Ratcheting up Environmental Protection Standards: What are the Opportunities for Improving the EU-Andes Trade Agreement?

Christian Delev*

Executive summary: This legal brief considers how the EU-Andes Trade Agreement could be amended to facilitate the achievement of the Parties' nationally declared contributions (NDCs) under the Paris Agreement, as well as those set by Bolivia should it accede in the future. The paper first identifies specific environmental protection objectives which existing Parties' NDCs share in common. It proceeds to review the existing environmental protection objectives and disciplines under the agreement. The effectiveness of the agreement is evaluated based on the results of the 2009 sustainability impact assessment and 2022 evaluation report. Finally, recommendations are made on what disciplines should be adopted as part of the renewed agreement. These would include broadening the scope of environmental protection issues by establishing clearer general exceptions and carve-outs, as well as the adoption of broader obligations to cooperate on issues of environmental protection. While the expanding the scope of the dispute settlement system to address compliance with Members' Trade and Sustainable Development is recommended, this legal decision should depend on whether it is likely to affect the future accession of Bolivia to the EU-Andes Agreement.

1. Introduction

In designing its trade relationship with Latin American and Caribbean States, the European Union (EU) has emphasised the significant role of environmental protection objectives. This was underlined in 2019, when the High Representative and Commission issued a Joint Communication,[1] which stressed the significance of commitments undertaken as part of Agenda 2030 and the Paris Agreement.[2] With this policy position in mind, it remains to be seen in what ways the EU and Latin American States may build on or even renegotiate their existing trade agreements.

This legal brief considers the trade agreement concluded by the EU with Colombia, Peru, and Ecuador (EU-Andes Agreement) with the purpose to establish what viable opportunities there are for enhancing existing environmental commitments.[3] In doing so, it identifies the nationally determined contributions (NDCs) of each of the current treaty Parties and Bolivia (as a potential acceding State),[4] and examines to what extent achieving these commitments is supported by existing EU-Andes Agreement disciplines. A broad range of

* The author is a PhD researcher in international law at St Catharine's College, University of Cambridge, and Legal Research Fellow at the Centre for International Sustainable Development Law (CISDL). He is thankful for comments from Professor Javiera Caceres, Dr Markus Gehring, and Marios Tokas on earlier versions.

[1] Joint Communication to the European Parliament and the Council European Union, Latin America and the Caribbean: Joining Forces for a Common Future [2019] JOIN/2019/6 final, 1. See also the response by the Council confirming this trade policy: Council, Council Conclusions on the Joint HR/Commission Communication on EU relations with Latin America and the Caribbean, "Joining forces for a common future" [2019] 9241/19, 3–5.

[2] UNGA Res 70/1 (21 October 2015) UN Doc A/RES/70/1; Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) <unfccc.int/sites/default/files/english_paris_agreement.pdf> accessed 1 June 2022 (Paris Agreement).

[3] Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part [2012] OJ L 354/3 (EU-Andes Agreement).

[4] See, for possibility and procedures for Bolivian accession, Article 329 EU-Andes Agreement. The agreement generally operates as a framework which allowed for Andean Community States to accede on an individual basis. Originally, the agreement was provisionally applied to Peru and Colombia from 2013, with Ecuador acceding only in 2017.

proposals are then made on how the current rules may be amended so as to effectively supplement the Parties' efforts to achieve their NDCs.

The linkage between trade and environmental commitments under the agreement is likely to be impactful, especially considering the relatively high volume of trade between the EU and Colombia, Peru, and Ecuador, respectively. In 2019 the EU was the third largest goods importer to Colombia, Peru, and Ecuador, representing 14,3%, 10,6%, and 11,8% of their total imports respectively.[5] Moreover, the EU represents an important export market for Colombia, Peru, and Ecuador, being the third largest export market for Colombia (10,5% overall volume) and Peru (12,4% overall volume), and the second largest for Ecuador (13,2% overall volume).[6] Importantly, such disciplines would also be impactful on key exports from Andean Community States, given that 'agricultural products' and 'fuels and mining products' are the two largest export product categories for all three current Andean Parties to the treaty.[7]

