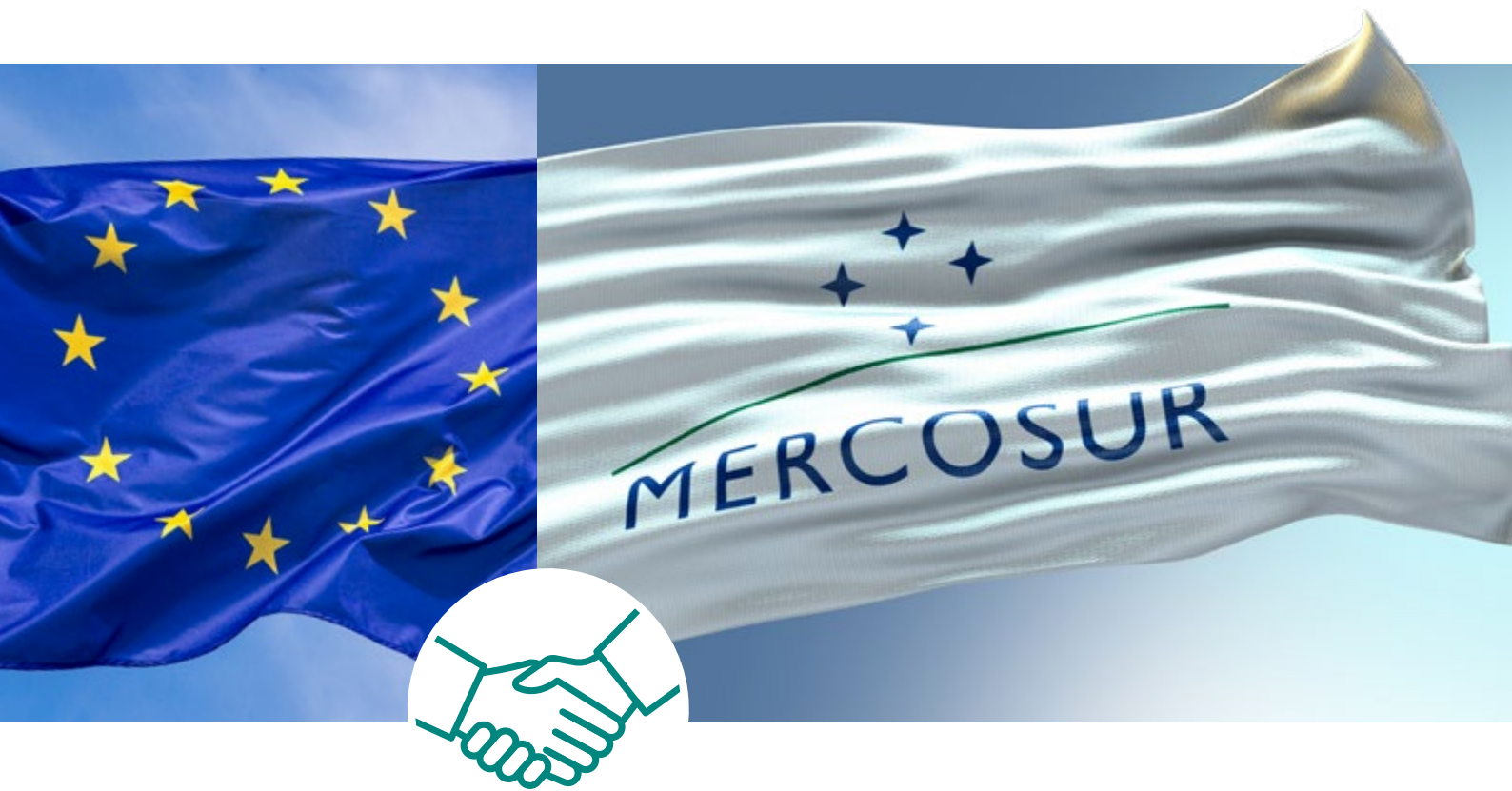


Legal opinion and proposals regarding a possible improvement or renegotiation of the draft **EU-Mercosur Association Agreement**

Dr. Rhea Tamara Hoffmann and Prof. Dr. Markus Krajewski



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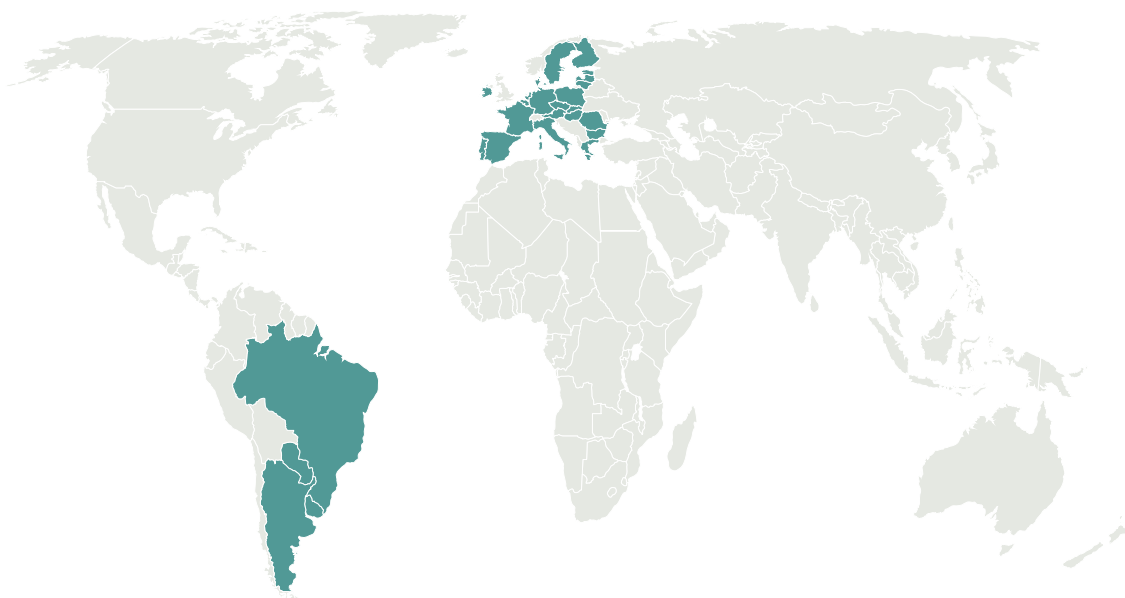
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► Preface

“The EU projects its values through its trade agreements. Concluding a trade agreement before its potential impact has been fully assessed risks undermining those values and the public’s ability to debate the merits of the deal. It also risks weakening European and national parliaments’ ability to comprehensively debate the trade agreement.” This is how European Ombudsman Emily O’Reilly commented on the shortcomings of the Sustainability Impact Assessment for the EU-Mercosur Trade Agreement in March 2021.

The EU Commission commissioned the impact assessment already in 2017 but failed to submit it as planned prior to conclusion of the political negotiations in summer 2019. Five non-governmental organizations subsequently lodged a complaint with the Ombudsman. Ms. O’Reilly confirmed in her inquiry report in March that the EU should have demonstrated that it had fully considered the potential environmental impacts and other issues prior to conclusion. The EU Commission then published the final report a few days after the Ombudsman’s reprimand.

The EU-Mercosur Association Agreement and especially the trade part contained therein have been criticized for years. Already in December 2017, Misereor pointed out the potential social, environmental and human rights impacts of the agreement.¹ At the same time, Greenpeace published for the first time hitherto secret documents of the negotiations.² Although the political negotiations have now been concluded, the full text of the negotiations is not yet available to the public. Individual European governments and parliaments, such as Austria and France, are also in opposition to the agreement. There is also increasing criticism

from Mercosur, for example from civil society and the trade unions.³

The EU Commission calls itself the most transparent negotiator in the world.⁴ At the same time, not even the mandate for the EU-Mercosur Association Agreement of 1999 has been published to date. Parts of the trade agreement are still missing even today. The Association Agreement adopted in June 2020 is still not officially available for inspection today.

The lack of transparency on the part of the EU Commission continues: For months there has been speculation that, in addition to the Agreement, there will be a declaration on sustainability aspects negotiated with Mercosur in response to massive criticism. The EU Commission is silent about both the content and the status of negotiations regarding these additional declarations.

But can an agreement be improved at all through supplementary declarations? How are these initiatives to be classified under international law? Would not complete renegotiation be the only way to eliminate the Agreement’s obvious shortcomings?

In order to get to the bottom of these questions and to counter the lack of transparency, Greenpeace, Misereor and CIDSE commissioned this legal opinion. Rhea Hoffmann and Markus Krajewski from the University of Erlangen-Nürnberg, renowned lawyers in the field of trade and international law, were commissioned with the work. In our view, the opinion not only fills a gap left by the EU Commission’s lack of transparency, but also points the way forward for further debate.

3 See <https://thomas-fritz.org/studien/das-eu-mercotur-abkommen-auf-dem-pruefstand>

4 See <https://trade-leaks.org/mercotur-leaks/>

5 See overview at <https://stopeumercotur.org/>

6 The then Trade Commissioner Cecilia Malmström wrote in the magazine “The Parliament”: “We should be proud that the EU is now the most transparent trade negotiator in the world”. Her article, “The evolution of EU trade policy,” appeared on 25 June 2019, three days prior to conclusion of the political part of the EU-Mercosur Trade Agreement. See <https://www.theparliamentmagazine.eu/news/article/the-evolution-of-eu-trade-policy>

Preface

The two experts come to the conclusion that the serious shortcomings of the Agreement in the area of environmental protection and human rights can only be remedied in the long term through renegotiation. They put forward concrete proposals for the wording of the sustainability chapter and the human rights clause. At the same time, they emphasize that the other chapters of the Agreement should also be placed under scrutiny. However, the EU Commission has thus far categorically ruled out renegotiation.

So it is now up to civil society to demand that their respective governments not approve the Agreement in its current form. Cosmetic changes must be rejected as sham solutions. The solution can only be transparent and democratic renegotiation.

The significance of the EU-Mercosur Agreement is immense: it would be the EU's largest free trade agreement to date. It is also Mercosur's first ever trade agreement. The responsibility on the part of both sides to ensure that the contents are forward-looking and appropriate at all levels weighs all the more heavily. These criteria can only be met if human rights and the rights of indigenous peoples are guaranteed; if the environment and climate are protected; if sufficient income and reasonable working conditions are ensured for the people concerned; and if confidence in the rule of law and democratic participation is not abused. ◀

Aachen, Brussels, Hamburg in May 2021

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Executive Summary

In light of growing opposition against the draft of the trade part of the EU-Mercosur Association Agreement (AA) with regards to climate change, the rights of Indigenous Peoples, labour, environmental and human rights various options for changes are currently discussed among stakeholders. This study identifies shortcomings in the Trade and Sustainable Development (TSD) Chapter with respect to substantive as well as procedural standards and analyses possible reforms which are announced by the EU Commission.⁷

With respect to procedural standards, the Parties to the draft trade part of the EU-Mercosur AA decided that the TSD Chapter should not refer to the general State-to-State dispute settlement mechanism enshrined in Chapter VIII “dispute settlement mechanism”. Instead, they opted for the standard model of EU Free Trade Agreements concerning dispute settlement in TSD Chapters, a less forceful mechanism which ultimately rests on the political will of the Parties to implement the recommendations of the Report of the Panel of Experts.

With respect to substantive standards, the draft EU-Mercosur AA formulates human rights obligations and commitments which refer to multinational environmental and labour agreements often in a non-binding manner. Many provisions only contain “best endeavor”-clauses and are mere declarations of intent or remain vague and only entail a low level of commitment.

Therefore, the study discusses various options for improvement with respect to its opportunities and limits from a legal perspective. All of these options have in common that new treaty texts can only be effective if all parties agree to them. Unilater-

al declarations cannot change the content of the agreement (at best, they can suspend provisions, but they cannot create new obligations). Moreover, the name given to an instrument is irrelevant to the instrument’s legal nature – its content and the legal effect is important.

The only option to improve this agreement would be treaty renegotiations. A new EU-Mercosur AA should include a progressive TSD Chapter with substantive sustainability standards and effective implementation measures and dispute settlement mechanism. This goal could be achieved via renegotiations only.

A protocol/separate agreement which could implement changes to the TSD Chapter – with respect to its substance, procedure or both aspects – would not be useful. This option would be based on the assumption to leave the text of the EU-Mercosur AA untouched. Therefore, such an additional agreement cannot address all shortcomings of the TSD Chapter.

