those whose GNI per capita, measured in purchasing power parities and calculated on the basis of Community figures for the period 2001 to 2003, is less than 90 % of the average GNI of the EU-25 and which have a program for meeting the economic convergence conditions referred to in Article 104 of the Treaty.

In addition, Article 8 establishes ‘transitional support’ for regions in transition of classification due to the enlargement process:

8. 1. The NUTS level 2 regions which would have been eligible for Convergence objective status under Article 5(1) had the eligibility threshold remained at 75% of the average GDP of the EU-15, but which lose eligibility because their nominal GDP per capita level will exceed 75% of the average GDP of the EU-25, measured and calculated according to Article 5(1), shall be eligible, on a transitional and specific basis, for financing by the Structural Funds under the Convergence objective.

8.3 The member states eligible for funding from the Cohesion Fund in 2006 which would have continued to be eligible had the eligibility threshold remained at 90% of the average GNI of the EU-15, but which lose eligibility because their nominal per capita GNI will exceed 90% of the average GNI of the EU-25 measured and calculated according to Article 5(2), shall be eligible, on a transitional and specific basis, for financing by the Cohesion Fund under the Convergence objective.

Article 4 defines the instruments that should provide financial support, and specific possibilities of funding are determined by the specific regulations for each fund:

i) the ERDF: shall focus its assistance on supporting sustainable, integrated regional and local economic development and employment, through the following headings: 1. research and technological development (R&TD), innovation and entrepreneurship; 2. information society, including development of electronic communications infrastructure, local content, services and applications, improvement of secure access to and development of on-line public services; aid and services to SMEs to adopt and effectively use information and communication technologies (ICTs) or to exploit new ideas; 3. local development initiatives and aid for structures providing neighborhood services to create new jobs; 4. environment, including investments connected with water supply and water and waste management; waste-water treatment and air quality; prevention, control and fight against desertification; integrated pollution prevention and control; aid to mitigate the effects of climate change; rehabilitation of the physical environment, including contaminated sites and land and brownfield redevelopment; promotion of biodiversity and nature protection, including investments in NATURA 2000 sites; aid to SMEs to promote sustainable production patterns through the introduction of cost-effective environmental management systems and the adoption and use of pollution-prevention technologies; 5. prevention of risks, including development and implementation of plans to prevent and cope with natural and technological risks; 6. tourism, including promotion of natural assets as potential for the development of sustainable tourism; protection and enhancement of natural heritage in support of socio-economic development; aid to improve the supply of tourism services through new higher added-value services and to encourage new, more sustainable patterns of tourism; 7. investments in culture; 8. transport investments; 9. energy investments; 10. education investments; 11. investment in health and social infrastructure which contribute to regional and local development and improve quality of life.

ii) the ESF: (a) increasing adaptability of workers, enterprises and entrepreneurs with a view to improving the anticipation and positive management of economic change; (b) improving access to employment and the sustainable inclusion in the labor market of job seekers and inactive people, preventing unemployment -in particular long-term and youth unemployment,

encouraging active ageing and longer working lives, and increasing participation in the labor market; c) reinforcing the social inclusion of disadvantaged people with a view to their sustainable integration in employment and combating all forms of discrimination in the labor market; (d) enhancing human capital and (e) promoting partnerships, pacts and initiatives through networking of relevant stakeholders, such as the social partners and non-governmental organizations, at the transnational, national, regional and local levels in order to mobilize for reforms in the field of employment and labor market inclusiveness.

iii) the Cohesion Fund: (a) trans-European transport networks, in particular priority projects of common interest as identified by Decision No. 1692/96/EC; (b) the environment within the priorities assigned to the Community environmental protection policy under the policy and action program on the environment. In this context, the Fund may also intervene in areas related to sustainable development which clearly present environmental benefits, namely energy efficiency, renewable energy and, in the transport sector outside the trans-European networks, rail, river and sea transport, intermodal transport systems and their interoperability, management of road, sea and air traffic, clean urban transport and public transport.

Article 19 defines the resources available for this objective: 81.54% of the total (i.e. of €251 billion), to be distributed between the different components as follows:

- (a) 70.51% (€177 billion) for the financing referred to in Article 5(1), using eligible population, regional prosperity, national prosperity and unemployment rate as the criteria for calculating the indicative breakdowns by Member State;
- (b) 4.99% (€12 billion) for the transitional and specific support referred to in Article 8(1), using eligible population, regional prosperity, national prosperity and unemployment rate as the criteria for calculating the indicative breakdowns by Member State;
- (c) 23.22% (€58 billion) for the financing referred to in Article 5(2), using population, national prosperity and surface area as the criteria for calculating the indicative breakdowns by Member State;
- (d) 1.29% (€3.25 billion) for the transitional and specific support referred to in Article 8(3).

According to the principle of complementarity, the funding provided under this objective is restricted to established ceilings which apply to co-financing rates: 75% of public expenditure co-financed by the ERDF or the ESF. This ceiling can be raised to 80% where the eligible regions are located in a Member State covered by the Cohesion Fund, and even to 85% in the case of the outermost regions; 85% of public expenditure co-financed by the Cohesion Fund; 50% of public expenditure co-financed in the outermost regions (a new additional allocation from the ERDF to compensate for excess costs).

**2) The Regional competitiveness and employment objective, which shall, outside the least-developed regions, be aimed at strengthening regions' competitiveness and attractiveness as well as employment by anticipating economic and social changes**, including those linked to the opening of trade, through increasing and improving the quality of investment in human capital, innovation and the promotion of the knowledge society, entrepreneurship, the protection and improvement of the environment, and the improvement of accessibility, adaptability of workers and businesses, as well as the development of inclusive job markets.

Article 6 defines regions eligible for funding under this objective: those not covered by Article 5(1) and Article 8(1) and (2), meaning those covered under Objective 1, above. In addition, transitional support under this objective is also envisaged by Article 8. 2: The NUTS level 2 regions totally covered by Objective 1 in 2006 under Article 3 of Regulation (EC) No 1260/1999 whose nominal GDP level per capita, measured and calculated according to Article 5(1), will exceed 75% of the average GDP of the EU15 shall be eligible, on a transitional and specific basis, for financing by the Structural Funds under the Regional competitiveness and employment objective. Recognizing that, on the basis of revised figures for the period 1997 to 1999, Cyprus should have been eligible for Objective 1 from 2004 to 2006, Cyprus shall benefit between 2007 and 2013 from the transitional financing applicable to the regions referred to in the first subparagraph.

Article 4 defines the instruments that should provide financial support:

i) ERDF: shall focus its assistance in the context of sustainable development strategies, while promoting employment, primarily on the following three priorities: 1. innovation and the knowledge economy, including through the creation and strengthening of efficient regional innovation economies, systemic relations between the private and public sectors, universities and technology centers which take into account local needs; 2. environment and risk prevention; and 3. access to transport and telecommunication services of general economic interest;

ii) ESF: same as in previous objective.

Article 19 determines the resources: 15.95 % of the resources referred to in Article 18(1) (€49 billion) to be distributed between the different components as follows: (a) 78.86 % (€39 billion) for the financing referred to in Article 6, using eligible population, regional prosperity, unemployment rate, employment rate and population density as the criteria for calculating the indicative breakdowns by Member State; and (b) 21.14 % (€10 billion) for the transitional and specific support referred to in Article 8(2), using eligible population, regional prosperity, national prosperity and unemployment rate as the criteria for calculating the indicative breakdowns by Member State. Under this objective, measures can be co-financed up to 50% of public expenditure. The ceiling is 85% for the outermost regions.

(iii) The European territorial cooperation objective, which shall be aimed at strengthening cross-border cooperation through joint local and regional initiatives, strengthening transnational cooperation by means of actions conducive to integrated territorial development linked to the Community priorities, and strengthening interregional cooperation and exchange of experience at the appropriate territorial level.

Article 7 defines regions available under this objective: 1. NUTS level 3 regions of the Community along all internal and certain external land borders and all NUTS level 3 regions of the Community along maritime borders separated, as a general rule, by a maximum of 150 kilometers shall be eligible for financing taking into account potential adjustments needed to ensure the coherence and continuity of the cooperation action. (...). 3. For the purpose of

interregional cooperation, cooperation networks and exchange of experience, the entire territory of the Community shall be eligible.

Article 4 determines that only the ERDF is to support this objective, in the following areas: 1. the development of cross-border economic, social and environmental activities through joint strategies for sustainable territorial development; 2. the establishment and development of transnational cooperation, including bilateral cooperation between maritime regions not covered under point 1, through the financing of networks and of actions conducive to integrated territorial development; 3. reinforcement of the effectiveness of regional policy by promoting: (a) interregional cooperation focusing on innovation and the knowledge economy and environment and risk prevention in the sense of Article 5(1) and (2); (b) exchanges of experience concerning the identification, transfer and dissemination of best practice including on sustainable urban development as referred to in Article 8; and (c) actions involving studies, data collection, and the observation and analysis of development trends in the Community.

Article 21 defines the resources available: 2.52 % of the resources referred to in Article 18(1) (€7 billion) and, excluding the amount referred to in paragraph 22 of Annex II, this shall be distributed between the different components as follows: (a) 73.86 % for the financing of cross-border cooperation referred to in Article 7(1), using eligible population as the criterion for calculating the indicative breakdowns by Member State; (b) 20.95 % for the financing of transnational cooperation referred to in Article 7(2), using eligible population as the criterion for calculating the indicative breakdowns by Member State; (c) 5.19 % for the financing of interregional cooperation, cooperation networks and exchange of experience referred to in Article 7(3). The ceiling for co-financing is 75% of public expenditure.

Based on these objectives and funding specifications, the Regulation also sets the principles of assistance from the funds: complementarity to national actions, consistency with Community priorities and coordination among the financial instruments (Article 9); Programming: the objectives shall be pursued in the framework of a multiannual programming system organized in several stages comprising the identification of priorities, the financing, and a system of management and control (Article 10) and in ‘partnership’ or close cooperation between the

Commission and each Member State covering the preparation, implementation, monitoring and evaluation of operational programs. Member states shall involve, where appropriate, each of the relevant partners, and particularly the regions, in the different stages of programming within the time limit set for each stage (Article 11); Territorial level of implementation: the implementation of operational programs is the responsibility of member states at the appropriate territorial level (Article 12); Proportional intervention, meaning proportional employment of financial and administrative resources by the Commission and member states according to the proportion of expenditure allocated to an operational program (Article 13); Shared management (Article 14); Additionality: contributions from the Structural Funds shall not replace public or equivalent structural expenditure by a Member State, which may vary in the different objectives (Article 15); Equality between men and women and non-discrimination (Article 16); Sustainable development: the objectives of the Funds shall be pursued in the framework of sustainable development and the Community promotion of the goal of protecting and improving the environment as set out in Article 6 of the Treaty (Article 17).

In addition, according to Article 25, the Council should established the ‘strategic guidelines’ through a policy document defining an indicative framework for the intervention of the Funds, taking account of other relevant Community policies. For each of the objectives of the Funds, those guidelines shall “give effect to the priorities of the Community with a view to promoting the harmonious, balanced and sustainable development of the Community referred to in Article 3(1).” In this regard, in 2006 these guidelines were established, representing “*a single framework which member states and regions are invited to use when developing national, regional, and local programs, in particular with a view to assessing their contribution to the Community's objectives in terms of cohesion, growth and jobs*”<sup>26</sup> They concentrate on three priorities that should be the targets of resources to be allocated by the funds to the programs presented by member states:

- (i) improving the attractiveness of member states, regions and cities by improving accessibility, ensuring adequate quality and level of services, and preserving the environment;

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<sup>26</sup> Council Decision 2006/702/EC.

- (ii) encouraging innovation, entrepreneurship and the growth of the knowledge economy through research and innovation capacities, including new information and communication technologies;
- (iii) creating more and better jobs by attracting more people into employment or entrepreneurial activity, improving the adaptability of workers and enterprises and increasing investment in human capital.

The guidelines also stress that member states and regions should pursue “*the objective of sustainable development and boost synergies between the economic, social and environmental dimensions. The renewed Lisbon strategy for Growth and Jobs and the National Reform Programs emphasize the role of environment in growth, competitiveness and employment. Environmental protection needs to be taken into account in preparing programs and projects with a view to promoting sustainable development*”. The guidelines are thus indicative policy objectives and principles to orient the implantation, and based on these guidelines, member states adopt a national strategic reference framework. This framework serves as the basis for programming actions financed by the Funds, and has the purpose of ensuring that interventions of the funds are in line with the strategic guidelines.

Based on these principles, the Regulation designs the functioning of the funds based on the elaboration of national frameworks and operational programs by member states that are entitled to funding under the different programs, including, among other requirements, environmental impact assessments of the proposed measure. These operational programs are then reviewed by the Commission and implemented by the States at the appropriate level of governance. Member states also have to report on the implementation to the Commission, which is responsible for the evaluation and is entitled to eventually suspend the funding.

The current operational regulations are in force until 2013, but after the release of the Europe 2020 agenda, a Communication was issued in order to stress the role of Regional Policy in this strategy, based on a two-pillar approach to increase its contribution to sustainable growth during the current programming period:

- (i) Investing more in sustainable growth: encouraging greater strategic focus in investments on sustainable growth with emphasis on resource efficient and low-carbon economy; and
- (ii) Investing ‘better’ in sustainable growth: improving policy delivery mechanisms by reinforcing the application of sustainable development principles in the operational programs.

While major changes in the way Regional Policy operates can only be envisaged in the next multiannual financial framework, this Communication sets out how managing authorities can realign current Regional Policy programs with the Europe 2020 sustainable growth objectives. These actions should be seen in the context of -and are complementary to- the ‘Resource Efficient Europe’ flagship initiative and the climate and energy targets of Europe 2020.<sup>27</sup> Once more, not only has the regional policy aimed to address the regions that are lagging behind in economic development, as stated in the convergence objective, but it has also adapted to function as an instrument of the wider policy objectives of the EU.

#### **4. Concluding remarks**

The regional policy has moved from being an “*accompanying policy designed to offset the regional perverse effects of other Community policies*”<sup>28</sup> and to provide additional support to member states in overcoming their own backwardness, to become a comprehensive and mainstream policy, seen not only as an objective but also as a means of completing the integration project itself. The policy nowadays encompasses approximately one third of the EU budget, has a complex set of objectives defined at the supranational level, and has proven to have an impact on regional development, while also being both highly contested and ambiguous in its effects and the coherence of its goals. Based on the analysis provided in this section, some conclusions can be drawn.

Firstly, the scope of the regional policy has evolved significantly and in parallel to transformations taking place in the EU itself. Tackling regional imbalances was seen at the time

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<sup>27</sup> European Council Conclusions of 17.06.2010

<sup>28</sup> J. Scott, ‘Environmental Compatibility and the Community’s Structural Funds: a legal analysis’, in *Journal of Environmental Law* 8, 1996, Oxford Univ. Press.

of the creation of the ERDF as necessary for the achievement of the common market. Nevertheless, as the evolution continued, the idea of cohesion was introduced into the treaties as a goal of the EC to be achieved by way of the implementation of the common market and the Community's policies. This led to the establishment of a regional development policy, as an instrument based on solidarity between member states and designed to induce not only convergence in economic development among different regions, but also the implementation of the different overall policy strategies of the bloc.

It is important to note, in this regard, the equal constitutional status of the EC's tasks, according to Article 2 TEC: (i) harmonious, balanced and sustainable development of economic activities; (ii) high level of employment and of social protection; (iii) equality between men and women; (iv) sustainable and non-inflationary growth; (iv) competitiveness and convergence of economic performance; (v) protection and improvement of the quality of the environment; (vi) raising of life quality and living standards and (vii) economic and social cohesion and solidarity among member states – the Lisbon Treaty added 'territorial' to this last goal, reflecting the existence of this objective in the Structural Funds Regulation. In addition, policy documents such as the SDS, the Lisbon Agenda and Europe 2020 introduced new cross-cutting objectives to be pursued through all policy instruments, with sustainable development, above all, as a mainstream goal. Nevertheless, achieving coherence between these goals is a complex task, given the wide range of issues comprised in those targets and the difficulty in defining concrete objectives – sustainable development is not defined in the Regulations, its meaning coming from the SDS.

From the legal instruments analyzed above, it can be perceived that the majority of the resources (81%) is allocated to the Convergence objective, which aims at (i) improving conditions for growth and employment through investment in physical and human capital, (ii) the development of innovation and of the knowledge society, adaptability to economic and social changes, (iii) the protection and improvement of the environment, and (iv) administrative efficiency (Reg. 1083 Article 3.1). Within this framework, 70% of the resources are allocated according to quantitative economic criteria: GDP per capita below 75% of the community average makes a region eligible for funding under this objective. Therefore, it can be said that the absolute priority of the regional policy as it stands today is to address regions which are lagging behind in development terms,

understood as having economic development below the average. The means envisaged to promote such a convergence range from infrastructure investments to sustainable tourism and water treatment, showing that the cross-cutting policy objectives mentioned above have been taken into consideration. On the other hand, it is a bit unclear how these objectives fit together.

This complexity is reflected in the implementation and evaluation of the impact of these instruments. For instance, despite the fact of the requirement of environmental integration into the *ex ante* evaluations of the programs to be funded, the *ex post* evaluation of the programs under implementation, and also the overall requirement to work towards the objective of sustainable development, the impact of the convergence objective on the social and -primarily- environmental spheres is more complex. As argued by Joanne Scott in 1996, it is clear that the requirements contained in the Regulations alone are not sufficient to assure compatibility between the measures funded and the environmental/sustainability goals, as repeatedly measures funded under ‘Objective 1’ (as it was once called) were found not to comply with EU environmental law and to have negative environmental impacts.<sup>29</sup>

Later analysis has confirmed Scott’s legal insights with data. In a comprehensive study with a twofold aim, namely to analyze the impact of the structural funds towards the promotion of sustainable development, and to develop indicators in order to evaluate how the situation would be in the absence of the structural funds programs, Paul Ekins presents two interesting conclusions. Firstly, acknowledging that there is increasing consistency between regional policy priorities and the broader regional development strategies, the case study suggests that the funds have made a generally positive contribution to ‘manufactured and human capital’, but that the key regional constraints on sustainability in relation to natural and social capital, identified in the regional assessments, are not at the center of the structural funds programs, and measures have made significant negative contributions to natural capital, as well as contributing to significant environmental improvements, especially in Objective 2 regions: *“These negative effects occur largely in relation to the impacts of new infrastructure investment, especially roads. These impacts are generally an implicitly understood and accepted part of a program of development*

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<sup>29</sup> J Scott, ‘Environmental Compatibility and the Community’s Structural Funds: a legal analysis’, in *Journal of Environmental Law* 8, 1996, Oxford Univ. Press.

*and have been taken to provide higher levels of social welfare, by regional decision-makers. The case studies suggest however changes in the relative weight given to natural capital in determining trade-offs with a decline in natural capital becoming less acceptable in the current period. The evaluations are those of regional (and MS) decision-makers. It is not obvious that taking an EU perspective would result in a similar evaluation of the trade-offs, for example in the cases where increases in GHG have been accepted. The emergence of potential differences in the way in which trade-offs are evaluated is suggestive of the need for clearer EU criteria when evaluating SF programs. The evidence from the cases is that resource efficiency measures are not specified as a means of managing the inevitable trade-offs.”*

Secondly, the study considers the added value of the programs in comparison with a situation lacking such interventions: *“Whilst a difficult and necessarily speculative analysis, the case studies suggest that the SF programs have accelerated ‘conventional’ measures of regional development in the form of infrastructure, productive investments and skills development. Perhaps more importantly the SF have allowed regions to broaden and ‘modernize’ the policy mix to include fuller consideration of ICT and R&D, environmental measures, territorial planning and integrated urban and rural development, human resource development and measures to combat social exclusion. In doing so, the SF fosters a more comprehensive regional development policy and one that has greater co-ordination with other Community policies. Finally, in terms of the contribution of the SF to SD, identified in the cases, a common finding has been the strong positive impact that the design and operation of SF programs has had on the development of institutional capacity at the regional and local levels. The ability to take strategic views, adopt coordinated policy approaches, apply methods for policy evaluation and to adopt consultative and partnership approaches, has been strengthened. This capacity has taken a considerable time to develop, but will remain a permanent benefit in those regions receiving SF support.”* In concluding, the study suggests that *“in order to rise to the challenge the structural funds have to be seen as an agent for sustainable development as well as the achievement of cohesion. (...) As an EU policy tool, the SF, with due initiative and improvement, has the potential to be a constructive motor for sustainable development. The SF provide the opportunity to challenge regions to accelerate to a more sustainable development path, to embrace a model of development that better addresses the constraints to sustainable development, and which in*

*turn fosters an improved quality of life now and in the future for regional and EU citizens”.*<sup>30</sup>

Thus, it can be perceived that the regional policy has had several positive impacts in the sustainable development of the regions, even if sometimes the trade-offs between the gains are of complex nature.

Finally, regarding the management of the funds, it can be said that control over the use of the funds has been gradually transferred to the Commission, which establishes the eligible regions - for the majority of the cases - through specific guidelines in the Regulations. Nevertheless, tension has always existed between Community priorities and Member States' control, which has been apparent from the beginning. At the time of its establishment, the policy was officially presented as a way of promoting regional development, but was also an instrument of political bargaining between stronger and smaller countries and regions within the Community in terms of implementing the common goals of the integration project. Since then, the policy has come a long way, from being a complementary policy to national development efforts to a complex communitarian vision of development, and the majority of the financial resources are applied in objectives decided at EU level. The eligibility for structural funds under the convergence objective, which accounts for 80% of the funding available, is to be applied based on horizontal criteria, which for a long time have been again designated on the basis of GDP per capita, which should be less than 75% of the Community average. However, there was no area designation at EU level for the regional competitiveness and employment objective; instead, it became the responsibility of the member states to determine the eligible NUTS I or II regions to be selected for this objective under national planning. While some argue that this culminated a trend of increasing national influence on the spatial coverage of the regional policy since 1993, others are more cautious in making such claims, given that this policy objective represents only 15% of the available resources and that the implementation of such resources is also done according to guidelines decided at EU level.<sup>31</sup>

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<sup>30</sup> P Ekins, 'Evaluating the Contribution of the EU Structural Funds to Sustainable Development', available at [http://europa.eu.int/comm/regional\\_policy/sources/docgener/evaluation/rado\\_en.htm](http://europa.eu.int/comm/regional_policy/sources/docgener/evaluation/rado_en.htm).

<sup>31</sup> Regarding the debate concerning the governing of the funds, see J Bachtler, 'Who governs EU Cohesion Policy? Deconstructing the Reforms of the Structural Funds', *Journal of Common Market Studies*, 2007, Volume 45, Number 3.

In sum, despite the criticism that might be raised regarding its flaws, it seems as though the regional policy has been an important instrument of solidarity between member states and a good example of a measure designed to promote regional development. It has induced development in regions lagging behind; it has included issues that were incorporated into the EU as part of a 'sustainable development strategy' in the regional development agenda, being thus a means of promoting sustainable regional development through a legal framework; and it has brought the debate and decision-making procedures to the regional level, making it easier to take regional specificities and needs into consideration, as well as appropriate ways to tackle them. In this regard, considering it as a benchmark, the next section will analyze a similar initiative that has been recently established in MERCOSUR.

## II. The Structural Development Fund of MERCOSUR (FOCEM)

MERCOSUR is another example of a regional integration project where a positive integration measure was designed in order to address development imbalances within the common market. Despite differences in comparison with the EU, as previously stated the European model of integration has always been a model for the South American bloc, and in the case of the structural funds, several parallels can be traced and important insights formed.

### 1. Introduction: background of the establishment of FOCEM

MERCOSUR was founded under the rationale of integrating the regional market in order to expand the national economies and promote “*regional development with social justice*” (preamble of the Asunción Treaty). Nevertheless, apart from the market freedoms, few positive integration policies were envisaged in the early years of the project, and the goal itself was to achieve a common market as a means of economic development.

This scenario slowly began to change, and after the re-launch of the integration project in the year 2000 and the institutional innovations that followed,<sup>32</sup> the idea that a common market was not enough to address the development needs of the region began to gain support, and the member states came to agree on the need to take positive measures in order to address one of the main challenges of the bloc, its internal asymmetries: the four current member states are not only very different in size and economic power, but also have different approaches to the project. The entrance of Venezuela is also likely to alter this already delicate balance.<sup>33</sup> On the one hand, for the smaller partners, Paraguay and Uruguay, intra-regional trade corresponds to a very important share of their total trade and, given the fact that the completion of the common market has not been achieved so far, they claim that they are not reaping enough benefits from the integration

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<sup>32</sup> See chapter 3.

<sup>33</sup> To illustrate these asymmetries, it's worth mentioning some indicators of the four current members: Argentina: size: 2,780.4 sq. km; population: 40 million; GDP: US\$ 328.4 billion; GNI per capita: US\$ 7,200. Brazil: size: 8,514.0 sq. km; population: 192 million; GDP: US\$ 1.612.5 billion; GNI per capita: US\$ 7,350; Paraguay: size: 406.8 sq. km; population: 6.2 million; GDP: US\$ 16 billion; GDP per capita: US\$ 2,180; Uruguay: size: 176.2 sq.km; population: 3.3 million; GDP: US\$ 32.2 billion; GNI per capita: US\$ 8,260. Venezuela's accession change the internal balance of the bloc: size: 921.1 sq. km; population: 27.0 million; GDP: US\$ 313 billion; GNI per capita: US\$ 9,230. Source: World Bank database, available online at [www.worldbank.com](http://www.worldbank.com).

process and are not being adequately compensated for liberalizing trade and being constrained by a common commercial policy.<sup>34</sup> On the other hand, for the bigger partners, Argentina and Brazil, the situation is the opposite. Particularly in the case of Brazil, the biggest player in the region, internal trade is not the only point, and it is argued that MERCOSUR is seen by the Brazilian government as an instrument to support its ambitions to become a global actor. MERCOSUR has become a declared priority in the Brazilian diplomatic agenda, especially under the administration of President Lula (2002-2010) who constantly stressed the importance of integration to the development of South America and of the current administration.<sup>35</sup> This did not prevent difficulties arising in harmonization of positions with the other big partner, Argentina, and the bloc's functioning has faced complications.

In this context, another important initiative was taken: the creation of a 'structural convergence fund', designed to address the challenge of overcoming the internal asymmetries in the region and balancing the weight of member states in the bloc. This fund, said to be inspired by the structural funds of the European Union, is regarded as one of the most important achievements in recent years, and is especially noteworthy because it is not a 'negative measure' taken in order to remove barriers to the common market, but rather a 'positive measure' taken to strengthen the bloc as a whole by addressing the needs of its weaker areas.<sup>36</sup>

From a legal perspective, the creation of the fund was not determined under any specific competence of the bloc, but rather on a pragmatic basis which characterizes many actions undertaken and with the discretion allowed to an organization that depends mainly on political

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<sup>34</sup> Uruguay particularly has been threatening to sign free trade agreements with third countries due to dissatisfaction with the results of MERCOSUR. For more details regarding the economic situation of the bloc, see F Masi, A Hoste, *Economic Development and Asymmetries in MERCOSUR: The prospects of a MERCOSUR Regional Development Fund*, University of Miami, Dante B. Fascell North South Center Working Paper Series, Paper No 4, 2002.

<sup>35</sup> See B Magalhaes, J Erthal, 'Brasil: as dificuldades internas da liderança regional' in MR Soares de Lima, MV Coutinho, *Agenda Sul-Americana: mudanças e desafios no início do Século XXI*, Fundação Alexandre de Gusmao, Brasília, 2007. In addition, it can be noted that Brazil has been trying to become a leading voice among developing countries, using international fora such as the G-20 in negotiations at the WTO Doha Round. This trend could be reinforced in the coming years, as the country has been gaining international recognition for economic developments achieved under the last administrations, and recently found a substantial amount of oil on its offshore coasts, which could boost its importance in the international scenario.

<sup>36</sup> It should be noted that, in terms of 'negative measures', the two smaller countries, Paraguay and Uruguay, benefited, from the beginning, from differential treatment regarding the accomplishment of the liberalization of trade and removal of customs duties, provided for in Article 6 of TA.

decisions to function.<sup>37</sup> Article 35 of the ‘Ouro Preto Protocol’ authorizes the CMC “*to carry out all the measures necessary to attain its objectives, according to its competences*”, and the idea behind the promotion of specific measures supporting the reduction of internal asymmetries emerged from the assumption that MERCOSUR “*should be a tool to promote the social and economic development of the member states with social justice*”; thus, if the liberalization of trade had proven to be insufficient to reduce such imbalances, positive measures should be taken to achieve this objective.

The project of the fund gained momentum in 2003, when the CMC issued Decision 27/2003, reaffirming this solidarity idea in its preamble and determining, in Article 1 “*that studies should be made in order to establish structural funds to enhance the competitiveness of smaller countries and less favored regions*”. As a result, in 2004 Decision 19/04 created a ‘High Level Group’<sup>38</sup> formed by the Ministers of Foreign Affairs and of the Economy of member states in order to coordinate the steps to achieve this objective, identifying the initiatives and programs to be taken and proposing ways of financing their implementation. Afterwards, Decision 45/2004 officially created the ‘MERCOSUR Structural Convergence Fund’ (FOCEM)<sup>39</sup> on December 16<sup>th</sup> 2004, aiming to finance programs to promote the competitiveness and social cohesion of member states, to reduce the asymmetries of less developed Members and regions and to support the structural convergence of the bloc.

The ‘high level group’ kept working until Decision 18/2005, creating the regulation of the funds, was passed one year later, stating in its preamble that in order to assure the process of convergence towards the common market it was necessary to reinforce the principle of solidarity, and that the benefits of the market expansion resulting from integration would not benefit all parties while asymmetries still existed. The decision established the programs and priorities of FOCEM around four areas: structural convergence; competitiveness; social cohesion; and strengthening of the institutional structure and of the integration process as a whole.

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<sup>37</sup> See, in this regard, M.L. Olivar Jiménez, ‘La Adhesión de Nuevos Miembros al MERCOSUR: una cuestión fundamental para la evolución de la organización’, in E Accioly (ed), *Direito no século XXI*, Curitiba, Juruá, 2008, in which the author highlights the pragmatic character of the bloc, in which “solutions are adopted as problems come up”.

<sup>38</sup> Type of body dependent on the CMC, formed in order to carry out specific tasks. The group was to be coordinated by the CRPM and assisted in its work by the Secretariat, and to present its conclusions in the CMC meeting.

<sup>39</sup> In Portuguese, “Fundo para a convergência estrutural do MERCOSUL”.

Furthermore, FOCEM appears to play a role that goes beyond structural convergence, but also to balance the asymmetries in size and economic power within the bloc, as the functioning of the fund, which will be analyzed in the next section, seems to suggest. In this regard, it can be noted that the background to the establishment of the structural funds of the EU is similar to the context in which MERCOSUR created FOCEM. It is clear that the projects have significant differences, not only in their approaches – the EU has always had supranational institutions defending the ‘European interest’, as opposed to the intergovernmental rationale of MERCOSUR - but also in terms of scope – the EU has, from the beginning, had the idea that the common market was not a goal, but a tool to promote development, and a broader mandate to pursue and promote common policies on trade, agriculture, competition, etc., to achieve this bigger objective. Nevertheless, in both cases the projects came to a point where positive measures were deemed necessary in order to correct regional imbalances that were not being reduced by the integration project.

## **2. Functioning of FOCEM**

The institutional framework and the regulation of the fund were established by the CMC in Decisions 18/2005 and 24/2005, which initially set its functioning over a period of ten years, with a budget of one hundred million U.S. dollars per year. FOCEM seems to perform a redistributive role among member states, since quotas have been established for each party. Being the biggest countries, Argentina and Brazil are responsible for donating 27% and 70% of the budget, respectively, and are each entitled to benefit from only 10% of the total amount; Paraguay and Uruguay donate 1% and 2% of the budget, and benefit from 48% and 32% of total resources, respectively.<sup>40</sup> It would thus be a form of compensating the smaller countries for the disadvantages of liberalizing trade with bigger Members. Moreover, the fund follows a rationale of complementarity to national efforts to promote development, since the resources are designated in the form of non-reimbursable donations, but member states should finance at least 15% of the total cost of approved projects.

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<sup>40</sup> Article 8 also allows the contributions of third countries and international institutions and organizations to the fund.

The development process to be promoted by the fund is carried out through programs which finance projects according to four main pillars:<sup>41</sup>

i) Structural convergence: projects designed to contribute to the development and structural adjustment of smaller economies and less developed regions, including the improvement of broader integration structures and communication in general. Under this program, projects can cover the following areas: construction and improvement of transportation routes which optimize the movement of goods and promote the physical integration of member states and their sub-regions; exploitation, transport and distribution of fossil and bio-fuels; generation, transportation and distribution of electric energy; implementation of infrastructure work to contain and conduct water systems, sanitation systems and draining;

ii) Development of competitiveness:<sup>42</sup> projects designed to contribute to the competitiveness of productive processes within MERCOSUR, including projects of production and labor improvement to facilitate intra-bloc trade, integration of productive chains and improvement of public and private institutions connected with production quality (technical standards, certificates, etc.) and research and development of new technologies. Under this program, projects can cover the following areas: generation and diffusion of knowledge related to dynamic productive sectors; metrology and certification of quality in products and productive processes; tracing and control of animal and agricultural products and guarantee of quality and security of its sub-products of economic value; promotion of the development of productive chains in dynamic and differentiated economic sectors; promotion of companies and productive and exporter groups; strengthening the conversion, growth and associability of small and medium companies, their links with regional markets and the promotion of new enterprises; professional training in management, productive organization in cooperatives and associations and entrepreneurial initiatives;

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<sup>41</sup> Articles 2 and 3.

<sup>42</sup> It should be noted, in this regard, that the CMC decided in 2008 to give priority to a 'productive integration' strategy, as stated in Decision 12/2008, and thus there was a provision making the use of FOCES resources possible for initiatives under this strategy; in addition, a new fund was established to promote this objective, but is still not operational.

iii) Social Cohesion: projects designed to foster social development, especially in border zones, including programs of community interest and health, poverty eradication and employment. Under this program, projects can cover the following areas: health care projects aimed at reducing child mortality and enhancing living expectations, improving hospital capacity in remote zones and eradicating epidemic and endemic diseases resulting from poor living conditions; teaching programs for youth and adults and professional training aimed at reducing illiteracy, enhancing the coverage of the educational system of the population, covering specific needs and reducing disparities in access to education; training and certifying workers, providing micro-credit, promoting first employment opportunities and income in activities -particularly in regions with lower employment rates, and regarding young people; combating poverty, identifying most affected zones, promoting access to housing, health, food and education in vulnerable areas of poorer regions and border zones;

iv) Strengthening of the Institutional Structure and of the Integration Project: projects designed to improve the institutional structure of MERCOSUR. In addition, in this initial phase, the improvement of infrastructure in the bloc was emphasized, since Arts. 12 and 13 determine that in the first four years of functioning, priority would be given in assigning the fund's resources to projects under Program I, with the additional possibility of assigning 0.5% to projects under Program IV; moreover, resources assigned to Program I should be used in projects to improve the intra-bloc infrastructure, in order to facilitate integration. After the fourth year, results shall be analyzed and these priorities reviewed.

