



**GOVERNMENT PROCUREMENT, FINANCIAL SERVICES, AND
ENVIRONMENT IN THE EU-MERCOSUR TRADE AGREEMENT:
LINKAGES AND IMPLICATIONS FOR THE EU AND BRAZIL**

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Executive Summary

Government procurement:

The relationship between trade agreements and the environment is increasingly a priority for policymakers and civil society today. However, some of the disciplines covered by modern trade agreements have not received enough attention when it comes to their potential impact on the environment. Financial services and government procurement are two such areas, even though they are increasingly consequential topics for international trade policy and negotiations. This blind spot merits greater consideration as the connections definitely exist: the regulation of government procurement and financial services can have positive or negative implications for environmental outcomes on the ground, which makes understanding these links a crucial task. Engaging in this very task, this report focuses on the EU-Mercosur Trade Agreement, with a particular attention to the case of Brazil. Using the Agreement on Government Procurement (GPA) and the General Agreement on Trade in Services (GATS) as an analytical base, the report examines recent and relevant trade agreements entered into by Brazil and the EU to contextualize and understand the links between environmental protection on the one hand and government procurement and financial services on the other. The insights generated are then applied to the analysis of the government procurement and financial services chapters of the EUMTA, in an effort to understand how these rules affect parties' ability to regulate in pursuit of environmental outcomes.

- **Nexus between government procurement and the environment.** The study notes that government procurement can be a significant area for inclusion of environmental considerations, as governments and their entities procure a spectrum of goods and services for the fulfilment of their public responsibilities. Consequently, inclusion of environmental considerations in decisions concerning government procurement, as long as permitted under applicable trade rules, can have a positive effect on the environment in several ways.
- **The WTO Government Procurement Agreement (GPA) and sustainable procurement.** GPA parties have options for including environment-related considerations along various phases of the procurement process, such as technical specification and tender documentation phase, during the qualification of tenderers, and while awarding the contract. Exceptions included in the GPA also allow parties to derogate from their obligations under certain conditions that may include environmental considerations.
- **Relevance of the EU-Mercosur Trade Agreement (EUMTA) for sustainable procurement in Brazil.** Though not the most ambitious trade agreement in terms of integrating environmental concerns, the EUMTA can potentially serve as a driver of reform by including Brazil—which is not a party to the GPA—in government procurement frameworks that contain rules recognizing and allowing for sustainable procurement.

- **Policy space for sustainable procurement under the EUMTA.** Largely reflecting the provision of the GPA, the EUMTA also provides for similar opportunities as the GPA for the inclusion of environmental considerations in the procurement process. Based on the environment-related provisions included in the public procurement chapter of the EUMTA, there is room for the parties to adopt environmental considerations throughout the procurement procedure.

Financial services:

- **Nexus between trade in financial services and the environment.** The study's point of departure is the recognition that linkages between financial regulation and environmental policy are fairly new. As a result, the relationship between trade governance on financial services and environmental policy is virtually unexplored in the literature or in case law.
- **Relevance of the EUMTA to Green Financial Measures.** Although the EU and, to a lesser extent, Mercosur have each made progress towards integrating environmental concerns into their trade agreements, this has not yet been strongly reflected in rules concerning trade in financial services. Nevertheless, the EUMTA disciplines on services, following the blueprint of the WTO General Agreement on Trade in Services (GATS), are broad and flexible enough to be directly relevant to environment-related financial measures (Green Financial Measures) in various ways.
- **Policy space for green financial regulation under the EUMTA.** The EUMTA provides several mechanisms through which a party could seek to challenge a Green Financial Measure as unlawful or overly restrictive. On the other hand, the EUMTA also contains important flexibilities and exceptions that should, in principle, allow EUMTA countries sufficient policy space to enact environment-related financial regulation without major difficulties from a trade standpoint. This report identifies a number of factors that should be relevant when analyzing the consistency of Green Financial Measures with the EUMTA, such as the existence of origin-based discrimination between services and service providers, whether or not measures are based on international standards, the conduct of regulators when administering a measure, among others.
- **Allowing v. requiring conduct.** The study highlights that the EUMTA does not *require*—or even nudge—parties to consider environmental implications in their regulation of financial services, but rather grants them the *flexibility to do so* if they wish.
- **Expected impact of the trade liberalization on the environment.** The report concludes that the actual environmental impacts of the liberalization of trade in financial services between the EU and Mercosur are still difficult to visualize or assess. In any case, any such impact should be indirect and most likely associated with an expansion of agricultural and animal sectors in Brazil and other countries resulting from the liberalization of trade in goods. Even in this scenario, the main driver of environmental risk—which mainly relates to deforestation—would be the deterioration of environmental governance in Brazil rather than the trade liberalization itself.

Introduction

The links between environment-related issues, on the one hand, and public procurement and financial services, on the other, have not featured significantly in the trade law and policy discourse to date. However, regulation of both government procurement and financial services does not take place in clinical isolation from other policy areas—including the environment.¹ In other words, government procurement and financial regulation are two areas that certainly have either positive or negative implications for environmental outcomes. This makes understanding and exploring these disciplines, and their link with environmental regulation, a crucial task, including from a trade governance perspective.

This report, prepared upon request for the non-governmental organization FERN,² engages in this very task. In doing so, it focuses on the rules of the European Union-Mercosur³ Trade Agreement (“EUMTA”), as well as its expected impacts and circumstances in Brazil, Mercosur’s largest economy and a source of controversy concerning the potential environmental effects of trade agreements.⁴ The report therefore looks at existing multilateral and bilateral rules related to financial services and public procurement in order to understand the extent to which these rules take into account—or potentially curtail—environmental protection and conservation.

To understand how environmental considerations are accounted for in the world trading system, the report uses the relevant agreements of the World Trade Organization (“WTO”) as the baseline for its analysis. For the purposes of this report, the two relevant agreements are the multilateral General Agreement on Trade in Services (“GATS”) and the plurilateral Agreement on Public Procurement (“GPA”). However, the WTO framework is mostly silent on matters of environmental governance, including in these two general agreements. Specifically, these agreements do not prescribe environmental measures but rather allow members to trade—under certain conditions—based on environmental preferences.

Some states have negotiated stricter disciplines on environmental protection through Free Trade Agreements (“FTAs”), as stand-alone chapters and/or as provisions within other chapters of the FTA. The European Union (“EU”) and the United States (“US”), for instance, incorporate environmental provisions or chapters in all their FTAs with their

1 This borrows from one of the most famous and repeated rulings of the World Trade Organization’s Appellate Body, where it stated in its very first report that “WTO agreements are not to be read in clinical isolation from public international law” (Appellate Body Report, *US – Gasoline*, para. 17).

2 See at: <https://www.fern.org/>.

3 Mercosur, or the Southern Common Market (“Mercado Comum do Sul”), is an economic and political bloc originally comprising Argentina, Brazil, Paraguay, and Uruguay.

4 The negotiations for the EUMTA were concluded in July 2019, when the EU and Mercosur agreed on a basic text. During a subsequent phase of “legal revision” of the text, process towards the conclusion of the agreement effectively halted due to a deterioration of environmental governance in Brazil—including spiking rates of deforestation—and ensuing political differences between the EU and the Brazilian administration at the time, under President Jair Bolsonaro. As of the publishing of this report, both sides (with Brazil now under a new administration) continued to discuss possible ways forward for the conclusion of the trade agreement, notably the possibility of including additional environmental commitments. The last version of the text about which the parties tentatively agreed is the one produced after the July 2019 deal, and is the version considered in this report (available here: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mercrosur/eu-mercrosur-agreement/agreement-principle_en).

trading partners. Although the effectiveness of these requirements on environmental outcomes is subject to debate, the EU and US FTAs generally require positive integration of environmental standards and measures.

Using GPA and the GATS as an analytical base, the report examines recent and relevant trade agreements entered into by Brazil and the EU to contextualize and understand the links between environmental protection on the one hand and government procurement and financial services on the other. The insights generated are then applied to the analysis of the government procurement and services chapters of the EUMTA, to understand how these rules affect parties' ability to regulate in pursuit of environmental outcomes.



Section I: Government Procurement

Government Procurement usually accounts for 10-15 percent of a country's GDP on an average basis and therefore is an important area for many WTO members.⁵ Given the size of trade in this area, policies of members on government procurement can operate as important barriers to international trade.

For both political and practical reasons, most government procurement remained excluded from General Agreement on Tariffs and Trade ("GATT") 1997, and even later from negotiations under the Uruguay Round that led to the establishment of the WTO.⁶ In fact, Article III:8a of the GATT and Article XIII:1 of the General Agreement on Trade in Services ("GATS"), both in similar language explicitly exclude the application of the respective agreements when it comes to procurement of goods and services by governmental agencies for governmental purposes.

Presently, government procurement in the WTO is governed by the plurilateral Agreement on Government Procurement ("GPA") where signatories commit that when purchasing good for governmental purposes (i.e., their own consumption), will do so on a non-discriminatory basis from suppliers from other GPA signatories. Presently, the GPA (revised in 2012) has 22 parties comprising 49 WTO members (the EU and its member states are counted as one party).⁷

The aim of the GPA is to open trade in government procurement markets between the signatories and subject it to fair and transparent competition. The WTO estimates that as a result of negotiations, trade accounting for more than US\$ 1.7 trillion annually is now subject to international competition between the GPA parties.⁸ While developed countries currently form most of the GPA parties, many developing countries including Brazil, China and India have either observer status or are in the process of negotiating their accession to the GPA. Some have estimated that the government procurement market will increase significantly in size if key developing countries become parties to the GPA.⁹

That being said, disciplines on government procurement, although a plurilateral agreement in the WTO, have been a part of Free Trade Agreements (FTAs), with several countries having chapters concerning government procurement as part of their FTAs. In the present report this aspect will be the major focus area.

5 WTO and government procurement, at https://www.wto.org/english/tratop_e/gproc_e/gproc_e.htm (accessed 1 March 2024).

6 Sue Arrowsmith, *Government Procurement in the WTO*. The Hague: Kluwer Law International, 2003.

7 GPA Parties, observers and accessions, accessible at: https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm. (accessed 15 July 2022). While the other Mercosur countries- Argentina, Paraguay and Uruguay- are not parties to the GPA, Brazil is in the process of negotiating its accession to the GPA.

8 Agreement on Government Procurement, accessible at: https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm (accessed 15 July 2022).

9 For an evaluation of the BRICS countries, see Anderson, Robert D., Philippe Pelletier, Kodjo Osei-Lah, and Anna Caroline Müller, *Assessing the Value of Future Accessions to the WTO Agreement on Government Procurement (GPA): Some New Data Sources, Provisional Estimates, and an Evaluative Framework for Individual WTO Members Considering Accession*, WTO Staff Working Paper, ERSD-2011-15, 2011, Geneva: WTO. See also, Chen, Hejing, and John Whalley, *The WTO Government Procurement Agreement and Its Impacts on Trade*, Working Paper 17365, US National Bureau of Economic Research (NBER), 2011.

Government Procurement and the Environment - Establishing Relational Links

With progressive liberalization and integration of global markets in all aspects, be it goods or services, standards or intellectual property, there has been an increasing focus on bringing in sustainability issues such as those concerning environment and labor within the realm of international trade regulation. This has undoubtedly resulted in significant changes in international trade practices and the increased focus on these issues means that more and more countries are notifying and accepting disciplines in these areas.

The evolution of public procurement reflects these emerging international business dynamics.¹⁰ The strategic use of public procurement for promoting social and environmental goals has a long history, founded on its economic relevance in terms of governmental spending in the market, as a significant fraction of Gross Domestic Product (GDP). In countries such as the EU, the US, Canada and South Africa, practices governing public procurement are also motivated by the political determination and willingness to bat for environmental protection, enforce labor laws, ensure compliance with human rights or to alleviate structural discrimination based on race and gender.¹¹

The emerging practices in government procurement and environment have come to be highlighted by the phrase ‘sustainable public procurement’. This broad term embraces not only procurement practices with a strong environmental focus, but also more ethical initiatives of socially responsible public procurement.¹² A few examples of these practices, particularly in Europe, include production of goods using sustainable timber and respecting environmental standards in the construction of public buildings. Thus, under the definition of sustainable public procurement, socio-economic issues have been wrapped into the procurement decisions of many countries and rightly so.

Government procurement is a significant area for environmental improvement, as governments and their entities procure a spectrum of goods and services, ranging from small objects of everyday use to millions of dollars in investments for the fulfilment of their public responsibilities. Potentially, inclusion of environmental considerations in decisions concerning government procurement can have a positive effect on the environment in several ways:¹³

- Directly, by demanding products and services with a lower overall environmental impact;
- Indirectly, by putting pressure on producers to develop products and services with a lower environmental impact;

10 See Maria Anna Corvaglia, *Public Procurement and Private Standards: Ensuring Sustainability Under the WTO Agreement on Government Procurement*, *Journal of International Economic Law*, Volume 19, Issue 3, September 2016, pages 607–627.

11 See generally, Christopher, *Buying Social Justice: Equality, Government Procurement, and Legal Change*. Oxford: Oxford University Press, 2007.

12 Reinhard Steurer et al., *Sustainable Public Procurement in EU Member States: Overview of Government Initiatives and Selected Cases*, Research Institute for Managing Sustainability, 2007. Available at: http://www.sustainability.eu/pdf/csr/policies/Sustainable%20Public%20Procurement%20in%20EU%20Member%20States_Final%20Report.pdf.

13 See Marron, D., *Greener public purchasing as an environmental policy instrument* In: OECD (Ed.), *The Environmental Performance of Public Procurement: Issues of Policy Coherence*. Organization for Economic Cooperation and Development, Paris, 2003, and van der Grijp, N., *The greening of public procurement in the Netherlands*. In: T. Russel (Ed.), *Greener Purchasing: Opportunities and Innovations*. Greenleaf Publishing, Sheffield, UK, 1998.

- Indirectly, by improving the market position of environmentally preferable products and services, including innovative technologies;
- Indirectly, by setting an example to other consumers.

As discussed in more detail in the subsequent sections, the GPA provides its parties opportunities for including environment related considerations in various phases of the procurement process. In addition to the GPA itself, the Committee on Government Procurement in 2012 adopted a Decision on Sustainable Procurement which instituted a work program on sustainable procurement.¹⁴ As part of this work program, GPA parties, among others, would examine ways to integrate the concept of sustainable procurement into national and sub-national procurement policies, and identify and consolidate measures they consider as reflecting sustainable procurement.

1. The WTO Government Procurement Agreement

The GPA is a plurilateral agreement within the framework of the WTO, meaning that not all WTO members are parties to the agreement. As mentioned above, the GPA presently has 21 parties as members, most of which are developed countries. However, before we delve into the analysis of the GPA, it would be worthwhile to explore in brief the origins of the government procurement in the WTO.

1.1 Evolution of the GPA

The Tokyo Round Code on Government Procurement (1979) was the forerunner of the modern-day GPA in the WTO. Like the present (revised GPA of 2012) and the 1994 GPA that was negotiated as a plurilateral agreement under the Uruguay Round, the Tokyo Round Code also covered obligations on non-discrimination and transparency. However, the Tokyo Round Code was substantially more limited than the current GPA as it only covered the procurement of goods and was only applicable to central government entities.

The GPA 1994 brought about important changes to both the scope and content of the agreement. To begin with, its coverage was expanded to include sub-central and other entities, in addition to the procurement of services and construction services. The GPA 1994 also included important new institutional requirements for bid protest or “domestic review” systems to rule on supplier complaints and strengthened disciplines on “offsets.”

The GPA 1994 was followed by subsequent negotiations that culminated in the revised GPA in 2012. In addition to expanding market access commitments of the Parties, the revised GPA text crystallizes current best practices in government procurement agreed upon by and acceptable to all GPA Parties. Most relevant for the purposes of this study, the revised GPA for the first time modified the provisions on technical specifications to expressly allow for technical specifications to promote the conservation of natural resources or protect the environment, thus ensuring due scope to address environmental issues.¹⁵

¹⁴ Decision of the Committee on Government Procurement of 30 March 2012 (Annex E to Appendix 2 of GPA/113, of 2 April 2012).

¹⁵ Robert D. Anderson and Anna Caroline Müller, *The Revised WTO Agreement on Government Procurement (GPA): Key Design Features and Significance for Global Trade and Development*, WTO Working Paper ERSD-2017-04, January 2017.

1.2 The revised GPA 2012: Benchmark for the analysis

The 2012 GPA is composed mainly of two parts: the text of the agreement and parties' market access schedules of commitments. The text of the agreement establishes rules requiring that open, fair, and transparent conditions of competition be ensured in government procurement. The fundamental aim of the GPA is to mutually open government procurement markets amongst its parties. In that sense the GPA provides for certain core principles that must be followed when the GPA parties procure for governmental purposes. Additionally, the GPA also delineates the scope and coverage of measures, technical specifications of tenders and the procedure for floating and awarding tenders. These will be examined and discussed in this section.

Scope and coverage

Article II of the GPA lays down the intended coverage of the agreement. Defined in terms of "measures," the GPA includes procurement of goods and services or a combination thereof for governmental purposes which are specified as per each party's annexes to Appendix I. The coverage schedules play a critical role in determining whether a procurement activity is covered by the agreement or not. Only those procurement activities that are carried out by covered entities purchasing listed goods, services or construction services of a value exceeding specified threshold values are covered by the agreement.

THE STRUCTURE OF GPA COVERAGE SCHEDULES (APPENDIX I OF THE AGREEMENT)¹⁶

For each GPA Party, Appendix I is divided into six Annexes which deal, respectively, with (i) central government entities covered by the agreement; (ii) covered sub-central government entities; (iii) "other" covered entities (e.g. utilities and SOEs); (iv) coverage of goods; (v) services coverage; (vi) coverage of construction services; and (vii) any general notes.

Annex 1 Central Government Entities

Annex 2 Sub-Central Government Entities

Annex 3 Other Entities

Annex 4 Goods

Annex 5 Services

Annex 6 Construction Services

Annex 7 General Notes

The Annexes also specify the threshold values above which individual procurements are subject to the GPA disciplines. In addition, the Annexes of most Parties contain notes that qualify the application of the agreement. In principle, all goods are covered if procured by a covered entity and not excluded specifically. Parties are, in principle, free to choose a generic or a list approach and, in the case of the latter, they can freely adopt a positive-list or a negative-list approach. In general, GPA Parties use the United Nations Provisional Central Product Classification (CPC) classification numbers, as defined in the Services classification List (MTN.GNS/W/120) for services classifications.

In addition to the entities covered, there is also a limitation concerning the threshold value of contracts that are found in the relevant annexes to Appendix I for parties—for example, the threshold for construction service contracts would be laid out in Annex 6 to Appendix I for a party.

¹⁶ Box from Anderson and Müller (2017).

Non-discrimination

A key obligation that all parties to the GPA assume is that of non-discrimination, which is provided for under Article IV of the agreement. This means that parties to the GPA and their procuring entities shall not discriminate between goods and services provided by other parties and shall accord them immediately and unconditionally, a “treatment that is no less favorable” that it accords to its “domestic goods, services and suppliers” and to “goods, services and suppliers of any other Party.”¹⁷

Another aspect of non-discrimination is embodied in Article IV:2 of the GPA which states that a GPA party will not treat locally established suppliers less favorably than another locally established supplier depending on the degree of its foreign affiliation or ownership. This is an important obligation, particularly, because of the ongoing liberalization in investment and services that has resulted in the establishment of local subsidiaries of foreign-owned companies.¹⁸

Transparency

Transparency is another core obligation that parties assume under the GPA and examination of the agreement text reveals several provisions that highlight the importance the agreement gives to transparency. Transparency in the GPA thus, in a sense, functions as an anti-circumvention tool to ensure that the principle of non-discrimination is respected. The obligations for transparency can be divided as being *ex ante* and *ex post*.¹⁹ An illustration of an *ex ante* transparency obligation is Article VI of the GPA which requires each party to provide information about the procurement methods they utilize and the relevant laws and regulations regarding procurement. Similarly, as an example of an *ex post* obligation, the GPA parties are required to maintain records of specific procurements for three years after their award²⁰ and upon request, must make available information that the procurement has been made fairly, impartially and in accordance with the agreement.²¹

Valuation and offsets

Article II:6-8 of the GPA deals with how the contracts for government procurement are to be valued. Article II:6(a) states that parties shall “neither divide a procurement into separate procurements nor select or use a particular valuation method for estimating the value of a procurement with the intention of totally or partially excluding it from the application of this Agreement.” An anti-circumvention provision of sorts, this was deemed necessary because the GPA does not provide any particular method for valuation of contracts that must be used by GPA signatories at all times, rather, it provides criteria to be used when establishing the valuation method.²² Consequently, some degree of discretion is available to the parties.

17 For a discussion on whether the GPA also imposes the likeness test as under the GATT 1994, and how this could be used to distinguish environmental-friendly products from others, see, Geert van Calster, *Green Procurement and the WTO – Shades of Grey*, Review of European, Comparative & International Environmental Law, Vol. 11, Issue 3 (2002), pp. 298-305.

18 Arrowsmith (2003), p.156. See also, Petros Mavroidis, *The Regulation of International Trade*, Vol. 2, Cambridge: MIT Press, 2016, p. 636. (hereafter “Mavroidis (2016b).”)

19 Mavroidis (2016b), p. 650.

20 Article XVI:3, GPA.

21 Article XVII:1, GPA.

22 Mavroidis (2016b), p. 633.

In addition, Article II also lays down disciplines governing recurring contracts (when an individual procurement contract requires more than one contract or when contract is awarded in separate parts) and in those cases of procurement by lease, rental or hire purchase of goods or services, or procurement for which a total price is not specified.

