_____OSSERVATORIO SULLE FONTI_____

SOLIDARITY IN MERCOSUR LAW, SOLIDARITY BEYOND E.U. LAW

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Summary

Abstract

The principle of solidarity can be found in current MERCOSUR law in fields such as solidarity economy, emergency situations and migration. It has neither the width nor the depth which it enjoys in E.U. law (which can be considered as a model for other regional organizations in this such as in other fields), though. The conclusions drawn may provide useful elements for a more general analysis on the role of solidarity in contemporary international law.

Suggerimento di citazione

L. PASQUALI, *Solidarity in MERCOSUR Law, Solidarity Beyond E.U. Law*, in *Osservatorio sulle fonti*, n. 1/2021. Disponibile in: http://www.osservatoriosullefonti.it

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Registrazione presso il Tribunale di Firenze n. 5626 del 24 dicembre 2007
Rivista inclusa nella classe A delle Riviste scientifiche di Area 12 – Direttore Prof. Paolo Caretti
ISSN 2038-5633

1. Introductory remarks

In a community such as the traditional international one, formed by sovereign States *superiorem non recognoscentes*[1], international law was primarily aimed at balancing the interests that the abovementioned subjects tried to preserve and develop, in opposition to each other. Alongside this primeval and essential function, which consisted in trying to guarantee the coexistence among the States themselves, there was another one, secondary to some extent (since from a theoretical point of view it is not indispensable *stricto sensu*, unlike the first one), consisting in favouring the cooperation among them.

An important evolution of the international society and of its law occurred firstly with the birth and then with the extremely relevant development of the phenomenon of international organisations. Through them, indeed, the States establish, even if on a conventional basis, relationships of institutionalised cooperation. Such institutionalised cooperation -which initially was limited to technical matters and was functional to the satisfaction of common interests- has subsequently resulted, in some cases, in a true political cooperation[2].

The question which arises is if the phenomenon of international organisations is limited to favouring the cooperation among sovereign States (institutionalising it, indeed), or if such entities, through their action, have transformed the agreement that establishes them in an "instrument of cooperation and solidarity among peoples"[3]. In other words, if and to what extent international organisations have contributed and are still contributing to moving the international society and its law from the traditional "Grotian" model to the "Kantian" one, based on transnational solidarity, or solidarity and integration of the States members of the international community[4]. In the latter model, the States end up being (a little) less sovereign "*superiorem non recognoscentes*", than they were according to the traditional model, since they decided, with an act of volition (the signature and ratification of an international treaty), to surrender part of their exclusive sovereignty, sharing it with other States, under condition of reciprocity, within an international organisation.

Among international organisations, the main candidates to play such role seem to be, at least from a theoretical point of view, the regional ones.

[1] Such model of society is defined in literature as "Grotian". In this sense A. CASSESE, *Diritto internazionale*, Il Mulino, Bologna, 2017, p. 35.

[2] On the topic see, *inter alios,* G. MARTINO, *Origine del fenomeno e sua evoluzione*, in P. PENNETTA, S. CAFARO, A. DI STASI, I. INGRAVALLO, G. MARTINO, C. NOVI, *Diritto delle organizzazioni internazionali*, Wolter Kluver, Milan, 2018, p. 33 ff.

[3] In this sense B. CONFORTI, *Scritti di diritto internazionale*, Editoriale scientifica, Naples, 2003, p. 96.

[4] See A. CASSESE, *Diritto internazionale*, *op. cit.*, p. 35.

Regional systems, indeed, usually display a form of cooperation which is, in general, more intense than what happens at a universal level, since in regional organisations the degree of integration among the States is also generally higher.

For these reasons, the existence of the conditions necessary to develop a true solidarity -defined by literature as "regional solidarity"[5] and determined *in primis* by political factors and better perceived mutual benefits- becomes possible in such a framework.

The Member States of a regional organisation -and the regional organisation itself- have an immediate and direct interest in avoiding (or at least in trying to reduce the extent of), through solidarity, certain situations in the countries which belong to the organisation itself, since otherwise the negative effects of such situations might well spread in the region at stake, involving other States[6]. It is, in short, a more "simple" and "immediate" solidarity, since the risk of a negative reaction (which can always rise within the State that practices solidarity towards others) is mitigated. Such solidarity, indeed, could be correctly perceived not much and not only as a gratuity, but mostly as aimed at reducing the impact that a crisis which occurs in a near State, belonging to the same region, could have on the State that practices solidarity and on its population. Consequently, the advantage for those States practising solidarity towards other States would be more easily appreciated, as long as every State has a direct interest in regional stability. All this helps the States to form the political will which is necessary in order to practice solidarity.

Moreover, the higher the degree of integration among the States of the region is, the greater and more direct will be the interest and, consequently, the drive to exercise solidarity in order to reduce the negative effects which are likely to be produced (also for the State that exercises it), in its absence. Let's think, for instance, of the consequences that an economic crisis in a State that shares the currency with other States (such is the case of Euro, for exemple) could cause in the latter and, therefore, their interest in exercising solidarity towards the former. A similar, and particularly up-to-date, argument can be made also for the outbreak of an epidemic in a State belonging to a regional organisation where there is freedom of movement of goods and people.

[5] The expression can be found, for example, in J. G. MERRILLS, *International Dispute Settlement,* Cambridge University Press, Cambridge, 5th ed., 2011, p. 272.

[6] For example, a field where the so-called "regional solidarity" led to concrete results of a certain importance is the one of maintenance of international peace and security with measures not involving the use of force. My book L. PASQUALI, *Il contributo delle organizzazioni regionali al mantenimento della pace e della sicurezza internazionale con mezzi non implicanti l'uso della forza*, Giappichelli, Turin, 2012, provided the starting point for my thinking about the subject.

Such theoretical assumption seems to be corroborated in practice from the analysis of what happens in the regional organisation which represents the best example of integration among its Member States: i.e. the European Union[7].

In truth, the idea of solidarity seems to be inherent in the idea of European integration itself.

Let's quote, in this sense, the founding political act of the European Coal and Steel Community, the Schuman declaration, where the following words state that: "*Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a* **de facto *solidarity***".

From a legal point of view there are several provisions, both in the TEU and in the TFEU (but also in the Charter of Fundamental Rights of the European Union), which enshrine solidarity in European Union law. Thus, in the TEU solidarity is listed both among the values of the E.U.[8] and among its aims, in particular with regard to the relations between generations, the ones among Member States[9] and the relations between the Union and the wider world[10]. Furthermore, it is one of the principles that inspire the C.F.S.P., since it must be advanced in the wider world[11] and applied to the relations among Member States in the implementation of the C.F.S.P. itself[12]. Additionally, according to

[7] Books on solidarity in E.U. Law include C. JIMENEZ PIERNAS, L. PASQUALI, F. PASCUAL VIVES (eds.), *Solidarity and Protection of Individuals in E.U. Law*, Giappichelli, Turin, 2017. A more critical approach can be found in A. GRIMMEL, S. M. GIANG (eds.), *Solidarity in the European Union – A Fundamental Value in Crisis*, Springer, Cham, 2017.

[8] Art. 2 TEU: "*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail*".

[9] Art. 3 TEU: "*3... 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. It shall promote economic, social and territorial cohesion, and solidarity among Member States*".

[10] Art. 3 TEU: "*5... 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*".

[11] Art. 21 TEU: "*1. The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law*".

[12] Art. 24 TEU: "*2. Within the framework of the principles and objectives of its external action, the Union shall conduct, define and implement a common foreign and security policy, based on the*

art. 31 TEU, it is a "*spirit of mutual solidarity*" that induces a Member State which abstained in the Council vote in the field of the C.F.S.P. to refrain from any action likely to conflict with or impede Union action, even if it is not legally obliged to apply the decision itself.

In the TFEU there are several provisions which conjugate different profiles of solidarity. Already in the Preamble solidarity is mentioned as the basis of the bond between the E.U. and "*overseas countries*".

Moreover, there is the specification of some cases where the implementation of solidarity among Member States and between Member States and the Union is explicitly provided for: asylum, immigration and external border control[13]; difficulties in the supply of certain products and resources[14]; energy[15]; terrorist attack or natural or man-made disaster of which a Member State is victim[16].

In the Charter of Fundamental Rights of the European Union a whole Title, the IV, which includes twelve articles (from 27 to 38), is entitled "solidarity". It deals with provisions that concern labour law and social security and social assistance law (articles 27-34), health and environment protection (articles 35 and 37), access to services of general economic interest (article 36) and consumer protection (article 38).

The question which arises is if this enshrinement of solidarity within the European Union and its law represents an *unicum* or if it is just an example, albeit advanced, of what is happening in international organisations and specifically in regional integration ones.

In order to try to give a first, partial, answer to such question it is appropriate to analyse the position of solidarity in the law of the regional integration organisation which, probably, represents the comparatively closest experience to what happens in Europe, the Southern Cone Common Market (or

development of mutual political solidarity among Member States, the identification of questions of general interest and the achievement of an ever-increasing degree of convergence of Member States' actions".

