

EU-Mercosur Free Trade Agreement

LEGAL Q&A

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Note

This Q&A focuses on the [text of the trade agreement](#), which was agreed “in principle” in June 2019 by the European Commission and the four Mercosur countries (Brazil, Argentina, Uruguay and Paraguay). Each reference below to the “agreement” only refers to the EU-Mercosur trade agreement. The trade agreement is part of an Association Agreement which will also cover political dialogue and cooperation.

The Q&A is based on a technical analysis by Ciaran Cross and Thomas Fritz (available on request).

List of abbreviations

AA	Association Agreement
BRF	Brasil Foods, one of the world's biggest food companies
CBD	United Nations Convention on Biological Diversity
CAFTA	Central America Free Trade Agreement (US-Central America)
CETA	Comprehensive Economic and Trade Agreement (EU-Canada)
CJEU	Court of Justice of the European Union
DAG	Domestic Advisory Group, civil society representative body
EP	European Parliament
EU	European Union
FAO	United Nations Food and Agriculture Organization
FPIC	Free, Prior and Informed Consent
FTA	Free Trade Agreement
GMO	Genetically Modified Organism
HRIA	Human Rights Impact Assessment
ICTUR	International Centre for Trade Union Rights
ILO	International Labour Organization
ITUC	International Trade Union Confederation
JBS	José Batista Sobrinho, world's largest meat producer
JEFTA	Japan-EU Free Trade Agreement
Mercosur	Southern Common Market: South American trade bloc made up of Brazil, Argentina, Uruguay and Paraguay
SDG(s)	Sustainable Development Goal(s)
SIA	Sustainability Impact Assessment
SPS	Sanitary and Phytosanitary [measures]
TFEU	Treaty on the Functioning of the European Union
TSD	Trade and Sustainable Development
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNFCCC	United Nations Framework Convention on Climate Change
WTO	World Trade Organization

1. GENERAL QUESTIONS

○ What is the EU-Mercosur trade agreement and why should we care?

This trade agreement is part of a wider Association Agreement which covers three pillars: trade, political dialogue and cooperation. The political dialogue and cooperation pillars are partly agreed¹, partly still being negotiated, and we have almost no information about what will be in these sections (even the mandate for these negotiations was secret until it was [leaked](#) twenty years after it was approved).

The EU and Mercosur countries want to maximise access to each other's markets and to increase exports. The European Union's focus is on gaining market access for cars, car parts, machinery, chemicals, beverages, and services (including financial services), among others. The EU wants tariffs to be eliminated and it wants access for European companies to bid on procurement contracts at local level, including for contracts with big municipalities or federal states.

In return, the EU is offering Mercosur countries more market access for beef, poultry meat, sugar, ethanol for biofuels, rice, juices and other agricultural products. Increasing the trade in agricultural commodities will exacerbate the climate crisis and biodiversity loss, especially through deforestation, but also increased pesticide use.

Cattle is the biggest driver of deforestation in the Amazon, with 63% of deforested areas occupied by animal pastures. Almost eight thousand square kilometers of the Brazilian Amazon was destroyed in 2018.

The trade agreement will increase exports of pesticides from the EU (including ones that cannot be used legally in the EU) to Mercosur countries. Crops that have been sprayed with these pesticides can then be exported to the EU. And to close this vicious trade cycle, once animals in Europe are fed with these crops

from Mercosur, the EU will increase exports of dairy products (among others) to Mercosur, thus increasing climate emissions by shipping products that could be produced and consumed locally.

While EU standards on what is allowed for sale in the EU will not technically change, import controls will be lowered and exporters will be allowed to self-certify that they follow EU policy on things such as pesticide residue and growth hormones. Exporters will be notified at least 60 working days in advance of any import checks.²

○ Could this agreement still change?

Yes. It is currently (March 2020) undergoing 'legal scrubbing', which is officially meant to fix typos and legal ambiguities. However, during CETA's legal scrubbing, [19% of the agreement changed](#).

This legal scrubbing is expected to take at least until spring 2020.

○ What happens after the legal scrubbing?

After all changes have been made, the agreement will be translated into the 23 official EU languages, and sent to the European Council for approval. Because this agreement is (still) a [mixed agreement](#) – of mixed EU and national competence –, the Council's vote must be unanimous. Only after it passes in the Council will it be submitted to the European Parliament for its consent.

The European Council can still modify the decision-making process regarding this agreement to make it of EU-competence only, meaning it would only require [qualified majority](#) approval in the Council³ and would allow the provisional application of the trade part of the agreement.

