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Decentralized Enforcement of Sustainability Commitments

Rebalancing, Targeted Enforcement, and Production Requirements in Trade Agreements

Geraldo Vidigal

I. Introduction

This chapter concerns means of enforcing trade and sustainable development (TSD) commitments and objectives in trade agreements (TAs) beyond adjudication. These are means that do not require a pronouncement by an adjudicative authority but can be employed by each party directly, in what can be termed ‘horizontal’ or ‘decentralized’ enforcement. In a sense, these are the traditional means by which international commitments are enforced in treaties without specific enforcement. In these cases, enforcement measures are adopted based on a state’s individual determination of what the relevant rules require from others, whether these requirements have been met, and what can be done in response to their assessment that a violation is taking place.

Decentralized enforcement can take place through international law’s reciprocity mechanisms, such as countermeasures or suspension of a violated agreement, involving an *active* decision to respond to another state’s unlawful conduct.¹ Another form of decentralized enforcement is mere implementation by each state, in its domestic laws and regulations, of agreed policies affecting private parties. Enforcement in which the enforcer demands compliance not from states but from producers abroad can be termed ‘diagonal’² Enforcement in this manner may be thought of as *passive* since it does not involve action against a state but mere domestic regulation. At the same time, enforcing sustainability requirements in production abroad requires behind-the-border verification, as well as sanctions against non-complying entities. Implementing diagonal enforcement often

¹ See Serena Forlati, ‘Reactions to Non-Performance of Treaties in International Law’ (2012) 25 *Leiden Journal of International Law* 759.

² Kathleen Claussen and Chad P Bown, ‘Corporate Accountability by Treaty: The New North American Rapid Response Labor Mechanism’ (2024) 118 *American Journal of International Law* 98, 106.

requires significant action, and may draw criticisms from other states or lead to disputes.

Mechanisms for trade-based decentralized enforcement of sustainability have been proposed from time to time. These mechanisms can be compared to trade remedies, which offer a form of consented decentralized enforcement of certain (economic) standards.³ Trade remedies can be employed without prior resort to an international adjudicator, through a wholly domestic adjudicatory process. Another source of inspiration may be Part III of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, which provides for decentralized enforcement of intellectual property rights. Part III requires each World Trade Organization (WTO) member to establish domestic enforcement mechanisms to address violations of the intellectual property standards set out in the TRIPS Agreement, without requiring a complaint from another member. In these cases, if another state believes that an instance of decentralized enforcement is unwarranted or excessive, it falls upon the dissatisfied state to challenge it through state-to-state adjudication.

As the chapter shows, there are now meaningful—if still experimental—examples of consented decentralized enforcement of sustainability commitments in TAs.⁴ Some agreements establish a right to ‘active horizontal enforcement’. These provisions legitimize horizontal action by one party in response to its assessment of non-compliance by the other party, or producers within it, with sustainability commitments. Other provisions permit passive enforcement, principally as ‘conditionality-based enforcement’ or ‘passive regulatory enforcement’, limiting trade benefits under the TA to products produced under certain circumstances or legitimizing the adoption by the parties of laws and regulations imposing sustainability conditions affecting all private parties. As the chapter delves into the topic, it will be evident that these categories are not watertight.

Following this Introduction, the chapter proceeds in four parts. Section II outlines the notion of decentralized enforcement and its various forms. Section III examines provisions in international TAs that enshrine, and thereby legitimize, active or horizontal enforcement of sustainability commitments. Section IV considers provisions that enshrine the right of parties to adopt passive enforcement measures, either imposing requirements for products to receive benefits under the agreement or establishing the right of parties to adopt specific regulations. Section V concludes, considering the effects of these provisions, as well as safeguards that

³ See eg Gregory Shaffer, ‘Retooling Trade Agreements for Social Inclusion’ (2019) *University of Illinois Law Review* 1, 35.

⁴ For recent work on these, see Kathleen Claussen, ‘Trade Policing’, (2023) 65 *Harvard International Law Journal* 25; James Harrison, ‘Trade Agreements and Sustainability: Exploring the Potential of Global Value Chain (GVC) Obligations’ (2023) 26 *Journal of International Economic Law* 199–215; Tim Meyer, ‘Consumption Governance: The Role of Production and Consumption in International Economic Law’, *Duke Law School Public Law & Legal Theory Series* No 2023-39.

can be used to prevent sustainability objectives from being invoked as a pretext for protectionist or coercive action.

