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Editorial

“If you have ten thousand regulations you destroy all respect for the law.”

Wiston Churchill

Rafael Tamayo Franco

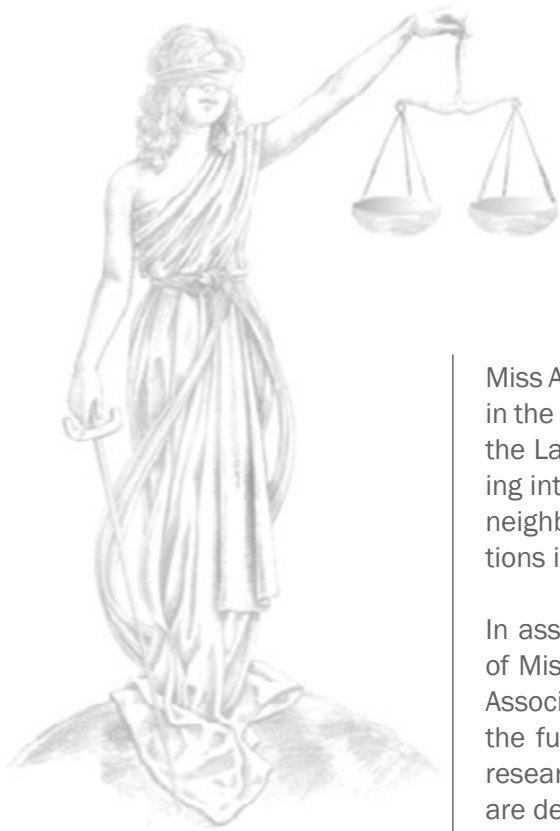
International Law Coordinator
EAFIT University

With the second edition of EAFIT Journal of International Law we close our first year of activities. It has been a time full of challenges and success. We are now registered in the Colombian official database for electronic publications. We ought to thank the Law School and the Research Division of EAFIT University for their support.

The last year of the XXI century's first decade has been full of events that are very significant for International Law: Australia, Japan, Burkina Faso, Costa Rica, Nicaragua and Niger are some of the States involved in cases before the ICJ; Israel, US and North Korea still undergo military tensions; UN, EU, WTO and ASEAN are currently some of the most active organizations in economic, social and political issues. Although the international system evolves and the creation of rules proliferates, the consequence of Mr Churchill quote is still accurate in terms of the importance of a legal system based on principles. Thus, publications like ours observe and comment the principles behind the current dynamics.

For this edition we received an important number of submissions. They included graduate and undergraduate students, professors from Colombian universities and other universities in Latin-American. The outcome of the selection is rewarding as the publication reveals.

Professor Calle-Cook wrote an article on “International Trade Law and Emerging Trade-Related Issues: The case of Animal Welfare Concerns” based in her research experience in Switzerland and Colombia. The text deals with the narrow relationship between international trade and other topics less commented in International Law.



Miss Ana Maria Guerrero wrote the article “Does Colombia participate in the Law of the Sea?” where she describes traditional institutions of the Law of the Sea and the Colombian approach to the system. Taking into consideration the cases presented to the ICJ by Colombian’s neighbors, the document profiles some clues of the Colombian actions in the matter.

In association with EAFIT Center for Asia-Pacific Studies, the article of Miss Melissa Eusse on “The Process of Institutionalization of the Association of Southeast Asian Nations: Evolution and Prospects for the future in East Asian Regionalism”, is the result of a consistent research process that builds upon her recent experience in Asia. We are delighted to publish her considerations on ASEAN.

Finally, fulfilling the requirement of our readers we ask Mr. Felipe Pino to translate into Spanish his article on “NATO in Kosovo: operation allied force viewed from the core principles of jus in bello”. The article was published in our first volume and it has been subject of study in International Law courses this year. Thus, with the Spanish version more students from the Law School and other universities will have access to his analysis about the complex situation Kosovo went through.

I would like to thank all the authors and in particular the readers of our publication and encourage them to share their comments with us.



International Trade Law and emerging trade-related issues:

The case of Animal Welfare Concerns

✉ By: María Alejandra Calle-Cook

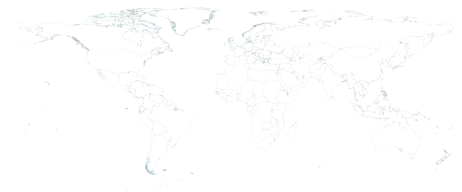
Abstract

This article aims to address the main concerns on the plausibility (legality and legitimacy) for WTO Member States when adopting trade related measures (mandatory ecolabeling schemes). Such measures are intended to enhance or to provide animal welfare regulations in the course of trade, especially in the context of the WTO covered agreements, like in the case of GATT, the agreement on Sanitary and Phyto-sanitary measures and the agreement on Technical Barriers to Trade. This article is also intended to identify the main forces and challenges beyond market driven initiatives related to labeling animal welfare standards, considering the fact that this bundle of concerns are mostly based on ethologic and veterinary criteria, and also taking into account that they are subject to ethical based analysis, specially dependent on socio economical structures and cultural values that play a decisive role when deciding if animal welfare (or even compassion to certain animals) has a room in domestic policy and then in trade politics.

Key words

International Trade Law, International Animal Welfare Standards, Eco-Labeling, Trade Related Measures, Trade Policy.

The relation between ethical issues and trade remains as one of the most important challenges not only for domestic decision-making but for the stability and predictability of the multilateral trading system. Nature and biodiversity lost its ancient divinity in order to be treated as goods and raw-material to trade with. The mere intent of protecting domestic “natural resources” has its consequences under the trading system, since globalization and the presence of supply chains are intrinsically dependent of nature as the main source of trade. In this context, animals are not an exception, as a matter of fact, trade on animal products is an important component of international trade and dispute resolution under the WTO covered agreements.



According to Weiss, even more is expected of the contemporary world trading system for which the WTO provides the common institutional framework and its main negotiating forum increasingly, that system intersects with issues directly affecting peoples' lives, such as investment and competition policies, environmental and development policies. Human rights, labor, standards, health, animal welfare, distribution of resources, ethical issues, and even national security. All these issues are raised with 'sovereignty of purpose' by particular interest groups seeking regulatory intervention, unconcerned about possible 'limits to the growth' and utility of such activity in the global economy.¹

Many trade related issues are strongly related to social and cultural identity. Recent trade disputes dealing with food (use of artificial growth hormones in beef production and application of biotechnology –GMOs) are particularly grounded in the cultural perceptions and social meaning of food (resistance towards artificial growth hormones and GM-food is in this sense not strictly science based but also culture based).² In the same way, animal welfare standards or animal-cruelty awareness among consumers is deeply enrooted in culture and socio economical realities. Thus, if such values (concerns) exist in a given society, citizens (consumers and taxpayers) have the legitimacy to demand governmental intervention in order to protect their concerns even if third countries expectations related to trade are at stake.

In this sense, the basis of animal welfare ideas could be described as the moral consideration of animals as sentient beings. Embedded in philosophic and ethical theories³ such as Bentham's Utilitarian approach, the rationale of this notion is not merely posing the question of if animals can reason but if they can experiment suffering.⁴ According to this approach, the capacity to feel pain will be the condition to identify interests in animals (e.g. pain, stress and fear).

The central point that can be extracted from Bentham's and Singer's argument is that animal interests should be –prima facie- considered in the course of moral deliberation as animal interest in avoiding pain are very similar to those of humans. Drawing the line at interests-in pain and displeasure-is seen a the only possible line of demarcation as all other supposedly

1 Weiss, F, 2006. "The limits of the WTO: Facing non-trade issues", in Sacerdoti, G, Bohanes, J, Yanovich, A. (eds.), *The WTO at 10: The Role of the Dispute Settlement System*, Cambridge University Press, WTO, May 2006.

2 See Brom, Frans "WTO, Public Reason and Food, public reasoning in trade conflict on GM-Food". 2004

3 'Philosophers, theologians, and others have long debated the interrelationships between man and animals in terms of the position and role of animals in the world, the obligations of man towards them (if any) and the uses to which animals should be put. Much of the early writings on these matters took the ethical position that animals exist for the sake of man (e.g., Aristotle) and that man can, and should, use animals anyway that he pleases (e.g., Saint Thomas Aquinas). Indeed, some writers have gone as far as asserting that animals are nothing more than machines that lack speech and hence cannot reason (e.g., Rene Descartes). Regan and Singer (1989) provide a useful brief review of these early writings. The more-recent debate has centered largely around animal sentience and cognition, various forms of utilitarianism and contractualism and how they relate to the question of rights. In his well-known treatise, Jeremy Bentham (Bentham, 1789), the "father" of utilitarianism, contends that the key issue is that animals are capable of pleasure and pain. He writes that "animals stand degraded into the class of things" and states that "the day may come, when the rest of the animal kingdom may acquire those rights which never could have been withholder from them but by the act of tyranny" (Bentham, 1789, p. 283).' (Bennet et al, 2002:187-88)

4 See, Bentham, J., *An Introduction to the Principles of Morals and Legislation* (Russell, London, 1962)



unique human qualities, such as rationality, etc., are not in fact shared by all humanity, i.e. infants or the mentally disabled. Nevertheless, despite all humanity not sharing the “higher” capacities like intelligence-which animals are traditionally supposed not to have-all humans from infants and imbeciles to “normal” functioning people have an interest in the avoidance of physical suffering. However, this is characteristic of all the sentient creatures, and not just humans. Therefore, membership of the human species cannot justify a difference in moral treatment, as the relevant consideration, the avoidance of pain, is also applicable to non-human beings which are sentient, throughout the ages; this has been noted by Montaigne, Primatt, Rosseau, Hume, J.S. Mill and Henry Salt.⁵

Animals are defined as living natural resources and are nothing different from goods in terms of trade. Animal exploitation occurs in different economic sectors: agriculture, the fashion industry, entertainment services (zoos, circus and even controversial activities as bullfighting, horse, dogs races, etc) pharmaceuticals (as many experiments are conducted with animals) and of course, the mere exhibition and breeding are also considered as a form of animal exploitation. “Hence, unlikely species protection, specimen protection issues forces people to consider –on a personal level-where his or her limits are regarding abuse or neglect of animals; i.e., what do I think is ok-what is not-and why.”⁶

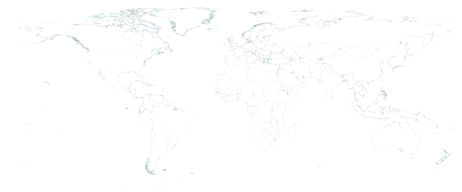
Those questions emerge as the basis of animal welfare -wellbeing- concerns that would be formally expressed as standards and therefore having the possibility of limiting the scope and extension of economic activities depending of animal exploitation.

Generally, it is true that animal welfare standards are mostly based in scientific evidence (ethologic and veterinary criteria) but it is also evident the fact that they are subject to ethical based analysis, especially socio economical structures and cultural values play an important role when deciding if animal welfare (or even compassion to certain animals) is a legitimate goal within domestic policy. In this sense, it is possible to say that global animal welfare standards are non-existent. However, some multilateral and unilateral attempts have been made (specially by the United States and the European Union and its member states) in order to have a more predictable and certain set of standards for the alleviation of suffering of animals in industries and laboratories. Such standards will raise certain obligations on producers, especially in the agriculture sector, based on the idea that ‘welfare of farm animals is dependent on human care, this raises the ethical issue of what are the duties of humans to animals, given generally accepted moral principles in a society. The usual premise is that while animals can be used for the benefit of humans, such use carries certain obligations.’⁷ These are the provision of essential food, water and shelter, healthcare and maintenance,

5 Gillespie, Alexander. *International Environmental Law Policy and Ethics*. Oxford University press, 1997.

6 Nielsen, Laura. 2007. “Animal Welfare”, en: University of Copenhagen . *Series on International Law and Development*. Martinus Nijhoff Publishers. Leiden.

7 Sandoe, P., R. Crisp and N. Holtug. 1997. *Ethics in Animal Welfare*. In *Animal Welfare*, eds. Appleby, M and B. Hughes. Wallingford: CAB International.



alleviation of pain and suffering, and the ability to enjoy minimal movement. ‘Such obligations are reflected in the so-called “five freedoms” elaborated by the Brambell Committee of the U.K. Parliament in 1965 and in subsequent conventions on animal welfare agreed in the Council of Europe.⁵ These conventions have been extremely important in guiding legislation on animal welfare in the European Union.’⁸

In this context, the World Organization for Animal Health emerges as the international-setting standard body for animal welfare. Therefore, it is possible to say that even if this topic have been studied and presented as a low-profile issue, their implications to trade liberalization shall not been underestimated . Especially because the driven force that increasingly advocates for animal welfare as a trade related issue is based on consumer´s autonomy and in some cases, as a “policy space” matter (animal welfare standards are commonly regulated by domestic legislation). In other words, animal welfare standards are often perceived as a Non Trade Barrier in WTO jargon.

Moreover, market driven responses and constituencies claims over governments are increasingly consisting in ethical and cultural concerns. According to Hobbs, as concerns relating to ethical issues in production have increased for some consumers, so too have demands for information concerning production methods. Intense lobbying efforts by non-governmental organizations (NGOs) have been the most visible manifestation of these demands. In response to these efforts, the EU has adopted a new and more stringent set of legislative initiatives regarding the welfare of animals. Council Directive 98/58/EC is the main law protecting animals kept for farming purposes; it lays down standards for the conditions in which farm animal are to be kept and bred in Member States. Additional legislation exists regarding the protection of laying hens and veal calves. The Treaty of Amsterdam also contains a protocol on the Protection and Welfare of Animals.⁹

Thus, Animal welfare concerns are arguably interpreted as trade barriers-disguised protectionism-, but nevertheless it is also plausible to say that they might be also considered as legitimate domestic responses to common concerns embedded inter alia in ‘laws restricting import of (specimens of) endangered animals, skins, of pups of harp and hooded seals and derived products, wild birds, cosmetic tested on animals, animals transported under inhumane conditions, meat from animals slaughtered or transported in “inhumane” ways, or shrimp caught in a way that harmed endangered sea turtles..’¹⁰

8 Blanford, David, Bureau, J.C., Fulponi, Linda, Henson, Spencer. Potential implications of animal welfare concerns public policies in industrialized countries for International Trade.

