

EU-Mercosur Association Agreement

Governance issues in the EU trade decision making process

This briefing will explore several governance issues related to the negotiations of the EU-Mercosur trade agreement. It will also discuss the ratification process required by the agreement's specific nature, namely unanimity voting at the Council and ratification by national parliaments.

EU-Mercosur trade deal concluded without a complete SIA

Increases in deforestation and carbon emissions, erosion of biodiversity, challenges for the protection of the rights of local communities and Indigenous Peoples. From the outset of the negotiations, a variety of serious concerns have been raised about environmental and human rights issues in connection with the future EU-Mercosur trade deal.

EU trade negotiations are supposed to be informed by a 'sustainability impact assessment' (SIA), to ensure the European Commission's policy choices are based on evidence and that the resulting agreements respect human rights and high economic, social and environmental standards. According to DG Trade itself, SIAs are a "*key instrument in the formulation of sound, transparent and evidence-based trade policies*".¹

However, when the EU and Mercosur (Argentina, Brazil, Paraguay and Uruguay) concluded the negotiations of the trade deal in June 2019, only the first phase (out of three) of the sustainability impact assessment was completed. In a decision of 19 March 2021, the European Ombudsman found that the

¹ DG Trade, Sustainability Impact Assessments webpage, https://ec.europa.eu/trade/policy/policy-making/analysis/policy-evaluation/sustainability-impactassessments/index_en.htm.

Commission's failure to complete a timely assessment of the social and environmental impact of the trade deal between the EU and the Mercosur bloc of South American countries, constituted maladministration.²

SIAs are one of the Commission's most important tools to ensure that the EU's sustainability principles and objectives, set out in Article 21 TEU, are respected in trade agreements.³ Not finalising this necessary assessment raises the question as to whether the Commission had exercised "all the due diligence" necessary during the negotiations to ensure that the envisaged agreement would not lead and/or contribute to social, economic, environmental degradation and human rights violations in the EU and the Mercosur countries.

SIAs are also the main instrument to ensure environmental considerations are effectively integrated in the negotiations of trade agreement in accordance with Article 11 TFEU. The European Ombudsman decision confirms civil society's criticism that the Commission attached too little consideration to non-economic factors when it negotiated its trade deal with Mercosur countries, and seriously undermines the case that environmental and social concerns have been sufficiently addressed in the text of the agreement.⁴

Finally, serious concerns were repeatedly expressed by civil society organisations during the conduct of the SIA, in particular regarding potentially devastating impacts on forests, indigenous peoples' rights, climate change and small-scale farmers.⁵ The failure to complete the SIA in time and thus integrate these concerns further undermines any notion that public input was valued in the negotiation process. SIAs are indeed key to ensuring transparency and appropriate involvement of all stakeholders in the decision making process.

² 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, 19 March 2021, <https://www.ombudsman.europa.eu/fr/press-release/en/139425>.

³ Article 207(1) TFEU and Article 21(3) TEU. See also the Ombudsman's 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, paragraph 11.

⁴ James Harrison and Sophia Paulini, The Trade and Sustainable Development Chapter in the EU-Mercosur Association Agreement: Is it fit for purpose?, ClientEarth legal analysis, July 2020, <https://www.documents.clientearth.org/library/download-info/the-trade-and-sustainable-development-chapter-in-the-eu-mercrosur-association-agreement/>.

⁵ Civil Society Letter on the EU-Mercosur Free Trade Deal Negotiations, 24 April 2018, <https://www.fern.org/publications-insight/civil-society-letter-on-the-eu-mercrosur-free-trade-deal-negotiations-104/> ; 340+ organisations call on the EU to immediately halt trade negotiations with Brazil, 17 June 2019, <https://www.fern.org/publications-insight/340-organisations-call-on-the-eu-to-immediately-halt-trade-negotiations-with-brazil-1980/> ; Position note by the Climate Observatory, 5 May 2020, <http://www.observatoriodoclima.eco.br/en/ue-precisarever-premissas-de-acordo-com-mercrosul/>.