Another important aspect of the GPA is the disciplines on offsets, which was strengthened as the agreement evolved from the Tokyo Round Code to the 1994 GPA. Offsets under the agreement mean “*any condition or undertaking that encourages local development or improves a Party’s balance-of-payments accounts, such as the use of domestic content, the licensing of technology, investment, counter-trade and similar action or requirement.*”²³

In other words, offsets refer to conditions put forth by procuring governments on firms to ensure that local content or local participation is made part of the procurement process. Therefore, they are a development strategy tool for stimulating national industries.²⁴ For firms, offsets could constitute additional conditionalities in the tender which are not directly related to the procurement and may be seen as discriminatory, or favoring domestic goods and services over those produced internationally. Nonetheless, offsets are not necessarily aimed at excluding foreign bidders as all bidders in the procurement process, regardless of origin, are subject to the same offset conditions and in this sense, they are not inherently discriminatory.²⁵

Why are offsets necessary? The aim of the GPA is to liberalize government procurement markets by eliminating discrimination between suppliers based on origin and ensuring that the tendering process is administered in a fair and transparent process. Procurement offsets are seen as “inefficient and counter-productive, diverting trade away from highest value uses”²⁶ and therefore Article IV (6) of the GPA seeks to prohibit members from imposing or accounting for any offsets. The intent behind the provision is to capture those instances and elements which are not necessary to the submission of an offer but could influence procuring entities to award contracts to suppliers that provide offsets. Thus, the provision is aimed at encompassing measures that pertain to not just the direct performance of contracts such as use of domestic content or production facilities but also measures that are aimed at activity outside of the scope of the contract as well.²⁷

Conditions for participation

Article VIII of the GPA lays down the conditions that a supplier may be subjected to. While prescribing the conditions for participation, a procuring entity shall limit the conditions for participation in a procurement to those which are essential to ensure that a supplier has the legal and financial capacities and the commercial and technical abilities to undertake the relevant procurement. Under Article VIII:2, a procuring entity is restricted from limiting the participation to only those suppliers that have been previously awarded a contract by the

23 Article I(l), GPA.

24 See David Collins, *Government Procurement with Strings Attached: The Uneven Control of Offsets by the World Trade Organization and Regional Trade Agreements*, *Asian Journal of International Law* 8 (2), 2018, pp. 301–21.

25 Anna C. Muller, *Special and Differential Treatment and Other Special Measures for Developing Countries under the Agreement on Government Procurement: The Current Text and New Provisions* In: Sue Arrowsmith and Robert D. Anderson (Eds.), *The WTO Regime on Government Procurement: Challenge and Reform*. Cambridge: Cambridge University Press, 2011, p. 361.

26 See generally, Collins (2018).

27 Arrowsmith (2003), p. 164.

procuring entity—however, wherever necessary, it may require relevant prior experience from the suppliers.

With regards to the assessment of suppliers, a procuring entity is required to consider the financial capacity and technical abilities of a supplier on the basis of supplier activities both inside and outside the territory of the party. Additionally, the party is required to carry out the evaluation on the basis of the conditions that have been set out in advance in the tender notices and documentation. This provision ensures that the suppliers remain aware of the conditions based on which their bids would be evaluated.

Finally, a party and its procuring entities may exclude a supplier on grounds such as bankruptcy, false declarations, professional misconduct, or failure to file taxes.²⁸

Technical specifications and tender documentation

This is perhaps the most important area for the purposes of this study because it is here that governments have the discretion to incorporate environmental aspects into their tendering contracts—recall that the revised GPA for the first time modified the provisions on technical specifications to expressly allow for environmental considerations as part of Article X of the GPA.

Before we examine the technical specifications under Article X of the GPA, it is important to note that technical specifications refer to a tendering requirement that lays down the characteristics of goods or services to be procured, including quality, performance, safety and dimensions, or the processes and methods for their production or provision; or addresses terminology, symbols, packaging, marking or labelling requirements, as they apply to a good or service. When parties prescribe technical specifications for any tender, they must ensure that such specifications do not create unnecessary obstacles to international trade. In this regard, as a step to harmonize to some extent the technical specifications, the GPA requires parties to base their technical specifications on international standards where they exist or otherwise on national technical regulations, recognized national standards or building codes.

Pertinent here is Article X:6 that allows parties to prepare, adopt and apply technical specifications to promote the conservation of natural resources or protect the environment. Thus, parties may include environmental considerations during the tendering process, provided of course they follow Article X:1 and do not create unnecessary obstacles to trade.

In the tender documentation the purchasing entity is required to give all necessary information related to the procurement in question to enable potential suppliers to submit tenders, including information required to be published in tender notices and other relevant information, for example economic and technical requirements, financial guarantees, and the criteria for awarding the contract and procedural information such as the closing date and time for receipt of tenders.

With regards to the tender documentation, the GPA presents another opportunity for members to include environment related conditions in the tender notice or documentation. Article X:9 permits parties to have an evaluation criterion for suppliers

²⁸ Article VIII:4, GPA.

that includes price and other cost factors, quality, technical merit, environmental characteristics, and terms of delivery.

Tendering process and award of contracts

The GPA contains several procedural obligations which procuring entities must fulfil to ensure the effective application of its basic principles (Articles VII to XVI). In many respects, these provisions codify recognized good practices in the area of government procurement aimed at ensuring efficiency and value for money.²⁹ In the context of the GPA, they also serve the purpose of guaranteeing that access to covered procurement is open and that an equal opportunity is given to both domestic as well as foreign suppliers and suppliers in competing for government contracts.³⁰

The agreement allows the use of open, selective, and limited tendering procedures, provided they are consistent with the provisions laid out in Articles VII to XVI.³¹

- **Open tendering:** Under open procedures all interested suppliers may submit a tender;
- **Selective tendering:** Under selective tendering procedures only those suppliers that are invited by the parties may submit a tender (Articles VII:3(b) and X). To ensure optimum effective international competition, purchasing entities are required to invite tenders from the maximum number of foreign suppliers. Safeguards to ensure that the procedures and conditions for qualification of suppliers do not discriminate against suppliers of other parties are set out in Article VIII. For example, conditions for participation in the tendering process by suppliers must be limited to those that are essential to ensure the firm's capability to fulfil the contract and must not have a discriminatory effect;
- **Limited tendering:** Under limited tendering procedures the entity floating the tender contacts the potential suppliers individually (Article VII:3(c)). The GPA lays down the situations in which this method can be used, for example in the absence of tenders in response to an open tender or selective tender or in cases of collusion, when the product or service can be supplied only by a particular supplier, or for reasons of extreme urgency brought about by events unforeseeable by the entity (Article XV).

Security and general exceptions

Members may derogate from their obligations under the GPA by taking recourse to the security and general exceptions under Article III of the agreement. General exceptions under Article III:2 in this regard cover imposition of measures which are 'necessary to protect public morals, order or safety,' 'necessary to protect (...) human, animal or plant life or health,' 'necessary to protect intellectual property' or 'relating to goods or services of persons with disabilities, philanthropic institutions or prison labor.' Recourse to these exceptions is contingent on the fact that these measures do not result in 'arbitrary or unjustifiable discrimination (...) or a disguised restriction on international trade.'

29 Overview of the Agreement on Government Procurement, available at: https://www.wto.org/english/tratop_e/gproc_e/gpa_overview_e.htm (accessed 15 July 2022).

30 Id.

31 Id, note 24.

There are similarities between the text of this Article and the exception of Article XX(b) of the GATT³² which has already been subject to a number of cases brought before the WTO dispute settlement mechanism. However, whether the GATT jurisprudence can be applied to the GPA exception is unclear and no WTO Panels seem to have adjudicated this area.

Interestingly, the GPA does not contain, within the permissible list of exceptions, a broader environmental exception along the lines of Article XX(g) of the GATT, which is generally considered to leave more room for environmental considerations.³³ More importantly, GATT Article XX exceptions is not available for justifying measures taken under the GPA.³⁴ This is because government procurement under the GATT is exempted from requirements of both national treatment and MFN—GATT Article III:8 (a) expressly excludes “laws, regulations and requirements” concerning government procurement from national treatment, and case law (*EC - Commercial Vehicles*) informs us that government procurement under GATT is also excluded from the MFN obligation.³⁵ Therefore government procurement under the WTO framework is regulated only by GPA and exceptions under GATT Article XX (or GATS for that matter) are not available for derogations under the GPA. Nevertheless, the general exceptions under the GPA as they exist, do seem to leave adequate room to justify environment-related procurement practices that might be inconsistent with the GPA.

Besides the general exceptions, there is also a provision for security exceptions under Article III:1 of the GPA which states that a derogation from the GPA would be permissible if such measure is taken by a party for purposes that it considers necessary for the protection of its “essential security interests” relating to the “procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defense purposes.” As opposed to the security exceptions under Article XXI GATT and Article XIVbis of GATS, the scope of security exceptions, i.e., instances where the security exception under the GPA can be applied, do not cover those actions that are taken in time of war or other emergency in international relations, and those related to fissionable materials or the materials from which they are derived.³⁶ In the context of climate change, some commentators are trying to establish links between the environmental crisis, and the notion of “emergency in international relations” as under GATT Article XXI.³⁷

32 See for example, P. Kunzlik, *International procurement regimes and the scope for the inclusion of environmental factors in public procurement*. In: OECD (Ed.), *The Environmental Performance of Public Procurement: Issues of Policy Coherence*. Organization for Economic Cooperation and Development, 2003; and H. van Asselt, *Environmental considerations under the WTO Agreement on Government Procurement: promises and pitfalls*, Griffin's View on International and Comparative Law 6(2), 2005, pp. 78–93.

33 Article XX (g) deals with measures “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”

34 The comparison between general and security exceptions between the GATT and the GPA is only done to show that exceptions under GPA are limited in scope as opposed to the GATT.

35 Panel Report, *European Communities — Measures Affecting Trade in Commercial Vessels*, para 7.89.

36 Article XXI GATT and Article XIVbis of GATS both allow members to derogate from their obligations under limited but similar situations. These include not furnishing information which a member considers contrary to its essential security interests, or taking action for protecting its essential security interests- a. related to fissionable materials, b. supply of goods or services for the purposes of provisioning a military establishment, c. taken in time of war or other emergency in international relations. Article III:1 GPA on the other hand, states that “[n]othing in this Agreement shall be construed to prevent any Party from taking any action or not disclosing any information that it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defense purposes.” Thus, we note that security exceptions under the GPA do not cover those actions that are taken in time of war or other emergency in international relations, and those related to fissionable materials.

37 See, for instance, S. Franks, *Exploring Climate Security to Article XXI of the GATT*, Washington University Global Studies Law Review 20(2), 2021, pp. 523-533.

Challenge procedures and enforcement

In addition to recourse to the WTO's dispute settlement system under Article XX of the agreement, the revised GPA also incorporates a domestic review procedure under Article XVIII. Per Article XVIII, the GPA parties must provide a "timely, effective, transparent and non-discriminatory administrative or judicial review procedure" through which a supplier may challenge a breach of the agreement, or a failure to comply with a Party's measures implementing the agreement where the supplier does not have a right to directly challenge a breach of the GPA. Pertinent to note here is the fact that as opposed to the traditional WTO dispute settlement process, which is used by states to bring complaints against other states, the domestic review procedures under Article XVIII GPA provides locus to supplier firms for bringing disputes to the domestic forums of a GPA party. If implemented effectively, these domestic review systems can serve as a transparency and accountability mechanism within the government procurement system.³⁸ Since, the challenge procedures under the GPA ensure that parties have access to the national fora for redressal of GPA-related disputes,³⁹ these procedures are especially useful, as the traditional WTO dispute settlement system could be inadequate⁴⁰ or "much too slow for real world procurement situations."⁴¹

Further, Article XVIII:4 provides that all GPA parties "establish or designate at least one impartial administrative or judicial authority that is independent of its procuring entities to receive and review a challenge by a supplier arising in the context of a covered procurement." Where a body other than an authority referred to in Article XVIII:4 initially reviews a challenge, the GPA parties must ensure that suppliers can appeal the initial decision to an independent (of the procuring entity) and impartial administrative or judicial authority.⁴²

The domestic review procedures also provide for remedies that include rapid interim measures to preserve the supplier's opportunity to participate in the procurement, even resulting in the suspension of the procurement process, and corrective action or compensation, in cases where the authorities have determined that there has been a breach or a failure to comply with measures implementing the GPA.⁴³

However, the challenge procedures in the GPA have been criticized for being "insufficiently strong and prescriptive."⁴⁴ The full extent of the corrective powers under Article XVIII:7(b) is unclear, especially whether the review body is required to have the authority for setting

38 "It is widely acknowledged that an effective domestic review mechanism for disappointed bidders establishes an invaluable transparency, self-policing, and accountability mechanism within the government procurement system itself." See, Kamala Dawar, *Government Procurement in the WTO: A Case for Greater Integration*, 15 *World Trade Review* 645–670 (2016) (hereafter "Dawar 2016"). See also, Sue L. Arrowsmith, John Linarelli, and Don Wallace Jr, *Enforcement and Remedies, Regulating Public Procurement: National and International Perspectives*, chapter 12, Kluwer Law and Business, 2000.

39 Mavroidis (2016b), p.656.

40 See, Arwel Davies, *The Evolving GPA: Lessons of Experience and Prospects for the Future*, In Aris C. Georgopoulos, Bernard Hoekman, and Petros C. Mavroidis (eds), *The Internationalization of Government Procurement Regulation*, Oxford, 2017, p.32. (hereafter "Davies (2017)").

41 Bernard Hoekman, *International Cooperation on Public Procurement Regulation*, In Aris C. Georgopoulos, Bernard Hoekman, and Petros C. Mavroidis (eds), *The Internationalization of Government Procurement Regulation*, Oxford, 2017, p. 579.

42 Article XVIII:5, GPA.

43 Article XVIII:7, GPA.

44 See Davies (2017), p.36.

aside an already awarded contract that violates the GPA.⁴⁵ Further, the compensation for the loss or damages suffered as a result of a breach or failure is limited.⁴⁶ Moreover, numerous studies have found that practice under challenge procedures is still very scarce and it is difficult to conclude how effective their introduction has been.⁴⁷

1.3 Brazil's accession to the GPA⁴⁸

Accession to the GPA

Accession to the GPA has two main aspects. The first aspect relates to the negotiation of the acceding member's GPA coverage and market access commitments, while the second aspect serves to ensure that the member's domestic procurement legislation is consistent with the requirements of the GPA. The first part of the accession process usually must be completed within 11 months from the submission of the initial offer, while the second part, being a review of the domestic procurement regime of the acceding member usually takes longer (18 months).⁴⁹ However, these timelines are purely indicative in nature. After the terms of accession are agreed between the acceding member and the GPA parties, the Committee on Government Procurement adopts a decision inviting member to accede to the GPA and to deposit its instrument of ratification with the WTO Director-General.⁵⁰

Brazil: accession update

Brazil has been an observer of the WTO Committee on Government Procurement since 2017⁵¹ and had applied for accession to the GPA in 2020.⁵² Brazil submitted three market access proposals for consideration of the GPA parties. Its initial market access offer was submitted in February 2021, and was revised in November 2021. Brazil's final market access offer was submitted on 14 June 2022. The details of these offers were not available in public domain. There were also discussions on Brazil's market access offer within the Committee on Government Procurement—members asking questions and Brazil responding—however the details of these discussions were also not publicly available. Most recently, through a communication that was circulated by Brazil to the GPA parties on 30 May 2023, Brazil indicated its decision to withdraw the proposed market access offers.⁵³

45 Dawar (2016), p.651.

46 Article XVIII:7(b), GPA states that “[c]ompensation for the loss or damages suffered, which may be limited to either the costs for the preparation of the tender or the costs relating to the challenge, or both.”

47 See generally, Aris C. Georgopoulos, Bernard Hoekman, and Petros C. Mavroidis (eds), *The Internationalization of Government Procurement Regulation*, Oxford, 2017.

48 In the course of finalization of this report, Brazil, as is also discussed subsequently, withdrew its market access offers leaving its accession to the GPA uncertain. For the sake of completeness, the authors have retained the relevant analysis here.

49 For more detail on the accession process, see *Indicative Time-Frame for Accession Negotiations and Reporting on the Progress of Work*, Note by the Secretariat, Document No. GPA/W/109/Rev.2, dated 3 January 2001.

50 See, WTO, *Parties, observers and accessions*, available at https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm (accessed 15 July 2022).

51 *Request for Observer Status*, Communication from Brazil, Document No. GPA/W/344, dated 28 August 2017.

52 *Application for Accession of Brazil to the Agreement on Government Procurement*, Communication from Brazil, Document No. GPA/ACC/BRA/1, dated 19 May 2020.

53 *Accession of Brazil to the Agreement on Government Procurement, Withdrawal of Market Access Offers*, Document No. GPA/ACC/BRA/3/Rev.3, dated 30 May 2023. See also, Press Releases N. 220, *Brazil withdraws offer to accede to the WTO Government Procurement Agreement*, Ministry of Foreign Affairs of Brazil, available at <https://www.gov.br/mre/en/contact-us/press-area/press-releases/brazil-withdraws-offer-to-accede-to-the-wto-government-procurement-agreement> (accessed 31 March 2024)

1.4 ‘Environment-conditioned’ procurement under the GPA⁵⁴

From the discussion above, we can gauge that GPA parties have options for including environment related considerations in the following phases of the tendering procedure.

- **Technical specifications and tender documentation:** This is the first instance where GPA parties may include environment or climate related requirements or specifications in procurement. Article X (6) of the GPA permits parties to include environment related specifications in the tender documents. This provision while providing some flexibility with respect to technical specifications, should not create unnecessary obstacles to trade and where appropriate, the specifications prescribed must be ‘in terms of performance rather than design or descriptive characteristics,’ and be based on international standards, where these exist.⁵⁵ Similarly, Article X (9) allows the “evaluation criteria set out in the notice of intended procurement or tender documentation may include, among others... environmental characteristics.” Together, these provisions provide some flexibility to members for the inclusion of environment related conditionalities in the tender.
- **Selection and qualification of tenderers:** This provides another avenue for parties to set out environment related conditions in the tendering process. As discussed above, first, Article VIII of the GPA lays down the conditions that a supplier may be subjected to and in this regard, parties may formulate environmental criteria concerning the supplying firm’s ability to deliver the specified goods or services. A firm that does not fulfil the set criteria could be rejected. Secondly, parties may seek to exclude from tenders those firms that have a history of environmental violations or non-compliance, if this can be considered ‘essential to ensure the firm’s capability to fulfil the contract in question.’ For example, a case can be made that infringements of national provisions on emissions trading, such as a firm or installation under the EU Emissions Trading System exceeding its set cap, may reduce the environmental integrity of a supplying firm and could hence form grounds for exclusion.⁵⁶
- **Awarding of the contract:** The final instance where parties have flexibility to consider environmental considerations within a specified procurement contract is at the stage of the awarding of contract. The GPA provides rules for the criteria that may be adopted for the awarding of contracts (Article XV:4-7). Tendering entities have the option to choose between two criteria. The first is that of the most advantageous tender—a criterion which is based on specific evaluation criteria laid down by the public entity in earlier documents where entities may have included environment related conditions in the tender. The second is based on the price, and where price is the sole criteria for the award of contracts, it must be awarded to the lowest priced tender.

54 This section draws from Harro van Asselt, Nicolien van der Grijp & Frans Oosterhuis, *Greener public purchasing: opportunities for climate-friendly government procurement under WTO and EU rules*, *Climate Policy*, 6:2, 217-229, 2006. It has been updated to reflect the legal provisions as per the revised GPA, but the base analytical framework remains the same.

55 Article X:2, GPA.

56 van Asselt, van der Grijp and Oosterhuis (2006). Take the example of the EU Emissions Trading Scheme under which companies subject to the scheme have to reduce their carbon emissions over time. Procurement could be conditioned in a way such that companies which do not meet their caps or purchase extra carbon allowances could be excluded from the tender process.

- **Exceptions:** The provisions on general and security exceptions provide an opportunity for GPA parties to derogate from the rules under the agreement to accommodate certain measures that meet the criteria listed under Article III. The general exceptions appear broad enough to accommodate environment-related procurement practices that might be otherwise inconsistent with the GPA.
- **Challenge procedures and enforcement:** The challenge procedures under Article XVIII of the GPA are provisions through which suppliers have the right to directly seek redressal of potential violations of the agreement with an established or designated administrative or judicial fora of a GPA party. Though the challenge/domestic review procedures are available generally for a breach of the agreement, they also provide an opportunity for suppliers to bring claims against the procuring entities if the suppliers believe that tender procedures, including environmental conditions and specifications if prescribed, are not followed. Additionally, the GPA parties themselves, as discussed earlier, may also bring claims against other parties through the traditional WTO dispute settlement process on similar grounds.

2. EU-Canada Comprehensive Economic and Trade Agreement (CETA)

The EU-Canada CETA is an ambitious and modern FTA that contains several innovations in terms of obligations in areas such as financial services, and in case of public procurement, provides both EU and Canada enhanced access to each other's markets.

2.1 *Trade and environment/sustainable development provisions in CETA*

Chapters on trade and sustainable development have prominently featured in all of EU's FTAs since its FTA with South Korea that entered into provisional application in 2011 and was formally ratified in 2015. The EU-Canada CETA agreement follows this trend but features instead two separate chapters covering trade and sustainable development (chapter 22) and trade and environment (chapter 24), and another on trade and labor (chapter 23).