9 Hobbs, A.L., Hobbs, Jill E., Isaac, G.E., Kerr, William, A., 2002. Ethics , domestic food policy and trade law: assessing the EU animal welfare proposal to the WTO. *Food policy* 27, 437-54.

10 Nollkaemper André, “The Legality of Moral Crusades Disguised in Trade Law: an analysis of the ec ‘ban’ on furs from animals taken by Leghold traps”, *Journal of Environmental Law*, vol.8, issue.2, 1996, p.237-256



Unilateral attempts in setting Animal Welfare Standards: Merciful vindication or hidden protectionism?

According to Matsushita, Shoenbaum & Mavroidis¹¹, there are four schemes in which trade and market access barriers can be grouped. The first scheme is related to governmental border measures (tariffs, quotas, customs regulations, import licensing, testing and certifications). The second scheme includes internal regulations and practices that have potential protective effects. Those regulations usually include certain conditions related to product and services, distribution channels, technical standards, subsidies, state-trading monopolies, and bio-security measures. The third scheme relates to private business practices and customs affecting business behavior and consumer preferences, whereas the fourth scheme includes economic and structural characteristics of the importing country (government credit, macro-economic, investment and industrial policies).

However is not upon the WTO to reach all those categories in the sense that “the WTO has tended to concentrate on explicit and obvious governmentally imposed trade obstacles, such as tariffs, quotas and customs regulations and practices. In the later rounds on trade negotiations, however, notably the Tokyo and Uruguay Rounds, the WTO addressed less obvious governmental measures, such as import licensing, subsidies and technical barriers to trade. Nevertheless, many trade barriers remain outside the purview of the WTO agreements”¹²

Domestic regulations on animal welfare matters are often included seem as technical barriers to trade. These types of regulations are nothing different from requirements related to certain characteristics that products should meet in order to be allowed within the market. It is important to say that technical regulations are not considered as barriers per se under the WTO law. That is to say that in order to be considered as barrier, a regulation must be unrealistic or unreasonable and the procedures to verify compliance with those regulations could be also considered as barriers according to their nature. In some cases the barrier lingers on the proliferation of non standardized certification processes.

In order to solve those kinds of problems, the Agreement on Technical Barriers to Trade (hereinafter TBT) seeks to strike a balance between the policy space of Member States and the discipline that such measures must observe in order to minimize their impact on trade liberalization. According to the TBT Agreement “technical regulations” are “mandatory laws or provisions specifying the characteristics of products, the processes or production methods for creating products or the terminology, symbols, packaging, marking, or labeling requirements for products.”¹³ Additionally, “the TBT Agreement requires the WTO members to apply national treatment and MFN standards with respect to technical regulations. It also requires

11 Matsushita, Mitsuo., Schoenbaum, Thomas J., and Mavroidis, Petros C. *The WTO Law, Practice and Policy*, USA, Oxford University Press, 2003, p.258-285

12 *Ibid.*, p.258-259

13 TBT Agreement, Annex.1, para.1, p.16



WTO members to use international standards when such standards are available, except when such standards would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued.”¹⁴ Furthermore, technical regulations must fulfill certain requirements in terms of: transparency, prompt publication (to make them generally available), shall not create “unnecessary obstacles to international trade” or be “more trade-restrictive than necessary to fulfill a legitimate objective”.¹⁵ It is still problematic if the above mentioned definition will include the polemical non-production-related standards and most generally Product Production Methods (hereinafter PPMs) in which animal welfare concerns have their most prominent expression.¹⁶

In relation to adoption preparation and application of standards, the TBT also contains a Code of Good Practices. In this Code, the term standard is defined as a voluntary guideline for characteristic of products¹⁷ (Annex 1, para.2) and requires Member States to participate in and comply with standards code being formulated by international bodies like the International Organization for Standardization (ISO). Nevertheless, this organization is not certainly deeply related with ecological issues or animal welfare. Animal welfare often assumes the form of technical regulations and standards embedded in eco-labeling initiatives.

The eco-labeling case in animal welfare is becoming quite popular as a market driven mechanism to pursue ethical values related to environmental protection.

In this sense it is possible to say that ecological labels are market-based environmental policy instruments informing consumers about environmental characteristics of goods. Labels are granted by different private or governmental organizations to producers for different product categories. Many eco-labels not only inform about product quality itself, but also the whole life cycle, including generation of inputs, production processes, consumption and waste disposal. The number of countries applying eco-labels has been growing constantly. However,

14 Matsushita, Op. cit., p.279

15 According to the TBT Agreement, those objectives include concerns to: National security requirements, prevention of deceptive practices, protection of human health or safety, animal or plant life or health and environment.

16 According to Dröge, it is not that clear “whether non-product-related standards, which are applied in life cycle labeling schemes, are subject to TBT-rules. The definition in Annex 1.2 TBT names ‘products or related processes and production methods’. An interpretation has to consider the negotiation history of the agreement. Chang (1997; 147) states that non-product-related PPMs were explicitly excluded, already during the negotiation of the amendment to the TBT-Agreement, and thus cannot be considered when interpreting the text. During negotiations of the Uruguay-Round, negotiators used the expression ‘or related’ in order to exclude ‘non-related’ processes and production methods. According to these findings, non-product-related criteria in eco-labeling schemes are not covered by TBT-rules for standards and technical regulations and are therefore to date not a valid criterion to differentiate otherwise like products...Should there be any dispute, the TBT-Agreement would only cover those parts of labeling programs that determine product or product-related criteria. Such criteria could then be justified for both voluntary and obligatory labels with reference to the TBT preamble. More specifically, for compulsory schemes a country can refer to Article 2.2 TBT which names ‘the environment’ as a legitimate objective for which a certain degree of trade restrictions could be justified. However, also the requirement of non-discrimination between like products from national origin and abroad (Article 2.1 TBT) needs to be fulfilled.”(Dröge 2001:11)

17 TBT Agreement, Annex.1, para.2, p.16



with the increasing international integration, especially growth in trade in goods and services, consumers as well as producers demand compatibility and transparency of labels on an international level. Also, eco-labels from industrialized countries are subject to increasing criticism from developing countries, which regard labels as a new non-tariff trade barrier.¹⁸

From the analysis of the TBT Agreement it is evident that consequences of both dimensions –technical regulations and ecol-labeling initiatives- would have different impacts due to the voluntary nature whereas technical regulations are compulsory. According to Dröge, ‘criteria for voluntary eco-labeling can be interpreted as standards and those in mandatory schemes as technical regulations’¹⁹

When trying to find an alternative mechanism to avoid possible unilateralism in this type of measures (design and implementation of technical standards or eco-labeling schemes related to animal welfare) the most evident and popular option is usually linked to multilaterals efforts intended to negotiate an international agreement on animal welfare or even the creation of an organization in the similar fashion of ISO, in order to harmonize the different criteria when measuring animal welfare standards related to trade. However, According to Hobbs ‘this alternative of having such organization to establish a baseline international standard is unlikely to satisfy the EU because any common standard agreeable to developing countries would be too low to satisfy concerned EU consumers.’²⁰ However, even if an international agreement on animal welfare is unlikely to be challenged in the WTO, the volumes of trade that could be affected will be considerable.²¹

Animal welfare as a trade policy issue driven by consumer activism

Having an international agreement on animal welfare matters is often seen as a real utopia, nevertheless, the Agreement on International Humane Trapping Standards between the European Community, Canada and the Russian Federation and the International Agreement in the form of an Agreed Minute between the European Community and the United States on humane trapping standards, may be regarded as the first international agreements concerned exclusively with animal welfare²²

18 Dröge, Susan, 2001. Ecological labeling and the world trade organization. Deutsches Institut Für Wirtschaftsforschung, berlin. Discussion paper No. 242, 2-29.

19 Ibid.

20 Hobbs, A.L., Hobbs, Jill E., Isaac, G.E., Kerr, William, A., 2002. Ethics , domestic food policy and trade law: assessing the EU animal welfare proposal to the WTO. Food policy 27, 437-54.

21 ‘It is possible that the trade provisions of an animal welfare agreement would not be challenged at the WTO (Isaac et al., 2002). This has been the case for the (CITES). However, the volumes of trade affected by CITES are small. In the case of products covered by animal welfare regulations, the volumes of trade affected could be very large and countries who feel aggrieved will likely use the option to defer to the WTO given the lack of clarity over which international agreement would have primacy.’(Hobbs et al., 2002:448)

22 Stuart R Harrop, “The Agreements on International Humane Trapping Standards –Background, Critique and the Texts”, Journal of International Wildlife Law & Policy, vol.1, núm.3, 1998, p.387-394



Nevertheless, multilateral efforts are deemed necessary to address the importance of animal welfare concerns as trade related issues (especially for consumers). In the frequent reaction in order to enforce environmental standards and act accordingly consumer´s demands by means of trade policy responses, governments generally fall in unilateralism and sometimes in double morals arguments, which generally arises the discontent of other countries –particularly developing countries- in the sense that such actions are perceived as nothing different from the projection of the own countries’ values, (even the mercifulness over certain species). “The US government (and to some extent the European Union) falls back on unilateral action because there is no established international mechanism to enforce environmental standards or policies. Moreover, the need to achieve unanimity for decisions taken in the international realm can make multilateral agreements bland, inoffensive, and ineffectual.

The intrinsic difficulty of multilateral decision making and the lack of existing institutional structures for effective international environmental policymaking therefore makes unilateral action a necessary, if unfortunate, policy option in some circumstances. Even Robert Hudec, accepts the inevitability of some unilateral actions, concluding that under certain circumstances, intentional disregard of GATT obligations may be useful in ‘breaking legal deadlocks and stimulating improvements in GATT law. Such justified disobedience should, in Hudec’s view, be conditioned by a requirement that the disobeying country imposes the same standard on itself that it seeks to mandate for others.’²³

In this context the tension between domestic policy, morals and trade liberalization emerge when understating the rationale and the consequences of animal welfare standards. What issue should prevail upon the other? The WTO has been traditional producer oriented even if some the ideas of democracy and inclusion of the civil society has been common components of its discourse, nevertheless this topic will be driven by consumers. How ready is the WTO to attend certain governmental measures motivated by nothing different of moral and philosophical questions?

Contrasting Esty’s view, Charnovitz pose additional questions: should local morals be able to trump economic globalization? Should international morals be able to trump the exercise of power by local elites?²⁴ Policymakers trying to answer these questions will want to examine the potential effectiveness of trade measures as well as their legality under international trade rules. Assessing effectiveness requires a specification of the moral goal -... Once the goal is specified, an important variable will be the number of states involved. Multilateral action will probably be more effective if the goal is to change behavior. With unilateral action, the potential usefulness of a trade measure can be undercut through trade diversion. As one political scientist explained, “[a] single state may adopt what it deems to be effective measures to combat certain evils, only to find that its policies are largely defeated by the failure of neighboring states to adopt similar measures.”²⁵

23 Esty, Daniel, C., 1994. *Greening the GATT: Trade, Environment, and the Future*. Institute for International Economics. Washington, DC.

24 Charnovitz, Steve. 1998. *The Moral Exception in Trade Policy*. *Virginia Journal of International Law*. 38 Va. J. Int’L. 689.

25 *Ibid.*



Thus, moral dialogs and consumer concerns are inevitable for governments; consumers express them in order to give voice to their moral beliefs and ideals. According to Meijboom and Brom, governments and industries, therefore, cannot adequately deal with consumer concerns without engaging in a moral dialogue about these concerns. Answering the question whether consumer concerns are reconcilable with the current WTO framework remains problematic. Some consumers happen to fit perfectly within the current WTO aims.²⁶

In this context, it is important to say that environmental protection and animal welfare are different but interdependent concerns and also that every action intended to protect the nature has an ethical dimension.²⁷ The so called animal welfare standards are intrinsically moral oriented concerns and hence, the awareness upon animal life is not necessarily driven by an environmental aim (although it is scientifically argued that animal welfare standards have a deep implication on human and animal life and health). Therefore, the question of animals and the WTO entails a complex multidimensional approach: philosophical, legal and economical.

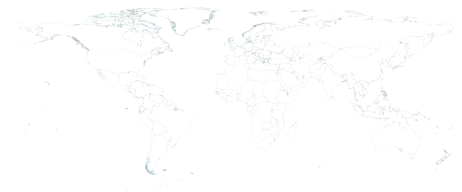
Animal welfare issues are a relevant for the international trade law and therefore to the WTO, especially because those concerns could be addressed as a “legitimate policy objective” being invoked as public morals issues and in this sense being considered as trade barriers (independently of its successful inclusion on Article XX of GATT). Animal welfare concerns may produce different trade measures - trade barriers- inter alia. bans on imports of furs and pelts from wild animals skinned alive (foxes, raccoons, ermines, seals, etc); bans on import of furs and pelts from domesticated animals (cats and dogs) bans on furs and pelts from animals caught in leg-hold traps, etc. This trade measures are often motivated in the process of production rather than in the product.

However under the WTO, ‘members may not be allowed to enact or maintain trade barriers to protect animals in the course of trade. The legality of trade measures depends on the analysis of the General Exceptions in GATT Article XX because trade barriers, most likely, violate the substantive obligations under the GATT.’²⁸

26 Vedder, A, 2003. *The WTO and concerns regarding animals and nature*. Nijmegen: Wolf legal publishers, 173-82.

27 To understand why environmental protection has an ethical dimension it is important to mention the impact of theories as the “Radical Ecology” when interpreting the international environmental problematique. In this sense, “Radical ecology devolves into two parts. The first known as ‘deep ecology’ and the second as social ecology’. Very briefly, deep ecology is concerned with why the environment is protected, whereas social ecology is concerned with how to achieve this end..Deep ecology is also known as ‘land ethics’ or holistic environmental ethics. By virtue of the fact that deep ecology has evolved from the works of a number of theorists it is not a theory that is rigidly defined. There is however one common feature that is often agreed by all the relevant theorists, namely that environmental protection must be based upon the inherent (or intrinsic) value of non-human Nature. This is in contrast to what is known as ‘shallow environmentalism’ which justifies environmental protection on the grounds that Nature has an instrumental value to humans. This position, which revolves around anthropocentrism, proclaims that only humanity has an inherent value. It is this shallow environmentalism that forms the predominant basis of international environmental law and policy” (GILLESPIE, Alexander. 1997: 2)

28 Laura Nielsen, “The WTO & Animal Welfare: Sufficient Nexus” for Morally Based NPR-PPMs in GATT Article XX?”, ELSA SPEL(2004, ed. 1), pag.3, [on line], 2004, available in: http://www.elsa.org/fileadmin/user_upload/elsa_international/PDF/SPEL/SPEL_2004-I-NIELSEN.pdf



The most famous WTO cases related to animal protection are Tuna/Dolphin²⁹ and Shrimp/Turtle³⁰ which have been by far the most polemic WTO precedents when addressing trade related issues. Those cases were mostly defended on environmental concerns rather than animal welfare matters, since the main interest was the conservation of the species (conservation of exhaustible natural resources³¹) rather the “humanity” or “morality” of the way in which those animals were killed; in other words, the cases were less connected to the “animal rights philosophy” than with international environmental principles. Nevertheless it is possible to affirm that even in the absence of “official” records in animal welfare cases under the Dispute Settlement Understanding, many potential disputes are about to come to the attention of the WTO, like in the case of the recent seal ban adopted by the EU which have again arisen the green tension and bitter responses from the governments of Canada, Norway and Greenland.

