Legal Analysis

How Sustainable is the EU-Mercosur Agreement?

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Executive summary

The EU-Mercosur Agreement has the potential to undermine the EU's existing commitments to mitigate the climate crisis and stand in the way of green policies adopted in the future. **The core issue that emerges from the study is that the EU-Mercosur Agreement is likely to force the EU to contribute to rising global emissions by obliging it to increase trade in emission-intensive goods.**

The **rebalancing mechanism** could create additional difficulties for potential future policies aimed at reducing (trade-related) emissions. In addition, it could be used as an argument against an ambitious implementation of already existing legislation that necessarily requires further steps to be given effect.

The mechanism could further serve as an additional tool to pressure countries into weakening their regulatory measures and extend to measures needed to give effect to the European Green Deal. Even if the other parties do not threaten to use the rebalancing mechanism, officials may self-censure to avoid even the prospect of a claim. In addition, the rebalancing mechanism may at least potentially act as an obstacle to adopting and implementing European legislation designed to make access of imports to EU markets conditional on compliance with European production standards. These are so-called mirror measures. Hence, the rebalancing mechanism institutionalises a bias towards the status quo when what we need is a transition towards a decarbonised economy.

At the same time, **the European Green Deal has come under attack,** e.g., with the Omnibus proposal. In this context, the rebalancing mechanism could be particularly harmful, as many measures that make the EU market more sustainable are likely to qualify as a measure capable of triggering the rebalancing mechanism.

Including a reference to the **Paris Agreement as an essential element will not give climate concerns precedence**. **The reference is vague and adds little meaning or teeth to already existing international obligations**. It is highly unlikely that failing to cooperate towards international climate governance may lead to (partial) suspension of the EU-Mercosur Agreement or that the possibility of such suspension would even be credibly used as a means of political pressure.

The new EU-Mercosur Agreement formulates its reference to Paris compliance in a way that textually limits its application. It is limited to cases where a party does not 'remain a party, in good faith of the UNFCCC and its Paris Agreement'. 'Remaining a party' is a very low bar. Literally, this does not even include threatening to withdraw from the Paris Agreement, but only actual exiting.

Moreover, the provisions on deforestation set out in the **Trade and Sustainable Development (TSD) Chapter** of the EU-Mercosur Agreement express potentially conflicting ambitions: while the Chapter outlines specific commitments, they are also likely to **result in a weaker**

application of the Regulation on Deforestation-free Products (EUDR) vis-à-vis Mercosur countries.

While considerations related to EU competences do not directly affect the content of EU international agreements, we can reasonably expect that Commission negotiators shape their strategy and demands, including on Trade and Sustainable Development obligations, in a way that avoids any trespassing into the territory of 'harmonising environmental standards'. Because if they do not, they would leave the territory of EU exclusive trade competence and would require the EU under its own law to conclude a trade agreement with the EU and its Member States as contracting parties (mixed agreements), making the ratification process more comprehensive. This indicates that, contrary to public statements sometimes made by Commission officials, TSD commitments have limited potential to address climate policy objectives because they need to be squared with the constitutional confines of EU trade policy.

By way of comparison, in the unilateral tool of EU common commercial policy governing the very asymmetrical relations of the EU with Least Developed Countries, namely the General Scheme of Preferences (GSP) of 2012, the granting and withdrawal of preferences is made in a stricter formulation conditional to the ratification and effective implementation of numerous international environmental agreements, including the UNFCCC. The Commission's proposal of 2021 for the new GSP also includes the 2015 Paris Agreement. In terms of wording, this is comparable to 'an essential element'. However, despite the fact that progress in ratification has not (necessarily) led to progress in implementation, until now, none of the limited number of temporary withdrawals of preferences under the GSP seems to have been related to either climate or environmental treaties. This would justify a low expectation that the Paris Agreement provision would, in practice, result in a suspension of (part of) the Agreement.

1. Introduction

On 6 December 2024, the European Union and the Mercosur countries (Argentina, Brazil, Uruguay and Paraguay[1]) concluded the negotiations of the EU-Mercosur Partnership Agreement.[2] The core objective of the EU-Mercosur Agreement, as of other EU trade agreements, is to facilitate (and hence increase the volume of) **trade** between the EU and third countries. It does so, centrally, by lowering tariff rates applied to categories of products, harmonising liberalisation measures, excluding or limiting protective measures (anti-dumping mostly), (export) subsidies and quotas for import and export. In its communications, the European Commission has been eager to underline the political dimension of the Agreement,

[1] Bolivia (joined recently) and Venezuela (suspended since 2016) are also members of Mercosur but only the original four countries participated in the negotiations.

[2] European Commission, EU and Mercosur reach political agreement on groundbreaking partnership, Press Release, 6 December 2024, https://ec.europa.eu/commission/presscorner/detail/en/ip_24_6244, accessed on 24 February 2025.

claiming that it would solidify the **political partnership** between the EU and Mercosur countries, drawing on cultural links and shared values such as the commitment to democracy.[3]

This study examines the EU-Mercosur Agreement, including both its trade and political and cooperation components to the extent that they are *publicly available*, against the EU's current climate policies and the EU's domestic and international climate commitments and obligations that will necessarily require further climate policies in the future.

Importantly, on 9 April 2024, the European Court of Human Rights (ECtHR) concluded in its first climate ruling, ***KlimaSeniorinnen*, that GHG emissions generated abroad for consumption of imports on a state's territory ('embedded emissions') can be attributed to that state and fall within the scope of human rights protection of the Convention**.[4] In the case of Switzerland, these embedded emissions amounted to an estimate of **70% of Swiss emissions**.[5] This has direct implications for the Convention obligations of all EU Member States to reduce import-related emissions. It also has indirect consequences for the European Union itself, which is under the EU Treaties unambiguously committed to comply with the ECHR and hence must take not only export-related (generated on EU territory) but also import-related emissions (of goods consumed on EU territory) into account.

Trade and climate change are intricately connected. Trade is at least also a major source of greenhouse gas (GHG) emissions.[6] **About 30% of global carbon dioxide (CO2) emissions are associated with trade.**[7] At the same time, trade is a context of bilateral and multilateral negotiations where states have influence on each other's economic activities, including the sustainability thereof. Generally, the understanding that trade objectives and market liberalisation cannot trump environmental and social considerations has taken hold in academia and society.[8] The current trade policy paradigm of the EU also *declares* that sustainability is a defining feature of EU trade policy and should be implemented throughout various trade policy instruments.[9] According to EU officials, the EU-Mercosur Agreement is supposed to contribute to EU climate policy, notably by enshrining in the Agreement 'strong,

[3] The EU and Mercosur concluded an Interregional Framework Cooperation Agreement as early 1995 - Interregional Framework Cooperation Agreement between the European Community and its Member States, of the one part, and the Southern Common Market and its Party States, of the other part, C 14 (19/01/1996).
[4] ECtHR, *KlimaSeniorinnen Schweiz et al. v Switzerland*, no. 53600/20.
[5] ECtHR, *KlimaSeniorinnen*, para 279.
[6] Our World in Data "CO_2 emissions embedded in trade" (available at www.ourworldindata.org; last accessed 14.01.2025)
[7] World Trade Organization, *World Trade Report 2022: Climate Change and International Trade* https://www.wto.org/english/res_e/booksp_e/wtr22_e/wtr22_e.pdf 11; Intergovernmental Panel on Climate Change, *Synthesis Report of the IPCC sixth assessment report (AR6) - Summary for Policymakers* https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf 4, and https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_Chapter11.pdf, 1176.
[8] Laurens Ankersmit, "The EU's strategy for more 'rules-based' trade and the EU's withdrawal from the Energy Charter Treaty" (2023) Legal Issues of Economic Integration (editorial); Chapters by Ankersmit and Eckes, in: Eckes, Leino and Wallerman, *The Balance of Powers in the European Union* (Hart, 2024). Visible also in ibid.
[9] European Commission, *Trade Policy Review – An Open, Sustainable and Assertive Trade Policy,* COM(2021) 66 final, pp.12-14.

specific and measurable commitments to stop deforestation' and making the Paris Agreement an essential element of the Agreement.[10]

However, in relation to the climate crisis and in light of the EU's international and domestic commitments to reduce GHG emissions, trade can *only and exclusively be seen as sustainable* and in line with the EU's climate mitigation obligations to the extent that it concerns the diffusion and deployment of **'green products'**, i.e. products that are produced with a (significantly) smaller carbon footprint or products (services, capital, or know-how) that directly contribute to the green transition. This is the case for example when goods or services can be produced or created with lower GHG emissions elsewhere (*e.g.*, because a place enjoys better conditions to produce renewable energy and the production of the good is particularly energy-intensive[11]) or a product directly related to the green transition can be produced at a lower price (e.g., electric vehicles, solar panels, green steel). All other trade increases may be expected or even intended to lead to greater availability of lower-priced consumer goods and hence **more consumption**.

