

Legal Analysis of the leaked EU-Mercosur Joint Instrument

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Executive Summary:

- A draft Joint Instrument that is to set forth shared interpretations of a number of provisions under the EU-Mercosur Association Agreement (‘EUMAA’) – created by the European Commission and likely intended to serve as a basis for further negotiation between the EU and Mercosur – has been leaked. It addresses provisions in the Trade and Sustainable Development (‘TSD’) Chapter of the EU-Mercosur Trade Agreement (EUMTA) as well as in the Political Dialogue and Cooperation pillar of EUMAA.
- The document contains a lot of preambular language, reiterations of commitments made in the EUMAA, acknowledgements of issues as well as declarations of the parties’ intended impact of the EUMAA. While these provisions lack interpretative guidance from which one could derive actionable commitments, the Joint Instrument also sets out a number of meaningful concretisation of commitments. However, **the Joint Instrument fails to address crucial aspects, such as dispute settlement and enforcement of TSD Chapters, despite well-established weaknesses.** Notably, the lack of a sanctioning mechanism for TSD commitments “makes their implementation to a large extent dependent on the parties’ political goodwill.”¹ **The Joint Instrument also fails to align the EUMAA with the Commission’s new TSD Strategy**, which seeks to subject TSD Chapters to the general state-to-state dispute settlement mechanism of trade agreements and enables the application of sanctions in defined circumstances.
- Importantly, **clarifications and concretisations within the Joint Instrument are insufficient to rectify the systemic deficiencies that have been identified with respect to the EUMAA.** Sustainability aspects remain substantively and institutionally detached from the rest of the agreement. The TSD Chapter does not mainstream sustainability considerations throughout the entire agreement but sidelines them. As a consequence, the EUMAA does not differentiate between trade that is sustainable and trade that is unsustainable and grants preferential trading conditions also to unsustainable trade.
- **It is crucial to note the formal limits of an interpretative statement, like the Joint Instrument, to be annexed to an international agreement and which may provide clarifications of the treaty text but cannot set forth new commitments.** Some of the content of the Joint Instrument, such as the commitment to devise an interim target for reducing deforestation by at least 50%, goes beyond mere interpretations of the treaty text and constitutes obligations in addition to what is stipulated in the text of the EUMAA. However, enforcing such obligations is impeded by aforementioned limitations within the TSD Chapter’s enforcement mechanism. Moreover, **such**

¹ Axel Marx, Franz Ebert, Nicolas Hachez and Jan Wouters, ‘Dispute Settlement in the Trade and Sustainable Development Chapters of EU Trade Agreements’ (Leuven Centre for Global Governance Studies 2017).

new obligations would also have to be ratified as a separate international agreement, creating further legal complexities. Revisions of the EUMAA going beyond interpretations of its text should be directly incorporated into the text of the EUMAA given that it has not yet been signed. Similarly, due to its formal limits, an interpretative statement also cannot address matters that have been wholly left out of the original text of the treaty but are of great relevance to the trade relationship of the parties, such as the export of pesticides from the EU to the Mercosur region that are not authorised on the EU market due to their hazardous properties.

- The Joint Instrument does not acknowledge the EU's role in deforestation in the Mercosur region due to imports of deforestation-linked goods, nor does it address the potential impacts on indigenous communities resulting from increased agricultural exports from Mercosur to the EU under the agreement. There is also no mentioning of any financial mechanisms to be provided by the EU to Mercosur to support the protection of biomes and other important ecosystems.
- While the Joint Instrument was devised in the context of public concerns against the EUMAA, the process leading to the creation of the current draft was not transparent and did not include consultation from civil society. Indigenous groups – despite the concerns about them potentially adversely impacted by the EUMAA – also do not appear to have participated in the creation of the Joint Instrument.

1. Introduction

After their initial launch and subsequent suspension, negotiations of the EU-Mercosur Trade Agreement ('EUMTA') were resumed in 2016 and concluded in 2019.² The trade deal is part of an Association Agreement ('EUMAA') consisting of also a Political Dialogue and Cooperation part which has not yet been made available to the public.³ On the EU side, the deal was presented as providing access to what is currently a rather closed Mercosur market and thereby creating new export opportunities in the region for various European industry sectors including chemicals, cars and machinery. However, following the conclusion of the negotiations of the EUMTA and the publishing of much of the deal's text, various actors contested the agreement. Among them is the European Parliament that expressed in a Resolution its intention not to ratify the deal in its current state.⁴ Also, a number of Member States, including Austria, France and Ireland, spoke out against the agreement.⁵ According to Austria's Vice Chancellor, "the MERCOSUR-agreement is at odds with our efforts to address the economic crisis in a way that is compatible with environmental and climate ambitions and commitments, failing to build a more resilient economic system."⁶ Other deficiencies that were pointed out include soaring deforestation rates in Brazil under former President Bolsonaro and the risk of the agreement exacerbating the situation, adverse impacts on indigenous groups of changes in land use due to an expanding agricultural sector in the Mercosur region under the agreement,⁷ as well as concerns that

² European Commission, 'EU-Mercosur agreement: Documents' available at <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mercocor/eu-mercocor-agreement/documents_en>; European Commission, 'EU-Mercosur Trade Agreement' available at <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mercocor/eu-mercocor-agreement_en>.