The disciplines may be important should Bolivia choose to begin negotiations to accede to the EU-Andes Agreement. Currently, the EU is the fourth largest goods importer to Bolivia, which represent 9,4% of its overall imports.[8] Similarly, the EU is only the fourth largest export market representing 9,1% overall volume.[9] As major export sectors for Bolivia include agricultural products, oil, and natural resources, any changes to the existing disciplines affecting these sectors may influence its political decision on whether to accede to the treaty.[10]

The analysis in this brief is divided into four sections. Section 2 examines the NDCs of the current and potential Parties to the EU-Andes Agreement, focusing on their general commitments and which mitigating measures have been identified. Section 3 turns to the current agreement and provides a functional typology of the legal disciplines which are directly relevant to environmental protection. This is supplemented by a categorisation of these disciplines based on which of the Parties' mitigating measures they support. The environmental implications of the current disciplines are then analysed in Section 4. Finally, Section 5 presents certain proposals for adjusting the existing environmental disciplines in order to supplement the Parties' respective NDCs.

2. EU and Andean States' Trade-Related Nationally Declared Contributions

Within the framework of the Paris Agreement, Parties are obliged to issue NDCs under Article 4. These instruments contain specific 'contributions that [each Party] intends to achieve' through mitigation measures, which must be pursued through 'domestic mitigation measures'.[11] While the legal bindingness of NDCs under international law is unclear and, if so, whether compliance would entail an obligation of conduct or result,[12] even assuming that they

[5] WTO, 'Colombia – Trade Profile' <www.wto.org/english/res_e/statis_e/daily_update_e/trade_profiles/CO_e.pdf> accessed 1 June 2022 (Colombia Trade Profile); WTO, 'Peru – Trade Profile' <www.wto.org/english/res_e/statis_e/daily_update_e/trade_profiles/PE_e.pdf> accessed 1 June 2022 (Peru Trade Profile); WTO, 'Ecuador – Trade Profile' <www.wto.org/english/res_e/statis_e/daily_update_e/trade_profiles/EC_e.pdf> accessed 1 June 2022 (Ecuador Trade Profile).

[6] Colombia Trade Profile (n 5); Peru Trade Profile (n 5); Ecuador Trade Profile (n 5).

[7] Colombia Trade Profile (n 5); Peru Trade Profile (n 5); Ecuador Trade Profile (n 5).

[8] WTO, 'Bolivia, Plurinational State of – Trade Profile' <www.wto.org/english/res_e/statis_e/daily_update_e/trade_profiles/BO_e.pdf> accessed 1 June 2022.

[9] ibid.

[10] ibid.

[11] Article 4.2 Paris Agreement.

[12] A wide range of legal views have been developed concerning whether NDCs are legally binding unilateral declarations or relevant for the interpretation of the Paris Agreement under Article 31(3) Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations

are non-binding it would still appear that Paris Agreement Parties are required to adopt mitigation measures 'with the aim of achieving the objectives of' NDCs.[13]

All current and potential Parties to the EU-Andes Agreement have issued at least one instrument explaining their NDCs, which identify their general commitments and specific target sectors of their economies where mitigation measures are set to be adopted.

In its 2018 NDC, Colombia set its unconditional commitments (i.e., without requiring international support or assistance) to a 20% reduction of its carbon emissions by 2030 from its business-as-usual (BAU) projections, while its conditional commitments (i.e., requiring assistance from the international community) at a 30% reduction of carbon emissions relative to the BAU projection.[14] The NDC further identified six economic sectors on which Colombia intended to focus its mitigation measures: 'transport, energy, agriculture, housing, health, and trade, tourism and industry'.[15]

Peru updated its NDC in 2020, where it sets its unconditional commitments to reducing BAU-projected carbon emissions by 30%, and its conditional commitments by 40% overall.[16] The target sectors where mitigation measures are adopted have been maintained since Peru's first NDC. These are energy, industrial processes, waste, land use, land use change and forestry, and agriculture.[17]

