

# **Academic Statement: Proposals on the EU-Mercosur Association Agreement and the Environment (8 February 2021)**

James Harrison (University of Warwick), Sophia Paulini (Erasmus University Rotterdam), Laurens Ankersmit (University of Amsterdam), Harro van Asselt (University of Eastern Finland), Ana Flávia Barros-Platiau (University of Brasilia), Luis Eslava (University of Kent), Bård Harstad (University of Oslo), Karina Marzano (Institute for Advanced Sustainability Studies (IASS) Potsdam), Werner Raza (Austrian Foundation for Development Research), Carlos Rittl (IASS Potsdam), Cathrin Zengerling (Albert-Ludwigs-Universität Freiburg).

## **Introduction**

This statement makes practical proposals to address serious environmental issues raised by the EU-Mercosur Association Agreement (EUMAA). The EUMAA fails to adequately address issues of climate change and environmental degradation, both in the EU and the Mercosur countries, which poses an unprecedented challenge for these regions.<sup>1</sup> It thereby fails to reflect the parties' climate targets and other environmental commitments, such as the EU Green Deal and the Brazilian national climate policy.<sup>2</sup> The EUMAA - as among the largest interregional trade agreements globally - will expand trade between the EU and Mercosur while not addressing the environmental consequences of production, consumption and transportation. In particular, the EUMAA fails to sufficiently respond to increasing deforestation rates and forest fires in the Mercosur region.<sup>3</sup> In this respect, it fails to hold accountable both the EU and the Mercosur states, the former as a major consumer market for forest-risk goods.<sup>4</sup> This is despite several studies projecting that the EUMAA is likely to lead to an increase in deforestation.<sup>5</sup>

We concentrate in this statement on making concrete proposals on five priority issues which address the above failings and limitations:

1. Addressing deforestation in the Amazon and in other biomes.
2. Combating broader issues of climate change and environmental degradation.
3. Recognising the asymmetry of the trading relationship between the EU and Mercosur and its impacts on the sustainable development of the Mercosur region.
4. Improving the evidence base and consultation arrangements in relation to the environmental impacts of the EUMAA and future agreements.
5. Supporting the environmental efforts of civil society organisations (CSOs).

The environmental impacts of the EUMAA cannot be seen in a vacuum. There are critical human rights issues (e.g. the situation of indigenous peoples and the collective right to a healthy environment) as well as developmental and post-colonial issues (e.g. the asymmetry of the trading relationship) with which this statement seeks to engage. We recognise that we do not do justice to the intersectionality of international trade law rules with a complex range of issues

including human and labour rights as well as economic, racial and gender inequality. Questions about the overall legitimacy of concluding the EUMAA are also beyond the scope of the proposals in this document. Rather, these proposals have the narrower purpose of serving as benchmarks against which to measure environmental reforms to the EUMAA that are currently being negotiated. Our intervention should therefore be seen as only one aspect of a broader debate about how the EUMAA, and trade agreements more generally, need to contribute to, and not undermine, the achievement of broader societal objectives.

## **1. Addressing deforestation in the Amazon and in other biomes**

There are various ways in which the EUMAA could be utilised in order to significantly address deforestation issues in the Amazon and in other biomes. Meaningful and actionable commitments can be created (A) before the agreement is signed and (B) whenever it comes into force. Additionally, (C) tariffs can be utilised to create a positive relationship between trade and conservation. These three issues are explored in turn below.

### **A. Pre-ratification commitments**

Trade agreements should be concluded by parties who have demonstrated a commitment to key shared values such as the protection of the environment and human rights. Despite this, the EUMAA fails to require the parties to demonstrate their shared commitment to combatting climate change and reducing deforestation rates before it comes into force.

Both parties to EUMAA should – prior to its ratification – agree on meaningful commitments to tackle, in particular, deforestation in the Mercosur region, which aggravates climate change, biodiversity loss and is linked to human rights violations.<sup>6</sup> As well as imposing obligations on Mercosur countries, this should also involve acknowledging that the EU is a major consumer market for forest-risk goods and establishing legal responsibility for the link between unsustainable extraction or production of commodities and the consumption of such commodities.<sup>7</sup> The EU should also recognise its co-responsibility for the conservation of biomes, such as the Amazon, on the basis of the benefits they provide to the global climate and environment.

Pre-ratification commitments must involve specific and meaningful action to address issues identified before ratification is undertaken. Pre-ratification commitments should also represent essential elements of the EUMAA to ensure continuous compliance whenever the EUMAA comes into force.<sup>8</sup> We suggest the following pre-ratification commitments:

- i. The EU should undertake pre-ratification commitments involving:

- Committing to cooperate with the Mercosur region to reduce deforestation rates and providing technical assistance and financial support for the setting up of systems of sustainable forestry management.<sup>9</sup>
- Recognising the EU's role in deforestation in the Amazon as a major consumer of forest-risk commodities and taking legal steps to ensure that commodities that have been produced or extracted from natural forests or from land that shortly before constituted a natural forest are not placed on the EU market. There are different options of how to put such a system in place, including introducing legislation setting out mandatory due diligence for EU companies whose supply chains feature deforestation-sensitive goods and commodities<sup>10</sup> and a widening of the scope of the EU Timber Regulation to include forest sustainability.<sup>11</sup> Such a system should be accompanied by measures to incentivise serious and long-term commitments by lead firms to improve social and environmental outcomes in supply chains. This is to ensure that the costs of sustainability initiatives undertaken in supply chains are equitably shared between lead firms and firms operating 'upstream' in the supply chain.<sup>12</sup>

Funding and technical assistance mechanisms together with a legislative initiative ensuring that commodities that have been produced or extracted from natural forests are not placed on the EU market should be in place before ratification is undertaken.

ii. The Mercosur region should undertake pre-ratification commitments involving:

- Substantially decreasing deforestation rates of the Amazon and other biomes.
- Protecting the rights of indigenous people put at risk by deforestation activities in the Amazon and other biomes.