[13] Art. 67 TFEU: "*1. The Union… shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States…*". Similarly, see also art. 80 TFEU.

[14] Art. 122 TFEU: "*1. Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy*".

[15] Art. 194 TFEU: "*1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to: (a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and(d) promote the interconnection of energy networks*".

[16] Art. 222 TFEU: "*1. The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster...*".

MERCOSUR), although relevant differences exist between the two experiences, in particular the lower degree of integration in the Latin-American than in the European one[17].

2. The evolution of MERCOSUR Law, from free trade to solidarity economy

In order to approach in the best possible way the issue of solidarity in MERCOSUR law it seems appropriate to recall, first of all, that it was born at the beginning of the '90s of the past century (the Asunción Treaty that established it actually dates back to 1991). In that historical period, the worldwide prevailing tendency was to create economic blocs, i.e. organisations which had, as a founding idea, the free trade in goods among the members of the bloc (that, in the case of MERCOSUR, was initially composed of Brazil, Argentina, Uruguay and Paraguay[18]). For such reasons, it is convincingly argued that it is the result of an "open regionalism", of a neo-liberal mould[19], since the initial idea of MERCOSUR excluded from its agenda the social, cultural, political, productive and environmental dimensions in its integration model[20].

Therefore, the fact that in the Asunción Treaty the word solidarity is not even mentioned is not such a big surprise.

In truth, also in the Treaty establishing the European Economic Community the references to solidarity were neither many nor particularly important. It is possible to find such reference only in the premises and, furthermore, with a very particular meaning, since it concerns the relations between the Community and some of the former colonies of some Member States[21].

[17] Many papers or books are devoted to this topic. An interesting study is M. DI FILIPPO (ed.), *Organizzazioni regionali, modello sovranazionale e metodo intergovernativo: i casi dell'Unione europea e del Mercosur*, Giappichelli, Turin, 2012.

[18] Actually, nowadays all countries in South America participate in some way in MERCOSUR since, in addition to the four founding States, Venezuela joined as fifth member (it applied in 2006 and was formally admitted in 2012, although it is currently suspended from all the rights and obligations resulting from its membership, according to art. 5, par. 2, of the Ushuaia Protocol), while Bolivia, whose accession protocol was signed in 2015 by the representatives of all Member States, is still awaiting for the finalisation of the accession procedure through the ratification of the parliaments of such States. Chile, Peru, Colombia, Ecuador, Guiana and Suriname, instead, are associate States, respectively since 1996 (Chile), 2003 (Peru), 2004 (Colombia and Ecuador) and 2013 (Guiana and Suriname).

[19] In this sense see, *inter alios*, G. FERREIRA SANTOS, B. S. NASCIMIENTO SANTOS, *The principle of Solidarity in the Latin American Legal System*, in C. JIMÉNEZ PIERNAS, L. PASQUALI, F. PASCUAL-VIVES, *Solidarity and Protection of Individuals in E.U. Law*, *op. cit.*, p. 312.

[20] See INSTITUTO SOCIAL DEL MERCOSUR, *Plan Estratégico de Acción Social del MERCOSUR (PEAS)*, Tekoha, Asunción, 2012, p. 11. The document is available on Internet at the website: https://www.mercosur.int/documento/plan-estrategico-de-accion-social-del-mercosur-peas/ (in Spanish).

[21] Even less relevant, for the purposes of the present writing, is the reference to solidarity with the "*people of Berlin*", which, moreover, is not even included in the Rome Treaty *stricto sensu*, but in the "*Joint Declaration on Berlin*" attached to it.

The Rome Treaty, however, dates back to 1957, while, with regard to E.U. law, the treaty which is coeval to the Asunción Treaty is the Maastricht Treaty (indeed, it dates back to 1992), which is the actual instrument that modified the primary European Union law by introducing several references to solidarity.

In the first decade of the life of the South American organisation, however, the economic asymmetries between the different areas within MERCOSUR, instead of being reduced, had aggravated[22], with economic activity concentrated in urban centres along the São Paulo–Buenos Aires "axis"[23]. This led to a rethinking, which resulted in a true "paradigm shift", as trade became complemented by the social dimension, characterized by equity promotion and regional welfare policies[24]. Some scholars believe that such phenomenon was favoured by the change of the political situation in the MERCOSUR Member States, with the election, at the beginning of the XXI century, of progressive governments in Argentina (2003), Brazil (2003) and Uruguay (2005), in addition to the adhesion of Venezuela[25].

An important moment of such shift is the "Final Declaration"[26] of the "*I Cúpula social*", held in the Brazilian capital, Brasilia, on the 13th and 14th December 2006.

In this document -after stating the importance, in regional integration, of completing the commercial and economic dimensions with the political, social,

[22] "*La crisis social, económica y política que afectó a la región principalmente entre 1998 y 2002 puso al descubierto las limitaciones y el agotamiento de aquel modelo de desarrollo a nivel de los Estados Partes, debilitando también al MERCOSUR y a las capacidades de los Estados — encargados de llevar adelante los procesos de integración regional—, que dejaron de operar con la lógica mercantilista y burocrática hacia sus instituciones. La "nueva cuestión social" se plasmó con mayor virulencia, arrojando altos niveles de inequidad, pobreza, desempleo y exclusión social en varios países de la Región. A este proceso se sumaron transformaciones y cambios en las coyunturas regionales, identificando nuevos segmentos de la población — denominados "nuevos pobres" —, individuos y familias que se constituyeron en los principales destinatarios de las políticas sociales asistencialistas y focalizadas. De esta manera se profundizó aún más la desigualdad en la Región, afectando severamente los niveles de cohesión, equidad e integración social en los Estados de la Región*"; INSTITUTO SOCIAL DEL MERCOSUR, *Plan Estratégico de Acción Social del MERCOSUR (PEAS), op. cit.*, p. 11.

[23] On the topic see N. MELLADO, R. GAJATE, *La inclusión de la regiones en el MERCOSUR*, in *Aportes para la Integración Latino-americana*, vol. 4, n. 4, 1998, pp. 91–123, at p. 91.

[24] J. BRICEÑO RUIZ describes this "paradigm shift" in his paper *New left governments, civil society, and constructing a social dimension in Mercosur*, in B. CANNON, P. KIRBY (eds.), *Civil Society and the State in Left-Led Latin America*, Zed Books, London, 2012, p. 175.

[25] The possible relevance of the change of the political situation in the MERCOSUR Member States is discussed by T. MUHR, *South-South Cooperation and the Geographies of Latin America-Caribbean Integration and Development: A Socio-spatial Approach*, in *Antipode*, vol. 49, n. 4, 2017, pp. 843-866, at p. 855, and also by J. BRICEÑO RUIZ, *New left governments, civil society, and constructing a social dimension in Mercosur*, *op. cit.*

[26] The full text of the declaration is available on Internet, for example at the websites: https://issuu.com/secretariageralpr/docs/cupula_declaracaoport (in Portuguese) and http://consejodepaz.org.ar/declaracion-final-cumbre-social-mercosur/ (in Spanish).

labour, environmental and cultural ones, with the aim of "overcoming neoliberalism", in order to move towards a completer and more democratic MERCOSUR[27] - there is an explicit reference, in two points, to "solidarity economy". More specifically, solidarity economy is mentioned as a fundamental instrument both to achieve a model of sustainable development[28] and to build a more just society, to generate decent work and incomes, and to include the excluded populations[29].

Even if the legal value of such declaration is limited, since it consists basically of a series of recommendations to be delivered to the Presidents of the MERCOSUR Member States in occasion of their following summit, its political implications are anything but insignificant. Indeed, the declaration was signed by more than five hundred representatives of the civil society and of the governments of the five MERCOSUR Member States.

Such ideas were later effectively developed in the Strategic Plan for Social Action (PEAS), adopted in 2011 in conclusion of the Asunción summit among the Ministers and the authorities responsible for social policies[30].

In the abovementioned document it is explicitly stated that the aims of MERCOSUR were by then different from the initial ones, since the concept of a regional integration exclusively based on factors and indicators of economic and commercial growth had been overcome, and since it was necessary to complete the view of an exclusively market-oriented MERCOSUR with a strategic project which involved the social dimension[31].

The PEAS embraces the idea of "solidarity economy"[32] (together with the one of "cooperation based on solidarity"[33]). In such frame the MERCOSUR project "Social and Solidarity Economy for Regional Integration"is developed. It is aimed at countering the serious social, economic, productive and

[27] *Ibid*., § 2.

[28] *Ibid.,* § 12.

[29] *Ibid.,* § 18.

[30] The full text of the Plan can be found in INSTITUTO SOCIAL DEL MERCOSUR, *Plan Estratégico de Acción Social del MERCOSUR (PEAS), cit.*, p. 41 ff. For information about PEAS (in Spanish and Portuguese) a starting point is the dedicated page of the website of the Social Institute of MERCOSUR, at the link: https://peas.ismercosur.org/es/portada/.