The 2019 Ecuadorian NDC sets its unconditional commitment to carbon emission reductions from the BAU projection at around 12%, and its conditional commitment at 21%.[18] It additionally identifies its target sectors as energy, industrial processes, agriculture, land use, changes to land use and forestry, and waste management.[19]

The EU sets its target at a minimum '40% reduction in greenhouse gas emissions as compared to 1990 levels' by 2030 in its updated 2020 NDC.[20] In addition, a 2020 European Commission Communication identifies 'priority areas for reform and investments' as including 'decarbonisation of industry and renewable energy', 'sustainable mobility', and 'energy system integration including infrastructure, batteries and renewable hydrogen'.[21]

(adopted 21 March 1986, not yet in force) UN Doc A/CONF.129/15 (VCLT IO), which applies as customary international law to treaties between States and International Organizations. For the purposes of this legal brief, this question is not addressed, although NDCs are seen as being *at least* politically influential commitments made by the Parties to the Paris Agreement, which are achieved through legally binding measures.

[13] Article 4.2 Paris Agreement.

[14] UNFCCC, 'Gobierno de Colombia – Intended Nationally Determined Contribution' (12 July 2018) 2 <www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Colombia%20First/Colombia%20iNDC%20Unofficial%20translation%20Eng.pdf> accessed 1 June 2022.

[15] ibid 6.

[16] UNFCCC, 'Contribuciones Determinadas a Nivel Nacional Del Perú – Reporte de Actualización Periodo 2021-2030' (18 December 2020) 9, at fn 10 <www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Peru%20First/Reporte%20de%20Actualización%20de%20las%20NDC%20del%20Perú.pdf> accessed 1 June 2022.

[17] ibid 12.

[18] This rate is based on a calculation of the statistics provided in Image 1 on UNFCCC, 'Primera Contribución Determinada a Nivel Nacional Para el Acuerdo de París Bajo la Convención Marco de Naciones Unidas Sobre Cabio Climático' (29 March 2019) 17 <www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Ecuador%20First/Primera%20NDC%20Ecuador.pdf> accessed 1 June 2022.

[19] ibid 14.

[20] UNFCCC, 'The Update of the Nationally Determined Contribution of the European Union and its Member States' (UNFCCC, 17 December 2020) 5, at para 25 <www4.unfccc.int/sites/ndcstaging/PublishedDocuments/European%20Union%20First/EU_NDC_Submission_December%202020.pdf> accessed 1 June 2022.

[21] European Commission, 'An EU-wide Assessment of National Energy and Climate Plans: Driving Forward the Green Transition and Promoting Economic Recovery through Integrated Energy and Climate Planning' [2020] COM(2020) 564.

As a potential Party to the EU-Andres Agreement, Bolivia's 2016 NDC does not determine a specific target reduction of greenhouse gas emissions. While Bolivia in particular rejects 'the failed capitalist system', its main mitigating measures and budget allocations focus on water, energy, and forests and agriculture as economic sectors.[22] As such, apart from the unclear commitments made by Bolivia, there seems to be a high degree of convergence in NDC commitments between Andean States and the EU.

3. Environmental Protection Disciplines under the EU-Andes Agreement

In light of the environmental commitments made by each of the Parties to the EU-Andes Agreement through their NDCs, it is important to address the existing provisions and what normative functions they respectively serve. This section considers the ways in which environmental protection is incorporated within the object and purpose of the agreement and provides a general categorisation of the disciplines found in the Trade and Sustainable Development (TSD) title. Annex A of this legal brief provides a summary of which provisions may be relevant for supplementing the Parties' mitigating measures as they strive to comply with their respective NDCs.

