

EU-Mercosur association agreement: lost transparency



A 10-point peek
behind the
curtain



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Introduction

The EU has been negotiating the EU-Mercosur Association Agreement with Argentina, Brazil, Paraguay and Uruguay since 1999. Much has changed politically and economically since then. However, the cornerstones of the agreement have not. It is outdated and therefore unable to provide answers to the social, ecological, economic and political challenges of the 21st century.

A provisional political agreement was reached in 2019, but ratification was not possible at the time. In particular this was due to loud criticism from civil society of Brazilian President Bolsonaro and his ecologically damaging and antisocial policies in the Amazon. At that time, deforestation in the Amazon rainforest and other ecosystems had risen to a historic high, which posed a major threat to the climate then - as indeed it still does today. The election of the new Brazilian President Luiz Inácio Lula da Silva, who voiced his commitment to protect the Amazon rainforest, Indigenous Peoples' rights and the climate, was received in Europe with relief. However, the enormous pressure from the agricultural, chemical and automotive lobbies on both sides of the Atlantic to conclude the EU-Mercosur agreement now poses a great danger of pushing the deal over the line.

Since December last year, however, the democratic situation has deteriorated not in Brazil, but in Argentina: Since his inauguration, the climate-denier Javier Milei has begun to structurally dismantle social and ecological rights and is attempting to do so outside the usual democratic channels. We consider it dangerous to attempt to bring about a quick conclusion with a president in Milei who tramples on freedom and human rights as well as on environmental protection and democracy in Argentina.

Nevertheless, the risk that this harmful agreement is concluded quickly has not vanished. While sustainability and human rights are the main topics of discussion in the public debate, one point is barely mentioned, namely the lack of transparency in the negotiation process. In view of the far-reaching effects on the global climate and social inequality that the agreement could entail, this lack of transparency poses a particular problem for democratic politics.

The new elections to the EU Parliament in June 2024 will temporarily close the window of opportunity to conclude the agreement. The lack of transparency, in particular the fact that important parts of the agreement are still not publicly available and therefore no transparent public discussion can take place, is therefore becoming an increasingly concerning problem.

We want to draw particular attention to this with this publication.

What is the deal about?

After more than 20 years of negotiations, the European Union and Mercosur (Argentina, Brazil, Paraguay, Uruguay) reached a free trade agreement in 2019. If ratified, it would become one of the largest trade deals in the world. This corporate-friendly deal would boost the trade in harmful products between the two regions by removing most of the tariffs on goods. It would have disastrous effects on the environment and human rights. Dire consequences are looming both on regional and global levels: more and worse fires in the Amazon, soaring greenhouse gas emissions, disruption of local food production in Mercosur countries, increased use of dangerous pesticides and other toxic substances threatening food safety in Europe.

The double standards of the EU

On September 28, 2023, the EU Commission wrote on X (formerly Twitter) that its trade department is the most transparent in the world.¹ It is correct in so far as transparency is enshrined in the EU treaties: it is obliged to disclose information on political decisions and expenditure and to uphold the principle of freedom of information. Article 10 of the Treaty on European Union stipulates that open decisions must be taken "as closely as possible to the citizen". According to Article 11, both individuals and representative associations should be given the opportunity "to make known and publicly exchange their views in all areas of Union action". The Treaty on the Functioning of the European Union elaborates on these points. According to this, the EU institutions are obliged to act publicly and to ensure that individuals and any natural or legal person residing or having its registered office in an EU country have access to documents (Article 15). Further, the Ombudsperson recommended based on ongoing critique concerning intransparency during TTIP negotiations to improve transparency for future trade negotiations.² Unfortunately, the reality is often quite different. The full text of the EU-Mercosur Association Agreement is still not public. Important information on the status of negotiations often only reaches the public via leaked documents. This inaccessibility of documents automatically leads to the exclusion of certain voices in these negotiation processes.

10 reasons why EU-Mercosur is unbeatable in terms of lack of transparency

1. The negotiating mandate for the EU-Mercosur agreement was adopted by the European Council in September 1999, but has not yet been published.

In order to be allowed to start negotiations on a trade agreement, the EU member states issue the EU Commission with a so-called negotiating directive, which sets out the main features of a possible agreement.

It has long been promised³ that the mandates would be published promptly, particularly since controversy around the lack of transparency of trade agreements such as TTIP, CETA, JEFTA and TiSA . Although this has been done in recent years for all other agreements currently being negotiated (albeit sometimes with a delay of years) the mandate for the EU-Mercosur Association Agreement has still not been officially published⁴. The negotiating mandates are vitally important because they set out how the agreements are to be structured (e.g. political and economic parts) and what the priorities are in terms of content.