[31] See INSTITUTO SOCIAL DEL MERCOSUR, *Plan Estratégico de Acción Social del MERCOSUR (PEAS), cit.*, p. 9 ff.

[32] More specifically, in Axis VI of the Plan (entitled "*Ensuring productive inclusion*") the solidarity economy is included in Directive 17, which consists exactly in promoting also solidarity economy and, as a consequence, among the priority objectives of Directive 17 itself, in which the promotion of the consumption of products and services resulting from solidarity economy is also mentioned.

[33] Its promotion, together with the exchange for the improvement of education systems, is the subject of Directive 12, included in Axis IV "Universalising education and eradicating illiteracy". On solidarity in MERCOSUR in the field of education see *infra*.

commercial asymmetries through the adoption of public policies in the field of social rights such as food, health, labour, housing, education and culture[34].

Moreover, solidarity is expressly mentioned among the key principles of MERCOSUR international cooperation policy, together with non-conditionality, consensus and mutual benefit, but always respecting the principle of non-interference in the internal affairs of other States.

This is clearly stated in a MERCOSUR legal instrument, the Decision of the Common Market Council N° 23/14 dated 16 December 2014, more precisely in art. 2 of its Annex which establishes the "MERCOSUR International Cooperation Policy"[35].

Such article gives a definition of solidarity, which is "understood as the achievement of the development goals of all participants".

It is, therefore, a purely economic meaning of solidarity, which takes undoubtedly into account the fact that within MERCOSUR there are serious asymmetries both between the different countries and between urban centres and rural areas.

Going back to the parallelism with what happens in the European Union, it is possible to highlight a relevant similarity with the amendments to the Treaty establishing the European Community introduced by the Maastricht Treaty. In particular, art. G. of the latter provides that: "*2) Article 2 shall be replaced by the following: «Article 2 The Community shall have as its task… to promote… a high degree of convergence of economic performance, a high level of employment and of social protection… economic and social cohesion and solidarity among Member States»*".

The quoted provision goes on underlining which activities of the Community will be included in the new art. 3: a policy in the social sphere; the strengthening of economic and social cohesion; a contribution to the attainment of a high level of health protection and a contribution to education and training of quality. Such concepts are further developed in the Protocol on economic and social cohesion, attached to the Maastricht Treaty itself.

The rule contained in the primary European Union law currently in force that resembles the most the notion of solidarity accepted in MERCOSUR as described *supra* is art. 174 TFEU. According to it the strengthening of the economic and social (but also territorial) cohesion is pursued through the reduction of the "*disparities between the levels of development of the various regions*" and of the "*backwardness of the least favoured regions*", with specific care for

[34] Other information on the project is available on Internet at the website: *http://www.socio-eco.org/bdf_fiche-document-5802_it.html*.

[35] The full text of the decision is available on Internet, at the following link: *https://www.mercosur.int/documento/decision-cmc-23-14/*.

rural areas, areas affected by industrial transition and regions which suffer from severe and permanent natural or demographic handicaps.

3. The FOCEM

From a financial point of view the tool created within MERCOSUR in order to implement the PEAS is the "MERCOSUR Fund for Structural Convergence", or FOCEM[36]. The fund was established with the Decision of the Common Market Council (or CMC) N° 45/04 of December 16th, 2004[37] and completed with Decision N° 18/05 of June 19th, 2005[38]. It is meant for financing programs to promote structural convergence, increasing competitiveness and promoting social cohesion, in particular within the smaller economies and the less developed regions; supporting the functioning of the institutional structure and the strengthening of the integration process[39].

Its original period of validity, according to art. 22 of Decision N° 18/05, should have been ten years from the payment of the first contribution by one of the FOCEM Member States, which happened in 2006. However, it was extended by Decision N° 22/15 of July 16th, 2015[40] for a further ten years (in this case, calculated from the 1st of January of the year following the one of the entry into force of the decision itself[41]).

The FOCEM is a tool of economic solidarity within MERCOSUR from a double point of view. First of all, it is such on a purely international level, since funds are redistributed from the more developed countries to the ones with a weaker economy. Secondly, it is such also from a "semi-statal" or, *rectius*, "semi-federal" point of view. Socio-spatially public policies are mobilised to redistribute resources from the dynamic centres in the MERCOSUR territorial space to historically marginalised zones, in order to contribute to reducing the severe social, economic, productive and commercial asymmetries between the two sides of the border, to contain the rural exodus (of especially young people), and to restrain labour exploitation.

In Decision N° 18/05, after making clear in art. 5 that the contributions of the MERCOSUR Fund for Structural Convergence Member States must be qualified as non-repayable grants, it is specified, in the following art. 6, that the

[36] For a website (in Spanish and Portuguese) specifically devoted to the FOCEM: *https://focem.mercosur.int/es/*.

[37] The full text of the decision is available on Internet, at the following link: *https://focem.mercosur.int/uploads/normativa/DEC_045-2004_ES_FondoConvergenciaEstructural-3.pdf*.

[38] The full text of the decision is available on Internet, at the following link: *https://focem.mercosur.int/uploads/normativa/DEC_0182005_ES_FE_IntyFuncFOCEMyFortalEstrctInstit-1.pdf*.

[39] Art. 1 of Decision N° 45/04 and art. 1 of Decision N° 18/05.

[40] The full text of the decision is available on Internet, at the following link: *https://focem.mercosur.int/uploads/normativa/DEC_022-2015_ES_%20Renovacion%20FOCEM-8.pdf*.

[41] Cf. art. 9 of Decision N° 22/15.

annual total of the contributions (which amounts to one hundred million dollars), must be divided among the different Member States in percentages calculated on the basis of the historical average of their GDPs[42]. As a consequence, the sum of the contributions of Brazil and Argentina amounts to the 97% of the total (respectively, 70% Brazil and 27% Argentina), while Uruguay and Paraguay only contribute, respectively, with the 2% and the 1%.

The redistributive effect is achieved through the combined provisions of this art. 6 and art. 10, according to which the resources of the FOCEM must be distributed among the Member States on the basis of the following percentages: Paraguay 48%; Uruguay 32%; Argentina and Brazil 10% each. Argentina, but especially Brazil, therefore, are net contributors, while Paraguay and, to a lesser extent, Uruguay are net beneficiaries of the program.

In practice, between 2006 and 2015, the total paid sum, amounting to 1.306 million dollars, was provided in the following way: Brazil 72.5% of the total (which corresponds to 947.5 million dollars: 647.5 as regular contribution and 300 as voluntary contribution); Argentina 19.1% (which corresponds to 249.7 million dollars); Venezuela 6.2% (which corresponds to 81 million dollars); Uruguay 1.4% (which corresponds to 18.5 million dollars) and Paraguay 0.7% (which corresponds to 9.2 million dollars)[43]; such funds were redistributed to Paraguay, 43.70% of the total, Uruguay, 29.15% of the total, and Venezuela, Argentina and Brazil at equal shares (9.05% of the total each). Such discrepancy with what the legal texts provided depends, basically on a new member State (Venezuela) joining MERCOSUR and also FOCEM after Decision N° 18/05. Moreover Brazil, because of its voluntary contribution, paid a higher percentage of what was due, even if the number of contributors had increased for the said accession of Venezuela (this should have determined, in theory, a decrease of the amount due from Brazil, as well as from the others).

What really happened in the period 2006-2015 was taken into consideration for modifying the FOCEM with Decision N° 22/15 of July 16th, 2015.

On the one hand, the fact that the members were not four, but five, has resulted, according to what is specified in art. 3 of the latter decision, both in the increase of the annual total of the contributions (which goes from 100 to 127 million dollars) and in the review of the percentages of the single countries. Accordingly, Brazil is called to contribute with 70 million dollars (which correspond to about 55.12% of the total), Argentina and Venezuela with 27 million dollars each (which correspond to about 21.26% of the total), Uruguay

[42] Moreover, art. 8 of the decision expressly provides that the MERCOSUR Fund for Structural Convergence, in order to develop the projects, can receive contributions both from third countries and from international institutions or organisms.

[43] Such data was found in C. G. ROJAS DE CERQUEIRA, *FOCEM: Evaluación sobre su desempeño y posibilidades de reforma*, OBEI/CADEP, Asunción, 2015.

with 2 million dollars (which correspond to about 1.57% of the total) and Paraguay with 1 million dollars (which correspond to about 0.79% of the total). On the other hand, because of art. 4 of the decision itself, the funds are redistributed in percentages which reflect what happened in practice. More specifically, Paraguay gets the 43.65% of the total, Uruguay gets the 29.05% and Venezuela, Argentina and Brazil each get the 9.1%.

The importance of the FOCEM is highlighted in the joint statement of the Presidents of the MERCOSUR Member States adopted in conclusion of the summit held in Montevideo on July 12th, 2013, where it is qualified as the "principal tool of solidarity within the region to fight the asymmetries" [44].