¹ According to the [Legislative Train Schedule of the EU-Mercosur Association Agreement](#) (AA) the parts on political dialogue and cooperation were agreed upon in June 2018, but are [not publicly available as we write](#).

² Dr. Luciana Ghiotto and Dr. Javier Echaide, 2020, "[Analysis of the Agreement between the European Union and the Mercosur](#)".

³ "The Council notes that in the future the Commission intends to recommend draft negotiating directives for FTAs covering exclusive EU competence on the one hand and separate mixed investment agreements on the other, with a view to strengthening the EU's position as a negotiating partner. It is for the Council to decide whether to open negotiations on this basis. It is equally for the Council to decide, on a case-by-case basis, on the splitting of trade agreements. Depending on their content, association agreements should be mixed. The ones that are currently being negotiated, such as with Mexico, Mercosur and Chile, will remain mixed agreements." [Council of the EU, Press release 22 May 2018: New approach on negotiating and concluding EU trade agreements adopted by Council](#).

2. PRECAUTIONARY PRINCIPLE

○ What is the precautionary principle as understood in EU law?

The precautionary principle entails that where there is uncertainty about the existence or extent of risks to health, the environment and labour rights, protective measures may be taken without having to wait until the risks become fully apparent. Where it proves impossible to determine with certainty the existence or extent of the alleged risk because the evidence is inconclusive, but the likelihood of real harm to public health persists should the risk materialise, the precautionary principle justifies the adoption of restrictive measures.⁴

On an international level, the precautionary principle was first recognized in the World Charter for Nature, adopted by the UN General Assembly in 1982. It was subsequently incorporated into various international conventions on the protection of the environment.

It has been a leading principle for EU environment policy since the Maastricht Treaty (1992): *“Although the Precautionary Principle is not explicitly mentioned in the [Maastricht] Treaty except in the environmental field, its scope is far wider and covers those specific circumstances where scientific evidence is insufficient, inconclusive or uncertain and there are indications through preliminary objective scientific evaluation that there are reasonable grounds for concern that the potentially dangerous effects on the environment, human, animal or plant health may be inconsistent with the chosen level of protection,”* wrote the European Commission in 2000.⁵ Enshrined in Article 191 of the TFEU, the [precautionary principle](#) is the basis of many legislative acts covering food, chemicals and pesticides.

○ Is the precautionary principle, as enshrined in EU Treaties, protected in the agreement?

No. The only mention in the agreement’s TSD chapter is unenforceable, as explained below. There are also no references to the precautionary principle in the agreement’s SPS chapter, as defined in Article 191 of the TFEU – even if the EU Commission claims the opposite.⁶

The SPS chapter’s Article 11(f) only refers to the adoption of provisional measures⁷ *“where relevant scientific evidence is insufficient”*.

This provision fails to reflect the role that the precautionary principle has in the EU system: indeed, provisional measures are by nature exceptional and temporary and are meant to address situations of urgency or emergency until scientific information is available. The burden of proof on the necessity and appropriateness of provisional measures falls on the authority that adopts them (and this is reflected in the text of the SPS chapter).

By contrast, the precautionary principle informs the way EU authorities ordinarily handle hazards and risks. Measures adopted on the basis of the precautionary principle (for example a ban on certain pesticides, chemical substances or on GMOs) are not temporary but permanent. They are justified if economic operators meet the burden of proof that a substance or an organism is safe or otherwise meets the requirements imposed by the law.

Here is what the Court of Justice says:

The precautionary principle *“entails that where there is uncertainty as to the existence or extent of risks to human health, protective measures may be taken without having to wait until the reality and seriousness of those*

⁴ European Court of Justice, [Case C-616/17 Blaise et al.](#) Paragraph 42.

⁵ Commission of the European Communities: COMMUNICATION FROM THE EUROPEAN COMMISSION ON THE PRECAUTIONARY PRINCIPLE. Brussels, 2 February 2000, Com 2000 1 final. <https://op.europa.eu/en/publication-detail/-/publication/21676661-a79f-4153-b984-aeb28f07c80a/language-en>.