Article 22.1 of the trade and sustainable development chapter of the EU-Canada CETA sets out the objectives of the chapter, recognizing the interlinkages between economic growth, social development, and environmental protection. To this extent, the parties through CETA reaffirm their commitment to "promoting the development of international trade in such a way as to contribute to the objective of sustainable development," for the welfare of present and future generations.⁵⁷ This chapter highlights the commitments of parties to sustainable development by establishing horizontal commitments on a best-endeavor basis such as developing and using voluntary schemes for production of goods and services,⁵⁸ developing and using voluntary best practices of corporate social responsibility⁵⁹ and encouraging the integration of sustainability considerations in private and public consumption decisions.⁶⁰ In a sense, this chapter urges to the parties to consider environment and sustainable development in their decisions pertaining to trade measures.

⁵⁷ CETA Article 22.1 (1).

⁵⁸ CETA Article 22.3 (2)(a).

⁵⁹ CETA Article 22.3 (2)(b).

⁶⁰ CETA Article 22.3 (2)(c).

Chapter 22 also establishes a Committee on Trade and Sustainable Development that would be responsible for matters under the present chapter and chapters concerning trade and environment and trade and labor.⁶¹ This Committee is also responsible for the administration and/or creation of consultative mechanisms for discussing matters pertaining to trade and labor and trade and environment. Finally, the chapter also provides for a facilitation of a Civil Society Forum to conduct a dialogue on the sustainable development aspects of the agreement.⁶²

While chapter 22 of CETA functions as a broad umbrella chapter concerning trade and sustainable development, it also deals with the specific commitments of the parties with respect to trade and environment. This chapter respects and protects the rights of parties to regulate on environmental matters⁶³ and requires the parties to enforce their domestic environmental laws and regulations.⁶⁴ Moreover, parties reaffirm their commitment to implement multilateral environmental agreements to which they are a party,⁶⁵ and commit to upholding the levels of environmental protection and not waive or derogate from their environmental laws in order to attract or retain investment.⁶⁶

Article 24.9 under the trade and environment chapter encourages the parties to facilitate and promote trade and investment in environmental goods and services, including through addressing the reduction of non-tariff barriers related to these goods and services.⁶⁷ It also required the parties to pay special attention to facilitating the removal of obstacles to trade or investment in goods and services of particular relevance for climate change mitigation and in particular trade or investment in renewable energy goods and related services as is consistent with their international obligations.⁶⁸ The chapter also encourages sustainable trade in forest products, exchange of information on sustainable forest management and international fora that deal with the conservation and sustainable management of forests.⁶⁹

Importantly, under the trade and environment chapter, a party may request consultations with the other party for any matter arising under it⁷⁰ and if the matter is not resolved then, may request the Committee on Trade and Sustainable Development to consider the matter.⁷¹ If consultations fail, a panel of three independent experts can be convened by the parties (each party appoints one expert and the third is jointly appointed) to determine whether a party is in breach of its obligations and suggest ways to resolve the issue.⁷² Finally, any dispute that arises under the trade and environment chapter would be resolved through the mechanisms available under it and parties may have recourse to good offices, conciliation, or mediation for the resolution of the dispute.⁷³

61 CETA Article 22.4 (1).

62 CETA Article 22.5 (1).

63 CETA Article 24.3.

64 CETA Article 24.5 (3).

65 CETA Article 24.4 (2).

66 CETA Article 24.5 (1)-(2).

67 CETA Article 24.9 (1).

68 CETA Article 24.9 (2).

69 CETA Article 24.10 (2).

70 CETA Article 24.14 (1).

71 CETA Article 24.14 (4).

72 CETA Article 24.15.

73 CETA Article 24.16.

The provisions discussed above can be said to reflect a high level of ambition on trade, environment, and sustainable development. However, the effectiveness of trade and environment/sustainable development provisions in EU's FTAs has been a matter of concern. Several commentators have opined that these provisions, especially on dispute resolution and enforcement, 'lack bite'⁷⁴ and they need to be strengthened and retooled to ensure stronger compliance.⁷⁵ The European Commission in 2017 sought feedback from stakeholders on its consultative approach to trade and sustainable development and whether a shift was warranted to a sanctions-based approach,⁷⁶ similar to that of Canada and the US. The Commission published another paper in 2018 which concluded that pursuing a sanctions-based approach to enforcing EU trade and sustainable development chapters was not desirable, and instead recommended improving the existing model: to increase transparency and implement a more assertive approach to enforcement under the existing mechanisms.⁷⁷

2.2 EU's new approach to TSD chapters in trade agreements

Very recently, the European Commission unveiled its new approach to the TSD chapters.⁷⁸ This new approach seeks to:

- have a result-based dialogue with trading partners;
- enhance participation of civil society; and
- include stronger implementation and enforcement ("sanctions").

Under the new sanctions-based approach, which is incorporated in the recently concluded EU-New Zealand FTA, the TSD chapter is now subject to the compliance⁷⁹ provisions of the dispute settlement chapter. This means that a party found in violation of any of the TSD commitments will have to promptly inform how it plans to implement the recommendations of the panel, as well as comply within a certain period. The TSD chapter will also now be subject to the temporary remedies (or sanctions)⁸⁰ provisions of the dispute settlement chapter, meaning that there will be a possibility to apply, as a matter of last resort, trade sanctions for "material" breaches of the Paris Climate Agreement and the core ILO labor principles.

The reactions to EU's new approach to TSD chapters have been mixed. While the new approach in general has been appreciated to the extent that it aims to increase dialogue

74 Sam Lowe, *The EU should reconsider its approach to trade and sustainable development*, Centre for European Reform, 31 October 2019, available at: https://www.cer.eu/sites/default/files/insight_SL_31.10.19.pdf.

75 On proposals suggested for retooling, see Marco Bronckers, Giovanni Gruni, *Retooling the Sustainability Standards in EU Free Trade Agreements*, *Journal of International Economic Law*, Volume 24, Issue 1, March 2021, pages 25–51.

76 European Commission, "Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs)," available at: https://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf.

77 European Commission, "Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements," available at: https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf.

78 European Commission, "Commission unveils new TSD approach to trade agreements," available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3921. See also, European Commission, "Communication on Trade and Sustainable Development chapters in FTAs," available at: <https://circabc.europa.eu/rest/download/8c5821b3-2b18-43a1-b791-2df56b673900?ticket=>.

79 See for instance Article X.13, Draft EU-New Zealand FTA, available at: <https://circabc.europa.eu/rest/download/af42c268-16d2-4a56-a8ab-6d548e0052a3?ticket=>.

80 See for instance Article X.16 (2), Draft EU-New Zealand FTA, available at <https://circabc.europa.eu/rest/download/af42c268-16d2-4a56-a8ab-6d548e0052a3?ticket=>.

with trading partners and seeks more involvement of the civil society, other aspects such as the efficacy of the monitoring systems and sanctions-based approach has been criticized for falling short.⁸¹ With regards to its applicability, it is unlikely that the approach will be applied to previously concluded trade deals.⁸² This means that trade agreements such as the EUMTA may be exempted from the new sanctions-based approach.

2.3 Government procurement and environmental links under CETA

Public procurement of goods and services constitutes a significant market and area of economic activity for EU and Canada. Since both the EU and Canada are parties to the GPA, they already have undertaken commitments pertaining to non-discrimination, impartiality, and transparency in their government procurement activities. In the GPA, these rules apply to only a limited set of procurement activities taken by governments in the EU and Canada. CETA builds upon the GPA commitments and opens up competition to a much wider range of government procurement activities.⁸³ As an illustration, Canada in its schedule under CETA has included 98 entities under Annex 19-1 (Central Government Entities) that will be covered for the purposes of government procurement, while in the WTO, Canada's offer under the GPA is limited to only 78 entities under the corresponding annex for Central Government Entities (Annex-1).

Both the EU and Canada have committed a wide range of government entities (e.g., central, sub-central, municipal government entities, government enterprises, etc.), being subject to the disciplines on government procurement under the CETA. Additionally, as mentioned above, the EU Canada CETA, to a great extent, replicates the substantive provisions of the GPA.⁸⁴ The key provisions on non-discrimination,⁸⁵ offsets,⁸⁶ conditions for participation of suppliers,⁸⁷ tender documentation and technical specifications,⁸⁸ awarding of contract⁸⁹ are the same as those set out in the GPA. The provisions on general and security exceptions between the two agreements are also the same.

Therefore, the analysis undertaken for the GPA in the preceding sections applies *mutatis mutandis* for CETA as well, and the opportunities for the EU and Canada for regulating public procurement based on environment-related conditionalities remain the same as that under the GPA. Parties can thus impose environmental conditions in the tender documentation and technical specifications for the procurement and provide that suppliers of goods or

81 IEEP's assessment of the new EU Trade and Sustainable Development Action Plan, 2022, available at <https://ieep.eu/news/ieeps-assessment-of-the-new-eu-trade-and-sustainable-development-action-plan/>. See also, FERN, "Commission's Trade Sanctions Proposal Falls Short," 2022, available at: <https://www.fern.org/publications-insight/commissions-trade-sanctions-proposal-falls-short-2522/>.

82 The Commission's press release states that the new approach "will be applied to future negotiations and to ongoing negotiations as appropriate" (available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3921).

83 Chapter 19, Overview, Canada-EU CETA, available at: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/chapter_summary-resume_chapitre.aspx?lang=eng#a19.

84 Since both EU and Canada are parties to the GPA, the GPA invariably forms the basis for the chapter on government procurement within the EU-Canada CETA. The CETA further liberalizes government procurement between the two parties, building up on the GPA commitments and opening competition to a much wider range of government procurement activities.

85 CETA Article 19.4 (1).

86 CETA Article 19.4(6).

87 CETA Article 19.7.

88 CETA Article 19.9.

89 CETA Article 19.14.

services meet the prescribed environmental criteria to be awarded the contract. However, given the enhanced coverage of CETA, environmental conditionalities can now be expanded to include more entities, which is definitely a positive outcome.

3. Brazil/Mercosur Trade Agreements

3.1 Overview of government procurement provisions

The most recent and relevant trade agreements that Brazil has entered into with respect to government procurement are the (i) Mercosur Government Procurement Protocol (“Mercosur Protocol”);⁹⁰ (ii) Brazil-Chile FTA;⁹¹ and (iii) Brazil-Peru Economic and Trade Expansion Agreement.⁹²

The Brazil-Peru ETEA, signed in 2016, marked the first time Brazil agreed to undertake commitments on government procurement. The agreement with Chile was signed two years later, in 2018, but has yet to be ratified by Brazil and other Mercosur countries.⁹³ That is also the case for the Mercosur Protocol: despite the protocol’s approval in 2017 by Mercosur’s highest body (the ‘Common Market of the South’), as of this date, Argentina, Brazil, and Uruguay have ratified the agreement.

Like the CETA, the trade agreements surveyed in this subsection also largely reflect the content of the GPA’s substantive provisions—even as no Mercosur country is an actual party to the GPA. There are, however, some small but important differences between these agreements and the GPA that seem to guarantee among Mercosur countries increased policy space to consider environmental concerns in public tender processes.

3.2 Government procurement and environmental links under Mercosur agreements

Concerning the preamble, the Mercosur agreements set out ‘sustainable development’ as a guiding principle for the legal texts, a reference that is absent in the GPA but present in the Marrakesh Agreement establishing the WTO. In the case of the Mercosur Protocol, this principle is invoked as directly relevant to public tendering processes.

With respect to technical specifications, the relevant provisions in the Mercosur agreements are very similar to Article X of the GPA. The notable exception is Mercosur agreements’ expansion of the GPA’s reference to “environmental characteristics” as a factor that may be included among the tender qualification criteria. Instead of following the more succinct formulation of Article X, the Chile (Art. 12.9) and Peru (Art. 4.9) FTAs provide that parties are free to “prepare, adopt or apply” technical specifications that contribute to the “conservation of natural resources or to the protection of the environment.”

90 Fourth Version of MERCOSUR Public Procurement Protocol, approved by Decision CMC No. 37/17 (Brasilia, 20 December 2017).

91 Free Trade Agreement between the Federative Republic of Brazil and the Republic of Chile added as the Sixty-fourth Additional Protocol to Economic Complementation Agreement No. 35, in 2018. Available at: <https://www.in.gov.br/en/web/dou/-/decreto-n-10.949-de-26-de-janeiro-de-2022-376296307>.

92 Brazil-Peru Economic and Trade Expansion Agreement, 2016, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5402/download>.

93 The Brazil-Chile FTA was negotiated as an additional protocol to the Mercosul-Chile Economic Complementation Agreement of 2005.

The exceptions clauses in the Mercosur agreements also contain slightly modified language in relation to GPA Article III to address environmental concerns more clearly. Whereas the GPA exceptions provision contains the traditional carve-out for measures “necessary to protect human, animal or plant life or health,” the Mercosur agreements reproduce this language but adds a clarification to the effect that these “include measures relating to environmental measures.”⁹⁴

Even if one could argue that the reference to ‘environmental measures’ was not necessary—as any such measure can be said to ultimately relate to ‘human, animal or plant life or health’—the choice of the Mercosur negotiators is a likely indication of their attention to environmental concerns in the context of public procurement. This conclusion is reinforced by the other provisions addressed above. In this sense, it is interesting to note that for a subject (government procurement) in which FTAs tend not to depart significantly from the multilateral structure and text,⁹⁵ some small innovations found in the Mercosur agreements relate precisely to non-economic concerns such as the environment.⁹⁶

4. EU-Mercosur Trade Agreement (EUMTA)

4.1 Overview of trade and sustainable development provisions in EUMTA

Unlike the CETA that has separate chapters, the EUMTA contains a single chapter on trade and sustainable development that encompasses provisions pertaining to trade, environment, and labor. The parties undertake to promote sustainable development through developing trade and economic relations in a manner that promotes SDGs, respects, and supports the commitments of parties in the fields of labor, and environment, and enhances cooperation between the parties in these areas.⁹⁷ The chapter also embodies a cooperative approach based on common values and interests, recognizing the differences in levels of development of the parties.⁹⁸

The EUMTA acknowledges the parties’ right to regulate in order to protect the environment and worker’s rights and supports the existing labor and environmental standards in EU and Mercosur countries.⁹⁹ The chapter also contains obligations to prevent derogation from, dilution of, and failure to enforce environmental and labor standards between the parties for the purposes of attracting and/or retaining investment.¹⁰⁰

Additionally, the chapter places due importance on the multilateral labor and environment agreements that the EU and Mercosur countries are party to and reaffirm their commitments to promote and effectively implement these agreements.¹⁰¹ The agreement further contains commitments pertaining to climate change (effectively implementing the Paris

94 Mercosur Protocol, Article 13.2; Brazil-Chile FTA, Article 12.3.2; Brazil-Peru FTA, Article 4.3.2.

95 The provisions concerning selection and qualification of tenderers as well as awarding of contracts are virtually identical to the corresponding disciplines in the GPA, for which we refer to Section I.1.3 above.

96 Another source of innovations in the Mercosur agreements relates to small and medium-sized enterprises (“SMEs”), a topic that is of shared concern to Mercosur countries.

97 EUMTA, Trade and Sustainable Development Chapter, Article 1 (4).

98 EUMTA, Trade and Sustainable Development Chapter, Article 1 (5).

99 EUMTA, Trade and Sustainable Development Chapter, Article 2.

100 EUMTA, Trade and Sustainable Development Chapter, Article 2.

101 See generally, EUMTA, Trade and Sustainable Development Chapter, Article 4 and 5.

Agreement and the UNFCCC)¹⁰² sustainable fisheries, aquaculture and sustainable forest management, among others.¹⁰³ Interestingly, the chapter also has provisions dealing with trade and responsible management of supply chains through which the parties shall strive to promote supply chains through responsible business conduct and corporate social responsibility practices based on internationally agreed guidance.¹⁰⁴

Like how the CETA establishes a Committee on Trade and Sustainable Development, the EUMTA also establishes a Sub-Committee on Trade and Sustainable Development and a contact point to facilitate communication and coordination between the parties on matter under the trade and sustainable development chapter.¹⁰⁵

Finally with respect to dispute settlement, a party can hold consultations with the other party through a written request to discuss any issues arising under this chapter,¹⁰⁶ however, recourse to the formal chapter on dispute settlement under the FTA is precluded for matters that arise under the trade and sustainable development chapter.¹⁰⁷ If a satisfactory solution is not reached, the parties may approach the Sub-Committee for Trade and Sustainable Development that will endeavor to reach a mutually satisfactory resolution of the matter.¹⁰⁸

If the matter is still not resolved to the satisfaction of the parties, they may request for the establishment of a panel usually comprising three panelists.¹⁰⁹ The panelists are selected from a fifteen-member panel of experts that are nominated by the parties and have specialized knowledge of, or expertise in issues concerning labor, environmental or trade law, or in the resolution of disputes arising under international agreements.¹¹⁰ The selected panelists are required to interpret the provisions applicable to the matter in accordance with international law¹¹¹ and suggest in a report, the ways to resolve the dispute.¹¹² Upon issuance of the report, the parties are required to discuss appropriate implementation measures, which shall be subjected to monitoring by the Sub-Committee on Trade and Sustainable Development.¹¹³

The provisions of EUMTA on trade and sustainable development are expansive and as discussed above, cover a range of areas from sustainable supply chains to forest management and implementation of international agreements concerning labor and environment. EU's concerns with respect to the protection of the Amazon rainforest in Brazil is an important area that it seeks to address through this FTA.¹¹⁴ However, as in the case of the CETA, the effectiveness of the FTA when it comes to provisions on trade and sustainable development remains in question, since the EUMTA, in its current form,

102 EUMTA, Trade and Sustainable Development Chapter, Article 6.

103 See *generally*, EUMTA, Trade and Sustainable Development Chapter, Article 8 and 9.

104 EUMTA, Trade and Sustainable Development Chapter, Article 11.

105 EUMTA, Trade and Sustainable Development Chapter, Article 14.

106 EUMTA, Trade and Sustainable Development Chapter, Article 16 (1).

107 EUMTA, Trade and Sustainable Development Chapter, Article 15(5).

108 EUMTA, Trade and Sustainable Development Chapter, Article 16(5).

109 EUMTA, Trade and Sustainable Development Chapter, Article 17(5).

110 EUMTA, Trade and Sustainable Development Chapter, Article 17(4).

111 EUMTA, Trade and Sustainable Development Chapter, Article 17(8).

112 EUMTA, Trade and Sustainable Development Chapter, Article 17(9).

113 EUMTA, Trade and Sustainable Development Chapter, Article 17(11).

114 See for instance, Questions and Answers on the EUMTA, p.14, available at: https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157953.pdf, where the issue of impact of the FTA on the Amazon rain forest is discussed.

also adopts a consultative and monitoring-based approach as opposed to the harsher sanctions-based approach with respect to violations.

4.2 Government procurement and environmental links under EUMTA

As mentioned earlier, the Mercosur countries are not a party to the GPA and hence the EUMTA forms the basis for regulating government procurement between the Mercosur countries and the EU.¹¹⁵ Similar to CETA, the provisions of the EUMTA also largely reflect the substantive provisions of the GPA. The key provisions where environment-based conditions for procurement may be prescribed are: non-discrimination, tender documentation and technical specifications, and award of tenders, which remain broadly the same.

On technical specifications, though phrased with mild differences, both the GPA¹¹⁶ and the EUMTA¹¹⁷ contain provisions that, in legal effect, allow procuring entities to “prepare, adopt, or apply technical specifications to promote the conservation of natural resources or protect the environment.” This means that the flexibility offered under the GPA and the EUMTA on the technical specification aspect are the same.

With regards to inclusion of environmental conditionalities in the tender documentation or notice of intended procurement, Article X:9 of the GPA allows parties to “include in the evaluation criteria, [...among other factors...], environmental characteristics...” The corresponding provision in the EUMTA is Article 17:3 which has been incorporated verbatim.

Similarly, the GPA provides through Article XV:4-7, rules for the criteria that may be adopted for the awarding of contracts. Unless it is determined by a procuring entity that it is not in the public interest to award a contract, tendering entities may choose between two criteria: most advantageous tender or where price is the sole criterion, the lowest price. The provisions of EUMTA¹¹⁸ for award of contract are the same as the GPA and therefore, both the agreements equally require procuring entities to take into account “evaluation criteria specified in the notices and tender documentation,” which, as previously discussed, may include environmental conditionalities.

Some differences between the GPA and EUMTA have been observed such as the coverage of entities¹¹⁹ and limited exception to the application of offsets¹²⁰ but other relevant substantive provisions as noted above remain broadly the same. Further, while the general

115 Brazil is in the process of accession to the WTO GPA and submitted its revised offer on market access on 25 November, 2021, see “Joint Press Release by the Ministry of External Relations and the Ministry of Economy - Brazil presents offer for accession to the Agreement on Government Procurement,” available at: <https://www.gov.br/mre/en/contact-us/press-area/press-releases/joint-press-release-by-the-ministry-of-external-relations-and-the-ministry-of-economy-brazil-presents-offer-for-accession-to-the-agreement-on-government-procurement>.

116 Article X:6, GPA.

117 EUMTA, “Government Procurement”, Article 16 (6).

118 EUMTA, “Government Procurement”, Article 22:4.

119 The GPA also covers sub-central entities in its coverage while under the EUMTA, Brazil “shall initiate internal consultation proceedings with... [municipal governments] ... with a view to committing a satisfactory level of coverage at sub- central level.” These consultations have to be completed within two years. See Brazil’s offer, Appendix I, Annex II, available at: https://trade.ec.europa.eu/doclib/docs/2021/july/tradoc_159737.pdf. EUMTA’s scope is less wide than the CETA as well, which covers provincial and municipal government.

