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Legal Analysis

The EU-Mercosur Free Trade Agreement's impacts on greenhouse gas emissions and compatibility with EU and international law

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Executive Summary

The global community is currently on a devastating track to a 2.9°C warmer world. The IPCC is clear: Without immediate and deep emissions reductions across all sectors, limiting global warming to 1.5°C is beyond reach. Deforestation, especially in tropical forests, is one of the main drivers of losses of carbon sinks and yet deforestation levels remain high.

Since 1999, the EU and the Mercosur countries (Brazil, Argentina, Paraguay and Uruguay) have been negotiating an Association Agreement which will include a trade pillar, the latter being the Free Trade Agreement (FTA). The FTA aims at increasing the amount of goods crossing borders, including products associated with high greenhouse gas emissions or having strong impacts on forests and other valuable ecosystems, which are at risk of deforestation, conversion or degradation.

This legal opinion assesses whether the adoption of the EU-Mercosur FTA contravenes the EU's obligations under EU and international law – with a focus on climate protection. It also assesses whether the Commission and Council are sufficiently ensuring that the FTA is consistent with other EU policies.

The conclusion is that the EU-Mercosur FTA does not comply with EU and international law. It is expected to lead to increased deforestation through incentives, and result in an overall rise in greenhouse gas (GHG) emissions, instead of contributing to their globally required reduction.

The legal analysis is structured as follows:

- Chapter A introduces the research question
- Chapter B gives an overview of the relevant aspects of the FTA
- Chapter B.I describes the FTA's current state of play
- Chapter B.II summarises the main legal provisions of the FTA
- Chapter B.III assesses the FTA's expected impacts on the environment and the climate
- Chapter C sets out the applicable legal framework to be respected by the EU
- Chapter D assesses the compatibility of the proposed FTA and its projected impacts with international climate law

- Chapter E addresses the compatibility of the FTA with EU fundamental rights
- Chapter F analyses the compatibility of the FTA with other EU rules and policies.

Chapter A: The research question

The legal opinion assesses whether a ratification of the EU-Mercosur FTA contravenes the EU's obligations under international law – with a focus on climate protection. It also assesses whether the Commission and Council is sufficiently ensuring that the FTA is consistent with other EU policies.

Chapter B: The EU-Mercosur FTA and its expected impacts on environment and climate

While the EU-Mercosur FTA notes the parties' existing international commitments, (including Multilateral Environmental Agreements on biodiversity, forests and climate change), it fails to consider the devastating impact a massive increase in trade will have on them.

The FTA is expected to lead to an increase in total production output in both EU and Mercosur, and due to increased trade incentives, maritime and air transport will also increase. It is therefore sound to assume that the FTA will lead to a rise in GHG emissions.

The FTA's Sustainability Impact Assessment (SIA) was conducted by London School of Economics (LSE) for the EU Commission. It calculates that the FTA would lead to a global increase of methane and nitrous oxide, as well as a rise in CO2 emissions in the EU, Brazil and Argentina, and an "overall moderate increase" in GHG emissions in Mercosur countries. Based on the assumption that GHG will decrease in the rest of the world to balance the rise in emissions in the Mercosur countries, the study projects that global GHG emissions will remain more or less unchanged in total. However, LSE admits that these projections exclude any emissions from changes in land-use, land-use change and forestry (LULUCF), which includes deforestation.

Under EU law, an SIA must include all relevant impacts. The study itself notes that LULUCF emissions make up 55% of Brazil's and 70% of Paraguay's CO2 emissions. Clearly, the SIA omitted an important share of the FTA's effect on GHG emissions. It is projected that LULUCF emissions will rise significantly due to the FTA. Due to the increased beef exports generated by the EU-Mercosur FTA alone, deforestation rates in the Mercosur region are estimated to accelerate by 5% per year for six years, with other projections suggesting this would cover an

area of between 620,000 ha and 1.35 million ha over five years, in a worst-case scenario. Overall, higher trade volumes leading to increased deforestation is estimated to mean an immense rise in GHG emissions.

In addition, experts have noted that the SIA does not sufficiently account for emissions linked to international transport of goods, which make up approximately one third of trade-related emissions around the world.

For the legal analysis, different types of emissions and sink losses must be distinguished. For the EU (reflecting the EU's legal obligations and perspective) these are:

- Greenhouse gas emissions and sink loss within the EU due to growth in automobile production, intensified agriculture and chemicals production ('EU internal emissions', de facto encompassing scope 1 and 2 emissions),
- Greenhouse gas emissions and sink loss outside the EU territory but caused by the EU ('EU external emissions and sink loss'), due to
  - growth in use of products (emissions from imported cars, intensified agriculture due to imported agrochemicals) ('EU supply push', also called scope 3 emissions), and
  - growth in the production of goods generated by EU demand (intensified agriculture and ecosystem conversion to produce feed and meat for export) ('EU demand pull', also scope 3 emissions).

Chapter C: The applicable legal framework

The applicable legal framework that needs to be considered in order to assess FTA compliance with EU law includes EU primary law - such as the Treaty on the European Union (TEU), the Treaty on the Functioning of the European Union (TFEU), and the Charter of Fundamental Rights (CHFR); international treaties such as the Paris Agreement, which are supreme; and the general principle of consistency, which requires that the Commission and the Council must ensure that the FTA is "compatible with internal Union policies and rules" (Art 207.3 TFEU).

Chapter D: Is the proposed FTA compatible with international climate laws?

Both the EU and all Mercosur states are party to the United Nations Framework Convention on Climate Change (UNFCCC) and 2015 Paris Agreement. While the legal opinion cannot generally conclude that, as a result of the FTA, the EU will fail to meet its Nationally

Determined Contributions (NDCs) under the Paris Agreement, any incentive for deforestation as well as increasing GHG emissions will jeopardise the overall binding objective of the UNFCCC and the Paris Agreement.

Regarding Scope 1 and 2 (internal emissions): The current projected emission pathway of nearly 3°C is so far off from the Paris Agreement's aim of 1.5°C that it is clear that any relevant new international agreement must support the reduction of greenhouse gas emissions, and at the very least be neutral to that aim. An overall increase of emissions and reduction in carbon sink capacity, as expected if the FTA enters into force, is not in line with this obligation.

Regarding Scope 3 (external emissions): Customary international law's "no harm" rule covers all causation processes originating from and under control of a state; it does not restrict obligations of states to internal emissions, and therefore supports the finding that the EU may not conclude a new FTA which leads to an overall rise in GHG emissions and deforestation levels.

Chapter E: Is the proposed FTA compatible with EU fundamental rights and primary law principles?

The activities of EU institutions, including treaty making, but also any resulting treaty, are subject to the ChFR. Climate change affects several articles relating to human life and health (arts. 2 and 3), freedom of occupation (art. 15), freedom of enterprise (art. 16), property (art.17) and children's rights (art.24).

The application of fundamental rights as a positive obligation has - through the jurisprudence of national courts and the European Court of Human Rights (ECHR) - become a general principle that according to Art. 6 (5) TEU and Art. 52(3) CHFR must be respected by the CJEU.

The EU fundamental rights extend to both internal and external emissions and sink losses under control of the EU. Such emissions and activities are already interfering with the fundamental rights, and any further source, such as trade growth generated by the FTA, will exacerbate the encroachment. Many individual right holders living both within and outside EU borders will be affected according to an objective fundamental rights test. Public interests that may justify interferences, such as revenue opportunities, do not render such interferences proportionate considering the catastrophic nature of climate change. The FTA would infringe the said fundamental rights because it causes additional GHG emissions and sink losses.

EU primary law (e.g. Art. 9, 11, 191 TFEU) also supports sustainability and environmental protection as important objectives of EU policies, including the common commercial policy and, more specifically, trade agreements. Sustainable development, environmental and climate protection do not form an integral part of the operative text of the FTA. A legal act that promotes major sources of emissions and loss of sinks must be qualified as unsustainable and not in line with EU primary law.

Chapter F: Is the FTA compatible with other EU policies?

Both the European Council and the Commission must ensure compatibility, i.e. consistency with other EU policies and rules during the treaty-making process according to Art 207.3 TFEU.

This chapter shows, among other things, that the current draft FTA runs contrary to Art. 2 EU Climate Law and does not meet the requirements of Art. 6 EU Climate Law "to assess the compatibility of the projected changes over time with the Union targets 2030 and 2040." In fact, the Sustainability Impact Assessment (SIA) of the LSE does not assess this at all.

Conclusion

This Free Trade Agreement belongs in the past. It has been assessed to lead to increases in GHG emissions rather than contributing to climate mitigation and the protection of carbon sinks. Given the current projections of a world well on the way to a devastating 2.9°C temperature increase compared to pre-industrial levels, concluding a trade agreement that would lead to emissions increases both in and outside of the EU as well as losses of carbon sinks and detrimental effects on biodiversity is legally unacceptable.

The current version of the EU-Mercosur FTA cannot be signed or ratified by the EU institutions, because:

- It infringes the EU's obligations under international law, and in particular the UN climate regime
- It is not in line with EU primary law, i.e. the EU Treaties and the Charter of Fundamental Rights
- It is inconsistent with EU secondary law such as the EU Climate Law.

List of Abbreviations

Art.	Article
AA	Association Agreement
BVerfG	Bundesverfassungsgericht
CAT	Climate Action Tracker
CCP	Common Commercial Policy
CGE	computable general equilibrium
ChFR	Charter of Fundamental Rights of the EU
CJEU	Court of Justice of the EU
ECJ	European Court of Justice
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EIA	environmental impact assessment
EPC	equal per capita
EU	European Union
EU Climate Law	Regulation (EU) 2021/1119 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade of 1994
GDP	General Domestic Product
GC	General Court [of the EU]
GHG	greenhouse gas
HDI	Human Development Index
i.e.	*id est*
ICE	internal combustion engine
ICJ	International Court of Justice
ILO	International Labour Organisation
IPCC	Intergovernmental Panel on Climate Change

LSE	London School of Economics and Political Science
LULUCF	Land Use, Land Use Change and Forestry
MEA	Multilateral Environmental Agreements
Mercosur	Mercado Común del Sur, Common Market of the South
NDC	Nationally determined contributions
PA	Paris Agreement of 2015
SIA	Sustainability Impact Assessment
SPM	Summary for Policymakers
SPS	Sanitary and Phytosanitary Measures
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TBT	Technical Barriers to Trade
TSD	Trade and Sustainable Development
UN	United Nations
UNEP	UN Environment Programme
UNFCCC	UN Framework Convention on Climate Change
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

A. Introduction and the research question

The authors have been asked by Greenpeace Germany to assess whether the draft agreement under negotiation of the EU-Mercosur Free Trade Agreement is in compliance with applicable EU and international law, with a focus on climate change protection.

Based on the 1995 Interregional Framework Cooperation Agreement between the European Community and the Common Market of the South (Mercosur), the EU and the four founding members of Mercosur (Brazil, Argentina, Uruguay and Paraguay), have aimed to conclude a comprehensive Association Agreement (AA) for decades. The Agreement has been formally negotiated for over twenty years (1999-2020).[1]

The legal basis for the EU as an entity is the common commercial policy (CCP), set out in both the EU Treaties, i.e. the Treaty on the European Union (TEU) and the Treaty on the Functioning of the EU (TFEU).

Art. 3(5) TEU sets out general aims of the EU and states that the Union

> "shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter."

The initial (leaked) negotiation mandate of September 1999[2] from the Council to the Commission, based on an authorisation within Art. 207(3) TFEU, has been supplemented by the EU Council general guidelines on bilateral trade negotiations of 2018.[3]

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[1] *Eckes/Verheyen/Krajewski*, Treaty-Making by Afterthought, Archiv des Völkerrechts, 2024 forthcoming, p. 3.
[2] UE-Mercosur, Directives de negociation, par la Commission, d'un Accord d'Association entre les parties, 17 September 1999, https://www.bilaterals.org/IMG/pdf/ue-mercosur-mandat-sep-1999.pdf.
[3] 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. See in detail on the history: European Parliament, Assessing the political dialogue and cooperation pillar of the EU-Mercosur Association Agreement: towards a bi-regional strategic partnership?, January 2022, https://www.europarl.europa.eu/thinktank/en/home.

The EU-Mercosur Association Agreement will include a Political Dialogue and Cooperation pillar, and a Trade pillar, the latter being the Free Trade Agreement (FTA). According to the European Commission, besides trade liberalisation, the AA seeks to improve political dialogue and cooperation in fields such as migration, education, and human rights. To this aim, the AA provides for, *inter alia*, mechanisms of exchange of information and best-practices, capacity-building, and joint voluntary initiatives with an Association Council supervising the activities.

The FTA would establish the largest free trade zone the EU has ever created, covering more than 700 million people, and remove the majority of the inter-regional tariffs.[4] Simply put, it aims at increasing the amount of goods crossing borders, including products associated with high greenhouse gas emissions or having strong impacts on forests and other valuable ecosystems, which are at risk of deforestation, conversion or degradation.

Once ratified, the AA, including the FTA, would be an international treaty concluded by the EU (and, as necessary, by the Member States) and as such legally binding on both the EU and its Member States (Art. 216 TFEU).

Since the beginning of the initial negotiation of the FTA in 1999, there have been significant developments in international law as well as in the legal framework of the EU and the Mercosur block. This is the case with respect to climate change and environmental protection policies and law, but applies also to the EU's constitutional framework[5], human rights law, and EU international trade policies as part of the CCP. The Treaty of Lisbon was only approved in 2009; at the same time, the Charter of Fundamental Rights was formally incorporated in the EU Constitutional Framework. The Paris Agreement (PA) only became binding for the EU in 2016.

While there is ample disagreement about the benefits and risks of the EU-Mercosur AA, and heated discussions on ratification competences, as well as on a "splitting" of the AA, no analysis of the FTA's consistency with overall EU

[4] European Commission, EU and Mercosur reach agreement on trade, 28 June 2019, https://ec.europa.eu/commission/presscorner/detail/en/IP_19_3396.
[5] This term refers to the three primary law sources of the EU: The TEU, the TFEU and the Charter of Fundamental Rights. See: *Hatje/Müller-Graff*, p. 68 in: Hatje/Müller-Graff (eds.) Europäisches Organisations- und Verfassungsrecht, 2022.

policies and law seems to exist as of today. Given that all treaties concluded by the EU must abide by the internal constitutional framework and the EU's international obligations under, *inter alia*, the United Nations (UN) Climate Regime and in particular, the Paris Agreement of 2015, such analysis is a worthwhile undertaking.

Current projections based on combined global commitments to date show that the world is heading towards 2.9°C rather than the defined planetary boundary of 1.5°C warming compared to pre-industrial times (as also set out in the 2015 Paris Agreement).[6] Furthermore, deforestation has already significantly contributed to the tipping of the biosphere integrity and land-system change boundaries.[7] Today, deforestation, especially in tropical forests, is one of the main drivers of biodiversity loss and threatens global climate targets.[8]

This legal analysis scrutinises the existing EU-Mercosur FTA text against the EU's legal framework, including the EU's commitment to international law, in order to assess its consistency and/or compliance with these norms.

This is an analysis of existing law focusing on the question set out above. The authors do not discuss or answer any of the important (general) questions on the role of trade and economic growth in the context of keeping within planetary boundaries.[9] However, there is statistical evidence that international trade policy has detrimental effects on the environment, not limited to greenhouse gas emissions or deforestation.[10]

The first part of this analysis sets out how the FTA in particular will impact trade and global emissions, giving an overview of the agreement's contents and the

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[6] United Nations Environment Programme (UNEP), Emissions Gap Report 2023: Broken Record – Temperatures hit new highs, yet world fails to cut emissions (again), https://www.unep.org/resources/emissions-gap-report-2023.
[7] See on the concept: *Steffen*, Planetary boundaries: Guiding human development on a changing planet, Science Vol. 347, Issue 6223, DOI:10.1126/science.1259855.
[8] See only: IPCC 6th Assessment Report, Cross-Chapter Paper 7: Tropical Forests, November 2023, https://www.ipcc.ch/report/ar6/wg2/chapter/ccp7/.
[9] See already *Copeland/Taylor*, Trade and the Environment – Theory and Evidence, 2003; and for the EU in particular: *Ziegler*, Trade and Environmental Law in the European Community, 1996; and (demanding a structured research agenda): *Sureth et.al.*, A Welfare Economic Approach to Planetary Boundaries, 2022, https://www.degruyter.com/document/doi/10.1515/jbnst-2022-0022/html.
[10] See e.g. *Zengerling*, Strengthening Climate Protection and Development through International Trade Law, 2020, https://www.wbgu.de/fileadmin/user_upload/wbgu/publikationen/hauptgutachten/hg2020/pdf/Expertise_Zengerling_EN.pdf, p. 1 with further references.

predicted environmental impacts (Chapter B). Readers well acquainted with the content and impacts of the agreements may move to Chapter C immediately, which establishes an understanding of the EU legal framework as a basis for the legal analysis, in particular the different levels of legal scrutiny during negotiations and after ratification. Chapter D then focuses on compliance with international climate change law, and Chapter E sets out EU human rights obligations as a limitation to the FTA. Chapter F looks at various other policies, which could be deemed inconsistent with the FTA.

B. The Agreement – state of negotiations, summary and impacts

I. State of negotiations

As introduced above, there are two parts to the AA: The European Commission (its Directorate-General for TRADE) has negotiated the trade part and finalised it in Brussels on 28 June 2019 in the form of an Agreement in Principle,[11] while the European External Action Service has negotiated the political party, which was agreed upon on 18 June 2020.[12]

The Commission has published the draft chapters of the FTA on its website.[13] The parties have not yet made public the political part of the AA; but Greenpeace Netherlands leaked a version of the (incomplete) text in 2017 and again in October 2020.[14]

As of November 2023, the agreement has not yet been signed, while further negotiations over an additional instrument / annex are taking place in parallel.[15] Several EU Member States as well as the European Parliament and several national and regional parliaments have voiced their opposition to the AA, fearing negative impacts on the environment, climate, on farmers, and on their countries' economies.[16]

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[11] European Commission, The Agreement in Principle, 8 September 2022, CIRCABC, https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/5896ba4d-b083-485d-a8d2-62b50264c3b3/details.

[12] European Commission, EU and Mercosur reach agreement on trade, 28 June 2019, https://ec.europa.eu/commission/presscorner/detail/en/IP_19_3396.

[13] European Commission, EU-Mercosur: Text of the Agreement, 2019, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mercosur/eu-mercosur-agreement/text-agreement_en.

[14] Greenpeace Netherlands, EU-Mercosur Association Agreement leaks, 8 October 2020, https://trade-leaks.org/mercosur-eu-association-agreement-leaks-8-october-2020/.

[15] European Commission, EU and Mercosur reach agreement on trade, note 12; European Commission, Answer given by Executive Vice-President Dombrovskis, 1 June 2023, https://www.europarl.europa.eu/doceo/document/E-9-2023-000848-ASW_EN.html.

[16] Reuters, France will not sign up to Mercosur deal at any price: ministers, 2 July 2019, https://www.reuters.com/article/us-eu-mercosur-france-idINKCN1TX1PN; NRC, Tweede Kamer stemt tegen Mercosur-verdrag: "oneerlijke concurrentie voor Europese boeren" (Lower House votes against Mercosur treaty: 'unfair competition for European farmers'), 7 March 2023, https://www.nrc.nl/nieuws/2023/03/07/tweede-kamer-stemt-tegen-mercosur-verdrag-oneerlijke-concurrentie-voor-europese-boeren-a4158825; *Swanton*, Austrian agriculture minister says "no" to Mercosur deal amid industry pressure, Euractiv, 21 March 2023, https://www.euractiv.com/section/politics/news/austrian-agriculture-minister-says-no-to-mercosur-deal-amid-industry-pressure/.

