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Brief analysis of the compatibility of the EU- Mercosur Partnership Agreement and the Interim Trade Agreement with the EU Founding Treaties

by

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The purpose of this working paper is to provide a concise, objective and scholarly overview of the legal difficulties raised by the procedure for signing and concluding two agreements with Mercosur, as well as the compatibility of several of the legal mechanisms provided for in these agreements with EU primary law.

Potential breach of the 1999 Council mandate

The 1995 IFCA was presented, in its preamble, as a ‘prelude to the negotiation of an Interregional Association Agreement’ with the aim of ‘prepar[ing] the conditions enabling an interregional association to be created’. Against this background, negotiating directives for the conclusion of an Interregional Association Agreement between the EU and Mercosur were adopted by the Council on 17 September 1999. These directives stressed that ‘the parties will develop the existing framework agreement into a political and economic association agreement between the parties, as part of the strategy to strengthen European policy in Latin America’. On 22 May 2018, the scope of this mandate was confirmed by the Council.

As a matter of principle, the envisioned association agreement had to be signed and concluded in accordance with former Article 310 of the EC Treaty, which has been replaced following the entry into force of the Lisbon Treaty by Article 217 Treaty on the Functioning of the European Union (TFEU). Pursuant to this provision, ‘The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure’.

Based on a triptych (political dialogue, cooperation and trade), association agreements aim to establish close and lasting links between the EU and a third country. Although the founding treaties never specified with precision their material scope, areas frequently covered by such agreements include the development of political, trade, social, cultural and security cooperation. Accordingly, they are global in nature.¹ Furthermore, these agreements incorporate a substantial institutional framework. From a procedural point of view, the conclusion of an association agreement is subject to its own special rules. In terms of voting procedures, the Council must act unanimously in accordance with Article 218(8), second indent TFEU. What is more, in order to overcome the limits inherent within the principle of conferral of powers, association agreements are deemed to be mixed.

Due to opposition to the conclusion of a Free Trade Agreement (FTA) with Mercosur from several Member States, on 3 September 2025 the European Commission is proposing two separate agreements.

On the one hand, the Interim Agreement on Trade (ITA) is a ‘stand-alone’ FTA as it relates exclusively to trade and investment. Accordingly, it must be founded on Article 207 TFEU, the legal basis for acts pertaining to the Common Commercial Policy (CCP). This legal basis requires a qualified majority. The fact that the ITA overlaps with several policies falling under shared competence (transport, sustainable development, etc.) does not call into question the EU’s exclusive CCP competence (point (e) of Article 3(1)) and recourse to Article 207 TFEU.²

¹ In its judgment in *United Kingdom v Council*, the CJEU held that Article 217 TEU confers on the Union a general power ‘to guarantee commitments towards third countries in all the fields covered by the TFEU’. See Case C-81/13 *United Kingdom/Council* 2014 EU:C:2014:2449, para 61.

² Opinion 2/15 [2017] EU:C:2017:376.

On the other hand, the EU-MERCOSUR Partnership Agreement (EMPA) will include a) the Political and Cooperation pillar and b) the Trade and Investment pillar. Insofar as the EMPA encompasses policies falling under shared competences, the European Commission considers, first of all, that it should be adopted by the Council according to a qualified majority and secondly that, due to its mixed nature, it is subject to a requirement of approval by national parliaments.

As far as procedural requirements are concerned, Article 218(8) TFEU lays down voting procedures in the Council with regard to the signature and the conclusion of the EMPA ('throughout the procedure') similar to those applicable to the adoption of corresponding internal rules.³ Since the internal rules governing most of the chapters of the EMPA require an ordinary legislative procedure, 'the Council shall act by a qualified majority throughout the procedure'.

The following question thus arises: will the Council's decisions concerning the signature and subsequently the conclusion of the EMPA have to be adopted by qualified majority, on the grounds that this agreement falls within the scope of different EU policies requiring a qualified majority, or rather unanimously by the Council as the Council has mandated the Commission to negotiate such an agreement, and the EMPA is akin to other association agreements the conclusion of which requires unanimity (Article 218(8), second indent TFEU). The choice between these two alternatives has far-reaching consequences.