II. Enforcing Commitments Without Adjudication

A. Forms of Decentralized Enforcement

The term ‘enforcement’ in international law usually encompasses two separate legal concepts. One is what can be called ‘judicial’ or ‘adjudicative’ enforcement. In TAs, adjudication is usually associated with dispute settlement clauses or chapters, which allow an enforcing actor to request from an adjudicator an authoritative determination of the lawfulness of certain conduct under the relevant agreement. During the Uruguay Round of negotiations that led to the creation of the WTO, demands to make the rules of the future WTO ‘enforceable’ meant, primarily, ensuring the ability of members to resort to dispute settlement and obtain a final ruling. In *Mexico—Soft Drinks*, the Appellate Body noted that WTO obligations can be ‘judicially enforced in the WTO’.⁵

The term ‘enforcement’ can also be used to refer to non-adjudicative or decentralized enforcement. An actor—usually a state or international organization⁶—may respond to perceived violations of a commitment not by requesting an authority to pronounce on the matter but by itself adopting certain measures. When compared to adjudication, decentralized enforcement ensures expedited response to violations of commitments, by state parties, or of standards of production, by producers.

As regards sustainability, in addition to adopting measures in response to specific wrongful conduct, a party may simply adopt sustainability policies directly affecting foreign producers. It may require a demonstration of compliance with specific production standards for products to access this party’s market. Measures adopted unilaterally to enforce sustainability objectives horizontally in this manner include the production requirements adopted by the United States that led to the WTO disputes *US—Gasoline*,⁷ *US—*

⁵ Appellate Body Report, *Mexico—Soft Drinks*, 6 March 2006, para 42 (differentiating these obligations from obligations under the North American Free Trade Agreement [NAFTA]).

⁶ International organizations can perform horizontal enforcement when they are parties to agreements on a co-equal status with states or with each other, as is the case of the European Union vis-à-vis Canada, in the Comprehensive and Economic Trade Agreement (CETA), or vis-à-vis the South African Customs Union (SACU), in the EU–Southern African Development Community Agreement (EU–SADC). By contrast, when an EU institution applies a sanctioning measure vis-à-vis an EU Member State, the EU institution operates as an authority, legally ‘above’ the EU Member State rather than in a horizontal relationship with it.

⁷ Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, 29 April 1996, WT/DS2/AB/R.

Shrimp,⁸ and *US—Tuna II*.⁹ They also include the more recent EU Deforestation Regulation¹⁰ and Forced Labour Regulation,¹¹ or conditionalities in Generalized Systems of Preferences.¹²

B. The Purpose of Consented Decentralized Enforcement

Horizontal enforcement is generally permissible under international law as countermeasures. As the arbitral tribunal in *Air Service Agreement* put it, under international law, ‘unless the contrary results from special obligations arising under particular treaties . . . each State establishes for itself its legal situation vis-à-vis other States’¹³ and may adopt reciprocal measures in case it determines that another state has violated its commitments. These measures include countermeasures but also, for example, suspension of obligations under the Vienna Convention on the Law of Treaties (VCLT) in case of material breach.¹⁴ In *Opinion 2/15*, the Court of Justice of the European Union (CJEU) referred to the VCLT to affirm that a violation of TSD commitments in agreements between the European Union and third states would permit the other party ‘to terminate or suspend the [trade] liberalisation, provided for in the other provisions of the envisaged agreement’.¹⁵

Additionally, the prevailing interpretation of TAs permits many policies that enforce sustainability requirements passively, that is, by imposing on imported products so-called process and production method requirements. In all three aforementioned WTO disputes,¹⁶ the basic right to adopt sustainability measures affecting foreign production was upheld. General Agreement on Tariffs and Trade (GATT) Article XX has been amply interpreted to make measures that promote sustainability objectives through product requirements justifiable, subject

⁸ Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, 12 October 1998, WT/DS58/AB/R.

⁹ Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, 16 May 2012, WT/DS381/AB/R.

¹⁰ 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 [2023] OJ L 150. See Gracia Marín Durán and Joanne Scott, ‘Regulating Trade in Forest-Risk Commodities: Two Cheers for the European Union’ (2022) 34 *Journal of Environmental Law* 245.

¹¹ Regulation (EU) 2023/1115 (n 10). See Marco Bronckers and Giovanni Gruni, ‘Retooling the Sustainability Standards in EU Free Trade Agreements’ (2021) 24 *Journal of International Economic Law* 25.

¹² Lorand Bartels, ‘The WTO Legality of the EU’s GSP+ Arrangement’ (2007) 10 *Journal of International Economic Law* 869.

¹³ *Air Service Agreement Arbitration (France v United States)* (1978) 18 RIAA 417, at 443.

¹⁴ Vienna Convention on the Law of Treaties, in force 27 January 1980, art 60.

¹⁵ CJEU Opinion 2/15, 17 May 2017 (ECLI:EU:C:2017:376), para 161. Arguably, this statement confuses different international legal instruments. Considering it in depth is beyond the scope of this chapter.