Lack of transparency regarding the additional instrument to address climate and deforestation concerns

The recent publication of the SIA final report⁶ as well as the Commission's formal response to it,⁷ almost two years after the end of the negotiations, does not provide any remedy to the above-mentioned issues. The Commission has been clear from the beginning that the negotiations were closed, and that the parties will not reopen the text of the agreement. Most recommendations relating to environmental impacts in the SIA final report are addressed to the Mercosur countries. It is notably up to Brazil to adopt active policies to prevent deforestation and forest degradation.⁸ Executive Vice President of the European Commission and Trade Commissioner Valdis Dombrovskis recently reiterated that the TSD chapter of the trade deal "is already binding and enforceable and therefore no modification or renegotiation of the negotiated text is required."⁹

The Commission is instead seeking pre-ratification commitments from Mercosur countries on climate and deforestation.¹⁰ The Commission hopes clarifying environmental provisions will help moving forward with the ratification of the agreement, since a number of Member States governments and parliaments as well as Members of European Parliament have indicated they would not support the deal as it stands.

In fact, the SIA's findings, and more generally the merits of the agreement, are still to be publicly debated at EU and national level. While the Commission's SIA is overall positive on the potential effects of the agreement, other studies are less optimistic and confirm civil society's fears. A study commissioned by the French government (the French study) indeed confirms that agreement is likely to lead to an increase in deforestation in the Mercosur countries, particularly in Brazil, linked to the increase in beef exports to the EU generated by the agreement.¹¹ In contrast with the moderate risk of increased deforestation described by the Commission's SIA, the French study concluded the agreement could accelerate deforestation by 5% per year over the first 6 years. The French study also points out that the deforestation caused by the increase in meat exports alone would generate a climate impact such that the expected economic gains of the agreement would not compensate for it. Finally, the study concludes that this agreement represents a missed opportunity for the EU to use its negotiating power to obtain solid guarantees that meet the environmental, health and, more generally, societal expectations of its citizens.¹² It states in particular that the climate dimension of the EU-Mercosur agreement remains almost entirely to be invented.¹³

⁶ LSE Enterprises, Sustainability Impact Assessment in Support of the Association Agreement Negotiations between the EU and Mercosur, Final Report, 29 March 2021, https://trade.ec.europa.eu/doclib/docs/2021/march/tradoc_159509.pdf.

⁷ DG Trade, Press release, European Commission publishes final Sustainability Impact Assessment and Position Paper on the EU-Mercosur Trade Agreement, 29 March 2021, <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2260>.

⁸ LSE Enterprises, *op. cit.*, Final Report, p. 104.

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

¹⁰ DG Trade, Press Release, 29 March 2021, *op. cit.*

¹¹ Commission Ambec, Rapport au Premier Ministre, Dispositions et effets potentiels de la partie commerciale de l'Accord d'Association entre l'Union Européenne et le Mercosur, https://www.gouvernement.fr/sites/default/files/document/document/2020/09/rapport_de_la_commission_devaluati_on_du_projet_daccord_ue_mercosur.pdf.

¹² *Op. cit.*, pages 4 - 6.

¹³ *Op. cit.*, page 23

Pre-ratification commitments are thus not going to be sufficient to effectively address the above deforestation and broader issues of climate change and environmental degradation. In a public statement published in February 2021, an interdisciplinary group of academic experts has developed practical proposals on five priority issues to effectively address serious environmental issues raised by the EU-Mercosur trade deal.¹⁴ These proposals include pre-ratification commitments as well as improvements of the procedural and substantive provisions contained in the Trade and Sustainable Development (TSD). The academic statement goes also beyond TSD Chapter in order to integrate environmental considerations throughout the entire agreement. Finally, it also recognises the importance of addressing “the asymmetry of the trading relationship between the EU and Mercosur and its impacts on the sustainable development of the Mercosur region”.

Little is known so far about the exact nature and content of the additional instrument the Commission is currently negotiating with Mercosur countries. Ultimately, the legal effects will depend on the exact terms and wording of this additional agreement. In any case, the Commission must stop taking trade decisions in isolation from other social and environmental considerations. This requires the Commission to ensure transparency about the ongoing discussions with Mercosur countries. Otherwise, the Commission risks further aggravating the lack of transparency and the democratic deficit that has characterised the decision-making process from the beginning of these negotiations. Key stakeholders, including civil society, must be appropriately involved to discuss openly all potential solutions in order to ensure their concerns are now appropriately addressed.¹⁵ The Commission is notably required under Article 218 (10) TFEU to involve and keep the European Parliament immediately informed of the discussions.