In its resolution of 7 October 2020 on the implementation of the CCP, the European Parliament emphasised that “the EU-Mercosur agreement cannot be ratified as it stands”.[17] Similarly, according to its resolution of 20 October 2021 on a farm to fork strategy, the agreement “cannot be ratified as it stands since, *inter alia*, it does not ensure biodiversity protection, in particular in the Amazon, nor does it bring guarantees as regards farming standards”.[18] In its resolution of 16 February 2023, the European Parliament re-emphasised that the bilateral agreement with Mercosur should be ratified “provided that pre-ratification commitments on climate change, deforestation and other concerns are satisfactory”.[19]

So far, the most recent legal debates on the AA’s current status focus on two issues: First, it is discussed whether the Commission is allowed to split the agreement in order to speed up ratification or provisional application, because the FTA might fall into the EU’s exclusive competence of CCP.[20] While this option is highly contested,[21] it does not fall within the scope of the current analysis. Second, there is a discussion on whether the negotiated text of the FTA is still in line with EU policies, particularly with the Council Conclusions on the negotiation and conclusion of EU trade agreements of 2018.[22] For this reason, the leaked Commission’s proposal for a Joint Instrument to the EU-Mercosur

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[17] European Parliament resolution on the implementation of the common commercial policy – annual report 2018 (2019/2197(INI)), 7 October 2020, para. 36, https://www.europarl.europa.eu/doceo/document/TA-9-2020-0252_EN.html.

[18] European Parliament resolution on a farm to fork strategy for a fair, healthy and environmentally-friendly food system (2020/2260(INI)), 20 October 2021, para. 137, https://www.europarl.europa.eu/doceo/document/TA-9-2021-0425_EN.html.

[19] European Parliament resolution on an EU strategy to boost industrial competitiveness, trade and quality jobs (2023/2513(RSP)), 16 February 2023, para. N, https://www.europarl.europa.eu/doceo/document/TA-9-2023-0053_EN.html.

[20] *Moens/Hanke Vela*, Brussels looks to evade EU capitals to get Mercosur deal done, Politico, 28 September 2022, https://www.politico.eu/article/brussels-eu-commission-grab-trade-power-mercosur-deal/.

[21] The negotiating directives speak clearly of an AA, which would have to be adopted as a whole under unanimity and national ratification. See for an in depth analysis: *Krajewski/Werner*, Legal Comment on Issues in Connection with the Mandate of the EU Commission for Negotiating the EU-Mercosur Association Agreement, May 2023, https://s2bnetwork.org/wp-content/uploads/2023/05/The-EU-Commissions-possible-attempts-to-fast-track-the-EU-Mercosur-deal-Legal-Analysis-by-Prof-Krajewski-May-2023-1.pdf. See also ClientEarth, EU-Mercosur Association Agreement: Governance issues in the EU trade decision making process, 2021, https://www.clientearth.org.

[22] 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. See in detail on the history: European Parliament, Assessing the political dialogue and cooperation pillar of the EU-Mercosur Association Agreement: towards a bi-regional strategic partnership?, January 2022, https://www.europarl.europa.eu/thinktank/en/home.

agreement [23] seeks to establish further clarifications with respect to climate change and deforestation.[24] While the detailed assessment of the draft joint instrument exceeds the scope of this analysis, the analysis refers to the instrument below where relevant.

II. The FTA summarised

In order to analyse the current text of the FTA against the EU's legal framework, the following section offers a brief overview of the most relevant rules liberalising trade (1.) and the Trade and Sustainable Development Chapter (2.), before briefly turning to the geographical scope of the Agreement (3.). This overview omits the chapters on trade in services and others, as these are expected to have only minor climate effects.

1. Rules liberalising trade

As is expected of trade agreements in general,[25] the FTA text contains rules to liberalise trade, thus increasing trade volumes and intensity. While several chapters have influence on the increase of trade volumes, the following section primarily focuses on the trade in goods chapter.[26] The trade in goods chapter is most likely to cause a significant increase in GHG emissions and losses of sinks, for instance, through deforestation or the conversion of other valuable ecosystems such the Cerrado or the Chaco.[27] Subsequently, the other relevant chapters are only briefly sketched.

Trade in Goods Chapter

Mercosur and the EU will establish a Free Trade Area for trade in goods (Art. 1 of the Trade in Goods Chapter). The parties shall accord national treatment to the goods of other parties in accordance with Art. III of the 1994 General

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[23] EU-Mercosur Joint Instrument, version leaked by Friends of the Earth in March 2023, https://friendsoftheearth.eu/wp-content/uploads/2023/03/LEAK-joint-instrument-EU-Mercosur.pdf.

[24] EU-Mercosur Joint Instrument, note 23.

[25] *Krist*, Chapter 3: Trade Agreements and Economic Theory, in: Krist, Globalization and America's Trade Agreements, Woodrow Wilson Center Press, 2013, https://www.wilsoncenter.org/chapter-3-trade-agreements-and-economic-theory.

[26] European Commission, Trade in Goods, 8 September 2022, CIRCABC, https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/6e1ba7dd-1328-4dbb-af30-d77f1fba3450/details.

[27] For a critical analysis from a general environmental perspective, see *Krämer*, A Lost Opportunity? The Environment and the EU-Mercosur Trade Agreement, Journal for European Environmental & Planning Law, 18 (2021), 143-163.

Agreement on Tariffs and Trade (GATT) (Art. 2 of the Trade in Goods Chapter), and shall reduce their customs duties according to the schedules of Annex 1 of the agreement (Art. 3(2) FTA). Accordingly, and as specified in the negotiated Annexes and Appendices to the Trade in Goods Chapter, the EU will remove custom duties on 95% of the tariff lines for imports from the Mercosur countries within ten years after the FTA's entry into force.[28] This accounts for 100% of industrial goods and 82% of agricultural goods, with protective measures remaining for sensitive sectors such as meat and sugar.[29] The Mercosur countries must fully liberalise 91% of the tariff lines, including 93% of the agricultural tariff lines and key (industrial) sectors like cars, car parts, machinery, chemicals and pharmaceutical products.[30] Mercosur's liberalisation process must also take place within ten years, with some sectors having an extended transition period of fifteen years. [31]

Fees other than customs duties may only be charged to recover the costs of a provided service (Art. 5(1-2)). The requirement of a licence for the import or export of goods will be restricted (Art. 6(1)). Charges on exports shall be eliminated (Art. 8) and quantitative restrictions (Art. 10(1)) and price requirements (Art. 10(2)) are forbidden.

By doing so, the Parties reduce the so-called "barriers and costs to trade" in order to increase trade in volume.

Art. XX GATT on general exceptions is integrated into this chapter of the FTA (Art. 13). Art XX GATT allows Parties to adopt exceptional measures restricting trade for policy reasons, such as the protection of human, animal or plant life or health (Art. XX(b) GATT) and the conservation of exhaustible natural resources (Art. XX(g) GATT).[32]

Art. 13 states that the measures in Art. XX(b) GATT "include environmental measures, such as measures taken to implement multilateral environmental agreements, which are necessary to protect human, animal or plant life or health"

[28] European Commission, The Agreement in Principle, note 11, p. 2 f.
[29] Ibid.
[30] Ibid.
[31] Ibid.
[32] A good overview of the content and history of this provision is found in *Zengerling*, note 10, p. 6 ff.

(Art. 13(2)(a)) and that Art. XX(g) GATT "applies to measures for the conservation of living and non-living exhaustible natural resources" (Art. 13(2)(b)). However, the exception has no universal application to the AA as a whole, but is limited to two specific chapters (see Art. 13(1) of the Trade in Goods chapter), which weakens its impact on protecting the environment.[33]

Other relevant chapters liberalising trade

Beyond the trade in goods chapter, other FTA chapters will equally contribute to an increased trade volume due to an overall liberalisation:

Due to the regional integration clause,[34] goods from Mercosur countries will benefit from the EU's free movement of goods regulated in the TFEU (Art. X(2)(a)), and goods from the EU will be subject to no less favourable customs procedures within Mercosur than goods originating from Mercosur countries (Art. X(2)(b)).

The Customs and Trade Facilitation Chapter[35] obliges the parties to make their customs procedures less bureaucratic and trade restrictive (Art. 1(3)) and they agree to adopt procedures for a timely release of products after customs (Art. 4(a)).

In their Capital Movements Chapter,[36] the Parties allow the free movement of capital and the liquidation and repatriation of capital and all generated profits (Art. 1). This Chapter will support trade in goods by easing financial management and investment.

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[33] *Hoffmann/Krajewski*, Rechtsgutachten und Vorschläge für eine mögliche Verbesserung oder Neuverhandlung des Entwurfs des EU-Mercosur-Assoziierungsabkommens, Misereor, Greenpeace, CIDSE, 2021, p. 17 f.
[34] European Commission, Regional Integration, 8 September 2022, CIRCABC, https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/ed5f632c-f83e-4417-af38-6c8242ce0961/details.
[35] European Commission, Customs and Trade Facilitation, 8 September 2022, CIRCABC, https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/b3638190-dd18-4f00-bdd9-0f31a97433a0/details.
[36] European Commission, Current Payments and Capital Movements, 8 September 2022, CIRCABC, https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/2618143a-6b2e-45d4-b462-378ad8d7dfb9/details.

The Technical Barriers to Trade (TBT) Chapter[37] seeks to standardise goods in order to make transport and use easier in all applicable markets. This includes rules for product weight, size, or packaging; ingredient or identity standards; shelf-life restrictions and import testing and certification procedures. Given their potential in shaping production and consumption patterns, technical regulations, standards and conformity assessment procedures constitute one of the main policy instruments used to implement environmental objectives.[38] Any initiatives on eco-labelling or animal welfare labelling of products would be subject to the rules in this Chapter. The same is true for product related regulations on energy efficiency, resource efficiency and circular economy.

The TBT Chapter incorporates the World Trade Organization (WTO) TBT Agreement and associated rules, but does not specify any public interest that goes further than the traditional standards such as human, animal and plant life or health, such as climate protection, circular economy or other sustainability concerns. Moreover, the pursuance of such interests remains a bilateral right rather than an obligation for enhanced regulatory cooperation. It only includes a general clause on regulatory freedom within the regulatory cooperation Article (Art. 4.6).

Further, the Sanitary and Phytosanitary Measures (SPS) Chapter[39] regulates the development, adoption and enforcement of sanitary (human or animal life or health) and phytosanitary (plant life or health) measures which may affect trade. An example of an SPS requirement would be thresholds for pesticide residues or use of additives in food. The SPS Chapter incorporates and details the rules already in place under the WTO SPS Agreement. There is no reference to any environmental aims.

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[37] European Commission, Technical Barriers to Trade, 8 September 2022, CIRCABC, https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/f607bc49-4040-4294-9598-d3ffe13168c8/details.

[38] For an overview of the relationship between TBT Chapters and environmental protection, see: OECD Joint Working Party on Trade and Environment, Greening regional trade agreements (RTAS) on non-tariff measures (NTMs) through technical barriers to trade (TBT), and regulatory co-operation, COM/TAD/ENV/JWPTE(2020)1/FINAL, 25 November 2020.

[39] European Commission, Sanitary and Phytosanitary Measures, 8 September 2022, CIRCABC, https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/8e389497-7cbd-44e1-a951-aa913344cf7c/details.

By opening the respective procurement markets (Art. 1), the Government Procurement Chapter,[40] leads to a substantial reinforcement of the general volume of traded goods. There is no exception clause relating to the environment, as can be found, for example, in the EU-Mexico FTA.

Finally, the agreement provides for a chapter on settlement of disputes[41] concerning the interpretation and application of the agreement (Art. 3). This is standard in trade agreements and enforces compliance with the substantive obligations. Yet, not all chapters of the agreement are covered by the scope of the mechanism and it remains unclear which chapters are to be included (see Art. 3). The Agreement in Principle speaks about "the interpretation or application of the *trade part* of the agreement"[42].

2. Trade and Sustainable Development Chapter

Beyond the many chapters that aim at liberalising trade, the FTA also contains a chapter on Trade and Sustainable Development (TSD).[43] The inclusion of such TSD chapters is common in many trade agreements today,[44] although their effectiveness is disputed,[45] and they are sometimes referred to as mere greenwashing. In contrast to such TSD chapters, recent negotiations attempt to *primarily* aim at using trade and technology transfer as a means to reduce

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[40] European Commission, Government Procurement, 8 September 2022, CIRCABC, https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/30c555f1-3ada-4234-81bc-6bfd49bacb68/details.

[41] European Commission, Dispute Settlement, 8 September 2022, CIRCABC, https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/1f85f829-fef4-4194-a1b8-295663a8d511/details.

[42] European Commission, The Agreement in principle, note 11, p. 16, emphasis added.

[43] European Commission, Trade and Sustainable Development, 8 September 2022, CIRCABC, https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/414085b5-8507-42c5-977e-5993cde81385/details.

[44] See *Velut et al.*, Comparative Analysis of Trade and Sustainable Development Provisions in Free Trade Agreements, LSE Consulting, London, 2022, https://trade.ec.europa.eu/doclib/docs/2022/february/tradoc_160043.pdf; and the earlier analysis: *VanDuzer*, Sustainable Development Provisions in International Trade Treaties, in: Hindelang/Krajewski (eds.), Shifting Paradigms in International Investment Law, 2016, p. 145 ff. See first Non-paper of the Commission services, Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs), 11 July 2017, http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf; and compilation of all feedback at https://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157122.pdf.

[45] See in detail: *Kanalan*, Nachhaltigkeitskapitel in Freihandelsabkommen der EU: Unterschätzte Potentiale bei ihrer Durchsetzung?, Europarecht 2022, 482. Against the backdrop of the EU-South Korea Panel of Experts decision of 2021, *Kanalan* argues that TSD Chapter obligations are often underestimated and can be enforced.

emissions and save forests.[46] One recent example is the proposed Agreement on Climate Change, Trade and Sustainability between New Zealand, Fiji, Costa Rica, Norway and Iceland for a new plurilateral agreement on climate change, trade and sustainability.[47]

However, the EU-Mercosur FTA contains only a traditional form of TSD chapter. Art. 2 contains the "right to regulate" clause that allows each state party to determine its sustainable development policies and priorities, to establish the levels of domestic environmental and labour protection it deems appropriate and to adopt or modify its law and policies. Most provisions of the chapter recall the parties' existing international commitments, and Art. 5(2) reaffirms the parties' pledge to multilateral environmental agreements to which they are already a party. The chapter then specifically refers to biodiversity (Art. 7), forests (Art. 8) as well as climate change (Art. 6).

With regard to climate change, Art. 6 mainly stresses the "importance" of the UN Framework Convention on Climate Change (UNFCCC) (Art. 6(1)), which the parties shall effectively implement as well as the Paris Agreement (Art. 6(2)). Further, the parties shall "cooperate, as appropriate, on trade-related climate change issues" (Art. 6(3)).

The only new requirements that go beyond existing obligations refer to the exchange of information (e.g. Art. 7(3)) and the promotion of voluntary private initiatives (e.g. Art. 11(2)(b)). Thus, the TSD chapter does not oblige Parties to change any substantive or a general policy in the areas of sustainable development, nor does it make compliance with, and the implementation of, the various multilateral environmental agreements (MEA) such as the Paris Agreement and the UNFCCC mandatory within the framework of the FTA/AA.[48] It only reaffirms the already existing obligations. The chapter's obligations are also weakly framed as they leave any activity of the states to their

[46] In general, see *Footer/Kolsky Lewis/Messenger*, Sustainable Development and the Green Economy in International Trade Law, International Law Association Reports of Conferences 80, 396, 398-406, 417-424.
[47] Negotiations are still underway at the time of writing: New Zealand Foreign Affairs & Trade, Agreement on Climate Change, Trade and Sustainability (ACCTS) negotiations, https://www.mfat.govt.nz/en/trade/free-trade-agreements/trade-and-climate/agreement-on-climate-change-trade-and-sustainability-accts-negotiations/.
[48] *Ghiotto/Echaide*, Analysis of the agreement between the European Union and the Mercosur, Anna Cavazzini MEP, The Greens/EFA, 2019, p. 65.

assessment whether such activity is "appropriate" (e.g. Art. 6(3), 7(3)) and predominantly constitute obligations of conduct,[49] not of result.

Furthermore, the TSD chapter is explicitly excluded from the dispute settlement mechanism of the FTA (Art. 15(5).[50] The TSD Chapter merely provides for consultations (Art. 16) and expert reports without enforcement consequences, only having the parties "discuss appropriate measures to be implemented" (Art. 17(11)).

The European Commission intends to provide further detail on the contents of this chapter through the aforementioned Joint Instrument. The text of the Commission's proposed Joint Instrument is more detailed on environmental standards than the agreed text in the TSD Chapter. However, it does not go further with respect to the substantive obligations. Neither does it remedy the fact that the TSD chapter's provisions are not subject to the regular dispute settlement mechanism. More importantly, the exact contents of the Joint Instrument are still negotiated[51] and it does not "exist" in any formal shape yet.[52] As it is still entirely unclear whether and which text might finally be adopted, the assessment of this hypothetical Joint Instrument is disregarded in the legal analysis in Chapters D-F.

3. Geographical scope

The FTA contains a Protocol on Rules of Origin that defines which products are considered to be from the EU or Mercosur states, and thus which goods are eligible for preferential tariff treatment.[53] It also contains a chapter on Product Specific Rules of origin.[54] These chapters also determine the circumstances under which goods, imported from a member that have components or inputs

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[49] *Hoffmann/Krajewski*, note 33, p. 12 f.
[50] See Annex.
[51] REUTERS, Mercosur reply on EU trade to be ready in September, Brazil minister tells farm caucus, 29 August 2023, https://www.reuters.com/markets/mercosur-reply-eu-trade-be-ready-september-brazil-minister-tells-farm-caucus-2023-08-29/.
[52] *Eckes/Verheyen/Krajewski*, note 1, p. 5 f.; *Paulini*, Legal Analysis of the leaked EU-Mercosur Joint Instrument, Commissioned by Friends of the Earth Europe, June 2023, https://friendsoftheearth.eu/wp-content/uploads/2023/06/FoEE-Legal-Analysis-of-the-leaked-EU-Mercosur-Joint-Instrument.pdf, p. 7-8.
[53] European Commission, Protocol on Rules of Origin, 8 September 2022, CIRCABC, https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/78acac82-1b10-410e-b970-40c8ec25c316/details.
[54] European Commission, Product-Specific Rules of Origin, 8 September 2022, CIRCABC, https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/c9330d4b-b337-4ffa-937a-609657444de8/details.

from a non-member, are still eligible for preferential tariff treatment. Most importantly for the current analysis, products from third countries processed in Mercosur can be included in the FTA. According to Art. 2(2) of the Rules of Origin chapter, products can be considered as "originating in Mercosur" and thereby subject to the FTA, if they incorporate materials from third countries.

While the EU-Mercosur AA would initially only be concluded between the EU and Argentina, Brazil, Paraguay and Uruguay,[55] these rules of origin chapters will have effects on other, probably most Latin American, countries. The majority of South America as well as Mexico, Cuba and Panama are members of the Latin American Integration Association.[56] By the Treaty of Montevideo, the members grant one another a preferential tariff, and Bolivia[57] and Ecuador further receive a differential treatment as "countries at a relatively less advanced stage of economic development"[58].

Because of these preferential tariff systems with Latin American third countries, the FTA is likely to have an impact on trade within Latin America and the use of intermediate products from the whole continent for the export of products to the EU. Inversely, the export of products such as automobiles from the EU to the Mercosur state parties will likely increase due to preferential resale to other Latin American countries.