The **practical challenges** of reflecting the GHG intensity of a product in the customs laws and codes and allocating a different code to, *e.g.*, 'green steel' as compared to 'normal steel', and ensuring adequate up-to-date codes in light of the comparatively slow and cumbersome workings of the International Customs Organisation are significant; yet, the fundamental point remains that trade in emission-intense products only adds transport emissions and incites more consumption of these products – emissions that contribute to the continuous increase of global emissions.[12] **And, limiting the analysis to the economic implications,[13] this increase in global emissions comes with increasing climate impacts which impose immense economic costs on the EU and Mercosur.**[14]

To give one concrete example of relevance to the EU-Mercosur Agreement, we know that the current way we produce and consume **food** is unsustainable, and increasing trade of meat or animal feed is necessarily contributing to maintaining the unsustainable status quo or worsening it. At the same time, in a shorter-term perspective, EU policymakers often see removing barriers to trade as a tool for delivering economic growth, especially for

[10] European Commission, EU and Mercosur reach political agreement on groundbreaking partnership, Press Release, 6 December 2024, https://ec.europa.eu/commission/presscorner/detail/en/ip_24_6244, accessed on 24 February 2025.
[11] An example could be steel, which requires a large amount of energy, which is easier to produce renewably elsewhere.
[12] cf. the Global Carbon Budget, available at https://globalcarbonbudget.org/, accessed on 24 February 2025.
[13] Disregarding for a moment the human costs of climate change, which are well documented, *e.g.*, here: Romanello, Marina et al, 'The 2024 report of the Lancet Countdown on health and climate change: facing record-breaking threats from delayed action', The Lancet, Volume 404, Issue 10465, 1847 – 1896, available at: https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(24)01822-1/fulltext.
[14] World Economic Forum, https://www.weforum.org/stories/2023/10/climate-loss-and-damage-cost-16-million-per-hour/; on the impacts in Latin America: https://unfccc.int/news/new-report-details-dire-climate-impacts-in-latin-america-and-the-caribbean.

export-oriented Member States.[15] **The proposed agreement would facilitate trade in some highly emission-intensive food products, such as beef, and increase the supply of feed products, such as soybeans.**[16]

Three aspects of the EU-Mercosur Agreement are particularly relevant for sustainability and climate change mitigation, namely the reference to the Paris Agreement and international climate governance as an essential element (Section 2), the rebalancing mechanism (Section 3) as well as the Trade and Sustainability Development Chapter and deforestation commitments included therein (Section 4). In addition, we also discuss possible ratification and conclusion scenarios for the Agreement, examining specifically the risk that it ends up being **split into an interim-trade deal and a political cooperation agreement** (Section 5). An interim trade deal, as opposed to an originally envisaged association agreement, could be concluded by a qualified majority of the Council, without the need for ratification by national parliaments. **These legal questions are relevant for the broader democratic legitimacy of the EU-Mercosur Agreement and thus merit closer scrutiny.**

We conclude with a summary of our main points (Section 6), where we outline why the EU-Mercosur Agreement as it was agreed on 6 December 2024 – or at least the parts that are publicly available[17] – has the potential of undermining the EU's existing commitments to mitigate the climate crisis and standing in the way of green policies adopted in the future. **The core issue that emerges from our assessment is that the EU-Mercosur Agreement is likely to oblige the EU to contribute to rising global emissions by obliging it to increase trade in emission-intensive goods**. In relation to the Trade and Sustainable Development commitments (including the proposed annex), we concluded that they do not ensure an effective implementation of the 2015 Paris Agreement and the aims of the Convention on Biological Diversity, as well as the 2022 Global Biodiversity Framework.[18]

2. Paris Agreement as an Essential Element of the Mercosur Agreement

The EU-Mercosur Partnership Agreement contains in **Article XX** a reference to the Paris Agreement and the United Nations Framework Convention on Climate Change (UNFCCC) as an 'essential element'. The language is meant to evoke Article 60.3(b) VCLT, stipulating that a

[15] European Commission, *Trade Policy Review*, pp.5-6.

[16] The Commission fact sheet explicates, in a seemingly justificatory manner, the low percentage of EU imports in the overall MECOSUR beef market: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mercosur/eu-mercosur-agreement/factsheet-eu-mercosur-partnership-agreement-opening-opportunities-european-farmers_en.

[17] European Commission, EU-Mercosur: Text of the agreement, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mercosur/eu-mercosur-agreement/text-agreement_en, accessed on 24 February 2025.

[18] C Eckes, R Verheyen, P Krajewski, Treaty-Making by Afterthought: Can the EU-Mercosur Association Agreement Be Saved by the Joint Instrument?, Archiv des Völkerrechts, 2023.

'material breach' of a multilateral agreement by one party entitles the other parties (by unanimous agreement) to suspend or terminate the agreement (in part or in whole).

The provision reads:

> "Article XX
>
> 1. The Parties recognise that the global threat of climate change calls for the widest possible cooperation of all countries to reduce global greenhouse gas emissions and to adapt to the adverse effects of climate change in a manner that *does not threaten food production*, with developed countries continuing to take the lead. The Parties reiterate their commitment to the implementation of the Paris Agreement adopted under the UN Framework Convention on Climate Change (UNFCCC), reflecting *equity and the principle of common but differentiated responsibilities and respective capabilities*, in light of different national circumstances.
>
> 2. The Parties shall cooperate, as appropriate, on trade-related climate change issues bilaterally, regionally, and in relevant international fora. In this context, recognizing the role of trade in contributing to the response to the urgent threat of climate change, each Party shall *remain a party, in good faith, of the UNFCCC and its Paris Agreement*.
>
> 3. The Parties agree that the second sentence of paragraph 2 constitutes an *essential element* of this Agreement."[19]

In addition, **Article 6** of the TSD Chapter of the EU-Mercosur Agreement recognises the objective of the UNFCCC, 'the urgent threat of climate change and the role of trade to this end',[20] demands that the Parties 'shall effectively implement' the Paris Agreement,[21] and formulates that Parties 'shall […] promote the positive contribution of trade' to climate mitigation.[22]

Importantly, neither of the two provisions stipulates that obligations under the international climate governance system shall prevail in the event of inconsistencies between these obligations and obligations under the EU-Mercosur Agreement. **Thus, despite the compelling language, neither of the two provisions is formulated in a way that will require giving priority to climate concerns, *i.e.* as a hierarchically superior means of interpretation. This means that in practice, other (economic) considerations and obligations may be given priority over climate in the interpretation of what the EU-Mercosur Agreement demands of parties**.

Location in the Agreement

The location of the Paris Agreement provision in either the 'political', *i.e.*, non-trade part, or the trade part of the Agreement is not clearly indicated. However, weighing the different indications, the authors come to the conclusion that the provision of the Paris Agreement as

[19] *Emphasis added*.
[20] Article 6(1) TSD Chapter.
[21] Article 6(1)(a) TSD Chapter.
[22] Article 6(2)(b) TSD Chapter.

an essential element is at this point intended to be included in the *political* part.[23] If the EU-Mercosur Agreement is split, this may of course still change. The implications of its location in the political part are, for example, that it would not be provisionally applied. Practice shows that the trade part may be provisionally applied for many years before the political part takes effect. **Arguably, the location in the political part hence also reflects an economic mindset in which the dominating purpose of the Agreement, namely trade, is shielded and can move ahead in isolation from what is termed to be an 'essential element'.** Logically, these two points seem difficult to reconcile.

'Essential element' vs other references

Fragmentation of international law, with different, partially contradictory obligations of states under different sectoral regimes, has been a long-discussed topic in academia.[24] Recognising other international treaties in later concluded agreement may be welcomed as a means of ensuring greater coherence. It is also in line with Article 3(5) and 21 TEU mandating the EU to conduct its common commercial policy 'in the context of the principles and objectives of the Union's external actions', which include 'sustainable development of the *Earth* [!]' and 'free and fair trade', as well as 'strict observance and development of international law'.[25]

References in trade agreements confirm the relevance of the Paris Agreement, together with the UNFCCC, as the cornerstone of international climate governance. Singling out the obligations of contracting parties under the Paris Agreement and the international climate governance framework in this way is also a recognition of the **exceptionalism of the climate crisis** as a guiding consideration in the context of all other substantive fields.

By way of comparison, references to the Paris Agreement have so far been included in the EU-New Zealand Agreement and in the EU-UK Trade and Cooperation Agreement. In both agreements, these provisions do not refer to the Paris Agreement 'as an essential element', but with precise formulations that demand cooperation under the international climate governance regime are stricter, more detailed, and leave less room for interpretation of what

[23] This point is not clearly communicated. What seems to indicate that Article XX is in the *political* part is the following: first, the text of Article XY (fulfilment of obligations), which distinguishes between 'obligations under Part X (Trade) of this Agreement' (para 2) and 'obligations that are described as essential elements' (para 3) and, second, the chapeau included by the Commission in the published document on Article XX, referring to 'newly negotiated texts pertaining to the Agreement with Mercosur' rather than 'the texts of the Trade Part of the Agreement', which is the formulation used for the provisions of the trade part. However, Paris as an essential element is presented in relation to trade, on the website of DG Trade, the numbering as Article XX may suggest that the Paris agreement provision will be added to the TSD chapter (followed with some extension like XX.1) which is Chapter XX under current numbering. Also the summary presentation of changes between the 2019 and 2024 agreements appears to indicate that forms part of the trade part: 2024 EU-Mercosur summary (2).pdf.