¹⁶ See (n 7), (n 8), and (n 9).

to certain conditions. Under TAs modelled on the GATT—the vast majority of them—passive enforcement, even if severely trade-restrictive, is likely to be permissible, provided that it is non-discriminatory and does not involve a disguised restriction on trade.

This was confirmed, with regard to the EU–Ukraine Association Agreement (AA), by the panel in *Ukraine—Wood Export Ban*. Though considering a different matter (environmentally justified export bans), the panel based its reasoning on this WTO jurisprudence. This panel found that

legitimate public policy goals . . . may be invoked to justify a violation of . . . the AA, provided that such measure is not applied, as specified in the chapeau of Article XX, ‘in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade.’¹⁷

Like this AA, many other contemporary TAs incorporate or reproduce GATT Article XX. Most of them will accordingly provide some leeway for non-discriminatory passive enforcement.

Still, adopting new trade-restrictive measures unilaterally often leads to political opposition by affected states, which believe they are unlawful, excessive, or simply abusive unilateral renegotiation of agreed terms. Even if one may ultimately argue successfully for the lawfulness of sustainability measures, a state negotiating a new TA may not find it acceptable for an agreement to include an open-ended authorization for the other party to impose new barriers to trade, unilaterally nullifying its hard-fought concessions.

The purpose of including provisions specifically permitting non-adjudicatory enforcement of TSD commitments in TAs is thus twofold. On the one hand, through these provisions, the relevant enforcement measures become legitimized by state consent, precluding a debate on whether they are violations of the trade commitments in the relevant TA (or, as developing countries sometimes see it, unilateral renegotiations of the underlying bargain by means of an exception). On the other hand, these provisions establish conditions for the adoption of these enforcement measures.

¹⁷ Panel Report, *Ukraine—Wood Export Ban*, 11 December 2020, para 258.

III. Active Enforcement: Rebalancing, Level Playing Field, and Rapid Responses

The trend of including provisions permitting non-adjudicatory enforcement in TAs may seem contradictory. Throughout the twentieth century, much of the evolution of international trade law consisted in replacing unilateral enforcement with adjudication-mediated enforcement. At the WTO, Article 23 of the Dispute Settlement Understanding (DSU) prevents WTO members from unilaterally determining that a violation of WTO rules has taken place and acting upon this determination. WTO members may only resort to enforcement through trade-restrictive measures after a multi-stage adjudication process, whereby impartial WTO organs conclude that certain measures are unlawful, this conclusion does not lead to compliance, and the WTO authorizes a specific form and level of retaliation.¹⁸ Although WTO retaliation is, in substance, similar to countermeasures under general international law, it is not technically a 'non-performance' of WTO obligations but part of the WTO legal framework.¹⁹ Permitting TA parties to enforce commitments unilaterally may seem like a step back when compared to conditioning enforcement to prior adjudication and authorization.

Permitting non-adjudicatory enforcement can be justified on two grounds. The first ground is that it avoids what Rachel Brewster has termed the 'remedy gap' in WTO dispute settlement, that is, the long lag between the violation and the authorization for reciprocal non-performance.²⁰ This lag is likely to make post-adjudication retaliation less effective a remedy, from the perspective of actors who lose out from violations, than immediate response. Permitting immediate response would ensure that parties cannot temporarily benefit from violating their commitments. With regard to sustainability commitments, this remedy gap could be argued to be all the more concerning, since violations of at least some of these commitments can produce irreversible consequences, not only for economic operators but also for Earth's life support systems.

The second ground underlying a return to non-adjudicatory enforcement is preserving what is sometimes called the 'level playing field'. Beyond their societal objectives, sustainability commitments also aim to preserve the competitiveness of products and companies in parties that fulfil their labour and environmental commitments. Lowering (or failing to enforce) labour and environmental standards

¹⁸ Understanding on Rules and Procedures Governing the Settlement of Disputes, in force 1 January 1995, art 22.2. See Geraldo Vidigal, 'Re-Assessing WTO Remedies: The Prospective and the Retrospective' (2013) 16 *Journal of International Economic Law* 505.

¹⁹ It is beyond the scope of this chapter to compare 'suspension of concessions and other obligations' under the DSU with countermeasures under the law of responsibility, on the one hand, and reciprocal suspension of a treaty 'in part' as a response to a material breach of the treaty, as codified in VCLT art 60, on the other.