3.1 Environmental Protection as Treaty Object and Purpose

Article 31(1) Vienna Convention on the Law of Treaties between States and International Organizations (VCLT IO) notes that the 'object and purpose' is one of the elements that must be resorted to when interpreting a treaty.[23] Resort may be had to purposive interpretation to clarify the meaning of treaty language in such a way as to promote express objectives. At the same time, it must be noted that the treaty object and purpose is only a tool for treaty interpretation and, as such, cannot be relied on to amend treaty rights and obligations.[24] For the latter to be achieved, this would require express carve-outs, exceptions, or obligations to be incorporated into the treaty which serve to ensure environmental protection objectives are achieved.

Accordingly, Article 4(j) EU-Andes Agreement stipulates that the treaty objective includes, inter alia, 'promot[ing] international trade in a way that contributes to the *objective of sustainable development*, and to work in order to integrate and reflect this objective in the Parties' trade relations'.[25] However, it should also be noted that Article 4 also refers to the 'liberalisation' of goods and services trade, as well as 'conduct of economic activities […] in conformity with the principle of free competition'.[26] Similarly, in framing the TSD title, Article 267(1) 'recall[s]' various international environmental instruments and 'the objective of sustainable development', while Article 267(2) highlights the objectives of 'cooperation' and 'strengthen[ing]' of rules on sustainable development.[27] While such provisions do not

[22] UNFCCC, 'Intended Nationally Determined Contribution from the Plurinational State of Bolivia' (5 October 2016) 1–2, 10–11 <www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Bolivia%20(Plurinational%20State%20of)%20First/INDC-Bolivia-english.pdf> accessed 1 June 2022.

[23] Article 31(1) VCLT IO states: 'A treaty 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.' Accordingly, the 'object and purpose' is one element which must be resorted to in addition to the text and context of the treaty.

[24] MC Cordonier-Segger, *Crafting Trade and Investment Accords for Sustainable Development: Athena's Treaties* (OUP 2021) 176–180.

[25] Article 4(j) EU-Andes Agreement.

[26] See, in particular, Article 4, paragraphs (a), (b), (c) and (h).

[27] Article 267(2).

expressly clarify the relationship between trade liberalisation and sustainable development objectives, a closer look at the broader treaty obligations – particularly the right to regulate and general exception provisions – suggests that the latter are conditionally superior.

3.2 Typology of Legal Disciplines

The TSD title appears to serve four essential functions with respect to environmental protection. These are to i) incorporate norms from other chapters or international legal instruments, ii) establish norms requiring cooperation or the promotion of best practices, iii) enable citizen participation in the application of the title, and iv) create a mechanism for dispute settlement. In general, these disciplines are largely procedural, and chiefly emphasise transnational engagement with both other Parties and civil society.

The two main norms incorporated or referred to from other treaties, or arguably even other chapters of the EU-Andes Agreement, are so-called level-playing-field obligations and the right to regulate.[28] The main level-playing-field obligations are found in Article 270, which reads in its operative part:[29]

> **Article 270**
> **Multilateral Environmental Standards and Agreements**
>
> 1. The Parties recognise the value of international environmental governance and agreements as a response of the international community to global or regional environmental problems and stress the need to enhance the mutual supportiveness between trade and environment. In this context, the Parties shall dialogue and cooperate as appropriate with respect to trade-related environmental issues of mutual interest.
> 2. The Parties reaffirm their commitment to effectively implement in their laws and practices the following multilateral environmental agreements: the Montreal Protocol on Substances that Deplete the Ozone Layer adopted on 16 September of 1987, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal adopted on 22 March 1989, the Stockholm Convention on Persistent Organic Pollutants adopted on 22 May 2001, the Convention on International Trade in Endangered Species of Wild Fauna and Flora signed on 3 March 1973 (hereinafter referred to as 'CITES'), the [Convention on Biodiversity], the Cartagena Protocol on Biosafety to the CBD adopted on 29 January 2000, the Kyoto Protocol to the United Nations Framework Convention on Climate Change adopted on 11 December 1997 (hereinafter referred to as 'Kyoto Protocol') and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade adopted on 10 September 1998 […].
> 3. The Trade Committee may recommend the extension of the application of paragraph 2 to other multilateral environmental agreements following a proposal by the Sub-committee on Trade and Sustainable Development.