The institutional structure designed to manage the fund comprises the following bodies:<sup>43</sup> technical units in each Member State (National Technical Unit, NTU), which select the projects to be presented to the main technical unit (FOCEM Technical Unit, FTU), and evaluate the projects already in force; the FTU also manages the implementation of the projects; an '*ad hoc* expert group' (AHEG) formed by technical personnel assigned by each Member State, which provides technical support to the FTU in order to evaluate the projects presented by the NTUs and the projects in force; the CRPM, which verifies the admissibility of projects according to the established guidelines and requirements; the CMG, which drafts a report to be presented to the

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<sup>43</sup> As determined by Decision 24/05.

CMC, informing about the projects considered suitable for implementation; and finally the CMC, which approves the projects to be carried out, with the corresponding designation of resources.

Under Decision No 24/05, articles 44 to 53, the procedure to present projects commences with the submission of proposals by member states to the NTUs; the latter must verify whether the projects meet the criteria set out in Decision No 24/05, articles 32 to 39: (1) projects must be proposed by the public sector of one Member State (although multinational projects are also accepted) which must agree to finance at least 15 per cent of total costs; (2) projects must fit within the guidelines of one of Programs I to IV; (3) the total cost must be a minimum of US\$500,000 (except for projects falling under Program IV); and (4) the rate of socio-economic return must meet a minimum amount, set every year by the CRPM. There are also environmental and social requirements: projects must optimize the use of natural resources and reduce environmental impact, and also respect the geographic, economic, social and cultural specificities of the place where it will be implemented. It seems evident that the criteria were drafted in a very broad and vague way, leaving a large amount of discretion to member states as regards presenting projects to fulfill their quota.

The projects selected by each NTU are presented to the CRPM, which analyzes the fulfillment of all the criteria again and, within 30 days, sends the approved projects to the FTU; the FTU, with assistance from the ‘*ad hoc* expert group’, drafts a technical report, specifying the viability, technical and financial feasibility and sustainability of the projects, serving as a means of comparison with other projects presented; this technical report is sent back to the CRPM, which drafts a memo to be presented to the CMG regarding the eligibility of selected projects; the CMG presents a final memo to the CMC, which finally analyzes and votes on the approval of selected projects, assigning the correspondent resources to finance them. The Secretariat then signs legal instruments with the corresponding member states, which are responsible for the implementation of the projects with the assigned funds.

The fund started to be implemented in 2007, after the first initial contributions by member states. A new regulatory framework was approved in 2012, introducing changes mainly in the technical

aspects of the functioning and implementation of FOCEM but not substantively altering its scope or programs.<sup>44</sup> A decision was also passed in 2012 incorporating Venezuela into the framework.<sup>45</sup>

According to Decision 18/2005, Article 21, pilot projects with strong impact were to be implemented in the first years, and the first projects were approved in 2008.<sup>46</sup> So far, forty-three projects have been approved, among which four have been assigned Argentina, five to Brazil, seventeen to Paraguay, ten to Uruguay, as well as three joint projects and four projects under Program VI related to strengthening the institutional structures of the bloc. Projects under Program I clearly receive the majority of financial resources.<sup>47</sup> The latest project which has been approved is called *Building an infrastructure for the Protection and Promotion of Human Rights in the MERCOSUR Public Policy Institute for Human Rights (IPPDH)*, and is aimed at promoting new state coordination mechanisms and social participation in the processes of public policy formation of national and regional human rights, increasing technical training instruments for policy public agencies and government institutions, social organizations and coordination of MERCOSUR for planning and management of public policies on human rights.<sup>48</sup>

Finally, it is interesting to note that in this initial phase FOCEM has now come to resemble the structure designed to regulate the EU's ERDF: it established a quota system, according to the size and economic power of the countries; it has followed a complementarity rationale according to which the funds should complement the efforts made by member states to carry out development projects; and it did not establish a regional development plan at the initial stage. Nevertheless, the evolution of the EU's regional policy provides important insights for FOCEM: firstly, the importance of defining a regional strategy for development, so that the funds can operate as an instrument to achieve it; secondly, the need to define clearer criteria for the selection of beneficiaries of the funds is crucial if the funds are truly established in order to promote regional development, meaning the convergence of regions which are backward, and necessarily assuring that those regions are the ones to which the resources will be applied. In the case of the EU, a

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<sup>44</sup> CMC Decision 01/10, revoking Decisions 24/05 and 15/09.

<sup>45</sup> CMC Decision 41/10, establishing Venezuela's contribution of US\$ 15,000/year.

<sup>46</sup> The current budget of FOCEM is US\$ 685million, according to Decision 48/12, which established the budget for 2013.

<sup>47</sup> For more details regarding projects, see document available – in Spanish and Portuguese - at the official website of FOCEM, [www.MERCOSUR.int/focem/index.php](http://www.MERCOSUR.int/focem/index.php),

<sup>48</sup> COF 01/13, with a budget of US\$ 500,000.00 for a period of two years.

quantitative economic indicator, GDP per capita, has been used since then for most of the funds' programs – it should be noted that, even though many authors criticize this method, arguing that a more comprehensive set of indicators, such as those of the 'human development index' created by the UN, could be applied in order to truly identify the most underdeveloped regions;<sup>49</sup> nevertheless, it has clear advantages in comparison to the national quota system operating in FOCEM.

### **3. The way forward: integration of FOCEM – IIRSA – UNASUR?**

While FOCEM's resources and projects up to this point have been symbolic, at the same time they represent a very modest initiative which will have to find its way into a more comprehensive strategy over time. At the same time, as discussed in Chapter 3, when analyzing regional integration in Latin America, it is important to bear in mind the 'multilayered' system of integration initiatives in the continent. In this regard, an important remark should be made regarding recent developments in the context of UNASUR, the possibilities of overlap with MERCOSUR and the likely scenarios in the years to come.

Within UNASUR's spheres of competence, the organization is aiming to provide (e) the development of an infrastructure for the interconnection of the region and among our peoples, based on sustainable social and economic development criteria; (h) the development of concrete and effective mechanisms to overcome asymmetries, thus achieving an equitable integration; (m) industrial and productive integration, focusing especially on the important role that small and medium size enterprises, cooperatives, networks and other forms of productive organization may play; (n) the definition and implementation of common or complementary policies and projects of research, innovation, technological transfer and technological production, aimed at enhancing the region's own capacity and sustainability (Article 3 of the UNASUR Treaty). The wording of these competences suggests several overlapping goals as regards what MERCOSUR aims to achieve through FOCEM, and indeed it seems like this might already be happening, at least in relation to infrastructure – one of FOCEM's main goals.

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<sup>49</sup> J Scott, *op. cit.*, pages 29 and 56.

At the Third Summit Meeting of UNASUR (Quito, August 2009), the South American presidents decided to create, in such an institutional context, the Infrastructure and Planning Council (COSIPLAN – Consejo de Infraestructura y Planeamiento), which has been one of the most active bodies of the organization up to this point. On the same occasion, it was also decided to include the Initiative for the Integration of Infrastructure in South America (IIRSA) as COSIPLAN's infrastructure technical forum. IIRSA was launched in 2000 with the participation of the 12 countries of South America, comprising physical integration projects with integrationist objectives and seeking to promote this goal via the modernization, expansion or construction of transport, energy and telecommunications networks. The financial support for the initiative is provided by regional financial organizations such as the Corporación Andina de Fomento (CAF), the Inter-American Development Bank (IDB) and the River Plate Basin Financial Development Fund (Fonplata), as well as from national institutions such as the Brazilian National Development Bank (BNDES). IIRSA's projects have been concentrated in three main areas of action: the development of a strategic vision for physical integration in South America, the development of ten Integration and Development Hubs linking up the continent, and territorial planning. COSIPLAN is the new regional sphere for political and strategic coordination for infrastructure issues, in which IIRSA will serve as a mechanism of action coordination and a technical body for the planning of new projects in this area.

From several points of view, it might make sense to integrate the infrastructure initiatives under FOCEM to COSIPLAN's framework. A first reason seems to be to avoid the overlap of competences between MERCOSUR and UNASUR, above all in order to assure coherence and the maximization of resources, chiefly financial resources. Coherence is important given that an integrated infrastructure system might benefit not just a smaller regional area but the whole South American continent, given that trade relations between most of the countries are integrated through a net of trade liberalization agreements – MERCOSUR itself has economic complementarity agreements with several south American countries, as seen in Chapter 3. Thus, an integrated infrastructure system could benefit an increasingly integrated South American market.

Furthermore, the integration of financial resources can be an advantage, especially considering

FOCEM's reduced budget and project portfolio up to this point. IIRSA, on the other hand, has significantly higher resources and greater experience in infrastructure projects: to this point, IIRSA has a portfolio of 531 projects, among which 74% have advanced significantly (12% are concluded, 30% ongoing, 30% are in the pre-execution phase); the remaining are in the stage of technical studies; the resources invested in these projects amount to US\$ 116 billion. Furthermore, a considerable amount of resources are expected to be invested over the next few years within COSIPLAN's framework: the latest meeting of the Council took place in November 2011, an occasion on which the 'Agenda of Priority Integration Projects (API) was launched, consisting of a set of 31 strategic projects of "high impact for the physical integration and regional socio-economic development". The API includes 88 infrastructure projects that mobilize resources estimated at US\$ 14billion to be executed within ten years. The works grouped here involve ports, logistics centers, border stations, waterways, railways, roads, bridges, tunnels, power transmission lines, airports, pipelines and multimodal transport systems. During the meeting, UNASUR's Ministers also approved the 2012-2022 Strategic Action Plan (SAP), which establishes a set of actions that will guide the Council's work over the next decade. Additionally, it was decided to establish three working groups to support COSIPLAN tasks, in: (i) Integration of South American Railway, including the construction of the Bi-Oceanic Corridor Railway, (ii) Funding Mechanisms and Guarantees, and (iii) Telecommunications in South America, for the implementation of a broadband optical ring.<sup>50</sup> In this regard, leaving infrastructure projects to COSIPLAN's framework, FOCEM could make use of its resources serving other priorities, especially in the integration of productive chains and human development, which are a fundamental part of the development objectives that it aims to promote – and of sustainable development from a broader perspective.

Finally, from a sustainable development point of view, another benefit that might arise from integrating COSIPLAN and FOCEM is the better use of impact assessment methodologies. FOCEM has a requirement for environmental assessments accompanying the projects presented by member states, but nevertheless has no guidelines regarding what these studies should consist of, relying on member states' own legislation in the area. It should be noted, in this regard, that environmental legislation varies significantly among MERCOSUR's countries and that this can

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<sup>50</sup> <http://www.iadb.org/intal/cartamensual/cartas/Articulo.aspx?Id=4b49cf45-1ee7-4124-8445-076cc009b639>.

undermine the relevance of this environmental requirement. On the other hand, strategic evaluation is IIRSA's Environmental and Social Planning Instrument. The methodologies were developed in 2006 and the first half of 2007 under the guidance of the Initiative's Technical Coordination Committee (CCT). The CCT then submitted them to IIRSA's National Coordinations to be piloted in an -as yet- undetermined number of Project Groups prioritized by the IIRSA Executive Technical Groups (GTEs). IIRSA's Strategic Environmental and Social Evaluation (EASE) Methodology aimed to promote the positive social and environmental effects in a given project and to minimize the negative effects. This gives IIRSA a conceptual framework and practical guidelines for its Project Groups for the specific purposes of improving territories' understanding in order to boost sustainable development and optimize the benefits from the project groups; gauging impacts, critical aspects, and vulnerable areas, and identifying socio-environmental development opportunities of these groups' territories of influence; establishing management guidelines and associated investments to generate more sustainable development options, and identifying project group design and implementation recommendations; creating a space for participative activities and a constructive dialogue between governments and key actors in the project groups' area of influence.<sup>51</sup> Thus, the integration with IIRSA would have the benefit of introducing a scheme of impact assessment, one recognized tool for the promotion of sustainable development.

In conclusion, in the future it could well be that the authorities in the region see the value of integrating FOCEM within UNASUR's COSIPLAN. This analysis is merely speculative, as no plans in this regard have been apparent up to this point. In addition, as discussed above, FOCEM's rationale also has a strong political motivation, which might undermine the incentives to dilute the initiative in a larger framework. Nevertheless, from the perspective of the more efficient promotion of regional development, this seems to be a possibility that should be taken into consideration.

#### **4. Concluding remarks**

FOCEM is a new and welcome initiative, demonstrating the capacity of MERCOSUR's member

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<sup>51</sup> [http://www.iadb.org/intal/articulo\\_carta.asp?tid=5&idioma=eng&aid=418&cid=234&carta\\_id=725](http://www.iadb.org/intal/articulo_carta.asp?tid=5&idioma=eng&aid=418&cid=234&carta_id=725).

states not only to liberalize trade, but also to take joint decisions responding to a recognized obstacle to the further progress of the bloc. On the other hand, the effectiveness of this initiative will be observed in the years to come, even though some conclusions can already be sketched regarding the legal/institutional framework and the development goals put forward.

First, as a fund created to promote development and structural convergence within the bloc, FOCEM was designed above all to address (at least in its initial stage) the inadequacy of infrastructure, which was considered to be an obstacle to the completion of the common market, particularly with respect to the smaller partners; in this regard, it has established priority guidelines to signal which issues should be tackled first. This shows that, in MERCOSUR, the idea of a structural fund is still much more focused on macroeconomic development, and reflects the fact that the functioning of the common market is the main goal. Notwithstanding, interesting projects, such as the creation of a university with a regional focus, are representative measures of efforts to have an impact on the social sphere – both on the education of the people and on the promotion of knowledge regarding the integration project itself and general themes pertaining to the Latin American continent. On the other hand, the preoccupation with the environmental sphere seems to be much less pronounced in MERCOSUR. This might not be surprising if one considers that the bloc itself has development with social justice as its main focus, reflecting the fact that the region still faces not only inequalities among member states, but also within member states, including in the biggest country, Brazil, which has poverty reduction as a major challenge. In addition, the bloc has not developed a strong level of environmental regulation and thus the pursuit of environmental goals is less pronounced, it being more difficult to integrate environmental issues within the as yet embryonic regional policy.

Regarding its functioning, FOCEM establishes quotas for assistance and leaves considerable discretion to member states regarding the presentation of projects—they only have to respect the vague guidelines of the programs and the (mostly technical) criteria set out in the regulations. This can jeopardize the achievement of goals, since it is not necessarily the most backward regions that will benefit from these programs, but also those areas which each Member State considers to be in its national interest to promote. In the end, it is for each Member State to choose which sort of project to propose, and within which region of the country. The quota

system underlines the redistributive role played by FOCEM, by compensating for the differences in the sizes and economic powers of member states. The decision-making procedure, which ultimately falls within the framework of the CCM as responsible for approving the final projects and budget, follows the consensus rationale that characterizes the institutions of the bloc, favoring this trend. It can be said, then, that FOCEM is a highly political tool, which will certainly help MERCOSUR to reduce some of its deficit, but will not necessarily lead to the socio-economic convergence of poorer regions. It should be noted, in this regard, that the larger partners of the bloc, Argentina and Brazil, also have severe internal asymmetries which will not be addressed by the fund's resources in this initial stage.

### **Conclusions**

As a general conclusion, it can be seen that regional integration may be an important means of promoting development, as integration projects such as the European Union and MERCOSUR create legal frameworks and policies that interfere in the national programs of member states and actively promote intra-regional development, as well as promoting free trade. Analysis of both MERCOSUR and EU policies shows that the two blocs have made efforts (at different levels, according to their capacity) to actively promote the development of their backward regions.

In comparing the EU funds and FOCEM, many considerations can be highlighted, and the lessons learned by the European Union during its long evolution (demonstrated by the various reform processes carried out over time) can provide interesting insights in relation to MERCOSUR, respecting of course the enormous differences between the two projects. First, regarding the scope of the policies, it is clear that, compared to FOCEM, the regional policy of the European Union has evolved from being an instrument helping to address the asymmetries resulting from the common market, into a broad policy that is now seen as an effective means of ensuring harmonious integration, by furthering the convergence of several regions within the bloc but also promoting broader regional development strategies. FOCEM is, of course, a new and still modest initiative which will need to prove its effectiveness in the South American context before it can be expanded, but the need for a regional development strategy is a deficiency within MERCOSUR.

Secondly, in the EU, a more holistic approach of development with a view to promote sustainable development can be observed, despite the ambiguities outlined above. The regional policy is seen as a part of a system that has sustainable development as its ultimate goal, and the strategies of the policy are defined accordingly. In MERCOSUR, the vision of development is still more attached to economic and social development, as the objective of the bloc is envisioned as promoting a common market to promote development with social justice, and environmental considerations play a very marginal role in FOCES's framework. This can pose particular problems, if consideration is taken of the fact that the region houses areas with some of the world's greatest natural diversity and resources, and MERCOSUR would benefit from the development of a stronger environmental strategy.

Thirdly, in both schemes, the sectors which are considered to need support through the funds are selected at the higher regional level, by the determination of programs and areas of action. Nevertheless, it can be noted that in the European Union there seems to be a clearer development strategy, focused on social cohesion and solidarity, which the funds were adopted to promote. In MERCOSUR, this idea is less developed, as programs have been defined, but not a true regional development strategy. Moreover, the means to select which regions can benefit from these programs differ substantially: in the European Union, there is a quantitative economic criterion (GDP per capita, which in most cases must be below 75 per cent of the Community average in order to make a region eligible for aid); in MERCOSUR, the fund is still at an initial stage, and it is interesting to note that it resembles the EU regional policy at its inception. Member states can propose projects which they consider of interest to their national economies and the integration project as a whole, within their quotas of the fund's budget and the framework of the programs established. This does not entail that states will not generally choose to address the problems of the less developed regions, but stricter criteria, defined at a higher level, would create a legal obligation to assign resources to those areas, not only among member states but also within each Member State (Argentina and Brazil are countries with severe internal asymmetries). This would help to ensure that FOCES becomes an effective instrument to promote the development of the most backward regions, and thus to overcome the challenge of reducing the imbalances within the bloc. Nevertheless, it should also be noted from the European case that an integration project

involves a great deal of political maneuvering, with tension still persisting in control over the allocation of resources. In its initial phase, EU regional policy played a greater role than it does currently in the 'redistribution' of economic power among the member states, as is presently the case with FOCEM. This issue has been the subject of considerable debate in the European Union, and to a significant extent the funds are nowadays subject to an overall development initiative decided at the regional level, but this remains a sensitive issue.

Another consideration concerns the decision-making procedures in each integration project, which certainly play an important role in the functioning of the funds, although these will not be compared in detail here given the considerable differences between the two blocs: while the European Union functions to a large extent (including in the case of the funds) as a supranational system, MERCOSUR works on an intergovernmental basis. It has been argued that one of the reasons for the success of the European Union is its supranational structure; while this is very likely to be true (although very difficult to measure), it does not mean that a supranational system would work just as well in other regional integration projects. In any case, this should not prevent a project with an intergovernmental structure such as MERCOSUR from achieving its goals and policies through a fund such as FOCEM. The most important thing in such initiatives seems to be the establishment of procedures guaranteeing that the resources be assigned to the areas which are in greatest need of aid, and this can also be achieved through an intergovernmental method of operating. It is political will, in the end, that will make the difference.

All this leads to the conclusion that the European Union's regional policy can provide important lessons for FOCEM. More comprehensive criteria could be used to accurately identify regions which are backward in development, and there should be a more precise definition of a true regional development plan in MERCOSUR. Nevertheless, as a newly created initiative, FOCEM has made its appearance with strategic timing, to help the bloc to overcome its legitimacy crisis and to move forward by responding to member states' differing expectations and needs.

Regional frameworks can provide a promising mechanism to deliver on the objectives of development cooperation, mainly for their capacity to replace external aid for an internally constructed development agenda. This is fundamental in terms of ownership, given that priorities

arise from a regionally discussed agenda which is created and implemented by the same group of countries. The challenges consist of linking the regional agenda with the international development goals, and above all in this case the transition to a green economy, which should be a fundamental part of fighting inequality and promoting sustainable development. In addition, in the case of MERCOSUR, the main challenge is to provide sufficient funds for FOCEM to be a true development mechanism, and not just a symbolic instrument of wealth transfer.



## **Chapter 5 - Regional integration and development: the integration of (sustainable) development into trade policies of the European Union and MERCOSUR**

This Chapter aims to analyze the trade policies and instruments developed by the EU and MERCOSUR and the extent to which these regional blocs have been integrating sustainable development concerns into their trade relations. As discussed in Chapter 2, the international trade regime, as part of international economic law, is a fundamental framework for the implementation of the principle of integration for sustainable development. The legal frameworks of regional integration agreements such as the EU and MERCOSUR can provide innovative ways of integrating sustainable development measures beyond the stalled multilateral negotiations, while also accounting for more specific regional and national concerns.

In this regard, a historical examination of how these policies have evolved, their scope, legal framework and instruments, is presented. The emphasis, however, will be on how these policies are related to the promotion of development, be it in the sense that they promote deeper economic integration regarding the WTO/multilateral sphere and Special and Differential Treatment (SDT) as a development tool, or in the sense that they promote integration of a wider scope of issues, including procedural tools such as impact assessment procedures, and substantive measures integrating trade and labor/environmental concerns into positive policy instruments.

### **I. The European Union Common Commercial Policy (CCP): between trade, development and politics**

Trade policy is one of the oldest policies within the EU framework, which emerged with the Treaty of Rome (TR) in 1958 and has evolved significantly over the years, both in scope and in breadth. Given the wide spectrum of issues involved with EU trade policy, the analysis here will focus on the development aspects of some of its instruments, particularly the newest trade agreements concluded with a series of partners in the last decade. Nevertheless, brief examinations about the general framework and legal aspects of the CCP will also be presented, as well as the emergence of a specific ‘development cooperation policy’ independent from the trade competence. This will be followed by more specific analysis of two sets of trade

instruments that have a development component: i) the Generalized System of Preferences (GSP), a non-contractual instrument that allows the EU to provide trade preferences unilaterally to other parties, and has progressively integrated sustainable development concerns as a conditionality for its beneficiaries; ii) contractual instruments, the trade agreements, which are the most comprehensive instruments of the CCP and have progressively integrated sustainable development concerns, among which two will be analyzed in particular: the *ex-ante* Sustainability Impact Assessments (SIA) undertaken during the negotiation of the agreement; and the ‘Trade and Sustainable Development’ Chapters which were gradually included, containing specific trade related measures aiming to promote sustainable development between the parties.

## **1. Introduction: Framework of the CCP**

Since the TR, the European Communities had a CCP with a link to development. The TR preamble mentioned that the parties desired “*to contribute, by means of a common commercial policy, to the progressive abolition of restrictions on international trade*” and intended “*to confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations.*” Furthermore, Article 3 of the TR stated that “*for the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein: (b) the establishment of a common customs tariff and of a common commercial policy towards third countries; (k) the association of the overseas countries and territories in order to increase trade and to promote jointly economic and social development.*” Thus, the CCP from the outset provided the EEC with an instrument that could be used for development purposes.

The CCP framework included the competence to conclude trade agreements in Article 133 EC, which in its original version covered only trade in goods. Nevertheless, the boundaries of the CCP evolved significantly over the years, especially in regard to the high number of issues that were becoming relevant to trade policy, leading to the expansion of the breadth and depth of its scope and the redefinition of the exclusivity of trade competence between the Community and member states. As there were no provisions in the EU treaties in this regard, the Court of Justice

of the EU (ECJ) had a prominent role in interpreting and stating the extent to which specific trade competences were held exclusively by the Community or if shared with member states. Among several important cases which helped to set the boundaries of the trade policy, the following can be cited as relevant: In Opinion 1/75,<sup>1</sup> the ECJ defined the scope of the CCP with reference to the external policy of a state, pronouncing that it concerns a broad field that develops progressively through a combination of external and internal measures, without any one taking priority over the other. Thus, the Court expressed the view that the policy could only be built gradually, through the adoption of internal legislation and the conclusion of international agreements, and that it should be a principally exclusive competence. This rationale was further reinforced in other cases,<sup>2</sup> even if member states had some margin of discretion such as regarding the establishment of deviating import rules when authorized to do so by the EC.<sup>3</sup>

In the 1980s and 1990s, international trade went through a significant change during the Tokyo (1973-79) and Uruguay (1986-94) Rounds of Negotiation, which included several issues in the trade agenda - such as technical standards, government procurement, services, intellectual property and trade related investments – and led to the creation of a comprehensive organization to regulate trade and encompass the GATT: the WTO. In this context, member states and the Commission had opposing views as regards the competence to conclude agreements of this nature, chiefly the WTO agreement and related agreements such as the TRIPS, TBT and SPS agreements, since some of these issues were considered as falling within the national competences. The ECJ again was called upon to clarify the issue in Opinion 1/94,<sup>4</sup> and expressed the view that some of the agreements, such as those addressing trade in goods, would fall within the exclusive competence while others, such as services and intellectual property, were not considered as relating specifically to international trade, but were affecting it as much as internal trade, and thus the competence had to be shared with member states – and the GATS and TRIPS Agreements were mixed agreements.

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<sup>1</sup> Opinion 1/75, Draft Understanding on a Local Coast Standard.

<sup>2</sup> Opinion 1/78, International Agreement on Natural Rubber, and Case 45/86, *Commission v Council* (Generalized Tariff Preferences).

<sup>3</sup> Such as in Case 41/76, *Donckervolke and Schou v Procureur de la République au Tribunal de Grande Instance de Lille and Director General of Customs*.

<sup>4</sup> Opinion 1/94, Competence of the Community to Conclude International Agreements Concerning Services and the Protection of Intellectual Property.

The situation changed with the Nice Treaty, which went back to the rationale of Opinion 1/75 and expanded the ambit of the CCP,<sup>5</sup> extending competence to cover trade in services and commercial aspects of intellectual property. While the original CCP (trade in goods and ‘GATS mode 1’ services<sup>6</sup>) falls within the exclusive competence of the Community, the newer dimensions added by the Treaty of Nice are shared competences, and some types of agreement (trade in cultural and audio-visual services, educational services and social and human health services) must now be concluded jointly with member states.

Finally, the Treaty of Lisbon added foreign direct investment to Union competence under the CCP, and moved the whole of this policy into its exclusive competence.<sup>7</sup> The Treaty deals with the issue in Part Five, within the external action of the EU, Title II being devoted to the CCP. Article 206 (ex Article 131 TEC) states that “[b]y establishing a customs union in accordance with Articles 28 to 32, the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers”; Article 207 expanded this scope: “1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action. 2. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy. 3. Where agreements with one or more third countries or international organizations need to be negotiated and concluded, Article 218 shall apply, subject to the special provisions of this

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<sup>5</sup> H. De Waele, *Layered Global Player: legal dynamics of EU external relations*, Springer, 2011, Chapter 4, The Common Commercial Policy, 2011, p. 67-70.

<sup>6</sup> The GATS establishes four modes of supply of services; mode 1 entails the cross-border provision of services without commercial presence or the movement of either provider or recipient; GATS OJ 1994 L 336/191, Art.1.

<sup>7</sup> Arts. 3(1)(c) and 207(1) Treaty on the Functioning of the European Union (TFEU). In cases of exclusive competence only the Union may legislate and adopt legally binding acts; Member States may only do so where empowered by the Union or in implementation of Union acts: Art.2(1) TFEU.

*Article. The Commission shall make recommendations to the Council, which shall authorize it to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules. The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations. 4. For the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by a qualified majority. For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules. The Council shall also act unanimously for the negotiation and conclusion of agreements: (a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity; (b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organization of such services and prejudicing the responsibility of Member states to deliver them. 5. The negotiation and conclusion of international agreements in the field of transport shall be subject to Title VI of Part Three and to Article 218. 6. The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member states, and shall not lead to harmonization of legislative or regulatory provisions of the Member states in so far as the Treaties exclude such harmonization".* Thus the CCP became exclusive in a wide array of competences, and basically has two types of legal instruments with which to pursue its goals nowadays: regulations adopted on the basis of Article 207.2 TFEU, according to the ordinary procedure of Arts. 289 – 294 TFEU, and international agreements concluded on the basis of Article 207.3 TFEU according to the procedure of Article 218 TFEU.

In addition to competence based on the CCP, the EU can conclude association agreements, which may cover (without additional legal bases being necessary) all policy fields covered by

the EC Treaty,<sup>8</sup> from trade provisions to a wider range of commitments and institutional structures that can include the creation of institutions with decision-making powers. After the Treaty of Lisbon, these association agreements, which had already been concluded previously, remained one of the major pillars of the EU's external policy. The Treaty distinguishes association agreements by a separate legal basis (Article 217 TFEU) and a specific procedure (Article 218 TFEU). In the latter case, association agreements differ from other EU external agreements by the fact that the decision to conclude an association agreement with a third country comes only after a unanimous vote by the Council and the consent of the European Parliament.

Having made these brief remarks about the general contours of the CCP's framework, instruments and competences, this section now examines the trade and development aspects of this policy. In addition, it presents an overview of how an independent but correlated 'development cooperation policy' emerged over the years, allowing the EU to provide development aid targeting the sustainable development of its partners but also the promotion of its own policy objectives, without being bound by WTO legality concerns.

## **2. The evolution of the development rationale in the CCP**

### **2.1 From 1957 to 1963: a colonialist external trade policy**

The starting point for the developmental aspects of the CCP was strongly linked to the process of decolonization and was concerned with maintaining ties that bound some EC countries to their former colonies, and above all, French and German colonies in Africa and the Pacific region. Other regions such as Latin America had a low priority, as on the one hand it took time for the EC to open up this focus, and on the other hand, Spain and Portugal, the countries with the strongest historical ties to LA, only joined the EC in the 1980s. As it is argued, "historical ties rather than need" have been the criteria for determining preferential trade and aid relations.<sup>9</sup>

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<sup>8</sup> Case 12/86 *Demirel* [1987] ECR 3719.

<sup>9</sup> M. Holland, *The European Union and the Third World*, Basingstoke: Palgrave Macmillan, 2000.

The relationship of the ECC with the overseas territories was regulated by Part IV of the TR, which provided for an ‘association’ with these parties on a permanent basis. The core provisions concerned free trade, investment, and development aid. As far as trade was concerned, the association built on the system of market access established for the EEC member states in the TR, which sought to achieve internal free trade within the EEC over a transitional period of 12 years by gradually reducing duties and quantitative restrictions. The reduction in quantitative restrictions was to be achieved by a prohibition on new restrictions and a staged increase in restriction-free quotas, a 100% quota being equivalent to the complete elimination of restrictions. This system was largely transposed to trade between the member states and the overseas territories: on the EEC side, all of these obligations were applied to trade with the overseas territories; on the other side, the territories (except those bound to trade on a non-discriminatory basis) were to reduce duties and open up quotas for EEC imports according to the standard transitional timetable, but, by implication, were still permitted to impose quantitative restrictions on non-quota imports. There were also some obligations with respect to inter-territory trade: duties -but not quantitative restrictions- were to be reduced. Finally, there was a provision for infant industry protection, allowing the territories to impose “*customs duties which meet the needs of their development and industrialization or produce revenue for their budgets*”. This exception was controversial within the GATT, but in fact it was only invoked once during the life of these three instruments. This arrangement was completed by a protectionist EEC Common External Tariff (CET), which imposed high tariffs on products of interest to the associates. These relationships had thus a strong political component, serving also to assure market access for European products in the associate territories.<sup>10</sup>

## 2.2 From 1963 to 1971: the Yaoundé Conventions

After the entry into force of the TR, most of the African territories covered by Part IV declared independence. Reflecting their new status, in 1963 a new five-year international agreement, the Yaoundé Convention, was concluded between all of these countries, except for Guinea, and this was followed by the five-year Yaoundé II Convention in 1969. For the remaining dependent territories, Part IV continued to apply and a decision was taken providing for more or less the

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<sup>10</sup> L. Bartels, ‘The Trade and Development Policy of the European Union’, *The European Journal of International Law*, Vol. 18 no. 4, 2007.

same benefits as under the Yaoundé Convention.

