

The EU-Mercosur Association Agreement

Assessment and analysis of the negotiation document dated 18 June 2020, to which Greenpeace has been given access

Summary

The EU-Mercosur Association Agreement has long been eclipsed by the EU-Mercosur Trade Agreement in public discourse. Lack of transparency about the Association Agreement is one reason for this.

The Association Agreement is the comprehensive overarching agreement, of which the Trade Agreement is only a part. Whereas [individual “agreed in principle” chapters](#) of the Trade Agreement have been publicly available [since 12 July respectively 6 September 2019](#), the contents and text passages of the Association Agreement, parts of which were [politically concluded in June 2018](#) and which was finalised in [June 2020](#), have not yet been made public.

The German Foreign Office, the German ministry responsible for the Association Agreement, responded to an inquiry by a lawyer commissioned by Greenpeace, saying that the text was not yet publicly available and was subject to the obligations of official secrecy according to both German and EU law.

The [trade agreement](#) cannot, however, be comprehensively assessed without understanding what is in the Association Agreement, especially with regard to sustainability, climate and environmental protection. Over the past two months, the environmental impacts of the agreement have increasingly become the subject of heated debate in various member states.

The secret EU-Mercosur Association Agreement negotiating document, dated 18 June 2020, has now been made available to Greenpeace, allowing a more comprehensive analysis of the planned treaty between the EU and the four Mercosur countries. This document reveals that the Association Agreement has major shortcomings, particularly with regard to climate and environmental protection.

Classification of the negotiating document

The Association Agreement document contains a collection of texts separate from the trade agreement. EU Association Agreements are usually subdivided into parts, titles and articles. However, the document made available lacks both this structure and the numbering of the individual elements of the agreement. As indicated by a note in the document, the order of the elements may still be changed.

Even if we put the trade agreement parts published in July 2019 together with this document from June 2020, we still do not know the full extent of the Association Agreement. The annexes and protocols, which usually extend to several hundred pages, are still missing, as are entire articles

on various substantive provisions, such as the definitions of contractual terms or *general exceptions* to the terms of the agreement.

Content Analysis

Climate and environmental protection merely “desired”, with weak legal status

Although climate and environmental issues are mentioned in the document, they are afforded a comparatively weak legal status. The treaty does not consider environmental protection or climate protection to be an ‘*essential element*’, i.e. a principle on which sanctions can be applied. This is significant, because if one party is in breach of an *essential element*, the other party is entitled to take immediate *appropriate measures*, even to the extent of a partial or full suspension of the agreement. The *essential elements* in the text include: respect for democratic principles, human rights and the rule of law and, the commitment of both parties to fully implement their existing obligations under international treaties on disarmament and non-proliferation of weapons of mass destruction.

Environmental and climate protection are not listed essential elements in the Association Agreement, but are discussed in the Trade and Sustainable Development chapter in the Trade Agreement. Although the Association Agreement goes further in substance than what is in the Trade Agreement, there are no obligations on the parties to respect climate and environmental protection, rather the parties state that they intend to do so. The Paris climate agreement is welcomed by the signatory parties and they call for its rapid implementation. Beyond this, the preamble describes the protection of the environment as being one of the *legitimate policy objectives*, which are protected by the right of the parties to the Agreement to regulate.

The cooperation part also contains several articles on environmental cooperation, including *sustainable development, environment, sustainable urban development, climate change, oceans and seas, energy and raw materials*. However, even here there are hardly any concrete initiatives to which the parties commit themselves. Instead, numerous so-called “*best endeavour clauses*” exist, in which the parties make non-binding declarations of intent.

The article on climate protection and the Paris agreement is also limited to listing a few areas of cooperation (including research partnerships, exchange of technology and knowledge transfer) in which the parties “*should*” strengthen their cooperation. However, none of the options for cooperation listed here are binding. Consequently, these are non-binding statements with reference to the UN climate process and the Paris climate agreement. Despite referring to the *nationally determined contributions* (or NDCs) to climate protection set out in the Paris agreement, these are not themselves binding, nor is it possible to enforce these commitments with sanctions. The promotion of a national climate programme to limit deforestation, which is proposed in the text, is also very general and mixed with other measures (“...*including, but not limited to, deforestation and forest degradation and restoration...*”).

