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Report **2018**

TRADE AT ANY COST?

STUDY ON THE EUROPEAN UNION'S FREE TRADE AGREEMENTS WITH MERCOSUR (ARGENTINA, BRAZIL, URUGUAY AND PARAGUAY), MEXICO, JAPAN, VIETNAM AND INDONESIA.

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TRADE AT ANY COST?

Study on the European Union's free trade agreements with Mercosur (Argentina, Brazil, Uruguay and Paraguay), Mexico, Japan, Vietnam and Indonesia.

Conducted by PowerShift on behalf of foodwatch.
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February 2018

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INTRODUCTION

The European Union is currently negotiating a number of free trade agreements (FTAs). To date, public attention has been mainly focused on the agreements with the US (TTIP) and Canada (CETA), as well as the Trade in Services Agreement (TiSA). However, there are numerous other countries with whom the EU is currently discussing trade deals.

This study examines five of the EU trade agreements currently under negotiation that have attracted less public interest to date, as these negotiations could also end in FTAs that have negative ramifications for environmental and consumer protection, agriculture, food and democratic processes.

The five cases that were selected for this publication are the EU's negotiations with Japan, Vietnam, Indonesia, Mexico and Mercosur (Brazil, Argentina, Paraguay and Uruguay). For each of these planned FTAs, the study offers an overview of the current status of the talks and important negotiation issues.

While the TTIP and CETA agreements clearly belong to the "new generation" of FTAs whose primary aim is the elimination of "non-tariff" trade barriers, the agreements investigated for this study are additionally focused on the traditional elements of free trade agreements, namely the opening of markets and the removal of protective tariffs.

Accordingly, the study covers a wide range of issues: e.g. the planned provisions concerning tariff reduction and market liberalisation, investment protection, agriculture, food, the European precautionary principle and regulatory cooperation. Possible risks to consumer protection, food safety and nutrition are outlined for each FTA. The summary at the end of the report offers an overview of the most important findings.

The negotiations for the various agreements are all at different stages. Some are just getting started, and others are so far advanced that the first drafts of consolidated texts have already been drawn up. Accordingly, the information used as the basis of the analyses presented here varies widely, and in certain cases the evaluation of the potential consequences is therefore still subject to some degree of uncertainty.

1. MERCOSUR

1. MERCOSUR

1.1 STATUS OF NEGOTIATIONS

Mercosur trade bloc (Mercado Común del Sur) who are currently taking part in the negotiations for an Association Agreement with the European Union are Argentina, Brazil, Paraguay and Uruguay.

The talks between the two parties started as early as 1999 but have repeatedly stalled. The first official round of negotiations began in April 2000 in Buenos Aires. However, after 16 rounds, the negotiations were suspended in October 2004 and did not resume again until June 2010, representing a break of more than five years. Negotiations stalled once again in October 2012 after nine rounds, and it was not until October of 2016 that the negotiators returned to the table.[1] One of the main reasons for the frequent breaks in negotiations has been the lack of agreement over increased market access for agricultural products (see below).

In July 2017 the Commission submitted draft consolidated texts to the Trade Policy Committee of the Council.[2] However, the objective of concluding the negotiations by the end of 2017 could not be achieved. Therefore, the talks will be continued in 2018.[3]

Mercosur's largest trading partner is the European Union: roughly 18 per cent of its exports go to the EU.[4] Three-quarters of Mercosur's exports are primary products, and well over half of these are agricultural products. The EU, on the other hand, exports mainly manufactured goods to Mercosur. The most important agricultural products that Mercosur exports to the EU are soybeans and soybean meal. The latter, a by-product of the extraction of soybean oil, is primarily used as a high-protein animal feed. Other important Mercosur exports include coffee, meat and fruit juices.[5]

A study from the European Commission's Joint Research Centre (JRC) reveals the high economic impact of the Mercosur agreement in comparison to other FTAs in terms of trade in agricultural products and foodstuffs. It compares the 12 most important FTAs currently being negotiated by the EU. According to its findings, the lion's share of European agri-food imports already comes from Mercosur. According to the JRC's "baseline" scenario, these imports are expected to increase even without the Association Agreement. The researchers predict that, by 2025, the 12 FTA partners will account for 52 per cent of all EU agri-food imports, whereby roughly half of this total (24.5 per cent) will come from Mercosur alone. Accordingly, the Mercosur talks represent the EU's most important trade negotiations in terms of imports.[6]

1.2 TARIFFS / QUOTAS

The main interest of the Mercosur governments is focused on the agricultural sector, and in particular on the EU's import quotas. This issue has repeatedly led to significant disputes between the two trading partners and was also a reason for the multiple suspensions of negotiations. The agricultural quotas have also been the main sticking point in the debates surrounding the Mercosur negotiations within the EU. After negotiations were re-launched in 2016, a group of EU Member States led by France strongly criticised the European Commission's plan to offer tariff quotas[7] for sensitive products like beef, ethanol and sugar. The large European farmers' organisations agreed with France's criticism.

In its exchange of market access offers with Mercosur in May 2016, the Commission responded to this pressure by provisionally excluding the originally planned tariff quotas for beef, poultry and ethanol from the EU offer.[8]

In October and November 2017, the EU added the previously omitted tariff quotas to its offer. According to press reports, it has since offered Mercosur preferential market access quotas with reduced tariff rates for 70,000 tonnes of beef, 78,000 tonnes of poultry, 100,000 tonnes of sugar and 600,000 hectolitres of ethanol. Nevertheless, Argentinian and Brazilian negotiators called the offer "disappointing".[9]

1.3 INVESTMENTS / ISDS

In the EU-Mercosur Association Agreement, the negotiating parties also intend to include specific rules on investment in both the investment chapter and the chapter on services. In addition, a planned annex to the agreement will include extensive schedules of commitments detailing the liberalised sectors and the tariff lines that will continue to be exempted from liberalisation.

Unlike several of the other prospective FTAs being negotiated by the EU, the Mercosur agreement in its current form does not include rules on investment protection or the controversial investor-state dispute settlement system, which allows foreign investors to sue governments for compensation in international arbitration tribunals (see Box 3). Therefore, under the Mercosur Agreement, investors would have to rely on the FTA's state-state dispute settlement mechanism, which requires governments to represent the interests of their investors in cases of dispute. Furthermore, the state-state mechanism does not include specific investment-protection standards, such as the right to "fair and equitable treatment" or the right not to be "indirectly expropriated" without full compensation.

However, in this context it is important to consider the fact that the numerous bilateral investment treaties (BITs) that have been concluded between Mercosur countries and EU Member States provide for investor-state dispute settlement. Argentina has signed BITs with 21 EU Member States, Uruguay with 14, Paraguay with 14 and Brazil with 10.[10] However, in the case of Brazil, its Congress has yet to ratify any of the BITs that were negotiated by previous governments. Therefore, none of the 10 BITs that were signed with EU countries have entered into force.

The Federal Republic of Germany has also signed BITs with all four Mercosur countries (so-called investment promotion and protection agreements). However, only the agreements with Argentina, Paraguay and Uruguay have entered into force.[11] The same applies to France and the Netherlands. Both countries have signed BITs with all four Mercosur countries, and only the agreement with Brazil has yet to be enacted.[12]

1.4 AGRICULTURE / FOOD

SOYBEAN EXPORTS TO THE EU: The EU has been offering duty-free access for Mercosur's main export products – soybeans and soybean meal – since the early 1960s.[13] Therefore, the Association Agreement would not effect any changes in this context. The EU's high dependence on soybean imports from Mercosur will presumably continue unless there are significant changes in eating habits or production methods in the European Union.

However, what would change significantly after the Association Agreement is the EU's ability to implement environmental and consumer protection measures. This issue is particularly pressing in light of the high environmental and health impacts of soybean production.

In total, 96 per cent of the soy used in the EU is imported, and the lion's share of these imports comes from Mercosur, primarily from Argentina and Brazil, with smaller quantities imported from Paraguay and Uruguay. The Mercosur countries are responsible for around 60 per cent of the EU's soybean imports and 90 per cent of its soybean meal imports.[14]

The highly industrialised model of soybean cultivation in Mercosur countries poses a major threat to human and environmental health. Nearly 100 per cent of Argentina's soybean acreage and roughly 96 per cent of Brazil's is planted in genetically modified varieties.[15] The market leader for transgenic soy is the US-based Monsanto corporation, which the German company Bayer AG is currently in the process of acquiring.

Monsanto's "Roundup Ready" soybean varieties are resistant to its own herbicide "Roundup", whose active ingredient is glyphosate. In 2015 the World Health Organization classified this chemical as a "probable carcinogen" for humans.[16]

With the expansion of soybean cultivation in the Mercosur countries, the use of glyphosate has increased drastically, resulting in considerable health impacts. When the herbicide is sprayed onto crops by aeroplane or tractor, it often drifts into nearby residential areas. The affected residents complain of skin rashes, dizziness, vomiting and difficulty breathing. In addition, regions in which genetically modified soybeans are heavily grown have higher rates of birth defects, infertility and premature births.[17]

SUGAR AND ISOGLUCOSE: The Mercosur Agreement could result in more significant quantitative changes with products like maize, wheat and meat if EU import quotas are increased. As with soy, the methods used for the production of maize, wheat and meat in South America are highly intensive and therefore also pose risks for environmental and consumer protection. For example, the import of maize or wheat from Mercosur at lower tariff rates could contribute to an increased production of isoglucose in the EU. Such increases are now possible thanks to the new EU sugar regime that went into effect on 1 October 2017, abolishing the EU production quotas for sugar (previously 13 million tonnes) and isoglucose (previously 700,000 tonnes). The external tariffs for sugar remained unchanged.[18]

In Europe, isoglucose (also known as glucose fructose syrup or high fructose corn syrup) is made from maize or wheat starch and used in the food industry as an inexpensive substitute for beet sugar. Owing to the previous isoglucose production quota within the EU, isoglucose had a limited market share of less than five per cent. Now that the quota has been eliminated, its market share could increase owing to the fact that isoglucose is cheaper than beet sugar.

However, it is difficult to estimate what percentage of the sugar market will switch to isoglucose. According to an estimate by the Johann Heinrich von Thünen Institute, the demand for sugar in the beverage industry, the main consumer of isoglucose, could be reduced by 10 to 15 per cent.[19] The European Starch Industry Association believes that the market share of isoglucose could reach up to 20 per cent.[20] The European Commission is predicting that isoglucose production in the EU could increase from 700,000 to 2.3 million tonnes by 2025.[21]

The extent to which sugar exports to the EU will increase is debatable. According to media reports, the European Union excluded sugar from its most recent offer to Mercosur in October 2017.[22] Furthermore, the EU has already given Brazil a quota of approximately 400,000 tonnes of sugar for reduced import tariffs.[23] At the same time, it is important to consider that Brazil's sugar exports are based on cane sugar, which is more expensive than isoglucose. In light of this fact, maize imports from Mercosur could contribute more significantly to the price reduction of sweeteners in the EU than sugar imports.

With these factors in mind, it is safe to say that the Mercosur Agreement could, to a certain degree, contribute to a reduction of sugar and isoglucose production costs in the EU, which would further stimulate their increased use in the food industry. As a result, the EU may see an increasingly urgent need for fiscal policies, such as taxes and levies on sugary foods and drinks, as a means of encouraging people to make healthier dietary choices. However, such regulation could come into conflict with the Association Agreement (see below).

MEAT EXPORTS: If Mercosur's demands for meat quotas are accepted, its meat exports to the EU could increase significantly. One issue here is that the mass production of meat in South America, like in Europe, has substantial negative impacts on the environment, consumers and public health. This has been demonstrated by experience in Brazil and Argentina, two of the world's leading meat exporters.

In recent years, beef production in Brazil has undergone explosive growth. As a result, Brazilian beef exports have increased by more than 700 per cent over the past 14 years. The country is now the world's second largest producer and largest exporter of beef.