However, even if such tool actually obtained some results, it still has relevant limits.

On the one hand, it is important to remember that in its first decade of life, it approved funding for about fifty projects in various sectors, such as housing, transport, energy, productive integration, biosecurity, capacity building, sanitation and health, and education, whereby micro, small and medium community-based enterprises and cooperatives are primarily promoted[45]. Moreover, for Paraguay the MERCOSUR Fund for Structural Convergence ranges first among multilateral cooperation institutions, for Uruguay it ranges second, for Argentina it ranges fourth and for Brazil it ranges fifth[46].

On the other hand, evidence suggests that the annual contribution of the MERCOSUR members to the FOCEM is only 0.008% of their GDPs, which makes it an instrument still needing to be improved[47].

The MERCOSUR Fund for Structural Convergence also recalls similar instruments which exist in European Union Law. The reference is to what is provided by current art. 175 TFEU, according to which, in order to strengthen the economic, social and territorial cohesion in compliance with the previous art. 174 TFEU, there are also the so-called "Structural Funds", namely the European Agricultural Guidance and Guarantee Fund, the European Social

[44] See *Comunicado conjunto de los Presidentes de los Estados Partes del MERCOSUR*, Montevideo (Uruguay), 12 July 2013, § 33. The full text of the joint statement is available on Internet, at the following link: *http://antigo.itamaraty.gov.br/en/press-releases/9045-documents-adopted-at-the-summit-of-heads-of-state-of-mercosur-and-associated-states-montevideo-july-12-2013.*

[45] As highlighted by T. MUHR, *South-South Cooperation and the Geographies of Latin America-Caribbean Integration and Development: A Socio-spatial Approach*, in *Antipode*, vol. 49, n. 4, 2017, pp. 843-866, at p. 856.

[46] As pointed out by P. RODRÍGUEZ PATRINÓS, *El MERCOSUR: Nuevas formas de cooperación y coordinación política*, in B. AYLLÓN, T. OJEDA, J. SURASKY (eds.), *Cooperación Sur-Sur. Regionalismos e Integración en América Latina*, Catarata, Madrid, 2014, pp. 90-107, at p. 97.

[47] Such data is found in T. MUHR, *South-South Cooperation and the Geographies of Latin America-Caribbean Integration and Development: A Socio-spatial Approach*, *op. cit.,* p. 856.

Fund and the European Regional Development Fund[48]. In particular, the purpose of the latter is to "*help to redress the main regional imbalances in the Union through participation in the development and structural adjustment of regions whose development is lagging behind and in the conversion of declining industrial regions*", as provided by art. 176.

It can be useful to remember that the abovementioned funds were established with the Maastricht Treaty, in accordance with articles 130 A, 130 B and 130 C.

4. Solidarity among Member States in emergency

A field of European Union law where solidarity among Member States found an explicit recognition, in primary law, is the response to certain emergency situations. In particular, the reference is to what provided by art. 222 TFEU. Such article, which is the only one of Title VII, exactly entitled "Solidarity Clause", provides that the "*spirit of solidarity*" shall inspire the action of the E.U and of its Member States when one of the latter is hit by a terrorist attack[49] or is the victim of a natural or man-made disaster[50].

It is not unreasonable to state that also in MERCOSUR law there is, in such situations, a certain degree of solidarity.

With regard to terrorism, indeed, the difference between the law of the E.U. and of the Latin American organisation is not irrelevant.

In MERCOSUR, indeed, such hypothesis was taken into consideration only occasionally, in particular in the years at the turn of the century, as a reaction to the terrorist attacks which took place in that period both in the territory of a Member State (the specific reference is to the ones happened in the Republic of Argentina in 1992 and 1994 against the Argentine Israelite Mutual Association) and outside (in particular, the destruction of the twin towers in New York on September 11th, 2001). From the legal perspective this concern resulted in the adoption of the Decision of the Common Market Council N° 23/99 of December 7th, 1999, through which the "General Plan for Cooperation and Reciprocal Coordination on Regional Security Matters in MERCOSUR" was

[48] For information about such funds a starting point is the *ad hoc* page on the website of the E.U.: *https://ec.europa.eu/regional_policy/it/funding/*.

[49] Among references specifically about solidarity in E.U. Law if a Member State is the object of a terrorist attack M. DEL CHICCA, *Solidarity among Member States in case of a Terrorist Attack,* in C. JIMENEZ PIERNAS, L. PASQUALI, F. PASCUAL VIVES (eds.), *Solidarity and Protection of Individuals in E.U. Law*, *op. cit.*, pp. 27-48 stands out.

[50] Excellent papers about solidarity in E.U. Law if a Member State is the victim of a natural or man-made disaster include T. RUSSO, *Natural and Man-made Disasters: Solidarity among Member States*, *ibid.,* pp. 3-25.

established[51]; such plan repeals and replaces the previous Plan for Cooperation and Reciprocal Assistance on Regional Security, adopted with Decision of the CMC N° 6/98[52]. A specific section of such plan, the second of Chapter II, is specifically devoted to terrorism. However, according to the plan, cooperation is mainly limited to the prevention of terrorist attacks. There are measures such as the exchange of experience and information or the prompt cooperation in case of concrete risk situations, which is why a parallel with art. 222 of the TFEU is a daring attempt. Also, Decision N° 10/02 of July 5th, 2002[53], despite amending the plan precisely with regard to terrorism, does not foresee a different approach. It just improves what had already been established by Decision N° 23/99, creating for example a standard form for the exchange of information on investigations concerning terrorist activities[54].

Recently, in the framework of the 25th anniversary of the attack against the Argentinean Israeli Mutual Association (AMIA), a Presidential Declaration was adopted, reiterating the condemnation of terrorism in all its forms and the commitment of Member States to contribute to the fight against it[55]. However, such act, the political value of which cannot be ignored, adds nothing with regard to the implementation of the principle of solidarity among MERCOSUR Member States in the matter of counterterrorism.

On the other hand, there are fewer differences between the rights of the two regional integration organisations, the European and the Latin American one, when it comes to solidarity in case of disasters.

With regard to MERCOSUR first and foremost the "Additional Protocol to the Framework Agreement on the Environment of MERCOSUR on Cooperation and Assistance in Environmental Emergencies" signed by the representatives of the Member States on July 7th, 2004 in Porto Iguazù and entered

[51] See MERCOSUR/CMC/DEC. Nº 23/99, *Plan general de cooperacion y coordinacion reciproca para la seguridad regional*, Montevideo, 7 December 1999. The full text of the decision in available on Internet, for example (in Spanish) at the following link: *https://silo.tips/download/plan-general-de-cooperacion-y-coordinacion-reciproca-para-la-seguridad-regional*.

[52] See the first "*Whereas*" of the decision.

[53] MERCOSUR/CMC/DEC. Nº 10/02, *Adecuación del plan general de cooperacion y coordinacion reciproca para la seguridad regional entre los estados partes del Mercosur y la República de Bolivia y la República de Chile,* Buenos Aires, 5 July 2002. The full text of the decision in available on Internet, for example (in Spanish) at the following link: *http://www.sice.oas.org/Trade/MRCSRS/Decisions/dec1002s.asp*.

[54] See art. 5 of the Annex to the Decision.

[55] MERCOSUR, *Declaração de Presidentes sobre Terrorismo e 25° Aniversário do Atentado contra a AMIA*, Santa Fé, 17 July 2019. The full text of the Declaration is available on Internet, for example (in Portuguese) at the following link: *https://www.mercosur.int/documento/declaracao-de-presidentes-sobre-terrorismo-e-25-aniversario-do-atentado-contra-a-amia/*.

into force on April 21st, 2012, in accordance with its article 11, first paragraph[56] can be considered.

The fundamental role that solidarity plays in emergencies is recalled in the fifth paragraph of the Protocol's Preamble, which states that it is precisely in circumstances such as environmental emergencies that solidarity and good-neighbourly relations emerge. This statement recalls, indeed, the relationship between solidarity and disasters enshrined in E.U. law, specifically in article 222 TFEU.

Generally, in the Protocol "mutual cooperation and assistance" is preferred to the word "solidarity". These terms are used not only in the title of the Protocol itself, but also in the Preamble (in particular paragraphs 1, 3 and 4), as well as in the *corpus*, in articles 2, 5, 6, 8 and 9.

However, this terminological difference is not the only one between MERCOSUR law and E.U. law, nor the most important.

The scope *ratione materiae* of article 222 TFEU and that of MERCOSUR Protocol do not coincide, even though they were drafted at the same time[57].

First of all, the aim of the E.U. article is much broader, given that, as mentioned above, it concerns three cases, namely terrorist attack, natural disaster and man-made disaster, whereas MERCOSUR's Protocol concerns only environmental emergencies.

Secondly, not even the solidarity in environmental matters, which exists in both systems, coincides perfectly, having in one case to subsist in a situation of "environmental emergency" while in the other when there is a "natural disaster".