³ A leaked version of the text has been published by Greenpeace, see <<https://trade-leaks.org/mercocor-eu-association-agreement-leaks-8-october-2020/mercocor-association-agreement-text/>>;

The German Parliament received the text of the political part of the Association Agreement at the end of February 2023 as classified information (see Kleine Anfrage der Abgeordneten Alexander Ulrich, Andrej Hunko, Klaus Ernst, Ina Latendorf, Ralph Lenkert, Christian Leye, Pascal Meiser, Cornelia Möhring und der Fraktion DIE LINKE, 'Das Freihandelsabkommen zwischen der Europäischen Union und den Mercosur-Staaten', Drucksache 20/6552, 26.04.2023, available at <<https://dserver.bundestag.de/btd/20/065/2006552.pdf>>).

For an assessment of the Political Dialogue and Cooperation pillar of the Association Agreement, see Andrés Malamud, 'Assessing the political dialogue and cooperation pillar of the EU-Mercosur Association Agreement: towards a bi-regional strategic partnership' (2022, requested by the European Parliament's Committee on Foreign Affairs) available at <[https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/653652/EXPO_IDA\(2022\)653652_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/653652/EXPO_IDA(2022)653652_EN.pdf)>.

⁴ "The European Parliament ... emphasises that the EU-Mercosur agreement cannot be ratified as it stands" in European Parliament resolution of 7 October 2020 on the implementation of the common commercial policy – annual report 2018 (2019/2197(INI)) at <https://www.europarl.europa.eu/doceo/document/TA-9-2020-0252_EN.html>.

⁵ Arthur Neslen and Hans von der Burchard, *EU's green trade promises face rainforest reality* (18 June 2019) available at <<https://www.politico.eu/article/eus-green-trade-promises-face-reality-check-in-the-rainforest/>>; Andrés Malamud, *Assessing the political dialogue and cooperation pillar of the EU-Mercosur Association Agreement: towards a bi-regional strategic partnership?* (2022, requested by the European Parliament's Committee on Foreign Affairs) 18-9; Reuters, 'Austrian parliament votes to oppose EU-Mercosur pact' (Reuters, 19 September 2019) available at <<https://www.reuters.com/article/eu-trade-mercocor-austria-idUSL5N26A4OM>>.

⁶ Kogler also stated that "... we must seize this opportunity to use the Green Deal to advance international climate protection and give new impetus to the Paris Climate Agreement. Signing the EU-MERCOSUR trade agreement would thwart such progress." See Letter by Vice Chancellor and Federal Minister Werner Kogler to António Costa, Prime Minister of Portugal 'Mercosur and Portuguese EU-Presidency' (4 March 2021) available at <https://extranet.greens-efa.eu/public/media/file/1/6813?link_id=1&can_id=f534559ffdf9605dcf44af504fe1b455&source=email-austrian-government-rejects-signing-of-the-mercocor-agreement&email_referrer=email_1100754&email_subject=austrian-government-rejects-eu-mercocor-agreement>.

⁷ Luciana Ghiotto and Javier Echaide, Analysis of the agreement between the European Union and the Mercosur (December 2019) at <https://www.annacavazzini.eu/wp-content/uploads/2020/01/Study-on-the-EU-Mercocor-agreement-09.01.2020-1.pdf>, 122.

the deal will entrench the asymmetric nature of the trading relationship between the EU and Mercosur and thereby perpetuate socio-economic and –ecologic inequalities.⁸

As a response to these concerns and the unlikely prospect to ratify the deal in its current state given wide opposition, the Commission made known its plans to seek the negotiation of further commitments with Mercosur.⁹ A document created by the Commission - titled 'EU-Mercosur Joint Instrument' (hereafter referred to as 'Joint Instrument') - was recently leaked and states that it provides "an agreed interpretation" of "a number of provisions under the EU-Mercosur Agreement." The Joint Instrument addresses provisions in the Trade and Sustainable Development ('TSD') Chapter of the EUMTA as well as in the Political Dialogue and Cooperation pillar of EUMAA. It is dated February 2023 and is likely intended to serve as a basis for further negotiations between the EU and Mercosur. The document appears to be in draft state, with provisions inconsistently numbered and formatted.

The following legal analysis of the leaked Joint Instrument addresses various formal and substantive aspects of the Joint Instrument to conclude that while the Joint Instrument puts forward clarifications of some provisions of the EUMAA, it is unable to address systemic deficiencies of the deal that lead to a lack of consideration of whether the trade occurring under the EUMAA is sustainable. Moreover, the Joint Instrument does not – and due to its nature as an interpretive statement is indeed formally unable to – address widely established weaknesses of the dispute settlement mechanism under the EUMTA's TSD Chapter. As will be discussed below, here the EUMAA and the Joint Instrument lag behind the Commission's 2022 Review of its TSD Strategy.¹⁰

2. Substantive content of the Joint Instrument

The Joint Instrument launches with a vast preambular section which makes reference to international commitments, such as the United Nations Framework Convention on Climate Change ('UNFCCC'), the UN Declaration on Rights of Indigenous Peoples and International Labor Organization ('ILO') Declarations, and expresses the intention of the parties to establish a trade relationship that enhances sustainable development and which supports "a just transition to a green and low emissions net zero economy by or around mid-century."

The preamble is followed by provisions addressing specific issues pertaining to trade and sustainability, including 'Biological Diversity', 'Forests' and 'Climate Change'.¹¹ These provisions contain plenty of

⁸ Luciana Ghiotto and Javier Echaide, *Analysis of the agreement between the European Union and the Mercosur* (December 2019) available at <<https://www.annacavazzini.eu/wp-content/uploads/2020/01/Study-on-the-EU-Mercosur-agreement-09.01.2020-1.pdf>>, page 16; LSE Consulting, *Sustainability Impact Assessment in Support of the Association Agreement Negotiations between the European Union and Mercosur* (Draft Final Report, July 2020) available at

<https://trade.ec.europa.eu/doclib/docs/2020/july/tradoc_158889.pdf>, page 20.

