

15 June 2020

Complaint to the European Ombudsman – The European Commission’s failure to complete a final sustainability impact assessment prior to the conclusion of the negotiations of the EU-Mercosur Free Trade Agreement

1. This complaint, which is submitted on behalf of ClientEarth, Fern, Veblen Institute, La Fondation Nicolas Hulot pour la Nature et l'Homme and International Federation for Human Rights (the “Complainants”), deals with the European Commission’s (the “Commission”) failure to complete a final sustainability impact assessment (“SIA”) of the EU-Mercosur Free Trade Agreement (the “Agreement”) prior to the conclusion of the negotiations.
2. The Commission intends to pursue a trade policy ‘based on values’.¹ The EU Treaties make clear that this is not only a policy preference but also a legal obligation. The Treaties state that in its relations with the wider world, the EU “*shall uphold and promote its values, contribute to the sustainable development of the earth and the eradication of poverty and the protection of human rights, in particular the rights of the child*”.² Moreover, the “*Union’s action on the international scene shall be guided by [...] democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms*”.³ These principles also apply in the area of common commercial policy.⁴
3. These legal obligations flowing from the Treaties were specifically acknowledged by DG Trade when it published its Communication on Trade for All in 2015, stating “*The EU Treaties demand that the EU promotes its values, including the development of poorer countries, high social and environmental standards, and respect for human rights, around the world. In this regard, trade and investment policy must be consistent with other instruments of EU external action.*”⁵
4. In light of these policy objectives and legal obligations, the EU should not conclude Free Trade Agreements (FTAs) without knowing if they have the potential to encourage violations of these values. This implies that draft negotiating texts for such agreements are subject to independent impact assessments and that civil society organisations are consulted in a meaningful manner. This also implies that the outcomes of impact assessments are taken into timely consideration to influence ongoing negotiations. These commitments are detailed in the methodology developed by the Commission as to how SIAs are to be conducted.⁶
5. By concluding the negotiations without the findings of the interim and the final SIA report, we consider the Commission did not respect rules relating to good administration.
6. The first part of the complaint will lay out the relevant background and context (section 1). The complaint will then describe the content and process of the SIA procedure that was conducted in relation to the Agreement. The Complainants will demonstrate that the

¹ See the Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “Trade for All: Towards a more responsible trade and investment policy”, COM/2015/0497 final, [Communication on the Trade for All], <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0497&from=en>

² Article 3 (5) TEU

³ Article 21 (1) TEU

⁴ Article 207 TFEU states that the common commercial policy “*shall be conducted in the context of the principles and objectives of the Union’s external action*”

⁵ Communication on Trade for All, page 15

⁶ European Commission, Handbook for Trade Sustainability Impacts Assessment, Second Edition, April 2016, [Handbook for Trade SIA], https://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154464.PDF

Commission conducted and concluded the trade talks with Mercosur countries without appropriate and updated information about the potential social, environmental and economic impacts of the proposed Agreement, and without appropriate involvement of all stakeholders (section 2). Finally, the complaint will establish the grounds for the Commission's maladministration, based on its failure to comply with its own guidelines on SIAs and, more importantly, the provisions of the EU's founding Treaties (section 3).

1 Background and Context of the Complaint

7. On 28 June 2019, the Commission announced that the EU and the countries of Mercosur ("Mercosur" - Argentina, Brazil, Paraguay and Uruguay) had reached an agreement on trade after more than 20 years of negotiation.
8. With over 260 million consumers and an annual GDP of 2.2 trillion euros, Mercosur is the fifth largest economy outside the EU and has consistently attracted European investments. As a consequence, over 60,500 European Union companies are present in the region and investment stocks reached 381 billion euros in 2017.⁷
9. If the process is successful, the Agreement will be the largest concluded by the EU for the population concerned (780 million people) and one of the largest in terms of the volume of trade covered (40 to 45 billion euros of imports and exports).
10. Like the trade agreements concluded or recently negotiated by the EU with third countries (Canada, Japan, Singapore, South Korea, Vietnam, etc.), the Agreement is a "new generation" agreement with a very wide scope. The full agreement has not yet been published, but the Commission has made public the English texts of around 30 chapters and appendices which allow to understand the majority of its content.⁸
11. This Agreement would provide for the removal of more than 91% of customs duties on trade between the two areas' the simplification of customs formalities and procedures; and the elimination of "non-tariff barriers" to trade through the harmonization of standards. The Agreement also intends to open access to public markets, liberalize services and capital movements, protect intellectual property, etc.⁹
12. It should encourage exports by European companies in the automotive, chemical, pharmaceutical and clothing sectors and offer them increased access to the public markets of Mercosur states. In exchange, Mercosur companies would benefit, in particular in the agri-food industry, from larger outlets on the European market for their production (beef, poultry, sugar / ethanol, etc.).¹⁰
13. When the Commission announced that an Agreement had been reached on 28 June 2019, it indicated that both sides were to perform a legal verification of the agreed text to correct legal inconsistencies and come up with the final version.¹¹ The legal verification of the text usually does not leave room for change in the content of the text. Once the legal check is completed, the translation by the Commission services into all 24 EU official languages can take several months. The Agreement will then be sent to the Council and subsequently to the European Parliament for consent.