Consequently, by means of the rules of origin chapters, the increase of trade volumes will most probably not be limited to EU and Mercosur States themselves, but the geographical scope of the FTA will cause further economic effects beyond the actual territorial borders of the potential Member States. These economic effects as well as environmental projections are illustrated in the next section. Yet, it is important to bear in mind that the foregoing extended

[55] Greenpeace Netherlands, EU Mercosur Association Agreement Text, 8 October 2020, https://trade-leaks.org/mercosur-eu-association-agreement-leaks-8-october-2020/mercosur-association-agreement-text/, p. 2.
[56] Treaty of Montevideo (Instrument Establishing the Latin American Integration Association (ALADI)), 12 August 1980, UN Treaty Series Volume 1329, p. 225.
[57] Since December 2023, Bolivia is in the process of becoming a full member of Mercosur, see Reuters, 'Bolivia gets green light for full Mercosur membership', 29 November 2023, https://www.reuters.com/world/americas/bolivia-gets-green-light-full-mercosur-membership-2023-11-29/.
[58] The Council of Ministers of Foreign Affairs of the Contracting Parties, Resolution 6: Categories of countries, SECOND a, https://wits.worldbank.org/GPTAD/PDF/archive/LAIA-ALADI.pdf, p. 31.

geographical scope has not been taken into consideration in the different economic and environmental projections of the FTA. This includes not only GHG emissions, but also deforestation incentives in other Latin American states.

III. Expected environmental and climate impacts

1. Economic projections

The FTA is expected to lead to a net increase in bilateral trade between the EU and the Mercosur states, with associated environmental impacts.

After a general impact assessment (practice for all legislation in the EU) concluded in 2011,[59] the EU Commission commissioned a Sustainability Impact Assessment (SIA), which was conducted by the London School of Economics (LSE) in 2020 after public consultations.[60] It was started on the basis of the negotiation text of March 2017. The SIA is "an examination of the potential economic, social, human rights and environmental impact of the trade component", and was based on various assumptions, limiting frameworks, and scenarios. The SIA forecasts a rise in exports and imports for both blocks in both a "conservative" and an "ambitious" scenario.[61] Other studies also project increases in both total exports and imports for both the EU and Mercosur.[62]

The expected rise in exports from Mercosur is centred on agricultural products such as soy, processed livestock, fish and sugar,[63] while the EU will mostly increase its export of processed products and industrial goods[64]. This corresponds to the annexes of the Trade in Goods Chapter as set out above.

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[59] *Burrell et al.*, Potential EU-Mercosur Free Trade Agreement: Impact Assessment, Volume 1: Main results, European Commission Joint Research Center, 2011, https://publications.jrc.ec.europa.eu/repository/bitstream/JRC67394/ipts%20potential%20eu-mercosur%20free%20trade%20agreement%20v1%28online%29.pdf.

[60] *Mendez-Parra et al.*, Sustainability Impact Assessment in Support of the Association Agreement Negotiations between the European Union and Mercosur, LSE Consulting, 2020, https://www.lse.ac.uk/business/consulting/assets/documents/SIA-in-Support-of-the-Association-Agreement-Negotiations-between-the-EU-and-Mercosur-Final-Report.pdf.

[61] *Mendez-Parra et al.*, note 60, p. 29 f.

[62] *Timini/Viani*, A Highway Across The Atlantic? Trade And Welfare Effects Of The EU-Mercosur Agreement, Banco de España, 2020, https://www.bde.es/f/webbde/SES/Secciones/Publicaciones/PublicacionesSeriadas/DocumentosTrabajo/20/Files/dt2023e.pdf, p. 20.

[63] Amazon Institute of People and the Environment, Is the EU-MERCOSUR trade agreement deforestation-proof?, Instituto do Homem e Meio Ambiente da Amazônia, 2020, https://imazon.org.br/en/publicacoes/is-the-eu-mercosur-trade-agreement-deforestation-proof/, p. 20 ff.

[64] Amazon Institute of People and the Environment, note 63, p. 24.

Further, the FTA includes schedules for the European car industry. Besides eliminating customs duties for European cars exported to Mercosur, it will become much cheaper to import natural resources and car parts from Mercosur necessary for production in Europe. Higher amounts of cheap ethanol from Mercosur (primarily produced from sugar cane) can be imported into the EU to be used as biofuel.[65]

Total production output is expected to increase in both EU and Mercosur,[66] and due to increased trade incentives, maritime and air transport will increase as well.[67]

2. Environmental projections

Increased production and transport have negative impacts on the environment and resources, especially taking into account the negotiated schedules of products. Given the broad criticism of international trade agreements with regard to their negative effect on the environment, it is evident that the FTA's impacts in this area must be carefully evaluated. This was the task set for the SIA.

Due to the focus of the legal analysis, the following summary of the SIA and the academic criticism focus on GHG emissions and deforestation. The summary considers the total projected effects, as this approach reflects climate change as a common problem and concern for both parties. Most importantly for the legal analysis, projections show that GHG emissions are going to *rise* due to the FTA's measures and its economic effects, in particular due to increased trade in goods associated with high GHG emissions.[68] Yet, as pointed out by a study conducted by a commission of independent experts for the French Prime Minister, the FTA does not regulate the climate impacts of the products traded – as is reflected in the analysis of the FTA provisions above.[69] Also, the SIA excludes all effects from land use and emissions from deforestation.

[65] *Fritz*, Mobilitätswende ausgebremst: Das EU-Mercosur-Abkommen und die Autoindustrie, Attac Deutschland et al., 2022, https://power-shift.de/wp-content/uploads/2022/05/Studie_Mobilitaetswende_ausgebremst_web_final-3.pdf, p. 16.
[66] *Burrell et al.*, note 59, p. 48 ff.
[67] *Ghiotto/Echaide*, note 48, p. 70.
[68] *Ghiotto/Echaide*, note 48, p. 66.
[69] *Ambec et al.*, Dispositions et effets potentiels de la partie commerciale de l'Accord d'Association entre l'Union européenne et le Mercosur en matière de développement durable - Rapport au Premier minister, 2020, https://www.vie-publique.fr/rapport/276279-effets-potentiels-de-laccord-dassociation-entre-lue-et-le-mercosur, p. 22.

The effects of trade are assessed in a very different fashion than climate change obligations and targets, or compliance with them. The latter normally relate only to emissions that are clearly associated with one state territory, or, in the case on private actors, a particular company or value chain. The same is true with regard to the loss of carbon sinks due to deforestation – inventories are national in accordance with the rules set by the UNFCCC. When discussing the effects trade has on GHG emissions, these are spread over many state territories. The economic literature generally takes three dimensions of effects into account:[70]

> - **Scale effect:** Increased trade can generate economic growth. The scale effect refers to the pollution caused by economic expansion linked to unchanged production methods. This effect has a negative impact on the environment: more production and consumption for a given technology generate more polluting emissions. As the EU-Mercosur FTA will come to full fruition within ten years, the production methods will not have changed to GHG neutrality in the meantime. Consequently, the described negative scale effect for the environment will be realised.
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> - **Composition effect:** The reduction in tariff barriers changes the distribution of production between sectors. It benefits those sectors in which the country has a comparative advantage, to the detriment of others. The net impact on pollution depends on the environmental performance of the sectors concerned. It is positive if the internationally competitive sectors are the cleanest. It is negative if the internationally competitive sectors belong to sectors with detrimental effects on the environment. In the context of the EU-Mercosur FTA, the meat and agricultural sectors are expected to grow most in the Mercosur countries, which leads to methane and CO2 emissions including from deforestation and the conversion and degradation of natural ecosystems such as the Cerrado. In the EU, projections illustrate that products such as cars, car parts and chemical products (including pesticides) will increase in volume, which generates high levels of GHG emissions during both production and use.
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> **- Technological effect:** Companies adapt their choice of technology to the new trade environment. The impact on pollution is generally positive (less pollution). When companies invest in new machinery, it is usually less energy-intensive, and therefore less emissions-intensive, than the technology used previously. Industry representatives often (one-sidedly) rely on this impact.[71]

These effects are captured in the SIA analysis to various degrees, but naturally not exhaustively. For its calculations in the SIA, the LSE used a computable

[70] Adapted from the summary in: *Ambec et al.*, note 69.
[71] CNI (Brazilian Confederation of Industry), The EU-Mercosur Agreement – A unique opportunity to foster trade and sustainable development, 2021, http://www.portaldaindustria.com.br/cni/.

general equilibrium (CGE) model for the economic effects of the FTA, on which the authors then base their assessment of the environmental effects.[72] The CGE model was run with two scenarios: a conservative and an ambitious scenario. These differ with respect to the degree of trade liberalisation assumed, i.e. the scope of the text to be ratified at the end of the EU-Mercosur negotiations. However, the applied CGE model assumes perfectly competitive markets in equilibrium and long-term dynamic gains from liberalised trade, which economists have criticised for being unrealistic and one-sided.[73] The SIA was also criticised for lacking transparency on data and baseline simulations.[74]

The SIA predicts that the reduction of tariffs for agricultural products and the resulting increased demand from the EU due to lower prices will lead to an intensification of agriculture in Mercosur. The increased use of pesticides (on which custom duties are eliminated) and cars will raise GHG emissions.[75] The increased production of animal products will lead to higher methane emissions.

Overall, the SIA calculates a global increase of methane and nitrous oxide in both conservative and ambitious scenarios,[76] as well as a rise in CO2 emissions in the EU, Brazil and Argentina, and an "overall moderate increase" in GHG emissions in Mercosur countries.[77] Based on the assumption that GHG will decrease in the rest of the world to balance the rise in emissions in the Mercosur countries, the study projects that global GHG emissions will remain unchanged in total.[78] Yet, this latter assumption is "built" into the assumptions of the CGE model and does not have a clear scientific basis. Moreover, the study assumes that the increase of GHG emissions in Mercosur states due to the FTA will "have a limited impact on trading partners' ability to meet their commitments to the

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[72] *Mendez-Parra et al.*, note 60, p. 20, 86.
[73] Seattle to Brussels Network, Open Letter regarding the economic impacts of the EU-Mercosur agreement, 8 November 2020, https://s2bnetwork.org/open-letter-sia/; *Dauphin/Dupré*, The European Commission's Trade Sustainability Impact Assessments: A Critical Review, Veblen Institute for Economic Reforms/Greenpeace e.V., 2022, p. 13 ff.
[74] *Tröster/Raza*, ASSESS_EU_MERCOSUR: Assessing the claimed benefits of the Association Agreement between the EU and Mercosur, Final Report, 2021, https://wien.arbeiterkammer.at/service/studien/eu/EU_Mercosur_2021_10.pdf.
[75] On the impacts of pesticides on GHG emissions: *Drugmand et al.*, Fossils, Fertilizers, and False Solutions – How Laundering Fossil Fuels in Agrochemicals Puts the Climate and the Planet at Risk, Center for International Environmental Law, 2022, https://www.ciel.org/wp-content/uploads/2022/10/Fossils-Fertilizers-and-False-Solutions.pdf.
[76] *Mendez-Parra et al.*, note 60, p 87.
[77] *Mendez-Parra et al.*, note 60, p 86
[78] *Mendez-Parra et al.*, note 60, p 89.

Paris Agreement" – meaning the contributions to reduce GHG emissions (nationally determined contributions, NDC).[79] This is a void statement given that countries' NDC will change over time in accordance with the Paris Agreement. Also, the SIA does not challenge or scrutinise this impact on the basis of the overall evident gap between commitments and the necessary reduction pathway to comply with the temperature target of the Paris Agreement. Only a few pages above this assertion, the study itself admits that Argentina's emissions are projected to grow significantly under the country's current NDC, and that Uruguay has not even committed to an absolute emissions reduction target.[80] These issues are analysed from a legal perspective in Chapter D.

Beyond these methodological lacunae, the SIA excludes from its calculation emissions from changes in land-use, land-use change and forestry (LULUCF), which includes deforestation.[81] This is surprising given the task to assess the impact of the EU-Mercosur FTA as a whole. Under EU law, a sustainability impact assessment must include all relevant impacts.[82] Further, the study itself finds that LULUCF emissions make up 55% of Brazil's and 70% of Paraguay's CO2 emissions.[83] Clearly, the SIA omitted an important share of the FTA's effect on GHG emissions, and it is projected that LULUCF emissions as a whole will rise significantly due to the FTA:[84]

South America accounts for 33% of global gross deforestation (i.e. excluding reforestation).[85] A 2019 publication suggests that international trade (i.e. exported and imported deforestation in relation to deforestation generated by domestic consumption) is responsible for 39% of global deforestation. More than half (53%) can be attributed to agriculture, while a quarter (24%) could not be traced back to a precise cause, but may be linked to factors related to agriculture, such as fires. In Latin America, beef is the main cause of

[79] *Mendez-Parra et al.*, note 60, p. 89.
[80] *Mendez-Parra et al.*, note 60, p. 75.
[81] *Mendez-Parra et al.*, note 60, p. 86.
[82] Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment, known as the "SEA" (strategic environmental assessment), which reflects the need to use procedural provisions in order to serve the purpose of ensuring the effective implementation of EU environmental law; see also ECJ, Kraaijeveld and Others, C-72/95, EU:C:1996:404, para. 56.
[83] *Mendez-Parra et al.*, note 60, p. 73.
[84] Amazon Institute of People and the Environment, note 63, p. 140.
[85] See Global Forest Watch, https://www.globalforestwatch.org/.

deforestation, mainly due to Brazilian production.[86] Due to the increased beef exports generated by the EU-Mercosur FTA, this deforestation is estimated to accelerate by 5% per year for six years, covering an area of between 620.000 ha and 1.35 million ha in a worst-case scenario.[87] Overall, this increased deforestation due to higher trade volumes will lead to an immense rise in GHG emissions.[88] Moreover, in the deforested areas, the carbon sink capacity of the forests is lost.[89]

In addition, the SIA has not sufficiently taken into account emissions linked to international transport of goods,[90] which make up approximately a third of trade-related emissions.[91] These are mostly not captured in states' GHG inventories and – while subject to the Paris Agreement as such[92] – are not subject to explicit country reduction commitments under the climate Regime.

It is also unclear to what extent the SIA appropriately considers the effect of the FTA with respect to the EU car industry. The EU has set the year 2035 as the phase-out date for sales of internal combustion engine (ICE) cars on the EU market.[93] With view to potential future exports to the Mercosur market, the European car industry now has an even stronger interest in prolonging the production of ICE, which in turn decreases the pressure to switch early to the

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[86] *Pendrill et al.*, Agricultural and forestry trade drives large share of tropical deforestation emissions, Global Environmental Change 2019, vol. 56, p. 1.
[87] *Buczinski/Chotteau/Duflot/Rosa*, The EU-Mercosur Free Trade Agreement, its impacts on Agriculture, Institut de l'Elevage, May 2023, The Greens/EFA, https://extranet.greens-efa.eu/public/media/file/1/8401; *Ambec et al.*, note 69, p. 133.
[88] See also GRAIN, EU-Mercosur trade deal will intensify the climate crisis from agriculture, 2019, https://grain.org/en/article/6355-eu-mercosur-trade-deal-will-intensify-the-climate-crisis-from-agriculture.
[89] *Ghiotto/Echaide*, note 48, p. 66.
[90] *Dauphin/Dupré*, note 73, p. 22; *Ambec et al.*, note 69, p. 140 ff.
[91] *Cristea et al.*, Trade and the Greenhouse Gas Emissions from International Freight Transport, Journal of Environmental Economics and Management, 65, 2013, 153-173
[92] According to the IPCC Guidelines for the preparation of GHG inventories (2006, http://www.ipcc-nggip.iges.or.jp/public/2006gl/index.html), the UNFCCC Reporting guidelines on annual inventories for Parties (UN Doc. FCCC/CP/2013/10/Add.3, Decision 24/CP.19), and the UNFCCC Modalities, procedures and guidelines for the transparency framework for action and support (UN Doc. FCCC/PA/CMA/2018/3/Add.2, Decision 18/CMA.1), emissions from international aviation and maritime transport should be calculated as part of the national GHG inventories of Parties, but should be excluded from national totals and reported separately. See in detail here: Transport & Environment, Shipping and aviation are subject to the Paris Agreement, legal analysis shows, 12 October 2021, https://www.transportenvironment.org/discover/shipping-and-aviation-are-subject-to-the-paris-agreement-legal-analysis-shows/.
[93] Regulation (EU) 2023/851 of the European Parliament and of the Council, 19 April 2023.

production of electric cars due to the EU phase-out date.[94] Even if such ICE vehicles would be fuelled with biofuels, the increased use in Mercosur states as well as the facilitated import of ethanol into the EU will inevitably lead to increased sugarcane production in Mercosur, triggering further changes in land-use and increased CO2-emissions.[95]

Based on the available data, it is therefore sound to assume that the FTA will, overall, lead to a substantial rise in GHG emissions and loss of carbon sinks, as well as incentivise further deforestation as well as international transport. Although, according to Art. 6 of the TSD chapter, the parties "recognise the importance of pursuing the ultimate objective" of the UNFCCC, and each party shall "promote the positive contribution of trade to a pathway towards low greenhouse gas emissions", there is no safeguard against these effects in the FTA.

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[94] *Fritz*, note 65, p. 25.

[95] *Fritz*, note 65, p. 34 f.; *Follador et al.*, Brazil's sugarcane embitters the EU-Mercosur trade talks, Scientific Reports 2021, https://www.nature.com/articles/s41598-021-93349-8.

C. Legal framework and consequences of incompatibility

I. EU legal framework

As set out in the introduction, this legal analysis scrutinises the existing EU-Mercosur FTA text and its projected impacts against higher rank legal requirements. Overall, the EU legal order can be classified into the following levels: the EU constitutional framework (or primary law); international law within the EU framework; secondary law and, lastly, EU policies.

The EU constitutional framework consists of the sources of primary law, i.e. the Treaty on the European Union (TEU), the Treaty on the Functioning of the European Union (TFEU), and the Charter of Fundamental Rights (ChFR). These sources of primary law are by their very nature higher-ranking in relation to secondary law and any other EU measure or policy (Art. 13(2) TEU).

Consequently, the EU-Mercosur FTA has to comply with the sources of primary law, including fundamental rights of the ChFR (see below E.). The ChFR is applicable to treaty-making activities of the EU, since the EU institutions are "implementing Union law" in the sense of Art. 51(1) ChFR when concluding treaties.[96]

Should the FTA be concluded and become binding for the EU, it will achieve equal status like other treaties to which the EU adheres. However, as long as the FTA is not ratified yet, international treaties on climate protection, such as the Paris Agreement (PA) are binding on the EU in its treaty-making process. This results from a reading of Art. 216(2) TFEU, which stipulates the supremacy of international treaties vis-à-vis secondary law and other acts of the EU institutions:

> "Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States."

This provision is understood to accord international treaties a higher status than secondary EU law, and to even constitute grounds for annulment in relation to

[96] Art. 51(1) ChFR stipulates: "The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only <u>when they are implementing Union law</u>." (emphasis added).

contravening EU law or measures, provided the applicable treaty provisions are precise and unconditional.[97]

Therefore, the EU institutions are bound by existing international law obligations by virtue of Art. 216(2) TFEU in the conclusion of new international agreements.[98] With regard to the scope of the present analysis, the EU-Mercosur FTA must thus comply with international climate law obligations arising from the UNFCCC and the PA (see below D.). This hierarchy of international climate law prevails during the whole negotiation process.

Beyond the aforementioned hierarchy, EU primary law itself determines that the EU institutions have to abide to certain obligations during the whole process of treaty negotiation.