As a conclusion, it is possible to say that animal welfare and environment protection of animals have been waiting too long for their floor in Agriculture and NAMA,³² multilateral negotiations and the covered agreements of the WTO (specially the SPS³³ and the TBT³⁴), including the Dispute Settlement Mechanism. These multilateral tracks for dealing with animal welfare and environmental protection should be interpreted as the iceberg’s point since bilateral negotiations (especially in FTA’s and RTA’s) could deal with similar concerns in a wider and deeper context which may includes inter alia: eco-labeling, general exceptions, technical standards for products and processes (PPM’s and its impact in GATT and GATS interpretation).

29 United States-Restrictions on Imports of Tuna, DS29/R, 16 June 1994. Reprinted in 33 I.L.M. 839 (1994) (unadopted) [hereinafter Tuna Dolphin II].

30 U.S – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/R (1998). Appellate Body Report [hereinafter Shrimp-Turtle].

31 GATT Article XX (g)

32 Non-agricultural Market Access.

33 SPS stands for the WTO agreement on Sanitary and Phyto-sanitary measures

34 TBT stands for WTO agreement on Technical Barriers to Trade



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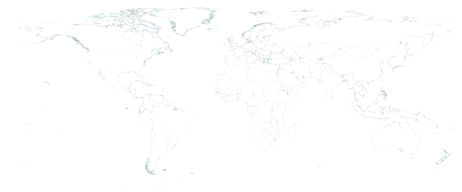
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Does Colombia participate in the law of the sea?

✉ By: Ana María Guerrero

From many years ago, the sea and the oceans had served the human beings for different uses such as communication and commerce between cities, discovery and knowledge, the increase of the military potency of the cities, the coast defense and territory, fishing, and after some years, the use of other economic resources.

The law of the sea has many stages in its evolutive and formative process, giving itself to be known in a clear way, the way how it started to be and how, as years were passing by, it has been evolving and has been adopted each time by more states.

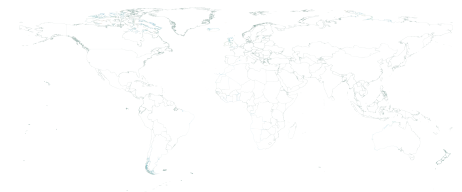
In this essay, it's going to be given many important aspects to be known about the law of the sea, its definition, origin and characteristics that had been very important in the international community involving Colombia, as well as other states in their definition of limits and sea zones, in the sea resources conservation, deals made to fish in determined territories. All of this had given place to conferences to treat and clarify important aspects that every country is willing to take care of. Not forgetting to mention the controversy caused between Nicaragua and Colombian Islands of San Andrés y Providencia, Which is still waiting for a definitive solution.

What is the law of the sea? How had it been evolving?

The law of the sea is one of the most important branches of international law, it permits to solve the state's complaints, according to its national interests, about the use of the ocean resources. The evolution that the law of the sea had showed from immemorial times has to guarantee the progress and economic development, the most important ones.

In its oldest stage, it involves the beginning of the civilizations, where the oceans started to play a very important role in the city's development; it establishes the commerce contact between the different human groups, making people get used to the sea resources in peace or war. It never existed a written law to establish the norms and state's behavior, or its mobilization between the oceans¹

1. Anand, R. P. (1982). "Origin and Development of the law of the Sea." Publications on ocean development, Vol. 7, (The Hague), p.2.



In the classic stage of the law of the sea, the commerce expansion was one of the causes for the discovery of new lands, starting in that way the International Community. In this stage the juridical sea regimen was expressed in safety and commerce terms. And the territorial sea wideness of the state was not defined in a clear way, so, for many states, it was defined by the defense capacity of their coasts².

Just from the 1st Hague Conference of 1899, is where the idea of codifying the international aspects about the sea started to grow. It was given birth to an uncountable number of conferences, meetings and congresses, until 1970. Where is necessary to highlight the first united nations conference on the law of the sea at Geneva in 1958 (UNCLOS I) which drew up four conventions: the convention on the territorial Sea and the contiguous zone, the convention on the high seas, the convention on fishing and conservation of the living resources of the high seas, and the convention on the continental shelf³.

In 1960 the II Ginebra Convention on the law of the sea (UNCLOS II) was held, but it failed confronting the opposite positions between the states, because there was an onflow supported by United States which proposed a wideness of 6 miles of territorial sea, while the other flow constituted by the developing countries that wanted 12 miles instead⁴.

The contemporary stage starts in 1973, in Caracas, Venezuela. When the 3rd UN conference met about the law of the sea (UNCLOS III), and concludes with the text of the actual law of the sea which involves some concepts of the four Ginebra conventions of 1958⁵.

That way, the 3rd UN convention about the law of the sea, has been the most populated in the world history, talking about the people and states which participated, and is the one with the longest elaboration.

In 1982, after a very long work, it was achieved the approbation of the convention Project which is now the universal law of the sea, but there were some countries who rejected it, like Venezuela. Despite of being the convention called "Caracas convention" making honor to the nation which received them back in 1973⁶.

A very important point to put the finger on is that the states which belong to the convention can't present reservation in front of each of the articles that conform this national instrument; they have to accept its content as it is⁷.

2 Vanderpool, C. K. (1983). "Marine Science and the Law of the Sea." Sage Publications, Ltd, p.108-109.

3 Alexander, L. M. (1968). "Geography and the Law of the Sea." Taylor & Francis, Ltd. on behalf of the Association of American Geographers, p.182.

4 Oda, S. (1983). "Fisheries under the United Nations Convention on the Law of the Sea.", American Society of International Law, p.739-740.

5 Malanczuck, P. (1997). "Akehurt's Modern introduction to international Law.", Routledge, chapter 17, (London and NY), p.173.

6 Vanderpool, C. K. (1983). "Marine Science and the Law of the Sea." Sage Publications, Ltd, p.10.

7 Malanczuck, P. (1997). "Akehurt's Modern introduction to international law.", Routledge, chapter 18, (London and NY), p.299.



All of this exposed previously, gives the way to know the origin of the law of the sea. Knowing that there were some countries that didn't agree with it at first, but as years were passing by they accepted it, and agreed to comply all the established items.

Next, it's going to be shown some important aspects about topics that were held on the first United Nations conference on the law of the sea, and today, they still being relevant for the commercial, economic and politic areas of the states in the moment of making changes.

The maritime boundaries delimitation

Years ago, the states did not delimit their maritime boundaries with other states. But with the commercial exploitation and the development of the ocean resources, they have required defined areas located among operators. All of this has made that states claim new zones of maritime jurisdiction seaward and define boundaries with other states that maximize the areas over which they have exclusive authority to exploit and manage these resources. And the result is that delimitation of maritime boundaries among neighboring states has intensified more and more⁸.

That's why the maritime delimitation has benefited and benefits the coastal states industrial and technologically, and that means that the nations increase their management of living resources found in their adjacent maritime areas and take steps to protect the marine environment from damage resulting from exploitation activities.

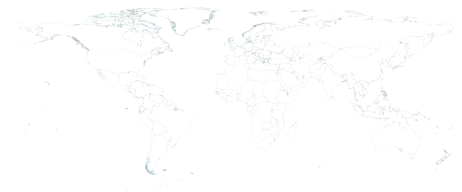
The states have established many maritime boundaries and there has been more litigation before the international court of justice on maritime boundaries than any other single subject. And also disputes over the location of maritime boundaries have been common with controversies⁹.

The international Law commission organized a group of experts to consider the formulations of norms for the maritime boundaries, and the result was the law of the sea conference of 1958 but it did not achieve the purposes that were supposed to be completed, and also the matter was subsequently taken by the international court of justice in the north sea Continental Shelf but they made the law more indeterminate.

It is also important to know that some conventions as the Geneva Convention on the territorial sea, place primary emphasis on the equidistance principle, but other conventions such as the Geneva Convention on the continental shelf places primary emphasis on delimitation agreement, both talk about special circumstances but the maritime boundaries based on the equidistance principle are distorted by the islands or curvatures of the coast and that

8 Jonathan I. Charney, L. M. A. (1991). "International Maritime Boundaries.", American Society of International Law, U.S.A, p.23.

9 Jonathan I. Charney, L. M. A. (1991). "International Maritime Boundaries." American Society of International Law U.S.A, p.27.



makes that one moves out to sea, and that makes that the court and the international law of the sea make important decisions in order to achieve an equitable solution¹⁰.

Than the matter was not addressed at the second conference on the law of the sea but finally in the third conference resulted the 1982 convention on the law of the sea which determined equidistance special circumstances for maritime boundaries in the territorial sea, the continental shelf and the exclusive economic zone¹¹.

Exclusive fishery zones and exclusive economic zones

Over the years the States have claimed for the exclusive fishery zones beyond their territorial seas¹².

The states have needed some control over exploitation of the resources and of the vast oceans if their most favorable utilization was to be assured. With the UNCLOS I, some treaties were concluded providing the effective regulation of fishing on the high seas. Without forgetting the equal access to fisheries and equal limitations on fishing¹³.

In 1960 were referred questions of the breadth of the territorial sea and the extent of the coastal state's fishery jurisdiction, in the second conference on the law of the sea (UNCLOS II). Those facts were not approved but with the practice the extent of the fisheries jurisdiction of the coastal state became separated from the notion of territorial sea, reflecting the importance of fishery resources for all states.

That's why the states obtained two very important concepts, first that the concept of the fishery zone is independent of the territorial sea and that the extension of that fishery zone up to 12-mile limit from the baselines was accepted. And second is the concept of preferential rights of fishing in adjacent waters in favour of the coastal state in a situation of special dependence on its coastal fisheries, operating in regard to other states concerned in the exploitation of the same fisheries¹⁴. That is the case of the states that had traditionally fished and also their population is economically dependent on fishing there¹⁵.

10 Malanczuk, P. (1997). "Akehurt's Modern Introduction to international law." Routledge, London and NY, (Chapter 17), p.195-196.

11 Jonathan I. Charney, L. M. A. (1991). "International Maritime Boundaries.", American Society of International Law, U.S.A, p.28.

12 Malanczuk, P. (1997). "Akehurt's Modern Introduction to international law." Routledge, London and NY, (Chapter 17), p.183.

13 Oda, S. (1983). "Fisheries under the United Nations Convention on the Law of the Sea.", American Society of International Law, Vol. 77, p.740.

14 Evans, A. E. (1975). "Fisheries Jurisdiction Case (United Kingdom v. Iceland). ICJ Reports," American Society of International Law, Vol. 69, p.161.

15 Malanczuk, P. (1997). "Akehurt's Modern Introduction to international law." Routledge, London and NY,(Chapter 17), p.183.



The UNCLOS III provided the new concept of the 200 mile exclusive economic zone in which the coastal state has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, including fishing and natural resources, and other states may continue to enjoy the freedom of navigation and overflight¹⁶, and in this conference was approved the territorial sea of 12 miles, that could not be successful in the UNCLOS II¹⁷.

In 1994 some states claimed the right to restrict activities within their zones beyond what the 1982 convention allows, and some claimed an exclusive economic zone but no more than 200 miles. It is also important to recognize that the largest exclusive economic zone belongs to the United States in the Atlantic, Pacific and Arctic Oceans, including the US island territories.

In addition to this, when the foreign ships violate the rights of a coastal state in its exclusive fishery zone or EEZ, they may be arrested by the coastal state, and also in some cases in its contiguous zone¹⁸.

What has been the colombian role in some aspects of the law of the sea?

The United Nations convened the First Conference on the Law of the Sea in Geneva in 1958. Colombia's delegates to this Conference were José Joaquín Caicedo Castilla and Juan Uribe Holguín, both former Ministers of Foreign Affairs¹⁹. And four conventions were signed during the course of the Conference, the projects for which had been prepared by the UN Legal Committee, such as the Convention on Territorial Waters and Contiguous Zone, the Convention on Continental Platform, the Convention on the High Seas and the Convention on Fishing and Conservation of Living Resources on the High Seas²⁰. The Secretary of the Third Maritime Conference was the eminent Colombian legalist and bemoaned attorney, Bernardo Zuleta Torres, as delegate of the Secretary General. Acting on behalf of Colombia were Ambassadors Germán Zea Hernández, Antonio José Uribe and Hector Charry Samper. Within the delegation, Ambassador José Joaquín Gori gave a brilliant performance²¹.

16 Oda, S. (1983). "Fisheries under the United Nations Convention on the Law of the Sea.", American Society of International Law, Vol. 77, p.741.

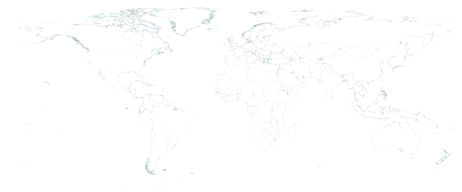
17 Malanczuk, P. (1997). "Akehurt's Modern Introduction to international law." Routledge, London and NY(Chapter 17), p.183.

18 Malanczuk, P. (1997). "Akehurt's Modern Introduction to international law." Routledge, London and NY(Chapter 17), p.184.

19 Holguín, J. U. (1963). "Informe de los embajadores Juan Uribe Holguín y José Joaquín Caicedo Castilla, delegados de Colombia a la Conferencia sobre Derecho del Mar."

20 Alexander, L. M. (1968). "Geography and the Law of the Sea." Taylor & Francis, Ltd. on behalf of the Association of American Geographers, Vol. 58, p.182.