[24] Koskenniemi M and Leino P., 'Fragmentation of International Law? Postmodern Anxieties', *Leiden Journal of International Law*, 2002;15(3):553-579.

[25] Article 3(5) TEU (emphasis added). See also Article 21(2)(f) TEU: 'develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development'.

could be considered a breach.[26] In other words, **despite the term 'essential element', the EU-Mercosur Agreement sets a low bar for what could be considered compliance.** By way of comparison, in the EU-New Zealand Free Trade Agreement, parties committed to sanctions in case of 'actions or omissions which materially defeat the object and purpose of the Paris Agreement'. This is also true in relation to Article 6(2)(a) of the TSD Chapter. As these agreements entered into force relatively recently, no practice in relation to the Paris Agreement provisions exists.[27] We do know, however, that essential clauses on human rights are rarely invoked. Key actors in trade policy tend to understand them as deterrents rather than potential enforcement mechanisms.[28] **On this basis, it is realistic not to expect that the provision will actually ever trigger the suspension of the Agreement.**

At the same time, the EU-Mercosur Agreement does **not recognise that the Paris Agreement takes unambiguous precedence** when it comes into conflict with other rights and obligations under the Agreement.[29] This, however, would be required in light of the exceptionalism of the climate crisis, its economic (and human) impacts, and the inherent tension between free trade, certainly in other than 'green products'. Transport emissions only add to the carbon footprint of a good and are hence problematic, except if the good can be produced in a significantly less carbon-intensive way elsewhere. More consumption (certainly of other than 'green products') leads to more emissions and hence directly goes against the objectives of the Paris Agreement and exhausts the EU's fair share carbon budget even faster, **with Europe already failing to stay within its fair share carbon budget**.[30]

By way of comparison, in the unilateral tool of EU common commercial policy governing the very asymmetrical relations of the EU with Least Developed Countries, namely the General Scheme of Preferences (GSP) of 2012, the granting and withdrawal of preferences is made in a stricter formulation conditional to the ratification and effective implementation of numerous international environmental agreements, including the UNFCCC.[31] The Commission proposal

[26] Article 401 EU-UK TCA and Article 19.6 EU-NZ Agreement speak of 'effectively implement[ing]' and refer to *nationally determined contributions* (EU-NZ) and commitment to the *long-term temperature goal* (EU-UK), respectively. They also detail what is demanded in terms of cooperation and what Parties should refrain from doing. See also Article19.7 EU-NZ Agreement on fossil fuel subsidies.

[27] The EU-New Zealand trade agreement entered into force on 1 May 2024. The EU-UK TCA entered into force on 1 May 2021

[28] The EU-Israel Association Agreement includes a reference to the 'respect for human rights' as an 'essential element'; yet, even with the ongoing war in Gaza, the Commission has not proposed to the Council the suspension of this agreement.

[29] Jessica C. Lawrence and Laurens Ankersmit, 'Making EU FTAs 'Paris Safe' Three studies with concrete proposals', available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3407949.

[30] Eckes, GLJ 2025 setting out an argument centrally based on the work of the European Scientific Advisory Body on Climate Change (ESABCC).

[31] Regulation (EU) No 978/2012 of the European Parliament and of the Council Regulation of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008. See Art 9(1)(b) together with Annex VIII. See for an attempt to define 'effective implementation': Article 2(11) Proposal COM (2021) 579 final from the Commission of 22 September 2021 for a regulation of the European Parliament and of the Council on applying a generalised scheme of tariff preferences and repealing regulation (EU) 978/2012 of the European Parliament and of the Council.

of 2021 for the new GSP also includes the 2015 Paris Agreement.[32] In terms of wording, this is comparable to 'an essential element'. However, despite the fact that progress in ratification has not (necessarily) led to progress in implementation,[33] until now none of the limited number of temporary withdrawals of preferences under the GSP seems to have been related to either climate or environmental treaties.[34] **This would justify a low expectation that the Paris Agreement provision would, in practice, result in a suspension of (part of) the Agreement**.[35]

Consequences of the reference

The recognition of the Paris Agreement and the UNFCCC as an essential element does not create binding obligations that go beyond already existing obligations under international law; however, such recognition may add a mechanism of incentive and disincentive structures that re-enforces existing obligations.

As outlined in the Agreement, recognition as an essential element legally allows, as a measure of last resort, to suspend the agreement in part or in full.[36] The incentive/disincentive structure is, however, subject to a number of limitations.

Controversial hard legal obligations of individual signatories

It remains controversial to what extent the Paris Agreement contains specific obligations on individual signatories rather than the collective.[37] Three types of commitments can be distinguished relating to: first, mitigation;[38] second, adaptation;[39] and third, finance.[40] As is well-known, the Paris Agreement does not mandate, in terms of emission reduction, specific substantive national obligations but relies on obligations of conduct (rather than result), such as the drawing up of nationally determined contributions (NDCs). The commitment by all contracting parties to the long-term temperature goal of 1.5°C has been recognised by several national judges as a point of reference for imposing on states and corporations legal

[32] Proposal COM (2021) 579 final, ibid.
[33] G van der Loo, 'The Commission proposal on reforming the Generalised Scheme of Tariff Preferences: analysis of human rights incentives and conditionalities' (European Parliament in-depth analysis requested by the DROI Subcommittee 2022) 9.
[34] I Borchert, P Conconi, M Di Ubaldo and C Herghelegiu, 'The Pursuit of Non-Trade Policy Objectives in EU Trade Policy' (EUI Working Papers 2020/26).
[35] A similar argument is supported in relation to human rights clauses as essential elements of trade agreements, *e.g.*: Assessment of the implementation of the human rights clause in international and sectoral agreements, available at: https://www.europarl.europa.eu/RegData/etudes/IDAN/2023/702586/EXPO_IDA(2023)702586_EN.pdf, accessed on 24 February 2025.
[36] Article XY (3)
[37] D Bodansky, 'The Legal Character of the Paris Agreement' (2016) in Review of European, Comparative and International Environmental Law 142; L Rajamani, 'The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations' (2016) JEL 337.
[38] Articles 3-6 PA.
[39] Article 7 PA.
[40] Article 9 PA.

obligations to reduce emissions.[41] The reference to the 1.5°C long-term temperature goal is a welcome confirmation of the relevance of this goal.[42] However, the goal also directly flows from the Paris Agreement and successive decisions of the Conference of the Parties (COPs) under the UNFCCC.[43]

The Paris Agreement enshrines the principle of progression,[44] which is an expression of the generally accepted principle of non-regression in international environmental law. [45] Hence, regression in climate action should also logically be able to justify invoking the provision of the Paris Agreement as an essential element. Ultimately, the clearer such a provision is formulated, the more scope for disagreement and diverging interpretations remains. In a context where the EU can act *unilaterally*, this means that it has a greater margin of action under a vague provision than under a highly specific one. The EU could, for example, reasonably claim that submitting a regressive NDC violates the provision and suspend benefits accordingly. The question remains whether and how this benefits the climate and sustainability, and what the political costs of suspension are. This is why a formulation making climate obligations *essential to the interpretation* of the EU-Mercosur Agreement by allowing climate obligations to prevail would better connect to the ambition of not only reconciling climate protection and sustainability considerations with trade but prioritising climate and only facilitating trade in green products, while excluding negative effects of the latter on the former.

Weak formulation

The new EU-Mercosur Agreement formulates its reference to Paris compliance in a way that textually limits its application. It is limited to cases where a party does not 'remain a party, in good faith of the UNFCCC and its Paris Agreement'. **'Remaining a party' is a very low bar. Literally, this does not even include *threatening* to withdraw from the Paris Agreement but only actual exiting.** However, the reference to 'good faith' widens the provision to the obligation to act as a reasonable party would. The Commission explains that this should be understood as excluding actions that 'undermine the Paris Agreement from within'.[46] This interpretation, which catches the situation that a contracting party remains a party to the Paris Agreement but fails to cooperate, *i.e.*, genuinely participate in pursuing the objectives of the

[41] Court of Appeal Brussels, *Klimaatzaak,* 30 November 2023, 2021/AR/15gs; Administrative Tribunal Paris, Notre Affair À Tous, 14 October 2021.
[42] Article 401(2)(a) EU-UK TCA.
[43] See notably the Glasgow Climate Pact at COP26. The 1.5°C concern the long-term temperature goal, which refers to average temperatures of at least two decades. We have exceeded the 1.5°C for and staying long term below 1.5°C may *physically* no longer be achievable; yet, this is the agreed goal and it remains the *politically* agreed goal to stay below (and if this fails to return to below) 1.5°C. Failing to achieve a legal obligation does not absolve the actor from this obligation but requires continuous best efforts to comply.
[44] Articles 3 and 4 PA.
[45] M Prieur, 'The Principle of Non-Regression' in L Krämer and E Orlando (eds), *Principles of Environmental Law* (Edward Elgar 2018) 251; M Vordermayer-Riemer, *Non-Regression in International Environmental Law: Human Rights Doctrine and the Promises of Comparative International Law* (Intersentia 2021); AD Mitchell and J Munro, 'An International Law Principle of Non-Regression from Environmental Protections' (2023) ICLQ 35, 61 ff.
[46] Commission Summary, para 1.