Benchmarks should be devised for the above commitments which are suitably precise, actionable, ambitious and credible. With regard to deforestation rates, there is concern about utilising the Nationally Determined Contribution (NDC) of Brazil submitted pursuant to the Paris Agreement, as recently updated, as such a benchmark. It has been argued that the recent update of Brazil's NDC constitutes a regression from Brazil's stated ambitions in its original NDCs.<sup>13</sup> For example, the updated NDC does not replicate the intention of Brazil to achieve zero illegal deforestation by 2030 as well as to restore and reforest forests as expressed in its original NDC.<sup>14</sup> In the absence of meaningful NDC commitments that do not establish clear or credible benchmarks, consideration should be given to other benchmarks, particularly those suggested by local civil society actors. For example, Imazon demands that "tariff reductions should be contingent on Brazil reducing its deforestation according to the country's National Climate Change Policy target: 3,900 km<sup>2</sup>."<sup>15</sup> A group of 62 Brazilian NGOs have proposed a number of emergency measures to fight the deforestation crisis in the Amazon, including the "[p]rohibition of any deforestation in the Amazon for at least five (5) years, with exceptions made for subsistence agriculture and practices of traditional populations, smallholder agriculture,

sustainable forestry, works of public utility and national security issues” as well as on an “[i]ncrease in penalties for illegal deforestation.”<sup>16</sup>

Benchmarks for protecting the rights of indigenous peoples should include a substantial reduction in violations of indigenous peoples’ rights, the demarcation of indigenous territories and the eviction of invaders from indigenous peoples’ lands, and that legislation to protect indigenous peoples’ rights is retained and effectively enforced.<sup>17</sup>

Ratification of the EUMAA should not take place before at least one year of a continuous and demonstrable decrease in deforestation rates as well as compliance with other benchmarks. After the coming into force of the EUMAA, ongoing and independent monitoring of deforestation rates as well as of the situation of indigenous people must take place to ensure pre-ratification commitments continue to be met.

#### B. Commitments contained within the EUMAA

The Trade and Sustainable Development (TSD) Chapter of the EUMAA is ambiguous on the actions required to fulfil the obligation it sets out to effectively implement the UNFCCC and Paris Agreement (in particular, whether this means the commitments made in NDCs have to be achieved). Its dispute settlement mechanism for violations of the TSD Chapter is also inadequate.<sup>18</sup> The EUMAA needs to include:

- Suitably specific, actionable and ambitious commitments of the parties to adhere to their Paris Agreement climate change commitments or where appropriate alternative benchmarks (see section 1.A(ii) above), including in relation to deforestation. All pre-ratification commitments should also continue to apply whenever the EUMAA comes into force. All of the parties’ climate change and deforestation commitments within the EUMAA should represent ‘essential elements’ of the agreement.<sup>19</sup>
- A strong mechanism for reviewing whether the parties are in compliance with their EUMAA obligations. One approach would be to adapt the consultative processes in the TSD Chapter to reflect innovative compliance review mechanisms as occur under the Aarhus Convention and the Kyoto Protocol where cases can be brought by non-state actors such as individuals and NGOs (Aarhus Convention) or an expert review team (Kyoto Protocol).<sup>20</sup>
- Strengthening the dispute settlement mechanism so that it effectively enforces the parties’ climate change commitments. This should include: (1) A complaints mechanism that can be activated by CSOs as well as governments; and (2) an adjudication panel that has demonstrable environmental expertise and, after a timely dispute settlement process, has the capacity to impose sanctions and other forms of relief which act as a serious deterrent against breaches of the obligations.

### C. Using tariffs to create a positive relationship between trade and forest conservation

Once trade agreements are in force, there is already a robust body of evidence that the trade they produce increases deforestation and possibly moves deforestation activities to ecologically sensitive areas.<sup>21</sup> The EUMAA, in particular, has been projected to lead to an increase in deforestation.<sup>22</sup>

A recent economic analysis shows that trade agreements, such as the EUMAA, tend to be inefficient as they incentivise the depletion of resources, but also that it is possible to design trade agreements that motivate conservation.<sup>23</sup> The tariff schedule of the EUMAA, and other EU Free Trade Agreements (FTAs), is simply the result of a bargaining exercise between the parties driven by commercial interests and does not reflect environmental objectives. Instead, tariffs could be utilised to incentivise sustainable production, as recommended by the governments of the Netherlands and France.<sup>24</sup>

There are models available for how tariffs could be used to specifically incentivise sustainable production models and conservation of vital natural resources such as rainforests. For example, the EU could offer low/preferential tariffs for sustainable products while applying higher tariffs for non-sustainable products. This could be done in practice by using sustainability certification.<sup>25</sup> A challenge of implementing such models is to prevent leakage of unsustainably produced goods and commodities to the domestic market or exports elsewhere. To avoid leakage, tariffs could be made contingent on the degree of forest cover. If the forest cover increases, tariffs decrease and, conversely, if the forest cover decreases higher tariffs will apply.<sup>26</sup>