²⁰ Rachel Brewster, 'The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement' (2011) 80 *George Washington Law Review* 102.

may give a state's companies illegitimate competitive advantages vis-à-vis producers that abide by sustainability standards. Decentralized enforcement permits immediate responses, countering this illegitimate competitive advantage. In *Opinion 2/15*, the CJEU stated that one of the objectives of sustainability commitments is to ensure 'free trade on an equal footing', that is, without 'major disparities between the costs of producing goods and supplying services' owing to low labour and environmental standards.²¹ In this regard, this form of enforcement is most justifiable when it affects the specific areas and economic actors that credibly gain from a violation of sustainability commitments.

A. Country-Wide Decentralized Enforcement—Rebalancing and Level Playing Field under the EU–UK TCA

Negotiated as part of EU–UK Trade and Co-operation Agreement (TCA), the 'Rebalancing' mechanism established by its Article 411 allows non-adjudicatory, horizontal responses to lowered sustainability standards. In TCA Article 411(1), the parties acknowledge that 'significant divergences' in the areas of 'labour and social, environmental or climate protection, or with respect to subsidy control', are 'capable of impacting trade or investment between the Parties in a manner that changes the circumstances that have formed the basis for the conclusion of this Agreement'. TCA Article 411(2) provides:

If material impacts on trade or investment between the Parties are arising as a result of significant divergences between the Parties in the areas referred to in paragraph 1, either Party may take appropriate rebalancing measures to address the situation. Such measures shall be restricted with respect to their scope and duration to what is strictly necessary and proportionate in order to remedy the situation. Priority shall be given to such measures as will least disturb the functioning of this Agreement. A Party's assessment of those impacts shall be based on reliable evidence and not merely on conjecture or remote possibility.

Thus, resorting to rebalancing measures is permitted if: (i) there are significant divergences between the parties; (ii) as a result, material impact on trade and investment between the parties arises; and (iii) the measures adopted are appropriate to redress the situation. As regards what 'appropriate rebalancing measures' are, TCA Article 762 refers to suspension of benefits under the TCA itself—so-called 'trade retaliation'—subject to various conditions with regard to its scope and permissible level.²²

²¹ CJEU *Opinion 2/15* (n 15) para 159.

²² See, on the specific requirements, David Collins, 'Standing the Test of Time: The Level Playing Field and Rebalancing Mechanism in the UK–EU Trade and Cooperation Agreement

The TCA regulates in detail the procedure surrounding Article 411. It requires the party seeking rebalancing to notify the other party of the measures it intends to take, following which consultations between the parties must ensue. If these consultations do not yield a satisfactory outcome, the party targeted by rebalancing may request an arbitration tribunal to determine the consistency of the proposed measures with the requirements of Article 411(2) (along with, presumably, other provisions specifying what measures are ‘appropriate’). In case of delay by the arbitration tribunal, the party that proposed rebalancing measures may adopt them nonetheless, but it is subject to self-judging countermeasures from the other party. A finding of inconsistency requires the ‘withdrawal or adjustment of the rebalancing measures’ to reflect the findings of the arbitral tribunal.²³ Upon delivery of the arbitral tribunal’s award, any early adopted rebalancing measures found to be inconsistent with the TCA, as well as all countermeasures adopted to respond to this early adoption, must be withdrawn.

In short, rebalancing under the TCA is subject to both substantive and procedural requirements. These procedural requirements go beyond requiring certain conduct prior to the adoption of rebalancing measures. Once considered in their entirety, they mean that TCA rebalancing does not operate as a wholly horizontal mechanism. Instead, the party targeted by proposed rebalancing is empowered to request adjudication and obtain a ruling on the lawfulness of the proposed measures—a request that prevents the party seeking rebalancing from implementing the proposed measures pending adjudication. The horizontal enforcement based on a purely unilateral assessment (an early proposal made by the European Union) is now vestigial, remaining available provisionally, and solely in case of a delay on the part of the arbitral tribunal. Additionally, this unilateral rebalancing is subject to an equally unilateral response from the party targeted by the rebalancing measures. Ultimately, what the TCA’s rebalancing mechanism creates is a reversal of the burden of bringing a dispute, perhaps (if a dispute is ever brought) with a corresponding shifting of the burden of proof.

B. Targeted Decentralized Enforcement—US–Peru Forest Governance and USMCA Rapid Response Mechanism

A second means of decentralized enforcement is targeted unilateral enforcement. Targeted unilateral enforcement replaces the blunt instrument of measures affecting

(TCA)’ (2021) 12 *Journal of International Dispute Settlement* 617; Giulia Claudia Leonelli, ‘From Extra-Territorial Leverage and Transnational Environmental Protection to Distortions of Competition: The Level Playing Field in the EU–UK Trade and Cooperation Agreement’ (2021) 33 *Journal of Environmental Law* 611.