⁶ [“Food safety, animal and plant health”](#): *The ambitious chapter on Sanitary and Phytosanitary (SPS) matters, which covers, food safety, and animal and plant health, will uphold our highest standards. Nothing in the agreement changes the way the EU adopts and enforces its food safety rules, be it for domestically produced or imported products. The agreement also explicitly upholds the ‘precautionary principle’, meaning that public authorities have a legal right to act to protect human, animal or plant health, or the environment, in the face of a perceived risk even when scientific analysis is not conclusive...*

⁷ Provisional measures are adopted, as the words suggests, for a limited period of time, with a view to adopt definitive measures. In principle, precautionary measures have unlimited validity and can only be reversed by providing evidence of the absence of risk.

risks become fully apparent. Where it proves to be impossible to determine with certainty the existence or extent of the alleged risk because the results of studies conducted are inconclusive, but the likelihood of real harm to public health persists should the risk materialise, the precautionary principle justifies the adoption of restrictive measures.”⁸

The objective of the SPS chapter is to ensure “that SPS measures do not create unjustified barriers to trade” (article 1), prioritising trade facilitation over human and environmental protection. SPS measures cover a broad range of regulations affecting human, animal or plant health, including laws governing food safety, pesticide residues, agricultural biotechnology and animal welfare.

The chapter on TSD expressly allows “measures based on the precautionary principle” (Article 10). It is the only part of the trade agreement featuring the precautionary principle.

However, this chapter is excluded from the agreement’s main enforcement mechanism. The chapter’s Article 15.5 stipulates that no party shall have recourse to the agreement’s (state-to-state) dispute settlement mechanism “for any matter arising under this Chapter”. In other words, the chapter is unenforceable, unlike the overwhelming rest⁹ of the agreement (see below for more on this).

Adding insult to injury, the TSD chapter limits the application of the precautionary principle to risks of environmental degradation and of occupational health. Conversely, risks to human, animal and plant health covered by the SPS chapter appear to remain outside the scope of the TSD chapter.

○ Does this mean the trade deal makes it impossible to apply EU law and the precautionary principle?

Yes. Valeria Csukasi, Director-General for Health Affairs, Integration and Mercosur for the government of Uruguay, [said](#) that Mercosur officials successfully diluted the precautionary principle in the SPS chapter, “nullifying the possibility of applying it in cases involving pesticides”, sidelining it to the TSD chapter, which contains no reference to “human health or plant health”, and thus “cannot be invoked to prevent the entry of food that threatens human health”. Csukasi

further claimed that the TSD Chapter “is a declarative chapter, which is not even subject to dispute settlement. That is, this agreement cannot be triggered to comply with any measure. You could not say: ‘I will suspend [trade] preferences for Mercosur – and Brazil in particular – because they are deforesting the Amazon. This is not possible today because it is not foreseen within that agreement.” Csukasi makes the additional point that the FTA does not preclude Mercosur states from bringing a dispute over SPS measures to the WTO.

There is also no reference in the TSD or SPS chapters to the Cartagena Protocol, under the Convention on Biodiversity, which includes the precautionary principle as enshrined in the Rio Declaration.

From earlier drafts it is evident that the EU never proposed inclusion of the precautionary principle during negotiations.¹⁰

○ Are there any safeguards in the SPS chapter?

The agreement sets a very low bar indeed. Not only can the EU not use the precautionary principle as recognised in EU law, the European Commission negotiators also agreed to use the WTO’s more restrictive requirements related to regulating sanitary and phytosanitary issues.

The SPS chapter effectively incorporates the WTO’s restrictive SPS agreement (Article 4) and its risk-based approach to regulation.

The problem is that a risk-based approach is a limitation of the precautionary principle. For example, even if regulators know that there is a problem with a chemical, if the risk is not deemed to be high enough, regulators do not need to take action (as opposed to a hazard-based approach, where if they know there is a problem, they have to take action regardless of the level of risk).

The WTO agreement generally only permits regulatory measures which are a) “based on scientific principles”, b) “necessary” to fulfill their claimed objective and c) do not constitute “a disguised restriction on international trade”. In cases where scientific evidence is insufficient, but there is a serious risk that a product or practice could be harmful, a WTO member may only “provisionally” apply SPS measures and must

⁸ Judgement of the Court of Justice of 1 October 2019 ([Case C-616/17 Blaise et al.](#)), para.43.

⁹ There are only two chapters of the agreement excluded from the state to state dispute settlement mechanism. These are the chapters on Trade and Sustainable Development and the Chapter on Small and Medium-Sized Enterprises.

¹⁰ See [Research on the impacts of the EU-Mercosur trade negotiations](#), Thomas Fritz, 1 December 2017; [EU-Mercosur association agreement: The SPS and sustainability chapters in the Uruguay leaks](#), Thomas Fritz, 19 January 2018; and [EU-Mercosur FTA: An assessment of the trade and sustainable development chapter](#), Ciaran Cross, 1 December 2017.

provide additional information enabling “a more objective assessment” [of the particular risk](#). Under this approach, the burden of proof on the necessity and appropriateness of a measure (which is only authorised insofar as it is provisional) is on the authority that adopts it.

