Treaty-Making by Afterthought

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DOI
10.1628/avr-2023-0025

Publication date
2023

Document Version
Final published version

Published in
Archiv des Völkerrechts

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I. Introduction

The conclusion of EU Trade and investment agreements has increasingly become politicised. An important set of criticisms relates to the lack of genuine legal mechanisms ensuring the commitments to sustainability and emission reduction.[1] The days of unqualified endorsement of trade liberalisation and investment protection have come to an end.[2]

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[1] Generally: *Dani Rodrik*, "Has Globalization Gone Too Far?" (1998) 41 Challenge 81; on EU agreements: *Demy van 't Wout*, "The enforceability of the trade and sustainable development chapters of the European Union's free trade agreements" (2022) 20 Asia Europe Journal 81; *Jan Orbie* et al., "Promoting sustainable development or legitimizing free trade? Civil society mechanisms in EU trade agreements" (2016) 1 Third World Thematics 526; Specifically on the UK-Australia FTA: *Margaret A Young* and *Georgina Clough*, "Net Zero Emissions and Free Trade Agreements: Efforts at Integrating Climate Goals by the United Kingdom and Australia" (2023) 72 International and Comparative Law Quarterly 393, 406–407.

[2] *Laurens Ankersmit*, "The EU's strategy for more 'rules-based' trade and the EU's withdrawal from the Energy Charter Treaty" (2023) Legal Issues of Economic Integration (editorial).

AVR 61, 390–420 – DOI 10.1628/avr-2023-0025
ISSN 0003-892X

Mainstream economic thinking based on the theories of absolute and comparative cost advantages by *Adam Smith* and *David Ricardo*, respectively, has argued for a long time that trade liberalisation always generates economic growth and benefits all trading countries and their populations. Simply put, free trade brings comparative advantage, which trigger specialisation. This increasing specialisation results in economies of scale, which in turn increase consumer welfare.[3] However, this mantra has been increasingly challenged in past years. Public opinion has become more critical of this basic assumption. Ever more production, trade, and hence consumption simply is not sustainable.[4] Even if removing barriers to trade brings benefits to consumers, it also triggers redistributive mechanisms that might affect different groups of population or sectors of the economy (e.g. blue-collar workers or farmers) in an unequal fashion.[5] Furthermore, the so-called positive integration understood as transnational mutual recognition or harmonisation of regulatory regimes by means of trade agreements can be challenged due to concerns of democratic legitimacy.[6]

The departure from the general assumption that trade liberalisation and investment protection are positive has politicised the conclusion of EU trade and investment deals. This in turn has created persistent negotiation and ratification difficulties.[7] At the same time, bilateral agreements have become more important for the EU due to the weaknesses of the World Trade Organization (WTO).

To solve these ratification difficulties, the EU Commission has started to deploy a new strategy, which we call treaty-making by afterthought. The Commission, jointly with the other party or parties to a trade and/or investment agreement, draws up "Joint (Interpretative) Instruments" to support agreements that encounter public criticism. This new cate-

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[3] GATT, "Trade Policies for a Better Future: Proposals for action" (1985); *Milton Friedman*, "The Case for Free Trade" (1997) 4 Hoover Digest; see critically for a more elaborate discussion and references *Dani Rodrik*, "What Do Trade Agreements Really Do?" (2018) 32 Journal of Economic Perspectives 73.

[4] United Nations, "Sustainable development goals: goal 12" <https://www.un.org/sustainabledevelopment/sustainable-consumption-production/> accessed 3 April 2023; European Commission, "A new Circular Economy Action Plan For a cleaner and more competitive Europe" COM/2020/98 final.

[5] *Rodrik* (n 1), 75–76.

[6] *Kalypso Nicolaïdis* and *Gregory Shaffer*, "Transnational Mutual Recognition Regimes: Governance without Global Government" (2005) 68 Law and contemporary problems 263, 300.

[7] TTIP; CETA; EU-MERCOSUR. See e.g. *Niels Gheyle* and *Julia Rone*, "'The Politicisation Game': Strategic Interactions in the Contention over TTIP in Germany" (2022) German Politics <https://doi.org/10.1080/09644008.2022.2042517> accessed 24 April 2023; *Francesco Duina*, "Why the excitement? Values, identities, and the politicization of EU trade policy with North America" (2019) 26 Journal of European Public Policy 1866.

gory of joint statements, drawn up like afterthoughts, months, sometimes years after the conclusion of the actual negotiations, are, however, not a solution and dressed up as more than they are. While legally they are of interpretative value and do not amend the treaty text, they are presented as solving the critics" objections to that treaty text. They also call into question the relationship between the EU and the Member States.

Three recent examples have created heated debates: the Joint Interpretative Instruments in relation to CETA,[8] the Decision of the Heads of State and Government on the EU-Ukraine Association Agreement (AA),[9] and the recently published proposal for a Joint Instrument relating to the EU-Mercosur agreement.[10]

This article focuses on this most recent afterthought to the EU-Mercosur AA, as per the Commission textual proposal for the EU-Mercosur Joint Instrument of March 2023. It concludes the EU-Mercosur Joint Instrument substantively amounts to a modification of the AA. The Joint Instrument should therefore be adopted pursuant to the ordinary procedures of treaty-making involving parliaments. What is further, the focus of the Joint Instrument is on non-trade measures. While it does not bring the EU-Mercosur deal in line with the EU's Green Deal it strengthens and expands sustainability commitments. For this reason, it requires involvement of Member States and hence also national parliaments. The latter also appears to be the only probable way of avoiding ratification difficulties of the AA.

Section II explains and contextualises the EU-Mercosur AA. It sets out the circumstances of its negotiation, the European Commission's assessment of its impact on sustainability, and the criticism of the agreement (both AA and its trade part). It then examines the Trade and Sustainable Development (TSD) Chapter of the trade part. Section III turns to the Joint Instrument relating to the EU-Mercosur agreement. It explains the nature and particularities of afterthoughts to treaty-making and offers a comparison of the CETA Joint Interpretative Instrument, the Decision relating to the EU-Ukraine AA, and the EU-Mercosur Joint Instrument. Section IV identifies and explains the main conclusions.

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[8] Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, 14 January 2017.

[9] Decision of the Heads of State or Government of the 28 Member States of the European Union, meeting within the European Council, on the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part (Annex to the European Council Conclusions on Ukraine, 15 December 2016).

[10] EU Mercosur Joint Instrument <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/da997440-4edb-437d-aa4a-3cb9a5e77930/details?download=true> accessed 20 February 2024.

II. EU-Mercosur Association Agreement – State of Play

1. Framework

Based on the 1995 Interregional Framework Cooperation Agreement, the EU and the Mercosur states, Brazil, Argentina, Uruguay and Paraguay (the four founding members of the Common Market of the South [Mercosur]), have aimed to conclude a comprehensive trade agreement for decades. The Agreement was formally negotiated over the course of almost 20 years (1999–2019).

The history of the negotiations demonstrates a lack of a coordinated and strategic approach of the EU towards the Mercosur. After the accession of Spain and Portugal to the EU in 1986, these two countries have taken the lead in advocating a closer engagement of the EU with Latin America and Mercosur specifically.[11] Throughout the negotiation process, they pushed other EU Member States to advance with the negotiations, for instance by putting the Agreement on the agenda of Council presidencies or organising high-level intergovernmental summits.[12] At the same time, trade liberalisation between the two blocks was contested by countries with strong agricultural constituencies, notably France and Ireland, who feared competition from Mercosur farmers enjoying lower production costs and having less stringent consumer and animal welfare standards.[13]

The negotiations of the AA progressed at a very uneven pace. First, the negotiations of the Agreement were taking place on the sidelines of the ongoing Doha Round within the WTO and continued until 2005.[14] At the time, it became clear that there was not sufficient alignment between the positions of the negotiating partners.[15] Also around that time, under the tenure of Trade Commissioner *Peter Mandelson*, the EU started a more aggressive bilateral engagement, looking to negotiate trade agreements with countries that were considered to have significant economic potential.[16] However, the negotiations with the Mercosur bloc only restarted in 2010, accelerated in 2016 because of the favourable domestic political situation in Brazil and Argentina, and were finalised in 2019. Despite the fact that the negotiations had been concluded and the part-

[11] *Arantza Gomez Arana*, "The European Union's Policy towards Mercosur: Responsive Not Strategic" (2017) 70–71.

[12] Ibid., 155.

[13] Ibid., 177–178.

[14] Interviews with two European Commission officials, conducted with permission of the UvA's ethical committee, pursuant to the UvA's ethical guidelines, and archived at the UvA's data repository.

[15] Ibid.