²³ Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community and the United Kingdom of Great Britain and Northern Ireland (TCA), in force 1 May 2021, art 411.3(e), fn 65.

the trade of a non-complying state, without distinction between individual entities affected, with sanctions targeting non-complying entities. The most advanced mechanisms of this type appear in the Annex on Forest Sector Governance in the US–Peru Trade Promotion Agreement (TPA) and in the Rapid Response Mechanism (RRM) set up in the United States–Mexico–Canada Agreement (USMCA).²⁴ A detailed analysis of the RRM is offered in Chapter 17 of this volume.²⁵ For purposes of this chapter, the relevant point is that these mechanisms permit a party to act on its own interpretation that production abroad is taking place in violation of certain sustainability standards set out in the TA.

Both mechanisms involve, first and foremost, a demand from the complaining party, addressed to the party in which the sub-standard production is believed to be taking place, for an investigation on the matter. In the TPA, the mechanism applies where the United States believes that a producer or exporter of Peruvian timber products has not ‘complied with applicable laws, regulations, and other measures of Peru governing the harvest of, and trade in, those products.’²⁶ In the USMCA, the United States or Canada may act on its belief that workers in specific facilities in Mexico are being subject to a ‘Denial of Rights’, in that they ‘are being denied the right of free association and collective bargaining under laws necessary to fulfil the obligations of [that] Party’ under the USMCA Labour Chapter.²⁷

In case of non-responsiveness or of a response considered unsatisfactory, the agreements provide for different procedures. Under the TPA, following a report by Peru on the matter, the United States may directly adopt certain measures targeting the specific products or the companies involved, including ‘denying entry to the shipment that was the subject of the verification’ or denying entry to all products of an enterprise ‘that has knowingly provided false information to Peruvian or United States officials regarding a shipment.’²⁸ The latter sanction has been adopted vis-à-vis two companies, in 2017²⁹ and 2019.³⁰ Peru has not objected to either application.

²⁴ The RRM only applies between the United States and Mexico (Annex 31-A) and between Canada and Mexico (Annex 31-B).

²⁵ See Chapter 17 in this volume.

²⁶ United States–Peru Trade Promotion Agreement, in force 1 February 2009, Annex 18.3.4, para 7.

²⁷ Agreement between the United States of America, the United Mexican States, and Canada, in force 1 July 2020, art 31-A.2. In principle, Mexico vis-à-vis the United States or Canada may also invoke the mechanism.

²⁸ TPA Annex 18.3.4, para 13(a). The same measures can be adopted if Peru does not provide a verification report. *ibid* para 14.

²⁹ USTR, ‘USTR Announces Unprecedented Action to Block Illegal Timber Imports from Peru,’ *Press Release* (19 October 2017).

³⁰ USTR, ‘USTR Announces Enforcement Action to Block Illegal Timber Imports from Peru,’ *Press Release* (26 July 2019).

The RRM involves a more complex mechanism. The complaining party must request the establishment of a ‘Rapid Response Labor Panel’ to adjudicate the matter.³¹ If this panel finds a Denial of Rights in a ‘Covered Facility’, the complainant can then impose remedies, including ‘suspension of preferential tariff treatment for goods manufactured at the Covered Facility or the imposition of penalties on goods manufactured at or services provided by the Covered Facility.’³²

The RRM might seem like a regular adjudication-based enforcement mechanism. However, it includes a decentralized element, which, though formulated as optional, has become de facto the main means of enforcement of USMCA’s labour component. Pursuant to USMCA Article 31-A-4(3), together with the request for an investigation, ‘the complainant Party may delay final settlement of customs accounts related to entries of goods from the Covered Facility’ in which it suspects Denials of Rights to be taking place.

The latter mechanism implies a de facto temporary withdrawal of USMCA preferences. As long as it is in place, in order to import into the complaining party products produced in the targeted facility, an importer may be required to post a bond equivalent to the amount of the applicable tariff. This posting must continue pending resolution of the dispute or a panel ruling, after which the bonds are either returned (in case the panel finds that the measures were unwarranted) or become part of the remedies that the complaining party can continue to apply.³³ Thus, the financial harm caused to that facility does not start after an independently verified failure to conform to USMCA standards. It starts from the unilateral determination by the complaining party that it ‘has a good faith basis to believe that a Denial of Rights is occurring at a Covered Facility’ and a unilateral decision to accompany its request for an investigation with a temporary suspension of USMCA preferential treatment with respect to products produced in the relevant facility.

Since its creation, the RRM has seen significant use by the United States, which has invoked it 16 times, with respect to 15 facilities, between May 2021 and September 2023. Out of these, on 12 instances (75 per cent) the US Trade Representative has compounded the request for review with a letter directing the US Secretary of the Treasury to suspend ‘the liquidation for all unliquidated entries of goods from the Facility’.³⁴ In all cases started before 2023, this sanction was followed, over the subsequent months, by a resolution of the matter, or an agreement for a ‘course of remediation’—and another letter from the US Trade Representative

³¹ USMCA arts 31-A.4 and 31-A.5.