The most important difference between these Conventions and Part IV was institutional, but on substantive matters they remained similar. The exception concerned products covered by the newly established Common Agricultural Policy (CAP), which was designed to protect EEC agricultural producers. In practice, the associates continued to receive a measure of preferential treatment, ranging from equivalent treatment for Member State products to reductions on the ‘variable levies’ charged at the border. On the other side, there was also a strong measure of liberalization. Under Yaoundé I, the associates continued to reduce duties and open quotas for EEC products and undertook to abolish all quantitative restrictions within four years. One of the main features of these conventions, however, was their reciprocity in trade liberalization. It is argued that at the time of the Yaoundé Conventions, the main reasons given for reciprocity were ideological, but at the same time hiding a pragmatic effect, which was to benefit the (mainly) French exporters, who tended to be monopolists, and therefore able to keep prices high despite their low export costs. In reality, with minor exceptions, trade between the Community and the associates did not involve products which were competitive in their respective markets.<sup>11</sup>

Another development in this period was the creation of a European Development Fund (EDF) to disburse funds to overseas countries and territories. The initial sum in Part IV of the TR was US\$581m to be collected and spent over five years, in annually increasing amounts. The fund was intended to focus on public investments (in particular on hospitals and educational facilities) and other ‘economic’ investments, with only 18% reserved for agricultural production. This began to change with the Second EDF under Yaoundé II, when the amount was increased to US\$730m and understood as compensation for declining preferential margins on duties and the abolition of French price support. In total, one third of this fund was spent at this point on support for agricultural production. This was with the specific aim of adapting subsidized products to world prices, as well as for commodity price stabilization. Yaoundé II endowed the Third EDF with US\$900m and in general terms continued the same theme.<sup>12</sup>

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<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

### **2.3 From 1973 to 2000: the Lomé Conventions and expansion of the trade policy**

The 1970s saw important changes to the CCP, largely in line with the newly developed UNCTAD principles. With respect to its associates (now expanded in numbers), the Community abandoned the principle of reciprocity; with respect to other developing countries it established a scheme of non-reciprocal trade preferences (the GSP, addressed below); and with respect to its Mediterranean neighbors it concluded a number of preferential trade agreements. This basic structure of the CCP remained stable for 20 years, until it was unsettled by a series of WTO legal challenges.<sup>13</sup>

As regards the ACP countries, negotiations on a successor agreement to Yaoundé II began in 1973, influenced by the accession of the UK in 1972 and the addition of 21 Commonwealth countries and six other African countries to the 19 Yaoundé associates. The principle of reciprocity, initially defended by the EEC and Yaoundé associates but strongly opposed by new members, was abandoned in the 1975 Lomé Convention, which enshrined the principle of non-reciprocal trade preferences. The first Lomé Convention (Lomé I) was replaced by subsequent five-year Conventions – Lomé II (1980-85) and Lomé III (1985-1990) – and the ten-year Lomé IV Convention (1990-2000). Each of these negotiating rounds took account of new developments in the European Community –successive enlargements among the ACP States, more liberal political regimes, and concern about improved management of resources, for instance - and in the international scenario, for example, debt reduction efforts. This was reflected in the scope of the agreements, which gradually acquired a more political dimension. Whereas no human rights provisions were included in Lomé I and II, those included in Lomé III, and Lomé IV contained a relatively comprehensive human rights clause - the first agreements concluded by the Community that contained such a clause. Furthermore, Lomé III introduced a major innovation: policy dialogue, intended to pave the way for mutual commitments that could be included in the five-year indicative programs.<sup>14</sup>

Although it was still geared towards Africa and, in most cases, the formerly dependent territories, the Lomé Convention symbolized a geographical expansion that influenced the

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<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

Mediterranean countries, Asia and Latin America. Wide-ranging cooperation agreements were then concluded with Israel (1975), Tunisia, Algeria and Morocco (1976) as well as with Egypt, Jordan, Syria and Lebanon (1977). The agreements, which in contrast to Lomé were concluded for an unspecified period, largely contained provisions on trade. Except in the case of Israel, which made provision for the progressive creation of a free trade area, these agreements were based on the unilateral awarding of trading advantages by the Community and, in particular, on the free access of industrial products to the Community market, and an *ad hoc* system of preferences for certain agricultural products. The agreements were supplemented by five-year financial protocols, food aid and, at a later stage, appropriations intended to promote regional cooperation and structural adjustment.<sup>15</sup>

Other significant developments in the period included the expansion of non-trade issues within the CCP. Firstly, in 1995 it became official EU policy to include human rights clauses in all new trade and cooperation agreements negotiated with third countries.<sup>16</sup> Furthermore, from this period onwards, the Commission started undertaking ‘Sustainability Impact Assessments’ (SIA) for all major trade negotiations, a practice which later was expanded to include all major EU policies and legislative plans, as discussed in Chapter 3. In addition, a new type of trade agreement, the so-called ‘third-generation agreement’, started to be used by the EU, which gradually extended to cover a whole range of fields of cooperation, including provisions on political dialogue and the promotion of human rights, democratic principles and the rule of law, highlighting the Community’s shift towards a more political dimension. An early example of these new association agreements was the EU – Chile AA, which is analyzed further below.

In the year 2000 the Cotonou Agreement was signed<sup>17</sup> as a new framework for the EU-ACP relations, replacing the Lomé IV Convention which had expired earlier that year. The agreement was based on three pillars: two political and developmental pillars due to expire after 20 years, and a trade pillar, which expired at the end of 2007. The ultimate goal of establishing regional

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<sup>15</sup> Ibid.

<sup>16</sup> Commission Communication on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries, COM(95)216 and Commission Communication on the European Union and the External Dimension of Human Rights Policy: From Rome to Maastricht and Beyond, COM(95)567.

<sup>17</sup> Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, Cotonou, Benin, June 2000, OJ 2000 L317 3.

trade agreements between groups of ACP countries and the EU also became a goal, reflected in Title II of the Agreement which called the parties to conclude new WTO-compatible arrangements, progressively removing barriers to trade between them and enhancing cooperation in relevant areas. The Cotonou Agreement was also based on an ambitious agenda to reduce and eradicate poverty and to contribute to sustainable development of ACP countries and their integration in the world economy. It thus pursued an integrated approach based on political, economic, social, cultural and environmental aspects of development, and followed the principles of equality of the parties, ownership of development strategies, participation and differentiation and regional integration as means of promoting development. It was envisaged that until the entry into force of future EPAs, non-reciprocal trade preferences under Lomé IV would be maintained, and the ACP countries were granted a waiver from MFN requisites during the WTO Doha Ministerial Conference. Despite its commitment to providing a more solid basis for the trade and development relationship between the parties, the Cotonou Agreement and the negotiation process it put forward faced criticism and challenges in its implementation.<sup>18</sup> As will be discussed below, the EU has faced and keeps facing legal challenges between its trade and development rhetoric and the often ambiguous reality behind its trade policy instruments.

## **2.4 The trade and development rationale: between development rhetoric and GATT/WTO compatibility**

The trade and development instruments of the EU were more or less defined up to this point. Nevertheless, and although based on a WTO law framework, they have often faced challenges regarding their use as development tools according to the objectives and political interests of the EU, and conformity with international trade law which regulates these issues broadly. On the one hand, it can be observed that regarding development measures implemented through the preferential trade dimension based on a PTA/Article XXIV GATT legal base, there is a thin line between determining what can be considered as a development measure, and what is merely a

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<sup>18</sup> For critical appraisals of the 'Cotonou process', see S. R. Hurt, 'Co-operation and Coercion? The Cotonou Agreement between the European Union and ACP States and the End of the Lomé Convention', *Third World Quarterly*, Volume 24, Issue 1, 2003, 61-176; S. R. Hurt, 'The European Union's external relations with Africa after the Cold War: Aspects of continuity and change' in I. Taylor and P. Williams (eds), *Africa in International Politics: External involvement on the continent*, Routledge, 2004, pp. 155-173; V. N. Koutrakou, 'New directions in the EU's Third World policy: from aid to trade under the watchful eye of the WTO' in V. N. Koutrakou (ed) *Contemporary Issues and Debates in EU Policy: The European Union and International Relations*, Manchester University Press, 2004, p. 120-133.

preferential scheme with a political connotation, which is therefore not justifiable under trade law. On the other hand, the attempts to integrate broader development issues attested to the fact that the relationship between regional and international law in this field is not always a smooth one when it comes to dealing with non-trade issues.<sup>19</sup>

The ‘Banana War’ episode serves well to illustrate this case: the market access provisions of the four Lomé Conventions and the Cotonou Agreement were based on the principle of non-reciprocity, and the ACP countries were under no obligation to offer reciprocal market access, except for treatment no less favorable than that offered to other non-developing countries. On the other side, the EU granted ACP products full duty-free and quota-free access, except for products competitive with those falling under the CAP for which the only obligation is that they be granted treatment more favorable than non-ACP products. For certain commodities, the nature of the Community’s preferential treatment was spelled out in special commodity protocols. Among others, a protocol on bananas in the four Lomé Conventions promised that “[a]s regards its exports of bananas to the EEC, no ACP State will be placed, as regards access to the markets and market advantages, in a less favorable situation than in the past or at present”. In practice, this authorized certain EEC Member states (the United Kingdom and Italy) to restrict the importation of non-ACP bananas which were otherwise in free circulation in the EEC.

A major legal development occurred in 1994, when a GATT panel report (EC – Bananas II)<sup>20</sup> held that the Lomé Convention could not be justified as a regional trade agreement under Article XXIV GATT. The reasoning of the panel was that the principle of non-reciprocity in trade negotiations set out in Part IV of the GATT did not apply to Article XXIV. The adoption of this report was blocked and in the short term the EC (and those of the ACP countries that were GATT Contracting Parties) applied and obtained a waiver of the MFN obligation in Article I GATT for preferential treatment for products originating in ACP States as required by the

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<sup>19</sup> See in this regard See, in this regard, M. Cremona, ‘Neutrality or Discrimination? The WTO, the EU and External Trade’ in De Búrca G. & Scott, J. (eds.), *The EU and the WTO. Legal and Constitutional Issues*, Hart Publishing, 2001; G. Marceau and C. Reiman, ‘When and How Is a Regional Trade Agreement Compatible with the WTO?’, *Legal Issues of Economic Integration* 28(3), 2001, 297–336; L. A. Winters, ‘The European Union Trade Policy: Actually or Just Nominally Liberal?’ in H. Wallace (ed.), *Interlocking Dimensions of European Integration*, Basingstoke: Palgrave, 2001; M. Cremona, ‘Rhetoric and Reticence: EU External Commercial Policy in a Multilateral Context’, 38 *Common Market Law Review*, 2001, 359.

<sup>20</sup> WT/DS16 (EC- Regime for Importation, Distribution and Sale of bananas). A full summary of the banana disputes can be accessed at: [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds27\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds27_e.htm). See also F. Breuss, S. Griller, *The Bananas Dispute: an economic and legal analysis*, Springer, 2003.

relevant provisions of the Fourth Lomé Convention. Identical preferences were included in the Cotonou Agreement, with a waiver that expired in 2007.<sup>21</sup> Several disputes followed until the parties announced a mutually agreed solution to these cases in November 2012.<sup>22</sup> The ‘banana war’ illustrates that a development rationale cannot justify an exception to the MFN principle under Article XXIV GATT, when the parties are not both developing countries, but rather in a North-South relationship, in which reciprocity is required under this type of contractual arrangement.<sup>23</sup> In fact, the new trade agreements concluded by the EU have a reciprocity basis, with the SDT treatment addressed through different measures of phased liberalization accorded in each case.

Currently a new set of Economic Partnership Agreements (EPAs) is being negotiated between the EU and ACP countries, under the Cotonou Agreement’s legal framework. At first glance, the EPAs are seen as policy responses to some of the major shortcomings revealed under the previous system, from both an internal and an external perspective. Internally, the EPAs seek to address core aspects that previously limited the effectiveness of the preferential treatment granted by the EU under the Lomé trade regime, providing an opportunity to improve the EU’s trade and development package for the ACP: (i) The EPAs aspire to improve the relative quality and value of preferential access to EU markets, notably through a revision of the rules of origin and greater market access. (ii) The introduction of reciprocity and the comprehensive coverage of the EPAs, for their part, make it possible to overcome the restrictive approach of a preferential regime focused on tariffs and quotas only. EPAs thus can include all rules and issues relevant to building up the economic governance framework of the ACP. Second, externally the EPAs are better embedded in the regulatory framework of multilateral trade because of their compatibility with WTO rules, and hence can shelter the ACP-EU regime from being legally challenged by the wider WTO membership. Furthermore, the key elements appear to have strengthened the trade-development nexus by integrating the main points of convergence that theoretical considerations indicate are necessary to make trade liberalization supportive of

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<sup>21</sup> L Bartels, *op cit*.

<sup>22</sup> WTO Document WT/DS364/3G/L/822/Add.1, accessible at: [http://trade.ec.europa.eu/doclib/docs/2012/december/tradoc\\_150147.pdf](http://trade.ec.europa.eu/doclib/docs/2012/december/tradoc_150147.pdf)

<sup>23</sup> See also, in this regard, J. Bourgeois, O. Lynskey, ‘The extent to which the EC legislature takes into account WTO obligations: jousting lessons from the European Parliament’ in A. Dashwood, M. Maresceau (eds.), *Law and practice of EU external relations: salient features of a changing landscape*. Cambridge University Press, 2008, pp. 202-224.

development objectives, like a comprehensive regulatory framework; selectivity of products (notably through the foreseen asymmetrical and gradual liberalization of ACP trade), which also allows for the adoption of flanking policies and accompanying measures or reforms necessary to benefit from trade liberalization; capacity-building; and emphasis on the promotion of regional integration by EPA – conceived as a stepping-stone towards integration into the world economy. This last element is considered more challenging, as there are no clear answers in theoretical discussions as to whether parallel North-South and South-South integration can be taken as development-friendly, or rather development-unfriendly. EPAs might work, provided there is scope for sequencing of the integration processes and adequate support for integration; in addition, the regional dimension of the EPAs will have to be reconciled with the national level of implementation.<sup>24</sup>

In this regard, the negotiation of the EPAs has been heavily criticized for being ambiguous and negative towards ACP interests. Critics argue that EPAs secure market access for traditional exports that form the cornerstone of their economies, but that the ‘reciprocal’ nature of the agreements might also represent a threat to their sustainable development.<sup>25</sup> As a consequence, although EPA negotiations had to be concluded by 31<sup>st</sup> December 2007, only one has already been finalized – the EU-CARIFORUM EPA. Despite the critical aspects raised regarding EPAs, the EU-CARIFORUM EPA will be discussed in greater detail below, in the context of the analysis of how sustainable development has been integrated into these agreements and how these measures might provide windows of opportunity to help gear these relationships to more sustainable outcomes.

### 3. The birth of an independent ‘development cooperation policy’

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<sup>24</sup> D. Makhan, ‘Linking EU trade and development policies : lessons from the ACP-EU trade negotiations on economic partnership agreements’, *Research Project ‘European Policy for Global Development’*, German Development Institute/DIE, 2009.

<sup>25</sup> S. Gaiani, *The Economic Partnership Agreements (EPAs): a threat or an opportunity for sustainable development?*, Proceedings of the 4th Annual GARNET Conference, 2009, available at: <http://w3.uniroma1.it/cidei/garnet/ConferenceProgramme.html>. For a critical and negative view of more specific issues, see N. Slocum-Bradly and A. Bradley, ‘Is the EU’s Governance ‘Good’? An assessment of EU governance in its partnership with ACP states’, and S. R. Hurt, ‘Understanding EU Development Policy: history, global context and self-interest?’, in *Third World Quarterly, Special Issue: Governance, Development and the South: contesting EU policies*, Volume 31, Issue 1, 2012.

A policy for development cooperation, independent from trade issues, began to emerge during the 1970s, divided between two political currents: the first, backed by France, advocated keeping and extending a policy of association limited, in regional terms, to the former colonies; the other, backed by Germany and the Netherlands, wanted to terminate the Yaoundé policy and replace it with a policy of worldwide development aid. The Commission intervened in this conflict by publishing its first ‘Memorandum on a Community development cooperation policy’ in July 1971, with the view that existing development policy measures were no longer in keeping with the EC’s growing international importance, especially as an initial enlargement was on the horizon, and that, while maintaining and extending the policy of association, it was also necessary to offer other developing countries tangible opportunities for cooperation. As a result, the Commission paved the way for the decisions taken at the Paris Summit in 1972, which resolved the conflict of views stressing the ‘essential importance’ attached to the policy of association and to the agreements concluded or to be concluded with the countries of the Mediterranean basin, but inviting the Community and members to progressively implement an overall policy of development cooperation at the global level. The foundations were thus laid for gradually introducing measures for developing countries that had been excluded until then.<sup>26</sup>

The reform process of the Maastricht Treaty concluded the establishment of such a development cooperation policy independent from the CCP. The Treaty on European Union (TEU) was a turning point in development policy: Title XVII of the Treaty finally provided this policy with a specific legal basis. Article 3(q) was included in the TEC to enshrine among the activities of the community a ‘policy in the sphere of development cooperation’, which was further regulated in the newly created chapter on this subject (title XVII, articles 130u to y).

The development policy was designed as a shared competence with member states, aimed to foster “*the sustainable economic and social development of the developing countries, and more particularly the most disadvantaged among them; the smooth and gradual integration of the developing countries into the world economy; the campaign against poverty in the developing countries*”, and also to “*contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental*

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<sup>26</sup> D Frisch, *The European Union Development Policy. A personal view of 50 years of Development Policy (Policy Management Report)*, ECDPM, Maastricht, 2008.

*freedoms*". There was also an express provision that "*the Community and the Member states shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organizations*". The express mention of sustainable development as one of the main objectives seems to indicate that within the EU the meaning of sustainable development should be compatible with that expressed in the International Law documents, given the lack of a description of this concept in primary law, as discussed in Chapter 3.

Furthermore, a clear mandate to promote policy coherence was provided by the Maastricht Treaty: "*the Community and the Member states shall coordinate their policies on development cooperation and shall consult each other on their aid programs*". Making coherence an imperative was intended to turn development policy into a cross-cutting task, meaning that measures planned in other policies had to be examined to as regarded compatibility with development policy and, where necessary, adjusted. While this provision did not go so far as to give development policy primacy over other policies, it did necessitate the harmonization of other policies -as far as possible- with its goals. Furthermore, there was an aim to prevent centralization of the instruments of development policy at European Union level, but rather, through systematic coordination, to gradually make Community policy and the policies of member states into a coherent and effective whole, while safeguarding various levels of implementation and priorities, and also facilitating coordination of the Community and member states in international fora.<sup>27</sup>

In the year 2000, the Council and the Commission issued a statement declaring their decision to concentrate the development action on a limited number of areas selected on the basis of their contribution towards reducing poverty and for which they believed the Community could provide added value: the link between trade and development; support for regional integration and cooperation; support for macroeconomic policies; transport; food security and sustainable rural development; and institutional capacity-building, particularly in the area of good governance and the rule of law, highlighting the need to mainstream *cross-cutting concerns*,

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<sup>27</sup> Ibid.

namely the promotion of human rights, gender, children's rights and the environmental dimension.<sup>28</sup>

This thinking gave impetus to the EU to strengthen its efforts in development cooperation and to expand the scope of this policy, which had remained concentrated on the ACP countries, and also to make it more coherent and unified with the member states, ultimately leading to the adoption of the 'European Consensus on Development' (ECD) in 2005.<sup>29</sup> The ECD is a joint statement adopted by the Council providing a common framework of objectives, values and principles that the Union – all Member states and the Community - supports and promotes as a “global player and a global partner”, providing for the first time, “a common vision that guides the action of the EU, both at its Member States and Community levels, in development cooperation”. The document is divided into two parts: the first part presents a common vision of the whole EU on development, which includes: (i) a common objective of development cooperation, set as the eradication of poverty in the context of sustainable development and the pursuit of the MDGs; (ii) a common set of principles to guide all EU action: partnership and ownership, political dialogue, civil society participation, gender equality; (iii) a commitment to increase development financial aid: one of the mainstream commitments of the ECD, sets a target of 0.7% of member states' GNI by 2015;<sup>30</sup> moreover, it makes a commitment to deliver more efficient aid, and to reserve at least half of it for Africa; (iv) a commitment to promote coherence among all EU policies in order to observe these development cooperation commitments – recognizing that other internal policies such as the CAP might have a trade

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<sup>28</sup> Statement by the Council and the Commission of 20<sup>th</sup> November 2000, summary available at [http://europa.eu/legislation\\_summaries/other/r12001](http://europa.eu/legislation_summaries/other/r12001). In this regard, Regulation 2493/2000 (OJ L 288/1, 15.11.2000) was passed in order to “promote the full integration of the environmental dimension in the development process of developing countries”, stating that “the Community shall provide financial assistance and appropriate expertise aimed at drawing up and promoting the implementation of policies, strategies, tools and technologies for the pursuit of sustainable development”; it provides one definition of sustainable development in secondary law, as “the improvement of the standard of living and welfare of the relevant populations within the limits of the capacity of the ecosystems by maintaining natural assets and their biological diversity for the benefit of present and future generations”.

<sup>29</sup> Joint Statement by the Council and the Representatives of the Governments of the Member states meeting within the Council, the European Parliament and the Commission on European Union Development Policy, Council Document 14820/05.

<sup>30</sup> In this regard, it is noted that developing countries have tried for a long time to argue for a legal obligation to receive a steady flow of development aid measured as a percentage of the budget of industrialized countries. In that respect, the EU made an important political commitment; although not amounting to an acknowledgement of a customary law obligation to do so, it nevertheless shows the impact that UN development ‘soft law’ may have on the European Union and vice versa. F Hoffmeister, 'The contribution of EU practice to international law', in M. Cremona, *Developments in EU external relations law*, Oxford University Press, 2008. Nevertheless, ODA levels remain far below this threshold.

distortion impact on developing countries;<sup>31</sup> (v) finally, recognizing the interconnection between development and security. The second part presents the focal areas and implementation strategies specifically to guide EC action on this field: (i) trade and regional integration: assistance to developing countries for trade and regional integration and gradual integration into the world economy, and linking trade and poverty reduction or equivalent strategies; (ii) environment and sustainable management of natural resources; (iii) governance, democracy, human rights and institutional reform; (iv) human development through MDG enforcement; and (v) social cohesion and employment.

The ECD is not a legally binding document, but represents a political compromise and has been influencing EU policy making since its adoption. In 2006, a series of new regulations was passed, among which was a new Development Cooperation Instrument,<sup>32</sup> providing finance for cooperation with developing countries, territories and regions included in the list of aid recipients of the OECD/DAC, unifying previous regulations which had a more limited scope. Article 2 of the Regulation sets as objectives the eradication of poverty in partner countries in the context of sustainable development, including pursuit of the MDGs, as well as the promotion of democracy, good governance and respect for human rights and rule of law. The policies are to be implemented through geographic - South- and Central America, Asia, Central Asia and South Africa - and thematic programs, providing financial resources to develop the cooperation measures which carry out the strategic plans guiding relations with external parties.

The development cooperation policy has represented an important step towards the contribution that the EU can make regarding sustainable development. As an independent policy, it is not tied to the internal and external legal requirements of the trade policy and thus can pursue EU external action objectives regardless of legal constraints. At the same time, as a shared competence with EU member states, this policy is often criticized as lacking coherence and efficiency.<sup>33</sup> On the evolution of this policy, Maurizio Carbone notes that, firstly, significant

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<sup>31</sup> Regarding policy coherence, see: M Carbone, *Policy coherence and EU development policy*, Routledge, 2009.

<sup>32</sup> Council Regulation 1905/2006, OJ L 378/41, 27.12.2006.

<sup>33</sup> See B. Martenczuck, 'Cooperation with Developing Countries and Other Third Countries: Elements of a Community Foreign Policy' in Griller S. & Weidel, B. (eds.), *External Economic Relations and Foreign Policy in the European Union*, Springer, 2002; E. Grilli, *The European Community and Developing Countries*, Cambridge University Press, 1993; J. McMahon, *The Development Cooperation Policy of the EC*, Kluwer Law International, 1998; K. Arts and A. K. Dickson (ed.), *EU Development Cooperation. From Model to Symbol*, Manchester University Press, 2004.

emphasis has been placed on efficiency and coherence in external relations over participation and ownership, thus altering the nature of the relations between the EU and the developing world. Secondly, the will to project a 'European vision of development' through the European Consensus on Development and the new agenda on aid effectiveness is not just an attempt to make aid work better but is consistent with the EU's overall agenda in external relations, that is, to establish itself as a global power. Thirdly, changes made in the EU have strong implications for international development more broadly. In fact, not only is the EU the largest aid donor in the world, but it also has a number of policies that have direct impact on developing countries (e.g. trade, agriculture, fisheries). With the policy coherence for development agenda, he claims the EU has thus far achieved less than it had expected, and that the added value of EU development policy is not linked to its 'global presence', but to its role in the promotion of policy coherence for development and aid coordination among the Member States and the European Commission. In this sense, since the early 2000s, Member States have shown a change of attitude and now seem better prepared to act in a more coordinated fashion. More generally, the past decade has shown that development policy offers a significant example of the role that the EU aspires to play in the international arena. The Lisbon Treaty represents an important step forward for development cooperation by making poverty eradication the central aim of development policy and strengthening the principles of policy coherence and requiring that Member States' and EC development policies complement and reinforce each other. However, the space for an autonomous development policy in the new institutional settings may be at risk, with further potential politicization of development cooperation and instrumentalization of development funds for foreign policy objectives.<sup>34</sup>

#### **4. The EU Generalized System of Preferences: non-contractual preferences between WTO legality and sustainable development goals**

##### **4.1 The genesis and evolution of the GSP**

In 1965, Part IV of the GATT was included and the Enabling Clause was enacted, allowing for non-contractual trade preferences from developed countries to developing countries, as

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<sup>34</sup> M. Carbone, 'Development Policy, the Treaty of Lisbon and the EU's role in the International Arena' *European Union Studies Association Review*, Volume 23, Issue 1, 2010.

discussed in Chapter 2. In this context, the EU established a GSP scheme as part of trade policy in 1971,<sup>35</sup> the first one to be created in the world, and gradually modified it in the following decades, both due to the impetus to include different schemes for developmental reasons, and also due to WTO compatibility challenges.

The most relevant dispute related to the GSP scheme introduced in 2001,<sup>36</sup> which provided for two types of tariff preferences for goods from developing countries: ‘non-sensitive’ products received duty-free treatment, while ‘sensitive’ products received a reduction in the MFN duty rate. Moreover, the program provided for ‘special incentives’ in a number of areas: all products (except arms) from LDCs received duty-free treatment, and developing countries could apply to receive additional preferences on all products if they demonstrated compliance with specified labor standards in the production of those products, and on tropical timber products if they demonstrated compliance with international standards on the sustainable management of tropical timber. There were also additional preferences granted to countries engaged in efforts to combat drug production and trafficking. There was no mechanism for a beneficiary country to apply for these special preferences, unlike the mechanisms available for the additional preferences for countries complying with labor and tropical timber standards (although there was monitoring of the effects of the drugs preferences on the beneficiaries’ use of the preferences, and the beneficiaries’ efforts in combating drugs), but rather, it was the EC that decided on the beneficiaries of these preferences, based on its own criteria.

This scheme led to a dispute concerning the additional tariff preferences combating drug production and trafficking. For some time, the EC had been granting these additional ‘drugs’ preferences to eleven South and Central American countries, but in 2001 Pakistan was added to this list of countries. India requested consultations with the EC in March 2002, arguing to be suffering trade diversion to Pakistan as a result of these additional trade preferences, and requested the establishment of a panel in December of that year. India’s claim was that the drugs regime under the EC’s GSP program was discriminatory, in violation of one of the requirements for GSP programs, as the reference to ‘non-discriminatory’ preferences in the Enabling Clause

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<sup>35</sup> Regulations 1308/71 to 1314/71 [1971] OJ L142.

<sup>36</sup> Council Regulation (EC) No 2501/2001 of 10 December 2001 applying a scheme of generalized tariff preferences for the period from 1 January 2002 to 31 December 2004 [2001] OJ L 346/1 (the ‘GSP Regulation’), as amended and extended by Council Regulation (EC) No 2211/2003 [2003] OJ L 332/1.

meant that no difference in treatment between developing countries was permitted.<sup>37</sup>

The Appellate Body ruled in favor of India but rejected part of the argument, stating that ‘non discriminatory’ does not require identical treatment of all developing countries; rather, additional preferences may be made available to developing countries that share the same “development, financial or trade need”. Drawing on other provisions of the Enabling Clause, the Appellate Body also set out further conditions for any such differential treatment: first, the identified “development, financial and trade need” must meet an “objective standard”, and added that “[b]road-based recognition [as] set out in the WTO Agreement or in multilateral instruments adopted by international organizations, could serve as such a standard”. Second, the identified need “must by its nature, be such that it can be effectively addressed through tariff preferences”. Third, on the facts of the case, “a sufficient nexus should exist between, on the one hand, the preferential treatment provided ... and, on the other, hand, the likelihood of alleviating the relevant ‘development, financial [or] trade need’”. It was unnecessary for the Appellate Body to determine whether the drugs arrangement at issue met these conditions, because this arrangement was operated through a ‘closed list’. On this, the Appellate Body considered “*that the measure at issue fails to meet this requirement for the following reasons. First, as the European Communities itself acknowledges, according benefits under the Drug Arrangements to countries other than the 12 identified beneficiaries would require an amendment to the Regulation ... Secondly, the Regulation contains no criteria or standards to provide a basis for distinguishing beneficiaries under the Drug Arrangements from other GSP beneficiaries.*” It is still debatable, though, whether the drugs regime would have met the conditions set by the Appellate Body, aside from this administrative aspect.<sup>38</sup>

<sup>37</sup> L. Bartels, ‘The Appellate Body Report In European Communities – Conditions For The Granting Of Tariff Preferences To Developing Countries, and Its Implications For Conditionality In GSP Programs’, in T Cottier et al., *Human Rights and International Trade*, Oxford University Press, 2006.

<sup>38</sup> L. Bartels, ‘The WTO Legality of the EU’s GSP+ Arrangement’, *Journal of International Economic Law*, Oxford University Press, 2007, 10 (4): 869-886. See also J. Harrison, ‘Incentives for Development: The EC’s Generalised System of Preferences, India’s WTO Challenge and Proposals for Reform’, 42 *Common Market Law Review*, 2005, 1663-1689; L. Bartels, ‘The WTO Enabling Clause and Positive Conditionality in the European Community’s GSP Program’, 6 *Journal of International Economic Law*, 2003 507; R. Howse, ‘India’s WTO Challenge to Drug Enforcement Conditions in the European Community Generalised System of Preferences. A Little Known Case with Major Repercussions for ‘Political’ Conditionality in US Trade Policy’, *Chicago Journal of International Law* 4(2), 2003, 385-405; G. Marín Durán, E. Morgera, ‘Case Note on the WTO India-EC GSP Dispute: The Future of Unilateral Trade Incentives Linked to Multilateral Environmental Agreements’, *Review of European Community and International Environmental Law* 14, 2005, 173-179; N. B. Dos Santos, R. Farias, R. Cunha, ‘Generalised System of Preferences in the General Agreement on Tariffs and Trade/World Trade Organisation: History and Current Issues’, *Journal of World Trade* 39 (4), 2005, 637-670.

## 4.2 The GSP framework reforms

### i) The renovated GSP

The basic objectives and implementing instruments of the GSP for the period 2006-2015 were set out in a Commission Communication in 2004.<sup>39</sup> This communication aimed at the rationalization and simplification of the GSP regime, having the primary objective of contributing to the reduction of poverty and the promotion of sustainable development and good governance. On 22<sup>nd</sup> July 2008 a Council Regulation was adopted for the period from 1 January 2009 to 31<sup>st</sup> December 2011 (which was later extended until 2013), providing a legal basis for the continuation of the GSP scheme after the expiry of Regulation 980/2005, but not changing the substance of the scheme.

The current GSP framework differs from the previous ones in terms of predictability and simplicity. It runs for three years as opposed to one year – GSP coverage and country eligibility are no longer subject to annual revisions. It is composed of three rather than five separate regimes. The three different preference programs under the current GSP are: (a) the basic or general GSP for which all 176 developing countries and territories are eligible; (b) the GSP+ program which offers additional tariff reductions on top of the general GSP to a selected group of developing countries that are vulnerable and are implementing specified core international human, labor and environmental standards and with respect to good governance; (c) the Everything-but-Arms program offers duty-free and quota-free market access to the 50 Least Developed Countries (LDCs). Under the EU's GSP scheme, imports to the EU from developing countries amounted to €40 billion in 2004.

The EU's basic GSP provides preferences for which all developing countries are automatically eligible and is more favorable for some products than the EU's MFN tariffs. The EU reports that of the 10,300 tariff lines in the EU's Common Customs Tariff, roughly 2,100 products have a MFN duty rate of zero and tariff preferences are not relevant for these. Of the 8,200 products

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<sup>39</sup> 'Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee on the function of the Community's generalised system of preferences for the ten year period from 2006-15' (COM(2004)461 – Official Journal C 242 of 29.4.04).

that are dutiable, GSP covers roughly 7,000 -of which about 3,300 are classified as non-sensitive and 3,700 as sensitive. Non-sensitive products have duty-free access and sensitive products benefit from a tariff reduction. The sensitivity of a product is determined by whether or not it is produced in the EU and by how competitive European producers are. The non-sensitive category covers most manufactured products but excludes some labor intensive and processed primary products such as textiles, clothing and footwear. In addition, agricultural products covered by the EU's CAP are deemed to be too sensitive to be granted duty-free market access by any potentially large and competitive suppliers.

ii) The GSP+

Since 1998, the Community has offered additional preferences for certain non-trade reasons. One aspect of this program was a 'drugs regime', mentioned above, which the WTO Appellate Body considered to violate the Enabling Clause, stating that the drugs regime was necessarily discriminatory because it operated through a 'closed list' that precluded an assessment of the different situations of the potential beneficiaries. Following this ruling, the Community modified its special incentives arrangement, providing for greater preferences for vulnerable non-LDCs meeting specific, widely recognized criteria including ratification and implementation of international conventions on human and labor rights, good governance and the environment. The GSP+ provides additional preferences for vulnerable non-LDCs that comply with a list of 16 international conventions on human and labor rights, and 11 conventions on good governance and the environment, with more attractive preferences than the regular GSP preferences.

In order to be eligible for the GSP+ program, a country must first be classified as vulnerable, by satisfying the following two criteria: (a) a country cannot be classified as high income and the five largest sections of its GSP-covered exports to the EU must account for over 75% of its total GSP-covered exports; and (b) GSP-covered exports from the country must represent less than 1 percent of total EU imports under the GSP. To then qualify for the additional preferences under the GSP+ program, a vulnerable country must have ratified and effectively implemented the twenty-seven international conventions, and provide comprehensive information concerning legislation and other measures to implement them. It must commit itself to accepting regular monitoring and reviewing of its implementation record. Finally, the country must make a formal

request to qualify for GSP+. 16 countries were granted GSP+ preferences from January 2009, but in mid-2009 Venezuela was deleted from the list of beneficiary countries

The GSP+ program has some limitations. First, the implementation of some of the international conventions required for eligibility for GSP+ may not be an immediate development priority in many low-income countries and may distract attention and effort from other possibly higher priority reforms necessary to accelerate growth and poverty reduction. In addition, it is questionable as to whether these criteria meet the conditions set out in EC Tariff Preferences, as the temporal condition on applications has the effect of creating a ‘closed list’ of beneficiaries, thus replicating the fatal characteristic of the drugs regime. Second, by defining the ‘vulnerability’ criterion in terms of a country’s share of EU imports, and not in terms of the needs of the beneficiary at issue, it is hard to see how this relates to their “development, financial or trade needs”. Third, by requiring ratification of certain treaties as a condition of receiving benefits, the EU a priori excludes countries with the same objective needs but without the desire to ratify the listed treaties, again in violation of the Appellate Body’s criteria. Finally, it is likely that at least some of the current beneficiaries of GSP+ preferences are missing at least some of the identified ‘needs’ – for instance, those relating to the prevention of apartheid or genocide.<sup>40</sup>

A recent review commissioned by the EU concluded that it is early to tell whether the provisions of the GSP+ aimed at promoting sustainable development will in fact lead to the fulfillment of its objectives. At the same time, it points to one general conclusion - that the design of the GSP+ is relatively robust in providing opportunities for improvements in some countries or in some spheres, while the risk of negative effects is very limited. For instance, the GSP+ appears to be effective in promoting ratifications of the 27 conventions. Case studies and a literature review suggest that de jure implementation beyond ratification already faces several constraints, but no evidence of any significant positive effects of GSP+ was highlighted.<sup>41</sup>

iii) a special arrangement for LDCs

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<sup>40</sup> Ibid.