120 While the provisions on offsets under the EUMTA are the same as that of the GPA, Brazil has reserved the right to impose offsets for the first 8 years after entry into force of the agreement or 15 years for the development of scientific or technical capacity. See, Annex 7 of Brazil to the Chapter on Government Procurement, available at: https://trade.ec.europa.eu/doclib/docs/2021/july/tradoc_159737.pdf.

exceptions in the EUMTA are also broadly the same as that under the GPA, i.e. they allow measures which are ‘necessary to protect public morals, order or safety,’ ‘necessary to protect (...) human, animal or plant life or health,’ ‘necessary to protect intellectual property’ or ‘relating to goods or services of persons with disabilities, philanthropic institutions or prison labor’ provided they do not result in arbitrary or unjustifiable discrimination or a disguised restriction on international trade, they additionally clarify that measures necessary to protect human, animal, or plant life or health, also include “environmental measures.”¹²¹

With respect to the provisions on conditions of participation, while the GPA imposes a stronger obligation that a party “shall” not impose a condition of previous award of contracts to a supplier to participate in a procurement, the EUMTA uses a “may” for defining the obligation of the parties in this regard.¹²² The use of ‘may’ over ‘shall’ provides the EUMTA parties the flexibility to require a supplier to demonstrate that it has been awarded a contract previously by the procuring entity to participate in a procurement.

The opportunities for the EU and the Mercosur countries for conditioning public procurement on environment-related considerations remain largely the same as that under the GPA. Similar to our analysis with respect to CETA and the GPA, parties can impose environmental conditions in the tender documentation and technical specifications for the procurement and provide that a supplier of goods or services meet the prescribed environmental criteria to be awarded the contract, and thus restrict the access to its markets if these conditions are not met by the suppliers.

4.3 Brazil, GPA, and EUMTA: Implications for sustainable procurement

Provisions pertaining to environment in FTAs can broadly affect policies of the parties in two ways. First, agreeing to stronger disciplines on environment and sustainable development in within the FTA, can oblige parties to themselves enforce and implement environmental legislations giving effect to these commitments and at the same time reinforce commitments undertaken as part of other multilateral agreements—therefore also encouraging cross-compliance. This reflects a more *self-driven approach* where parties themselves agree to raise environmental protection standards or adopt an environment-conscious approach when framing rules for procurement for instance. Second, since the benefits accruing to parties under an FTA are conditioned on compliance with the provisions of the FTA, a party may restrict access to its market on the failure of the other party to comply. Such restriction on accessing a party’s market may provide an incentive to comply for the defaulting party. This reflects, in a sense, a *coercive approach* where denial of economic benefits due under the FTA fosters positive developments in environmental regulation. Important here is to note that how these disciplines are translated into legalese, i.e., whether the language incorporating such provisions is mandatory, or remains merely aspirational, will also play a role in their compliance by the FTA parties.

Since Brazil is not a party to the GPA, the EUMTA, when it comes into force, will serve as the basis for the government procurement regulation between EU and Brazil. In this sense and

¹²¹ Article 5(2)(c) of the Government Procurement chapter of the EUMTA therefore reads, “c. necessary to protect human, animal, or plant life or health including environmental measures[...]”

¹²² EUMTA, “Government Procurement,” Article 14 (2).

given Brazil's recent withdrawal of its GPA market access offers, the "EU-Mercosur agreement compensates for [Brazil's] absence in the GPA."¹²³ Brazil's government procurement market is largest of the Mercosur countries and European players can access this market as part of the EUMTA. Commentators have observed that agreements such as the GPA and EUMTA can serve as a driver of reform¹²⁴ by including Brazil in government procurement frameworks which include rules recognizing and allowing for sustainable procurement. Broadly, based on the environment-related provisions included in the EUMTA, there is room for the parties to "agree on further environmental considerations throughout the procurement procedure."¹²⁵

In addition, Brazil also recently passed a new public procurement law in April 2021 that replaces the previous public procurement framework and among others, introduces new environment considerations in the procurement process.¹²⁶ These include basing remuneration of the contractor on performance which takes into account environmental sustainability and quality standards and inclusion of social impacts, mitigating factors, energy consumption requirements and reverse logistics for recycling in the procurement reference sheets.¹²⁷ The new public procurement seems timely and reflective of a self-driven approach, given that Brazil has signed the draft EUMTA, and is in the process of negotiating its accession to the GPA. However, the effectiveness of sustainable procurement provisions under the EUMTA and Brazil's own domestic procurement framework remains largely dependent on political will and an effective implementation of the agreement.



123 Guinea, Oscar; Sharma, Vanika, *EU and Mercosur in the twenty first century: Taking stock of the economic and cultural ties*, ECIPE Policy Brief, No. 15/2021, European Centre for International Political Economy (ECIPE), Brussels, 2021.

124 See generally, Jan Hagemeyer, Andreas Maurer, Bettina Rudloff, Peter-Tobias Stoll, Stephen Woolcock, Andréia Costa Vieira, Kristina Mensah and Katarzyna Sidło, *Trade aspects of the EU-Mercosur Association Agreement*, Directorate General for External Policies of the European Union, available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/653650/EXPO_STU\(2021\)653650_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/653650/EXPO_STU(2021)653650_EN.pdf).

125 Marcus Maurer de Salles and Regiane Nitsch Bressan, *Chapter 7: Sustainable Development and Trade*, In *The European Union and Mercosur Agreement, Multilateralism and Regionalism in Challenging Times: Relations between Europe and Latin America and the Caribbean*, EU-LAC Foundation, 2022, p. 84.

126 The new procurement law is available at <https://www.in.gov.br/en/web/dou/-/lei-n-14.133-de-1-de-abril-de-2021-311876884> (in Portuguese).

127 For a summary of changes in Brazil's procurement law, see *Public Procurement & Government Contracts 2022*, Chambers and Partners, 2022, available at <https://practiceguides.chambers.com/practice-guides/public-procurement-government-contracts-2022/brazil>. See also, *Fighting Bid Rigging in Brazil: A Review of Federal Public Procurement*, OECD, 2021, available at <https://www.oecd.org/competition/fighting-bid-rigging-in-brazil-a-review-of-federal-public-procurement.htm>, and Leopoldo Pagotto, *New Public Procurement Law Focuses on Environmental, Social and Governance Compliance*, International Bar Association, 2021, available at <https://www.ibanet.org/june-2021-new-public-procurement-law>.

Section II: Financial Services

1. Introduction

The financial services sector is typically the subject of specific attention in the context of international trade regulation (usually together with telecommunications). This is due to its critical role in the modern economy and particular sensitivity for countries' domestic regulatory arrangements. The different institutions that make up an economy's financial system provide vital functions such as facilitating transactions (exchange of goods and services), mobilizing savings, allocating capital funds, monitoring firms and managers (so that the funds allocated are spent as envisaged), and mitigating risk in a view to ensure the integrity of the financial system.¹²⁸ In view of this, opening the financial sector to foreign participation and competition poses significant and particular challenges, which have led countries to single out this sector in their negotiations over trade liberalization.

This is exemplified by the negotiating process that led to the inclusion of financial services in the WTO rulebook. Although financial services were one of the major drivers behind countries' will to liberalize cross-border trade in services at the Uruguay Round, trading nations were not able to agree on concessions until *after* the end of that round in 1995.¹²⁹ Therefore, trade in services under the WTO is currently regulated by both the GATS and the Annex on Financial Services, finalized in 1997. In similar fashion FTAs will usually include separate chapters or side instruments dealing with financial services. This is the case for both the Mercosur legal instruments and the EUMTA.

There is scarce literature and discussion on the links between trade in financial services and environmental policy or environmental outcomes. Countries also seem to be at the early stages of identifying and exploring the relationship between these two areas in the trade context.¹³⁰ When it comes to the trade in services and the environment, the focus is usually on so-called "environmental services" (e.g., services relating to renewable energy generation and distribution; advisory services on reducing tailpipe emissions from vehicles; application of clean technologies in manufacturing;

128 See WTO, "Financial Services". Access on: June 27, 2022. Available at: https://www.wto.org/english/tratop_e/serv_e/finance_e/finance_e.htm.

129 Carlo Cantore, *The Prudential Carve-Out for Financial Services: Rationale and Practice in the GATS and Free Trade Agreements* (Cambridge: Cambridge University Press), 2018, p. 10.

130 This can be illustrated by the data compiled in the WTO's environment-related measures and notifications database (the 'Environment-related Notifications and Measures,' available at: <https://edb.wto.org/notifications/14287>). Although the system's current filters do not include a "financial services" option, a perusal of the data reveals that very few such notifications have been submitted to the WTO between 2010 and 2020, period covered by the database. See, e.g., Regulation 2015/760 notified by the European Union in 2016, which introduced a new regulatory framework for investment funds and included certain sustainability components (Doc. No. S/C/N/866, available at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006...). Members are required to make notifications to the WTO Council for Trade in Services pursuant to different provisions of the GATS. For instance, Article III:3 provides that "Each Member shall promptly and at least annually inform the Council for Trade in Services of the introduction of any new, or any changes to existing, laws, regulations or administrative guidelines which significantly affect trade in services covered by its specific commitments under this Agreement."

advisory services on land-use management and agricultural practices, among others), rather than on the environmental impact of trade in financial services.¹³¹

If there is a lack of structured discussions on the links between financial services and the environment in the trade context, this is certainly not the case in the context of finance itself. Financial institutions are facing mounting scrutiny and pressure from shareholders and regulators for their Environmental, Social, and Governance (“ESG”) commitments. Nowhere is this concern for the financial sector’s environmental accountability clearer than in the climate change field. Central banks and other financial regulators devote increasing attention to the manifold impacts that rising temperatures and a changing climate will have on the stability of the financial system,¹³² and a flurry of measures are being considered or rolled out at a very fast pace.

Featuring prominently in this regulatory agenda for the financial sector is the creation of a climate and environmental disclosure framework.¹³³ This consists of requiring financial institutions and public companies to disclose information on the risks that climate change (or other types of environmental hazards) poses to their business, so as to provide investors with reliable information that allows them to accurately price such risks.¹³⁴ Although a considerable number of countries have some sort of climate-related disclosure framework in place, these vary significantly in terms of coverage, precision, and stringency.¹³⁵ In this sense, regulations may range from requiring voluntary or open-ended reporting on businesses’ perceived risks arising from climate change¹³⁶ to rules that impose binding reporting targets within specified timeframes,¹³⁷ and precise obligations

131 Paul Brenton, Vicky Chemutai, *The Trade and Climate Change Nexus: The Urgency and Opportunities for Developing Countries* (Washington, DC: World Bank), 2021, p. 61. Available at: <https://www.worldbank.org/en/events/2021/09/29/trade-part-of-solution-to-climate-change>. It is worth noting that environmental services are *not* part of the discussions of trade in environmental goods under the Environmental Goods Agreement at the WTO, a plurilateral negotiation launched in July 2014, as the participating Members could not agree on its inclusion.

132 In 2017, eight central banks established the Network for Greening the Financial System (“NGFS”). This international group of central banks and financial regulators works to integrate the risks of climate change into their respective supervisory and regulatory regimes, recognizing that “Climate-related risks are a source of financial risk and it therefore falls squarely within the mandates of central banks and supervisors to ensure the financial system is resilient to these risks.” (See NGFS, “A call for action: Climate change as a source of financial risk,” April 2019. Available at: https://www.ngfs.net/sites/default/files/medias/documents/synthese_ngfs-2019_-_17042019_0.pdf).

133 A leading initial effort in this sense came from the Task Force on Climate-Related Financial Disclosures (“TCFD”), a creation of the G-20’s Financial Stability Board (“FSB”). The TCFD released its recommendations in June 2017, which have served as a unifying framework for developing corporate climate-related disclosure for both industry players and regulators (TCFD, “Final Report: Recommendations of the Task Force on Climate-Related Financial Disclosures,” June 2017. Available at: <https://www.fsb-tcfd.org/recommendations/>).

134 Risks to financial stability in the context of climate change disclosure frameworks are typically divided into two categories: (i) *physical risks*, referring to the possibility that the economic costs of the increasing severity and frequency of climate-change related extreme weather events, as well as more gradual changes in climate, might erode the value of financial assets and/or increase liabilities; and (ii) *transition risks*, relating to the process of adjustment towards a low-carbon economy, to the extent that shifts in policies designed to mitigate and adapt to climate change affect the value of financial assets and liabilities (see FSB, “The Implications of Climate Change for Financial Stability,” 23 November, 2020, p. 4. Available at: <https://www.fsb.org/wp-content/uploads/P231120.pdf>).

135 Organization for Economic Cooperation and Development (“OECD”), “Climate change disclosure in G20 countries: Stocktaking of corporate reporting schemes,” 2015, p. 27. Available at: <https://www.oecd.org/daf/inv/mne/Report-on-climate-change-disclosure-in-G20-countries.pdf>.

136 That is the standard applicable to US financial institutions until the entry into force of new regulation announced in March 2022 by the Securities Exchange Commission (“SEC”) (Financial Times, “Why the SEC is right to make climate risk disclosure mandatory,” March 29, 2022. Available at: <https://www.ft.com/content/b6cc17f0-c0c3-476a-bb77-1e7c1e9e946a?desktop=true&segmentId=7c8f09b9-9b61-4fbb-9430-9208a9e233c8#myft:notification:daily-email:content>).

137 Examples include France, Switzerland, and the United Kingdom (Reuters, “Swiss join France, others in laying out climate disclosure timeline,” August 18, 2021. Available at: <https://www.reuters.com/business/sustainable-business/swiss-join-france-others-laying-out-climate-disclosure-timeline-2021-08-18/>).

such as relating to the accounting of greenhouse gas (“GHG”) emissions based on specific methodological guidance.¹³⁸

Other initiatives currently being considered by experts and/or introduced by financial regulators include:

- **Instituting “climate change stress tests” for the largest financial institutions:** firms would be required to incorporate climate risk into their capital planning processes, internal controls, and governance structures to prepare for and manage a climate shock;¹³⁹
- **Integrating climate risks in credit analyses for loan and financing operations:** integration of climate-related risk factors into the borrowers’ creditworthiness analysis, influencing contractual covenants and pricing, ensuring that the “climate due diligence” is robust enough and impacting the approval process;¹⁴⁰
- **Integrating climate and environmental risks into capital minimum requirements:** regulators will usually set minimum amounts of capital that financial institutions are required to hold, based on the capital adequacy ratio of equity as a percentage of risk-weighted assets; regulators could impose “climate risk buffer” requirements and “climate risk weight” policies tying minimum capital requirements to climate risk, which could cover requirements imposed upon all financial firms in a jurisdiction (also known as ‘Pillar 1’ options) as well as capital surcharges imposed through discretionary supervisory powers upon an institution to reflect its specific risk profile (‘Pillar 2’);¹⁴¹
- **Further quantitative and qualitative restrictions on banks’ portfolios and activities:** regulators may take even more assertive action towards requiring financial institutions to reduce their level of risk, ultimately imposing limitations on certain categories of transactions or operations or, alternatively, guiding financial institutions towards adjusting their business models before the risk could materialize.¹⁴² Specific

138 The US SEC newly-proposed climate-related disclosure rule requires market agents to “disclose information about its direct GHG emissions (Scope 1) and indirect emissions from purchased electricity or other forms of energy (Scope 2),” as well as “GHG emissions from upstream and downstream activities in its value chain (Scope 3), if material or if the registrant has set a GHG emissions target or goal that includes Scope 3 emissions.” (SEC, “SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors,” March 21, 2022. Available at: <https://www.sec.gov/news/press-release/2022-46>).

139 Regulators and other bodies that begun to develop climate change-oriented stress tests include the Bank of England, the Dutch National Bank, the European Systemic Risk Board, Germany’s “BaFin,” and the NGFS (Center for American Progress, “Climate Change Threatens the Stability of the Financial System,” November 21, 2019. Available at: <https://www.americanprogress.org/article/climate-change-threatens-stability-financial-system/>).

140 World Bank blogs, “Supervisory guidance on risk management can foster a greener financial sector,” May 6, 2021. Available at: <https://blogs.worldbank.org/psd/supervisory-guidance-risk-management-can-foster-greener-financial-sector>. In this scenario, covenants related to compliance with environmental laws and/or adequate insurance in place—for floods or droughts, for example—could be considered as conditions for the disbursement of loans. Pricing could also reflect climate-related risks, with interest rates on long-term loans potentially linked to the borrowers’ achievement of pre-agreed green goals.

141 European Central Bank, Macprudential Bulletin, Issue 16, January 2022. Available at: <https://www.ecb.europa.eu/pub/financial-stability/macprudential-bulletin/html/index.en.html>. Also in this sense, a proposal from the NGO Finance Watch would require “minimum capital requirements for financial firms who finance fossil-fuel companies and projects” (Finance Watch, “Minimum capital requirements: the cornerstone to tackling climate risk,” 20 November, 2021. Available at: <https://www.finance-watch.org/press-release/minimum-capital-requirements-the-cornerstone-to-tackling-climate-risk/>).

142 NGFS, “Guide for Supervisors Integrating climate-related and environmental risks into prudential supervision,” May 2020, p. 51. Available at: https://www.ngfs.net/sites/default/files/medias/documents/ngfs_guide_for_supervisors.pdf.

measures in this direction include (i) risk mitigation tools (guarantees by third parties, reinsurance or other forms of protection); (ii) limiting or prohibiting financial institutions from carrying out certain categories of activities, such as financing customers/subscribing securities from a specific territory or economic sector/or underwriting particular types of risks; (iii) prescribing the deleveraging of certain risks; and (iv) requiring business model adjustments within a longer-term perspective.

It is relevant to consider the extent to which it will be developed countries taking the lead on many of these initiatives, which is the predominant trend so far. This situation has the potential of creating a regulatory gap between developed and developing countries, breeding tensions that may well spill over to the trade governance arena. In this sense, developed countries may advance ever more stringent environment-oriented financial regulation, which affected developing countries could denounce—and seek to challenge—as unlawful protectionism.

Another important aspect, with particular significance for the analysis developed below, is the extent to which these initiatives are being introduced on a purely unilateral basis or derive from broader efforts involving the participation of standard-setting bodies. Some of the main such bodies in the financial sector are the Basel Committee on Banking Supervision (“Basel Committee”) the International Association of Insurance Supervisors (“IAIS”), and the International Organization of Securities Commissions (“IOSCO”). Newer organizations that are active in developing standards specifically in the context of climate change-related financial regulation include the already mentioned TCFD (maintained by the G20’s FSB) and NGFS. The work developed by these standard-setting bodies complements and intersects with the rule-setting activity of domestic regulators.

The regulatory ecosystem affecting financial services is extremely complex, potentially involving numerous and diverse regulators, such as central banks, securities regulators, investor protection authorities, antitrust agencies, among others. In the case of the European Union in particular, the European System of Financial Supervision (“ESFS”) is primarily responsible for regulating the financial sector and financial services providers. The ESFS is a network centered around three European Supervisory Authorities, the European Systemic Risk Board and national supervisors. The objective of the ESFS is to ensure consistent and appropriate financial supervision throughout the EU, covering both macro- and micro-prudential supervision.¹⁴³

- The **European Systemic Risk Board** is responsible for macro-prudential supervision of the EU financial system; its main tasks are: (i) collecting and analyzing relevant information to identify systemic risks; (ii) issuing warnings where systemic risks are deemed to be significant; (iii) issuing recommendations for action in response to the risks identified; (iv) monitoring the follow-up of warnings and recommendations; and (v) cooperating and coordinating with ESAs and international fora;
- The **European Supervisory Authorities** (“ESAs”) are responsible for the micro-prudential supervision of the EU’s financial system. These authorities are the (i)

¹⁴³ ECB, “European System of Financial Supervision.” Access on: July 2, 2022. Available at: <https://www.bankingsupervision.europa.eu/about/esfs/html/index.en.html>. Macro-prudential supervision involves oversight of the financial system as a whole. Its main aim is to prevent or mitigate risks to the financial system. Micro-prudential supervision refers to the supervision of individual institutions, such as banks, insurance companies or pension funds.

European Banking Authority (EBA); (ii) European Insurance and Occupational Pensions Authority (EIOPA); and (iii) European Securities and Markets Authority (ESMA). As the European banking supervisor, the **European Central Bank** (ECB) also closely coordinates with the ESAs, especially the EBA;

- **National supervisors** are the national competent authorities in charge of banking supervision in EU countries. A full list of national supervisors per country can be found in the ECB website.¹⁴⁴

The discussion on the relationship between environmental protection, climate change mitigation/adaptation and the financial sector is very fast-paced, and trade policy is yet to catch up. In view of this, the list of issues surveyed in this introduction is very much a moving target. The present section of the report will analyze to what extent international trade rules—and in particular those contained in the EUMTA—may affect countries’ ability to enact financial services regulations that take into account environmental considerations. The following sub-sections will then examine whether the provisions pertaining to financial services in the selected trade agreements (a) are likely to constrain countries’ policy space to regulate financial services based on environmental grounds and (b) are likely to have direct or indirect impact on environmental outcomes in Brazil.

2. The WTO GATS and Annex on Financial Services

The following sub-sections will provide an overview of the most relevant WTO legal instruments regulating trade in financial services, followed by a consideration of those instruments and their provisions in the context of environment-related financial services regulation as canvassed in the previous section.

Similar to the GPA, the rules that regulate trade in services included in preferential and regional trade agreements largely track the structure and content of the GATS. For this reason, the more substantive analysis contained in these sub-sections will inform and serve as a baseline for the analyses in the following sub-sections concerning the Mercosur and EU agreements as well as the EUMTA itself.