A mere declaration of interpretation to the TSD Chapter would not be useful since it does not change the substantive standards and does not establish a binding enforcement mechanism.

Importantly, the best TSD Chapter alone does not guarantee the sustainability of the agreement. Laying down sustainable development clauses in a closed chapter without integrating sustainable development obligations of the Parties into other chapters of the Free Trade Agreement (FTA) is not enough. A comprehensive approach needs to take into account all details of the treaty. Labour, environmental and human rights protection requirements must be integrated throughout the text of the whole agreement. ◀

⁷ “Given the concerns over deforestation and the environment, the Commission is seeking meaningful engagement by Mercosur on the Paris Agreement and deforestation as we move towards ratification of the Agreement. At the EU27-LAC Ministerial of 14 December 2020, the EVP Dombrovskis and Mercosur Ministers instructed their officials to intensify contacts with a view to enhancing the exchange of information in these areas, increasing policy dialogue and identifying areas of cooperation. The Commission has already started to work on an initiative to address these concerns.” See EU Commission: Overview of FTA and other Trade Negotiations (Updated March 2021). Available at: https://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf (accessed 21 March 2021).

1. Introduction

On 28 June 2019, the Mercosur group and the European Union (EU) announced “a political agreement for an ambitious, balanced and comprehensive trade agreement”.⁸ The negotiations on the EU-Mercosur Association Agreement took place between 2000 and 2020 with years of pauses in negotiations; the substantive negotiations only began in 2016.⁹ Approval by the Council and the European Parliament is still pending. The treaty should come into force between the EU, the 27 Member States of the EU and the four member States of the South American economic region Mercosur (Argentina, Brazil, Paraguay and Uruguay) unless the agreement is split into a trade part and a political part in which case the trade part could be signed as an EU-only agreement (see below).

The planned treaty consists of two parts: The main part deals with tariffs, import quotas and non-tariff barriers to trade – a free trade agreement – and the political framework agreement (association agreement in a narrow sense) which would address general political, cooperation and institutional issues.

The TSD Chapter is one chapter in the trade part of the agreement.¹⁰ TSD Chapters in EU free trade agreements traditionally cover provisions on trade

and environment and trade and labour. It should be noted that the classic understanding of sustainable development which contains economic, ecologic and social dimensions is not limited to these issues. Instead, the protection of human rights can also be considered as an element of sustainable development in the context of trade agreements. As trade liberalisation may have negative impacts on human rights, adding human rights obligations to a TSD Chapter would be an important element of an improved TSD Chapter. However, the TSD Chapter in the trade part of the AA only covers the labour and environmental aspect of sustainable development, but not human rights, which are covered in the cooperation part of the AA.

A final text of the agreement is not yet available, the trade part is partially available since July 2019, the political framework agreement of June 2020 has not been officially published yet.¹¹ The agreement is still under review (so-called “legal scrubbing”) and translations are in process.¹² Recently, there have been increasing indications that the two parts of the Agreement might be split into a trade agreement which would fall into the exclusive competence of the EU (EU only) and the political part of the Agreement which would fall into the shared competence

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- 8 See EU Commission, Brussels, 28 June 2019: EU and Mercosur reach agreement on trade. Available at: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=2039> (accessed 21 March 2021).
- 9 “Although the EU and Mercosur had opened negotiations on an Association Agreement in 2000, trade negotiations had proved problematic. Negotiations were broken off in 2004, re-launched in 2010, and paused again in 2012. Since 2016, the two sides fully engaged in negotiations, which ended up in a final text agreed in June 2019.” Source: European Parliament Delegations: History - Delegation for relations with Mercosur (DMER). Available at <https://www.europarl.europa.eu/delegations/en/dmer/about/history> (accessed 21 March 2021).
- 10 See the text of the TSD Chapter of the “Trade Part of the Agreement following the agreement in principle announced on 28 June 2019”, which was published on 12 July 2019. The text is available at https://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_158166.%20Trade%20and%20Sustainable%20Development.pdf (accessed 21 March 2021).
- 11 For the purposes of this legal opinion, we rely on the text of the draft chapters which are available here <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2048> (accessed 1 March 2021). The political and cooperation part of the framework agreement was leaked in October 2020. The leak is available at <https://trade-leaks.org/mercrosur-eu-association-agreement-leaks-8-october-2020/> (accessed 21 March 2021).
- 12 See EU Commission: Overview of FTA and other Trade Negotiations (Updated March 2021). Available at: https://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf (accessed 21 March 2021).

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of the Member States and the EU (mixed agreement) in order to ensure the swift ratification of the trade part without requiring the ratification by EU Member States and thus approval by national parliaments. Whether or not the splitting of the agreement would have a negative impact on sustainable development would depend on the final version of the trade part of the AA. As human rights are currently not included in the trade part, there is a danger that sustainable development would be limited to labour and environmental issues if the text as it currently stands would become the trade agreement. However, it should be noted that the current draft trade agreement could not be turned into an stand-alone agreement as it lacks central elements of the institutional framework which are currently covered in the political part of the AA.

Article 3 paragraph 5 and Article 21 paragraph 2 of the Treaty on European Union (TEU) refer to sustainable development – including human rights¹³ – as one of the major goals of EU external activities. Article 207 paragraph 1 of the Treaty on the Functioning of the European Union (TFEU) clearly states that these objectives also apply to trade and

investment agreements of the EU.¹⁴ Moreover, the United Nations Guiding Principles on Business and Human Rights (UNGPR) state in Principle 9 that States should maintain adequate domestic policy space to meet their human rights obligations when pursuing free trade agreements. General Comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities of the Committee on Economic Social and Cultural Rights concretizes the obligation of States in the context of trade agreements.¹⁵ As a consequence, all free trade agreements of the EU need to contribute to the goal of sustainable development and should avoid negative effects on sustainable development.¹⁶ In line with these obligations, the EU integrated non enforceable provisions concerning labour and environmental aspects of sustainable development in its bilateral free trade agreements such as the trade agreements with South Korea (2011)¹⁷, Central America (2012)¹⁸ and Colombia/Peru (2012)¹⁹. The most recent examples are the chapters on trade and sustainable development, trade and labour as well as trade and environment in the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada (2017)²⁰ and the TSD Chapters in

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- 13 See *Lorand Bartels*, A Model Human Rights Clause for the EU's International Trade Agreements (February 1, 2014). German Institute for Human Rights and Misereor, 2014, available at <https://ssrn.com/abstract=2405852> (accessed 21 March 2021).
- 14 *Markus Krajewski*, Normative Grundlagen der EU-Außenwirtschaftsbeziehungen: Verbindlich, umsetzbar und angewandt?, 51 *Europarecht* 2016, pp. 239-241. See also Vivian Kube, The European Union's External Human Rights Commitment: What is the Legal Value of Art. 21 TEU?, *EUI Working Paper LAW 2016/10*.
- 15 General Comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities of the Committee on Economic Social and Cultural Rights, paras 13 and 29, available at <https://digitallibrary.un.org/record/1304491?ln=en> (accessed 25 March 2021).
- 16 *Rafel Leal-Arcas and Catherine Wilmarth*, Strengthening Sustainable Development through Preferential Trade Agreements, Queen Mary School of Law Legal Studies Research Paper No. 174/2014, p. 8.
- 17 For an analysis of sustainable development issues in the EU-South Korea FTA, see Ludo Cuyvers, The Sustainable Development Clauses in Free Trade Agreements: An EU Perspective for ASEAN?, *UNU-CRIS Working Papers*, W-2013/10, pp. 17 et seq.; *Gracia Marín-Durán*, The European Union and South Korea, The Legal Framework for Strengthening Trade, Economic and Political Relations, Edinburgh University Press, 2013, pp. 124-146.
- 18 For an analysis of sustainable development issues in the EU-Central America Association Agreement, see *Steve Woolcock et al*, The Trade Chapter of the European Union Association Agreement with Central America, Study requested by the European Parliament's Committee on International Trade, 2012, pp. 37-42.
- 19 *Lorand Bartels*, Human Rights and Sustainable Development Obligations in EU Free Trade Agreements, 40 *Legal Issues of Economic Integration* 2013, pp. 297-313. For an evaluation of the EU-Colombia/Peru FTA, see *Thomas Fritz*, The Second Conquest, The EU Free Trade Agreement with Colombia and Peru, *FDCL/TNI*, October 2010, pp. 18-19.
- 20 For an analysis of sustainable development issues in CETA, see *ALOP et al*, EU Trade Agreements with Central America, Colombia and Peru: Roadblocks for sustainable development, Briefing for MEPs, October 2011; *Aaron Cosbey*, Inside CETA: Unpacking the EU-Canada free trade deal, *Biores*, Volume 8, Number 9, November 2014, available at <http://www.ictsd.org/bridges-news/biores/news/inside-ceta-unpacking-the-eu-canada-free-trade-deal>.

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EU-Japan (2018), EU-Singapore (2019), EU-Vietnam (2020) and EU-UK (2020)²¹. This follows a global trend in bilateral trade agreements which increasingly contain sustainable development provisions.²²

The TSD Chapter of the draft EU-Mercosur AA, however, has been criticized for its ineffectiveness to deal with environmental, human rights and labour concerns. This has been pointed out as one of many reasons for the resistance to the planned agreement in some EU states, Mercosur countries and civil society. In particular, growing concerns relate to Brazil's deforestation of the Amazon rainforest.²³ Therefore, several EU countries have threatened to veto the agreement and the European Parliament indicated last year that it will not give its consent to the agreement "as it stands".²⁴ Moreover, critique refers to incentives of the agreement to expand production of sugar cane, beef, and soy, leading to forest destruction, damage to biodiversity, displacement of Indigenous Peoples, and human rights violations; increased use of highly hazardous pesticides and threats to biodiversity and the right to health; lack of precautionary principle in the Chapter on Sanitary and Phytosanitary Measures (SPS); securing access

to cheap metallic raw materials from environmentally and human rights highly problematic mining; prohibition of promotion of domestic industry in public procurement; and serious weaknesses in the sustainability chapter and human rights clause.²⁵ In addition, as Argentinian academics have elaborated, the agreement will deepen trade asymmetries between the blocs and guarantee more business for European companies in the automotive, chemical, machinery and other industrial sectors.²⁶

In an answer to a parliamentary question, the European Commission stated on 13 January 2021 that in order to address the aforementioned concerns "the EU should work with the Mercosur countries to see how the Agreement could help address and improve the environmental/climate change/deforestation situation in Mercosur." The Commission acknowledged "a need for real changes in the situation on the ground before it can proceed to the ratification." However, the Commission clarified that respective commitments could be formalised in an additional document. The Commission indicated that a decision on the exact shape of such an instrument had not yet been taken and would need

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- 21 The EU-UK agreement has a Chapter eight: "Other instruments for trade and sustainable development" (in Title XI: Level Playing Field for Open and Fair Competition and Sustainable Development) which is similar to TSD Chapters in other EU FTAs. See Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one Part, and the United Kingdom of Great Britain and Northern Ireland, of the other Part, Official Journal of the European Union, 31.12.2020. Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:2020A1231\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:2020A1231(01)&from=EN) (accessed 21 March 2021).
- 22 J. Anthony VanDuzer, Sustainable Development Provisions in International Trade Treaties, in: Steffen Hindelang and Markus Krajewski (eds), *Shifting Paradigms in International Investment Law*, Oxford 2016, pp. 145 et seq.
- 23 IMAZON, Is the EU-Mercosur trade agreement deforestation-proof?, November 2020, available at <https://amazon.org.br/en/publicacoes/is-the-eu-mercursosur-trade-agreement-deforestation-proof/> (accessed 3 March 2021); Luciana Ghiotto and Javier Echaide, Analysis of the agreement between the European Union and the Mercosur, December 2019, available at <https://power-shift.de/wp-content/uploads/2020/01/Study-on-the-EU-Mercosur-agreement-09.01.2020-1.pdf> (accessed 3 March 2021); James Harrison and Sophia Paulini, The Trade and Sustainable Development Chapter in the EU-Mercosur Association Agreement – Is it fit for purpose?, July 2020, available at <https://www.documents.clientearth.org/library/download-info/the-trade-and-sustainable-development-chapter-in-the-eu-mercursosur-association-agreement/> (accessed 3 March 2021).
- 24 POLITICO, Dombrovskis moves to save Mercosur deal, available at <https://www.politico.eu/article/dombrovskis-hopes-to-save-mercursosur-deal/> (accessed 3 March 2021).
- 25 Thomas Fritz, EU-Mercosur Agreement - Risks to Climate Protection and Human Rights, Misereor/Greenpeace/CIDSE, 2020, pp. 5-7. Available at <https://www.cidse.org/wp-content/uploads/2020/06/Study-EU-Mercosur-Agreement-Risks-to-Climate-Protection-and-Human-Rights....pdf> (accessed 21 March 2021).
- 26 Luciana Ghiotto and Javier Echaide, Analysis of the agreement between the European Union and the Mercosur, The Greens/EFA and PowerShift e.V., Berlin, Buenos Aires, Brussels, December 2019. Available at <https://power-shift.de/wp-content/uploads/2020/01/Study-on-the-EU-Mercosur-agreement-09.01.2020.pdf> (accessed 21 March 2021).