⁷ DG Trade, Factsheet "EU-Mercosur Trade Agreement: Building Bridges for Trade and Sustainable Development", June 2019, http://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157954.pdf

⁸ DG Trade, The EU-Mercosur Trade Agreement in Principle and its texts, <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2048>

⁹ See further details in « Un accord perdant perdant. Analyse préliminaire de l'accord de commerce entre l'Union européenne et le Mercosur », Veblen Institute and FNH, November 2019, https://www.veblen-institute.org/IMG/pdf/analyse_accord_ue_mercosur_fnh_veblen.pdf

¹⁰ Ibid

¹¹ DG Trade, Press release "EU and Mercosur reach agreement on trade", 28 June 2019, <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2039>

14. This Agreement is part of a wider Association Agreement¹² between the two regions, which include also a political and institutional agreement.
15. This complaint is based on the following factual elements with regard to the timeline of the EU-Mercosur negotiations:
 - The talks between the EU and Mercosur started as early as 1999.¹³
 - A first sustainability impact assessment for the EU-Mercosur trade negotiations was published in 2009 (“the 2009 SIA”).¹⁴
 - Following a suspension of talks, negotiations restarted in 2010. The negotiations gained new impetus in 2016.¹⁵
 - At the end of 2016, the Commission launched a request for services to conduct a new SIA on the Agreement stating in particular that “*given that the economic context has since changed, this SIA [the 2009 SIA] may no longer provide an up-to-date picture of the potential impact of an EU-Mercosur Association Agreement*”.¹⁶
 - In 2017, the Commission mandated a new contractor, LSE Consulting, to conduct a new SIA.
 - On 24 January 2018, the consultants issued the SIA inception report (the “Inception Report”), followed by stakeholder consultations.¹⁷
 - In April 2018, European and international NGOs sent a joint open letter, calling on the Commission to ensure “*the ongoing sustainability and human rights impact assessments of the EU-Mercosur free trade agreement are conducted in a comprehensive and participatory way and that their findings are taken into account before concluding the negotiations, according to the rules set out in the Commission’s handbook for trade sustainability impact assessments and article 21 of the Treaty on the European Union*”.¹⁸ The letter recalled the Ombudsman’s decision in case 1409/2014/MHZ on the European Commission’s failure to carry out a prior human rights impact assessment of the EU-Vietnam FTA.¹⁹
 - On 28 June 2019, the EU and Mercosur announced that they had reached a political agreement on the EU-Mercosur Trade Agreement, while the new SIA was still ongoing and the interim report had not even been published.²⁰
 - In a Q&A published in July 2019, the Commission explained that “*Work is currently underway on a new a Trade Sustainability Impact Assessment (SIA) evaluating the economic, social, environmental and human rights impact of a trade agreement*”

¹² Article 217 TFEU

¹³ The consolidated version of the Union’s negotiating directives for an Inter-Regional Association Agreement with Mercosur, adopted by the Council in September 1999. See the Decision of the European Commission refusing to grant access to the negotiating directives, <https://www.asktheeu.org/en/request/7049/response/24971/attach/html/3/2019%203840%20C%202020%20960%20F1%20DECISION%20LETTER%20EN%20V2%20P1%201067908.PDF.pdf.html>

¹⁴ The University of Manchester, Trade Sustainability Impact Assessment (SIA) of the Association Agreement under negotiation between the European Community and Mercosur, March 2009, http://trade.ec.europa.eu/doclib/docs/2009/april/tradoc_142921.pdf

¹⁵ DG Trade, The EU-Mercosur Trade Agreement, Questions and Answers, 9 July 2019, https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157953.pdf

¹⁶ European Commission request for services, Terms of Reference related to a contract to provide a Sustainability Impact Assessment (SIA) in support of association agreement (AA) negotiations between the European Union and Mercosur, https://trade.ec.europa.eu/doclib/docs/2017/august/tradoc_155999.docx.pdf

¹⁷ LSE Enterprises, Sustainability Impact Assessment in Support of the Association Agreement Negotiations between the EU and Mercosur, Inception Report, 24 January 2018, http://www.eumercosursia.com/uploads/4/0/7/2/40728425/sia_mercosur_finalinceptionreport.pdf

¹⁸ Civil Society Letter on the EU-Mercosur Free Trade Deal Negotiations, 24 April 2018, <https://www.fern.org/news-resources/civil-society-letter-on-the-eu-mercorsur-free-trade-deal-negotiations-104/>

¹⁹ European Ombudsman, Decision in case 1409/2014/MHZ on the European Commission’s failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement, [Decision of the Ombudsman on the EU-Vietnam case], <https://www.ombudsman.europa.eu/fr/decision/en/64308>

²⁰ DG Trade, Press Release “EU and Mercosur reach agreement on trade”, op. cit.