2.1 Overview

The GATS is a multilateral trade agreement annexed to the WTO Agreement. According to its preamble, the GATS establishes a multilateral legal framework aiming at the expansion of trade in services “under conditions of transparency and progressive liberalization.” The agreement’s preamble also recognizes Members’ right to regulate the supply of services within their territories “in order to meet national policy objectives.” The GATS constitutes, therefore, a “negative integration” contract, in that it prohibits certain conducts but does not require Members to follow any particular regulatory approach.¹⁴⁵

The GATS brings under the WTO realm some 150 sectors and subsectors of the economy. The agreement also has a broad substantive scope, as it covers all measures “*affecting* trade

¹⁴⁴ Available at: <https://www.bankingsupervision.europa.eu/organisation/nationalsupervisors/html/index.en.html>. It should be noted that national central banks that are not designated as the national competent authority have supervisory competences under national law.

¹⁴⁵ In that, the GATS is similar to most of the WTO Agreement (see Mavroidis (2016b), pp. 39–40).

in services.”¹⁴⁶ In *EC – Bananas III*, the Appellate Body confirmed that the term ‘affecting’ suggests a broad scope of application for the GATS.¹⁴⁷ The GATS disciplines apply not only to measures taken by governments and public authorities but also non-governmental bodies with delegated powers,¹⁴⁸ so that trade restrictive actions taken by self-regulatory bodies are also covered by the GATS. As a general rule, services relating to the exercise of governmental authority, understood as those not supplied on a commercial basis nor in competition with other service suppliers, are excluded from the scope of the GATS.¹⁴⁹

Modes of supply and three-tiered structure

The GATS does not include a definition for what constitutes a service. Rather, it identifies four ‘modes’ through which a service can be supplied:

- **Mode 1:** cross-border supply, whereby only the service moves to the territory of the service recipient, typically through electronic means (e.g., consultancy services provided to foreign clients);
- **Mode 2:** consumption abroad, whereby the service recipient moves to the territory of the service supplier to receive the service (e.g., tourism services);
- **Mode 3:** commercial presence, whereby the service supplier establishes in the territory of the service recipient; and
- **Mode 4:** temporary movement of natural persons, whereby the service supplier temporarily moves to the territory of the service recipient to offer his or her services.

The GATS has a three-tiered structure: (i) a framework Agreement, which includes the obligations accepted by its Members; (ii) eight Annexes, which cover horizontal (e.g., the movement of natural persons) and sector-specific (e.g., financial sector) matters¹⁵⁰; and (iii) schedules of specific commitments in which each WTO Member undertakes liberalizing commitments subject to certain terms, qualifications, and conditions that Members themselves choose.¹⁵¹ A complete assessment of any measure and Member’s compliance with the GATS should include analysis on all three tiers of legal obligations applicable in a given case. As of February 2024, this framework now also includes the rules resulting from the Joint Statement Initiative on Services Domestic Regulation (“SDR JSI”) for those Members that took part in these negotiations and agreed to incorporate the new commitments in their GATS schedules.¹⁵²

146 GATS, Article I:1 (emphasis added).

147 GATS Article XXVIII contains definitions on terms like “measure” and “supply of a service” that further clarify the agreement’s coverage.

148 GATS, Article I:3.

149 GATS, Articles I:3(b) and I:3(c).

150 These should include also subsequent instruments clarifying the interpretation or application of these annexes, such as the understanding on commitments on financial services and the reference paper on telecommunication services.

151 Panagiotis Delimatsis, *GATS Basics - Revisiting Some Basic Notions and Concepts of the General Agreement on Trade in Services*, Tilburg Law School Research Paper No.01/2018, November 2017, p. 4. The concept of the three-tiered structure is from Bernard Hoekman, *Tentative First Steps: An Assessment of the Uruguay Round Agreement on Services*, World Bank Policy Research Working Paper No 1455, 1995. Available at: <https://elibrary.worldbank.org/doi/abs/10.1596/1813-9450-1455>.

152 See WTO, “New disciplines on good regulatory practice for services trade enter into force” (27 February 2024). Available at: https://www.wto.org/english/news_e/news24_e/serv_27feb24_e.htm.

General and specific rules

The obligations of WTO Members under the GATS can be divided into general obligations and specific commitments. This means that the latter obligations only apply to those service sectors in which a WTO Member has undertaken commitments in its schedule of concessions. Thus, the GATS adopts a flexible framework that combines (a) a few basic obligations that apply to all Members regardless of any commitments undertaken in their schedules and (b) certain more significant obligations that apply only to service sectors—and modes of supply—Members have decided to liberalize.¹⁵³

- **General obligations:** The most important general obligation in the GATS is the most-favored nation (MFN) treatment under Article II, which obliges Members to extend to all other WTO Members, immediately and unconditionally, any advantage granted to any like service or service supplier, be it from a WTO Member or not.¹⁵⁴ Members are allowed to list ‘one-off temporary exemptions’, that is, exemptions to certain services sectors, in accordance with the GATS Annex on Article II Exemptions. These lists of MFN exemptions are listed in a so-called ‘negative’ manner, which means that no MFN limitations other than those listed are allowed.¹⁵⁵
- **Rules subject to specific commitments:** the most important conditional obligations concern market access (Article XVI) and national treatment (Article XVII). The purpose of these obligations is to curtail Members’ efforts to restrict trade in services at either the establishment of a foreign service supplier in a Member’s territory or at the moment of supply. Another important obligation concerns the domestic regulation of services (Article VI), which requires Members to ensure the reasonable, objective, and impartial administration of all measures of general application affecting trade in services (Article VI:1).¹⁵⁶ Also, pursuant to Article XVIII, Members can inscribe in their schedules additional commitments not dealt with under Articles XVI and XVII and other provisions containing conditional obligations.

Market access and national treatment

The GATS market access obligation prohibits several types of restrictions that may hinder the supply of services in a given market. These restrictions are mostly of a quantitative nature and are prohibited even if they are non-discriminatory (i.e., apply to domestic and foreign services and service providers alike).¹⁵⁷ Article XVI thus covers restrictions on the number of service suppliers; the total value of service transactions or assets; the total number of service operations or the total quantity of service output; and the total number of natural

¹⁵³ Delimatsis (2017), p. 7.

¹⁵⁴ Other general rules include obligations to (i) publish all relevant measures of general application affecting trade in services (Article III); (ii) establish or maintain independent review mechanisms for the prompt review of, and appropriate remedies for, administrative decisions affecting trade in services (Article VI:2); and (iii) some softer obligations on monopolies and competition-restrictive business practices.

¹⁵⁵ Another important derogation from MFN is contained in Article V, which relates to preferential agreements that WTO Members can enter for the elimination of barriers to trade in services. According to Article V, these agreements shall have substantial sectoral coverage and aim at alleviating substantially all discrimination through the elimination of existing discriminatory (i.e., national treatment) barriers and the prohibition of new or more discriminatory measures.

¹⁵⁶ Other conditional rules in the GATS include obligations for Members to notify new, or changes to existing, measures that significantly affect trade in services on at least annual, basis (Article III:3) and refrain from applying restrictions on international transfers and payments for current transactions which relate to their specific commitments (Article VIII).

¹⁵⁷ In that respect, Article XVI GATS has no equivalent in the WTO’s General Agreement on Tariffs and Trade 1994 (“GATT”).

persons. Article XVI:2 also outlaws measures which prescribe specific legal forms for service suppliers (such as joint ventures) as well as measures that limit the participation of foreign capital or the total value of foreign investment in that supplier. The GATS market access obligation focuses on the quantitative *effect* of the restrictive measures listed rather than their form, so that Article XVI will apply regardless of whether a given measure is expressed in numerical terms.¹⁵⁸

Article XVI thus serves as a powerful market liberalization tool. It is important to stress that this obligation will only apply for those sectors (e.g., financial services) or sub-sectors (e.g., payment services) that Members expressly indicated in their schedule of concessions, as is the case for all other conditional obligations in the GATS.¹⁵⁹

The second most important conditional obligation in the GATS is national treatment. The obligation inscribed in Article XVII covers all measures that affect the supply of services that may discriminate against foreign services or service suppliers in relation to their domestic counterparts.¹⁶⁰ Importantly, discrimination may occur not only when a measure expressly or textually differentiates between services and service suppliers (which is known as a ‘*de jure*’ discrimination), but also when a measure produces such differentiation *in effect* (known as ‘*de facto*’ discrimination).¹⁶¹

Domestic regulation

Domestic services regulation is the object of Article VI of the GATS. The purpose of Article VI is to ensure the balance between the two overarching GATS objectives enunciated in the agreement’s preamble: the promotion of “progressive liberalization” in trade in services and the preservation of Members’ ability to regulate this area of their economy “in order to meet national policy objectives.” In this sense, Article VI seeks to provide a mechanism to identify those regulations that are *not* essential for the attainment of legitimate policy objectives.¹⁶²

Article VI includes (i) legally binding provisions of procedural nature (Article VI:1-3 and 6); (ii) a mandate for development of multilateral rules relating to licensing, qualifications and technical standards (Article VI:4); and (iii) a mechanism for the provisional application of the main principles underlying these future multilateral rules (Article VI:5).

158 Appellate Body report, *US – Gambling*, para. 232.

159 Additionally, Members may include terms, conditions, and qualifications on their market access commitments inscribed in their schedule of concessions.

160 Note that, since Article XVII covers *all* measures affecting services supply, it inevitably overlaps with Article XVI on market access (which covers select, exhaustive categories of measures).

161 See, e.g., Petros Mavroidis, *The Regulation of International Trade*, Vol. 3, Cambridge: MIT Press, 2020, p. 469. Although claims of ‘*de facto*’ discrimination comprise the overwhelming majority of discrimination cases brought before the WTO, definitions of ‘*de facto* discrimination’ are actually scarce in the case law. One notable exception is *Canada – Pharmaceutical Patents*, where the panel stated that “[*de facto* discrimination is a general term describing the legal conclusion that an ostensibly neutral measure transgresses a non-discrimination norm because its actual effect is to impose differentially disadvantageous consequences on certain parties, and because those differential effects are found to be wrong or unjustifiable” (para. 7.101). In *US – Tuna II*, Mexico brought a *de facto* discrimination claim against a U.S. regulation according to which tuna products could only be sold bearing a ‘dolphin-safe’ label in the U.S. domestic market if the tuna had not been caught using certain fishing methods that were considered harmful to dolphins (in the case, the ‘dolphin-unsafe’ methods at issue were prevalent in Mexico at the time).

162 Panagiotis Delimatsis, *Due Process, and ‘Good’ Regulation Embedded in the GATS – Disciplining Regulatory Behaviour in Services Through Article VI of the GATS*, *Journal of International Economic Law*, Volume 10, Issue 1, March 2007, p. 17.

The most significant provision of procedural nature can be found in paragraph 1 of Article VI.¹⁶³ The main objective of that paragraph is to ensure that foreign service suppliers are not impeded in their work by the arbitrary or biased administration of domestic regulations affecting trade in services in sectors where specific commitments have been made.¹⁶⁴ Article VI:4 provides an indicative list of minimum standards that future disciplines relating to technical standards and licensing and qualification requirements should meet. Until Members agree on more specific rules under paragraph 4, paragraph 5 provides for the provisional application of the main principles of paragraph 4, so that all Members are discouraged from nullifying or impairing their commitments pending the elaboration of the domestic services discipline in the GATS.¹⁶⁵

For greater clarity on the disciplines contained in Article VI:4-5, it is useful to reproduce the text of these provisions in its entirety:

“4. With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia*:

- (a) based on objective and transparent criteria, such as competence and the ability to supply the service;
- (b) not more burdensome than necessary to ensure the quality of the service;
- (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

5. (a) In sectors in which a Member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which:

- (i) does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c); and
- (ii) could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.”

(b) In determining whether a Member is in conformity with the obligation under paragraph 5(a), account shall be taken of international standards of relevant international organizations applied by that Member.”¹⁶⁶

Article VI:5 is thus triggered when the application of a Member’s measures covering licensing, qualifications, (which essentially correspond to authorization for the supply of services) or technical standards (a) is not based on objective and transparent criteria, such as competence and the ability to supply a service; is more burdensome than necessary to ensure the quality

163 The provision reads in the relevant part that “[i]n sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective, and impartial manner.”

164 Delimatsis (2007), p. 27.

165 *Id.*, p. 39.

166 Footnotes omitted.

of the service; and, in the case of licensing procedures, is in itself a restriction on the supply of the service; and (b) could not reasonably have been expected at the time the specific commitments were made. Therefore, the thrust of the legal discipline contained in Article VI:5 concerns *the manner in which* domestic licensing and qualification requirements and procedures as well as technical standards apply, and not the measures *per se*.¹⁶⁷

With respect to the relationship between Article VI (domestic services regulation) and Articles XVI (market access) and XVII (national treatment), Article VI addresses trade-distortive effects of domestic regulations which do not fall into any of the six types of market access limitations of Article XVI and which do not discriminate, *de jure or de facto*, against foreign service suppliers and thus fall outside the scope of Article XVII GATS.¹⁶⁸ In this sense, government intervention in the services industry that *quantitatively* restricts the very access or establishment of foreign services or service suppliers to a country's domestic market is subject to a different discipline than domestic regulations addressing the *quality* of a service or its supplier.¹⁶⁹

As noted above, in February 2024, an additional set of rules on domestic services regulation entered into force with respect to a group of WTO Members, as a result of the SDR JSI process.¹⁷⁰ That plurilateral process was formally launched in 2017 with a view to fulfill the negotiating mandate of Article VI:4, while participating Members—totaling 67 by the end of negotiations in December 2021—agreed to incorporate the final set of disciplines into their respective GATS schedules as “additional commitments” under Article XVIII. This means that the new rules become binding only on these Members, although they have also agreed to apply them on an MFN basis – i.e., to the benefit of the entire membership.”¹⁷¹

The rules build on the disciplines contained in GATS Article VI without departing from the purpose and general approach adopted by that provision. In this sense, the new rules set out in the SDR Reference Paper apply to measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards affecting trade in services, with a particular focus on measures closely linked to the process of authorization to supply a service. The rules revolve around three pillars: (i) transparency (e.g., relating to enquiry points, participation of stakeholders in licensing and qualification procedures, and making relevant information available); (ii) legal certainty and predictability (e.g., relating to due process in licensing and qualification procedures); and (iii) regulatory quality and facilitation (e.g., relating to the use of technical standards and good regulatory practice).

It should be noted that the conclusion of the negotiations on domestic services regulation does not automatically preempt or displace the application of GATS Articles VI:4-5, and by consequence does not reduce the usefulness of analyzing these provisions. That

167 Delimatsis (2007), p. 39.

168 Delimatsis (2017), p. 20; but see Mavroidis (2020), pp. 475-476.

169 Joost Pauwelyn, *Rien ne Va Plus? Distinguishing domestic regulation from market access in GATT and GATS*, World Trade Review, Vol.4(2), 2005, p. 136.

170 As of the writing of this paper, the certification process of the additional commitments had been completed for 52 Members, while others were still pending.

171 The final version of the rules can be found in the reference paper of the SDR JSI (document WT/L/1129) (“SDR Reference Paper”), available at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/SDR/1.pdf&Open=True>.

is because (i) not all WTO Members agreed to implement the SDR Reference Paper’s provisions, meaning that these Members are still only bound by GATS Article VI:5 in their regulation of domestic services; and (ii) not all existing FTAs are aligned with the new rules on domestic services regulation negotiated at the WTO, meaning these rules will have varying significance for the purposes of understanding the scope and interpretation of services provisions in such FTAs (which is one of this report’s main focuses).

General exceptions

Measures adopted by WTO Members that violate GATS general obligations and/or specific commitments undertaken by those Members can be justified if they meet the requirements of GATS Article XIV. This provision allows deviations based on grounds of public morals or public order, public health (including “animal or plant life or health”), consumer protection and safety. The list of objectives enshrined in this provision is exhaustive (but broadly defined). In addition to satisfy one of subparagraphs of Article XIV, a measure must also not be applied in “arbitrary or discriminatory” manner nor constitute a “disguised restriction to trade” in order to benefit from the exemption.

Article XIV incorporates a necessity test (specifically in paragraphs ‘a’ to ‘c’), through which the WTO dispute settlement arm has sought to balance economic and non-economic objectives and assess the lawfulness of particular measures presented as necessary to achieve certain ends of typically non-economic nature.¹⁷²

Financial services

The Annex on Financial Services is an integral part of the GATS and sets out the relevant discipline on trade in financial services.¹⁷³ It is comprised of only five paragraphs and adds few but important substantive rules governing services trade in this sector.

Paragraph 1 circumscribes the scope of application of the special discipline to countries’ measures “affecting” the supply of financial services, making reference to GATS Article II:1 and its four modes of supply of services. That paragraph also expressly excludes from the discipline’s purview of activities from central banks or other public entities in pursuit of monetary or exchange rate policies, as well as those relating to social security or public retirement plans.¹⁷⁴ Paragraph 5 contains a list of definitions for “financial services” that are useful for the purpose of establishing the application of the Annex.

The other most important contribution of the Annex on Financial Services is its specific rule on domestic regulation, enshrined in Paragraph 2. That provision incorporates what is known as the “prudential carve-out” and seeks to guarantee that Members are not prevented from adopting measures for prudential reasons, including for the protection of investors and other agents or to ensure the integrity and stability of the financial system:

¹⁷² Delimatsis (2017), p. 8.

¹⁷³ The complete list of instruments that discipline financial services at the multilateral level also include countries’ Schedules of Specific Commitments, the Annex on Article II Exemptions as well as the lists on Article II exemptions, the Understanding on Commitments in Financial Services, the Interim Agreement, and the Financial Services Agreement.

¹⁷⁴ Note, however, that Paragraph 1(c) creates an exception for when a Member allows financial service suppliers to conduct such activities in competition with the relevant public entities.

“2. Domestic Regulation

(a) Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member’s commitments or obligations under the Agreement.

(b) Nothing in the Agreement shall be construed to require a Member to disclose information relating to the affairs and accounts of individual customers or any confidential or proprietary information in the possession of public entities.”

Paragraph 2 provides for an escape clause in case GATS obligations and commitments do not allow domestic governments to adopt measures in pursuance of prudential policy objectives (as per the language “[n]otwithstanding any other provisions of the Agreement” at the beginning of the paragraph).¹⁷⁵ The regulatory objectives Members are free to pursue under the rubric of prudential regulation is non-exhaustive, signaled by the use of the word “including.”¹⁷⁶ Finally, the second part of the provision indicates that any measures taken pursuant to the prudential carve-out “shall not be used as a means of avoiding the Member’s commitments or obligations under the Agreement,” in a similar vein of GATS Article XIV.

2.2 *Implications for environment-related regulation of financial services*

The GATS disciplines considered above do not contain express references to the environment¹⁷⁷ or, more precisely, to WTO Members’ right to regulate trade in services taking into account environmental objectives (such as mitigating climate change, curbing deforestation, and protecting socio-environmental rights of indigenous communities). Of course, that does not mean that Members do not retain such right under the GATS. Like most WTO agreements, GATS takes a “negative integration” approach to the regulation of international trade, meaning that it does not *prescribe* regulatory content but rather *prohibits* certain conducts considered more trade-distortive or protectionist than what is necessary to pursue legitimate policy objectives.¹⁷⁸ In this sense, Members are free in principle to enact environment-related regulation affecting trade in financial services as long as they remain within the four corners of their obligations under the GATS and the Annex on Financial Services, which include MFN, national treatment, market access, rules on domestic services regulation, the prudential carve-out, among others.

This sub-section will consider how possible environment-related regulation of financial services might be framed under the substantive disciplines of the GATS. The purpose will be to assess the situations in which a country enacting environment-related financial regulation may run against the rules of the GATS—or the extent to which countries wishing to challenge such regulation would be able to do so under GATS rules.

¹⁷⁵ Cantore (2018), p. 65.

¹⁷⁶ *Id.*, p. 66.

¹⁷⁷ The sole exception is in the newly-negotiated rules on domestic services regulation laid out in the SDR Reference Paper, as will be addressed in greater detail in what follows.

¹⁷⁸ Mavroidis (2020), p. 234.

To conduct this assessment, each discipline of the GATS that might be engaged by the introduction of an environment-related financial regulation (hereinafter, a “Green Financial Measure”) will be considered in turn, including possible defenses. It is worth noting in advance that there has been no WTO dispute concerning this specific scenario to date. This is hardly surprising considering the relatively low number of GATS disputes generally, as well as how recent the concept of environment-related financial regulation even is.¹⁷⁹ Nevertheless, some WTO cases have provided useful guidance as to how certain relevant GATS provisions might be interpreted when faced with a Green Financial Measure, and these cases will be considered here where applicable.

As indicated before, the analysis that follows will then provide a baseline for the comparison of similar provisions in EU, Mercosur, and the EU-Mercosur agreements.

Non-discrimination obligations

As a preliminary observation, a Green Financial Measure would probably come under the purview of the GATS and its special discipline on financial services. The GATS and the Annex on Financial Services have a purposefully broad scope of application, covering all measures that “affect” the supply of financial services.¹⁸⁰

The GATS contains two non-discrimination obligations: the MFN rule, and the national treatment obligation. The first is a general or horizontal obligation, applying to all Members and to all services sectors irrespective of specific commitments made in schedules of concessions. The second is a conditional obligation, meaning that Members will only need to afford national treatment for measures concerning those sectors (e.g., financial service), sub-sectors (e.g., payment services), and modes of supply (e.g., Mode 1 or cross-border supply of services) expressly indicated in their schedules.¹⁸¹ As a result, a Member’s Green Financial Measure will always be subject to MFN, but will not necessarily be subject to the national treatment rule.