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to be agreed with the Mercosur partners. However, the Commission was of the view that the TSD Chapter of the trade part of the Association Agreement “is already binding and enforceable and therefore no modification or renegotiation of the negotiated text is required.”²⁷

This legal opinion discusses how measures to protect Indigenous Peoples, human rights, labour rights, forests and the climate can be anchored in EU Free Trade Agreements in such a way that they are enforceable and subject to sanctions. In addition, the report presents formal legal options as to whether and how these measures can still be implemented in the draft EU-Mercosur AA at this point and identifies possible alternatives such as renegotiations. Therefore, the study discusses necessary general modifications to the Free Trade Agreement in a first step (below 2.). This section focuses on pre-ratification commitments (2.1), current shortcomings of the TSD Chapter and suggestions to achieve an effective

TSD Chapter (2.2) as well as aspects beyond the TSD Chapter such as an essential elements clause (2.3). In a second step (below 3.) two options for improvement of the TSD Chapter (3.1 and 3.2) as well as the option for renegotiations (3.3) are discussed in detail. Finally, the study explains the currently discussed splitting of the EU-Mercosur AA (below 4.) The final section (below 5) presents concrete recommendations in two Annexes. Annex 1 presents an Alternative Text for the TSD Chapter based on the draft EU-Mercosur AA. Annex 2 presents a possible clause for general exceptions from the obligations of the trade agreement.

Importantly, the best TSD Chapter alone does not guarantee the sustainability of the agreement. A comprehensive approach needs to take into account all details of the whole treaty. Labour, environmental and human rights protection requirements must be integrated throughout the text of the whole agreement. ◀

27 E-005764/2020 Answer given by Executive Vice-President Dombrovskis on behalf of the European Commission (13 January 2021), https://www.europarl.europa.eu/doceo/document/E-9-2020-005764-ASW_EN.pdf (accessed 4 March 2021).

2. Necessary General Modifications to the Free Trade Agreement to Protect Indigenous People, Human Rights, Labour Rights, the Environment and Climate

2.1 Necessary Pre-Ratification-Commitments

The parties could lay down necessary commitments in an agreement, which have to be fulfilled in advance of the ratification of the EU-Mercosur AA. However, commitments in advance of the ratification of the EU-Mercosur AA (pre-ratification commitments) might only be political. Those commitments would not be legally enforceable and the actual impact is limited. Alternatively, pre-ratification commitments could also be laid down in a separate and previous treaty obliging the parties to conclude an agreement (*pactum de contrahendo*).²⁸ Such a treaty which would be concluded prior to the ratification of the EU-Mercosur AA could contain an obligation of the EU to sign the FTA if Mercosur countries fulfilled certain conditions.

A pre-ratification commitment could address deforestation and destruction of forests and other natural ecosystems in Mercosur countries. Moreover, the EU could undertake pre-ratification commitments involving commitments to cooperate with the Mercosur region to halt deforestation as well as taking legal steps to ensure that forest and ecosystem-risk commodities are not placed on the EU market.²⁹

2.2 Sustainable Development Chapter

Current Shortcomings

The EU-Mercosur AA often formulates obligations and commitments which refer to multinational environmental and labour agreements in a non-binding manner. Some relevant provisions only contain “best endeavor”-clauses and are mere declarations of intent.

For example, the TSD Chapter contains two articles dealing explicitly with sustainable forestry. Article 8 addresses sustainable forest management and commits the parties (i) to “encourage trade in products from sustainably managed forests,” (ii) to “promote, as appropriate and with their prior informed consent, the inclusion of forest-based local communities and indigenous peoples in sustainable supply chains of timber and non-timber forest products” and (iii) to “combat illegal logging”. This article has several key weaknesses: sustainably managed forests are only as good as in the law of the country of harvest sustainability is defined and practiced. Moreover, the crucial word free is missing in the expression “prior informed consent (PIC) as the UN Declaration on the Rights of Indigenous Peoples

28 *Antony Aust*, *Modern Treaty Law and Practice*, 3rd ed., OUP 2013, p. 26; *Hisashi Owada*, *Pactum de contrahendo, pactum de negotiando*, *Max Planck Encyclopedia of International Law [MPIL]*, para 3-4.

29 For various suggestions with respect to the content of pre-ratification commitment to address deforestation, see *James Harrison et al*, *Academic Statement: Proposals on the EU-Mercosur Association Agreement and the Environment* (8 February 2021), pp. 2-4, available at <https://warwick.ac.uk/fac/soc/law/research/centres/chrp/governance/eumercosuraa/> (accessed 2 March 2021).

2. Necessary General Modifications to the Free Trade Agreement to Protect Indigenous People, Human Rights, Labour Rights, the Environment and Climate

(UNDRIP) provides for the core principle of ‘free, prior and informed consent’ (FPIC).³⁰ Furthermore, the article speaks of indigenous peoples instead of the usual UN spelling with capital letters at the beginning of the words, and the PIC provision is also insufficient, because it limits the applicability of PIC to forests, without regard to other land ecosystems like the Cerrado or Pantanal. In addition, the article commits parties to information exchange and cooperation on trade and forest conservation at the bilateral and international level. Article 13 contains a comprehensive list of areas of cooperation the parties may wish to engage in, including inter alia (j) corporate social responsibility, responsible business conduct, responsible management of global supply chains and accountability, (l) the conservation and sustainable use of biological diversity and (o) private and public initiatives contributing to the objective of halting deforestation, including those linking production and consumption through supply chains, consistent with Sustainable Development Goals (SDGs) 12 and 15.

Besides being insufficient in scope and content, these provisions are essentially of a best-efforts nature, i.e. their actual implementation depends on the political will of the parties. Implementation is facilitated by regular consultations in the respective trade and development committees established under the agreements, where consultations and discussions on matters of sustainable forestry take place. As explained in the Report of the Panel of Experts in the recent EU-Korea dispute on labour standards in the EU-Korea Free Trade Agreement the standard of “best endeavours” is “higher than undertaking merely minimal steps or none at all, and lower than a requirement to explore and mobilise all measures available at all times.”³¹ This interpretation of the “best endeavours” clause shows its ineffectiveness.

Although the chapter also contains legally binding obligations, these obligations are insignificant. For example, Article 7 (Trade and Biodiversity) TSD Chapter states that the Parties shall “(a) promote the use of CITES as an instrument for conservation and sustainable use of biodiversity” instead of effectively implementing the respective Convention. Another example is Article 8 paragraph 2(a) TSD Chapter which states that each Party shall encourage trade in products from sustainable managed forests.

In addition to shortcomings with regards to substantive elements of the TSD Chapter, the dispute settlement mechanism is ineffective. Disputes concerning the provisions on trade and sustainable development are initiated by consultations and may involve the establishment of a panel of experts issuing a report with recommendations which the parties need to consider. Recourse to trade sanctions in the event of a breach of commitments by a party under the regular dispute settlement procedure of the agreement is, however, not possible. It is not clear whether the Panel of Experts’ finding of a violation of the obligations under the TSD Chapter results in recommendations or an implementation obligation without any means of enforcement. In any case, the lack of available remedies makes this chapter ineffective. According to Article 17.11 TSD Chapter the “Parties shall discuss appropriate measures to be implemented taking into account the report and recommendations of the Panel of Experts”. This clearly indicates that the reports do not contain legally binding obligations. Unlike Article 12.8 of Title VIII (Dispute Settlement) which expressly states that the arbitral award is binding on the Parties, Article 17.11 TSD Chapter does not contain such language and therefore does not support the conclusion that a final report of the Panel of Experts would be binding on the Parties. It should also be noted that the Panel of Experts adjudicating the EU-Korea labour dispute did not state that its decisions were binding

30 In particular UNDRIP Article 32, also Articles 10, 19, 28(1), 2 of the United Nations Declaration on the Rights of Indigenous Peoples (available at https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf, accessed 21 March 2021) and *Greenpeace*, EU-Mercosur Free Trade Agreement Legal Q&A, June 2020. Available at https://www.greenpeace.de/sites/www.greenpeace.de/files/publications/eu-mercotur_free_trade_agreement_legal_qa_greenpeace_june_2020.pdf (accessed 21 March 2021).

31 EU Korea, Report of the Panel of Experts, 20 January 2021, para 277, available at <https://trade.ec.europa.eu/doclib/html/159358.htm> (accessed 2 March 2021).

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on the parties.³² Consultation and other soft-law mechanisms are insufficient to ensure that the parties observe sustainable development obligations.³³

Furthermore, the TSD Chapter does not include a separate section on human rights. This is problematic because without binding commitments on labour, environment and human rights, trade agreements lack a balance between economic and non-economic objectives and principles.

Finally, the agreement only contains limited and fragmented general exception clauses. The exception clauses do not cover all relevant non-trade policies and do not apply to all chapters of the agreement. For example, the exception clauses do not allow the parties to deviate from the agreements in order to protect human or labour rights.³⁴

In summary, the TSD Chapter excludes sustainable development commitments from the state-to-state dispute settlement mechanism and subjects them to a special mechanism based on consultations and a panel of experts only. The standing of these commitments is weak and ineffectual, which is by design, given that the regular trade commitments in the rest of the agreement are strong and effective.

Necessary changes to achieve an effective TSD Chapter: Suggestions

As this legal analysis focuses on the TSD Chapter, rather than the problems with sustainability on the whole, this section focuses on addressing the shortcomings of the aforementioned chapter. Therefore, an Alternative Text in Annex 1 below suggests important improvements to the current text of the chapter.³⁵

Firstly, the Alternative Text formulates binding obligations to implement the most important international treaties on labour, environmental and human rights. To this end, the vague and non-binding formulation referring to efforts towards ratification of the eight most important ILO-Conventions is exchanged with a binding obligation to ensure that the domestic laws and policies are in conformity with fundamental labour, environment and human rights agreements. The Alternative Text of the chapter does not formally require the parties to ratify the treaties. Instead, it provides for a short-cut: Even without ratification of the treaties, the parties are obliged to ensure that their domestic laws and policies are in conformity with the respective obligations. Therefore, it creates a factually binding effect independent of the ratification. Moreover, the clauses in the respective sections also oblige the treaty parties to implement all obligations arising out of the ratified treaties. The relevant international agreements are specifically listed in the respective agreements. With respect to labour rights, the obligation comprises the eight ILO-Conventions covering the core labour rights (Article 4 in Annex 1 below). For example, Brazil did not ratify the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87). With respect to environmental law issues, the list covers twenty-four multilateral environmental agreements (MEAs) most often referred to as a baseline (Article 5 in the Annex below). Regarding human rights, the chapter refers to the core international human rights treaties (Article 11a in Annex 1 below).

Secondly, the obligations of the Alternative Text are effectively implemented through binding dispute settlement. To this end, the TSD Chapter is subject

32 Report of the Panel of Experts, EU-Korea free trade agreement, 20 January 2021, available at <https://trade.ec.europa.eu/doclib/html/159358.htm> (accessed 4 March 2021). On 20 January 2021, the Panel of Experts under Chapter 13 of the EU-Korea Free Trade Agreement found that Korea breached its obligations related to multilateral labour standards and agreements under the EU-Korea FTA.

33 *Reingard Zimmer*, Sozialklauseln im Freihandelsabkommen der Europäischen Union mit Kolumbien und Peru, *Recht der Internationalen Wirtschaft* 2011, pp. 625-632.

34 *Lorand Bartels*, A Model Human Rights Clause for the EU's International Trade Agreements, study conducted on behalf of the German Institute for Human Rights and MISEROR, 2014, pp. 27-28.