Brazil's fastest growing cattle herds can be found in Amazonia. From 2000 to 2012, Amazonian cattle herds grew by 71 per cent, and herds in other parts of the country by 24 per cent. This trend resulted in a practically unregulated expansion of slaughterhouses, many of which are illegal. Owing to the lack of regulation, many slaughterhouses have no mechanisms whatsoever for verifying the origin of the livestock. Their suppliers include numerous livestock operations that violate environmental and labour laws and are involved in land conflicts with small farmers and indigenous people.[25]

The Brazilian market leader JBS has acquired numerous slaughterhouses and meat-processing companies to become the largest beef producer and one of the largest meat processors in the world.[26] JBS is also at the centre of a current food and corruption scandal that has even implicated Brazil's president, Michel Temer (see Box 1).

The more intensive the cattle farming system, the greater the threat to public health and the environment, as can be seen with the so-called feedlots, which are expanding at a particularly rapid pace in Argentina. At these feedlots, thousands of cattle spend the last few months of their lives in cramped holding pens, where they are fattened before slaughter. Today, 50 per cent of all cattle slaughtered in Argentina come from feedlots, which have a significant environmental impact.[27]

In addition to high levels of greenhouse gas emissions, they produce vast amounts of manure and slurry, which contaminate the groundwater with nitrate. Furthermore, they provide a dangerous breeding ground for disease. Many cattle carry the pathogen EHEC,[28] which, owing to the poor sanitary conditions in the feedlots, can enter the food chain via contaminated meat and has already caused kidney failure in numerous Argentinian children. In several provinces of Argentina, local residents have formed action groups to protest against the feedlots and demand their closure.[29]

BOX 1

BRAZIL'S ROTTEN MEAT SCANDAL

In March 2017 Brazilian police raided dozens of meat-processing plants, uncovering one of the largest corruption scandals in recent years. Several companies, including JBS, had been systematically mixing rotten meat into their products. They had also been bribing numerous Agriculture Ministry inspectors in order to obtain the required government health certificates.[30] After the scandal broke, several countries imposed import restrictions on Brazilian meat. In June 2017 the US stopped all imports of fresh beef from Brazil.[31]

The EU, however, decided to ban imports from only the meat-processing plants implicated in the scandal and to step up its inspection of Brazilian meat imports. According to a European Commission report, the border inspection posts conducting the additional checks had rejected a total of 108 Brazilian consignments by the end of May 2017. The inspectors found not only Salmonella (in 77 of these cases) but also E. coli and drug residues.[32]

In the meantime, the scandal in Brazil has continued to widen. The owners of the holding company J&F, a controlling shareholder of JBS, confessed to Brazilian prosecutors that the company had bribed hundreds of politicians, including President Temer. As a result, Brazil's attorney general filed criminal charges against Temer for corruption on 26 June 2017.[33]

In September 2017 the two owners of the holding company were arrested by the Brazilian police for insider trading. In Europe, JBS owns the poultry meat producer Moy Park, which operates processing plants in the UK, Ireland, France and the Netherlands.[34]

The rapidly increasing beef production in Brazil is contributing to rainforest destruction and biodiversity losses in the state of Amazonas, the region with the largest area of virgin rainforest in Brazil. It is also home to numerous indigenous groups, many of which have never had contact with the outside world. The deforestation of the Amazon and the use of land for cattle farms have resulted in massive increases in greenhouse gas emissions. These negative environmental impacts are not addressed in the agreement with Brazil, in spite of the fact that they could undermine internationally agreed climate protection goals.

1.5 THE PRECAUTIONARY PRINCIPLE

The EU-Mercosur Agreement also includes provisions on technical barriers to trade (TBT), as well as sanitary and phytosanitary (SPS) measures, which could have a significant impact on consumer protection by undermining the European precautionary principle. Under the precautionary principle, trade-restrictive measures can also be implemented when there is scientific uncertainty regarding the risks associated with a product. In light of the hygiene problems at meat-production facilities and possible pesticide residues in soy products, it is particularly important that the EU be able to apply the precautionary principle without restrictions whenever required.

However, the governments of the Mercosur countries have in the past been critical of the precautionary principle owing to their export-oriented, industrialised agriculture. For example, the four Mercosur countries were part of a group of 17 co-plaintiffs that, together with the US, brought a case against the EU's moratorium on GMOs to the World Trade Organization in the context of which the EU invoked the precautionary principle. This case was ultimately lost by the EU (see Box 2).[35]

According to the draft consolidated texts of the Association Agreement, the Mercosur FTA will include a chapter on SPS and another on TBT. These chapters will have articles that refer to the TBT and SPS Agreements of the WTO.[36] The current plan is to adopt the complete text of the SPS and large parts of the TBT into the Mercosur Agreement.[37] This means that the Mercosur FTA will also be incorporating the shortcomings of the two WTO Agreements (see Box 2).

In Article 3 of the SPS Chapter in the Mercosur Agreement, the parties explicitly reaffirm their "rights and obligations under the SPS Agreement" of the WTO. In Article 12, the EU itself makes a restrictive proposal, specifying that an importing party that implements a precautionary measure based on the SPS chapter "shall provide the scientific justification for its measure".[38]

The precautionary principle only appears once in the draft consolidated texts, and only in a very limited form in the chapter on Trade and Sustainable Development in the wording proposed by the EU. In the Trade and Sustainable Development (TSD) chapters of EU free trade agreements, the parties simply confirm their obligations as signatories to the conventions of the International Labour Organisation and to multilateral environmental agreements. However, the provisions of these TSD chapters do not cover consumer protection as a separate subject area. Furthermore, TSD chapters are among the few sections of EU FTAs that have never been subject to general dispute-settlement mechanisms. Therefore, violations of the respective provisions cannot lead to sanctions involving the suspension of trade preferences.

BOX 2

WTO AGREEMENTS ON TBT AND SPS: COST-BENEFIT APPROACH VERSUS PRECAUTIONARY PRINCIPLE

The two WTO agreements on TBT and SPS are of great significance for consumer protection because they can considerably limit the application of the European precautionary principle. Most of the EU's bilateral FTAs adopt provisions from these two WTO agreements.

The purpose of the Technical Barriers to Trade (TBT) Agreement is to ensure that technical regulations, standards and conformity-assessment procedures do not become obstacles to trade. It applies to important instruments of consumer protection, such as certifications and labelling rules. Labelling requirements for ingredients and nutrition information, or for the use of genetically modified organisms (GMOs), can be challenged as potential trade barriers.

This could also affect the introduction of traffic light labels, which show how much fat, sugar and salt are in a certain food product, using the colours red (for high percentages), amber (for moderate) and green (for low). Similar conflicts with the TBT Agreement would be conceivable if the EU were to extend its GM labelling rules to animal products. Currently, foods in the EU that contain GMOs must be labelled accordingly. However, meat, milk and eggs from animals fed on GM feeds do not have to be labelled as such.

The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) applies to government measures aimed at protecting human, animal or plant health, like food safety or the risk assessments and approval processes for genetic engineering, pesticides, antibiotics, flavourings and additives.

Both agreements only allow measures that are "not more trade-restrictive than required" to achieve their appropriate level of protection or fulfil a legitimate objective (SPS Article 5.6, TBT Article 2.2). The TBT Agreement also stipulates that technical regulations not be "prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade" (TBT Article 2.2).[39]

In principle, the SPS Agreement only allows protective measures based on scientific risk assessment (SPS Articles 2.2, 3.3 and 5.1). Article 5.7 of the SPS Agreement also allows for protective measures in cases of scientific uncertainty, but such measures can only be "provisionally" adopted. Within a "reasonable" period of time, the member must provide scientifically verifiable evidence for the necessity of its protective measures.[40] In this context, it is important to consider that it often takes several years to collect the scientific evidence that is needed for assessing the risks of certain products, and frequently these conclusions do not represent scientific consensus.

The EU has already lost two WTO cases in which the application of the precautionary principle was not accepted as adequate justification for its regulatory measures. The WTO's Dispute Settlement Body and Appellate Body ruled that the EU's import ban on beef treated with growth hormones was illegal owing to the lack of scientific evidence on the risks associated with the hormones in question. The WTO also ruled against the EU in the case involving its 1998-2004 moratorium on the approval of genetically modified organisms (GMOs).[41]

Furthermore, the wording proposed by the EU for the precautionary principle in Article 10 of the Trade and Sustainable Development chapter is very vague. It states that, when implementing measures for protecting the environment or labour conditions, the parties should take into account scientific and technical information "including the precautionary principle". The section proposed by the EU continues as follows: "Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[42] In this context, the EU has missed an opportunity to clarify the role of cost efficiency in the application of the precautionary principle and to give environmental protection a much higher priority than cost efficiency.

1.6 REGULATORY COOPERATION

The draft consolidated texts of the agreement do not include a chapter dedicated to regulatory cooperation. However, there are provisions in the chapter on technical barriers to trade (TBT) that are relevant to regulatory cooperation.

For example, in Article 3 of the TBT chapter, the parties commit to the negotiation of trade-facilitating initiatives in the area of technical standards. The initiatives listed in this Article include "harmonisation with international standards, the use of accreditation to qualify conformity assessment bodies, as well as mutual or unilateral recognition of conformity assessment procedures and their results." In the context of these initiatives, the parties also commit to encouraging the participation of not only competent regulatory and governmental authorities but also "whenever appropriate, representatives of the private sector".[43]

However, the involvement of industry representatives in harmonisation initiatives increases the risk that public regulators could fall under the influence of lobbies and lose their independence. Furthermore, the TBT chapter does not include any measures aimed at ensuring the transparency of lobbying activities or allowing public scrutiny of the access that lobbyists have to regulators.

1.7 COMMITTEES

The draft consolidated texts include plans for the establishment of various committees under the EU-Mercosur FTA, some of which would be given extensive powers. These committees would also have the power to add to or modify the Agreement after its entry into force. These provisions raise critical questions concerning the democratic scrutiny and parliamentary accountability of the implementation process, issues that have already led to a constitutional complaint concerning the CETA agreement in Germany.

In the context of the Mercosur FTA, several subcommittees are to be established under the umbrella of an as-of-yet-unnamed trade committee.[44] These would include subcommittees on customs cooperation, trade facilitation and origin rules, as well as a subcommittee for the SPS measures that have such a significant impact on food safety. According to these provisions, the subcommittee on SPS matters would have the power to "establish the necessary arrangements to resolve the problems raised by the implementation of [the SPS] Chapter", "recommend the amendment of the Annexes" and "perform any other function" referred to it by the Parties.[45] In addition, the subcommittee has the right to amend the list of food products subjected to regional trade conditions (in Annex III).[46] This means that the SPS subcommittee's powers could be used for changing the Mercosur Agreement substantially after its entry into force.

However, it remains unclear as to what procedures will be used by both parties for ensuring the democratic legitimacy of these types of changes by the subcommittee or of the decisions of the other committees.

1.8 HUMAN RIGHTS

The implementation of the commitments from the planned Association Agreement could lead to human rights violations. The Mercosur countries have already seen widespread violations of the human rights of farmers and indigenous people resulting from land rights conflicts.[47] Violations of international labour standards in the agriculture and food sector are also very common. For example, inspectors from the Brazilian Ministry of Labour and Employment are still uncovering many cases of slave-like working conditions on not only sugar-cane and soybean plantations but also cattle farms.[48] Furthermore, extensive human rights violations have been committed through the aerial pesticide spraying and drift of pesticides over vast areas (see Section 1.4).

The EU's bilateral trade agreements include instruments aimed at protecting human rights. These include above all the so-called human rights clause and the Trade and Sustainable Development (TSD) chapters. Both instruments are also planned for the Association Agreement with Mercosur. However, these instruments have substantial weaknesses that limit their effectiveness.

In the Trade and Sustainable Development chapters of the EU's FTAs, and likewise in the draft of the Mercosur Agreement, the parties confirm their obligations as signatories to the conventions of the International Labour Organisation.[49] However, owing to the lack of enforcement mechanisms in these TSD chapters, possible violations against conventions cannot be punished through the suspension of trade preferences (see also Section 1.5). As a result, the TSD chapters have remained largely ineffective.

