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Trade and Environment in EU-Mercosur Relations: Negotiating in the Shadow of Unilateralism

Alessandra LEHMEN^{*} & Geraldo VIDIGAL^{**}

This article analyses the interplay between the negotiation of sustainability commitments in trade agreements and unilateral measures adopted to promote sustainability in international trade, focusing on relations between the European Union (EU) and the Common Market of the South (Mercosur). We consider the negotiations for inclusion and reform of provisions on Trade and Sustainable Development (TSD) in the agreed EU-Mercosur Partnership Agreement (EUMPA). These negotiations took place at the same time as the EU forged ahead with unilateral measures linking trade policy and environmental objectives. We consider not only measures directly targeting global value chains – the Deforestation Regulation, Due Diligence Directive, and Carbon Border Adjustment Mechanism (CBAM) – but also measures not usually associated with international trade, such as the Environmental Crime Directive, the EU Taxonomy for Sustainable Activities, the anti-greenwashing Green Claims Directive, and the sustainability exception for agreements between competitors. In light of this ‘sustainability arsenal’ and its foreseeable impacts, we examine the agreed and proposed provisions in the EUMPA to pursue environmental sustainability in production and trade, considering how they can add to, facilitate the effectiveness of, or impose limits on, the impact of the EU’s unilateral measures.

Keywords: Trade and sustainable development, International Trade Law, Free trade agreements, Unilateral trade measures, Environmental Law, Climate Change, European Union, MERCOSUR

1 INTRODUCTION

Concerns with the impacts of international trade and trade relations on sustainable development have taken centre stage in international economic governance. Over the past decade, these concerns have materialized into two parallel phenomena. On the one hand, international trade agreements increasingly include provisions on ‘trade and sustainable development’ (TSD), featuring principally commitments to ensure a minimum level of environmental conservation and labour standards. On

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the other hand, large developed economies – chiefly, the European Union (EU) – have combined negotiations of TSD provisions with the unilateral adoption of measures linking trade to sustainability requirements.

These unilateral or autonomous sustainability measures mostly operate by preventing, or imposing restrictions on, the importation into a market of targeted products, employing a variety of mechanisms. Mechanisms applied include prohibiting the importation of products deemed to be produced without concern for sustainability requirements; requiring products to be accompanied by certificates providing evidence of compliance with sustainable production standards; and imposing a monetary charge equivalent to that imposed on domestic products to account for their negative sustainability impact.¹ Additionally, though not targeting trade directly, measures imposing sustainability requirements on large transnational corporations, applicable to their supply chain, ultimately require producers all over the world to apply sustainability standards in their production.

This can put developing countries, in particular, in a delicate position when negotiating trade agreements with large developed economies. As part of the trade negotiation, countries are enjoined to sign up to certain sustainability standards for domestic production, presumably higher than those that would have been achieved through their own domestic political process. These standards and the required verification and certification will almost by definition increase domestic costs of production, lowering the competitiveness of domestic products, which the trade agreement was meant to increase. In addition to any economic impact, TSD commitments can be perceived as having a neocolonial flavour.² This owes not so much to the nature of the commitments as to the discourse that often surrounds them, portraying them as conditions imposed by developed economies to sign agreements with their less developed counterparts.

At the same time, a developing country negotiating TSD commitments in trade agreements is faced with the prospect that negotiations could be futile. Whatever the outcome of bilateral negotiations, the large developed market may impose on the developing country's exporters higher production standards than those agreed upon. This means that TSD negotiations take place 'in the shadow of unilateralism'.³ This can have two effects. On the one hand, it may make

¹ See G. Vidigal, *Decentralized Enforcement of Sustainability Commitments: Rebalancing, Targeted Enforcement, and Production Requirements in Trade Agreements*, in *The Sustainability Revolution in International Trade Agreements* (G. Vidigal & K. Claussen eds, Oxford University Press 2024), doi: 10.1093/9780191994470.003.0016.

² C. Omari Lichuma, *(Laws) Made in the 'First World': A TWAIL Critique of the Use of Domestic Legislation to Extraterritorially Regulate Global Value Chain*, Heidelberg J. Int'l L. 497–532 (2021), doi: 10.17104/0044-2348-2021-2-497.

³ The wording recalls R. Cooter, S. Marks & R. Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior* 11 J. Legal Stud. 225–251 (1982), doi: 10.1086/467699; R. Powell,

negotiations seem moot and lead developing countries to sign up for the TSD commitments, without expecting to have meaningful additional impact. On the other hand, it might lead countries with bargaining power, or that perceive the imposition of sustainability standards as illegitimate, to harden their position and reject the negotiation of TSD standards.

One of the key relations on which the future of this new development in trade agreements hinges is that between the Southern Common Market (Mercosur) and the EU, and in particular the negotiations over the EU-Mercosur Partnership Agreement (EUMPA). The EUMPA represents, for the EU, the deepening of its trade and investment links to the region; and, for Mercosur, a consolidation of its status as a regional trading bloc. Furthermore, EUMPA negotiations are a crucial barometer for the broader state of sustainability mechanisms in global trade relations.⁴

The multiplication of TSD chapters with meaningful, specific commitments has taken place largely in agreements between developed economies and far smaller economies, which are often heavily dependent on the relevant trade, or in agreements between developed economies (the EFTA-Indonesia Cooperation and Economic Partnership Agreement (CEPA) being a key outlier). Large developing countries will be the crucial battleground for determining whether sustainability commitments in trade relations will prevail, and result in more sustainable production standards throughout the world, or will be a distraction from the bigger story: a shift of gravity of the global economy away from the West and to today's large developing economies, and the fall of the project of global sustainability standards in production, in the face of North-South and East-West controversies over the responsibility for cleaning up global production.

Following this introduction, section 2 examines the EUMPA TSD chapter, its negotiating history, and attempts to strengthen it through a joint interpretative instrument. Section 3 analyses the various components of the EU's unilateral or autonomous 'sustainability arsenal', adopted without regard for bilateral commitments or negotiations. Section 4 considers what it means for developing countries to negotiate sustainability commitments in the shadow of unilateralism. Section 5 concludes.

Bargaining in the Shadow of Power, 15 *Games & Econ. Behavior* 255–289 (1996), doi: 10.1006/game.1996.0068; R. H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 *Int'l Org.* 339–374 (2002), doi: 10.1162/002081802320005504.

⁴ See F. De Andrade Correa & A. Lehmen, *Trade, Sustainable Development and Climate Change: How Can Free Trade Agreements Be Leveraged for Increased Climate Action? Perspectives on the EU-MERCOSUR Agreement*, 50 *Legal Issues Econ. Integ.* 287–306 (2023), doi: 10.54648/leie2023014.

2 NEGOTIATING TSD PROVISIONS IN THE EUMPA

An increasingly popular strategy to ensure commonly agreed sustainability standards in transnational production chains is to include in trade agreements TSD chapters, featuring positive commitments by the parties to adopt and enforce labour and environmental standards in domestic production. TSD chapters in trade agreements have two advantages over other policy instruments for sustainability. First, they are grounded on consent, weakening claims that sustainability requirements are a mix of disguised protectionism and imperial-like transnational regulation. Second, they contain a built-in enforcement mechanism, insofar as they allow parties to respond to violations of TSD commitments by suspending the agreed trade preferences.⁵ In some of the most sophisticated TSD chapters, such as the EFTA–Indonesia CEPA and the United States–Mexico–Canada Agreement (USMCA), trade agreements condition the very trade between the parties under the agreement to continued compliance by producers with sustainability standards.⁶

2.1 THE 2019 AGREEMENT IN PRINCIPLE AND ITS TSD CHAPTER

EUMPA negotiations started in 1999, before TSD chapters became a common feature of trade agreements. The parties spent twenty years negotiating a text for the EUMPA, having started in 1999 on the basis of their 1995 ‘Interregional Framework Cooperation Agreement’. The 1995 framework agreement was signed to prepare for ‘a political and economic interregional association founded on greater political cooperation and progressive and reciprocal liberalization of all trade’.⁷ While negotiations on the ‘cooperation’ and ‘political dialogue’ chapters of the agreement were relatively straightforward, negotiation of the trade pillar encountered various barriers and opposition throughout. In 2004, negotiations were paused following the 2003 WTO Cancún Ministerial Conference, in which negotiations between Brazil (and other developing countries) and the US and the EU ended abruptly. Bilateral negotiations were re-launched in May 2010, and paused again in 2012 due to Paraguay’s

⁵ Many agreements require parties to resort to adjudicatory dispute settlement prior to suspending trade commitments in response to alleged violations of TSD commitments. Agreements that do not feature such procedures have sometimes been thought not to permit this suspension. The Court of Justice of the European Union (CJEU), however, has stated that in this case the regular rules of international law apply permitting reciprocal suspension of treaty provisions in response to breach (CJEU, *Opinion 2/15* (Full Court), ECLI:EU:C:2017:376, para. 161).