35 See the text in the Annex below; the draft TSD Chapter is also available at https://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_158166.%20Trade%20and%20Sustainable%20Development.pdf (accessed 3 March 2021).

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to the state-to-state dispute settlement mechanism provided for in another chapter of the treaty (Article 15 in Annex 1 below). Importantly, the application of the state-to-state dispute settlement mechanism guarantees the level playing field between all obligations of the parties in the free trade agreement – whether they relate to trade or sustainable development. EU trade agreements excluded this option resulting in toothless commitments of the Parties since they could not be enforced effectively.³⁶ The state-to-state dispute settlement mechanism ensures that either Party can suspend concessions and/or obligations in case of noncompliance with a ruling of the dispute settlement panel.

The Alternative Text in Annex 1 below can be divided into five sections. Articles 1 – 3 provide clauses framing the context of the TSD Chapter, specifies its objectives, provides for transparency and formulates a general right to regulate clause. Article 4 covers sustainable development relating to labour issues by obliging the treaty Parties to ratify and fulfil the most important ILO Conventions. Articles 5 – 9 cover amongst others sustainable development relating to environmental issues by obliging the treaty Parties to ratify and fulfil the most important MEAs. Article 11 and 11a contain the Parties' obligations concerning human rights. To this end, Article 11a obliges the treaty Parties to ensure conformity with the most important human rights treaties (nine in total) and to implement all obligations arising out of ratified human rights treaties in their domestic laws and practices. Articles 12 – 15 contain technical issues such as a Sub-Committee on Trade and Sustainable Development, an article on working together on TSD issues, an article on impact assessments and reviews, an article on voluntary sustainability assurance schemes and a clause referring to dispute settlement.

2.3

Beyond the Sustainable Development Chapter: Sustainable Development in other Chapters of the Agreement

Human Rights Clause/Essential Elements Clause

An essential elements clause or human rights clause is a provision that would allow the suspension of the agreement if either side breaches its commitment under an agreement mentioned in the essential elements clause such as human rights treaties or the Paris Agreement on climate.

For example, the EU-UK Trade and Cooperation Agreement³⁷ sets the fight against climate change as an essential element of the treaty in its preamble as well as in “Article COMPROV.12: Essential elements”. Combating climate change thus adds for the first time to the list of essential components, which previously included only democratic principles, the rule of law and human rights, and combating the proliferation of weapons of mass destruction. According to Article INST.35 (1) either party may decide to terminate or suspend the operation of this Agreement or any supplementing agreement in whole or in part if it considers that there has been a serious and substantial failure by the other Party to fulfil any of the obligations that are described as essential elements.

According to the new trade policy review of the EU Commission the “EU will propose that the respect of the Paris Agreement be considered an essential element in future trade and investment agreements. In addition, the conclusion of trade and investment agreements with G20 countries should be based on a common ambition to achieve climate neutrality as soon as possible and in line with the recommen-

36 The only exception to this policy is the EU-Caribbean Economic Partnership Agreement (Article 204(6)). The use of dispute settlement is, however, made conditional upon resorting to a specific consultation mechanism in Article 189 of the agreement.

37 Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one Part, and the United Kingdom of Great Britain and Northern Ireland, of the other Part, available at https://ec.europa.eu/info/sites/info/files/draft_eu-uk_trade_and_cooperation_agreement.pdf (accessed 3 March 2021).

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dations of the Intergovernmental Panel on Climate Change (IPCC). This ambition should also be properly reflected in Nationally Determined Contributions (NDCs) submitted under the Paris Agreement. The EU will also prioritise effective implementation of the Convention on Biological Diversity in trade and investment agreements.”³⁸

Whereas the additional inclusion of climate goals in essential elements clauses can be welcomed in principle,³⁹ the effectiveness of their enforcement is highly questionable. The treaty parties may be hesitant to use this form of sanction since its consequence is a suspension or termination of the entire agreement. Therefore, essential elements clauses follow an “all or nothing approach”. This is problematic, because the parties might consider some behaviour as a serious and substantial failure to fulfil an obligation, but could prefer not to suspend or terminate the agreement. In July 2019, the European Parliamentary Research Service came to the conclusion that so far, “the EU has clearly preferred a constructive engagement to more restrictive measures, and has not activated the clause to suspend trade preferences under any of its trade agreements.”⁴⁰ It is preferable to include human rights as well as combating climate change in the TSD Chapter with binding commitments which are enforceable in state-to-state dispute settlement procedures as described above instead of relying on an

essential element clause which might not be used by the treaty parties. An essential elements clause would be a complementary but not sufficient option in this regard. It could be included additionally but not as a stand-alone option.

General Exception/Exemption Clause

Exception clauses provide the opportunity to justify a breach of treaty obligations in exceptional circumstances. The EU-Mercosur AA contains only limited and fragmented general exemptions. Exemptions do not cover all relevant non-trade measures and do not apply to all chapters of the agreement. For example, the exceptions do not allow parties to derogate from agreements to protect human or labour rights.

Therefore, the EU-Mercosur AA should introduce a broader general exception clause. This contributes to a balance between trade and investment interests on the one hand and non-economic interest such as labour, environmental and social rights on the other hand. A broader exception clause should lay down the most important aspects with respect to sustainable development (labour, environment and human rights) and apply the “relationship”-standard. Therefore, regulations of a treaty party could be justified if they relate to sustainable development. The general exception clause should be located in the final provisions of the treaty applying to all aspects

38 See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Trade Policy Review – an Open, Sustainable and Assertive Trade Policy, Brussels, 18 February 2021 COM(2021) 66 final, available at https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc_159438.pdf, p. 12. (accessed 17 March 2021).

39 See e.g. Non-paper from the Netherlands and France on trade, social economic effects and sustainable development, 15 May 2020, available at <https://www.permanentrepresentations.nl/documents/publications/2020/05/08/non-paper-from-nl-and-fr-on-trade-social-economic-effects-and-sustainable-development> (accessed 3 March 2021) p. 3; Werner Raza et al, In-depth-analysis, How can international trade contribute to sustainable forestry and the preservation of the world’s forests through the Green Deal?, EP/EXPO/A/INT A/FWC/2019-01/Lot5/2/C04, [https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/603513/EXPO_IDA\(2020\)603513_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/603513/EXPO_IDA(2020)603513_EN.pdf), p. 1; Cathrin Zengerling, Stärkung von Klimaschutz und Entwicklung durch internationales Handelsrecht (Legal opinion commissioned by Wissenschaftlicher Beirat der Bundesregierung Globale Umweltveränderung (German Advisory Council on Global Change), May 2020, p. 54, available at https://www.wbgu.de/fileadmin/user_upload/wbgu/publikationen/hauptgutachten/hg2020/pdf/Expertise_Zengerling.pdf (accessed 3 March 2021).

40 European Parliamentary Research Service, Human rights in EU trade agreements – The human rights clause and its application, 8 July 2019, available at [https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637975/EPRS_BRI\(2019\)637975_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637975/EPRS_BRI(2019)637975_EN.pdf) (accessed 3 March 2021).

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of the treaty. A model exception clause can be found in Annex 2 below.

Further Aspects

Importantly, it should be pointed out that laying down sustainable development clauses in a closed chapter (like this draft in Annex 1) without integrating sustainable development obligations of the Parties into other chapters of the FTA is not enough. A comprehensive approach needs to take into account all details of the treaty. Labour, environmental and human rights protection requirements must be integrated throughout the text of the whole agreement.

In addition to these changes to the TSD Chapter, all other chapters may contain provisions having effects on sustainable development. Therefore, other chapters need to be brought into accordance with sustainable development goals. This might relate to the chapters on regulatory cooperation, Sanitary and Phytosanitary Measures (SPS) and Technical Barriers to Trade (TBT), for example. However, a trade agreement between the EU and Mercosur which is based on the principle of sustainable development as its primary objective would be an entirely different agreement. It would include completely reformed chapters on standards (TBT and SPS), services liberalisation and regulatory coherence to name but the most important elements in need of reform. ◀

3. Options for Improvement or Renegotiation

In light of the above analysis and discussion this section assesses different reform options which have been articulated by stakeholders with respect to its opportunities and limits from a legal perspective.

It should be recalled that new treaty texts can only be effective if all parties agree to them. Unilateral declarations can hardly change the content of the agreement (at best, they can suspend provisions, but they cannot create new obligations). Moreover, it does not matter what the new text is called – its content and the legal effect is important. According to Article 2(1)a Vienna Convention of the Law of Treaties (VCLT) a treaty can be embodied in a single instrument as well as in two or more related instruments.

At the current stage, the treaty parties did not issue statements about how the informal discussions run at present and what the parties aim for in technical terms. Media reports refer to planned "additional precommitments", possible "side letters", interpretative or joint declarations and a text as precondition for the ratification – whereby this leaves open whether such a text is to be ratified before the ratification of the agreement itself or after. This leaves room for various options for improvement of existing treaty text but also for a complete renegotiation of the EU-Mercosur AA.

3.1 Option 1: Selfstanding Agreement ("Side Letter" or Protocol)

Description

According to media reports, a so-called "side letter" could be added to the EU-Mercosur AA.⁴¹ Assuming that the language of such a side letter would suggest that it contains legally binding obligations, it could be a self-standing agreement, i.e. an additional agreement or protocol.

It is possible that an additional agreement is concluded and that this treaty is concluded at the same time as (or before) the EU-Mercosur AA.

Opportunities and limits

An additional agreement could change the relevant contents of the EU-Mercosur AA with respect to substance (e.g. labour, environmental and human rights) or with respect to the enforcement mechanism or both. With respect to the enforcement mechanism, an additional agreement or protocol to the TSD Chapter could be designed in a way that it adds to or replaces the existing provisions of the TSD Chapter. For example, an additional agreement/protocol could establish an enforcement mechanism that goes beyond the obligations under Articles 17.10 and 17.11 of the TSD Chapter. This option has certain disadvantages compared to a renegotiation of the treaty. Firstly, an additional agreement could produce contradictions if it is not formulated precisely enough. Moreover, it could produce incoherency between the various clauses of the agreements. And finally, if the parties were able to reach an agreement in an additional side letter, they might also renegotiate the treaty formally. Formal renegotiations would avoid the disadvantages described above.

41 POLITICO Pro Morning Trade: Dombro on US, China – Saving Mercosur – Brexit today, 19 October 2020.

3. Options for Improvement or Renegotiation

3.2

Option 2: „Interpretive Declaration“

Description

A second option could refer to an interpretive declaration. An interpretative declaration is an authoritative statement of the parties concerning the interpretation of an international agreement, which is to be taken into account in the systematic interpretation of the treaty in the context of the provisions of the agreement pursuant to Article 31(2) VCLT. An interpretive declaration would be an agreement reached between the parties. Such an agreement is not a treaty in the formal sense as the term “agreement” in Article 31(2) (a) VCLT is wider than the term treaty.⁴² Usually, such interpretative declarations are agreed upon by governmental experts and adopted simultaneously with the text of the treaty.⁴³ Such a declaration was adopted, for example, in the case of CETA.⁴⁴ The so-called Joint Interpretative Instrument⁴⁵ contained in particular provisions which are supposed to clarify obligations with respect to investment protection and labour protection. It was adopted by the parties on the occasion of the signature of the CETA.

Since the VCLT is not directly applicable to the EU, reference must be made to the principle of customary international law, which has the same content.⁴⁶ When interpreting the agreement, the declaration must therefore be consulted and the agreement interpreted in the light of the interpretive declaration. An interpretation of a provision of the agreement that violates the interpretative declaration would in principle be inadmissible.

Opportunities and limits

However, interpretative declarations are only one of several sources of interpretation. Pursuant to Article 31(1) VCLT, the interpretation should be in accordance with the ordinary meaning of terms of the treaty in their context and in the light of its object and purpose. A joint interpretative declaration cannot easily prevail over a different wording. It would also be conceivable for an interpretative body of the EU-Mercosur AA to allow the interpretative declaration to take second place to an interpretation based on the meaning and purpose of EU-Mercosur AA, in particular if, in the view of the interpretative body, there is a real or perceived conflict between the interpretative declaration and the meaning and purpose of the agreement.

A joint interpretative declaration is not an agreement under international law that is incorporated into the agreement as a protocol or an annex. An interpretative declaration would not be an independent agreement standing alongside the EU-Mercosur AA. Therefore, the declaration does not lead to any amendment or supplementation of existing provisions, but only takes effect in each case on the basis of a specific agreement provision, which must then be interpreted. For this reason, a joint interpretative declaration cannot bring about any change to individual provisions or the contents of the agreement.