[16] European Commission, "Communication from the Commission: Global Europe: Competing in the World" COM (2006) 567 final.

ners had reached a political agreement, *Emmanuel Macron*, President of France, and other leaders from Ireland, Luxembourg, and Austria called for changes or even a "complete revision".[17]

Association agreements find their legal basis in Article 217 TFEU and are almost always concluded as mixed agreements. The Stabilisation and Association Agreement (SAA) with Kosovo and the EU-UK Trade and Cooperation Agreement (TCA) are the only exceptions.[18] An Association is a specific type of cooperation between the EU and a third state, not a specific policy field. Article 217 TFEU by its nature covers all fields of EU powers, whether or not previously exercised, and the policy fields and the types of commitments that are included are the result of a negotiation process between the EU (and usually its Member States) on the one side and a third state on the other. Association agreements pursue the objective of "creating special, privileged links with a non-member country".[19]

On 28 June 2019, an "agreement in principle"[20] was reached between the Parties on the largely negotiated chapters of the trade part (here, for simplicity abbreviated as FTA) that forms part of the wider AA, which had already been agreed in June 2018.[21] This later document, i.e. the text of the AA, has not been published and thus is not subject to our legal analysis as such,[22] requires ratification by the EU and Member States,

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[17] *Luciana Ghiotto* and *Javier Echaide*, "Analysis of the agreement between the European Union and the Mercosur" (Powershift 2019) <https://www.annacavazzini.eu/wp-content/uploads/2020/01/Study-on-the-EU-Mercosur-agreement-09.01.2020-1.pdf> accessed 24 April 2023, 6.

[18] See: *Christina Eckes* and *Päivi Leino-Sandberg*, "The EU-UK Trade and Cooperation Agreement – Exceptional Circumstances or a new Paradigm for EU External Relations?" (2022) 85 Modern Law Review 164; Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part, OJ (2016) L 71/3. See on the Kosovo SAA: *Peter van Elsuwege*, "Legal Creativity in EU External Relations: The Stabilization and Association Agreement Between the EU and Kosovo" (2017) 22 European Foreign Affairs Review 393.

[19] Case 12/86 *Demirel* ECLI:EU:C:1987:400, para 9.

[20] New EU-Mercosur trade agreement: The agreement in principle (Brussels, 1 July 2019) <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mercosur/eu-mercosur-agreement/text-agreement_en> accessed 24 April 2023. See for a non-European perspective: *Jamile Mata Diz*, "The Mercosur and European Union relationship: an analysis on the incorporation of the Association Agreement in Mercosur (2022) Europe and the World: A Law Review, Vol. 6(1).

[21] See Commission press release on the EU and Mercosur reach agreement on trade of 28 June 2019 <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_3396> accessed 24 April 2023.

[22] Parts have been made available, inter alia to the German Greenpeace office upon request, but there is no complete text. See "The EU-Mercosur Association Agreement Assessment and analysis of the negotiation document dated 18 June 2020: to which Greenpeace has been given access" <https://trade-leaks.org/wp-content/uploads/2020/10/EU-Mercosur_Association_Agreement_Background_And_Analysis.pdf> accessed 19 May 2023.

i.e., mixity, as acknowledged by all sides. Mixity requires, besides conclusion by the Union, ratification in the 27 Member States, pursuant to their own constitutional rules. This renders the process necessarily more time-consuming and cumbersome. It also makes the political opposition mentioned above constitutionally more relevant, namely not only as a counter voice in the Council but as a potential veto of national parliaments.

The agreement in principle (dated 1st July 2019, available on the COM website[23]) is decreed "not a legal text".[24] The text of the FTA, once ratified, would be an international treaty, and would be concluded by the EU and as such legally binding on both the EU and its Member States.[25] The Court of Justice has repeatedly interpreted the EU's exclusive competence for the EU's Common Commercial Policy (CCP) generously. It holds that "an EU act falls within [CCP] if it relates specifically to such trade in that it is essentially intended to promote, facilitate or govern such trade and has direct and immediate effects on it".[26] This includes provisions relating to sustainable development. In other words, the published chapters of the FTA would most likely pass the Court of Justice's test of being sufficiently "trade-related".[27] The FTA/trade part of the EU-Mercosur agreement could thus qualify for EU-only conclusion and would not require a mixed agreement.

If ratified, the FTA would establish the largest free trade zone the EU has ever created, covering more than 720 million people, eliminating customs duties on 91 % of EU goods exports to Mercosur. In turn, Mercosur would remove import duties on industrial products from the EU such as cars, car parts, machinery, chemicals, clothing, pharmaceuticals, leather shoes, and textiles.

Aiming to promote good regulation standards and evidence-based policymaking, the Commission has committed to conduct sustainability impact assessments (SIA) for all EU trade agreements. The first SIA for the trade part of the EU-Mercosur Association Agreement was conducted between the years 2003 and 2007 and covered several sectors, addressing specifically how the agreement would affect agricultural and

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[23] New EU-Mercosur trade agreement: The agreement in principle (n 20).

[24] Ibid., citation from the official document.

[25] Art. 216 TFEU.

[26] Opinion 2/15, ECLI:EU:C:2017:376, para 36 et seq., referring inter alia to C 414/11, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, EU:C:2013:520, para 51.

[27] See for the very wide interpretation of the EU's Common Commercial Policy (CCP) competence post-Lisbon: Case C-414/11 *Daiichi Sankyo* ECLI:EU:C:2013:520; Case C-114/12 *European Commission v Council of the European Union* (*Broadcasting Rights*) ECLI:EU:C:2014:224; Opinion 2/15 *EU-Singapore FTA* ECLI:EU:C:2017:376.

automotive sectors as well as measuring the environmental impact of the agreement, with a specific study dedicated to forests.[28]

During the second attempt to negotiate the agreement, the Commission initiated another SIA process, aiming to obtain an up-to-date picture of the societal and environmental consequences of the proposed agreement.[29] However, this SIA was only completed at the end of 2020, after the Chapters were negotiated in detail and after the Agreement in Principle on the AA. Neither the AA, nor its trade part have entered into force, but the ratification process has now been picked up since *Luiz Inácio Lula da Silva* won the 2022 Brazilian elections. At this point, neither the European Parliament nor the Member States" Parliaments have ratified the agreements. A current final text is not available, the process of "legal scrubbing", i.e., the process of legal revision, is not complete.[30]

As was reported, the Commission initiated splitting the agreement in an EU-only and a mixed agreement part. This would pull apart the trade provisions (EU-only) from the more political part covering institutional cooperation and human rights commitments, which would have to be adopted as a mixed agreement and hence require ratification by all national (and some regional) parliaments.[31] This seems to be intended to ensure smooth ratification by side-lining (potential) national opposition.[32] This, however, is problematic as it isolates the economic provisions from the political commitments, including those to protect human rights for example in the process of production of the goods that are then traded. Moreover, as stated above, while parts of the FTA are publicly available, the political part on which the parties reached agreement on 18 June 2020, the AA, has not yet been publicly shared, which means that

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[28] All the published reports are available at European Commission, "Sustainability Impact Assessments", section 2009/03: EU-Mercosur Association Agreement Negotiations <https://policy.trade.ec.europa.eu/analysis-and-assessment/sustainability-impact-assessments_en> accessed 15 May 2023.

[29] *Max Mendez-Parra* et al., "Sustainability Impact Assessment in Support of the Association Agreement Negotiations between the European Union and Mercosur" (LSE Consulting 2020) <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/abfa1190-59d1-4f59-93a5-9b9810d2b744/details> accessed 24 April 2023.

[30] New EU-Mercosur trade agreement: The agreement in principle (n 20).

[31] *Barbara Moens* and *Jakob 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/> accessed on 24 April 2023.

[32] The French government has been critical of the agreement for a long time (see e.g. Reuters Staff, "France will not sign up to Mercosur deal at any price: ministers" (Reuters 2 July 2019). In March 2023, the Dutch parliament called on the Dutch government to block the agreement (see *Rein Wieringa*, "Tweede Kamer stemt tegen Mercosur-verdrag: 'oneerlijke concurrentie voor Europese boeren'" (NRC, 7 March 2023). In the same month, the Austrian Agriculture Minister made clear he opposes the agreement (*Chiara Swanton*, "Austrian agriculture minister says 'no' to Mercosur deal amid industry pressure" (Euractiv, 21 March 2023).

public and parliamentary debate in the Member States cannot refer to any actual text apart from the FTA.[33]

Some commentators have argued that geopolitical factors should encourage the EU to speed up the ratification process, especially in the context of multiple crises falling upon the EU post-pandemic and post-Russian invasion of Ukraine. For instance, it has been pointed out that by rejecting the agreement, the EU risks losing economic and political competition with China when it comes to its relationship with Latin America.[34] More broadly, the progressing collapse of the multilateral trading system and the unilateralisation of world trade[35] was claimed to increase the urgency for the EU to strike more bilateral bargains in order to secure access to critical resources and keep favourable market access conditions.[36]

This article focusses on the trade part of the EU-Mercosur Association Agreement (FTA). In 2023, it became clear that the Commission would propose an additional text to the AA/FTA, the Joint Instrument. The proposal for the Joint Instrument was first leaked and subsequently published by the Commission services (it is publicly accessible as of September 2023).