Paris Agreement, *e.g.*, including through their participation in the COPs, seems a reasonable and desirable interpretation. **In other words, Argentina's withdrawal from COP29 on day three should *prima facie* qualify as failing to cooperate in good faith and undermines the possibility of achieving the objectives of the Paris Agreement.** However, as stated above, the comparatively weak formulation opens the door for disagreement and diverging interpretations.

Another issue is whether compliance with pledges in NDCs is covered by the reference to the Paris Agreement. The Paris Agreement arguably creates a good faith expectation that contracting parties effectively endeavour to achieve their NDCs. However, this does not mean that they have to fully attain their objectives.[47] **The Paris Agreement does not offer an enforcement mechanism**. Recognitions by other binding international treaties that the parties are obliged to effectively implement their NDCs are welcome.[48] However, even if the EU-Mercosur Agreement does not mention NDCs, a strong argument can be made in relation to the 'good faith' reference that, without a change of circumstances, a party that does not endeavour to achieve its own NDC commitments allows invoking the Paris-Agreement-as-an-essential-element provision. At the same time, because of the obligation of conduct, it seems less straightforward that not complying with one's own NDCs could be seen as meeting the threshold of failing to '*remain a party*, in good faith of the UNFCCC and its Paris Agreement.' Hence, the Commission's assertion that the Paris Agreement provision would be engaged in the case that Brazil does not deliver on its NDC pledge to halt illegal deforestation, including in the Brazilian Amazon, seems very optimistic in this respect.[49]

Food production and the Principle of Common But Differentiated Responsibilities and Respective Capabilities (CBDR-RC)

Interesting is the specific requirement that a climate policy 'does not threaten food production'. This echoes Article 2(1)b and the recitals of the Paris agreement. However, emphasising food production in this prominent manner in the short Paris Agreement provision of the EU-Mercosur Agreement gives it greater weight as a qualification of climate-related obligations.

The UNFCCC does not mention trade, even though some have argued that the mentioning of 'the impacts of the measures taken in response to [climate change]' implicitly refers to discriminatory unilateral trade instruments.[50] The normative framework of the UNFCCC and the Paris Agreement, however, emphasises the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC) that underlines the different positions of

[47] See also: D Bodansky, J Brunnée and L Rajamani, *International Climate Change Law* (OUP 2012) 231.
[48] Article 19.6(2) EU-New Zealand Agreement.
[49] European Commission, Factsheet: EU-Mercosur partnership agreement – Trade and sustainable development, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mercosur/eu-mercosur-agreement/factsheet-eu-mercosur-partnership-agreement-trade-and-sustainable-development_en.
[50] D Bodansky, J Brunnée and L Rajamani, *International Climate Change Law* (OUP 2012) 348.

developing and developed countries.[51] The Paris Agreement does not define these categories, but Mercosur countries identify as developing countries to which less stringent obligations apply.[52] **The reference to the CBDR-RC principle underlines that the demands on the Mercosur countries under the Paris Agreement are less stringent than on the EU. This also affects the interpretation of the Paris Agreement-related obligations under the EU-Mercosur Agreement, certainly in relation to ambitions but arguably also compliance.**

Suspension vis-à-vis whom?

The next issue relates to the understanding of who is a party. Party in Article XX refers to the EU and its Member States and to the Mercosur countries, consisting of Brazil, Argentina, Paraguay, and Uruguay. While the EU is itself formally a contracting party to the Paris Agreement and the EU-Mercosur Agreement, Mercosur is not. One difference between the two regimes is that, in the EU-Mercosur Agreement, trading blocs take a central role, while under the UNFCCC and the Paris Agreement, the individual Mercosur states make climate commitments (and the EU makes commitments as a bloc).

The trading bloc focus of the EU-Mercosur Agreement makes it practically difficult to suspend the EU-Mercosur Agreement only for one or several countries. Hence, if one or several of the Mercosur countries or EU Member States left the Paris Agreement, practical difficulties of a targeted response would suggest a reaction towards Mercosur or the EU as a bloc. That, however, seems politically difficult, arguably also undesirable. On a deeper level, state sovereignty stands in tension with using one international agreement with very different objectives as an enforcement mechanism and lock-in clause to a different agreement.

Human Rights Responsibility for Trade-Related Emissions

Finally, the intrinsic connection between obligations under the Paris Agreement and the UNFCCC, on the one hand, and the EU-Mercosur Agreement, on the other, comes to the fore in the context of climate litigation. Domestic courts have given effect to Paris Agreement obligations, directly, in consistent interpretation, or at least as a means of interpreting binding norms of national law. In *KlimaSeniorinnen*, the ECtHR found the scope of the complaint and hence the established human rights violation to encompass 'embedded emissions', *i.e.* emissions arising from products produced elsewhere, imported and consumed on Swiss territory.[53] The fact that the Paris Agreement in this respect directly only establishes mitigation obligations in relation to territorial emissions (even if these obligations extend in a fair share

[51] Article 2(2) PA.
[52] See Brazil's first NDC: https://unfccc.int/sites/default/files/NDC/2022-06/Brazil%20First%20NDC%20%28Updated%20submission%29.pdf
[53] ECtHR, *KlimaSeniorinnen*, 283.

reading to financial and support obligations to reduce emissions abroad) is immaterial in this respect.[54]

All 27 Member States are directly bound by the European Convention on Human Rights (ECHR) and hence post-*KlimaSeniorinnen* are required to quantify their fair share carbon budget, specify interim reduction targets, and implement measures to meet these targets, including in relation to their embedded (trade-related) emissions.[55] The EU is more indirectly bound by the ECHR, but certainly committed to compliance.[56] Hence, whatever the EU-Mercosur Agreement does, it should contribute to *reducing* trade-related emissions to be considered compatible with human rights obligations under the ECHR. By contrast, it should be seen as *breaching* these Convention obligations if it has the potential to oblige the EU and its Member States to contribute to increasing emissions that are related to (increasing) consumption on EU territory. However, this is precisely what the EU-Mercosur Agreement does. Besides trade in 'green products' as defined in the introduction, it mostly facilitates trade in high-emission products and is expected to decrease their price and increase their consumption.[57]

If an increase in high-emission products cannot be effectively avoided, the Agreement cannot be seen as promoting sustainability. One suggestion has been to work with explicit clarifications that decisions based on the carbon footprint of a product are *permissible*.[58] Such measures calculate and regulate products based on their *total* GHG emissions generated throughout the production, transportation, and consumption stages. Practical and legal difficulties are acknowledged but not insurmountable.[59]

3. Rebalancing mechanism for trade concessions

The 'rebalancing mechanism' introduced in the Dispute Settlement Chapter allows a party, if it can make 'an allegation […] that a measure applied by the other party nullifies or substantially impairs any benefit accruing to it under [Part X of the Agreement] in a manner adversely

[54] Geraldo Vidigal, 'International Trade and Embedded Emissions after KlimaSeniorinnen', in: Maxim Bönnemann & Maria Antonia Tigre, *The Transformation of European Climate Litigation*, available at: International_Trade_and_Embedded_Emissions_after_KlimaSeniorinnen.pdf.

[55] Christina Eckes, 'Strengthening democracy beyond majoritarianism: The European Court of Human Rights ruling in KlimaSeniorinnen', *Ars Aqui* 2025 and Christina Eckes, '"It's the democracy, stupid!" in defence of KlimaSeniorinnen', *ERA Forum* (2025), available at: https://doi.org/10.1007/s12027-025-00828-w.

[56] Eckes, 'EU Accession to the ECHR: Between Autonomy and Adaptation', MLR 2013.

[57] See for the flipside, *i.e.*, that higher prices stifle consumption: https://www.ecb.europa.eu/press/blog/date/2023/html/ecb.blog.230525~4a51965f26.en.html.