The introduction of a binding dispute resolution mechanism for the TSD Chapter, as proposed by political, civil society and trade union actors, cannot therefore be achieved by an interpretative declaration from the outset.

42 Oliver Dörr/Kirsten Schmalenbach, Article 31 VCLT, 2012, para 67.

43 Oliver Dörr/Kirsten Schmalenbach, Article 31 VCLT, 2012, para 67.

44 See e.g. Markus Krajewski, Kurzbewertung der Gemeinsamen Auslegungserklärung zum CETA insbesondere mit Blick auf den Investitionsschutz, https://katharina-droege.de/sites/default/files/Kurzbewertung%20der%20Gemeinsamen%20Auslegung-serkl%C3%A4rung%20zum%20CETA%20insbesondere%20mit%20Blick%20auf%20den%20Investitionsschutz_Krajewski.pdf (accessed 1 March 2021); Gus Van Harten, The EU-Canada Joint Interpretive Declaration/Instrument on the CETA, Osgoode Legal Studies Research Paper No. 6/2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2850281 (accessed 1 March 2021).

45 Joint Interpretative Instrument on the [CETA] between Canada and the European Union and its Member States, 27 October 2017 (13541/16), available at <http://data.consilium.europa.eu/doc/document/ST-13541-2016-INIT/en/pdf> (accessed 2 March 2021).

46 The Vienna Convention of the Law of Treaties between States and International Organizations or between International Organizations (VCLTIO), which entails an identical provision in Article 31, is not yet in force.

3. Options for Improvement or Renegotiation

3.3 Option 3: Renegotiations

Description

Treaty re-negotiations are not limited to any subject matter or any time frame.

Opportunities and limits

Renegotiations could address all aspects of the agreement which are currently under debate. The parties would not have to start from zero but could focus on necessary modifications of the agreement.

Content wise, renegotiations offer many opportunities to modify the existing agreement. For example, the TSD Chapter could refer to the binding dispute settlement procedures and could include binding commitments as referred to in Annex 1 below.

Serious consideration should be given to making the TSD Chapter subject to mandatory dispute resolution. As discussed above, including essential elements clauses can be a complementary option in this regard and should be included additionally but not as a stand-alone option. ◀

4. Splitting of the Agreement

A ccording to media reports, the European Commission is currently discussing with EU Member States whether to split the trade part of the Mercosur-EU AA from the political part of the Agreement to allow its ratification only by the EU without ratification by the Member States (so called “EU only” option).⁴⁷ This “EU only” option is legally possible since the trade part of the Agreement would fall into the exclusive competence of the EU (EU only) and the political part of the Agreement would fall into the shared competence of the Member States and the EU (mixed agreement). In line with the opinion of the European Court of Justice (CJEU) with respect to the EU Singapore Free Trade Agreement, the TSD Chapter of the EU-Mercosur AA as it currently stands could be ratified at EU level together with the chapters on trade. In its opinion, the CJEU concluded that Chapter 13 (the TSD Chapter) of the EU Singapore Agreement is within the common commercial policy and, therefore, within the exclusive competence of the European Union referred to in Article 3(1)(e) TFEU.⁴⁸

This legal argumentation can most likely be applied to the EU-Mercosur Agreement, too. Consequently, the TSD Chapter as it stands could therefore be ratified by the EU without the approval by the Member

States parliaments even though some Member States are opposing the agreement as it stands.⁴⁹

It should be noted that a decision to split the trade and the more general political part of the AA would need some adjustments in the texts as they are currently known. In particular, the general part of the agreement contains a number of institutional provisions which the trade part relies on or refers to. This includes also the formation of the Domestic Advisory Groups (DAGs) which are a key element of the institutional structure of the TSD Chapter. From the perspective of sustainable development, it is specifically important to remember that the TSD Chapter does not contain any references to human rights. In addition, the so-called essential elements clause which would allow the suspension of the trade agreement in case of serious human rights violations is also not contained in the trade part. Hence, if the agreement would be split along those lines, the trade agreement would have an even more negative effect on sustainable development.

With regard to the possible splitting, it should also be remembered that the original negotiating mandate of 1999 speaks of an association agreement⁵⁰ and the EU Foreign Affairs Council in 2018 again

47 *Politico Pro*, EU eyes fast-track option to ratify South America trade deal, 8 February 2021.

48 Opinion 2/15 of the Court of 16 May 2017, para. 139-167.

49 Media reports referred to Austria, France and Germany in this regard in 2020, <https://www.politico.eu/article/new-austrian-government-will-reject-mercotur-deal/>, <https://www.euractiv.com/section/eu-council-presidency/news/france-wont-sign-this-eu-mercotur-deal/>, <https://en.mercopress.com/2020/09/22/eu-conditions-ratification-of-trade-deal-with-mercotur-france-and-germany-lead-objections> (accessed 3 March 2021). A recent Politico story quoted the French Trade Minister Riestler’s view on two camps: “Belgium, Luxembourg, Austria and Poland are on France’s side as they are still unconvinced, while Spain, Portugal and, to a lesser extent, Italy want ‘to go fast’”. POLITICO Pro Morning Trade Europe, 10 March 2021.

50 See EU Commission: UE-Mercosur - Directives de Negociation, par la Commission, d’un accord d’association entre les parties, Bruxelles, le 17 septembre 1999, VERSION CONSOLIDEE, available at <https://www.bilaterals.org/IMG/pdf/ue-mercotur-mandat-sep-1999.pdf> (accessed 18 March 2021).

4. Splitting of the Agreement

explicitly confirmed that the agreement is a mixed one.⁵¹ While a decision to split the agreement would therefore be in contradiction to the opinion of the Council the legal effects of this deviation are unclear. It could be argued that the Commission's movements towards splitting are not in line with the negotiating mandate and therefore violate this mandate. However, if the Council decides to change its priorities, it could amend the negotiation mandate accordingly.

Apart from the legal questions, a splitting of the agreement would also weaken the political cooperation part which would only be ratified much later, or never. In addition, it is not unlikely that the TSD Chapter in a split "EU only"-trade agreement would not include human rights references or the protection of human rights. This is why splitting would pose a threat to sustainable development in the current context. ◀

51 "It is equally for the Council to decide, on a case-by-case basis, on the splitting of trade agreements. Depending on their content, association agreements should be mixed. The ones that are currently being negotiated, such as with Mexico, Mercosur and Chile, will remain mixed agreements". Draft Council conclusions on the negotiation and conclusion of EU trade agreements-Adoption, Council of the European Union, Brussels, 8 May 2018, available at <https://data.consilium.europa.eu/doc/document/ST-8622-2018-INIT/en/pdf> (accessed 18 March 2021). Adopted at the Council Meeting on 22 May 2018, see OUTCOME OF THE COUNCIL MEETING, 3618th Council meeting Foreign Affairs, Trade and development issues, Brussels, 22 May 2018, available at <https://www.consilium.europa.eu/media/34837/st09102-en18.pdf> (accessed 18 March 2021). E.g. Art. 4(3), 5(3) and 6(2) TSD Chapter of the EU-Mercosur AA.

5. Recommendations

The study concludes with two recommendations. Firstly, the parties should engage in renegotiations for an improved TSD Chapter with binding obligations and an effective dispute settlement system. Respective substantive provisions could be more effective if they oblige the parties to ensure that their laws, policies and practices are in conformity with environmental and human rights treaties. A provision could effectively incorporate international treaties and conventions as binding obligations in the agreement. This approach would be more effective than obliging the Parties to “effectively implement” the international treaties and conventions.⁵² It is of utmost importance that the treaty parties ensure that their laws, policies and practices are in conformity with human rights treaties. Currently, human rights are only entailed in the political part of the AA and do not entail binding obligations at all but mere cooperation provisions. Besides binding obligations, the effective dispute settlement struc-

tures are the most important elements of a TSD Chapter. Therefore, the TSD Chapter should refer to the state-to-state dispute settlement. Further provisions should provide for sanctions (for example through increasing tariff rates) in case of non-compliance with the decision of the dispute resolution panel. This reference increases the credibility and effectiveness of the parties’ obligations under the Chapter.

Secondly, the treaty parties need to assess the content of the other chapters and consider renegotiations to secure sustainability of all chapters. The EU-Mercosur AA could only be a sustainable treaty if all chapters undergo a renegotiation which touch upon sustainability aspects.

Detailed recommendations for an improved TSD Chapter with binding obligations and an effective dispute settlement system can be found in the Annex 1 below. ◀

52 E.g. Art. 4(3), 5(3) and 6(2) TSD Chapter of the EU-Mercosur AA.

Annex 1:

Alternative Text for a Trade and Sustainable Development Chapter

The text in the Annex contains a proposed Alternative Text for a Sustainable Development Chapter covering relevant provisions for sustainable development in a comprehensive free trade agreement (FTA). This Alternative Text builds on the trade part of the EU-Mercosur Association Agreement TSD Chapter which was published by the EU Commission as part of the texts of the Trade Part of the Agreement following the agreement in principle announced on 28 June 2019. Moreover, it builds on the Alternative Text of a Trade, Investment and Sustainable Development Chapter developed for TTIP by Prof. Dr. Krajewski and Dr. Hoffmann in 2016.⁵³ Whenever formulations are compiled from relevant elements

of existing treaties, a reference is included in a footnote to the clause or the commentary to the clause. The text is based on the TSD Chapter of the trade part of the EU-Mercosur Association Agreement⁵⁴ and therefore follows the logic of their chapter and is not a TSD Chapter which is drafted from scratch. Any changes in treaty language are emphasized by underlinings; deleted text is marked as ~~deleted~~. If appropriate, Articles are followed by comments in italics with respect to the legal consequences of the content of the Article. The following proposal doesn't reflect the forthcoming EU legislation on sustainable corporate governance as well as deforestation as no drafts for both projects are known yet.⁵⁵

CHAPTER TRADE AND SUSTAINABLE DEVELOPMENT

Article 1

Objectives and Scope

1. The objective of this Chapter is to enhance the integration of sustainable development in the Parties' trade and investment relationship, notably by establishing principles and actions concerning labour⁵⁶ and environmental aspects of sustainable development of specific relevance in a trade and investment context.

2. The Parties recall the Agenda 21 and the Rio Declaration on Environment and Development of 1992, the Johannesburg Declaration on Sustainable Development and the Johannesburg Plan of Implementation on Sustainable Development of 2002, the Ministerial Declaration of the United Nations Economic and Social

53 Markus Krajewski and Rhea Tamara Hoffmann, Alternative Model for a Sustainable Development Chapter and related provisions in the Transatlantic Trade and Investment Partnership (TTIP), 2016, available at https://reinhardbuetikofer.eu/wp-content/uploads/2016/08/Model-SD-Chapter-TTIP-Second-Draft-July_final.pdf (accessed 4 March 2021).

54 See the text of the TSD Chapter of the "Trade Part of the Agreement following the agreement in principle announced on 28 June 2019", which was published on 12 July 2019 and this version has not been changed since the first publication. The disclaimer of this text states that this and the other "texts are published for information purposes only and may undergo further modifications including as a result of the process of legal revision, The texts will be final upon signature". The text is available at https://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_158166.%20Trade%20and%20Sustainable%20Development.pdf (accessed 21 March 2021).

55 "The Commission's sustainable corporate governance law, which includes supply chain due diligence and corporate board sustainability obligations, is expected in June. The regulation to prevent the import of goods linked to deforestation, spearheaded by Environment Commissioner Virginijus Sinkevičius, will also land in June". Politico Morning Trade Europe, 16 March 2021.

56 For the purposes of this chapter, the term "labour" means the strategic objectives of the ILO under the Decent Work Agenda, which is expressed in the ILO 2008 Declaration on Social Justice for a Fair Globalisation.

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Council on Creating an environment at the national and international levels conducive to generating full and productive employment and decent work for all, and its impact on sustainable development of 2006, the Declaration on Social Justice for a Fair Globalisation of 2008 of the International Labour Organisation (ILO), and the Outcome Document of the UN Conference on Sustainable Development of 2012 entitled "The Future We Want" and the document "Transforming our World: the 2030 Agenda for Sustainable Development", adopted in 2015.

3. The Parties recognize that the economic, social and environmental dimensions are interdependent and mutually reinforcing dimensions of sustainable development, and reaffirm their commitment to promoting the development of international trade in such a way as to contribute to the objective of sustainable development, for the welfare of present and future generations.