With respect to MFN, GATS Article II:1 provides that all Members shall accord “immediately and unconditionally to services and service suppliers of any other Member treatment no less favorable than that it accords to like services and service suppliers of any other country.” The rule can be broken down in three components: (i) the standard of treatment to foreign services and service suppliers is that it be “no less favorable” than that afforded to other countries; (ii) the treatment must be afforded on an immediate and unconditional basis; and (iii) the services and suppliers compared must be ‘like.’

Of particular importance to the analysis is the idea of ‘like’ services and service suppliers. ‘Likeness’ is a key concept in WTO law, acting as a mechanism to determine the application of WTO disciplines. ‘Likeness’ may have different a meaning and scope in different WTO agreements, and even in different provisions within the same WTO agreement. Despite different formulations and particularities, a finding of likeness will usually involve an assessment of the conditions of competition that exist between any two products/services/suppliers compared.¹⁸²

¹⁷⁹ See sub-section II.1 above.

¹⁸⁰ Annex on Financial Services, Article 1(a).

¹⁸¹ See sub-section II.2.1 above.

¹⁸² The relevance of this analysis to the GATS was confirmed by the Appellate Body in *Argentina – Financial Services*.

With respect to the GATS, the Appellate Body in *Argentina – Financial Services* decided that services and service suppliers can be presumed to be ‘like’ if a Member has operated a distinction between them that is “exclusively based on origin.”¹⁸³ In that same case, the Panel considered the extent to which service suppliers based in different regulatory environments could be considered ‘like’ service suppliers for the purposes of applying the MFN clause.¹⁸⁴ The Panel was entertaining an argument from Argentina according to which financial service providers from Panama could not be considered ‘like’ those in certain third countries in view of “important regulatory differences” in the respective countries of origin. These regulatory differences related to tax evasion and tax secrecy and countries’ cooperation with Argentinean authorities on those matters, which would form the basis for Argentina to differentiate between “cooperative” and “uncooperative” countries in its regulation of certain financial services.¹⁸⁵ Even though the Panel dismissed Argentina’s argument based on what it saw as an arbitrary or inconsistent administration of that country’s system for differentiating between “cooperative” and “uncooperative” countries—thus concluding that origin *was* indeed the controlling factor behind differential treatment—, its analysis seems to have left room for factoring in regulatory arrangements into the “likeness” analysis under the GATS.¹⁸⁶

With respect to national treatment, Article XVII:1 provides that, subject to the inclusion of specific commitments in Members’ schedule of concessions, each Member shall accord to services and service suppliers of any other Member treatment no less favorable than that it accords to its own like services and service suppliers. Differently from MFN, Article XVII:3 includes a further clarification to the effect that treatment will be considered less favorable if it “modifies the conditions of competition in favor of services or service suppliers of the [imposing] Member compared to like services or service suppliers of any other Member.”

In light of the above, it can be concluded that the enactment of a Green Financial Measure by a WTO Member may run afoul of GATS rules on non-discrimination if it (i) affords less favorable treatment (i.e., modifying the conditions of competition) to a foreign service/service provider in relation to another foreign or domestic service/service provider; or (ii) affords equal treatment to a foreign service/service provider that however is not “immediate and unconditionally” extended to another foreign service/service provider.¹⁸⁷

To illustrate how a Green Financial Measure may discriminate between services or service providers, it may be useful to consider some hypothetical situations: a measure that limits the

183 Appellate Body Report, *Argentina – Financial Services*, para. 6.52.

184 Panel Report, *Argentina – Financial Services*, para. 7.166.

185 Cantore (2018), pp. 84-87.

186 See Mavroidis (2020), p. 380. This is more so considering the Panel’s reference and reliance on other precedents in which factors of regulatory nature had played a role in the determination of likeness (Appellate Body Report, *EC – Asbestos*, para. 115; Appellate Body Report, *US – Clove Cigarettes*, paras. 116–17). The Appellate Body reversed the Panel’s finding of likeness in *Argentina – Financial Services* because it concluded that the Panel had not actually found Argentina’s distinction to have been made *exclusively* on the grounds of origin. According to the Appellate Body, in that case the Panel should have considered “various criteria relevant for an assessment of the competitive relationship of the services and service suppliers of cooperative and non-cooperative countries” (para. 6.61)—which could arguably include regulatory factors.

187 An example would be if a measure institutes a benefit or advantage that is available for both domestic and foreign-owned financial institutions, but where foreign firms are obliged to fulfil additional requirements as compared to domestic firms to be entitled to the benefit/advantage, thus possibly raising the issue that the treatment is not afforded “immediate and unconditionally.” On the other hand, it should be noted that a footnote to GATS Article XVII.1 clarifies that the national treatment obligation “shall not be construed to require any Member to compensate for any *inherent competitive disadvantages which result from the foreign character* of the relevant services or service suppliers” (emphasis added).

ability of financial institutions to offer loans to borrowers based on their ESG record (concerns cross-border supply and consumption abroad—Modes 1 or 2) or mandates increased minimum capital requirements for financial institutions exposed to specific environmental or climate risks (concerns commercial presence—Mode 3) *might* be construed as MFN or NT violations in case the distinctions operated by these measures are *based on origin* (e.g., in the examples provided, the countries where the financial institutions or the borrowers are based).

It is important to recall at this point that GATS disciplines admit both *de jure* and *de facto* violations. Therefore, even if a Green Financial Measure was on its face origin-neutral, the more specific the scope of its operative distinctions, the more they would be subject to framing as *de facto* discriminating against certain countries.¹⁸⁸

A key aspect of the analysis for both MFN and national treatment would be likeness. The discussion briefly examined above indicates that a Member could in theory seek to defend a Green Financial Measure that effectively differentiates between service suppliers from different countries by arguing that the suppliers are not ‘like’ in view of regulatory factors prevailing in the two countries (which may concern environmental-related financial regulation or strictly environmental policy).¹⁸⁹ Additionally, a Member might argue in certain instances that a service supplier’s environmental record itself affects—from a consumer’s perspective—the competitive conditions between that supplier’s services and the services rendered by other, environmentally-compliant suppliers, so that the two services could not be considered ‘like.’¹⁹⁰

In any event, it would seem that financial regulators acting under the GATS have significant room to craft regulation that does not run afoul of the non-discrimination obligations enshrined in Articles II and XVII—i.e., *origin-neutral* Green Financial Measures.



188 For instance, if a Green Financial Measure set out to address a particular environmental concern that is so specific (e.g., relating to a particular plant or animal species) that it effectively singles out a country or group of countries.

189 Of course, the analysis above does not prejudice the outcome of such an argument and does not mean that it would stand the scrutiny of a WTO Panel or Appellate Body.

190 In this sense, the traditional interpretation of “likeness” from WTO panels and the Appellate Body (specifically in the context of the GATT), which has emphasized consumer perceptions on whether products actually compete in the market, might favor a lawful differentiation between “environmentally-friendly” and “environmentally-unfriendly financial services” (see, e.g., Boris Karapinar and Kateryna Holzer, *Legal Implications of the Use of Export Taxes in Addressing Carbon Leakage: Competing Border Adjustment Measures*, 10 NZJPIL 15, 2012). In the context of the GATS, while consumer perceptions have usually not featured prominently in adjudicator’ analysis on likeness, the case law has left a window open to “policy likeness” (i.e., accounting for differences in domestic regulation in determining whether services/suppliers are “like”), which could also serve as a backdoor for environmental distinctions.

Market access commitments

GATS market access commitments comprise prohibitions on the adoption of certain types of measure listed in Article XVI, mostly of a quantitative nature. They include limitations on the number of service suppliers, total value of services, percentage of participation of foreign capital, among others. Similar to national treatment, market access commitments are conditional obligations, only applying to those sectors and modes of supply Members agreed to include in their schedules.

Market access commitments do not pose significant issues in terms of limiting Members' ability to regulate financial services based on environmental grounds, in the sense that the application of the discipline in question would be relatively straightforward. Therefore, if a Green Financial Measure amounts to a market access limitation corresponding to one of the situations listed in Article XVI, it will be prohibited under that provision. In this case, the imposing Member may still be able to justify the Green Financial Measure under the prudential carve-out and the general exceptions of the GATS, addressed below.

Domestic regulation

Article VI of the GATS disciplines Members' domestic regulation of services, also applying only to specific commitments Members included in their schedules. The aim of this provision is to establish a process allowing the identification of trade-restrictive measures that are not essential for the achievement of the domestic regulatory objectives unilaterally defined by Members.¹⁹¹ Because of Article VI, even a service measure that does not qualify as a market access restriction under Article XVI and does not discriminate between foreign and domestic services or service suppliers under Article XVII, can in theory still run afoul of the GATS. That will be the case if the measure proves inconsistent with the transparency and impartial administration requirements of paragraphs 1 to 3 or is found to restrict trade more than necessary contrary to paragraph 5.¹⁹²

Similar to market access commitments and Article XVI, the application of paragraphs 1 to 3 of Article VI to Green Financial Measures does not raise specific issues (i.e., particular issues relating to the *environmental* component of the measures we consider here). As long as such measures are administered in a "reasonable, objective, and impartial manner," and other due process requirements such as those relating to the authorization for the supply of a service are followed, there will be no inconsistency with the GATS.

Paragraph 5 of Article VI addresses measures that relate to licensing, qualifications, and technical standards requirements. Importantly, paragraph 5 contains a rule for the transitional application of the paragraph 4 disciplines pending the fulfillment of the negotiating mandate for additional rules on domestic services; as previously noted, that transitional rule remains the sole relevant obligation on domestic services regulation for the

¹⁹¹ Delimatsis (2007), p. 17.

¹⁹² Pauwelyn (2005), p. 137. Even if Article VI extends the reach of GATS disciplines in an important way, it does not necessarily add much stringency to the agreement as a whole. In other words, the existence of Article VI does not seem to make it more difficult for Members to enact GATS-consistent measures. That is because Article VI disciplines, as will be explained, are open-ended and procedurally oriented, making them difficult to enforce. As a result, there are very few complaints under GATS Article VI to date, and even fewer cases where the provision has been squarely dealt with by WTO panels or the Appellate Body.

Members that did not take part in the SDR JSI (a majority of the membership). Paragraphs 4(a) and 4(b) (which paragraph 5 refers to) require that those requirements “be based on objective and transparent criteria, such as competence and the ability to supply the service” and are “not more burdensome than necessary to ensure the quality of the service.” The provision’s emphasis on the ‘ability to supply’ and the ‘quality’ of the service might raise questions as to whether an environment-related regulation would pass this test.

For instance, measures that require financial institutions to disclose information on their exposure to climate risks or their GHG emissions, or a measure that restricts financial institutions from carrying out certain operations due to their impact on the environment, may be construed as not relating to those suppliers’ “ability to supply a service” or to the “quality of the service” supplied. On the other hand, as the Panel in *Argentina – Financial Services* concluded, the domain of domestic services regulations governed by Article VI is broad, and the narrow interpretation just advanced would seem to go against the provision’s nature and language,¹⁹³ which is also informed by the GATS preamble’s recognition of Members’ right to regulate in order to meet national policy objectives.

The additional disciplines of the SDR JSI have contributed to clarify the record on this score in the absence of a pronouncement of WTO adjudicating bodies. In the provision that is equivalent to Article VI:4(a) of the GATS, the SDR Reference Paper repeats that measures should be based on “objective and transparent criteria” but adds a footnote stating that “[s]uch criteria may include, *inter alia*, competence and the ability to supply a service, *including to do so in a manner consistent with a Member’s regulatory requirements, such as health and environmental requirements.*”¹⁹⁴

Article VI:5(b) of the GATS requires that when the WTO adjudicating bodies evaluate the conformity of a Member’s measure with its obligations under Article VI:5(a), due account be taken of any international standards of “relevant international organizations” that this Member applies. Therefore, whether a Green Financial Measure is based on standards developed by international standard-setting bodies or not may be relevant for the purposes of conformity with Article VI. Importantly, a footnote to Article VI:5(a) clarifies that “relevant international organizations” refers to international bodies whose membership is open to all WTO Members. This means that, in the context of Green Financial Measures, it may be relevant if the standards relied upon are those set by bodies such as the Basel Committee, IAIS, and IOSCO (which allow all countries to participate) or bodies like the G-20’s FSB and the NGFS (which do not allow all countries to participate).

Therefore, Article VI rules prescribing good regulatory practices for domestic services regulation seem to provide Members with considerable policy space to enact Green Financial Measures that are GATS-consistent. Considering the above, we identify Paragraph 4(a-b) (applied together with Paragraph 5(a)) as the Article VI mechanism most likely to be used for challenging a Green Financial Measure under Article VI.¹⁹⁵ The argument in this sense would be that a given environment-related regulation concerning the authorization for the supply of a service or a technical standard does not rely on “objective criteria” and

¹⁹³ Panel Report, *Argentina – Financial Services*, para. 7.838.

¹⁹⁴ SDR Reference Paper, Article 22 (emphasis added).

¹⁹⁵ It should be stressed, however, that Members have been generally hesitant to bring claims under Article VI in general.

would be “more burdensome than necessary” to the extent it did not strictly relate to the supplier’s competence and the service’s quality. However, there seems to be good grounds to defend a Green Financial Measure even in this scenario, considering Article VI’s broad scope (read in tandem with GATS’ preamble), and especially for those Members that adopt the new rules on domestic regulation of services included in the SDR Reference Paper.

Prudential carve-out

The prudential carve-out (“PCO”) contained in the Annex on Financial Services is a complex provision, the legal status and implications of which are not immediately clear from its reading.¹⁹⁶ However, this provision was litigated in one WTO case—*Argentina – Financial Services*—which provides useful guidance for understanding the PCO’s scope and effect.¹⁹⁷

We recall that the PCO seeks to guarantee Members’ right to adopt measures for prudential reasons, including for the protection of investors and other agents and to ensure the integrity and stability of the financial system.¹⁹⁸ In *Argentina – Financial Services*, the panel found that the PCO operates like an exception, akin to GATS Article XIV.¹⁹⁹ In this sense, measures that would otherwise be inconsistent with substantive disciplines in the GATS can be justified if adopted pursuant to the PCO. The panel then articulated the following legal standard for a finding of compliance with the PCO: (i) the measure must affect the supply of financial services; (ii) the measure must have been taken for prudential reasons; and (iii) the measure must have not been used as a means of avoiding the regulating Member’s commitments or obligations under the GATS.²⁰⁰

With regards to the second step of the analysis (that a measure be taken “for prudential reasons”), the panel in *Argentina – Financial Services* stated that the notion of ‘prudential reasons’ is directly linked with that of “preventive or precautionary reasons,” and emphasized the “intrinsic evolutionary nature” of prudential objectives and the measures to achieve them.²⁰¹ In this sense, the panel was of the view that the meaning and importance of prudential objectives may vary over time, depending on the evolution of the social and political preferences of a society.²⁰² Such reading of the PCO would be germane to the reading of the ‘public order’ and ‘public morals’ clauses put forward by the panel in *US – Gambling*, according to which Members are free to determine and set the level of protection that they consider appropriate, consistently with their own systems and scales of values.²⁰³ Further, while the panel in *Argentina – Financial Services* noted that the PCO does not require that measures be ‘necessary’ to achieve a particular end to be justified (unlike under different subparagraphs of GATS Article XIV and GATT Article XX), the word

196 Cantore (2018), p. 67.

197 The relevant analysis considered below is that of the panel. The panel’s analysis and decision regarding the PCO were upheld by the Appellate Body on appeal.

198 The PCO mentions the following measures that could be taken for prudential reasons: “protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system.”

199 Panel Report, *Argentina – Financial Services*, para. 7.813.

200 *Id.*, paras. 7.848–9.

201 *Id.*, paras. 7.868 and 7.873.

202 *Id.*, para. 7.870.

203 Panel Report, *US – Gambling*, para. 6.461, cited in Panel Report, *Argentina – Financial Services*, para. 7.870. Cantore (2018), p. 99.

‘for’ in the expression “measures for prudential reasons” calls for a rational relationship of cause and effect between the measure adopted and the objective pursued.²⁰⁴

In evaluating against these standards the measures Argentina adopted allegedly for prudential reasons, the panel in *Argentina – Financial Services* regarded as relevant: (i) the degree to which the measures were reflected in recommendations from regional and international bodies, including the Association of Latin American Insurance Supervisors and the IAIS;²⁰⁵ and (ii) the manner in which Argentina designed and implemented the measures, considering the existence of any inconsistency, arbitrariness, and impartiality in this regard. Ultimately, the panel found that the stated objectives of Argentina’s measures were indeed prudential and thus under the purview of the PCO; however, due to inconsistency in the way Argentina operated the distinction between “cooperative” and “non-cooperative” countries (as mentioned before),²⁰⁶ the panel concluded that the challenged measure did not have a rational relationship with the prudential objectives it was presumed to pursue.²⁰⁷

Turning to the relationship between the PCO and potential Green Financial Measures, a first question is whether environment-related financial regulation could in principle be characterized as “prudential measures” pursuant to that provision. At least two aspects previously highlighted suggest that it could. First is the fact that the list of prudential regulatory objectives enunciated in the PCO is not exhaustive, as signaled by the use of the word “including,” although the examples provided by the clause serve as important guidance. Second is the recognition by the panel in *Argentina – Financial Services* of the “intrinsic evolutionary nature” of prudential objectives, which are subject to the evolution of a society’s social and political preferences. Furthermore, measures previously discussed—such as those concerning climate-related financial disclosures, climate change stress tests, and integration of environmental and climate risks into minimum capital requirements—are in many cases being expressly conceived as efforts to protect investors and other market agents and ensure the integrity and stability of the financial system. The realization on the links between climate change—with its multifaceted nature that includes various environmental concerns—and prudential regulation dates back at least to 2015, when then Governor of the Bank of England Mark Carney authored an influential speech precisely on the subject of “climate change and financial instability.”²⁰⁸ Since then, a number of regulators and authorities have come out with similar positions.²⁰⁹

204 Panel Report, *Argentina – Financial Services*, paras. 7.884 and 7.891.

205 *Id.*, paras. 7.901 and 7.902.

206 Argentina had established two criteria for a country to be considered “cooperative”: first, a country would be considered “cooperative” if it had either signed an agreement with Argentina concerning the exchange of tax information or an international double taxation convention incorporating clauses for the effective exchange of information; second, Argentina could recognize a country as “cooperative” even if it had only started negotiations of an agreement of the kind discussed earlier. However, Panama (the complainant in the case) demonstrated that it did not exchange any kind of tax information with Argentina before or after its classification as a “cooperative” country by the latter (when Argentina unilaterally considered that negotiations to that effect between had been initiated), which led the panel to second-guess the effective contribution of the measures to the achievement of their stated aim. Additionally, the panel took note that countries in the same situation as Panama were never recognized as “cooperative” by the Argentinean government, thus implying a certain degree of arbitrariness in the manner in which that list was kept (see Panel Report, *Argentina – Financial Services*, paras. 7.916-7.943; Cantore (2018), p. 102).

207 Panel Report, *Argentina – Financial Services*, paras. 7.919 and 7.920. Since the panel concluded that the Argentinean measures failed the second prong of the legal test, the panel exercised judicial economy with respect to the third prong (i.e., whether the measure was used as a means of avoiding the imposing Member’s commitments under the GATS).

208 Mark Carney, “Breaking the tragedy on the horizon – climate change and financial stability,” Bank of England (September 29, 2015). Available at: <https://www.bis.org/review/r151009a.pdf>.

209 As previously mentioned, in a 2019 report the NGFS—a group that represents central banks and other financial regulators from a number of developed countries—stated that “[c]limate-related risks are a source of financial risk and it therefore falls squarely within the mandates of central banks and supervisors.”

A different issue, inextricably related to a case-by-case analysis, is whether a Green Financial Measure enacted for prudential reasons would be designed and administered consistently and objectively, so as to not cast doubt on the “rational connection” between that measure and the end it claims to pursue. The facts of the *Argentina* case are especially relevant here. In that case, the WTO adjudicators did not take the relationship between Argentina’s prudential goals and the measures it enacted at face value and inquired into the particular circumstances regarding the measures’ application to determine if the measures in fact contributed to those objectives. Therefore, even if the underlying regulatory purpose of a Green Financial Measure falls under the PCO, an enacting Member will have to be extremely mindful of the *manner* in which such measure is applied, and especially if it entails an unjustifiable discrimination between similarly situated countries. Finally, still considering the reasoning of the panel in *Argentina – Financial Services*, it may also be relevant if a prudential Green Financial Measure is aligned with recommendations and standards from standard-setting bodies.

General exceptions

Article XIV of the GATS contains the general exception clause of the GATS. The provision allows Members to justify measures that are inconsistent with their general obligations or specific commitments under the GATS if the requirements laid out in Article XIV are met.

Article XIV allows Members to justify GATS-inconsistent measures in five situations, namely when a measure is (i) necessary to protect public morals or to maintain public order; (ii) necessary to protect human, animal or plant life or health; (iii) necessary to secure compliance with laws or regulations not inconsistent with the provisions of the GATS, including the prevention of deceptive and fraudulent practices and the protection of privacy; (iv) aimed at ensuring the equitable or effective imposition or collection of direct taxes (specific for violations of national treatment); and (v) a result of an agreement avoiding double taxation entered into by the Member (specific for violations of MFN). In addition to having to demonstrate that its measure falls under one of these categories, a Member wishing to avail itself of GATS’ general exceptions clause must also show that the measure in question is not being applied in “arbitrary or unjustifiable” manner or as a “disguised restriction on trade in services,” pursuant to the so-called ‘*chapeau*’ of Article XIV.