[58] Under WTO law, these measures are controversial, see: L. J. Ankersmit, J.C. Lawrence, and G.T. Davies, 'Diverging EU and WTO Perspectives on Extraterritorial Process Regulation' (2012) 21 Minnesota Journal of International Law Online; Steve Charnovitz, 'The Law of Environmental PPMs in the WTO: Debunking the Myth of Illegality' (2002) 27 The Yale Journal of International Law, 59; Sanford E. Gaines, 'Processes and Production Methods: How to Produce Sound Policy for Environmental PPM-Based Trade Measures?' (2002) 27 Columbia Journal of Environmental Law, 383.

[59] See Introduction and Lawrence and Ankersmit, Section 2, n. 28 above.

affecting trade between the parties', to ask a panel to assess and rule on this allegation.[60] Part X appears to refer to Title X Trade in Goods. If the panel confirms a nullification or substantial impairment, the party that activated the mechanism may take rebalancing measures.

The formulation evokes the non-violation remedy under the GATT,[61] which has been seldom used but allows challenging an otherwise WTO-consistent measure on the basis that it 'nullifies or impairs' 'any benefit accruing to it directly or indirectly' under a WTO agreement.[62] **Mercosur countries have used the non-violation remedy under the GATT in the past, e.g., Brazil against the USA[63] and the (then) European Communities.[64]**

By their logic, both the rebalancing mechanism and the GATT non-violation remedy have the *potential* to threaten the regulatory autonomy of the Contracting Parties when they introduce unilateral measures that may negatively affect already-negotiated trade concessions. This includes central *climate mitigation or other sustainability measures*. The proposed Trade and Sustainable Development chapter explicitly mentions the *right to regulate* and a *non-regression clause*.[65] The Commission translates this in its summary as meaning that '[t]he rebalancing mechanism does not undermine the parties' right to regulate; no party could ever be required under this mechanism to withdraw or amend its measures. The rebalancing mechanism only concerns trade effects of measures that the complainant *could not have expected* when the deal was closed'.[66]

It is correct that the remedy that may be obtained under the rebalancing mechanism does not affect the validity of the domestic policy measure. The party hence does not have to amend or withdraw a measure, but a finding that a measure nullifies or substantially impairs benefits would, of course, be leading in the negotiations towards finding a 'mutually satisfactory adjustment'.[67] **Any such adjustment may very well entail compensation via additional concessions and market access for *unsustainable* products. One could think of beef.[68] This would directly lead to an increase in the EU's trade-related GHG emissions, which contribute to the climate crisis and the related human rights impacts.** Ultimately, it may

[60] Article XX.4(b).
[61] Article XXIII 1(b) GATT.
[62] Matthew Stilwell, Elisabeth Tuerk, 'Non-Violation Complaints and the TRIPS Agreement: Some Considerations for TWO Members', Center for International Environmental Law, May 2001, https://www.ciel.org/wp-content/uploads/2015/03/Nonviolation_Paper1.pdf.
[63] World Trade Organization, DS217, *United States — Continued Dumping and Subsidy Offset Act of 2000*.
[64] World Trade Organization, DS269, *European Communities — Customs Classification of Frozen Boneless Chicken Cuts*.
[65] Article 2.
[66] Commission Summary, https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/86fb1930-16ed-4ac6-af25-5e0ad0d0c816/details?download=true, para 8.
[67] Article XX.13(9bis)(c) of the Dispute Settlement Chapter.
[68] Beef production emits more than 50 times the GHGs of plant-based foods per unit of protein (average), see: J Poore & T Nemecek, 'Reducing food's environmental impacts through producers and consumers', Science 2018, 360(6392), 987.

result in legal responsibility of the EU Member States under the ECHR for the human rights violations caused by trade-related emissions.[69]

The experience of the non-violation remedy under the GATT may justify an expectation that the rebalancing mechanism under the EU-Mercosur Agreement would not be used often. In addition, the threshold of '*substantially* impairing benefits' under the EU-Mercosur Agreement is *textually* higher. It also lacks the formulation 'directly or indirectly' of the non-violation remedy under the GATT, which further opens the scope of that provision.[70] A textual interpretation would hence require limiting the application of the rebalancing mechanism to a 'substantial', *i.e.*, high impairment of benefits, and potentially only to direct impairments.

However, the EU-Mercosur Agreement only includes a vague reference to the interpretation of GATT/WTO panels. In relation to the impairment of benefits, GATT/WTO panels have applied a fairly high threshold. Generally, the GATT/WTO panels have applied the non-violation remedy cautiously, limiting it, for example, to situations where the measures allegedly impairing benefits could not have been '*reasonably anticipated*' by the party relying on the non-violation remedy.[71] This appears to be also the source for the Commission's interpretation mentioned above.

However, *without a textual reference* in the EU-Mercosur Agreement to this practice of interpretation, rebalancing panels may take different routes on whether a measure/benefit should or could have been reasonably expected, as well as the level of impairment.

In other words, **the Commission's assertion that 'measures foreseeable by the time negotiations are concluded' are excluded from the rebalancing mechanism does not find support in the text.** On the contrary, the agreement states 'for greater clarity' that 'the term "measure" includes omissions and legislation that has not been fully implemented at the conclusion of the negotiations of this Agreement as well as its implementing acts.'[72] On this basis, it seems difficult to see how measures adopted to implement the European Green Deal[73] and more specifically the EU's climate ambitions do not fall within the wording of the rebalancing mechanism. This is certainly also the understanding of the Brazilian Government, which published a fact sheet stating, in relation to the rebalancing mechanism, that 'the European Union adopted *legislation that, depending on how it is implemented, could disrupt the balance reflected in the 2019 [political] understanding* on issues that were not renegotiated in the phase that began in 2023. This is the case, for example, of the quotas offered by the EU

[69] See above Section 2 on the Paris Agreement as an Essential Element.
[70] Article XXIII:1(b) of the General Agreement on Tariffs and Trade (GATT) (and Article 26(1) of the WTO Dispute Settlement Understanding (DSU)).
[71] Panel Report, *Japan – Film*, WT/DS44/R, para. 10.61.
[72] Ibid.
[73] Communication COM (2019) 640 final from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, 'The European Green Deal'. For general overviews, see L Krämer, 'Planning for Climate and the Environment: the EU Green Deal' (2020) *Journal for European Environmental and Planning Law* 267.

for the *export of meat from MERCOSUR*.'[74] **This quote appears to refer directly to the European Green Deal and the possibility that its implementation could lead to a reduction of the import of emission-intensive products, which in turn could result–irrespective of whether the agreement was violated–in trade compensation, *i.e.*, market opening for other emission-intensive products.** Other areas on which the Mercosur countries have already expressed criticism and that could lead to claims that the balance of the commitments made–not the actual legal rights and obligations–were disturbed are implementation measures related to the Carbon Border Adjustment Mechanism (CBAM) or the deforestation regulation (EUDR).[75] It should be added that the WTO panel report in *EU – Palm Oil* asserted that measures against the climate crisis as a phenomenon of "inherently global in nature" affecting each and every country in the world are legally possible as long as they *genuinely protect the climate* and are *non-discriminatory*.[76] Genuine contribution to climate protection must be understood in relation to the legal responsibilities of the country in question.[77] It cannot be countered by pointing at potential carbon leakage or market take-overs by third parties with lower sustainability ambitions. In other words, the EU's climate measures cannot (already under WTO law) discriminate against exports.

What is more, when the non-violation remedy is triggered in relation to *trade-related* measures (as it has so far been the case) it concerns *economic* measures that were not specifically excluded or agreed by the parties (as no provision of the Agreement is infringed). What this would mean for *climate-related or environmental measures* allegedly impairing an economic benefit in a *contextual* interpretation of an agreement that is first and foremost pursuing the objective of economic benefits remains to be seen. The interpretation of what could be reasonably anticipated or expected both in terms of measures and benefits may be different as the argument that these (often internal) climate or environmental measures were simply not within the scope of negotiation and hence could not be anticipated by the other party, which may necessarily be expected to know less about the domestic law of the other party.

Moreover, the incentive structure to bring a complaint under the GATT as a multilateral (and currently practically paralysed) trade system is different from bringing a complaint under the newly negotiated EU-Mercosur Agreement, where the rebalancing mechanism was included at the same time as additional environmental measures and is – at least the interpretation of (one) Mercosur (country) – meant to offer an institutional counterbalance to these substantive concessions.[78] Moreover, this does not mean that the rebalancing mechanism does not have political and legal implications.

[74] Government of Brazil, Factsheet Mercosur-European Union Partnership Agreement, 6 December 2024, https://www.gov.br/mre/en/content-centers/statements-and-other-documents/factsheet-mercosur-european-union-partnership-agreement-december-6-2024.

[75] More on the latter in Section 4 below.

[76] WTO report WTO, 'European Union and Certain Member states - Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels, WT/DS600/10, Panel Report of 30 April 2024' (2024), para. 7.314.

[77] National courts have time and again rejected 'drop in the ocean' or carbon leakage arguments and decided that states are responsible for their own emissions, see: Dutch Supreme Court, *Urgenda* (2019); German Constitutional Court, *Neubauer* (2021); ECtHR, *KlimaSeniorinnen* (2024).