4. Consistent with the instruments referred to in paragraph 2, the Parties shall promote sustainable development through:

(a) the development of trade and economic relations in a manner that contributes to the objective of achieving the Sustainable Development Goals and supports their respective human rights, labour and environmental standards and objectives in a context of trade relations that are free, open, transparent, and respectful of multilateral agreements to which they are Party.

~~(b) the respect of their multilateral commitments in the fields of labour and of the environment.~~ enhanced compliance with, and enforcement of, labour, environmental and human rights multilateral agreements and domestic laws.

(c) enhanced cooperation and understanding of their respective human rights, labour and environmental trade-related policies and measures, taking into account the different national realities, capacities, needs and levels of development and respecting national policies and priorities.

5. Recognizing the differences in their levels of development, the Parties agree that this Chapter embodies a cooperative approach based on common values and interests.

Comment:

Article 1 sets out the objectives and scope of the chapter. Its paragraphs do not contain any directly binding obligations, but provide interpretative guidance. Under the generally recognised rules on the interpretation of international agreements, the object and purpose of an agreement is an important interpretative tool. Article 1 underlines the Parties commitments to sustainable development by outlining a number of international conventions, declarations and other international documents.

The Article sets the objectives of the chapter in terms of the shared desire to develop bilateral trade and investment relations in such a way as to contribute to the overarching objective of sustainable development, the goal to promote dialogue and cooperation between the partners to this end and the aim to build on this framework, and in the substantive provisions address human rights, labour and environmental issues of relevance in a trade context, identified as key elements of a shared approach to trade and sustainable development. An important aspect which has been added in this Alternative Text compared to the draft TSD Chapter is the aim of enhancing compliance and enforcement of multilateral agreements relating to a sustainable development of trade and investment policy. Moreover, paragraph 4 lit. (b) was inserted into the list of objectives to stress the need for compliance with, and the enforcement of, labour, environmental and human rights multilateral agreements and domestic laws.

Article 2

Right to regulate and levels of protection

1. The Parties recognise the right of each Party to determine its sustainable development policies and priorities, to establish the levels of domestic human rights, environmental and labour protection it deems appropriate and to adopt or modify its law and policies. Such levels, law and policies shall be consistent with each Party's commitment to the international agreements and labour standards referred to in Articles 4, ~~and 5~~ and 11a.

2. Each Party shall strive to improve its relevant laws and policies so as to ensure high and effective levels of environmental and labour protection.

3. A Party should not weaken the levels of protection afforded in its laws aimed at protecting the environment, labour and human rights ~~domestic environmental labour law~~ with the intention of encouraging trade or investment.

4. A Party shall not waive or derogate from, or offer to waive or derogate from, its environmental, ~~or labour or human rights obligations~~ laws in order to encourage trade or investment.

5. A Party shall not, through a sustained or recurring course of action or inaction, fail to effectively enforce its environmental, ~~or labour or human rights obligations or labour laws in order to encourage trade or investment.~~ in cases where other provisions of this agreement interfere with these commitments.

5a. A Party shall not, through a sustained or recurring course of action or inaction, fail to effectively enforce its laws aimed at protecting the environment, labour and human rights as an encouragement for, or in a manner affecting, trade or investment.

6. A Party shall not apply environmental and labour laws in a manner that would constitute a disguised restriction on trade or an unjustifiable or arbitrary discrimination.

Comment:

This Article contains the so-called “right to regulate” clause in paragraph 1. However, the wording of the clause is not a substantive provision, but only a declaration of objectives.

As there is a concern that international competition for foreign investment may lead some countries to lower their environmental, human rights and labour standards and that this could lead to a “race to the bottom” in terms of regulatory standards the “not lowering of standards” clause responds to this concern regarding a potential race to the bottom.

In addition to the binding commitments of the treaty Parties with respect to human rights, labour rights and the environment included in Articles 4, 5 and 11a in this Alternative Text, a so-called “not lowering of standards” clause complements these clauses. The clause refers to the environmental, human rights and labour clauses contained in the Alternative Text and includes a commitment to refrain from relaxing domestic environmental, labour and human right legislation to encourage investment.

Article 2 paragraph 3 discourages “lowering of standards” that is, providing regulatory incentives to investors to the detriment of environmental protection or labour laws. “Not lowering of standards”-clauses seek to ensure the respect of existing environmental, labour or human rights standards and to avoid that States compete for investment by lowering these standards. The immediate addressees of these clauses are the State Parties themselves. The principle is also articulated in the ILO Declaration 2008 on Social Justice for a Fair Globalization. The clause refers to “its laws aimed at protecting the environment, labour and human rights” instead of “environment and labour laws” as environmental or labour protection can also be elements of other laws.

Paragraph 5a aims at ensuring that obligations resulting from other chapters of the FTA do not hinder the enforcement of environmental, labour or human rights obligations of the Sustainable Development Chapter. The formulation of the paragraph is retrieved from AK Wien and Ludwig Boltzmann Institute, Social Standards in Sustainability Chapters of Bilateral Free Trade Agreements, June 2010 (p. 29).

Article 3 Transparency

1. Each Party shall, in accordance with Chapter n°xx [Transparency], ensure that the development, enactment and implementation of:

(a) measures aimed at protecting the human rights, environment and labour conditions that may affect trade or investment, or

(b) trade or investment measures that may affect the protection of the human rights, environment or labour conditions,

are done in a transparent manner, ensuring awareness and encouraging public participation, in accordance with its domestic rules and procedures.

Article 3 a General obligations

Each Party shall ensure that sustainable development objectives of this Chapter are integrated and reflected at every level of the trade and investment relationship of the Parties.

Comment:

The new Article 3a contains a general obligation and obliges the parties to ensure that sustainable development is recognized in every aspect of trade and investment relations. It is hence a general “catch-all” obligation which would only become operative if the specific obligations of the following articles are not applicable.

Article 4 Multilateral Labour Standards and Agreements

1. Affirming the value of greater policy coherence in decent work, encompassing core labour standards, and high levels of labour protection, coupled with their effective enforcement, the Parties recognize the beneficial role that those areas can have on economic efficiency, innovation and productivity, including export performance. In this context, they also recognize the importance of social dialogue on labour matters among workers and employers, and their respective organizations, and governments, and commit to the promotion of such dialogue.

2. The Parties reaffirm their commitment to promote the development of international trade in a way that is conducive to decent work for all, including for women and young people.

3. In accordance with the ILO Constitution and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its 86th Session in 1998, each Party shall respect, promote and effectively

~~implement the internationally recognised core labour standards, as defined in the fundamental ILO Conventions, which are:~~ ensure that its laws, policies and practices are in conformity with the following conventions and their relevant protocols:

- (a) Freedom of association and the effective recognition of the right to collective bargaining;
- (b) The elimination of all forms of forced or compulsory labour;
- (c) The effective abolition of child labour; and
- (d) The elimination of discrimination in respect of employment and occupation.

In fulfilling this obligation, each Party shall be guided by the respective ILO Recommendations.

3a. Notwithstanding paragraph 3 each Party shall effectively implement in its laws and practices and

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in its whole territory the ILO Conventions it has ratified.

4. Each Party shall make continued and sustained efforts towards ratifying the fundamental ILO Conventions, Protocols and other relevant ILO Conventions to which it is not yet Party and that are classified as up-to-date by the ILO.

5. Recalling that among the objectives of the Agenda 2030 is the elimination of forced labour, the Parties underline the importance of ratification and then effective implementation of the 2014 Protocol to the Forced Labour Convention.

6. The Parties shall regularly exchange information on their respective progress with regard to ratification of the fundamental ILO Conventions and related Protocols and of other ILO Conventions or protocols to which they are not yet party and that are classified as up-to-date by the ILO.

7. Recalling paragraph 2, each Party reaffirms its commitment to promote and effectively implement the ILO Conventions and Protocols ratified by the signatory Mercosur States and by the Member States of the European Union respectively and classified as up-to-date by the ILO.

8. The Parties shall consult and cooperate, as appropriate, on trade-related labour issues of mutual interest, including in the context of the ILO.

9. Recalling the ILO Declaration of Fundamental Principles and Rights at Work of 1998 and the ILO Declaration on Social Justice for a Fair Globalisation of 2008, the Parties note that the violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage and that labour standards should not be used for protectionist trade purposes.

10. Each Party shall promote decent work as provided by the Declaration on Social Justice for a Fair Globali-

zation of 2008 adopted by the International Labour Conference at its 97th Session. Particular attention shall be paid by each Party to:

(a) developing and enhancing measures for occupational safety and health, including compensation in case of occupational injury or illness, as defined in the relevant ILO Conventions and other international commitments;

(b) decent working conditions for all, with regard to, inter alia, wages and earnings, working hours and other conditions of work;

(c) labour inspection, in particular through effective implementation of relevant ILO standards on labour inspections.

(d) non-discrimination in respect of working conditions, including for migrant workers.

11. Each Party shall ensure that administrative and judicial proceedings are available and accessible in order to permit effective action to be taken against infringements of labour rights referred to in this Chapter.

Comment:

Article 4 is the first substantive and concrete obligatory provision of the Alternative Text. It addresses international labour standards. Paragraph 1 refers to the common goals and contextualises these goals in the wider global discourse. It does not add any new element.

However, paragraph 3 of Article 4 replaces the previous paragraph 3 and moves beyond the generally recognised standard. It obliges the parties to ensure that their laws, policies and practices are in conformity with the eight ILO Conventions which relate to the ILO core labour standards. In other words, the provision effectively incorporates these conventions as binding obligations in the agreement. This approach is more effective than obliging the Parties to “effectively implement” the ILO Conventions.

Article 5

Multilateral Environmental Agreements

1. The Parties recognize that the environment is one of the three dimensions of sustainable development and that its three dimensions - economic, social and environmental - should be addressed in a balanced and integrated manner. Additionally, the Parties recognize the contribution that trade could make to sustainable development.

2. The Parties recognise the importance of the United Nations Environment Assembly (UNEA) of the United Nations Environment Programme (UNEP) and multilateral environment agreements as a response of the international community to global or regional environmental challenges and stress the need to enhance the mutual supportiveness between trade and environment policies.

3. Recalling the above paragraphs, each Party reaffirms its commitments to promote and effectively implement, multilateral environmental agreements (MEAs), protocols and their amendments to which it is a party. Each Party shall ensure that its laws, policies and practices are in conformity with the following conventions:

- a) Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)
- b) Convention on Biological Diversity (CBD)
- c) International Tropical Timber Agreement (ITTA)
- d) Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR)
- e) International Convention for the Conservation of Atlantic Tunas (ICCAT)
- f) United Nations Fish Stocks Agreement (UNFSA)
- g) International Plant Protection Convention (IPPC)
- h) Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits

Arising from their Utilization to the Convention on Biological Diversity

- i) Cartagena Protocol on Biosafety to the Convention on Biological Diversity
- j) Nagoya – Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety
- k) Montreal Protocol and the Vienna Convention on Substances that Deplete the Ozone Layer
- l) United Nations Framework Convention on Climate Change (UNFCCC)
- m) Paris Agreement to the UNFCCC
- n) Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal
- o) Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade
- p) Stockholm Convention on Persistent Organic Pollutants
- q) Minamata Convention on Mercury

3a. Notwithstanding paragraph 3 each Party reaffirms its commitment to effectively implement in its domestic laws and practices the Multilateral Environmental Agreements to which it is a party.

4. The Parties shall regularly exchange information on their respective progress as regards the ratifications of MEAs, including their protocols and amendments.

5. The Parties shall consult and cooperate, as appropriate, on trade-related environmental matters of mutual interest in the context of multilateral environmental agreements.

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6. The Parties acknowledge their right to invoke Article [insert article number – General Exceptions] in relation to environmental measures.⁵⁷

7. Nothing in this agreement shall prevent Parties from adopting or maintaining measures to implement the MEAs to which they are party provided that such measures are consistent with Article 2.6.

Comment:

Article 5 fulfils similar functions as Article 4. Similar to paragraph 3 of Article 4, paragraph 3 of Article 5 incorporates Multinational Environmental Agreements (MEAs). The list in the Alternative Text is based on WTO MEA list – it also includes the 2015 Paris Agreement on UNFCCC.⁵⁸ The functioning of this article would also

depend on a sufficiently broad list of MEAs including those which at least one of the Parties has not ratified.