2. The agreement was largely negotiated and concluded in secret.

Diplomats and bureaucrats negotiate the agreement on the basis of the negotiating mandate. The substantive elements of these negotiations are not discussed publicly on an ongoing basis, but are kept secret. Civil society is informed at irregular intervals via the usual dialogue (CSD) exchange (so-called "Update on EU-Mercosur trade negotiations" meetings⁵), but this process has neither provided relevant information nor allowed all questions to be asked or answered⁶.

Note: Businesses and their associations naturally have other opportunities beyond the CSD meetings (including bilateral meetings with the EU Commission and Mercosur members) to present their positions to the EU Commission.

3. Before the agreement was politically concluded on June 28, 2019, the quantity and quality of the documents published on the website of the Directorate-General for Trade were worse than those published for the highly controversial TTIP agreement with the USA.

Before the first leak of the trade part in December 2017 (18 years after the start of negotiations!), the EU had only published draft texts for seven chapters and one annex. The first leak⁷ and a second in February 2018⁸ improved the information situation, as consolidated versions of further chapters were now available.

Between the two leaks and the political conclusion of the trade section, the Commission did not publish any further texts; these were only published after the political conclusion in June 2019.

By way of comparison, by November 2015 (2 years after the start of negotiations!), the EU Commission had published 12 text proposals and countless additional position papers and factsheets on the planned 24 chapters of the TTIP agreement.

4. To date, there is no complete text of the trade part of the EU-Mercosur Association Agreement.

Although the political negotiations were officially concluded on June 28, 2019, and individual chapters of the agreement were published online a fortnight later, there are numerous areas of the agreement that were not published at that point. On July 12, 2019, 27 individual documents (20 chapters, 2 protocols and 5 annexes) were published and on September 6, 2019, the chapter on intellectual property rights and an annex to it were published. One of the published annexes indicated that there was a deadline of May 1, 2020 for amendments and improvements, but the Commission denied this. It had planned a meeting for the end of April 2020 to finalize the text. This meeting was canceled due to Covid-19. The European Commission has announced several times since June 28, 2019 that it will publish the concrete market schedules, which are the part of the trade agreement that concerns the opening of markets. These texts were only published without notice in July 2021.⁹

The important chapter on market access and the corresponding annexes were only published two years later in July 2021, while the equally important chapter on "General Provisions" is still missing today. Ghiotto & Echaide write about the latter chapter:

"An important chapter - that of the General Provisions - as well as several annexes and appendices have not yet been published. The chapter on the General Provisions will contain important information on the ratification process of the Agreement and its entry into force. It will also define the functioning of the Association Committee, which will oversee the application of the whole Agreement and to which all subcommittees will report. Without precise knowledge of the composition of this committee and its relationship with the legislative powers of the Mercosur countries and the European Parliament, there is no guarantee that mechanisms of democratic control and scrutiny will be provided for."¹⁰

5. The text of the Association Agreement, which has been politically approved for more than three years, has not yet been published.

The trade agreement between the EU and Mercosur is the trade policy pillar of a more comprehensive association agreement, which also includes political dialogue and cooperation. Parts of the AA were already agreed in June 2018, the political conclusion of the Association Agreement text took place in June 2020, but was only announced in July 2020. None of this has been published to date, although the text contains important elements (such as on human rights, indigenous rights and the structure of the agreement and its bodies) and the trade section is not complete without this text. Greenpeace leaked the text of the Association Agreement in October 2020.¹¹

6. There is no concrete information on the status of legal scrubbing and translations, although the texts were adopted four years ago.

The political agreement, which was reached in June 2019, is usually followed by the process of legal scrubbing and translations. A period of more than four years for legal scrubbing is unusually long and suggests that the treaty texts were still being worked on behind the scenes despite political agreement having been reached. In the case of geographic indications¹², it has been known since the end of 2020 that negotiations have continued despite a text supposedly having been negotiated since September 6, 2019.¹³ Trade Commissioner Valdis Dombrovskis announced at the end of September 2021 that the texts, which have largely been available since summer 2019, had therefore not yet undergone the legal review process. Only once these renegotiations have been completed can the legal fine-tuning and translation into the other 23 official languages take place.