2. European Commission's framing of the Agreement and its environmental impact

This section reviews various policy documents of the Commission related to sustainability obligations and environmental impact of the Agreement in question, focusing on the impact assessment studies and their interpretation presented by the Commission as well as various communications

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[33] See for example the debate in the German Bundestag of 26 January 2023: "Anträge zum EU-Abkommen mit den Mercosur-Staaten im Parlament beraten" <https://www.bundestag.de/dokumente/textarchiv/2023/kw04-de-mercosur-930076> accessed 19 May 2023. With an intervention by *Sebastian Roloff* (SPD) emphasising that splitting the AA into a trade and non-trade part is not desirable (at 3:30 min) and that the obligation relating to environmental and climate protection should be subject to sanctions (at 5 min), <https://www.bundestag.de/mediathek?videoid=7550354#url=L21lZGlhdGhla292ZXJsYXk/dmlkZW9pZD03NTUwMzU0&mod=mediathek>.

[34] *Frederik Stender*, "Sitting, waiting, wishing: Why the EU-Mercosur agreement remains on hold" (LSE, 11 October 2022) <https://blogs.lse.ac.uk/europpblog/2022/10/11/sitting-waiting-wishing-why-the-eu-mercosur-agreement-remains-on-hold/> accessed 19 May 2023.

[35] *Geraldo Vidigal*, "The Unilateralization of Trade Governance: Constructive, Reconstructive, and Deconstructive Unilateralism" (2023) 50 Legal Issues of Economic Integration 1.

[36] *Josep Borrell*, "Why Europe and Latin America Need Each Other" (Project Syndicate, 30 November 2022) <https://www.project-syndicate.org/commentary/eu-mercosur-must-complete-trade-agreement-negotiations-by-josep-borrell-2022-11> accessed 19 May 2023.

that present the Commission's view vis-à-vis the Agreement with Mercosur. Findings from several interviews with EU officials who have knowledge or experience directly relevant to the subject matter of this article are likewise incorporated in the analysis.

As early as 1994, the Commission proposed launching the negotiations of an inter-regional association agreement between the EU and Mercosur. At that time, the Mercosur bloc had been just established, dating back to 1991. The Commission foresaw that the Association Agreement would be preceded by a less ambitious interregional framework cooperation agreement which was indeed concluded in 1999. The Commission set out an ambition to establish a comprehensive economic and political partnership with Mercosur. It cited strong commercial links between the EU and Mercosur that had already been in place and proposed that a future agreement would deepen and broaden the existing relationship.[37] The proposed association agreement was meant to combine ambitious trade and political components, covering, inter alia, trade liberalisation for industrial and agricultural products, trade liberalisation in services and capital, cooperation on environmental issues, science, and technology as well as political cooperation, and coordination in international forums underpinned by seemingly shared values.[38]

The trade part of the Association Agreement with Mercosur was initially perceived as being complementary to multilateral negotiations conducted within the framework of the Doha Round at the WTO.[39] Once it became clear that the Doha Round would not deliver tangible results, bilateral negotiations with Mercosur gained importance, their urgency further accentuated by the combined size of the two blocks and the economic benefits associated with trade liberalisation between them.[40] Bilateral negotiations were also seen as an opportunity to establish commitments that go broader and deeper than WTO agreements, covering such areas as investment, public procurement, competition, and regulatory cooperation.[41]

Between the years 2003 and 2007, several impact assessment studies related to the proposed agreement were conducted and subsequently published. Impact assessments in the EU context constitute one of the

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[37] European Commission, "Communication of the Commission on the strengthening of the Union's policy with regard to Mercosur" P/94/55 <https://ec.europa.eu/commission/presscorner/detail/en/P_94_55> accessed 19 May 2023.

[38] Ibid.

[39] European Commission, "Answer given by Mr Mandelson on behalf of the Commission" P6_RE(2005)4318_EN (19 December 2005).

[40] European Commission "Answer given by Mr Mandelson on behalf of the Commission" E-0989/08EN (21 April 2008).

[41] European Commission, "Communication from the Commission: Global Europe: Competing in the World" COM (2006) 567 final, 8–10.

instruments aimed at achieving good regulation standards and promoting transparent and evidence-based policymaking.[42] Sustainability impact assessments, a subset of these, are supposed to operationalise the constitutional principle of sustainable development as enshrined in the EU treaties[43] while also including the findings on human rights and societal impact of an agreement.[44] In addition to that, they also serve to gather inputs from interested stakeholders in civil society and the private sector alike. Sustainability impact assessments normally take place during the negotiation process and after the formal start of the negotiations[45] which means that their findings should inform the direction of this process but cannot stop it altogether. The findings of the impact assessment studies were ultimately addressed by the Commission Position Paper from 2010 which outlined the political stance of the Commission services towards the proposed agreement and its potential economic and environmental impact.

At the time when the first impact assessments were launched, the Commission was likely to contemplate various levels of trade liberalisation in the final agreement. In this context, the Consultant tasked with conducting the SIA study analysed the impact of an agreement by comparing a baseline scenario that assumed that the status quo would not change and that existing trends would continue with a full liberalisation scenario that assumed the removal of existing tariff and non-tariff barriers to trade by the proposed Association Agreement.[46]

According to the study, the environmental impact of the agreement in the ambitious scenario would be rather limited in the EU, but significant in Mercosur countries. Production expansion with respect to such products as beef or ethanol could contribute to deforestation and biodiversity losses.[47] Although increased demand for agricultural produce in Mercosur countries could reduce rural poverty, it would also put pressure on farmers operating on a small scale and indigenous peoples.[48] The Consultant warned that public policy interventions and mitigation measures

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[42] European Commission, "Commission Staff Working Document: Better Regulation Guidelines", SWD (2021) 305 final, 10.

[43] European Commission Directorate General for Trade, "Handbook for Trade Sustainability Impact Assessment" (Publications Office 2016), 5 <https://doi.org/10.2781/999660> accessed 30 April 2023.

[44] Ibid.

[45] Ibid., 11.

[46] European Commission, "Impact assessments for the EU-Mercosur Agreement 2002", Annex 1 – Task Specifications, 1.

[47] Institute for Development Policy and Management (IDPM), "Trade SIA of the Association Agreement under negotiation between the European Community and Mercosur" (Final report, University of Manchester 2008), 63.

[48] Ibid., 92.

would be necessary to address the negative social and environmental consequences of the agreement.[49]

The position paper issued by the Commission did not omit the problematic findings but also attempted to underline the potential benefits of the agreement. Somewhat overplaying the predicted gains in productivity and GDP, the Commission put emphasis on the economic benefits of the agreement, for instance with respect to manufacturing and services sectors.[50] Acknowledging the identified problems related to the pressure on the agricultural sector in the EU and environmental and biodiversity risks in the Mercosur countries, the Commission underlined that these risks would be mitigated by several types of measures. Support programmes were singled out as a potential remedy for the agricultural sector.[51] Furthermore, the Commission pointed out that trade liberalisation in selected sectors would be phased in order to create adjustment periods for vulnerable sectors.[52] When it comes to environmental risks, the Commission pledged that it would negotiate an ambitious trade and sustainable development chapter in the future agreement[53] and use the channels of political cooperation between the EU and Mercosur to support regulatory capacity building in Mercosur countries.[54]

Already at the time when the first set of impact assessment studies was being published, the bilateral negotiations between the EU came to a standstill and were suspended in 2005.[55] They were officially relaunched in 2010 following the EU-Mercosur Summit[56] and accelerated after an exchange of market access offers in 2016.[57] The Agenda of the negotiation round that took place at the end of 2016 indicate that negotiators were already working on the newly exchanged offers.[58] The Agreement was finalised relatively quickly after the negotiations were restarted. The EU and Mercosur negotiators reached an agreement on trade in June

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[49] Ibid., 94.

[50] European Commission, "Position Paper – Trade Sustainability Impact Assessment (SIA) of the Association Agreement under negotiation between the European Union and Mercosur" (2010), 2.

[51] Ibid., 3.

[52] Ibid., 5.

[53] Ibid., 4.

[54] Ibid., 4–5.

[55] Question for written answer E-008979/14 to the Commission – Answer given by Ms *Malmström* on behalf of the Commission (16 December 2014).

[56] Question for written answer E-000852/2015 – Reply (23 March 2015).

[57] Question for written answer E-001837/16 – Answer given by Ms *Malmström* on behalf of the Commission (21 April 2016).

[58] European Commission, "Date: 26/10/2016 Report of the XXVI negotiation round on the trade part of the EU-Mercosur Association Agreement" (Brussels, 10–14 October 2016) <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/8aca42c4-fb01-47a9-a47d-e4de2ff6a23d/details> accessed 19 May 2023.

