ClientEarth

December 2024

Mercosur and the EU Deforestation Regulation

Inconsistencies and potential legal conflicts

The European Commission has just agreed a trade deal with Mercosur countries (Brazil, Argentina, Paraguay, Uruguay), called the EU-Mercosur Partnership Agreement. While the conclusion of these decade-long negotiations has been celebrated as a success by free trade enthusiasts, the Commission seems to have shot itself and EU Member States in the foot when it comes to implementing the EU's deforestation regulation (EUDR).

Unfortunately, the concessions agreed in the final round of negotiations could force EU authorities and Member States to act inconsistently with their obligations under the EUDR or risk trade disputes with Mercosur countries – directly undermining the EU's efforts to protect the world's remaining forests and minimise trade-driven deforestation.

Fundamentally, the Mercosur Agreement cannot exempt the Commission or any EU Member State from properly complying with their obligations under the EUDR or any other EU law.

But we are concerned that the Mercosur agreement seems to compromise the independence of Member State enforcement authorities – which could undermine the EUDR's implementation.

In particular, Articles 54, 55 and 56 of the Annex to the Trade and Sustainable Development chapter are clearly intended to allow Mercosur countries to influence how the EUDR is implemented by the Commission and all 27 EU Member States, inevitably compromising the objectivity of EUDR processes and the independence of EUDR enforcement authorities. The potential for Commission and Member State decisions and actions to implement the EUDR to be subject to the Mercosur Agreement's dispute settlement procedure also raises obvious risks that the day-to-day implementation of the EUDR may be subject to political influence or formal disputes from Mercosur countries.

The Commission's legal service should review these provisions *very* carefully during the legal review process so as not to bind the Commission or EU Member States to act inconsistently with their obligations under the EUDR.

Agreement to allow third country interference in EU law enforcement

The Mercosur Agreement would allow third country governments to intervene and interfere in Member States' implementation of EU law

When it comes to Member States' obligations to check the compliance of products subject to the EUDR, including those from Mercosur countries, the EUDR is crystal clear that their enforcement authorities must act with independence – but **the Mercosur agreement seems to deliberately compromise this independence**.

- Articles 54, 55, 56(b), and 56(c) of the Trade and Sustainable Development Annex would allow the independence of Member States' authorities to be directly compromised by interventions from Mercosur countries. Obliging Member States to facilitate access for Mercosur country governments to their national enforcement authorities and obliging them to consider and use information provided by Mercosur countries would appear to significantly limit the freedom of EU Member States to establish effective and efficient EUDR monitoring and enforcement procedures.
- In particular, Article 55 seems to suggest that Member States' authorities will follow the assurances of Mercosur countries as to the legal compliance of the products they produce (legal compliance being one of the two essential requirements under the EUDR). This seems to compromise the independence of competent authorities to make their own assessment of compliance based on all the available information.

The obligation to take into account information provided by or approved by Mercosur countries would also **potentially interfere with Member State authorities' assessment of whether EU companies are carrying out adequate due diligence on their own products** (as required by the EUDR). In this regard, it is important to note that the EUDR is not concerned with whether the *government* of the country of origin believes that it is producing EUDR-compliant products, but whether the *company* importing those products into the EU (the 'operator') has sufficiently investigated their supply chain and is sufficiently confident that their products are EUDR compliant.

While these provisions in the Mercosur Agreement do not explicitly state that information provided by Mercosur countries about the compliance of products they produce should be accepted without qualification, they would nevertheless force Member State authorities to "give full consideration", to "promptly consider", to "take into account", to "use" and to "use as a source" information that they would not otherwise have to consider, thereby inevitably influencing the performance of their duties.

While the provisions do not explicitly state that Member State agencies must blindly accept the instructions of Mercosur governments, they clearly imply that representations from Mercosur countries should be followed and acted upon.

Allowing Mercosur countries to intervene in the application of EU in this way would allow – and facilitate – undue political influence by Mercosur country governments in domestic Member State affairs, namely their implementation of the EUDR.