³² USMCA art 31-A.2(2).

³³ See Chad P Bown and Kathleen Claussen, ‘The Rapid Response Labor Mechanism of the US–Mexico–Canada Agreement’ (forthcoming 2024) *World Trade Review*.

³⁴ Letter from United States Trade Representative to United States Secretary of Treasury, 30 January 2023 <<https://ustr.gov/sites/default/files/2023-01/VU%20II%20-%20Suspension%20of%20Liquidation%20-%20for%20posting.pdf>> accessed 1 September 2023.

(USTR) directing the US Secretary of Treasury to resume liquidation. In 2023, the only case in which the settlement of accounts remained suspended after three months concerned a facility for which the RRM was triggered a second time.³⁵ This plant has now been closed.

By contrast, only one panel has been requested under the RRM, after Mexico rejected the applicability of the mechanism to the targeted facility (the San Martín mine).³⁶ At the time of writing, Mexico had recently consented to allow this panel to hold a verification hearing in Mexico City.³⁷ The virtual lack of RRM litigation and expedited resolution of complaints suggests that more than accepting the truth of the complaint, affected facilities simply cannot afford to have their cash flow affected while they engage in a months-long international dispute settlement procedure.

Targeted unilateral enforcement may seem to be a powerful mechanism but its reach can be limited by the ability of economic operators to shift their mode of operation without addressing the underlying issue.³⁸ Nonetheless, when adopted between highly integrated economies and towards entities in the relatively smaller partners, which are more likely to be highly dependent on their business with the larger partner, it may lead to rapid change of behaviour. At the same time, if not tempered by adjudication, active decentralized enforcement may become difficult to distinguish from (consented) extraterritorial exercise of enforcement jurisdiction, without many of the legal safeguards that would surround this exercise in a domestic setting.

IV. Passive Enforcement: Product Conditionalities for Benefits and for Trade

What this chapter labels passive decentralized enforcement encompasses measures whose application is embedded in the ordinary operation of domestic laws and policies. Passive enforcement does not take place exceptionally, in response to specific identified instances of non-compliance with sustainability commitments or standards; instead, demonstrating compliance with sustainability standards becomes a condition for a product to be granted certain advantages or, in some cases,

³⁵ *ibid.*

³⁶ USTR, Letter to the Mexican Section of the USMCA Secretariat, 22 August 2023 <<https://ustr.gov/sites/default/files/2023-08/US%20Request%20for%20RRM%20Panel%20-%20San%20Martin.pdf>> accessed 1 December 2023.

³⁷ Kathleen Claussen, 'First Rapid Response Labor Panel Begins Work under USMCA' (*International Economic Law and Policy Blog*, 2023) <<https://ielp.worldtradelaw.net/2023/10/first-rapid-response-labor-panel-begins-work-under-usmca.html>> accessed 1 December 2023.

³⁸ See eg Alianza Periodística Madera Sin Rastro, 'Sanctioned Peruvian Loggers Continue Illegal Export of Amazonian Timber (Portuguese)' (*Publica*, 31 May 2023) <<https://rainforestjournalismfund.org/id/node/22429>> accessed 1 December 2023.

for being accepted at all in a certain market. As a matter of how these policies are conducted, this can mean imposing sustainability requirements that apply and are enforced equally vis-à-vis domestic and imported products. More controversially, it may involve applying different requirements to domestic and imported products or applying the same requirements but using different enforcement mechanisms.

In principle, applying sustainability requirements to products is permissible under international trade law, without the need for this to be specified in a treaty. In WTO dispute settlement, such measures have been found permissible in principle, including when they result in new barriers to trade or unfavourable competitive conditions for imported products.³⁹ In summary, the conditions set out in WTO jurisprudence for the lawfulness of trade-restrictive measures that pursue a legitimate objective are:

- (i) a demonstrable nexus between the measures being adopted and the legitimate objective, so that each measure must make an ascertainable contribution to the objective and, in some cases, make a contribution to this objective that cannot be made through a reasonably available, less trade-restrictive measure; and
- (ii) an application without arbitrary or unjustifiable discriminatory effects, so that any adverse effects caused by the measure on the competitive conditions of products imported from a WTO member, when compared to products of another member or domestic products, are rationally justifiable, in principle based on the same objective that justifies adopting the measure.⁴⁰

A trade-restrictive measure that makes such a demonstrable contribution and is non-discriminatory in its application would be lawful under WTO Agreements (and TAs that reproduce the balance between trade obligations and regulatory freedom in the WTO Agreements) without the need for this to be further specified in the agreement.