⁹ Reuters, 'EU seeks Mercosur green commitments by end-2021 – EU trade chief' (30 April 2021, Reuters) at <<https://www.reuters.com/article/eu-mercocur-trade-idUSL8N2MN6EK>>; Barbara Moens and Jakob Hanke Vela, 'Brussels looks to evade EU capitals to get Mercosur deal done' (28 September 2022, Politico) at <<https://www.politico.eu/article/brussels-eu-commission-grab-trade-power-mercocur-deal/>>.

¹⁰ European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions - The power of trade partnerships: together for green and just economic growth' (COM(2022) 409 final) 7.

¹¹ The remaining issues addressed are: 'Non-regression and High and Effective Levels of Environmental and Labour Protection', 'Labour Rights', 'Cooperation', 'Human Rights', 'Civil Society' and 'Monitoring and Review'.

restatements of the text of the EUMAA¹² as well as acknowledgements of issues¹³ and declarations of the parties' intended impact of the agreement¹⁴. While the two latter types of provisions provide context for the interpretation of the text of the EUMAA, they do not provide concrete guidance for the interpretation of specific provisions of the EUMAA from which one could derive actionable commitments. The Joint Instrument also contains a number of meaningful concretisation of commitments. As the Joint Instrument fails to address the weak enforcement mechanism of the TSD Chapter (see Section 4(ii)), however, such clarifications are unlikely to have a significant impact in practice. For example, the Joint Instrument reiterates commitments the parties have made in the TSD Chapter with respect to levels of protection in and effective enforcement of the parties' domestic law on the environment and labour protection.¹⁵ As a qualification to these commitments, the Joint Instrument provides that the parties are being granted "reasonable discretion" in the allocation of their budgets but states the common understanding of the parties that the resources are to be allocated in a manner that will allow domestic environmental and labour laws to "be effectively implemented, monitored and enforced." This is likely intended to address the practice of defunding environmental institutions reported in Brazil under former President Bolsonaro.¹⁶

In a provision titled 'Climate Change', the Joint Instrument attempts to clarify Art. 6(2) of the TSD Chapter of the EUMTA and Art. 29 of the Political Dialogue and Cooperation part of the EUMAA, according to which the parties have committed to implement the UNFCCC and the Paris Agreement. Art. 6(2) of the TSD Chapter, in particular, is ambiguous in the precise actions it entails with respect to the parties' National Determined Contributions ('NDCs'), which, pursuant to the Paris Agreement, parties must aim to achieve.¹⁷ Making reference to Art. 4(2) + (3) of the Paris Agreement,¹⁸ the Joint Instrument provides that Art. 6(2) of the TSD Chapter and Art. 29 of the Political Dialogue and Cooperation part is to include the "[t]imely communication and *implementation* of successive and progressive Nationally Determined Contributions (NDCs) reflecting the highest possible ambition [emphasis added]." Here, the Joint Instrument - by requiring the implementation of the parties' NDCs - enhances the obligation of conduct in Art. 4(2) of the Paris Agreement to merely "*pursue* domestic mitigation measures, with the aim of achieving the objectives of [the NDCs] [emphasis added]." The

¹² "... in Art. 27 of the Political and Cooperation Agreement, the parties commit to enhance environmental cooperation, including in the area of biodiversity, with the aim to contribute to the protection, conservation and sustainable use of natural resources."

¹³ "Both the EU and Mercosur are committed to the protection of labour rights and recognises the role of the International Labour Organisation as the key multilateral organisation in this field."

¹⁴ "This provision will avoid a "race to the bottom" with regard to environmental and labour protection."

¹⁵ Art. 2 TSD Chapter of the EUMTA.

¹⁶ Sue Branford and Thais Borges, 'Brazil guts agencies, 'sabotaging environmental protection' in Amazon: Report' (Mongabay, 1 February 2021) available at <<https://news.mongabay.com/2021/02/brazil-guts-agencies-sabotaging-environmental-protection-in-amazon-report/>>; Jake Spring, 'Brazil proposes cuts to 2021 budget for environmental protection as deforestation spikes' (Reuters, 26 January 2021) available at <<https://www.reuters.com/article/us-brazil-environment-idUSKBN29U26S>>.

¹⁷ James Harrison and Sophia Paulini, *The Trade and Sustainable Development Chapter in the EU Mercosur Association Agreement - Is it fit for purpose?* (July 2020) available at <<https://www.documents.clientearth.org/wp-content/uploads/library/2020-07-15-the-trade-and-sustainable-development-chapter-in-the-eu-mercotur-association-agreement-ext-en.pdf>>.

¹⁸ Art. 4(2) states

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

Art. 4(3) states

"Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances."

Joint Instrument also requires a minimum level of ambition to be reflected in the parties' NDCs that cannot stay below the parties' deforestation targets at the time of the political agreement on the text of the EU-Mercosur trade agreement (28 June 2019) and deforestation targets reflected in the domestic law of the parties.