The crux of the problem lies specifically in the mandate conferred by the Council on the European Commission in 1999. In defining the essential parameters for negotiations, this mandate explicitly determined negotiators' room for manoeuvre. The option of splitting the association agreement in order to fast-track the signature and conclusion of the ITA and EMPA has clearly never been envisaged by the Council.

One may therefore wonder whether the European Commission is able to endorse a splitting approach after the Council mandated the Commission in 1999 and 2018 to negotiate an association agreement. This mandate is governed by Article 218 TFEU. As discussed below, such a question should be subject to the issue of an opinion by the CJEU pursuant to Article 218(11) TFEU.

Potential breach of the correct legal bases

The Commission takes the view that the EMPA 'covers areas which fall within the scope of the common commercial policy, transport, development cooperation and of the economic, financial and technical cooperation with third countries. The legal bases of the proposed decision should therefore be Articles 91, 100(2), first subparagraph of 207(4), 209(2) and 212 of the TFEU'.⁴

³ For instance, if the agreement relates to an area for which the special legislative procedure is required when adopting internal rules or is an association agreement, the Council must decide unanimously. Otherwise, it rules by qualified majority.

⁴ These legal bases are very similar to those underpinning Council decision (EU) 2024/1758 of 4 December 2023 on the signing, on behalf of the European Union, and provisional application of the Advanced Framework Agreement between the European Union and its Member States, of the one part, and the Republic of Chile, of the other part, OJ L 2024/1758.

These various legal bases thus include transport policy (Articles 91 and 100(2) TFEU), the CCP (Article 217 TFEU), development cooperation policy (Article 209(2) TFEU) as well as economic and technical cooperation (Article 212 TFEU).

Instead of one single legal basis for the conclusion of an association agreement, the European Commission proposes that the EMPA be concluded on five distinct legal bases.

It must be recalled that each piece of EU legislation must be founded on one or more legal bases set out in the TEU and the TFEU. The particular legal basis chosen determines not only which institution has competence to take the action but also the procedure to be followed and the objective pursued.

It is settled case law that ‘the choice of the legal base for a measure may not depend simply on an institution’s conviction as to the object pursued’.⁵ Instead, the determination of the legal basis is amenable to judicial review, which also covers the aim and content of the measure.⁶

The choice of the correct legal basis is not a purely formal question, but rather one of substance, being a matter of ‘constitutional significance’.⁷ In effect, this obligation is justified in the light of the principle of the allocation of powers, the duty to preserve the prerogatives of the EU institutions, the obligation to state reasons and the requirement of legal certainty.⁸ Admittedly, an incorrect choice of legal basis could lead to the nullification of the act.

If it is established that, when the act simultaneously pursues different objectives or has several components that are indissociably linked, and if one of these can be identified as the main or predominant purpose or component whereas the other is merely incidental, it will have to be founded on one single legal base, namely that required by the main or predominant purpose or component – the centre of gravity of the act – rather than its effects.⁹ However, where the twin objectives and the two constituent parts of the act are ‘inseparably’ or inextricably linked without either being secondary and indirect in relation to the other, it is impossible to apply the predominant aim and content test. Exceptionally, the Court of Justice of the EU (CJEU) accepts that such a measure must be founded on the corresponding legal bases and the applicable legislative procedures must be respected.¹⁰

The aim of the EMPA is to ‘reinforce’ the ties between the EU and the Mercosur ‘and intensify their relations on the basis of dialogue and cooperation, with a view to establishing a strategic partnership’ ‘based on shared values, including reciprocity, and common interest’ (preamble, and Article 1.3). The parties are willing ‘to strengthen cooperation between the Parties, on the basis of an open and permanent dialogue in all areas of mutual interest, in particular in the

⁵ Case C-300/89 *Commission v. Council* (Titanium dioxide) [1991] ECR I-2867, para. 10.

⁶ See, inter alia, Case C-300/89 ‘*Titanium Dioxide*’, para. 10; Case C-269/97 *Commission v. Council* [2000] ECR I-2257, para. 43; and Case C-211/01 *Commission v. Council* [2003] ECR I-3651, para. 38; and Case C-338/01 *Commission v Council* [2004] ECR I-4829, para. 54

⁷ Opinion 2/00 [2001] ECR I-9713, para. 5.