On the contrary, when the precautionary principle is applied, authorities are allowed to apply restrictive measures to protect health and the environment until those wishing to carry out hazardous activities have provided scientific information on the compliance with safety standards for health and environment as provided for by the law.

The EU has already lost two WTO disputes involving the precautionary principle. The first case concerned the EU’s import ban on [beef treated with growth hormones](#), the second one its de facto moratorium on the approval of [GMOs for cultivation](#). Both disputes were filed by the United States government, with all four Mercosur members joining the complaint as third parties.

Under the TSD chapter, precautionary measures may be invoked where there is “*risk of serious environmental degradation or to occupational health and safety in its territory*” (Article 10.2). This is an undue and damaging limitation: the precautionary principle in the EU covers and protects human health and the environment without qualification (notably, not only occupational health but everyone’s health). Inexplicably, the Commission has accepted to have a limited version of the principle included in a chapter that is in any event unenforceable. This is not an acceptable way to protect the public interest in trade negotiations.

Given the likelihood for environmental damage or pollution to cross borders, this is a particularly unhelpful addition. The climate crisis is global and the EU must not be limited in its responses, particularly when its policies and trade have an impact well beyond its borders.

3. TRADE AND SUSTAINABLE DEVELOPMENT CHAPTER

○ **Deforestation is a major issue in Mercosur countries – does this chapter address that?**

The TSD chapter includes provisions on Trade and Climate Change (Article 6), Trade and Biodiversity (Article 7), Trade and Sustainable Management of Forests (Article 8), Trade and Sustainable Management of Fisheries and Aquaculture (Article 9) and Trade and Responsible Management of Supply Chains (Article 11). But the commitments contained here are very weak when it comes to forest protection. For example, the only obligation requires Parties to the agreement to merely “*implement measures to combat illegal logging and related trade*” (Article 8.2(c)) (despite the absence

of an enforcement mechanism). All other provisions on forest management are vague and not legally enforceable (i.e. encouraging “*cooperation*” or “*promotion*”).

○ **Does the chapter do anything to protect the rights of Indigenous Peoples?**

The sole references to matters concerning Indigenous Peoples are in two articles on Biodiversity and Forest Management (Arts. 7.2(d) and 8.2(b)). In spite of the fact that some [two million Indigenous Peoples live in Mercosur countries](#), and the fact that *all Parties to the FTA* supported the adoption of the [United Nations](#)

[Declaration on the Rights of Indigenous Peoples \(UNDRIP\)](#) in 2007, the issue is ignored in the TSD Chapter. In addition, the TSD chapter does not make any reference to human rights issues.

The UNDRIP seeks to guarantee Indigenous Peoples' rights over the land they live on.¹¹ In the TSD Chapter, the UNDRIP's core principle of 'free, prior and informed consent'¹² (FPIC) is reduced to 'prior informed consent'. It furthermore assumes that the "inclusion" of Indigenous Peoples' in transnational "supply chains of timber and non-timber forest products" is by definition the most appropriate or desirable means of "enhancing their livelihoods" and "promoting the conservation and sustainable use of forests". This is an alarming presumption, not only because the European Commission has made no effort to ensure that these groups have been consulted on the FTA's actual content,¹³ but also because the Commission did not wait for the completion of its own Sustainability Impact Assessment before concluding negotiations (see below for more on this).

○ What about labour rights in this chapter?

The Article on Multilateral Labour Standards and Agreements lays out the FTA Parties' "reaffirmation" of internationally recognised core labour standards, and commits them to "respect, promote and effectively implement" these standards (Article 4.3), to ratify fundamental ILO Conventions, Protocols, as well as future, relevant or "up-to-date" Conventions (Article 4.4). It specifically requires the ratification and implementation of the 2014 Protocol to the Forced Labour Convention (Article 4.5).

However, similarly to most environmental provisions, these are unenforceable obligations. Ratification or implementation of the Conventions is not a requirement for the FTA to come into force. Argentina is the only Mercosur country to have ratified the [Protocol to the Forced Labour Convention](#) (in 2016). Brazil is also yet to ratify the ILO Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

No lessons have been drawn from experiences with South Korea's failure to ratify the fundamental ILO Conventions – despite a commitment to do so in its free trade agreement with the EU (provisionally applied since 2011, ratified in 2015).¹⁴

The [ITUC Global Rights Index 2019](#) identifies "systemic violations of rights" in both Paraguay and Argentina; Brazil is characterised as having "no guarantee of rights". A [2018 investigation uncovered potential links between forced labour in Paraguay and the supply chains of BMW, Citroën, Peugeot and Renault](#). Bolsonaro has [defended child labour](#), taken aim at the country's anti-slavery policies, and dismantled Brazil's [labour ministry](#).