Unanimity voting at the Council and ratification by national parliaments

This lack of transparency and democratic participation across the whole process has significantly limited opportunities for civil society and parliaments at both EU and national level to engage into meaningful discussions. In such a sensitive context, unanimity voting at the Council, approval by the European Parliament and ratification by the parliaments of the 27 Member States will provide a significant democratic guarantee and ensure public scrutiny.

The EU-Mercosur trade deal is part of a wider Association Agreement that provides a broad and complex framework for an intensified cooperation between the EU and the Mercosur countries. Besides the trade part, this agreement is indeed also composed of a political and cooperation pillar. The agreement’s institutional provisions set up a robust framework for the functioning of the entire agreement, ensuring dialogue at the level of heads of state, ministers, or senior officials level, as well as between parliaments and with civil society. This implies a stronger and deeper political relationship between entities. As a result of its specific nature and architecture, the procedure to conclude the agreement is subject to two specificities.

¹⁴ The Academic Statement of 8 February 2021, Proposals on the EU-Mercosur Association Agreement and the Environment, <https://warwick.ac.uk/fac/soc/law/research/centres/chrp/governance/eumercosuraa/statement.pdf>.

¹⁵ See an analysis of all options by Dr. Rhea Tamara Hoffmann and Prof. Dr. Markus Krajewski, Legal opinion and proposals regarding a possible improvement or renegotiation of the draft EU-Mercosur Association Agreement, https://www.cidse.org/wp-content/uploads/2021/05/Legal-Opinion-EU-Mercosur_EN_final.pdf.

Firstly, Article 218 (8) TFEU, which provides the procedure to conclude international agreements, indicates that, at the very least, the Council must act unanimously in the case of association agreements, thus giving Member State a veto in the Council.

Secondly, the agreement falls under the shared competence of both the EU and the Member States. This mixed nature means that the agreement can only enter into force when all parties, including the 27 Member States, have ratified the agreement. The process of ratification in the 27 Member States is an entirely domestic affair, and follows the national procedures for ratification of international agreements.

From the outset of the negotiations, the Council considered this comprehensive two-pillar structure to be important and that the political component makes it a mixed agreement. The Council's negotiating directives of 1999 (the 1999 mandate) for the EU-Mercosur Association Agreement emphasise on numerous occasions that the agreement to be negotiated by the Commission with the Mercosur states rests on two pillars: a political pillar on the one hand, and an economic and commercial pillar on the other. The fourth paragraph of Title I, entitled "Nature and Scope of the Agreement", states that the agreement "will be balanced, comprehensive and will constitute a single undertaking".¹⁶ The agreement pursues objectives and has components in the areas of common foreign and security policy, common commercial policy and development cooperation. These aspects of the agreement are intrinsically linked, without one being accessory to the other.

Moreover, in the conclusions adopted by the Council on its new approach on negotiating and concluding EU trade agreements in 2018 (the 2018 Council conclusions), the Council confirmed the mixed nature of the agreement with Mercosur."¹⁷

Yet, it has been reported that the Commission is currently discussing internally whether to "split" the trade part of the Mercosur-EU agreement from the political part to allow its conclusion by EU institutions only (approval of the Council at a qualified majority and the approval of the European Parliament) without ratification by the Member States (so called 'EU-only FTA' option).¹⁸

There has been some precedent of trade agreements splits in the past. Indeed, following Opinion 2/15 by the Court of Justice of the European Union (see box below),¹⁹ the European Commission decided to split a number of investment chapters from the rest of trade agreements (eg. EU-Japan, EU-Vietnam, EU-Singapore) or to exclude elements which the Court considered in its Opinion as falling within the shared competences from its trade negotiations (e.g. EU-Australia and EU-New Zealand) in order to avoid the burdensome and unpredictable ratification procedure by Member States parliaments in case of mixed agreement (see for eg. CETA).