21 Arteaga, J. R. B. (2004). "Memorias del encuentro Camilo Torres y Tenorio." Centro Editorial Universidad del Rosario, Colombia, p.59.



Colombia and its maritime delimitation

During the government of the expresident Alfonso Michelsen (1974-1978) the Colombian diplomacy consolidated the most of its sea limits in the Caribbean area, when there wasn't any sea reclamation to Colombia, and bordering disputes for these delimitations either, with exception of the Colombia-Venezuela case, in which an agreement haven't been achieved about the delimitation of marine and submarine areas in the golf.²²

However, the negotiation process had been developed by the use of ordinary diplomatic ways, the direct negotiation, in this case the high commissioners of Colombia and Venezuela named by them for that effects, according to the San Pedro Alejandrino Act of 1990, subscribed by the presidents Virgilio Barco Vargas and Carlos Andrés Pérez.²³

The sea delimitation between states its adjusted by a lot of technic criteria, represented in a letter which contains exact lines sustented in the treaty text, without historic or demographic considerations. An example of this sea delimitation its constituted by how Colombia could establish those spaces with all of the Caribbean countries, which shares borders with. Some of them will be mentioned up next, having in mind that there are some in force and others waiting to be ratified with the centro-american and Caribbean countries, including Ecuador which border with Colombia is the Pacific Ocean in the Ancón de Sardinias bay. Here is just going to be made reference to some of them, showing the cases in which has been more action or created controversy, without saying that the others had lost importance or total lack of it.

Starting with Ecuador, Colombia signed in Quito the Liévano-Luccio about the sea area delimitation and sea cooperation on August 23rd of 1975, it points the geographic parallel line that cuts the point where the international border (From Ecuador and Colombia) goes until the sea, by this way, is established the right of each country to practice its own sovereignty, jurisdiction or security in the sea area next to their coasts until 200 miles. Both countries are compromised to facilitate the development of the wide cooperation for the protection of renewable and no renewable natural resources, besides of giving a wide cooperation to promote the international navigation in the seas submitted to the sovereignty and jurisdiction of each country, the coordination of fishing permission and cooperation in species conservation matter, which moves away from their respective sea areas²⁴.

Keeping with the countries which have treaties with Colombia, it comes the case with Nicaragua, where the Esguerra-Bárceñas treaty is signed in Managua on March the 24th of 1928, where the change of ratifications had place in Bogotá on May 5th of 1930. In this treaty was established that Colombia recognizes the Nicaragua's sovereignty of the "Costa

22 Duarte, B. A. (1999). "Alfonso López Michelsen: escritos y acción de un constitucionalista." Instituto de Investigaciones Jurídicas, Colombia, p.100-101.

23 Otálvora, E. C. (1994). "La Paz Ramónica.", Pomaire, Caracas. p.35.

24 Truque, G. F. (1997). "Mares y Fronteras." Sociedad Geográfica de Colombia, Colombia, p.7.



de los Mosquitos” between the “Cape Gracias a Dios” and San Juan river, and of the Mangle Grande islands and Mangle Chico in the Atlantic Ocean, Nicaragua recognizes as well the sovereignty and complete domain of the San Andrés Y Providencia islands, as well as Santa Catalina and all of the islands around. But on February the 2nd of 1980, the Revolutionary Meeting of National Reconstruction instaurated in Nicaragua, disowned the treaty validity, and started a reclamation to Colombia, nowadays it is a case to Hague International Court Of Justice, which had been solved partially but no totally. The same way, the Esguerra-Árcenas treaty is still working inside the rules on International Law, precisely in the Viena Convention about the treaties rights of 1969. And it’s important to know that in this treaty, the Roncador, Quitasueño and Serrana islets are not included, because the domain about these was on litigation between Colombia and United States²⁵.

Costa Rica is another country which Colombia have had inconvenients with, because despite of having signed the Fernández-Facio treaty about marine and submarine area delimitation and sea cooperation in the Caribe sea made in San José on March the 17th of 1977, approved after by the Colombian Congress with de 8th law of 1978, the Nicaragua government has been making pressure, because this treaty, as well as the treaties with Panamá, Honduras, Jamaica and United States, recognize the San Andrés y Providencia islands belong to Colombia, in that way, they started to set the maritime limits and submarine area. Besides, Colombia has treaties with other countries such as Dominican Republic, Panamá, Venezuela, Jamaica, Honduras, and Haiti. And despite of, it doesn’t border with United States, there is an agreement of joint exploitation in fishing but not the borders, established in the Vásquez-Saccio treaty signed in September the 8th of 1972²⁶.

Parallel, the country kept going on in the sea route, giving the law 10 of 1978 dictating norms about the territorial sea, the exclusive economic zone and the continental platform, involving the national material legislation of the new law of the sea; with posteriority emits the 1436 law of 1984, that determines the straight base lines, measuring the sea areas consecrated in the law of the sea²⁷.

Colombia and the exclusive fishery zones and the exclusive economic zones

Colombia ratified the Conventions on Platforms and Fishing. However, it has failed to do the same with the Conventions on Territorial Waters and High Seas. In the Third Conference signed at Montego Bay on December 10 in 1982, the countries met and made some decisions such as a claim to a 200 mile limit for territorial waters by the South Pacific countries. Latin

25 Liévano, E. G. (1997). “Colombia Insular y San Andrés como archipiélago oceánico.” Sociedad Geográfica de Colombia, Colombia, p.3.

26 Truque, G. F. (1997). “Mares y Fronteras.” Sociedad Geográfica de Colombia, Colombia, p.7.

27 Colombia, P. d. I. R. d. (1984). “Decreto 1436 de 1984.” Rodrigo Lloreda Caicedo, Gustavo Matamoros Bogotá., p.1-2



Americans including Colombia, met in Mexico and Santo Domingo, and proposed the creation of a 200 mile zone classified as an economic zone, called by some the epicontinental zone, instead of 200 miles of territorial waters²⁸.

About the Exclusive Economic Zone, States like Colombia, Chile, Ecuador and Peru joined the 1982 letter to the president of UNCLOS III claiming to be the first to declare the concept of the EEZ in the Santiago declaration²⁹, they accepted that this zone has a width of 200 miles measured from the base lines, and exists only from territorial waters. Those countries talked about the necessary restrictions on the exercise of sovereignty and jurisdiction imposed by international law to permit the freedom of navigation, a very important issue to resolve³⁰.

In the case of the Platform and Exclusive Economic Zone, jurisdiction is exercised only over the exploitation of the resources on the platform, on the bed and in the subsoil. In the economic zone it is exercised over resources found in overlying waters, extending to the bed and subsoil, but this is applied only when the zone exceeds the platform. But the coastal states exercise sovereignty in the Exclusive Economic Zone for exploration, exploitation, conservation and administration of living and non-living resources in waters overlying the bed, and the bed itself and subsoil³¹.

This topic was very important for Colombia and the other Latin-American States which participated actively in the convention and established the parameters of both the exclusive economic and fishery zones, and how they must be respected by all states in the world.

In addition to this and according to the databases of the "sea around us Project" found in the webpage, it can be showed that the area of the Colombia's ZEE is 817,816 (21,419) km² ³², while for example for the US, only the west coast is 825,549 (30,050) km² ³³.

To sum up, it is clear that the law of the sea is one of the most important branches of the international law, which permits to use the ocean resources in a good way, and when that does not happen, the States can claim before the international court or before tribunals which are part of the 4 options of the parties in the section 2 of the system in the international Law convention. The dispute settlement system of the 1982 law of the sea

28 Garcia-Amador, F. V. (1974). "The Latin American Contribution to the Development of the Law of the Sea." American Society of International Law Vol. 68, p.41-42.

29 Kwiatkowska, B. (1989). "the 200 mile exclusive economic zone in the new law of the sea." Publications on ocean development U.S.A and Canada, p.209

30 Garcia-Amador, F. V. (1974). "The Latin American Contribution to the Development of the Law of the Sea.", American Society of International Law Vol. 68, p.38

31 Oda, S. (1983). "Fisheries under the United Nations Convention on the Law of the Sea.", American Society of International Law Vol. 77, p.741-743

32 "Sea around U.S Project." The Pew Charitable Trusts.URL: <http://www.seaaroundus.org/eez/170.aspx>, Accessed: 28/03/2010.

33 "Sea around U.S Project." The Pew Charitable Trusts.URL: <http://www.seaaroundus.org/eez/848.aspx>, Accessed: 28/03/2010.



convention provides for some form of binding third-party decision and also lays down the option of non-binding conciliation (article 284)³⁴.

The international law of the sea has not only been used in the war but also has been used in peace times in order to resolve the interests of the merchant fleets and the fishing industry. It includes topics such as the exploitation and exploration of the resources in the international maritime zone, the territorial sea and the contiguous zone, the continental shelf, the exclusive economic zone, the fishery zone, the preservation of the sea resources, and the scientific investigation of the oceans³⁵.

That's why its evolution has been very fast and has been the base for the socioeconomic development of the states and also to control the rational use of ocean resources for the benefit of the people. And like that, there is no discrimination in the moment of the participation of industrialized states, maritime powers, and also developing countries without taking into account the social, economical or political position.

After the three conferences made, the result was the adoption of the 4 conventions about the territorial sea, the contiguous zone, high seas, fishery and its preservation and the continental shelf. And with the third conference made in Ginebra, Switzerland, they formulated a new legal order for the seas and oceans of the world, taking into account the needs and the interests of the people and their resources³⁶. And besides that, it is important to recognize that the exclusive Economic zone was born in Latin America and represents one of the biggest achievements in the diplomacy of the third world states, because it is one of the instruments that can be used in bilateral, regional and multilateral forums and exploit resources more equitably³⁷.

The third United Nations convention of the law of the sea is the result of three decades of hard work of the international community, through the Organization of the United Nations, fulfilling the mission which marks the Charter, to promote the development and codification of international law³⁸.

During all this process, Colombia has been present and could make treaties with other countries, with them, it has won territorial extension, bearing in mind that the San Andrés y Providencia islands has been also included. Besides, Colombia could define, using equidistance and the intermediate line, the almost totality of its sea and submarine spaces in the Pacific Ocean and the Caribbean sea as well, under parameters and fair politics, this situation gave it special

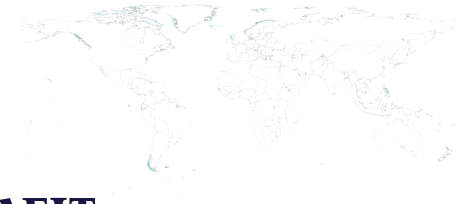
34 Malanczuk, P. (1997). "Akehurt's Modern introduction to international law", Routledge, chapter 18, (London and NY), p.299.

35 Malanczuk, P. (1997). "Akehurt's Modern Introduction to international law." Routledge, London and NY(Chapter 17), p.183.

36 Alexander, L. M. (1968). "Geography and the Law of the Sea." Taylor & Francis, Ltd. on behalf of the Association of American Geographers, p.182.

37 Kwiatkowska, B. (1989). "the 200 mile exclusive economic zone in the new law of the sea." Publications on ocean development U.S.A and Canada, Vol. 14, p.209

38 Vanderpool, C. K. (1983). "Marine Science and the Law of the Sea." Sage Publications, Ltd, p.10.



consistency and stability to its sea borders, which are adjusted in its formation to norms and principles accepted by the International Community³⁹.

This way, Colombia had been part of the law of the sea, actively participating of conventions and conferences, had ratified treaties with other countries, in that way, it could establish and define its sea borders and has respected everything that has been established in these conventions. Its governments since the 70's had been developing this process becoming an active part of the law of the sea; besides, with its definition of the exclusive fishery zone and the exclusive economic zone, it has achieved a favorable commercial interchange and had developed activities for the nation progress. It is true that it has been involved in controversies with countries like Nicaragua, but its expected with the pass of the time, get a fair agreement, where Colombia doesn't have to be the harmed one.

39 Truque, G. F. (1997). "Mares y Fronteras." Sociedad Geográfica de Colombia, Colombia, p.7.



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The Process of Institutionalization of the Association of Southeast Asian Nations: Evolution and Prospects for the future in East Asian Regionalism

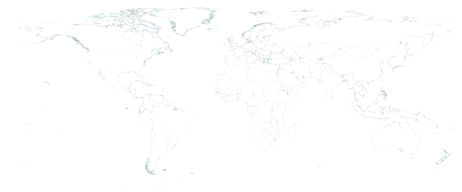
✉ By: Melissa Eusse Giraldo

Abstract

This paper aims to trace briefly the process of institutionalization of the Association of Southeast Asian Nations (ASEAN) since its creation in 1967 as a response to the increasing regional trade within Southeast Asia and this region with the rest of the world. The process of regionalism in the region has been constrained by different interests of the country members and the rule of consensus in every decision making process inside the organization. Real achievements came to the scenario mostly, after the Asian financial crisis in 1997, when the regional institutions failed to respond properly and their role was highly questioned. To regain its position and influence, ASEAN has become the first multilateral mechanism to regulate economic and political relations in Asia and the first to establish a Free Trade Area among its members and other countries outside the agreement. The ASEAN charter now in force will serve to guarantee the accomplishment of the ASEAN Vision 2020 that will make ASEAN one of the strongest partnerships in Asia and in the rest of the world. Some scholars affirm that further institutionalization of ASEAN can lead to a deeper process of regionalism in Asia, especially with northeast Asia (China, Japan and South Korea), countries with historical rivalries and distinctive approaches towards regionalism.

Key words

ASEAN, regionalism, ASEAN Charter, ASEAN Community.



Introduction

Regional integration in Eastern Asia has been a process basically led by market forces that have resulted in increasing intraregional trade and investment among the neighboring countries and subsequently, creating interdependence of their economies. In respect to regional integration, Gooptu and Pangestu (2002)¹ define the concepts of regionalism and regionalization, the latter consists precisely in the informal process that has taken place in Eastern Asia motivated by the market forces in absence of regulatory mechanisms and institutions. Regionalism on the contrary, is the process by which formal institutions and regulations are established regarding integration and economic cooperation within the regions in order to promote to higher rates of trade and investment. In the mid 1980s, many Multinational Corporations took their factories of production to newly industrialized economies in China and eastern Asia; that showed an increased trade inside the region but without any regulatory framework up to those years despite the existence of the Association of Southeast Asian Nations (ASEAN) since the late 1960s.