Moreover, Article 268 provides for the 'right to regulate' in the following terms:[30]

> **Article 268**
> **Right to Regulate and Levels of Protection**

[28] For level-playing-field obligations, see Articles 270, 272(1). 273, 274 and 275, while the right to regulate is chiefly expressed in Articles 268 and 270(4).
[29] Article 270(1)-(3).
[30] Article 268.

> Recognising the sovereign right of each Party to establish its domestic policies and priorities on sustainable development, and its own levels of environmental and labour protection, consistent with the internationally recognised standards and agreements referred to in Articles 269 and 270, and to adopt or modify accordingly its relevant laws, regulations and policies; each Party shall strive to ensure that its relevant laws and policies provide for and encourage high levels of environmental and labour protection.

From a normative standpoint, the former incorporations serve to embed already existing environmental commitments undertaken by each Party and reframe them as establishing a minimum level of trade-affecting environmental protection.[31] Moreover, the right to regulate reaffirms the general exception provisions found in the exception chapters of the Agreement.[32] It remains unclear, whether Article 268 may extend the scope of such general exceptions to other chapters of the agreement, by analogy to the ways in which the Article XX GATT exception had been extended to WTO-plus obligations under the Chinese Accession Protocol in *China – Audiovisual Products*.[33] In any event, such incorporating provisions may be relevant for interpreting disciplines within the Agreement more broadly, given that the incorporated norm may be treated as 'context' for the purposes of treaty interpretation, as specified in Article 31(2) VCLT IO.[34]

In addition, the agreement provides for the Parties to 'cooperate' on sustainable development and 'promote' certain legal practices. The main areas which are addressed include trade in forest products (Article 273), sustainable fishing (Article 274), climate change (Article 275), and more general obligations to cooperate on trade and sustainable development (Article 286). In general, the provisions must be understood as forming obligations of conduct than of result. While no specific legal outcome is required to be achieved, it should be noted that such obligations have commonly been understood to require good faith engagement from all Parties.[35]

Similarly, the Agreement establishes procedures for dialogue and engagement with civil society. Article 282 expressly requires the Sub-committee on Trade and Sustainable Development to hold 'a session with civil society organisations and the public at large, in order to carry out a dialogue on matters related to the implementation of' the TSD title.[36] This is in

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[31] The term 'level-playing-field' has traditionally been associated with an economic rationale, namely that the Parties must maintain their levels of environmental protection standards in order to avoid a race to the bottom. See, for instance, I Borchert et al, 'The Pursuit of Non-Trade Policy Objectives in EU Trade Policy' (2021) 20(5) WTR 623, passim. It should be noted that any incorporation of international environmental law must be interpreted in view of environmental principles which 'can [...] perform an "architectural function" in that they can lay the foundations of an environmental regime', such as the common but differentiated responsibilities principle. See P-M Dupuy and JE Viñuales, *International Environmental Law* (2nd edn, CUP 2018) 60.

[32] See, for instance, Article 106(1)(b) and (g) EU-Andes Agreement on trade in goods, Article 167(1)(c) on supply of services, and Article 174(b) on public procurement.

[33] Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (adopted 2010) WT/DS363/AB/R, paras 214–229 concerning the meaning of the phrase 'right to regulate trade in a manner consistent with the WTO Agreement' in Protocol on the Accession of the People's Republic of China (23 November 2001) WT/L/432, para 5.1.

[34] Article 31(2) VCLT IO. The significance of context has been described by I Van Damme, Treaty Interpretation by the WTO Appellate Body (OUP 2008) 219 as having a 'dual function': 'Context fills an external or formal function because it influences how and what principles of interpretation are applied to the text and what weight is given to various means of interpretation.'

[35] See, for instance, Obligation to Negotiate Access to the Pacific (Bolivia v Chile) (2018) ICJ Rep 507, paras 148; *Railway Traffic between Lithuania and Poland (Railway Sector Landwarów-Kaisiadorys)* [1931] Series A/B No 42, 116; *Puerto Rico Regulations on the Import, Distribution and Sale of UHT Milk from Quebec*, Final Report of the Panel, USA-CDA-1993-1807-01 (3 June 1993), para 5.28.