⁶ See Vidigal & Claussen, *supra* n. 1.

⁷ *Interregional Framework Cooperation Agreement between the European Community and Its Member States, of the one part, and the Southern Common Market and Its Party States, of the Other Part – Joint Declaration on Political Dialogue Between the European Union and Mercosur*, 69 OJEU L 4 (19 Mar. 1996).

suspension from MERCOSUR.⁸ Negotiations were started again in May 2016, with another round taking place in October 2016.⁹ After thirty-eight negotiation rounds, a political agreement for an Association Agreement including a trade component was finally reached in June 2019.

Another five years would pass before, on 6 December 2024, the blocks announced reaching an ‘upgraded’ final negotiated text. The new EUMPA includes the 2019 texts, lists of trade concessions shared between the parties in 2022, and additional annexes and other text meant to be incorporated into the final agreement, which must still be accepted through the EU and Mercosur domestic processes.¹⁰ Though EUMPA negotiations began before sustainability commitments became a common feature of trade agreements, by 2019 it had become politically impossible within the EU to sign a trade agreement with a broad scope without sustainability provisions. Following further concerns expressed within the EU, new instruments were added – explored in section 2.2

The TSD chapter, adopted in 2019 and only expanded on in 2024, describes its objective as ‘to enhance the integration of sustainable development in the Parties’ trade and investment relationship’.¹¹ Many provisions reaffirm existing commitments, promote or require exchange of information, establish fora for cooperation, and enjoin or require parties to participate in bilateral, multilateral or regional governance initiatives. Comparatively, these provisions are in line with other agreements signed by the EU under its ‘cooperative’ approach.¹² Those who believe environmental cooperation is best achieved by provisions requiring specific conduct, enforceable through binding dispute settlement and sanctions, however, were disappointed.¹³

⁸ See G. Vidigal, *Enforcing Democracy at the Regional Level: Paraguay’s Suspension Before the Mercosur Court*, 2 Cambridge Int’l L.J. 337–349 (2013), doi: 10.7574/cjicl.02.02.93.

⁹ European Commission, *Countries and Regions: Mercosur* (2018), https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mercotur_en (accessed 3 Oct. 2024). Moreover, the EU had a longstanding interest in supporting the MCS project of regional integration, which it also saw as reinforcing regionalism as an important feature of global governance. See further, in this regard, F. de Andrade Correa, *The Implementation of Sustainable Development in Regional Trade Agreements: A Case Study on the European Union and Mercosur* (European University Institute 2013), doi: 10.2870/69866.

¹⁰ European Commission, ‘The upgraded EU-Mercosur agreement – what is new compared to the 2019 agreement’ (10 Dec. 2024, <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/86fb1930-16ed-4ac6-af25-5e0ad0d0c816/details?download=true>) (accessed 10 Dec. 2024).

¹¹ EUMPA, TSD chapter, Art. 1.1.

¹² S. E. M. Cesar de Oliveira, J. C. Visentin, B. F. Pavani, P. D. Branco, M. de Maria & R. Loyola, *The European Union-Mercosur Free Trade Agreement as a Tool for Environmentally Sustainable Land Use Governance*, 161 *Envtl. Sci. & Pol’y* 103875 (2024), doi: 10.1016/j.envsci.2024.103875.

¹³ M. Bronckers & G. Gruni, *Retooling the Sustainability Standards in EU Free Trade Agreements*, 24 *J. Int’l Econ. L.* 25–51 (2021), doi: 10.1093/jiel/jgab007; C. Eckes & R. Verheyen, *Treaty-Making by Afterthought: Can the EU-Mercosur Association Agreement Be Saved by the Joint Instrument* 17–8 (Umweltinstitut München e.V. 2023); S. Paulini, *The Trade and Sustainable Development Chapter in the EU-Mercosur Association Agreement – Is It Fit for Purpose?* (ClientEarth 2020).

The TSD chapter's provision regarding Multilateral Environmental Agreements (MEAs) provides, in its main operative paragraph, that each party 'reaffirms its commitments to promote, and effectively implement, MEAs, protocols and their amendments to which it is a party'.¹⁴ It is not clear whether, and to what extent, provisions in a trade agreement 'reaffirming' multilateral commitments create obligations under the trade agreement. While merely 'reaffirming' commitments might be insufficient to create a binding obligation, the terms 'effectively implement' may be seen as engendering more specific constraints.

The Panel of Experts in *Korea – Labour Commitments*, operating under the EU-Korea FTA, considered that an obligation emerged from a provision whereby the parties, besides reaffirming their commitment to implement International Labour Organization (ILO) Conventions, stated that they 'will make continued and sustained efforts towards ratifying the fundamental ILO Conventions concerned a commitment'.¹⁵ At the same time, the latter sentence goes beyond reaffirming prior commitments and sets out the specific actions the parties commit to undertake.

Parallels with the legal situation before the *Korea – Labour Commitments* panel may be found in the EUMPA provisions regarding climate change and biodiversity. As regards climate change, in the 2019 text the parties 'recognize the importance of pursuing the ultimate objective of the United Nations Framework Convention on Climate Change (UNFCCC)', and also commit to 'effectively implement the UNFCCC and the Paris Agreement established thereunder'.¹⁶ As regards biodiversity, the parties similarly 'recognize the importance of the conservation and sustainable use of biological diversity consistent with' key conventions in the field, while each party also undertakes to 'implement effective measures leading to a reduction of illegal trade in wildlife, consistent with international agreements to which it is Party'.¹⁷

By comparison, the commitments regarding Trade and Sustainable Management of Forests seem less specific. The key commitments in the EUMPA are to:

- (1) encourage trade in products from sustainably managed forests harvested in accordance with the law of the country of harvest;
- (2) promote, as appropriate and with their prior informed consent, the inclusion of forest-based local communities and indigenous peoples in sustainable supply chains of timber and non-timber forest products, as a

¹⁴ *Ibid.*, Art. 5.3.

¹⁵ Report of the Panel of Experts, *Panel of Experts Proceeding Constituted under Article 13.15 of the EU-Korea Free Trade Agreement* (20 Jan. 2021), paras 61, 271.

¹⁶ EUMPA, TSD chapter, Arts 6.1, 6.2.

¹⁷ *Ibid.*, Arts 7.1, 7.2(b).

means of enhancing their livelihoods and of promoting the conservation and sustainable use of forests;

- (3) implement measures to combat illegal logging and related trade.¹⁸

The latter paragraph, though the most constraining of the three, provides little in the way of objective, ascertainable standards for conduct. This can be compared to the far more detailed commitments under the Trade and Labour provision of the TSD chapter. These are:

- (1) 'to promote and effectively implement the ILO Conventions and Protocols ratified by the signatory Mercosur States and by the Member States of the European Union respectively and classified as up-to-date by the ILO'¹⁹;
- (2) to 'promote decent work as provided by the Declaration on Social Justice for a Fair Globalization of 2008 adopted by the International Labour Conference';²⁰
- (3) to 'respect, promote and effectively implement the internationally recognized core labour standards, as defined in the fundamental ILO Conventions', that is:
 - (a) Freedom of association and the effective recognition of the right to collective bargaining;
 - (b) The elimination of all forms of forced or compulsory labour;
 - (c) The effective abolition of child labour; and
 - (d) The elimination of discrimination in respect of employment and occupation.²¹
- (4) to 'ensure that administrative and judicial proceedings are available and accessible in order to permit effective action to be taken against infringements of labour rights referred to in this Chapter'.²²

In addition to imprecise commitments, concerns were also raised with regard to the dispute settlement provisions of the EUMPA TSD chapter. Any party can request the establishment of a Panel of Experts to assess a dispute under the TSD chapter. This Panel issues a report setting out 'the findings of facts, the applicability of the relevant provisions and the basic rationale behind any findings and recommendations'.²³

¹⁸ *Ibid.*, Art. 8.2.

¹⁹ *Ibid.*, Art. 4.7.

²⁰ *Ibid.*, Art. 4.10.

²¹ *Ibid.*, Art. 4.2.

²² *Ibid.*, Art. 4.11.

²³ *Ibid.*, Arts 17.6, 17.9.