<sup>41</sup> Mid-term Evaluation of the EU’s Generalized System of Preferences: Final Report submitted by Michael Gasiorek, CARIS, University of Sussex, available at: [http://trade.ec.europa.eu/doclib/docs/2010/may/tradoc\\_146196.pdf](http://trade.ec.europa.eu/doclib/docs/2010/may/tradoc_146196.pdf)

The WTO Enabling Clause permits donor countries to grant additional preferences to the least developed countries without granting the same preferences to other developing countries. The EU has granted the least developed countries some form of additional preferential treatment since 1977, and over the years this has been steadily improved. In 1998, least developed countries were granted ACP equivalent market access, and under the 2001 ‘Everything But Arms’ (EBA) program they were granted duty-free access on all products except arms, with full liberalization for bananas, rice and sugar, staggered over a number of years. The current GSP program repeats this offer for an indefinite duration for 50 LDCs.<sup>42</sup>

### 4.3 The current GSP scheme

The EU adopted a new GSP on 31<sup>st</sup> October 2012, which will apply as of 1<sup>st</sup> January 2014.<sup>43</sup> The objectives of the EU's new GSP are to strengthen GSP+ as an incentive to good governance and sustainable development and to make the scheme more transparent, stable and predictable. The three main variants of the scheme (the overall GSP scheme, the ‘GSP+’ incentive scheme for the respect of labor, human, environmental and good governance rights and rules, and the ‘Everything but Arms’ scheme for least developed countries) are maintained, but preferences suffered some re-adjustments, especially in terms of concentration on fewer countries. A number of countries would no longer benefit from the scheme, including: countries that have preferential access to the EU which is at least as good as under GSP – for example, under a Free Trade Agreement or a special autonomous trade regime; countries which have achieved a high or upper-middle income per capita according to World Bank classification, such as Brazil, Malaysia, Russia and Saudi Arabia; a number of overseas countries and territories (OCTs), which have an alternative market access arrangement for developed markets.

The EU GSP provides an interesting example of an attempt to link trade policy to development concerns. The basic idea of giving trade preferences in exchange for positive action from the counterpart is promising even though, in most cases, it proves difficult to evaluate the real

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<sup>42</sup> See, for a more comprehensive overview of GSP schemes focused on LDCs, S. Laird, *A Review of Trade Preference Schemes for the World's Poorest Countries*; ICTSD Programme on Competitiveness and Development; Issue Paper No. 25; 2012.

<sup>43</sup> Regulation (EU) 978/2012 of the European Parliament and of the Council. 

impact of such measures. On the one hand, the incentives for implementation of international socio-environmental instruments -a *carrot and stick* approach- is a basic means of linking trade policy to the pursuit of non-trade goals; furthermore, the general preferences for LDCs have a traditional development rationale of SDT treatment for developing countries that is also an important component of the multilateral trade and development agenda. On the other hand, the efficiency of these measures in relation to the goals of sustainable development is uncertain, as, regarding the GSP+, the effects of the ratification and implementation of the instruments cannot be predicted and thus the real impact of these measures is hard to evaluate; in addition, the actual benefits that LDCs might take from the EBA scheme also depend on a series of other factors beyond the granting of preferences.

In this regard, the next section turns to the analysis of provisions included in trade agreements, which provide a more interesting framework for measures incentivizing positive trade instruments on issues that promote sustainability.

## **5. Case study: the integration of sustainable development in EU trade agreements**

This section turns to a case study on how the EU has been attempting to integrate sustainable development into trade policy through the inclusion of this issue in its trade agreements.<sup>44</sup> The EU currently has a wide array of trade agreements:<sup>45</sup> twenty eight already in force, nine completed but not yet in force (five of which are EPAs under the Cotonou Agreement framework), and several others under negotiation (with partners such as MERCOSUR, Canada, India, Malaysia, the Gulf Cooperation Council and further EPAs); furthermore, future negotiations are said to be starting soon with the USA, Japan, the Association of Southeast Asian Nations (ASEAN) and Morocco.<sup>46</sup>

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<sup>44</sup> While the analysis here will focus on specific issues, a more comprehensive overview can be seen in G. Marín Durán & E. Morgera, 'Towards Environmental Integration in EC External Relations? A Comparative Analysis of Selected Association Agreements', *Yearbook of European Environmental Law* Vol. 6, 2006, 179-210; J. H. Mathis *Regional Trade Agreements in the GATT/WTO*, TMC Asser Press, 2002.

<sup>45</sup> Agreements that would require notification under either Article XXIV GATT or Article V GATS.

<sup>46</sup> European Commission Memo, *The EU's free trade agreements – where are we?*, March 25, 2013, available at: [http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/agreements/#\\_europe](http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/agreements/#_europe).

EU trade agreements have not only become significant in number, but are also one of the most sophisticated instruments used both to advance trade liberalization and market access, as well as other policy objectives. This expansion of agreements, both in terms of number, depth -referring to the way in which the EU seeks to deepen economic integration, extending beyond the traditional removal of tariff barriers and quotas into regulatory policy, and beyond trade in goods to services and investment- and width -referring to the embedding of economic integration into the wider relationship with the partner country or region- is related to the many goals pursued by the EU through its trade policy. These agreements can be seen as part of the framework within which countries can move towards accession to the EU; they provide the core of EU relations with its neighbors who are not themselves candidates or potential candidates; they have become a basis to pursue many of the EU's development policy goals; and also to work for market access purposes.<sup>47</sup> This last aspect has been emphasized in the DG Trade's communication 'Global Europe: Competing in the World', which discusses the external aspects of EU competitiveness in the context of the EU's broader competitiveness agenda, presented in the Lisbon Strategy for Growth and Jobs.<sup>48</sup> The Commission, while claiming that "*there will be no European retreat from multilateralism*", argued the value of trade agreements in furthering the EU's market opening objectives, pointing out that while the WTO provides the basic ground rules for trade relations as well as a framework for ongoing negotiation, FTAs can include issues not yet covered by the WTO, including investment, public procurement, competition and other regulatory issues. In addition, the Commission referred to the stalled Doha Round and while recognizing the problems that FTA proliferation can cause for the multilateral system, defended the idea that under the right conditions FTAs could 'build on' the WTO and 'prepare the ground' for multilateral liberalization, acting as a stepping stone rather than a stumbling block.

This expansion of depth and width of EU trade agreements takes a variety of forms: the trade dimension may form part of a broader agreement, such as an association agreement; the trade provisions may be linked to specific conditionalities or 'essential element' clauses with a security or human rights component; the agreement may also incorporate a sustainable development perspective which attempts to integrate development, social, and environmental

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<sup>47</sup> M. Cremona, 'The European Union and Regional Trade Agreements', *European Yearbook of International Economic Law*, 2010, Volume 1, Part 2, 245-268.

<sup>48</sup> 'Global Europe: Competing in the World: A Contribution to the EU's Growth and Job Strategy', communication by DG Trade, 4 October 2006.

concerns into the trade liberalization and market opening objectives. In fact, as sustainable development has become one of the main overarching objectives of EU policy in general, trade agreements have progressively integrated the promotion of this goal.

The integration of sustainable development objectives has been carried out through two main means: a procedural component, *ex-ante* SIAs;<sup>49</sup> and a substantive element, the inclusion of ‘Trade and Sustainable Development’ chapters in addition to other related provisions in the agreements. The analysis undertaken in this section focuses on five agreements that provide an overview of how these issues have been integrated:

- 1) the Association Agreement (AA) signed with Chile in 2002, the first comprehensive agreement of this kind to be concluded by the EU and to go through a SIA procedure;
- 2) the EPA concluded with CARIFORUM in 2008, the first to include a ‘Trade and Sustainable Development’ chapter;
- 3) the Free Trade Agreement (FTA) signed with South Korea, considered the EU’s *flagship agreement* given its deep level of integration and broad coverage;
- 4) the AA signed with the Central American countries, the first and only bi-regional association agreement concluded thus far and among the most advanced in terms of references to sustainable development;
- 5) the FTA concluded with the Andean countries, the latest one to include a ‘Trade and Sustainable Development’ chapter, with innovative references to climate change and biodiversity.

The analysis includes an overview of the SIA undertaken during the negotiations and the later position paper of the Commission (but not Chile, as it is not available), and the content of the final ‘Trade and Sustainable Development’ chapter in the agreement as signed by the parties. This exercise allows for an understanding of how the EU attempts to integrate sustainable development into trade policy through contractual instruments – notwithstanding the remaining GSP arrangements that also incorporate sustainable development issues on a non-contractual basis. Moreover, this analysis provides input for the discussion of the EU – MERCOSUR

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<sup>49</sup> For an overview of the value of SIAs in the context of trade law, see M. Gehring, ‘Sustainable Development through process in world trade law’, in M-C. Cordonier Segger and M. Ghering (eds.), *Sustainable Development in World Trade Law*, Kluwer Law International, 2005.

negotiations towards an AA, which will be the focus of the extended case study undertaken in Chapter 6.

These agreements represent a more comprehensive and sophisticated form of integration of sustainable development objectives within a trade instrument in relation to the GSP schemes. The latter are based on the rationale of providing trade preferences in return for a commitment to sign and implement a series of international environmental and social/human rights instruments (GSP+), or an SDT arrangement for LDCs. It represents, in this regard, a *carrot and stick* approach that, while certainly important, is also questionable as the best approach to induce real change in recipient countries. Trade agreements are, on the other hand, progressively including trade measures aiming to create positive integration measures, in the sense of using trade to promote important goals of sustainable development such as the transition to a green economy and the fight against climate change, as discussed in Chapter 1. These measures include liberalization of trade in important sectors such as environmental goods and services (EGS), renewable energy, transfer of green technologies, support for certification and labeling schemes aimed at making the supply chain more sustainable, such as *fair trade*, certified timber and fishing schemes, among others. In this regard, these trade measures go well beyond merely committing the parties to implement legal instruments and threatening suspension of trade preferences in cases of non-compliance, but rather generate trade in a way that promotes actively sustainable development objectives. This is the rationale behind the principle of integration, that is, promoting trade policies that contain considerations of environmental and social aspects, not only as an allowed exception to general liberalization, but in fact as an integral part of the trade or service in question. The fact that these categories of goods and services are liberalized within the trade relations of the parties can thus represent an important building block for the establishment of a multilateral framework regulating these issues, which is currently lacking, as discussed in Chapter 2.

### **5.1 The Association Agreement with Chile**

#### **Background**

The negotiations for an AA between the EU and Chile officially commenced in 2000, a time when the Commission's DG Trade was focusing on WTO negotiations and had discarded bilateral negotiations as too costly and time-consuming for the relatively small rewards offered in terms of enhanced trade and investment. Nevertheless, the EU and Chile concluded an AA in 2002, which entered into force in February 2003 and became the most comprehensive agreement the EU had signed up to that point. This might seem surprising, as the EU was involved in other negotiations such as with MERCOSUR, arguably more relevant within the context of its external relations. However, a combination of factors, such as Chile's economic openness and the structure of its economic relations with the EU, enabled this agreement to go beyond deals with other parties, aided by the fact that there were fewer sensitive agricultural products to exclude from the negotiations.<sup>50</sup>

### **The Sustainability Impact Assessment**

The agreement with Chile was the first of this kind to go through the SIA procedure, which aimed “*to identify the implications of the trade measures of the EU-Chile Association Agreement for the long-term economic, social and environmental development of both partners to the agreement; (...) to optimize the outcome of the trade measures through the definition of measures aimed at mitigating any negative impacts and enhancing any positive repercussions of the trade measures.*”<sup>51</sup> In this regard, the studies undertaken examined the likely impacts of the agreement in Chile, both in general terms and in twelve sectors of the Chilean economy, divided into five primary sectors: grains, other agricultural products and forestry; processed foods, chemicals, non-ferrous metals and mining; fisheries; land transport, electricity and tourism; services, foreign direct investment and intellectual property. The potential impact on the EU was analyzed from a perspective of sectorial impacts on Member States. The study also included broad consultations with civil society and governments.

The final report was presented in December 2002, concluding that the overall economic impact of the AA would benefit both Chile and the EU, with wider economic benefits for the latter, by

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<sup>50</sup> M. Garcia, ‘Incidents Along the Path: Understanding the rationale behind the EU – Chile Association Agreement’, *JCMS Volume 49, Number 3*, Blackwell, 2011, p. 501-524.

<sup>51</sup> EU – Chile Association Agreement Sustainability Impact Assessment, Final Report, available at: [http://trade.ec.europa.eu/doclib/docs/2010/may/tradoc\\_146109.pdf](http://trade.ec.europa.eu/doclib/docs/2010/may/tradoc_146109.pdf). The studies were conducted by a mixed team of Luxemburg based PLANSTAT consultants and Chilean consultants from the Universidad de Chile.

reinforcing existing economic growth trends, but also that pre-existing social and environmental issues would require additional flanking measures to ensure sustainability. The SIA proposed mitigation and flanking strategies to address the impacts identified, emphasizing two main issues particularly: Corporate Social Responsibility (CSR) initiatives to support efforts of stakeholders and related flanking measures; technology transfer as a mitigating action to provide technical means to reduce various forms of pollution that would otherwise result from increased production from the agreement.

## The Agreement

The EU-Chile AA<sup>52</sup> is broad and comprehensive, following a three-pillar model focusing on political dialogue, cooperation and trade chapters which would become usual for other AAs afterwards. Furthermore, it was one of the first to contain direct references to sustainable development. In the preamble the contracting parties highlighted “*the need to promote economic and social progress for their peoples, taking into account the principle of sustainable development and environmental protection requirements*” (emphasis added). Despite this preambular reference, and the fact that Article 1 stated that the promotion of sustainable economic and social development and the equitable distribution of the benefits of the association would be considered guiding principles for the implementation of the agreement, no specific chapter was included in this regard.

In fact, most of the provisions relating to sustainable development are to be found in the Cooperation Chapter, where the parties included among the objectives the promotion of “*social development, which should go hand in hand with economic development and the protection of the environment*”. In addition, the “*importance of economic, financial and technical cooperation, as a means of contributing towards implementing the objectives and principles derived from this Agreement*” was highlighted. The chapter is long and measures included are comprehensive, including issues such as cooperation on sustainable environmental management, renewable energy and technology transfer. In terms of trade, the scope of this AA transcended that of previous EU FTAs as both parties liberalized 90% of all trade flows from the entry into

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<sup>52</sup> 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, 30.12.2002.

force of the agreement, surpassing WTO commitments, and most of the 300 pages are devoted to trade and issues such as investment promotion (Article 21), science and technology, financial services (Article 121), and IP rights (Title V).

The relevance of analyzing this particular agreement is to show that, in this early example of an attempt to integrate sustainable development measures, the EU emphasized it as a guiding principle of the agreement -thus possibly informing the interpretation of its provisions- and as an objective to be pursued through development cooperation. While several other objectives have been pointed out as the ‘real’ purposes of this agreement,<sup>53</sup> this commitment to sustainable development is of greater relevance here. The next cases will demonstrate that a bolder approach has been developed to integrate this issue through trade related measures designed to promote the creation of markets in goods and services that are relevant to the transition to a green economy, instead of relying only on the provision of aid to the counterparty.

## **5.2 The Economic Partnership Agreement with CARIFORUM**

### **Background**

The EPAs, as mentioned in the previous sections, are trade and economic partnerships between regional groups of ACP countries and the EU which aim to replace the Cotonou Partnership Agreement, which expired at the end of 2007. The objective of EPAs was to establish comprehensive trade agreements which included the promotion of sustainable development and poverty reduction by helping to integrate ACP regions into the world trading system and supporting their own regional economic integration, as well as cooperation in a range of trade-related areas and improved access to EU markets as part of new goods and services trade arrangements compatible with WTO rules. The ACP countries themselves decided on the regional groupings for EPA negotiations, and gathered in four negotiating regions in Africa, one in the Pacific and one in the Caribbean.

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<sup>53</sup> See, in this regard, A. Dur, ‘EU Trade Policy as protection for exporters: the agreements with Mexico and Chile’, *Journal of Common Market Studies*, 2007, Volume 45, Number 4, 833-855, where the author makes the argument that the real purpose of these agreements is to secure markets for EU investors. At the same time, a study of the CEPAL indicates that the EU-Chile AA has effectively led to increased economic growth and exports in Chile, see CEPAL, *European Union and Latin America and the Caribbean: Investments for growth, social inclusion and environmental sustainability*, LC/L.3535, 2012.

The Caribbean group of negotiations was made up of the 15 countries of the CARIFORUM: Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, the Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Saint Luca, Saint Vincent and the Grenadines, Saint Kitts and Nevis, Suriname, and Trinidad and Tobago. Cuba is also a member of CARIFORUM but was not part of the ACP group and did not participate in negotiations. Negotiations for this EPA started in 2004 and the agreement was signed on 15<sup>th</sup> October 2008, and provisionally applied as of 29<sup>th</sup> December 2008. Haiti signed the agreement on 10<sup>th</sup> December 2009 but its ratification is still pending, delayed due to the earthquake in 2010.

### **The Sustainability Impact Assessment**

A multi-step SIA preceded the EPA. The first relevant report was released on January 30<sup>th</sup> 2004,<sup>54</sup> as part of an ongoing SIA launched to assess the impacts of the future EPAs between the EU and regions of the Africa-Caribbean-Pacific (ACP) countries. The report presented the preliminary findings for the Caribbean region (CARICOM & Dominican Republic), emphasizing that the EPAs, not really as such, but in relation to the impact of some changes in EU trade regime (CAP reform, EBA initiative, Doha Development Round negotiations), would bring about a different economic and trading environment from that present under the Lomé Conventions, with adjustments in the Caribbean ACP countries in terms of the re-orientation of their productive base towards less traditional agricultural crops or a greater amount of light manufacturing. It also highlighted that the envisaged scenarios would not have absolute negative or positive impacts, depending on the adoption of domestic measures to mitigate the impacts of change, and thus a preliminary set of recommendations was presented, based on consultations held in November 2003. Among these were policies to promote sustainability, such as: involvement of non-state actors in the negotiation process; support for development of productive capacities and efforts to develop other revenue creating activities; support for implementation of effective national regulatory frameworks, including social safety nets, measures to maintain and improve the respect of health and other standards, and strong environmental regulations to offset the potential negative impacts of tourism development;

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<sup>54</sup> Sustainability Impact Assessment of the EU-ACP Economic Partnership Agreements: Regional SA: Caribbean Countries Final Report, 30 January 2004, PricewaterhouseCoopers, available at: [http://trade.ec.europa.eu/doclib/docs/2005/january/tradoc\\_121202.pdf](http://trade.ec.europa.eu/doclib/docs/2005/january/tradoc_121202.pdf).

transfers of environmentally sound technologies from the EU to Caribbean countries; and support for Caribbean efforts to fight against poverty.

A more comprehensive report was released in 2007,<sup>55</sup> taking stock of the overall EPA negotiations SIA undertaken over four years. This involved developing a methodology and undertaking case studies in key sectors throughout the ACP, one in each of the six regional negotiating configurations. For each of the six sectors studied, policy recommendations were developed in three general categories: policies related to regional integration, policies addressing trade-related measures and policies to promote sustainability. In addition, the SIA had broad public participation through public consultations, electronic mechanisms, stakeholder meetings in the ACP regions, meetings in the EU with stakeholders and negotiators, other expert meetings, specialized interviews and field missions. The report concluded that trade liberalization alone was not a sufficient condition to guarantee increased levels of trade and/or economic, environmental and social sustainability without attention being paid to technical assistance and development cooperation including policies and programs to support trade, build capacity, and promote sustainable development, and that none of the trade measures discussed in the SIA taken in isolation would necessarily lead to sustainability or even to an increase in trade. Thus, it highlighted policies to be included in and to accompany the EPAs, to be undertaken at the national or regional level. Twelve recommendations were highlighted as relevant for ACP regions and countries, among which three priority areas of technical assistance and development cooperation should be directed in the short term to help ensure that the EPAs encourage trade and sustainable development: priority needs for diversification and increased added-value in production; improvement of data collection and analysis of trade and sustainability at the national and regional levels; and capacity building to strengthen human and technical support for sustainability.

The Commission issued a ‘Position Paper’ on the final SIA report,<sup>56</sup> stating that its approach to the EPAs was *“to change the relationship between the EU and the ACP from one of dependency on EU tariff preferences to a WTO-compatible partnership, guided by the need to promote*

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<sup>55</sup> *Sustainability Impact Assessment of the EU-ACP Economic Partnership Agreements: key findings, recommendations and lessons learned*, Pars, PricewaterhouseCoopers, May 2007, available at: <http://trade.ec.europa.eu/>.

<sup>56</sup> European Commission, Position Paper, Sustainability Impact Assessment of EU-ACP Economic Partnership Agreements, 16th November 2007, available at: [http://ec.europa.eu/trade/issues/bilateral/regions/acp/ndex\\_en.htm](http://ec.europa.eu/trade/issues/bilateral/regions/acp/ndex_en.htm).

*development that is economically, socially and environmentally sustainable*". The paper reacts to each of the twelve recommendations outlined in the SIA. Particularly on the issues related to sustainability, the Commission noted that "*environmental aspects of the EPAs were highlighted in many recommendations*", and declared itself "*fully committed to further pursue its efforts to incorporate an environmental dimension into the EPAs*", with "*similar efforts [to] be made in relation to social and labor issues*".

## **The Agreement**

The EU-CARIFORUM EPA<sup>57</sup> was the first to be concluded among the ACP negotiating configurations. One of the main changes introduced by the agreement was the reciprocal granting of preferences by the two sides, instead of the non-reciprocal, preferential (duty-free) market access for ACP States, and encompasses trade in goods, services, trade-related issues and development cooperation, with strong emphasis on sustainable development and regional integration. At the same time, several criticisms have been raised regarding the effectiveness of EPAs as development tools, as commented above.<sup>58</sup>

The preamble of the EPA contains several references to sustainable development, including "*the need to promote economic and social progress for their people in a manner consistent with sustainable development by respecting basic labor rights in line with the commitments (...) undertaken within the International Labor Organization and by protecting the environment in line with the 2002 Johannesburg Declaration; (...) commitment to work together towards (...) poverty eradication, sustainable development and the gradual integration of the African, Caribbean and Pacific (ACP) States into the world economy*"; a desire for "*strengthening [of] the framework for economic and trade relations between them through the establishment of an Economic Partnership Agreement which can serve as an instrument for the development of the CARIFORUM States*"; a commitment "*to support the regional integration process among*

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<sup>57</sup> Economic Partnership Agreement between the CARIFORUM States and the European Community and its Member States, OJ L 289/I/3, 30/10/2008.

<sup>58</sup> See J. Nwobike, 'The Emerging Trade Regime under the Cotonou Partnership Agreement: Its Human Rights Implications', *Journal of World Trade* 40(2), 2006, 291-314; K. Arts, 'ACP-EU relations in a new era: The Cotonou Agreement', *Common Market Law Review* 40, 2003, 95-116; M. G. Desta, 'EC-ACP Economic Partnership Agreements and the Question of WTO Compatibility: An Experiment in North-South Regional Integration Agreements?', *Common Market Law Review* 43, 2006, 1343-1379.

*CARIFORUM States, and in particular to foster regional economic integration as a key instrument to facilitate their integration into the world economy (...) and achieve the economic growth and social progress compatible with sustainable development to which they aim”.*

These preambular references are then reinforced in Part I of the Agreement, titled a ‘Trade Partnership for Sustainable Development’. This Part is divided into 8 Articles that cover four main issues:

i) Objectives and principles: Article 1 states that the objectives of the agreement are to contribute “*to the reduction and eventual eradication of poverty through the establishment of a trade partnership consistent with the objective of sustainable development, the Millennium Development Goals and the Cotonou Agreement*” (emphasis added); in addition, it determines that, consistent with the respective levels of development of the Parties and WTO obligations, the agreement shall establish progressive and asymmetrical liberalization of trade and reinforce, broaden and deepen cooperation in all areas relevant to trade and investment. This was an important issue in the SIA process, and has thus been taken into account.

More interestingly, Article 3 ‘reaffirms’ that the objective of sustainable development is to be applied and integrated at every level of the agreement, which should represent a commitment to two issues in particular: (a) the application of the agreement shall take into account the human, cultural, economic, social, health and environmental best interests of the populations and of future generations; (b) decision-making methods shall embrace the fundamental principles of ownership, participation and dialogue.

ii) Support for regional integration: Article 4 determines this issue as an integral element of the partnership and stresses it as a mechanism for enabling CARIFORUM to achieve greater economic opportunities and enhanced political stability, and to foster their effective integration into the world economy.

iii) Continuous monitoring of the agreement through participatory processes and institutions formed by representatives of both parties, as well as those set up under the agreement itself.

iv) Development cooperation, stressed as a crucial element of the EPA and an essential factor in the realization its objectives. The areas of cooperation and technical assistance are set out, as appropriate, in the individual chapters of the agreement, but a set of priorities is provided in this part: (a) technical assistance to build human, legal and institutional capacity in the CARIFORUM States so as to facilitate their ability to comply with the commitments set out in the Agreement; (b) assistance for capacity and institution building for fiscal reform; (c) support measures aimed at promoting private sector and enterprise development, in particular for small economic operators, and enhancing the international competitiveness of CARIFORUM firms and the diversification of their economies; (d) diversification of CARIFORUM exports of goods and services through new investment and the development of new sectors; (e) enhancing the technological and research capacity of CARIFORUM States so as to facilitate development of, and compliance with, internationally recognized sanitary and phytosanitary measures and technical standards and internationally recognized labor and environmental standards. These areas of cooperation largely reflect the recommendations made in the SIA process.

The Provisions in Part I are reinforced in Part II, ‘Trade-related issues’, and Chapters 4 and 5 deal with environmental and social issues, respectively. These chapters contain, in summary, a set of four types of issues:

i) Reaffirmation of international commitments to which the Parties are signatories. Article 183 on Chapter 4 makes a more general reference to the need to “*conserve, protect and improve the environment, including through multilateral and regional environmental agreements to which they are Parties*”. The social equivalent in Chapter 5, Article 191 makes a much more specific reference to internationally recognized core labor standards, as defined by the relevant ILO Conventions, and in particular to the freedom of association and the right to collective bargaining, the abolition of forced labor, the elimination of the worst forms of child labor and non-discrimination in respect to employment; the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998); the 2006 Ministerial declaration by the UN Economic and Social Council on Full Employment and Decent Work.

In addition, recognition of a) the right of the parties to regulate their own level of domestic environmental, public health and social protection and sustainable development priorities, and to

adopt or modify other environmental laws and policies accordingly, and a commitment to avoid application of such measures in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties or a disguised restriction on trade between them, while not preventing any Party from adopting or maintaining measures necessary to protect human, animal or plant life or health, related to the conservation of natural resources or protection of the environment. Further references are made to the precautionary principle in environmental matters, and transparency; b) a commitment not to encourage trade or foreign direct investment to enhance or maintain a competitive advantage by lowering the level of protection provided by domestic environmental, public health and social legislation, or derogating from, and failing to apply such legislation.

ii) Commitment to facilitate trade in socio-environmentally friendly goods. Article 183 provides for the promotion of international trade in such a way as to ensure sustainable and sound management of the environment, in accordance with other undertakings in this area including the international conventions to which they are party and with due regard to other respective level of development. In this regard, the Parties undertake to facilitate trade in goods and services considered to be beneficial to the environment, such as environmental technologies, renewable and energy-efficient goods and services and eco-labeled goods. Further, Article 191 recognizes the benefits and importance of facilitating commerce in fair and ethical trade products.

iii) Procedural issues of consultation in the matters arising from these Chapters: a CARIFORUM-EC Consultative Committee on environmental and social issues covered by the respective Articles of these Chapters, which can submit oral or written recommendations to the Parties for disseminating and sharing best practice relating to issues covered by this Chapter. The Parties might also request consultations from external experts.

iv) Specific cooperation priorities and mechanisms, as referenced above.

As can be inferred, the specific provisions of this agreement in terms of sustainable development evolved considerably in comparison to the Chile AA. This EPA introduced sustainable development not as a guiding principle but as one of the main objectives of the agreement itself,

and included specific trade-related measures aimed at promoting the commitments to international agreements on social and environmental issues, and facilitating trade on socio-environmentally friendly goods, in addition to specific cooperation measures.

In general terms, the EPA contains considerable flexibility for CARIFORUM to exclude sensitive products and industries from liberalization or to 'phase in' liberalization. The coverage of goods liberalized by CARIFORUM countries amounts to 61% of EU imports in value over 10 years, 82% over 15 years (85% of tariff lines) and 86% over 25 years (90% of tariff lines). The main exclusions from tariff cuts are agricultural and processed agricultural products; some chemicals, furniture and other industrial products. The EPA will be supported by financial assistance from the EDF, in particular the regional program, which amounts to €165 million for the period 2008-2013.

### **5.3 The Free Trade Agreement with South Korea**

#### **Background**

The 2006 'Global Europe' strategy mandated the negotiation of a new generation of FTAs focusing on countries with high potential for the EU's economy. These FTAs would be ambitious in eliminating tariffs, as well as far-reaching in the liberalization of services and investment, and in finding novel ways of effectively tackling non-tariff barriers. In this context, the negotiations with South Korea, the EU's fourth-largest trading partner outside Europe, were launched in 2007 and concluded in 2009. The Agreement was signed in 2010 and entered into force in 2011.

#### **The Sustainability impact Assessment**

The negotiations of this FTA were also followed by a SIA, the results of which stated that the convergence in development levels and the broad similarity in the distribution of income between the EU and Korea would tend to limit significant social impacts on either side. The innovation in this study though was related to the recommendations and proposals made in relation to sustainable development, in which a suggestion to include a sustainable development

section within the trade chapter was made for the first time. This *Sustainable Development and Trade* part of the trade provisions was to include commitments similar to the CARIFORUM EPA but concentrated in one single chapter, such as cooperation on core labor standards and areas where core ILO conventions have not yet been ratified by the Parties and multilateral environmental conventions; complementary efforts to cooperate in response to multilateral environmental challenges; liberalization of environmental goods and services; and the development of a *Sustainable Development Council* representing stakeholders in the EU and Korea to review the provisions in the agreement and ensure transparency.<sup>59</sup>

In fact, these recommendations made their way into the agreement. Exceptionally, the Commission presented its Position Paper<sup>60</sup> after the conclusion of the negotiations, and thus it focuses on explaining to what extent the SIA recommendations have been taken into account in the text of the agreement. In terms of the sustainability measures proposed, the Commission was reported to have *engaged actively* in negotiating a ‘Trade and Sustainable Development’ chapter with South Korea, covering provisions on the implementation and monitoring of, and cooperation on, core labor standards and the decent work agenda, multilateral environmental conventions and international labor standards and related policy agendas, procedural mechanisms and liberalization of environmental goods and services.

## The Agreement

The EU- Korea FTA<sup>61</sup> is considered the most comprehensive to have ever been negotiated by the EU in terms of trade issues, with import duties eliminated on nearly all products and far-reaching liberalization of trade in services, including provisions on investments both in services and industrial sectors, strong discipline on intellectual property (including geographical indications), public procurement, competition rules, transparency of regulation and sustainable development. The FTA comprises 15 Chapters, several annexes and appendixes, three protocols and four understandings. Substantively, the agreement provides for the liberalization of almost

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<sup>59</sup> EU – South Korea Free Trade Agreement Final Report, available at: [http://trade.ec.europa.eu/doclib/docs/2008/december/tradoc\\_141660.pdf](http://trade.ec.europa.eu/doclib/docs/2008/december/tradoc_141660.pdf).

<sup>60</sup> Trade SIA of the EU-Korea FTA: Position Paper, June 2010, available at: <http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/korea/>.

<sup>61</sup> Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ L 127/6, 14/05/2011.

all trade and covers a broad spectrum of goods and services. Specifically, 99% of European tariffs and 96% of South Korean tariffs on imports from the other party will be eliminated over a three-year period.

The conclusion of the agreement prompted the launch of polemics, particularly in the European Parliament, where the debates over the effects of the agreement were substantive.<sup>62</sup> Particular concerns were raised regarding the need to include a safeguard clause related to sensitive sectors of the EU economy, which was ultimately included. Nevertheless, the FTA is in force since 1 July 2011, and is reported to have led to cash savings of €350 million, from increases in sales of European goods.<sup>63</sup>

Moreover, the FTA includes several Provisions on sustainable development. In Article 1, the Parties “*commit, in the recognition that sustainable development is an overarching objective, to the development of international trade in such a way as to contribute to the objective of sustainable development and strive to ensure that this objective is integrated and reflected at every level of the Parties’ trade relationship*” (emphasis added). In this regard, a ‘Trade and Sustainable Development’ Chapter was inserted, featuring four main types of Provision:

i) Commitments on both sides to labor and environmental agreements and standards. Some labor agreements are explicitly mentioned, such as the 2006 Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work, general obligations deriving from membership of the ILO and the ILO Declaration on Fundamental Principles and Rights at Work and commitment to respecting, promoting and realizing principles concerning the fundamental rights, such as freedom of association and the effective recognition of the right to collective bargaining; elimination of all forms of forced or compulsory labor; effective abolition of child labor; and elimination of discrimination in respect of employment and occupation. On the other hand, a more general reference to MEAs is made, with only the UNFCCC and the Kyoto Protocol being expressly cited.

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<sup>62</sup> See European Parliament, Committee on International Trade, Draft Recommendation on the proposal of a Council Decision concluding the FTA between the European Union and the Republic of Korea, Document 2010/0075(NLE), available at: [http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/inta/pr/815/815710/815710en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/inta/pr/815/815710/815710en.pdf).

<sup>63</sup> European Commission Memo, op cit.

ii) Trade related Provisions: the Parties “*shall strive to facilitate and promote*” trade and foreign direct investment in environmental goods and services, including environmental technologies, sustainable renewable energy, energy efficient products and services and eco-labeled goods, including through addressing related non-tariff barriers, and “*shall strive to facilitate and promote*” trade in goods that contribute to sustainable development, including goods that are the subject of schemes such as fair and ethical trade and those involving corporate social responsibility and accountability.

iii) Provisions of a procedural nature: determination of a continuous review of sustainability impacts through SIAs, and setting up of institutional structures to implement and monitor the commitments between the Parties, including through civil society participation. Furthermore, a specific dispute settlement procedure is established, excluding the provisions of this Chapter from the general dispute settlement mechanism provided for the rest of the agreement.

iv) Cooperation measures set up in Annex 13 of the FTA, to promote the achievement of the objectives of the trade and sustainable development chapter and to assist in the fulfillment of their obligations pursuant to it.

The nature of the sustainable development related provisions in this agreement were thus very similar to those of the CARIFORUM EPA. The difference here, though, was that all of those measures were condensed into a ‘Trade and Sustainable Development’ Chapter, which in addition was more specific in listing socio-environmental goods whose liberalization was to be facilitated by the Parties.