- between the EU and Mercosur. An independent contractor is carrying out the study.²¹
- On 15 July 2019, the Commission organised a Civil Society Dialogue to debrief civil society organisations on the state of play and to exchange views on the topic.²²
 - On 3 October 2019, the SIA draft interim report (the “Draft Interim Report”) was published and followed by stakeholder consultations.²³
 - On 9 February 2020, the final interim report (the “Interim Report”), with a similar assessment as in the Draft Interim Report, was published.²⁴
 - At the time of submitting the complaint, the final SIA Report has not yet been published.
16. It is clear from the above that the Commission concluded the negotiations with Mercosur without having completed the SIA process beforehand. Moreover, the content of the Draft Interim Report and the Interim Report demonstrate that the Commission conducted the negotiations without appropriate and updated information about the potential social, environmental and economic impacts of the proposed trade agreement (see below section 2). This is despite DG Trade’s own assertion that SIAs are a “key instrument in the formulation of sound, transparent and evidence-based trade policies”.²⁵
17. This issue was first raised after the Civil Society Dialogue of 15 July 2019, via a follow-up email sent to DG Trade by several CSOs.²⁶ It was again raised during the Civil Society Dialogue on the Draft Interim Report on 15 October 2019, as well as in CSOs’ replies to the Draft Interim Report.²⁷ On those several occasions, it was pointed out to the Commission and the consultants that the absence of a finalised SIA prior to the end of the negotiations calls into question whether (or the extent to which) the SIA process has actually fed into the Commission’s decision-making process and enabled facts-based policy choices during the negotiations. The Commission answered that despite the absence of the final report, the negotiators had been informed by the consultants through the preparation of the reports.²⁸
18. Finally, in a letter addressed to the Commission on 29 January 2020, ClientEarth, Fern and Veblen Institute, respectfully requested an explanation of how the Commission integrated the potential economic, social and environmental impacts into the EU-Mercosur trade agreement without the final report of the SIA. We also requested that the SIA final report, when published, inform European and national decision makers, as well as the

²¹ DG Trade, The EU-Mercosur Trade Agreement, Questions and answers, op. cit., page 17

²² DG Trade, Civil Society Dialogue on the EU-Mercosur Trade Agreement, 15 July 2019, <https://trade.ec.europa.eu/civilsoc/meetdetails.cfm?meet=11545>

²³ LSE Enterprises, Sustainability Impact Assessment in Support of the Association Agreement Negotiations between the EU and Mercosur, Draft Interim Report, 3 October 2019, http://www.eumercosursia.com/uploads/4/0/7/2/40728425/final_interim_report_publication_03oct2019.pdf

²⁴ LSE Enterprises, Sustainability Impact Assessment in Support of the Association Agreement Negotiations between the EU and Mercosur, Final Interim Report, 9 February 2020, http://www.eumercosursia.com/uploads/4/0/7/2/40728425/eumercosursia_final_interim_report_.pdf

²⁵ DG Trade, Communication on Trade for All, page 18 ; see also DG Trade, Sustainability Impact Assessments webpage, https://ec.europa.eu/trade/policy/policy-making/analysis/policy-evaluation/sustainability-impact-assessments/index_en.htm

²⁶ See Annex 1a : Conservation International and other civil society organisations, Email to DG Trade follow-up civil society dialogue on the EU-Mercosur Trade Agreement, 05/08/2019

²⁷ ClientEarth, Fern and Conservation International, Joint Reply to the Draft Interim Report of the Sustainability Impact Assessment in support of the EU-Mercosur Association Agreement, October 30, 2019, <https://www.documents.clientearth.org/library/download-info/clientearth-fern-and-conservationinternational-joint-reply-to-the-draft-interim-report-of-the-sustainability-impact-assessment-of-the-eumercosur-trade-agreement-october-30-2019/> ; See also the Contribution of the Veblen Institute for Economic Reforms and Fondation Nicolas Hulot to the Draft Interim Report of the Sustainability Impact Assessment in support of the EU-Mercosur Association Agreement, October 29, 2019, https://www.veblen-institute.org/IMG/pdf/institut_veblen_fnh_comments_on_sia_291019.pdf

²⁸ See Annex 1b: DG Trade, Reply, 13/08/2019

public, of the likely environmental impacts of the actual terms of the agreement, now that these are settled.²⁹

19. In its answer by letter dated 14 February 2020, the Commission reiterated that the negotiators had been informed by the consultant through the preparation of the reports and that *“the consultant is currently working on the final report, which we expect to be available in the next couple of months, in good time to inform the discussion during the ratification process in the EU”*.³⁰ We consider these answers as unsatisfactory. As a result, we are bringing these issues of maladministration on the part of the Commission before the European Ombudsman.

2 Shortcomings in the SIA process and findings in support of the EU-Mercosur trade negotiations

20. The conclusion of the negotiations before the completion of the SIA renders the purpose of the process meaningless since the findings and recommendations in the upcoming final report are incapable of feeding into the negotiations.
21. The Commission has argued that, despite the fact that the final report will only be published after the negotiations have been concluded, the SIA was able to feed into negotiations through the inception and the interim phases of the SIA, which have informed the negotiators.³¹
22. However, it is important to consider the information available to the Commission during the negotiations of the Agreement, which concluded on 28 June 2019. The content of the Inception Report, Draft Interim Report and Interim Report clearly show that these were incapable of feeding into the negotiations in any meaningful way. Indeed, it is clear that the Commission failed to rely on updated information and appropriate analysis of the potential impacts of the proposed trade agreement (subsections 2.1 to 2.3). Furthermore, the failure to complete the SIA process before the end of the negotiations means that the Commission has failed to ensure the appropriate involvement of all stakeholders in the decision making process (subsection 2.4).