One of the few concrete commitments is to cooperate within the context of the UN to develop a binding instrument for the *conservation and sustainable use of marine biological diversity* – with the long-term objective of improving the condition of the oceans. The article on *cooperation on*

energy also mentions a measure that is certainly important for the purpose of climate protection. It proposes cooperation with the aim of *rationalising and phasing out inefficient fossil-fuel subsidies that encourage wasteful consumption*. This type of cooperation could make a real contribution to climate protection, but a corresponding concrete plan for implementation is missing. The mention of phasing out fossil fuels refers only to the subsidies, and not to the fossil fuels themselves. This does not go far enough to count as meaningful climate action.

Finally, the specific commitments dealing with cooperation include an article entitled *Resources*. In Paragraph 1 of this article, the parties undertake to provide *appropriate resources, including financial resources*, for cooperation, as far as they are able. They also commit to encouraging public and private financial institutions to participate in funding cooperative projects. Paragraph 2 of this article states that the parties also intend to encourage the European Investment Bank (EIB) to continue its operations in the Mercosur countries. In the case of the EIB and other development banks, however, there should be a political demand to link their lending to sustainability criteria. But this obligation is missing from the Association Agreement, which is also important in the light of the EIB's recent stance on climate change policy, the Climate Bank Roadmap 2021-2025. Without such an obligation, the EIB could continue to fund climate-wrecking industrial livestock farming, for example, as [criticized by NGOs](#).

Almost all aspects of environmental and climate protection in the deal are lacking two things: a binding commitment and enforceability. For these aspects to be worth the paper they are written on, enforceable sanctions must exist in case a party to the agreement fails to comply with the measures set out in the text. If environmental and climate protection were essential elements of the Association Agreement, they would be enforceable, and thus be effective clauses. If the European Commission were genuinely concerned about climate and environmental protection, it would have adopted the proposal made by France and the Netherlands and declared environmental and climate protection to be an *essential element* of the EU-Mercosur Association Agreement. Declaring environmental and climate protection to be an *essential element* is not enough, however. The sanctions associated with this must also be applied in the event of a breach of the *essential element*. While the European Commission is happy to impose [sanctions](#) when it comes to other trade agreements or areas, it presents [flimsy reasons](#) for resisting doing the same in the event of environmental and climate protection requirement violations.

Making environmental and climate protection an essential element of the Association Agreement would be insufficient to the EU-Mercosur Association Agreement, along with its trade agreement, into an agreement committed to sustainability. It would neither eliminate the intended asymmetry of the “cows for cars deal” (Mercosur countries supply agricultural and extracted raw materials, while EU member states export industrial products), nor overcome the weaknesses related to workers' rights, nor improve the protection of Indigenous Peoples' rights. It would also not respect the precautionary principle regarding consumer protection. [This list of deficiencies could be continued.](#)

The fact that the European Commission Directorate-General for Trade has not apparently made any effort to negotiate anything in the Association Agreement and its trade agreement that would help climate action and environmental protection, shows two things: Despite the undeniable

climate and environmental crises, the opportunities offered by trade agreements to limit the extent of such crises are not being exploited. And secondly, the [guidelines set out](#) by the von der Leyen Commission as part of the EU's Green Deal to make environmental and climate protection more enforceable in trade agreements were either not meant seriously or are not being taken seriously by the Directorate-General for Trade.

Lack of transparency in the negotiating process

The EU-Mercosur Agreement (the Association Agreement and its free trade agreement component) negotiations has been characterised by lack of transparency.

The EU-Mercosur negotiations are based on the Council of the EU's negotiating directives (the "mandate" of 1999) which have not yet been officially published. Two attempts by Friends of the Earth France (Les Amis de la Terre) to obtain the text through a petition under the right of access to documents remained [unsuccessful](#). In early 2020, a French version of the mandate ([UE-Mercosur: Directives de négociations \(1999\)](#)) became available on [bilaterals.org](#).

Association Agreements normally cover additional aspects, such as political dialogue and cooperation on democratic principles, human rights, the rule of law, and international peace and security. They also deal with the institutional framework for managing the agreement, such as setting up councils, committees, subcommittees and bodies to handle relations with parliamentarians or civil society. In addition, Association Agreements revisit issues mentioned in the Trade and Sustainable Development chapter of the free trade agreement.