Regarding 'Forests', the Joint Instrument recites the commitments made on forests both in the TSD Chapter (also by way of reference to Paris Agreement and the obligation to effectively implement the latter) and in the Political Dialogue and Cooperation part of the Agreement. Also, reference is made to the Glasgow Leaders' Declaration on Forests and Land Use of 2 November 2021. The Glasgow Leaders' Declaration is a pledge signed by 145 states to raise efforts to conserve forests, accelerate the restoration of forests and promote the production and consumption of sustainable commodities.¹⁹ The signatory states specifically commit "to working collectively to halt and reverse forest loss and land degradation by 2030 while delivering sustainable development and promoting an inclusive rural transformation."²⁰ In the Joint Instrument, it is stated that both the EU and Mercosur commit to setting "an interim target" in relation to the Glasgow Leader's Declaration of reducing deforestation rates at least by 50% in 2025 compared to current levels. This constitutes a concrete minimum level for the reduction of deforestation to be achieved in the near future, which is very much in contrast with the general and unspecific language typically found in TSD Chapters. Moreover, the Instrument sets out the commitment of the parties "to make significant progress in restoration of forests" by 2025. There is no quantified target stated as to what constitutes "significant progress." Notably, the above obligations go beyond possible interpretations of the provisions referred to in the TSD Chapter or Political Dialogue and Cooperation Pillar and appear to create additional commitments to what is currently stipulated in the EUMAA. The legal implication of this is discussed in the next section.

With respect to 'Labour Rights', the Joint Instrument makes reference to the obligation set out by Art. 4.4 of the TSD Chapter as well as Art. 45bis of the Political Dialogue and Cooperation chapter, according to which the parties must "make continued and sustained efforts to ratify the fundamental ILO Conventions other relevant Conventions" and specifies that this is an "ongoing obligation." Here, parties are to make continuous efforts to ratify said Conventions.²¹ When it comes to Multilateral Environmental Agreements ('MEAs'), the Joint Instrument sticks with the low ambition of the provision on MEAs in the TSD Chapter of the EUMTA, which merely requires the parties to reaffirm commitments to those MEAs to which they already a party.²²

¹⁹ Glasgow Leaders' Declaration on Forests and Land Use (2 November 2021) available at <<https://ukcop26.org/glasgow-leaders-declaration-on-forests-and-land-use/>>.

²⁰ *Ibid.*

²¹ An equivalent clause in the EU-Korea FTA was among the subjects of the first ever dispute on a TSD Chapter in an EU FTA. Here, the EU argued that Korea's efforts were insufficient to satisfy the commitment to make continued and sustained efforts to ratify the fundamental ILO Conventions, also since Korea, and this was undisputed between the parties, has not taken steps to ratify remaining ILO Conventions up until 2017. The EU argued efforts have to be made "without interruption" (para. 270). The Panel of Experts confirmed the ongoing nature of obligation but does not appear to interpret this as meaning there cannot be interruption in efforts (paras. 177-80). The Panel found that "Korea's efforts are less than optimal, and that there is still much to be done" (para. 291). Yet, according to the Panel, the steps that have been taken by Korea do meet the legal standard of making continued and sustained efforts towards the ratification of core ILO Convention (paras. 291-3). Korea's interpretation of the clause, according to which "a Party is permitted to simply maintain the status quo or only to make minimal efforts," was argued by the Panel not to correspond with the ordinary meaning of the clause (para. 272). The Joint Instrument therefore emphasises the ongoing nature of the obligation - which can be contrasted with Korea's submission claiming that maintaining the status quo is acceptable - but does not clarify the provision along the lines of the submission of the EU in the dispute, according to which there cannot be any interruption in the efforts the ratify the required Conventions.

²² Art. 5(3) of the TSD Chapter of the EU – Mercosur Trade Agreement.

Moreover, the parties are to develop a roadmap that indicates how the TSD commitments are to be implemented, including “a series of actions and cooperation activities.” This relates to one of the action points in the Commission’s 2022 Review of its TSD Strategy stating the Commission intends to negotiate “detailed and time-bound roadmaps with milestones.”²³ The meaningfulness of the envisaged roadmap will depend on the precise action points it includes.

3. The formal limits of the Joint Instrument

The creation of documents setting out common understandings of terminologies in treaty texts has become frequent practice in the field of international investment agreements.²⁴ Also in the case of the EU-Canada Comprehensive Economic and Trade Agreement (‘CETA’), a ‘Joint Interpretative Instrument’ was agreed upon by the parties which, as the Joint Instrument to the EUMAA, sets out shared interpretations of the various parts of the agreement at the time of the signature of the agreement.²⁵ CETA’s Joint Interpretative Instrument was negotiated in a very similar political context to address opposition against the agreement, most notably by the Walloon government.²⁶ It has been argued – however – to not sufficiently address the concerns raised vis-à-vis the agreement.²⁷

According to the preamble of the Joint Instrument to the EU-Mercosur Agreement, it “provides, in the sense of Article 31 of the Vienna Convention on the Law of Treaties, “an agreed interpretation” of a number of provisions “that have been the object of public debate and concerns.”²⁸ The remainder of the Joint Instrument refers to and sets forth interpretations of provisions both in the TSD Chapter of the EUMTA as well as in the Political Dialogue and Cooperation part of the Association Agreement.

As such, the Joint Instrument appears not to be intended as a self-standing additional agreement but rather as an instrument related to a treaty within the meaning of Art. 31(2) Vienna Convention on the Law of Treaties (‘VCLT’).²⁹ The latter provides that part of the context of a treaty to be referred to in its interpretation is “any agreement relating to the treaty which was made between all the parties in

²³ European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions - The power of trade partnerships: together for green and just economic growth’ (COM(2022) 409 final) 7.