⁸ Case C-370/07 *Commission v Council* [2009] ECR I-8917, paras. 37, 39, 46, 48. It must be noted that AG Kokott stressed in addition to these obligations the principle of transparency (paras. 37 and 38).

⁹ See, inter alia, Case C-155/91 *Commission v. Council* [1993] ECR I-939, paras. 19 and 21, Case C-36/98 *Spain v Council* [2001] ECR I-779, para. 59; Case C-281/01 *Commission v. Council* [2002] ECR I-12049, para. 57; Case C-338/01 *Commission v. Council*, para. 55; and Case C-91/05 *Commission v. Council*, para. 73.

¹⁰ Case C-300/89 ‘*Titanium dioxide*’, para. 13; Case C-336/00 *Huber* [2002] ECR I-7699, para. 31; Case C-281/01 *Commission v. Council* [2002] ECR I-12049, para. 35, Case C-211/01 *Commission v. Council*, para. 40; Case C-211/01 *Commission v. Council* [2003] ECR I-8913, paragraph 40, Case C-91/05 *Commission v. Council*, para. 75; and Opinion 2/00 [2001] ECR I-9713, para. 23.

political, economic, commercial, financial, legal and judicial, freedom and security, scientific and technological, social and cultural fields' (preamble). The general objectives pursued by the EMPA mirror the commitment to establish a partnership premised on an institutional framework that enhances political dialogue through new institutional mechanisms, cooperation, as well as the expansion and diversification of the Parties' biregional trade relations (Article 1.4).

The content of the EMPA largely reflects this diversity of objectives. It provides for general principles and an institutional framework (Part I), as well as political dialogue and cooperation between the EU and Mercosur (Part II) covering the key EU values of justice, freedom and security, sustainable development, social, economic and cultural partnership. Matters relating to trade are addressed in Part III.

All in all, the aims and content of the EMPA seem to be relatively similar to those of other association agreements, and include for instance a highly advanced institutional framework, broad objectives ranging from political dialogue between the Parties to the gradual liberalisation of trade,¹¹ cooperation on issues of mutual interest as well as an array of diverse EU policies. Furthermore, one might also wonder whether, in view of the content of the EMPA, other legal bases should not be considered, such as those relating to the environment and energy (Articles 192(1) and 194 TFEU).

One might also ask whether, in the light of the CJEU case law, it would be possible for the Commission to propose a plurality of legal bases to the Council for the conclusion of the EMPA, instead of one single basis such as Article 217 TFEU. If the answer is in the affirmative, we must then ask what legal bases should be retained by the Council for both the signature and conclusion of the EMPA.

In addition, the Commission's proposal to base the Council's decision on several legal bases, rather than a single one, has not been explained in the memorandum concerning its proposal. This raises constitutional issues with respect to Article 13(2) TEU, Article 296(2) TFEU and Article 41(2)(c) of the Charter.

Potential breach of the principle of institutional balance enshrined in Article 13(2) TEU and the principle of sincere cooperation enshrined in Article 4(3) and Article 13(2) TEU

Article 13(2) TEU provides that each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. That provision reflects the principle of institutional balance, characteristic of the institutional structure of the Union. Accordingly, each of the institutions exercises its powers having due regard for the powers of the other institutions.¹² It follows that the EU institutions are not at liberty to cherry-pick certain aspects of the procedures laid down in the Treaties, while disregarding others.

It follows from the context of Article 218 TFEU, as well as from the wording and broad logic of that provision – and, in particular, from its objective of establishing a general system and

¹¹ See, for instance, Article 1 of the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part.

¹² Case C-409/13 *Council v Commission* [2015] EU:C:2015:217, para. 64, and Case C-73/14 *Council v Commission* [2015] EU:C:2015:663, para. 61

procedural rules for the negotiation and conclusion of international agreements by the EU¹³ – that the Commission cannot depart from the procedures laid down in that provision.

Furthermore, Article 4(3) TEU enshrines the principle of cooperation between Member States and the EU institutions. In accordance with this principle, the institutions must ensure that the Union functions properly.