The contents of the Association Agreement are crucial for verifying the European Commission's claim that the *Trade and Sustainable Development (TSD)* chapter of the EU-Mercosur Trade Agreement is the best of all EU free trade agreements. Even after repeated requests by NGOs to view the text or at least receive further information, the only response from the Directorate-General for Trade was to say that it was not responsible for the Association Agreement, which is in the hands of the European External Action Service (EEAS), and that it had no information about it. The fact that the Directorate-General for Trade is unaware of what other parts of the European Commission are doing is difficult to comprehend, especially as the Trade and Sustainable Development chapter alone includes 11 passages that reference the Association Agreement.

There is also still no fully published draft text for the trade agreement component. Prior to the conclusion of the Trade Agreement at the political level on 28 June 2019, little information was available on the [website of the European Commission's Directorate-General for Trade](#) concerning the EU's proposed texts. After Greenpeace and other NGOs leaked negotiating texts in 2017, the availability of draft documents improved slightly. Nevertheless, the quantity and quality of publicly available information remains poor. In fact, the European Commission has until now only published [parts of the Trade Agreement](#): 27 individual documents (20 chapters, 2 protocols and 5 annexes) published on 12 July 2019 and the chapter on intellectual property rights, together with its annex, published online on 6 September 2019. Since 28 June 2019, the European Commission has repeatedly announced its intention to publish the concrete timetable for opening

the market, the “market access schedule” describing which tariff reduction would be done when. This has not yet happened.

Once an agreement has been politically concluded, it is followed by a legal review (formal review or “legal scrubbing”), and translation of the English text into the 23 other official languages of the EU and Mercosur countries, and a further legal review of the translation. This process can take months and is itself more than just a technical issue, since it can also be used for renegotiation. In the case of the EU’s Comprehensive Economic Trade Agreement with Canada (CETA), [almost twenty percent of the text was changed](#) during this formal process, without those changes being made public. The individual chapters published after the political conclusion of the trade agreement component of the Association Agreement still contain gaps and deadlines for finalisation, so it can be assumed that, also in the case of EU-Mercosur, renegotiations took place without the public being informed. The lack of transparency in the mandate and in the negotiations continues even after the political agreement has been reached.

Lack of democratic processes

In the past, trade rules were limited to tariffs and quotas. Nowadays, they also regulate how we adopt environmental and health standards. These rules are bound to interfere with decision-making processes that should take place having only the public interest in mind. The EU-Mercosur Association Agreement creates structures that operate outside the normal democratic decision-making process and whose decisions can clash with those taken by democratically elected parliaments and by governments and administrations accountable to those parliaments.

As a “living agreement” the EU-Mercosur Association Agreement creates bodies vested with real powers (the Association Council and the Association Committees): the Association Agreement gives these bodies the competence to adopt binding decisions, including on the interpretation of the agreement’s provisions (a function that, in democratic systems, should be reserved to proper courts of law), and to make and examine proposals and recommendations. Such “decisions and recommendations shall then be adopted “by agreement of the Parties and in accordance with its rules of procedure” and “be binding on the Parties, which shall take all necessary measures, in accordance with their internal procedures, to implement them”.

In addition to the Council and Committees' powers to interpret the agreement and to take binding decisions, paragraph 2 of the Association Agreement's article on “amendments” confers onto the Association Committee, in its “trade” composition, the power to modify protocols and annexes of the relevant part of the Association Agreement. Such amendments may already be decided during the provisional application of the Association Agreement (according to the article on 'Application before entry into force').

The exercise of the decision-making powers takes place outside the realm of democratic public scrutiny and oversight. Even if the approval by the parties is required for the final adoption of decisions and recommendations (parties are the 27 EU member states, the European Union, the four Mercosur countries and the Common Market of the South (MERCOSUR), the voting

procedures are not specified. It remains unclear which decisions and amendments, if any, require the consent, or at least the involvement, of the European Parliament and the national parliaments.

These risks and threats linked to the creation of decision-making bodies outside democratic scrutiny are not exclusive to the EU-Mercosur deal: in the case of CETA,¹ an [analysis by the German academic Prof. Dr. Wolfgang Weiss](#) (Chair of Public Law, University Speyer) concludes that CETA's treaty committees effectively exercise sovereignty without any parliamentary control in areas requiring the consent of the European Parliament. This analysis was submitted to the German Federal Constitutional Court as part of a constitutional complaint against CETA.