²⁴ David Gaukrodger, *The Legal Framework Applicable to Joint Interpretive Agreements of Investment Treaties* (OECD Working Papers on International Investment 2016/01, 2016); Sarthak Malhotra, *India’s Joint Interpretive Statement for BITs: An Attempt to Slay the Ghosts of the Past* (IISD, 12 December 2016) at <https://www.iisd.org/itn/en/2016/12/12/indias-joint-interpretive-statement-for-bits-an-attempt-to-slay-the-ghosts-of-the-past-sarthak-malhotra/>.

²⁵ Art. 1(a)+(e) of the Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States.

²⁶ Guillaume Van der Loo, ‘CETA’s signature: 38 statements, a joint interpretative instrument and an uncertain future’ (CEPS Commentary, 31 October 2016) available at <https://www.ceps.eu/wp-content/uploads/2016/10/GVdL%20CETA%20%20II.pdf>.

²⁷ Gus Van Harten, ‘The EU-Canada Joint Interpretative Declaration/Instrument on the CETA – Updated Comments’ (2017) 13 *Osgoode Hall Law School Legal Studies Research Paper Series*, Research Paper No. 6; Transport & Environment and ClientEarth, ‘Comprehensive Economic and Trade Agreement (CETA) and the environment – A gold standard for the planet or for big business?’ (November 2016) available at https://www.transportenvironment.org/wp-content/uploads/2021/07/2016_11_CETA_Gold_Standard_FINAL.pdf.

²⁸ Here, Joint Instrument mirrors language used in the CETA Joint Interpretative Instrument: “This interpretative instrument, provides, in the sense of Article 31 of the Vienna Convention on the Law of Treaties, a clear and unambiguous statement of what Canada and the European Union 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.” Article 1(e).

²⁹ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

connection with the conclusion of the treaty” as well as “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.” The type of agreement and instrument referred to in Art. 31(2) VCLT must be distinguished from unilateral statements or declarations of interpretation, as all parties, meaning both the EU and Mercosur, must be involved in the making of or accept such agreement/instrument. As a first step, it therefore remains to be seen if Mercosur is willing to agree to the content of the leaked draft of the Joint Instrument. It is very likely that the leaked draft will be subject to revisions and amendments following negotiations with Mercosur.

Secondly, in some instances the Joint Instrument appears to present as ‘interpretations’ additional commitments that go beyond the meaning of the provisions to which it refers, thereby establishing new commitments rather than only clarifying the meaning of those commitments already contained in the EUMAA.³⁰ For example, as already discussed above, the Joint Instrument derives the obligation to establish a specific interim target for the reduction of deforestation from commitments to promote trade in forest products from sustainably managed forests and a reference to the Paris Agreement in the TSD Chapter³¹ as well as from a commitment to enhance cooperation and dialogue on deforestation to strengthen domestic policies in the Political Dialogue and Cooperation Chapter of the EUMAA³². In principle, the consequence of the Joint Instrument setting out new/additional commitments to the EU-Mercosur Agreement is its legal classification as a separate international agreement, which would need to be ratified accordingly. Should the EUMAA and the Joint Instrument be concluded as a package of legally binding agreements, this would then create further legal complexities, such as the question of whether there exists a hierarchy between the rules in the different agreements.³³ A significantly more straight forward solution is therefore the integration of what are additional commitments into the text of the EUMAA, which has not yet been signed by either side and can easily be amended. This is also because an interpretative statement formally cannot address matters that have been wholly left out of the original text of the treaty but are of great relevance to the trade relationship of the parties, such as

³⁰ For a similar argument, see Christina Eckes and Roda Verheyen, ‘Treaty-Making by Afterthought: Can the EU-Mercosur Association Agreement Be Saved by the Joint Instrument’ (April 2023, commissioned by Umweltinstitut München e.V.) 17-8.

³¹ Arts. 8 and 6.2 TSD Chapter.

³² Art. 29 of the Political Dialogue and Cooperation Chapter of the EUMAA.

³³ See Rhea Tamara Hoffmann and Markus Krajewski, ‘Legal opinion and proposal regarding a possible improvement or renegotiation of the draft EU-Mercosur Association Agreement (May 2021, commissioned by Misereor, Greenpeace and CIDSE) available at <https://www.cidse.org/wp-content/uploads/2021/05/Legal-Opinion-EU-Mercosur_EN_final.pdf>.

Notably, this question poses itself also with respect to the TSD Chapter vis-à-vis the rest of the agreement. The relationship between TSD commitments and trade liberalisation commitments was subject of a dispute between the EU and Ukraine under the EU-Ukraine Association Agreement in which the EU challenged Ukraine’s export ban of certain wood products (Final Report of the Arbitration Panel, Restrictions applied by Ukraine on exports of certain wood products to the European Union (11 December 2020), available at <<https://jusmundi.com/fr/document/decision/en-european-union-v-ukraine-ukraine-wood-exports-ban-establishment-of-the-panel-tuesday-28th-january-2020>>).

Responding to Ukraine’s invocation of a number of provisions in the Association Agreement’s TSD Chapter, the Arbitration Panel found that ‘the provisions of Chapter 13 [the TSD Chapter] are not in and of themselves self-standing or unqualified exceptions to justify measures that are in breach of other provisions such as Article 35 of the AA [prohibiting export restrictions].’ (para. 244) According to the Arbitration Panel, the TSD Chapter is limited to providing context in an assessment of whether a measure falls within the provision incorporating Art. XX of the GATT, which excepts violations of trade commitments in a number of limited circumstances, including the protection of the environment. (para. 249) The Arbitration Panel further found that the provisions of the TSD Chapter that Ukraine is invoking - among them the right to regulate and the duty to cooperate to promote the sustainable management of forest resources - are of “promotional” or “programmatic” nature’ and ‘may not give rise to immediate and precise obligations.’ (para. 250) The findings of the Arbitration Panel call into doubt the legal relevance of the TSD Chapter within the legal framework of the agreement.