Art. 6 TEU explicitly binds the Union to the Charter of Fundamental Rights, "which shall have the same legal value as the Treaties", and mandates the Union to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms [(ECHR)], which has not been completed to date. Yet, Art. 6(3) also states: "Fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

Art. 21(1) TEU stipulates:

> The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law. (emphasis added)

[97] ECJ, 10 September 1996, C-61/94 (Commission / Germany), ECLI:EU:C:1996:313, para. 52; ECJ, 12 April 2005, C-165/03 (Simutenkov), ECLI:EU:C:2005:213, para. 21; ECJ, 3 June 2008, C-308/06 (Intertanko), ECLI:EU:C:2008:312, para. 51; ECJ, 21 December 2011, C-366/10 (Air Transport Association of America), ECLI:EU:C:2011:864, para. 50.

[98] ECJ, 24 November 1992, C-286/90 (Poulsen and Diva Navigation), ECLI:EU:C:1992:453, para. 9; ECJ, 16 June 1998, C-162/96 (Racke), ECLI:EU:C:1998:293, para. 45; *Haag/Kotzur*, in: Bieber/Epiney/Haag/Kotzur, Die Europäische Union, 2021, § 6 para. 16.

Art. 205 TFEU states:

> The Union's action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union. (emphasis added)

Specifically with regard to the EU's common commercial policy, Art. 207(1) TFEU reads:

> […] The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

These principles and objectives are specified, *inter alia*, in Art. 21(2) TEU, e.g. in lit. f), which stipulates that the EU should pursue its policies in order to:

> (f) help 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.[99]

As the provisions of the TEU and TFEU have equal value (Art. 1(3) TEU), they must be interpreted in consistency with each other. Therefore, the principles in Art. 21 TEU are generally binding on external relation policies.[100]

Finally, treaty making must also be compatible with internal Union policies and rules. This is expressed in Art. 207(3) TFEU, which reads:

> […] The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules. (emphasis added)

Even though after its conclusion, the FTA will be higher-ranking than the pre-existing EU secondary law, Art. 207(3) TFEU contains a general principle of consistency. Consequently, the EU institutions are obliged to guarantee a consistency of negotiated international agreements with the totality of EU policies and rules, including secondary law (see below F.).

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[99] See also ECJ, 16 May 2017, Opinion 2/15, ECLI:EU:C:2017:376, para. 142. In more detail, see below E.II.

[100] See: *Krajewski,* Normative Grundlagen der EU-Außenwirtschaftsbeziehungen: Verbindlich, umsetzbar und angewandt?, Europarecht 2016, p. 235.

Different views on the role of international trade in the EU legal framework:

In light of the foregoing legal framework and relationship between the different levels of EU law, it is helpful to conceptualise the general role of international trade and the CCP in the EU legal framework. There are three ways to evaluate the legality and effectiveness of an international trade agreement in EU law.

According to a modern, holistic view,[101] international trade is a means to an end, i.e. a (potential) means to achieve sustainable development. Given that no specific normative or quantitative aims are stipulated for the CCP in the EU constitutional framework as such, the conclusion of further trade agreements would not be a separate interest of the EU as a legal entity. Instead, it must serve to achieve other aims as stipulated in the EU treaties.

The second approach can be summarised as the "equal footing" position:[102] free trade supports economic growth, which is on equal footing with all of the other aims and principles in the EU constitutional framework. Most understandings of the principle of sustainable development also support this position.[103]

The third view on the role of international trade in the EU framework considered trade to be an overriding and separate interest of the EU. This view – based on previous versions of the EU Treaties – centres on the idea that the EU, in concluding trade agreements, is free to negotiate what is diplomatically feasible to enable more trade. Sustainability only plays a secondary corrective role in this concept.

A thorough analysis of the merit of these three views and their applicability to the current legal framework of EU law goes beyond the scope of this analysis. Yet, in our view, the EU constitutional framework does not support the third approach on international trade as a separate interest, as has been clarified early by the ECJ.[104] Although the first holistic approach seems preferable to the authors in light of the importance of sustainable development and other primary objectives of the EU, it is not yet fully supported by the existing EU constitutional framework or CJEU jurisprudence. For this reason, the following analysis is based on the second approach, i.e. considering economic growth on equal footing with other EU aims, such as environmental protection. This also seems to be supported now by the EU institutions' approach to their trade policy.[105] Nonetheless, as the following chapters demonstrate, this equal footing can turn to a predominance of these other EU aims, such as environmental or human rights protection, over international trade and economic growth as a result of a balancing process.

[101] See e.g. *Zengerling*, note 10, p. 51: "The advancement of sustainable development is the prime objective of economic partnership agreements."
[102] See, e.g., *Oeter*, Art. 21, in: Blanke/Mangiameli (eds.), The Treaty on European Union (TEU): A Commentary, 2013, paras. 33, 35.
[103] *Oeter*, note 102, paras. 33, 34. cf. Gerd Winter, A Fundament and Two Pillars; The Concept of Sustainable Development 20 Years after the Brundtland Report, in: Hans Christian Bugge and Christina Voigt, Sustainable Development in International and National Law, 2008, pp. 25 – 45.
[104] See ECJ, 26 March 1987, C-45/86 (Commission / Council), ECLI:EU:C:1987:163, paras. 18-21.
[105] See, e.g., Joint Statement by the Council and the Representatives of Governments of the Member States meeting within the Council, the European Parliament and European Commission (New European Consensus on Development), 7 June 2017, O.J. 2017/C 210/01.

II. Consequences of the relationship between the levels of norms

From this systematization of the EU legal framework, two different standards result for the legal analysis of compatibility. First, until the conclusion of the EU-Mercosur FTA, the EU institutions must adhere to the whole EU legal framework, including primary law, pre-existing international agreements and also secondary EU law and policies.

If the content of the envisaged FTA is incompatible with this EU legal framework, the following effects will take place:

- the mandate of the Council is not binding on the Commission,
- the draft text of the FTA as negotiated by the Commission may not be pursued for ratification,
- the European Parliament must refuse its consent to the conclusion of the FTA (Art. 218(6) TFEU),
- the Council must abstain from adopting a decision to conclude the FTA.

Art. 17(1) TFEU supports this as the Commission, in particular, must prevent any conduct that violates primary law.[106]

Second, if the FTA was ratified despite incompatibility with a provision of the EU legal framework, the consequences would differ depending on the level of the violated legal norm. With regard to incompatibility of the FTA with EU primary law, including fundamental rights, the FTA would have to be declared unlawful upon judgment of a competent dispute settlement body, as international treaties are higher-ranking only in relation to secondary law. The CJEU would be competent to decide on such incompatibility as it concerns questions of internal EU law; this question is not subject to any dispute settlement mechanism within the FTA itself.

With regard to incompatibility with pre-existing international agreements, such as the UNFCCC and PA, the FTA would, upon ratification, become an international agreement on equal footing with the respective climate protection treaties. Conflicts between the two regimes would have to be solved by

[106] Cf. ECJ, 20 September 2016, C-8-10/15 (Ledra), ECLI:EU:C:2016:701, paras. 55-57.

application of principles of lex specialis/lex generalis and lex posterior/lex prior.[107] Such conflict should naturally be avoided. After ratification, the FTA could only be declared unlawful due to incompatibility with EU Constitutional Law (below E.) or the climate protection regime, as far as the pre-existing international law obligations also constitute "principles of international law" (Art. 21(1) TEU)[108] (see below D.III.).

Similarly, inconsistency of the FTA with EU secondary law and internal policies would not lead to unlawfulness of the FTA after its conclusion. Consequently, primary law remains the main standard to measure the FTA against after its conclusion.

III. Relevant causation levels - scopes of GHG emissions

While the overview of the adverse impacts on the environment and the climate in particular illustrates the *factual* effects of the FTA, the *legal* analysis depends on the origin of the respective emissions, or phrased differently, the causal chain. For the purpose of the following legal analysis, the predictable climate effects of the FTA must be categorised depending on whether they are directly caused by the EU, by Mercosur or by other state's actions.

For the legal analysis, which is based on EU public international law and human rights law, the authors suggest the following categorisation.

Causation by the EU

- **'EU internal emissions':** GHG emissions directly within the EU due to growth in automobile manufacture, intensified agriculture and chemicals production, having both
    - **internal effects:** climate impacts on individuals within the territory of the EU Member States
    - and **external effects:** climate impacts on individuals outside the territory of the EU members states;
- **'EU external emissions and loss of sinks':** GHG emissions and loss of sinks outside the EU territory but indirectly caused by the EU, due to

[107] *Matz-Lück*, Conflicts between Treaties (last updated December 2010), in: Peters & Wolfrum (eds.), Max Planck Encyclopedia of International Law, 2008-2024.
[108] Cf. *Oeter*, note 102, para. 19.

    - **'EU supply push':** growth in products exported from the EU (exhaust from imported automobiles, intensified agriculture due to imported agrochemicals)
    - **'EU demand pull':** growth in the production of goods created by EU demand (intensified agriculture and ecosystem conversion for production of feed and meat for export, minerals exploitation);

It must be noted that external emissions also have effects within the EU and outside of the EU due to the global character of climate change.

Causation by Mercosur States

- **'Mercosur internal emissions and loss of sinks':** GHG emissions and loss of sinks within the Mercosur countries from deforestation caused by growth of production of food and feed, imported automobiles, agrochemicals, etc., again having both
    - **internal effects:** climate impacts on individuals within the territory of the Mercosur states
    - and **external effects**: climate impacts on individuals outside the territory of the Mercosur states
- **'Mercosur external emissions and loss of sinks':** GHG emissions and loss of sinks outside Mercosur but indirectly caused by Mercosur countries, including due to
    - **'Mercosur supply push'**: growth in exported products (intensified agriculture due to imported feed; emissions from imported fuel)
    - **'Mercosur demand pull':** growth in the production of goods created by Mercosur demand (increased car manufacture and production of agrochemicals)

Again, with the understanding that, naturally, both also have effects within the territory of Mercosur members and outside Mercosur due to the global character of climate change.

The following legal analysis concentrates on the EU perspective. Although the responsibilities of the Mercosur states deserve to be examined, particularly with regard to the climate disengagement of the past *Bolsonaro* government in Brazil

as well as the upcoming *Milei* government in Argentina, we do not address the Mercosur obligations, but simply refer to:

i) the UN gap report which clearly shows the global commitment gap[109] and

ii) the scientific assessment by *Climate Action Tracker*, which found that the Mercosur states are not on track regarding their individual performance to comply with the Paris Agreement,[110] both under fair effort sharing criteria and according to modelled reduction pathways (see on these below in D.).[111]

It should be noted that the issue of external causation of actions (or omissions) of states is already part of several ongoing court cases, in particular before the European Court of Human Rights (ECtHR), in the context of various legal preconditions, such as the victim status and causation in law. So far, there is no jurisprudence of the CJEU on this issue that applies directly or establishes other categories.

Most commonly, the issue of direct or indirect emission is captured by the category "Scope" coined by the standard of the "Greenhouse Gas Protocol" applicable as a standard to companies and private actors and already applied in law by the District Court of The Hague in the *Milieudefensie* Case[112] as well as by the Norwegian Supreme Court in the Barents Sea case[113] and recently the Oslo District Court in the *North Sea Fields* Case.[114] The suggested categories above parallel this categorisation to some degree but there

[109] See UNEP, Emissions Gap Report 2023, note 6.
[110] For the emission gaps between the submitted GHG emission reduction targets and the required domestic efforts, see Climate Action Tracker (CAT), e.g. for Brazil, https://climateactiontracker.org/countries/brazil/; for Argentina, https://climateactiontracker.org/countries/argentina/.
[111] Jurisprudence of the Brazilian Supreme Court indicates that if elected representatives in Brazil make resource allocation choices that reduce the likelihood of meeting climate goals under the Paris Agreement, which may constitute a violation of fundamental rights, in these cases, it may, and the Court must exercise control over such allocative acts. It is a question of controlling legality and not the merit or political convenience of such acts cf. cf. Federal Supreme Court of Brazil, PSB et al. V. Brazil (on Climate Fund), decision of 1 July 2022, https://climatecasechart.com/non-us-case/psb-et-al-v-federal-union/, paras. 18, 34-35.
[112] District Court of The Hague, *Milieudefensie et al. v. Shell*, 26 May 2021, C/09/571932 / HA ZA 19-379, ECLI:NL:RBDHA:2021:5339.
[113] Supreme Court, Natur og Ungdom and Föreningen Greenpeace Norden, HR-2020-2472-P, 22.12.2020.; unofficial English translation, paras 78-145, esp. 142. https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2020/20201222_HR-2020-846-J_judgment.pdf
[114] Oslo District Court, *Greenpeace et al. v. Ministry of Energy*, 23-099330TVI-TOSL/05, 18 January 2024.

are differences. Under the GHG Protocol definition,[115] Scope 1 emissions are direct emissions from owned or controlled sources. Scope 2 emissions are indirect emissions from the generation of purchased energy. Scope 3 emissions are all indirect emissions (not included in Scope 2) that occur in the value chain of the (reporting or obligated) company, including both upstream and downstream emissions.

First, our category *internal emissions* covers Scope 1 emissions. Scope 2 emissions are not included in our categories since the import of electricity as a product is not covered by the FTA, while internal emissions also include Scope 2 emissions as indirect part of the products produced in the EU. Particularly with view to the EU's human rights obligations (see E.), it is relevant whether these internal emissions (Scope 1 and 2) only lead to internal *effects* within the EU or also to external *effects* outside the territory of the EU. Second, the category of *external emissions and loss of sinks* is comparable to Scope 3 emissions as they do not occur within the EU itself but they are the direct and foreseeable product of EU activity. The EU's activity based on the FTA will constitute an essential cause of these emissions abroad. The differentiation between supply push and demand pull may help to specify the two main movements of goods deployed by the FTA.

In the context of international trade, the last category of external emissions is particularly relevant, yet it has not yet been properly captured in case law or constitutional law as such.

The GHG Protocol suggests different categories of causation in its Policy and Action Standard tool applicable to states or other public bodies in the understanding that the: "causal chain should be as comprehensive as possible, rather than limited by geographic or temporal boundaries."[116] Indeed, it would be theoretically possible to apply this standard to the FTA even though it is designed to assess the impacts of internal laws and policies on climate targets.

[115] See World Resources Institute and World Business Council for Sustainable Development, Greenhouse Gas Protocol, https://ghgprotocol.org/.
[116] GHG Protocol, Policy and Action Standard, p. 56, https://ghgprotocol.org/sites/default/files/standards/Policy%20and%20Action%20Standard.pdf.

Yet, the above categorisation stems from the application of treaty obligations and human rights law and is therefore more useful to the legal analysis.

Another remark is relevant here: In the *Air Transport of America* case, the CJEU stated that the EU has "unlimited" jurisdiction to address greenhouse gas emissions caused by aircrafts using EU airports[117], which are *external emissions* in the categories used here. This case concerned the validity of EU secondary law with international law, and thus not the same legal question as the one in the present analysis. It shows, however, that the court acknowledges the possible effects of EU activities outside its physical boundaries, and thus jurisdiction for external emissions.[118] It essentially accepted unilateral climate protection measures in light of the EU's primary law aims – regardless of the physical place of emissions.

[117] ECJ, 21 December 2011, C-366/10 (Air Transport Association of America), ECLI:EU:C:2011:864.
[118] See *Dobson*, Extraterritoriality and Climate Change Jurisdiction, 2021, p. 4.

D. Compatibility of the FTA with international climate protection law

The following analysis looks at EU-caused *internal and external* emissions and loss of sinks. Activities that lead to emissions and loss of sinks caused by the Mercosur states would have to be assessed against their proper international law obligations, which is, however, left out in this analysis, see above.

Both the EU and the Mercosur states are bound by the UN Framework Convention on Climate Change (UNFCCC) and the Paris Agreement (PA) as well as by obligations of customary international law. Several potential violations of international climate protection law could follow from these obligations. The next sub-section briefly addresses the primary obligation of the Paris Agreement concerning the Nationally Determined Contributions (NDC) (I.). The two subsequent sub-sections then assess two obligations arising from the UNFCCC and the PA that go beyond the mere adoption of NDC and that require different degrees of action by the state parties, including the EU and the Mercosur states. First, the binding temperature limits in the UNFCCC and PA have implications on the respective carbon budgets of the state parties, binding them with regard to their internal emissions (II.). Second, there is an overall obligation to adhere to and support the PA's objective in good faith that has separate far-reaching consequences for the parties, also with regard to their external emissions (III.).

I. Obligation to adopt (and implement) NDC

According to Art. 4(2) PA, the State parties to the PA:

> "shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions."

This provision constitutes the main individual obligation in the Paris Agreement.[119] It contains binding obligations of conduct to prepare, communicate and maintain NDC as well as to pursue domestic measures and

[119] *Bodansky/Brunnée/Rajamani*, International Climate Change Law, 2017, p. 231.

thus only addresses internal emissions as categorised above[120]; further, they must at least intend and aim in good faith to achieve the objectives of their contributions.[121] NDC are short- to medium-term targets and include measures GHG reduction measures, but also LULUCF-related national targets.[122] States are required to update their NDC every five years – the global stock-take was due in 2023 at the Conference of Parties in Dubai. Each update is required to be more "ambitious", thus obliging states to adopt more stringent targets for themselves.[123]

Whether or not States are obliged under the PA, beyond this, to actually comply with their own NDC is subject to controversy.[124] Yet, the present analysis must not answer this question, as there is currently not sufficient evidence that would support a statement that the 2030 NDC will not be reached *due to* the FTA's existence: Given the FTA timelines, the effects of the FTA will take place step by step in the next years, until 95% of the tariff lines for imports from the Mercosur countries are lowered within ten years after the FTA's entry into force, so that the observance of the 2030 NDC will not necessarily be influenced by the FTA's entry into force. Another finding cannot be deduced either from the LSE SIA, neither for the EU nor the Mercosur state's NDC.

Yet, the EU NDC as well as those of other states are themselves too unambitious and insufficient to contribute to effective climate protection with a view to the temperature limit in Art. 2(1) PA.[125] This was argued already in the *Carvalho v. Parliament* proceedings in the EU Courts,[126] which was not decided on the

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[120] See for a thorough differentiation: *Dobson*, note 118.
[121] *Bodansky/Brunnée/Rajamani*, note 119, p. 231.
[122] The official list of submitted NDC can be found here: https://unfccc.int/NDCREG.
[123] This is a due diligence obligation to adopt NDC in line with Art. 4(1) PA, see *Voigt*, The power of the Paris Agreement in international climate litigation, RECIEL 2023, p. 237, at 241.
[124] In favour, see, e.g., *Voigt*, note 123; *Viñuales*, The Paris Climate Agreement: An Initial Examination, C-EENRG Working Papers No. 6, 2015, 1(5); *Mayer*, Article 4 Mitigation, In: van Calster/Reins (eds.), Paris Agreement on Climate Change – A Commentary, 2021, p. 109, at 125-128); cf. W*inkler*, Mitigation (Article 4), In: Klein et al. (eds.), The Paris Agreement on Climate Change. Analysis and Commentary, 2017, p. 141, at 148, 162. Contra, see, e.g., *Franzius/Kling*, The Paris Climate Agreement and Liability Issues, In: Kahl/Weller (eds.), Climate Change Litigation. A Handbook, 2021, p. 197 (202); *Stoll/Krüger*, Klimawandel, In: Proelß (ed.), Internationales Umweltrecht, 2022, p. 433.
[125] This can be deduced from the recent analysis of the CAT on the reduction targets in the EU's NDC: CAT, Country summary of the EU, https://climateactiontracker.org/countries/eu/.
[126] ECJ, 25 March 2021, C-565/19 (Armando Carvalho), ECLI:EU:C:2021:252.

merits and is now again argued in a request for internal review launched by Climate Action Network Europe.[127]

This issue is addressed in the next section:

II. Obligation to observe a sound carbon budget under the UNFCCC and the PA (and reduce emissions accordingly)

As set out above, impartial current projections based on combined global commitments by states in their NDC show that the world is heading towards 2.9°C rather than 1.5°C warming compared to pre-industrial times.[128] The same insufficiency can be established with a view to the EU's emission targets in its NDC.[129] Therefore, it is necessary to assess whether and which other climate protection obligations could be violated by the EU beyond their obligation to adopt (and possibly comply with) NDC by adopting and implementing the FTA.