Conclusion

A range of reform proposals are concerned with eliminating parts of the unequal treatment of human rights and environmental protection in EU trade agreements. On 15 May 2020, the governments of France and the Netherlands published a *non-paper* (on “*trade, social economic effects and social development*”) calling, among other things, for the Paris climate agreement to be made an *essential element* of all future EU trade and policy framework agreements – including those currently under negotiation.

The two countries suggested that the Paris agreement and its implementation should be added to the two existing *essential elements* – respect for human rights and the fight against the proliferation of weapons of mass destruction. The European Commission did not adopt this demand in its negotiations with Mercosur, thus missing out on a key opportunity, [legitimised by a ruling of the European Court of Justice](#), to raise climate and environmental protection from the level of a declaration of intent and turn it into a binding obligation. In the face of the global climate crisis, the continuing loss of biodiversity and increasing environmental pollution, such an omission cannot be justified – especially in view of the Paris climate agreement, which contains no sanction mechanisms of its own, and in which the European Commission ensured that trade is not mentioned. While the Commission's reluctance to use this opportunity to give the Paris agreement greater force through international agreements such as the EU-Mercosur Association Agreement is scandalous, it should be noted that the simple fact that we must rely on an economic agreement to give force to a multilateral environmental agreement demonstrates how skewed our decision-makers' priorities are.

Particularly in the case of the EU-Mercosur Association Agreement, it is once again clear that the Commission's grandiose claims that “[the EU is the most transparent negotiator in the world](#)” do not coincide with reality. However, the member states are guilty of a lack of transparency as well, because despite deciding years ago in the Council of the European Union that they would in future publish trade mandates, they refused to make a twenty-year-old mandate available to the public.

¹ CETA is the Comprehensive Free Trade Agreement with Canada, which is provisional applied since 21 September 2017,

Without transparency, the democratic participation of all stakeholders, including citizens and civil society organisations is impossible.

As has also been criticised in the case of other agreements, the structure of the intended bodies for implementing the EU-Mercosur Association Agreement undermines the role and the influence of parliaments. If their role is going to be confined to nodding an agreement through, they will be deprived of even this possibility if the Association Council proceeds to make changes to the agreement. Amendments can be made to the important annexes of the agreement without parliamentary control, leading to a de-democratisation of trade policy.

Finally, the analysis of the Association Agreement confirms that a comprehensive realignment of EU trade policy is essential. Agreements such as that between the EU and Mercosur are simply not suitable as a means of addressing pressing global problems like the destruction of nature and global heating, human rights violations, and socio-economic injustice. Instead, in its current form, it undermines global agreements such as the Paris climate agreement and the Convention on Biological Diversity, by promoting precisely those sectors (such as industrial agriculture and manufacturing petrol and diesel vehicles) that are contributing to the climate crisis and the dramatic extinction of species.

A forward-looking trade policy must focus on social justice and the protection of natural resources. Greenpeace has produced a framework for this in the form of its [10 principles for trade](#).

Further resources on the deal:

- [Fritz, T.: EU-Mercosur Agreement: Risks to Climate Protection and Human Rights](#). The publication by MISEREOR, Greenpeace and CIDSE describes central human rights and ecological risks posed by the EU-Mercosur Agreement based on the texts of the treaty as published to date. It also analyses the extent to which the intended agreement could obstruct the necessary control of harmful movements of goods
- [Greenpeace e.V.: EU-Mercosur Legal Q+A](#). This document provides information on the text of the agreement, focusing on the Trade and Sustainable Development Chapter and the precautionary principle, as well as issues such as the right to regulate, food safety, and the Paris Agreement.
- [Greenpeace e.V.: EU-Mercosur: Double Standards concerning agrotoxics](#). The brief analysis shows that companies in the EU, including the German chemical giants BAYER and BASF, will benefit from the planned custom duty exemption under the EU-Mercosur trade agreement - at the expense of biodiversity, people and the environment.
- Dr. Ghiotto, L./Dr. Echaide, J.: [Analysis of the agreement between the European Union and the Mercosur](#), This comprehensive analysis of the negotiated trade agreement reveals consequences of the agreement, particularly with regard to the climate and environment, agriculture and development policy.