the export of pesticides from the EU to the Mercosur region that are not authorised on the EU market due to their hazardous properties.³⁴

Given the above-stated concerns about the potential adverse impact of the EUMAA on indigenous communities, consultation and participation of indigenous groups should be part of any process aiming to address such concerns. Indigenous groups have also expressed their desire to participate in the next steps taken in relation to the agreement.³⁵ It appears, however, that the content of the Joint Instrument has been devised without the inclusion or consultation of indigenous voices. On the EU side, it seems that despite the expressed opposition of the European Parliament to the agreement, it was neither actively involved nor kept informed about the negotiations of additional commitments between the EU and Mercosur.³⁶ Civil Society was also not consulted on the draft Joint Instrument. Importantly, it should be avoided to use the framing of the Joint Instrument as an interpretative statement (rather than a new international agreement) to justify a lack of stakeholder engagement on its contents.

4. The substantive limits of the Joint Instrument

(i) *The systemic deficiencies of the deal cannot be remedied by an interpretative statement*

The above-identified formal limits of an interpretative statement then constrain the substantive improvements the stipulation of shared interpretations of the agreement can possibly provide. While an interpretative statement to an agreement between states may prove utile when addressing ambiguities of the text of the agreement, mere clarifications of the treaty text are unable to remedy the systemic deficiencies of the EUMAA and its TSD Chapter. Among them is the substantive and institutional dissociation of sustainability aspects from the rest of the agreement by way of the TSD Chapter. Rather than integrating or “mainstreaming” sustainability considerations throughout the entire agreement and, importantly, reconciling them with trade liberalisation commitments, the TSD Chapter substantively sidelines them.

Another systemic weakness of the TSD Chapter model not addressable by an interpretative statement is its focus mainly on the domestic law and policy of parties, instead of regulating the sustainability of the trade between the parties. Such approach would allow taking into consideration how unsustainable trade patterns lead to certain domestic issues, such as outsourced production in the Mercosur region

³⁴ Laurent Gaberell and Géraldine Viret, Banned in Europe: How the EU exports pesticides too dangerous for use in Europe (September 2020) available at <<https://www.publiceye.ch/en/topics/pesticides/banned-in-europe>>.

The UN Special Rapporteur on toxics stated that “[t]he EU continues to export such pesticides and toxic industrial chemicals, resulting in widespread infringements of human rights to life, dignity and freedom from cruel, inhuman and degrading treatment in low and middle-income countries.” See OHCHR, States must stop exporting unwanted toxic chemicals to poorer countries, says UN expert (July 2020) available at <<https://www.ohchr.org/en/press-releases/2020/07/states-must-stop-exporting-unwanted-toxic-chemicals-poorer-countries-says-un>>.

³⁵ “...community members want to give their opinions and perspectives, to be a part of the process” in Fern, Ipam and Instituto Socioambiental, ‘not just about trade – Communities from Argentina, Brazil and Paraguay give their views on the EU-Mercosur Trade Agreement’ (February 2023) available at <https://www.fern.org/fileadmin/uploads/fern/Documents/2023/Not_Just_about_trade_ENG.pdf>

³⁶ See Questions for written answer E-000348/2023 to the Commission by Benoît Lutgen (PPE) and Pascal Arimont (PPE) submitted 6 February 2023 asking whether there “[h]as there been any progress in the negotiations on an additional text on sustainable development to get clear commitments from the Mercosur partners in this field.” Available at <https://www.europarl.europa.eu/doceo/document/E-9-2023-000348_EN.html>.

and associated environmental degradation of goods consumed in the EU. The TSD Chapter could be argued to lay down some minimum sustainability standards that the parties have to implement in their domestic law and policy. This is especially so in the field of labour protection, as the TSD Chapter of the EUMTA requires the parties to implement core labour standards defined in the fundamental ILO Conventions and make efforts to ratify at least fundamental ILO Conventions.³⁷ It is, notably, less so when it comes to MEAs, which, pursuant to the TSD Chapter of the EUMTA, the parties only have to implement if they are already a party to the respective MEA. In any case, the TSD Chapter fails to shift the focus onto the trade occurring under the agreement and, as a result, is unable to guarantee that trade under the agreement is in fact sustainable. An interpretative statement is also incapable of addressing the raised asymmetry of trade relations between the EU and Mercosur with a large majority of exports from Mercosur states to the EU being agricultural goods and raw materials, while the EU exports medium to high value goods to the Mercosur region.³⁸

A much-discussed feature of TSD Chapters of EU trade agreements in general and the TSD Chapter of the EUMTA specifically is that - rather than setting out concrete obligations to achieve specific results - most commitments are generally and aspirationally worded to “promote the development of sustainable and responsible aquaculture,”³⁹ to “encourage trade in natural resources-based products obtained through a sustainable use of biological resources”⁴⁰ or “to strive to improve its relevant laws and policies.”⁴¹ The enforceability of such commitments is limited since due to their vagueness, hortatory character and the lack of concrete actionable obligations set out, establishing a violation will prove difficult.⁴² While an interpretative statement can potentially improve the concreteness of generally worded commitments, it cannot alter the nature of commitments from promotional and best-endeavour commitments to obligations of result.