However, the EUMPA does not mandate compliance with this report. Instead, the parties are required solely to ‘discuss appropriate measures to be implemented taking into account the report and recommendations of the Panel of Experts’.²⁴ After this, a party found to be in violation of its TSD commitments has ninety days to ‘inform’ civil society and the other party ‘of its decisions on any actions or measures to be implemented’.²⁵ The Sub-Committee on Trade and Sustainable Development is required to ‘monitor the follow-up to the report of the Panel of Experts and its recommendations’, but, since any decisions depend on agreement between the parties, enforcement through this mechanism is unlikely.

In other words, the EUMPA provided no legal consequences for failing to follow the recommendations of a TSD panel report, or for failing to address a violation found by the panel. This was in contrast with the EUMPA rules for trade disputes, where failure to comply with a panel report permits the application of trade retaliation. The aggrieved party may ‘suspend concessions or other obligations ... equivalent to the nullification or impairment of benefits ... suffered as a result of the violation’.²⁶

In conclusion, the EUMPA TSD chapter agreed in 2019 presented an overall low level of precision in its commitments to environmental conservation, especially when contrasted with the commitments to uphold minimum labour standards. The most precise commitment in the environmental field concerned the implementation of climate change conventions. At the same time, in this case the key underlying agreement – the Paris Agreement – leaves the specific commitments and associated required conduct largely to be determined by each individual party. Additionally, formally speaking TSD commitments had low enforceability. Though a party might seek to invoke general international law to respond to continued violations of the TSD chapter,²⁷ no formal EUMPA mechanism permitted an adjudication-based suspension of trade concessions in case of non-compliance with a condemnatory report by a TSD Panel of Experts. Even the term ‘non-compliance’ might be misleading, as there was no EUMPA obligation to implement or comply with panel reports finding violations of TSD commitments.

2.2 POST-2019 NEGOTIATIONS OVER AN INTERPRETATIVE INSTRUMENT

After the text of the EUMPA was publicized, many in the EU felt that the TSD commitments it contained were insufficient.²⁸ To enter into force, the EUMPA as

²⁴ *Ibid.*, Art. 17.11.

²⁵ *Ibid.*

²⁶ EUMPA, Dispute Settlement chapter, Art. 18.2.

²⁷ See Vidigal, *supra* n. 1.

²⁸ See (n. 13).

negotiated in 2019 would require the approval of the European Parliament, of national parliaments of the twenty-seven EU Member States, and of national parliaments of the Mercosur countries. Even in 2024, where everything suggests that the trade section will be ‘split’ from the rest of the agreement, approving it will require a majority approval at the European Parliament before being considered by the EU Council. And, in 2020, the European Parliament adopted a resolution finding that ‘that the EU-Mercosur agreement cannot be ratified as it stands’.²⁹ Concerns about environmental impacts are among the issues that have led negotiations to take over twenty years to conclude, and remained contentious after 2019.

From an environmental and climate change standpoint, the additional liberalization the EUMPA entails may be problematic. The additional economic activity this liberalization entails may have significant effects on deforestation in Mercosur, home to the Amazon rainforest and other deforestation-sensitive biomes, especially by driving agricultural extensification. While there are studies establishing causal evidence on the relationship between trade liberalization and deforestation increase,³⁰ there is also evidence of the effectiveness of including specific provisions aimed at protecting forests and/or biodiversity in FTAs,³¹ as well as on greening exports of developing countries.³²

For these reasons, almost immediately after the text of the 2019 Agreement in Principle was publicized, pressure began for the EU to add to EUMPA an additional instruments to enhance, in particular, the environmental commitments under the TSD chapter. This enhancement should include the possibility of enforcement through trade sanctions, in response to violations of TSD commitments. On 8 July 2020, the European Commission published a draft Sustainability Impact Assessment (SIA) of the potential economic, social, environmental and human rights impact of the trade part of the association agreement between the EU and Mercosur.³³ On 21 March 2021, the European Commission published the final version of the SIA and a Position Paper on the EUMPA.³⁴

²⁹ European Parliament, *Resolution of 7 October 2020 on the Implementation of the Common Commercial Policy* para. 36 (2020), https://www.europarl.europa.eu/doceo/document/TA-9-2020-0252_EN.html (accessed 3 Oct. 2024).

³⁰ R. Abman & C. Lundberg, *Does Free Trade Increase Deforestation? The Effects of Regional Trade Agreements*, 7 *J. Assoc. Env't & Res. Econ.* 35–72 (2020), doi: 10.1086/705787; K. Zaman, *Environmental Cost of Deforestation in Brazil's Amazon Rainforest: Controlling Biocapacity Deficit and Renewable Wastes for Conserving Forest Resources*, 504 *For. Ecol. & Mgmt.* (2022) 119854, doi: 10.1016/j.foreco.2021.119854.

³¹ R. M. Abman, C. C. Lundberg & M. Ruta, *The Effectiveness of Environmental Provisions in Regional Trade Agreements*, World Bank Policy Research Working Paper Series 9601/2021.

³² C. Brandi, J. Schwab, A. Berger & J.-F. Morin, *Do Environmental Provisions in Trade Agreements Make Exports from Developing Countries Greener?* 129 *World Dev.* 104899 (2020), doi: 10.1016/j.worlddev.2020.104899.

³³ European Commission, *European Commission Publishes Draft Sustainability Impact Assessment for the Trade Part of the EU-Mercosur Association Agreement* (2020), https://policy.trade.ec.europa.eu/news/european-commission-publishes-draft-sustainability-impact-assessment-trade-part-eu-mercosur-2020-07-08_en (accessed 3 Oct. 2024).

³⁴ European Commission, *European Commission Publishes Final Sustainability Impact Assessment and Position Paper on the EU-Mercosur Trade Agreement* (2021), https://policy.trade.ec.europa.eu/news/commission-publishes-final-sia-and-position-paper-eu-mercosur-trade-agreement-2021-03-29_en (accessed 3 Oct. 2024).

Pursuant to the SIA, the EU-Mercosur agreement would have a positive impact on the economies of both blocs and would consolidate a critical partnership between the two blocs based on common values. Based on concerns about the agreement's potential impact on environment, human rights, and Indigenous peoples made in the SIA, the Commission recommended, in the 2021 Position Paper, the creation of a joint initiative which could include higher-level political engagement; intensified dialogue and cooperation to address deforestation and biodiversity loss, as well as developing sustainable business models; and private sector actions and green investment to mobilize public and/or private financial institutions, with a possible pledge linked to signature of the agreement.

This was compounded by the adoption by the European Commission, in 2022, of a Communication proposing a 'new approach' to TSD commitments in trade agreements, including 'a fully-fledged compliance stage and the use of trade sanctions'.³⁵ The Communication pledged to propose, in all future negotiations, and to promote in ongoing negotiations, 'as appropriate', a new approach to TSD commitments. This approach would feature 'the possibility of trade sanctions as a matter of last resort, in instances of serious violations of core TSD commitments, namely the ILO fundamental principles and rights at work, and of the Paris Agreement on Climate Change'.³⁶

In February 2023, the EU proposed a draft Joint Instrument for the parties to add to the EUMPA. An early draft became unofficially available, featuring a loosely organized set of declarations, interpretations, and additional commitments.³⁷ On deforestation, the proposal largely reaffirmed the previous EUMPA text. The parties would, among others, assert that 90% of deforestation in the world is due to agricultural expansion; pledge not to lower labour and environmental standards to attract investment; agree to combat illegal logging; cooperate on measures to ensure that the products that citizens consume do not contribute to deforestation and forest degradation; take action to eliminate sources of wild fires in or near forest areas, and to further reduce deforestation and forest degradation; ensure public participation in environmental decision-making and access to justice in environmental matters; cooperate on sustainable supply chains, including supply chains for products not linked to deforestation; and support for the role of indigenous and local communities in protecting forests.³⁸

³⁵ European Commission, *The Power of Trade Partnerships: Together for Green and Just Economic Growth*, Communication from the Commission, COM(2022) 409 final 1 (22 Jun. 2022).

³⁶ *Ibid.*, at 11.

³⁷ *EU Proposal for an EU-Mercosur Joint Instrument* (Feb. 2023), made available by Friends of the Earth Europe, <https://friendsoftheearth.eu/wp-content/uploads/2023/03/LEAK-joint-instrument-EU-Mercosur.pdf> (accessed 3 Oct. 2024).

³⁸ *Ibid.*, s. 4.