Even the tremendous economic growth of the economies in Eastern Asia for the last four decades (mainly given to international trade and foreign direct investment in the region), proliferation of Free Trade Areas in this region have come late in the picture compared to other continents like Europe and North America.

Regional agreements and international economic cooperation in the world were born in the post cold war years. In the case of Asia, these processes started in 1967 with the creation of ASEAN based on the Bangkok Declaration on commercial preferences and 20 years later, with the creation of the Asia Pacific Economic Cooperation (APEC) in 1989.

Currently, ASEAN is the association with the highest relevance in the region given its evolution and scope of work that is still expanding and improving relations of the country members. The ASEAN was in the first place established for economic, social and cultural cooperation although; the most important achievements have been in terms of politics and diplomacy². ASEAN was founded in Thailand by 5 countries of the region: Indonesia, Malaysia, Singapore, Thailand and Philippines. Later on, the other current members joined in different years as follows: Brunei Darussalam in 1984, Viet Nam in 1995, Lao PDR³ and Myanmar in 1997 and Cambodia in 1999⁴.

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- 1 Gooptu Sudarshan and Pangestu Mari. (2002). "New regionalism: options for China and East Asia". Available at: [publicaciones del Banco Mundial](#).
 - 2 Hwee, Ye Lay. (2006). "Japan, ASEAN, and the Construction of an East Asian Community". Available at: Contemporary Southeast Asia. Vol. 28. No. 2. Pp. 259-276.
 - 3 Lao PDR: Lao People's Democratic Republic
 - 4 Association of Southeast Asian Nations (ASEAN). 2010. About ASEAN. Official website: http://www.aseansec.org/about_ASEAN.html. Accessed on October 1, 2010.



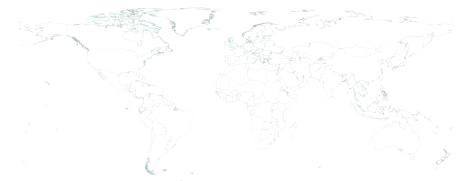
Evolution

As an institution, ASEAN has shaped its legal personality throughout the time by the amendments and the additions to the aims and purposes and the fundamental principles set up in its beginnings. The constitution of ASEAN in its very beginning in 1967, was based on the aims and purposes stated in the ASEAN or Bangkok Declaration which briefly are: to increase economic growth, social progress and cultural development in the spirit of equality and partnership, to promote regional peace and stability by supporting unconditionally the rule of law and the respect to justice in the relation with the other members in compliance also with the Charter of the United Nations, to promote active collaboration and mutual assistance on matters of mutual interest, to provide assistance to each other in the form of training and research facilities, to collaborate more effectively for the greater utilization of their agriculture and industries, the expansion of their trade; to promote the Southeast Asian studies, and to maintain close and beneficial relations with other international and regional organizations with similar aims and purposes. These founding guidelines for cooperation were further developed nine years after the formal creation of ASEAN with the signing of the Treaty of Amity and Cooperation in Southeast Asia (TAC) in Indonesia in 1976. The content of this treaty is the fundamental principles that guide roughly all interactions of the member countries within ASEAN. These are: mutual respect for the independence, sovereignty, equality, territorial integrity, and national identity of all nations; the right of every state to lead its national policy, non-interference in the internal affairs of members; settlement of differences by peaceful manners; renunciation of threat or use of force; effective cooperation among all members.

Nevertheless the aims, purposes and main purposes served well as the basis to the continuous cooperation inside the ASEAN, the evolution process towards a more institutionalized and regulated mechanism has been slow to achieve. From the 1990s real steps forward have been taken up to the general consensus to build the ASEAN community. In the first decades of existence, ASEAN had the most improvements as a diplomatic community rather than an economic mechanism due to high competition and protectionism among the members that made integration and reciprocity of their economies hard to accomplish⁵. With the successful resolution of the crisis in Cambodia in 1991, the ASEAN recovered much of its credibility in the region as a useful mechanism but at the same time, it had to face important challenges with the birth of new regional economic institutions and competitors in the international market. Due to the new scenario in the mid 1990s (creation of NAFTA in 1994 and the strengthen of the European Community), the conception of economic liberalization had to change in all the country members of ASEAN in order to preserve the unity of the association and to overcome the new conditions and obstacles imposed by the contemporary world.

As part of the high level meetings that take place every year certain period of time according to the agenda and the needs in the different country members of ASEAN, the 1992 ASEAN

5 Hwee, Ye Lay. (2006). "Japan, ASEAN, and the Construction of an East Asian Community". Available at: Contemporary Southeast Asia. Vol. 28. No. 2. Pp. 259-276.



meeting in Singapore had a especial outcome. In response to other regional integration processes going on in the world and based on the general will to regulate the commercial relationships of the members, the initiative to create a Free Trade Area for ASEAN, namely AFTA⁶ became part of the agenda and finally came into force in 2002. The process to finally consolidate the agreement took around ten years due to political and economic differences among its members such as: inflexible political systems in some countries, unequal levels of wealth and economic growth and income distribution. Furthermore, the topics regarding to agriculture, investment and services were highly discussed inside the AFTA negotiations. The FTA was developed in three distinctive phases⁷: the consolidation phase (1991-95) during this period of time intergovernmental meetings were conducted on an informal basis; the expansion phase (1996-97) in which agriculture, services, liberalization in investment and industrial cooperation and finally, from 1998 to 2002, the period during the Asian Financial crisis and the post crisis time, characterized by new emerging initiatives as a response to the downturn caused by the crisis. Even though the initial reluctance to the AFTA, this regional project allowed important progress in the member economies due to the lowering in barriers, officially regulated by the Common Effective Preferential Tariff (CEPT).

In spite of the size and the importance that the APEC means to the Asia Pacific region because of the number of economies involved⁸ and their share in the global trade of 43.7% in 2008⁹; ASEAN has proved in its 43 years of existence, greater relevance in terms of economic and political achievements namely, the AFTA already mentioned and the ASEAN Charter which provides the basis to the construction of the ASEAN community in 2020. For the ASEAN, has been easier to preserve higher cohesion in contrast to APEC, which involves a larger number of economies with different levels of economic growth and different cultures and to the exclusive economic nature of the forum¹⁰. In addition to the important steps taken inside ASEAN, other initiatives towards the expansion of the institution are gaining acceptance for the future, such as the ASEAN+3¹¹. Other proposal of a more extended ASEAN community is the ASEAN+6¹², a more complex idea towards regionalism, supported by few members and especially by Japan who holds a more holistic approach in terms of regionalism.

6 ASEAN Free Trade Area (AFTA).

7 Nesadurai, Helen E.S. (2003). "AFTA in perspective". Available at: Globalization, Domestic Politics and Regionalism: The Asean Free Trade Area. No.1. Routledge Taylor and Francis Group. London and New York.

8 Current members of APEC (21): Australia, Brunei Darussalam, Canada, Republic of Korea, Chile, People's Republic of China, United States, Philippines, Hong Kong (China), Indonesia, Japan, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, Russian Federation, Singapore, Thailand, Taiwan and Viet Nam.

9 Asia Pacific Economic Cooperation (APEC). 2010. About APEC. Official website. http://www.apec.org/apec/about_apec.html. Accessed on October 5th, 2010

10 Bustelo, Pablo. (2005). "Regionalismo y las relaciones económicas en Asia oriental". En: ponencia dirigida por Sean Golden, "Regionalismo y desarrollo en Asia: modelos, tendencias y procesos", Consorci UIMP de Barcelona.

11 ASEAN+3: The 10 member countries of ASEAN plus China, Republic of Korea and Japan.

12 ASEAN+6: The 10 member countries of ASEAN plus China, Republic of Korea, Japan, Australia, New Zealand and India.



The overall evolution of ASEAN up to the level of institutionalization reached until now has passed through different stages of involvement and commitment of the country members. Starting by the Bangkok or ASEAN Declaration of 1967, the document of formal foundation of the association that established its existence on the collective will of the fathers of ASEAN, expecting that other countries of the Southeast Asian region could join in the following years. The other four countries members (Brunei Darussalam, Viet Nam, Lao PDR, Myanmar and Cambodia) of the region joined the association, years after its creation. The following milestone in the evolution of ASEAN is the Treaty of Amity and Cooperation in Southeast Asia (TAC) of 1976 which drew up the fundamental principles and basis for further integration.

The next important milestone takes place in the 30th anniversary of ASEAN in 1997¹³. This could be one of the most relevant moments in the history of ASEAN. All leaders of the member economies, agreed on the ASEAN Vision 2020 which refers to an outward looking, peaceful, stable and prosper Southeast Asian community, bonded in partnership. This represented the first step forward for this regional project. Further commitment was materialized during the 9th ASEAN Summit in 2003 when all members resolved that the ASEAN community had to be established. More recently, in the 12th ASEAN Summit in 2007, all members pushed the goal to be fulfilled before than planned, for 2015 by the signature of the Cebu Declaration on the Acceleration of the Establishment of an ASEAN Community by 2015¹⁴ which is basically supported on collective will and commitment. The ASEAN community along with the AFTA is one of the most ambitious projects inside ASEAN that have tangible outcomes so far. In respect to the ASEAN community, there are three pillars that sustain the whole idea to construct the community: the ASEAN Political-Security Community, the ASEAN Economic Community and the ASEAN Socio-Cultural Community¹⁵. Each of these pillars has its own blueprint or specific project in the region and they encompass the holistic approach of the community-building process. Together with the ASEAN community, the Initiative for ASEAN Integration (IAI) Strategic Framework and the IAI Work Plan Phase II (2009-2015) work hand in hand in order to achieve further integration in the region by bridging the gaps in development of the member states in ASEAN, becoming into more competitive economies inside and outside ASEAN¹⁶.

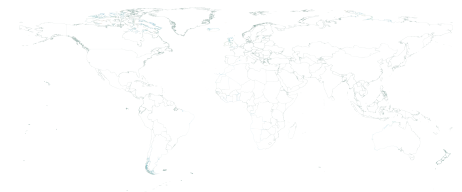
As to summarize the process of evolution within the ASEAN institution building process, the ultimate achievement in terms of institutionalization is the establishment of the ASEAN Charter, already mentioned. The ASEAN charter came into force in December, 2008 as a legally binding agreement among the 10 member states of ASEAN. The Charter serves as a strong basis to accomplish the ASEAN community by providing legal status and institutional framework to ASEAN. This document codifies all customary and non-mandatory rules, norms and values

13 Association of Southeast Asian Nations (ASEAN). 2010. About ASEAN. Official website: http://www.aseansec.org/about_ASEAN.html. Accessed on October 4th , 2010.

14 Ibid.

15 Ibid.

16 Ibid



up to that year. Everything concerning members, the complete structure of ASEAN and its main bodies, entities related to ASEAN, the decision making process, dispute settlement of disputes between states, budget and finance, administrative procedures and identity and symbols are codified in the Charter¹⁷. Additionally, it outlines the main targets the institution aims to achieve in the short and the long term presenting accountability and compliance of the members. With the creation of the Charter, it is expected that a number of new organs will be born to boost the community creation process which is stipulated to start in 2015.

Prospects for the future in East Asian Regionalism

In contrast to the loss of relevance of APEC, the ASEAN has recently assertively responded to the changes and new challenges in the region, the imminent rise of China in Asia and in the world, bonding relationships with this new giant through high level and informal dialogues such the ASEAN Regional Forum (ARF). Other dialogues going on with other regions is the one with Europe through the Asia-Europe meeting (ASEM). The other important initiative with interesting prospects for the future is the ASEAN+3, which emerged after the Asian financial crisis hit the region and questioned the effectiveness of regional mechanisms to respond to its effects. The initiative was born with the intention to complement the role of ASEAN with the participation of more developed economies such as Japan, South Korea and China.

The ASEAN is therefore born as a new initiative of regionalism in eastern Asia, in its origins picked up former Indonesian Prime Minister Mahatir Mohamad proposal of 1990 to create an East Asian Economic Caucus (EAEC) that in essence presented the need to create an institutionalized mechanism in the region. Even though the proposal could not be achieved as such as a result of objections from both the United States and Japan, the idea for a community in eastern Asia reflected the need to forge common identity among the peoples in the region¹⁸. Objections to the construction of the EAEC by Japan and the United States were based on their conception of a regional institution that would include as well other countries of the Asia Pacific rim.

The first summit as ASEAN plus three, took place in Kuala Lumpur, Malaysia by the end of 1997 when informal negotiations of the ASEAN+3 started. Later on, ASEAN+3 summits became formal by 1999 when during the high level meeting in Manila the general consent

17 Association of Southeast Asian Nations. 2008. ASEAN Charter.

18 Park, Chang-Gun. (2006). "Japan's Emerging Role in Promoting Regional Integration in East Asia: Towards an East Asian Integration Regime (EAIR)". Available at: Journal of International and Area Studies. Vol. 12. No.1. Pp 53-71.



to establish the institution of the ASEAN+3 community was discussed and agreed among all members to set up a framework of cooperation with the countries in the region. Since then, these summits take place every year by the 10 members of the association and along with China, Japan and South Korea¹⁹.

ASEAN+3 summits are organized every year by the foreign ministers of the 10 country members of ASEAN and together with China, Japan and South Korea. During negotiations, countries like Japan reflected a proactive approach in favor to regionalism in eastern Asia. The starring role that Japan has played in this process was proved in the ASEAN+3 2001 summit in Brunei Darussalam, in which by Japanese initiative, two working groups were established made up of academic authorities namely, East Asian Vision Group (EAVG) and East Asian Study Group (EASG). They were created in order to assess the political and economic possibilities for a possible Free Trade Area in the region before the one purposed by the APEC in 2020, including other topics like cooperation, transfer of technology and as the ultimate goal, the creation of a regional regime for eastern Asia²⁰.

The process of integration of ASEAN with the three countries of East Asia has been different and has been conducted separately with each. China is the main partner in the region of Southeast Asia in terms of trade.

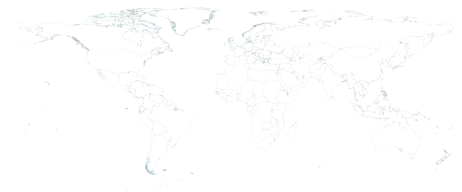
ASEAN + China Free Trade Area (ACFTA)

A Framework Agreement on Comprehensive Economic Co-operation between the Association of Southeast Asian Nations and the People's Republic of China was signed in November 2002 during a ministerial meeting in 2002 in Cambodia²¹. This came into force in July 2003. Under the framework agreement, both parties agreed to establish a FTA between China and the six founding members of ASEAN (Brunei Darussalam, China, Indonesia, Malaysia, Philippines, Singapore and Thailand) for the year 2010 and another deadline for the FTA of China with the other four ASEAN members (Cambodia, Lao PDR, Myanmar, and Viet Nam) for the year 2015. China has a positive relation with the ASEAN which represents an important challenge for both Japan and South Korea work towards a beneficial negotiation process with the association.