Both relevant treaties, the UNFCCC and the PA, set up warming limits and lay out criteria for the sharing of efforts to keep GHG emissions within certain limits. The limits are determined

- by the Convention's objective in Art. 2 UNFCCC: "the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system",
- by the aim of the Paris Agreement in Art. 2.1 (a) PA: "[h]olding the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels", and the pathway for getting there ('how') is set out in Article 4(1).[130]

[127] 80. Internal review request ref. IR/2023/540061 - Global Legal Action Network & Climate Action Network Europe, Request for internal review under Title IV of the Aarhus Regulation, August 2023, https://circabc.europa.eu/ui/group/3b48eff1-b955-423f-9086-0d85ad1c5879/library/9efaaa39-1015-4dfd-87ea-120e9e2596d1/details.
[128] UNEP, Emissions Gap Report 2023, note 6.
[129] CAT, EU, note 125.
[130] "In order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty."

On the basis of IPCC reports since 2018, there is now scientific consensus that global warming of 1.5ºC will not in fact prevent a "dangerous anthropogenic interference with the climate system" nor would it ensure that "food production is not threatened".[131]

While the PA establishes the obligation to set up and possibly comply with NDC, Art. 4(2) UNFCCC includes an obligation to reduce emissions and preserve carbon sinks for "developed countries", including the EU:

> "The developed country Parties and other Parties included in Annex I commit themselves specifically as provided for in the following:
>
> (a) Each of these Parties shall adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs […]"

There is thus a treaty provision that obliges states to reduce emissions – independently from the PA itself.

Given the wide commitment gap, the existing science on dangerous levels of greenhouse gases summarised by the IPCC as well as the acutely threatened tipping points,[132] it seems obvious that a rise in GHG emissions (rather than a dramatic drop in emission levels) is not tolerable globally. But how can activities and impacts of EU actions (or treaty making) be evaluated against the obligation of conduct in Art 4.2 UNFCCC?

Although the UNFCCC did not contain a specific degree value for the maximum temperature limit, the object and purpose of the UN climate protection regime, as already envisaged in Art. 2 UNFCCC, aims at preventing "dangerous anthropogenic interference with the climate system". Although some authors reject any binding character of Art. 2 UNFCCC as it would constitute a mere

[131] See only: IPCC, Global Warming of 1.5°C – Special Report, 2018, https://www.ipcc.ch/sr15/, Technical Summary (TS), p. 44, Chapter 5, p. 447 stating that global warming of 1.5°C was not safe "for most nations, communities, ecosystems and sectors".
[132] See for a recent analysis: Global Tipping Point Report, 2023, https://global-tipping-points.org/.

programmatic target,[133] this weak understanding of the provision is not convincing.[134] With view to the immense additional adverse effects that would be caused by a temperature rise of even well below 2°C instead of 1.5°C,[135] this object and purpose of the UNFCCC cannot leave a reasonable doubt that the provision must be interpreted in light of the best available existing scientific knowledge on the climate system to incorporate a temperature limit,[136] with an inherent global carbon budget left to achieve and hold such limit.[137]

This issue will undoubtedly be addressed by the International Court of Justice's Advisory Opinion, now underway as a result of the UN General Assembly Resolution of March 2023.[138] Part a) of the request asks the court to consider:

> (a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations?

This includes the obligations under the UNFCCC and the PA.

Yet, one statement is obvious under international law: the adoption of the PA cannot override other, particularly pre-existing, climate protection obligations without explicitly stating so, i.e. without states consenting to such effect. No such consent has been given,[139] rather the PA and its explicit architecture is

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[133] See, e.g., *Bodansky*, The UN Framework Convention on Climate Change: A Commentary, 18 Yale Journal of International Law (1993), p. 451, at 500; *Stoll/Krüger*, note 124, p. 433.
[134] See also *Dolzer*, Die internationale Konvention zum Schutz des Klimas und das allgemeine Völkerrecht, in: Festschrift für Bernhard, 1995, p. 960.
[135] *Singh Ghaleigh/Navraj*, Article 2 – Aims, objectives and principles, in: van Calster/Reins (eds.), Paris Agreement on Climate Change – A Commentary, 2021, p. 73–93 (80). On the differences between 1.5°C warming and 2°C warming, see IPCC, Global Warming of 1.5°C, note 131, Chapter 1.
[136] See already *Schröder et al.*, Klimavorhersage und Klimavorsorge, 2002, p. 15; *O'Neill/Oppenheimer*, Dangerous Climate Impacts and the Kyoto Protocol, 296 Science (2002), p. 1971 (1972); *Metz et al.*, Towards an equitable global climate change regime: compatibility with Article 2 of the Climate Change Convention and the link with sustainable development, 2 Climate Policy (2002), p. 211; *Verheyen*, Climate Change Damage and International Law, 2005, p. 63-64, 66.
[137] See already *Verheyen*, The Climate Change Regime after Montreal: Article 2 of the UN Framework Convention on Climate Change Revisited, Yearbook of European Environmental Law, vol. 7 (2007), p. 234.
[138] UN General Assembly, Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change, 1 March 2023, UN Doc. A/77/L.58; see also on the website of the ICJ: https://www.icj-cij.org/case/187.
[139] In fact, several states pointed out the contrary upon ratification of the PA, see, e.g., the declarations of Cook Islands, Micronesia, Tuvalu and Vanuatu, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27.

considered to provide subsequent practice to the UNFCCC as well was a basis of the latter's interpretation with respect to the explicit long term temperature goal in Art. 2 PA.[140] Parties have accepted the legal nature of Art. 2 PA, as can be deduced from a variety of Member States that explicitly based their proper NDC on the temperature limits of the PA.[141] Further, several national courts have relied on these temperature limits in order to assess the respective states' obligations under climate law and (international) human rights.[142]

The temperature limit of "well below 2°C" as captured in Art 2 PA has been interpreted in different ways. The German Constitutional Court has, for instance, found that it is not sufficient to limit the temperature rise to 2°C, but that the common objective of the PA aims at halting global warming at least several degrees below this maximum limit.[143] However, the genesis of the 2°C-limit as well as the applicable principles of prevention and precaution point to an understanding of "well below" that refers to the very high likelihood (more than 90%) that has to be envisaged to stay below a global average temperature rise of 2°C.[144] Calculating such high likelihoods to reach "below" 2° as opposed to the 67% likelihood of reaching 1.5°C renders the absolute carbon budgets behind these figures very similar. Moreover, Art. 4(1) PA is not static, but is relative to the emission reductions achieved and to best available science.

As stated above, the findings of the IPCC in its 1.5°C-Report from 2018 clarify that even a global temperature rise that is limited to 1.5°C would not constitute a safe option that would prevent "dangerous anthropogenic interference with the

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[140] *Winter*, Armando Carvalho and Others v. EU, Invoking Human Rights and the Paris Agreement for Better Climate Protection Legislation, Transnational Environmental Law 9 (2020), p. 137 (144). Cf. *Crosland et al.*, Paris Agreement Implementation Blueprint (Part 2), Legal Avenues to Blueprint Implementation, Environmental Liability 24 (2016), p. 1 (5).

[141] *Rajamani et al.*, National 'fair shares' in reducing greenhouse gas emissions within the principled framework of international environmental law, Climate Policy 21 (2021), p. 983 (994) with reference to 127 states.

[142] United Kingdom Court of Appeal, *Plan B Earth v. Secretary of State for Transportation* [2019] Case C1/2019/1053, para. 185; German Constitutional Court, *Neubauer et al.*, Case No. 1 BvR 2656/18, 78/20, 96/20, and 288/20, BVerfGE 157, 30, para. 159; Land and Environment Court in New South Wales, *Gloucester Resources Ltd. v. Minister for Planning*, Order of 8 February 2018, Case [2019] NSWLEC 7, paras. 441, 697; Supreme Court of the Netherlands, *State of the Netherlands v. Urgenda*, 20 December 2019, ECLI:NL:HR:2019:2007, para. 7.2.8.

[143] Cf. *Neubauer et al.*, note 142, para. 234.

[144] *Schleussner et al.*, An emission pathway classification reflecting the Paris Agreement climate objectives, Communications Earth & Environment 3 (2022), p. 827.

climate system" in the sense of Art. 2 UNFCCC.[145] Instead, already the current rise in the global temperature causes and will cause forms of extreme weather events that further threaten human rights and constitute significant risks to natural and human systems, communities, ecosystems and sectors, especially for people in vulnerable situations.[146] Reaching 1.5°C would further "cause unavoidable increases in multiple climate hazards and present multiple risks to ecosystems and humans".[147] Consequently, 1.5°C must not be understood as an *aim* of international climate protection, but rather as an upper limit that should not be exceeded.

Consequently, and according to the best available science, the upper limit of 1.5°C has since become consensus among Parties when interpreting Art. 2 of the UNFCCC,[148] as is set out in the Glasgow Climate Pact of 2021.[149] Such a legal interpretation of the obligations arising from Art. 2 PA complies both with the rule to interpret a treaty provision in light of the treaty's object and purpose (Art. 31(1) of the Vienna Convention on the Law of Treaties, VCLT) and with the interpretation rule that takes into account " any subsequent practice in the application of the treaty" (Art. 31(3) lit. b VCLT).[150] The analysis therefore proceeds under the assumption that 1.5°C is a binding global limit – accepting that this infers a range of global carbon budgets depending on the likelihood ranges and uncertainties involved.

To stay below this global limit, the efforts in reaching the aforementioned aims need to be distributed among the treaty parties. Criteria for sharing efforts to reduce GHG emissions are set out as follows in the agreements:[151]

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[145] IPCC, Global Warming of 1.5°C, note 131, Summary for Policymakers (SPM), A.1-A.3.
[146] IPCC, Global Warming of 1.5°C, note 131, TS, p. 44, Chapter 5, p. 447.
[147] IPCC, Climate Change 2022 – Impacts, Adaptation and Vulnerability, Working Group II Contribution to the IPCC 6th Assessment Report, SPM, B.3.
[148] *Rajamani/Guérin*, Central Concepts in the Paris Agreement and How They Evolved. In: Klein et al. (eds.), The Paris Agreement on Climate Change. Analysis and Commentary, 2017, p. 74 (75 f.). Cf. *Gupta/Arts*, Achieving the 1.5°C objective: just implementation through a right to (sustainable) development approach, (2018) International Environmental Agreements 18 (1), p. 11 (12 f.).
[149] In Glasgow, Parties to the PA resolved to pursue to limit the temperature increase to 1.5°C and explicitly accepted the assessment by the IPCC, see: Decision 1/CMA.3, Glasgow Climate Pact' UN Doc. FCCC/PA/CMA/2021/10/Add.1, paras. 21-22.
[150] International Court of Justice (ICJ), Judgment of 9 April 1949, ICJ Reports 1949, 4.
[151] See *Franzius/Kling*, The Paris Climate Agreement and Liability Issues, In: Kahl/Weller (eds.), Climate Change Litigation. A Handbook, 2021, p. 197 (203).

- by Art. 3(1) UNFCCC: "The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof." (emphasis added)
- by Art. 2(3): "This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances."
- and, also, by Art 4(2) UNFCCC which sets reduction obligations *only* on developed state parties at the time of conclusion of the UNFCCC (1992)

These provisions on the burden-sharing criteria are commonly used to determine global GHG emissions budgets as related to different heating ceilings,[152] as well as to allocate the global GHG budgets to individual states. In case of the EU budget, an overall budget is allocated for the EU as a collective of its Member States. The global budget depends on the assumed limit of temperature increase and the probability in order to stay below this limit.[153]

Before turning to different criteria that are suggested for a fair sharing of the global budget to individual states and supranational entities as the EU (2.), the following sub-section first addresses the issue, which kind of emissions are captured by the legal climate protection regime at all (1.).

1. Relevance of internal and external emissions

To achieve the PA's long-term temperature goal, parties have *collectively* committed to global peaking of greenhouse gas emissions as soon as possible, so as to achieving a balance between anthropogenic emissions by sources and removals by sinks in the second half of this century (Art. 4.1 PA). This, together with the long term temperature goal of Art. 2 forms the *legal* basis and normative

[152] For an overview as of 2020, see *Canadell et al.*, Global Carbon and Other Biogeochemical Cycles and Feedbacks, In: IPCC, Climate Change 2021 – The Physical Science Basis. Working Group I Contribution to the IPCC 6th Assessment Report, Chapter 5, p. 673–815, Table 5.8, https://www.ipcc.ch/report/ar6/wg1/chapter/chapter-5/.

[153] For instance, the remaining carbon budget in order to stay below 1.5°C with a probability of more than 67% is 400 GtCO2; in order to stay below 2°C with a probability of 83%, it is 900 GtCO2.

standard for the determination of the global carbon budget as spelled out by the IPCC.

With regard to the distribution of the remaining global carbon budget between states, the legal debate has focused mainly on emissions originating in a state, i.e. under control of national inventories, (internal emissions). As far as national carbon *budgets* (not: all legal obligations, see below) are concerned, it seems clear that these budgets naturally refer to and limit those emissions that emerge directly from a state's territory.[154] In contrast, external emissions (either due to supply push or demand pull) are neglected so far by the relevant academic literature discussing climate protection treaty law, even though they are currently under scrutiny in the context of environmental impact assessments for projects.[155]

At this stage, it is thus relevant whether such external emissions would fall within the EU's obligation to observe a certain "national" carbon budget – or whether these external emissions do not form part of the EU's carbon budget assumed under treaty law. In light of several provisions of the UNFCCC and the PA,[156] one could adopt a comprehensive perspective that requires states to also limit their external emissions within the boundaries of their respective budgets under treaty law. However, such a comprehensive understanding would neither fit into the systematic approach of the regime of national inventories (see Art. 4(1) lit. a UNFCCC) nor the idea of national carbon budgets. This approach to carbon budgets envisages sharing the responsibility for staying below the respective temperature as well as the remaining global carbon budget between states (or supranational entities). For this reason, a quantifiable approach is necessary that unequivocally allocates specific emissions to specific states. Such a responsibility to observe a carbon budget can then theoretically be implemented fully domestically (as was the case in the German constitutional

[154] In the context of international climate protection law, there is no legal differentiation between the (internal or external) effects of such internal emissions, so that these are not mentioned separately here. See, however, below in E.I.2.
[155] While indirect emissions are often declared not to be legally part of a project the Oslo District Court recently stated that external emissions (Scope 3) of a specific fossil fuel infrastructure ("combustion emissions") must be considered in an environmental impact assessment, as they constitute part of the emissions of the production state, see *Greenpeace et al. v. Ministry of Energy*, note 114, p. 35-45.
[156] See, e.g., Art. 3(3), Art. 4(1) lit. c and d UNFCCC as well as Art. 2(1), Art. 5(2) PA. In more detail, see below in section D.III.

case involving the national Climate Law) or using mechanisms such as international trading (this is the case in the Swiss climate policy which intends to fulfil a large part of its obligations in other countries).[157]

With regard to external emissions, this is complicated, if not impossible: Would emissions in other states due to a supply push or due to a demand pull by the EU be accorded to the EU budget or the budget of the respective state in which they arise? Although the relevant treaty provisions of the UNFCCC and the PA do not exclude a comprehensive understanding, the existing system of budgeting the global emissions by distributing them to states is not compatible with an inclusion of external emissions to this approach.

2. Budgeting the EU emissions and effect of the FTA

Consequently, this section focuses on the EU's internal emissions caused by the FTA, whereas D.III. and E. also treat external emissions. These internal emissions must remain within the limits that the EU is obliged to comply with in light of the shared global efforts under the UNFCCC regime. In order to remain below the binding temperature limits of the UNFCCC and PA, Articles 3 UNFCCC and Art. 2 PA offers a number of criteria for the sharing of efforts between States. These criteria include equity, common but differentiated responsibility, respective capabilities and different national circumstances.

However, these principles in general language leave some discretion, so that an operationalisation of the effort sharing is required. So far, two approaches as to how to share the efforts have been elaborated. These are:

- equity based on fair shares of the global budget and
- feasibility based on reduction pathways modelled transnationally.

There is no legally binding method yet.[158] The International Court of Justice (ICJ) will possibly favour one of these approaches in the interpretation of

[157] This is now (*inter alia*) under scrutiny in the *KlimaSeniorinnen* case before the ECtHR, see *Klimaseniorinnen v. Switzerland (ECtHR)*, Application no. 53600/20, https://climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-council-and-others/. A judgement is expected in 2024.

[158] For a thorough analysis with scientific annexes, see *Klimaseniorinnen v. Switzerland (ECtHR)*, Response to the Respondent's written answers to the questions communicated by the Court to the parties on 16 March 2023 to be addressed in their oral submission at the hearing before the Grand Chamber, accessible at: https://www.klimaseniorinnen.ch/dokumente/.

international law in its coming advisory opinion.[159] The analysis introduces them briefly, although, as will be seen, the FTA impact on internal emissions in the EU is not in compliance with either of them.

a) Fair shares

Fair shares reasoning is based on equity principles, more specifically in widely accepted principles of international environmental law.[160] These fair shares approaches aim at distributing the remaining global budget according to ethical considerations.[161] The potential approaches contain, for instance, responsibility for past emissions, equal per capita (EPC) referring to a global budget available at present, need (or right to development), General Domestic Product (GDP) and Human Development Index (HDI).[162] Again, there is no consensus so far, which of these approaches would prevail from a legal point of view, as different states base their NDC on different sets of criteria.[163] For instance, the German Federal Constitutional Court found EPC to be a legitimate criterion of budget sharing.[164] The Climate Action Tracker (CAT) developed a comprehensive method that combines a wide range of proposals in interdisciplinary literature that can be considered a "fair" distribution of remaining GHG emissions.[165] of application of all of the criteria suggesting that each individual state should apply that criterion which is most demanding for it. Many recent complaints before international and national courts and other bodies argue based on the CAT method and ask these bodies to determine respective state obligations and ambitions.[166]

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[159] For more details on the ongoing proceedings, see the website of the ICJ: https://www.icj-cij.org/case/187.
[160] *Rajamani et al.*, note 141, p. 983.
[161] See *Ringius/Torvanger/Underdal*, Burden Sharing and Fairness Principles in International Climate Policy, International Environmental Agreements 2 (2002), p. 1. On a distinction, which of these approaches are actually based on equity considerations, see *Dooley et al.*, Ethical choices behind quantifications of fair contributions under the Paris Agreement, Nature Climate Change 11 (2021), p. 300–305.
[162] In more detail, see, e.g., CAT, Fair share, https://climateactiontracker.org/methodology/cat-rating-methodology/fair-share/ with further references.
[163] *Rajamani et al.*, note 141, p. 983.
[164] *Neubauer et al.*, note 142, para. 225.
[165] CAT, Fair share, note 162.
[166] See, e.g., *Duarte Agostinho et al. v. Portugal et al.*, Complaint to the ECtHR, 2 September 2020, https://climatecasechart.com/non-us-case/youth-for-climate-justice-v-austria-et-al/; *Daniel Billy et al. v. Australia*, Complaint to the Human Rights Committee, 13 May 2019, https://climatecasechart.com/non-us-case/petition-of-torres-strait-islanders-to-the-united-nations-human-rights-committee-alleging-violations-stemming-from-australias-inaction-on-climate-change/; *Mataatua District Maori Council v. New Zealand*, Application to the New

Whichever method is used, the resulting budget for the EU requires drastic cuts in emissions,[167] if the global budget is derived from the 1.5°C limit. However, even with regard to the 2°C limit, the EU must reduce its emissions in order to meet its obligations with a probability of 66% – but even more so by 98% as proposed by scientists and legally required by the UNFCCC.[168] In conclusion, any budget remaining for the EU is so small that any new source of internal emissions, such as caused by the FTA, would be incompatible with the fair shares equity criteria of Art. 3 UNFCCC and 2 PA.

b) Transnationally modelled reduction pathways

Besides fair shares approaches, the approach of modelled reduction pathways is used to assess whether and how far national targets and policies are on track towards emission reduction in compliance with the 1.5°C temperature limit.[169] They aim at providing feasible emission reduction pathways and are based on the criterion of "respective capabilities" in Art. 2(3) PA.