These two concepts do not correspond. The first one is defined in article 1(a) of the Protocol as follows: "*a situation resulting from a natural or anthropogenic phenomenon which is likely to cause serious damage to the environment or ecosystems and which, because of its characteristics, requires immediate assistance*". Conversely, there is no definition of "natural disaster" in article 222 TFEU. To find it, it is necessary to examine the Council Decision adopted in

[56] See MERCOSUR/CMC/DEC. N° 14/04, *Protocolo adicional al acuerdo marco sobre medio ambiente del Mercosur en materia de cooperación y asistencia ante emergencias ambientales*, Puerto Iguazú, 7 July 2004. The full text of the Protocol can be found on the Internet, for example (in Spanish) at the following link: *http://www.sice.oas.org/trade/mrcsrs/decisions/dec1404s.asp*.

[57] Actually, the solidarity clause was formally introduced into primary E.U. law in 2009 by the Lisbon Treaty. The content of today's art. 222 TFEU had though already been set in the Treaty establishing a Constitution for Europe (signed in Rome by the representatives of all Member States on 29 October 2004, but never entered into force due to the lack of ratification by some of them), albeit in two different rules, art. I-43 for its substantive aspects and art. III-329 for its procedural rules.

application of the third paragraph of art. 222[58]. Specifically, article 3 of the Decision defines a disaster as "*any situation which has or may have a severe impact on people, the environment or property, including cultural heritage*". This situation is twofold, so it can be originated from natural events or caused by human behaviour. The MERCOSUR Protocol does not take into account this last hypothesis. However, even if we consider only the first case (disaster resulting from natural events), it is clear that this case is broader in E.U. law than the one outlined in MERCOSUR from two points of view.

The first is about the fact that in the latter situation the disaster should not only be of a natural origin, but it should also cause serious damage to the environment or ecosystems, whereas the one referred to in E.U. law, although also of natural origin, triggers the solidarity clause not only if it causes serious damage to the environment, but also if it causes such damage to people or property "*including cultural heritage*".

Second, mutual assistance and cooperation is expressly provided for in the Protocol only when "immediate assistance" is required, whereas this condition is absent in E.U. law. The latter, on the other hand, limits the possibility for the Member State to activate the solidarity clause in cases where "*after having exploited the possibilities offered by existing means and tools at national and Union level, it considers that the crisis clearly overwhelms the response capabilities available to it*", as article 4 of Decision 2014/415/EU specifies.

The higher degree of solidarity provided for in E.U. law in the event of a disaster in comparison to MERCOSUR law, in addition to the material scope of application, concerns the financial element.

While the general rule laid down in article 8 of the Protocol is that the State Parties which have sought cooperation from the others shall bear the costs thereof, although a different agreement is always possible, in the Decision 2014/415/EU – and in particular in its article 5 – is specified that the Union shall also seek to provide sufficient financial resources.

The need to trigger solidarity between Member States in the event of disasters through a practical cooperation and coordination is felt as much in MERCOSUR as in the European Union. It is the reason why both the "Specialised Meeting on Socio-Natural Disaster Risk Reduction, Civil Defence, Civil Protection and Humanitarian Assistance" (or REHU) and the subsequent "Meeting of Ministers and High Authorities for Integral Risk Management of Disasters" (for what concerns the Latin American organisation) and the "Community mechanism to facilitate reinforced cooperation in civil protection

[58] See Council Decision of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause. The text of the Decision can be found on the Internet (in all the official languages of the Union) on the website: *https://eur-lex.europa.eu*.

assistance interventions" and the "Union Civil Protection Mechanism" (regarding the European Union) should be interpreted.

The REHU was established in 2009, by Common Market Decision N° 03/09 adopted in Asunción on July 24th, 2009[59], and its scope was to create "mechanisms for coordination and cooperation between national systems of risk management, civil defence, civil protection and humanitarian assistance of States Parties", as specified in its article 2. The REHU was replaced by the "Meeting of Ministers and High Authorities for Integral Disaster Risk Management" (or RMAGIR) by virtue of Common Market Decision N° 47/15 adopted in Asunción on December 20th, 2015[60], which, pursuant to its article 4, repeals Decision N° 03/09.

Once again, there is a certain similarity with E.U. law, where a first mechanism "*to facilitate reinforced cooperation in civil protection assistance intervention*"[61] was later replaced by an effective "Union Civil Protection Mechanism"[62].

The analogy includes also the fact that under both MERCOSUR and E.U. law, the Member States bear the primary responsibility for disaster prevention and management, while the competence of the regional organisation is limited to the mere coordination of Member States' activities and to the cooperation with and between them, as article 2 of MERCOSUR Decision 47/15 and article 1 of Decision 1313/2013/EU make clear. This is not a surprise, if one considers that in the field of civil protection the competence of the E.U. is only to carry

[59] MERCOSUR/CMC/DEC. N° 03/09. The full text of the Decision can be found on the Internet, for example (in Spanish) at the following link: *http://www.sice.oas.org/trade/mrcsrs/decisions/DEC0309_s.pdf*. According to its article 4, this is a Decision that does not need to be incorporated into the legal systems of the MERCOSUR Member States, because it "*regulates aspects of the organisation or functioning of MERCOSUR*".

[60] MERCOSUR/CMC/DEC. N° 47/15. The full text of the Decision can be found on the Internet, for example (in Spanish) at the following link: *http://www.sice.oas.org/Trade/MRCSRS/Decisions/DEC_047_2015_s.pdf*. Neither this Decision needs to be incorporated into the legal systems of the MERCOSUR Member States, as provided for by in its article 5.

[61] Established by Council Decision N° 2001/792/EC, Euratom of 23 October 2001. T. RUSSO, *Natural and Man-made Disasters: Solidarity among Member States*, *op. cit.*, p. 13 and p. 14 is a convenient reference for the legal basis of this Decision and that of the subsequent Decision N° 1313/2013/EU: "*The legislative reference was article 3(f) TEC which included, among the actions that could be taken by the EC to achieve its purposes, the adoption of measures in the field of civil protection. This occurred in accordance with different treaty provisions, such as those concerning the environment, 52 as well as article 308 TEC. On the basis of the latter article, the Council Decision 2001/792/EC, Euratom 53 established a Community Civil protection Mechanism to «… facilitate reinforced cooperation between the Community and the Member States in civil protection assistance intervention in the event of major emergencies, or the imminent threat thereof». Thanks to the Lisbon Treaty, civil protection has now a proper legal basis in article 196 TFEU which merely encodes the practice developed on the basis of the so-called disaster management cycle: prevention, preparedness and response to deal with disasters both inside and outside Europe.*".

[62] Established by Decision N° 1313/2013/EU of the European Parliament and of the Council of 17 December 2013.

out actions intended to support, coordinate or supplement the actions of the Member States, as expressly provided for by Article 6(f) TFEU. As better specified in article 196 TFEU, the "*cooperation between Member States*" is at the core of the system and the E.U. action is limited to supporting and supplementing that of the Member States and to promoting *"rapid and effective operational cooperation within the Union*", since the possibility of internal harmonisation of the legislation on the matter by the E.U. is expressly excluded[63].

The difference between the two regional systems lies, however, in the fact that while in MERCOSUR the activity of coordination and cooperation is entrusted to a body in which the representatives of all the States part of the bloc sit – the Meeting of Ministers and High Authorities for Integral Risk Management of Disasters, which is a subordinate body of the Common Market Council, in accordance with the provisions of article 1 of Decision 47/15 – in the European Union this function is entrusted to the European Commission, i.e. the institution composed of individuals not representing any Member State and delegated to promote the general interest of the Union, not of the individual States. In accordance with the requirement of Article 7 of Decision N° 1313/2013/EU, the mechanism created within the E.U. is also more structured and further analysed. This results, *inter alia*, from: the establishment of the "Emergency Response Coordination Centre" (or ERCC)[64]; the existence of a "Common Emergency Communication and Information System", or CECIS, managed by the Commission and ensuring communication and information exchange between the ERCC and the contact points of the Member States; certain operational powers attributed to the Commission. These include setting up and managing the capacity to mobilise and deploy expert teams, setting up and maintaining the capacity to provide them with logistical support, as well as facilitating the coordination of the pre-positioning by Member States of disaster response capacities within the Union. Compared to these, the functions attributed to RMAGIR by article 2 of Decision 47/15 seem to be of a more general and less penetrating nature. They consist in defining priorities for integrated disaster risk management, proposing cross-border sub-regional policies in this area and finally promoting the creation of an *ad hoc* platform for integrated disaster risk management.

Both the European and South American mechanisms are relatively broad in scope.

[63] A stimulating interpretation of this exclusion is provided by G. GATTINARA, *Art. 196 TFUE*, in A. TIZZANO (ed.), *Trattati dell'Unione europea*, Giuffrè, Milan, 2014, p. 1668. The author considers that the major reasons are the different traditions of the Member States in the field of civil protection and the fact that the control of the territory is part of the true essence of the State.