19 From 1997, the ASEAN+3 summits have taken place in the following countries: Kuala Lumpur, Malaysia (1997); Manila, Philippines (November 28th, 1999), Singapore (November 24th, 2000), Brunei Darussalam (November 6th, 2001); Phnom Penh, Cambodia (November 4th, 2002); Bali, Indonesia (October 3th, 2003); Vientiane, Lao PDR (November 29th, 2004); Kuala Lumpur, Malaysia (December 12th, 2005), Singapore (November 20th, 2007), Singapore (July 22nd, 2008), Phuket, Thailand (July 22nd, 2009) and Ha Noi, Viet Nam (July 21st, 2010).

20 Hong, Peng. (2006). "East Asian New Regionalism and China". Prepared for the Third Annual CEPPI-IDB Conference "The New Regionalism: Progress, Setbacks and Challenges". Washington DC.

21 Association of Southeast Asian Nations (ASEAN). 2010. ASEAN-China Free Trade Area. Official Website: <http://www.aseansec.org/19105.htm>. Accessed on November 4th, 2010.



ASEAN + South Korea

The process between the two players was basically established with the signature of the Agreement on Trade in Services under the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of the ASEAN and South Korea²². The feasibility study began in 2005 reaching the first agreement in goods and services. In terms of investment, rounds of negotiations were conducted until 2009 reaching also an agreement.

ASEAN + Japan

Japan started the study of feasibility of a possible agreement with the ASEAN in 2002 and finally in 2007, both parties signed the ASEAN-Japan Comprehensive Economic Partnership Agreement (AJCEP)²³ in which every country member of the ASEAN has a specific deadline to gradually liberalize trade between Japan and the member country. With this agreement Japan intends to strengthen the commercial relations in terms of trade of goods and services and regional cooperation looking forward to establish a FTA with ASEAN by the year 2012.

Nonetheless negotiations with China, South Korea and Japan with the ASEAN have been conducted separately; the most important objective in the long run for the ASEAN+3 proposal is to establish an East Asian Free Trade Area (EAFTA) like the existent one among the members of the association, with the intention to further expand cooperation and reach what Park (2006) calls the East Asian Integration Regime (EAIR) as the ultimate stage of integration in the region of East Asia. In preliminary negotiations of the EAFTA, economic differences of the potential members of this community raise many questions. China recently overpassed Japan as the second largest economy in the world and Japan on the third place, both countries with highly marked differences in development and income distribution. Other countries in Southeast Asia like Cambodia and Lao PDR require structural and urgent reforms. Therefore, reciprocity shall be present among all potential countries in the agreement and a balanced power structure in order to guarantee an effective community-building process.

Important initiatives in regional integration have been proposed by Japan who has also been an important donor to the countries in the southeast region, especially after the financial crisis of 1997. Basically three main initiatives have been Japanese creation and these are:

22 Association of Southeast Asian Nations (ASEAN). 2010. ASEAN-Republic of Korea Free Trade Area. Official Web site: <http://www.aseansec.org/22557.htm>. Accessed on November 4th, 2010.

23 Association of Southeast Asian Nations (ASEAN). 2010. ASEAN-Republic of Korea Free Trade Area. Official Web site: <http://www.aseansec.org/22572.htm>. Accessed on November 4th, 2010.



East Asia Free Trade Area, the development of an East Asian Market and the establishment of an East Asian Monetary Fund²⁴. Due to differing interests of the United States, China and the International Monetary Fund, the first two initiatives have not been well received and thus, they have not been developed deeper. The third proposal to build an East Asian Monetary Fund is supported by China but to be developed in the long term as a strategy to enhance financial cooperation.

The EAFTA and the EAIR initiatives have been discussed in the annual meeting of the ASEAN+3 since 1999. According to Park (2006) the process of integration in East Asia is based on three factors: first, on the geopolitical environment of the region; second, on institutional capability and third, on the will to regulate a mechanism of integration. These issues will be crucial in the last phase of integration which is the construction of an East Asian community.

The construction of an East Asian community is still a vague idea to develop formally given the many discrepancies among the parties and the processes that need to occur before the development of a wider community. ASEAN as itself has to deepen its process of institutionalization taking into account the level of economic development and reciprocity of the economies to further consider on including more members to the scenario. That means, the association has to reach a higher point of maturity before including economies that could jeopardize national economic conditions and international trade of the least developed nations of the ASEAN.

It is still interesting to mention the initiative to strengthen the dialogue of the ASEAN+3 proposal by inviting other states that could be beneficial for the whole process such as: Australia, New Zealand and India; into an ASEAN+6 initiative with observer states like the United States and Russia. Their participation might result in better and greater changes in the region. The question that remains is if the inclusion of all these states is actually economic and politically sustainable over time for the community-building process the ASEAN and the northeast Asian states are looking for.

²⁴ Park, Chang-Gun. (2006). "Japan's Emerging Role in Promoting Regional Integration in East Asia: Towards an East Asian Integration Regime (EAIR)". Available at: Journal of International and Area Studies. Vol. 12. No.1. Pp 53-71.



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OTAN en Kosovo:

la Operación Fuerza Aliada vista desde los principios básicos del *jus in bello*¹

✉ By: Felipe Montoya Pino

Resumen

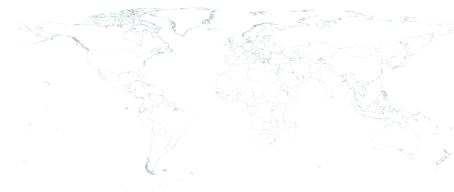
*Este artículo hace una revisión de la Operación Fuerza Aliada llevada a cabo por la OTAN en Kosovo en 1999, con base en los principios del Derecho Internacional Humanitario, a saber, los de distinción, proporcionalidad, precaución y limitaciones sobre el tipo de armas a emplear dentro de las operaciones militares. Este documento se distribuye en dos partes principales. La primera describe el tratado constitutivo de la OTAN haciendo énfasis en los que se consideran sus artículos más destacados, posteriormente se hace una presentación de los cuatro principios del **jus in bello**, citados anteriormente. La segunda parte describe cuatro incidentes aéreos dentro de la Operación que aparentemente apuntan a la violación de las normas del Derecho Internacional Humanitario, además la opinión de expertos con respecto al tema de discusión es presentada, así como la decisión final del Tribunal Penal Internacional para la ex Yugoslavia (TPIY) de no iniciar una investigación.*

*Este documento es el resultado de una investigación realizada a través de diferentes revistas de Derecho Internacional y noticias del sitio web oficial de la OTAN. Por último, vale la pena mencionar que no se pretende criticar ninguno de los argumentos presentados por los estudiosos oponiéndose a la intervención de la OTAN ni la decisión a la que el Tribunal llegó, el objetivo es presentar un caso que si bien no ha tenido consenso entre los analistas de derecho internacional, es de gran ayuda para comprender el **jus in bello** en las Relaciones Internacionales.*

Palabras Claves:

OTAN, Kosovo, proporcionalidad, distinción, precaución, limitación en el uso de armas, DIH.

1. La versión en inglés del presente artículo puede ser encontrada en el primer volumen de EAFIT Journal of International Law.



Introducción

La Organización del Tratado Atlántico Norte (OTAN) es una alianza de 28 países de América del Norte y Europa confiado “para alcanzar los objetivos del Tratado del Atlántico Norte firmado el 4 de abril de 1949”.² Esta organización tiene entre sus principales objetivos “salvaguardar la libertad y la seguridad de sus países miembros”³ y los valores de la democracia, la libertad individual, el Estado de Derecho y la resolución pacífica de las controversias tanto a través de medios políticos como militares. A lo largo de su proceso de ampliación la OTAN ha sido catalogada como una de las más exitosas y perdurables alianzas militares en la historia de las relaciones internacionales, sin embargo, “[d]esde el 24 de marzo hasta el 10 de junio de 1999, la Organización del Tratado del Atlántico Norte (...) participó en un campaña de bombardeos contra la República Federativa de Yugoslavia (RFY) en respuesta a las atrocidades cometidas por las fuerzas serbias contra la población de la etnia albanesa en Kosovo. Bajo el nombre código “Operación Fuerza Aliada”, la campaña resultó en la muerte de aproximadamente 500 civiles inocentes e hiriendo a más de 800 otros”.⁴

Aunque ésta estaba destinada a ser una intervención humanitaria, teniendo en cuenta la forma en que las operaciones se llevaron a cabo y sus resultados en términos de víctimas, algunos expertos argumentaron que la OTAN había cometido crímenes de guerra y que debía ser juzgada ante el Tribunal Penal Internacional para la Antigua Yugoslavia (TPIY), que tenía jurisdicción en este caso particular. En este contexto, el propósito de este trabajo es analizar los argumentos que indican que tales crímenes de guerra se produjeron ya que “[l]as normas principales del Derecho Internacional Humanitario [que] consisten en los principios de distinción, proporcionalidad y precaución en el ataque, así como la idea de limitar el uso de ciertos tipos de armas”⁵ fueron violadas.

Este documento se distribuye en dos partes principales. La primera (1) hace una breve introducción sobre la OTAN y describe su tratado constitutivo, haciendo énfasis en los que se consideran sus artículos más importantes (1.1), a continuación, en el marco del *jus in bello*, los cuatro principios fundamentales del Derecho Internacional Humanitario, mencionados anteriormente, se presentan y describen (1.2). La segunda parte (2) se centra en la “Operación Fuerza Aliada” describiendo cuatro atentados particulares con bombardeos aéreos que, aparentemente, violan los principios mencionados (2.1), y finalmente un breve análisis es realizado sobre la base de los argumentos planteados por diferentes autores, así como los presentadas por el TPIY (2.2).

2 What is NATO? North Atlantic Treaty Organization. *On line*: [http://www.nato.int/cps/en/natolive/what_is_nato.htm] Accessed: 05/04/2010.

3 Ibid.

4 MASSA, Anne-Sophie. “NATO’s Intervention in Kosovo and the Decision of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia Not to Investigate: An Abusive Exercise of Prosecutorial Discretion?.” *Berkeley Journal of International Law* 24, no. 2 (June 2006): 610-649. Business Source Complete, EBSCOhost., p.611.

5 Ibid., p.621.



1. La otan y las normas básicas del derecho internacional humanitario.

Varias críticas relacionadas con el carácter pro-democrático de la OTAN han puesto su reputación en duda. Algunos autores coinciden en que la *raison d'être* de la OTAN es la confianza mutua y que, como tal, sus propósitos se refieren a tópicos que van más allá del interés en la seguridad nacional. El debate tiene diferentes argumentos igualmente válidos, algunos de ellos, por ejemplo, argumentan que dado que “[v]arios de sus miembros han sido en diferentes momentos de la historia Estados no democráticos”⁶, la cuestión de cuándo la OTAN obtuvo su identidad democrática muestra que la organización ha sido “claramente inconsistente en el tiempo en términos de la importancia que atribuye a los principios democráticos”.⁷

Por otro lado, otros dicen que si una alianza militar es “una organización que se ha creado con el único objetivo de proteger a los Estados miembros de una amenaza externa claramente identificada, y que se mantiene unida principalmente como resultado de una percepción común de dicha amenaza, entonces parece plausible que la OTAN ha fijado como objetivo, y se percibe a sí misma como algo más, y hay algunas pruebas que apoyan la idea que la “nueva OTAN” ha tratado de establecer una base de legitimidad para sí misma, y una definición de sus propios fines, que están de alguna manera ligadas a la idea de la gobernabilidad democrática”.⁸

Otros autores permanecen neutrales y declaran que incluso si “la OTAN no es ciertamente el mecanismo causal directo para la democratización y la supervivencia de la democracia (...) los lazos oficiales y no oficiales de alianza de la OTAN facilitan un proceso subyacente que ayuda a reducir la amenaza externa, (...) [y] [e]ste proceso subyacente aumenta la probabilidad de transición a la democracia o la consolidación ayudando a la solución de los desacuerdos territoriales, que tienen un efecto tan perjudicial sobre el estado”.⁹ No obstante, para evitar tomar partido, la siguiente sección se centrará únicamente en virtud del tratado constitutivo de la OTAN. Posteriormente, las normas básicas del Derecho Internacional Humanitario se describen brevemente con base en el análisis realizado por Anne-Sophie Massa, candidata a doctorado en el Departamento de Derecho Penal de la Facultad de Derecho de la Universidad de Maastricht.

6. SJURSEN, Helene. On the Identity of NATO. *International Affairs* (Royal Institute of International Affairs 1944-), Vol. 80, No. 4, The Transatlantic Relationship (Jul., 2004), pp. 687-703 Published by Blackwell Publishing on behalf of the Royal Institute of International Affairs. Stable URL: [<http://www.jstor.org/stable/3569530>] Accessed: 07/04/2010 15:00. , p.695.

7. Ibid, SJURSEN, Helene. , p.695.

8. Ibid, SJURSEN, Helene. , p.693.

9. GIBLER, Douglas M. and Sewell, Jamil A. External Threat and Democracy: The Role of NATO Revisited. *Journal of Peace Research*, Vol. 43, No. 4, Special Issue on Alliances (Jul., 2006), pp. 413-431 Published by Sage Publications, Ltd. Stable URL: [<http://www.jstor.org/stable/27640351>] Accessed: 07/04/2010 15:13. p. 416-417.