2.1. Up-to-date and best available research, information and data

23. The Terms of Reference related to the contract to provide a SIA in support of the association agreement negotiations between the European Union and Mercosur explained: *‘As is typically the case for trade negotiations, DG TRADE conducted a Trade Sustainability Impact Assessment (SIA) in 2009. However, given that the economic context has since changed, this SIA may no longer provide an up-to-date picture of the potential impact of an EU-Mercosur Association Agreement. In addition, since the 2009 SIA was concluded, Commission policy and practice on Impact Assessments and SIAs have moved on considerably, e.g. as regards the incorporation of human rights issues. Accordingly, DG TRADE will conduct a new SIA to assess the economic, social, environmental, and human rights impact of an Association Agreement, both in the EU and in Mercosur. It should also propose measures to maximise the expected benefits of the agreement and to minimise potential negative impacts.’*³²
24. This was confirmed by the SIA Interim Report which mentions that the analysis underlying the previous SIA of 2009 in many respects *“does not hold in today’s context. Compared to the current study, the previous SIA did not account for many of the latest development in*

²⁹ See Annex 2a: ClientEarth, Fern and Institut Veblen, Letter re: non-completion, prior to the conclusion of the negotiations with Mercosur of a sustainability and human rights impact assessment, 29/01/2020

³⁰ See Annex 2b: DG Trade, Letter reply to ClientEarth et al., 14/02/2020

³¹ See Annex 1b and Annex 3: DG Trade, Letter reply to Fern, 24/07/2018

³² European Commission request for services, op. cit., page 1

*Mercosur trade flows.*³³ In particular, the consultants point out the lower Chinese trade flows with EU and Mercosur and the fact that Mercosur countries were all still GSP³⁴ beneficiaries.

25. However, the Draft Interim Report and the Interim Report do not use the best available research, information and data. The failure to take recent data or events into account risks creating incorrect and biased results. This is particularly critical across the different parts of the environmental analysis, where the study fails to take into account the latest data on deforestation and the changes in forest governance and to draw conclusions from them to make sure future risk is taken into account:
- The Draft Interim Report refers to the 2016 Environmental Performance Index,³⁵ whereas there is an updated version for 2018.³⁶ In this latest version, three of the Mercosur countries rank lower than in 2016 – e.g. Brazil (69th), Argentina (74th) and Paraguay (105th).
 - The Draft Interim Report does not include recent data on deforestation rate concerning Brazil as well as recent information regarding changes made to its forest legal framework. The 2019 New York Declaration on Forests Five-Year Assessment Report states that: *“In June 2019 alone, deforestation rates in the Brazilian Amazon increased by 88 percent compared to the same month last year. [...] After a change of government in 2019, deforestation in Brazil has increased due to reversals of existing legal and institutional forest protection policies and frameworks. [...] Changes to Brazil’s mining code could open up 9.8 Mha of protected area to mining development by 2025 [...] The new government administration has further loosened environmental controls and enforcement. In its first months, the new administration dissolved climate and forest departments; transferred the Brazilian Forest Services (previously housed under Ministry of Environment) to the Ministry of Agriculture, and forcibly sought to transfer demarcation of indigenous lands to the Ministry of Agriculture.”*³⁷
 - The Draft Interim Report mentions briefly the fires in the Amazon in August 2019, without drawing conclusions or assessing whether there is a risk that new trends emerge in the coming years.³⁸
 - There is no data on illegal logging and its contribution to land use change.
 - The information on pesticide and fertilizer use rely on outdated data from 2013-2014,³⁹ and fails to reflect new trends. For instance, Brazil has recently approved hundreds of new pesticides.⁴⁰
 - The Draft Interim Report does not mention the existence of violations of indigenous peoples’ rights, which are supported by widespread evidence. It is particularly problematic

³³ Draft Interim Report, page 14

³⁴ The EU’s Generalised Scheme of Preferences (GSP) is a unilateral EU initiative, which removes import duties from products entering the EU market from certain developing countries.

³⁵ Draft Interim Report, page 70

³⁶ Environmental Performance Index, 2018, <https://epi.envirocenter.yale.edu/downloads/epi2018policymakerssummaryv01.pdf>

³⁷ NYDF Assessment Partners, “Protecting and Restoring Forests: A Story of Large Commitments yet Limited Progress”, New York Declaration on Forests Five-Year Assessment Report, Climate Focus, 2019, pages 15, 18, 43, and 75, <https://forestdeclaration.org> ; This report was researched and authored by the New York Declaration on Forests Assessment Partners and coordinated by Climate Focus. It is a collaborative effort that relies on the contributions of countless individuals and organizations. The report and its accompanying technical annexes have undergone an extensive internal and external peer review process, with 700+ comments and input received from 50+ experts around the world (see page 5 of the report, cited in footnote 29)

³⁸ Draft Interim Report, page 78

³⁹ Ibid, pages 81 and 82, figures 26 and 27

⁴⁰ “Hundreds of new pesticides approved in Brazil under Bolsonaro”, 12 June 2019, The Guardian <https://www.theguardian.com/environment/2019/jun/12/hundreds-new-pesticides-approved-brazil-under-bolsonaro>; See also Larissa Mies Bombardi, ‘Atlas of Agrottoxins in Brazil and Connection with the European Union’, FFLCH - USP, 2019, <http://www.livrosabertos.sibi.usp.br/portaldelivrosUSP/catalog/view/352/309/1388-1>

in light of the recent rise of abuses and murders against the indigenous populations in Mercosur in relation to land-use disputes involving agri-business, mining, hydroelectric, and timber sectors, most notably in Brazil.⁴¹

- There is no overview of the legal framework, domestic policies and practices regarding the recognition of indigenous peoples rights. It does not provide any information about the current state of land rights recognition for indigenous peoples as well as recent policy developments towards indigenous peoples in Mercosur countries, particularly Brazil.
26. The above reveals the Commission conducted the negotiations without relying on up-to-date and best available research, information and data.