With regard to climate change, the parties would declare that Article 6 (Climate Change) of the TSD chapter ‘includes’ a number of commitments. These were the ‘timely communication and implementation of successive and progressive Nationally Determined Contributions (NDCs) reflecting the highest possible ambition, in accordance with Arts 4.2 and 4.3 of the Paris Agreement’, as well as other obligations already undertaken under the Paris Agreement, such as the ratchet mechanism of progressive ambition (‘no reduction in the level of ambition of each Party’s NDC, including with respect to deforestation targets’). The document also mentioned ‘legislative, regulatory and policy action aiming at making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development, in accordance with Art. 2.1.c. of the Paris Agreement’.³⁹

No mention was made in the EU-proposed Joint Instrument of the Commission’s stated intention of including trade retaliation as a measure of last resort in case of violation of TSD commitments in newly negotiated trade agreements. Despite this not being included in the proposed instrument, at the subsequent Mercosur, summit Brazil’s President labelled the proposed Joint Instrument ‘unacceptable’. He stated that Mercosur Member States had no interest in ‘agreements that condemn us to be exporters of raw materials’ and that ‘strategic partners should not hold a sword over each other’s heads’.⁴⁰

A response by Mercosur Member States was made available, also unofficially, in September 2023.⁴¹ In it, Mercosur Member States stood by the TSD chapter as concluded in 2019 and stated their willingness to ‘lead by example in the integration of trade and sustainable development, as long as this is pursued in a collaborative manner’. In this regard, they stated that parties must ‘avoid the use of measures aimed at achieving sustainable development as an unjustified or unnecessary obstacle to trade’. More importantly, they noted that any instrument must ‘not feature sanctions (or even the hint of sanctions)’. Finally, they sought to include in the EUMPA ‘a mechanism to rebalance the negotiated trade concessions, in case these concessions are suspended or nullified as a result of EU domestic legislation’.⁴²

³⁹ *Ibid.*, s. 2.

⁴⁰ J. Barbon & M. Teixeira, *Não temos interesse em acordo que nos condene a exportadores de matérias-primas, diz Lula*, Folha de S. Paulo (4 Jul. 2023), <https://www1.folha.uol.com.br/mercado/2023/07/nada-de-parceiro-botar-espada-na-cabeca-do-outro-diz-lula-sobre-acordo-ue-mercosul.shtml> (accessed 3 Oct. 2024).

⁴¹ A. Moreira, *Exclusivo: A Íntegra da Resposta do Mercosul à UE para Concluir o Acordo*, Valor Econômico (16 Sep. 2023), <https://valor.globo.com/opiniao/assis-moreira/coluna/a-integra-da-resposta-do-mercosul-a-ue-para-concluir-o-acordo.ghtml> (accessed 3 Oct. 2024). See a translated version in *EU-Mercosur FTA: Mercosur’s Response to the EU Joint Instrument*, <https://www.bilaterals.org/?eu-mercosur-fta-mercosur-s> (16 Sep. 2023) (accessed 3 Oct. 2024).

⁴² *Ibid.*

Slow progress followed this exchange. Mixed positions on the agreement were reported at the individual country level. The French National Assembly adopted a resolution on 13 June 2023,⁴³ calling for renegotiating the free trade agreement to ensure the inclusion of social and environmental clauses. The same year, the European Commission, backed by Spain which held the rotating presidency of the Council, and Brazil, which held the rotating presidency of Mercosur, pledged (unsuccessfully) to seek to finalize the deal by the end of 2023.⁴⁴ Chief negotiators from both blocs met in Brasilia in early October 2023, aiming to reach a deal before the end of the year. Late that month, Argentina and Brazil proposed that, in order to guarantee compliance with the objectives of the agreement, the EU should allocate financial resources to assist the development of sustainable production, and its demonstration to authorities, in an amount of no less than 12.5 billion euros in subsidies, loans and other financial instruments.⁴⁵

The TSD issues were not the only ones holding back signature of the EUMPA. Other controversial issues needed to be resolved, such as the backtrack of concessions on government procurement defended by Brazil and Argentina; a request by the EU for commitments regarding critical raw materials; and a demand by Mercosur countries for special safeguards for electric vehicles.⁴⁶ On the institutional front, the European Commission concluded that it should split the agreement into two parts: one specifically addressing trade issues, to be brought before the Council of the EU and the European Parliament; and another containing the non-trade provisions of the deal, which would require ratification by all EU Member States.⁴⁷ This possibility was challenged by some as incompatible with the EU Treaties, since the agreement was originally negotiated as a single political and economic association agreement.⁴⁸

⁴³ Assemblée Nationale, *Proposition de résolution n°1173* (2023), https://www.assemblee-nationale.fr/dyn/16/textes/l16b1173_proposition-resolution (accessed 3 Oct. 2024).

⁴⁴ *Spain Pushes to Conclude Mercosur Trade Deal Talks, France Wants Time* (2023), <https://www.reuters.com/markets/europe/spain-pushes-conclude-mercosur-trade-deal-talks-france-wants-time-2023-10-20/> (accessed 3 Oct. 2024); *Speech by President Luiz Inácio Lula da Silva at the opening of the European Union-Latin America Business Forum* (2023), <https://www.gov.br/planalto/en/follow-the-government/speeches/speech-by-president-luiz-inacio-lula-da-silva-at-the-opening-of-the-eu-celac-business-summit-on-july-17-2023-in-brussels-belgium> (accessed 3 Oct. 2024).

⁴⁵ B. Carreño & A. Boadle, *Argentina, Brazil Seek 12.5 Billion Euros of Financial Aid in EU-Mercosur Talks*, Reuters (20 Oct. 2023).

⁴⁶ C. Gijjs, *We Don't Want Your EVs, Brazil Tells EU as Trade Talks Hit Crunch Time*, Politico (16 Sep. 2024), <https://www.politico.eu/article/brazil-electric-vehicle-eu-mercosur-trade/> (accessed 3 Oct. 2024).

⁴⁷ *Ibid.*

⁴⁸ M. Krajewski & J. Werner, *Legal Comment on Issues in Connection With the Mandate of the EU Commission for Negotiating the EU-Mercosur Association Agreement* (May 2023), <https://s2bnetwork.org/wp-content/uploads/2023/05/The-EU-Commissions-possible-attemptsto-fast-track-the-EU-Mercosur-deal-Legal-Analysis-by-Prof-Krajewski-May-2023-1.pdf> (accessed 3 Oct. 2024).

Finally, and somewhat surprisingly, on 6 December 2024 the President of the European Commission joined a Mercosur Summit, where, together with the Presidents of the four full Mercosur Member States, she announced the conclusion of the upgraded EUMPA. The new agreement, released the final stages of drafting of this article, includes:

- (1) Two additional articles, presumably for the TSD Chapter, entitled ‘Climate Change’ and ‘Fulfilment of Obligations’. The former provides that remaining ‘a party, in good faith, of the UNFCCC and its Paris Agreement ... constitutes an essential element of this Agreement’, meaning that withdrawal would entitle the other party to terminate the agreement. The latter provides that ‘particularly serious and substantial violations of the essential elements’ of obligations in human rights and democracy, weapons of mass destruction, and the Paris Agreement, empower the other party to suspend the agreement, partially or entirely, ‘for the minimum period necessary to resolve the issue in a manner acceptable to the Parties’ .
- (2) An unusually long, fifty-eight-paragraph Annex to the TSD Chapter, with some paragraphs cast in obligatory language, providing for specific environmental targets (*see* paras 14(a) (‘will’) and 16 (‘shall’)), as well as a dedicated section on ‘Sustainability measures affecting trade’, requiring these measures to take into account the information provided by the party affected by the measure, as well as to use information provided by a Party’s authorities when assessing compliance with the law of that Party.
- (3) A renewed dispute settlement chapter, which applies to all measures that affect trade between the parties and nullify or impair benefits they receive from the agreement, ‘whether or not such measure conflicts with the provisions of ... the Agreement’. In other words, even a lawful unilateral measure – meaning one that is justified as fulfilling a legitimate objective – may be challenged under dispute settlement, if it results in nullification of EUMPA benefits to the other party.

The negotiations leading to these new provisions were affected by a key development. Between 2022 and 2024, the EU unilaterally adopted a series of measures aimed at infusing the EU’s economic relations with the wider world with sustainability concerns, which were perceived as unwarranted and excessive by various EU trade partners, including Mercosur Member States. The next section considers these measures.