[64] See art. 7 Decision N° 1313/2013/EU, which also specifies that: "*The ERCC shall ensure 24/7 operational capacity and serve the Member States and the Commission in pursuit of the objectives of the Union Mechanism*".

Specifically, as far as MERCOSUR law is concerned, while the scope of the "Additional Protocol to the Framework Agreement on the Environment of MERCOSUR on Cooperation and Assistance in Environmental Emergencies" is limited to environmental emergencies, as explained above, the second recital of Decision 47/15 explicitly refers to "*disasters, whatever their origin, which cause serious human, social and economic loss*". On the other hand, the breadth of the notion of disaster underlying the activation of the E.U. Civil Protection Mechanism appears from practice, due to the extreme heterogeneity of the cases in which it has been used[65].

Both the REHU and the RMAGIR undoubtedly constitute an application of the principle of solidarity in MERCOSUR law, although this has not been made clear in Decisions 03/09 and 47/15: only in Decision N° 1313/2013/EU solidarity is expressly mentioned[66] both in the Preamble – in particular in recitals 1 ("*The European Union should promote solidarity and should support, complement, and facilitate the coordination of Member States' actions in the field of civil protection*") and 5 ("*The Union Mechanism constitutes a visible expression of European solidarity*") – and in the body of the Decision, in article 1, paragraph 3 ("*The Union Mechanism shall promote solidarity between the Member States through practical cooperation and coordination of activities*"). This is not the case of MERCOSUR Decisions. This does not detract, indeed, from the fact that elements such as transboundary sub-regional disaster risk management policies based on national realities contributing to disaster risk management, provided for in Article 2 of Decision 47/15, are an expression of solidarity among MERCOSUR Member States in the field of environmental disasters.

5. Migrations and solidarity

In regional integration organisations' normative framework on migration, a distinction is usually made between migrants moving from one Member State of the organisation to another and third-country nationals arriving in the territory of a Member State. Generally speaking, from a legal point of view, migration between Member States tends to be much easier than migration from third countries. If this is undoubtedly true for the European Union, whose law

[65] "*It was activated several times to face disasters very different from each other, ranging from floods, earthquakes, forest fires, flash floods and landslides, oil spill, ammunition blast, tropical cyclone, storm, armed conflict, terrorist attack, typhoon, tsunami, severe respiratory infection (H1N1), volcano eruption, potential tailing dam collapse, Haiti cholera outbreak, the Ebola outbreak, etc. Later, it was adopted for the civil unrest in Libya and for the current refugee crisis in Europe*"; T. RUSSO, *Natural and Man-made Disasters: Solidarity among Member States, op. cit.*, p. 13.

[66] K. CEDERVALL LAUTA, *Disaster Law*, Routledge, New York, 2015, p. 89 describes the E.U. Civil Protection Mechanism as "*the short-term instrument for the realisation of the solidarity clause*". On the same fourth recital of Decision 1313/2013/EU though it is clearly stated that: "*The Union Mechanism should also contribute to the implementation of Article 222 of the Treaty on the Functioning of the European Union (TFEU), by making available its resources and capabilities as necessary*".

allows a very wide freedom of movement and establishment to nationals of any Member State in any other Member State – also thanks to the existence of a citizenship of the Union which is additional to that of the Member States – this is also true, to a certain extent, in MERCOSUR law, although there are considerable differences with the E.U. normative framework.

The double application of the principle of solidarity in the two particular cases is different, due to their specific nature. In the first case (intra-organisation migration), the question is whether and to what extent the principle is applied in relations between the host State and nationals of other Member States who are on its territory[67]. In the second case (migration from third States), on the contrary, the degree of solidarity between Member States must be verified in particular in the management of refugees and irregular migrants[68].

In MERCOSUR law, with respect to the first of these two issues, it should be noted that there has been a sort of evolution[69]. Originally, the establishment of nationals of one Member State in the territory of another did not seem to be one of the organisation's priorities. In the Asunción Treaty, which is strongly based on free trade, the movement of persons is essentially seen as the necessary complement to the free movement of capital, goods and services within a larger and more efficient regional market. However, this issue was addressed after, also at a regulatory level. The first step in this direction was already taken in the 1994 Ouro Preto Protocol, but as it was aimed at the establishment of a customs union, focused on the free movement of goods and capital, so it deals only with the movement of workers as factors of production. A milestone in the path of solidarity between the citizens of a MERCOSUR Member State and another Member State, the host State specifically, is the Multilateral Agreement on Social Security, approved by Common Market Decision N° 19/97 adopted in Montevideo on December 15th, 1997[70]. The latter transposes into a legal text the declarations of the Member States on the necessary equality of rights between migrant workers of one MERCOSUR country and the nationals of

[67] Suggestions for those interested in reading further on the application of the principle of solidarity to citizens of a E.U. member State in other member States include my own paper L. PASQUALI, *The entitlement of migrant Union citizens to social assistance in the host Member State: which kind of solidarity?,* in C. JIMENEZ PIERNAS, L. PASQUALI, F. PASCUAL VIVES (eds.), *Solidarity and Protection of Individuals in E.U. Law, op. cit.*, pp. 51-91.

[68] Many papers or books are devoted to migration and E.U. law. Relevant publications include B. JONES, *EU common policy on asylum, irregular migration and external border control and solidarity between Member States*, *ibid.*, pp. 203-215.

[69] The same happened in E.U. law. See L. PASQUALI, *The entitlement of migrant Union citizens to social assistance in the host Member State: which kind of solidarity?*, *op. cit.,* p. 53 ff.

[70] MERCOSUR/CMC/DEC. N° 19/97. The full text of the Decision can be found on the Internet, for example (in Spanish) at the following link: *http://www.cartillaciudadania.mercosur.int/oldAssets/uploads/DEC_019-1997_ES_AcuSegSocial.pdf.* As specified in article 4, this is a decision that does not need to be incorporated into the legal systems of the MERCOSUR Member States, as it "*regulates aspects of the organisation or functioning of MERCOSUR*".

another MERCOSUR country and the harmonisation of the rules on worker mobility.

For the purposes of this analysis, the importance of this agreement lies in the fact that it adopts rules governing social security relations between MERCOSUR member States, as expressly stated both in the sole recital of the decision and in the Preamble to the agreement itself. The aim is to guarantee the right to social security benefits to nationals of a MERCOSUR country who reside and work in another Member State. The key provision is article 2, which provides that workers who are nationals of one Member State and who work or have worked in another Member State shall enjoy the same social security rights of the nationals of the latter country and shall be subject to the same obligations. These rights are also extended to their family members and assimilated persons[71]. The exact scope therefore depends on the domestic legislation of the host state, as set out in article 3, covering both cash benefits and health benefits.

While there is no doubt that these rules require host States to entitle social benefits to certain nationals of other Member States, it is equally true that this obligation is not the consequence of the application of a general principle of solidarity between the nationals of a host MERCOSUR country and the nationals of the other States belonging to the regional organisation, but rather a mere corollary of the free movement of workers.

This type of solidarity is the easiest to achieve, insofar as there is a link between the scope of equal treatment with nationals of the host state enjoyed by migrant workers and their role in the economy of the latter country.

In the light of the connection between solidarity and community, the right of an individual to social benefits depends essentially on his right to claim membership in a specific solidarity community. In general, two arguments are used to claim this membership: nationality or economic contribution[72]. The right to social benefits of nationals of other Member States in the host state, as outlined in the 1997 Agreement, is based on this second criterion, namely economic contribution. From a certain point of view, this can be considered as "natural" since, while it is true that membership of a solidarity community is often and primarily a matter of nationality, it is also true that it is easier to accept as members of a given solidarity community those who, while not having the same nationality as the other members of the group, nevertheless make an economic

[71] These social benefits, according to article 6, shall in principle also be provided to workers temporarily posted from one MERCOSUR country to another, the right being extended, even in this case, to their family members and assimilated persons.

[72] Links between community and solidarity are explored by M. DOUGAN, E. SPAVENTA, "*Wish You Weren't Here…": new models of social solidarity in the European Union*, in M. DOUGAN, E. SPAVENTA (eds.), *Social Welfare and EU Law*, Hart Publishing, Oxford and Portland, 2005, p. 184.

contribution to public resources. And this is what migrant workers who are nationals of another Member State actually do in the host country.

As explained above, however, the right to enjoy the same social benefits of the host Member State nationals is not only granted to migrant workers who are nationals of another MERCOSUR country, but also to their family members and assimilates.

Since the latter do not *stricto sensu* make a direct economic contribution to the public resources of the host country, this might seem to be an exception to the principle that limits the allocation of social assistance in the host state exclusively to those who can claim membership of the solidarity community on the basis of their nationality or the economic contribution they make to it.