1.1. El tratado del Atlántico Norte de abril 4, 1949.

“(…) El Tratado del Atlántico Norte, así como numerosos documentos y declaraciones posteriores de la OTAN, hacen hincapié en la importancia de los principios democráticos. Así, en el preámbulo del tratado se establece que las partes están “decididas a preservar la libertad, la herencia común y la civilización de sus pueblos, fundada en los principios de la democracia, la libertad individual y el imperio de la ley”.¹⁰ Los principios de la Carta de las Naciones Unidas son comúnmente mencionados en el tratado de la OTAN, por consiguiente, las partes se comprometen a actuar de acuerdo con ellos como se cita en el artículo 1: “Las Partes se comprometen (...) a resolver cualquier controversia internacional en el que puedan estar involucradas por medios pacíficos (...) y de abstenerse en sus relaciones internacionales de la amenaza o al uso de la fuerza en cualquier forma incompatible con los propósitos de las Naciones Unidas”.¹¹

“Mientras que para la mayoría de los europeos el artículo 5 [mencionado a continuación], fue la atracción principal de la OTAN, los miembros de América del Norte estaban más interesados en el artículo 2, que aboga por el fortalecimiento de las instituciones libres y la promoción de la estabilidad política y el bienestar material a través del comercio internacional y la cooperación económica”.¹²

El aspecto militar del tratado puede ser percibido en el artículo 3, que llama a cada parte a “mantener y desarrollar [su] capacidad individual y colectiva para resistir un ataque armado”.¹³ Asimismo, el artículo 4 establece la oportunidad de las partes a solicitar consultas cada vez que, en su opinión, “la integridad territorial, la independencia política o la seguridad de cualquiera de las Partes se vea amenazada”.¹⁴ Sin embargo, “[e]l componente crítico del Tratado del Atlántico Norte es el artículo 5, en el que los Estados signatarios acuerdan que “un ataque armado contra uno o varios de ellos en Europa o Norteamérica será considerado un ataque contra todos ellos”, y se comprometen a ayudar unos a otros “tomando de inmediato, en forma individual y en conjunto con las otras Partes, las medidas tales como [cada signatario] considere necesarias, incluyendo el uso de la fuerza armada, para restaurar y mantener la seguridad de la zona del Atlántico Norte”¹⁵ Este artículo también establece que el ataque armado, así como las medidas adoptadas para responder a éste deben ser reportados inmediatamente al Consejo de Seguridad y que las medidas adoptadas para responder al ataque mencionado cesarán cuando el Consejo haya adoptado medidas para restablecer el orden.

10 SJURSEN, Helene. , op. cit. , p.691.

11 The North Atlantic Treaty. Washington D.C. -4 April 1949. North Atlantic Treaty Organization. *On line*: [http://www.nato.int/cps/en/natolive/official_texts_17120.htm]

12 Barany, Zoltan. 2009. NATO AT SIXTY. *Journal of Democracy* 20, no. 2, (April 1): 108-122. <http://www.proquest.com/> (accessed April 16, 2010). , p.110.

13 The North Atlantic Treaty, op. cit.

14 The North Atlantic Treaty, op. cit.

15 Barany, Zoltan. 2009. op. cit. , p.109.



En este sentido, el artículo 6 define lo que para la OTAN constituye un ataque armado y el artículo 7 aclara que el tratado no afecta en modo alguno las obligaciones y derechos bajo la Carta de las Naciones Unidas y que no tiene intención de modificar el papel del Consejo de Seguridad como el garante de la paz y la seguridad. Además, el artículo 9, establece un Consejo en el que cada parte deberá asumir la representación, un Consejo capaz de reunirse “con rapidez en cualquier momento”, y le da la libertad de establecer cuantos órganos subsidiarios sean necesarios, por último, insta a la creación de un Comité de Defensa a cargo de la aplicación de los artículos 3 y 5.

Desde el artículo 10 al 14 se hace referencia a formalidades, como el procedimiento para que un Estado se convierta en parte (artículo 10), las condiciones para que el tratado entre en vigor (artículo 11), la posibilidad de revisar el tratado a petición de cualquiera de las partes después de que éste ha estado en vigor durante diez años (artículo 12), la opción de notificación de denuncia por una Parte después de que el tratado ha estado en vigor durante más de veinte años (artículo 13), y el lugar de depósito del tratado (artículo 14) que para este fin fueron los archivos del Gobierno de los Estados Unidos de América.

Sin embargo, estos últimos cinco artículos no son tan importantes bajo el propósito del presente trabajo. Por último, se puede decir que a pesar de que algunas opiniones sobre la *raison d'être* de la OTAN y su identidad democrática pueden ser contradictorias, una cosa está clara y es que en el momento de la constitución y en todos sus procesos de ampliación “los miembros de la OTAN entraron libremente y no fueron obligados a tomar parte en ella contra su voluntad. [También], [l]a Alianza ha tenido siempre un secretario general europeo, y su estructura ha permitido la participación real y activa de los Estados miembros”.¹⁶

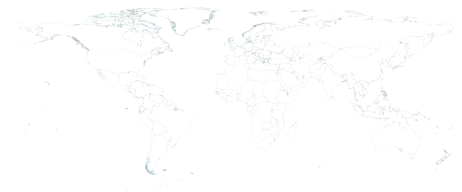
1.2 Las normas básicas del Derecho Internacional Humanitario.

Con el fin de describir los principios del Derecho Internacional Humanitario, la diferencia entre el *jus ad bellum* y el *jus in bello* debe ser establecida. “En primer lugar, el *jus ad bellum* se compone de las normas de la Carta de las Naciones Unidas sobre el recurso a la fuerza. Por lo tanto, los Estados pueden usar la fuerza sólo en respuesta a un ataque armado (según el artículo 51) o con la autorización del Consejo de Seguridad”.¹⁷ No obstante, como se ha observado en Derecho Internacional Público, los Estados pueden ir a la guerra basados en una de tres situaciones que vienen de la doctrina, a saber, la legítima defensa, la seguridad nacional, o la intervención humanitaria.

“(…) [A]l Estado que recurre a la fuerza le corresponde entonces apreciar si el uso de la fuerza cumple con los requisitos de necesidad y proporcionalidad. La necesidad “determina si la situación realmente amerita el uso de la fuerza armada”. (...) En caso

¹⁶ Barany, Zoltan. 2009. , op. cit. , p.112.

¹⁷ O'CONNELL, Mary Ellen. Reviewed work(s): Necessity, Proportionality and the Use of Force by States by Judith Gardam. The American Journal of International Law, Vol. 100, No. 4 (Oct., 2006), pp. 973-978 Published by: American Society of International Law Stable URL: [http://www.jstor.org/stable/4126348] Accessed: 10/04/2010 21:19. p.973-974.



afirmativo, la proporcionalidad requiere que se esté sujeto a una evaluación de los medios para lograr el objetivo legítimo. ¿Superará el costo para lograr ese objetivo en términos de vidas civiles perdidas y destrucción de bienes civiles y el medio natural el valor mismo del objetivo?”.¹⁸

Por otra parte, “[el] *jus in bello* consiste en los numerosos tratados, normas del derecho internacional consuetudinario y principios generales que rigen la conducta de la fuerza -sea legal en virtud del *jus ad bellum* o no”.¹⁹ Especial énfasis se hará en esta última observación. El hecho de que independientemente la guerra sea legal bajo el *jus ad bellum* o no, el *jus in bello* sigue siendo válido es fundamental porque a veces aunque la justificación para ir a la guerra es lícito según la Carta de las Naciones Unidas, los medios utilizados durante el conflicto no lo son, y el Estado que cometió tales actos debe responder ante un tribunal internacional por haber violado el Derecho Internacional Humanitario.

El Derecho Internacional Humanitario (DIH) busca “moderar la conducta de los conflictos armados y mitigar los sufrimientos que estos causan. De ello se deduce que las personas que no participan o que cesan de participar en las hostilidades, como los civiles, los combatientes heridos y enfermos y los prisioneros de guerra deberán ser protegidos durante el conflicto y se les permite beneficiarse de la asistencia humanitaria”.²⁰ Como se mencionó antes, hay cuatro principios fundamentales que componen el DIH los cuales están codificados en el Protocolo Adicional I a los Convenios de Ginebra y son reconocidos como Costumbre Internacional.

El primer principio es el de *distinción*. Está contenido en el artículo 48 del Protocolo Adicional I y señala que “una guerra se libra sólo contra las fuerzas armadas del enemigo y por lo tanto requiere que distinciones sean establecidas entre civiles y combatientes y entre bienes civiles y objetivos militares (...) La población civil como tal, así como las personas civiles, no serán objeto de ataque. En otras palabras, la población civil y bienes de carácter civil (...) deben estar protegidos en todas las circunstancias”.²¹ Por lo tanto, la definición de lo que se considera un objetivo militar es crucial cuando se aplica el principio de distinción. De acuerdo con el Protocolo Adicional I los “objetivos militares se limitan a aquellos objetos que por su naturaleza, ubicación, finalidad o utilización contribuyan eficazmente a la acción militar y cuya destrucción total o parcial, captura o neutralización ofrezca en las circunstancias del momento, una clara ventaja militar”.²²

18 Ibid, O'CONNELL, Mary Ellen.

19 Ibid, O'CONNELL, Mary Ellen. , p.974.

20 MASSA, Anne-Sophie, op.cit. .p.621.

21 Ibid, MASSA, Anne-Sophie.

22 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. International Humanitarian Law - Treaties & Documents. On line: [<http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079j>]



Hoy día se ha vuelto difícil identificar algunos objetos que se utilizan tanto para fines civiles como militares. Estos “objetos de doble propósito”, definidos así por Annie-Sophie Massa tienen que estar claramente identificados como objetos que contribuyan efectivamente a la acción militar, porque si hay lugar a dudas, se debe suponer que son civiles, como se indica en el artículo 52 (3) del Protocolo: “En caso de duda si un objeto que normalmente se destina a fines civiles, como un lugar de culto, una casa u otra vivienda o una escuela, se está utilizando para hacer una contribución efectiva a la acción militar, se presumirá que no se utiliza con tal fin”.²³

El principio de *proporcionalidad* viene en segundo lugar. En él se prohíbe un ataque que “se espera causará pérdidas de vidas civiles, heridas a personas civiles, daños a bienes de carácter civil, o ambas cosas, que serían excesivos en relación con la ventaja militar concreta y directa prevista”.²⁴ Además, el principio de precaución ha sido codificado en el artículo 57 del Protocolo adicional I (PA I), donde una serie de precauciones deben tomarse en “los diferentes niveles de la jerarquía militar con el fin de evitar bajas civiles”.²⁵ Algunas de estas precauciones son las de preservar a la población civil, los civiles y bienes de carácter civil; verificar que los objetivos a ser atacados son estrictamente militares; cancelar o suspender el ataque, si condiciones especiales se presentan²⁶; dar una advertencia previa efectiva de los atentados que puedan afectar a la población civil, entre otros.

Por último, el *uso de las armas* es mencionado en el artículo 35 (3) del (PA I), que prohíbe el uso de “armas de tal índole que causen males superfluos o sufrimientos innecesarios”. En cuanto a la protección del medio ambiente se refiere, el Artículo 35 (3), excluye el uso de los medios de guerra que causarían “daños extensos, duraderos y graves al medio ambiente natural”.²⁷ El *uso de las armas* es mencionado en otras convenciones donde se prohíbe el uso de ciertos tipos de armas, ya que violan “las leyes o usos de la guerra”.

La violación de los principios de distinción, proporcionalidad y el uso de armas constituye un crimen de guerra, y aunque la violación del principio de precaución no constituye en sí un crimen de guerra” si una violación del principio conduce a un ataque directo contra la población civil o bienes de carácter civil, o un ataque indiscriminado, la falta de precaución contribuye indirectamente a la comisión de crímenes de guerra”.²⁸ Estos elementos descritos anteriormente muestran que las acciones cometidas en la guerra debe ser cuidadosamente reguladas puesto que la comisión de una imprudencia puede constituir la violación de un principio

23 Ibid.

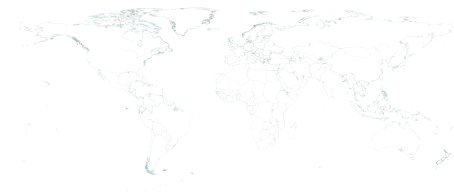
24 MASSA, Anne-Sophie, op.cit. , p.623.

25 Ibid, MASSA, Anne-Sophie. , p.624.

26 “Si se pone de manifiesto que el objetivo no es militar o que goza de protección especial o que del ataque se puede esperar que causará pérdidas de vidas civiles, heridas a personas civiles, daños a bienes de carácter civil, o ambas cosas, que sería excesivo en relación con la ventaja militar concreta y directa prevista” Artículo 57 (2b) Protocolo Adicional I.

27 MASSA, Anne-Sophie, op.cit. , p.625-626.

28 MASSA, Anne-Sophie, op.cit. , p.625.



que está a la vez codificado en los tratados ratificados por la mayoría de los países en el mundo y considerado Costumbre Internacional. Ahora que algunos conceptos del Derecho Internacional Humanitario se han explicado, este documento se centrará en la descripción de la Operación Fuerza Aliada de la OTAN con el propósito de analizar los acontecimientos concretos a la luz del *jus in bello*.

2. La operación fuerza aliada y sus consecuencias vistas desde el *jus in bello*

Después que las negociaciones de Rambouillet fallaron y debido a los continuos ataques contra la población albanesa que causaron un desplazamiento masivo de refugiados, la OTAN decidió implementar la Operación Fuerza Aliada con el objetivo de poner fin a las acciones de los serbios. “Sin embargo, los ataques aéreos de la OTAN, lejos de detener la crisis humanitaria, ‘añadió una nueva dimensión’ a la misma, contribuyendo así al mayor éxodo de refugiados desde la Segunda Guerra Mundial”.²⁹

“En junio [10] 1999, [después de meses de ataques aéreos] el Consejo de Seguridad de las Naciones Unidas (ONU) adoptó la Resolución 1244 para prever el despliegue de presencias civiles y de seguridad internacionales en Kosovo, bajo los auspicios de las Naciones Unidas, de conformidad con un pacto de paz acordado por la República Federativa de Yugoslavia [El Acuerdo Técnico Militar]. Actuando en virtud del Capítulo VII de la Carta de las Naciones Unidas (...), el Consejo de Seguridad autorizó al Secretario General para establecer una presencia civil internacional para proporcionar una administración provisional en Kosovo [UNMIK], y además autorizó a los Estados miembros de la ONU y las organizaciones internacionales pertinentes para establecer una presencia de seguridad internacional, con la participación sustancial de la OTAN y operando bajo “mando y control unificados”, a fin de establecer un entorno seguro para todas las personas en Kosovo”.³⁰

Sin embargo, durante la intervención algunas preguntas sobre la forma en que la OTAN estaba llevando a cabo los ataques comenzaron a surgir. La OTAN argumentó que no estaba violando las reglas de la guerra y que, contrario a los señalamientos, estaba siguiendo el Protocolo Adicional I, pero los incidentes ocurridos demostraron lo contrario a los ojos de algunos académicos. El propósito de esta sección es describir de forma breve y concisa los hechos denunciados que más tarde serán útiles para analizar a la luz del Derecho Internacional Humanitario.