The risk of undue political influence in EUDR implementation would also arises from the possibility for a Mercosur country to bring a dispute about decisions by Member State authorities concerning Mercosur products under the Agreement's dispute settlement procedure (see below). The risk that a competent authority's performance of its duties under the EUDR could be subject to a bilateral trade dispute would of itself, in our opinion, compromise the authority's independence. Indeed, the potential for Mercosur countries to use the *prospect* of a dispute to exert political and diplomatic pressure alone risks jeopardising the careful and fair application of the EUDR.

By agreeing to these last minute concessions to seal the Mercosur deal, **the Commission is effectively negotiating away the ability of EU Member States to fulfil their legal obligations under the EUDR and implement the it impartially.** The potential intervention by third country governments in Member State domestic law enforcement affairs would not only seem inconsistent with Member State's obligations under the EUDR, but it also potentially undermines the integrity of EU law enforcement procedures and the Rule of Law in the EU.

Even if allowed under EU law, the right of Mercosur countries to intervene in the enforcement of the EUDR would likely result in **significant practical delays for Member State authorities** if they were required to translate, review, consider and use information at the request of a third country government before being able to carry out their duties. As this engagement with third country governments is **not contemplated in the EUDR**, this process could make competent authorities or their staff vulnerable to censure by national courts if the performance of their duties is subject to administrative or judicial review (as specifically provided for in Article 32 of the EUDR).

Improper politicisation of the country benchmarking process

In a similar way, Article 56(a) of the Trade and Sustainable Development Annex seems inconsistent with the letter and intent of the EUDR's country benchmarking provisions (Article 29 of the EUDR). Article 56(a) of the Annex states that the Commission *must* consider the Mercosur Agreement and actions taken to implement it *and* give it *favourable consideration* as part of the country benchmarking assessment.

While the Commission "may", as part of its benchmarking assessment, take into account "agreements and other instruments between the country concerned and the Union and/or its Member States *that address deforestation and forest degradation and facilitate compliance of relevant commodities and relevant products with Article 3* and their effective implementation" (Article 29(4)(b), emphasis added), it is **unclear whether the Mercosur Agreement would qualify as an agreement that may be considered**. If not, it should not be considered *at all* by the Commission under the country benchmarking procedure.

An obligation on the Commission to *favourably* consider the Mercosur Agreement in its benchmarking assessment of Mercosur countries seems inconsistent with the Commission's obligation under the EUDR that this assessment "be based on an objective and transparent assessment". In our view, even if the Mercosur Agreement is indeed a kind of agreement the Commission may consider, any obligatory

'favourable consideration' negotiated as part of a highly political trade deal is unlikely to result in an 'objective and transparent assessment'.

Member States may be forced to balance conflicting legal obligations

While Article 56 of the Trade and Sustainable Development Annex states that it applies "where EU law so allows…" (and therefore would not apply if not allowed under EU law), this qualification provides little legal certainty given, in our view, EU law would *not* allow any of the actions proposed in Article 56. If the Agreement becomes legally binding, Member States may be forced to answer this question – whether EU law allows them to open EUDR implementation to influence from Mercosur countries in the way contemplated by Article 56 – on a case by case basis whenever a Mercosur country seeks to assert its rights under the Mercosur Agreement. The potential for Member States to take divergent approaches on this question and for disputes to arise between EU Member States and Mercosur governments about what is and is not 'allowed' would seem significant.

Article 55 does not include this qualification and would, in our view, create an unavoidable inconsistency with the EUDR and would unavoidably compromise the independence of EUDR competent authorities contrary to Member State's obligations under the EUDR.

Mercosur countries would have a right to bring trade disputes about Member States' implementation of the EUDR

By agreeing to include an unprecedented 'rebalancing mechanism' in the Mercosur agreement, **the Commission has potentially made every Member State vulnerable to trade disputes when they comply with their obligations to apply the EUDR to products from Mercosur countries**.

In the Commission's summary of the deal the Commission expresses the view that this rebalancing mechanism "only concerns trade effects of measures that the complainant could not have expected when the deal was closed" (section 8).

However, this is not what the Agreement says.