In presenting the Council with a *fait accompli* by negotiating a different type of agreement, subject to different voting arrangements, from the envisioned association agreement, did the European Commission breach the principle of sincere cooperation? This issue has not as yet been ruled on by the CJEU.

The question thus arises as to whether, by proposing two agreements instead of one single association agreement, which would require a unanimous vote within the Council, the European Commission has acted in excess of its 1999 mandate and breached the principles of institutional balance and sincere cooperation.

Potential breach of Article 296(2) TFEU and Article 41(2)(c) of the Charter

Article 296(2) TFEU and point (c) of Article 41(2) of the Charter require that the EU institutions must state the reasons for any act producing legal effects, regardless of its name. The obligation to state reasons constitutes an essential procedural requirement on the grounds that it enables institutions, Member States and individuals to understand the reasoning of the author of the act and to decide, with a full knowledge of the facts, whether it is in their interest to take legal action. Compliance with the obligation to state reasons is even more important given that procedural safeguards must be upheld. The choice between a legal basis that requires unanimity within the Council and a basis that only requires a qualified majority entails significant consequences.

Given the institutional consequences of the splitting approach proposed by the European Commission, one could ask whether the lack of a statement of reasons regarding the need to endorse a splitting approach is compatible with Article 296(2) TFEU and Article 41(2)(c) of the Charter.

Potential breach of the principle of a high level of environmental protection

Point (b) of Article 20.4 in Chapter 21 of the ITA, in conjunction with point (k) of Article 1.3 in Chapter 1, introduce a ‘rebalancing mechanism or clause’ which allows a party to seek compensation if a ‘measure applied by the other party nullifies or substantially impairs any benefit accruing to it under the covered provisions in a manner adversely affecting trade between the parties, whether or not such measure conflicts with the provisions of this Agreement, except if otherwise expressly provided’. This mechanism aims to compensate for the economic impact of a trading partner’s legislation or practice, even when these do not breach the provisions of the ITA.

EU primary law is characterised by numerous provisions which, within the framework of European integration, oblige the institutions to achieve a high level of protection. For instance, pursuant to Article 3(3) of the EU Treaty, Article 191(2) TFEU and Article 37 CFREU, EU

¹³ Opinion AG Mengozzi, in Case C-28/12, *Commission v Council* [2015] EU:C:2015:43, para. 47.

policies must aim at a high level of environmental protection. With respect to measures related to the establishment and functioning of the internal market, Article 114(3) TFEU lays down a similar obligation. In accordance with Article 168(1) TFEU, a ‘high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities’ related to health. Pursuant to Article 169(1) TFEU, the EU is called on to ‘ensure a high level of consumer protection’. Article 9 TFEU obliges the EU institutions ‘to take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health’. The obligation to attain a ‘high level of protection’, be it for workers, patients, consumers or the environment, gives rise to specific positive obligations for the EU institutions. Articles 35, 37 and 38 of the EU Charter of Fundamental Rights enshrine similar obligations. In addition, the EU is a party to the Paris Agreement.

The EMPA’ trade and sustainable development (TSD) chapter has introduced safeguards to the right to regulate, including the achievement of high level of protection. In particular, Article 18(2) recognises the sovereign right of each Party to determine its sustainable development policies and priorities, as well as to establish its own levels of domestic environmental and labour protection. Article 18(3) stimulate Parties to ‘strive to improve its relevant laws, regulations, and policies so as to ensure high and effective levels of environmental and labour protection’. These provisions mirror the approach has been embraced by the CJEU, which confirmed that the objective of sustainable development ‘forms an integral part’ of the Common Commercial Policy.¹⁴ However, these provisions may be viewed as aspirational standards, that are likely not to erase the chilling effect stemming from the ITA’ ‘rebalancing mechanism’.

The question arises as to whether the mechanism provided for in point (b) of Article 20.4 in connection with point (i) of Article 1.3 in Chapter 1 of the ITA could give rise to a chilling effect that would call into question the principle of a high level of protection enshrined in treaty law and the obligations stemming from the Paris Agreement, in spite of the environmental and labour commitments enshrined in the EMPA’ TSD chapter.