## **2. Combating broader issues of climate change and environmental degradation**

Currently, environmental objectives in the EUMAA, as well as other EU FTAs, are contained in a TSD Chapter which is disconnected from the rest of the trade agreement and contains, for the most part, vague and unenforceable commitments to act individually and co-operate on sustainable consumption and production initiatives.<sup>27</sup> If the EUMAA is to become a building block for a transition to a green economy, environmental objectives need to be interwoven into liberalisation and regulatory commitments throughout the entire agreement. At the same time, the EUMAA cannot be allowed to restrict the policy space for genuine environmental and climate policies and create 'regulatory chill' due to risks of litigation.<sup>28</sup> Below we articulate examples of ways in which this could be achieved, while recognising that these proposals are by no means exhaustive:<sup>29</sup>

A. Promoting sustainable goods and services and banning their unsustainable counterparts

Trade agreements should actively incentivise the sustainable production and consumption of goods and provision of services, rather than perpetuating outdated models of economic growth that have led to environmental degradation and the climate crisis. This could be done in a variety of ways, including:

- By implementing the models discussed above in Section 1.C – which use tariffs to create a positive relationship between trade and forest conservation – with respect to an extended scope of goods covering environmental protection more broadly.<sup>30</sup>
- By banning or otherwise restricting the export of goods and substances which are intrinsically harmful to the environment. For instance, goods and substances that have already been banned from the EU market on grounds of their risks to the environment or human health should not be permitted to be exported to the EU's trade partners. The trade in pesticides is a particularly pertinent issue in the context of the EUMAA, as almost half of the active ingredients used in pesticides in Brazil are currently prohibited in the EU.<sup>31</sup> But at the same time, European companies produce and export pesticides banned in the EU to Brazil.<sup>32</sup> The Sustainability Impact Assessment (SIA) of EUMAA projects an increase in exports of chemicals and pharmaceuticals from the EU to Mercosur of up to 60.2 %, so a substantial rise in the export of pesticides is likely.<sup>33</sup> It further highlights that “agricultural expansion also threatens indigenous health with the increase of pesticide use in the intensification of agriculture.”<sup>34</sup>

B. Addressing the energy transition

Trading rules supporting the energy transition and sustainable extraction of raw materials should be included in the EUMAA.<sup>35</sup> They are essential to mitigating climate change and a major challenge for the EU and the Mercosur region. A sustainable energy chapter should promote the expansion of sustainable renewable energy. Any expansion in the trade and use of renewable energy must be based on sustainable production of those energy sources (e.g. see issues with ethanol production from sugarcane<sup>36</sup>). It should also make sustainable extraction of raw materials a precondition for trade and investment in those materials. Key elements of the chapter should include:

- Specific provisions to promote the expansion of renewable energy, including ensuring that restrictions in relation to local content requirements do not constrain national efforts to grow domestic industries.<sup>37</sup>
- Commitments in relation to the disclosure of subsidies provided to fossil fuels and the phasing out of such fossil fuel subsidies.<sup>38</sup>

- Obligations on the parties to the EUMAA to ensure sustainable extraction of raw materials and monitoring and enforcement processes to ensure that such commitments are then effectively enforced.<sup>39</sup> This should include measures to address asymmetries in the trading relationship between the EU and Mercosur (as set out in section 3 below).
  - Obligations to ensure that best practices in the extractive industry are enforced upon entities undertaking extractive operations in relation to key environmental and social risks and impacts.<sup>40</sup>
  - That the interests of all stakeholders affected by trade and investment in the extraction of raw materials are protected, including that ‘free, prior and informed consent’ should be obtained from indigenous peoples, according to international and domestic legal obligations, by relevant entities before extraction projects occur on their lands.<sup>41</sup>
- C. Ensuring trade agreements do not prevent action to address climate change and environmental degradation

Pre-existing legal uncertainties around the trade and environment nexus need to be clarified in order to ensure policy space for environmental and climate policies and avoid regulatory stagnation due to litigation risks.<sup>42</sup> Key elements in this respect include:

- The EUMAA should incorporate a fixed list of MEAs that parties must comply with (regardless of their membership of those MEAs).<sup>43</sup> This would serve as a minimum level of environmental protection on which the parties agree by making reference to multilaterally agreed standards.
- The EUMAA should also incorporate a hierarchy clause stipulating that in the event of inconsistency between the EUMAA and a MEA, obligations from the latter shall prevail. This will reduce litigation risks when creating environmental policies or implementing multilaterally negotiated environmental policies.<sup>44</sup>
- The incorporation of Article XX GATT into the EUMAA should be revised by creating an open list approach in recognition of the constant evolution of public policy objectives.<sup>45</sup> Such a provision should also clarify that carbon footprint measures and other measures regulating non-product-related process and production methods (PPMs) are permissible and make reference to environmental principles, such as the precautionary principle.<sup>46</sup> Further, a wide margin of appreciation should be applied.<sup>47</sup> Article XX GATT as incorporated into the EUMAA should apply to all Chapters, notably, also to the Sanitary and Phytosanitary Measures (SPS) Chapter so that it is clear that precautionary measures can be taken in the area of SPS.