2019 whereas the political cooperation part of the Association Agreement was finalised a year earlier, in June 2018.[59] The Commission underlined the importance of commitments enshrined in the TSD chapter of the Agreement, with a specific obligation to implement the Paris Climate Agreement and the provisions establishing the right to regulate in the public interest.[60] The Agreement was also hailed for facilitating political cooperation in salient areas of research, protection of the environment, and crime prevention.[61]

Owing to the length of the negotiations and the change in economic and political context, in 2017, the Commission initiated another sustainability impact assessment process, aiming to obtain an up-to-date study outlining the environmental and societal consequences of the agreement that would reflect the reality at the time of the conclusion of the Agreement. The new SIA report was only published in December 2020 whereas, as mentioned before, the negotiations of the trade part of the Association Agreement were finalised in 2019. This delay has led to the proceedings before the European Ombudsman initiated by five civil society organisations.[62] The Ombudsman concluded that the Commission's failure to finalise the SIA before the conclusion of trade negotiations constituted maladministration.[63] The Ombudsman pointed out, relying on Commission's own assertions, that SIA can only serve its purpose if its findings are available beforehand and can thus inform the decision-making process.[64]

The new SIA, like the first one, attempted to analyse the impact of the proposed agreement for two scenarios. The conservative scenario assumed the elimination of tariffs in 90 % of the industrial products and 80 % in agricultural products for the Mercosur bloc; the ambitious scenario assumed the elimination of tariffs in 100 % products for the Mercosur bloc. The EU would eliminate tariffs on all industrial products in both scenarios and apply partial tariff cuts of 15 % in the conservative scenario and 30 % in the ambitious scenario in rice, sugar, ruminant meat, and other meat sectors.[65]

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[59] European Commission, "EU and Mercosur Reach Agreement on Trade" (EC Press corner, 28 June 2019) <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_3396> accessed 19 May 2023.

[60] Ibid.

[61] Ibid.

[62] These organisations are: ClientEarth, Fern, Veblen Institute, La Fondation Nicolas Hulot pour la Nature et l"Homme and International Federation for Human Rights.

[63] European Ombudsman, "Decision in case 1026/2020/MAS concerning the failure by the European Commission to finalise an updated 'sustainability impact assessment' before concluding the EU-Mercosur trade negotiations" (17 March 2021) <https://www.ombudsman.europa.eu/en/decision/en/139418> accessed 19 May 2023.

[64] Ibid., para 33.

[65] *Mendez-Parra* et al. (n 29).

The SIA acknowledged several familiar concerns related, inter alia, to labour standards and the environmental impact of the agreement, recommending various mitigation measures, for instance strengthening the anti-deforestation policies in Mercosur, reinforcing the commitments to the Paris Agreement and using political cooperation channels between the EU and Mercosur to promote and share green technologies.[66] The Consultant also pointed out that Mercosur had not previously included TSD chapters in trade agreements and the one included in the EU-Mercosur AA offers great opportunities to establish ambitious standards and strengthen the links between trade regulation and climate policies.[67] In this respect, the Consultant also suggested that a more robust dispute settlement applicable to TSD provisions and a stronger role for civil society in dispute resolution proceedings would be beneficial.[68]

The negotiated agreement does not exactly correspond to any of the scenarios analysed by the Consultant, although the Commission asserted that for some areas, for instance, agriculture, the conservative scenario is close to reality. In this respect, the Commission highlighted a very cautious approach to trade liberalisation in agricultural products, with the use of Tariff Rate Quotas which would "allow imports at preferential tariff rates up to a limited volume, which will only represent a very limited share of the EU market"[69]. The TRQs would be applied to such products as beef, poultry, sugar, and ethanol.[70] In addition to that, the Commission reserved the right to introduce safeguard measures in the event of serious injury or a threat thereof to the EU industry.[71]

The Commission concurred with the concerns of the Consultant related to deforestation and threats to biodiversity and pointed out that it would attempt to fully use the potential of the TSD chapter as well as flanking measures. With respect to the former, the Commission evaded the criticism raised by the Consultant related to the weak nature of the dispute settlement mechanism and instead underlined that the TSD chapter enshrines the right to regulate and the non-regression principle

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[66] Ibid., 104–105.

[67] Ibid., 67.

[68] Ibid., 64.

[69] European Commission, "European Commission Services" Position paper on the sustainability impact assessment in support of negotiations for the trade part of the European Union – Mercosur Association Agreement' (March 2021), 9 <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/a974649b-a1ef-4436-9dc4-c80492a64b70/details> accessed 19 May 2023.

[70] European Commission, "Factsheet, EU-Mercosur trade agreement – Creating opportunities while respecting the interests of European farmers", 3–4.

[71] See Chapter BILATERAL SAFEGUARD MEASURES, notably Art. 2 in New EU-Mercosur trade agreement: The agreement in principle (n 20).

that prohibits lowering regulatory standards to attract trade and investment.[72]

With respect to the flanking measures, the Commission emphasised the importance of several unilateral instruments designed to address concerns related to sustainability and labour standards beyond the EU borders, notably the Deforestation Regulation, Carbon Border Adjustment Mechanism, and proposal on sustainable corporate governance.[73] It appears however that these arguments have not been sufficient to alleviate the concerns of the Parliament and the Council related to sustainability. In this connection, the Commission has shared the information that an additional instrument attached to the Agreement (see Section III) would clarify and elaborate on sustainable development commitments without reopening the negotiations.[74]

2. Criticism of the Association Agreement and its Trade Part

Civil society groups[75] as well as scientific studies[76] have found that the EU-Mercosur trade agreement would most likely, inter alia

- foster large-scale deforestation
- lead to an expansion of agricultural land in the Mercosur countries, and increasing meat production
- ease the export of passenger cars and other products making it difficult for countries worldwide to meet climate targets
- endanger human rights.

Overall, it would endanger both the implementation of the 2015 Paris Agreement and the aims of the Convention on Biological Diversity, as well as the 2022 Global Biodiversity Framework.

The EU Commission has tried to counter these arguments and insists that the FTA would be beneficial and help to implement international environmental law and the UN Development goals. It has also argued that the impacts raised by civil society are mostly managed through the

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[72] European Commission, "Position Paper" (n 69), 11.

[73] Ibid., 4.

[74] Question for written answer E-003195/22 to the Commission – Answer given by Executive Vice-President Dombrovskis on behalf of the European Commission (28 November 2022); Question for written answer E-000965/22 to the Commission – Answer given by Executive Vice-President Dombrovskis on behalf of the European Commission (29 April 2022).

[75] *Thomas Fritz*, "EU-Mercosur-Abkommen: Risiken für Klimaschutz und Menschenrechte" (Greenpeace/Misereor 2020) <https://www.greenpeace.de/publikationen/greenpeace-misereor-dka-studie-eu-mercosur-abkommen-0620.pdf> accessed 24 April 2023.

[76] *Luciana Ghiotto* and *Javier Echaide* (n 17).

new Forest Product Regulation[77] which has been agreed by the European Parliament only on 20 April 2023. Yet, aside from only establishing a system of due diligence obligations for affected companies, this Regulation excludes Mercosur core produce such as corn, sugar cane, rice, poultry, and ethanol.

This stands in contrast with Member States" constitutional obligations not to enter into agreements that might lead to further deforestation.[78] Indeed, as explicitly stated by the German Constitutional Court, the state objective layed down in "Art. 20a [of the German Constitution] requires the state to globally coordinated conduct to protect the global climate (…)."[79]

3. Trade and Sustainable Development (TSD) Chapter

The Agreement in Principle includes a chapter on Trade and Sustainable Development (TSD), and this 18–Article long chapter has been used by the Commission and others to deflect criticism of the EU-Mercosur Agreement as a whole.

The Agreement in Principle states:

"The Trade and Sustainable Development (TSD) chapter lives up to the highest standards for chapters in other modern agreements such as those with Mexico or Japan. The basis is the premise that increased trade should not come at the expense of the environment or labour conditions. On the contrary, it should promote sustainable development.

The Parties agree that they should not lower *labour or environmental standards* in order to attract trade and investment. They also agree that the trade agreement should not constrain their right to regulate on environmental or labour matters, including in situations where scientific information is not conclusive"

The TSD chapter includes both defensive (protecting governments" policy space for adopting environmental regulation) and offensive clauses (provisions prescribing environmental policies).[80] More specifically, the topics of the TSD chapter, which would become legal text should the FTA be ratified and enter into force, include:

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[77] European Commission, "Proposal for a regulation on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation" (EU) No 995/2010, COM (2021) 706; EU-Regulation on Deforestation-free Supply Chains (EP(2023)000229) – not in force.

[78] See Deutscher Bundesstag, "Ausschussdrucksache 20(9)244" (21 April 2023) <https://www.bundestag.de/resource/blob/944196/79297f163b8e8cd97f14d9a236b81b90/Stellungnahme_Holterhus-data.pdf> accessed 19 May 2023.

[79] BVerfG, *Neubauer* et al., Order of 24th March 2021, 1 BvR 2656/18 u.a., margin no. 201. See in depth on this obligation: *Roda Verheyen* and *Matthias Markus*, "Umweltvölkerrecht" in H.-J. Koch et al. (eds.), Handbuch Umweltrecht (2023).

[80] *Dominique Blümer* et al., "Environmental Provisions in Trade Agreements: Defending Regulatory Space or Pursuing Offensive Interests?" (2020) 29 Environmental Politics 866, 867; *Young* and *Clough* n 1.