Brazil's compliance with the TSD Chapter's Article 4.11 (under which Parties commit to "ensure that judicial and administrative proceedings are available and accessible in order to permit effective action to be taken against infringements of labour rights") is significantly impaired, and the current administration shows no intention of complying with these obligations.

¹¹ In particular UNDRIP Article 32, also Articles 10, 19, 28(1), 29(2)

¹² See Article 7.2(d): "promote the fair and equitable sharing of benefits arising from the use of genetic resources and, where appropriate, measures for access to such resources and prior informed consent." And Article 8.2(b): "... promote, as appropriate and with their prior informed consent, the inclusion of forest-based local communities and indigenous peoples in sustainable supply chains of timber and non-timber forest products, as a means of enhancing their livelihoods and of promoting the conservation and sustainable use of forests."

¹³ In this respect, it is worth recalling the Commission's response to recent ECJ judgments concerning the application of EU agreements with Morocco over Western Sahara. Mandated to ensure that the population of Western Sahara consented to such application, the Commission commented that the ECJ had not stipulated 'how' such consent should be determined. It then conducted a consultation that was widely derided as a sham and boycotted by 89 organisations. The Commission concluded that there was sufficient approval for the application of EU-Morocco agreements over Moroccan-occupied Western Sahara. See C. Cross: Silencing the Saharawi: Legal Fiction and Real Plunder in Africa's Last Colony. [International Union Rights, Volume 25 Issue 4](#) 2018.

¹⁴ The European Commission only initiated consultations with South Korea over these failures in December 2018, despite a host of labour rights violations being brought to its attention over many years by the trade union movement and the free trade agreement's domestic advisory group. In 2019, South Korean unions complained that progress towards ratification of the ILO Conventions has been co-opted by employer groups and that the legal reforms around ratification will weaken domestic labour protection. See M. Ryu, [Ratification of C87 and C98: A means of regression? International Union Rights](#). Volume 26 Issue 3 2019. According to [procedural information related to EU-Korea dispute settlement on Labour](#), published on 19 December 2019, a panel of experts started its work on 30 December 2019 and should present its report to the parties by the end of March 2020.

○ **Isn't there a dispute resolution process for the TSD chapter? Wouldn't that make it enforceable?**

Unfortunately, while there is a dispute resolution process for the TSD chapter, it is so weak, it would do nothing to enforce the chapter.

The process involves two stages of consultations (Article 16) and the establishment of a “*Panel of Experts*” (Article 17) if the consultation process fails. The timeframe for both these stages may be extended by mutual agreement of the parties (Article 15.2).

The consultations are aimed at a mutually satisfactory resolution (Article 16.3). But if the issue cannot be resolved to the satisfaction of both parties, it will be escalated to the Panel of Experts. These experts will issue a report and recommendations, which the Parties must take into account when discussing the implementation of appropriate measures (Article 17.11). This report must be made public (Article 17.10), but has no binding effect on the Parties or on what measures should be taken to remedy the dispute.

This dispute resolution process is not an “*effective deterrent measure*”, as requested by the European Parliament in its 2016 resolution (see [here](#) and below¹⁵).

And even if the dispute resolution process were strong, it would be difficult to prove that any weak obligations were violated. For example, Article 11 offers nothing concrete on the accountability of economic actors. It merely commits Parties to promote “*the voluntary uptake by companies of corporate social responsibility or responsible business practices*” (Article 11.2(b)).

○ **This dispute resolution process doesn't exclude reduction or suspension of trade benefits, or fines. Could that still happen?**

The Court of Justice of the European Union (CJEU), in its [Opinion 2/15 on the EU-Singapore Free Trade Agreement](#), said that the EU is already entitled to suspend trade commitments in the event of a breach of environmental and labour provisions undertaken in its FTAs (paragraph 161). But it is hard to imagine that the EU would do that, as it would need a Commission proposal, and a qualified majority decision in the Council (55% of EU governments representing 65% of the EU's population) to approve such a suspension. This has only happened once, in relation to the non-economic aspects of the EU's trade agreement with Syria.¹⁶

While giving the TSD chapter ‘teeth’ is an important step, it would be largely symbolic as long as meaningful action remains so unlikely. Beyond an enforceable TSD chapter, the EU should never enter into a free trade agreement unless there are clear mechanisms to bind the Commission to take action in case of a breach.