### **3. Recognising the asymmetry of the trading relationship between the EU and Mercosur and its impacts on the sustainable development of the Mercosur region**

Mercosur's biggest exports to the EU are agricultural goods and raw materials, while the EU mainly exports higher value goods to Mercosur.<sup>48</sup> The EUMAA fails to deal with the impacts this asymmetry has on the sustainability dimension in the trading relationship between the EU and the Mercosur region. For example, consideration needs to be given to how to share the costs of sustainability and increased environmental standards across the supply chain as well as how to deal with value capture in supply chains, which may affect the ability of the Mercosur region to increase its capacity for advancing environmental protection. Mechanisms need to be put in place that enable the sharing of costs of increasing sustainability and ensuring conservation throughout the entire supply chain. These should include:

- Technical assistance and financial support from the EU to Mercosur countries for the setting up and maintaining of sustainability initiatives which are initiated or strengthened in Mercosur countries as a result of action taken through the EUMAA.
- Measures to incentivise serious and long-term commitments by lead firms to improve social and environmental outcomes in supply chains. This is to ensure that the costs of sustainability initiatives undertaken in supply chains are equitably shared between lead firms and firms operating 'upstream' in the supply chain.<sup>49</sup>
- Assessments of where inequitable practices and 'value capture' are taking place in supply chains linking the EU and Mercosur and how more equitable power and value distribution can occur.<sup>50</sup> Such assessments should be undertaken as part of the EUMAA's *ex post* monitoring and review process (see 4.A) and action should be taken to address issues identified through the process.

#### **4. Improving the evidence base and consultation arrangements in relation to the environmental impacts of EUMAA and future agreements**

The *ex ante* assessment process for the EUMAA was inadequate, as were consultation processes with key stakeholders.<sup>51</sup> The limited recommendations made for meaningful action on environmental issues made in the SIA were not acted upon.<sup>52</sup> The assessment process was also undertaken too late to have an effect on negotiation outcomes.<sup>53</sup> *Ex post* assessment arrangements in the EUMAA fail to guarantee environmental impacts will be given due weight, key stakeholders will be consulted, and action taken to address problems identified.<sup>54</sup> Underpinning this, the methodology which is utilised for impact assessments and consultations processes is not fit for purpose.<sup>55</sup> These issues need to be rectified in the EUMAA and in future trade agreements. This could be achieved through the following actions:

- A. *Ex post* monitoring and review of EUMAA's environmental impacts and consultation with affected communities



In relation to the EUMAA, a rigorous and independent *ex post* monitoring system should be devised so that environmental impacts of the EUMAA are regularly reviewed. This should include the following key elements:

- A monitoring process for the environmental and social impacts of the *commercial provisions* of EUMAA which gives due weight to those issues.<sup>56</sup>
- A monitoring process for the *environmental provisions* contained within the EUMAA to assess whether they are effective in achieving their objectives.
- As a fundamental aspect of the monitoring processes in (1) and (2), widespread consultation with groups and individuals who are affected by EUMAA's commercial and environmental provisions.
- A review and revision clause in the EUMAA. Here, the compliance review process set out in Section 1.B could be activated where the *ex post* monitoring process show either (1) negative impacts of commercial provisions on the environment or (2) environmental provisions failing to be effective. It should ensure that action is then taken to address those issues either by revising the agreement or by other appropriate action.

B. *Ex ante* impact assessments which put environmental issues and the voices of key stakeholders at the heart of the negotiating process

Policymakers must also admit to the inadequacies of the *ex ante* impact assessment and consultation processes for the EUMAA and commit to future processes which put environmental issues and the voices of key stakeholders at the heart of the negotiating process. This should include:

- New methodologies for ensuring that *ex ante* impact assessments fully investigate (1) how trade agreements can achieve specified environmental (as well as social) goals (2) ensure that trade agreements contain legal obligations that will achieve such goals and (3) exclude obligations which pose serious risks of exacerbating climate change or environmental degradation.<sup>57</sup>
- Environmental (as well as social) experts at the heart of impact assessment teams, playing a central role in how methodologies are operationalised.
- Binding commitments that *ex ante* impact assessment processes must be considered and acted upon by trade negotiators in the negotiation of trade agreements.<sup>58</sup>
- New participatory modes of negotiating trade agreements, such as (1) learning from the convention-style manner in which MEAs are negotiated and applying to trade negotiating processes (2) increasing the competences and level of scrutiny of trade agreements by parliamentary bodies in the EU and trade partners as well as co-operation between those bodies<sup>59</sup> (3) utilising the principle of prior and informed consent in the negotiating process, where trade agreements threaten the rights and interests of indigenous peoples.

## **5. Effectively supporting the environmental efforts of civil society organisations**

Experience from previous EU trade agreements suggests that the civil society bodies constituted within the EUMAA will prove inadequate at effectively supporting the efforts of civil society groups who are fighting for environmental justice.<sup>60</sup> They have unclear objectives and are underfunded to achieve those objectives.<sup>61</sup> They lack procedural rights to demand action from relevant (inter)governmental bodies associated with the trade agreement.<sup>62</sup> Their establishment can be delayed until many years after the trade agreement has come into force, and questions are then sometimes raised about their independence from government.<sup>63</sup> Below we set out proposals to address these issues:

The civil society bodies within EUMAA should therefore be strengthened including by

- Ensuring that civil society representatives are demonstrably independent from all governments which are parties to the EUMAA.<sup>64</sup>
- More clearly defining what the roles and powers of the civil society bodies are. For instance, this should include the power to commission independent assessments of (A) whether the parties are living up to their social and environmental commitments in practice or (B) whether the EUMAA itself is having detrimental environmental and social outcomes.
- Ensuring that they have funding and technical support commensurate with those roles and powers.
- Spelling out the rights of civil society actors to demand action from relevant (inter)governmental bodies to address the issues they have identified.
- Enabling civil society actors to bring complaints through compliance review and dispute settlement processes (see proposal above in Section 1.B).<sup>65</sup>

The EUMAA should also contain concrete measures to support the activities of key initiatives by civil society actors fighting for environmental justice at the national level. This should include commitments from all parties to the agreement:

- To take concrete measures towards ending impunity for violence against environmental groups including community leaders and environment and forest defenders (as measured by the number of these cases investigated, prosecuted, and brought to trial).<sup>66</sup>
- To ensure that the free, prior and informed consent according to international and domestic legal obligations are effectively operationalised in relation to all scenarios

where indigenous groups are affected by the actions of entities involved in the production and international trade of goods and commodities.