Article 2: Right to regulate
Article 4: Multilateral Agreements of Labour Standards
Article 5: Multilateral Environmental Agreements
Article 6: Trade and Climate Change
Article 7: Trade and Biodiversity
Article 8: Trade and Sustainable Forest Management
Article 9: Trade and Sustainable Management of Fisheries and Aquaculture
Article 10: Technical and Scientific Information
Article 11: Trade and Responsible Management of Supply Chains

Under Art. 6 for example, Parties commit (again) to the Paris Agreement on Climate Change. The language of the provision is aspirational and cannot be interpreted as an obligation to deliver specific results.[81] The clause does not bind Brazil or other Mercosur states beyond and above what is already binding international environmental law, and it does not include enforceable mechanisms in this regard.

Art. 15.5 specifies: "No Party shall have recourse to dispute settlement under Title VIII (Dispute Settlement) for any matter arising under this Chapter". Rather, Art. 14 of the TSD Chapter establishes a "Sub-Committee on Trade and Sustainable Development" tasked "to facilitate and monitor the effective implementation of this Chapter, including cooperation activities undertaken under this Chapter". Alleviating this criticism was part of the aim of the Commission's initiative which resulted in the Joint Instrument, also because the current analysis of the Association Agreement text (as incomplete as it is available) shows that sanctions or enforcement of these obligations are not addressed there, either.

> "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 …"[82]

The EU Commission had, in fact, committed to use trade sanctions in case of violations of commitments made under the Paris Agreement.[83] Overall,

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[81] *Alberto do Amaral* and *Marina Martins Martes*, "The Mercosur-EU FTA and the Obligation to Implement the Paris Agreement: An Analysis from the Brazilian Perspective" in M. Bungenberg et al. (eds.), European Yearbook of International Economic Law 2020 (2022) 407 <https://doi.org/10.1007/8165_2021_68>.

[82] See n 22.

[83] European Commission, "Commission unveils new approach to trade agreements to promote green and just growth" (EC Press Corner, 22 June 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3921> accessed 19 May 2023.

it is no surprise that this chapter does not require a break with the economic growth mantra. All the trade enhancing measures for products remain intact.[84]

III. The EU-Mercosur Joint Instrument

1. Content

The Commission's mandate to negotiate the Mercosur-EU Association stems from 1999 – much has changed since. To manage the opposition of Members of the European Parliament (MEPs), Member States and civil society, the EU Commission has launched attempts to persuade Argentina, Brazil, Paraguay, and Uruguay to sign a supplementary declaration to the EU-Mercosur AA (the Joint Instrument).[85] The declared objective of the EU-Mercosur Joint Instrument was to strengthen the sustainability commitments under the EU-Mercosur deal beyond the TSD chapter, including enforcement (see above). Supposedly, the leaked text of the Joint Instrument was to be discussed at a joint meeting in mid-April, which was then postponed.[86]

The document is entitled "EU-Mercosur Joint Instrument DRAFT DOCUMENT As a contribution from the EU to the Mercosur countries Version of March 2023" and has only 8 pages in the Commission version, referring first to the

"need to take urgent action to tackle the triple planetary crisis of climate change, biodiversity loss and pollution, as clearly pointed out by the most recent scientific evidence, including the Sixth Assessment Report of the IPCC published in August 2021, the 2019 IPBES global assessment report on biodiversity and ecosystem services, the 2022 Global Land Outlook and the IRP Global Resources Outlook 2019;"

Its intent is summarised as follows:

"This joint instrument, provides, in the sense of Article 31 of the Vienna Convention on the Law of Treaties, a statement of what Mercosur and the European Union agreed in a number of provisions under the EU-Mercosur Agreement that have been the object of public debate and concerns and an agreed interpretation thereof."

It refers to the agreed topics in the various chapters of the draft FTA, and in particular to the TSD Chapter, reiterates and details some of the obliga-

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[84] See on all of this: *Jessica C. Lawrence*, "The EU in the Mirror of NPE: Normative Power Europe in the EU's New Generation Trade and Investment Agreements" in C. Nagy (ed.) Studies in European Economic Law and Regulation (2020).

[85] The first recital refers to the entire Association Agreement rather than only the trade part.

[86] "EU und Mercosur ringen um Klimaschutz-Zusagen" (TABLECLIMATE, 20 April 2023) <https://table.media/climate/analyse/eu-und-mercosur-ringen-um-klimaschutz-zusagen/> accessed 24 April 2023.

tions in the legal text. The text is in fact far more detailed than the agreed text in the TSD Chapter, as this comparison of the Climate Change Part shows:

Art. 6 of the TSD Chapter in the FTA	**Joint Instrument**
1. The Parties recognise the importance of pursuing the ultimate objective of the United Nations Framework Convention on Climate Change (UNFCCC) in order to address the urgent threat of climate change and the role of trade to this end.	The commitment in Article 6.2 of the TSD Chapter and Article 29 of the Political and Cooperation chapter to effectively implement the UNCCC and the Paris Agreement in line with the best available science includes:
2. Pursuant to paragraph 1, each Party shall:	Timely communication and implementation of successive and progressive Nationally Determined Contributions (NDCs) reflecting the highest possible ambition, in accordance with Art. 4.2 and 4.3 of the Paris Agreement, and that therefore there will be no reduction in the level of ambition of each Party's NDC, including with respect to deforestation targets existing on 28 June 2019, i.e. the date of the political agreement on the EU-Mercosur text, and as reflected in each Party's national laws;
(a) effectively implement the UNFCCC and the Paris Agreement established thereunder;	Pursuit of domestic mitigation measures, with the aim of achieving the objectives of such NDCs, in accordance with Art. 4.2 of the Paris Agreement;
(b) consistent with article 2 of the Paris Agreement, promote the positive contribution of trade to a pathway towards low greenhouse gas emissions and climate-resilient development and to increasing the ability to adapt to the adverse impacts of climate change in a manner that does not threaten food production.	Engagement, as appropriate, in adaptation planning processes and the implementation of actions, in accordance with Art. 7.9 of the Paris Agreement, with the aim of contributing to the global goal on adaptation established in Article 7.1 of the Paris Agreement;
3. The Parties shall also cooperate, as appropriate, on trade-related climate change issues bilaterally, regionally and in international fora, particularly in the UNFCCC.	Submission and periodical update of an adaptation communication, in accordance with Article 7.10 of the Paris Agreement;
	Submission of long-term low greenhouse gas emission development strategies, in accordance with Art. 4.19 of the Paris Agreement, and timely implementation thereof;

Art. 6 of the TSD Chapter in the FTA	Joint Instrument
	Legislative, regulatory and policy action aiming at making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development, in accordance with Art. 2.1.c. of the Paris Agreement; Reflection of the best available science in all aspects of implementation; Updating and enhancing actions and support to the Paris Agreement objectives and goals by taking into account the outcome of the periodical global stocktake, in accordance with Articles 4.9 and 14 of the Paris Agreement; Any further decisions made by the governing bodies of the UNFCCC and the Paris Agreement. Recalling the objective in Article 1 of the TSD Chapter of integrating sustainable development in the Parties' trade and investment relationship, information submitted by each Party to the UNCCC Secretariat under Art. 13 of the Paris Agreement will be taken into account in the monitoring of progress in effective implementation of the Paris Agreement in Article 6 of the Trade and Sustainable Development Chapter of the EU-Mercosur Agreement

Overall, the text suggests that indeed new obligations are meant to be added to the TSD chapter, or in the reverse: It demonstrates that the Commission does not see the current provision in the TSD as fit to meet its own aims.

Assuming the above text would become part of the TSD Chapter, all the detailed provisions, which are mostly not trade-related (stock take, NDC monitoring), would become subject to the TSD Committee's remit. If they stay in a separate Joint Instrument, which does not foresee monitoring by the TSD Committee and the treaty status of which is questionable, this would not be the case.

The Joint Instrument contains a final section on "monitoring and review", but that section only refers to the TSD Committee and states rather vaguely that some joint action is necessary:

> "The Parties agree that to ensure an effective implementation of TSD commitments they will develop a roadmap towards meeting these commitments and put in place a series of actions and cooperation activities."

The sections on civil society participation and human rights directly refer to and relate to the political parts of the EU-Mercosur AA.[87] They cannot be construed to only pertain to trade part.

While the Mercosur Partners apparently rejected the document outright, some internal critics deem it too modest, in particular since any form of enforcement regime to the TSD Chapter is missing.[88] Overall, the Joint Instrument does not change the asymmetry between trade and sustainability considerations. However, it adds new obligations that are only tenuously related to trade. This is the case for example with the new and more precise obligation to reduce current deforestation levels by 50 % by 2025.

2. Legal Significance

Neither the EU-Mercosur AA nor its FTA part are in force. The Joint Instrument is meant to counter actual and potential political opposition in the EU and in several Member States and to avoid ratification problems comparable to those in the contexts of CETA and the EU-Ukraine AA. However, the Member States were not at the table, could not formally make demands concerning its content, nor would they be legally involved in concluding this afterthought.