The proposed dispute settlement procedure applies to any dispute "concerning an *allegation* by a party that a measure applied by the other party nullifies or substantially impairs *any benefit* accruing to it under [the Agreement] in a manner adversely affecting trade between the parties," whether or not the measure is inconsistent with the Mercosur Agreement (Article XX.4(b), emphasis added).

"Measure" is defined in extremely broad terms; including "*any measure* by a party, whether in the form of a law, regulation, rule, procedure, decision, administrative action, requirement or practice" (emphasis added). A footnote to the definition further states that "the term 'measure' includes omissions and legislation that has not been fully implemented at the conclusion of the *negotiations* of this Agreement as well as its implementing acts." (emphasis added).

While the Agreement will not become legally binding until each party completes its internal procedures for ratification, the negotiations were concluded on 6 December 2024. Ordinarily, only acts or omissions that occur after an agreement becomes legally binding are subject to its provisions. The Commission appears to have agreed an exception to this rule by including the reference to legislation that is not 'fully implemented' at the conclusion of the *negotiations*, as opposed to the date the Agreement becomes legally binding.

Implementing the EUDR would qualify as a 'measure' that could be disputed

In our view, the EUDR had not been fully implemented when the Mercosur negotiations concluded because half its provisions – arguably its most important provisions, the provisions that apply to the private sector – had not yet started applying. Thanks to the Commission's proposal of 2 October 2024, since adopted by the Parliament and Council, those provisions will not start applying until 31 December 2025 (instead of 31 December 2024).

Indeed, there is a strong argument that those provisions will have the biggest impact on trade between the EU and Mercosur countries (as opposed to the provisions that apply to the Commission or Member States), because products imported into the EU will need to be deforestation-free and produced legally – something EU companies are not currently required to check. Therefore, when they do start applying and the EUDR becomes 'fully implemented', there is a genuine risk that any impacts on trade with Mercosur countries could form the basis of a dispute under the Mercosur Agreement.

Similarly, the EUDR's country benchmarking mechanism must be implemented by the Commission by means of implementing acts (Article 29(2) EUDR). Based on the definition of 'measure' above, those implementing acts would qualify as a 'measure' for the purpose of the Mercosur Agreement and could – depending on their effect on the interests of a Mercosur country under the Agreement – be the subject of a trade dispute.

There is therefore an obvious risk – if not a probability – that an assessment of a Mercosur country as 'high risk' under that process would lead to a dispute under the Mercosur Agreement. It is hard to see how the prospect of an international trade dispute would not influence the Commission in that assessment, contrary to the letter and intent of the law.

In addition, given the very broad definition of 'measure', there seems to be a very real potential that any procedures, decisions, administrative action etc. taken by Member States or their enforcement agencies in implementing the EUDR could *also* be subject to the dispute settlement procedure – if a Mercosur country alleges that their interests under the Agreement have been nullified or substantially impaired.

In this regard, even if a 'measure' taken by an EU Member State or the Commission (such as measures to implement the EUDR) impacts a Mercosur country, this does not necessarily mean that the Mercosur country would be justified in bringing a dispute or that they would be successful. The relevant measure must "nullify or substantially impair" a benefit that would have otherwise accrued to the Mercosur country under the Mercosur Agreement.

Potential disputes about trade impacts of other EU sustainability reforms

The ambiguity about whether an impact on trade as a consequence of EUDR compliance, for example an impact on the trade in beef or soy between Brazil and France, would amount to a 'substantial impairment' of one benefit or another expected under the Mercosur Agreement, and the potential for differences of opinion on that question between Mercosur and EU countries, only heightens risks that the future implementation of the EUDR could be subject to political pressure and disputes by Mercosur countries.

While the dispute settlement procedure, if followed, would not oblige a Member State or the Commission to withdraw the 'measure' complained about, the potential that the implementation of the EUDR by Member States or the Commission or **any EU law or policy that might impact trade with a Mercosur country could be the subject of a trade dispute raises obvious concerns**. This would pose significant challenges not only for the implementation of initiatives to improve the sustainability of the EU market, but for effecting the necessary transition away from the current model of globalised market liberalism and towards an alternative where environmental and social imperatives are prioritised alongside, if not above, global trade.