- <sup>1</sup> M. Stefan Ambec et al, *Rapport au Premier ministre - Dispositions et effets potentiels de la partie commerciale de l'Accord d'Association entre l'Union européenne et le Mercosur en matière de développement durable* (April 2020) available at [https://www.gouvernement.fr/sites/default/files/document/document/2020/09/rapport\\_de\\_la\\_commission\\_devaluation\\_du\\_projet\\_daccord\\_ue\\_mercosur.pdf](https://www.gouvernement.fr/sites/default/files/document/document/2020/09/rapport_de_la_commission_devaluation_du_projet_daccord_ue_mercosur.pdf), IMAZON, *Is the EU-Mercosur trade agreement deforestation-proof?* (November 2020) available at [https://amazon.org.br/wp-content/uploads/2020/12/Imazon\\_report\\_mercosul-december2020.pdf](https://amazon.org.br/wp-content/uploads/2020/12/Imazon_report_mercosul-december2020.pdf), 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>, 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-mercrosur-association-agreement-ext-en.pdf>
- <sup>2</sup> Brazilian National Policy on Climate Change (Law No. 12,187/2009); Communication From The Commission To The European Parliament, The European Council, The Council, The European Economic and Social Committee And The Committee Of The Regions, The European Green Deal (COM(2019) 640 final), available at [https://eur-lex.europa.eu/resource.html?uri=cellar:b828d165-1c22-11ea-8c1f-01aa75ed71a1.0002.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:b828d165-1c22-11ea-8c1f-01aa75ed71a1.0002.02/DOC_1&format=PDF)
- <sup>3</sup> Uki Gofii, 'Soy destruction in Argentina leads straight to our dinner plates' (Guardian, October 2018) available at <https://www.theguardian.com/environment/2018/oct/26/soy-destruction-deforestation-in-argentina-leads-straight-to-our-dinner-plates>; Umair Irfan, 'Brazil's Amazon rainforest destruction is at its highest rate in more than a decade' (Vox, 18 November 2019) available at <https://www.vox.com/science-and-health/2019/11/18/20970604/amazon-rainforest-2019-brazil-burning-deforestation-bolsonaro>; UNEP-WCMC, Briefing Note for the Competent Authorities (CA) implementing the EU Timber Regulation February – May 2020, available at <https://ec.europa.eu/environment/forests/pdf/EUTR%20Briefing%20note%20February-May%202020.pdf>
- <sup>4</sup> Raoni Rajão, Britaldo Soares-Filho et al, 'The rotten apples of Brazil's agribusiness' (2020) 369 *Science* 246
- <sup>5</sup> M. Stefan Ambec et al, above note 1, page 5; IMAZON, above note 1, page 30; Ghiotto and Echaide, above note 1, page 67
- <sup>6</sup> Cristina Müller, 'Brazil and the Amazon Rainforest - Deforestation, Biodiversity and Cooperation with the EU and International Forums' (Report requested by the European Parliament ENVI committee, May 2020) available at [https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/648792/IPOL\\_IDA\(2020\)648792\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/648792/IPOL_IDA(2020)648792_EN.pdf); Guilia Bondi, 'Beef, banks and the Brazilian Amazon: the EU's complicity in driving deforestation' (EURACTIV, 10 December 2020) available at <https://www.euractiv.com/section/energy-environment/opinion/beef-banks-and-the-brazilian-amazon-the-eus-complicity-in-driving-deforestation/>
- <sup>7</sup> Rajão, Soares-Filho et al, above note 4
- <sup>8</sup> See Non-paper from the Netherlands and France on trade, social economic effects and sustainable development (15 May 2020) available at <https://nl.ambafrance.org/Non-paper-from-the-Netherlands-and-France-on-trade-social-economic-effects-and>, page 3; Bard Harstad, *Trade deals could combat Brazil's Amazon deforestation* (Financial Times, 22 August 2019) available at <https://www.ft.com/content/5f123000-bf5e-11e9-9381-78bab8a70848>; Cathrin Zengerling, *Stärkung von Klimaschutz und Entwicklung durch internationales Handelsrecht* (Legal opinion commissioned by Wissenschaftlicher Beirat der Bundesregierung Globale Umweltveränderung (German Advisory Council on Global Change), May 2020), page 54; Werner Raza, Bernhard Tröster et al, 'How can international trade contribute to sustainable forestry and the preservation of the world's forest through the Green Deal' (October 2020) available at [https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/603513/EXPO\\_IDA\(2020\)603513\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/603513/EXPO_IDA(2020)603513_EN.pdf), page 1
- <sup>9</sup> Brazilian NGO Imazon proposes to set up a fund to finance the sustainable use of land to which the parties to EUMAA contribute on the basis of their respective financial gains on the basis of EUMAA, see IMAZON, above note 1, page 84; Harstad, above note 8