Against this background it is worth examining the significance of the join instrument for the scope, content, and interpretation of rights and obligations under the EU-Mercosur AA, including the trade part (FTA).

a. Joint (Interpretative) Instruments – It is in the Name

The use of instrument both in the CETA Joint Interpretative Instrument and the EU-Mercosur Joint Instrument appear to indicate the parties intended to draft an act with legal effect. The name of a document does not determine the juridical status.[89] Yet, the name of any document may count as an indication of the intention of state(s).

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[87] Sections 7 and 8 EU Mercosur Joint Instrument (leaked version of February 2023) (n 10).

[88] See *do Amaral* and *Martins Martes* (n 81).

[89] See Definition in Art. 2(1)a VCLT. Exchanges of letters or notes can be a way to express consent to be bound (see also Art. 13 VCLT (exchange of notes)).

Public international law knows unilateral declarations and reservations.[90] It also knows bilateral, multilateral, or plurilateral[91] amendments. The term "instrument" is used in the VCLT in Article 2(1)(a) to refer to a single or several parts of an international treaty: "'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".[92]

Other (unilateral or joint) documents, such as statements, precisely are not called instrument in the terminology of international law, indicating that they do not carry the same legal significance. Joint statements are less synallagmatic and bilateral than agreements. Usually, the use of "statement" element means to indicate that it is about a unilateral act (albeit collectively with others) and precisely not an extension of the treaty. Hence, when documents are called "Joint Interpretative Instrument" or "Joint Instrument" they seem to indicate treaty value, i.e., legally binding effect. The use of "interpretative" should be rightly used in the case of CETA as indicating that the aim is not modification (change in legal obligations) but only clarifying, declaratory of what legally already exists.

States sometimes use semantic elements on purpose to make an act sound as if it is a treaty (modification) OR as if it is not a treaty, while the act actually substantively amounts to a modification. Decisive is the substance of the act, not its denomination. Masking reservations as "declarations" is an old trick in treaty-making, which states almost always get away with for lack of a centralised authority that can decide. A rare exception is for example the *Belilos* case, in which the European Court of Human Rights exposed Switzerland as using this trick.[93] Normative fuzziness also results in practice from some Conference of the Parties (COP) and Meeting of the Parties (MOP) "decisions" under existing treaty frameworks, when they amount (content-wise) to a modification of the treaty under which they take place but will not involve the parties" parliaments (no ratification).

In the context of the "EU Mercosur Joint Instrument" the denomination as "instrument" is a suggestive choice that recalls the notion "legal instruments", i.e., tools to generate some kind of legal effect. It makes

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[90] Reservation within the meaning of Art. 2(1)(d) VCLT.

[91] This term is used in the context of mixed agreements, where the EU and the Member States are one party to an international agreement with third parties.

[92] For unilateral acts, the term "instruments of ratification, acceptance, approval or accession" is used, for example in Article 16 VCLT. Also, here the use of the term "instrument" indicates the legal effects of the act.

[93] ECtHR, *Belilos*, app. No. 10328/83.

the act sound powerful. A similar choice was made in 2016 for the "Joint Interpretative Instrument" regarding CETA.[94]

The parties generally refer to Article 31 VCLT (General rule of interpretation) and state that the EU-Mercosur Joint Instrument is a "statement of what Mercosur and the European Union agreed in a number of provisions under the EU-Mercosur Agreement that have been the object of public debate and concerns and an agreed interpretation thereof."[95] However, only Article 31(2) VCLT on the contextual interpretation appears to be relevant here. Art. 31(1) VCLT concerns good faith interpretation. Art. 31(3) concerns, next to relevant rules of international law, subsequent agreements and practices. A joint statement at the moment of or before conclusion of the treaty (as is the case here) does not qualify as "subsequent".

> Article 31(2) VCLT reads:
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
> (a) any *agreement* relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
> (b) any *instrument* which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

Article 31(2)(a) refers to "any agreement" between "all the parties". The EU and Mercosur could be understood to be all the parties to the FTA/trade part of the EU-Mercosur AA, as the Member States are not competent for the trade part. Yet, the Member States are of course parties to the mixed agreement, i.e., the AA. In addition, adopting an additional "agreement" in the legal sense would require negotiation and involvement of parliaments via conclusion (EU)/ratification (states).

Article 31(2)(b) refers to "any *instrument*" made by "one or more parties" and "accepted by the other parties". In other words, not all parties to the agreement are involved in the making of the tool; yet, the instrument formally qualifies as a tool of interpretation. That not all relevant states have to formally accept the substance of the tool is logical in a contextual reading taking account of Articles 31(2)(a) and 31(3)(a) VCLT.[96]

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[94] See discussion in the next subsection.

[95] The Joint Interpretative Instrument relating to CETA contains the same reference to Art. 31 VCLT.

[96] *Richard Gardiner*, Treaty Interpretation (Oxford international Law Library, 2015 (2nd edition)), Part II Interpretation Applying the Vienna Convention on the Law of Treaties, A The General Rule, 6 The General Rule: (2) Agreements as Context, Subsequent Agreements, and Subsequent Practice, Section 2.3.1 Instruments covered by Article 31(2)(b) of the Vienna Convention.

Hence, Article 31(2)(b) covers instruments by two or more parties to the agreement, if accepted by the others.[97]

The EU-Mercosur Joint Instrument only relates to the trade part to which the Member States are not parties. Hence, in relation to the trade agreement, the EU and the Mercosur countries are "all parties"; in relation to the AA, they are only part of the concluding parties. The issue here is whether the Member States as other parties accept the substance of the Joint Instrument.

From an EU law perspective, it is normatively unclear whether the Joint Instrument would require involvement of (at least) the EU Parliament, i.e., adoption pursuant to internal rules in Article 218 TFEU. Arguably the substance of the act should be determinative. If it modifies the rights and obligations under the treaty, conclusion and ratification should be ensured. As stated above, we argue this to be the case (albeit not in a manner to rectify existing substantive criticism of the FTA/AA).

The term "instrument" in Article 31(2)(b) refers to the tool not to the content.[98] Again, this confirms that the term "Joint Instrument" is chosen, firstly, because it carries the suggestion of a "tool" to perform an act with legal effect (unlike, e.g., statement, or a declaration) and, secondly, because it is a subliminal reference to statements that are called "*interpretative* instruments" (which also often aim to modify the treaty text rather than just interpret it); and perhaps separately and thirdly, to link to Article 31(2)(b) VCLT.

b. Context and Comparable Documents

Adopting interpretative documents post closure of political agreement or end of the formal negotiations has become more frequent. There are at least three contexts in which interpretative instruments were concluded to save the respective international agreements, i.e., to allow ratification against the backdrop of political concerns relating to actual and potential scenarios of consequences of the conclusion of these agreements: The CETA saga in Wallonia (2016), the German CETA ratification (2022) and the Dutch ratification of the EU-Ukraine Association Agreement (2016) are illustrative examples.[99] All interpretative documents in these three contexts attempted to narrow the scope for interpretation to disperse political concerns. They all have very limited legal effects. However, for these three examples, variations in legal significance can be observed.

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[97] Ibid.

[98] Ibid.

[99] *Niels Gheyle*, "On a side note: The role of interpretative instruments in defusing deadlocked EU international agreements" (March 2023 preprint) <dx.doi.org/10.13140/RG.2.2.24249.03688> accessed 24 April 2023.

CETA is a recent example where many statements were drafted after the negotiations had closed.[100] The EU Commission, together with the Canadian authorities, drafted the Joint Interpretative Instrument to accommodate some of the criticism raised against the conclusion of the CETA. Its main objective was to strengthen the sustainability commitments under CETA. The Joint Interpretative Instrument aims to give "a clear and unambiguous statement of what Canada and the EU and its Member States agreed in a number of CETA provisions that have been the object of public debate and concerns and provides an agreed interpretation thereof."[101] The Contracting Parties and the CETA Investment Court will have to take the Joint Interpretative Instrument into account when interpreting CETA. However, in terms of substance the Joint Interpretative Instrument is window dressing and falls short of offering a new approach that could substantively counter any of the underlying concerns.[102] Even if the CETA Joint Interpretative Instrument amounts to a primary source of interpretation under Article 31 VCLT[103] its content has widely been assessed as insufficient to address the concerns that it set out to address and its language as overly vague and unable to amount to a modification.[104]

A similar solution of adopting a treaty afterthought was found to solve the ratification difficulties arising from the negative Dutch referendum on the Association Agreement between the European Union, its Member States, and Ukraine in 2016.[105] The Dutch voted against approving the

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[100] *Guillaume van der Loo*, "CETA's signature: 38 statements, a joint interpretative instrument and an uncertain future" (*CEPS* 31 October 2016) <https://www.ceps.eu/ceps-publications/cetas-signature-38-statements-joint-interpretative-instrument-and-uncertain-future/> accessed 24 April 2023; *Wybe Th. Douma*, "CETA: Gold Standard or Greenwashing?" in W. Th. Douma et al. (eds.), The Evolving Nature of EU External Relations Law (2021).

[101] Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States (14 January 2017), preamble 1(e).