○ **The European Commission said that the EU-Mercosur agreement gives civil society an “active” and “prominent” role in the agreement’s “implementation, including on the provisions on trade and sustainable development”. Is this true?**

According to the Commission, the TSD chapter commits Parties to keep civil society “*informed of how they are implementing the agreement*” and that “*civil society groups will be able to voice their views and provide input to discussions on how the trade part of the agreement is being implemented*”.¹⁷

But these provisions on civil society in the TSD chapter are largely incomplete and contain placeholder

¹⁵ This statement was reconfirmed in the recent [European Parliament resolution of 15 January 2020 on the European Green Deal \(2019/2956\(RSP\)\)](#): Article 110 “*highlights that trade can be an important tool to promote sustainable development and to help fight climate change; believes that the European Green Deal should ensure that all international trade and investment agreements include strong, binding and enforceable sustainable development chapters, including on the climate and the environment, that fully respect international commitments, in particular the Paris Agreement, and are compliant with WTO rules; welcomes the Commission's intention to make the Paris Agreement an essential element of all future trade and investment agreements and to ensure that all chemicals, materials, food and other products placed on the European market fully comply with relevant EU regulations and standards;...*”

¹⁶ According to the [EU Commission](#) the “[b]ilateral EU-Syria relations are governed by the Cooperation Agreement signed in 1977 but is currently suspended as regards trade in crude oil, petroleum products, gold, precious metals and diamonds. Syria and the EU have negotiated an Association Agreement. However, the signature of the Association Agreement between the EU and Syria has been put on hold by the EU due to the internal situation in Syria and with time the legal texts of the agreement have become obsolete. The ongoing internal repression in Syria has also led to restrictive measures by the EU and has a significant impact on bilateral trade”.

¹⁷ European Commission: Key elements of the EU-Mercosur trade agreement. Questions and answers. Brussels, 28 June 2019. https://ec.europa.eu/commission/presscorner/detail/en/QANDA_19_3375

text (Arts. 14.3(c), 16.6, 17.11). The provisions refer to “domestic advisory groups set up under the Agreement” and a “[civil society mechanism], referred to in Article ... of Chapter ... [general institutional provisions]”¹⁸. The European Commission and the Mercosur countries have agreed to an unfinished and therefore meaningless text.

The only defined functions are that civil society groups may “make recommendations to the Trade Committee” [presumably the TSD Sub-Committee] (Article 14.3(c)). During consultations, the TSD Sub-Committee “shall take into account any such views” (Article 16.6), publish a report and inform its civil society domestic advisory group of its decisions (Article 17.11). Civil society groups may also submit “observations” to the TSD Sub-Committee’s decisions (Article 17.11). An additional provision on transparency is weak on detail: requiring Parties only to ensure that the “development, enactment and implementation” of measures that have environmental or labour aspects are “done in a transparent manner...” (Article 3.1).

Put simply, civil society is accorded only some vague consultative status – fed some information and allowed to speak at some point, with no guarantee that it will be heard. If other provisions do exist, they are yet to be published: no further detail is included on the constitutions, mandates, rights or resources of the Sub-Committee.

○ What does the European Parliament say about civil society participation?

In 2016, the EP passed a resolution requesting for “sustainable development forums or advisory groups to be set up at the various stages of drafting, negotiating and implementing an agreement” (para. 22 and (c)). It said these groups should be “independent” and with adequate resources.

But the TSD Sub-Committee to which civil society groups are permitted to make recommendations (under Article 14.3(c)) is only obliged to meet within one year of the FTA’s entry into force and “thereafter as necessary in accordance with... [Institutional provisions...]” which are yet to be drafted (Article 14.2). The same Parliament resolution also said that EU free trade agreements should provide avenues “to appeal and seek redress through a complaints procedure for social partners and civil society” (para. 21(c)). The introduction of an avenue for redress that can be initiated

by civil society actors has arisen in the face of obvious reluctance from states to initiate dispute resolution mechanisms even in instances of widespread violations of labour or environmental commitments. The dearth of labour and environmental disputes arising from free trade agreements is a strong indication that Parties to FTAs are determined to avoid challenges.¹⁹

The FTA clearly does not meet the expectations of the European Parliament in terms of transparency and democratic participation. It follows in the footsteps of the EU-Japan deal (JEFTA) and the Commission’s “gold standard” trade agreement, CETA, the agreement with Canada.

○ Does this trade agreement recognise the Paris climate agreement?

As explained above, the TSD chapter doesn’t have any mechanism to enforce the commitments laid out in this chapter. It is also totally unclear what would happen if one party justified trade-restrictive measures to protect the environment. Could they be successfully challenged by other parties in the agreement?