- 10 European Parliament resolution of 22 October 2020 with recommendations to the Commission on an EU legal framework to halt and reverse EU-driven global deforestation (2020/2006(INL)) available at [https://www.europarl.europa.eu/doceo/document/TA-9-2020-0285\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/TA-9-2020-0285_EN.pdf). The European Commission is also in the process of “carry[ing] out an impact assessment of regulatory and non-regulatory options for additional demand side measures to minimize the risk that products linked to deforestation are placed on the EU market and to develop a definition of deforestation-free supply chains.”, see European Commission, *Deforestation and forest degradation – reducing the impact of products placed on the EU market*, available at <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12137-Deforestation-and-forest-degradation-reducing-the-impact-of-products-placed-on-the-EU-market>
- 11 Werner Raza, Bernhard Tröster et al, ‘How can international trade contribute to sustainable forestry and the preservation of the world’s forest through the Green Deal’ (October 2020) available at [https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/603513/EXPO\\_IDA\(2020\)603513\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/603513/EXPO_IDA(2020)603513_EN.pdf), page 17
- 12 The improvement of environmental and labour conditions in supply chains depends on the commitments adopted by buyers in investing in long-term, mutually beneficial relations with suppliers as well as a better understanding of the particularities of the local contexts. See Richard M. Locke, *The Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy* (CUP 2013). One suggestion for the role of FTAs in achieving this is to use them as a coordinating forum for joint liability agreements - binding agreements between buyers and suppliers which oblige firms to improve working conditions and hold them accountable in instances where systematic rights violations or serious injury do occur (See Adrian Smith et al, *Free Trade Agreements and Global Labour Governance: The European Union’s Trade-Labour Linkage in a Value Chain World* (Routledge 2020). Equivalent mechanisms could be created with regard to environmental commitments.
- 13 Truls Gulowsen, *Brazil increases emission allowance in new climate plan* (Rainforest Foundation Norway, December 2020) available at <https://www.regnskog.no/en/news/brazil-increases-emission-allowance-in-new-climate-plan>; Climate Action Tracker, *Climate Target Update Tracker – Brazil*, available at <https://climateactiontracker.org/climate-target-update-tracker/brazil/>; Observatório Do Clima, *NDC and the carbon trick maneuver: how Brazil reduced the ambition of its goals under the Paris Agreement* (December 2020) available at <http://www.oc.eco.br/wp-content/uploads/2020/12/NDC-analysis-EN.pdf>; Brazil disputes these claims, see Ministério das Relações Exteriores, *Clarifications on the new Brazilian NDC presented under the Paris Agreement* (Press Release N. 162, December 2020) available at <https://www.gov.br/mre/en/contact-us/press-area/press-releases/clarifications-on-the-new-brazilian-ndc-presented-under-the-paris-agreement>
- 14 Climate Action Tracker, above note 13
- 15 IMAZON, above note 1, page 81
- 16 ‘FIVE EMERGENCY MEASURES TO FIGHT THE DEFORESTATION CRISIS IN THE AMAZON’ (August 2020) available at [http://www.observatoriodoclima.eco.br/wp-content/uploads/2020/08/Emergency-measures-deforestation-Update6\\_8V.pdf](http://www.observatoriodoclima.eco.br/wp-content/uploads/2020/08/Emergency-measures-deforestation-Update6_8V.pdf)
- 17 See IMAZON, above note 1, pages 11, 82 on demarcation of indigenous land and relocation of invaders and page 14 on proposals which threatened to open up indigenous lands to commercial use. See also ‘FIVE EMERGENCY MEASURES TO FIGHT THE DEFORESTATION CRISIS IN THE AMAZON’, note 16
- 18 Harrison and Paulini, above note 1, page 5
- 19 See Non-paper from the Netherlands and France, above note 8, page 3; Zengerling, above note 8, page 54
- 20 Zengerling, above note 8, page 39
- 21 Ryan Abman and Clark Lundberg, ‘Does Free Trade Increase Deforestation? The Effects of Regional Trade Agreements’ (2020) 7 *Journal of the Association of Environmental and Resource Economists* 35-72
- 22 M. Stefan Ambec et al, above note 1, page 5
- 23 Bard Harstad, ‘Trade and Trees: How Trade Agreements Can Motivate Conservation Instead of Depletion’ (October 2020, CESifo Working Paper No. 8569)
- 24 See Non-paper from the Netherlands and France, above note 8. This states: “Parties should introduce, where relevant, staged implementation of tariff reduction linked to the effective implementation of TSD provisions and clarify what conditions countries are expected to meet for these reductions, including the possibility of withdrawal of those specific tariff lines in the event of a breach of those provisions.”
- 25 Werner Raza, Bernhard Tröster et al, above note 11, page 23
- 26 Harstad, above note 23
- 27 Harrison and Paulini, above note 1, page 7

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28 Emily Barrett Lydgate, 'Biofuels, Sustainability, And Trade-Related Regulatory Chill' (2012) 15 *Journal of International Economic Law* 157–180

29 We do not, for instance, make any proposals in relation to procurement rules, where there are clearly serious environmental implications.