Potential breach of the precautionary principle as defined by the CJEU

The Trade and Sustainable Development Chapter (Chapter 18) of the ITA restricts the application of the precautionary principle, notably to situations involving a ‘risk of serious environmental degradation or to occupational health and safety’.

Under EU law, the precautionary principle is deemed to be one of the foundations of the high level of environmental protection in the EU.¹⁵ The question arises as to whether the ITA definition is compatible with the much more general definition of the CJEU according to which: ‘where there is uncertainty as to the existence or extent of risks to human health, protective measures may be taken without having to wait until the reality and seriousness of those risks become fully apparent’.¹⁶

¹⁴ Opinion 2/15, para. 147.

¹⁵ Case C-127/02 *Waddenzee* [2004] ECR I-7405, para 44 ; Case T-125/17, *BASF Grenzach GmbH* [2019] T:2019:638, para 272.

¹⁶ See Case C-157/96 *NFU* [1998] ECR I-2211, para 63; Case C-180/96 *UK v Commission* [1998] ECR I-2265, para 99. This interpretation of the principle has become settled case law: Case C-236/01 *Monsanto Agricoltura Italia* [2003] ECR I-8105, para 111; Case C-77/09 *Gowan* [2010] C:2010:803, para 73; Case C-333/08 *Commission v France* [2010] ECR I-757, para 91; Case C-343/09 *Afton* [2010] C:2010:419, para 62. See also Case T-13/99 *Pfizer* [2002] ECR II-3305, para 139.

Request for an opinion in accordance with Article 218(11) TFEU

Article 218(11) TFEU has the aim of forestalling complications which would result from legal disputes concerning the compatibility with the Treaties of international agreements binding upon the EU.¹⁷ Such a request for an opinion on the compatibility of the EU-Mercosur Agreements with the founding treaties would be made, as a preventive measure, prior to its signature and conclusion. Indeed, this *ex ante* review of decisions concerning signature and conclusion removes the risk of an *ex post* review of these acts.

The European Parliament may request the Court of justice to deliver such an opinion, individually, without any consultation with other institutions or Member States.

By reason of the non-contentious character of the procedure contained in Article 288 (11), there is no time-limit for the submission of such a request.¹⁸ A request may be made to the Court of justice only in so far as the EU is not yet bound by the envisaged agreement. In this connection, it makes no difference at what stage in the process of concluding the agreement the opinion is sought. As a result, an opinion may be requested before the European Commission has made any recommendation to the Council pursuant to article 218(1) with a view to opening negotiations with a third State. Similarly, an opinion may also be sought after the negotiations have closed, but before the Council signs the agreement.¹⁹ The request for such an opinion is not out of time even when discussions concerning the substance of the agreement are at an end.²⁰ The Court of justice can be requested to issue such an opinion given that ‘the envisaged agreement is known, even though there are a number of alternatives still open’.²¹ To conclude with, the Court may thus rule at any time on the compatibility of the proposed agreement before the EU institutions are definitively bound by it. In other words, until consent is given in the form of a Council decision, the agreement remains an envisaged agreement for the purpose of Article 218 (11).

The Court of Justice accepts all questions that fall within the scope of judicial review, i.e. questions that raise doubts as to the conformity of the substantive or formal validity of the agreement with the founding Treaties. Therefore, the review of the Court is limited to the compatibility of the envisaged agreement with the treaties. In effect, the Court ‘must confine itself to examining the compatibility of that agreement with the Treaties and satisfy itself not only that it does not infringe any provision of primary law but also that it contains every provision that primary law may require’.²² That being said, nothing precludes a limited review of parts of the agreement.

¹⁷ See Opinions 2/94, EU:C:1996:140, para. 3; 1/08, EU:C:2009:739, para. 107; and 1/09, EU:C:2011:123, para. 47.

¹⁸ Opinion 1/75, 11 November 1975, ECR 1975 p. 1355.

¹⁹ K. Lenaerts, D. Arts, and I. Maselis, *Procedural law of the European Union*, 2nd edition (Thompson - Sweet & Maxwell 2006), 413.

²⁰ Opinion 1/75, 11 November 1975, ECR 1975 p. 1355.

²¹ Opinion 1/78 [1979] ECR 2871, para. 34.

²² Para 150.