The Paris Agreement is a good example of this. In Article 6.2(a) – the strongest of the climate change provisions – each Party shall “effectively implement the UNFCCC and the Paris Agreement established thereunder”. But this single provision has no mechanism to meaningfully enforce it, particularly since, as we have said, the TSD chapter is unenforceable.

The exclusion of the entire TSD Chapter from the FTA’s dispute settlement mechanism also raises questions as to how such potential conflicts would be adjudicated. This brief and vague commitment does not offer much reassurance.

¹⁸ The general institutional provisions are not yet published.

¹⁹ The US-Guatemala case brought under CAFTA is the only labour dispute to proceed to the final stages of an FTA’s dispute resolution mechanism (in this case, arbitration proceedings). After nearly a decade of delay, the arbitration found no breach of Guatemala’s commitments under the FTA. See, C. Cross, [Legitimising an unsustainable approach to trade: A discussion paper on sustainable development provisions in EU Free Trade Agreements](#).

4. RIGHT TO REGULATE

○ Is the right to regulate protected in the agreement?

The TSD Chapter provides little in the way of an effective or enforceable right to regulate. Most of the relevant provisions are weakly constructed or contain caveats. For example, the Parties *“recognise the right of each 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”*, consistent with their respective international commitments (Art 2.1). Each Party *“shall strive to improve its relevant laws and policies...”* (Article 2.2). Committing to recognise or strive for something is not exactly the strong and enforceable language needed to protect the right to regulate.

The provisions do contain somewhat stronger commitments for the Parties not to *“weaken”* (Article 2.3), *“waive or derogate from”* (Article 2.4), or *“through a sustained or recurring course of action or inaction, fail to effectively enforce”* (Article 2.5) their respective environmental or labour laws.

Similar provisions were included in CETA (Article 24.5), and the EU-Mercosur agreement follows CETA's approach: each of these commitments contains the proviso that Parties must not lower such protection with the intention of encouraging trade or investment. What is unclear is how you would prove that intention.

Furthermore, these commitments are not subject to any enforceable mechanism, as the TSD chapter is excluded from the agreement's dispute settlement mechanism.

This is a far cry from the 2016 European Parliament Resolution, which specifically requested that the Commission guarantee that *“any measure adopted by a Party in the framework of the Paris Agreement or relating to any of the principles or commitments contained in Articles 3 and 4 of the UNFCCC will be secured also by providing legally sounder protection of the right to regulate in trade agreements”* (para. 13).

5. FOOD SAFETY

○ Does the EU-Mercosur trade agreement ensure EU food safety and health standards?

EU negotiators inserted an article in the SPS chapter aimed at fast-tracking the approval of animal products intended for export. This weakens import controls, and increases public health risks, as recent scandals over exports of rotten meat (including from Brazil) and salmonella-infected chicken have shown.

The SPS chapter contains an extensive article on “*Trade facilitation measures*” in the field of animal products (Article 7) – [a specific EU demand](#). This article has no equivalent in the WTO’s SPS agreement, which means that the EU has accepted a level of deregulation that not even the WTO requires.

Article 7 comprises three parts: approval of establishments exporting animal products (the so-called pre-listing approach), reducing SPS import checks, and harmonising import and export requirements among Mercosur members.

Under the article, the EU can grant import approvals “*without prior inspection of individual establishments*”, once it has recognised the exporting party’s control system and is confident there are “*sufficient guarantees*” that its exporters comply with sanitary requirements (Article 7.A.2). Furthermore, the parties can agree “*to simplify controls and verifications and reduce the frequency of the import checks*” (Article 7.B.2).

The EU also promotes this light-touch approach in the WTO. In a submission to the WTO’s SPS committee, the EU explains that its pre-listing system dismantles “*trade-prohibitive practices*” and avoids “*unjustified delays*” and “*exorbitant costs*”. Even worse, the [EU openly admits](#) that pre-listing represents a “*risk based approach*” targeting only “*those commodities that pose the highest risk*”. So, instead of supporting the precautionary principle, to which it is legally bound in its treaties, the EU promotes the very opposite in its bilateral trade agreement with Mercosur and in the WTO (see sections on the precautionary principle above).

○ What were the recent meat export scandals?

In March 2017, Brazilian police uncovered that slaughterhouses belonging to meat transnationals JBS and BRF bribed officials to obtain health certificates for huge amounts of rotten meat intended for export. A [report of the Commission’s Directorate-General for Health and Food Safety](#) concluded that, apart from several other shortcomings, Brazilian authorities “*had not considered any long term actions to prevent similar situations in the future*”.