(ii) *The Joint Instrument does not address the weak dispute settlement mechanism under EUMTA's TSD Chapter*

Like other new generation trade agreements of the EU, the EUMTA does not subject the environmental and labour obligations in its TSD Chapter to the ordinary dispute settlement mechanism (‘DSM’) of the agreement but establishes a separate mechanism to settle disputes under the TSD Chapter. Deficiencies with respect to the latter have been identified by a variety of actors, including civil society,⁴³ the

³⁷ Art. 4 (3) + (4) TSD Chapter of EUMTA.

³⁸ Luciana Ghiotto and Javier Echaide, *Analysis of the agreement between the European Union and the Mercosur* (December 2019) available at <<https://www.annacavazzini.eu/wp-content/uploads/2020/01/Study-on-the-EU-Mercosur-agreement-09.01.2020-1.pdf>>, pages 16-17.

³⁹ Art. 9.2(f) TSD Chapter of EUMTA.

⁴⁰ Art. 7.2(c) TSD Chapter of EUMTA.

⁴¹ Art. 2.2 TSD Chapter of EUMTA.

⁴² On the nature of provisions in the TSD Chapter of the EUMTA, see in more detail: James Harrison and Sophia Paulini, *The Trade and Sustainable Development Chapter in the EU Mercosur Association Agreement - Is it fit for purpose?* (July 2020) available at <<https://www.documents.clientearth.org/wp-content/uploads/library/2020-07-15-the-trade-and-sustainable-development-chapter-in-the-eu-mercocur-association-agreement-ext-en.pdf>> 7-8.

⁴³ EESC, ‘Opinion of the European Economic and Social Committee on ‘Trade and sustainable development chapters (TSD) in EU Free Trade Agreements (FTA)’ (2018) OJ C 227, 27-34.

European Parliament⁴⁴ and Member States.⁴⁵ Commentators have, in particular, pointed out the lack of a sanctioning mechanism in case of a continuous violation of TSD commitments, which “makes their implementation to a large extent dependent on the parties’ political goodwill.”⁴⁶ This is in contrast to the ordinary DSM which can be invoked for violations of trade liberalisation commitments and which provides a party with the possibility to suspend trade commitments if the other party continuously violates the agreement.⁴⁷ Moreover, a less noted but significant difference between the two DSMs is that while the ordinary DSM requires compliance with the ‘Arbitral Award,’⁴⁸ the DSM of the TSD Chapter sets out an obligation of conduct to “discuss appropriate measures to be implemented taking into account the report and recommendations of the Panel of Experts.”⁴⁹ The violating party is therefore not strictly required to come into compliance with the TSD Chapter following the finding of a violation by the Panel of Experts.

The issue of dispute settlement under TSD Chapters was taken up by the Commission’s 2022 review of its TSD Strategy which announced a significant policy shift, according to which commitments of the TSD Chapter will be subjected to the general state-to-state dispute settlement mechanism of the agreement and, notably, there will be the possibility to apply sanctions should a party “materially defeat[...] the object and purpose of the Paris Agreement on Climate Change or in serious instances of non-compliance with the ILO fundamental principles and rights at work.”⁵⁰ This change of approach to dispute settlement of TSD Chapters has already been implemented in the recently concluded EU – New Zealand deal.⁵¹ Despite the above-discussed weaknesses of the DSM under the TSD Chapter of the EUMTA being well-established and the change of approach to dispute settlement of TSD commitments in the Commission’s TSD Review, the Joint Instrument fails to touch upon the dispute settlement and enforcement of sustainability obligations in TSD Chapters.

(iii) The clarifications of commitments on deforestation are significant but do not sufficiently take account of the systemic nature of the issue

Among the more substantive concretisations made in the Joint Instrument is the provision on ‘Forests’ and, in particular, the commitment to set an interim target of reduction of deforestation that must be at least 50% by 2025, compared to current levels. The Joint Statement foresees the setting of an interim target by the parties later on, likely after ratification of the agreement, rather than directly stipulating a

⁴⁴ European Parliament, Resolution on implementation of the 2010 recommendations of Parliament on social and environmental standards, human rights and corporate responsibility (2015/2038(INI)) (2016) OJ C 101, para. 21.

⁴⁵ ‘Non-paper from the Netherlands and France on trade, social economic effects and sustainable development’ (2020) <<https://www.tresor.economie.gouv.fr/Articles/73ce0c5c-11ab-402d-95b1-5dbb8759d699/files/6b6ff3bf-e8fb-4de2-94f8-922eddd81d08>>.

Non paper of the Commission services, ‘Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements’ (2018) <https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf> 7.

⁴⁶ Axel Marx, Franz Ebert, Nicolas Hachez and Jan Wouters, ‘Dispute Settlement in the Trade and Sustainable Development Chapters of EU Trade Agreements’ (Leuven Centre for Global Governance Studies 2017).

⁴⁷ Art. 18(2) of the Chapter on Dispute Settlement. CETA also provides for financial sanctions (Art. 29.14.1(c) CETA).

⁴⁸ Art. 15.1 provides that “[t]he defending party shall take any measure necessary to comply promptly and in good faith with the arbitral award.”

⁴⁹ Art. 17.11 of the TSD Chapter.

⁵⁰ European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions - The power of trade partnerships: together for green and just economic growth’ (COM(2022) 409 final) 11-2.