30 This could be done, for instance, in relation to animal welfare standards. See proposals made by EuroGroup for Animals, Briefing: Mercosur, available at <https://www.eurogroupforanimals.org/sites/eurogroup/files/2020-06/Eurogroup%20for%20Animals%20-%20Report%20-%20Animal%20Protection%20in%20EU%20Mercosur%20Agreement.pdf>

31 Lu Sudré, *Agrotóxicos: 44% dos princípios ativos liberados no Brasil são proibidos na Europa* (Brasil De Fato, 6 August 2020), available at <https://www.brasildefato.com.br/2019/08/06/agrotoxicos-44-dos-principios-ativos-liberados-no-brasil-sao-proibidos-na-europa#page=8>

32 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>. According to the UN Special Rapporteur on toxics, “[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/NewsEvents/Pages/DisplayNews.aspx?NewsID=26063&LangID=E>

33 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](https://trade.ec.europa.eu/doclib/docs/2020/july/tradoc_158889.pdf), page 249

34 *Ibid*, page 166

35 Zengerling, above note 8, page 38

36 For instance, any expansion of ethanol production and trade must avoid “the destruction or damage of high-biodiversity areas, deforestation, degradation or damaging of soils through the use of chemicals and soil decarbonization, water resources contamination or depletion [and] competition between food and fuel production decreasing food security” See José Goldemberg, Suani Teixeira Coelho, Patricia Guardabassi, ‘The sustainability of ethanol production from sugarcane’ (2008) 36 *Energy Policy* 2086–2097

37 Zengerling, above note 8. On debates about local content requirements and how they should be addressed in trade agreements see Sherry Stephenson, ‘Addressing local content requirements in a sustainable energy trade agreement’ (International Centre for Trade and Sustainable Development, 2013) available at [https://www.files.ethz.ch/isn/166575/addressing-local-content-requirements\\_opt.pdf](https://www.files.ethz.ch/isn/166575/addressing-local-content-requirements_opt.pdf)

38 Zengerling, above note 8

39 Laurens Ankersmit and Enrico Partiti, ‘Alternatives for the ‘Energy and Raw Materials Chapters’ in EU trade agreements – An inclusive approach’ (May 2020) available at <https://power-shift.de/wp-content/uploads/2020/05/Alternatives-for-the-%E2%80%98Raw-materials-and-Energy-Chapters%E2%80%99-in-EU-trade-agreements-web.pdf>, page 19f

40 *Ibid*, page 28

41 *Ibid*, page 21

42 Harro van Asselt, ‘The Prospects of Trade and Climate Disputes before the WTO’ in Ivano Alogna, Christine Bakker and Jean Pierre Gauci (eds.), *Climate Change Litigation: Global Perspectives* (Brill, Forthcoming)

43 See Free trade agreement between the United States of America and the Republic of Korea, 30 June 2007 (entered into force 15 March 2012), which provides in Art. 20.2 that ‘A Party shall adopt, maintain, and implement laws, regulations, and all other measures to fulfil its obligations under [the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Montreal Protocol on Substances that Deplete the Ozone Layer, the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships ... ].’

44 Jessica C. Lawrence and Laurens Ankersmit, ‘Making EU FTAs ‘Paris Safe’, Three Studies with Concrete Proposals’ (8 March 2019) available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3407949](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3407949), pages 3-5

45 For instance, Article 2.2 of the TBT Agreement stipulates that “technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective [emphasis added].”

46 For an overview of the precautionary principle in the context of WTO law as well as of the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, see Wybe Th. Douma, ‘The limits to precaution in international trade law: from WTO law to EU trade agreements’ in Lorenzo Squintani, Jan Darpö, Luc Lavrysen and Peter-Tobias Stoll (eds.), *Managing Facts and Feelings in Environmental Governance* (Edward Elgar 2019) 163–200; see also Peter-Tobias Stoll, Wybe Th. Douma, Nicolas de

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Sadeleer and Patrick Abel, 'CETA, TTIP and the EU precautionary principle - Legal analysis of selected parts of the draft CETA agreement and the EU TTIP proposals' (Study commissioned by Foodwatch, 2016) available at [https://www.foodwatch.org/fileadmin/Themen/TTIP\\_Freihandel/Dokumente/2016-06-21\\_foodwatch-study\\_precautionary-principle.pdf](https://www.foodwatch.org/fileadmin/Themen/TTIP_Freihandel/Dokumente/2016-06-21_foodwatch-study_precautionary-principle.pdf)

47 Lawrence and Ankersmit, above note 44, page 14

48 Ghiotto and Echaide, above note 1, page 16; LSE Consulting, above note 33, page 20; BANCO DE ESPAÑA, Economic Bulletin 3/2019 available at [https://www.bde.es/bde/en/secciones/informes/boletines/Boletin\\_economico/index2019.html](https://www.bde.es/bde/en/secciones/informes/boletines/Boletin_economico/index2019.html), page 22

49 See Richard M. Locke, above note 12; Adrian Smith et al, above note 12

50 See Stefano Ponte, *Business, Power and Sustainability in a World of Global Value Chains* (Zed Books 2019). Lead-firms are often powerful economic actors in global value chains and work as "gatekeepers" – establishing entry and mobility barriers –, and drive the chain in terms of value addition and distribution. Ponte argues that sustainability-driven demands from lead-firms in their GVCs are often used as a tool to capture value for themselves, and push costs upstream, extracting more demands from suppliers and consolidating their supply base. This relates to and is a consequence of a broader "process of unequalisation" (Raphael Kaplinsky, 'Spreading the gains from globalization: what can be learned from value-chain analysis?' (2004) 47 *Problems of economic transition* 74-115), in which unequal distribution of the gains of participating in GVCs occur between countries, within countries and even among participant firms. The ownership of key chain nodes guarantees important leverage for nations and companies, but also raises question of iniquitous GVCs, since profits are concentrated in big companies in wealthy countries.