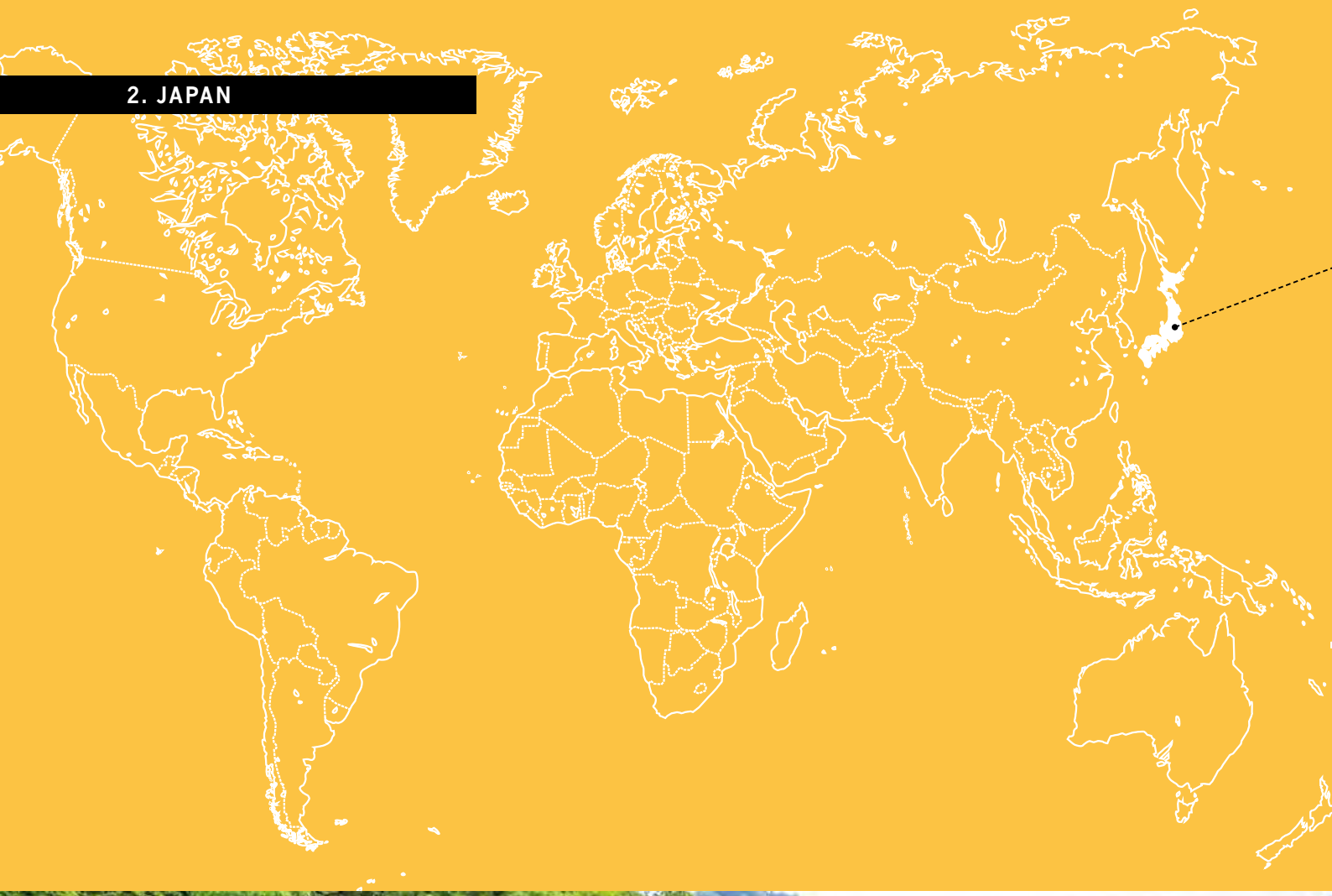
In July 2017 in response to persistent criticism of this approach, the Commission published a discussion document ("non-paper"), in which it presents two options for increasing the effectiveness of the Trade and Sustainable Development chapters.[50] This discussion is still ongoing. In the negotiation documents on the Association Agreement with Mercosur, there are as of yet no sections on the dispute-settlement procedure for the Trade and Sustainable Development chapter, and it is therefore unclear what sanctions would be available for enforcing adherence to the provisions.

The human rights clause that the EU integrates into its free trade agreements requires parties to respect human rights and democratic principles. Unlike the Trade and Sustainable Development chapters, it allows for the suspension of trade preferences in cases involving the violation of human rights standards. However, the clause includes such high hurdles for the use of this sanction that it has never been applied. For example, in the 23 cases to date in which the clause has been activated against ACP countries (mainly former colonies of EU countries in Africa, the Caribbean and the Pacific), the EU took no further action beyond consultation procedures. The most common

cause leading to the activation of the clause has been serious events, like coups d'état; however, every-day human rights violations have rarely been used as justification for activating the clause. The efficacy of the clause is also limited by the fact that there are no effective monitoring and complaint mechanisms. In addition, it cannot be activated for preventing human rights violations that are associated with the obligations of the FTAs themselves.[51]

In many cases, human rights clauses are not added directly to the free trade agreements but are instead integrated into the FTA by means of a reference to the corresponding clauses in existing framework and cooperation agreements. The currently available documents do not provide any indication as to how this clause will be incorporated in the Association Agreement with Mercosur. To date, the EU-Mercosur relationships have been structured on the basis of the "Interregional Framework Cooperation Agreement", which entered into force in 1999 and includes a human rights clause in Article 1.[52]

2. JAPAN



2. JAPAN

2.1 STATUS OF NEGOTIATIONS

Japan and the EU have been negotiating their "Economic Partnership Agreement" (Japan-EU EPA or JEEPA – previously known as JEFTA) since March 2013. Although these negotiations have gone largely unnoticed by the public, the resulting FTA could have far-reaching implications. After all, Japan is the world's fourth largest economic power and the EU's second largest trading partner in Asia. Together, the EU and Japan account for more than one third of the world economy.

To date, 19 rounds of negotiations have taken place, and on 8 December 2017 the two parties announced the conclusion of the negotiation process. In November 2017 the EU and Japan agreed to exclude the investment protection section from the agreement and to potentially negotiate this part separately in the future. This means that JEEPA could be ratified by the Council of the European Union and the European Parliament by the end of 2018 – as per the plans of the European Commission. The legal scrubbing of the EPA text is already under way with the aim of concluding this process by mid-2018.[53]

The European Commission published a Trade Sustainability Impact Assessment in 2016.[54] This assessment was based on data from an unpublished 2011 study by Copenhagen Economics, which concluded that the EU's GDP could increase by 1.88 per cent (most optimistic scenario) as a result of JEEPA. However, these findings clearly contradict those of a 2009 study by Copenhagen Economics, which estimated that the EU's long-term GDP growth after the agreement would amount to a mere 0.14 per cent.[55]

2.2 TARIFFS / QUOTAS

Although the tariffs between the EU and Japan are already very low, Japan has shown a strong interest in tariff reduction, particularly in the duty-free export of motor vehicles, automotive parts and electronics. The EU, on the other hand, has focused its attention on the elimination of non-tariff barriers to trade (NTBs), prioritising the liberalisation of the agricultural market.

The mutual tariff reductions will be implemented over a period of 15 years. Japan will liberalise 86 per cent of its tariff lines when the agreement enters into force. After the 15-year transition period, 97 per cent of these tariffs will have been eliminated. The EU has agreed to liberalise 96 per cent of its tariff lines upon entry into force and nearly 100 per cent by the end of the transition period.[56]

Longer transition periods for full or partial liberalisation are planned for the import of motor vehicles and car parts (seven years), tuna and tomato sauce (five years each), wood products (seven years), candies, pasta and pork (ten years each) and cheese and beef (15 years each). The EU will be able to export wines to Japan duty-free as soon as the agreement enters into force. Several of the additives used in European wines are problematic for Japan, but the country has nevertheless committed to approving 35 additives within five years after entry into force.[57]

The planned elimination of tariffs will have a particularly significant impact on the agricultural sector. Japan will be opening its markets for milk and meat from Europe to a much greater extent than in the past. Japan's pork imports from the EU have been growing rapidly since as early as 2013. These could increase even further after the EPA enters into force.[58] Japan is already the second largest importer of agricultural products from Europe. In 2016 the EU exported € 5.77 billion worth of agri-food products to Japan and only imported € 326 million in agri-foods from Japan.[59]

The new rules could have negative implications for both Japan and Europe. A possible decline in producer prices in Japan, though advantageous for consumers, would threaten the existence of thousands of small farmers. Eighty-nine per cent of the farms in Japan are smaller than three hectares. It would be practically impossible for these farmers to compete with larger exporters from Europe.

At the same time, the Japanese government recently passed an amendment to its "Livestock Stabilisation Act" in the milk sector, which will enter into force in April 2018. This amendment was a market-simplifying measure aimed at preparing the Japanese market for JEEPA. However, it could lead to a further lowering of the producer prices offered by dairies. In this context, JEEPA could threaten the existence of Japanese milk producers.[60]

2.3 INVESTMENTS / ISDS

The investor-state dispute settlement provisions in JEEPA would significantly expand the legal remedies available to Japanese companies. To date, Japanese businesses could only sue European countries on the basis of the Energy Charter Treaty. However, this situation will change when JEEPA enters into force.

Investment protection was one of the most controversial issues of the JEEPA talks. Therefore, the parties decided to deal with it at the very end of the negotiation process. The lines of conflict can be seen in the draft texts and reports from the European Commission.[61]

Japan wants the old ISDS system, not the reformed ICS from CETA, which is now preferred by the EU. In the draft text from September 2016, the EU and Japan had already agreed on other areas of investment protection. However, these agreements were also a step back from the hard-won concessions in CETA. The so-called "fair and equitable treatment" provision, one of the clauses that is used most often as the basis for legal action, was weakened somewhat in CETA by several clarifying statements. These clarifications are much less strict in JEEPA. For example, while CETA forbids "targeted discrimination on wrongful grounds", the word "targeted" was left out in the JEEPA version. Furthermore, the JEEPA text defines the "right to regulate" in weaker terms than the CETA and TPP agreements, and these earlier definitions were already lacking in clarity. Ambiguities of this kind can be gateways for lawsuits.

On 16 November 2017 the European Commission announced that it would seek to ratify part of JEEPA without the investment chapter as an EU-only agreement.[62] These plans are not surprising in light of the fact that the Commission is currently considering the possibility of negotiating and ratifying future trade and investment protection agreements separately.[63] This approach would make it possible to finalise and ratify the Agreement more quickly (without requiring approval from all of the national parliaments of the Member States). However, it also indicates how controversial the issue of investment protection has become.

BOX 3

INVESTOR-STATE DISPUTE SETTLEMENT

Trade and investment agreements include so-called investor-state dispute settlement (ISDS) mechanisms, which give companies the right to sue countries for compensation if they feel their profits are threatened by laws that protect the environment or human rights. Such cases are heard by non-transparent arbitration tribunals that consist of three attorneys as so-called arbitrators.

Only foreign companies can bring an action to enforce their claims. If a country loses a case, its taxpayers are forced to pay the required compensation. In the past, governments have often abandoned or watered down environmental or consumer protection laws for fear of ISDS lawsuits. In this respect, ISDS is a sharp sword in the hands of big business. To date, there have been a total of 817 known ISDS cases, with 69 in 2016 alone, and the number of cases brought each year has been increasing.[64]

In recent years, after a groundswell of public criticism over the old approach to investor protection, the EU has begun implementing a reform of the arbitral institutions and arbitration procedures. However, this reform only applies to the operation of the dispute-settlement system. The scope of the investment chapters and the substantive rights provided to foreign investors have been further expanded instead of weakened.

The first negotiated free trade agreements in which the EU was able to incorporate its reformed dispute-settlement system were CETA and the FTA with Vietnam. The investment chapters of these two agreements contain the "investment court system" (ICS) proposed by the EU. This system provides for the establishment of a permanent, bilateral Tribunal of First Instance, along with an Appeals Tribunal. Unlike the old ISDS system, in which arbitrators are nominated by the investors, the ICS Tribunal of First Instance comprises 15 permanent judges who are appointed by the EU and Canada (or the EU and Vietnam, respectively). Each dispute is adjudicated by three randomly selected Tribunal members.

Although a few procedural improvements have been achieved, the "reformed" system has failed to address the main concerns around ISDS:[65]

>> Foreign investors are still afforded greater substantive rights than domestic businesses. Only they can bring cases.
>> Foreign investors are still granted sweeping rights with no enforceable obligations, such as compliance with human rights or environmental laws.
>> The independence of the Tribunal members is still not guaranteed.
>> There is still no requirement to first exhaust domestic remedies.
>> Dangerous clauses like "fair and equitable treatment" are still used.