3 IMPACTS OF EU UNILATERAL MEASURES ON GLOBAL VALUE CHAINS

Impacts of sustainability issues on international trade are not limited to trade agreements. A series of sustainability measures with cross-border effects and significant potential to affect global value chains has been enacted by the EU in recent years, particularly in the context of the European Green Deal and the Fit for fifty-five frameworks, a set of proposals to revise and update EU legislation and to put in place new initiatives with the aim of ensuring that EU policies are in line with the sustainability and climate goals agreed by the Council and the European Parliament. Examples of this trend include recent directives, already implemented or under discussion, regarding deforestation (EU Deforestation Regulation – EUDR), due diligence (Corporate Sustainability Due Diligence Directive – CSDDD and Corporate Sustainability Reporting Directive – CSRD), greenwashing (Green Claims Directive and Empowering Consumers Directive), carbon border adjustment mechanisms (CBAM), sustainable taxonomy (EU Sustainable Taxonomy), antitrust (EU Horizontal Cooperation Guidelines), and environmental crimes (Environmental Crime Directive).

3.1 MEASURES TARGETING TRADE

Among EU sustainability measures, the *CBAM*⁴⁹ and the *EUDR*⁵⁰ target trade directly. The CBAM Regulation requires the payment for embedded carbon emissions generated during the production of specific imported goods in order to ensure that the carbon price of imports equals that of EU-produced goods.

The primary purpose of border adjustments is to prevent ‘carbon leakage’, shorthand for the risk that high-carbon imported goods, paying little or no price for carbon emissions, will take market share from carbon-paying domestic firms, thereby defeating the effort to reduce global emissions while harming the domestic industry.

Carbon trade mechanisms could arguably incentivize climate action globally by making low-carbon production more competitive. They could lead industries within jurisdictions facing carbon trade barriers to push for better access to renewable energy and more ambitious climate policies overall, including carbon pricing,

⁴⁹ Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 Establishing a Carbon Border Adjustment Mechanism, OJ L 52, 130 (16 May 2023).

⁵⁰ Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the Making Available on the Union Market and the Export from the Union of Certain Commodities and Products Associated With Deforestation and Forest Degradation and Repealing Regulation (EU) No 995/2010, OJ L 206, 150 (9 Jun. 2023).

and challenge the view that transitioning to a low-carbon economy is economically uncompetitive.

However, trade-connected carbon tax proposals raise at least two concerns: first, about disguised protectionism and potential breach of WTO regulations; second, that they may provoke resistance and hinder collaborative efforts to curb global emissions, ultimately undermining the objectives of the Paris Agreement. Poor implementation could trigger retaliatory measures from governments facing carbon barriers on their exports, or, in a worst-case scenario, withdrawal from the Paris Agreement.

In addition to concerns about carbon leakage, carbon trade mechanisms could inadvertently incentivize companies to relocate production away from countries lacking robust climate policies. This could lead to a scenario where high-emitting countries are discouraged from taking ambitious climate action, potentially fostering the formation of ‘carbon clubs’ among countries with comparable carbon pricing structures.

Countries that are heavily reliant on the EU market, especially least developed countries (LDCs), face challenges transitioning away from energy-intensive production methods due to limited resources. Critics argue that the CBAM may undermine the principle of Common but Differentiated Responsibilities (CBDR), central to international climate governance.⁵¹ Developed countries, historically major emitters, are expected to lead emission reductions and support developing countries in their climate efforts. Some view the CBAM as potentially unfair and discriminatory, shifting the burden of emissions reduction onto developing countries.⁵²

Being at the intersection of the international trade and climate change regimes, carbon border adjustments need to be robust from a legal standpoint. To add to the complexity, the trade governance system is rules-based, with no quantitative target. The sustainability side, by contrast, is often outcome-based. Paris targets, for instance, define an outcome, which is 1.5 degree and the net-zero emissions needed to achieve it, but despite the Paris Agreement having normative

⁵¹ J. Bednarek, *Is the EU Realizing an Externally Just Green Transition? A Short Analysis of the Carbon Border Adjustment Mechanism from the Perspective of the CBDR Principle and the Right to Development of LDCs*, <https://www.ejiltalk.org/is-the-eu-realizing-an-externally-just-green-transition-a-short-analysis-of-the-carbon-border-adjustment-mechanism-from-the-perspective-of-the-cbdr-principle-and-the-right-to-development-of-ldcs/> (accessed 3 Oct. 2024).

⁵² ‘This issue was considered very controversial. Developing countries would be disproportionately affected by BCAs. The absence of special treatment for developing and least developed countries would violate the “common but differentiated responsibilities” principle. While recognizing that the imposition of BCAs’ costs on developing countries’ exports is unfair, participants shared their concerns that an exemption would represent a violation of WTO rules and a risk of carbon leakage. The participants’ recommendation to deal with this issue is that developed countries implementing BCAs use the collected revenues to finance technological adaptation in developing countries’, *International Institute for Sustainable Development, Global Dialogue on Border Carbon Adjustments: The Case of Brazil*, <https://www.iisd.org/system/files/2024-07/border-carbon-adjustments-brazil.pdf>.

content in some dispositions, it leaves it to countries to define decarbonization contributions nationally. Legal strategies to reconcile climate and trade develop, therefore, at the junction of a rules-based and an outcomes-based regime. Measures to pre-empt a climate trade war potentially include cooperation to promote a positive agenda of free trade of low-carbon products and technologies; ensuring that revenues go to climate action; including implicit carbon taxes used by countries that pursue legitimate means of decarbonization other than explicit pricing, for example banning coal-fired power stations; some form of favourable treatment for developing countries, particularly LDCs; and a sectoral approach to ensure that the carbon trade mechanisms covers sectors where inclusion affords clear environmental benefits.

Additionally, the *EUDR* has significant implications for trade, as it prohibits the export to the EU of agricultural products originating from illegally deforested areas, with full implementation originally scheduled for 30 December 2024.⁵³ Import and trade of certain commodities within the European bloc must adhere to ‘deforestation-free’ criteria, meaning they cannot originate from areas of deforested or degraded forests after 31 December 2020. The regulation’s scope encompasses commodities listed in its Annex 1, such as cattle/beef, soybean/soybean meal and oil, coffee, cocoa/chocolate, wood/furniture, among others. However, the regulation allows for the potential inclusion of new products from existing commodities or products from new commodities in the future.

The *EUDR* application is limited to addressing deforestation or degradation exclusively in forests, defined as lands with an area greater than 0.5 hectares, trees taller than five meters, and forest cover exceeding 10%. The conversion of other forms of native vegetation for commodity production falls outside the European standard. However, there is a possibility for the regulation’s scope to expand in the future to encompass other wooded land and possibly other natural ecosystems, subject to legislative proposals.

Traders are required to undergo a due diligence process to verify that products are free from deforestation before they are made available on the European market. This process involves three stages: information gathering, risk assessment, and risk mitigation if a risk is considered significant. The due diligence declaration must be submitted to competent European authorities via an information system upon the product’s entry into the bloc, and entails identifying the geolocation of every land plot where commodities were produced across the commodity chain. It also involves obtaining information, data, and documents confirming that a product

⁵³ At the time of writing, the Commission had proposed delaying the key implementation dates by a year. *Commission Strengthens Support for EU Deforestation Regulation Implementation and Proposes Extra 12 Months of Phasing-in Time, Responding to Calls by Global Partners* (2 Oct. 2024), https://ec.europa.eu/commission/presscorner/detail/en/ip_24_5009 (accessed 3 Oct. 2024).

originates from a deforestation-free area and was produced in compliance with the legislation of the country of origin, including indigenous rights protection.

The EUDR establishes a benchmarking system to categorize countries, either as a whole or by region, into high, standard, or low deforestation risk categories. Criteria for classification include deforestation rates, agricultural or livestock expansion, commodity production trends, among others. This classification, originally meant to be finalized in 2024, will determine the extent of due diligence procedures. For countries classified as low risk, the procedure will be simplified, requiring only information gathering. For countries classified as standard or high risk, comprehensive due diligence is necessary, including risk assessment and mitigation procedures.

The EUDR also outlines penalties for non-compliance with the regulations. Sanctions include fines proportional to environmental damage, equivalent to at least 4% of the operator's total annual turnover, confiscation of products and revenues, and a temporary ban on the import and sale of regulated products.

3.2 MEASURES TARGETING CORPORATE CONDUCT ABROAD

The regulations in the previous section target trade directly. Equally relevant for the shadow cast by EU rules on trade is new legislation that requires corporations with a significant presence in the EU to ensure sustainability standards in all their supply chain, including outside the EU. The CSDDD or CS3D⁵⁴ was introduced in 2024. In February 2022, when the European Commission unveiled its proposal for a Directive on corporate sustainability due diligence, the response appeared largely favourable. This announcement came after calls from the Council and European Parliament in 2020 and 2021 to establish legislation holding companies accountable for climate change responsibilities. Despite a brief setback earlier this year, when key Member States nearly withdrew their support, an agreement was eventually reached in March, and the European Parliament endorsed a revised version of the Directive, which Member States now have a two-year window to incorporate into their national legislation.