In its Sixth Assessment Report of 2022,[170] the IPCC has set out pathways consistent with holding temperature increases to 1.5°C. These pathways essentially show that it is necessary to decrease global net CO2 emissions by 45% by 2030 (relative to 2010 levels) and to achieve global net-zero CO2 emissions around 2050 (as well as deep reductions in other greenhouse gases).

In a first step, modelled global pathways can be constructed based on a given set of technological, socio-economic and policy assumptions.[171] In a second step, specific country-level pathways are derived from these global scenarios.

They are elaborated on the basis of a great number of scenarios that model national and transnational emission reduction potentials, both sector-wise and

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Zealand Waitangi Tribunal, 4 July 2017, https://climatecasechart.com/non-us-case/mataatua-district-maori-council-v-new-zealand/.

[167] In more detail on the following conclusions, see CAT, EU, note 125.

[168] See already above in note 153.

[169] In detail, see, e.g., CAT, Modelled domestic pathways, https://climateactiontracker.org/methodology/cat-rating-methodology/modelled-domestic-pathways/ with further references.

[170] IPCC, Climate Change 2022 – Mitigation of Climate Change, Working Group III Contribution to the IPCC 6th Assessment Report, SPM, Section C.

[171] *Rogelj et al.*, Mitigation Pathways Compatible With 1.5°C in the Context of Sustainable Development, In: IPCC, Global Warming of 1.5°C, note 131, p. 82; *Huppmann et al.*, IAMC 1.5°C Scenario Explorer and Data hosted by IIASA, 2019, https://doi.org/10.5281/ZENODO.3363345.

cross-sectoral. The scenarios are grouped according to cost-effectiveness, i.e. favouring the least-cost option among alternative reduction policies.[172] Therefore, they take into consideration that emission reductions can be achieved at lower cost by some countries than by others. In general, this implies that developed countries are less burdened than developing ones because their costs per unit of emission reduction tends to be higher than those of developing countries.[173] In effect, the resulting budget for developed states such as the EU will be larger than the one derived from fair shares. Consequently, these modelled reduction pathways have been criticised as they are not compatible with equitable principles of distribution under international environmental law, but rather lead to a continuation of uneven shares and a perpetuation of past inequalities between states.[174]

Notwithstanding this fundamental criticism and without taking a stance in this regard, the EU's current NDC as well as the EU's policies are not on track of either a 2°C-modelled pathway nor a 1.5°C pathway.[175] The CAT rates the EU's NDC as "almost sufficient" when compared to the level of emissions reductions needed within the EU. It is thus not consistent with limiting warming to 1.5°C. Although it could be compatible with contributing to hold the global temperature below 2°C, it is not sufficient with regard to the "well below 2°C" limit. Consequently, the conclusion of the FTA is also incompatible with the "respective capabilities" criterion of Art. 2(3) PA, in particular since the FTA would only take full effect in a number of years where, in accordance with both fair share and modelled pathways, GHG emissions would need to drop to net zero eventually (Art. 4(1) PA).

3. Art. 2 PA and the duty not to defeat the objective of the treaty

Given the binding nature of the UNFCCC and the PA on all negotiation partners to the Mercosur FTA and the fact that the overall aim of the PA is in peril, the question could be asked whether treaty law contains an additional obligation, which prohibits in effect the FTA's ratification and implementation.

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[172] See *Rajamani et al.*, note 141, p. 993.
[173] CAT, Modelled domestic pathways, note 169.
[174] *Rajamani et al.*, note 141, p. 992; *Dooley et al.*, Ethical choices behind quantifications of fair contributions under the Paris Agreement, Nature Climate Change 11 (2021), p. 300–305.
[175] In more detail on the following conclusions, see CAT, EU, note 125.

Art. 18 of the VCLT establishes an obligation for States to refrain from acts that would defeat the object and purpose of a treaty between its signature and ratification. The UNFCC and PA are of course in force and the conclusion of the FTA would come, for the EU, formally after this interim phase expressly covered by Art. 18 VCLT. Yet, Art. 18 is only one aspect of the principle of good faith which is woven through the entire VCLT.

Even if the legal nature and temporal scope of Art. 18 VCLT is not clearly established in case law, it seems obvious that a treaty's purpose should not be defeated by Parties after ratification as much as before ratification. It has also been shown that it applies to bilateral and multilateral treaties such as the climate treaties.[176]

Yet, overall, the standard of care under this principle would not go further than what has been shown as part of the treaty analysis above in section 2. However, this VCLT standard could possibly extend to *external emissions and losses of sinks* if it were attached to the general aims of Art. 2 PA which are not limited to internal emissions or inventories but a global aim. In effect, the authors find that this duty would overlap with the customary law no harm rule, addressed in the following section.

III. The no harm rule

The no harm rule is referred to in the preamble to the UNFCCC as stating that "states have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." It is a rule (and not only a principle) of customary international law.[177]

Sections I. and II. of this Chapter assessed the FTA against international treaty law. Naturally, the EU is also bound by customary international law, in particular the no harm rule. The Paris Agreement has not superseded this rule, as was explicitly stated in declarations of low lying states when signing the Paris

[176] *Gragl/Fitzmaurice*, The legal character of Article 18 of the Vienna Convention on the Law on the Treaties, International & Comparative Law Quarterly 2019, Issue 3 , p. 699, at 714.
[177] ICJ, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) ICJ Reports 1996, 226, 241, para. 27.

Agreement [178] Naturally, the degree of legal clarity derived from customary law may be lower than when applying treaty provisions. The ECJ has found: "A principle of customary international law does not have the same degree of precision as a provision of an international agreement, judicial review must necessarily be limited to the question whether, in adopting the act in question, the institutions of the European Union made manifest errors of assessment concerning the conditions for applying those principles".[179] However, this does not exclude relevant legal content of the no harm with respect to the subject of this study.

Given that the treaty law assessed above focuses on *internal* emissions, the question is warranted whether customary international law and in particular the no harm rule contains any obligations regarding *external* emissions and losses of sinks as categorised above. This is especially pertinent since the effects on external sinks (in Mercosur states) are predicted to be high and have not explicitly been assessed by the SIA.

There is little case law on the scope and content of the no harm rule in general,[180] and none on the applicability in the context of climate change. It will most likely be covered by the ICJ Advisory Opinion (see above).[181] However, academic literature has generally applied the rule in the sense of a due diligence obligation.[182] As such, states must act with due diligence in order to ensure to the highest possible extent that activities that are carried out on their territory or within their jurisdiction do not cause harmful consequences to other states or to areas beyond national jurisdiction. The rule addresses all sorts of state behaviour,[183] even if the rule itself originates from the *Trail Smelter* case in

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[178] Available at https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en

[179] ECJ, 21 December 2011, C-366/10 (Air Transport Association of America), ECLI:EU:C:2011:864, para. 110

[180] See however in the context of regional law: Inter-American Court of Human Rights, The Environment and Human Rights (Requested by the Republic of Colombia), Advisory Opinion, OC-23/17, 15 November 2017, paras. 47 ff.

[181] See note 138.

[182] See *Benoit Mayer et.al.*, The No-Harm Principle as the Foundation of International Climate Law , 2021; *Roda Verheyen*, note 136, p. 63-64, 66.

[183] See *Campbell-Duruflé*, The Significant Transboundary Harm Prevention Rule and Climate Change: One-Size-Fits-All or One-Size-Fits-None? in Mayer/Zahar (eds.), Debating Climate Law, 2021.

which emissions from one state territory harmed another state.[184] It can thus be applied to the impacts of the FTA as a whole and is applicable to external emissions as well as internal emissions.

Due diligence is often equated with taking adequate care. An obvious obligation is one of assessment. Given the absolute lack of assessment with respect to the losses of sinks (and impacts on biodiversity) the EU may be argued to have infringed its duty of conduct already at this stage. Moreover, given the obvious lack of progress in the protection of the global climate (see above) it may also constitute a violation of care to not actively strive towards an agreement which ensures a global decline in emissions overall, rather than accept a rise in GHG emissions.

With respect to a more substantive duty of care, the "best possible means" approach seems plausible to the present authors both with respect to internal and external emissions. As such, treaty law can provide standards of care with respect to the protection level (i.e. an acceptable temperature limit as set out above), as has been carefully examined by *Christina Voigt*.[185]

On the basis of the treaty content above and existing science, it is clear that current emissions and losses of sinks cause damage and harm. Given the apparent gap in implementation (and GHG reduction), states must tackle all causes of climate change, and not (as is currently the focus of treaty law) just their internal emissions and losses of sinks. Although methods of calculating budgets for external contributions of states have not yet been elaborated (see above), the EU is, as a minimum, obliged to prevent causing new emissions and sink losses abroad that are not compensated by emissions reductions elsewhere.

A feasibility-based strategy to define a standard of care for states has recently been proposed by the EU Scientific Advisory Board on Climate Change.[186] It was also proposed as a third-party observation to the Duarte Agostinho case

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[184] Arbitral Tribunal, *Trail Smelter Arbitration*, Award of 16 April 1938, RIAA, III (1938), 1905.
[185] *Voigt*, note 123, p. 241.
[186] European Scientific Advisory Board on Climate Change, Setting climate targets based on scientific evidence and EU values: initial recommendations to the European Commission, January 2023, https://climate-advisory-board.europa.eu/reports-and-publications/setting-climate-targets-based-on-scientific-evidence-and-eu-values-initial-recommendations-to-the-european-commission.

pending at the ECtHR,[187] and set out by the current authors as standard of care for internal emissions in the *Carvalho v. Parliament* case before the CJEU.[188]

Its elements are as follows [189]:

- Calculating bottom up from domestic levels rather than top down from global budgets,
- Searching for best means within sectors, cross-sectoral and instrumentally,
- Reflecting social, technological, economical, institutional and geographical conditions,
- Including sufficiency potentialities.

This approach, called "best possible means", is relatively easy and practical to handle in court proceedings because it allows courts to scrutinise whether the respondent state has procedurally and substantively done what it sincerely is able to do. In these proceedings, studies elaborating possible pathways can be presented and assessed both in terms of adequate methodology and factual correctness.[190]

If this approach was applied to the FTA, it would be obvious that the FTA is incompatible with the no harm rule. The increase of production and trade of goods that cause high levels of emissions and losses of sinks elsewhere constitute the opposite of "taking best possible means of emission reductions".

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[187] *Duarte Agostinho et al. v. Portugal et al.*, note 166, Observations of CAN-E and Germanwatch, 6 May 2021.

[188] *Armando Carvalho v. European Parliament and Council*, Application, 24 April 2018, http://climatecasechart.com/non-us-case/armando-ferrao-carvalho-and-others-v-the-european-parliament-and-the-council/.

[189] Cf. Gerd Winter, Indicators for the implementation of international climate protection law, in: Jérome Fromageau, Ayman Cherkaoui, Roberto Coll (eds.) Measuring the effectiveness of environmental law through legal indicators and quality analyses. IUCN Environmental Policy and Law Paper, No. 91 (2023) Gland, Switzerland: IUCN.

[190] For an example of this kind of assessment, see ECtHR, *Cordella et al. v. Italy*, 24 January 2019, Appl. No. 54414/13, 54264/15.

E. Compatibility of the FTA with EU fundamental rights and primary law principles

I. Fundamental rights

In this chapter, the authors will discuss the scope and general content of affected rights (1.), their geographical reach (2.), interference with these rights (3.), and possible justifications of an interference (4.).

1. Scope and doctrinal structure of affected fundamental rights

a) Scope

For more than a decade, climate change has been acknowledged as a human rights issue.[191] Heat waves have harmed and are currently harming human health, extreme droughts and extreme precipitation have damaged occupational activities and property, especially of farmers and house-owners. This puts *fundamental rights* to health, occupation, property, children's welfare and equal treatment to the fore. These rights are guaranteed by the EU Charter of Fundamental Rights (ChFR), and more precisely its Articles 2 and 3 (human life and health), Art. 15 (freedom of occupation), Art. 16 (freedom of enterprise), Art. 17 (property), Art. 24 (children's rights), and Art. 20 and 21 (equal treatment). The EU institutions are directly bound by the ChFR, Art. 6(1) TEU.

In addition to the ChFR, the EU must take into account pertinent international *human rights* treaties. Although the EU itself is not a contracting party, the fact that many Member States have ratified them suggests that the EU should regard them as interpretive guidance. This includes in particular the rules contained in the ECHR and the jurisprudence of the ECtHR.[192] Also, concerning harm the younger generation will suffer in future Art. 6 of the UN Convention on the Rights of the Child establishes: "States Parties recognize that every child has the inherent right to life. States Parties shall ensure to the maximum extent possible the survival and development of the child."

Concerning the effects of the FTA on traditional living areas of indigenous people, Art. 1 of the International Covenant on Civil and Political Rights and

[191] The various UN body decisions and declaration are now summarised in the context of the ICJ advisory opinion and accessible at: https://www.icj-cij.org/case/187.

[192] These are explicitly referred to in the preamble to the ChFR but the EU is not a party as a supranational body. Art. 6(3) TEU renders these rights part of the legal order of the EU.

Art. 1 of the International Covenant on Economic, Social and Cultural Rights contain the general right to self-determination and more specifically the guarantee that "in no case may a people be deprived of its own means of subsistence".

b) Doctrinal structure

The fundamental rights of the ChFR are commonly interpreted as shields of private persons against 'vertical' interferences by public authorities, also called negative obligations. Some of the rights are considered to have a 'horizontal effect'. According to the ECJ, this presupposes that the relevant article of the ChFR addresses relationships between two private persons, such as safe working conditions according to Art. 31 ChFR, which can only be thought of as relationships between employee and employer.[193] Although the rights to climate protection discussed here also address relationships between private parties, namely between emitters and victims, this is not explicitly assumed or stated in the text of the pertinent provisions (human health, children's welfare, occupation and property). However, negative obligations of the EU institutions can be transformed into positive obligations to protect citizens from 'horizontal' interferences by private actors, more precisely from GHG emissions that are incentivised by the FTA.

Although the case law of the CJEU is not yet rich in such doctrinal transformation,[194] steps in that direction can be observed. First of all, the ECJ has established positive obligations concerning basic freedoms. In particular, Member States are obliged to ensure the free movement of goods, including on transit transportation highways.[195] In relation to fundamental rights, certain statements of the ECJ can be understood as construing obligations not only to desist from interferences but to actively protect right holders. For instance, the

[193] ECJ, 6 November 2018, C-569/16 and C-570/16 (Bauer) ECLI:EU:C:2018:871, paras. 88-92. *Lenaerts/Guterriérrez-Fons*, Reflections on the EU Charter of Fundamental Rights, in: Peers et al. (eds.), The EU Charter of Fundamental Rights – A Commentary, 2021, para. 55.31.
[194] Dirk Ehlers, Claas Friedrich Germelmann in Ehlers/Germelmann (eds.) Europäische Grundrechte und Grundfreiheiten, 5th ed. 2023, pp. 205-207.
[195] ECJ, 12 June 2003, C-112/00 (Schmidberger), ECLI:EU:C:2003:333, para.57: "In this way the Court held in particular that, as an indispensable instrument for the realisation of a market without internal frontiers, Article 30 does not prohibit only measures emanating from the State which, in themselves, create restrictions on trade between Member States. It also applies where a Member State abstains from adopting the measures required in order to deal with obstacles to the free movement of goods which are not caused by the State."

court held in a case concerning bio-patents on human embryos: "It is for the Court of Justice, in its review of the compatibility of acts of the institutions with the general principles of Community law, to ensure that the fundamental right to human dignity and integrity is observed."[196] Concerning the freedom to conduct a business the court ruled in a case on restrictions of copyrights that it is "necessary to strike a balance, primarily, between (i) copyrights and related rights, which are intellectual property and are therefore protected under Art. 17(2) of the Charter, (ii) the freedom to conduct a business, which economic agents such as internet service providers enjoy under Art. 16 of the Charter, and (iii) the freedom of information of internet users, whose protection is ensured by Art. 11 of the Charter."[197]

In interpreting the ChFR, the CJEU could also rely on case law of Member State Courts that have recognised positive obligations to protect human health and property against environmental pollution.[198] The case law of the ECtHR concerning environmental pollution is particularly fitting in this respect.[199] Such interpretation of national and ECHR fundamental rights must be regarded as general principles that, according to Art. 6(3) TEU, are part of Union law and thus to be respected by the CJEU.[200]

Positive obligations have also been developed regarding climate change effects. The CJEU has so far refused to accept direct legal actions aiming at more ambitious EU climate legislation, but only for procedural, not for substantive reasons.[201] Nevertheless, judgments of Member State courts have broken ground: This includes the Dutch Hoge Raad in *Urgenda et al.* concerning rights

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[196] ECJ, 9 October 2001, C-377/98 (Netherlands / Parliament and Council), ECLI:EU:C:2001:523, para. 70.
[197] ECJ, 27 March 2014, C-314/12 (UPC Telekabel Wien), ECLI:EU:C:2014:192, para. 47.
[198] *Neubauer et al.*, note 142, paras. 143-181. Cf. *Thilo Marauhn*, Sicherung grund- und menschenrechtlicher Standards gegenüber neuen Gefährdungen durch private und ausländische Akteure, VVDSTrL74 (2015) pp.373-400 (38-39).
[199] See e.g. ECtHR *Hatton et al. v UK,* appl. no. 36022/97 para. 98 with further references. For an overview see Council of Europe, Manual on Human Rights and the Environment (3rd edition), Council of Europe 2022; *Natalia Kobylarz*, Balancing its way out of strong anthropocentrism: Integration of 'ecological minimum standards in the European Court of Human Rights' 'fair balance' review, (2022), available at https://ssrn.com/abstract=4093117, *Heike Krieger*, Positive Verpflichtungen unter der EMRK: Unentbehrliches Element einer gemeineuropäischen Grundrechtsdogmatik, leeres Versprechen oder Grenze der Justiziabilität? ZaöRV 74 (2014), pp. 187-213
[200] Cf. *Malu Beijer*, The limits of fundamental rights protection by the EU: the scope for the development of positive obligations, 2017.
[201] *Armando Carvalho*, note 126.

of the ECHR,[202] and the German Federal Constitutional Court in *Neubauer et al.* concerning rights of the German Basic Law.[203] The same issue will soon be answered in a number of cases pending before the ECtHR, and in particular *Schweizer Klimaseniorinnen* and *Duarte Agostinho*.[204]

2. Geographical scope of fundamental rights

With regard to the distinction between internal and external emissions, it is important to clarify to what extent fundamental rights construed as positive obligations cover both types of emissions.