2.2. Detailed analysis of the Agreement's potential impacts

27. The Commission further failed to rely on an in-depth and detailed analysis of the Agreement's potential impacts. The Inception Report only "*provides an overview of the proposed framework for conducting the sustainability assessment analysis and methodologies to be employed, including the consultations activities, for the study*" and "*the preliminary analysis for the tasks to be expanded upon throughout the implementation of the project.*"⁴² In other words, the Inception Report does not itself contain substantive information capable of informing the Commission's negotiations.
28. Regarding the Draft Interim Report, even if one leaves aside the fact that it was published more than three months after the conclusion of the negotiations, it does not contain preliminary findings and analysis of the economic, social, human rights and environmental impacts. It contains only an extremely brief analysis of certain potential impacts of the agreement, particularly on the environment and indigenous peoples' rights:
- The Draft Interim Report dedicates less than one page (out of 250) to the assessment of the impact of the Agreement on indigenous peoples' rights. Importantly, there is no analysis of the likely impacts of potential increased pressures on land use and the frequency of land rights disputes. The Draft Interim Report only includes in its bibliography a list of relevant studies - yet without assessing these findings in the context of the Agreement.
 - There is a lack of assessment of the likely impact on deforestation rates in each (relevant) Mercosur country.
 - The assessment of the impacts on the expansion of agriculture land does not fully take account of the scale of the potential expansion into forested land and natural ecosystems. The sectoral analysis on beef in the Draft Interim Report is overly brief and merely sets out various "possible consequences" of the rise of production without assessing their actual probability of occurrence.⁴³
 - The assessment of the impact of the agreement on overall greenhouse gas emission is limited to CO₂ emissions only, despite recognising in the baseline the relative importance of methane and nitrous oxide as part of the greenhouse gas emissions mix in Uruguay and Paraguay⁴⁴. Moreover, it seems that the assessment does not take into account how the Agreement's potential impact on land use, land-use change and forestry ("LULUCF") will affect GHG emissions, despite acknowledging that "[i]n both Brazil and Paraguay, land use, land-use change and forestry has been key contributor to CO₂ emissions".⁴⁵ Failure to take properly into account a "key contributor" to CO₂ emissions could lead to seriously erroneous conclusions. The Draft Interim Report also fails to analyse the potential environmental impacts of plantations for pulp production although this is also a sensitive sector in which there might be a 13.1% increase in Brazilian exports

⁴¹ See for example <https://www.iwgia.org/images/documents/indigenous-world/indigenous-world-2018.pdf>, p. 193

⁴² Inception Report, page 10

⁴³ Draft Interim Report, page 113

⁴⁴ Ibid, page 74.

⁴⁵ Ibid, page 75: between 2005 and 2010, LULUCF accounted for 55% of Brazil's emissions and 70% of Paraguay's.

of wood and paper products according to the "ambitious" scenario modelling included in the Draft Interim Report and Interim Report.

- The Interim Report of February 2020 only dedicates two pages to the environmental analysis and indicates in a "Further analysis" section that the final SIA report "*will analyse the impact on other GHGs and will lay a particular focus on the impact on deforestation, pesticides use, fisheries for Argentina and Uruguay and water resources, mostly for Paraguay and Uruguay. ... We will also analyse the scope of the TSD [trade and sustainable development] chapter and the potential impact of the AA [Association Agreement] on MEAs [Multilateral Environmental Agreements], with an emphasis on nature and biodiversity, climate change and ozone depletion, waste and chemicals and as well as other issues emerging from the stakeholder consultations*".⁴⁶ However, it is clear that future findings are now unable to contribute to the negotiations, which have concluded.
29. In light of the above, the Commission thus cannot argue that the information gathered and the analytical exercise carried out during the inception and interim stages of the SIA have fed into the negotiations. The absence of a detailed analysis of all the potential impacts is particularly problematic in the light of the current situation in Mercosur with respect to environmental and human rights protection – and a major concern for civil society organisations.

2.3. Relevance of the modelling to the current context

30. The modelling of the Draft Interim Report and the Interim Report is based on two speculative scenarios: conservative and ambitious liberalisation. As noted by the Commission in its letter of 14 February 2020, the SIA purpose is not to provide an analysis of the impacts of the final results of the negotiations and the actual terms of the agreement.⁴⁷ However, it is unclear why the Draft Interim Report and the Interim Report proceeded on the basis of modelled outcomes respectively more than three months and eight months after the negotiations concluded.

2.4. Participation and transparency

31. During the Civil Society Dialogue on the Draft Interim Report on 15 October 2019, the Commission held that "*through the SIA and the workshops and dialogues it enables on both sides of the Atlantic, the Commission receives input from civil society throughout the negotiation. The SIA is thus important as a participatory process rather than just a finished product*".⁴⁸
32. Before the conclusion of the negotiations, the following engagement with civil society took place:
- A Civil Society Dialogue was organised in Brussels on 13 October 2017 to present the Inception Report, which was limited to the presentation of the methodological approach and analytical tasks to be carried out during the process'.
 - The consultants and the Commission held an online consultation,
 - four roundtables (one on Environment & Human Rights) in Brussels,
 - and two workshops took place respectively in Brazil and Argentina to channel inputs from key stakeholders on the possible impacts of the Agreement in 2018.⁴⁹
33. These opportunities to engage with the consultants and the Commission at an early stage in the SIA process are welcome. However, all of the 2018 sessions were aimed at gathering information about *what* the consultants should look at (the 'channels of impact')