So it did not come as a surprise when, in July 2019, a [team of British and Brazilian journalists revealed](#) that large amounts of salmonella-infected chicken from Brazil entered the EU undetected. According to this investigation, 20% of Brazilian frozen chicken was contaminated with salmonella.

This episode proves once again that trade agreements should strengthen food controls and not weaken them.

○ What is the European Parliament’s position on food and other standards?

The European Parliament, in its [2016 Resolution on the implementation of the 2010 recommendations of Parliament on social and environmental standards, human rights and corporate responsibility](#), called on the Commission to “*uphold the highest level of consistency in all trade negotiations*” and to introduce TSD chapters in future free trade agreements which feature, among other things:

- coverage of TSD provisions by the FTA’s general dispute resolution procedures (i.e., treating it as important as all the other chapters by making this chapter enforceable);
- effective deterrent measures (including potential sanctions for non-compliance);
- and complaints mechanisms for civil society (para. 21).

The Resolution stresses that *“the effective implementation of these recommendations constitutes a crucial element in Parliament’s assessment of trade agreements negotiated by the Commission”* (para. 40).

Looking at the EU-Mercosur trade agreement, it is clear that the Commission has not implemented these recommendations. The most consistent aspect of the texts negotiated by the Commission since this 2016 European Parliament Resolution is the absence of precisely these safeguards.

○ Isn’t the mention of international labour standards and international environmental agreements sufficient?

No. When these standards and agreements are mentioned, the text says things like *“parties agree to promote”* or *“parties will endeavour to”*, with no clear or enforceable obligations. It is difficult to prove that a country hasn’t *“promoted best practices”*, and if it could be proven, it wouldn’t make any meaningful difference, as promoting something is not the same as ensuring it gets done.

6. SUSTAINABILITY IMPACT ASSESSMENT

○ Didn’t a Sustainability Impact Assessment guide the European Commission during negotiations?

Sustainability Impact Assessments are routine for the negotiations of EU Free Trade Agreements. According to the EU Commission, SIAs should *“contribute to sound, evidence-based and transparent trade negotiations. SIAs have several purposes, including:*

- *feeding information into and helping steer the negotiations*
- *assessing the changes that are likely to be caused by a trade agreement*
- *helping to identify possible trade-offs*
- *ensuring that the related policy choices are optimised”*.²⁰

The final [SIA for the EU-Mercosur FTA](#) is still being carried out by the Trade Consulting Hub at LSE Consulting, the consulting arm of the London School of Economics and Political Science, on behalf of the EU. The [Inception Report](#) was published on 24 January 2018; the [draft interim Sustainability Impact Assessment report](#) was published on 4 October 2019, the [final interim report](#) in February 2020. The draft interim

SIA report was published three months after the political conclusion of the agreement. Therefore, the SIA is highly unlikely to have influenced negotiations.

The Commission recently announced that the final report would be ready in early 2020, during the legal scrubbing and translations of the final text. The EP Resolution in 2016 specifically called on the Commission *“to ensure the timely publication of SIAs in order to inform negotiating positions before they are formulated, to inform the public and to enable elected representatives to properly assess any proposed agreement”*; and *“to take the findings of such (SIAs) assessments fully into account during negotiations”* (para. 17 (e) and (f)).

These recommendations have been patently ignored. The [SIA’s January 2018 Inception Report](#) already hinted at a plethora of environmental concerns that should be taken into account and addressed in the negotiation process. It is no secret that in the nearly two years since the Inception Report was published, these concerns have only escalated.

Even the 2019 draft Interim Report doesn’t reflect the current situation in Mercosur countries, especially in Brazil. Most of the information provided on Brazilian forests is outdated (2010-2015), ignores the newest

²⁰ See https://ec.europa.eu/trade/policy/policy-making/analysis/policy-evaluation/sustainability-impact-assessments/index_en.htm

scientific research and gives a false picture of the political, social and environmental situation in Brazil. Even before the Amazon fires started in August 2019, the rate of deforestation was increasing. The fact that the FAO's Global Forest Assessment might be published in 2020, after the final SIA report, should not be used as an excuse to ignore the latest scientific evidence.

The SIAs also do not adequately reflect the situation of forests in Argentina and Paraguay and fail to consider the impact of the Mercosur Agreement on forest biodiversity.

For further remarks regarding the weakness of the EU-Mercosur draft interim SIA report, see the [Contribution of the Veblen Institute for Economic reforms and the Fondation Nicolas Hulot](#).

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