⁵¹ See EU – New Zealand Free Trade Agreement, Art. 26.16(2)-(5) available at <<https://circabc.europa.eu/rest/download/1a0e0689-f705-47f3-88e1-09103b88b58d>>.

target. As stated above, the need for the restoration of forests is also acknowledged, although no specific targets are put forward. It is to be welcomed that the commitment to set a target to slow down deforestation is of reciprocal nature applying to both Mercosur and the EU. This is, in particular, since rising deforestation rates have also been reported in the EU.⁵² However, the role of the EU in deforestation in the Mercosur region by way of imports of goods embodying deforestation into the EU is not acknowledged.⁵³ Neither is the risk of changes in land use and its potential impacts on indigenous communities following the increase of agricultural exports from Mercosur to the EU under the agreement addressed.⁵⁴ There is also no mentioning of any financial mechanisms to be provided by the EU to Mercosur to support the protection of biomes and other important ecosystems.⁵⁵ Finally, it is to be noted that the enforcement mechanism to which these commitments on deforestation are subject are very weak not allowing for economic sanctions (see above section).

(iv) *The Joint Instrument is silent as to the interaction of EUMAA with the EU's supply chain due diligence requirements*

The Joint Instrument fails to make reference to some notable and relevant legal developments in the field of trade and sustainability that took place in the EU since the negotiations of the text of the EUMAA were formally concluded. The EU is currently working on a package of unilateral legal instruments that regulate the sustainability of goods that are imported into the EU. These include the proposal for a regulation laying down due diligence requirements with respect to a number of commodities and products associated with deforestation⁵⁶ and the Directive on Corporate Sustainability Due Diligence⁵⁷ and will also apply to commodities and goods imported from the Mercosur region. The Joint Instrument, however, fails to provide any indications of how these different instruments to regulate the sustainability of trade - the bilateral trade agreement with Mercosur and its TSD Chapter, on the one hand, and the supply chain due diligence requirements for goods imported to the EU, on the other hand – are to interact with one another. To ensure the effectiveness of both types of instruments, they should operate in complementarity. The EUMTA as well as other bilateral trade agreements of the EU

⁵² “... our results show that the intensity in harvest, defined here as the percentage of harvested forest area per year, was very stable in magnitude and spatial pattern across most EU26 countries from 2004 to 2015 (Fig. 1). Conversely, we observed a sudden increase in the mean value for the years 2016–2018: 43% with respect to the mean of the years 2004–2015 and 49% with respect to the mean of the years 2011–2015, with particular contributions from large EU domains such as the regions of Finland, Sweden, Lithuania, Latvia, Estonia and Poland, and the western part of the Iberian Peninsula.” Guido Ceccherini et al., ‘Abrupt increase in harvested forest area over Europe after 2015’ (2020) 583 *Nature* 72-7.

⁵³ F. Pendrill et al., ‘Deforestation displaced: trade in forest-risk commodities and the prospects for a global forest transition’ (2019) 14 *Environmental Research Letters*.

⁵⁴ It is notable, however, that the rights of indigenous people to land under traditional use is addressed in the context of cooperation endeavours of the parties. In the provision addressing ‘Human Rights’, it is stated that the commitment to cooperate on the promotion and protection of human rights, as set out in Art. 11 of the Political Dialogue and Cooperation part of the EUMAA, includes the rights of indigenous peoples under the UN Declaration on the Rights of Indigenous Peoples and the parties’ constitutions. The rights of indigenous peoples, pursuant to the Joint Instrument, encompasses “rights to land under traditional use by such communities.”

⁵⁵ See also: Ignacio Arróniz Velasco and Jonny Peters, ‘The EU-Mercosur joint instrument fails to pass the EU’s own sustainability tests’ (E3G, 5 April 2021) available at <<https://www.e3g.org/news/the-eu-mercotur-joint-instrument-fails-to-pass-the-eu-s-own-sustainability-tests/>>.

⁵⁶ Proposal for a regulation of the European Parliament and of the Council 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.

⁵⁷ Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937.

could serve, for example, as fora create common sustainability standards.⁵⁸ This is also featured in the Commission's 2022 TSD Review which stipulates that the Commission will use trade agreements to facilitate a dialogue on the EU's supply chain due diligence legislation.⁵⁹

5. Conclusions:

Adding an interpretative statement to the text of international agreements has become frequent practice in the international investment regime but was also done in the context of CETA to address political contestation. While an interpretative statement by the parties to a trade agreement can provide some clarification of ambiguous or generally worded commitments, it is unable address systemic deficiencies of agreements.

Due to its nature as an interpretative statement it has certain formal limits and cannot create new commitments in addition to those in the treaty text. For example, the commitment to set interim targets for the reduction of deforestation stipulated in the Joint Instrument appears to be a new obligation that cannot be derived from the text of the EUMAA. As such, it will have to be ratified as a separate international agreement. Such formal limits then constrain what substantive reforms can be achieved by an interpretative statement. Consequently, the Joint Instrument is unable to mainstream sustainability considerations throughout the entire agreement and, importantly, reconcile them with trade liberalisation commitments as would be required in order to ensure that trade under the EUMAA is sustainable. The Joint Instrument also does not bring the EUMAA on par with the Commission's latest TSD review which, among other things, sets out important reforms to the dispute settlement mechanism under the TSD Chapter.

Since the EUMAA has not been signed by either of the parties, it is advisable to integrate the fundamental reforms required in order to meet the demands of relevant stakeholders on the sustainability of the deal directly into the treaty text.

⁵⁸ In the section on 'Forests', the Joint Instrument refers to a number of cooperation commitments in the TSD Chapter (Arts. 11.2, 13(n), 13(o)) and states that "[i]mproved traceability, transparency and due diligence will be a key means to develop sustainable supply chains" and that "[t]his will be a priority during implementation..." but the concrete due diligence instruments currently developed are not mentioned.

⁵⁹ European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions - The power of trade partnerships: together for green and just economic growth' (COM(2022) 409 final) 5.