Specific provisions on passive sustainability enforcement in TAs have a two-fold purpose. First, they legitimize sustainability requirements in production. Compliance with these requirements can either be a condition for a product to benefit from trade preferences under the RTA or, conceivably, a condition to export specifically at-risk products to the trade partner at all. Second, these provisions specify the conditions under which trade-restrictive measures may be adopted and trade benefits may be denied. This reduces uncertainty for the parties, preventing

³⁹ On this see (n 7), (n 8), and (n 9).

⁴⁰ On this see Geraldo Vidigal and Ingo Venzke, 'Of False Conflicts and Real Challenges: Trade Agreements, Climate Clubs, and Border Adjustments' (2022) 116 *American Journal of International Law Unbound* 202; Robert Howse, Joanna Langille, and Katie Sykes, 'Pluralism in Practice: Moral Legislation and the Law of the WTO after Seal Products' (2015) 48 *The George Washington International Law Review* 81; Emily Lydgate, 'Is It Rational and Consistent? The WTO's Surprising Role in Shaping Domestic Public Policy' (2017) 21 *Journal of International Economic Law* 561; Giulia Claudia Leonelli, 'Anti-Deforestation npr-PPMs and Carbon Border Measures: Thinking About the Chapeau of Article XX GATT in Times of Climate Crisis' (2023) 26 *Journal of International Economic Law* 416.

resort to these measures from being perceived as ‘sustainability unilateralism’, and avoids difficult litigation in which trade rules can be portrayed as ‘point[ing] in a different direction’ from the adoption of measures to pursue sustainability objectives⁴¹ (even when, in reality, all that trade rules require is that the measures indeed contribute to their asserted objective and do not discriminate against foreign products and producers).

A. Sustainability-Related Conditionalities

Explicit sustainability-related conditionalities have so far been included in two TAs, both conditioning the lower trade barriers in the agreement to the fulfilment of sustainability conditions in production processes. First, under the European Free Trade Association–Indonesia Comprehensive Economic Partnership (EFTA–Indonesia CEPA), the trade benefits accorded to vegetable oil—principally palm oil—are conditional upon such vegetable oil being produced sustainably. Second (and taking a broad view of ‘sustainability’), under the agreed-in-principle EU–Mercosur AA, the trade benefits accorded by the European Union to eggs from Mercosur are conditional upon such eggs being produced pursuant to EU animal welfare standards.

In the EFTA–Indonesia CEPA, the sustainability-related conditionality is introduced by Article 8.10, entitled Sustainable Management of the Vegetable Oils Sector and Associated Trade. Article 8.10(a) sets out the parties’ agreed sustainability objectives for the palm oil industry: ‘protecting primary forests, peatlands, and related ecosystems, halting deforestation, peat drainage and fire clearing in land preparation, reducing air and water pollution, and respecting rights of local and indigenous communities and workers’. In Article 8.10(e), the parties commit to ‘ensure that vegetable oils and their derivatives traded between the Parties are produced in accordance with the sustainability objectives’ described in paragraph (a). Thus, parties do not only commit, under paragraph (a), to ‘effectively apply laws, policies and practices’ to pursue sustainability objectives in the vegetable oils sector; under subparagraph (e), they also commit to ‘ensure’ that all trade between them of vegetable oils and their derivatives involves products ‘produced in accordance’ with these sustainability objectives.

In itself, Article 8.10 appears to convey regular sustainability commitments, the enforcement of which might require resort to adjudication. The decentralized enforcement of Article 8.10 is based on an asterisk and a footnote in the Schedules of

⁴¹ International Law Commission, ‘Fragmentation of International Law: Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi’ (2006) A/CN.4/L.682 and Add.1*, para 15.

Tariff Commitments of Norway, Iceland, and Switzerland (the latter being applicable to Liechtenstein). The footnote provides:

Products of HS heading 15.11 and 15.13 imported into [relevant EFTA Member State] under the Agreement shall meet the sustainability objectives as set out in Article 8.10 (Sustainable Management of the Vegetable Oils Sector and Associated Trade) of the Agreement.⁴²

CEPA tariff benefits for palm oil products are thus conditional upon the fulfilment of Article 8.10 sustainability requirements. The mechanism empowers each party, when applying its own tariff concessions, to establish means to determine whether the sustainability objectives of Article 8.10 have been met. This has been complemented by domestic laws in each EFTA Member State. For instance, under Swiss law, the products in question must be accompanied by certificates issued by the Roundtable on Sustainable Palm Oil, the International Sustainability and Carbon Certification PLUS, or the Palm Oil Innovation Group.⁴³ The Swiss State Secretariat for the Economy verifies regularly that these certification systems continue to meet the conditions for accurately certifying that products have been produced respecting the objectives of Article 8.10.