[102] *Gus van Harten*, "The EU-Canada Joint Interpretative Declaration/Instrument on the CETA: Updated Comments", Osgoode Hall Law School Legal Studies Research Paper Series 13(2) (2017). See specifically for labour standards: *Franz Christian Ebert*, "The Comprehensive Economic and Trade Agreement (CETA): Are Existing Arrangements Sufficient to Prevent Adverse Effects on Labour Standards?" (2017) 33 International Journal of Comparative Labour Law and Industrial Relations 295.

[103] Confirmed in Art. X of the Joined Interpretative Instrument (see n 101) and several Statements of the Council.

[104] *Van Harten* (n 102).

[105] Association Agreement of 21 March 2014 between the European Union and its Member States of the one part, and Ukraine, of the other part <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A22014A0529%2801%29> accessed 24 April 2023. The referendum concerned in fact the national Approval Act that ratified, for the Netherlands, the elements of the "mixed" EU-Ukraine Association Agreement that fall under Member States' competences. See for more details: *Ramses A. Wessel*, "The EU Solution to Deal with the Dutch Referendum Result on the EU-Ukraine

EU-Ukraine AA and the national Government decided that they could therefore not ratify the AA as earlier negotiated. One should note that this does not directly affect the provisional application of the AA, which could legally continue indefinitely. Politically, the Dutch ministry of foreign affairs acknowledged that this would be undesirable even if the provisional application only covers the parts of the mixed AA that fall under Union competence (and hence not those parts that require ratification by the Member States, including the Netherlands).[106]

The solution proposed was a "Decision of the Heads of State or Government of the 28 Member States of the European Union, meeting within the European Council", which would contain a particular interpretation of the AA. The Dutch scholar *Wessel* concludes that "the Decision is legally unharmful as it does not create rights or obligations that are not yet part of the Agreement".[107] The Council's legal service argued that the decision has the "legal force in order to exclude, as among the Member States of the EU, certain interpretations that could be given to the language of the agreement and certain forms of action that could be considered on its basis" and that the Court of Justice could use the decision "in its reasoning to assess the intentions of the EU Member States as to the scope of the commitments undertaken when becoming parties."[108] The Council's legal service also referred to the decision "as an instrument of international law, by which the EU Member States agree on how they understand and will apply, within their competences, certain provisions of an act by which they are otherwise all bound" despite the fact that the act is not concluded pursuant to "the formalities generally needed for self-standing agreements".[109] This confirms in no unclear

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Association Agreement" (2016) 1 European Papers 1305; *Peter van Elsuwege*, "The ratification saga of the EU-Ukraine Association Agreement: some lessons for the practice of mixed agreements' in S. Lorenzmeier et al. (eds.) EU External Relations Law: Shared Competences and Shared Values in Agreements Between the EU and Its Eastern Neighbourhood (2021); *Guillaume van der Loo*, "The Dutch Referendum on the EU-Ukraine Association Agreement: Legal Implications and Solutions" in M. Kuijer and W. Werner (eds.), Netherlands Yearbook of International Law (2017).

[106] With regard to CETA, the Council explicated that the EU would terminate provisional application if any one Member States could not ratify the agreement, see: Council of the European Union, Statements to be entered in the Council minutes (13463/1/16 REV 1) <http://data.consilium.europa.eu/doc/document/ST-13463-2016-REV-1/en/pdf> accessed 24 April 2023, 14.

[107] *Wessel* (n 105), 1308.

[108] European Council, "Opinion of the Legal Council: Draft Decision of the Heads of State or Government, meeting within the European Council, on the association agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part – Form, legal nature, effects and conformity with the association agreement" EUCO 37/16 LIMITE JUR 602 <https://data.consilium.europa.eu/doc/document/ST-37-2016-INIT/en/pdf> accessed 20 May 2023.

[109] Ibid.

words the intention to adopt an "agreement-like" act without following the ratification procedures required under national constitutional law, which are usually meant to protect the involvement of national parliaments and sometimes even require referendums.

However, as with the other afterthought instruments discussed in this article, the real issue is whether such a decision of the heads of state or government can alter the meaning or scope of the agreements to which they relate. In the case of the decision of the heads of state and government, the conclusion is clear. It is not a reservation. It cannot result in amending the scope or content of the EU-Ukraine AA as concerns the Member States. It is also only an expression of an agreed interpretation of the AA between the Member States, not the EU or Ukraine, which did not participate in the adoption of the decision but are parties to the AA. In short, a decision of the heads of state and government cannot alter or amend any part of the AA;[110] nor can it – unless the EU and Ukraine agree – create even a binding means of interpretation within the meaning of Article 31 VCLT.[111] It should be noted that this latter point distinguishes the decision in the context of the EU-Ukraine AA from the Joint Interpretative Instrument relating to CETA and the Joint Instrument relating to the EU-Mercosur AA.

c. Enforcement

No sanctions are attached to breaching the agreements in the Joint Instrument. This is in line with the EU's general policy of making provisions of trade agreements subject to dispute settlement mechanisms (DSM), while having a separate mechanism applicable to disputes concerning the TSD provisions.[112] The latter so far does not entail the option of imposing sanctions. In June 2022, the Commission declared that it intends to change its approach to enforcement of TSD provisions, aiming to extend the general dispute settlement (with a possibility to impose sanctions) to TSD chapters as well.[113] Nonetheless, the EU-Mercosur AA does not follow this revised approach.

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[110] See on this point also: Opinion of Advocate *General Saggio*, Case C-149/96, *Portugal v Council*, ECLI:EU:C:1999:92 and the judgment of the International Court of Justice, Case Concerning the Territorial Dispute, *Libyan Arab Jamahiriya v Chad*, Judgment of 3 February 1994.

[111] See also *van Elsuwege* (n 105).

[112] A recent example is: Art. 16.17 of the Agreement between the European Union and Japan for an Economic Partnership [2018], OJ L330/3.

[113] See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "The power of trade partnerships: together for just and green economic growth", Brussels, 22 June 2022, COM (2022) 409 final, p. 12. An example of the new approach can be observed in the EU-New Zealand Free Trade Agreement. Article 26.2 of the

In this context, some voices in the literature have argued that sanctions in trade agreements for sustainable development obligations are anyway ineffective and that other forms of "softer" pressures are more successful in inducing compliance.[114] Some have even taken the position that sanctions are counterproductive because they may cause economic harm which as such may be detrimental to sustainable development.[115] In addition, sanctions may stand in the way of cooperative processes which are needed to bring about changes in social and environmental regulations.[116] The EU's position here seems to have been that sustainable development is better promoted through cooperation rather than confrontation.

On the other hand, the idea and possibility of sanctions is powerfully symbolic and not being willing to attach sanctions makes sustainability obligations seem like second-class obligations in an otherwise sanctionable trade agreement. Compliance with decisions may be more difficult if there is not even a possibility of sanctions.[117] Moreover, the lack of a sanctions mechanism does not meet the objectives of the EU's own 2022 strategy, which committed to use trade sanctions in case of violations of commitments made under the Paris Agreement.[118]

Overall, why the use of sanctions may at times be ill-advised, including the possibility of sanctions demonstrates seriousness about the agreed commitments and simply adds another tool to the toolbox of how to achieve compliance with these commitments. Substantively, it seems desirable that the EU aims to use its market power and the fact that it is willing to pay higher prices in order to demand from trade partners compliance with certain sustainability standards across the whole economy, rather than creating two separate markets: EU-targeted pro-

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said Agreement stipulates that TSD provisions fall under the general dispute settlement mechanism and sets out a possibility to suspend the obligations set out in the agreement if one of the parties violated selected TSD provisions (Article 26.16).

[114] E.g., *Gracia Marín Durán*, "Sustainable Development Chapters in EU Free Trade Agreements: Emerging Compliance Issues" (2020) 57 Common Market Law Review 1031, p. 1058–1059.

[115] E.g., *Abram Chayes* and *Antonia Handler Chayes*, The New Sovereignty: Compliance with International Regulatory Agreements (1995), 92–98; *Denise Prévost* and *Iveta Alexovičová*, "Mind the Compliance Gap: Managing Trustworthy Partnerships for Sustainable Development in the European Union's Free Trade Agreements" (2019) 6 International Journal of Public Law and Policy 236, 242 et seq.; *Marín Durán* (n 114), 1061–1062.

[116] E.g., *Prévost* and *Alexovičová* (n 115), 243–244.

[117] *Marco Bronckers* and *Giovanni Gruni*, "Taking the Enforcement of Labour Standards in the EU's Free Trade Agreements Seriously" (2019) 56 Common Market Law Review 1591, 1610–1618. See more specifically on mechanism involving social society: *Jan Orbie* et al. (n 1), 528–529.

[118] European Commission, "Commission unveils new approach to trade agreements to promote green and just growth" (EC Press Corner 22 June 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3921>.

duction of sustainable goods and the overwhelming remaining market of carbon-intensive products leading to deforestation for the non-demanding importers. While this does not directly link to the EU's own participation in deforestation and other unsustainable practices (and is not directly covered by its own Paris obligations) it may serve the overall goal of addressing the "triple planetary crisis". Most effective seems creating a setting that allows for a combination of cooperative and – at least potentially – more confrontational approaches, depending on the position of the other party, including in light of political developments on their end.[119]

IV. Conclusions

The EU-Mercosur Joint Instrument was adopted to counter persistent and substantiated criticism that the EU-Mercosur deal clashes with the EU's ambitions and commitments to work towards a green and sustainable economy. Its analysis leads to several main conclusions:

First, the EU-Mercosur Joint Instrument substantively amounts to a modification of the FTA and should ideally, i.e., politically, as such be adopted pursuant to ordinary rules of treaty-making within the meaning of Article 218 TFEU (and relevant national constitutional provisions).