But, actually the family members of workers (as well as their assimilates) are, by definition, dependent on workers, unless they work themselves. In this last case, however, they would fall into the category of workers and would therefore belong to the solidarity community by virtue of their economic contribution to it. If, on the other hand, they do not work, they are basically considered by MERCOSUR law as a kind of "extension" of their family workers. The mere fact that workers contribute to the welfare system of the host Member State may justify the participation of family members (and assimilated persons) in that solidarity community, insofar as they contribute, albeit indirectly (i.e. thanks to the contribution of the worker on whom they depend), to that welfare system.

The next normative act that constitutes a further important step forward in the process of harmonisation of migration policies among MERCOSUR Member States[73] is the "Residence Agreement" signed in Brasilia on December 6th, 2002[74] (actually signed not only by MERCOSUR Member States, but also by Bolivia and Chile) and entered into force in 2009[75] following ratification by all States Parties, pursuant to article 14. This treaty effectively gives the nationals of each State party the right to establish in the territory of other contracting States[76], obtaining a temporary residence for a period of up to two years under article 4, which can subsequently be made permanent by virtue of article 5.

[73] See A. MARGHERITIS, *Piecemeal regional integration in the post-neoliberal era: Negotiating migration policies within Mercosur,* in *Review of International Political Economy*, n. 3, 2013, pp. 541-575, at p. 546.

[74] The full text of the Agreement can be found on the Internet, for example (in Spanish) at the following link: *https://www.mercosur.int/documento/acuerdo-residencia-nacionales-estados-partes-mercosur-bolivia-chile/*.

[75] L. CULPI, A. E. PEREIRA, *The Argentine Role in the Promotion of Migration Policy in Mercosur (1991–2014)*, in *Fédéralisme-Régionalisme*, vol. 16, 2016, p. 9, observes that: "*The document was implemented seven years after its creation, revealing the bloc's intergovernmental character as an obstacle.*".

[76] The same authors point out that "*This superseded Mercosur's commercial logic, which understood mobility only in relation to immigrant workers as a productive factor. The RA identified immigrants as*

In addition, under article 9, they enjoy the same "civil, social, cultural and economic rights and freedoms" of host States nationals, with equal treatment being provided for in the application of labour law, particularly as regards wages, working conditions and social security, and, for their children, access to education[77]. What is granted by this rule, however, is a minimum threshold that MERCOSUR law attributes to nationals of one Member State who migrate to the territory of another, since, by virtue of article 11, the rules of national law of the individual States that may be more favourable apply.

Conversely, the aforementioned right of residence (whether temporary or permanent) may be subject under the domestic law of the host State to the payment of a "service tax", pursuant to articles 4(g) and 5(e) respectively. In addition, permanent residence is further subject to proof by the applicant that he has lawful means of subsistence for himself and his cohabiting family group, as specified in article 5(d).

It is precisely the legitimacy of a tax that the host State may decide to impose on nationals of other Member States that constitutes an important difference, as regards the boundaries of solidarity, with respect to E.U. law. As is well known, a tax that an E.U. Member State imposes only on nationals of other E.U. countries is considered unlawful under E.U. law in light of the principle of non-discrimination between all those who enjoy European citizenship[78]. While in the European Union the limit to solidarity between the host country and the nationals of other Member States is the "*unreasonable burden*"[79], in MERCOSUR law the problem seems to be resolved, since the possibility to

citizens with numerous reasons for migration, such as students, religious leaders, or family members"; *ibid.*

[77] Moreover, "*El acceso a las instituciones de enseñanza preescolar o a las escuelas públicas no podrá denegarse o limitarse a causa de la circunstancial situación irregular de la permanencia de los padres*".

[78] For example, the Court of Justice concluded that a surcharge on enrolment in the universities of a Member State imposed on students who were nationals of other E.U. countries was unlawful under E.U. law. See CJEU, 2.2.1988, case 24/86, *Blaizot*, § 24. In this case, the seventeen applicants were all French nationals who had obtained residence permit to stay in Belgium as students in order to study veterinary medicine at University. However, they had to pay for each academic year, in addition to the registration fee, a surcharge, known as the *minerval,* as a personal contribution to expenses, from which Belgian students were exempt. In this judgment the Court applied to universities a principle it had already stated in relation to a higher institute of artistic education (CJEU 13.2.1985, Case 293/83, *Gravier*, § 25). Suggestions for those interested in reading further on this topic include my own paper L. PASQUALI, *L'accesso all'insegnamento superiore nello spazio giuridico europeo*, in E. CATELANI, R. TARCHI, *I diritti sociali nella pluralità degli ordinamenti,* Editoriale Scientifica, Napoli, 2015, p. 89 ff.

[79] References on the limits to solidarity between the host country and the nationals of other Member States in E.U. law include my paper L. PASQUALI, *The entitlement of migrant Union citizens to social assistance in the host Member State: which kind of solidarity?, op. cit.*, p. 59 ff.

impose such a tax allows each State of the bloc to reduce the burden, avoiding it to become "overwhelming"[80].

While a certain degree of solidarity seems to be present in MERCOSUR law with regard to "internal" migration, i.e. migration of nationals from one Member State to another, the issue is different with regard to migrants from third countries.

Although the issue has been on the MERCOSUR agenda[81] since the first years of this century, the chosen approach does not seem to be oriented toward the sharing of problems among Member States on a solidarity basis, but rather on the coordination and, at best, the harmonisation of the migration policies adopted by them.

This seems to be evident from an examination of the instruments adopted by MERCOSUR to address the phenomenon.

The first instrument to consider is the Migration Forum of MERCOSUR, which was created in 2004 in the framework of the MERCOSUR Summit of Ministers of the Interior, composed of Member States' Ministers of Labour and officials from national migration authorities. It is within this body, which meets quarterly, that the main MERCOSUR decisions on migration are taken. In addition, during the same period, the Forum meeting held in the Chilean capital in May 2004 adopted the Santiago Declaration on Migration Principles[82]. The text of such Declaration made clear that it is aimed at coordinating migration policy in the bloc: the first paragraph of the Preamble states that "the migration issue in the region should be addressed through open multilateral dialogue mechanisms as a way of strengthening the integration process", while in the fifth paragraph of the Preamble is written that "it is the responsibility of the States Parties and Associated States of MERCOSUR to work in a coordinated manner in combating and preventing trafficking in persons and abuses

[80] A writing by A. MARGHERITIS, *Piecemeal regional integration in the post-neoliberal era: Negotiating migration policies within Mercosur*, *op. cit.*, p. 547 describing the genesis of article 9 seems to confirm this hypothesis: "*this agreement was the result of a counter-proposal of Argentina to Brazil's suggestion to implement a simultaneous amnesty; the Argentine delegation – aware of the implications of increasing immigration– considered it necessary to address the roots of the problem, that is, to create legal channels to end with irregular situations, which otherwise might become an overwhelming burden for the national government*".

[81] The role played by Argentina in this process is debated by: J. NICOLAO, *Las migraciones en la agenda del MERCOSUR. El rol de Argentina en el Foro especializado migratorio*, in *Revista electrónica de estudios internacionales*, 2015, pp. 1-32; L. CULPI, A. E. PEREIRA, *The Argentine Role in the Promotion of Migration Policy in Mercosur (1991–2014)*, *op. cit.*; A. E. PEREIRA, J. B. GLAUCIA, A. L. CULPI, H. FIALHO PESSALI, *A governança facilitada no Mercosul: transferência de políticas e integração nas áreas de educação, migração e saúde*, in *Revista de administração pública,* 2018, pp. 285-302, at p. 289.

[82] MERCOSUR, *Declaración de Santiago sobre Principios Migratorios*, Santiago de Chile, 17 May 2004. The full text of the Agreement can be found on the Internet, for example (in Spanish) at the following link: *https://www.acnur.org/fileadmin/Documentos/BDL/2013/9083.pdf?view=1*.

related to illegal immigration in the region". Similarly, the actual text of the Declaration affirms: the need to develop tools for effective police and judicial cooperation in order to combat smuggling of migrants and trafficking in persons and children (Declaration IX), the importance of the use of coordination and cooperation mechanisms among migration bodies (Declaration XII) and the need for a multidisciplinary and multilateral approach to the migration phenomenon (Declaration XII).

This is confirmed by the analysis of the issues addressed in the meetings of the MERCOSUR Migration Forum, ranging from the harmonisation of Member States' migration legislation[83], the coordination of their migration policies[84], to the idea of developing a MERCOSUR Statute for refugees[85] and a MERCOSUR Agreement to standardise migration procedures[86].

Comparing MERCOSUR law with E.U. law on this issue[87], it can be concluded that, although MERCOSUR law is on the path towards the realisation of some of the goals already achieved by E.U. law – specifically the "*common policy on asylum, immigration and fair treatment of third-country nationals*" provided for under article 67, second paragraph, TFEU – there is no reference to the need to base the issue on principles of "*solidarity and fair sharing of responsibility between Member States, including its financial implications*", which are expressly provided for in primary E.U. law (in particular by art. 80 TFEU, but also by the same art. 67, second paragraph).