[36] Article 282 EU-Andes Agreement.

addition to the duty of individual Parties to 'consult domestic labour and environment or sustainable development committees or groups, or create such committees or groups when they do not exist' under Article 281, and 'to review, monitor and assess the impact of the implementation of this Agreement on […] environment […] through its respective domestic and participative processes' under Article 276.[37]

Finally, the TSD title includes provisions on available recourse to dispute settlement procedures. Article 285(5) provides that the TSD title is excluded from judicial methods for dispute settlement under title XII.[38] The alternative procedure instead first allows for inter-governmental consultations to be held under Article 283 and, should these fail to resolve disputes, recourse may be made to a Group of Experts to be convened and issue recommendations.[39]

4. Assessing the Environmental Effects of the EU-Andes Agreement

Two studies have been conducted on the environmental implications of the EU-Andes Agreement published by the European Commission: i) an *ex-ante* sustainability impact assessment (SIA) conducted by an implementing consortium and finalised in 2009, and ii) an *ex-post* implementation report prepared by BKP Economic Advisors and publicly released in April 2022.[40]

The 2009 SIA report framed the general impact of the EU-Andes Agreement by noting that the modelling conducted shows how the greater the degree of trade liberalisation, the greater the negative effects (i.e. increased CO2 emissions) over time.[41] While pointing out that the EU and Colombia were expected to experience the highest 'absolute' increase in emissions, the report also concludes that 'the [predicted] overall effects are small' and – subject to there being 'ambitious liberalisation' of trade – the Agreement would only have contributed an increase in global emissions by 0,01%.[42]

With respect to the impact of trade liberalisation in specific sectors, the report indicates that increased trade in agricultural and processed goods 'is expected to place additional pressure on both land and water'.[43] Moreover, it highlights the potential for increased deforestation in all four Andean Community States, which are expected to be affected by the 'conversion of pristine habitats and natural resources to agricultural production and mining'.[44] By contrast, services liberalisation is expected to 'increase the utilisation of environmentally efficient technologies and management techniques' and 'reduce pressures on consumption of water and other resources'.[45] However, any such environmental gains may be offset depending on how such services are 'sourced': notably, transportation may contribute to pollution.[46]

The 2022 final evaluation report confirms some of the predictions made by the SIA report. In particular, the report details that the environmental impact of the EU-Andes

[37] Article 281.
[38] Article 285(5)
[39] Articles 283, 284(1) and 285.
[40] DEVELOPMENT Solutions et al, 'EU-Andean Trade Sustainability Impact Assessment – Final Report' (European Commission, October 2009) <trade.ec.europa.eu/doclib/docs/2010/april/tradoc_146014.pdf> accessed 1 June 2022 (EU-Andes SIA); BKP Economic Advisors, 'Ex Post Evaluation of the Implementation of the Trade Agreement between the EU and its Member States and Colombia, Peru and Ecuador' (European Commission, January 2022) <www.fta-evaluation.eu/images/reports/I_Final_Report_ex_post_eval.pdf> accessed 1 June 2022 (Final Evaluation Report).
[41] EU-Andes SIA (n 40) 68.
[42] ibid.
[43] ibid, 84.
[44] ibid, 84–89.
[45] ibid, 104.
[46] ibid.