Companies with more than a thousand employees and global revenues exceeding 450 million euros will be required to audit their suppliers, investigating practices such as illegal deforestation, impacts on biodiversity, forced labour, and child labour. Through international trade, these regulations will have cross-border effects on global value chains.

⁵⁴ Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, OJ L, 2024/1760 (5 Jul. 2024).

The main objective of the directive is for companies to identify risks and implement necessary changes to reduce negative environmental and human rights externalities, and to adopt a climate mitigation plan aligned with the Paris Agreement, aiming to limit the global temperature increase to 1.5°C above pre-industrial levels. This plan should describe in detail the transition strategy, including goals, deadlines, and investments. Penalties for companies failing to comply with the directive could reach up to 5% of their net turnover.

The CSDDD surpasses the mandates outlined in similar national laws, such as those of France and Germany (*Loi de Vigilance* and *Lieferkettensorgfaltspflichtengesetz*), by explicitly integrating clauses addressing climate change.⁵⁵ While previous laws required companies to evaluate and mitigate their impacts on human rights and the environment through due diligence processes, potentially covering climate change indirectly, they lacked explicit references to the matter.

Formal approval of the CSDDD by the EU Council signals a trend of holding corporations accountable for their societal and environmental footprint, shouldering the responsibility of overseeing social and environmental ramifications across the value chain, encompassing direct and indirect suppliers, internal operations, as well as products and services. In North America, legislation like the California Transparency in Supply Chains Act and Canada's Fighting Against Forced and Child Labour in Supply Chains Act further are examples of this trend.

Crucially, the Directive extends its coverage to value chains both within and beyond European borders, exerting its influence on corporations worldwide. The CSDDD mandates that a company's due diligence encompasses not only its own operations and those of its subsidiaries, but also the activities of its business partners within its chain of activities. This means that obligations extend to the activities of upstream partners related to the company's products and services, as well as the activities of downstream partners, specifically limited to the distribution, transportation, and storage of products, provided these tasks are conducted for the company or on its behalf – as opposed to the approach of the OECD Guidelines and UNGPs, which encompass the entire value chain.⁵⁶

Similarly, the CSRD⁵⁷ transcends EU boundaries by mandating EU subsidiary firms and branches falling under the CSRD's umbrella, with a parent company

⁵⁵ I. Higham et al. *The Evolving Landscape of Global Business Regulation on Climate Change*, <https://www.lse.ac.uk/granthaminstitute/news/the-evolving-landscape-of-global-business-regulation-on-climate-change/> (accessed 3 Oct. 2024).

⁵⁶ N. Bueno, N. Bernaz, G. Holly & O. Martin-Ortega, *The EU Directive on Corporate Sustainability Due Diligence (CSDDD): The Final Political Compromise*, 9 Bus. & Hum. Rts. J. 294 (2024), doi: 10.1017/bhj.2024.10.

⁵⁷ *Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 Amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as Regards Corporate Sustainability Reporting*, OJ L 322 (16 Dec. 2022).

located in a third country, to issue a sustainability report at the group level. This mandate applies to all EU enterprises with a non-EU parent corporation, falling under the CSRD's scope before 2028. This encompasses large private EU companies, large EU-listed companies, and medium-sized EU subsidiary firms (excluding micro-companies) listed on EU regulated markets. The CSRD mandates companies within its scope to report material sustainability information across their entire value chains, particularly those with significant sustainability risks, not solely focusing on group operations.

The CSRD rationale for broadening its scope emphasizes the necessity for a 'level playing field' between 'third country undertakings with significant activity in the EU'⁵⁸ and EU entities subject to the CSRD. The European Council, in an earlier communication,⁵⁹ highlighted the importance of European citizens having access to minimum information requirements regarding goods and services they purchase in the EU. Nevertheless, non-EU companies have expressed apprehensions about the CSRD's reach. Notably, members of US House and Senate Committees raised concerns with regarding European governments' plans to 'impose onerous extra-territorial climate mandates on American businesses'.⁶⁰ They estimated that over 3,000 US companies would fall under CSRD scope.

Sustainability efforts by companies have also been addressed by the EU from a competition standpoint, an issue several regulators have been delving into.⁶¹ Sustainability issues, such as climate change, labour rights, or other social issues, are often systemic and require collective action. Companies, banks, insurers, and asset managers are increasingly collaborating within their respective industries on sustainability initiatives aimed at addressing shared objectives related to climate change, labour rights, and other social issues. Many view collective action as essential to making significant progress on systemic challenges, such as transitioning away from unsustainable technologies, which individual efforts have thus far struggled to accomplish. As with all collaboration between industry participants, however, sustainability initiatives may be subject to antitrust laws. Furthermore, sustainable investment typically refrains from certain economic sectors, so coordination in this front could also be seen as a pretext for collusion. For example, detractors have alleged that sustainable initiatives offer a forum to participants to

⁵⁸ *Ibid.*, para. 20.

⁵⁹ Council of the European Union. *Dossier Interinstitutionnel 2021/0104(COD)* (10 Jun. 2022).

⁶⁰ US Congress Letter to Treasury Secretary Janet Yellen (5 Jun. 2023), https://oversight.house.gov/wp-content/uploads/2023/06/6.5.23-Letter-to-Treasury-on-CSRD-CS3D-FINAL_.pdf (accessed 3 Oct. 2024).

⁶¹ International Chamber of Commerce, *Taking the Chill Out of Climate Action: A Progress Report on Aligning Competition Policy With Global Sustainability Goals* (ICC 2023).

improperly agree to not invest in fossil fuels, with the anticompetitive effect of raising prices for consumers.⁶²

At the EU level, the European Commission has incorporated a distinct chapter on sustainability agreements into its revised *EU Horizontal Cooperation Guidelines*.⁶³ A ‘sustainability agreement’ encompasses any form of horizontal cooperation agreement genuinely aimed at achieving one or more sustainability objectives, spanning activities supporting economic, environmental, and social (including labour and human rights) development. Despite the vigilance against greenwashing, sustainability agreements that unduly restrict competition by object (those that are *per se* illegal) will remain prohibited. For instance, agreements among competitors to pass on increased costs from adopting a sustainability or ESG standard as higher sale prices would fall under this prohibition. However, the revised Guidelines offer illustrative examples of agreements that either pose no competition law concerns or qualify for a newly introduced ‘soft safe harbour’, subject to specific cumulative conditions, as well as agreements that may be exempted due to the procompetitive benefits outweighing any negative impact on competition.

The soft safe harbour provision applies to sustainability standardization agreements, including those aiming to diminish or eliminate non-sustainable production processes or products. However, the criteria for an agreement to qualify for the safe harbour are stringent, especially the condition of no appreciable increase in price nor an appreciable reduction in choice of products, and its practical feasibility remains uncertain. Consequently, most agreements among competitors genuinely pursuing sustainability goals will likely still require self-assessment by weighing any significant adverse effects against anticipated efficiency gains and sustainability benefits, in order to ascertain if exemption is warranted.

A relevant requirement for exemption under EU regulations is that consumers receive a fair share of the resulting benefit,⁶⁴ a contentious issue where broader environmental or social gains from a sustainability agreement may lead to higher

⁶² D. Hearn, C. Hanawalt & L. Sachs, *Antitrust and Sustainability: A Landscape Analysis* (Columbia Center on Sustainable Investment and Sabin Center for Climate Change Law 2023).

⁶³ *Communication from the Commission – Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements* (2023/C 259/01).