## **5.4 The Association Agreement with Central America**

### **Background**

The EU and the Central American (CA) region agreed to negotiate an AA in 2004, with negotiations launched in 2007 and successfully concluded at the 2010 Madrid Summit between the EU and Latin American countries. During the summit, other important decisions regarding relations with other actors of the region were taken, among which were the re-launch

negotiations for an EU-MERCOSUR AA, and political approval for the conclusion of a trade agreement between the EU and the Andean Countries (Peru and Colombia). The EU – CA AA is particularly relevant for EU external relations since it is the first ‘bi-regional’ AA to have been finalized up to this point within the ‘interregional’ approach to international relations adopted by the EU in the 1990s. Nevertheless, this approach seems to be facing difficulties and risks being replaced by a more pragmatic strategy, as in the same Madrid Summit negotiations with the Andean Community were finally abandoned and the EU signed bilateral agreements with Peru and Colombia. At the same time, the flagship interregional agreement, the one with MERCOSUR, a more complex agreement -especially regarding its trade effects, has still not been concluded.<sup>64</sup> These issues will be further explored in Chapter 6.

### **The Sustainability Impact Assessment**

A SIA procedure was also carried out for this agreement, and its results were presented in September 2009.<sup>65</sup> The study concluded that the AA was “*expected to be positive for both the EU and all Central American countries and the deeper the integration, the more beneficial the effects are expected to be in the long run*”. However, the conclusions were also wary of possible negative social and environmental impacts on both sides. Therefore, the SIA also suggested, among other recommendations, the inclusion of a ‘Trade and Sustainable Development’ chapter, as had already been done in the SIA undertaken for the South Korea FTA, addressing specific social issues (international labor standards, implementation and monitoring systems, agreements on working conditions and sector-specific issues) and environmental issues (MEAs, issue-specific provisions in relation to forests, fishery, biofuels, organic farming, regional monitoring mechanisms and institutional capacity building of environmental agencies), flanked by an incentive cooperation structure.

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<sup>64</sup> See, in this regard, F Söderbaum et al., ‘The EU as a Global Actor and the dynamics of interregionalism: a comparative analysis’, in F Söderbaum et al., *The EU as a global player: the politics of interregionalism*, Routledge, 2006.

<sup>65</sup> EU – Central America AA Final Report, available at <http://ec.europa.eu/trade/analysis/Sustainability-Impact-assessments/assessments/>.

The Commission presented its Position Paper in June 2012,<sup>66</sup> agreeing with the conclusions that to ensure an agreement conducive to sustainable development, not only liberalization in trade in goods, services and investment should be contemplated but also a strong and coherent set of rules covering a wide range of areas to accompany the process of liberalization, including a ‘Trade and Sustainable Development’ chapter. These views have been taken into account and included in the AA, as shown below.

## **The Agreement**

The EU-CA AA<sup>67</sup> follows the three-pillar format of political dialogue, cooperation and trade that was used in other EU agreements, such as the Chile AA. However, as the two regions signed an agreement on political dialogue and cooperation in 2003, the trade pillar constitutes the principal change in the bi-regional relations. The AA was approved by the European Parliament on 11<sup>th</sup> December 2012 and, once ratified by both parties, is expected to increase trade in goods between Central America and the European Union, which was worth €52.8 billion in 2012.<sup>68</sup>

Furthermore, the AA has very comprehensive content related to sustainable development issues. Article 1 states that “[t]he Parties confirm their commitment to the promotion of sustainable development, which is a guiding principle for the implementation of this Agreement” (emphasis added), and Article 2 lists among the objectives of the AA to develop a privileged political partnership based on values, principles and common objectives, in particular the respect for and promotion of democracy and human rights, sustainable development, good governance and the rule of law, and enhance bi-regional cooperation in all areas of common interest with the aim of achieving more sustainable and equitable social and economic development in both regions. Once again, sustainable development is portrayed as a guiding principle and also as an objective of the AA, and this is reflected in provisions in subsequent chapters.

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<sup>66</sup> Commission Position paper on the SA of the Association Agreement between the EU and Central America, June 2012, available at: [http://trade.ec.europa.eu/doclib/docs/2010/june/tradoc\\_146262.pdf](http://trade.ec.europa.eu/doclib/docs/2010/june/tradoc_146262.pdf).

<sup>67</sup> Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America, on the other, OJ 30.05.2010.

<sup>68</sup> European Commission Memo, op cit.

The ‘Political Dialogue Chapter’ contains a provision that the Parties commit to a political partnership based on respect for and the promotion of democracy, peace, human rights, the rule of law, good governance and sustainable development. Therefore, several areas of political dialogue are cited in order to pave the way for new initiatives for pursuing common goals and establishing common ground, including environmental, social and sustainable development issues.

The ‘Cooperation Chapter’ explicitly states that “*promoting economic growth with a view to furthering sustainable development, reducing the imbalances between and within the Parties and developing synergies between the two regions*” should be among the priorities for cooperation. In this regard, the chapter comprises nine subchapters, many of which address key issues for sustainable development: democracy, human rights and good governance; justice, freedom and security; social development and social cohesion; migration; environment, natural disasters and climate change; economic and trade development; regional integration; culture and audiovisual cooperation; and the knowledge society, and includes innovative measures such as support for organic farming and climate change.

The ‘Trade Chapter’ features liberalization on trade in goods and services and other *WTO+* issues. Among the objectives, the text includes the “*promotion of international trade and investment between the Parties in a way that contributes to the objective of sustainable development through joint collaborative work*” (emphasis added). In addition, a ‘Trade And Sustainable Development’ Chapter (Title IV) has been included, with the Parties explicitly expressing their stance on the “*benefit of considering trade related social and environmental issues as part of a global approach to trade and sustainable development*”. This chapter mainly features four types of provisions, which are similar but even more comprehensive than those in the South Korea FTA:

i) Commitments on both sides on common objectives and labor and environmental agreements and standards. In this AA, the provisions are much more detailed, and Article 284 sets the context and objectives, among which is a commitment to achieving sustainable development in its three pillars as interdependent and mutually reinforcing, and underlines the “*benefit of considering trade related social and environmental issues as part of a global approach to trade and sustainable development*”. Article 285 follows with the affirmation of the rights of the

Parties to regulate their own sustainable development priorities and levels of domestic environmental and social protection, but also determining that they shall “*strive to ensure*” that their laws and policies provide for and encourage high levels of environmental and labor protection, appropriate to their social, environmental and economic conditions and consistent with the internationally recognized standards and agreements referred to in Articles 286 and 287<sup>69</sup> to which they are party, and “*shall strive to improve*” those laws and policies, provided that they are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties or a disguised restriction on international trade. Article 291 states that the Parties recognize as inappropriate the encouragement of trade or investment by lowering the levels of protection afforded in domestic environmental and labor laws, and shall not wave or derogate from, or offer to wave or offer to derogate from these in a manner affecting trade.

ii) Trade related provisions, which go beyond the facilitation of trade in environmental goods and services and fair trade and other labeled goods, as in the Korea-FTA. Article 288 on ‘Trade Favoring Sustainable Development’ contains recognition by the Parties of the value of international cooperation in support of trade schemes and trade practices favoring sustainable development, and determination that the Parties “*shall endeavor to*”:

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<sup>69</sup>In terms of social agreements, the AA cites the obligations of the Parties as members of the LO, to respect, promote, and realize in good faith the LO principles and Conventions: (a) the freedom of Association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labor; (c) the effective abolition of child labor; and (d) the elimination of discrimination in respect of employment and occupation; Convention 138 concerning Minimum Age for Admission to Employment; Convention 182 concerning the Prohibition and immediate Action for the Elimination of the Worst Forms of Child Labor; Convention 105 concerning the Abolition of Forced Labor; Convention 29 concerning Forced or Compulsory Labor; Convention 100 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value; Convention 111 concerning Discrimination in Respect of Employment and Occupation; Convention 87 concerning Freedom of Association and Protection of the Right to Organize; Convention 98 concerning the Application of the Principles of the Right to Organize and to Bargain Collectively.

In terms of Multilateral Environmental Standards and Agreements, the AA cites a commitment to effectively implement: the Montreal Protocol on Substances that Deplete the Ozone Layer; the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal; the Stockholm Convention on Persistent Organic Pollutants; the Convention on international Trade in Endangered Species of Wild Fauna and Flora (hereafter referred to as ‘CTES’); the Convention on Biological Diversity; the Cartagena Protocol on Biosafety to the Convention on Biological Diversity; and the Kyoto Protocol to the United Nations Framework Convention on Climate Change. Further, it states that the Parties undertake to ensure that they have ratified, by the date of entry into force of this Agreement, the Amendment to Article XX of CTES, adopted at Gaborone (Botswana), and to ratify and effectively implement, at latest by the date of entry into force of this Agreement, the Rotterdam Convention on the Prior informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade.

- a) Facilitate and promote trade and foreign direct investment in environmental technologies and services, renewable-energy and energy-efficient products and services, including through addressing related non-tariff barriers;
- b) Facilitate and promote trade in products that respond to sustainability considerations, including products that are the subject of schemes such as fair and ethical trade schemes, eco-labeling, organic production, and including those schemes involving CSR and accountability;
- c) Facilitate and promote the development of practices and programs aiming to foster appropriate economic returns from the conservation and sustainable use of the environment, such as ecotourism.

Further, Articles 289 and 290 respectively contain specific provisions on:

d) Trade in forest products, including a commitment “*to work together to improve*” forest law enforcement and governance and “*to promote trade in*” legal and sustainable forest products through instruments such as the use of CTES with regard to endangered timber species; certification schemes for sustainably harvested forest products; regional or bilateral Forest Law Enforcement Governance and Trade (FLEGT) Voluntary Partnership Agreements.

e) Trade in fish products, addressing particular issues and making reference to multilateral conventions that the Parties undertake to adhere to and effectively implement, such as the Agreement for the implementation of the Provisions of the UN Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks; cooperation to prevent Illegal, Unreported and Unregulated (IUU) fishing, to exchange scientific and non-confidential trade data, experiences and best practices in the field of sustainable fisheries and, more generally, to promote a sustainable approach to fisheries.

iii) Cooperation measures to support Provisions in this Chapter: Article 302 determines that cooperation and technical assistance measures related to this Chapter are established in Title V (Economic and Trade Development) of the Cooperation Chapter (Part III) of the Agreement.

iv) Provisions of a procedural nature: a continuous review of sustainability impacts through SIAs; institutional structures to implement and monitor the commitments between the Parties, including through civil society participation, government consultation and expert panels, and a special dispute settlement mechanism, as Article 284 excludes the general dispute settlement mechanism of the agreement from issues in this Chapter.

As can be seen, the broader structure of the AA and its three pillars allowed for a more comprehensive set of measures focused on sustainable development. Particularly, the trade chapter contains not only the liberalization of environmental goods and services, but also windows of opportunity to encourage trade in key areas such as fisheries and forestry products, which are of great relevance for the sustainability agenda. This approach has been reproduced and enhanced in the next agreement analyzed.

## **5.5 The FTA with Colombia and Peru**

### **Background**

Negotiations between the EU and the Andean Community for a bi-regional AA, including political dialogue, cooperation and trade were launched in June 2007, in the context of the negotiations with other blocs in the Southern Cone. Nevertheless, they were suspended in June 2008 after disagreement between the Andean countries on approaches to a number of key trade issues, and the weakening of the Andean Community itself. New negotiations for a multiparty trade agreement were launched in January 2009 between the EU and Colombia, Ecuador and Peru, but an agreement was finally reached in June 2012, excluding Ecuador. This FTA is an interesting example in light of the analysis undertaken in this chapter as, although it is a less comprehensive agreement in comparison with the broader, three-pillar format of the AAs, in relation to sustainable development provisions some of its elements are even deeper than the latter.

### **Sustainability Impact Assessment**

A SIA process was also undertaken for this agreement, including analysis of impacts within the EU and the Andean countries (Colombia, Bolivia, Ecuador and Peru, as at the time negotiations were still done on a bi-regional basis), and public consultations in both regions. The final report was presented in October 2009,<sup>70</sup> reaching the conclusion that the impacts of the agreement would be mixed, bringing economic benefits but also varied socio-environmental results on both sides, as was the case with other SIAs. In this regard, in order to promote sustainable development a series of measures were recommended to mitigate and flank the impacts of the agreement. Among these, a ‘Trade and Sustainable Development’ Chapter in the Trade Pillar was recommended, to include: a reference to effective implementation of core labor and environmental standards; business practices and sustainable logging in forested areas, particularly in regions of greater biodiversity; climate change; considerations in the mining and biofuel industries; and sustainability in fishing, organic farming, and other sectors/practices.

The Commission presented a Position Paper in November 2010,<sup>71</sup> examining the analysis and recommendations made and highlighting the benefits of the agreement. Particularly in the recommendation to create a ‘Trade and Sustainable Development’ Chapter, it confirmed the intention to include commitments to implement a number of key multilateral labor and environmental agreements, in addition to commitments on the effective implementation and enforcement of the domestic regulatory frameworks on labor and environmental issues, and also provide a basis to address sustainability considerations with respect to the production of trade in environmentally sensitive products (forestry and fisheries), as well as general biodiversity issues. These matters were in fact reflected in the final text of the agreement, as follows below.

### **The Agreement**

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<sup>70</sup> The EU-Andean Sustainability Impact Assessment Final Report, DEVELOPMENT Solutions, Centre for Economic Policy Research (CEPR) Institute for Development Policy and Management in the School of Environment and Development at the University of Manchester, October 2009, available at: <http://ec.europa.eu/trade/analysis/Sustainability-impact-assessments/assessments/>.

<sup>71</sup> Commission Services Position Paper on the trade Sustainability Impact assessment (SA) of the multiparty trade agreement with Andean countries, November 2010, available at: <http://ec.europa.eu/trade/analysis/Sustainability-impact-assessments/assessments/>.

The Colombia – Peru agreement is an FTA,<sup>72</sup> similar in structure to the Korea FTA, but following deeper sustainability provisions, like those in the Central America AA. It has been provisionally in force since 1<sup>st</sup> March 2013 for Peru, and Colombia is expected to apply the agreement provisionally in the coming months. The EU is the second largest trading partner of the Andean region after the US, and it is expected that, once fully implemented, the agreement will result in total tariff savings of more than €500 million per year.<sup>73</sup>

The preamble contains a commitment of the Parties “*to implement the objective of sustainable development, including, the promotion of economic progress, the respect for labor rights and the protection of the environment*” (emphasis added). Interestingly, sustainable development is not cited as a guiding principle of the agreement, as was the case in the Central America AA. It does, however, feature among the objectives of the agreement cited in Article 2, “*to promote international trade in a way that contributes to the objective of sustainable development*”. In addition, a ‘Trade and Sustainable Development’ Chapter has also been inserted, featuring four main types of Provisions, as in the previous examples above:

i) Commitments on both sides on common objectives and labor and environmental agreements and standards. In this agreement, provisions are much less detailed in comparison with the Central America AA, more closely resembling those in the Korea-FTA. Article 267 sets context and objectives provisions, among which is the promotion of dialogue and cooperation between the parties to strengthen the relationship between trade and labor and environmental policies and practices, and compliance with the labor and environmental legislation of each party, as well as with the commitments deriving from the international conventions and agreements referred to in Articles 269 and 270. Article 268 follows with the affirmation of the rights of the Parties to establish their domestic policies and priorities on sustainable development, and their own levels of environmental and labor protection, consistent with internationally recognized standards and agreements, and to adopt or modify accordingly their relevant laws, regulations and policies, also stating that each party shall strive to ensure that its relevant laws and policies provide for and encourage high levels of environmental and labor protection. Interestingly, in this agreement a much shorter list of labor standards is mentioned in comparison with the Central America AA,

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<sup>72</sup> Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, OJ 21.12.2012.

<sup>73</sup> European Commission Memo, op cit.

with only a statement committing the Parties to the promotion and effective implementation in their laws and practice and territory of internationally recognized core labor standards as contained in the fundamental Conventions of the ILO,<sup>74</sup> to exchange information on their respective situations and advancements as regards the ratification of the priorities of these conventions, and not to use such standards for protectionist trade purposes. The list of multilateral environmental agreements the Parties commit to implement is a long one, though, stressing a sensitivity to labor issues and emphasis on environmental challenges.<sup>75</sup>

Article 291 then states that the Parties recognize as inappropriate to encourage trade or investment by lowering the levels of protection afforded in domestic environmental and labor laws, and shall not wave or derogate from, or offer to wave or offer to derogate from these in a manner affecting trade.

ii) Trade related provisions, which go beyond even those of the Central America AA. Article 271 on ‘Trade Favoring Sustainable Development’ contains recognition by the Parties of the value of international cooperation in support of trade schemes and trade practices favoring sustainable development, and a determination that the Parties “*shall strive to facilitate and promote*”:

- a) trade and foreign direct investment in environmental goods and services;
- b) business practices related to CSR;
- c) the development of flexible, incentive-based and voluntary schemes.

Further, Articles 272-275 contain specific provisions on:

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<sup>74</sup> Freedom of Association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labor; the effective abolition of child labor; and the elimination of discrimination in respect of employment and occupation.

<sup>75</sup> Montreal Protocol on Substances that Deplete the Ozone Layer adopted on 16th September 1987, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal adopted on 22nd March 1989, the Stockholm Convention on Persistent Organic Pollutants adopted on 22nd May 2001, the Convention on international Trade in Endangered Species of Wild Fauna and Flora signed on 3rd March 1973 (CTES), the CBD, the Cartagena Protocol on Biosafety to the CBD adopted on 29th January 2000, the Kyoto Protocol to the United Nations Framework Convention on Climate Change adopted on 11th December 1997 (hereafter referred to as the ‘Kyoto Protocol’) and the Rotterdam Convention on the Prior informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in international Trade adopted on 10th September 1998.

d) trade in biodiversity products (Article 272), with commitments to: endeavor to jointly promote the development of practices and programs aiming to foster economic returns from the conservation and sustainable use of biological diversity; endeavor to create conditions to facilitate access to genetic resources for environmentally sound uses and not to impose restrictions that run counter to the objectives of the CBD; confirm that access to genetic resources shall be subject to the prior informed consent of any Party providing such resources, unless otherwise determined, and to take appropriate measures, in accordance with the CBD, to share the results of research and development and the benefits arising from the commercial and other utilization of genetic resources with the Party providing such resources; strengthen the capacity of national institutions in relation to the conservation and sustainable use of biological diversity.

e) trade in forest products (Article 273), including a commitment to work together to improve forest law enforcement and governance and to promote trade in legal and sustainable forest products through instruments such as use of CITES with regard to endangered timber species; the development of systems and mechanisms for verification of the legal origin of timber products throughout the market chain and voluntary mechanisms for forest certification.

g) trade in fish products (Article 274), addressing particular issues and cooperation in the context of Regional Fisheries Management Organizations of which they are parties, to revise and adjust the fishing capacity for fishery resources, adopt tools for monitoring and control, to ensure full compliance with applicable conservation measures, and adopt actions to combat illegal, unreported and unregulated (IUU) fishing.

f) trade and climate change issues (Article 275). There were strong concerns about climate change in the SIA, and in this article the parties recall international commitments and agree to promote the transition to low-carbon economy, promoting trade and investment measures that promote and facilitate access, dissemination and use of best available technologies for clean energy production and use, and for mitigation of and adaptation to climate change. Measures would include: facilitating the removal of trade and investment barriers to access to innovation, development, and deployment of goods, services and technologies that can contribute to mitigation or adaptation, taking into account the circumstances of developing countries;

promoting measures for energy efficiency and renewable energy that respond to environmental and economic needs and minimize technical obstacles to trade.

iii) cooperation measures to support the Provisions of this Chapter in Article 286, covering activities such as: evaluation of the socio-environmental impacts of the FTA; implementation of socio-environmental commitments in international standards and agreements; adaptation and mitigation of climate change, and support to other issues included in the trade measures, such as biodiversity, forestry, fisheries and CSR.

iv) provisions of a procedural nature: continuous review of sustainability impacts through SIAs; institutional structures to implement and monitor the commitments between the Parties, civil society participation, government consultation and expert panels. Finally, a special dispute settlement mechanism, as Article 285 excludes the general dispute settlement mechanism of the agreement from provisions in this Chapter.

## **5.6 Assessment of the main provisions**

As the measures analyzed in this section show, there has been significant change in the way integration of sustainable development in EU trade policy has been implemented, manifested in the enhanced level of sustainable development related measures included in the trade agreements outlined above. This integration has been undertaken through procedural and substantive provisions.

### **The SIAs**

In terms of procedural provisions, the SIAs accompanying the negotiations of these agreements can be cited as the main innovation. This type of *ex ante* analysis is an increasing trend not only for trade policies, and the EU model of SIA is considered as the most sophisticated model in force, including social and environmental concerns of both parties to an agreement being negotiated. Despite the fact that the recommendations of SIAs are not binding on the parties and thus that their real added-value and impact are questioned, their main purpose as a procedure is to provide information to stakeholders and allow for more informed decision-making output, as

well as a channel for the participation of the public in framing future policies, rendering the process more transparent and participatory.

In addition, the SIAs analyzed in this chapter consistently emphasized one important issue to decision makers and stakeholders: the fact that liberalization alone is insufficient to promote trade in a manner favoring sustainable development. The reports, prepared independently by different consultancies and university centers, point to the same fact - that development oriented SDT measures must not be contemplated in isolation, but must also include consideration of measures providing for positive liberalization policies favoring trade on issues that are relevant to the sustainability agenda, such as environmental goods and services, technology transfer and other issues that can benefit the transition to a green economy, and help mitigate and adapt to climate change and foster certification and labeling schemes that aim to make trade in sensitive sectors more responsible and sustainable. Moreover, other types of procedural measures have been recommended for inclusion in the agreements analyzed, such as procedures for the supervision of these agreements by joint bodies and civil society, and continuous SIA processes, in line with the understanding that public participation, access to information and a precautionary approach are vital for an inclusive and fair sustainable development process. Finally, the policy recommendations seem to have been taken into consideration and adopted in the cases analyzed here, showing a practical and positive impact in the final negotiation output.

### **Trade and Sustainable Development chapters**

The integration of substantive sustainable development measures has taken place through, firstly, preambular and introductory provisions in which sustainable development has been portrayed among the objectives of the agreements and, at times, as a guiding principle informing implementation. This type of recognition has relevance to trade law, as recognized by the WTO in several disputes, indicating the object and purpose of the agreements themselves, providing guidance to the parties in interpreting measures, shedding light on the meaning of exceptions provided for in the agreement, and informing dispute settlement bodies on how they might interpret the agreement in the event of a dispute.<sup>76</sup> At the same time, sustainable development,

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<sup>76</sup> See in this regard M Gehring and MC Cordonier Segger, *Sustainable Development in World Trade Law*, Kluwer, 2005, 1-24.

while at times portrayed as a principle, has never been treated as a concrete obligation in itself, but none of the agreements admit the possibility of violating the ‘principle of sustainable development’.<sup>77</sup> Although this might seem open to criticism, this approach goes in line with the general understatement of sustainable development as a guiding principle and summary of international goals, rather than a rights based/justiciable approach, as discussed in Chapter 1.

Secondly, provisions on political dialogue, cooperation and trade related sustainability measures have been progressively inserted into the agreements. While in the Chile AA these provisions were still concentrated in the Cooperation Chapter, after the significant upgrading of sustainable development as a guiding principle of the EU, the later agreements feature a more straightforward approach, with specific chapters related to sustainable development within their trade chapters. These ‘Trade and Sustainable Development’ chapters contain four main types of provisions:

1) Cooperation and commitment to ratify, implement and enforce existing agreements and standards in social and environmental law regimes. Beyond this, the Parties undertake not to lower their levels of protection to encourage trade or investment, or to fail to effectively enforce their labor and environmental legislation in a manner affecting trade investment, and to strive to ensure that laws and policies provide for and encourage appropriate levels of labor and environmental protection. The first of these obligations can be seen as guarantee against retrogression, when this relates to trade or investment under the agreement. The second is weaker, in the sense that it is only a ‘best endeavors’ provision, but broader in scope in that it applies to labor and environmental standards even when trade and investment are not affected. There are also clauses aiming to prevent protectionism, such as statements that labor and environmental standards should not be invoked or used for protectionist purposes – except in the Central America AA, where the environmental clause is not included, despite the strong environmental content of the text. These types of measure, while not necessarily novel, can provide a first step to link the economic objectives of trade agreements to the socio-environmental objectives of other international law regimes. In comparison with similar measures in the GSP+, which are non-contractual but represent an actual conditionality to

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<sup>77</sup> L Bartels, *Human Rights and Sustainable Development Obligations in EU Free Trade Agreements*, University of Cambridge Faculty of Law Legal Studies Research Paper Series, Paper 24/2012, September 2012, available at <http://www.law.cam.ac.uk/ssrn/>.

benefit from trade preferences, the measures here have a softer legal effect. However, they do have the purpose of making statements that can encourage the fulfillment of socio-environmental obligations, avoid discriminatory measures and the prevalence of economic objectives over sustainable development concerns, within the framework of an agreement that provides for specific dispute settlements between the parties.<sup>78</sup> Furthermore, they are in a way complemented by the other -more general- human rights clauses present in all EU trade agreements nowadays.<sup>79</sup>

2) More interesting though are the commitments to “*facilitate, strive to*” and *incentivize* the liberalization of trade in goods and services that might have a beneficial social and environmental impact, such as the liberalization of “*environmental goods and services (EGS), fair trade*” products, trade in certified timber and sustainable fisheries. While these commitments have been made as *soft* obligations, without precise definitions of modalities or timelines, these provisions represent a starting point that can be used to move forward with these issues, which are fundamental to the transition to a green economy and sustainable development, but are also still left outside of a multilateral framework.

**a) Liberalizing trade in environmental goods and services (EGS)** can create new markets and export opportunities, and provide access to ‘green’ goods and technologies at lower costs and with greater efficiency. Increased deployment of cheaper and better-quality environmental goods helps countries to pursue their national environmental policy objectives and counter environmental degradation and climate change, facilitating the transition to a green economy. Further, the market for environmental goods and services represents a significant opportunity for development, as in 2006, the global market for environmental goods and services was valued at US\$690 billion, with the possibility of rising to US\$1.9 trillion by 2020, with the greatest market potential in developing countries.<sup>80</sup>

<sup>78</sup> See, in this regard, MC Cordonier Segger, ‘Sustainable Development in Regional Trade Agreements’, in L Bartels and F Ortino, *Regional Trade Agreements and the WTO Legal System*, Oxford University Press, 2006.

<sup>79</sup> See L Bartels, *Human Rights and Sustainable Development Obligations in EU Free Trade Agreements*, op. cit., for an analysis of the relationship between general human rights clauses and human rights related measures included in ‘Trade and Sustainable Development Chapters’ of the EU trade agreements.

<sup>80</sup> UNEP, ITC and ICTSD; (2012); *Trade and Environment Briefings: Environmental Goods and Services*; ICTSD Programme on Global Economic Policy and Institutions; International Centre for Trade and Sustainable Development, Geneva, Switzerland, [www.ictsd.org](http://www.ictsd.org).

Negotiations on EGS liberalization were part of the WTO Doha Round mandate, and the Doha Declaration paragraph 31(iii) called for the “*reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services*”. The mandate, however, defined neither environmental goods and services, nor the speed or depth of liberalization to be achieved, creating a serious barrier, as no international agreement exists on the definition of EGS. A number of organizations have proposed definitions, such as the OECD, which defined EGS as: “*activities which produce goods and services to measure, prevent, limit, minimize or correct environmental damage to water, air and soil as well as problems related to waste, noise and ecosystems.*” However, the lack of agreement on how to define and categorize environmental and climate-friendly goods and services has been one of the main barriers to progress in negotiations on liberalization of trade in such products at the WTO, and much of the debate within the WTO negotiations has centered on the identification of specific environmental goods for liberalization. Further, despite the Doha mandate to reduce or eliminate tariff and non-tariff barriers to environmental goods and services, substantial barriers to trade remain, and it is estimated that the average world tariffs on EGS are bound at a level of 8.7%, almost three times higher than the average applied rate for all goods – considering full use of preferences – at 3%.<sup>81</sup>

In light of these challenges, and given the relevance of liberalizing EGS trade for the achievement of green economy and climate change objectives in the context of sustainable development, liberalization of certain environmental goods and services through other frameworks, such as regional or bilateral trade agreements, can be an option. One example is the liberalization of trade in environmental goods and services in the Asia-Pacific Economic Cooperation (APEC) agreement, whose twenty-one countries<sup>82</sup> aim to compile a list of environmental goods for tariff liberalization. In 2011, APEC leaders adopted the Honolulu Declaration, in which they outlined plans to develop a list of environmental goods that “*directly and positively contribute to our green growth and sustainable development objectives*”. Leaders had pledged to reduce the applied tariff rates on such products to five percent or less by the end of 2015 and to draw up a list of goods subject to these tariff cuts in 2012. While the Honolulu text includes references to environmental services, specifically with regard to other trade

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<sup>81</sup> Ibid.

<sup>82</sup> Australia, Brunei, Canada, Chile, China, Hong Kong, Indonesia, Japan, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, the Philippines, Russia, Singapore, South Korea, Chinese Taipei, Thailand, the US, and Vietnam.

concerns related to local content and government procurement, currently only goods are set to be liberalized.<sup>83</sup>

However, the APEC initiative aims to liberalize EGS within their internal market, while the inclusion of these issues in agreements such as those analyzed here goes further, aiming to provide a window of opportunity for this issue to be addressed between two different parties – and also regions, as in the case of the Central America AA. While the provisions for liberalization of EGS are soft, not representing binding commitments or providing timetables, if these issues manage to move forward within the trade relationships provided for in these agreements, they could represent an important building block for the creation of a global market for EGS and an incentive for the transition to a greener, low carbon economy.

**b) Promotion of trade in sustainable agriculture:** The growth of the global market for sustainable agriculture also represents valuable opportunities for developing countries, as global trade in organic food, drinks, fiber and cosmetics is estimated to be valued at over US\$60 billion per year. About one third of the world's agricultural land (12.5 million hectares) and more than 80% of producers are in developing countries and emerging markets, and demand for organic products is concentrated in North America and Europe, which account for 96% of global revenues.<sup>84</sup> Thus, incentives for trade in these products can benefit developing countries' producers while also promoting more sustainable practices in the producer countries.

**c) Liberalization in biodiversity-based products:** Biodiversity-based businesses include biodiversity-friendly production of commodities (food, timber, fabrics) or the sustainable use of ecosystems (tourism, extractives, cosmetics, pharmaceuticals). These businesses are increasingly recognized as a means of providing incentives for the sustainable management of biodiversity, while simultaneously creating employment opportunities and livelihoods. The demand for many biodiversity-based products such as natural cosmetics, medicines, food and food ingredients has grown significantly and shows considerable potential for further growth. Consequently, profits

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<sup>83</sup> <http://ictsd.org/i/news/bridgesweekly/134813/>.

<sup>84</sup> UNEP, ITC and ICTSD, *Trade and Environment Briefings: Trade and Green Economy*; ICTSD Programme on Global Economic Policy and institutions; Policy Brief No. 1; International Centre for Trade and Sustainable Development, Geneva, Switzerland, 2012.

from these developments can be significant: for example, the value of anti-cancer agents derived from marine organisms was estimated as being worth up to US\$1 billion in 2006.<sup>85</sup>

**d) Sustainable fisheries:** While several reports have documented the losses in the fisheries sector mainly due to overfishing, many others show the potential gains from a transition to sustainably managed fish stocks: the world economy could gain up to US\$50 billion every year by restoring stocks and reducing fishing capacity to an optimal level.<sup>86</sup>

**e) Certified timber:** The expansion of the market for certified wood, driven mostly by demand in the United States and the European Union, creates export opportunities for many developing countries. Certification such as Forest Stewardship Council (FSC), the Programme for the Endorsement of Forest Certification Scheme (PEFC), and the Rainforest Alliance have helped to created a reliable market for these products, and by 2009, the global area of certified forest endorsed by FSC and PEFC amounted to 325.2 million hectares, approximately 8% of global forest area, and can contribute to the sustainable use of natural resources.<sup>87</sup>

**f) Private trade-related sustainability schemes** also offer possibilities for growth and sustainable development. The case of ‘fair trade’ products, as one of the several types of certification and labeling schemes cited in the agreements analyzed, is perhaps the most relevant. Fair trade represents a promising opportunity for poor populations to achieve more sustainable economic development. Evidence indicates that poor producers and communities have experienced significant social and economic benefits resulting from their involvement in fair trade programs.<sup>88</sup> Fair trade allows producers to receive higher prices for good quality and ethically-made products than they would have otherwise, and also an additional amount known as the ‘fair trade premium’, a sum of money paid on top of the agreed price for investment in social, environmental or economic development projects, decided upon by producers themselves. These additional funds have compounding effects in reducing poverty, as benefits extend not only to producers but often to their families and wider communities as well. In this

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<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid.

<sup>88</sup> E Fischer, *Introduction: The Policy Trajectory of Fair Trade*, *Journal of International Development*, 2009, 996; see also M Reynolds, *One cup at a time: poverty alleviation and fair trade coffee in Latin America*, Fair Trade Research Group, Colorado State University, 2003, 19–47.

way, fair trade initiatives offer producers and workers a market structure that is more conducive to sustainable practices. Furthermore, through being able to bypass traditional intermediaries, small-scale producer organizations are sometimes able to reap as much as 40% of the final purchase price.<sup>89</sup> In addition, fair trade markets have become very attractive nowadays. Fair trade sales continue to grow worldwide, and in 2011 sales of Fair Trade International (FLO) certified goods, the main fair trade label worldwide, reached €4.9 billion. In the same year, producers belonging to the FLO Association received €65 million in fair trade premiums.<sup>90</sup> The fair trade market is growing in objective terms and also outperforming other ethical (and non-ethical) markets.<sup>91</sup>

## 6. Concluding remarks

The considerations undertaken in this section allow for the conclusion that the trade policy of the EU has gone through a significant evolution over the years. In what concerns the focus of the analysis, it is possible to observe an evolution in the development aspects of this policy, moving –at least to a certain extent- from a more politics oriented to a more principle based rationale (coming from history to principle, as one commentator has observed<sup>92</sup>). Promoting development has been a goal of the EU's CCP from the outset, but the scope of this policy has come a long way from providing some trade preferences to its associated states and former territories – often with hidden political agendas- to being a tool to promote the overarching goals of the 'external action' of the Union.