In *US – Gambling*, the general exception clause of the GATS was interpreted very similarly to GATT Article XX. As in the case of the GATT, determining the necessity of a measure under the GATS therefore requires a comparison of alternative measures and a weighing and balancing process that assesses the importance of the objective at issue, the contribution of the measure to the attainment of the objective and the trade restrictiveness of that measure.²¹⁰ If the measure is found to be necessary under this analysis, then it will be considered in light of the requirements of the Article XIV *chapeau*. The analysis of the *chapeau* focuses on the application of the measure at issue and the identification of patterns that reveal unjustifiable or arbitrary discrimination.²¹¹

Article XIV provides policy space for members to enact regulation pursuing non-economic objectives—including environmental protection—, adding to the embedded flexibilities

210 Delimatsis (2017), p. 8.

211 Ibid.

in the substantive provisions analyzed above. In this sense, a Green Financial Measure that contravened GATS obligations could in principle be justified under paragraph ‘b’ (protection of human, animal or plant life or health), or even paragraph ‘c’ (protection of public morals or maintenance of public order), of Article XIV. Even though climate change-related policy—which is the subject behind most environment-related financial regulation today—is not expressly referred to in Article XIV (nor in GATT Article XX), there is little question that such policies can be viewed as a policy for the protection of life and health of people, plants, and animals.²¹²

It is worth noting that GATS Article XIV does not have an equivalent to GATT Article XX(g), which allows justification for measures that “relate to the conservation of exhaustible natural resources.”²¹³ This is relevant because the standard “relates to” constitutes a lower threshold than the “necessary” standard in GATS Article XIV(b).²¹⁴ In *US – Shrimp*, the Appellate Body found that a measure can be justified under GATT Article XX(g) if it is “reasonably related” to the objective stated in this provision, thus confirming the applicability of a more deferential standard towards the regulating WTO Member.²¹⁵

Therefore, GATS Article XIV would probably be available for Members trying to justify Green Financial Measures—including when relating to climate change—found to be inconsistent with the substantive disciplines in the GATS, even if that task is made harder in comparison with trade in goods by the absence of an equivalent to GATT Article XX(g). Like with the PCO, the availability of GATS’ general exceptions clause would also depend on the existence of any inconsistency or arbitrariness in the application or administration of the measure (e.g., measure applies differently to financial services/providers from similarly positioned countries).

Importantly, tailoring the application of a measure may be problematic for the purposes of a general exceptions clause even if it is intended to pursue seemingly non-protectionist policy objectives (not necessarily the same as those behind the measure itself). This issue arose in the *EC – Seal Products*, which concerned a ban from the European Union on the importation and sale of products derived from seals. The EU’s regulation provided for a number of exceptions to the ban, including for products derived from hunts conducted by Inuit or indigenous communities. Even though the Appellate Body upheld the import ban as GATT-consistent, it ultimately faulted that particular exception as a violation of MFN incapable of being justified under GATT Article XX, since the advantage granted by the European Union to seal products originating in Greenland (and specifically from its Inuit population) was not accorded immediately and unconditionally to the like products originating in Canada (and specifically from indigenous communities within that country).

WTO case law has developed a demanding standard for the requirements of general exception clauses. A legal analysis of the GATS general exceptions clause involves a number

212 Marceau (2016), p. 13, Holzer (2014).

213 In *US – Gasoline*, clean air was considered an exhaustible natural resource. Panel report, *US – Gasoline*, para. 6.37.

214 Commentary on the interplay between climate change-related measures and GATT rules often note that Members defending such measures under GATT Article XX would probably prefer to do so under paragraph ‘g’ rather than paragraph ‘b,’ which deals with the protection of human, animal or plant life and health (see, e.g., Petros Mavroidis; Henrik Horn (2010), p. 33).

215 Ibid.

of pitfalls a regulating Member would have to avoid to defend its measure (e.g., comparison with alternative less trade-restrictive measures, contribution to the attainment of the stated objective, arbitrariness or inconsistent administration of the measure, etc.). This reinforces the ‘last-resort’ nature of such defenses.²¹⁶

Conclusion

Although GATS rules were not particularly designed to account for environment or climate change-related regulation—and may be less equipped than more recent agreements to deal with the sort of questions these regulations pose—they do not seem to be particularly unfit for purpose or overly limiting of Members’ ability to regulate.

It is true that Members wishing to challenge a Green Financial Measure will have various tools to do so under the GATS. They will also be aided in this effort by features such as unconditional obligations (which bind even those Members that did not inscribe financial services in their schedule of concessions), the distinction between *de jure* and *de facto* discrimination, and a broad scope of application that covers all measures ‘affecting’ the supply of services. Nevertheless, the substantive obligations of the GATS contain embedded flexibilities that in principle allow Members to design GATS-compliant Green Financial Measures. If this proves impossible in any given case, regulating Members still have recourse to two exception clauses, although these contain demanding requirements.

In any event, the analysis leaves open a number of questions. Apart from certain discrete legal issues discussed before (e.g., inclusion of regulatory factors into the ‘likeness’ analysis under MFN and NT; a potential conflict between licensing/qualification requirements and technical standards based on environmental grounds and an emphasis on Article VI:4(a-b) on competence to supply a service and the quality of the service), a recurring and important issue is how a Green Financial Measure is administered and applied. As the analysis above shows, this matter is relevant for discussions under non-discrimination obligations, domestic regulation of services, the PCO, and the general exceptions clause.

In this sense, particular attention should be devoted to the inclusion of any exceptions or flexibilities in the application of a Green Financial Measure that may have the effect of benefiting certain service suppliers and countries to the detriment of others. This may be an issue even if these flexibilities are included to pursue “legitimate” policy objectives rather than protectionist goals.

It is important to stress that there is no precedent of a Green Financial Measure being challenged under the GATS. The analysis in the section, therefore, considers the scope and implications of GATS rules, as interpreted by WTO adjudicators in different contexts, and seeks to apply any lessons to Green Financial Measures as defined in the beginning of the section. It is worth briefly inquiring *why* there are no such precedents.

The question can be analyzed from two perspectives: the small number of Green Financial Measures themselves and Members’ (un)willingness to challenge such measures at the WTO. Considering the first perspective, a possible culprit could be a ‘chilling effect’ caused by GATS

²¹⁶ See, e.g., Harlan Cohen, *What Is International Trade Law For?* American Journal of International Law, 113(2), 2019.

disciplines: the prospect of litigation and scrutiny under WTO rules could be acting as a disincentive for Members to enact more Green Financial Measures.²¹⁷ Although this phenomenon—which in any case would be difficult to measure—should not be entirely disregarded, we do not believe it played a significant role. For one thing, as was discussed in the introduction to this section,²¹⁸ the linkages between financial regulation and environmental policy are new and still taking shape. The first express recognition by a financial regulator that climate change is a source of financial instability, and thus within the remit of central banks’ regulatory mandate, dates from 2015.²¹⁹ One of the areas of environment-related financial regulation where we see considerable activity is climate financial disclosure, and even there most countries are yet to introduce measures, with many still struggling with policy design issues or domestic opposition.²²⁰

Turning to the second perspective, the GATS is a notoriously ‘under litigated’ WTO agreement. This is certainly not due to a lack of services regulation or to a limited coverage of the GATS. The reality is that trade in services, as a general rule, is more complex, sensitive, and less accessible²²¹ than trade in goods, and the Members most heavily invested in this sector may not wish to resolve some of the “constructive ambiguities” in the GATS text for fear that it would turn against their own regulatory capabilities in the future.²²²

3. EU-Canada Comprehensive Economic and Trade Agreement

The EU claims that CETA constitutes the most comprehensive trade agreement the EU has ever concluded with regard to trade in services.²²³ The financial services sector, in particular, seems to have been at the center of the liberalization objectives for that agreement. An official European Commission report on the agreement praises the Canadian financial sector as one of the strongest of the world, arguing that both its size and stability offer “excellent opportunities for EU companies to grow.”²²⁴

CETA’s rules concerning trade in services and trade in financial services include a number of innovations when compared to the GATS. One of the most structural is that CETA includes

217 Although usually associated with the field of international investment law, the “chilling effect” phenomenon is also discussed sparingly in the context of trade law and trade agreements. On the ‘trade and environment’ nexus in particular, some authors have argued that the “long shadow of the WTO” plays a “disciplinary effect” on the negotiation and conclusion of Multilateral Environmental Agreements (“MEAs”), moderating the content of environmental provisions in some cases to ensure the avoidance of trade-restrictiveness (see, Robyn Eckersley, *The Big Chill: The WTO and Multilateral Environmental Agreements*, Global Environmental Politics, vol. 4 no. 2, 2004).

218 See Section II.1 above.

219 Carney (2015).

220 See, e.g., Tim Quinson, “Corporate Backlash Over SEC Climate Plan Takes Shape,” Bloomberg (July 13, 2022). Available at: <https://www.bloomberg.com/news/articles/2022-07-13/corporate-backlash-over-sec-climate-plan-takes-shape-green-insight#xj4y7vzkg>.

221 In terms of the WTO membership engaged in services trade.

222 One author has addressed this issue as follows: “The regulation of investment and trade in services is a new area, it is generally more complex than the more traditional and better-known world of trade in goods, and, probably consequently, gives rise to new and challenging issues with few, if any, precedents to rely upon. This is reflected in the GATS itself, which is arguably the most complex, opaque and convoluted WTO Agreement. While the advent of the GATS was a watershed event in terms of the regulation of international trade (including investment) in services, the reality is that as uncertainty with respect to the Agreement and its obligations crept in, negotiators saw the need to clarify several key issues but were unable to do so, and WTO Members generally showed restraint in litigating disputes – applying the adage that what goes around may well come around” (Eric H. Leroux, *Twenty years of GATS case law: Does it taste like a good wine?* In Pierre Sauvé, Martin Roy (Eds.), *Research Handbook on Trade in Services*, Edward Elgar Publishing; 2016, pp. 191-192).

223 European Commission, Directorate-General for Trade, ‘Guide to the Comprehensive Economic and Trade Agreement (CETA),’ Publications Office, 2018, p. 21. Available at: <https://data.europa.eu/doi/10.2781/328037>.

224 European Commission, ‘CETA and Services Report,’ 2020, p. 14. Available at: https://trade.ec.europa.eu/doclib/docs/2020/september/tradoc_158940.pdf.

a dedicated chapter to financial services (Chapter 13), with specific substantive disciplines instead of the more synthetic approach of the GATS' Annex on Financial Services. This is a trend that has found its way into a number of FTAs after the GATS.

3.1 Overview

Similar to the GATS, CETA ensures a broad coverage of its disciplines over the services sector. Article 13.2 provides that the financial services chapter applies to measures instituted or maintained by one party of the agreement 'relating to': (i) financial institutions of the other party; (ii) an investor of the other Party, and an investment of that investor, in a financial institution in the Party's territory and; (iii) cross-border trade in financial service.²²⁵ Despite not resorting to the same methodology and terminology as the GATS, CETA thus covers all the traditional GATS modes of supply.

Like the GATS, CETA allows its parties to take a measured approach to the liberalization of their services sector, but through an opposite approach: instead of making positive commitments with respect to the sectors/types of services they agree will be subject to certain obligations, CETA parties must make reservations (negative commitments) with respect to measures and sectors they wish to exempt from the certain disciplines.²²⁶ Importantly, CETA excludes from the scope of application of financial services disciplines subsidies or other form of government support to trade in services.²²⁷

CETA recognizes and incorporates an overlap between its rules on trade in financial services and on investment protection. In view of this, traditional disciplines of foreign investment regulation (contained in Chapter 8), such as rules regarding expropriation and compensation, make their way into Chapter 13.²²⁸ Rules on non-discrimination—MFN and national treatment—are also imported to the financial services chapter via reference to the chapter on investment (when concerning financial institutions and investment in financial institutions),²²⁹ as well as to the Chapter 9 on trade in services (when concerning cross-border financial services).²³⁰ MFN and national treatment clauses are for the most part boilerplate provisions in trade and investment agreements. Therefore, their essence and operation are largely the same across different treaties. There is, however, one relevant difference between GATS and CETA's provisions on MFN: the latter agreement does not require that the treatment afforded to a third country be afforded to a CETA party "immediately and unconditionally."

The discipline on domestic services regulation is not exclusive to Chapter 13, but rather is included in a chapter of its own (Chapter 12) that is expressly incorporated by the rules on financial services. Chapter 12 covers measures adopted or maintained by a CETA party that relate to licensing and qualification requirements and procedures affecting the supply of services.²³¹ The purpose of the CETA discipline on domestic regulation is to preclude

²²⁵ The agreement clarifies that 'cross-border trade in financial service' means the supply of a financial service (a) from the territory of a party into the territory of the other party and (b) in the territory of a party by a person of that party to a person of the other party.

²²⁶ CETA Article 13.10.

²²⁷ CETA Article 13.10.7(b).

²²⁸ CETA Article 13.2(3).

²²⁹ CETA Articles 13.3 and 13.4.

²³⁰ CETA Article 13.7.

²³¹ CETA Article 12.2.

parties' authorities from behaving arbitrarily with respect to licensing and qualification requirements/procedures.²³² Chapter 12 thus contains a series of rules on good regulatory practice and due process, elaborating on the original disciplines inscribed in GATS Article VI relating to impartiality, reasonable timeframes, and avoidance of undue burden and delay, and other aspects relevant to the authorization for the supply of a service.

Importantly, Chapter 12 from CETA does not contain language similar to paragraphs 4(a) and 4(b) of the GATS (applied provisionally through paragraph 5 of that same provision), which require that licensing/qualification requirements “be based on objective and transparent criteria, *such as competence and the ability to supply the service*” and are “not more burdensome than necessary to ensure the quality of the service.”²³³ Finally, Chapter 12 is complemented when it comes to financial services by Article 13.11 concerning “effective and transparent regulation,” which contains further rules on good regulatory practices.

CETA's chapter on trade in financial services also contains a prudential carve-out clause, which guarantees parties' right to adopt “reasonable measures for prudential reasons” (Article 13.16). Similar to the GATS' PCO, Article 13 includes a non-exhaustive list of prudential objectives, which include the protection of investors and depositors, ensuring the integrity and stability of the financial system—like in the GATS—, but also “the maintenance of the safety, soundness, integrity, or financial responsibility of a financial institution.”²³⁴ Two other differences in relation to the GATS stand out: the express authorization for CETA parties to “prohibit a particular financial service or activity for prudential reasons,”²³⁵ and the absence of a requirement that measures in pursuance of prudential objectives are not “used as a means of avoiding the Member's commitments or obligations” under the agreement (probably the inclusion of the word “reasonable” to qualify the measures under the clause's scope is meant to serve the same purpose as the ‘no means of avoiding commitments’ language from the GATS' Annex on Financial Services).²³⁶

Chapter 28 of CETA contains the agreement's rules regarding exceptions. The clause applicable to trade in financial services virtually reproduces the language of GATS Article XIV. Article 28.3(2) allows CETA parties to cure a measure's inconsistency with the agreements to the extent that such measure is deemed ‘necessary’ to ‘protect human, animal or plant life or health’ (among the other permissible policy objectives) and is not applied in arbitrary or discriminatory manner and as a disguised restriction on trade in services. As an addition to the GATS' text, however, a footnote on Article 28.3(2.b) codifies CETA parties' understanding that measures necessary to protect human, animal or plant life or health include ‘environmental measures.’

For the analysis on Chapter 22 (trade & sustainable development) and Chapter 24 (trade & environment) of CETA we refer to Section I.2.1 above.

²³² CETA Article 12.3(1).

²³³ Emphasis added.

²³⁴ CETA Article 13.6(1.b).

²³⁵ CETA Article 13.6(3).

²³⁶ Interestingly, CETA institutes a “filter mechanism” for investment disputes involving the prudential carve-out clause, whereby the agreement's Financial Services Committee and CETA Joint Committee are tasked with deciding whether and to what extent that carve-out is a valid defense to a claim in a particular case (CETA Annex 13-B; see Patrick Leblond, “CETA and financial services: what to expect? CIGI papers No. 91 (February 2016)”). No similar mechanism was introduced for trade disputes under the agreement.

3.2 *Implications for environment-related regulation of financial services*

CETA is a more modern trade agreement than the GATS, and concerns about the environment and sustainable development were very much in the agenda of the negotiators. There is no question, therefore, that CETA is more accommodating of parties' right to regulate on environmental grounds than the GATS, including with respect to trade in financial services.

With respect to the substantive disciplines, developments in relation to GATS rules seem to afford CETA parties with greater policy space to enact Green Financial Measures without running afoul of their obligations. Concerning the rules on domestic services regulation, the absence in CETA of the GATS' focus on "ability to supply a service" and "quality of a service" when it comes to licensing/qualification requirements subtracts one possible mechanism through which a country could seek to challenge a Green Financial Measure. On the prudential carve-out provision, CETA adopts a softer approach than the GATS with respect to the language controlling for any abuse of the escape clause, simply requiring that measures taken for prudential reasons be "reasonable." Additionally, the express authorization for CETA parties to "prohibit a particular financial service or activity for prudential reasons" could be seized upon by CETA parties seeking to enact a Green Financial Measure that limits or prohibits financial transactions and operations due to their environmental implications (e.g., barring insurance providers from underwriting particular types of risks relating to a firm's willful exposure to certain climate or environmental hazards).

With respect to non-discrimination, the fact that CETA's MFN obligation does not require most-favorable treatment to be afforded on an "immediate and unconditional" basis would seem to reduce the stringency of that obligation in relation to the GATS. In this sense, it could be argued that countries under CETA are allowed to institute "conditional MFN obligations" whereby they prescribe certain requirements countries must satisfy to be afforded MFN in relation to a given measure. These requirements could in principle relate to a country's compliance with environmental standards, such as adherence to an environmental agreement or covenant regarding deforestation or GHG emissions.

One of the major innovations of CETA in relation to the GATS (and the WTO Agreement as a whole) is the inclusion of specific commitments concerning the relationship between trade and environmental protection. Even though the provisions in CETA Chapters 22 and 24 themselves mostly contain hortatory language (translating 'soft' obligations relating to dialogue, cooperation, recognition, etc.), they have a direct bearing on 'harder' obligations found elsewhere in the agreement—including with respect to financial services. In this sense, the commitments regarding trade and sustainable development/environment should be relevant for the interpretation of trade in services disciplines and CETA parties' ability to factor in non-economic objectives in their regulation of financial services.

Specifically, the inclusion of 'best-endeavor' commitments on matters such as developing and using voluntary schemes for production of services,²³⁷ developing and using voluntary best practices of corporate social responsibility²³⁸ and encouraging the integration of sustainability considerations in private and public consumption decisions,²³⁹ speaks

²³⁷ CETA Article 22.3 (2)(a).

²³⁸ CETA Article 22.3 (2)(b).

²³⁹ CETA Article 22.3 (2)(c).

directly to the sort of regulatory activity most likely involved in the development of Green Financial Measures. The nature of the commitments included in Chapters 22 and 24, together with the enforcement limitations previously highlighted,²⁴⁰ make it so that they operate less like tools to sanction environment-harmful (or neutral) financial regulation than tools to reward environment-conscious regulation, by making these harder to be challenged as CETA-inconsistent.

4. Brazil/Mercosur Trade Agreements

4.1 Overview

The most recent and relevant trade agreements Brazil has entered with respect to trade in financial services are the new Annex on Financial Services to the Montevideo Protocol on Trade in Services under Mercosur (“Mercosur Services Protocol”) and the Mercosur-Colombia FTA through its Protocol on Trade in Services.

Both the Mercosur Services Protocol and the Mercosur-Colombia FTA track closely the GATS in their approach to regulation of trade in services. In this sense, both agreements adopt the GATS methodology of distinguishing between general obligations and obligations subject to specific commitments (which include market access rules and national treatment). The agreements apply to measures affecting trade in services between their parties, considering all four modes of supply of services the GATS established.²⁴¹

With respect to non-discrimination, while both Mercosur agreements have a national treatment obligation,²⁴² only the Mercosur Services Protocol contains an MFN provision.²⁴³ That provision is textually identical to GATS Article II, including the obligation to afford most favored treatment on an ‘immediate and unconditional’ basis. Likewise, the national treatment obligation contained in both the Mercosur Services Protocol and the Mercosur-Colombia FTA is a *verbatim* reproduction of GATS Article XVII.

On domestic services regulation, the Mercosur Services Protocol reproduces for the most part Article VI of the GATS, including paragraphs 4(a) and 4(b) of the GATS requiring that licensing/qualification requirements “be based on objective and transparent criteria, such as competence and the ability to supply the service” and are “not more burdensome than necessary to ensure the quality of the service.” On the other hand, the Mercosur Services Protocol does not include the GATS Article VI provision to the effect that consistency with that article’s good regulatory practices should take into account whether a measure is enacted pursuant to international standards from standard-setting bodies.²⁴⁴ The rules in the Mercosur-Colombia FTA go in the opposite direction: while they do not include an equivalent to GATS Article VI, paragraphs 4(a) and 4(b), the agreement provides that a determination on whether licensing and qualification requirement/procedures are objective and impartial should consider any relevant international standards adopted by the regulating party.²⁴⁵

²⁴⁰ See Section I.2.1 above.

²⁴¹ Article II of the Montevideo Protocol on Trade in Services; Article II of the Services Protocol of the Mercosur-Colombia FTA.