First, internal emissions with internal effect, i.e. actions that have clear implications on state inventories, are covered by fundamental rights. This follows the cases cited above, including the most recent case from the Belgian courts.[205] With a view to the rights of the ChFR, this creates an obligation of the EU to protect EU citizens.

Second, external effects of internal emissions have increasingly also been accepted as included in the protective scope of fundamental rights. The German constitutional court has positively relied on the wording of fundamental rights, and particularly the obligation to protect human dignity (Art 1 German Basic Law), which does not confine the protective scope to national borders.[206] The ECJ has accepted a transnational application of both the basic freedoms of the TFEU and fundamental rights. In relation to basic freedoms the ECJ ruled, for example, that companies headquartered in Delaware can rely on the right of free movement of capital although their assets allegedly damaged were situated outside of the EU.[207] Likewise, the ECJ has accepted an external effect of fundamental rights, such as the right to free enterprise and property in a case

[202] The Hague District Court, *Urgenda v. State of the Netherlands*, 24 June 2015, ECLI:NL:RBDHA:2015:7196; The Hague Court of Appeal, *State of the Netherlands v. Urgenda*, 9 October 2018, ECLI:NL:GHDHA:2018:2610; Supreme Court of the Netherlands, *Urgenda*, note 142. For an overview, see http://climatecasechart.com/climate-change-litigation/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/.
[203] *Neubauer et al.*, note 142.
[204] See already *Klimaseniorinnen v. Switzerland*, note 157*; Duarte Agostinho*, note 166.
[205] Brussels Court of Appeal, *VZW Klimaatzaak v. Kingdom of Belgium*, 30 November 2023, https://climatecasechart.com/non-us-case/vzw-klimaatzaak-v-kingdom-of-belgium-et-al/.
[206] *Neubauer et al.*, note 142, paras. 174-175.
[207] See, e.g., ECJ, 11 September 2014, C-47/12 (Kronos International), ECLI:EU:C:2014:2200.

concerning alleged unlawful disrespect by EU institutions of WTO resolutions.[208]

The ECtHR is confronted with the issue in the *Duarte Agostinho* case pending before it. The applicants who live in Portugal allege to be harmed by emissions originating in 32 other states and causing effects to which they are exposed at home. The court is asked to extend its current case law concerning the rule that human rights are in principle confined to the jurisdiction of a state. The court has accepted jurisdiction beyond a state's territory *ratione loci* and *ratione personae*, i.e. if the state has effective control over an external area or an agent acting for it.[209] Considering the global effects of GHG emissions it is highly probable that the court will create a new case of external jurisdiction for external effects of permanent emissions regulated by a state.

Therefore, the authors consider that there is reason to expect the CJEU to apply the same approach in relation to cases arguing external harmful impact of internal emissions. In effect, this would mean that persons living outside the EU, including in the Mercosur countries, are within the protective scope of ChFR fundamental rights that may be violated by the FTA and its effects.

Third, the question of whether external emissions and sink losses incited by the FTA would fall within the geographical scope of the ChFR is still to be answered clearly by jurisprudence. As set out above, these external emissions (Scope 3) can be caused by supply push as well as demand pull. So far, courts and legal scholars have not yet consistently extended fundamental and human rights doctrine to these external emissions. The Dutch District Court at The Hague took a first step in this direction in its *Milieudefensie* case, in which the court applied rights of the ECHR in relation to emissions of Shell produced gasoline exported to other countries (Scope 3 emissions).[210] Likewise, the Norwegian Supreme Court stated that the right of individuals to a healthy

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[208] Cf. ECJ, 9 September 2008, C-120/06 P and C-121/06 P (FIAMM und FIAMM Technologies), ECLI:EU:C:2007:212, para. 183 concerning applicability of fundamental rights in case of unlawful disrespect by EU institutions of WTO resolutions.

[209] *Bankovic et al v Belgium et al*, appl. no. 52207/99, 12.12.2001; ECtHR, Practical Guide on Admissibility Criteria, 2023, paras 270-308 ; accessible at https://www.echr.coe.int/documents/d/echr/admissibility_guide_eng

[210] *Milieudefensie et al. v. Shell*, note 112. See *Verheyen/Franke*, Deliktsrechtlich begründete CO2- Reduktionspflichten von Privatunternehmen – Zum „Shell-Urteil" des Bezirksgericht Den Haag, Zeitschrift für Umweltrecht 2021, 22.

environment extends to external emissions of fossil fuel from exported Norwegian oil, even though the court only referred to effects reverted to Norway.[211] Following this Supreme Court judgment, the Oslo District Court recently confirmed that the external emissions of several fossil fuel extraction projects in Norway must be taken into account in the scope of an environmental impact assessment (EIA) under national and EU law.[212] The relevance of external emissions for an EIA was based both on a constitutional human rights provision[213] as well as on the EIA Directive of the EU.[214] As Art. 4 of the EIA Directive explicitly states that the EIA shall identify and assess the effects of a project on, *inter alia*, human beings, it has bearing on the interpretation of human rights. Comparably, the New South Wales environmental court acknowledged already in 2020 that emissions from coal exported to and burnt in foreign countries must be taken into consideration in an EIA before approval of its exploitation by the authorities.[215] The Land Court of Queensland went even further addressing human rights implications of external emissions. It argued that the approval of the exploitation of coal in Australia interferes with human rights to health, private sphere, property, children's welfare and first nation's freedoms with view to its later combustion, no matter where the combustion occurs.[216]

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[211]Supreme Court of Norway, *Greenpeace Nordic Ass'n v. Ministry of Petroleum and Energy (People v Arctic Oil)*, 22 December 2020, HR-2020-2472-P, para. 149. Contrastingly, the Appeal Court while also accepting responsibility for external emissions extended this to external effects.; cf. ibid. para. 13.
[212] *Greenpeace et al. v. Ministry of Energy*, note 114, pp. 35-51.
[213] Art. 112 of the Constitution of the Kingdom of Norway, see https://lovdata.no/dokument/NLE/lov/1814-05-17.
[214] Directive 2011/92/EU of the European Parliament and of the Council on the assessment of the effects of certain public and private projects on the environment, 13 December 2011, OJ of 28 January 2012, L 26/1.
[215] *Gloucester Resources Ltd.*, note 142, paras. 486-487: "The Rocky Hill Coal Project will result in GHG emissions. The Air Quality and Health Risk Assessment for the amended EIS estimated the Scope 1 and Scope 2 emissions to be about 1.8Mt CO2-e over the life of the mine and Scope 3 emissions to be at least 36Mt CO2-e. […] Although GRL [Gloucester Resources Ltd] submitted that Scope 3 emissions should not be considered in determining GRL's application for consent for the Rocky Hill Coal Project, I find they are relevant to be considered."
[216] Land Court of Queensland, *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* (No 6) [2022] QLC 21, https://archive.sclqld.org.au/qjudgment/2022/QLC22-021.pdf. See the summarising statement in para. 1370: "Accepting that the act of approving mining cannot be logically separated from the combustion of the coal, the ultimate decision makers do have effective control of the emissions from combustion of that coal."

We argue that the ChFR should be interpreted in a similar manner. The core criterion should be whether the external emissions are under effective control of the state of origin, or, in case the state remains passive, whether the state has the power to exert effective control. This means that external emissions caused by actions in the EU could infringe fundamental rights of the ChFR. While the external emissions of the FTA do not originate in exported coal or fuel, such as in the Norwegian and Australian cases, the situation of external emissions and losses of sinks caused by supply push and demand pull arises to a similar situation.

Overall, this means that affected persons both living within and outside the EU (internal and external effects) would fall under the protective geographical scope of ChFR fundamental rights, regardless of whether these effects on human rights result from internal emissions within the EU or from external emissions of supply push and demand pull. The entirety of the effects of the FTA would therefore be covered by the obligation to protect the respective human rights.

Having clarified the nature of rights as positive obligation and the geographical scope as extending to internal and external emissions, the analysis now proceeds to examine whether the FTA and its climate effects interfere with the pertinent fundamental rights (3.), and if so, whether such interference can be justified by preponderant public interests (4.).[217]

[217] A note on the methodology of applying positive obligations may be added. While for negative obligations two steps are distinguished, namely interference with the right and possible justification in view of overriding public interests, the methodology of applying positive obligations is not yet settled opinion. Often such obligations are regarded as an exercise of an open weighing up of various relevant interests against each other. We submit that such balancing disregards the preponderant weight of the fundamental right at stake. For this reason and for the sake of transparency it is preferable to apply the two-step procedure also for testing positive obligations. This was also suggested by ECtHR judge Wildhaber in his concurring opinion in: ECtHR, *Stjerna v Finland*, 25 November 1994, Appl. No. 18131/91. The German Federal Constitutional Court also follows this line, see, e.g., decision of 14 January 1981 (Fluglärm), BVerfGE 56, 54 (73-78, 80-86), in a case concerning airport noise. The court first discussed whether the noise is harmful for human health, and then went on to examine the duty to protect, finding that the measures taken were sufficient. In the context of this study, this means that it must first be determined whether the GHG emissions constitute an interference, and second, if public interests of rights of third persons justify a limitation. It is true, that at this second stage a weighing up of interests does apply but only after careful determination of the proper weight of the interference.

3. Interference with fundamental rights

In the framework of positive obligations concerning 'horizontal' causation of harm interference depends on (1) whether the causation indeed exists and (2) the state (or EU) is responsible for it.

Causation constituting interference depends on a number of criteria that have been phrased differently but can be summarised across legal systems as requiring personal, present and severe harm.[218]

It should be noted that in an objective evaluation of the FTA as conducted by the present study there is no need to identify individual right holders and their specific suffering, as would be required if they were to challenge the FTA in court. It is necessary and sufficient to prove that many right holders wherever they are and/or will be harmed.

On these premises all of the individual rights stated above have already been interfered with. The health of innumerable persons has been harmed by heat waves (this is now in court in the *Klimaseniorinnen* case). Many persons' occupations have been damaged by droughts (accepted in the *Neubauer* case). Many house owners have lost their houses and even lives by flooding or landslides. The land of many farmers has dried out, been salinated or washed away, and become unbearable. Most serious is the situation of children. The welfare of many of them, especially of those living in the global South, has already at present seriously been harmed, but they face a future of unbearable life conditions. This not only encroaches upon Art. 24 ChFR, but also constitutes unequal treatment because younger generations of today are discriminated against in comparison with present elder generations who have enjoyed and continue to enjoy the energy consuming Western lifestyle without much limitation.

The contribution of emissions originating in the EU (i.e. internal emissions) corresponds to the EU's share in the world wide GHG emissions, which is about

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[218] *Winter*, Human Rights and Climate Protection before the European Court of Human Rights: stare decisis or evolutive steps? Journal of Environmental Law, Mapping options for evolutive steps, 2024, under review of ZaöRV. Preprint available as FEU Arbeitspapier Nr. 16, https://www.uni-bremen.de/fileadmin/user_upload/fachbereiche/fb6/feu/FEU/Arbeitspapiere_FEU/FEU_AP16_Winter_ECtHR.pdf.

10%, to which internal sink losses and external emissions/ sink losses attributable to the EU including through the FTA would have to be added.

Responsibility of the EU for those emissions and their effects is based on a progressive construction of fundamental rights to embrace objective values that obliges the state (or EU) to engage in protective measures and endows right holders.[219] Such values include human health, occupation, property, and children's welfare. By failing to provide protection the state (or EU) is therefore an indirect cause of the interference.

It might be objected that interference should not be related to the real harm caused to human health, occupation and property but be defined as superimposed by the Paris Agreement. If that was the case it could be argued that the PA allows for an increase of emissions up to the warming up limits by 1.5°C or even "below 2°C". On that basis a global emissions budget could be compiled and allocated to states including the EU so that the EU could dispose of an own budget and argue that its emissions are covered, including additional quantities released based on the FTA. However, this must be rejected on principle. Interference with fundamental rights must be defined from the perspective of the right holder, not of international negotiations or an international treaty.

Yet, as outlined above, even if the PA and UNFCCC were accepted as providing the sole standard of care, the resulting budget for the EU would be so minimal that any additional emission sources would be prohibited.

In conclusion, any additional GHG induced by the FTA as opposed to an FTA in effect leading to a decline in emissions would constitute an interference (by omission) of the EU with all of the fundamental rights examined in this study.

4. Justification of an interference?

Concerning the public interests that may justify interferences the ECJ has held that "purely economic grounds, such as, in particular, promotion of the national economy or its proper functioning, cannot serve as justification for obstacles

[219] Such reasoning has succinctly been developed in German constitutional doctrine (*Neubauer et al.*, note 142, para. 145), but it can be transferred to ECtHR and CJEU jurisprudence, which is less sophisticated insofar.

prohibited by the Treaty".[220] Although this statement was related to interests of the national economy it can as well be applied to the EU. In simple terms, an increase in economic growth is not in itself a legitimate concern. Nevertheless, the court has acknowledged that an overriding reason could be social policy considerations promoting employment.[221]

However, it is by no means clear whether new employment will be created. It is more likely that - as a net result of the FTA- job opportunities might rather be lost, such as, for instance, farmers' loss of jobs due to the intensification of agriculture, and livelihoods of Indigenous Peoples lost due to deforestation. Job losses have been projected to amount to 186.000 in Argentina,[222] 400.000 in Brazil,[223] and 120.000 in the EU with 16.100 in agriculture, 33.800 in the food sectors and 103.400 in the services sectors. Only EU manufacturing sectors would likely see higher employment - although clear data seems scarce.

The supply of agricultural products such as soy and cattle meat imported from the Mercosur countries may be examined as another EU public interest. However, the legitimating weight of such supply would be low considering nutritional disadvantages of pork meat consumption, biodiversity loss caused by increased soy production and livestock herding, competitive stress for EU agriculture, and overproduction of livestock already existing within the EU.

Access to minerals exploited in the Mercosur states may be considered as a third public interest. However, the FTA is not "necessary" in order to reach this goal. Imports of minerals have happened and can continue to happen even without the FTA. It may be more costly due to tariff barriers but if the products remain expensive this can have an economising effect on their use.

In conclusion, it can be established that the FTA and its effects, by leading to rising GHG emissions and losses of sinks, and thus contributing to climate change rather than combatting it would violate the fundamental rights to health,

[220] ECJ, 21 December 2016, C-201/15 (AGET Iraklis), ECLI:EU:C:2016:972, para. 72.
[221] Ibid. paras. 73-78.
[222] Universidad Metropolitana para la Educación y el Trabajo, Observatorio de Empleo, Producción y Comercio Exterior, https://www.attac.at/fileadmin/user_upload/dateien/presse/downloads/ODEP_UMET__impacto_en_empleos_en_argentina.pdf.
[223] Greenpeace Germany, EU-Mercosur: Feminismus? Fehlanzeige!, 14 July 2023, ttps://www.greenpeace.de/biodiversitaet/waelder/waelder-erde/eu-mercosur-feminismus-fehlanzeige.

occupation, children's welfare, equal treatment and property as guaranteed by the ChFR.

II. Sustainability and Protection of the Global Climate

Sustainability and environmental protection are major objectives of EU policies, including of the common commercial policy and more precisely trade agreements. This was succinctly summarised by the ECJ in its Opinion 2/15 concerning the EU's agreement with Singapore.[224] The Council in its 2018 Conclusions on EU Trade Policy expressly recalls this Opinion. Therein, the Court points out the following:

> "140. As the Parliament has pointed out in its observations, the aim of those negotiations was to reach agreement on a 'new generation' free trade agreement, that is to say, a trade agreement including — in addition to the classical elements in such agreements, such as the reduction of tariff and non-tariff barriers to trade in goods and services — other aspects that are relevant, or even essential, to such trade.
>
> 141. In the case of the common commercial policy, the [TFEU] differs appreciably from the EC Treaty previously in force, in that it includes new aspects of contemporary international trade in that policy. The extension of the field of the common commercial policy by the TFEU Treaty constitutes a significant development of primary EU law (see […]).
>
> 142. One of the features of that development is the rule laid down in the second sentence of Article 207(1) TFEU that 'the common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action'. Those principles and objectives are specified in Article 21(1) and (2) TEU and, as is stated in Article 21(2)(f) TEU, relate inter alia to sustainable development linked to preservation and improvement of the quality of the environment and the sustainable management of global natural resources.
>
> 143. The obligation on the European Union to integrate those objectives and principles into the conduct of its common commercial policy is apparent from the second sentence of Article 207(1) TFEU read in conjunction with Article 21(3) TEU and Article 205 TFEU.
>
> 146. Account must, furthermore, be taken of Articles 9 and 11 TFEU, which respectively provide that, 'in defining and implementing its policies and activities, the Union shall take into account requirements linked to … the guarantee of adequate social protection' and 'environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development' (see, by analogy, […]). In addition, Article 3(5) TEU obliges the European Union to contribute, in its relations with the wider world, to 'free and fair' trade.

[224] ECJ, 16 May 2017, Opinion 2/15, ECLI:EU:C:2017:376.

> 147. It follows that the objective of sustainable development henceforth forms an integral part of the common commercial policy."
>
> (emphasis added)

It should be noted that, in this Opinion, the Court was asked to determine the exclusive or shared competence of the EU to conclude the agreement. It was not asked and did not examine whether the EU-Singapore Agreement fulfilled sustainability requirements. Yet, it determined that sustainability and environmental protection are integral parts of the new generation of trade agreements, with the consequence of exclusive competence of the Union for the agreement under scrutiny.

From the operative text of the FTA analysed above, the authors cannot conclude that sustainable development, environmental and climate protection form an integral part of the agreement. While a TSD Chapter does exist, the operative rules do not reflect any sustainability criteria. Some regional agreements have set sustainability goals more at the centre of the FTA, but that is not the case for the EU-Mercosur FTA.[225] The EU-Mercosur FTA represents a brand of trade agreements that does not belong to the 'new generation' assumed by the ECJ.

To take the analysis further, it must be determined whether the FTA and its effects not only constitutes an outdated brand but is *in substance* incompatible with the requirements of sustainability and environmental protection as established by primary EU law.

First, it is beyond doubt that environmental protection includes the protection of the climate. Art. 191 TFEU expressly lays out climate protection as an objective of environmental policy. This is so, even if objectively, climate protection has not been adequately pursued by the Union so far, considering the high level of GHG per capita and the historic responsibility for damage from climate change. So far, a 'high level of protection' as required by Art. 191 TFEU has not been achieved in or outside the EU. Rather, the massive gap identified (2.9°C world rather than holding temperature increase to 1.5°C as set by the PA) points to an insufficient level of protection. Against this backdrop, any additional major GHG emissions and sink losses would worsen the situation, at least if they are not compensated by further reductions elsewhere – which, as

[225] *Zengerling*, note 10, table at p. 26 ff.

stated above, is not perceptible in the FTA or any policy flanking it. Moreover, in the context of international treaty making, Art. 191 TFEU must be understood to extend to external emissions and sink losses controlled by the EU and possibly even by Mercosur countries. No such engagement is visible in the current text of the FTA.

Further looking at the FTA through a lens of the legal concept of sustainability, two definitions of the term are to be considered: a 'weak' concept of fair balancing of environmental, social and economic concerns versus a 'strong' concept requesting priority of environmental over social and economic concerns. EU primary law apparently alludes to the weak concept when listing the three concerns in Art. 3(3) TEU as well as in Art. 21(2) lit. d) TEU.