[78] Government of Brazil, Factsheet Mercosur-European Union Partnership Agreement.

First, it may be used as a means of political pressure. **Even if not triggered, a party may use the rebalancing mechanism as a means of *putting pressure* on the other party to adopt a particular interpretation or not to adopt a particular measure.**

Second, even if the other parties do not threaten to use the rebalancing mechanism, officials may **self-censure to avoid even the prospect of such a situation**, *i.e.*, when considering sustainability measures capable of impairing trade benefits, **the existence of the rebalancing mechanism is another consideration not to adopt these measures**. The rebalancing mechanism further institutionalises a bias towards the *status quo* at a time when what we need is a *transition* towards a low-emission, less fossil-fuel dependent economy. Adding an additional layer of institutional protection of trade liberalization benefits, including specific tariff concessions, specific classifications, *e.g.*, as 'green', and simplified licencing, without including an exemption for climate mitigation nudges the overall discussion on the desirability of a measures that may come at some cost to trade benefits (narrowly construed) towards these costs, rather than the question of whether and how that measure contributes to the EU's climate ambitions. It hence *institutionally* strengthens the economic lens. Companies may weigh on their governments–as we can see in relation to the WTO dispute settlement mechanism–to act against measures that allegedly impair their competitiveness.

Third, **the rebalancing mechanism may at least potentially act as an obstacle to adopting and implementing European legislation designed to make access of imports to EU markets conditional on compliance with European production standards, these are so-called *mirror measures*.** Food imports–food production was mentioned in context of the reference to the Paris Agreement–are again a good example. While 30% of global GHG emissions are food-system emissions, and about 19% of total food system emissions fall to transport ('food miles'), other environmental concerns are also intrinsically connected to food imports, such as rules relating to the use of pesticides and herbicides. [79] Regulating, for example, the use of these chemicals for imports in line with European standards would qualify as 'any measure by a party, whether in the form of a law, regulation, rule, procedure, decision, administrative action, requirement or practice'.[80] This connects closely to the above point that textually foreseeable measures are not excluded.

Overall, while the 'significant impairment' threshold is *textually* quite stringent a *contextual* interpretation may – without any references to the cautious position of GATT/WTO panels – nonetheless be wider, particularly in relation to climate or environmental measures than the interpretation of the GATT/WTO panels has been in relation to trade-related measures. Furthermore, a *textual* reading supports the conclusion that *any* EU policy that might impact trade with a Mercosur country may be the subject of a trade dispute. At this point, the EU *should* focus on the implementation of the European Green Deal to meet its climate and

[79] European Commission, 'Field to fork: global food miles generate nearly 20% of all CO2 emissions from food', 25 January 2023, https://environment.ec.europa.eu/news/field-fork-global-food-miles-generate-nearly-20-all-co2-emissions-food-2023-01-25_en#:~:text=The%20researchers%20also%20estimated%20the,of%20the%20world's%20GHG%20emissions.

[80] Article X.3 General Definitions.

human rights commitments. **Yet, the European Green Deal has come under attack, *e.g.*, with the Omnibus proposal. In this context, the rebalancing mechanism could be particularly harmful, as many measures that make the EU market more sustainable are likely to qualify as a measure capable of triggering the rebalancing mechanism.**

Moreover, **the rebalancing mechanism takes place behind closed doors**, which means that the public would not even know that it counteracts certain measures. The rebalancing mechanism could hence create additional difficulties for potential future policies aimed at reducing (trade-related) emissions. In addition, it could be used as an argument against an ambitious *implementation of already existing legislation* that necessarily requires further steps to be given effect. **Officials are risk-averse and may likely try to avoid the potential consequences of having their policy measures brought to the rebalancing mechanism.**

4. The Trade and Sustainable Development Chapter and deforestation prevention

The scope and normative force of the Trade and Sustainable Development (TSD) Chapter, including its proposed Annex (published in late 2024) and, also, how it relates to other legal obligations, such as the EU Regulation on Deforestation-free Products (EUDR),[81] are issues that directly determine the environmental impact of EU-Mercosur Agreement. In light of the well-documented deforestation problems in Mercosur countries, the relevance of this issue can hardly be overstated.

Limitations to TSD provisions stemming from EU constitutional law

Any EU trade agreement is negotiated against the background of important competence considerations, which directly affect the position of the EU on substantive issues. Tension between the scope and normative force of TSD provisions and climate policy objectives, on the one hand, and trade objectives, on the other, is not new to the EU constitutional order. In *Opinion 2/15*, the Court of Justice of the European Union (CJEU) examined the EU-Singapore Trade Agreement, chapter by chapter, in order to ascertain which parts of the agreement fell under the scope of EU trade policy, which is an exclusive EU competence. The CJEU held that provisions of the TSD chapter of the EU-Singapore Agreement did not aim at harmonising labour or environmental standards. The Court found instead that they were intended to ensure that trade liberalisation would not affect the existing regulatory standards or commitments

[81] Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010, OJ L 150, 9.6.2023, p. 206–247. EUDR is an autonomous EU instrument targeting traders in selected commodities, namely cattle, wood, cocoa, soy, palm oil, coffee, rubber, who intend to place these products on the EU market. Under EUDR, economic operators that wish to do so need to demonstrate that the products in question do not originate from recently deforested land or have contributed to forest degradation. They will do so by submitting due diligence forms in the electronic system.

under multilateral environmental or labour conventions.[82] For this reason, the Court declared that TSD provisions fell under the scope of EU trade policy.

While considerations related to EU competencies do not directly affect the content of EU international agreements, we can reasonably expect that Commission negotiators shape their strategy and demands, including on TSD obligations, in a way that avoids any trespassing into the territory of 'harmonising environmental standards'. Because if they do not, they would leave the territory of EU exclusive trade competence and would require the EU under its own law to conclude a trade agreement with the EU and its Member States as contracting parties (mixed agreements), making the ratification process more onerous.

This indicates that, contrary to public statements sometimes made by Commission officials, TSD commitments have limited potential to address climate policy objectives because they need to be squared with the constitutional confines of EU trade policy. In simpler terms, TSD provisions might address trade-flanking issues or add some context to the trade liberalisation part, but on their own, they are unlikely to create significant new obligations related to climate policy.

In this context, there are three most common types of provisions to be found in TSD chapters.[83] First, these chapters tend to include references to existing international obligations, especially multilateral environmental agreements (such as the Paris Agreement) or ILO Conventions. Second, they incorporate the so-called non-regression clauses that prohibit lowering regulatory standards with a view to attracting new trade and investment. Finally, there are aspirational clauses that, in broad, non-binding terms, express the willingness of the parties to promote and aspire to implement such values as gender equality, biodiversity or high labour standards. As the name indicates, **it is difficult to define what specific obligations such provisions entail**.

Deforestation commitments and the interplay between the EU-Mercosur Agreement and the EUDR

EU negotiators have gone to great lengths to stretch the limits of what TSD provisions can promise, as illustrated by the EU-Mercosur Agreement. The TSD chapter, as agreed by negotiators in 2019, includes a provision dedicated specifically to Trade and Sustainable Management of Forests (which is not the rule in other EU trade agreements). The first part of this provision includes a set of aspirational commitments: the parties are supposed to

[82] Opinion of 16 May 2017, 2/15, EU:C:2017:376, paragraphs 163-166.

[83] Dominique Blümer and others, 'Environmental Provisions in Trade Agreements: Defending Regulatory Space or Pursuing Offensive Interests?' (2020) 29 Environmental Politics 866; Marco Bronckers and Giovanni Gruni, 'Retooling the Sustainability Standards in EU Free Trade Agreements' (2021) 24 Journal of International Economic Law 25; Alberto do Amaral and Marina Martins Martes, 'The Mercosur-EU FTA and the Obligation to Implement the Paris Agreement: An Analysis from the Brazilian Perspective' in Marc Bungenberg and others (eds), *European Yearbook of International Economic Law 2020* (Springer International Publishing 2022), https://doi.org/10.1007/8165_2021_68.

encourage trade in products from sustainably managed forests, promote the inclusion of forest-based communities and indigenous peoples in sustainable supply chains and implement measures to combat illegal logging and related trade (Article 8(2) of the TSD chapter). More specifically, the parties also commit to exchanging information on trade-related initiatives on sustainable forest management and cooperate in bilateral and multilateral fora on issues related to trade and forest management (Article 8(3) of the TSD chapter). **The wording of these provisions is vague and does not imply a far-reaching obligation.** At the same time, they reflect the EU's collaborative approach to regulatory cooperation on climate-related policies.[84]

In late 2024, the Commission revealed an annex to the TSD chapter that was agreed upon by negotiators of both sides. It should be read alongside the TSD chapter agreed in 2019 and includes significant new commitments. Even though the Annex never mentions EUDR explicitly, several provisions address topics directly linked to the EUDR. Point 16 of the proposed Annex reaffirms the parties' commitment to implement domestic and international obligations aiming to reduce deforestation 'and enhance efforts to stabilize or increase forest cover from 2030'. Moreover, in our view, the EUDR falls under 'domestic obligations aiming to reduce deforestation' mentioned in this provision and means that the EU cannot be expected to repeal or significantly dilute the EUDR in the future. In turn, Point 50 of the Annex emphasises the importance of ensuring adequate financing aimed at preventing deforestation as well as conserving and restoring forests. This is likely a nod to existing and proposed EU development policy programmes managed by DG INTPA. In the runup to the entry into force of the EUDR, the Commission and some Member States have established programmes (notably Team Europe Initiative on Deforestation-free Value Chains) aiming at funding capacity-building and technical assistance in countries producing EUDR commodities in large quantities.[85] This provision can be used to put pressure on the EU to sustain or increase financing under similar assistance programmes.