Furthermore, the EU and Vietnam have committed to working with other interested parties on the creation of an international, multilateral system for the resolution of investment disputes. The European Commission has since submitted a draft mandate for the establishment of a multilateral investment court (MIC). An international negotiation process at UNCITRAL level could be launched in 2018 or 2019. This MIC would then replace the ICS in the Vietnam FTA.[66]

According to its critics, the proposed MIC system fails to address several fundamental problems of investment protection and arbitral jurisdiction and is being used as an attempt to legitimize and significantly expand the investor rights in future FTAs. Criticism of the new system has come from not only environmental organisations and trade unions but also groups like the German Association of Judges (Deutscher Richterbund, DRB).[67]

EXAMPLES OF DISPUTES THAT WERE RELEVANT TO CONSUMER PROTECTION

CARGILL VS. POLAND

In 2008 the corporation Cargill won an ISDS case against Poland on the basis of a bilateral investment protection agreement between Poland and the US. Cargill produces isogluclose (a wheat-derived sweetener) in Poland. In the context of its EU accession, Poland aligned its national laws with the EU's Common Agricultural Policy by setting new production quotas for sweeteners. Cargill felt that these quotas constituted expropriation and discriminatory treatment and brought an ISDS claim against Poland. The company was awarded US$16.3 million in compensation.[68]

DOW AGROSCIENCES VS. CANADA

In 2009 the US-based chemical giant Dow AgroSciences brought an ISDS claim against Canada (on the basis of the NAFTA agreement), demanding US$2 million in compensation. The Canadian province of Quebec had banned the toxic pesticide 2,4-D after this substance had been linked to increased rates of cancer and birth defects. The case ended in 2011 with a settlement deal. Although Quebec did not have to pay compensation, the government was required to make an official acknowledgement that products containing 2,4-D do not pose unacceptable risks to human health or the environment provided they are used in accordance with the instructions on their label. Dow AgroSciences celebrated this decision as a success. However, the results of this case could discourage other governments from banning this pesticide.[69]

2.4 AGRICULTURE / FOOD

Under JEEPA, the most serious impacts on agriculture and food safety would result from the liberalisation of tariffs on agricultural products. Owing to the fact that Japan exports relatively few agricultural products to Europe, the adverse effects for European consumers are likely to be minimal. Nevertheless, there are differences with respect to the regulation of genetically modified organisms (GMOs) and pesticide use that should be critically examined in light of the planned regulatory cooperation.

Like the EU (with its more than 60 authorised GMOs), Japan has approved numerous genetically modified organisms: these currently include 105 GMOs for scientific cultivation, 172 for food use, 162 for feed use and 11 as ornamental plants. However, owing to widespread public resistance, currently no GMO crops are grown in Japan, with the exception of one rose variety.[70] GMO maize is grown in the EU (on 0.14 million hectares, representing 1.5 per cent of the more than 9 million total hectares of maize crop cultivated in the EU).[71]

Japan imports a large percentage of its animal feed from other countries, and more than 90 per cent of the imports from its main suppliers are GMO feeds. As a result, 50 to 60 per cent of the animal feed used in Japan contains GMOs. Owing to the fact that the European Commission does not distinguish between GMO and non-GMO feeds in its data collection on imports, the following figures for the EU are only estimates: GMO soy (more than 30 million tonnes) accounts for approximately 85 per cent of the total soy imports each year; GMO maize (0.5 to 3 million tonnes) accounts for 5 to 35 per cent of the total maize imports, and GMO rapeseed (approx. 0.5 million tonnes) for 5 to 10 per cent of the total rapeseed imports.

In the EU any use of GM ingredients in food products must be labelled, whereas in Japan GM labelling is only required for 33 categories of processed foods (above all, 15 soy products, 9 maize products and 6 potato products) and eight raw materials (soy, maize, potatoes, rapeseed, cottonseed, alfalfa, beet, papaya).[72]

In Europe the threshold for the accidental presence of GM material in food products is set at 0.9 per cent, while Japanese regulations provide for a much higher threshold of 5 per cent, representing one of the world's highest thresholds for GM labelling in the case of unintentional contamination. Processed products in Japan do not require GM labelling as long as no modified DNA or proteins derived from such DNA can be detected after processing, even if there were GMOs among the original ingredients and they fall into one of the aforementioned 33 categories.

This means that, while in the EU all plant-derived food products containing GMOs or ingredients produced from GMOs must be labelled, even if they no longer contain detectable traces of GMOs, the regulations in Japan are less strict, and as a result Japanese consumers are often unaware that they are purchasing plant-derived foods with GMOs, such as soy sauce made from GMO soybeans.[73]

Furthermore, in its Sustainability Impact Assessment, the European Commission found that Japan's use of fertilisers and pesticides per square kilometre of agricultural land is much higher than the OECD average. This raises the question as to whether Japanese foods also have higher residue loads, an issue that has yet to be investigated.

2.5 THE PRECAUTIONARY PRINCIPLE

In the EU the precautionary principle governs policies related to food safety and the environment. Its purpose is to ensure that states act with precaution, even in cases where scientific uncertainty (still) exists about the potential for harm. This principle also underpins the provisions of the EU chemical regulation REACH. In addition, the precautionary principle is one of the cornerstones of Japanese legislation.[75]

Accordingly, this important principle should be explicitly enshrined in any agreement between the EU and Japan. However, JEEPA, like the agreement with Canada (CETA), fails to mention the precautionary principle in its chapters on TBT and SPS, which address the health of humans and animals and are therefore particularly important for consumer protection. In this context, the negotiations have been based not on the precautionary principle, but instead on the WTO SPS Agreement, which defines how standards should be set to ensure that they do not act as barriers to trade. However, WTO law does not cover the precautionary principle, an essential pillar of consumer health protection in the EU.

Although a reference to precaution can be found in the chapter on Trade and Sustainable Development (TSD), experience has shown that these provisions have little impact. Furthermore, the TSD chapter only makes reference to the "precautionary approach", which is also a step backwards, as the term "approach" is generally regarded as less stringent and more ambiguous than "principle" in legal contexts.

2.6 REGULATORY COOPERATION

Regulatory cooperation refers to the harmonisation and mutual recognition of standards and norms between the two parties of an FTA – in this case, the EU and Japan – with the aim of minimising trade barriers.

Such commitments can be problematic on many levels. For example, JEEPA includes agreements requiring the parties to engage in extensive consultation processes before introducing new legislation, which gives the parties the power to block or delay these laws.

In addition, the chapter opens the door for the influence of lobbyists from large corporations. In the context of regulatory cooperation, the European Commission and the Japanese government are creating opportunities for representatives of big business to comment on future legislation through committees and working groups – like in the CETA agreement – long before the European Parliament or the Japanese National Diet can exercise any influence.

The EU-Japan Business Round Table, an association for large companies from the EU and Japan, has complained that the implementation of the Biocide Product Regulation (BPR) imposes a heavy cost burden on companies. In this context, the industry representatives proposed weighing the economic impact against the human and environmental benefits of the regulation.[76] However, a "cost-benefit analysis" of this kind is a clear violation of the precautionary principle (see Section 1.5.). There is still considerable scientific uncertainty about the human health implications of many pesticides that have been linked to cancer, genetic mutations and other serious illnesses.

As mentioned above, the rate of pesticide use per hectare of agricultural land in Japan is significantly higher than the OECD average.[77] In this context, regulatory cooperation could lead to an increase in the number of approved pesticides in the EU. Demands like these have been clearly articulated by European and Japanese lobby groups, like the EU-Japan Business Round Table: "Excessive protection measures for food safety should be avoided in order to facilitate international trade."[78]

Another example of the risks associated with regulatory cooperation is one of the most controversial issues of the JEEPA negotiations: data protection. Japan has gone on the offensive in this area, seeking a far-reaching data-transfer pact with the European Union. The EU, on the other hand, has been more reluctant to make compromises, as there is still no common EU position, and the issue of data protection is too controversial among the European population. In the European Union, the General Data Protection Regulation (GDPR)

places restrictions on the processing and use of personal data collected by Internet companies. One data protection rule that is particularly disagreeable to Japanese businesses is the localisation requirement for data from EU citizens, which, according to the regulation, must be stored on servers within the EU. If JEEPA would have entered into force before the European Union passed the GDPR, it would have been much more difficult for the EU to adopt data protection laws that were significantly different from the Japanese regulations.

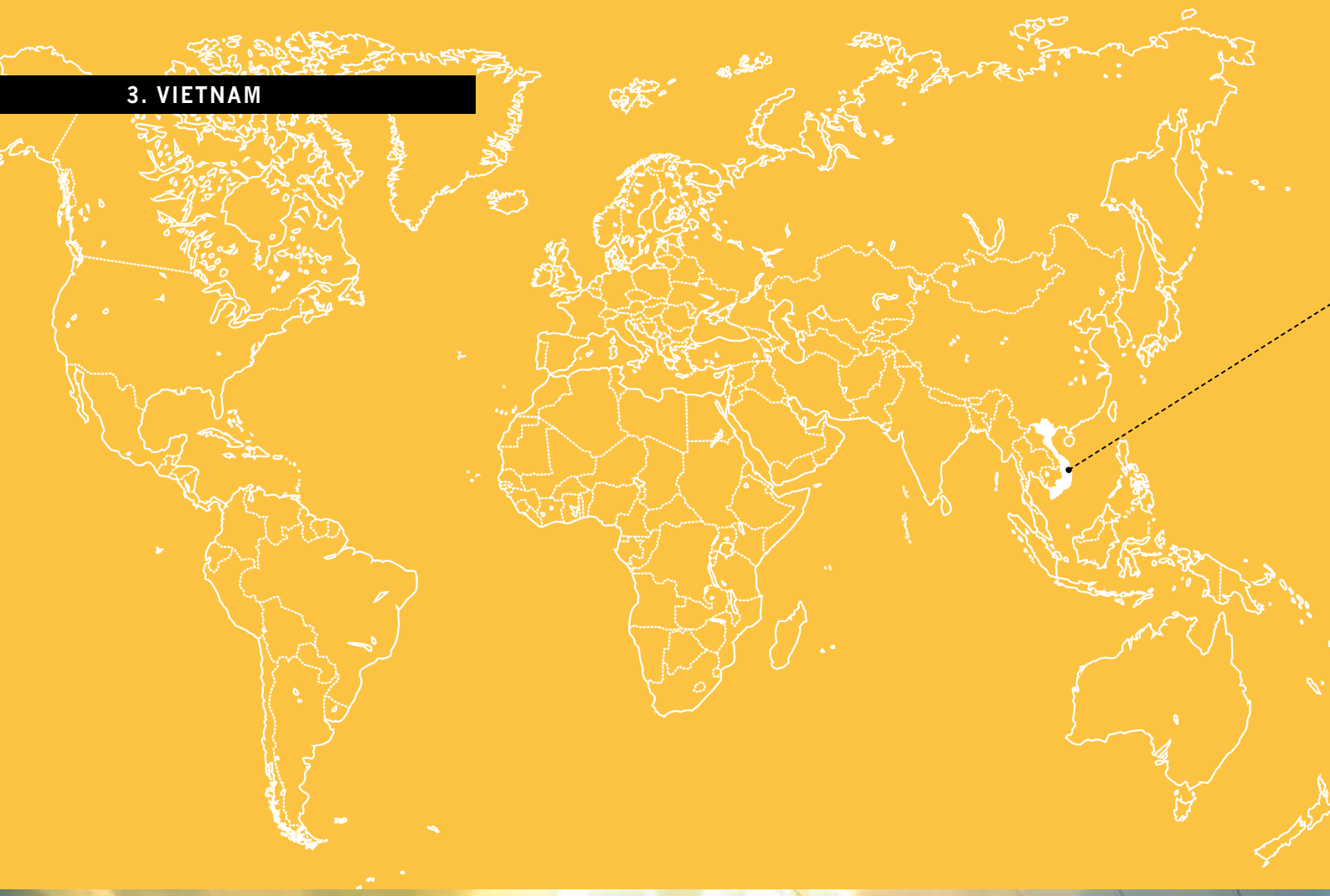
2.7 COMMITTEES

The chapter with the working title "Institutions" lays down rules concerning the institutional framework of the agreement. Plans include the creation of a so-called "Joint Committee", along with several specialised committees and working groups. A finalised chapter has yet to be published, and the contents of the available documents suggest that negotiations are still under way in this area. Therefore, no statement can be made as to the final provisions.[79]

The Joint Committee, which consists of representatives of both parties (the Japanese government and the European Commission), would meet once a year. Its responsibilities include the review and monitoring of the Agreement's implementation, the coordination of the specialised committees and working groups and the establishment of new specialised committees and working groups. Particularly far-reaching is its right to recommend amendments to the Agreement (for consideration by the two parties) and to amend provisions of the Agreement on behalf of the parties in special cases. The following specialised committees are planned: the Committee on Trade in Goods, the Committee on Services, Investment, Corporate Governance and E-commerce, the Committee on Government Procurement, the Committee on Trade and Sustainable Development, the Committee on Sanitary and Phytosanitary Measures, the Committee on Technical Barriers to Trade, the Committee on Customs Related Matters and Rules of Origin and the Committee on Intellectual Property. The composition of the specialised committees is defined by the Agreement and can be modified by the Joint Committee. In addition, the Agreement provides for the establishment of working groups on wine and on motor vehicles and parts. An "Animal Welfare Technical Working Group" may be established under the auspices of the Joint Committee.