Scholars rightly attribute MERCOSUR's insufficient action in the field of immigration to its markedly intergovernmental character, which has been and continues to be an obstacle to a truly integrated approach to the issue[88]. In my

[83] "*In Mar del Plata, at the March 2006 meeting, the Argentine delegation again suggested a change to migration standards for the member states to ensure effective harmonization. At the May 2006 meeting, Argentina presented a paper demonstrating the reasons for harmonizing the legislation among the member states... In March 2007, Uruguay presented its new migration law, which was being studied by the Mercosur Parliament. Uruguayan migration laws were emulated from the Argentine migration laws, which is an example in this matter*"; L. CULPI, A. E. PEREIRA, *The Argentine Role in the Promotion of Migration Policy in Mercosur (1991–2014)*, *op. cit.*, p. 10, "*Observa-se, também, que a atuação mediadora do Mercosul provocou transferência entre a lei de migrações da Argentina e a Nova Lei de Migrações brasileira no 13.445/2017*"; A. E. PEREIRA, J. B. GLAUCIA, A. L. CULPI, H. FIALHO PESSALI, *A governança facilitada no Mercosul: transferência de políticas e integração nas áreas de educação, migração e saúde*, *op. cit.,* p. 291.

[84] "*Since 2010, increased concern has been voiced regarding coordinating immigration policy among the member states by promoting courses on International Refugee Protection*"; L. CULPI, A. E. PEREIRA, *The Argentine Role in the Promotion of Migration Policy in Mercosur (1991–2014)*, *op. cit.,* p. 10.

[85] This issue was addressed, for example, at the August 2012 Meeting.

[86] This issue was addressed in the 2011 and 2013 Meetings.

[87] On E.U. law see, *ex plurimis* B. JONES, *EU common policy on asylum, irregular migration and external border control and solidarity between Member States*, *op. cit.*

[88] See L. CULPI, A. E. PEREIRA, *The Argentine Role in the Promotion of Migration Policy in Mercosur (1991–2014)*, *op. cit.*, p. 12, who also specify that: "*The problems surrounding communitarian*

opinion, this same element could be at the basis of the aforementioned difference in the field of solidarity with what has been decided in the European Union where, as we know, although there are still elements of an intergovernmental character, the prevailing aspect is the "Community" one.

6. Concluding remarks

Solidarity has been present for many years in the national legal systems of the four MERCOSUR Member States[89]. In Argentinian, Brazilian, Paraguayan and Uruguayan public and private law systems is possible to find references to solidarity. Similarly, references to solidarity can be found in many international treaties and declarations signed by the countries of the region since the 19th century. However, at the foundation of the regional organisation, solidarity was not part of its law and this was the case for the first decade of its life, until the end of the last century.

However, for reasons better explained in the introductory paragraph above, things started to change at the beginning of this century. Solidarity, which appeared in MERCOSUR law through the concept of solidarity economy, has subsequently and gradually been extended to other fields. In particular, this paper analyses whether, how and to what extent solidarity exists in specific areas, such as emergency situations or migration.

In the light of the study carried out, it can therefore be concluded that, today, although the references to solidarity contained in MERCOSUR primary and secondary law are not many, it does not seem correct to affirm that there is no solidarity, deriving from MERCOSUR law, between the Member States of the organization and their citizens. On the contrary, it seems to be true that the notion of solidarity, although limitedly mentioned in MERCOSUR positive law, is indeed present and has been implemented in the South American regional organisation.

However, if one compares the degree of solidarity existing in MERCOSUR law, its extent and its depth, with that existing in the law of the regional organisation that, in a certain sense, is the touchstone for comparison on a global

decisions persist because of weak institutions combined with conflicts among member states". Other scholars point out that: "*Na questão migratória no Mercosul ocorre, essencialmente, uma troca de informações baseada na governança facilitada, pois os Estados estabelecem intercâmbio de informações e conhecimentos nesses debates, a exemplo do Programa Pátria Grande argentino, mas não são impelidos a transferir a política. Os Estados mantêm sua soberania, transferem apenas as políticas quando as consideram vantajosas e, por esse motivo, adéquam-se voluntariamente às políticas e às decisões regionais*"; A. E. PEREIRA, J. B. GLAUCIA, A. L. CULPI, H. FIALHO PESSALI, *A governança facilitada no Mercosul: transferência de políticas e integração nas áreas de educação, migração e saúde*, *cit.*, p. 292.

[89] For information about the principle of solidarity in the Latin American Legal system a starting point is G. FERREIRA SANTOS, B. S. NASCIMIENTO SANTOS, *The principle of Solidarity in the Latin American Legal System, op. cit.*

level, i.e. the European Union, it is easy to find out that such degree of solidarity is much lower in the South American bloc.

In order to understand the reason for this, it is worth remembering that MERCOSUR institutional structure – in contrast to that of the European Union, which is essentially of a community nature[90] – is totally intergovernmental[91]. As it is well known, the Ministers of Economy and Foreign Affairs of the Member States played the main role in MERCOSUR. The two main decision-making bodies of MERCOSUR are the Common Market Council and the Common Market Group. The first one is composed of the Ministers of Foreign Affairs and the Ministers of Economic Affairs of the Member States and is the highest decision-making body within MERCOSUR, being responsible for defining the political strategies of the bloc and for promoting and establishing the common market. The second one, on the other hand, constitutes the executive body of MERCOSUR and it is composed of representatives of the individual countries belonging to the respective Ministries of Foreign Affairs, Economy or Central Banks. The normative acts adopted by the two bodies (decisions and resolutions respectively) are not directly applicable in the Member States but must be transposed internally.

The absence of a MERCOSUR Court of Justice[92] is a further element that may help to compose the picture aimed at providing an explanation for the aforementioned difference between the law of the South American organisation and that of the European Union in the field of solidarity. The fundamental role that the C.J.E.U has played in the process of European integration in general[93] and in the application and development of the principle of solidarity in particular[94] has not been played by anyone in MERCOSUR, where this absence

[90] References on the institutional structure of the European Union can be found on any European Union law handbook.

[91] References on the institutional structure of MERCOSUR can be found on any MERCOSUR law handbook. Among these handbooks, in English, M. T. FRANCA FILHO, L. LIXINSKI, M. B. OLMOS GIUPPONI (eds), *The law of MERCOSUR,* Hart Publishing, Oxford, 2010, in particular Chapter 3, A. DREYZIN DE KLOR, *The Legal-Institutional Structure of MERCOSUR,* p. 29 ff. stands out. Without attempting to carry on a full analysis of the reasons for this different structure here, it is worth noting that MERCOSUR, having been established more recently, has had a shorter development time than the European regional organisation.

[92] Although some attempts to establish it have been carried on. References on these attempts include the following: C. CASTRO, *La solución de controversias entre Estados miembros del Mercosur*, in M. DI FILIPPO, *op. cit*., p. 123.

[93] Notable books dealing with the role of ECJ in European integration process include M. MADURO, *We the Court: The European Court of Justice and the European Economic Constitution,* Bloomsbury Publishing, London, 1998; A. STONE SWEET*, The Judicial Construction of Europe,* Oxford University Press, Oxford, 2004.

[94] Accounts of the role of the ECJ in the application and development of the principle of solidarity include my paper L. PASQUALI, *The entitlement of migrant Union citizens to social assistance in the host Member State: which kind of solidarity?*, *op. cit.*

of "centralised" judicial solutions may have had a certain relevance also in the field of solidarity.

This link between integration among States at a regional level and the strengthening of the principle of solidarity seems understandable if one considers that the concepts of solidarity and community are closely interconnected and the right to enjoy the solidarity of others is, in general, normally closely related to the right to claim membership of a specific solidarity community[95]. Evidently, the more integration between States proceeds, the greater the creation of a real community is possible and consequently the easier and deeper solidarity tends to be.

Not to mention the fact that increasing integration between States follows the path from mere intergovernmental organisation to confederation or even federation. For example, the experience of the European Union is undoubtedly already beyond the first stage (i.e. that of pure and simple international organisation), even though it is certainly not (yet) a confederation or a federation of States.

Federalism has evolved in the field of the division of competences between federal States and central government. Alongside the "classic" models of dual federalism and cooperative federalism, a model of "solidarity-based" federalism has emerged in more recent times. While in the former (dual model) the central government could only act when it had exclusive powers and in the latter (cooperative) even when it had competing powers, in the solidarity model it can act to support, coordinate and supplement the action of the federated states, in a spirit of solidarity.

This initial comparison between MERCOSUR law and E.U. law, albeit limited to only two regional organisations, however important they may be, makes it possible to contemplate a further evolutionary line in contemporary international law, in which the law of cooperation has overlapped with the law of coexistence, which constituted the core of classical international law. Indeed, it does not seem far-fetched to assume that we are facing a gradual shift from the current law of cooperation towards a law of solidarity, and that the keystone is the increasing integration between States, specifically at the regional level.

[95] The right to claim membership of a specific solidarity community is debated by M. DOUGAN, E. SPAVENTA, *op. cit.*