Section B.3. of the Annex (Sustainability measures affecting trade) further addresses several issues related to the EUDR. One of the most contentious aspects of the EUDR is the country benchmarking system outlined in Article 29 EUDR. The benchmarking framework would allocate risk categories to all countries in the world or parts thereof (including EU Member States), dividing them into high-, low-, and standard risk categories. Under EUDR, economic operators residing in low-risk countries can expect to face less onerous due diligence obligations and fewer controls (EUDR, Recitals 67-68).

The benchmarking is supposed to be based on quantitative and qualitative criteria. The former are perhaps less controversial and assume that the risk category would be linked to the rate of

[84] Gracia Marin Duran, 'Sustainable Development Chapters in EU Free Trade Agreements: Emerging Compliance Issues' (2020) 57 Common market law review 1031, 1042.

[85] European Commission, Global Gateway: EU and Member States launch global Team Europe Initiative on Deforestation-free Value Chains, 9 December 2023, https://international-partnerships.ec.europa.eu/news-and-events/news/global-gateway-eu-and-member-states-launch-global-team-europe-initiative-deforestation-free-value-2023-12-09_en.

deforestation and forest degradation. The Commission will consider deforestation data compiled by internationally recognizable institutions, such as the Food and Agriculture Organisation (part of the United Nations system) or the Joint Research Centre of the European Commission.

In addition, qualitative criteria can potentially change the risk categorisation (for better or worse) that would result from the assessment of quantitative criteria only and, as such, provide more leverage to EU decision-makers. In this connection, Article 29(4)(b) of the EUDR mentions 'agreements and other instruments between the country concerned and the Union and/or its Member States that address deforestation and forest degradation and facilitate compliance of relevant commodities and relevant products with Article 3 and their effective implementation'. In turn, the Annex to the TSD chapter (Point 56(a)) of the EU-Mercosur Agreement declares that the EU-Mercosur Agreement would be favourably considered for the purposes of risk classification within the framework of domestic laws of one of the parties targeting imported products – a clear reference to the EUDR. **This means that the conclusion of the EU-Mercosur Agreement could potentially help Mercosur countries 'move up' in terms of their risk category under EUDR.**

The Annex also mentions that information and data from certification schemes and systems governed and recognized by Mercosur countries would be used as a source for verifying compliance with traceability requirements, another indirect reference to EUDR and its benchmarking system.[86] **T**his means that the EU would, in principle, accept in good faith any data, documentation, or certification schemes recognized in Mercosur countries for the purposes of verifying the compliance with EUDR obligations, especially the traceability obligation.[87] I**n this context, the EU seems to accept that, in principle, it will trust the reliability of certification schemes established in Mercosur countries. At the same time, previous studies have compellingly argued that such an approach interferes with the autonomy of national authorities in EU Member States that will be tasked with the implementation of the EUDR**.[88]

Enforcement mechanisms

The very last point of the Annex (Point 64) mentions that the Annex itself is without prejudice to a Party's rights under the World Trade Organization agreements. This provision does not add new normative substance but reasserts the existing rights of either party under the WTO system. **This can be construed as a hidden political threat that the legality of EUDR under the WTO framework might be challenged in the future.** At first sight, the main part of the EUDR seems tailored to meet the criteria developed in the *US-Shrimp* case, as it regulates

[86] Articles 55-56 of the Annex.
[87] cf. Article 5 of EUDR.
[88] ClientEarth, 'The Mercosur trade deal risks derailing the EU's plan to protect the world's forests', 20 December 2024, https://www.clientearth.org/latest/news/the-mercosur-trade-deal-risks-derailing-the-eus-plan-to-protect-the-worlds-forests/.

for a legitimate public policy objective (Article XX GATT) in a non-discriminatory manner[89] which means that it should be compliant with WTO law.

Regardless of the WTO dispute settlement, TSD obligations and the Annex are subject to specific enforcement mechanisms. Crucially, the ordinary dispute settlement mechanism established in the Agreement does not cover its TSD chapter or, by extension, the proposed Annex (Article 15(5) of the TSD chapter, Point 63 of the Annex). **This means that, in contrast to the recently updated approach of the Commission to TSD obligations, there is no possibility to apply sanctions for non-compliance with TSD commitments.**[90] While the value of economic sanctions with respect to TSD obligations has been put into doubt[91], it is important to note that extending the sanctions mechanisms to TSD obligations has some symbolic and political significance.

In the event of a dispute, a panel of experts can be convened in order to deliver a report on alleged lack of compliance with the provisions of the chapter. The report would contain the assessment of facts, findings, and recommendations (Article 17(9) of the TSD chapter). There is no legal avenue to enforce compliance with the report; however, the parties are obliged to discuss specific measures that would ensure the observance of recommendations issued by the Panel. In addition, the Sub-Committee on Trade and Sustainable Development established by the Agreement would monitor the follow-up to the report of the Panel of Experts (Article 17(11) of the TSD chapter).

One of the very few instances of dispute settlement under a similar TSD chapter in an agreement concluded by the EU is *Korea—Labor Commitments*, pertaining to TSD obligations outlined in the EU-Korea Free Trade Agreement. In this dispute, the EU claimed that Korea had failed to abide by two types of labour commitments in the EU–Korea Agreement: the obligation to respect the principle of freedom of association of workers and the obligation to make continued and sustained efforts toward ratifying the fundamental conventions of the International Labor Organization.[92] On the first claim, the Panel ruled that Korea failed to respect its commitments under the TSD chapter in question, while on the second, it did not establish any violation. It is crucial to note that the Panel seems to have declared that TSD provisions create self-standing obligations and their connection to trade liberalization does not need to be substantiated in the context of a trade agreement where the parties chose to include such provisions.[93] This, in principle, lowers the threshold to establish a violation of a TSD commitment. In addition, the Panel gave some indications as to

[89] United States - Import Prohibition of Certain Shrimp and Shrimp Products [1998] - AB-1998-4 - Report of the Appellate Body, paras 115-184.
[90] European Commission, The power of trade partnerships: together for green and just economic growth, June 2022, p. 12.
[91] Duran (n 82).
[92] Panel of Experts Proceeding constituted under Article 13.15 of the EU-Korea Free Trade Agreement, Report of the Panel of Experts, 20 January 2021 (*Korea-Labor Commitments*).
[93] Geraldo Vidigal, 'Regional Trade Adjudication and the Rise of Sustainability Disputes: *Korea—Labor Commitments* and *Ukraine—Wood Export Bans*' (2022) 116 American Journal of International Law 567, 574.

understanding the commitment to make continued and sustained efforts towards ratifying an international convention: the Panel specified that it is a 'best endeavours' commitment.[94] In this context, the Parties to an agreement are required to make continuous and ongoing efforts towards ratifying the convention in question while retaining leeway with respect to choosing specific steps towards achieving the goal.[95]

These considerations demonstrate that while TSD dispute settlement does not match the standard of a fully-fledged judicial review, it has the potential to serve as an accountability mechanism. The provisions in question do not need to be connected to trade liberalization and seem to create self-standing obligations. At the same time, the broad and usually aspirational language of TSD provisions does not suggest that they could be seen as a meaningful tool in enforcing more substantial climate policy objectives defined by specific benchmarks.

5. Commission's agenda-setting powers and democratic legitimacy of the Agreement: conclusion and ratification

The new political agreement on the trade pillar of the EU-Mercosur Agreement raises questions as to the formal procedure of ratification and conclusion of the Agreement, especially the required majority in the Council and the involvement (or lack thereof) of national parliaments in the ratification process.