As with the Mercosur Agreement and the corresponding provisions of CETA, democratic accountability for the decisions of the committees and working groups is not sufficiently guaranteed.

3. VIETNAM



3. VIETNAM

3.1 STATUS OF NEGOTIATIONS

The EU-Vietnam Free Trade Agreement is Europe's first comprehensive free trade deal with a developing country in Asia. The negotiations began in June 2012 and were concluded in December 2015. The 14 rounds of negotiations over a period of three years were conducted behind closed doors with no public scrutiny. In February 2016 the previously undisclosed text of the FTA was published.[80] However, the negotiating mandate has yet to be made public.

The agreed provisions of the FTA are similar to those of the other free trade agreements currently being negotiated with Asian countries, like Indonesia. EVFTA is being used as a blueprint for agreements with other countries in the region.

The agreement has yet to be ratified. However, since the European Court of Justice (ECJ) issued its opinion on the EU-Singapore Agreement[81] in May 2017, it has been clear that the EU-Vietnam FTA will also need to be concluded as a "mixed agreement", requiring the approval of not only the Council of the EU and European Parliament, but also the parliaments of all EU Member States. Though since December 2017 there are more and more indications that the agreement could be re-structured. The goal is to separate the investment part from the rest of the trade agreement with the result that the FTA could be ratified much faster, as only the EU-Council and the EU-Parliament have to approve it. However, this approach has not been officially confirmed by the European Commission yet.[82]

Vietnam is an export-oriented economy. Experts agree that the country, from an economic standpoint, would have more to gain from free trade agreements than any other ASEAN country. The EU is Vietnam's fourth largest trading partner after China, South Korea and the US, whereas Vietnam ranks 20th among the EU's largest trading partners.[83]

The European Commission included a brief impact assessment for Vietnam as an annex to its position paper on the Sustainability Impact Assessment (SIA) for the originally planned region-to-region free trade agreement between the EU and ASEAN.[84]

However, no human rights impact assessment has been conducted for EVFTA. A complaint to the European Ombudsman concerning the Commission's refusal to conduct an assessment of this kind had no effect. Although the European Ombudsman responded by recommending that a human rights impact assessment be performed, her recommendation went unheeded because

the Commission had already concluded its negotiations with Vietnam by the time the Ombudsman had reached her decision. Therefore, the Ombudsman could only conclude that the Commission's approach constituted maladministration. This is a typical example of the ineffectiveness of Ombudsman proceedings and the lack of consequences for the European Commission's failure to fulfil its duties.

3.2 TARIFFS / QUOTAS

Germany and the European Union expressed a strong interest in extensive tariff liberalisation. For example, Germany pushed for a complete elimination – or at least a gradual reduction – of tariffs, particularly on its most important exports to Vietnam (machines and chemical products). Although the EU still protects its markets by means of import quotas on sensitive products like rice and sugar, Vietnamese farmers do not enjoy this type of protection.[85] In light of the fact that a large percentage of the population relies on agriculture for their livelihoods, the impact on Vietnamese society will be immense. The agreement could lead to an increase in poverty in rural areas and exacerbate the problem of rural exodus.

3.3 INVESTMENTS / ISDS

The EU-Vietnam Agreement includes provisions on the so-called Investment Court System (ICS). In addition, the Agreement provides for the possibility of transitioning from the ICS mechanism to a multilateral investment court (MIC) in the future (see Box 3 for more information on investor-state dispute settlement).

3.4 AGRICULTURE / FOOD

Rules of origin specify to what extent a product must be produced or processed within the EU or Vietnam in order to claim preferential treatment under the Agreement. The agreed rules of origin would lead to an exclusion of products from EVFTA that puts Vietnam at a disadvantage. For example, Vietnam is fully integrated into regional markets in the textile, food and motorcycle industries. The negotiated FTA could have an adverse effect on trade relations because export would not be lucrative once the strict rules of origin go into effect. At the same time, the rules of origin would protect the EU in sensitive areas, such as the agricultural sector and textile industry. With respect to food, the FTA rules require that all products be wholly (100%) obtained in the EU or Vietnam.

FISHERIES AND AQUACULTURE: In 2016 Vietnam's fishery products accounted for just over three per cent of its total exports to the EU. This percentage is expected to increase. Vietnam's seafood industry is largely based on aquaculture operations, which have a negative impact on land use and biodiversity. In addition, the harvesting of wild fish (and the associated bycatch) as the main ingredient in aquaculture feed contributes to the pressures on already overstressed wild fish stocks.

SEEDS: While Article 27 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) gives countries the right to exclude seeds from patentability, the EU-Vietnam Free Trade Agreement expressly includes "plant variety rights" under intellectual property rights. This could affect the farmers' right to save part of their harvest as seeds for the next season, because patent rights for a certain plant variety could require them to purchase the seeds instead of saving and reusing them.

In this context, the EU is guaranteeing extensive protection of intellectual property for European patent holders while ignoring Vietnam's development needs. Studies that have investigated the impacts of similar provisions in other agreements found that they can lead to increases in prices for pharmaceutical, agricultural and other products, thereby threatening healthcare access and food security.[86]

3.5 THE PRECAUTIONARY PRINCIPLE

The precautionary principle is only explicitly mentioned once in the text of the FTA, including the annexes. To make matters worse, this mention occurs in Article 11 of the Trade and Sustainable Development chapter, which contains weak commitments and lacks legally enforceable provisions. The EU and Vietnam merely commit to taking account of international standards, including the precautionary principle, when they develop and adopt legislation that could affect trade or investment.

This commitment is even weaker than the corresponding provisions of CETA, in which the safeguarding of the precautionary principle was already inadequate.

In Article 11 2b of the TBT chapter, the risk-based approach to conformity assessment is recommended.[87] "Risk-based" means that a product or substance may be used until there is sufficient evidence of harm to human health or the environment. The European precautionary principle is based on the opposite assumption. This risk-based approach is also commonly used in the US and Canada and has been heavily criticised by numerous groups, such as environmental and consumer protection organisations, as well as governmental authorities, like the German Environment Agency (UBA).[88] When incorporated into a free trade agreement, it undermines the precautionary principle at the detriment to consumer protection.

3.6 REGULATORY COOPERATION

Unlike CETA, TTIP and JEEPA, the EU-Vietnam Agreement does not have a separate chapter on regulatory cooperation. However, the chapter on Technical Barriers to Trade (TBT) includes extensive standardisation and cooperation obligations.

The parties commit to exchanging information on standardisation processes and strengthening cooperation in the field of standards, e.g. by establishing regulatory dialogues. This section also includes the aforementioned paragraph on the risk-based approach to conformity assessment.

However, unlike CETA, JEEPA and TTIP, EVFTA does not provide for the establishment of a committee with the power to make far-reaching decisions on regulations. Instead, each of the parties designates an official within its administration to serve as the "Contact point". The EU's Contact point would be from the European Commission.

3.7 COMMITTEES

Chapter 17 of EVFTA covers institutional issues, including the various committees.[89] The parties commit to establishing a so-called Trade Committee that will comprise representatives of the EU and Vietnam and meet once a year. The Trade Committee is tasked with ensuring the proper implementation of the Agreement, coordinating the work of the specialised committees and working groups and, if necessary, establishing new specialised committees or working groups.

The Trade Committee enjoys extensive powers through its right to draft and adopt interpretations of the provisions of the Agreement, which would then be binding on both parties. It also has the power to recommend amendments to the Agreement and to "adopt decisions or make recommendations as envisaged by [the] Agreement". This clause is very broadly worded, leaving room for differing interpretations. The decisions of the Trade Committee are binding on the parties and must be implemented.

The following specialised committees are planned: a Committee on Trade in Goods, a Committee on Services, Investment and Government Procurement, a Committee on Trade and Sustainable Development, a Committee on Sanitary and Phytosanitary Measures and a Committee on Customs. These specialised committees can make proposals for consideration by the Trade Committee. For example, the Committee on Trade in Goods can propose additions or amendments to the existing list of fragrant rice varieties.

Furthermore, the Agreement provides for the establishment of working groups on Motor Vehicles and Parts and on Intellectual Property Rights, including Geographical Indications. The working groups are organised under the auspices of the respective specialised committees.

As in the FTAs with Mercosur and Japan, the democratic accountability of these committees is not guaranteed.

4. INDONESIA

4. INDONESIA

4.1 STATUS OF NEGOTIATIONS

Negotiations for a free trade agreement between the EU and Indonesia were launched in July 2016. To date, three rounds of talks have taken place, the most recent in September 2017 in Brussels.

The European Union is seeking a trade deal similar to the EU-Vietnam Free Trade Agreement. Both agreements are seen by the EU as building blocks towards a future FTA with ASEAN.

Indonesia is the largest economy in ASEAN and has a larger market than Canada. The EU is Indonesia's fourth largest trading partner, while Indonesia ranks 30th among the EU's trading partners. The country is a beneficiary of the so-called Generalised Scheme of Preferences (GSP), which provides tariff reductions for 30 per cent of imports from Indonesia.[90]

For Indonesia, the Agreement is particularly important with respect to its exports of palm oil and minerals. Commodities (e.g. palm oil, crude oil, natural gas and minerals) account for 79.6 per cent of Indonesia's gross domestic product. The European negotiators, on the other hand, are striving for an opening of the services and government procurement markets (which have been particularly well protected by Indonesia to date), as well as a liberalisation of tariffs, the regulation of international property rights and a strong system of investment protection through ISDS. No consolidated texts are available, as negotiations are still in the early stages. However, the European Commission has published several of its negotiating proposals on its website.[91]

Other existing documents include leaked negotiating proposals[92] (January 2017) and a confidential German report from November 2016, in which Germany presents its comments on the negotiations with the Philippines and Indonesia to the Foreign Affairs Council.[93] On the basis of these documents, several conclusions can be drawn about the progress of the negotiations and possible results.

4.2 TARIFFS / QUOTAS

The European Union has a strong interest in the reduction of import duties. In the agri-food sector, the aim is a total elimination of tariffs. However, if Germany has its way, tariffs on poultry, sugar and ethanol, which are sensitive commodities for the German market, will not be fully eliminated. In the agricultural sector, Germany would like to eliminate duties for beef, pork, meat by-products, milk, dairy products, hops and malt beer.[94] The trade in animal products between the EU and Indonesia has doubled over the past five years and will most likely continue to increase. In this area, it would be particularly beneficial for Europe to be rid of the tariffs that have protected the weaker Indonesian markets to date.

4.3 INVESTMENTS / ISDS

Indonesia is one of the countries that has had particularly bad experiences with ISDS in the past. Its lost cases have severely drained the government's coffers. To date, the country has faced a total of eight lawsuits, half of which affected the mining sector and thereby central pillars of environmental protection and occupational safety. This is why Indonesia decided to terminate its bilateral investment treaties (BITs) and develop its own BIT model.[95] Nevertheless, owing to "survival clauses" (or as they have been dubbed by critics, "zombie clauses"), the BITs that Indonesia signed in the past will remain in effect for ten more years.