Note: It is known from CETA that almost a fifth of the previously politically agreed negotiating text was changed during the legal scrubbing process.¹⁴

7. The sustainability impact assessment carried out for the agreement is of poor quality and was published too late.

The sustainability impact assessment (SIA) commissioned by the EU Commission has major shortcomings: from an economic perspective, some of the basic assumptions for the impact assessment must be rejected, while at the same time certain phenomena such as risks to biodiversity, CO₂ emissions from international transport or the curtailment of indigenous rights are massively underestimated.¹⁵ In addition, the impact assessment should have been published before the political agreement was reached so that it could be taken into account in the decision on this agreement. In the case of EU-Mercosur, the impact assessment was published in April 2021 - almost 2 years after the political agreement. This was also criticized by the EU ombudswoman.¹⁶ In October 2023, the UN Human Rights Committee then

also called for a "systematic" investigation into the impact of the agreement on human rights.¹⁷

8. The agreement creates bureaucracy that will make decisions undermining democratic processes.

There will be an overarching association committee to implement the agreement and subcommittees to deal with individual chapters. Details of these committees have not yet been published. It is known from the debate on other trade agreements, in particular from the CETA discussion¹⁸, that the various subcommittees will make decisions that will affect the welfare of consumers, workers and the environment without being accountable.¹⁹ Civil society will not play a significant role in these decisions. But businesses can use the increased "transparency" created by the transparency chapter (where planned regulations are communicated to businesses so that they can influence the discussion) to engage in discussions about planned regulations. Technically, the other parts of civil society and individuals can also take advantage of these "transparency" mechanisms, but in reality, participation requires more resources than most civil society organizations have, with the exception of business associations.

Note: Such transparency chapters are part of many EU trade agreements and are not specific to EU-Mercosur. The pitfalls of these transparency chapters were already highlighted in the second TiSA leak in 2016.²⁰

9. Complete lack of transparency regarding the content of the Additional Protocol

Since the political agreement was announced in June 2019, criticism of the agreement from civil society has intensified. Since December 2020, the European Commission has been holding talks on an additional protocol to the EU-Mercosur trade agreement in order to rectify the problems highlighted by civil society and experts and to increase the ability of both the EU Council and the European Parliament to approve the agreement.²¹ Friends of the Earth Europe (FOEE) made a request for access to the documents of the EU's proposal for the Additional Protocol²². The draft proposed by the EC only became known through a leak via FOEE in March 2023.^{23, 24, 25} In September 2023, the European Ombudswoman replied to FOEE's request by a letter²⁶ addressed to Ursula von der Leyen, where she asks the European Commission to "consider publishing the draft additional instrument proactively", and reminds the Commission's commitments "to a more open policy-making process in trade and investment". FOEE made a second request in August 2023 for access to the content of the Mercosur states' response but it also only became public through leaks in the press. The European Commission replied to

FOEE's second request by publishing the draft addendum made by the EC and already leaked in the press months ago.

10. For years, there has been no concrete statement as to whether the agreement will be split or not.

Another way to conclude the agreement quickly would be to force a change in the voting process. "Splitting" the agreement²⁷ would separate the trade part from the political part, with the effect that EU member states would no longer have to unanimously approve the trade part (which they currently cannot do, as the Austrian government at least is obliged by parliament to veto it).

In response to a written question from the EP, Trade Commissioner Valdis Dombrovskis wrote on behalf of the European Commission on June 23, 2021: "The Commission and Mercosur are still working on finalizing the text of the agreement. Therefore, there is currently no decision on the legal framework of the agreement".²⁸ Since then, several press articles have reported the EC's will to split the trade pillar of the agreement.²⁹ The option of splitting is essential from the point of view of transparency and democracy, as the public has a right to know whether or not their national parliaments are taking a decision on the agreement.

Conclusion

For years, we have sharply criticized the EU's undemocratic and non-transparent way of negotiating free-trade agreements. Yet still we wait in vain for an improvement. Instead, the process is becoming increasingly untransparent. This is demonstrated by the case of the EU-Mercosur agreement. In addition to the severe negative environmental, human rights and social impacts of the agreement, this is yet one more reason not to approve the deal as it currently stands.