⁴⁶ Interim Report, page 85

⁴⁷ See Annex 2b

⁴⁸ DG Trade, Civil Society Dialogue on the Draft Interim Report in support of the Association Agreement between the EU and Mercosur, 15 October 2019, page 4, https://trade.ec.europa.eu/doclib/docs/2020/february/tradoc_158611.pdf

⁴⁹ See SIA website, <http://www.eumercosursia.com/consultations.html>

- in their assessment, but they were not an opportunity for civil society to interrogate the findings - because there weren't any provisional findings yet available at that time.
34. The possibility for CSOs to raise concerns and discuss potential impacts of the Agreement was thus significantly limited because the consultation in the EU on the Draft Interim Report only happened mid October 2019, more than three months after the negotiations were over. This undermines any notion that public input is valued in the negotiation process. Moreover, stakeholders' comments have not even been analysed and integrated at the stage of the Interim Report of February 2020, which just added a section "Consultation process" listing a summary of the comments received and indicating "*The final report will take account of the above comments into the relevant analyses.*"⁵⁰
 35. This is very problematic given that the negotiations between the EU and Mercosur have raised deep concerns over the agreement's potential devastating impacts on forests, indigenous peoples' rights, climate change and small-scale farmers.
 36. In April 2018, European and international NGOs sent a joint open letter, calling for the EU to put human rights and sustainability at the forefront of the Agreement with Mercosur.⁵¹ In June 2019, over 340 civil society organisations called on the European Union to immediately halt free trade agreement negotiations with the Mercosur because of deteriorating human rights and environmental conditions in Brazil.⁵² In May 2020, 50 members of the Brazilian network of the Climate Observatory published a position note asking the EU to review the premises of the free trade deal with Mercosur.⁵³
 37. As these letters and statements demonstrate, potential impacts on the environment and human rights is one of the major concerns raised by the Agreement. The limited opportunities to engage meaningful discussions in this regard undermines the possibility for stakeholders to review and contribute to preliminary findings before the SIA process is finalised and the negotiations are closed. This is a major failing in terms of the transparency of the whole process.

3 The SIA process breached the Commission's Guidelines on SIAs and Article 21 TEU

38. The SIA process described above constitutes a clear instance of maladministration on the grounds that the Commission failed to follow its own guidelines on SIAs and, more importantly, it breached Article 21 TEU.

3.1. Commission Guidelines on SIAs

39. The Commission's 2015 Communication on "Trade For All: Towards a more responsible trade and investment policy" states that, in line with the principles of the 'Better regulation' agenda, every significant initiative in the field of trade policy will be the subject of an impact assessment. Impact assessments and evaluations are "*crucial for the formulation of sound, transparent and evidence-based trade policies*".⁵⁴

⁵⁰ Interim Report, page 242

⁵¹ Civil Society Letter on the EU-Mercosur Free Trade Deal Negotiations, 24 April 2018, op. cit.

⁵² 340+ organisations call on the EU to immediately halt trade negotiations with Brazil, 17 June 2019, <https://www.fern.org/news-resources/340-organisations-call-on-the-eu-to-immediately-halt-trade-negotiations-with-brazil-1980/>

⁵³ Position note by the Climate Observatory, 5 May 2020, <http://www.observatoriodoclima.eco.br/en/ue-precisa-rever-premissas-de-acordo-com-mercosul/>

⁵⁴ Communication on Trade for All, page 18

40. To give detail to this commitment, in 2016 the Commission published the second edition of its Handbook for Trade SIAs (the Handbook), providing a “*methodological basis on which future SIAs should build*” for the benefit of Commission officials, external experts and stakeholders. According to the Handbook, SIAs are an important instrument for integrating issues of sustainable development into trade policy “*by assessing in depth the potential economic, social and environmental impacts of a proposed trade agreement whilst its negotiation is ongoing*” and “*by facilitating a wider outreach to stakeholders in both the EU and partner countries*”.⁵⁵
41. SIAs have several purposes, including:
- feeding information into and helping steer the negotiations;
 - assessing the changes that are likely to be caused by a trade agreement;
 - helping to identify possible trade-offs;
 - ensuring that the related policy choices are optimized.⁵⁶
42. The Handbook expressly states that SIAs take place “*hand-in-hand with the negotiations*” and should start as early as possible “*to ensure that the analysis can usefully feed into the negotiating process at a useful stage*”. SIAs “*help to answer the question: ‘How should we run these negotiations?’*”.⁵⁷
43. Incidentally, it is notable that even the Terms of Reference related to the contract to provide a Sustainability Impact Assessment (SIA) in support of association agreement negotiations expressly mentioned that the “*SIA in support of Association Agreement (AA) negotiations between the European Union and Mercosur should be carried out during the negotiations. It shall be completed before or in any case not later than the end of the negotiations so that its results can inform the negotiations and decision-making process.*”⁵⁸
44. The SIA is divided into three phases:⁵⁹
- (1) Inception report: Outline of the methodological approach, draft consultation plan, preliminary screening and scoping, identification of sectors for detailed analysis.
 - (2) Interim report: Presentation of the preliminary findings of the in-depth economic, social, human rights and environmental impacts.
 - (3) Final report: Refinement of the overall and sectoral analyses, recapitulation of the outcomes and findings of the assessment, recommendations and proposals for flanking measures.
45. Importantly, the final report “*concludes the work of the consultants, but not of the Commission*”. Once the SIA is over, “*taking into account the specifics of the negotiation and the actual progress made in it*”, the Commission issues a position paper in which it expresses its views on the consultants’ findings and policy recommendations with regard to the identified impacts. The Commission explains how these findings have and will contribute to the negotiations and decision-making. The publication of the position paper on DG Trade’s SIA webpage, brings the SIA process to an end.⁶⁰
46. In addition, SIAs must be evidence-based. This means that SIAs must be based on the most up-to-date and best available research, information and data. SIAs must also be

⁵⁵ Handbook for Trade SIA, pages 7 and 8.