Agreement is 'very small […] and mixed'.[47] It identifies negative effects on deforestation, which are said to result from 'the increased production' and harvesting of specific agricultural and aquacultural products for the purposes of export to the EU (case-studies identified are Peruvian avocado production affecting forests and Ecuadorian shrimp farming affecting mangrove forests).[48] Nonetheless, limited findings are made on the 'permanent' impact on deforestation, with the exception of Colombia due to its agricultural activities.[49]

In terms of greenhouse gas emissions, the report notes that while there is a gross increase in emissions for Andean Community Parties, the adjustment in trade has led to 'lower gross [greenhouse gas] emissions in the rest of the world' and 'an estimated overall marginal decrease in gross [greenhouse gas] emissions.[50] This effect is explained in the following terms:[51]

> The increase in the Andean countries and in the EU is predominately driven by the positive impact of tariff reduction on production in the *petroleum and chemical*, *utilities*, and *transport* sectors. The decrease in the Rest of the World is driven by decreases in output in the *petroleum and chemical* and *utilities* sectors. The net-reduction impact is driven by differences in emission intensities (GHG emissions per unit of product) in the EU and the RoW. For example, an item produced in the EU may be produced with lower GHG emissions than the same item in a different country. If production shifts to the EU from that country, net GHG emissions reduce.

The evaluation report similarly provides a brief commentary on the interaction between the existing EU-Andes Agreement and the Paris Agreement. Largely, the discussion confirms the political framework of cooperation on trade and sustainable development as currently established under the TSD title:[52]

> With respect to governance and standards related to climate change, all Parties made significant progress since the start of application of the Agreement by signing and ratifying the Paris Agreement. […] Yet, it is very unlikely that the EU-Andean Trade Agreement influenced these (sic) development (*although the TSD Title did create a platform through which the importance of ratification was voiced by stakeholders*). (emphasis added)

5. Proposals for Modernising the EU-Andes Agreement[53]

Even as the TSD title establishes level-playing-field obligations and procedures for cooperation that supplement the existing Parties' environmental commitments, the recent evaluation report rightly points out that the EU-Andes Agreement does not 'influence' the Parties' adoption of further commitments under their NDCs.[54]

The recent evaluation report rightly notes the potential of the TSD title and establishes a wide range of areas where disciplines and mechanisms for cooperation could be strengthened

[47] Final Evaluation Report (n 40) xvi, para 11.
[48] ibid, 158.
[49] ibid.
[50] ibid, 156.
[51] ibid.
[52] ibid, 156–157.
[53] This section shares thoughts with C Delev and M Gehring, 'European Union Trade Agreement Negotiations with Latin American States: Next Steps in the Climate, Sustainable Development and Trade Agenda' (CISDL). The source is available on file with the author.
[54] Final Evaluation Report (n 40) 156–157.

or introduced. These include specific and proactive rules addressing deforestation and forestry management, Land Use, Land Use Change and Forestry (LULUCF) emissions and water use in Andean States' agricultural sectors, the need for extended producer responsibility and stricter standards for EU products, knowledge exchange on the mining sector, and the creation of concrete environmental targets.[55]

In line with these recommendations, this legal brief supports the introduction of new disciplines to strengthen the current TSD title while also noting the need for a broader approach extending beyond mechanisms for cooperation. Accordingly, this section adopts a 'catch-all' approach to examining available disciplines and clarifications which the Parties may adopt to improve the compatibility of the Agreement with their respective NDCs. These recommendations are provided in Table 1 below. While such recommendations would mostly require treaty renegotiation, it should be noted that under Article 270(3) the Trade Committee is enabled to extend level-playing-field obligations to other treaties, such as the Paris Agreement.[56] Moreover, in terms of increasing civil society participation, specific transparency obligations may be adopted which could be modelled on Article 398 EU-United Kingdom Trade and Cooperation Agreement that reads:[57]

> **Article 398**
> **Transparency**
>
> 1. The Parties stress the importance of ensuring transparency as a necessary element to promote public participation and of making information public within the context of this Chapter. In accordance with their laws and regulations, the provisions of this Chapter, of Title IX and of Title X, each Party shall:
>
> (a) ensure that any measure of general application pursuing the objectives of this Chapter is administered in a transparent manner, including by providing the public with reasonable opportunities and sufficient time to comment, and by publishing such measures;
>
> (b) ensure that the general public is given access to relevant environmental information held by or for public authorities, as well as ensuring the active dissemination of that information to the general public by electronic means;
>
> (c) encourage public debate with and among non-state actors as regards the development and definition of policies that may lead to the adoption of law relevant to this Chapter by its public authorities; this includes, in relation to the environment, public participation in projects, plans and programmes; and
>
> (d) promote public awareness of its laws and standards relevant to this Chapter, as well as enforcement and compliance procedures, by taking steps to further the knowledge and understanding of the public; in relation to labour laws and standards, this includes workers, employers and their representatives.