Unfazed by Indonesia's plans, Germany is calling for an investment section resembling that of the negotiated EU-Mexico Agreement, or the approach agreed in the mandate. This means that the FTA would include a dispute settlement chapter with ISDS provisions based on the ICS model from CETA. In the long term, a multilateral investment court could replace the dispute settlement provisions in the bilateral agreement between Indonesia and the EU (see also section on Vietnam). Apparently, Indonesia has since indicated its readiness to negotiate on the basis of an EU proposal on investment protection and dispute settlement.[96]

Not only the provisions on dispute settlement, but also the rest of the investment protection chapter could have adverse implications for Indonesia. Currently, foreign investors are subject to "negative lists" and thereby restrictions in various fields, such as architecture, restructuring consulting and project management. Foreign investors are also required to reinvest a certain portion of their profits in the country in order to strengthen the local economy (local content requirements). Germany would like to see all investment measures

like local content requirements eliminated, including measures that apply to government procurement, telecommunications (a field in which France also has a strong interest[97]), oil, natural gas and power supply.[98]

4.4 AGRICULTURE / FOOD

Indonesia maintains numerous non-tariff trade barriers. For example, it is difficult to obtain an import licence. In addition, Indonesia has its own standardisation system, which is particularly strict for agricultural products. The German government has voiced suspicion that the strict halal laws were introduced as barriers to imports[99] (to protect the Indonesian market). Halal is Arabic for "permissible" and describes products and activities that adhere to Islamic law. Halal laws play a particularly important role in the food sector. However, they can apply not only to food products but also to food additives, packaging materials and chemicals, e.g. in cosmetics and detergents. There are also so-called halal certificates, similar to organic certificates. After three rounds of negotiations, these halal laws have proven to be one of the biggest hurdles of the negotiation process.[100]

PALM OIL: One of the most important issues of the EU-Indonesia negotiations involves the handling of palm oil imports from the Southeast Asian country. Palm oil is used in the food industry, in cosmetics and for the production of biodiesel. Today, half of all processed foods use palm oil. However, it was not until the end of 2014 that the EU began requiring that palm oil be listed as an ingredient on food packaging.

Indonesia is the world's largest producer and exporter of palm oil, followed by Malaysia. Together, the two countries cover nearly 90 per cent of global production. Roughly 10 per cent of Indonesia's palm oil exports go to the EU. However, the burning of peatlands to make way for new palm oil plantations releases vast amounts of carbon dioxide, making Indonesia the world's third largest emitter of greenhouse gases.[101]

Between the two negotiating parties, as well as within the EU, there are currently disputes surrounding the incorporation of criteria aimed at ensuring that only palm oil from "sustainable" production can be placed on the EU market. In this context, certification systems like RSPO (Round Table on Sustainable Palm Oil) and ISCC (International Sustainability and Carbon Certification) are being discussed as possible instruments. Both are recognised under the EU's Renewable Energy Directive and have already granted certificates to Indonesian palm oil exporters.[102]

However, the European Parliament was highly critical of these approaches in its April 2017 resolution, in which it concluded that none of the recognised certification schemes effectively prohibit their members from converting rainforests or peatlands into palm plantations. In this context, the Parliament called on the Commission to "ensure that independent auditing and monitoring of those certifications schemes is carried out". To the chagrin of the Indonesian government, the European Parliament also demanded that, by 2020, the EU phase out its use of all vegetable oils that drive deforestation. Furthermore, the Parliament insisted that the Trade and Sustainable Development chapters of the EU's free trade agreements include binding commitments aimed at preventing deforestation, along with "an anti-deforestation guarantee".[103]

In March 2017 the German federal government submitted its comments on palm oil and the TSD chapter of the Indonesia Agreement to the Trade Policy Committee. In this document, Germany proposed that a bilateral working group be established in the context of this chapter that would develop extensive sustainability criteria for palm oil, building on the existing certification schemes. The country also argued that civil society should be involved in the monitoring of compliance with these sustainability criteria and that the FTA should include the stipulation that Indonesia must incorporate these criteria into national law and effectively implement them in order to take advantage of any tariff preferences for palm oil.[104]

In this context, it is worth noting that crude palm oil for industrial use, e.g. in the production of biodiesel, can already be exported duty free to the EU. However, this does not apply to refined palm oil or to crude palm oil that is used in foodstuffs. Currently, Indonesian exporters pay a duty rate of 3.8 per cent on crude palm oil for food uses and duty rates of between 5.1 and 12.8 per cent on refined palm oil.[105]

The German government estimates that 30 per cent of Indonesian palm oil exports are subject to import duties, meaning that Indonesia would therefore have a sufficient incentive to agree to the strict sustainability criteria. However, Germany went a step further in its comments, demanding that the tariff preferences granted under the FTA be suspended if the criteria are not met.[106]

Germany's suggestions are unusual in that, if implemented, they would overcome for the first time – at least for this one area – one of the main deficits of the Trade and Sustainable Development chapter: its unenforceability. As a result, violations against the palm oil criteria, unlike the other provisions of the TSD chapter, could actually lead to trade sanctions. To date, the Commission has been the main opponent of enforceable TSD chapters backed up by sanctions, arguing that their cooperative approach is more promising in the promotion of environmental and social standards.

In late September 2017 the Netherlands, France, Denmark and the UK presented a "non-paper" with their own recommendations on how agricultural commodities should be dealt with in the FTA with Indonesia.[107] In this document, the countries make four proposals for the drafting of the TSD chapter. In addition to their wish for an "ambitious" chapter, they stressed the requirement of achieving a fully sustainable palm oil supply chain by 2020, called for capacity-building measures and suggested a series of positive incentives for complying with environmental and human rights standards. However, unlike Germany's recommendations, there are no demands for ensuring the enforceability of the Trade and Sustainable Development chapter.

Meanwhile, Indonesia has been demanding market-access concessions from the EU to compensate for the more stringent sustainability requirements.[108]

4.5 THE PRECAUTIONARY PRINCIPLE

As with the EU-Vietnam FTA, the extent to which the precautionary principle is incorporated in the negotiating proposals with Indonesia represents a step back from the (already inadequate) provisions of CETA. In the proposed texts for the FTAs with both Vietnam and Indonesia, the precautionary principle is only mentioned once, and both provisions use the same wording.

4.6 REGULATORY COOPERATION

To date, the incorporation of provisions on regulatory cooperation in the Indonesia Agreement resembles the approach taken for the FTA with Vietnam. There is still no separate chapter on this subject. However, far-reaching commitments are made in the TBT chapter.

In addition, the EU would like to incorporate far-reaching agreements in the so-called SPS chapter (Sanitary and Phytosanitary Measures). The SPS chapter covers measures that apply to food, cosmetics, chemicals and pesticides. For example, the EU has proposed the following clause: "Each Party shall ensure that administrative procedures concerning the import requirements on food safety, animal health and plant health are not more burdensome or trade restrictive than necessary to give the importing Party adequate confidence that these requirements are met. These administrative procedures shall be set with the objective to minimise negative trade effects and to simplify and expedite the clearance process while meeting the importing Party requirements." The use of the term "simplify" is a well-known indicator for the dismantling of regulations.[109]

In the section on "equivalence",[110] the text proposed by the EU provides for the possibility of recognising the equivalence of the exporting party's SPS measures. The aim of the EU negotiators is to recognise the different methods and standards as equivalent. This approach could lead to the watering down of standards and protective measures because the question of whether standards offer the same level of protection can only be answered by equivalence tests that use the same measurement and test methods. However, the proposed FTA text makes no mention of such tests. As a result, there is a danger that the mutual recognition of standards could be used as a loophole for circumventing any rules on environmental and consumer protection that are considered trade restrictive. This risk exists when standards are mutually recognised without sufficient assessment. Once products or processes have been recognised as "equivalent", it is practically impossible for one of the parties to make changes. As a result, food standards could be "frozen" at a low level.

The EU's negotiating proposals for its Agreement with Indonesia are the first to include a separate section on relations with the business community. In these clauses, the parties agree to "timely and regular consultations with trade representatives on legislative proposals and general procedures related to customs and trade facilitation issues". The aim of these consultations is to ensure that the planned requirements and procedures "continue to meet the needs of the trading community [...] and remain as little trade-restrictive as possible". This amounts to the stipulation of exclusive access for corporations to contribute to the development of legislation.[111]

4.7 COMMITTEES

The negotiations for the Agreement with Indonesia are still in their early stages. Therefore, there are still no texts on institutional structures. However, it is to be expected that the Agreement with Indonesia, like the other FTAs included in this study, will provide for the establishment of committees with extensive powers. The negotiating proposals that the European Commission has submitted to Indonesia to date have been based on the agreements with Vietnam. Therefore, it is possible that it will also use EVFTA as a model for the establishment of committees.

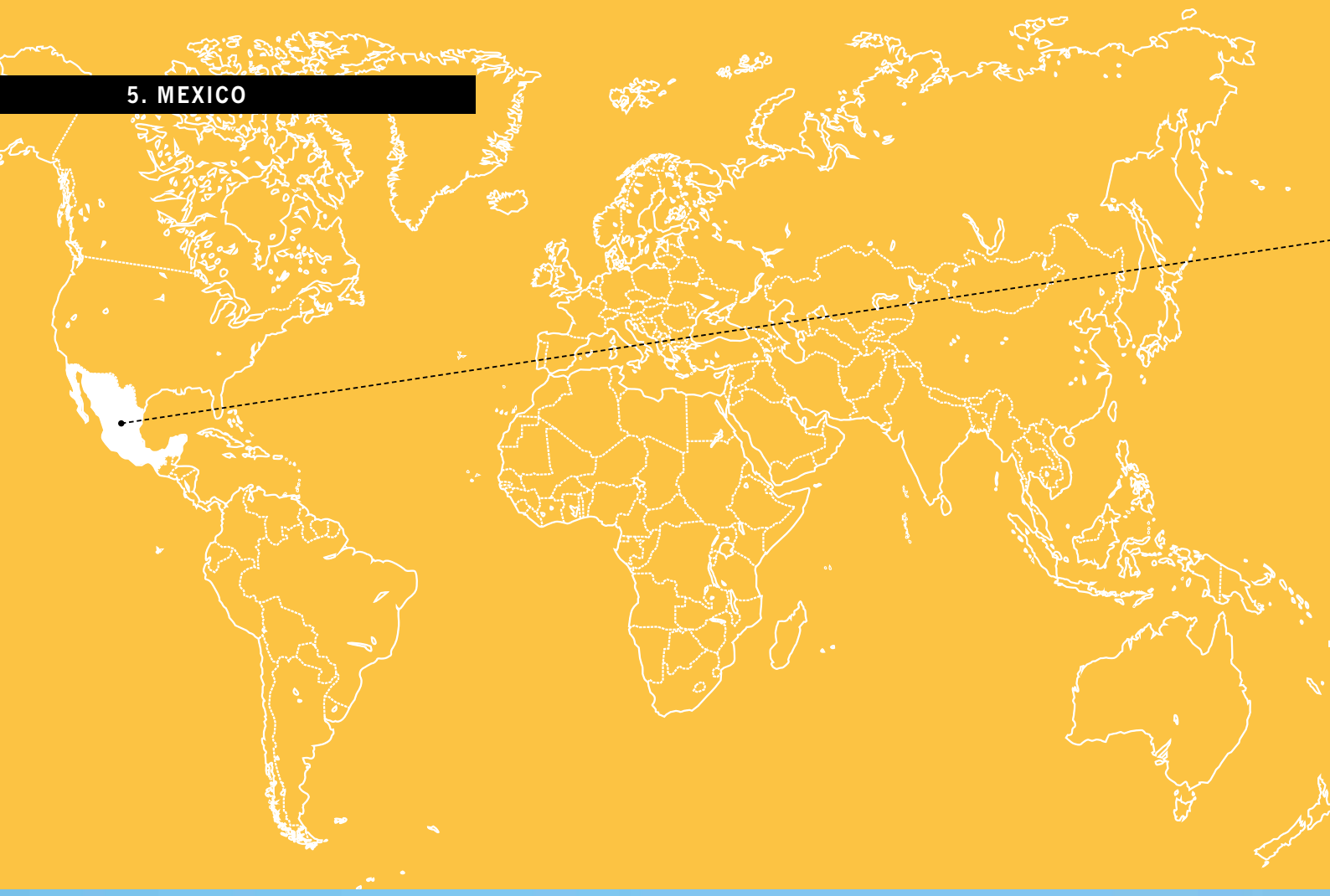
4.8 HUMAN RIGHTS

Owing to the lack of available documentation and the fact that the negotiations are still in their early stages, it is difficult to predict what types of commitments will be included in the provisions on human rights in the FTA with Indonesia. The widespread violations in palm oil production alone are enough to demonstrate the need for effective human rights instruments. The expanding palm oil plantations are not only responsible for numerous land rights conflicts with indigenous communities, but are also rife with serious labour law violations. The abuses that have been documented by human rights organisations include child labour, forced labour, discrimination and exposure to toxic chemicals.[112]

However, the discussions that have taken place in the Trade Policy Committee of the European Council about the Trade and Sustainable Development chapter of the Indonesia Agreement leave much to be desired. For example, only Germany has made a proposal on the possibility of imposing sanctions for violations of the strict sustainability criteria for palm oil (see Section 4.4). The German proposal also referred explicitly to the prevention of human rights abuses associated with land grabbing and poor working conditions.[113] Although the proposal certainly represents a move in the right direction, a limitation of human rights criteria to the palm oil industry would be insufficient. Furthermore, the proposal may not even be approved by the Council.