This shift has taken place not only alongside the overall evolution of the EU and its ever-expanding policy goals, but also providing for adjustments needed in relation to conflicts with international law – as the trade disputes within the WTO exemplify. In any case, the EU has become much more engaged in shaping and supporting the implementation of the international development agenda, and the implications of this fact for the present study are reflected in its

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<sup>89</sup> D Jaffee, *Bringing the 'Moral Charge' Home: Fair Trade within the North and within the South*, Rural Sociology, 2004, 69(2), 172.

<sup>90</sup> Fair Trade Labeling Organization, *Annual Report 2011-12*.

<sup>91</sup> Cooperative Bank, *The Ethical Consumerism Report 2011*, Manchester, UK: The Co-operative Bank, NEF, and The Future Foundation (2011).

<sup>92</sup> L Bartels, 'The trade and development policy of the EU', op. cit.

aim to increasingly integrate non-trade issues into the CCP, such as the promotion of sustainable development.

This integration has been analyzed here through two types of measures, the first of them being the development aspects of the GSP. This type of scheme, non-contractual and supported by the ‘Enabling Clause’, is by nature a development instrument in its most traditional sense, allowing for the integration of non-reciprocal trade preferences for developing countries, thus supporting their economies in integrating into the world market. The EU GSP went beyond this, creating two specific schemes that aim to integrate sustainable development considerations. The implementation of these schemes has faced challenges, which have in fact been more related to procedural aspects than to the core of its objectives. At the same time, this core has also met with criticism, to the extent that the main requirement to benefit from the GSP+ is ratification and implementation of a series of international instruments related to socio-environmental objectives. While encouraging developing countries to sign and implement these instruments can certainly contribute to the promotion of sustainable development, the outcome of their application in the national contexts of beneficiary countries is hard to predict. In this regard, the practical impact of integrating sustainable development through the GSP, while promising in theory, is also ambiguous.

The second type of instruments examined, the five recent trade agreements, offer an interesting perspective of a more comprehensive way to integrate sustainable development objectives into trade policy. While they may be criticized for several of their very broad issues – which could not be analyzed in their entirety due to length constraints in this study – as being counter-productive to development, and serving several internal objectives of the EU apart from promoting sustainable development –such as market access, protection for investors and positioning the EU as a global leader- these agreements can also be considered to contribute to the integration of sustainable development. Firstly, they have been preceded by *ex-ante* impact assessment procedures aimed at anticipating effects on sustainability, informing decision makers and stakeholders, and proposing ways to mitigate negative outcomes. Another contribution of the SIA reports, perhaps overlooked but of great relevance in practice, is to underline that trade liberalization alone does not lead to sustainable development, highlighting this fact based on substantive studies of the specific context involved.

In relation to their substance, the agreements provide deep trade liberalization of goods, and at times also services, being Article XXIV compatible, thus providing for reciprocal concessions while also including SDT for developing countries in the form of phased commitments. Furthermore, they are WTO+ or/and WTO-extra agreements, dealing with non-trade issues that are also a part of the stalled Doha Round negotiations. In this regard, the agreements can be considered to be important building blocks for the international trade and development agenda.

The most relevant aspect of the case study, though, has been its demonstration of the significant expansion in the breadth of scope of sustainable development measures included in the agreements analyzed, which went from being only cooperation measures supporting the achievement of sustainable development objectives, as in the case of the Chile AA, to more explicit trade related measures targeting specific issues that are considered as important to the sustainable development agenda. These measures include commitments to ratify, implement, and not derogate from applying various international socio-environmental instruments and principles, and not to use them as disguised protectionism. On this point, some of the considerations made regarding the GSP+ apply, even though in this case they are not imposed in a *carrot and stick* way but are negotiated. Furthermore, the agreements have shown the progressive inclusion of measures aiming to open negotiations of trade schemes benefiting strategic issues, such as EGS, renewable energy and fair trade labels. Most of these measures are drafted in ‘soft’ language and represent open-ended obligations, but at the same time, introduce a much needed framework that is still lacking at the multilateral level and prevents these promising sectors from moving on in terms of creating international markets. A multilateral framework would still be important to ensure coherence and effectiveness in relation to the wider sphere, and national measures have important roles to play in assuring the implementation of these provisions. Nevertheless, these measures go well beyond the negative integration approach undertaken by the WTO to date, and have an important role to play in advancing green economy objectives in relation to the multilateral framework.

Some more general observations can be made regarding the development cooperation policy. Despite the limited analysis undertaken, it is remarkable that from its outset three decades ago, development cooperation has become an independent policy that has made the EU, together with

its member states, the biggest donor of ODA in the world and thus has achieved significant relevance in the international sphere. The relevance of this policy relies on the fact that it provides a financial instrument to promote objectives of external relations without being tied to the specificities of trade policy, and the boundaries of WTO legality that this implies. The EU agenda of development cooperation is criticized as being a form of exporting the EU's own values and policy goals to recipients, but at the same time it is possible to observe that these goals are often related to internationally agreed development goals. Even if it is true that the EU played a prominent role in defining the international development agenda itself, the contributions that the bloc can make in promoting this agenda should not be undermined. This has been the case with sustainable development, which has now become the ultimate goal of EU development policy.

Criticism might also be leveled regarding the shortcomings of the development cooperation policy as regards the rhetoric of its legal framework. Firstly, regarding the target of committing 0.7% GNI for ODA, the EU is still lagging behind. Total net ODA by all 27 EU member states was US\$73.6 billion in 2011, representing 0.42% of their combined GNI, down from 0.44% in 2010. Grants by EU Institutions totaled US\$12.6 billion, representing a fall of 6.4% in real terms compared with 2010.<sup>93</sup> At the same time, the EU kept its position as the largest donor in the world, representing around 50% of world ODA. Another issue that proves to be challenging is the commitment to achieve increasing levels of policy coherence – not only in the EU and member states, but also in EU policies. It may be observed that, as regards trade policy, the development cooperation policy has often been used as a supporting instrument to deliver on the development-related trade measures of the agreements analyzed. At the same time, as regards other policies that are considered to have significant adverse effects on developing countries, achieving coherence is a greater challenge. The most relevant example is the conflict of goals between development cooperation and issues related to the CAP, such as agricultural subsidies and the relative protectionism that still restricts market access in agricultural products -often among the main exports of developing countries- which might undermine the potential effect of aid, and are often portrayed as mere compensation. It seems that the EU is increasingly more conscious of this fact and is committed to tackle it, but the question remains as to whether politics and internal dynamics will allow this situation to change.

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<sup>93</sup> Source: OECD, March 2013.

In sum, there has been a considerable level of integration of sustainable development into EU trade policy. While there may be much criticism regarding the ways in which this integration has taken place, the legal framework developed by the EU currently allows it to pursue policies and objectives which have the potential to make a valuable contribution to sustainable development goals, such as providing for more informed and participatory decision-making processes and fostering the transition to a green and low carbon economy.

## **II - The trade (and development?) policy of MERCOSUR**

Despite not having a ‘trade and development’ policy as such, MERCOSUR has been an active player in the field of external relations, above in in developing trade relations with third parties. The bloc was created among the ‘spaghetti bowl’ of trade relations in Latin America, and in this regard, has always had an external dimension in the sense that it was considered as a first step of economic integration in the region. Furthermore, recent developments in trade instruments have expanded the scope of MERCOSUR’s CCP to include development focused measures, such as technical cooperation clauses included in FTAs negotiated with third parties, and a common GSP system towards developing countries, which might imply some potential for future developments of this policy – particularly in the sphere of South-South cooperation.

### **1. Introduction: the framework of the MERCOSUR Common Commercial Policy**

The Treaty of Asunción declares, among its basic postulates, the goal of adopting a common trade policy for MERCOSUR. This principle was reaffirmed in Decision CMC 32/00, where the bloc reiterated the commitment of partner states to jointly negotiate trade agreements. MERCOSUR was formally deprived of legal personality from the time of its establishment in 1991 until the signing of the Ouro Preto Protocol (POP) in 1994, in which Article 34 finally stated that the bloc should possess legal personality in international law. However, between 1991 and 1994, MERCOSUR had already started to develop external trade relations and had a *de facto* foreign or trade policy, undertaking a pragmatic policy of international recognition and

initiated dialogue with the European Community and the United States at a very early stage.<sup>94</sup> With the introduction of the POP, MERCOSUR was granted the generic capacity of possessing (and maintaining) rights and duties under international law (Article 34) and of taking whatever action may be necessary to achieve its objectives -in particular, signing contracts, buying and selling personal and real property, appearing in court, holding funds and making transfers (Article 35).

The POP did not make specific mention of the powers to negotiate and conclude agreements, to accede to conventions, to become a Member or observer of an international organization, to bring international claims or to send or receive diplomatic delegations, but MERCOSUR's approach has been to exercise some of these specific competences under the argument of 'implied powers' in line with its own objectives, purposes and functions as stated in its primary law. In order to avoid problems of lack of competence and due to the inter-governmental nature of MERCOSUR, all of the agreements signed by the bloc are in principle mixed agreements, i.e., signed by all MERCOSUR Member states, mentioning the bloc as a contracting party and obeying the domestic requirements of internalization. Regarding the format of agreements and the process of their negotiation, the primary law of MERCOSUR does not establish any standard procedures.

Furthermore, the primary law does not establish general rules concerning the external representation of the bloc. In general, the main actor of MERCOSUR's external policy is the Council of the Common Market (CCM), with responsibility for the political leadership of the integration process and composed of the Foreign and Economic Ministers of the member states. The POP expressly attributes to the CCM the legal personality of MERCOSUR (Article 8 III) and the power to negotiate and sign agreements with other countries, groups of countries and international organizations (Article 8 IV). These last functions, however, may be delegated, by express mandate, to the Common Market Group (CMG), the executive and technical organ of the bloc, coordinated by the Ministries of Foreign Relations and Economy and the Presidents of the Central Banks (Article 8 IV). It is evident that, due to the lack of supranationality in the bloc and the decisive role exercised by the individual Ministries of Foreign Affairs through the

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<sup>94</sup> M Franca Filho, *MERCOSUR External Relations*, in L Lixinski et al, 'The Law of MERCOSUR', Hart, 2010.

coordination of all organs with decision-making power, in practice, the external relations function of MERCOSUR remains under the control of the individual member states.<sup>95</sup>

Delegation from the CCM to the CMG has taken place frequently over the years and has played an important role in MERCOSUR's external policy. According to Article 14 VII of the POP, the CMG can negotiate agreements on behalf of MERCOSUR, but only with the participation of representatives of all member states and within the limits laid down in the special mandate granted for that purpose. When so authorized and mandated by the CCM, the CMG may also sign those agreements on behalf of MERCOSUR and/or delegate all those powers to the MERCOSUR Trade Commission (Art 14 VII of the Ouro Preto Protocol). In 1995, with Resolution 34/95, the CMG created the *Ad Hoc* Group on External Relations, whose specific objective has been the discussion of MERCOSUR's external relations with third party countries, groups of countries and international agencies. The importance of this *Ad Hoc* Group was reaffirmed through Decision 59/00. In addition to those functions that can be delegated by the CMG, the Trade Commission also has other relevant roles relating to the bloc's external relations: in general terms, the body is responsible for following up and reviewing questions and issues relating to common trade policies, intra-MERCOSUR trade and commerce with third party countries (POP Article 16).

The Commission of Permanent Representatives of MERCOSUR constitutes another important organ with representative functions in the bloc's external relations. Officially, the main function of this Commission is to submit to the Common Market Council new initiatives relating to the development of the external negotiations and the empowerment of the process of regional integration (Article 4 b of the Decision CMC 11/03). In reference to MERCOSUR's external relations, the Chairman of the Commission of Permanent Representatives has been the most visible face and main voice of the external policies, given that he acts as the contact person for the international dialogue on political and commercial matters – comparable with the European High Representative for the Common Foreign and Security Policy (CFSP).<sup>96</sup> Article 5 of the Decision CMC 11/03 states that the President of the Commission of Permanent Representatives of MERCOSUR, when mandated by the Council, may represent the block in relations with third

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<sup>95</sup> D Ventura, *Las Asimetrías entre el MERCOSUR y la Unión Europea: Los Desafíos de una Asociación Interregional*, Montevideo, Fundación Konrad-Adenauer, 2005, at 154.

<sup>96</sup> Ibid at 155.

countries, groups of countries and international organizations. Due to the *pro tempore* nature of the MERCOSUR presidency, with changes every six months, the presence of a permanent negotiator (i. e. with a two year fixed appointment) could have a very positive influence by providing continuity in lengthy and complex negotiations.

Based on this framework, MERCOSUR nowadays has an extensive list of external trade relations, as discussed below. The most important negotiation underway, the EU-MERCOSUR Association Agreement, however, will be discussed more deeply in Chapter 6.

## **2. MERCOSUR external relations: an embryonic development component?**

### **2.1 Relations of MERCOSUR with other economic blocs or international organizations**

MERCOSUR is currently at several different stages in its relations with other organizations: agreements already signed; agreements signed but in part pending for additional negotiations; negotiations ongoing; negotiations yet to be initiated based on framework agreements already signed; dialogue processes practiced with some regularity; dialogue processes more vague in nature; and finally, proposals for the opening of new negotiation processes, not yet answered by MERCOSUR.<sup>97</sup>

On 16<sup>th</sup> December 2004, following a previous framework agreement towards the creation of a free trade area between MERCOSUR and South Africa, the South American bloc and the Southern African Customs Union (SACU) – composed of the Republic of Botswana, the Kingdom of Lesotho, the Republic of Namibia, the Republic of South Africa and the Kingdom of Swaziland – signed a preferential trade agreement as a first step toward the creation of a free trade area. The PTA contains a main text and five annexes, which create a legal basis to govern SACU and MERCOSUR trade relations. In April 2008 in Buenos Aires, Argentina, both parties concluded a final round of negotiations and decided that a free trade agreement will replace the agreement signed in December 2004 in Belo Horizonte, Brazil.<sup>98</sup>

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<sup>97</sup> EHF Araújo, *O Mercosul: Negociações Extra-Regionais* (Brasília, Fundação Alexandre de Gusmão, 2008) 66.

<sup>98</sup> All agreements and trade documents can be found on the MERCOSUR website ([www.MERCOSUR.int](http://www.MERCOSUR.int)), ALADI's website ([www.aladi.org](http://www.aladi.org)) or in the Foreign Trade Information System ([www.sice.oas.org](http://www.sice.oas.org)) created and maintained by the Organization of American States.

Other agreements of this nature that can be cited are: a Framework Agreement on Economic Cooperation signed between the Cooperation Council for the Arab States of the Gulf (CCG)<sup>99</sup> and MERCOSUR in May 2005, at the South America-Arab countries Summit held in Brasilia, Brazil. Further, MERCOSUR and the European Free Trade Association (EFTA), composed of Iceland, Lichtenstein, Norway and Switzerland, signed a Declaration on Trade and Investment Cooperation and Action Plan, recognized as a first step towards a free trade agreement, in order to enhance economic relations, in particular concerning trade in goods and services, as well as investments. MERCOSUR has also initiated trade talks with the Caribbean Community (CARICOM), the Association of Southeast Asian Nations (ASEAN),<sup>100</sup> the Australia-New Zealand Closer Economic Relationship Treaty Agreement,<sup>101</sup> the Community of Portuguese Language Countries (CPLP)<sup>102</sup> and the Central American Integration System (SICA).<sup>103</sup>

Regarding international organizations, MERCOSUR as such is not yet a formal member or officially recognized observer of any international organization. Nevertheless, there have been many occasions when the Member states of the bloc have had common positions on issues before multilateral bodies such as World Trade Organization, International Labour Organisation, International Telecommunications Union, World Customs Organisation and Universal Postal Union. On the other hand, MERCOSUR maintains some specific accords of cooperation with entities like the FAO, the Inter-American Development Bank, UNESCO and the Organization of the Convenio Andrés Bello.<sup>104</sup>

## 2.2 Relations of MERCOSUR and ALADI member states

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<sup>99</sup> The GCC is made up of the United Arab Emirates, the Kingdom of Bahrain, the Kingdom of Saudi Arabia, the Sultanate of Oman, Qatar and Kuwait.

<sup>100</sup> A memorandum of understanding signed in August 2007, creating a mechanism for dialogue on ASEAN-MERCOSUR trade issues. The ASEAN members are Indonesia, Malaysia, the Philippines, Singapore, Thailand, Brunei, Cambodia, Laos, Myanmar and Vietnam.

<sup>101</sup> A dialogue process started in 1994 relating to trade topics and other common interests.

<sup>102</sup> The CPLP is formed by Portugal, Brazil, East Timor, Angola, Cape Verde, Guinea-Bissau, Mozambique, and São Tomé and Príncipe. A proposal to negotiate a free trade agreement made by MERCOSUR in July 2004 has, until now, only received positive responses from São Tomé and Príncipe and Cape Verde.

<sup>103</sup> In October 2004 MERCOSUR initiated formal contact with the Central American Integration System (SICA), made up of Belize, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama. In February 2005, it launched a Joint Declaration recognizing the initial steps taken towards integration.

<sup>104</sup> The Organization of the Convenio Andrés Bello is an international organization with headquarters in Bogotá, Colombia, which since 1970 has worked in processes of educational, scientific, technological and cultural integration in Ibero America.

The ALADI was created in 1980 around the general principles of pluralism and flexibility in the political and economic convergence towards the formation of a future Latin American common market. These principles have allowed the signature of multiple forms of trade instruments, generally called *Acuerdos de Complementación Económica* (Economic Complementation Agreements, or simply ACE). Under the ALADI umbrella, up to this point, MERCOSUR has signed eight ACE, with the following partners:

(i) Chile (ACE-35), signed on 25<sup>th</sup> June 1996 in Potrero de los Funes, Argentina. The agreement aims at the establishment, in the near future, of a free trade zone between the parties. The process of reducing tariffs is currently at an advanced stage. The text of the agreement is supplemented by a number of additional protocols, and entered into force on 1<sup>st</sup> October 1996.

(ii) Bolivia (ACE-36), signed on 17<sup>th</sup> December 1996 in Fortaleza, Brazil, and entered into force on 28<sup>th</sup> February 1997. This is another free trade agreement with a fixed timetable and lists of some exceptions.

(iii) Mexico (ACE-54 and ACE-55). The ACE-54 is a framework agreement that establishes a legal basis for trade relations between Mexico and the Member states of MERCOSUR and aims to lay out the groundwork for a possible free trade area in the future. It was signed during the MERCOSUR Presidential Summit that took place on 5<sup>th</sup> July 2002 in Buenos Aires, Argentina, and came into force on 5<sup>th</sup> January 2006. On the other hand, the ACE-55, signed on 27<sup>th</sup> September 2002 in Montevideo, Uruguay, establishes a mutual reduction of import duties exclusively on products of the automotive sector (bilateral import quotas for tariff-free entry of automobiles). The agreement entered into force on 1<sup>st</sup> January 2003.

(iv) Members of the Andean Community (Bolivia, Colombia, Ecuador and Peru) (ACE-56, ACE-58 and ACE-59). These three agreements were signed on 6<sup>th</sup> December 2002, 30<sup>th</sup> November 2005 and 18<sup>th</sup> October 2004 respectively, and establish a free trade arrangement with special timing and some lists of exceptions in trade liberalization.

(v) Cuba (ACE-62), signed in July 2006. The Agreement consolidated as multilateral the preferred nation status negotiated in the four bilateral agreements between MERCOSUR member states and Cuba.

All of these negotiations have variable geometry and constitute, firstly, a deepening of an existing integration process -the ALADI- with arrangements based on history and models known to the parties. Secondly, these trade talks are -or may be- part of the MERCOSUR efforts towards expansion.<sup>105</sup>

## **2.3 Relations of MERCOSUR and non-ALADI member states**

### **i) Framework Agreements**

A framework agreement was signed between MERCOSUR and India on 17<sup>th</sup> June 2003, aiming above all to create conditions and mechanisms for increasing trade (specifically by the mutual granting of tariff preferences) and, in a second stage, to negotiate a free trade area between the two parties. As a follow-up to the framework agreement, a Preferential Trade Agreement (PTA) was signed in January 2004, aiming to grant reciprocal fixed tariff preferences and also to consolidate a political relationship. Closer ties between MERCOSUR and India would arguably bring indirect political benefits, for instance, fostering the India-Brazil-South Africa Dialogue Forum (IBSA).

In November 2004, MERCOSUR signed a framework trade agreement with the Kingdom of Morocco, aiming to establish conditions for the negotiation of a free trade agreement. The first round of negotiations was held in Rabat, Morocco, on 11<sup>th</sup> April 2008.

Beyond these agreements, MERCOSUR also has initiated exploratory dialogues with Panama, Trinidad and Tobago, Guyana, Singapore, Dominican Republic, Russia, Jordan, Turkey, Lebanon, Iran, South Korea, China, Japan, United States and Canada. MERCOSUR has been a

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<sup>105</sup> EHF Araújo, *O Mercosul: Negociações Extra-Regionais* (Brasília, Fundação Alexandre de Gusmão, 2008) 239.

key player in initiating these processes, a clear indicator of the pro-activity of the bloc in terms of external relations.<sup>106</sup>

## **ii) Free Trade Agreements**

As part of the South American efforts towards deepening of South-South diplomacy, MERCOSUR has also signed trade agreements with India, Egypt, Morocco, Israel and Pakistan in recent years.<sup>107</sup> These extra-regional negotiations have contributed to diversify and expand trade opportunities, reinforce the capacity to attract international investments and strengthen economic and political relations with non-traditional partners of the South American bloc.<sup>108</sup>

### **FTA with Israel**

Negotiations for the MERCOSUR-Israel FTA began in 2005 when a framework agreement was signed, and were completed in 2007, creating the first FTA between MERCOSUR and a partner outside the region. The FTA, which is already in force, primarily focuses on trade in goods, providing a scaled program of tariff reductions in the following categories, which are called ‘baskets’: basket A - immediate; basket B - four years; basket C - eight years; basket D - 10 years; and basket E - preferred quotas or margins. These baskets have since then become a pattern for the further FTAs of the bloc. In addition to the goods section, the agreement has chapters dealing with: rules of origin, based on WTO rules on this matter; safeguards; technical regulations, standards and conformity assessment procedures; sanitary and phytosanitary standards; technical and technological cooperation; countervailing duties; customs cooperation, and dispute settlement, establishing a forum choice clause between the WTO Dispute Settlement Body and the MERCOSUR-Israel FTA.

Despite the estimated low economic impact of this agreement, its relevance relates to the fact that it is the first trade agreement of this nature outside of South America. In this regard, it represents a valuable precedent for MERCOSUR member states, enhancing the bloc’s EP

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<sup>106</sup> M Franca Filho, op. cit.

<sup>107</sup> For an economic analysis of these agreements, see E. Guimarães, ‘Acordos do Mercosul com terceiros países’, *Textos para Discussão CEPAL-IPEA*, 23, CEPAL. Escritório no Brasil/IPEA, 2010.

<sup>108</sup> M. Franca Filho, op. cit.

external relations seeking new markets and reallocating its negotiations with third countries outside the region. At the same time, as the agreement is still recent and its liberalization will only be completed in 2018, it is still too early to evaluate its real impact.<sup>109</sup>

### **FTA with Egypt**

The second FTA signed by MERCOSUR was completed with Egypt in 2010. It is mainly a trade agreement, which aims at opening markets for goods, with an evolutionary clause on possible future negotiations on market access to services and investments, and follows the progressive tariff reduction scale used with Israel, with products divided in 4 groups: basket A - immediate; basket B - four years; basket C - eight years; basket D - 10 years; and basket E - preferred quotas or margins to be renegotiated once the FTA comes into force. Interestingly, Egypt's offer to MERCOSUR covers 97% of tariff items in baskets A to D, among which 46% are in A or B, while MERCOSUR's offer covers 99% of tariff items in baskets A to D, with 32% in A or B; it is thus a quite comprehensive agreement, achieving a deep level of free trade among the parties. Access to the text of the Agreement was not possible to verify any form of cooperation provided among the parties.

### **FTA with Palestine**

The MERCOSUR-Palestine Free Trade Agreement was signed on 20<sup>th</sup> December 2011, concluding the negotiation started with the signature of the Framework Agreement on Trade and Economic Cooperation in December 2010. The instrument signed with Palestine reaffirms the MERCOSUR countries' willingness to enhance their relationship with partners in the Middle East and in the Arab World – together with the Israel and Egypt FTAs. This FTA aims to open markets for goods, also with an evolutionary clause on possible future negotiations on market access to services and investments. It is divided into chapters, one of which concerns trade in goods: this also includes 'baskets' for duty elimination divided into eight categories: basket A - immediate; basket B - four years; basket C - eight years; basket D - 10 years; and basket E - preferred quotas or margins. In Basket A, MERCOSUR offered products that Palestine is

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<sup>109</sup> A Dreyzin de Klor, 'MERCOSUR: en movimiento?', in A. Dreyzin de Klor and C. Harrington (Eds.), *El derecho en movimiento: en homenaje a Elena Highton*, Rubinzal – Culzoni, 2012.

interested in exporting, such as olive oil, food products, stones and marble. Other chapters include: rules of origin; bilateral safeguards; technical regulations, standards and conformity assessment procedures; sanitary and phytosanitary measures; technical and technological cooperation; institutional provisions and dispute settlements. In addition, the Agreement expresses support from MERCOSUR Member states for the establishment of an independent and democratic Palestinian State, geographically contiguous and economically viable, that may co-exist in peace and harmony with its neighbors, having thus a political element also.<sup>110</sup>

### 2.4 MERCOSUR in the GSTP

Another recent development which is significant within MERCOSUR's trade policy is the decision to enter the GSTP as a bloc and a joint commitment has been made recently under the CET in the context of the Sao Paulo Round. The bloc joined the GSTP as a bloc in 2006, being the first regional actor to do so. The Round was launched in 2004 on the occasion of the quadrennial conference of UNCTAD ('UNCTAD XI') in São Paulo, Brazil. After years of negotiations, the parameters of the tariff-cutting formula were agreed at a ministerial meeting held in Geneva in December 2009, consisting of reducing applied tariffs by 20% on at least 70% of dutiable products, thereby combining effective tariff cuts (as tariffs are cut from applied rates, rather than WTO bound rates) with policy space and flexibilities. The modalities provided for some differential and more favorable treatment, including for those in the process of WTO accession. The Round was concluded at a ministerial meeting in December 2010 in Foz do Iguaçu, Brazil, and the resulting tariff concessions have broadened product coverage to 47,000 tariff lines (2), compared to some 650 products included in the previous two rounds.

Of the forty-three GSTP members, twenty-two participated in the São Paulo Round, and eleven agreed on tariff concessions, signing a Protocol concluding the Round. These countries are: Argentina, Brazil, Paraguay and Uruguay (together forming MERCOSUR), the Republic of Korea, India, Indonesia, Malaysia, Egypt, Morocco and Cuba. Some of the remaining eleven countries are also expected to join the Protocol at a later date. The changes will enter into force with the ratification of at least four countries. As of June 2011, India and Malaysia have

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<sup>110</sup> <http://www.itamaraty.gov.br/sa> <http://ictsd.org/i/news/tni/113063/la-de-imprensa/notas-a-imprensa/acordo-de-livre-comercio-mercosul-palestina-montevideu-20-de-dezembro-de-2011>.

completed the ratification procedures. Beyond tariff concessions, GSTP participants will also further examine the possibility of modifying the existing GSTP rules of origin that are based on value-added methods (i.e. the requirement that foreign contents of a product should not exceed 50% of its value), including the option of complementing them with other origin determination methods, such as the ‘change in tariff heading’ method.

The GSTP is considered as a significant contribution for its beneficiaries. Collectively, the 43 GSTP economies represented a market of US\$9 trillion in 2009, having grown at a rate of 5.5% during the 2000s (nearly twice the world average), and some are among the most dynamic emerging economies. These economies generated an import demand of about US\$2.2 trillion in 2009, or nearly 20% of total world imports. Imports by the eleven countries signing to the São Paulo Round results alone were around US\$1 trillion, of which 10 percent was intra-group trade. UNCTAD’s estimates find that, despite the reduced number of countries exchanging tariff concessions, the São Paulo Round results will have a significant positive welfare effect. Eleven participants will see welfare gains of US\$2.5 billion with associated increases in exports and employment, and these gains could be further increased to US\$5.8 billion if all countries that participated in the Round undertake tariff reduction. LDCs did not participate in the Round, but in the future, GSTP could provide an important trade opportunity for them.<sup>111</sup>

### **3. Concluding Remarks**

The trade policy of MERCOSUR has expanded over the past decades, which might seem surprising, as the bloc has been facing general overarching obstacles to progress. The analysis above shows that the MERCOSUR CCP policy has followed the pragmatic approach that characterizes the actions of the bloc, as it had started to develop external relations with the aim of establishing trade partnerships even before it had the necessary legal frameworks to do so. Several features can be highlighted in this regard, such as a lack of unified selection criteria to guide the approach to individual countries or regions, objectives and methodology in negotiations with varying arrangements, and of explanation of the reasons for the choices of different formats (fixed preferences, free trade areas or broader cooperation agreements). Furthermore, the agenda of MERCOSUR’s trade relations seems to indicate a progressive

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<sup>111</sup> Source: ICTSD, <http://ictsd.org/i/news/tni/113063/>.

increase in actors' isolated initiatives, such as the momentum of each Presidency Pro Tempore (PPT) for MERCOSUR member states, as in the case of the Committee of Permanent Representatives of MERCOSUR (CPMR) organizing joint trade missions, among others.<sup>112</sup>

In addition, this policy has focused more on the economic spheres of development: opening markets for economic growth, providing SDT for weaker parties and some forms of cooperation -above all technical cooperation- in addition to an embryonic GSP system. It is interesting to note, at the same time, some similarities with the EU 'trade and development' policies in its origins. Firstly, MEROCOSUR trade relations principally focus on maintaining a level of trade relationships with its neighboring countries, as is the case with the ACEs signed with other ALADI members. Secondly, some of the trade agreements signed to date have a strong political component, as is the case with those signed with Israel, Egypt and Palestine. These countries are clearly not among MERCOSUR's major trading partners, but political reasons might help to justify the signature of these agreements, such as enhancing presence and opening markets in the Middle East and Muslim regions – a major interest for Brazil. Similar reasoning was found with regard to the EU's relations with associate and overseas territories, although the political background was different in that case. Furthermore, these agreements occasionally provide for SDT for the counterparties, in the form of phased liberalization schemes – a form of development-related trade measure that is also WTO-compatible. Thirdly, as the bloc moves forward, and the economies of its member states become more developed, the creation of a system of preferences for least developed countries is an opportunity to incentivize trade and development, and potentially allows for the promotion of specific regulatory objectives, provided that is done on a non-discriminatory basis. Finally, some form of development cooperation has slowly started to appear as an accompanying measure to trade agreements.

Thus, the EU CCP could provide inspiration for MERCOSUR, in the sense that in order to become a development instrument, apart from just providing trade liberalization and SDT to chosen partners, a specific development mandate must back these policies, incentivizing the creation of measures that promote other specific objectives in addition to that of liberalization. Linking trade policy to sustainable development might prove beneficial not in the sense of imposing one bloc's particular regulatory frameworks or policy objectives onto its trade

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<sup>112</sup> A. Dreyzin de Klor, 'MERCOSUR: en movimiento?', op. cit.

partners, but actually to use the power of trade, and the more specific regional legal frameworks, to provide windows of opportunity to promote and support the transition to a greener, low carbon economy, which is a fundamental objective for sustainable development.

If regional integration agreements are going to be supportive of this goal, their legal and regulatory systems must pave the way for the construction of regional frameworks, as a first stage, leading to a global system of markets that provide economic growth opportunities while supporting social justice and environmental protection. Creating policies based on principles and not just on politics is the fundamental challenge to be overcome in this regard.

## **Chapter 6. The relationship of the European Union with MERCOSUR: regional integration and sustainable development, or unsustainable rhetoric?**

This concluding chapter aims to present an extended case study of the implementation of sustainable development in regional integration agreements. Taking stock of the discussions in the previous chapters, it undertakes an analysis of how the relationship between the EU and MERCOSUR has been encompassing sustainable development, both in cooperation and trade instruments. Furthermore, the analysis addresses the political issues that circumvent the relationship between the parties, and whether this bi-regional relationship might indicate that the EU's interregionalist approach has been supportive of this process. Taking these points into consideration, a historical overview of the evolution of the relationship between the EU and MERCOSUR and the context in which it is embedded is presented, followed by an examination of the negotiations of an association agreement between them.

These two blocs are among the most advanced projects of integration in force, and while the EU represents a far more mature and comprehensive example, the similarities in their scope and objectives have allowed their relationship to be, at the same time, focused on trade and market access, as well as on cooperation and institutional development, with particular focus on expanding the EU's regional approach. In this regard, concluding this agreement was for some time a high priority for the EU, but the negotiation has not yet come to an end. The discussion presented is based on the current framework agreement that provides a basis for the relationship between the blocs, and also the SIA carried out by the EU Commission and the 'Regional Strategy Paper' 2007-2013. This allows for discussion of the likely format that the agreement would have, and how sustainable development could be integrated in this context.

### **1. Introduction: contextualizing the subject matter**

The EU pursues several goals through its external relations, not only in relation to the achievement of its internal objectives, but also to promoting its values in the international sphere, shaping international relations according to its vision, and strengthening its position as a relevant global player. During the 1990s and 2000s, there was increasing emphasis placed on

interregionalism as a foundation for EU's external relations. The Commission, which has clearly acknowledged its support for other integration projects around the world, emphasizes the link between regional integration and development. The EU supports multilateral trade liberalization as key to promote sustainable development and equality in the world, and one crucial component is to integrate developing countries into the world economy. Furthermore, regional integration has become one of the six focal areas through which the EU promotes development around the world, together with support for trade and development; macroeconomic policies and promotion of access to social services; transport; food security and sustainable rural development; and institutional capacity building. Regional integration thus plays a double role for the EU: it helps to spread the EU's own values within the international scenario, and helps to create entities with which it can interact as regions, supporting and legitimizing its identity as a global actor, as well as strengthening the legitimacy of other regional actors. The 'interregional policy' does not consist of a set of guidelines, but is rather subject to adaptation according to the partner, being multifaceted and comprehensive in nature. Furthermore, different issues and themes receive varying degrees of attention in different regions, including trade, development cooperation, political dialogue, security and culture. This differentiation also implies the relative power of the partner regarding the EU, as the stronger the partner is, the more concession is given.<sup>1</sup>

Such is the case of the EU relations with MERCOSUR, which date back to the very early years of the South American bloc, and should be analyzed within two important contextual issues: the EU's interregionalist approach, and the more general relationship of the EU with Latin America. These two regions are strongly linked, not only from a historical perspective - taking into account the colonial past and the shared cultural heritage that resulted from it - but also considering their current relations in terms of trade, investment, cooperation and political dialogue on different issues; in addition, on both sides of the Atlantic the period after WWII witnessed different experiences of regional integration. In this regard, the European initiative is considered to be the most successful model of integration to date, and similar initiatives that emerged in Latin America have always had the EU as a benchmark. Moreover, given these similarities and links,

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<sup>1</sup> F Söderbaum et al, 'The EU as a Global Actor and the dynamics of Interregionalism: a comparative analysis', in F Söderbaum et al, *The EU as a global player: the politics of interregionalism* (Routledge 2006); the author notes that interregionalism, or the establishment of relations between regions, is one of the main trends in EU foreign relations nowadays, through which it seeks to incentivize the creation of other projects of integration which resemble its own, thus helping to shape an international scenario in which regions are recognized actors.