References:

1: https://twitter.com/Trade_EU/status/1707338157878837621

2: <https://www.ombudsman.europa.eu/en/press-release/en/54636>

3: “Since September 2017, starting with Australia and New Zealand, the Commission systematically publishes its recommendations for negotiating directives for trade agreements. This is the official document produced when the European Commission asks the Council to authorise the opening of negotiations for a free trade agreement (FTA) with a non-EU country. The document explains the reasons behind the proposal and sets out the objectives that the Commission plans to achieve during the negotiations, as well as the expected scope of the agreement.” Source: European Commission: Transparency Policy in DG TRADE - Listening and Engaging, Brussels, November 2018. <https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/ebae888d-6243-48a2-a766-e21923793a71/details>

4: A French version of the text "UE-MERCOSUR DIRECTIVES DE NEGOCIATION, PAR LA COMMISSION, D'UN ACCORD D'ASSOCIATION ENTRE LES PARTIES, Bruxelles, le 17 septembre 1999, VERSION CONSOLIDEE) was leaked on bilaterals.org. See <https://www.bilaterals.org/?ue-mercosur-directives-de&lang=en>.

5: Eight meetings between January 17, 2017 and July 15, 2019, two meetings each in 2017 and 2018 and four meetings in 2019.

6: Compare reports on different negotiation rounds: (Reports (publication date)): Report of the 38th Round, March 2019; Report of the 37th Round, January 2019; Report of the 36th Round, December 2018; Report of the 35th Round, September 2018; Report of the 34th Round, July 2018; Report of the 33rd Round, June 2018; Report of the 32nd Round, March 2018; Report of the 31st Round, December 2017; Report of the 30th Round, November 2017; Report of the 29th Round, October 2017; Report of the 28th Round, July 2017; Report of the 27th Round (joint communiqué) (March 2017); Report of the 26th Round (October 2016).

7: See <https://trade-leaks.org/mercosur-leaks/>

8: See <https://www.bilaterals.org/?eu-mercosur-fta-27-draft-chapters&lang=en>

9: The texts are the "Annex on tariff elimination schedule" and the two appendices "Appendix on tariff elimination schedule for the European Union" and "Appendix on tariff elimination schedule for Mercosur" (see <https://www.isds.bilaterals.org/?eu-mercosur-fta-tariff-elimination&lang=en>) to the chapter "Trade in Goods“.

10: Ghiotto, Luciana & Echaide, Javier (2020). Analysis of the agreement between the European Union and the Mercosur, page 124. see https://www.researchgate.net/publication/340413318_Analysis_of_the_agreement_between_the_European_Union_and_the_Mercosur/link/5e874cf5a6fdcca789eeefc8/download

11: See <https://trade-leaks.org/mercosur-eu-association-agreement-leaks-8-october-2020/>

12: See Sub-Section 4 - Geographical Indications, Article x33 and following in the chapter INTELLECTUAL PROPERTY (IP) and Annex II to this chapter. For links see Annex II.

13: The problem is the rights of the "prior users" of GIs in the Mercosur countries, see the corresponding empty footnotes 15-37 in the text of the IP chapter „to be included before the conclusion of the agreement“..

14: See <https://www.linkedin.com/pulse/legal-scrubbing-renegotiation-text-as-data-analysis-how-alschneider#:~:text=After%20any%20major%20treaty%20negotiation%20is%20concluded%20the,result%20in%20minor%20changes%20to%20the%20treaty%20text> bzw. <http://mappinginvestmenttreaties.com/blog/2016/03/legal%20scrubbing-ceta/> , siehe auch <https://www.greenpeace.org/eu-unit/issues/democracy-europe/45118/eu-mercosur-mythbuster/>

15: See <https://s2bnetwork.org/open-letter-sia/>

16: See <https://www.ombudsman.europa.eu/en/decision/de/139418>

17: See https://link.mediaoutreach.meltwater.com/ls/click?upn=H2yPqtQNxlI-2B-2B4SrGjsjmdWRL465xANggztMdPXO7u9bYsAw-2BKZtbKbyn1hMm4gUUOxWc-2BLd-2BPXRDOAF15vvGz42sPpOGel3lwHizjloOulvrENyaYbflVI29pngNc-2Fr2JFA2Ljf8omu8Jtyc4IU13Ms27fbc0VNWPx-2B-2FQ3pI3k58plxAdoGE1zvqNRkylIjvHRBVmpONhgG3k23Vnc4z64UfIAO3SYv9LCZTARuGhGorLiQ-2BZ5rgMtfbZ9SoSMBcC-L_6IjsKO7KRU5jjj5mkkziOsMB-2F7bncYIhW5CnAt2wE9HvB1KFvt5YsOVyQOVmudhTmuPzIQhU5ry7ELBmIZcVCQuaardpFD7ExbWQCtWogi7BssNn3HidAmLaVUVFByTjzIeKLFHxhNu1EvglXUMHweKtT4U1q17AAS2abzYW3q-2FWxwTx1RvFliAfusZp56lpPXeZkcF-2Bexf7qVqFqQwcThaVFyeP2Ku6KiNgrKPTXi7e80RgO67YfGPwhTTYso4-2B5wawZnaOv-2B4KVsa2ueSvOzaJ9cpjFgGRfgOkwHj-2B8GAXmxok6TCWzSSDQB4ne6N26out7-2BBsdc3d1QOoeiu7RvM4cJnebPrj9CsNH2M1Myxgr5xwA3mwjpaSOFw-2BP3t9O1DV2CxU6iuqOVX0Oa2kQ-3D-3D