From an EU law perspective, Article 216(2) TFEU provides that agreements concluded by the Union are directly binding on the EU institutions and the Member States. Any Joint Instrument that forms an integral part of an international agreement concluded by the EU would also be covered by Article 216(2) TFEU. Adopting the Joint Instrument as part of the overall treaty and in a procedure involving parliaments, erases normative doubts about its status and effectiveness within the EU legal order.

The Joint Instrument is – on its surface – a text intended to clarify the intentions of all the parties to the trade agreement/trade part of the overall AA, namely the Mercosur countries and the European Union – not the Member States, which are not party to the FTA/trade part.

The Joint Instrument, while being part of an overall pro-trade framework, gives additional context, adds more details than the agreed text in the TSD Chapter, clarifies more specific obligations, and provides additional elements that again require further interpretation. It contains a detailed and strengthened commitment by the parties to the Paris mechanism of formulating progressively NDCs that strengthen national cli-

[119] See above the changing political circumstances during the negotiations of the EU-Mercosur deal.

mate action, including explicitly on deforestation.[120] It for example requires compliance with best available science and links to the monitoring mechanism of the progress in effective implementation of the Paris Agreement in Article 6 of the TSD Chapter with submissions to the UNFCCC Secretariat under Art. 13 of the Paris Agreement. While the mechanism remains in line with the bottom up, party submission dependent procedures under the Paris Agreement, the more detailed commitments should be seen as connecting the EU-Mercosur AA closely with the monitoring under the Paris Agreement. Since the content of the EU-Mercosur Joint Instrument substantively amounts to more than a clarification of existing obligations, it is a modification, and the parties should consult their parliaments.

The only plausible way forward to ensure that the Joint Instrument forms part and parcel of the FTA agreement and expressly and transparently adds to and amends the scope and content of the FTA would be to integrate the content into the set of "instruments of international law" by making part of the further conclusion process, including legal scrubbing, etc. Adopting an additional text without the formal status of a legal instrument with legal effects, i.e., treaty character, which substantively amends and extends the obligations of the parties circumvents the ordinary ratification/conclusion processes and hence curtails the involvement of parliaments. It is also misleading. Therefore, it would be the more effective and more transparent option to explicitly give the Joint Instrument the status of an agreement, i.e., treaty law, in the sense of Article 31(2)(a) VCLT, or, possibly, the status of a binding collective statement in the sense of Article 31(2)(b) VCLT.

Second, the Joint Instrument falls short of what the Commission itself wants to achieve. The text of the Joint Instrument falls short of the Commission's own strategy.[121] *Audrey Changoe*, Friends of the Earth Europe, concluded that in the Joint Instrument includes "no new measure […] that will address issues of deforestation, climate change, human rights violations, or animal welfare".[122] The evaluation by Friends of the Earth criticises above all the contradiction between abstract targets and

[120] See table above in Section III.1.

[121] *Ignacio Arróniz Velasco* and *Jonny Peters*, "The EU-Mercosur joint instrument fails to pass the EU's own sustainability" (E3G 5 April 2023) <https://www.e3g.org/news/the-eu-mercosur-joint-instrument-fails-to-pass-the-eu-s-own-sustainability-tests/> accessed 24 April 2023; *Mathilde Dupré* and *Stéphanie Kpenou*, "EU-Mercosur: a draft interpretative declaration that resolves nothing" (Institut Veblen 23 March 2023) <https://www.veblen-institute.org/EU-Mercosur-a-draft-interpretative-declaration-that-resolves-nothing.html> accessed 24 April 2023.

[122] "Breaking: Civil society denounce leaked joint instrument on EU-Mercosur deal as blatant greenwashing" (Friends of the Earth Europe 22 March 2023) <https://friendsoftheearth.eu/press-release/breaking-civil-society-denounce-leaked-joint-instrument-on-eu-mercosur-deal-as-blatant-greenwashing/> accessed on 24 April 2023.

the overall framework aimed at increasing economic exchanges. On the one hand, the Joint Instrument sets out a commitment to the NDCs that were set in June 2019 and a 50 % reduction in current deforestation levels by 2025; on the other, it is an interpretative tool for a free trade agreement that has the objective of intensifying trade between the two blocks, including the import of poultry and soy from Mercosur to the EU, which is one of the driving forces of deforestation. In particular, the lack of serious enforcement structures does not meet the Commission's own ambitions to seriously reconcile trade with sustainability. NGOs have expressed their disappointment in the Joint Instrument and pointed out that it is not capable of making the needed changes to the EU-Mercosur FTA that could resolve the environmental, climate and health threats.[123]

Third, a close reading of the Joint Instrument reveals that the EU Commission itself assumes the agreed TSD Chapter is insufficient to uphold the spirit and intent of the Green Deal. This becomes apparent both in the general introductory remarks on the triple planetary crisis but also in the more detailed obligations, e.g., relating to the NDCs.

Fourth, the Joint Instrument does not resolve any potential ratification issues with the AA. The EU proposes additional obligations in terms of climate actions that go further than the text of the TSD Chapter/FTA but does not actually involve parliaments – neither the European Parliament nor national parliaments. The status of the Joint Instrument remains unclear, as does its potential impact on any AA. The approach is unlikely to convince national parliaments. Presumably, this would require involving them in the adoption process.

Fifth, the question of legality must be asked: Can the EU really conclude alone (i.e., without the Member States) such detailed agreement on obligations relating to communication and implementation of climate action, e.g., emission reduction?

The relationship between EU competence and mixity is complicated. Generally, international agreements that go beyond the exclusive EU competence for trade, such as for example environmental agreements, are concluded as mixed agreements. However, as explained above, the Court of Justice has interpreted the EU's competence for CCP very generously, including a wide range of "trade-related" matters.[124]

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[123] *Dupré* and *Kpenou* (n 121); *Arróniz Velasco* and *Peters* (n 121); Friends of the Earth Europe (n 122); "Still got it! As discussions aimed at ratification begin, Mercosur deal retains its capacity to dismay" (FERN 13 April 2023) <https://www.fern.org/pt/publications-insight/still-got-it-as-discussions-aimed-at-ratification-begin-mercosur-deal-retains-its-capacity-to-dismay-2654/> accessed 19 May 2023.

[124] Case C-414/11 *Daiichi Sankyo* ECLI:EU:C:2013:520; Case C-114/12 *European Commission v Council of the European Union* (*Broadcasting Rights*) ECLI:EU:C:2014:224; Opinion 2/15 *EU-Singapore FTA* ECLI:EU:C:2017:376.

However, the Joint Instrument is a separate afterthought to the original trade part/FTA. It explicitly and nearly exclusively aims to achieve non-trade objectives by strengthening among other things environmental and climate change obligations in a way that does not justify categorising these issues in isolation as trade-related and hence EU competence. This again raises the question of whether such treaty-making by afterthought is desirable from a democratic legitimacy perspective. However, when the EU concludes non-trade "instruments" that contain additional obligations in a way that is legally binding on the EU and by extension the Member States this also constitutes in terms of form and procedure a new way of pushing the boundaries of EU exclusive competence for CCP.

Summary

This article examines the Joint Instrument relating to the EU-Mercosur Association Agreement (AA). EU free trade agreements (FTAs) are increasingly met with political opposition. Generally, the mantra that free trade benefits all is under pressure. To solve the ratification difficulties that EU trade agreements, the EU Commission has started to deploy a new strategy, which we call *treaty-making by afterthought*. The EU-Mercosur Joint Instrument is the most recent afterthought.

The EU-Mercosur Joint Instrument is – on its surface – a text intended to clarify the intentions of all the parties to the trade agreement/trade part of the overall AA, namely the Mercosur countries and the European Union – not the Member States, which are not party to the FTA/trade part. It is available only in an unofficial (leaked) version of February 2023.

Examining this version and its adoption process, this article concludes that the EU-Mercosur Joint Instrument substantively amounts to a modification of the trade part of the EU-Mercosur deal. Therefore, it should form part and parcel of the FTA agreement and expressly and transparently add to and amend the scope and content of the FTA. For this, it would have to be integrated into the set of "instruments of international law" by making part of the further conclusion process, including legal scrubbing, etc. This would also ensure that it is adopted pursuant to the ordinary procedures of treaty-making involving parliaments.

What is further, the focus of the Joint Instrument is on non-trade measures. While it does not bring the EU-Mercosur deal in line with the EU's Green Deal it strengthens and expands sustainability commitments. For this reason, it requires involvement of Member States and hence also national parliaments. The latter also appears to be the only probable way of avoiding ratification difficulties of the AA.