Europe has seen in Latin America a region with the potential to develop regional integration projects that resemble its own.<sup>2</sup> Furthermore, the relations of the EU with Latin America exist amid a ‘spaghetti bowl’ of trade agreements in the continent and a complex net of different policy strategies: several EU member states have historical relations with MERCOSUR member states and with MERCOSUR itself; on the EU level, the bloc also has relations with MERCOSUR member states,<sup>3</sup> a general strategy towards the whole of Latin America<sup>4</sup> and finally a strategy specifically targeting MERCOSUR, which will be the object of the analysis here.

## 2. Background and framework of the relationship of the EU with MERCOSUR

When MERCOSUR was created, the EU was considered a benchmark, even though its goals as a project were less ambitious compared with the European counterpart, being based on intergovernmental institutions instead of a supranational structure.<sup>5</sup> Despite the institutional differences, the EU saw potential in MERCOSUR to be modeled after its own image,<sup>6</sup> and as early as 1992, even before MERCOSUR had completed its institutional setting and acquired legal personality,<sup>7</sup> the parties signed an Inter-institutional Cooperation Agreement through which the

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<sup>2</sup> R Seidelmann, ‘EU-Latin American biregionalism as object and subject of global change’, in W. Grabendorff and R. Seidelmann, *Relations between the European Union and Latin America : biregionalism in a changing global system* (Nomos 2005).

<sup>3</sup> Such is the case with Brazil, for instance, which was declared as a strategic partner in the region in the II Summit Brazil - EU in December 2008. See ‘Brazil – European Union strategic partnership and joint action plan’ available at [http://ec.europa.eu/external\\_relations/brazil/index\\_en.htm](http://ec.europa.eu/external_relations/brazil/index_en.htm). The partnership has mainly a political symbolism, but “places Brazil, the MERCOSUR region and South America high on the EU’s political map” and among the central topics are multilateralism, climate change, sustainable energy, the fight against poverty, MERCOSUR’s integration process and Latin America’s stability and prosperity.

<sup>4</sup> EU - LA Strategy paper 2007-13, in which the main objectives are to promote regional integration and negotiations to establish Association Agreements with sub-regions in Latin America, steer development cooperation towards the reduction of poverty and social inequality and improve educational levels.

<sup>5</sup> MERCOSUR was established through the Treaty of Asunción in 1991 between Argentina, Brazil, Uruguay and Paraguay, aiming to create a common market, an ambitious agenda that resulted from the momentum the region was going through at that point, with the reestablishment of democracy after decades of dictatorship regimes and new policies of openness to the external market. Nevertheless, it followed an intergovernmental model, being given institutions that represent the interest of member states. See, in this regard, J. Grugel, ‘Citizenship and governance in Mercosur: arguments for a social agenda’, *Third World Quarterly*, 2005, 26: 7, 1061 – 1076.

<sup>6</sup> S. Santander ‘The European Partnership with MERCOSUR: a relationship based on strategic and neo-liberal principles’ in Söderbaum et al (1 above).

<sup>7</sup> The Asunción Treaty is a framework agreement which established the objectives and institutional structures of the bloc; the actual functioning of the institutions and activities was determined through subsequent protocols, the most important of them being the ‘Ouro Preto Protocol’ of 1994, which officially created the institutional bodies and allowed MERCOSUR to sign agreements and thus to pursue external relations, even though it had a pragmatic approach on the issue from the beginning. See, in this regard, M. Toscano Franca Filho, ‘MERCOSUR External

EC committed to provide technical assistance, training for personnel and institutional support for the newly created bloc.<sup>8</sup> Three years later, after MERCOSUR had established its institutional framework, an Interregional Framework Cooperation Agreement (IFCA)<sup>9</sup> was signed, with the ambitious plan of establishing “*a political and economic interregional association founded on greater political cooperation and progressive and reciprocal liberalization of all trade*”.

The Agreement was founded on three main pillars: the first one was the establishment of an official framework for political dialogue, creating a ‘Cooperation Council’, responsible for the implementation of decisions and formed by members of the Council and the Commission on the EU side and of the Common Market Group and Council on the MERCOSUR side (Article 25). The dialogue was also considered in a ‘Joint Declaration on political dialogue between the European Union and MERCOSUR’ annexed to the main agreement, in which the influence of sustainable development as a goal and guiding principle stands out: the preamble stated that the parties shared “*an interest in regional integration as a means of enabling their citizens to achieve sustainable and harmonious development predicated upon social progress and solidarity between their members*” (6<sup>th</sup> recital); this was reinforced among the objectives, in which they reaffirmed that “*regional integration is one means of achieving sustainable and socially harmonious development, and a tool for ensuring competitiveness in the world economy*”.

The second pillar was concerned with the trade relations between the two blocs, which should guide the preparation for the future association agreement, forging “*closer relations with the aim of encouraging the increase and diversification of trade, preparing for subsequent gradual and reciprocal liberalization of trade and promoting conditions which are conducive to the establishment of the Interregional Association, taking into account, in conformity with WTO rules, the sensitivity of certain goods*”. The text of the agreement determined cooperation in trade matters and the start of negotiations, but didn’t include any binding obligations – it was rather an obligation of means, not of results, fixing no timetable for its conclusion.

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Relations’ in L Lixinski M Toscano Franca Filho, and M.B. Olmos Giupponi (eds.), *The Law of MERCOSUR*, Hart Publishing, 2010.

<sup>8</sup> Interinstitutional Cooperation Agreement, 29th of May 1992.

<sup>9</sup> Interregional Framework Cooperation Agreement between the European Community and its Member states and MERCOSUR and its Party States, 15th of December 1995, *Official Journal of the European Union* L 069, 19/03/1996. Technically, it was a mixed agreement on both sides: EU: legal base: Article 133, 181, 310, TEC; MERCOSUR: 8 ‘Ouro Preto Protocol’.

Finally, the third chapter established an official channel for cooperation, which should be “*as wide as possible*” in order “*to help [the parties] to expand their economies, increase their international competitiveness, foster technical and scientific development, improve their standards of living, establish conditions conducive to job creation and job quality and diversify and strengthen economic links between them*”, and “*encourage the conferring of a regional character on any aspect of cooperation which, by virtue of its scope or economies of scale, results in what they consider to be a more rational and efficient use of available resources and a better outcome*” (Article 10). Cooperation was provided in several areas, including institutional and technical assistance for the integration project itself. In addition, Article 17 stated that “*with the aim of achieving sustainable development, the Parties shall encourage awareness of the issues of environmental protection and the rational use of natural resources in all fields of interregional cooperation*”.

The EU policy *vis-à-vis* MERCOSUR nowadays is based on the IFCA and carried out through ‘Regional Strategy Papers’ (RSP) prepared by DG RELEX, whose programs are funded by the ‘Development Cooperation Instrument’, thus falling under the ‘development cooperation policy’. The current RSP covers the period 2007 – 2013,<sup>10</sup> having as its main goal the preparation for the future association agreement. In this regard, three main priority areas have been determined: firstly, providing support for MERCOSUR institutionalization, establishing cooperation measures to improve decision-making processes and internalization of rules in member states; secondly, support for the deepening of integration, aiming to foster measures to create better conditions for the final implementation of the common market provisions, which in turn would support the implementation of the future association agreement; finally, the third priority is to strengthen civil society participation, knowledge of the regional integration process, mutual understanding and mutual visibility, not only enhancing civil society understanding of MERCOSUR, but also of the EU as a trade partner, political actor and model of regional integration - which could “create aspirations to emulate and imitate the EU”.

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<sup>10</sup> This is the second RSP after the IFCA entered into force in 1999; the first covered the period 2000 – 2006.

While the negotiations of the association agreement have not been concluded, some progress has been achieved. The political cooperation chapter has been active through the organization of summits at Heads of State, Ministerial and Senior Official levels, in the framework of the European and Latin American Summits,<sup>11</sup> in which the EU and MERCOSUR gather in separate sessions. The VI EU-LAC Summit of Heads of State and Government took place in Madrid, Spain in May 2010, having as its central theme ‘Towards a new phase of the bi-regional association: innovation and technology for sustainable development and social inclusion’, and the EU’s contribution to the Summit is primarily based on the 2009 Commission Communication on Latin America, ‘The European Union and Latin America: Global Players in Partnership’, which stresses the link between regional integration and sustainable development and focuses on issues such as climate change and poverty reduction.<sup>12</sup>

The Summit resulted in some interesting developments. First of all, it institutionalized the relationship of the EU with the Community of Latin American and Caribbean States (CELAC), which became the EU's counterpart for the bi-regional partnership process, including at summit levels. On this occasion, a number of specific thematic dialogues and initiatives were launched, including: i) a ‘Joint Initiative on Research and Innovation’ focused on sustainability and social inclusion through a targeted focus on science, research, technology and innovation; ii) the ‘EU-CELAC Structured Dialogue on Migration’, to provide a framework for the exchange of best practices and capacity building; and iii) a ‘Coordination and Cooperation Mechanism on Drugs’, to provide a dialogue structure aimed at tackling the world drug problem. It is interesting to note, in this regard, the discussion undertaken in Chapter 3 regarding MERCOSUR’s challenge of orientation amid the ‘spaghetti bowl’ of regional arrangements in Latin America. The extent to which CELAC will become the official framework for dialogue in other policy areas in the future is still to be determined over the next decade.

At the margins of the Summit, a series of bilateral meetings with specific countries and sub-regions were held, among which was one with MERCOSUR, resulting in an official decision to

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<sup>11</sup> The EU – Latin American Summits took place for the first time in 1999 in Rio de Janeiro, Brazil, focused on strengthening relations and cooperation on political, economic/trade, cultural, educational and human issues; Subsequent meetings took place in 2002, in Madrid; 2004, in Guadalajara; in 2006, in Vienna and in 2008, in Lima. The documents related to the summits can be accessed at: [http://ec.europa.eu/external\\_relations/lac/index\\_en.htm](http://ec.europa.eu/external_relations/lac/index_en.htm).

<sup>12</sup> COM(2009) 495/3.

re-launch negotiations for the EU-MERCOSUR association agreement which had been suspended since 2007. Other relevant outcomes of the Summit were the political approval for the conclusion of trade agreement between the EU and the Andean Countries (Peru and Colombia), and most importantly, the conclusion of the negotiations of the first bi-regional association agreement, between the EU and Central American Integration System (SICA).<sup>13</sup> These outcomes show the importance of the system of summits in terms of political coordination; on the other hand, the specific outcomes regarding the negotiation of the association agreements with South-American blocs show that interregional relations are facing a stalemate, considering the difficulties in staying faithful to this policy objective instead of following a more pragmatic approach. While with Central America the negotiations were successful, in the case of the Andean countries bilateral agreements were finally preferred, given the difficulties in finalizing a bi-regional one. The case of MERCOSUR is perhaps the most representative of this dilemma, considering the proportions of its market and the presence of several sensitive issues, as will be seen below.

The cooperation chapter has also been active in the framework of the RSP, of which sustainable development is a “*cross cutting issue*”.<sup>14</sup> In this regard, one of the most significant outcomes has been the signature of a cooperation agreement between the EC and MERCOSUR in November 2009, framed in the 2<sup>nd</sup> pillar of the RSP and aiming to finance the deepening of the economic integration process and the sustainable development of MERCOSUR. The agreement provides funding for a project called ‘Eco-norms’, founded on pre-existing projects within MERCOSUR and based on four areas of action: the promotion of sustainable production and consumption patterns; the fight against desertification and the effects of drought; the implementation of the ‘global harmonized system of labeling and classification of chemical products’; and finally the convergence of norms and regulations on quality and security of selected production sectors and development of regional capacity on evaluation. The general objective of the program is to strengthen product quality in MERCOSUR and its capacity to conciliate economic and commercial growth with sustainable management of natural resources and strengthened

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<sup>13</sup> EU DG Trade website.

<sup>14</sup> Regional Strategy Paper 2007-13, available at [http://ec.europa.eu/external\\_relations/MERCOSUR/index\\_en.htm](http://ec.europa.eu/external_relations/MERCOSUR/index_en.htm).

environmental protection, fostering the integration process of the bloc and its insertion in the international market.<sup>15</sup>

### **3. Negotiations of the future agreement**

While the two previous chapters showed more progress, the trade chapter has been problematic. The goal has remained that of preparing an ambitious agreement, which would cover not only the liberalization of trade in goods, but also in other issues such as services, government procurement and intellectual property. Several rounds of negotiation have been undertaken so far, as well as a SIA process, analyzed below.

#### **3.1 The SIA Process**

As discussed in Chapter 3, in 1999 the EU started to apply ‘Sustainability Impact Assessment’ (SIA) to the negotiation of its trade agreements. Under the initiative of former Trade Commissioner Pascal Lamy, in the preparations for the WTO Seattle Round, the SIA was a tool aiming to integrate sustainable development into trade negotiations by developing a new assessment to identify the potential economic, social and environmental impacts of a trade agreement on both the EU and the partner in the negotiations, thus extending the scope of other models of IA.<sup>16</sup> This assessment model is now enshrined in a broader commitment made by the Commission for all policy areas,<sup>17</sup> but trade SIAs remain the most sophisticated form of impact assessment, being prepared for all of the EU’s major trade negotiations. The EU requests studies from external experts on the likely outcomes of a trade agreement and, considering their findings, a position paper is prepared by the Commission identifying points of agreement and responding to disagreements. The position paper considers what further analysis should be undertaken and what policy action should be implemented, and is discussed with member states at the Trade Committee. At the same time, it does not bind the EU’s negotiating position, which is based on a separate, confidential analysis. Thus, despite the fact that it provides information about expected

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<sup>15</sup> Covenant DCI-ALA 2009/19707, available (in Spanish) at the website of MERCOSUR [www.MERCOSUR.int](http://www.MERCOSUR.int).

<sup>16</sup> P. Ekins and T. Voituriez, *Trade, globalization and sustainability impact assessment: a critical look at methods and outcomes*, Earthscan, 2009.

<sup>17</sup> Commission Communication 2002/276 on the integrated impact assessment.

outcomes and creates a channel for public participation on both sides, its relevance for the final outcome is uncertain.

i) The SIA Report

The SIA prepared for the EU – MERCOSUR association agreement assessed how trade liberalization could affect the sustainable development of both regions, and proposed measures for avoiding, preventing or mitigating adverse impacts and enhancing beneficial ones. The assessment was made considering a scenario of full trade liberalization between the parties, covering tariffs as well as non-tariff barriers, and the expected outcomes that would arise from it, taking into account a set of criteria based on the three spheres of sustainable development.<sup>18</sup> The Final report of this SIA was issued in 2009,<sup>19</sup> consisting of an overview report and five sectorial studies on agriculture, forestry, automobiles, financial services and trade facilitation. The SIA also encompasses a series of preventative, mitigation and enhancement proposals aiming to define initiatives to maximize the effects of trade liberalization and economic growth while promoting other components of sustainable development, preventing or reducing potential negative impacts.

A number of proposals for mitigation and enhancement measures have been put forward in the three categories: (1) measures that relate to the trade pillar of the EU MERCOSUR Association Agreement; (2) measures that relate to the political and cooperation pillars; and (3) domestic measures. The most important aspects of the report in terms of impact and proposed measures are:

a) Economic: Overall, the economic impact of an FTA is estimated to be positive both for the EU and for MERCOSUR countries. Given that the MERCOSUR region is economically smaller than the European Union, this naturally implies that the relative effects on real income for

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<sup>18</sup> In order to evaluate each of the pillars, core sustainability indicators are used: for the economic pillar, Real income; Fixed capital formation; Employment; Environmental: Biodiversity; Environmental quality; Natural resource stocks Social: Poverty; Equity; Health and Education. In addition to the nine core indicators for sustainability outcomes, the methodology uses two process indicators which influence the long term economic, social and environmental impacts of trade liberalization: consistency with sustainable development principles and institutional capacity for effective sustainable development strategies.

<sup>19</sup> European Commission/DG Trade, Final report of the SIA EU-MERCOSUR, March 2009;

See also: European Commission/DG Trade, 'Handbook for Trade SIA', available at: [http://trade.ec.europa.eu/doclib/docs/2006/march/tradoc\\_127974.pdf](http://trade.ec.europa.eu/doclib/docs/2006/march/tradoc_127974.pdf).

MERCOSUR are expected to be larger. In the EU, the assessment finds that the economic impacts are likely to be positive overall, and that full liberalization would give an economic welfare gain in the order of 0.1% of GDP in the manufacturing and services sectors, which are predicted to benefit most from an FTA. There would be important adjustment costs for agriculture, particularly in the short term, which would require suitable transition periods and mitigation measures. However, the EU could reap some benefits from better market access to MERCOSUR for some vegetable products, as well as from better protection of Geographical Indications.

In MERCOSUR, economic benefits are expected throughout the whole economy and particularly in the agricultural sector. Economic gains are expected to increase over time as increased exposure to competition is predicted to raise efficiency and productivity. Moreover, the report highlighted that gains from science-driven innovation may be higher than direct trade-related benefits. The increased exposure to competition in the manufacturing and services sectors could however generate some adjustment costs in the short term unless they are appropriately addressed by mitigation measures.

In order to balance those issues, the following preventive, enhancement and mitigation measures were proposed:

#### Trade Pillar Measures

- Establish a timetable for phased reduction in tariff and NTM reductions to allow for an adjustment period in sectors that are expected to experience significant adjustment costs. In MERCOSUR, these sectors include motor vehicles and parts, transport equipment, textiles and clothing, machinery, financial services and distribution and retailing. In the EU, most of the adjustments will have to be made in agriculture.
- Agree a program of trade facilitation measures to improve the trading environment, aiming to reduce the costs of doing business: (i) establish a joint Customs and Trade Facilitation committee; (ii) de facto harmonization of customs procedures through adoption of international standards; (iii) improvement of single window systems for both exports and

imports, with particular attention paid to countries with less developed systems; (iv) extend the use of risk management techniques; (v) provide up-to-date information on all trade and customs procedures from a single source

- Include a 'Trade and Sustainable Development' chapter in the Trade Pillar of the agreement, including issues such as: the requirement that both parties commit to the effective ratification and implementation of core labor standards and other basic, decent work components, as well as multilateral agreements, such as the Kyoto Protocol; the establishment of a EU-MERCOSUR Trade SIA Forum with responsibility for monitoring the social and environmental impacts of the agreement; voluntary or mandatory certification for forest products and biofuels; cooperation on the development of measures to reduce particulate and CO<sub>2</sub> emissions from automobiles, focusing particularly on technology development and transfer opportunities in the areas of biofuels, engine design and emission control technology; a joint committee to report on the environmental consequences of increased production of biofuels; cooperation in promoting trade in environmental goods and services. The content of such a chapter would thus be very similar to those already included in the CARIFORUM, South Korea, Central America and Colombia/Peru agreements discussed in Chapter 5. The emphasis here on biofuels is significant, though, as MERCOSUR, and particularly Brazil, is one of the largest biofuels producers in the world, thus effective measures guaranteeing that it would benefit the economy, while not leading to increased pressure on the environment, are of great relevance.

#### Cooperation Measures

- Support for the establishment of an EU MERCOSUR Automotive Sector Forum with the aim of strengthening public-private cooperation.
- Support for a detailed assessment of the impact on the international competitiveness of the automotive sector in both regions in light of the replacement of regional-level regulations by international automobile technical standards (UN-ECE).
- Promote joint development of guidance on the implementation of the Basel principles on finance.

- Implement the European Commission's Economic and Financial Committee (EFC) recommendations for strengthening international and cross-sector co-operation, particularly in monitoring cross-border financial institutions.

#### Domestic Measures

- Implementation in both parties of the Basel Core Principles for Effective Banking Supervision, and implementation of any revisions to the Basel Principles that may be agreed in response to the current global crisis.
- Research in both regions into the barriers to trade facilitation reforms beyond those to which commitments are made in the trade agreement.

b) Social: The social impacts predicted are mixed, but overall, positive. In the EU the only sectors where social impact would be felt is in agriculture and rural areas where short to medium term social adjustment costs could occur during a transitional period and could add to the underlying downward trend in baseline agricultural sector employment in the EU. At the same time, the report highlights that appropriate support programs or other policy measures could mitigate this adjustment process. This is extremely relevant, as agricultural groups are among the fiercest political objectors to the agreement, and despite the support of the Commission, the agreement has been facing opposition from some EU member states, above all from France, whose agricultural sector fears the opening of the market to competition from MERCOSUR agricultural exports. In MERCOSUR, the social impacts are expected to be positive in the long term, while some adjustment costs in the short term could occur in the manufacturing sector. The SIA also stresses that the expansion of agriculture in MERCOSUR, which follows an internal trend in this region, could cause social problems in 'traditional agriculture'. Transitional adverse effects could impact on employment, and result in "loss of livelihoods for indigenous people". It is also mentioned that small-scale farmers could be the main losers in that process, including women, thus careful consideration was recommended regarding this issue. Mitigation measures proposed included:

### Trade Pillar Measures

Measures cited above within the ‘Trade and Sustainable Development’ chapter.

### Cooperation Measures

- Support for capacity building in regulatory and public policy analysis and design, through the provision of training in (Regulatory) Impact Assessment, drawing on the EC’s extensive experience in the use of IA methods for better regulation design.
- Technical support and training for the development of improved systems for evaluating the suitability of collateral offered by SMEs.

c) Environmental: the report highlighted that both positive and negative environmental impacts in the EU and MERCOSUR countries could arise depending on the policy measures that are taken to accompany the Agreement. Increased imports of raw materials could potentially result in land abandonment in the EU. In MERCOSUR, full trade liberalization in the agricultural and the forestry sectors could result in added pressure and potentially significant adverse impacts on natural resources, forest coverage and biodiversity, which would require adequate response measures. On the positive side, MERCOSUR is expected to benefit from increased access to environmental services.

### Trade Pillar Measures

- Timing of reductions in tariffs and quota restrictions for environmentally/biodiversity-related sensitive products to be conditional on compliance with a set of sustainability criteria.

### Cooperation Measures

- Support for regulatory policy capacity building in MERCOSUR, particularly in environmental regulation, public utility regulation (water and electricity sub-sectors) and financial sector regulation.

- Provision of development assistance including education and training in sustainable forestry practices and alternative skills.
- Technical assistance measures and cooperation to strengthen institutions, the legislative framework and enforcement in relation to environmental protection and safeguarding areas of natural forest..
- Strengthening systems to help MERCOSUR exporters to comply with REACH requirements, particularly by improving the provision of information and technical assistance through the WTO enquiry point and the European Chemicals Agency.

#### Domestic Measures

- Strengthening environmental regulation in MERCOSUR countries to offset adverse impacts of forest conversion and expansion in agricultural production, while exploiting potential gains.

#### ii) The Commission Position Paper

Based on the SIA report, the Commission issued a position paper supporting the importance of integrating sustainable development as one of the agreement's overarching objectives, to be reflected both in the general trade and cooperation chapters, and also through the inclusion of a specific 'Trade and Sustainable Development' chapter. Among the possible measures to implement, the Commission highlighted market access for environmental goods and services, investment, trade facilitation, commitment to implementation of core ILO labor standards and fundamental conventions and multilateral environmental agreements to which they are parties, and to establish a bi-regional forum to monitor the social and environmental impacts of the agreement. The Commission also stated its support for the determination of the strategic objectives of promoting sustainable development elements at a regional level, while also recognizing each party's right to regulate and set its own sustainable development priorities. Finally, while stressing the importance of the SIA, the Commission frequently recalled that the

results of the report are also available to MERCOSUR national authorities, which have the direct responsibility to implement these measures.<sup>20</sup>

### 3.2 Current status of the negotiations and future outlook

The EU policy *vis-à-vis* MERCOSUR is thus currently focused on the signature of a bi-regional association agreement, which would create the largest free trade area in the world. Despite these concerns regarding sustainable development, not all the regional trade agreements focus on policy objectives such as sustainable development, as is the case of the Association Agreement with MEROCUR, which rather has as its main focus the trade pillar and market access for the EU.<sup>21</sup> This is precisely what makes it so complicated to conclude, since there are several sensitive issues on both sides in terms of market access. Technically, it would be a mixed agreement on both sides, maintaining the current structure of three main chapters. While the policies in terms of political dialogue and cooperation would probably remain the same, the trade chapter would include not only a Free Trade Agreement in goods and services but also cover, amongst other things, rules on government procurement, investment, intellectual property rights, competition policies, sanitary and phytosanitary issues, technical barriers to trade, protection of geographical indications, business facilitation, trade defense instruments, and a dispute settlement mechanism.<sup>22</sup> In addition, it would also include a ‘Trade and Sustainable Development’ chapter, following the model of the agreements analyzed in Chapter 5, perhaps particularly the EU-Central America AA.

While both EU and MERCOSUR authorities have officially reiterated their willingness to conclude the agreement, negotiations face sensitive issues that are not only rooted in problematic policy areas for each of the parties, but which also go beyond the sphere of the bi-regional relations. The low level of integration in MERCOSUR is considered a primary challenge and the

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<sup>20</sup> EU DG Trade, available at: [http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc\\_146386.pdf](http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146386.pdf).

<sup>21</sup> See, in this regard, M. Cremona, ‘The European Union and Regional Trade Agreements’, *European Yearbook of International Economic Law*, 2010, 1, pp. 245-268.

<sup>22</sup> Taking as example the previous agreements of this kind signed by the EU, such as the association agreement with SICA, signed at the 2010 EU – LAC Summit.

lack of completion of the customs union makes the negotiation more difficult.<sup>23</sup> Moreover, while for MERCOSUR the trade share with the EU is quite significant, EU's trade with MERCOSUR represents a smaller share of its total trade, which makes incentives asymmetrical for the parties. Furthermore, the most sensitive issues for the trade negotiation coincide with difficult issues for a final agreement at the WTO Doha Round, since both the EU and MERCOSUR countries, especially Brazil, are major players in multilateral trade talks and have conflicting interests in sensitive areas. It is reported that, amongst the eleven working groups that are part of negotiations, trade in agriculture and intellectual property continue to be the two most contentious issues.<sup>24</sup>

For the EU, opening the agricultural market and reforming the 'Common Agriculture Policy' is still a controversial issue internally, given the resistance of some member states, and externally, deemed by developing countries to be unfair and harmful for the trade system. The exchange of agriculture proposals during this sixth round of discussions had to be deferred due to EU members still awaiting an agricultural impact assessment report from the European Commission. Given the economic recession and deepening euro crisis, the impact of South American agricultural products entering the European market is a highly sensitive issue for EU farmers. Belgium, France, Ireland, and Poland are four of the EU nations which have exhibited reluctance in accepting any trade concessions in certain agricultural sectors. One of these sectors is beef, where MERCOSUR is the largest global exporter. These EU countries are demanding that all imports be in compliance with EU sanitary and environmental regulations.<sup>25</sup> On the MERCOSUR side, the industrial sector (automobile, textiles, informatics) and the 'Singapore issues' (services, investment and government procurement – areas in which liberalization in MERCOSUR has not been completed, with protocols signed but not in force and measures not fully implemented) are problematic areas.<sup>26</sup>

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<sup>23</sup> In practice, MERCOSUR is a customs union to date, with liberalization of trade in goods almost completed but many non-tariff barriers and the lack of implementation in other sectors still hindering the functioning of the common market.

<sup>24</sup> ICTSD Bridges Weekly Trade News Digest, Volume 15, Number 23, 22nd June 2011.

<sup>25</sup> ICTSD Bridges Weekly Trade News Digest, Volume 15, Number 26, 13th July 2011.

<sup>26</sup> S. Gratius, 'EU-MERCOSUR relations as a learning experience for biregionalism' in W. Grabendorff and R. Seidelmann, *Relations between the European Union and Latin America: biregionalism in a changing global system*, Nomos, 2005.

In this regard, while the multilateral trade negotiations have stalled, the interregional alternative is presented as a new means of global governance towards a multilateral system, since it would be WTO compatible. For some, it is deemed to be the second best alternative, but since the Doha Round has been facing complications, it could also be a step further, promoting the issues at stake in the large territory covered by the agreement.<sup>27</sup> It is clear that both parties will have to make concessions in order to reach a viable agreement, but in spite of these sensitive areas, many beneficial aspects can also be highlighted. For the EU, the conclusion of the agreement with MERCOSUR would not only provide improved market access in important sectors, but also create a better structured environment for investment, especially considering the fact that several member states have important investment markets in South America; it would also encourage the development of another similar regional integration project which, in spite of its different institutional arrangements, itself has the potential to become a global actor like the EU, thus helping to legitimize regional integration blocs as global players and interregionalism as a new way of governance that is favorable to the EU itself as an international actor.

For MERCOSUR, on the other hand, the benefits would also not be restricted to the trade area – which would be favored, especially in terms of agricultural market access, given that its member states are important agricultural exporters. The prospect of an agreement with the EU is, for MERCOSUR, an incentive for a deepening of the integration project and the completion of the common market provisions, both in terms of trade and investment, and also other aspects such as cooperation and improved political bondage. Moreover, it would force MERCOSUR to deal with issues that would be considered in the agreement, such as harmonization of rules, sanitary and phytosanitary standards and, ultimately, environmental and sustainable development concerns.<sup>28</sup> In addition, for both parties the agreement represents a strategic political move, affirming their relevance in the region, reducing the influence of the USA and the proposed Free Trade Area of the Americas (FTAA).<sup>29</sup> Finally, concluding an agreement seems even more relevant now that

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<sup>27</sup> J Faust, 'The European Union's relations with MERCOSUR: the issue of trade liberalization', in M Hänggi and R Roloff, *Interregionalism and international relations*, Routledge, 2006; the author highlights that while interregionalism is still more limited than multilateralism in scope, it goes beyond regionalism and presents an alternative for global governance given the difficulties of achieving a multilateral solution.

<sup>28</sup> See discussions in Chapter 3 and, for a more detailed analysis, A. Correia Lima Macedo Franca, 'MERCOSUR and Environmental Law' in L. Lixinski et al., *The Law of MERCOSUR* (op cit).

<sup>29</sup> S Gratius, op. cit.

most of MERCOSUR's member states will fall out of the EU's GSP schemes, as highlighted in Chapter 5.

Regarding the effects of the agreement on sustainable development, the outcomes are unclear. From the difficulties presented in the trade area, one can argue that despite the rhetorical commitments of prioritizing the sustainability of both regions, other policy fields still have a higher ranking on the political agenda. Moreover, while the SIA process can be a beneficial aspect as one of the main tools developed in order to evaluate the premise that trade can work to promote sustainable development, two important points can be highlighted in this regard: firstly, the studies prepared for the EU – MERCOSUR negotiations show that the effects of trade liberalization differ, and that beneficial effects relating to sustainable development will depend on how these impacts are weighed against each other in practice. Secondly, the outcomes of the study are not binding on the negotiating position of the parties, and thus the extent to which it will influence the final text remains to be seen. The SIA process contributes to the information on which such value judgments may be based, both in preparation of the negotiating position of the EU and in the general negotiation agenda, but in the end it is the political will of the parties that will define the real sustainability of the agreement. Notwithstanding, the case studies undertaken in Chapter 5 allow the consideration that the SIAs have had an impact on the final texts of the agreements, and thus will also be likely to be followed in this case.

The negotiations of the AA, while not yet concluded, are moving forward despite the strong opposition openly declared by many European countries, especially France. Since being retaken in Madrid, 8 rounds of negotiation were carried out, the last one taking place from 22<sup>nd</sup> to 26<sup>th</sup> October 2012 in Brasilia.<sup>30</sup> More recently, an EU-MERCOSUR ministerial meeting took place on 26<sup>th</sup> January 2013, in the margins of the latest EU-CELAC summit in Santiago in Chile. In a Joint

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<sup>30</sup> While the documentation of the negotiations has not been publicly disclosed, some insights into the status of the negotiation were discussed in a meeting of the EUROLAT Parliamentary Assembly in November 2011. According to a negotiator from the EU side, progress in the technical rules has been achieved recently in the following areas: trade defense and competition were said to be almost finished; progress in rules of origin and DSP and non regulatory matters related to trade in services are said to be significant; SPS and customs and trade facilitation, TBT and sustainable development; difficult issues: IP and geo indications, especially resistance from MS going beyond TRIPS. Examples of rules achieved: common set of regulatory rules for postal and courier services, fair licensing procedures; provisions on technical standards for products in MS will be adopted by the 4 countries simultaneously, facilitating trade; facilitated customs procedures – fiscal control of products at the border and data for customs declaration.

Communiqué, the two parties agreed that the exchange of market access offers shall take place no later than the last quarter of 2013.<sup>31</sup>

#### **4. Concluding remarks**

The challenges of global governance require alternative ways of coping with issues of global concern. While the outcomes in the multilateral sphere have been proving insufficient - as discussed above - regional integration projects have proliferated in the past few years, not only aiming to promote regional governance but also playing a role in international relations, attempting to fill this gap between weak enforcement of multilateral agreements and the need of coordinate action among national states. In this context, sustainable development has become a global objective, representing the aim to pursue a development process that is balanced between economic, environmental and social concerns and sustainable over time, for present and future generations. Nevertheless, as a guiding principle, it has weak binding power, posing a challenge to the implementation and observance of the commitments it implies.

As this chapter has tried to show, regional integration can be a way of promoting sustainable development and implementing these commitments, as regional blocs create rules and policies that can be used to reflect the commitments made in the multilateral sphere. At the same time, the implementation of these measures may still face challenges related to effectiveness, policy coherence and political will at the regional level. Analyzing the case of the EU, this regional bloc has incorporated sustainable development as an overarching objective and a guiding principle in its legal order, generating obligations in relation to both its internal policies and external relations. Nevertheless, the concept of sustainable development is defined at EU level in policy documents, which are also broad and non-legally binding, making its implementation more susceptible to interference from other policy objectives and its evaluation more complex.