It is also still unclear how the standard human rights clause for EU FTAs will be used in the Agreement with Indonesia. Currently, the human rights clause from the 2014 Framework Agreement on Comprehensive Partnership and Cooperation applies to relationships with Indonesia.[114] There is also no indication as of yet that the significant deficits of this clause that are responsible for its extremely rare activation (see Section 1.8) will be addressed.

5. MEXICO



5. MEXICO

5.1 STATUS OF NEGOTIATIONS

In June 2015 the European Union and Mexico agreed to renegotiate the so-called Global Agreement that entered into force in 2000. The main pillar of this treaty is a free trade agreement that the parties intend to "modernise" through renegotiation. In May 2016 the European Council approved the negotiating directives for the modernisation of the EU-Mexico Global Agreement.[115]

As of December 2017, seven rounds of negotiations have taken place (the first in June 2016). Talks are set to continue in 2018.[116] In August 2017 the European Commission presented to the Trade Policy Committee of the Council the consolidated texts for 21 chapters of the new FTA.[117]

The planned Agreement covers a wide range of issues, including trade in goods, investments, services, SPS, TBT, intellectual property, regulatory coherence and sustainable development.[118] In addition, the parties intend to incorporate investment protection and investor-state dispute settlement mechanisms, provisions that are not included in the current Global Agreement (see below).

5.2 TARIFFS / QUOTAS

Mexico's main objective is the diversification of its export markets, as currently 80 per cent of Mexican exports go to the US, and only 5 per cent to the EU. The most important export products for both partners in bilateral trade are machinery and transport equipment. Petroleum accounts for roughly 20 per cent of Mexico's exports to the EU. Agricultural products, including food, make up seven per cent of Mexico's exports to the EU and four per cent of the EU's exports to Mexico.[119]

Industrial tariffs between the two parties have already been almost fully eliminated, while roughly 65 per cent of agricultural imports are duty free. Under tariff quotas, Mexico can export certain quantities of individual products to the EU at lower tariff rates. These quotas apply to juices, processed fruits, natural honey, avocados, asparagus, tuna, cane molasses and other products.[120]

5.3 INVESTMENTS / ISDS

In response to the widespread criticism of investor-state arbitration, the European Union has developed a slightly modified version of this system that has already been integrated into its FTAs with Canada (CETA) and Vietnam. The EU also plans to include this reformed mechanism, which the Commission calls the "investment court system", in its "modernised" Agreement with Mexico. The Commission presented a draft of this chapter in February 2017.[121]

However, the planned revisions have no effect on the heavily criticised special rights for foreign investors. The primary differences are as follows: when a claim is submitted, the parties no longer choose three tribunal judges freely, but instead from a pool of 15 previously appointed judges. In addition, there will be an Appeal Tribunal – a possibility that did not exist in the previous investor-state dispute settlement mechanism.[122]

Mexico and the EU also commit to pursuing the establishment of a multilateral investment tribunal with appellate mechanism. In September 2017 the European Commission published the draft mandate for the negotiation of this tribunal.[123] The Commission is hoping that the Council will approve this mandate.

The draft text for the investment protection rules of the EU-Mexico FTA includes the relevant standards of "indirect expropriation" and "fair and equitable treatment", both of which can be interpreted very broadly in favour of investors.[124]

In this context, it should also be noted that Mexico has already signed 15 bilateral investment treaties (BITs) with EU Member States, including Germany, France and the Netherlands.[125] The modernised Global Agreement would give investors from the 12 Member States that have not signed BITs with Mexico (mostly Eastern European Member States) the possibility to use this instrument.[126]

Unlike free trade agreements, the BITs between Mexico and EU states are quite short-term and can be terminated relatively quickly by either party. For example, seven of the BITs, including the one with Germany, can be terminated at any time, and six others as of 2019. By concluding a free trade agreement providing for investor-state dispute settlement, the EU and Mexico are tying their hands.[127]

As one of the most frequently sued countries, Mexico has faced 23 known ISDS cases, many of which involved issues relevant to consumer protection (see below). The majority of these claims have been brought under the ISDS mechanism in NAFTA, and others under BITs. Currently, the Spanish corporation Telefónica is suing Mexico before an international tribunal for requiring telecom operators to reduce their interconnection tariffs. Mexico has already paid US$ 246 million in compensation to multiple corporations.[128]

5.4 AGRICULTURE / FOOD

There are several significant regulatory differences between Mexico and the EU that could pose threats to food safety. For example, some agricultural chemicals that are available in Mexico have been banned in the EU, such as thiodicarb.

In Mexico the company Bayer sells two insecticides, Semevin 350 and Poncho Super, that contain the active substance thiodicarb,[129] which is not only suspected of causing cancer but also highly dangerous to bees.[130] Semevin is used on maize, sorghum, soybean and cotton crops, and Poncho Super on maize and sorghum.[131] Thiodicarb has been banned in the European Union since 2007.[132]

5.5 THE PRECAUTIONARY PRINCIPLE

The EU's draft consolidated text of the modernised FTA with Mexico follows the approach of other EU agreements (see Section 1.5) and imports provisions from the WTO agreements on technical barriers to trade (TBT) and sanitary and phytosanitary (SPS) measures, many of which are problematic from the standpoint of consumers. As a result, the trade deal with Mexico also includes various clauses that make it possible to undermine the precautionary principle. This could create a dangerous situation for both parties, particularly as precautionary measures are exposed to additional risks through the investment court system.

In Article 2 of the SPS chapter in the Mexico Agreement, the two parties reaffirm their obligations under the SPS Agreement of the WTO. Article 9 of the SPS chapter is very restrictive: "The Parties recognize the importance of ensuring that their respective sanitary and phytosanitary measures are based on scientific principles, and conform to the relevant international standards, guidelines and recommendations."[133] In cases where scientific evidence is insufficient, SPS measures can only be adopted "provisionally", and additional information for risk assessment must be obtained "within a reasonable period of time". The SPS chapter makes no reference to the precautionary principle.[134]

In fact, the only place where the precautionary principle appears in the current draft text is the chapter on "Regulatory Coherence", which is neither enforceable nor backed up by sanctions (see Section 5.6). Furthermore, only a partial and very weak formulation of the precautionary principle is used.

The regulations on SPS measures that can be adopted in urgent cases (emergency measures) are also very restrictive. According to Article 14 of the SPS chapter, emergency measures can only be taken "provisionally", on "serious grounds" and if "necessary for the protection of human, animal or plant health".[135]

This clear preference for evidentiary action (which is based on evidence of adverse effects) over the precautionary principle (which is used in cases of scientific uncertainty or where there is a lack of scientific data on the safety of products or processes) could become an obstacle to the introduction of important consumer protection regulations. Mexico has already had negative experiences in this area, for example, after introducing a tax on sugar-sweetened beverages in 2001 (see Box 4). Industry groups often use trade and investment agreements as instruments to oppose levies on unhealthy foods that are high in sugar, fat and/or salt.

BOX 4

TAX ON SWEETENED BEVERAGES IN MEXICO

In 2001 Mexico introduced a tax on all soft drinks flavoured with sweeteners other than cane sugar (e.g. with beet sugar or isoglucose, a syrup made from corn or wheat starch). The exception for drinks sweetened with cane sugar protected the country's own sugar cane production. The United States responded to this tax by bringing a case to the WTO, which ruled in favour of the US. The dispute panel determined that the tax constituted a discriminatory measure because it violated the "national treatment" principle. In January 2007 Mexico complied with the WTO's recommendations and rulings by withdrawing the measure.[136]

In addition, the US-based agri-food groups ADM, Corn Products International (now Ingredion) and Cargill initiated investor-state arbitration against the Mexican soft-drink tax under NAFTA (North American Free Trade Agreement). Mexico lost all three cases, as the arbitral tribunals concluded that the tax measure breached the national treatment and "fair and equitable treatment" requirements in NAFTA. [137] In these three cases, Mexico was required to pay a total of roughly US$ 185 million in damages.[138]

In 2014 Mexico introduced another tax on sugar-sweetened beverages, along with a tax on energy-dense foods and restrictions on food marketing to children. Once again, the international beverage industry crusaded against these taxes with a lobbying campaign. However, as of yet, no lawsuits have been filed under trade and investment agreements.[139] Nevertheless, the industry often denounces these types of measures, which are also being introduced in Europe, as a form of trade discrimination.[140]

Under current trade agreements, it is relatively easy for companies to challenge regulations like taxes on unhealthy foods and beverages whose regular consumption contributes to a number of chronic "lifestyle" diseases. One reason for this vulnerability is that there are not enough reference points in the form of international standards, which are also required under the SPS Agreement. This is a significant difference to the tobacco industry, because the World Health Organization (WHO) has developed a Framework Convention on Tobacco Control (FCTC), which is used as an instrument for justifying trade-restrictive measures, albeit not always successfully.[141] However, there is no comparable international instrument focused on health protection through the promotion of changes in dietary habits. Therefore, regulatory initiatives of this kind are easier to challenge under trade agreements.

5.6 REGULATORY COOPERATION

The modernised FTA with Mexico will also include a chapter on regulatory cooperation. According to the draft consolidated text, the EU is proposing the title "Good Regulatory Practices", while Mexico is arguing for "Regulatory Coherence".[142] The main objective of this chapter is to intensify cooperation between the parties on all issues of government regulation in order to promote trade and investment (Article X.2: General Principles). The provisions apply to all regulatory measures (regulations, directives, decrees etc.) of the EU and Mexico (Article X.1: Definitions).

In order to achieve their cooperation objectives, the parties commit to making publicly available a list of all planned regulations and amendments once a year, carrying out impact assessments, offering opportunities for any person or business to provide input through public consultations and considering the input received (Articles X.6, X.7, X.8 and X.12). In this context, Mexico is proposing a provision that explicitly requires the parties to consider "non-regulatory" alternatives that would achieve the same public policy objective (Article X.8). Furthermore, Article X.12 lists methodological approaches for regulatory cooperation, including the calculation of regulatory costs and the use of standardised cost models.

The extent to which the chapter reflects business interests is demonstrated by the fact that the list of methodologies in Article X.12 includes so-called "regulatory guillotines". This is a radical deregulation approach through which all regulations for a certain industry are publicly listed, and then, within a limited period of a few months, any regulation that is not justified as necessary for government policy is eliminated. An international consulting firm owns the trademark for this method and boasts that it has already been used to eliminate or water down 25,000 laws and regulations in a dozen countries, including Mexico. According to the firm, these regulatory reforms have reduced annual business costs by roughly US$8 billion.[143]

The chapter on regulatory cooperation is also the only section of the draft consolidated texts in which the precautionary principle is mentioned. In Article X.2, the EU proposes a provision specifying that each party is free to determine its approach to good regulatory practices in accordance with the fundamental principles of its regulatory system. A footnote to this provision clarifies that "for the EU, such principles include the precautionary principle".

According to Article X.15, both the EU and Mexico agree that the chapter on settling disputes between the parties concerning the Agreement should not apply to the regulatory cooperation chapter.