Article 5 applies a different legal methodology compared to Articles 6 and 7. Therefore, the content is repetitive in some aspects. Generally, Article 5 entails a broad binding effect under public international law. Article 5 paragraph 3 obliges the parties to ensure that their laws, policies and practices are in conformity with the MEAs mentioned. Therefore, it effectively incorporates these MEAs as binding obligations in the agreement. Similarly, Article 6 paragraph 2(a) entails an obligation to implement the UNFCCC and the Paris Agreement. Article 7 paragraph 2(a), however, only states that each Party shall promote the use of CITES and is therefore less forceful.

Article 6

Trade and Climate Change

1. The Parties recognise the importance of pursuing the ultimate objective of the United Nations Framework Convention on Climate Change (UNFCCC) in order to address the urgent threat of climate change and the role of trade to this end.

2. Pursuant to paragraph 1, each Party shall:

(a) effectively implement the UNFCCC and the Paris Agreement established thereunder;

(b) consistent with article 2 of the Paris Agreement, promote the positive contribution of trade to a pathway towards low greenhouse gas emissions and climate-resilient development and to increasing the ability to adapt to the adverse impacts of climate change in a manner that does not threaten food production.

3. The Parties shall also cooperate, as appropriate, on trade-related climate change issues bilaterally, regionally and in international fora, particularly in the UNFCCC.

Article 7

Trade and Biodiversity

1. The Parties recognise the importance of the conservation and sustainable use of biological diversity consistent with the Convention on Biological Diversity (CBD), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the International Treaty on Plant Genetic Resources for Food and Agriculture, and the decisions adopted

thereunder and the role that trade can play in contributing to the objectives of these agreements.

2. Pursuant to paragraph 1, each Party shall:

(a) promote the use of CITES as an instrument for conservation and sustainable use of biodiversity;

⁵⁷ Negotiators Note: To see in light of the relevant General Exceptions text.

⁵⁸ See *Client Earth and Transport and Environment*, Sustainable development and environment in TTIP, Moving from empty language to equal consideration, October 2015, p. 17.

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including through the inclusion of animal and plant species in the Appendices to the CITES where the conservation status of that species is considered at risk because of international trade.

(b) implement effective measures leading to a reduction of illegal trade in wildlife, consistent with international agreements to which it is Party.

(c) encourage trade in natural resource-based products obtained through a sustainable use of biological resources or which contribute to the conservation of biodiversity, in accordance with domestic laws.

(d) promote the fair and equitable sharing of benefits arising from the use of genetic resources and, where appropriate, measures for access to such resources and prior informed consent.

3. The Parties shall also exchange information on initiatives and good practices on trade in natural resource-based products with the aim of conserving biological diversity and cooperate, as appropriate, bilaterally, regionally and in international fora on issues covered by this article.

Article 8

Trade and Sustainable Management of Forests

1. The Parties recognise the importance of sustainable forest management and the role of trade in pursuing this objective and of forest restoration for conservation and sustainable use.

2. Pursuant to paragraph 1, each Party shall:

(a) encourage trade in products from sustainably managed forests harvested in accordance with the law of the country of harvest;

(b) promote, as appropriate and with their prior informed consent, the inclusion of forest-based local communities and indigenous peoples in sustainable supply chains of timber and non-timber forest products, as a means of enhancing their livelihoods and of promoting the conservation and sustainable use of forests.

(c) implement measures to combat illegal logging and related trade;

3. The Parties shall also:

(a) exchange information on trade-related initiatives on sustainable forest management, forest governance and on the conservation of forest cover and cooperate to maximise the impact and ensure the mutual supportiveness of their respective policies of mutual interest;

(b) Cooperate, as appropriate, bilaterally, regionally and in international fora on issues concerning trade and the conservation of forest cover as well as sustainable forest management, consistent with the 2030 Agenda for Sustainable Development.

Article 9

Trade and Sustainable Management of Fisheries and Aquaculture

1. The Parties recognise the importance of conserving and sustainably managing marine biological resources and marine ecosystems as well as of promoting responsible and sustainable aquaculture, and the role of trade in pursuing these objectives and their shared commitment to achieving Sustainable Development Goal 14 of the 2030 Agenda for Sustainable Development, particularly SDGs 14.4 and 14.6.

2. Pursuant to paragraph 1, and in a manner consistent with its international commitments, each Party shall:

(a) implement long-term conservation and management measures and sustainable exploitation of marine living resources in accordance with international law as enshrined in the UN Convention on the

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Law of the Sea of 1982 and other relevant UN and FAO instruments to which it is party.

(b) act consistent with the principles of the FAO Code of Conduct for Responsible Fisheries.

(c) participate and cooperate actively within the Regional Fisheries Management Organisations (RFMOs) and other relevant international fora to which it is a member, observer, or cooperating non-contracting party, with the aim of achieving good fisheries governance and sustainable fisheries; including through the adoption of effective control, monitoring and enforcement of management measures and, where applicable, the implementation of Catch Documentation or Certification Schemes;

(d) implement, consistent with its international commitments, comprehensive, effective and transparent measures to combat IUU fishing, and exclude from international trade products that do not comply with such measures, and cooperate to this end, including by facilitating the exchange of information.

(e) work with a view to coordinating the measures necessary for the conservation and sustainable use of straddling fish stocks in areas of common interest;

(f) promote the development of sustainable and responsible aquaculture, taking into account its economic, social and environmental aspects, including with regard to the implementation of the objectives and principles contained in the FAO Code of Conduct for Responsible Fisheries.

Article 10

Scientific and Technical Information

1. When establishing or implementing measures aimed at protecting the environment or labour conditions that may affect trade or investment, each Party shall ensure that the scientific and technical evidence on which they are based is from recognized technical and scientific bodies and that the measures are based on relevant international standards, guidelines or recommendations where they exist.

2. In cases when scientific evidence or information is insufficient or inconclusive and there is a risk of serious environmental degradation or to occupational health and safety in its territory, a Party may adopt measures based on the precautionary principle. Such measures shall be based upon available pertinent information and subject to periodic review. The Party adopting the measure shall seek to obtain new or ad-

ditional scientific information necessary for a more conclusive assessment and shall review the measure as appropriate.

3. When a measure adopted in accordance with the above paragraph has an impact on trade or investment, a Party may request to the Party adopting the measure to provide information indicating that scientific knowledge is insufficient or inconclusive in relation to the matter at stake and that the measure adopted is consistent with its own level of protection, and may request discussion of the matter in the TSD Sub-Committee.

4. Such measures shall not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

Article 11

Corporate social responsibility

1. The Parties recognise the importance of responsible management of supply chains through responsible business conduct and corporate social responsibility based on international standards.

2. Pursuant to paragraph 1, each Party shall:

(a) promote and actively support the use of relevant international instruments that it has endorsed or

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supported, such as the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises.

(b) oblige business enterprises to respect human rights and environmental standards in their activities and business relationships.

c) provide a legal and policy framework for the effective implementation of the above-mentioned guidelines and principles, including access to legal remedy for the affected persons in cases of human rights abuses by business enterprises.

3. The Parties recognise the utility of international sector-specific guidelines in the area of corporate social responsibility or responsible business conduct and shall promote joint work in this regard. In respect of the OECD Due Diligence Guidance for responsible supply chains of minerals from conflict-affected and high-risk areas and its supplements, the Parties adhering to or supporting such Guidance shall set out the expectation that companies fulfil its responsibilities according to the uptake of this Guidance.

4. The Parties shall exchange information as well as best practices⁵⁹ and, as appropriate, cooperate on issues covered by this article, including in relevant regional and international fora.

Comment

The provision on corporate responsibility should be based on the current policy framework set out in the internationally agreed standards as spelled out in the UN Guiding Principles on Business and Human Rights, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, and the OECD Guidelines for Multinational Enterprises. The reference to the Global Compact should be deleted as this instrument is very weak and no longer the main reference point. In line with future EU legislation on corporate responsibility and human rights due diligence and with the debates in the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights in the United Nations, the agreement should contain obligations to regulate private companies through binding legislation. Furthermore, the right to access to remedies should be emphasised as it is a key element of the protection of human rights.

Article 11 a

Human rights obligations

1. The parties recognize the fundamental value and importance of human rights as enshrined in the Universal Declaration on Human Rights of 1948 and the Vienna Declaration and Plan of Action of the World Conference on Human Rights of 1993.

2. Each Party shall ensure that its laws, policies and practices are in conformity with the following core international human rights instruments and their respective protocols:

a) International Convention on the Elimination of All Forms of Racial Discrimination

b) International Covenant on Civil and Political Rights

c) International Covenant on Economic, Social and Cultural Rights

d) Convention on the Elimination of All Forms of Discrimination against Women

e) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

f) Convention on the Rights of the Child

59 Negotiators Note: "buenas practicas" in Spanish version.

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- g) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
- h) International Convention for the Protection of All Persons from Enforced Disappearance
- i) Convention on the Rights of Persons with Disabilities

3. Notwithstanding paragraph 2 each Party reaffirms its commitment to effectively implement in its domestic laws and practices the international and regional human rights agreements to which it is a party.

Comment:

As mentioned above, the current trade part of the EU-Mercosur AA does not contain a specific human rights clause. Article 11a follows the logic of the labour and environment provisions which require the Parties to ensure that their domestic legal systems are in conformity with existing international agreements. The proposal of Article 11a applies this logic to internationally recognised human rights treaties and sets out relevant binding human rights obligations. It should be kept in mind, however, that not all Parties have ratified all human rights treaties. Brazil has not ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

Article 12

Other Trade and Investment-related Initiatives Favouring Sustainable Development

1. The Parties confirm their commitment to enhance the contribution of trade and investment to the objective of sustainable development in its economic, social and environmental dimensions.

Accordingly, the Parties shall:

(a) promote the objectives of the Decent Work Agenda, consistent with the 2008 ILO Declaration on Social Justice for a Fair Globalisation, including the minimum living wage, inclusive social protection, health and safety at work, and other aspects related to working conditions;

(b) encourage trade and investment in goods and services as well as the voluntary exchange of practices and technologies that contribute to enhanced social and environmental conditions, including those of particular relevance for climate change mitigation and adaptation, in a manner consistent with other provisions of this agreement.

(c) cooperate, as appropriate, bilaterally, regionally and in international fora on issues in this article.

Article 13

Working together on trade and sustainable development

The Parties recognise the importance of working together in order to achieve the objectives of this Chapter. They may work together on inter alia:

(a) labour and environmental aspects of trade and sustainable development in international fora, including in particular the WTO, the ILO, UNEP, UNCTAD, High-level Political Forum for Sustainable Development and multilateral environmental agreements (MEAs)

(b) the impact of labour and environmental law and standards on trade and investment;

(c) the impact of trade and investment law on labour and the environment;

(d) voluntary sustainability assurance schemes such as fair and ethical trade schemes and eco-labels through the sharing of experience and information on such schemes;

as well as trade-related aspects of:

(e) the implementation of fundamental, priority and other up-to-date ILO Conventions;

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(f) the ILO Decent Work Agenda, including on the inter-linkages between trade and full and productive employment, labour market adjustment, core labour standards, decent work in global supply chains, social protection and social inclusion, social dialogue, skills development and gender equality;

(g) the implementation of MEAs and support for each other's participation in such MEAs;

(h) the dynamic international climate change regime under the UNFCCC, in particular the implementation of the Paris Agreement;

(i) the Montreal Protocol and any amendments to it ratified by the Parties, in particular measures to control the production and consumption of and trade in Ozone Depleting Substances (ODS) and Hydrofluorocarbons (HFCs), and the promotion of environmentally friendly alternatives to them, and measures to address illegal trade of substances regulated by the Protocol;

(j) corporate social responsibility, responsible business conduct, responsible management of global supply chains and accountability, including with regard to implementation, follow-up, and dissemination of relevant international instruments;

(k) the sound management of chemicals and waste;

(l) the conservation and sustainable use of biological diversity, and the fair and equitable sharing of the benefits arising from the utilization of genetic resources, including by appropriate access to such resources, as referred to in Article 7;

(m) combatting wildlife trafficking, as referred to in Article 7;

(n) the promotion of the conservation and sustainable management of forests with a view to reducing deforestation and illegal logging, as referred to in Article 8;

(o) private and public initiatives contributing to the objective of halting deforestation, including those linking production and consumption through supply chains, consistent with SDGs 12 and 15;

(p) the promotion of sustainable fishing practices and trade in sustainably managed fish products, as referred to in Article 9;

(q) sustainable consumption and production initiatives consistent with SDG 12, including, but not limited to, circular economy and other sustainable economic models aimed at increasing resource efficiency and reducing waste generation.