Considering these observations, some conclusions can be drawn. Firstly, in the field of external relations, sustainable development has become one of the major policy objectives of the EU,

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<sup>31</sup> MERCOSUR-EUROPEAN UNION MINISTERIAL MEETING, Santiago, January 26, 2013 Joint communiqué, available at: [http://trade.ec.europa.eu/doclib/docs/2013/january/tradoc\\_150458.pdf](http://trade.ec.europa.eu/doclib/docs/2013/january/tradoc_150458.pdf).

generating the obligation to promote measures such as development cooperation while taking into account the common but differentiated responsibilities towards developing countries, promotion of environmental protection, good governance, and the use of preventive and integrative procedural tools such as impact assessment studies – showing consistency with the notion of sustainable development agreed in the international sphere. Furthermore, the integration of sustainable development has also been undertaken progressively, notably in trade-related measures, both procedural -the SIAs- and substantive -soft commitments to positive discrimination for environmental goods and services. In addition to this commitment to sustainable development, which arises from EU primary law, during the last few decades there has been increasing emphasis on interregionalism as a foundation for EU's external relations, as well as recognition of the link between regional integration and sustainable development. Nevertheless, this emphasis comes out of a political strategy of the EU, and a tension between legal commitments and political objectives can be perceived in the bloc's external relations, such as in the case study presented here.

In this context, the EU's relations with MERCOSUR focus on opening up access to markets of both regions, but framed around the promotion of sustainable development. This aim is translated into a 'regional strategy plan' that aims to support MERCOSUR's regional project as a whole, and has as its ultimate goal the signature of an association agreement comprising trade liberalization, political dialogue and development cooperation. This is to say that the EU's support for regional integration as a means of promoting sustainable development is related to the belief that the regional sphere is an important building block towards the goal of achieving sustainable development, but also to both its vision of promoting an international system in which regional actors are legitimized as relevant players, and its concern to expand market access and thus support its own internal market. In theory, there are no tensions necessarily arising from these policy goals, but in practice things are more complex.

The analysis of the current status of the relationship between the parties and the negotiations of the association agreement show some results of the promotion of sustainable development, while also reflecting tensions between policy objectives: the political dialogue channel created provides a forum for discussion and political coordination, and has focused on issues related to

sustainability, such as the general theme of the last EU – LAC Summit. This represents an important attempt to build political agreement between the regions and could have a positive impact on both regional and multilateral decision-making, even though disagreement on several international negotiations persist between the two regions – i.e. the Doha Round or climate change negotiations – and full evaluation of this impact goes beyond the scope of this paper.

The cooperation chapter has also been active, despite the fact that the amount of aid earmarked for the MERCOSUR region is, relatively, very low. Among other outcomes, the cooperation led to the signature of an agreement financing the development of ‘eco-norms’ in MERCOSUR, which would reinforce the bloc’s overall sustainability strategy, and also facilitate the trade relations between the two parties. The final impact of these measures is hard to evaluate, and this evaluation goes beyond the scope of this paper, but it can be said that this cooperation measure is in line with the idea of promoting regional sustainability.

Finally, the trade chapter shows more clearly the potential for tension mentioned above: on the one hand, the difficulty in the negotiation is certainly founded on innumerable factors, but among these the internal policies of the two blocs – regarding agriculture on the one side and industry sectors on the other side – stand out as a major barrier. In this regard, the EU’s commitment to promote sustainable development through regional integration, to maintain strengthened relations with other regional parties, and even its own objective to achieve more coherence between all of its policies, seem to be jeopardized by internal political influences, such as the agricultural sector in some member states and ultimately the reform of the CAP. On the other hand, a -rhetorical at least- commitment to achieve a ‘sustainable development oriented’ trade agreement can be observed on the EU side, through the analysis provided by the SIA and the proposal to include a ‘Trade and Sustainable Development’ chapter. Considering the complexity of issues involved in the trade relationship, and the need for more policy coherence, the normative content of sustainable development can help to balance conflicting goals in economic, environmental and social spheres, and the SIA is an example of an attempt to further integrate these areas. The outcome of the SIA process seems positive *per se*, to the extent that it shows that trade liberalization does not necessarily lead to the more sustainable development of the parties, but rather that important compensating measures must be undertaken on both sides; moreover, it

renders the decision-making process more transparent and inclusive towards civil society. Nevertheless, the practical influence of this instrument is ambiguous, and the impact that it might have on the final outcome will ultimately depend on the political will (or ability) of the EU to adopt the recommendations made.

As distinct from the other five agreements analyzed in Chapter 5, the EU-MERCOSUR negotiations are wider, given that they concern a bi-regional relationship and not a bilateral one, as in the agreements with Chile and Korea, in addition to the fact that MERCOSUR is a significantly bigger project than that of Central American integration, which makes the compromise more difficult, on the one hand, but on the other hand renders the negotiations more balanced, especially given the presence of Brazil, one of the largest contenders at the WTO negotiations. Moreover, from a North-South perspective, it is interesting to observe that both blocs have been aiming to deepen integration, to go beyond non-trade issues and develop external relations as a means of expanding their role as actors and promoting values and goals, respecting their differences in scope; in this regard, the relationship between the two blocs can be seen as an attempt to compromise between a developed and a developing partner, in which many issues that are controversial in the international arena, such as agricultural subsidies, intellectual property, trade and sustainable development are being negotiated in the context of the creation of the largest free-trade area in the world – which the EU-MERCOSUR FTA would be. In this regard, talks on these issues, which are seen as important for the promotion of sustainable development, can be agreed and promoted at the regional level, and in a way that balances the different views of developing and developed partners, and this would represent an important building block for the development of a multilateral framework for sustainable development.

The case study examined has shown that there are links between regional integration projects, trade measures and sustainable development concerns. From a legal perspective, the scope of this analysis was to see how regional integration can generate rules and policies that can effectively translate the political commitments made internationally and how it thus supports the enforcement and implementation of those obligations, being in this sense a ‘building block’ towards multilateral governance. On the other hand, it can be observed that the political tensions, which dominate the multilateral sphere and often prevent the implementation of international

commitments, can also be perceived at the regional level.<sup>32</sup> The strengthening of political commitment to the goals represented by sustainable development, and the enhancement of policy coherence allowing the process to be more effective remain the major challenges.

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<sup>32</sup> For an extended analysis of the political background in EU-LAC relations, see J.A. Sanahuja, *Towards a new framework of the relations between the European Union and Latin America and the Caribbean*, EU-LAC Foundation, 2013, available at: [www.eulacfoundation.org](http://www.eulacfoundation.org).



### **Final conclusions**

#### **Sustainable development, international law and regional integration: an important but overlooked link**

This thesis was motivated, above all, by a strong belief in the power of the concept of sustainable development, and the fundamental importance of the implementation of its moral and pragmatic considerations for our future as an increasingly global society. Moreover, it was framed by a curiosity and optimism about regional integration as an effective governance model that had been – to a great extent – successfully implemented in Europe, and had also been a recurrent objective in South America, the author's region of origin. As sustainable development can be considered the ultimate goal and challenge that the international community must deal with nowadays, the thesis undertook to analyze how sustainable development could be promoted in the regional governance sphere. The link between regional integration as a means to promote sustainable development is strongly supported by policy literature, but there was a gap in analysis on the legal side of it, which became the main objective of the thesis. In this regard, the aim of this work was to make an in-depth examination of the effectiveness of the European Union policies implementing sustainable development, followed by considerations on similar initiatives in MERCOSUR, and whether the European experience could/should inspire further developments in its southern counterpart.

Following from that background, the thesis highlighted the changing rationale of International Law (IL) as a body of rules and norms that governs the interaction between states as well as between other international actors, being more than ever instrumental to the international community in the globalized, interdependent international relations that characterize the international scenario, and as a system of norms and procedures that aim to regulate common goals and objectives. Within this system, sustainability is emerging as a core value of the international community, and the concept of sustainable development provides a normative framework promoting the goal of a development process based on economic growth, environmental protection and social justice, and working as a guiding principle that orients the balancing of these – still competing – objectives. Nevertheless, the implementation of these issues remains a challenge from a legal perspective.

### 1. Sustainable development and international law

Sustainable development is a concept that encompasses two main normative dimensions: a horizontal/policy dimension represented by the reorientation of the idea of development, prescribing that the development process should be focused on the needs of human beings and the realization of human rights, rather than solely promoting the economic development of the state; in addition, an inter-generational/temporal dimension that determines the need to make this process sustainable, allowing for economic development while also assuring environmental protection and social justice and ensuring the rights of future generations to meet their needs for a decent life just as the current one does. This concept has been progressively developed and mainstreamed within the international community, especially through a series of international conferences and declarations under the auspices of the United Nations (UN),<sup>1</sup> and is reflected in the famous definition provided by the World Commission on Environment and Development in 1987: “*development that meets the needs of the present without compromising the ability of future generations to meet their own needs; it contains two key concepts: the concept of needs, in particular the essential needs of the world’s poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organization on the environment’s ability to meet present and future needs*”.<sup>2</sup> The concept of sustainable development summarizes this idea of promoting a balance between economic development, social justice and environmental protection and assures the sustainability of the development process, and prescribes a series of substantive and procedural measures that aim to guide the decision-making of the international community. In fact, its relevance has just been confirmed on the occasion of the recent United Nations Conference on Sustainable Development (Rio+20), in which, despite all the criticism regarding the outcomes, the international community has “renewed” the commitment to the promotion of an “*economically, socially and environmentally sustainable future for our planet and for present and future generations*”, acknowledging the need to further mainstream sustainable development at all levels.<sup>3</sup>

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<sup>1</sup> The main ones are: Stockholm UN Convention on the Human Environment of 1972; the Rio de Janeiro UN Convention on the Environment and Development of 1992 (The Earth Summit); the Johannesburg UN Summit on Sustainable Development of 2002.

<sup>2</sup> Report of the WCED to the UNGA, recognized by UNGA Resolution 42/187, available at <http://www.un-documents.net/wced-ocf.htm>.

<sup>3</sup> UNCSD Outcome Document, ‘The Future We Want, UN Document A/66/L.56, UNGA 66th Session, July 24th 2012. Available at: <http://www.uncsd2012.org/thefuturewewant.html>.

Despite its normative appeal, there is no binding definition of sustainable development in international law, as most of the documents referring to its meaning at the international level are *soft law*, leading to a debate regarding its status as a principle of international law and to the details of its implications. While the recognition of this concept as a principle still faces criticism, it seems more relevant to highlight the impact it has as a guiding norm. In this regard, sustainable development has been recognized as a norm operating in international law in a twofold manner: firstly, as an emerging area of international law in its own right, given the substantive amount of legal instruments that are based on its normative assumptions or created in order to implement them (or both). Thus, ‘sustainable development law’ is considered to be a set of substantive and procedural norms at the intersection of international economic, social and environmental law, which help to reconcile these separate fields. Secondly, it can be considered as a ‘meta-principle’ acting upon other existing principles and rules, exercising a type of interstitial normativity, requiring the reconciliation and balance of the conflicting interests of economic growth, environmental protection and social justice, for present and future generations.<sup>4</sup>

Thus, it is in this guidance capacity that the importance of sustainable development lies, both as an objective and a guiding principle recognized by and widely spread within the international community, and encompassed by international law – in its capacity as instrument to pursue the common goals of the international community. In an attempt to clarify the legal aspects of what sustainable development implies, the International Law Association (ILA) released the *New Delhi Declaration on the Principles of International Law Related to Sustainable Development* in 2002, highlighting seven legal sub-principles which work towards the achievement of sustainable development goals: 1. The duty of States to ensure sustainable use of natural resources; 2. Equity and eradication of poverty; 3. The common but differentiated responsibilities of all the actors involved in the development process; 4. The precautionary approach to human health, natural resources and ecosystems; 5. Public participation and access to information and justice; 6. Good governance and 7. The principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives.

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<sup>4</sup> M.C. Cordonier Segger, *Sustainable development law: principles, practices and prospects*, Oxford University Press, 2004, pp. 45-50 and 368-71.

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Nowadays, sustainable development and its sub-principles have been extensively incorporated into international law, being present in the agenda of regional and multilateral organizations, in international treaties and national legislations worldwide, and cited by international dispute resolution bodies. Nevertheless, no specific regime or framework has been created to implement these goals, which have instead been inserted into other regimes and treaties. Thus, among the sub-principles cited above, the ‘Integration Principle’ is of paramount importance: it determines the integration of environmental and social concerns into all levels of governance and decision-making. The ILA committee has described it “*as the very backbone of the concept of sustainable development*”<sup>5</sup> and others have identified it as a core principle inherent to that concept<sup>6</sup>, while the other six principles are considered as expressions of this overarching principle.

The international law regimes have faced challenges in putting these principles into practice. The governance system represented by UN Conferences, such as Rio/1992 and Johannesburg/2002 and Rio+20/2012 developed the principle of sustainable development through soft law documents that, despite their non-binding character, set the agenda and path for action over the years. As has been pointed out, goals such as sustainable development are not achieved by legal rules alone: it is the existence of political will for the implementation of the goals that it represents that will secure change and action. Conferences such as Rio+20 are now much more than just government meetings, but rather a multitude of parallel events, discussions and presentations by various segments of civil society, business sectors and subnational governments, like municipalities and states, and actions and commitments made by these new actors are both more ambitious, and also fundamental, to the complex process of making development a more sustainable process. In this new context, the face of multilateralism is continually evolving, and the potential to provide coordination and to mainstream issues in the global agenda are fundamental. International law on sustainable development provides a foundation to achieve our common challenges.

At the same time, there remains a challenge of implementation, and the real impacts of sustainable development will be seen in the measures to translate commitment into action. The most important regimes, in this regard, the development cooperation system and the

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<sup>5</sup> ILA, op cit.

<sup>6</sup> P Sands, ‘*International Law in the Field of Sustainable Development*’, British Yearbook of International Law 1994, p. 303- 336; N Schrijver, ‘*The Evolution of Sustainable Development in International Law: Inception, Meaning and Status*’, The Hague Academy of International Law, 2008, p. 217, 362.

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international economic regimes, represent, respectively, the international system created to provide aid as a means of promoting equity and solidarity globally, and a regime where the integration of sustainable development is more pressing. These regimes have been failing in their objectives. The development cooperation system is based on a weak system of cooperation and, as a regime aimed at providing equity and solidarity within the international community, is still largely influenced by the national priorities of donors, falling short of its financial and moral commitments.

The international trade regime allows for sustainable development objectives to be pursued through trade measures, but still falls behind in terms of the need to promote a more positive approach, incentivizing trade as an instrument for the transition to a green economy in the pursuit of sustainable economic development. The WTO law is not unfair. In fact, the limitations it imposes on the adoption of measures related to sustainable development, such as the GATT Article XX exceptions, are in fact safeguards against disguised protectionism and unfair imposition of agendas among member parties, as the case law of the DSB demonstrates. At the same time, as negotiations on a more pro-active, positive liberalization agenda, as included in the Doha Round, have been stalled for more than a decade now, alternative ways are needed to advance the objective of integration of trade and sustainable development. Considering the relevance of trade for economic growth and development of all countries in the world, and the interrelated relevance of the international trade regime in international law, this integration is of the utmost importance for the objective of a more sustainable development process and the transition to a greener and low carbon economy. The importance of the integration of sustainable development in the trade regime is illustrated, for instance, in the prevalence that trade law might have on objectives of multilateral environmental agreements, which might be blocked given the strength of the trade regime, its institutionalized organization and DSB. Thus, integrating sustainable development into the trade regime is not just a matter of living up to the preamble of the Marrakesh Agreement, but also to the need for coherence and uniformity of international law itself, of which in the end all of these regimes are a part. As discussed in Chapter 1, IL nowadays has as one of its most pressing challenges and goals to achieve more fairness in international relations, and allowing a pure economic rationale to prevail is not sustainable for the international community over time, and thus is not fair. But again, if the advancement of these issues is stalled in the multilateral avenue, what are the alternatives?

This thesis claims that regional agreements are a promising alternative. Regional agreements are, originally, a sub-product of the international trade regime, and must abide by some of its rules, even when developing an independent legal order. This has been illustrated in the case of the EU and the many conflicts it has entered into regarding some of its policy instruments and compatibility with trade law. At the same time, once these compatibility requirements, which have as their ultimate goal the avoidance of protectionism and fairness in trade relations, are respected, regional agreements have considerable freedom to develop deeper and broader policies advancing issues that are stalled in the multilateral sphere.

In this framework, the regional sphere is presented as an alternative for the promotion of sustainable development. Regional blocs are fundamentally regional trade agreements that aim for the creation of trade liberalization schemes - to deeper or lesser extents, and have a development rationale of promoting the increase of trade as a means of economic development and welfare. Gradually, as these regional blocs have evolved, other issues have been included in their mandate and the regional sphere is also seen as a means of implementing the internationally agreed goals of sustainable development. In fact, Agenda 21, the JPOI and the Rio+20 Outcome Document mention the regional level as an important part of their implementation plan, as a fundamental sphere of governance. Given the weak capacity of centralized standard-setting and feeble capacity of enforcement at the international level, at a regional level regulation might work more easily to fill in this gap, by building legal frameworks that encompass these issues from the international agenda and transform them into binding goals within the regional sphere.

## **2. The EU and MERCOSUR: two examples of different RIAs with a common goal**

The EU has come a long way as a project of regional integration. It started with the idea of creating a common market and safeguarding peace in the European continent, but even in its initial stage the project had two important features: being based on a strong legal framework, a supranational set of institutions and set of values which influenced its evolution and its actions; and the fact that it had always both an internal and an external dimension, even though the latter was developed further as the project evolved. The EU is today a regional bloc that has as objectives the achievement of a set of policy goals, having the internal market as one of the instruments to this end, and these policies cover a substantial range of issues, both internally and externally. It is a project strongly based in a legal framework, which sees

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itself as independent from international law, while also interacting with it in several ways, in incorporating goals of the international community, but also in playing a role in defining goals of international law and international relations. The tensions which have existed between the legal principles and the political strategies of the bloc and its member states are still present and affect the functioning of the EU and the achievement of its goals. It is a *sui generis* international organization, based on a supranational framework having direct effect on member states, which nevertheless retain sovereignty and competences in a wide range of fields, making its functioning a complex task. Finally, it is deemed as an international actor and plays a strong normative role, promoting issues such as sustainable development internally and through its external relations. Within this framework, sustainable development has achieved a highly relevant place within the EU legal framework, both as a principle guiding EU action in all spheres of action, but also as an objective of the project itself. The EU has developed a considerable number of provisions that allow it to pursue sustainable development goals within substantive measures, such as integrating environmental considerations into all policy areas, and also to implement it through procedural instruments such as the SIAs.

MERCOSUR emerges as a simpler project in relation to the EU, but nevertheless is quite a complex governance structure, which on the one hand has achieved a great deal of economic integration, has been organized around a legal framework and comprises different institutions. On the other hand, it still depends on a stronger political/intergovernmental sphere which hinders its progress towards deeper levels of integration. Despite these downsides, MERCOSUR is also a project that aims to promote development. At the same time, more apparently than in the EU, which embraced the concept of sustainable development and its three pillars as one of the core values to be promoted, in MERCOSUR the idea of development is primarily centered in the economic sphere, through market integration, with an emphasis on 'social justice', which is translated into democratic values, and a support for intra-generational equity. Nevertheless, MERCOSUR is both a relatively young organization -and the EU gives a good indication of the amount of time such a deep level of integration might take to achieve- and an ambitious project, which is striving between rhetoric and reality.

### **3. Regional policies addressing intra-generational equity**

Both EU and MERCOSUR have developed policies addressing equity and solidarity within their internal spheres. The EU regional policy has moved from being an ‘accompanying policy’, designed to offset the regional perverse effects of other Community policies and to provide additional support to member states in overcoming their own backwardness, to a comprehensive and mainstream policy, seen not only as an objective but also as a means of completing the integration project itself. Regional policy nowadays accounts for approximately one third of the EU budget, has a complex set of objectives defined at supranational level, and has proven to have an impact on regional development, while also being highly contested and ambiguous regarding its effects and coherence among its goals. The scope of the regional policy has evolved significantly and in parallel to the transformations taking place in the EU itself, as an instrument based on solidarity between member states and designed not only to induce convergence in economic development among different regions, but also to bring about the implementation of the different overall policy strategies of the bloc. Despite the criticisms that might be raised regarding its flaws, regional policy has been an important instrument to promote regional development. It has stimulated the development of regions lagging behind; it has included in the regional development agenda issues incorporated into the EU as part of a ‘sustainable development strategy’, being thus a means of promoting sustainable regional development through a legal framework within the EU’s internal borders; and it has brought the debate and decision-making procedures to the regional level, making it easier to take regional specificities and needs into consideration, as well as appropriate ways to tackle them.

A similar policy has recently established in MERCOSUR. FOCEM is a new and welcome initiative, demonstrating the capacity of MERCOSUR’s member states not only to liberalize trade, but also to take joint decisions responding to a recognized obstacle to the further progress of the bloc. On the other hand, the effectiveness of this initiative is still to be observed over the years to come, and the lessons learned by the European Union during its long evolution can provide interesting insights in relation to MERCOSUR, with respect -of course- to the enormous differences between the two projects. Firstly, regarding the scope of the policies, it is clear that, compared to FOCEM, the regional policy of the European Union has evolved from being an instrument helping to address the asymmetries resulting from the

common market, to become a broad policy that is now seen as an effective means of ensuring harmonious integration, by furthering the convergence of several regions within the bloc but also promoting broader regional development strategies. FOCEM is, of course, a new and still modest initiative, which will need to prove its effectiveness in the South American context before it can be expanded, but the need for a regional development strategy is lacking within MERCOSUR. Secondly, in the EU, a more holistic approach of development with a view of promoting sustainable development can be observed. In MERCOSUR, the vision of development is still more closely attached to economic and social development, and would benefit from the development of a stronger environmental strategy. Thirdly, in both schemes, the sectors which are considered to be in need of support through the funds are selected at the higher regional level, by the determination of programs and areas of action. Nevertheless, it can be noted that within the European Union there seems to be a clearer development strategy, focused on social cohesion and solidarity, which the funds were adopted to promote. In MERCOSUR, this idea is not so well developed, as only programs have been defined, but not a true regional development strategy. Moreover, the means to select which regions will benefit from these programs differ substantially: in the European Union, there is a quantitative economic criterion (GDP per capita, which in most cases must be below 75 per cent of the Community average in order to make a region eligible for aid); in MERCOSUR, the fund is still at an initial stage, and it is interesting to note that it resembles the EU regional policy in its early stages. More comprehensive criteria could be used to more accurately identify regions which are backward in development, and there should be a more precise definition of a true regional development plan in MERCOSUR.

Regional frameworks can thus provide a promising mechanism to deliver on the objectives of development cooperation, mainly for their capacity to build internally constructed development agendas. This is fundamental in terms of ownership, given that priorities arise from a regionally discussed agenda, created and implemented by the same group of countries. The challenges exist in linking the regional agenda with the international development goals, above all in this case the transition to a green economy, which should be a fundamental part of fighting inequality and promoting sustainable development. In addition, in the case of MERCOSUR, the main challenge is to provide sufficient funds for FOCEM to be a true development mechanism, and not just a symbolic instrument of wealth transfer.

### 4. The integration of trade and sustainable development at the regional level

RIAs can also be a valuable means of promoting the integration of trade and sustainable development. On the one hand, trade instruments developed at the regional sphere have been shown to be more progressive regarding the implementation of sustainable development goals. On the other hand, it can be observed that, regarding development measures implemented through the preferential trade dimension based on a PTA/Article XXIV GATT legal base, there is a thin line between what can be considered as a development measure, and a preferential scheme with a political connotation, which is therefore not justifiable under trade law. The EU trade and development policy provides interesting insights in this regard. This policy evolved from a colonialist, politics oriented approach, to a more pragmatic, principle-based one, but not without some difficulties. Episodes such as the ‘Banana War’, for instance, illustrate that a development rationale cannot justify an exception to the MFN principle under Article XXIV GATT, when the parties are not both developing countries, but are rather in a North-South relationship. In this case, reciprocity is required under contractual arrangements, and ‘non discriminatory’ treatment does not require identical treatment of all developing countries, but does require that preferences can be granted with a clear objective, and in a non-discriminatory way, they can provide important incentives.

Furthermore, the EU GSP provides an interesting example of an attempt to link trade policy to development concerns through non-contractual arrangements, where the same concerns about not unjustified discrimination prevail, but still provide an interesting self-created mechanism integrating trade and sustainable development. The EU GSP went beyond this, creating two specific schemes that aim to integrate sustainable development considerations. While encouraging developing countries to sign and implement these instruments can certainly contribute to the promotion of sustainable development, the potential outcomes of their application in the national contexts of beneficiary countries are hard to predict. In this regard, the practical impact of integrating sustainable development through the GSP, while promising in theory, is also ambiguous.

More interestingly, nevertheless, the integration of sustainable development objectives in recent RIAs of the EU has occurred through two main avenues: a procedural component, *ex-ante* SIAs; and a substantive element, the inclusion of ‘Trade and Sustainable Development’

chapters in addition to other related provisions in the agreements. These SIA reports, which are perhaps overlooked but are of great relevance in practice, underline the fact that trade liberalization alone does not lead to sustainable development, highlighting this based on substantive studies of the specific context involved. Moreover, the SIAs provide important data that can guide decision-making towards more informed and targeted outcomes, while also helping to avoid unjustified, politically-oriented decisions and biases. Finally, they also provide a valuable channel for public participation in these decisions.

As regards their substance, the agreements provide deep trade liberalization of goods, and at times also services, being Article XXIV compatible, thus providing for reciprocal concessions while also including SDT for developing countries in the form of phased commitments. Furthermore, they are WTO+ or/and WTO-extra agreements, dealing with non-trade issues that are also a part of the stalled Doha Round negotiations. In this regard, the agreements can be considered important building blocks in the international trade and development agenda. The most relevant aspect of the case study, though, has been to show the significant expansion in the scope of sustainable development measures included in the agreements analyzed, which went from being cooperation measures only, supporting the achievement of sustainable development objectives, as in the case of the Chile AA, to more explicit trade-related measures targeting specific issues that are considered important to the sustainable development agenda. These measures include commitments to ratify, implement, and not derogate from applying various international socio-environmental instruments and principles, and not to use them as disguised protectionism. On this point, some of the considerations made regarding the GSP+ apply, even though in this case they are not imposed but negotiated. Furthermore, the agreements progressively include measures aiming to open up negotiations on trade schemes benefiting strategic issues, such as EGS, renewable energy and fair trade labels. Most of these measures have been drafted in ‘soft’ language and represent open-ended obligations, but at the same time they have opened a much needed framework that is still lacking at the multilateral level, preventing these promising sectors from moving on in terms of creating international markets. A multilateral framework would still be significant in ensuring coherence and effectiveness in relation to the wider sphere, and national measures have an important role to play in assuring the implementation of these provisions. Nevertheless, these measures go well beyond the negative integration approach undertaken by the WTO to date, and have an important role to play in further advancing green economy objectives in relation to the multilateral framework.

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In sum, there has been a considerable level of integration of sustainable development into EU trade policy. While criticism might be raised regarding the ways in which this integration has taken place, and the underlying hidden objectives behind the trade agreements signed with different parties, the legal framework developed by the EU currently allows it to pursue policies and objectives which have the potential to make a valuable contribution to sustainable development goals, such as providing for more informed and participatory decision-making processes and fostering the transition to a green and low carbon economy.

The trade policy of MERCOSUR has been expanding over the past decades, which might seem surprising, as the bloc has faced general overarching hindrances to progress. The above analysis shows that the MERCOSUR CCP has been following the pragmatic approach that characterizes the actions of the bloc, as it has started to develop external relations with the aim of establishing trade partnerships even before it has the necessary legal frameworks to do so. This policy has focused more on the economic spheres of development: opening markets for economic growth, providing SDT for weaker parties and some forms of cooperation – above all technical cooperation, in addition to an embryonic GSP system. It is interesting to note, at the same time, some similarities with the EU ‘trade and development’ policies in its origins. Firstly, MERCOSUR trade relations focus mainly on maintaining a level of trade relationships with its neighboring countries, as in the case of the ACEs signed with other ALADI members. Secondly, some of the trade agreements signed to date have a strong political component, as is the case with the agreements with Israel, Egypt and Palestine. These countries are clearly not among MERCOSUR’s major trade partners, but political reasons might help to justify the signature of these agreements, such as enhancing presence and opening markets in the Middle East and Muslim regions – a major interest for Brazil. Similar reasoning was also present in regard to the EU’s relations with associate and overseas territories, although the political background was different. Furthermore, these agreements occasionally provide for SDT for the counterparties, in the form of phased liberalization schemes – a form of development-related trade measure that is also WTO-compatible. Thirdly, as the bloc moves forward, and the economies of its member states become more developed, the creation of a system of preferences for the least developed countries is an opportunity to incentivize trade and development, and could potentially allow for the promotion of specific regulatory objectives, provided that it is done on a non-discriminatory

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basis. Finally, some form of development cooperation has slowly started to appear as an accompanying measure to trade agreements.

Thus, the EU CCP could provide inspiration for MERCOSUR, in the sense that in order to become a development instrument, as distinct from just providing trade liberalization and SDT to chosen partners, a specific development mandate must back these policies, incentivizing the creation of measures that promote these specific objectives in addition to that of liberalization. Linking trade policy to sustainable development might prove beneficial - not in imposing one bloc's particular regulatory frameworks or policy objectives onto its trade partners, but actually in using the power of trade, and the more specific regional legal frameworks, to provide windows of opportunity to promote and support the transition to a greener, low carbon economy, which is a fundamental objective for sustainable development.

If regional integration agreements are going to be supportive of this goal, their legal and regulatory systems must pave the way for the construction of regional frameworks, as a first stage, leading to a global system of markets that provide economic growth opportunities while supporting social justice and environmental protection. Creating policies based on principles -and not just on politics- is the fundamental challenge to overcome in this regard.

## **5. The EU and MERCOSUR: bi-regionalism and sustainable development**

The EU's relations with MERCOSUR focus on opening up access to the markets of both regions, but this focus is framed around the promotion of sustainable development. The analysis of the current status of the relationship between the parties and the negotiations of the association agreement show some outcomes of the promotion of sustainable development, while also revealing the tensions between policy objectives: the political dialogue channel created provides a forum for discussion and political coordination, and has focused on issues related to sustainability, such as the general theme of the last EU – LAC Summit. This represents an important attempt to achieve political agreement between the regions and can have a positive impact on both regional and multilateral decision-making, even though disagreements persist in several international negotiations between the two regions – i.e. the Doha Round or climate change negotiations – and full evaluation of this impact is beyond the scope of this paper.

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The cooperation chapter has also been active, despite the fact that the amount of aid earmarked for the MERCOSUR region is, relatively, very low. Among other outcomes, the cooperation led to the signature of an agreement financing the development of ‘eco-norms’ in MERCOSUR, which would reinforce the bloc’s overall sustainability strategy, and also facilitate the trade relations between the two parties. The final impact of these measures is hard to evaluate, and this evaluation is outside of the scope of this paper, but it can be said that this cooperation measure is in line with the idea of promoting regional sustainability.

Finally, the trade chapter more clearly shows the potential tensions mentioned above: on the one hand, the difficulties in the negotiations are certainly founded in innumerable factors, but among these, the internal policies of the two blocs – regarding agriculture on the one side and industry sectors on the other side – stand out as a major barrier. In this regard, the EU’s commitments to promote sustainable development through regional integration, to maintain strengthened relations with other regional parties, and even its own objective to achieve more coherence between all of its policies, seem to be jeopardized by internal political influences, such as the agricultural sector in some member states and ultimately the reform of the CAP. On the other hand, a rhetorical commitment -at least- to achieve a ‘sustainable development oriented’ trade agreement can be observed on the EU side, through the analysis provided by the SIA and the proposal to include a ‘Trade and Sustainable Development’ chapter. Considering the complexity of issues involved in the trade relationship, and the need for more policy coherence, the normative content of sustainable development can help to balance conflicting goals in economic, environmental and social spheres, and the SIA is an example of an attempt to integrate further these areas. The outcome of the SIA process seems positive *per se*, to the extent that it shows that trade liberalization does not necessarily lead to more sustainable development of the parties, but rather that important compensating measures must be ensured on both sides; moreover, it renders the decision-making process more transparent and inclusive towards civil society. Nevertheless, the practical influence of this instrument is ambiguous, and its potential impact on the final outcome will depend ultimately on the political will (or ability) of the EU to adopt the recommendations made therein.

The EU-MERCOSUR negotiations are broader than those which preceded the five agreements analyzed in Chapter 5, given that they concern a bi-regional relationship and not a bilateral one, as was the case in the agreements with Chile and Korea, in addition to the fact that MERCOSUR is a much bigger project than that of Central American integration, which

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makes the compromise more difficult, on the one hand, but on the other hand renders the negotiations more balanced, especially given the presence of Brazil, one of the largest contenders in the WTO negotiations. Moreover, from a North-South perspective, it is interesting to notice that both blocs have been aiming to deepen integration, going beyond non-trade issues and developing external relations as a means of expanding their role as actors and promoting values and goals, respective to their differences in scope. In this regard, the relationship between the two blocs can be seen as an attempt to compromise between a developed and a developing partner, in which many issues that are controversial in the international arena, such as agricultural subsidies, intellectual property and trade and sustainable development, are being negotiated in the context of the creation of the largest free-trade area in the world – which the EU-MERCOSUR FTA would be. In this regard, discussion of these issues, which is seen as important for the promotion of sustainable development, could be agreed and promoted at the regional level in a way that balances the differing views of developing and developed partners, and this would represent an important building block for the development of a multilateral framework for sustainable development.

## Concluding remarks

This thesis shows that there are links between regional trade agreements or regional integration projects, trade measures and sustainable development concerns. From a legal perspective, the scope of this analysis was to examine in what way regional integration could generate rules and policies to effectively translate the political commitments made internationally and thus support the enforcement and implementation of those obligations, being in this sense a ‘building block’ towards multilateral governance. Political tensions, which dominate the multilateral sphere and often prevent the implementation of international commitments, can also be perceived at the regional level. The strengthening of political commitment to the goals represented by sustainable development, and the enhancement of policy coherence to allow for a more effective process remain the major challenges.

In the regional sphere, a trend can be observed in actors’ shift in focus away from purely economic growth – embodied in the primordial market integration at the beginning of the projects analyzed – towards the promotion of other policies in the fields of environment and social justice. Thus, it can be stated that there is a growing sense of recognition for this holistic approach towards development at the regional level. Nevertheless, in many cases -

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also at the regional level, this integration of recognized goals is very much driven by market forces, which form the rationale around which other policies are designed and to which they are often subordinate. If regional integration can effectively support the transition towards a green economy, both by strengthening efforts to achieve greater equity among member parties, and in linking economic measures with social and environmental objectives, it will effectively represent a major building block in the evolution of a global governance responsive to the greater challenge of our time.

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