5.7 COMMITTEES

For the modernised EU-Mexico Agreement, the parties are also planning a system of committees that would be given extensive powers for changing the Agreement after its entry into force. Sub-committees, for example on Intellectual Property, Trade in Goods, Agriculture, Trade in Wine and Spirits, Technical Barriers to Trade and Sanitary and Phytosanitary Measures, are to be established under the auspices of a Trade Committee. The Trade Committee would have the right to amend an annex of the agreement "in order to accelerate the tariff reduction or elimination".[144] The Sub-Committee on Intellectual Property would enjoy equally extensive rights. The corresponding chapter gives this committee the power to amend an annex that will include a list of protected geographical indications for both parties.[145]

According to the draft Agreement, the Sub-Committee on Trade in Wine and Spirits shall have the power to make decisions concerning "product definitions, oenological practices and restrictions".[146] The tasks of the Sub-Committee on Technical Barriers to Trade would include "the identification of potential amendments or interpretations of the obligations" of the chapter on technical barriers to trade.[147]

All of these clauses allow the Trade Committee and its sub-committees to amend the modernised FTA after its entry into force, and – as with the FTAs with Vietnam, Indonesia, Mercosur and Japan – no mechanisms have been planned for the parliamentary oversight or democratic legitimation of these committees' decisions.

5.8 HUMAN RIGHTS

In Mexico, human-rights abuses in the agri-food sector are common and widespread. These include conflicts concerning communal land holdings (called ejidos) and indigenous territories. However, on the basis of the negotiation documents that have been made available to date, it is impossible to predict whether the modernised FTA with Mexico will include a sanction-backed Trade and Sustainable Development chapter or a more effective human rights clause (see also Sections 1.8 and 4.8).

Previous experiences with the human rights clause of the Global Agreement with Mexico that entered into force in 2000 demonstrate how essential more effective instruments would be in this context. The clause can be found in Article 1 and states that "respect for democratic principles and fundamental human rights [...] constitutes an essential element" of the Agreement.[148]

However, in spite of the numerous proven human-rights violations in Mexico, the EU has ignored all calls to activate this clause. This is particularly alarming in light of the extensive evidence that Mexico's own security forces have been involved in multiple human-rights abuses, most recently in the enforced disappearance of 43 students in the state of Guerrero.[149] To date, there is unfortunately no indication that the EU plans to establish a more effective human-rights instrument in the modernised FTA.

SUMMARY

This analysis examines five free trade agreements that the European Union is currently negotiating: with Japan, Vietnam, Indonesia, Mexico and the Mercosur bloc of South American countries. In this context, we investigate to what extent the possible ramifications of these FTAs – like those of the free trade agreements CETA with Canada and TTIP with the United States – provide legitimate reasons for concern. In particular, this investigation focuses on whether, like TTIP and CETA, the new FTAs would also threaten the regulatory sovereignty of the EU and its Member States – in other words, whether there is a risk that the ability of European governments to regulate in the public interest, e.g. to guarantee high levels of health, consumer and environmental protection, would be severely restricted.

PART I: GENERAL ASSESSMENT OF THE FTAs

1. What the examined agreements have in common is that their scope is not limited to the lowering or removal of protective tariffs, or so-called tariff trade barriers. Like TTIP and CETA, they belong to the new generation of free trade agreements that are focused to a much greater extent on the elimination of non-tariff barriers. These can include regulations on environmental, health and consumer protection, along with technical standards and norms.

2. The examined FTAs also incorporate many other contentious aspects of TTIP and CETA: e.g. the loss of the trading partners' regulatory sovereignty through the watering down of the European precautionary principle, the risk that standards of consumer and health protection could be harmonised to the lowest common denominator with no possibility of raising them in the future, the one-sided dispute-settlement system that allows investor claims only (with the exception of the Mercosur Agreement) and so-called regulatory cooperation, which requires the two parties to work together on their planned laws and regulations in order to harmonise or mutually recognise each other's standards and norms with the aim of eliminating non-tariff trade barriers.

   The committees and sub-committees that are established through these agreements lack democratic legitimacy, like the CETA committee that was the subject of a constitutional complaint in Germany. These committees are given extensive powers to amend and interpret individual parts of the agreement after it enters into force. However, no mechanisms are created for ensuring the democratic legitimacy and parliamentary scrutiny of possible amendments to the agreements.

3. The agreements covered in this analysis are being negotiated in the same manner as TTIP and CETA. Although the European Commission faced heavy criticism for the lack of transparency in its trade negotiations with the US and Canada and subsequently promised to make improvements in this area, the negotiations for its more recent FTAs are still being conducted with a similar level of secrecy. The negotiating mandates for the agreements have yet to be made public, the involvement of civil society has been inadequate, and the impact assessments have been not only unsatisfactory, but also too late and insufficiently independent from the European Commission.

4. It is also unclear by whom, when and how decisions about the FTAs will be made. Will the European Commission follow through on its announced intentions to split the agreements into an investment part that would have to be ratified by all Member States (as a "mixed agreement") and a trade part that would only require the approval of the Commission, the Council of the EU, and the European Parliament ("EU only")? Or will the agreements be proposed as "mixed agreements", like CETA?

PART II: INDIVIDUAL RISKS AND PROBLEMS ASSOCIATED WITH THE CONCLUSION OF THE AGREEMENTS

5. The expansion and continued intensification of agricultural production that can be expected to result from the agreements could have serious environmental impacts: e.g. in the EU through the expansion of milk production or in partner countries like Brazil through increased beef production. The agricultural sector is one of the world's largest polluters (contamination of drinking water with nitrates and pesticides, air pollution, greenhouse gas emissions, threats to biodiversity, soil erosion etc.).

   The FTAs with Brazil and Indonesia pose considerable environmental risks associated with climate protection and the preservation of biodiversity. Increases in beef production in Brazil and palm oil cultivation in Indonesia could potentially contribute significant quantities of greenhouse gases to the atmosphere, partly through the associated changes in land use (deforestation). This is due to the fact that tropical and subtropical rainforests, as well as Indonesia's peatlands, store huge amounts of carbon dioxide, which is released when the land is cleared. The current drafts of the agreements do not guarantee that these negative effects will be avoided or offset in any way.

   These examples are evidence of how free trade agreements can undermine political aims like climate and environmental protection. Similar risks are associated with the increasing fish exports from countries like Vietnam or Mexico, whereby Vietnam's aquaculture sector is particularly worrisome owing to its significant impacts on marine biodiversity.

6. All of the planned agreements covered in this paper would limit the rights of governments to regulate in the public interest, for example to protect public health, consumer rights and the environment. This loss of regulatory sovereignty would be due in part to the fact that, in the individual sections of the agreements, the European precautionary principle is either completely missing or only marginally recognised. In general, it is overshadowed by the approaches of scientific risk assessment and economic cost-benefit analysis, which are used by the WTO. In the few cases where the precautionary principle is mentioned in the agreements, it is hidden away in sections that have never been backed up by sanctions, such as the chapters on sustainable development and regulatory cooperation. These weaknesses could make it more difficult for countries to introduce all sorts of regulatory instruments that could be challenged as possible non-tariff barriers to trade. These include the initiatives that have been undertaken by Mexico and several European countries for the introduction of taxes on foods that are harmful to health (e.g. sugar, fat and calorie taxes).

   Countries could face similar restrictions on their ability to prohibit certain food products, additives, agricultural chemicals and genetically modified organisms (GMOs) if these decisions are viewed as constituting an illegal discrimination against foreign goods. For example, numerous products that are not, or no longer, approved in the EU are still available on the markets of the trading partners, such as the growth-promoting agent ractopamine (approved in Brazil) or the insecticide thiodicarb (approved in Mexico). In addition, the omission of the precautionary principle from the respective chapters on sanitary and phytosanitary (SPS) measures poses threats to the efficacy of food control systems. The identification of pathogens like salmonella, E. coli and EHEC, or of pesticide and medicine residues, may be more difficult because countries can only use measures that are as little trade-restrictive as possible. The mutual recognition of SPS measures is aimed at the elimination of additional controls by the importing country, which can make it significantly more difficult to detect pathogens and residues and increase risks for consumers.

7. In addition, the provisions on investor-state dispute settlement (ISDS) that are planned for the FTAs with Japan, Vietnam, Indonesia and Mexico would interfere with the EU's and its Member States' ability to regulate. No provisions on investor-state dispute settlement are planned for the Mercosur FTA. However, Argentina, Paraguay and Uruguay have already signed numerous bilateral investment treaties with EU Member States that provide for investor-state arbitration.

   ISDS clauses create a parallel legal system that is exclusively accessible by foreign investors. These mechanisms give corporations the right to sue governments for passing laws that are in the public interest. The planned investment courts could rule in favour of investors on legal issues where

ordinary courts would reach a different conclusion. Investors could effectively blackmail governments by threatening them with compensation claims worth billions of euros. As a result, planned regulations on consumer and environmental protection or the strengthening of workers' rights could be blocked or delayed.

8. The trade agreements covered in this paper do not allow for an appropriate differentiation between conventional products and those that have been produced using methods that are demonstrably more sustainable. Instead, they are treated as like products, meaning that any regulatory discrimination between them must be avoided. As a result, an effective enforcement of sustainable production methods that have been conclusively shown to reduce the social, health and human-rights risks associated with food production could be challenged.

For example, the fundamental requirement of avoiding discrimination between like products would apply to the various certification initiatives aimed at promoting more sustainable production methods for palm oil, soy and sugar cane. In the context of trade negotiations, there have been intense discussions about whether a) to increase the disputed effectiveness of these initiatives through audits and b) to integrate them into the Trade and Sustainable Development chapters. However, various interest groups, in particular Argentina's soy exporters and Indonesia's palm oil exporters, are arguing against these options.

One problem with the integration of these certification systems into the Trade and Sustainable Development chapters is the fact that these chapters have never been backed up by sanctions. However, in Europe, there are currently discussions about moving towards a sanctions-based enforcement model for the Trade and Sustainable Development chapters. In this context, Germany was the first country to propose linking preferential tariffs for Indonesia's palm oil exports to its compliance with stricter sustainability criteria and punishing any violations with the withdrawal of potential trade benefits. At this stage, it is impossible to predict whether initiatives of this kind would lead to substantial improvements.

9. In addition, the free trade agreements could pose risks for food labelling requirements, primarily owing to the often very restrictive provisions of the chapters on technical barriers to trade. These provisions would create numerous hurdles for the adoption of new labelling regulations, such as the introduction of traffic-light nutrition labelling or labelling requirements for products from GM-fed animals. Some of these risks arise from the WTO Agreement on Technical Barriers to Trade, which was the source of several provisions used by the free trade agreements examined for this paper.

10. The agreements on regulatory cooperation that are planned for the FTAs could also promote processes for harmonising food standards to the lowest common denominator. This could limit a government's ability to improve standards and procedures, as their "necessity" could be questioned during the assessment of alternative regulatory approaches. Furthermore, the agreements on regulatory cooperation (for which separate chapters exist in the draft texts of the FTAs with Japan and Mexico) provide for the involvement of the business community in the development of new laws, regulations and directives. The draft text for this chapter of the modernised Mexico FTA reveals that the parties could even follow very radical deregulation approaches, like the "regulatory guillotine". For this approach, all regulations for a certain industry are publicly listed, and then, within a limited period of a few months, any regulation that is not justified as necessary for government policy is eliminated.

11. In general, there is a risk that standards could be "frozen" at low levels owing to the agreements' binding obligations under international law with respect to the changing of standards for consumer, health and environmental protection. This curtailment of legislative discretion becomes particularly clear when the negotiating partners agree a common, specific standard in the context of mutual recognition, for example, for food labelling requirements. In this case, the standards could only be raised with the approval of all parties. This means that, if the EU wanted to raise existing standards, the changes would require approval from not only the trading partner (e.g. Mexico) but also all EU Member States. A decision by the European Parliament, or the European Commission and the Council of the European Union, would be inadequate because the mutually recognised standard would have special status under international law. And in the highly unlikely event that all Member States would vote unanimously in favour of the change, Mexico would still have to approve. If the EU were to amend the respective regulation unilaterally, it would have to face the possibility of contractual penalties and/or trade sanctions. This situation would protect the status quo of social regulations, hampering social progress.

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