There are broadly two types of treaty reform recommendations which may be adopted to increase the compatibility of the EU-Andes Agreement with the Parties' NDC commitments and to promote the adoption of effective mitigating measures. First, additional commitments are required concerning areas, such as sustainable forestry, the inclusion of clear treaty carve-outs and exception provisions with clear textual clarifications, as well as references to

[55] ibid, 159–161.
[56] Article 270(3) EU-Andes Agreement.
[57] Article 398 Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part [2021] OJ L 149/10 (EU-UK TCA).

commitments under international environmental agreements, including to the Paris Agreement among others.[58]

Second, specific obligations to cooperate should be introduced concerning deforestation and forest management. Even though such obligations are limited owing to the mitigation measures identified by the Parties in their NDCs, they could provide the scope for more ambitious knowledge exchange and assistance in line with the recommendations of the evaluation report.

Finally, outside of the specific mechanisms, the expansion of the binding dispute settlement procedures to the TSD chapter may be considered to induce compliance with treaty obligations. This could supplement the largely political mechanisms for cooperation under the TSD chapter. However, the viability of such a treaty amendment depends on whether it would affect the prospective accession of Bolivia to the EU-Andes Agreement pursuant to Article 329 EU-Andes Agreement.

Table 1. Environmental Priorities and Possible Trade Renegotiation Initiatives

Key Trade Partner Nationally Determined Contributions	**Possible Trade Agreement Disciplines**
1. Market approaches to deforestation	- Establishing specific commitments on cooperation concerning sustainable forestry product trade. - Promotion of FSC and other standards. - Commitment to sustainable forestry.
2. Increased Forest Plantations	- Establishing EU commitments on increased cooperation, technology transfer, and technical assistance in reforestation activities. - Preferential treatment for sustainable forestry products.
3. Increased technology transfer for achieving sustainable development objectives	N/A
4. Integrating greenhouse gas emissions-related externalities associated with consumption and production	- Introducing precise treaty carve-outs and clarifying the scope of exceptions *vis-à-vis* environmentally harmful process and production methods. - Introducing references to the Paris Agreement and Parties' NDCs.
5. Sustainable management of water resources	- Introducing specific carve-outs from services liberalisation for public procurement of water resources.

[58] See, for relevant EU treaty practice, see Articles 401, 764(1) and 772(4) EU-UK TCA and Articles 5, 6, 7, 8, 9 and 10 European Commission, 'Trade and Sustainable Development' <trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156822.pdf> accessed 1 June 2022.

	- Introducing exception for achieving conformity ‘with laws or regulations which are not inconsistent with the provisions of this Agreement’, and ‘relating to the conservation of living and non-living exhaustible natural resources’ modelled on Article 106 concerning exceptions to the Title on Trade in Goods.

Annex A

Key Trade Partner Nationally Determined Contributions	**Current Association Agreement Disciplines**
1. Market approaches to deforestation	- Article 273 on sustainable trade in forest products. - Article 286(d), (g) and (h) on trade and sustainable development cooperation.
2. Increased Forest Plantations	- Article 273 on trade in forest products. - Article 286(d), (g) and (h) on trade and sustainable development.
3. Increased technology transfer for achieving sustainable development objectives	- Articles 195(b), 196(3), 197(5), 201(6), 255, 324(2)(b), inter alia, on technology transfer and relevant exceptions to disciplines.
4. Integrating greenhouse gas emissions-related externalities associated with consumption and production	Article 286 on cooperation on trade and sustainable development.
5. Sustainable management of water resources	Concerning public procurement obligations, see general exception in Article 174(b) for measures 'necessary to protect human, animal or plant life or health, including the respective environmental measures'.