Yet there is a difference in the notion of sustainability in Art. 21(2) lit. d) and lit. f). Lit. d) speaks of 'sustainable economic, social and environmental development of developing countries', and lit. (f) of 'to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development.' The difference can be understood to mean that sustainability for developing states is based on the weak concept of principally equal value of economic, social and environmental concerns, allowing in specific cases even the prioritising of economic and social welfare over environmental interests. This clause might be of less importance to the founding members of Mercosur – it is unclear if all four Mercosur countries may be considered developing states or emerging economies, since there is no uniform definition.[226] Rather, they might belong to the category of emerging economies,[227] which enter into relations with the EU as partners in a mutual give and take setting. Such a setting is addressed by Art. 21(2) lit. f) TEU, which sets out the preservation and improvement of the environment as a primary objective. Sustainability appears as an attribute to the management of global natural resources and as an undefined overall goal. The entire provision therefore captures a strong concept of sustainability.

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[226] There is no list universally accepted by the UN or EU or a court regarding which states are "developing".
[227] As listed by the International Monetary Fund, see: https://www.imf.org/en/Publications/WEO/weo-database/2023/April/groups-and-aggregates#lac.

However, even if one starts from the weak concept this must be understood to support and demand a strong obligation if applied to climate change. Notably, the weak concept accepts that the balancing must be made with a longterm perspective because the concept is deeply bound to the protection of future generations. In that perspective it must be acknowledged that social welfare and economic activities will heavily be jeopardized if nature is not given priority today.

In conclusion this means that a legal act that promotes major sources of emissions and losses of sinks (external) must be qualified as unsustainable and not in line with EU primary law.

F. Compatibility of the FTA with internal policies and rules (Art. 207 (3) TFEU)

Art. 207(1) TFEU requires the Commission to follow the Council's guidance, and Art. 207(3) TFEU specifically states that "the agreements negotiated" must be "compatible with internal Union policies and rules". This is a specific form of the requirement of coherence, as can also be found in Art. 21 TEU.

Any draft agreement must thus be compatible with any of the principles and rules listed above as well as any EU secondary law adopted, for example, under Art 192 TFEU. "Rules" would thus include, for example, the EU Climate Law, referring to the global targets as set out by the Paris Agreement, as well as, for example, the aims set out in the new regulation to halt deforestation (EUDR). "Policies" would naturally include the EU's trade related policies, as Art. 207 is contained in the chapter on the CCP. An environmental policy relevant here could be the pledge to stop global deforestation made at the COP 26, the Glasgow Climate Conference[228].

Some legal scholars understand the language of Art. 207(3) to mean that an agreement shall not be negotiated and will even be void if it contradicts existing EU policies or rules. The agreement would then need to be renegotiated. The jurisprudence and majority of scholars however understand the provision as a sort of due diligence rule to procedurally alert the negotiators to possible tensions created with ordinary law, but without consequences for the agreement if they fail to do so.[229]

Against this background, a leading German commentator of the TFEU writes:

> "It is therefore correct to see in para. 3 UA para. 2 sentence 2 first of all an obligation of the Council and the Commission to compare the treaty with the status quo of the applicable Union law. This has always been a matter of course in practice, because such a stocktaking is a prerequisite for one's own conduct of negotiations and the subsequent bona fide fulfilment of the treaty as well as the avoidance of responsibility under international law. In many cases, the Council's negotiating directives for

[228] UNFCCC Conference of the Parties 26, Glasgow Leaders' Declaration on Forests and Land Use, 2 November 2021, https://ukcop26.org/glasgow-leaders-declaration-on-forests-and-land-use/. On the (lack of) progress, see European Forest Institute, https://efi.int/news/progress-glasgow-forest-declaration-impossible-without-forest-monitoring-2022-11-04.

[229] *Bungenberg*, in Pechstein et-al. (eds.), EUV/AEUV, Frankfurter Kommentar, 2017, Art. 207 para. 186.

> the Commission make explicit reference to the "relevant Union legislation in force." (translated by the authors)[230]

The authors understand Art. 207(3) TFEU as an obligation of the Council and Commission to produce and use for international negotiations only texts that are compatible with internal policies and rules. If they are incompatible they must be withdrawn.

I. Council policies, Art 207(1) TFEU

As stated above, the initial (leaked) negotiation mandate of September 1999[231] has *de facto* been supplemented by the EU Council general guidelines on bilateral trade negotiations of 2018[232] and the practices and policies outlined by the Commission in its Communication of 2021.[233] While the EU Council has been regularly informed by the Commission about its intentions to negotiate an additional instrument, no formal new mandate was issued.[234]

The 1999 mandate acknowledges "respect for democratic principles and fundamental human rights", as well as "the need to promote the economic and social progress of populations, taking into account the principle of sustainable development and environmental protection requirements". Sustainable development is mentioned twice, but there are no further requirements listed or mentioned.

In its 2018 guidelines on future trade negotiations, the Council states *inter alia* that the "need to promote EU values and standards, including the Paris Agreement on climate change and to preserve the right of governments to regulate in the public interest" must be taken into account. It also re-enforces the ECJ's reading of sustainable development being an integral part of the CCP (see already above, E.II.).

The authors read the formal mandate together with the Council's 2018 guidelines here since Art. 207(1) TFEU does not contain any formal requirements as to the form of a mandate, and it is obvious from the text of the 2018 Conclusions that the

[230] *Hahn*, in: Calliess/Ruffert (eds.), EUV/AEUV Kommentar, 2022, AEUV Art. 207 para. 111.
[231] UE-Mercosur, Directives de negociation, note 2.
[232] Council conclusions on the negotiation and conclusion of EU trade agreements, note 3.
[233] European Commission, Trade Policy Review – An Open, Sustainable and Assertive Trade Policy, 18 February 2021, COM (2021) 66 final.
[234] *Aarup*, EU-Mercosur deal faces moment of truth, Politico, 2 February 2023, https://www.politico.eu/article/eu-mercosur-deal-truth-amazon-deforestation-trade-agreement-france-emmanuel-macron/.

Council expects the Commission to follow the guidelines generically, and EU-Mercosur negotiations were not concluded in 2018.

As was analysed above, the mandate has not been followed in the current text of the FTA. The FTA does not support the aims of the Paris Agreement, infringes on human rights, and does not include sustainable development as an integral part of the text itself.

II. Trade Policies and practice

There are several "consistency issues" that could be highlighted in the context of the FTA and its impacts. Since the agreement has not been finalised, the consistency could still be ensured, for example by renegotiating or substantially changing the existing text.

While not legally binding, the European Commission has recently put forward a new communication in which it suggests how to comply with the 2018 task set by the Council by (inter alia) strengthening the implementation and enforcement of Trade and Sustainable Development (TSD) chapters of the EU's trade agreements. It states *inter alia:*

> "The EU is strongly committed to ensuring that its trade agreements foster sustainability, so that economic growth goes together with the protection of human rights, decent work, the climate and the environment, in full adherence with the Union's values and priorities".

The 2018 Council Conclusions, the 2021 Trade Policy Review and the 2022 Communication have set standards to trade agreements that the FTA currently does not meet, and are not currently reflected in a (written) mandate by the Council.

For example, in its 2021 review, the Commission states the need to "mainstream environmental sustainability aspects in the agricultural negotiations in line with the necessity of the green transition of economies"[235] This has not been done in the EU-Mercosur schedules on trade in goods or elsewhere.

In fact, in its 2021 review, the Commission set out a new approach to trade policies, and states:

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[235] European Commission, Trade Policy Review, note 233, Annex, p. 11.

> “As reflected in the European Green Deal, combatting climate change and environmental degradation is the EU’s top priority”:
>
> “In addition, they [bilateral trade agreements] provide an essential platform to engage with our partners on climate change, biodiversity, circular economy, pollution, clean energy technologies including renewable energy and energy efficiency and on the transition to sustainable food systems. And for future trade agreements, the Commission will propose a chapter on sustainable food systems. The EU will propose that the respect of the Paris Agreement be considered an essential element in future trade and investment agreements. In addition, the conclusion of trade and investment agreements with G20 countries should be based on a common ambition to achieve climate neutrality as soon as possible and in line with the recommendations of the [IPCC].[236]

This new approach is applied for example in the draft Free Trade Agreement between the European Union and New Zealand, but has not been suggested or applied in the Mercosur context. In particular, the 2021 communication calls for

- Dedicated provisions on trade and fossil fuel subsidies reform
- FTA rules that liberalise green goods and services at entry into force.
- New commitments on circular economy, deforestation, carbon pricing, and protection of marine environment.

Such rules are non-existent in the EU-Mercosur FTA.

This begs the question as to what extent new policy and practice has an influence on older trade negotiation mandates. There is nothing in the text of Art. 207(3) TFEU to indicate that there is a time-limitation on the requirement of consistency, nor is there any applicable jurisprudence.

Comparing this to the findings of the ECJ in *Air Transport of America* that “unlimited” jurisdiction to address external greenhouse gas emissions[237] (naturally confined to the particular case) it seems reasonable to assume that there is also a duty of the EU to thoroughly consider such external emissions over time.

The authors therefore consider that, due to its lack of consistency with the Council conclusions and Commission communications, the EU-Mercosur FTA currently is not in line with Art. 207(3) TFEU.

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[236] European Commission, Trade Policy Review, note 233, p. 12.
[237] ECJ, 21 December 2011, C-366/10 (Air Transport Association of America), ECLI:EU:C:2011:864.

III. European Green Deal and EU Climate Law

The FTA does not support the aims of the Green Deal and is inconsistent with the EU Climate Law.

1. EU Climate Law

Attempting to implement the Paris Agreement, the EU has set in motion the "European Green Deal" policy initiative in 2019[238], in which it sets out to make Europe the first climate neutral continent. The EU Climate Law[239], a regulation binding all Member States directly, has made this target legally binding: the Union must reach climate neutrality by 2050 in pursuit of the long-term temperature goal of 1.5°C to under 2°C of the PA (Art. 1 EU Climate Law). By 2030, net GHG emissions must be reduced by 55% compared to 1990 (Art. 4(1) EU Climate Law). Art 6(4) contains a mandatory climate consistency assessment in relation to all EU initiatives.

A whole string of related legislation on, *inter alia*, energy and transport, has been introduced or is being revised according to the "Fit for 55" package[240], as required by Art. 4(2) EU Climate Law. One of these initiatives is the restriction of the sale of vehicles with an ICE to curb CO2 emissions with a final phase out for the EU fleet in 2035.[241]

The conclusion of the FTA with the Mercosur countries can be said to be inconsistent with the EU Climate Law for the following reasons:

(1) The FTA has not been assessed as is required under Art. 6. The FTA is a measure which increases production in the EU, and could therefore be contrary

[238] European Commission, Communication 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, 11 December 2019, COM (2019) 640 final.

[239] Regulation (EU) 2021/1119 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999, 30 June 2021.

[240] European Council, European Green Deal, https://www.consilium.europa.eu/en/policies/green-deal/. See also *Schlacke et.al.*, Implementing the EU Climate Law via the Fit for 55 package, Oxford Open Energy 2022(1), p. 1.

[241] European Parliament, Revision of CO2 emission performance standards for cars and vans, as part of the European Green Deal, Legislative Train Schedule, https://www.europarl.europa.eu/legislative-train/theme-a-european-green-deal/file-co2-emission-standards-for-cars-and-vans-post-euro6vi-emission-standards. The law has been changed and is now in force with the amended Regulation (EU) 2019/631 of 17 April 2019, changed by Regulation (EU) 2023/851 of 19 April 2023).

to the climate neutrality objective as well as the EU targets for 2030 and 2040. Art. 6(4) reads:

> The Commission shall assess the consistency of any draft measure or legislative proposal, including budgetary proposals, with the climate-neutrality objective set out in Article 2(1) and the Union 2030 and 2040 climate targets before adoption, and include that assessment in any impact assessment accompanying these measures or proposals, and make the result of that assessment publicly available at the time of adoption. The Commission shall also assess whether those draft measures or legislative proposals, including budgetary proposals, are consistent with ensuring progress on adaptation as referred to in Article 5. When making its draft measures and legislative proposals, the Commission shall endeavour to align them with the objectives of this Regulation. In any case of non-alignment, the Commission shall provide the reasons as part of the consistency assessment referred to in this paragraph.

The SIA does not in fact assess the compatibility of the projected changes over time with the Union targets 2030 and 2040. The SIA still includes the old EU target (a 40% reduction by 2030 compared to 1990).[242] The FTA is a "draft measure or legislative proposal" - it will become binding after ratification, Art. 216 TFEU.

(2) The FTA runs contrary to Art. 2 EU Climate Law.

Notwithstanding any of the criticism of the methodology, the SIA itself projects an increase in "CO2 emissions in the EU by 0.03% in the long run under the conservative scenario (Table 23)".[243] As was pointed out recently by the EU advisory board on climate change, ambitious targets for 2030 and 2040 are both necessary and difficult to achieve. [244]

Art. 1 establishes that the Regulation "sets out a binding objective of climate neutrality in the Union by 2050 in pursuit of the long-term temperature goal set out in point (a) of Article 2(1) of the Paris Agreement, and provides a framework for achieving progress in pursuit of the global adaptation goal established in Article 7 of the Paris Agreement."

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[242] *Mendez-Parra et al.*, note 60, p 75.
[243] *Mendez-Parra et al.*, note 60, p 86.
[244] European Scientific Advisory Board on Climate Change, Scientific advice for the determination of an EU-wide 2040 climate target and a greenhouse gas budget for 2030–2050, https://climate-advisory-board.europa.eu.

The EU Climate Law includes a binding Union target of a net domestic reduction in greenhouse gas emissions for 2030 of 55% reduction compared to 1990 (Art. 4(1)) and refers to a carbon budget, which is to be set in accordance with Art. 4 et. seq. and which is to be translated into a domestic reduction target for 2040.

This, according to the scientific assessment, means that the EU must keep within a limit of 11 to 14 Gt CO2 between 2030 and 2050. This means in turn that emissions must be reduced by 90-95% by 2040 relative to 1990. Current projections are not in line with either the 2030 or such a 2040 target, and strict measures are necessary (new and old legal and budgetary instruments) to achieve this – and thus to ensure compliance with the EU Climate Law. An increase in GHG emissions, due to whichever instrument or legal act, is objectively inconsistent.

The EU Climate law is only directly concerned with internal EU emissions, i.e. emissions which occur within the EU territory (and some categories of transport emissions). Yet, the application of the EU Climate Law requires taking into account the implementation of the global target ("international developments and efforts undertaken to achieve the long-term objectives of the Paris Agreement and the ultimate objective of the UNFCCC, Art. 4 Para 5 l) and indeed the entire Regulation is based on a fair contribution to the goals of the Paris Agreement (Art 1 and preamble para.1).

Therefore, the projected impacts of the FTA outside of the EU, including deforestation, are also inconsistent with the EU Climate Law.

2. Glasgow Declaration

Related to the Green Deal transformation efforts are several current attempts to influence human rights, climate and biodiversity related activities outside of the EU. A directive on corporate due diligence is still under negotiation[245], to supplement other forest and biodiversity related internal rules with external effects. In line with are several policies on the UNFCCC level:

[245] See European Parliament, Corporate due diligence and corporate accountability, Legislative Train Schedule, https://www.europarl.europa.eu/legislative-train/theme-an-economy-that-works-for-people/file-corporate-due-diligence.

In 2021, 141 countries including the EU signed the Glasgow Leaders' Declaration on Forests and Land Use. The signatories commit to collectively "halt and reverse forest loss and land degradation by 2030 while delivering sustainable development". The declaration recognizes that land use and land management are responsible for an estimated 23% of global anthropogenic greenhouse gas emissions and that any plausible scenario to limit global warming to 1.5°C by 2100 must maintain and expand tree cover.

As this agreement is a trade agreement, and not an environmental agreement, it does not contain operative rules on deforestation. The TSD Chapter contains Art. 8, which is entitled "Trade and Sustainable Management of Forests", in which Parties "recognise the importance of sustainable forest management and the role of trade in pursuing this objective and of forest restoration for conservation and sustainable use" and shall "encourage trade in products from sustainably managed forests harvested in accordance with the law of the country of harvest". In addition, Art. 13 states that Parties "recognise the importance of working together in order to achieve the objectives of this Chapter. They may work together on […] (n) the promotion of the conservation and sustainable management of forests with a view to reducing deforestation and illegal logging, as referred to in Article 8." Recognising and encouraging are weak commitments that are practically unenforceable.

There is no indication that the FTA will work to promote the aims of the Glasgow deforestation commitment, but acts rather contrary to it.

G. Conclusion

The FTA is a trade agreement of the past: According to the EU Commission's own assessment, it will lead to increases in GHG emissions rather than contribute to climate mitigation and the protection of carbon sinks. Given the current projections of the world on the way to a 2.9°C temperature increase compared to pre-industrial levels, concluding a trade agreement that would lead to emissions increases both in and outside of the EU as well as losses of carbon sinks and detrimental effects on biodiversity is legally unacceptable.

For the legal analysis, different types of emissions and sink losses had to be distinguished, to describe the activity or omission on which responsibility of states can be based across the causal chain.

With respect to emissions caused by the EU, these are:

- GHG emissions within the EU due to growth in automobile manufacture, intensified agriculture and chemicals production (*'EU internal emissions'*, also called Scope 1 and 2 emissions)
- GHG emissions and loss of sinks outside the EU territory but caused by the EU (*'EU external emissions and sink loss'*), due to
    - growth in exported products (exhaust from imported automobiles, intensified agriculture due to imported agrochemicals) ('*EU supply push'*, Scope 3 emissions)
    - growth in the production of goods created by EU demand (intensified agriculture and ecosystem conversion for production of feed and meat for export, minerals exploitation) (*'EU demand pull',* also Scope 3 emissions)

Due to the global nature of climate change, all of these emissions will have both internal (only EU citizens and territory) and external effects with regard to climate impacts.

According to the present legal analysis, the current version of the EU-Mercosur FTA cannot be signed or ratified by the EU institutions: The FTA infringes the EU's obligations under international law, and particularly the UN climate regime.

With respect to EU *internal emissions*, the analysis comes to the following conclusion: While it cannot be stated that current NDC of the EU and Mercosur states under the PA will be failed due to the FTA, the EU does not fulfil its obligations to reduce emissions. Assuming a 1.5°C global temperature limit as

foreseen by the PA, the EU's carbon budget is exceeded. Even assuming that the IPCC modelled pathways would concretise the EU's obligations, the EU is not in line with adequate reduction commitments.

With regard to *internal* and *external emissions*, the authors find that the international law rule of "no harm" is infringed if the EU concludes and implements the FTA. The no harm rule is a due diligence obligation and by concluding the FTA, the EU does not take the necessary steps it can to reduce emissions and keep temperature increase to the levels specified in treaty law.

The FTA is also not in compliance with EU primary law, i.e. the EU Treaties and the ChFR. Climate change and its effects are already affecting the fundamental rights to health, occupation, children's welfare, equal treatment and property as guaranteed by the ChFR. This has generally been accepted both by international bodies and tribunals as well as national courts. While there is little case law mapping the doctrinal content and scope of the fundamental rights under the ChFR, the authors find that there is a dimension of "duty to protect" which covers both citizens inside and outside of the EU and both *internal emissions* and *external emissions*. The standard of care for the EU would be similar to what is reflected in international law. There is no room for emission increases under any of the applicable standards.

The FTA is also not in compliance with the primary law aim of supporting sustainable development as stated in Art. 21 TEU.

Regarding the negotiation process, the FTA is inconsistent with Art. 207(3) TFEU, as it is inconsistent with trade policies and other rules and policies of the EU. The FTA is inconsistent with EU secondary law such as the EU Climate Law. In particular, the impact of the FTA has not been assessed in accordance with Art. 6 of the EU Climate Law (climate assessment).

Amending the TSD chapter alone will not remedy this. Significant renegotiations would be needed to ensure that trade goals, climate protection and sustainable development are aligned.