29 Ibid., p.613.

30 SARI, Aurel. 2008. Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases. Human Rights Law Review 8, no. 1, (January 1): 151-170. [<http://www.proquest.com.ezproxy.eafit.edu.co/>] p.152.



2.1 Cuatro incidentes que reflejan la controversial planificación y fases de ejecución de la Operación Aliada.

“El 23 de abril de 1999, aviones de la OTAN bombardearon la Estación Estatal Serbia de Radio y Televisión en Belgrado sin negar que ése era el objetivo del ataque. La naturaleza del objetivo está en cuestión en este caso”.³¹ Ya se ha mencionado anteriormente que la naturaleza del objetivo a ser atacado tiene que estar claramente definida, especialmente con los denominados “objetos de doble uso”. El CICR ha incluido las estaciones de televisión en la categoría de potenciales objetivos militares, sin embargo, se aclara que la naturaleza del objetivo tiene que ser establecido en una base de caso por caso. Los ataques ocurrieron pasadas las 2 am, sin embargo, las fuerzas de la OTAN sabían que el edificio contaba con personal las veinticuatro horas.

Además, incluso si el objetivo es catalogado como militar, con el fin de ser destruido la ventaja militar obtenida de este modo tiene que ser considerable. Donde poca o ninguna ventaja militar es obtenida, la destrucción de la meta constituye una violación del *jus in bello*. Las razones dadas por la OTAN para justificar los ataques fueron que la Estación de Radio y Televisión “jugaba un papel de propaganda en el conflicto, [y] sostuvo que la estación de televisión era un objeto de doble propósito, porque era parte de la cadena de transmisión militar”.³² Tres horas más tarde después que el bombardeo se produjo, la transmisión se reanudó.

“Durante un ataque que se produjo en medio del día el 12 de abril de 1999, dos bombas cayeron en un tren de pasajeros civiles mientras cruzaba un puente. El objetivo del ataque era el puente, no el tren. Mientras que el lanzamiento de la primera bomba sobre el tren es atribuible al fracaso de la Alianza para verificar los horarios de los trenes y la gran altura desde la que la bomba fue lanzada, que al parecer impidió a los pilotos obtener una visión precisa de la meta en el momento del ataque, el lanzamiento de la segunda bomba es inexplicable”.³³ Éste fue conocido como el *Incidente del Puente de Ferrocarril Grdelica*, las explicaciones de la OTAN indicaron que el piloto que lanzó la segunda bomba “había entendido que la misión era destruir el puente sin importar el costo en términos de víctimas civiles”.

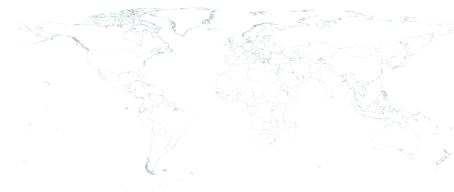
Al tercer evento se le conoce como *El Incidente de la Carretera Djakovica-Decan*. Varias personas de origen albanés murieron y más de 100 resultaron heridas cuando la OTAN, el 14 de abril; bombardeó varios convoyes de refugiados. Al principio, la OTAN rechazó su responsabilidad alegando que el ataque había sido llevado a cabo por las fuerzas yugoslavas, pero luego “admitió que los aviones de la Alianza habían llevado a cabo el atentado, sin embargo argumentó que los pilotos pensaban que estaban atacando vehículos militares”.³⁴ Después del ataque no hubo pruebas de que vehículos militares estuviesen presentes entre la po-

31 MASSA, Anne-Sophie, op.cit. , p.627.

32 Ibid. ,p.628.

33 Ibid. , p.630.

34 Ibid. , p.631.



blación civil, e incluso si las hubiera, el artículo 50 (3) del Protocolo Adicional I establece que “[l]a presencia entre la población civil de personas que no entran en la definición de civiles no priva a la población de su carácter civil”.³⁵ Vale la pena mencionar que después del ataque, la OTAN cambió la altitud a la que los pilotos estaban obligados a volar, de 15,000 pies y por encima a tan bajo como 6,000 pies, esto “con el fin de obtener una confirmación visual de la ausencia de civiles en las inmediaciones del objetivo (...)”.³⁶

Por último, *El Incidente en Nis* que ocurrió el 7 de mayo a mediodía consistió en que la OTAN lanzó bombas de racimo (bombas clúster) en dos zonas residenciales de la ciudad mencionada. Las bombas fueron lanzadas alrededor de la plaza de mercado y el hospital principal, catorce civiles resultaron muertos y una treintena lesionada. “Según Amnistía Internacional, las bombas cayeron en una parte ocupada de la ciudad en un momento cuando la gente estaba en las calles y en el mercado sin protegerse en los refugios donde habían pasado la noche”.³⁷ La OTAN sostuvo que el incidente había sido el resultado de un arma que había perdido su objetivo, ya que los verdaderos blancos eran “un aeródromo cercano utilizado por el ejército serbio y la aeronave, los sistemas de defensa aérea y vehículos de apoyo allí ubicados, <<objetivos para los que las municiones de racimo están debidamente adaptadas>>”.³⁸ Tras el incidente, los Estados Unidos de América emitió una directiva en el que pidió la restricción del uso de bombas de racimo.

Habiendo descrito los cuatro incidentes que se produjeron en el curso de la Operación Fuerza Aliada de la OTAN, este documento se centrará ahora en la presentación de algunos argumentos de académicos apuntando a las violaciones del Derecho Internacional Humanitario por parte de la OTAN, además, argumentos defendiendo las acciones de la OTAN se ilustran, dado que es considerado necesario tener en cuenta ambas partes en el conflicto. Como se mencionó anteriormente, este trabajo no tiene intención de tomar partido pues su objetivo es presentar el caso en el marco del DIH.

2.1 Alegaciones concernientes a las acciones de la OTAN en Kosovo.

Esta sección presenta algunos argumentos referentes a los acontecimientos mencionados *supra*. En primer lugar, el incidente de la Estación de Radio-Televisión (ERT) deja diversas dudas en cuanto al señalamiento de la (ERT) como un objetivo militar por parte de la OTAN, y porque ninguna ventaja militar significativa se obtuvo teniendo en cuenta que tres horas después de los atentados la emisión fue reiniciada. También, se argumenta que no había pruebas de que el objetivo era utilizado por la cadena militar serbia para propósitos de mando, control y comunicación. Algunos académicos sostienen que incluso si la (ERT) fuera un

35 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. Op. cit.

36 MASSA, Anne-Sophie, op.cit. , p.631-632.

37 Ibid. , p. 632

38 Ibid.



objetivo militar y una ventaja significativa fuera adquirida, la OTAN seguiría violando el principio de precaución ya que no advirtió a las personas que trabajaban en el lugar en cuestión a sabiendas de que estaba ocupado veinticuatro horas, como anota Anne-Sophie Massa “es difícil ver cómo la probable muerte o lesión de un número considerable de víctimas no podría considerarse como excesivo en comparación con una ventaja militar prevista de perturbar la radiodifusión por unas horas pasadas las 2 am”.³⁹

Con respecto al Incidente del *Puente del Ferrocarril Grdelica* el principal argumento citado es que el piloto debió haberse dado cuenta que la bomba había golpeado el tren, no el puente, y por lo tanto abstenerse de lanzar la segunda. El bombardeo del tren, claramente un objetivo civil, plantea la sugerencia que el piloto de la OTAN cometió “homicidio deliberado de civiles y ataque indiscriminado causando bajas civiles excesivas o daño excesivo”.⁴⁰ Diferentes argumentos entran en conflicto para definir si las violaciones fueron imputables al piloto o a sus superiores, e hipótesis sobre el conocimiento de los comandantes sobre el tren atribuyen diferentes grados de responsabilidad tanto a la persona que ejecutó la acción como a las que la ordenaron, pero entre los académicos es claro que la OTAN había cometido crímenes de guerra en este incidente en particular.

El tercer incidente también apunta hacia la comisión de asesinato deliberado de civiles dado que las precauciones pertinentes no fueron tomadas por la OTAN antes que los ataques aéreos se produjeron. Comisión de negligencia es también imputada, ya que los pilotos “confundieron el convoy con una columna militar”⁴¹, además la OTAN reconoció que después del ataque ninguna aeronave descendió para comprobar si se trataba efectivamente de un objetivo militar. En este caso, el debate de imputar responsabilidades penales individuales a los pilotos y sus superiores también está presente. Por último, los argumentos relacionados con el *Incidente de Nis* apuntan a una elección inapropiada de las armas a emplear y una violación del principio de distinción. El primero puede explicarse teniendo en cuenta que los comandantes de la OTAN sabían que la ubicación del objetivo militar yacía cerca de personas civiles y de acuerdo con esto se debería haber utilizado otro tipo de arsenal, el último argumento se explica mediante la siguiente declaración:

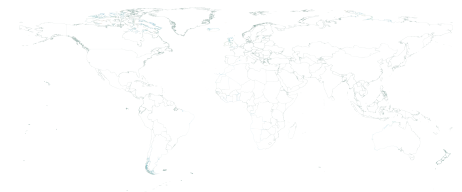
[e]l hecho de que armas de racimo fueron utilizadas en un objetivo localizado en las proximidades de un área civil, y en un momento del día en que los civiles se encontraban en las calles y probablemente se verían perjudicados, levantó serias preocupaciones sobre si la OTAN estaba efectivamente tomando la pasos apropiados para distinguir entre objetivos militares y civiles y bienes civiles, y si estaba tomando todas las precauciones necesarias para garantizar que los civiles no fueran puestos en peligro.⁴²

39 Ibid. , p.629.

40 Statute of the International Tribunal for the Former Yugoslavia. On line: [http://www.icty.de/dokumente/icty_statut.pdf] Accessed 10/04/2010

41 MASSA, Anne-Sophie, op.cit. , p.631.

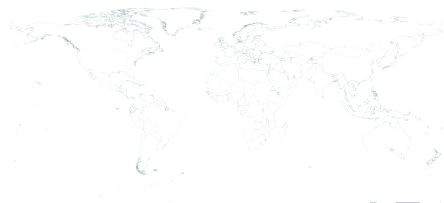
42 Ibid. , p.632.



Las opiniones de las ONG, los académicos y algunos Estados argumentando que los acontecimientos mencionados merecían una investigación adecuada, llevaron a la fiscal del TPIY, Louise Arbour, a establecer un Comité cuyo objetivo fue determinar si había suficientes bases para iniciar una investigación sobre la forma en que la Operación Fuerza Aliada de la OTAN fue llevada a cabo. “[E]l 02 de junio 2000, después de considerar la evaluación de su equipo sobre conducta de la OTAN en la campaña, la fiscal del TPIY, Carla del Ponte, quien había tomado el cargo de la ahora ex fiscal Louise Arbour (...), concluyó que “no [existían] bases para la apertura de una investigación en ninguna de las alegaciones o en ningún otro incidente relacionados con la campaña aérea de la OTAN”.⁴³

La fiscal argumentó que, aunque algunos errores fueron cometidos, saber que la OTAN no había realizado “señalamientos deliberados contra civiles o contra objetivos militares ilegales”, era suficiente para no abrir una investigación. Esta decisión generó diferentes sentimientos entre personas, algunas en defensa de la conclusión a la que la fiscal había llegado, mientras que otros alegaron que consideraciones políticas sesgaron su juicio.

43 Ibid. , p.611.



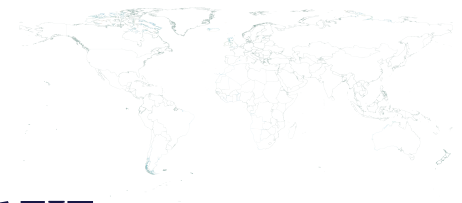
Conclusiones

“Aunque el uso de la fuerza militar en circunstancias extremas con fines humanitarios puede ser sin duda justificada, hay que decirlo, sobre todo en retrospectiva, que la Operación Fuerza Aliada de la OTAN en 1999 contra Serbia sobre Kosovo plantea a este respecto algunas preguntas y dudas graves”⁴⁴

Este trabajo se ha ocupado de la Operación Fuerza Aliada de la OTAN llevada a cabo en Kosovo en 1999, la cual llevó a la dimisión de las fuerzas serbias que atacaban a la población albanesa, pero también a la muerte de civiles en ataques aéreos realizados durante el conflicto, particularmente. El hecho de que en este momento todavía no existe un consenso entre los estudiosos acerca de las responsabilidades de la OTAN pone de manifiesto que los principios del *jus in bello*, aunque reconocidos en la comunidad internacional no siempre son fáciles de aplicar y tienen que ser analizados en una base de caso por caso. Algunos importantes grupos como Amnistía Internacional argumentan que una investigación de los hechos era necesaria, otros van más allá y aseguran que hubo un ejercicio abusivo de discrecionalidad judicial dentro de la decisión final de no investigar. Sin embargo, como se ha mencionado supra, el propósito de este trabajo se limita a presentar el caso en el marco del Derecho Internacional Humanitario, y así, invita al lector a una investigación más profunda sobre el tema para analizar más argumentos escritos por destacados eruditos en Derecho Internacional.

El presente trabajo se ha estructurado en dos partes. En la primera algunos argumentos relativos a la identidad democrática de la OTAN se han presentado y su Tratado Constitutivo ha sido descrito. A continuación, el *jus ad bellum* y *jus in bello* se mencionaron seguido por una presentación sobre los principios fundamentales de este último (i.e. el principio de distinción, proporcionalidad, la precaución y el uso de armas). La segunda parte describe cuatro incidentes que ocurrieron en la guerra de Kosovo que podría decirse violan los principios ya mencionados, y para concluir algunos argumentos relativos tanto a los acontecimientos como a los principios fueron explicados.

44 MÜLLERSON, Rein. 2009. Precedents in the Mountains: On the Parallels and Uniqueness of the Cases of Kosovo, South Ossetia and Abkhazia. *Chinese Journal of International Law* 8, no. 1, (March 1): 2-25. [<http://www.proquest.com.ezproxy.eafit.edu.co/>] p.9.



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