⁵⁶ DG Trade, Policy Evaluation, Sustainability Impact Assessments, https://ec.europa.eu/trade/policy/policy-making/analysis/policy-evaluation/sustainability-impact-assessments/index_en.htm#_methodology

⁵⁷ Handbook for Trade SIA, pages 10-11

⁵⁸ European Commission request for services, Terms of Reference related to a contract to provide a Sustainability Impact Assessment (SIA) in support of association agreement (AA) negotiations between the European Union and Mercosur, op.cit.

⁵⁹ Handbook for Trade SIA, pages 11-13

⁶⁰ Ibid, pages 13 and 30

proportionate, which requires the scope and the depth of each SIA to be “*calibrated to the importance and the type of trade measures being negotiated, as well as to the magnitude of the expected impacts*”.⁶¹

47. It is clear that the process and content described in section 2 do not meet these commitments in terms of the sequencing of the various SIA reports and their content. It is ultimately for the Commission to ensure it has enough information on which basis to negotiate an agreement that complies with the EU’s obligations in its international relations. Therefore, the Commission’s failure to rely on the most up-to-date and best available data as well as on robust analysis of the potential impacts of the Agreement during the negotiations constitutes maladministration.
48. In addition, SIAs are not only a preventive tool designed to anticipate and avoid any negative consequences of a proposed agreement. It is also a dynamic tool to ensure a high degree of transparency and participation in the EU external relations decision-making process. A continuous and wide-ranging consultation process involving stakeholders both in the EU and in the partner country constitutes the other key component of SIAs, as it provides opportunities for information-gathering and dissemination of results.⁶²
49. According to the SIA Handbook, SIAs “*contribute to the transparency of the analysis and of the ongoing trade negotiations by providing stakeholders with comprehensive information on the possible impacts of the agreement*”. In addition, SIAs “*work as a platform for systematic dialogue between stakeholders and trade negotiators, through in-depth consultation in which all stakeholders are given an opportunity to participate*”.⁶³
50. Stakeholders constitute “*a key pool of expertise in many areas*” and contribute “*to the identification of potential consequences of ongoing trade negotiations and sectors or cross-cutting issues for detailed analysis*”.⁶⁴ Their inputs are highly valued throughout the SIA process, because they provide for “*additional and constructive perspectives at each and every stage of the study*”.⁶⁵
51. However, the participatory and transparency dimension of SIAs must not be limited to organising consultations at an early stage in the SIA process and collecting data. It is an analytical process where CSOs input must be given due regard while the decision-making process is ongoing. As mentioned above, opportunities for civil society to raise concerns and discuss potential impacts of the Agreement was significantly limited.
52. The impacts of free trade agreements on our lives and the environment is of fundamental importance and cannot be treated as a technical issue to be dealt with by the Commission without public scrutiny - a fortiori for trade agreements that cover more and more areas of our economies. Enabling stakeholders’ contribution and participation to the negotiations of free trade agreements through all stages of SIAs enhances the quality of the Commission’s decisions and negotiation strategies.
53. On top of the failure related to the timing and content of the SIA in support of the EU-Mercosur trade negotiations, the Commission’s failure to ensure appropriate participation from civil society during the negotiations also constitutes an instance of maladministration.

3.2. Breach of Article 21 TEU

⁶¹ Ibid, pages 6 and 15

⁶² Ibid, pages 6 and 9

⁶³ Ibid, page 6

⁶⁴ Ibid, page 16

⁶⁵ Ibid, pages 10 and 25

54. In addition to this failure to comply with its own guidelines on SIA, the Commission's failure to conduct and finalise an appropriate and fully updated SIA before the conclusion of negotiations also goes against the highest values and principles on which the EU is based, and which apply with respect to administrative activities in the context of international treaty negotiations. As such, the Commission's conduct constitutes a further instance of maladministration.
55. Sustainable development is a principle enshrined in Article 3(5) TEU and Article 21(1) and (2) TEU. These principles also apply in the area of the common commercial policy⁶⁶.
56. According to Article 3(5) TEU, "*In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth*".
57. Under Article 21 TEU in particular, the European Union is committed to stepping up efforts to see that international trade and investment are used as a tool to achieve genuine global sustainable development. More specifically, Article 21 TEU provides that:
" 1. *The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.*
The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:
[...]
(b) consolidate and support democracy, the rule of law, human rights and the principles of international law; [...]
(f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development; [...]".
58. It follows that the EU has an obligation to ensure that the trade agreements it concludes do not lead and/or contribute to social, economic, environmental degradation and human rights violations in the EU and the countries where they are implemented. SIAs are an essential policy making instrument in that regard. Consequently, the failure to finalise a SIA prior to the end of the negotiations would not only render the SIA process and findings completely meaningless, but also deprive Article 21 TEU of its *effet utile*.
59. This was confirmed by the European Ombudsman following a complaint on the Commission's refusal to inform its negotiations by conducting a human rights impact assessment in advance of the negotiations in the context of the EU-Vietnam Free Trade Agreement, where it ruled that the Commission's failure to conduct such an impact assessment amounted to maladministration. The European Ombudsman stated that, although there appears to be no express and specific legally binding requirement to finalise a SIA concerning the relevant free trade agreement prior to the end of the negotiations, it would be in conformity with the spirit of good administration principles in the field of international treaty negotiations and the above-mentioned Treaty articles.⁶⁷
60. The Ombudsman's finding is based on the assumption that trade agreements may bring benefits but can also have negative consequences. The Ombudsman found it was crucial to know whether an agreement might have negative consequences on human rights in the