²⁴² Article V of the Montevideo Protocol on Trade in Services; Article V of the Services Protocol of the Mercosur-Colombia FTA.

²⁴³ Article III of the Montevideo Protocol on Trade in Services.

²⁴⁴ Article X of the Montevideo Protocol on Trade in Services.

²⁴⁵ Article X of the Services Protocol of the Mercosur-Colombia FTA.

Both Mercosur and Mercosur-Colombia rules regarding general exceptions are identical to GATS Article XIV.²⁴⁶ Finally, on prudential carve-out, the disciplines in the Mercosur Services Protocol and the Mercosur-Colombia FTA²⁴⁷ are similar but present important differences in relation to the GATS' Annex on Financial Services. Like in the GATS, the Mercosur PCO clauses provide that nothing in the respective agreements should be interpreted to preclude parties from adopting measures for prudential reasons, provided such measures are not used as means to avoid parties' commitments and obligations. While the list of prudential objectives in the Mercosur agreements is similar to that in the GATS, it is not preceded by the word "including" as it is in the multilateral agreement. In this sense, the Mercosur PCO clauses could be construed as prescribing an *exhaustive* set of prudential objectives, making them less comprehensive than the carve-out in the GATS Annex on Financial Services.

Finally, it is worth noting the rule in the Mercosur Services Protocol whereby parties commit to employ their best efforts to implement in their territories internationally recognized standards concerning the regulation and supervision of financial services.²⁴⁸ The provision goes on to provide a non-exhaustive list of international standard-setting bodies, which includes the G-20's FSB, the Basel Committee, IAIS, IOSCO, among others.

4.2 *Implications for environment-related regulation of financial services*

The relevant Mercosur rules on trade in financial services are very similar to those found in the GATS and its Annex on Financial Services. By the same token, the Mercosur disciplines did not introduce certain flexibilities in substantive provisions that CETA seems to have pursued with respect to trade in services.

In this sense, while CETA's MFN rule seems to allow its parties to institute 'conditional MFN' obligations that could potentially address environmental concerns, the Mercosur Services Protocol's rule on MFN provides no such option and demands that most favorable treatment be afforded on an 'immediate and unconditional' basis. With respect to domestic services regulation, the Mercosur Services Protocol repeats the GATS emphasis on a supplier's 'capacity to supply a service' and the 'quality of the service' for its characterization of objective, transparent and not overly burdensome criteria in the context of licensing and qualification requirements/procedures, a language that was not included in CETA. As noted earlier, such a wording could allow for a narrow interpretation of permissible authorization requirements for the supply of financial services that could foreclose factoring in environmental concerns.

On the other hand, both the Mercosur-Colombia FTA and the Mercosur Services Protocol take into account the role of international standards in the regulation of trade in services (for the evaluation of licensing/qualification requirements and the regulation and supervision of financial services, respectively). This shows that Brazil and the other Mercosur countries are aware of the importance of international standards in this area and in the context of trade in

246 Article XIII of the Montevideo Protocol on Trade in Services; Article XVI of the Services Protocol of the Mercosur-Colombia FTA.

247 Article 3 of the Financial Services Annex to the Montevideo Protocol; Article 4 of the Financial Services Annex to the Services Protocol of the Mercosur-Colombia FTA.

248 Article 8.4 of the Financial Services Annex to the Montevideo Protocol.

services, which is all the more relevant considering the significant activity happening today involving Green Financial Measures and standards-setting bodies.²⁴⁹

With respect to the prudential carve-out clause, the Mercosur agreements seem to stand for less policy space to regulators than CETA and even the GATS. That is because the wording of those provisions—i.e., the absence of the word ‘including’—seems to indicate an exhaustive character for the list of prudential objectives. This feature contrasts with GATS and CETA and is different from the broad manner in which this type of provision has been interpreted in the past in the WTO dispute settlement.²⁵⁰ This does not mean, however, that the PCO clauses in the Mercosur agreements are necessarily inconsistent with characterizing climate change and related environmental risks as threats to the stability of the financial system. They could still be encompassed by prudential objectives that could authorize a departure from those agreements’ substantive disciplines.

Finally, the Mercosur agreements analyzed in this section do not include specific commitments relating to environmental protection or sustainable development, direct or indirectly related to the agreements’ rules on trade in financial services. This reflects the general fact that Mercosur agreements are not attuned to non-economic concerns—such as environment and labor—in quite the same way that modern EU trade agreements are.

5. EU-Mercosur Trade Agreement

The EU-Mercosur negotiations aimed for commitments for services trade liberalization that went beyond those made under the GATS, considering that certain market access conditions for financial services and the application of the GATS’ basic principle—such as national treatment and MFN—were already included in different country-specific schedules. Given the considerable number of market access restrictions Mercosur countries—and Brazil in particular—inscribed in their GATS schedule of concessions for the financial services sector,²⁵¹ the European Commission consistently listed that sector among the main liberalization opportunities presented by the EUMTA.²⁵²

5.1 Overview²⁵³

Financial services trade is disciplined in the EUMTA under the chapter on “Trade in Services and Establishment.” From the outset, in the provision concerning the chapter’s coverage, the agreement provides that “each Party retains the right to regulate, and to introduce new regulations or to supply services to meet its policy objectives.”²⁵⁴ Similar to the agreements analyzed above, the EUMTA applies to measures ‘affecting’ trade in services

249 See Section II.1 above for the discussion on the role of standard-setting bodies in the production of environmentally-oriented financial disciplines.

250 See Section II.2.2 above.

251 European Commission, “SIA in support of association agreement (AA) negotiations between the European Union and Mercosur,” (December 2020), p. 311. Available at: https://trade.ec.europa.eu/doclib/docs/2021/march/tradoc_159509.pdf.

252 European Commission, “The EU-Mercosur Trade Agreement Explained.” Available at: <https://ec.europa.eu/trade/policy/in-focus/eu-mercrosur-association-agreement/agreement-explained/>.

253 This subsection deals exclusively with the rules of the EUMTA relevant to trade in financial services. Subsection II.5.2 briefly addresses the list of commitments of EU and Mercosur countries under the EUMTA services chapter.

254 EUMTA, “Trade in Services and Establishment,” Article 1.

and covering all modes of supply of services as defined in the GATS (cross border supply; consumption abroad; commercial presence; temporary movement of natural persons). Similar to CETA, the EUMTA excludes subsidies and government-supported loans (among other forms of state support) from the coverage of its trade in services chapter.²⁵⁵

Also in line with other agreements, the EUMTA's chapter on trade in services allows parties to decide which sectors and sub-sectors to include in Lists of Commitments that will be subject to rules on market access and national treatment, as well as to make reservations relative to specific services, suppliers, enterprises, and investors.²⁵⁶ It is important to note that national treatment is the only traditional non-discrimination discipline applicable to trade in services under the EUMTA, since the agreement does not include an MFN obligation in its services chapter. This absence is of little practical effect, however, since all WTO Members are bound to respect MFN in their regulation of trade in services for all services sectors covered by the GATS.²⁵⁷

Similar to the GATS, the EUMTA rules on domestic services regulation, contained in Article 13, apply only to the sectors for which parties made specific commitments. Article 13 thus addresses licensing and qualification requirements and procedures necessary for the supply of services, seeking to ensure that such requirements and procedures are administered by EUMTA parties in “a reasonable, objective and impartial manner.”²⁵⁸ Despite the similar nature and subject matter, the EUMTA disciplines on domestic regulation of services are more developed and extensive than in the other trade agreements considered so far.

Like CETA, the EUMTA avoids language linking the notion of objective and transparent criteria for licensing/qualification requirements to a supplier's ‘capacity to supply a service’ and the ‘quality of the service.’ On the other hand, the agreement requires that such licensing/qualification criteria be “proportionate to a public policy objective.”²⁵⁹ In addition to rules on domestic regulation and authorization to supply a service, the EUMTA also includes provisions on ‘effective and transparent regulation in the financial services sector’ in Article 37 of the chapter on “Trade in Services and Establishment.” Article 37.4 provides that parties shall “endeavor to ensure” that internationally agreed standards for the regulation and supervision of financial services are implemented and applied in their territory, listing organizations such as the FSB, the Basel Committee, IAIS, and IOSCO. This is the same provision included in the Annex on Financial Services to the Mercosur Services Protocol.

Article 36 contains the EUMTA's prudential carve-out clause. That clause is very similar to the original PCO contained in the Annex on Financial Services of the GATS, and for this same reason differs significantly from the corresponding provision in CETA. In this sense, while Article 36 creates an exception for EUMTA-inconsistent measures that (a)

255 EUMTA, “Trade in Services and Establishment,” Article 1.3.

256 EUMTA, “Trade in Services and Establishment,” Article 5.

257 We recall that the GATS MFN rule consists of a horizontal rather than commitment-specific obligation (see Section II.2.1 above). A possible effect of having an MFN obligation in the EUMTA would be to allow a EUMTA country to claim more favorable treatment afforded by another EUMTA country to its trading partner under a different FTA.

258 EUMTA, “Trade in Services and Establishment,” Article 13.3.

259 EUMTA, “Trade in Services and Establishment,” Articles 14.1(a) and 16.1.

pursue prudential objectives such as the protection of investors and depositors and ensuring the integrity and stability of the financial system and (b) are not used as a means of avoiding a party's commitments or obligations under the EUMTA, it includes no express authorization for parties to "prohibit a particular financial service or activity for prudential reasons"²⁶⁰ or an additional prudential objective consisting of maintaining the "safety, soundness, integrity, or financial responsibility of a financial institution" as can be found in the CETA.²⁶¹

Article 54 of the EUMTA's chapter on trade in services contains the general exceptions clause. It is virtually identical to other exception clauses considered so far, with one very significant difference: it allows parties to justify EUMTA-inconsistent measures "relating to the conservation of exhaustible natural resources,"²⁶² the exception inscribed in Article XX(g) of the GATT 1994.

For the analysis on the EUMTA Trade and Sustainable Development Chapter, we refer to Section I.4.1 above.

5.2 *Implications for environment-related regulation of financial services*

Based on the preceding analyses, the EUMTA rules on trade in services generally and financial services specifically seem more accommodating of countries' ability to enact Green Financial Measures than those of the GATS and the Mercosur agreements surveyed, but less so than those of CETA.

Even though the EUMTA only includes a national treatment obligation—and only for those sectors and according to any reservations as inscribed in parties' lists of concessions—the non-discrimination discipline in that agreement is complemented by the MFN provision of the GATS, of which all EUMTA countries are parties. Therefore, the conclusions reached in Section II.2.2 above with respect to the non-discrimination disciplines of the GATS are relevant in the context of the EUMTA, *mutatis mutandis*. This means that the enactment of a Green Financial Measure by a EUMTA country may run afoul of applicable non-discrimination obligations if it affords less favorable treatment (i.e., modifying the conditions of competition) to a service/service provider from another EUMTA country in relation to the treatment afforded to a domestic or foreign service/service provider.

WTO case law concepts and developments should be relevant for the interpretation of similarly-worded EUMTA provisions. By the same token, WTO case law may also inform EUMTA countries' positions with respect to their rights and obligation under this agreement. This is relevant, for instance, for issues such as the determination of 'like' services/service suppliers and whether or not it could take into account prevailing regulatory conditions (such as climate change mitigation and deforestation policies) as well as the distinction between *de jure* and *de facto* discrimination.²⁶³

²⁶⁰ CETA Article 13.6(3).

²⁶¹ CETA Article 13.6(1.b).

²⁶² The provision is complemented by the following requirement: "...if such measures are applied in conjunction with restrictions on domestic investors or on the domestic supply or consumption of services."

²⁶³ See Section II.2.2 above.

The same is true for the prudential carve-out clause in the EUMTA chapter on trade in services. WTO case law adjudicating a very similar PCO clause demonstrated that WTO Members have significant latitude to elect the prudential objective and the level of protection for the objective they wish to pursue through financial regulation. The conclusion reached previously that a Green Financial Measure could in principle fall under the GATS PCO holds true for the EUMTA, as does the warning that the requirement to show a “rational relationship of cause and effect” between the measure and the objective demands that the Green Financial Measure be applied in a consistent and objective manner (i.e., without arbitrarily differentiating between similarly placed service providers/countries).

Furthermore, WTO case law’s regard for international standards in the assessment of measures taken for prudential reasons coincides with the inclusion of Article 37.4 of the EUMTA services chapter and the call for parties to ensure the application in their territories of international standards concerning financial services regulation and supervision. The EUMTA provision in this regard is more favorable to the enactment of Green Financial Measures than Article VI:5(a) of the GATS, since it does not limit the definition of standard-setting organizations to those “international bodies whose membership is open to all WTO Members.” Rather, the EUMTA provisions expressly references the FSB (Financial Stability Board), which is an organization maintained by financial regulators of the G-20 and has been particularly active in the production of standards for environment-oriented financial regulation, most prominently in the area of corporate disclosure.²⁶⁴

Concerning domestic services regulation, as noted in relation to CETA, the absence in the EUMTA of the GATS’ focus on “ability to supply a service” and “quality of a service” when it comes to licensing/qualification requirements subtracts one possible mechanism through which a country could seek to challenge a Green Financial Measure under the agreement. On the other hand, the agreement’s requirement that such licensing/qualification criteria be “proportionate to a public policy objective”²⁶⁵ might introduce something akin to a ‘necessity’ test into the EUMTA domestic regulation discipline, creating difficulties for a regulating EUMTA country. It is also noteworthy that EUMTA does not adopt the approach of the new rules on domestic services regulation negotiated at the WTO, which included a clarification to the effect that licensing/qualification criteria may require that a country complies with regulatory requirements such as ‘relating to health or the environment.’²⁶⁶

While CETA arguably contains more flexible rules on domestic services regulation and the prudential carve-out, EUMTA’s general exceptions clause are certainly more favorable for the prospect of justifying potentially inconsistent Green Financial Measures. As noted before, the exception for ‘relating to the conservation of exhaustible natural resources’ poses a lower standard than the exception for measures ‘necessary to protect human, animal or plant life or health’ (in addition to being more easily applicable to a suite of environment-related measures). Here, again, the experience with the WTO Agreement may prove relevant. WTO adjudicating bodies have developed a considerably demanding legal test for Members to successfully avail themselves of general exceptions clauses, which includes a careful examination on *how* the challenged measure is being administered.

²⁶⁴ See Section II.1 above.

²⁶⁵ EUMTA, “Trade in Services and Establishment,” Articles 14.1(a) and 16.1.

²⁶⁶ SDR Reference Paper, Article 22.

As with CETA, the inclusion in EUMTA of a chapter on trade and sustainable development should make an important contribution towards parties' ability to enact Green Financial Measures. The analysis with respect to that agreement therefore applies to EUMTA *mutatis mutandis*. In particular, the TSD chapter of the EUMTA scores an important point by enlarging the policy space for parties to introduce EUMTA-consistent Green Financial Measures, to the extent it reaffirms parties' right to regulate in order to protect the environment²⁶⁷ and encourages the promotion of responsible business conduct and corporate social responsibility practices based on internationally agreed guidance.²⁶⁸ In this sense, even if these provisions correspond to hortatory—and therefore non-binding—language, they provide *context, object and purpose* for the interpretation of the agreement's 'hard' obligations, as per the general rule of treaty interpretation routinely employed by WTO panels and the Appellate Body.²⁶⁹

On the other hand, as noted before, the EUMTA TSD chapter does fall short of creating the sort of hard commitments and standards many argue it should have (and which are now contemplated for future EU trade agreements after the European Commission's review of TSD chapters),²⁷⁰ with stronger accountability mechanisms.

Importantly, the inclusion of the Trade and Sustainable Development Chapter in the EUMTA does not significantly alter the way in which environmental concerns play out in the regulation of services in trade agreements: in the sense of *allowing* more or less flexibility for parties to integrate environmental concerns into financial regulation, rather than *requiring* that parties do so.

Finally, concerning the *actual* environmental policy implications of the EUMTA's financial services provisions, the same observation from subsection II.2.2 is applicable here. In this sense, we stress the novelty of this discussion and of the linkages between financial regulation and environmental outcomes. Such novelty makes the exercise of considering future impacts even more speculative and prone to contingencies.²⁷¹

Considering the list of commitments of EUMTA parties under the agreement's services chapter, the major development in the inter-bloc trading relationship when compared

267 EUMTA, Trade and Sustainable Development Chapter, Article 2.

268 EUMTA, Trade and Sustainable Development Chapter, Article 11.

269 This consists of Article 31 of the Vienna Convention on the Law of Treaties, which provides in the relevant part that treaties "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty *in their context and in the light of its object and purpose*" (emphasis added), and further clarifies that 'context' includes the agreement's text, preambles, and annexes.

270 European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, COM(2022) 409 final, June 22, 2022. See also "Commission unveils new approach to trade agreements to promote green and just growth," Press Release (June 22, 2022). Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3921.

271 It should be noted that an analysis the specific services commitments of EUMTA parties does not contribute much to an assessment of the likely impacts of this aspect of the trade liberalization on forest protection and community rights on the ground. The list of commitments is structured to show sector (e.g., insurance services), mode of supply (e.g., Mode 1 or cross-border supply), commitment (e.g., "unbound," meaning that no commitments are made, or "none," meaning that no restrictions are included), and any restrictions or conditions associated with the liberalization in a given sector for a given mode of supply. Thus, there are no direct links between countries' commitments on financial services and environmental policy or outcomes. The EUMTA list of commitments for the services sector can be accessed here: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mercosur/eu-mercosur-agreement/agreement-principle_en.

to the existing GATS commitments will arguably be an increased access of EU companies to Mercosur markets, especially through establishment of EU financial institutions in Mercosur (Mode 3) and consumption of Mercosur financial services by EU companies (Mode 2).²⁷² This seems consistent with the economic analysis contained in the “Sustainability Impact Assessment” (“SIA Report”) for the EUMTA, commissioned by the European Commission in support of the agreement’s negotiation.²⁷³ The SIA Report projects no change or even a slight decrease of EU output of financial services resulting from the EUMTA’s implementation, whereas for Mercosur countries it expects small to moderate increase in output. In the case of Brazil and under an “ambitious scenario,” the SIA Report projects that financial output could increase as much as 9%.²⁷⁴



272 This makes sense when we consider that the EU services market was considerably more open than Mercosur markets due to different degrees of liberalization commitments inscribed in GATS schedules.

273 European Commission, “SIA in support of association agreement (AA) negotiations between the European Union and Mercosur,” (December 2020), p. 311. Available at: https://trade.ec.europa.eu/doclib/docs/2021/march/tradoc_159509.pdf.

274 It is not clear to what extent the study’s methodology considers the actual commitments EUMTA parties made under the services chapter of the agreement. Also, the SIA indicates that economic modeling of the agreement’s effects on trade in services is less accurate than with respect to trade in goods (SIA, Report (2020), p. 20).

From what seems to be a purely quantitative perspective, the SIA Report concludes that “no significant environmental impact” can be expected as a result of commitments concerning financial services.²⁷⁵ On the other hand, the report also notes “moderate concerns” about an expected expansion of the agricultural and animal sectors in Brazil resulting from a liberalization of trade in goods under the EUMTA, especially to the extent that such expansion is met by an “increase in forest clearing” instead of sustainable production methods (e.g., increases in productivity and the conversion of existing low-efficiency meadows and pastureland).²⁷⁶

As the SIA Report recognizes, however, the main driver for this deforestation risk would be the deterioration of environmental governance in Brazil rather than the trade liberalization itself.²⁷⁷ The same reasoning could be applied to trade in financial services: to the extent that increased trade in financial services contributes to an expansion of agricultural and extractive sectors in Brazil (through increased access to financing, lending, and insurance services), and in the absence of strong environmental governance mechanisms, these EUMTA commitments may contribute to increased deforestation. As it can be seen, however, the causal relationship between liberalization of trade in services and environmental outcomes is weaker than with respect to trade in goods.²⁷⁸

275 SIA Report (2020), p. 325.

276 SIA Report (2020), pp. 103-104.

277 In this sense, see the SIA report’s policy recommendation to the effect that Brazil “should improve anti-deforestation policies and law enforcement activities to detect illegal logging and expand monitoring along the supply chain” (SIA Report (2020), p. 104).

278 Expanding the analysis on the expected quantitative impact on the Brazilian environment of this aspect of the EUMTA trade liberalization would entail a highly complex (and probably imprecise) economic analysis, which falls outside the scope of this study.

Conclusion

Government procurement and financial services are relatively “new frontiers” in the regulation of international trade. Similarly, the links between these policy areas and environmental protection are fairly recent. But as climate change and other environmental crises become increasingly pressing and ubiquitous, these connections are bound to become more mainstream. In this context, it is crucial to understand the role played by the existing rules that govern international trade, as part of the problem or of the solution.

This report has analyzed and compared the regulatory space available to Brazil and the EU under the WTO, selected FTAs and the EUMTA with respect to government procurement and financial services regulation. The report has also highlighted the potential legal challenges that may arise if regulations are designed and implemented in violation of certain core trade law principles. While the EUMTA has generated some controversy regarding its provisions on sustainable development and environmental protection, this study finds that WTO law and the EUMTA do not impose major legal constraints on Brazil or the EU in their pursuit of sustainable procurement or ‘green financial measures.’ However, while the EUMTA provides significant flexibility for its parties to integrate environmental concerns into economic regulation, the agreement does not require –nor provides particularly strong incentives for— countries to do so.

We hope that the analyses contained in this report will help inform the debate about the liberalization of government procurement and financial services markets between the EU and Brazil and the possible implications for the environmental protection agendas in both sides of the Atlantic.



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