The negotiating directives for the Agreement were adopted by the Council as early as 1999. We do not have access to the document adopted by the Council (apart from a couple of introductory paragraphs)[96], but the Commission's recommendations for said directives are now declassified. Established practice suggests that the Commission's recommendations should be almost identical to the Council's directives, which means that the former gives us a good idea as to the scope and objectives of an agreement. **Both the Commission's recommendations and the introductory paragraphs of the Council directives indicate that the EU would negotiate with Mercosur an *association agreement*.**

Association agreements under EU law combine trade liberalisation provisions with commitments related to political and sectorial cooperation, the latter usually falling outside of the scope of EU trade policy. In practice, association agreements aim to establish special, privileged links with a bloc of countries, going beyond purely economic considerations.[97] Even though the wording of Article 217 TFEU suggests that association agreements could be concluded by the EU alone (with the unanimity requirement in the Council (Article 218(8) TFEU) and after obtaining the consent of the Parliament (Article 218(6)(a)(i)), association

[94] *Korea-Labor Commitments*, paragraph 277.
[95] Ibid, paragraph 278.
[96] Access to documents request to that end was rejected – Piotr Krajewski.
[97] cf. Case 12/86 *Demirel* ECLI:EU:C:1987:400, [1987] para 9.

agreements are almost always mixed.[98] Notable exceptions to this rule include the EU-Kosovo Stabilisation and Association Agreement and the EU-UK Trade and Cooperation Agreement, both of which were concluded as EU-only agreements.[99]

The negotiation directives adopted by the Council do not bind EU institutions as to the scope of the future agreement or its denomination. Given that negotiations involve horse-trading between two parties who will often have different objectives and priorities (not to mention changing governments and democratic majorities), it seems inevitable that some of the proposed elements would not find their way into the final agreement. At the same time, because the directives do indicate the proposed scope and objectives of an agreement that would be negotiated, they create a reasonable expectation as to the conclusion procedure, which directly depends on the scope of an agreement. This expectation is also justified because negotiating directives are never adopted out of the blue: they follow the scoping exercise whereby representatives of two parties discuss in detail, sometimes over a long period of time and involving high-level officials, what their ambitions and objectives as to the proposed agreement are and what is politically feasible in this respect.

In this context, concluding the EU-Mercosur Agreement in any other form than that prescribed for an association agreement is not illegal, but amounts to changing the rules of the game while the game is still going on. More specifically, concluding the deal as an association agreement would likely mean that the agreement is mixed, necessitating the ratification of the deal by national and regional parliaments in EU Member States. Regardless of mixity, the Council would need to reach unanimity in order to make a decision on the conclusion of the agreement (Article 218(8) TFEU). This inevitably changes the dynamics of coalition-building, especially in the context of an agreement where there have been highly diverging preferences among EU Member States: former colonial powers in Latin America (Spain and Portugal) alongside with export-oriented countries (Germany) have been consistently supportive of the Agreement while countries with powerful agricultural constituencies have been opposed to it (notably France and Ireland, recently joined by Poland).[100]

As of February 2025, we do not know how exactly the Commission will propose to conclude the Agreement in question, but there are indications that it will avoid concluding the deal as an association agreement. The official communications of the Commission now describe the deal as a "partnership agreement"[101], which in the past has been used with respect to, for instance, the EU-Japan Economic Partnership Agreement (a de facto trade agreement concluded by the EU only, without the participation of Member States). If the EU-Mercosur Agreement is not

[98] M Chamon and P van Elsuwege, 'The Meaning of "association" under EU Law: A Study on the Law and Practices of EU Association Agreements' (Luxembourg, Publications Office, 2019) 18–19.
[99] See C Eckes and P Leino-Sandberg, 'The EU-UK Trade and Cooperation Agreement – Exceptional Circumstances or a New Paradigm for EU External Relations?' (2022) 85 *The Modern Law Review* 164.
[100] Arantza Gomez Arana, *The European Union's Policy towards Mercosur: Responsive Not Strategic* (Manchester University Press 2017).
[101] European Commission, EU-Mercosur: Text of the agreement, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mercosur/eu-mercosur-agreement/text-agreement_en.

concluded as an association agreement, possible scenarios include splitting the Agreement into trade and political cooperation parts or concluding an interim EU-only trade agreement first, followed by a mixed agreement incorporating trade and political cooperation parts in the distant future.[102] Both scenarios have similar implications for the decision-making procedures, allowing the trade part to be concluded and enter into force after a qualified-majority decision in the Council. The first scenario was implemented in the past with respect to the EU-Singapore Trade Agreement where the investment protection part (falling outside of the scope of EU trade policy) was carved out of the trade liberalisation agreement. The second scenario was implemented with respect to the EU-Chile Advanced Framework Agreement, whose interim trade pillar was concluded and ratified by the EU and entered into force on 1 February 2025.[103]

The Commission's proposal (if it materialises) to split the agreement can be seen as a potential abuse of its agenda-setting powers; however, a qualified majority of Council members would still need to approve the signature and conclusion of an interim EU-Mercosur trade agreement. Even if splitting the agreement could be justified with respect to the scope of EU trade policy, the Commission risks significant backlash against the EU in Member States opposing the Agreement, especially when the opposition to the deal has a cross-partisan character, like in France.

6. Conclusions

The EU institutions invested a lot of **political capital** into the EU-Mercosur Agreement and for that reason they have a considerable interest in its conclusion.[104] This interest may also lead to backtracking on some (sustainability) obligations in order to ensure such conclusion of an agreement that does (at least not entirely) chime well with the EU's climate and other sustainability ambitions.

The reference to the **Paris Agreement** as an essential element should be welcomed, but it contains rather weak formulations and **adds little** meaning or teeth to these already existing international obligations. Similarly, the TSD chapter is more about restating existing obligations than increasing new obligations.

The **rebalancing mechanism,** as any mechanism of interpretation, allows to fill norms with different meanings. In the context of a trade agreement, it has the ***realistic potential* of**

[102] European Parliament Research Service, *Ratification scenarios for the EU-Mercosur Agreement,* available at: https://ibid.europarl.europa.eu/RegData/etudes/ATAG/2024/767166/EPRS_ATA(2024)767166_EN.pdf, December 2024, PE 767.166, accessed on 20 February 2025.

[103] European Commission, EU-Chile Interim Trade Agreement (ITA) will enter into force on 1 February 2025, https://taxation-customs.ec.europa.eu/news/eu-chile-interim-trade-agreement-ita-will-enter-force-1-february-2025-2025-01-06_en, accessed 24 February 2025.

[104] See for the Commission's strong attempts to push through the reform of the Energy Charter Treaty: Christina Eckes, 'The Autonomy of the EU Legal Order: The Case of the Energy Charter Treaty', *European Papers* , Vol. 8, 2023, No 3, pp. 1465-1494.

further strengthening the economic bias. In a contextual interpretation, sustainability concerns are likely struggling to assert the same weight as trade facilitation. This is a known phenomenon for any examination process that is located within the overarching economic logic of trade agreements.[105]

The selected sustainability commitments in the EU-Mercosur Agreement illustrate the dilemmas faced by Commission negotiators. On one hand, EU trade policy under the current paradigm is meant to serve sustainability objectives; political pressure from the European Parliament and civil society organisations reminds the Commission of this commitment. On the other hand, the reality of trade negotiations involves giving concessions and reaching compromises; the relative power of negotiating partners likewise affects their ability to deliver their respective political objectives. The interplay between the EU-Mercosur Agreement and the EUDR exemplifies this: while the Commission in its communications underlines the transformative regulatory potential of autonomous instruments such as EUDR, the provisions of the annex to the EU-Mercosur TSD chapter will probably result in a more lenient application of EUDR to imports from Mercosur. The agreed provisions of the TSD chapter, including the proposed annex, often express conflicting ambitions (setting out an aspiration to stabilize or increase forest cover from 2030) while providing for a more lenient application of the EUDR. **In the end, the agreed provisions are detailed but should not be expected to have transformative effects in terms of climate policy goals**.

However, most importantly, to the extent that the EU-Mercosur Agreement facilitates trade that leads to lower prices of high-emission products, this constitutes an unsustainable public act. This stands in contrast with the EU's own climate and other sustainability ambitions. Importantly, since the ECtHR has ruled that trade-related 'embedded' emissions fall within the scope of the human rights obligations of the Contracting Parties to the ECHR, **any facilitation and expansion of trade in high-emission products contributes to potential violations of the ECHR due to inadequate climate mitigation targets and policies.**

Finally, the potential splitting of the agreement into an (interim) trade part and a political cooperation part will unexpectedly change the decision-making procedure that applies to its signature, ratification, and conclusion process. If the agreement is concluded as an association agreement, as envisaged in the negotiating directives of the Council, it will have to be approved unanimously in the Council. Most likely, it will also be concluded by Member States participating alongside the EU, which would require ratification by national parliaments. In turn, carving the trade part (by the Commission) from the wider political cooperation package will open the door to signature and conclusion by a qualified majority of the Council members (at least 55% of Member States – at least 15 of them covering at least 65% of the EU's population). **Needless to say, this would dramatically change the coalition-building dynamics between EU Member States and exclude the voice of national parliaments.**

[105] Much has been written about this in the context of Investor-State-Dispute-Settlement mechanisms.