⁶⁶ Article 207(1) TFEU provides that: "[...] *The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.*" Article 21(3) TEU provides as follows: "[t]he Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and Part Five [TFEU ...]". Part Five TFEU covers, among other things, the common commercial policy.

⁶⁷ Decision of the Ombudsman on the EU-Vietnam case, op. cit., para. 11

EU and in the partner country, and that the most efficient way to assure EU citizens that it has thoroughly analysed the potential impacts and identified measures to prevent or mitigate negative impact,⁶⁸ is to carry out a human right impact assessment. The Ombudsman insisted that SIAs are key because they can lead the Commission to conclude that the envisaged free trade agreement complies with existing human rights, labour and environmental obligations and standards and will have no adverse effects on the latter. Or, depending on the results of its analysis, the Commission might need to consider appropriate measures which would ensure that no such adverse effects would occur.⁶⁹ Importantly, the Ombudsman highlighted that, to have a significant effect, the SIA “should be carried out before the agreement is concluded”.⁷⁰

61. These findings apply equally to the present case. The content of the Inception Report and the timing and content of the Drat Interim Report as well as of the Interim Report in support of to the EU-Mercosur Agreement demonstrate that the Commission failed to respect its legal obligations under Article 21 TEU. This is even more problematic given the widespread concerns about the environmental and human rights situation in the Mercosur countries.

Conclusion

62. Contrary to the arguments sustained by the Commission in relation to the EU-Mercosur Agreement, the purpose of the SIA reports prepared by the consultants is not to contribute to sound, evidence-based, and transparent “*debate in view of the future ratification process*”.⁷¹ According to the Commission’s own guidelines, the reports are meant to ensure sound, evidence-based, and transparent “decision making” and policy choices during negotiations.
63. The Commission has conducted the negotiations in the absence of an in-depth, robust and detailed analysis of the potential agreements’ impacts based on updated and appropriate data, and without a transparent and participatory process. As a result, the Commission cannot ensure that the Agreement will not lead and/or contribute to social, economic, environmental degradation and human rights violations in the EU and the Mercosur countries.
64. We consider that the Commission’s failure to complete a sustainability impact assessment prior to the conclusion of the negotiations of the EU-Mercosur Free Trade Agreement constitutes maladministration, and deprives Article 21 TEU of its *effet utile*.
65. Nevertheless, the negotiations have been concluded and an agreement in principle has been reached. Therefore, we urge the Ombudsman to seek a solution with the Commission to ensure the SIA final report is capable of informing the process for concluding the Agreement at EU and national level. This requires assessing the impact of the actual terms of the Agreement, now that these are “known”, and on the basis of most recent and detailed data on the social, environmental and human rights situations in Mercosur countries. This would entail a commitment by the Commission to refrain from proposing the decision for signature by the Council until it has published the SIA final report and its Position Paper.
66. In the absence of such a solution, we call on the Ombudsman to adopt a finding and issue the following recommendations:

⁶⁸ Ibid, para. 24

⁶⁹ Ibid, para. 12

⁷⁰ Ibid, para. 24

⁷¹ See Annex 2b; See also DG Trade, Press release, “European Commission publishes draft interim Sustainability Impact Assessment report for the EU-Mercosur Association Agreement”, 4 October 2019 <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2069&title=European-Commission-publishes-draft-interim-Sustainability-Impact-Assessment-report-for-the-EU-Mercosur-Association-Agreement>

- The conclusion process of the Agreement should be suspended until the Commission takes the following steps;
- The Commission must ensure that the final SIA report assesses the likely environmental and human rights impacts of the actual terms of the Agreement, now that these are known;
- The Commission must consult CSOs as to the content of the final SIA report before adopting its Position Paper on how SIA findings and recommendations will contribute to the Commission's decision-making;
- The Commission should publish its Position Paper on how the SIA findings and recommendations will contribute to the Commission's decision making.

Annexes

Annex 1a : Conservation International and other civil society organisations, Email to DG Trade follow-up civil society dialogue on the EU-Mercosur Trade Agreement, 05/08/2019

Annex 1b: DG Trade, Reply, 13/08/2019

Annex 2a: ClientEarth, Fern and Institut Veblen, Letter re: non-completion, prior to the conclusion of the negotiations with Mercosur of a sustainability and human rights impact assessment, 29/01/2020

Annex 2b: DG Trade, Reply, 14/02/2020

Annex 3: DG Trade, Letter reply to Fern, 24/07/2018

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