⁶⁴ *Ibid.*, at 9.4.3: ‘The second condition of Article 101(3) requires that consumers receive a fair share of the claimed benefits. The concept of “consumers” encompasses all direct and indirect customers of the products covered by the agreement. Consumers receive a fair share of the benefits when the benefits deriving from the agreement outweigh the harm caused by the agreement, so that the overall effect on consumers in the relevant market is at least neutral. Therefore, the sustainability benefits that result from an agreement must accrue to the consumers of the products covered by that agreement. There may be instances where the competitive harm is clearly insignificant compared to the potential benefits for the consumers in the relevant market, obviating the need for a detailed assessment. Conversely, in many instances, it may be obvious either that the claimed sustainability benefits do not accrue to the consumers in the relevant market or that they would not be significant enough to compensate for the

prices or reduced product choice for individual consumers. Merely demonstrating overall societal benefits from a sustainability agreement is insufficient under EU law, meaning that businesses must prove that its impact on consumers in the relevant market is at least neutral. Nevertheless, acknowledging collective benefit represents a more adaptable stance by the European Commission when compared, for instance, to that of the United States, where Federal Trade Commissioner Lina Khan stated that ‘they don’t ask us to pick between good and bad monopolies’.⁶⁵

The *Environmental Crime Directive*⁶⁶ was adopted in 2024, replacing the 2008 Environmental Crime Directive and coming into force on 20 May 2024. The European Commission’s proposal for the new Directive in 2021 outlined six key objectives, among which to ‘[f]oster cross-border investigation and prosecution’.⁶⁷

The Directive is based on the recognition that environmental crime poses a growing threat, causing extensive harm to the environment, public health, and economies worldwide. Such crimes encompass a range of offenses, including wildlife crimes, habitat destruction, illegal waste shipment or dumping, pollution, and illicit trade in hazardous substances. Given their cross-border nature, environmental crimes are lucrative and difficult to detect, prosecute, and penalize, making them attractive to organized crime groups.

To address these challenges, the new Environmental Crime Directive aims to bolster environmental protection through criminal law, setting minimum standards for defining offenses, imposing penalties, and implementing measures to prevent and combat environmental crime. The Directive seeks to address previous shortcomings in environmental criminal law enforcement, including low investigation and sentencing rates, inadequate penalties, and insufficient cross-border cooperation, by expanding the scope of environmental crime sectors, establishing clear penalties, enhancing cross-border collaboration, improving data collection and dissemination, and enhancing the effectiveness of national enforcement mechanisms.

These goals are justified by the fact that environmental crimes and financial crimes are increasingly intertwined, span multiple jurisdictions, and are often connected to economic activities that are legal. A recent study carried out by Brazil’s National Council of Justice shows that the bulk of environmental crimes in

harm suffered by those consumers. However, there may also be cases in which a detailed assessment cannot be avoided’.

⁶⁵ L. Khan, *ESG Won’t Stop the FTC: Our Job is to Prevent Illegal Mergers, Not to Make the World a Better Place*, Wall Street J. (21 Dec. 2022), <https://www.wsj.com/articles/esg-wont-stop-the-ftc-competition-merger-lina-khan-social-economic-promises-court-11671637135> (accessed 3 Oct. 2024).

⁶⁶ *Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the Protection of the Environment Through Criminal Law and Replacing Directives 2008/99/EC and 2009/123/EC*, OJEU L 2024/1203 (30 Apr. 2024).

⁶⁷ *Ibid.*

the Amazon is linked to commodity trade.⁶⁸ Tightening of environmental crime regulations has, therefore, a sizeable impact on international trade, and the EU initiative comes at the risk of clashing with local criminal laws.

3.3 MEASURES TARGETING CLAIMS TO SUSTAINABLE PRODUCTION

The European Commission's proposal for a *Green Claims Directive*⁶⁹ seeks to prevent greenwashing, and has significant cross-border implications as well. It establishes minimum standards for how companies should substantiate and convey their environmental claims, and sets forth that fines for cross-border infringements must be at least at 4% of the trader's total annual turnover in the preceding financial year.

The proposed directive aims to complement and operationalize Directive (EU) 2024/825,⁷⁰ known as the 'Empowering Consumers Directive', which aims to enhance consumer protection against unfair practices and improve information for the green transition. This directive has come into force on 26 March 2024, and amends the Unfair Commercial Practices Directive, which has been incorporated into the national laws of EU Member States. Member States are required to implement the new rules by 27 September 2026. The primary goal of these initiatives is to ensure that consumers are well-informed about the environmental claims associated with the products they purchase, shielding them from unfair commercial practices and encouraging them to consider environmental factors more frequently in their buying decisions. If approved, the Directive will apply to traders, encompassing companies and businesses across all sectors, engaging in business-to-consumer commercial activities, including advertising, and making environmental claims or employing environmental labels referencing their performance, services, or products.

The proposed Directive adopts a 'no data, no claim' approach to avoid unsubstantiated sustainability claims, as well as a life-cycle approach, which, too, has implications that span across global value chains. It seeks to introduce obligations to disclose if the claims refer to the entirety or part of product or activity; to

⁶⁸ Conselho Nacional de Justiça, *Crimes Ambientais na Amazônia Legal: A atuação da Justiça nas cadeias de lavagens de bens e capitais, corrupção e organização criminosa*, <https://www.cnj.jus.br/wp-content/uploads/2024/04/relatorio-crimes-ambientais-na-amazonia-legal-final.pdf> (accessed 3 Oct. 2024).

⁶⁹ European Commission, *Proposal for a Directive of the European Parliament and of the Council on Substantiation and Communication of Explicit Environmental Claims (Green Claims Directive)*, COM/2023/166 final (22 Mar. 2023).

⁷⁰ *Directive (EU) 2024/825 of the European Parliament and of the Council of 28 February 2024 Amending Directives 2005/29/EC and 2011/83/EU as Regards Empowering Consumers for the Green Transition Through Better Protection Against Unfair Practices and Through Better Information*, OJ L 2024/825 (6 Mar. 2024).

use widely recognized scientific evidence and accurate information; to demonstrate how positive sustainability impacts are significant from a life-cycle perspective; to demonstrate that the sustainable practice goes beyond what is required by law; to compare the claim with common practice standards; to identify trade-offs, that is, if a practice with a positive environmental impact can lead to other types of impact, e.g., climate or biodiversity; to report use of carbon offsets separately; to include primary or secondary information that is representative of the specific value chain of the product or company; and to perform independent verification of sustainability claims before a product is placed on the market.

The EU *Sustainable Taxonomy*,⁷¹ enacted in June 2020, defines sustainable economic activities as providing significant contributions toward one of six environmental objectives: climate change mitigation; climate change adaptation; the sustainable use and protection of water and marine resources; transition to a circular economy; pollution prevention and control; and protection and restoration of biodiversity and ecosystems (together, the Environmental Objectives). However, for an activity to be deemed sustainable, its substantial contribution to one objective must not entail significant harm to any other objective.

The Taxonomy aims to establish a classification system that offers a unified framework for determining what qualifies as a sustainable activity, outlining the criteria an economic endeavour must satisfy to contribute to EU sustainability objectives. This classification system aims to promote transparency and redirect financial flows toward sustainable investments. Additionally, variations in national standards and financial product labels within the EU, while sometimes justified, can confuse investors, including retail investors, and hinder cross-border sustainable investments. Inconsistencies or the absence of classification systems in certain jurisdictions also pose the risk of greenwashing, potentially eroding investor confidence.

The common thread of EU regulations setting to define cross-border standards is also present with the Taxonomy. The Technical Expert Group (TEG) charged with developing the legislative proposal and comprised of thirty-five members from civil society, academia, business and the finance sector, as well as members and observers from EU and international public bodies, ‘recognises that locally relevant standards may reasonably be applied in countries outside the EU’,⁷² and ‘invites companies and investors to provide additional details setting out the rationale for variation from the TEG standard’, adding that said details would not

⁷¹ Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 Jun. 2020 on the Establishment of a Framework to Facilitate Sustainable Investment, and Amending Regulation (EU) 2019/2088, OJ L 198 (22 Jun. 2020).

⁷² OECD, *The European Union Sustainable Finance Taxonomy*, in *Developing Sustainable Finance Definitions and Taxonomies* (OECD Publishing 2020), doi: 10.1787/5e092588-en.

make the activity EU Taxonomy-aligned unless the criteria are equivalent to or more ambitious than the EU threshold.⁷³

4 NEGOTIATING IN THE SHADOW OF UNILATERALISM

The EU's unilateral sustainability measures, both in the context of EUMPA negotiations and of the European Green Deal and Fit for fifty-five frameworks, entailed significant cross-border implications and are already beginning to reverberate along global value chains through international trade. These measures are already exerting cross-border influence and affecting international trade in various ways, prompting adjustments in policies and practices of companies across value chains. Foreign companies seeking to maintain and strengthen business ties with entities falling under the scope of EU regulations will need to conform to the new standards. This 'Brussels effect' has previously manifested in response to other EU norms.⁷⁴

In this regard, a key question that underlay the negotiations of the EUMPA was whether unilateral sustainability measures targeting production processes abroad are defensible, not as a matter of technical legal analysis⁷⁵ but as a legitimate *modus operandi* on the international scene. These measures may indeed be defensible as a means of addressing the 'tragedy of the commons' facing the international community when it comes to the environmental sustainability of the global economic system developed over the past century. In this system, each state and each corporation has an incentive to pursue what it perceives as its short-term economic interests, at the expense of environmental sustainability. However, there is ample scientific consensus that, as each state and corporation undertakes its preferred wealth-maximizing course of action and ignores sustainability requirements, the outcome will be the progressive exhaustion of the natural resources – including Earth's climate – that undergird human life, societies and economic production itself.