The opinion of the Court of Justice of the EU on the division of competences between the EU and its Member States

In its Opinion 2/15, the Court of Justice of the European Union (CJEU) dealt with the question of whether the EU had the competence to conclude the EU-Singapore Free Trade Agreement (FTA) on its own, or whether the Member States (and consequently their national parliaments) had to

¹⁶ Conseil des Ministres, Directives de Négociation par la Commission d'un Accord d'Association entre les Parties, 17 September 1999, <https://www.bilaterals.org/IMG/pdf/ue-mercotur-mandat-sep-1999.pdf>.

¹⁷ Council conclusions on the negotiation and conclusion of EU trade agreements, Brussels, 8 May 2018 <https://data.consilium.europa.eu/doc/document/ST-8622-2018-INIT/en/pdf>.

¹⁸ Politico Pro, EU eyes fast-track option to ratify South America trade deal, 8 February 2021.

¹⁹ Opinion 2/15 of the Court of Justice of the European Union concerning the competence of the EU to conclude the Free Trade Agreement with Singapore (EUSFTA), 16 May 2017, ECLI:EU:C:2017:376

be involved in the conclusion of a mixed agreement. The Court broadly interpreted the EU's post-Lisbon trade competences and concluded that the entire EU-Singapore FTA falls within the exclusive competences of the EU, with the notable exceptions of portfolio investment and the Investor-State Dispute Settlement (ISDS) mechanism. The latter fall within the shared competences of the EU and the Member States. With this Opinion, the Court paved the way for broad 'EU-only FTAs' that do not require the ratification by Member States parliaments, provided that portfolio investment and ISDS are not included or covered by the agreement in question.

However, the specific nature and architecture of this agreement as described above makes the situation very different from other comprehensive trade agreements that have been subject to a division of competences. A political manoeuvre from the Commission to split the EU-Mercosur deal with the view to bring the trade part within the scope of the common commercial policy referred to in Article 207 TFEU, and thus within the exclusive competence of the European Union, would simply be not acceptable.

A decision that would result in a radical change of direction in terms of division of competences between the EU and its Member States, after 20 years of negotiations, would not only deviate from the 1999 mandate and the 2018 Council conclusions, but would also violate the obligation of loyal cooperation referred to in Article 4 (3) TEU and Article 13 (2) TEU.

In accordance with this principle, EU institutions must mutually ensure the proper functioning of the Union. Article 4 (3) TEU explicitly provides that "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties". This principle applies to external relations (Article 205 TFEU), which means the Commission is required to work together with the Member States in external relations. Article 13 (2) TEU on institutional balance further requires that "Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation."

The whole process of scrutiny of the EU-Mercosur deal was based on the common understanding that it was a single undertaking and that the Member States would have a veto either in the Council or through the ratification at national level. The Commission cannot shortcut this process. This would create procedural pitfalls and violate the whole conclusion process in accordance with Article 218 TFEU.

The Commission cannot indeed deliver agreements B and C on the basis of a negotiation mandate granted by the Council for agreement A. The Commission's proposal to the Council must be based on the mandate. If the Commission cannot deliver the association agreement on the basis of the mandate received from the Council, it must seek a new negotiating mandate to negotiate a trade agreement, and inform the European Parliament in accordance with Article 218 (10) TFEU.

By not requesting a mandate for a separate trade deal and informing the European Parliament, the Commission would affect the position of the Council, but also the European Parliament. Indeed, the Council, Member States, and the European Parliament were working together with the Commission on the assumption there was one deal, of a specific and balanced nature - an association agreement, based on two pillars. If now, at the end of the process, this deal is split, this would significantly affect the political bargain Member States had signed up at the time of the mandate.

Conclusion

If the EU does not change the way it conducts its trade policy, its obligation under the Treaties to "foster sustainable development" (Article 21 TEU) and integrate environment protection (Article 11 TFEU) will remain largely an act of lip-service with regard to the environment. It is time for the EU trade policy to live up to the European Green Deal.

The Commission must improve its approach and make sure it is informed and participatory to effectively balance non-economic interests in its trade negotiations. It must also reflect the sustainability objectives put at the core of new trade policy by effectively addressing the missed opportunities of this agreement.

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