18: See https://www.veblen-institute.org/IMG/pdf/report_ceta_6_years_after_veblen_inst.pdf

19: See Ghiotto & Echaide, pages 48, 55, 123

20: See <https://trade-leaks.org/wp-content/uploads/2016/11/Analysis-of-the-TiSA-Annex-on-Transparency.pdf>

21: "Given the concerns about deforestation and the environment, the Commission is seeking meaningful engagement from Mercosur on the Paris Agreement and deforestation as we move towards ratification of the agreement. At the Informal Meeting of Foreign Ministers of the European Union with Latin American and Caribbean countries on December 14, 2020, European Commission Vice-President Dombrovskis and Mercosur Ministers instructed their officials to intensify contacts to improve information exchange in these areas, intensify policy dialogues and identify areas of cooperation. The Commission has already started work on an initiative to address these concerns." See European Commission: Overview of FTA and other Trade Negotiations (as of March 2021).

22: See https://www.asktheeu.org/en/request/we_are_asking_dg_trade_for_the_t#incoming-45628

23: See <https://www.faz.net/aktuell/wirtschaft/mercosur-staaten-erklaeren-bedingungen-fuer-handelsabkommen-mit-eu-19178118.html>

24: See <https://friendsoftheearth.eu/press-release/breaking-civil-society-denounce-leaked-joint-instrument-on-eu-mercosur-deal-as-blatant-greenwashing/>

25: <https://friendsoftheearth.eu/wp-content/uploads/2023/03/LEAK-joint-instrument-EU-Mercosur.pdf>

26: Emily O'Reilly's letter to Ursula von der Leyen : https://politico-uploads-production.s3.eu-west-1.amazonaws.com/editorial_documents/db662ab0-2f00-401c-8358-44dc80eee4d3-Cleaned%20DECISION_202301336_20230912_131709%5B37%5D.pdf?X-Amz-Algorithm=AWS4-HMAC-SHA256&X-Amz-Credential=AKIA4OBOTACJBFOCTOGF%2F20240207%2Feu-west-1%2Fs3%2Faws4_request&X-Amz-Date=20240207T131710Z&X-Amz-Expires=10&X-Amz-SignedHeaders=host&X-Amz-Signature=a9bc67af1ce39b4c514e5277f4f90d521f80217f30ab7006387803211c03bf46

27: "Splitting" means dividing the agreement into a political and an economic part. The EU Commission's aim is to exempt the member states from ratifying the economic part so that it can enter into force more quickly.

28: On 10. On May 10, 2021, MEPs Thomas Waitz (Verts/ALE), Andreas Schieder (S&D), Bettina Vollath (S&D), Franc Bogovič (PPE), Simone Schmiedtbauer (PPE), Maria Noichl (S&D), Anna Cavazzini (Verts/ALE), Herbert Dorfmann (PPE), Monika Vana (Verts/ALE) and Yannick Jadot (Verts/ALE) submitted a priority question to the European Commission for a written answer. The title of the question is "EU-Mercosur Association Agreement: further procedure, sustainability assessment and climate change mitigation." The reply from Trade Commissioner Valdis Dombrovskis on behalf of the European Commission was sent on June 23, 2021 (DE, P-002484/2021): "The Commission and Mercosur are still working on finalizing the text of the agreement. Therefore, there is currently no decision on the legal framework of the agreement." Comment: This means that the Commission is still leaving open whether it will submit a proposal to the Council to vote on the Association Agreement (including the trade part) or only on the trade part. In the first case, unanimity would be required; in the second case, a qualified majority would suffice.

29: See <https://www.politico.eu/article/brussels-eu-commission-grab-trade-power-mercocur-deal/>

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Editors: Anders Handeln, Friends of the Earth Europe, Netzwerk gerechter Welthandel
Author: Jürgen Knirsch
Collaboration: Ludwig Essig, Theresa Kofler, Julie Zalcman

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Responsible in terms of press law:
Ludwig Essig, essig@forumue.de