The ideal manner of overcoming this tragedy of the commons is to ensure voluntary, negotiated agreements involving all states, requiring the swift implementation of sustainability requirements in production processes. At the same time, the very challenge of the tragedy of the commons is that, though many and even all parties involved may understand the possible exhaustion of their resources, each party's

⁷³ *Ibid.*

⁷⁴ A. Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020).

⁷⁵ For the legal analysis, see I. Venzke & G. Vidigal, *Are Trade Measures to Tackle the Climate Crisis the End of Differentiated Responsibilities? The Case of the EU Carbon Border Adjustment Mechanism (CBAM)*, 51 *Neth. Y.B. Int'l L.* 187–225 (2020), doi: 10.1007/978-94-6265-527-0_7.

incentive is to act on its immediate self-interest. Even a party that would like to move ahead may have its will undermined by the prospect (or the experience) of, having renounced its immediate self-interest, seeing other parties adopt immediately self-interest conduct and gain economically from its renunciation. Unilateral measures may be perceived as a means to ‘break’ from this tragedy of the commons scenario, using the economic weight of the EU’s internal market to impose a solution where otherwise states acting individualistically would end up undermining their own ecological rounding – and, it is worth adding, economic future.

At the same time, seeking to impose solutions unilaterally may be counter-productive. If sustainable production standards are imposed through importing countries’ trade measures rather than consensually agreed, the outcome may be to split each exporting country’s economy into two: a sustainable section, organized to meet EU sustainability requirements, and a non-sustainable one, geared to maximize economic output at the expense of environmental consequences. In this case, the EU’s unilateral sustainability arsenal would still function as a means of giving EU citizens and leaders the good conscience of not contributing, through their companies and consumption, to further environmental harm. But it would defeat their purpose as instruments to solve the tragedy of the commons, namely that of producing a ‘shadow’ over environmental negotiations large enough to lead to a broad improvement in the sustainability of production processes around the world.

Unilateral measures and the prospect of their application will, to some degree, lead to compliance by exporting countries and companies. In 2023, for example, anticipating the need to ensure sustainability in meat production, the Brazilian Federation of Banks – FEBRABAN launched a self-regulating initiative for participating banks when offering credit to meat packing plants and slaughterhouses. Participating banks should demand from borrowers in Brazil’s Legal Amazon (and the state of Maranhão) a traceability and monitoring system to demonstrate, by December 2025, that no cattle associated with illegal deforestation is acquired from either direct or indirect suppliers.⁷⁶

Other responses have been less friendly. In Brazil, a politician introduced Bill nr. 2088/2023, aimed at amending the Brazilian National Policy on Climate Change to mimic the EU’s unilateral approach to trade and environmental conservation. It provides that only goods and products originating from countries that adopt and comply with greenhouse gas emissions levels equal to or lower than those of Brazil may be placed or made available on the Brazilian market. The proposed text, dubbed the ‘environmental reciprocity bill’, contains a specific mention to deforestation

⁷⁶ FEBRABAN, *Banks Establish Self-Regulatory Rule for Bovine Meat Chain*, <https://portal.febraban.org.br/noticia/3935/pt-br/> (accessed 3 Oct. 2024).

levels of trade partners, aiming to establish that the countries of origin of the goods and products referred to in the caput must comply with environmental protection standards compatible with those established by Brazilian legislation, in particular the Brazilian Forest Code enacted in 2012, which governs the protection of native ecosystems. On 22 May 2024, the Brazilian Senate held a public hearing to discuss the Bill, as a reaction – proposing a reverse Brussels effect of sorts – to EU unilateral trade measures. The Bill aimed to establish that the competent body responsible for import control must adopt measures to restrict imports in the event of non-compliance, and, eschewing subtlety, clarified that the standards it sought to impose were restricted to goods and products originating from economic blocs and countries that impose environmental restrictions, of any type, on international trade.

More broadly, the counteraction available to developing countries in the face of the shadow of unilateralism was voiced in late 2023 by the President of Paraguay: to withdraw from negotiations in which they were expected to accept ready-made sustainability rules, and to negotiate reciprocal trade openness with other developing countries.⁷⁷ The obvious alternative are the large Asian economies with a growing appetite for the agricultural and primary products that Mercosur Member States are so efficient at producing. Here, a different ‘shadow’ looms: that of the Chinese market, to which, in 2023, Brazil destined 73% of its soybean exports, 60% of its beef exports, and 48% of its wood pulp and paper exports.⁷⁸

Thus, those considering strategies to ensure that international trade is conducted in alignment with sustainability requirements have an interest in considering consensually agreed rules for environmental conservation. This is necessary not to ‘promote trade’ but to ensure that the protection of the environment they seek does not simply result in the redirection of trade towards less demanding markets. Even assuming a shared goal of environmental conservation, the unilateral imposition of unattainable production standards is unlikely to be a catalyst for sustainable production. More likely, producers faced with production standards with which they are unable to comply – technically or profitably – will either redirect their efforts towards different markets or seek a different, and not necessarily less environmentally destructive, economic use for the land and labour at their disposal.

In this regard, an important signal for the 2024 renegotiation was the approval, by the EU Council and European Parliament, of the proposal by the European Commission to delay implementation of the EUDR by a year,⁷⁹ after formal requests by Brazil, Malaysia and Indonesia. Arguably, this is precisely the point of the ‘shadow’ of unilateral regulation: to be a tool to attain commonly acceptable, and achievable,

⁷⁷ M. Stott, *South American Leaders Issue Ultimatum on EU Trade Pact*, Financial Times (25 Sep. 2023).

⁷⁸ ApexBrasil, *Mapa Bilateral de Comércio e Investimentos Brasil–China*, 27 (Apex 2024).

⁷⁹ See Commission Strengthens Support for EU, *supra* n. 53.

environmental standards, verified through a compliance control mechanism that is within reach for small producers within developing countries. The 2024 text, which features both commonly agreed standards and means of enforcement, is no doubt an outcome preferable, including from an environmental perspective, to unilaterally imposed restrictions whose effects will be limited to the (overall small) proportion of Mercosur products exported to the EU market.

5 CONCLUSION

EUMPA negotiations provide a useful example for how unilateral measures can cast a ‘shadow’ over negotiations, both the sense of being perceived as an unwelcome threat and in the sense of fostering a mutually agreeable solution. This is because international negotiations over sustainability standards for global production take place through two parallel tracks. Standards may be agreed consensually, for example within trade agreements such as EUMPA, or they may be imposed unilaterally, as part of trade policy. In standards negotiations, the shadow of unilateralism, available to a large economy such as the EU, may permit overcoming the collective action problem inherent in seeking to establish by agreement sustainability standards for transnational production.

Measures such as CBAM, the EUDR, and CSDDD, may play an important role in withdrawing from the set of available options a status quo of unsustainable production standards. Once a unilateral measure is in place and its implementation is looming, it may become in the self-interest of other countries and their individual producers to adhere to sustainable production processes. At the same time, these measures cannot in themselves address a global challenge. The risk exists that the EU will overestimate its economic might, and consequently its ability to induce change by threatening to sanction countries and producers. As the negotiations over the EUMPA show, unilateralism is at its most useful when employed as a potential alternative to an agreement, fostering such agreement rather than replacing it.

The globalized nature of the world economy, with supply chains spanning continents, coupled with a digital infrastructure that permits consumers to choose between suppliers at the click of a button, mean that sustainable development cannot be pursued at the national level solely. Instead, sustainability requirements are increasingly thought of as elements that must affect and be required throughout transnational supply chains. By the same token, however, producer countries have alternatives. Producers faced with unattainable unilateral standards must still find an economic activity. The existence of alternative, less demanding large markets provides a counter-threat to the threat of unilateralism which can be wielded ostensibly. The key obstacle to unilaterally determined standards, however, is not

the ostensible threat by governments to retaliate but the prospect that individual producers, whose challenges and context are ignored, will respond to the increased costs imposed on them not by complying with the standards desired by those imposing unilateral measures but by seeking alternative, and potentially far less sustainable, uses for the land and labour at their disposal. It seems that, in the EU-Mercosur negotiations, this truly tragic outcome has been avoided.