Article 14

Sub-Committee on Trade and Sustainable Development and Contact Points

1. The Parties hereby establish a Sub-Committee on Trade and Sustainable Development (hereafter "TSD Sub-Committee"). It shall comprise senior officials, or their delegates, from each Party.

2. The TSD Sub-Committee shall meet within a year of the date of entry into force of this Agreement, unless otherwise agreed by the Parties, and thereafter as necessary in accordance with Article ... of Chapter ... [Institutional provisions on meetings of Sub-Committees of the Trade Committee]. [This TSD Sub-Committee shall establish its own rules of procedures and adopt its decisions by consensus.]

3. The functions of the TSD Sub-Committee are to:
(a) facilitate and monitor the effective implementation of this Chapter, including cooperation activities undertaken under this Chapter,

~~(b) carry out the tasks referred to in Articles 16 and 17,~~

(c) make recommendations to the Trade Committee, including with regard to topics for discussion with the [civil society mechanism], referred to in Article ... of Chapter ... [general institutional provisions],

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(d) consider any other matter related to this Chapter as the Parties may agree.

4. The TSD Sub-Committee shall publish a report after each of its meetings.

5. Each Party shall designate a Contact Point within its administration to facilitate communication and coordination between the Parties on any matter relating to the implementation of this Chapter.

Article 15

Dispute Resolution

1. ~~The Parties shall make all efforts through dialogue, consultation, exchange of information and cooperation to address any disagreement on the interpretation or application of this Chapter.~~

2. ~~Any time period mentioned in Articles 16 and 17 may be extended by mutual agreement of the Parties.~~

3. ~~All time periods established under this Chapter shall be counted in calendar days from the day following the act or fact to which they refer.~~

4. ~~For the purpose of this Chapter, parties to a dispute under this chapter shall be as set out in Article 2 (Parties) of Chapter 1 (Objective and Scope) of Title VIII (Dispute Settlement).~~⁴

5. ~~No Party shall have recourse to dispute settlement under Title VIII (Dispute Settlement) for any matter arising under this Chapter.~~

Dispute settlement

1. For any matter arising under this Chapter where there is disagreement between the Parties, the Parties shall have recourse to the rules and procedures provided for in chapter xy (Dispute Settlement) as modified by subparagraphs 2, 3 and 4.

2. Panels for disputes which related to the provisions of this Chapter shall have the necessary expertise on environmental, labour or human rights matters as required.

3. In interpreting the provisions of this Chapter, the Panel shall be guided by relevant case law or decisions taken by competent organs to implement the agreements mentioned in Articles.

4. The provisions on the withdrawal of concessions do not apply to this chapter.

enforcement mechanisms. Even worse, the previous Article 15 paragraph 5 stated that “No Party shall have recourse to dispute settlement under Title VIII (Dispute Settlement) for any matter arising under this Chapter.” Besides binding obligations, the effective dispute settlement structures are the most important elements of a TSD Chapter. Therefore, the suggested Article 15 refers to the dispute settlement procedures provided for in Chapter xy of the EU-Mercosur Agreement. The respective Chapter xy should deal with state-to-state dispute settlement. Further provisions of Chapter xy should provide for sanctions (for example through increasing tariff rates) in case of non-compliance with the decision of the dispute resolution panel. This reference increases the credibility and effectiveness of the Parties’ obligations under the Chapter.

Article 15 paragraph 2 guarantees that the dispute resolution panel has the necessary SD-relating knowledge in order to resolve the dispute. Article 15 Paragraph 2 is based on a similar clause provided for in the Financial Services Annex to the GATS.

Comment:

Whereas the EU-Mercosur excluded any possibility to make use of dispute settlement and thereby effective

Article 16
Consultations

[deleted]

Article 17
Panel of Experts

[deleted]

Article 18
Review Impact assessments and review of sustainability impacts

1. For the purpose of enhancing the achievement of the objectives of this Chapter, the Parties shall discuss through the meetings of the Trade and Sustainable Development Sub-Committee its effective implementation, including a possible review of its provisions, taking into account, inter alia, the experience gained, policy developments in each Party, developments in international agreements and views presented by stakeholders.
2. The Trade and Sustainable Sub-Committee may recommend modifications to the relevant provisions of this Chapter reflecting the outcome of the discussions referred to in paragraph 1 above, in accordance with the amendment procedure established in Article X [Amendments].]
3. The Parties recognise the importance of identifying options to address trade and sustainable development issues on the basis of a balanced assessment of the likely economic, social, human rights and environmental impacts of possible actions, taking account of the views of stakeholders, particularly non-state actors, including social partners and environmental interest groups.
4. The Parties undertake to monitor continuously the operation of the Agreement through their respective participative processes and institutions, as well as those set up under this Agreement, in order to ensure that the implementation of the agreement does not affect the obligations of the Parties in Article 4, 5 and 11a.
5. A comprehensive review of the Agreement shall be undertaken by the Parties not later than five (5) years after the date of signature and at subsequent five-yearly intervals, in order to determine the impact of the Agreement on human rights, labour rights and the environment including the costs and consequences of implementation. The review will be undertaken on the basis of an impact assessment conducted by an independent body with appropriate expertise in the subject of human rights impact assessments, on the basis of transparent information and procedures, taking into account all available and relevant evidence from all sources, especially civil society, and will be appropriately resourced.
6. When conducting the assessment mentioned in paragraph 2, the parties will pay specific attention to developing countries and in particular LDCs with a view to maximising the positive spill-over effects of this Agreement.
7. The impact assessment and a report of the review will be published. The parties as appropriate shall amend its provisions and adjust their application as recommended by the review of the Agreement.

Comment:

Article 18 establishes a comprehensive system for sustainability assessment and review. Sustainability assessment and review are well-established tools for the promotion of sustainable development goals. Sustainability assessment may help states to implement their obligations to protect human and labour rights and the environment. However, until today, they are barely used in trade and investment agreements, neither as obligations on the treaty Parties nor as due diligence obligations for investors. In addition, according to

Annex 1: Alternative Text for a Trade and Sustainable Development Chapter

European Ombudsman the European Commission has shown “maladministration” in the conduction of at least two Sustainability Impact Assessments:

“The Commission failed to provide valid reasons for its refusal to carry out a prior human rights impact assessment for the EU Free Trade Agreement with Vietnam when negotiations on that agreement were still ongoing. This constitutes maladministration.”⁶⁰

“The European Commission failed to ensure the finalisation of the sustainability impact assessment in good time, notably before the end of the EU-Mercosur trade negotiations. This constitutes maladministration.”⁶¹

Therefore, the obligations contained in Article 4, 5 and 11a are supplemented by the Parties’ obligation to undertake impact assessments and a review in each of the legal fields addressed in the Articles.

This clause is partly based on the EU-Cariforum revision clause set out in the Declaration on the Signing of the Economic Partnership Agreement, and the Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements. Article 18b paragraph 4 and 5 were paragraphs 1 and 2 of Article 19 of the EU Proposal for TTIP.

60 See European Ombudsman, Decision in case 1409/2014/MHZ on the European Commission's failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement [Decision Case 1409/2014/MHZ - Opened on Wednesday, 3 September 2014 - Recommendation on Thursday, 26 March 2015 - Decision on Friday, 26 February 2016 - Institution concerned European Commission (Critical remark)], available at <https://www.ombudsman.europa.eu/en/decision/en/64308> (accessed 29 March 2021).

61 See European Ombudsman, Decision in case 1026/2020/MAS concerning the failure by the European Commission to finalise an updated 'sustainability impact assessment' before concluding the EU-Mercosur trade negotiations [Decision Case 1026/2020/MAS - Opened on Wednesday, 8 July 2020 – Decision on Wednesday, 17 March 2021 - Institution concerned European Commission (Maladministration found)], available at <https://www.ombudsman.europa.eu/en/decision/en/139418> (accessed 29 March 2021).

Annex 2:

Article xy General exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination nothing in this Agreement shall be construed to prevent the adoption or enforcement of measures by a Contracting Party related to

- a) protect public security or to maintain public order only, but only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society
- b) protect human, animal or plant life or health, including environmental measures;
- c) secure compliance with the precautionary principle;
- d) protect social and labour laws and collective bargaining agreements;
- e) respect, protect and fulfil human rights in their internal and international policies;
- f) preserve the diversity of cultural expressions;
- g) protect the conservation of living or non-living exhaustible natural resources; and
- h) secure compliance with laws or regulations including those relating to:
 - i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contracts;
 - ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
 - iii) safety.

Comment:

A general exception clause contributes to a balance between trade and investment interests on the one hand and non-economic interest such as labour, environmental and human rights on the other hand. Exceptions clauses do provide the opportunity to justify a breach of treaty obligations under exceptional circumstances. Therefore, exceptions clauses balance the parties regulations with private economic interests quite effectively. The suggested exception clause lays down the most important aspects relating to sustainable development (labour, environment and human rights). The general exception clause should be located in the final provisions of the treaty applying to all aspects of the treaty. This proposal for a general exceptions clause is partly modelled after GATT Article XX and the study of Lorand Bartels.⁶² In contrast to GATT Article XX, measures of the Parties do not need to be necessary to achieve the policies covered by paragraphs (a)-(h) but a relation to the objective is sufficient. The general exceptions clause above could replace the exceptions clause in the EU-Mercosur chapter on trade in goods (currently Article 13) as well as the general exceptions clause in Article 54 in the EU-Mercosur chapter on trade in services.

⁶² *Lorand Bartels, A Model Human Rights Clause for the EU's International Trade Agreements, study conducted on behalf of the German Institute for Human Rights and MISEROR, 2014 p. 37. In the study for the German Advisory Council on the Environment (SRU), the authors also suggest to implement a general exceptions clause in the investment protection chapter, see Peter-Tobias Stoll et al, Die Transatlantische Handels- und Investitionspartnerschaft (TTIP) – Regulatorische Zusammenarbeit und Investitionsschutz und ihre Bedeutung für den Umweltschutz, Rechtsgutachten im Auftrag des SRU, 2015, pp. 80-81.*

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List of abbreviations

AA	Association Agreement
Cariforum	Caribbean Forum [subgroup of the Organisation of African, Caribbean and Pacific States]
CBD	[United Nations] Convention on Biological Diversity
CCAMLR	Convention on the Conservation of Antarctic Marine Living Resources
CETA	Comprehensive Economic and Trade Agreement (EU-Canada)
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CJEU	Court of Justice of the European Union
COM	[EU] Commission
DAG	Domestic Advisory Group [civil society representative body in EU FTAs]
EP	European Parliament
EU	European Union
EVP	Executive Vice-President
FAO	United Nations Food and Agriculture Organization
FPIC	Free, Prior and Informed Consent
FTA(s)	Free Trade Agreement(s)
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
HFCs	Hydrofluorocarbons
ICCAT	International Convention for the Conservation of Atlantic Tunas
ILO	International Labour Organization
IPCC	Intergovernmental Panel on Climate Change
IPPC	International Plant Protection Convention
ITTA	International Tropical Timber Agreement
IUU	Illegal, Unreported and Unregulated (IUU) fishing
LAC	[Countries of] Latin America and the Caribbean
MEA(s)	Multilateral Environmental Agreement(s)
Mercosur	Southern Common Market: South American trade bloc made up of Brazil, Argentina, Uruguay and Paraguay
NDCs	Nationally Determined Contributions
OECD	Organisation for Economic Co-operation and Development
ODS	Ozone Depleting Substances
PIC	Prior Informed Consent
RFMOs	Regional Fisheries Management Organisations
SD	Sustainable Development
SDG(s)	Sustainable Development Goal(s)
SIA	Sustainability Impact Assessment
SPS	Sanitary and Phytosanitary [measures]
SRU	German Advisory Council on the Environment (Sachverständigenrat für Umweltfragen)

List of abbreviations

TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TSD	Trade and Sustainable Development [Chapter in EU FTAs]
TTIP	Transatlantic Trade and Investment Partnership
UNCTAD	United Nations Conference on Trade and Development
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNEA	United Nations Environment Assembly [of UNEP]
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNFSA	United Nations Fish Stocks Agreement
UNGP	United Nations Guiding Principles on Business and Human Rights
VCLT	Vienna Convention of the Law of Treaties
VCLTIO	Vienna Convention of the Law of Treaties between States and International Organizations or between International Organizations
WTO	World Trade Organization

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