51 Ghiotto and Echaide, above note 1, page 8; Harrison and Paulini, above note 1, page 12

52 The SIA recommends that Brazil should improve anti-deforestation policies and law enforcement activities to detect illegal logging and expand monitoring along the supply chain and should renew the policy environment that resulted in decreased deforestation from 2005 to 2012 (for example, the Action Plan for Prevention and Control of Deforestation in the Legal Amazon (PPCDAm)). See LSE Consulting, above note 33, page 104

53 Harrison and Paulini, above note 1, page 12

54 Harrison and Paulini, above note 1, page 13; Harrison et al, 'Labour Standards Provisions in EU Free Trade Agreements: Reflections on the European Commission's Reform Agenda' (2019) 18 *World Trade Review* 645; Marianne Kettunen et al., 'An EU Green Deal for trade policy and the environment: Aligning trade with climate and sustainable development objectives' (IEEP 2020) page 21, available at [https://ieep.eu/uploads/articles/attachments/9c951784-8c12-4ff5-a5c5-ee17c5f9f80b/Trade%20and%20environment\\_FINAL%20\(Jan%202020\).pdf?v=63748123099](https://ieep.eu/uploads/articles/attachments/9c951784-8c12-4ff5-a5c5-ee17c5f9f80b/Trade%20and%20environment_FINAL%20(Jan%202020).pdf?v=63748123099)

55 Harrison and Paulini, above note 1, pages 12-13; M. Stefan Ambec et al, above note 1; and on the social impacts see Harrison, 'Human rights impact assessment: the role of governmental and inter-governmental actors' in Nora Gotzmann (ed.) *Research Handbook on Human Rights Impact Assessment* (Edward Elgar 2019)

56 For some proposals on how to reform the methodology for assessing impacts which are relevant to both *ex ante* and *ex post* assessments, see M. Stefan Ambec et al, above note 1, and Harrison, above note 55

57 *Ibid.* On the environmental side, SIA methodologies should be driven by environmental objectives. For instance, with regard to greenhouse gas emissions, the SIA could identify early a "climate-safe" operating space for the trade agreement, ideally including "climate change mitigation supportive" scenarios of different levels. Negotiators can then only negotiate within such "climate-safe" or "climate-supportive" alternatives.

58 Douma argues that "...Trade Sustainability Impact Assessment should be promptly followed by a reaction from the side of the European Commission in which it is explained which recommendations are to be adopted, and which rejected, and for which reasons." See Wybe Th. Douma, 'Sustainability and precautionary aspects of CETA dissected' (2016) *Environmental Law Network International Review* No 2/2016, 63

59 See Bart Kerremans, Johan Adriaensen et al, *Parliamentary scrutiny of trade policies across the western world* (Study requested by the European Parliament's Committee on International Trade 2019) available at <https://op.europa.eu/en/publication-detail/-/publication/02cc8792-5500-11e9-a8ed-01aa75ed71a1/language-en/format-PDF/source-93662362>

60 There is an increasingly significant literature which has identified various serious problems and limitations with the inadequacy of civil society bodies in existing EU trade agreements. This literature is referred to in the footnotes below. For a report which summarises much of this recent literature see Nadia Ashraf and Jeske van Seters, *Making it Count: Civil Society Engagement in EU Trade Agreements* (ECPDM, 2020)

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available at <https://ecdpm.org/wp-content/uploads/Making-Count-Civil-Cociety-Engagement-EU-Trade-Agreements-Discussion-Paper-276-July-2020-ECDPM.pdf>

61 Adrian Smith et al, *Free Trade Agreements and Global Labour Governance: The European Union's Trade-Labour Linkage in a Value Chain World* (Routledge 2020) page 140; Harrison et al (2019), above note 54, page 644; Ashraf and van Seters, *ibid*, page 2

62 Ashraf and van Seters, above note 60, page 11

63 Harrison et al, 'Governing Labour Standards through Free Trade Agreements: Limits of the European Union's Trade and Sustainable Development Chapters' (2019) 57 *Journal of Common Market Studies* 260– 277 which highlights the fact that there was a six-year delay from the commencement of the agreement to the operationalization of the civil society mechanism. It also highlights problems with the perceived lack of independence of a number of members of the Korean Domestic Advisory Group.

64 The lack of independence of civil society representatives has been identified as a problem in relation to a number of existing EU trade agreements (See Ashraf and Seters, above note 60). It has been argued that the EU should play a stronger role in persuading its trade partners on the need to constitute representative and balanced civil society mechanisms. See the European Economic and Social Committee, *The role of Domestic Advisory Groups in monitoring the implementation of Free Trade Agreements* (2019) available at <https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/role-domestic-advisory-groups-monitoring-implementation-free-trade-agreements>

65 See also Laurens Ankersmit, *A Formal Complaint Procedure for a More Assertive Approach towards TSD Commitments* (ClientEarth, October 2017) available at <https://www.documents.clientearth.org/wp-content/uploads/library/2017-10-27-a-formal-complaint-procedure-for-a-more-assertive-approach-towards-tsd-commitments-version-1.1-ce-en.pdf>

66 Human Rights Watch, *Rainforest Mafias - How Violence and Impunity Fuel Deforestation in Brazil's Amazon* (September 2019) available at <https://www.hrw.org/report/2019/09/17/rainforest-mafias/how-violence-and-impunity-fuel-deforestation-brazils-amazon>