Significantly, Indonesia's own mandatory palm oil certification scheme (ISPO) was not accepted, with the authors of the study underlying the law stating that ISPO standards:

compare poorly to other standards . . . The benchmark for ISPO was hence not included in this report, though we reference findings regarding ISPO from other studies and a short description. It is worth noting that ISPO is currently under review. The forthcoming version of ISPO may prove to be more relevant for the Swiss industry and could be included in a future evaluation.⁴⁴

A similar mechanism is found in the EU–Mercosur agreed-in-principle AA regarding animal welfare standards in egg production. Animal welfare standards

⁴² Comprehensive Economic Partnership Agreement between Indonesia and the EFTA States, in force 1 November 2021, *Schedule of Tariff Commitments—Iceland and Indonesia*, 14, fn *, and 5; *Schedule of Tariff Commitments—Norway and Indonesia*, 53, fn 1, and 23; *Schedule of Tariff Commitments—Switzerland and Indonesia*, 99, fn *, and 47–48. The Harmonized System headings are 15.11 ('Palm oil and its fractions, whether or not refined, but not chemically modified') and 15.13 ('Coconut (copra), palm kernel or babassu oil and fractions thereof, whether or not refined, but not chemically modified').

⁴³ Ordonnance sur l'importation au taux préférentiel d'huile de palme de production durable en provenance d'Indonésie, No 632.324.27, 18 August 2021 (in force 1 November 2021), art 3 <<https://www.fedlex.admin.ch/eli/cc/2021/618/fr>> accessed 1 December 2023.

⁴⁴ FERN, 'Using Tariffs to Incentivize Sustainable Palm Oil' (2022) fn 11 <https://www.fern.org/fileadmin/uploads/fern/Documents/2022/Fern_briefing_-_Using_tariffs_to_incentivize_sustainable_palm_oil.pdf> accessed 1 December 2023.

may be considered sustainability standards in a broad sense, in particular insofar as they prevent the development and spread of animal diseases and foodborne human diseases.⁴⁵ In the EU's Tariff Elimination Schedule, tariffs for eggs of various types, for human consumption and incubation, are to be eliminated within four years of the AA entering into force.⁴⁶ However, to benefit from this progressive tariff elimination, Mercosur eggs must be 'accompanied by a certificate of compliance with Council Directive No. 1999/74/EC or any equivalent animal welfare official standards'.⁴⁷

Thus, as in the EFTA–Indonesia CEPA, this EU–Mercosur AA provision obviates the need for active enforcement of animal welfare standards, conditioning AA benefits to Mercosur eggs to evidence of compliance by producers with certain production standards. It is noteworthy that, in this case, the substantive standards to be applied are those set in an EU Directive, rather than standards set by an international body or especially formulated for the agreement.⁴⁸ Compliance with these standards can be verified by official certification—including, seemingly, that of Mercosur Member State governments—or by third-party certification.⁴⁹

The provision makes it clear that the requirement applies solely to eggs exported by Mercosur Member States under the Agreement and 'does not entail requirements for all MERCOSUR egg production system'. Combined with the direct reference to an EU Council Directive, this suggests that this provision, at least as much as it aims to enhance the well-being of the animals involved in egg production, seeks to preserve a level playing field between EU and Mercosur egg producers. To prevent the elimination of tariffs from leading to a dislocation of production owing to potential lower costs of animal welfare compliance in Mercosur countries, the AA imposes on producers who seek to benefit from tariff elimination compliance with the same EU Council Directive that applies to European producers.

B. Specific Consent to Sustainability Regulation

A final means of enforcement—which one might call simply 'regulation'—does not in principle require treaty provisions. The WTO has consolidated over two decades the understanding that the imposition of requirements concerning an imported product's production methods is not, in itself, incompatible with WTO law.

⁴⁵ See Alan M Goldberg, 'Farm Animal Welfare and Human Health' (2016) 3 *Current Environmental Health Reports* 313; Marian Stamp Dawkins, 'Animal Welfare and Efficient Farming: Is Conflict Inevitable?' (2017) 57 *Animal Production Science* 201.

⁴⁶ EU–Mercosur Trade Agreement – Agreement in Principle, 1 July 2019 (not signed), Appendix 2-A-1 (Tariff Elimination Schedule for the EU), 10.

⁴⁷ EU–Mercosur Agreement in Principle, Annex-A (Tariff Elimination Schedule), para 5(1), 8.

⁴⁸ *ibid.* Of course, by referring to Council Directive No 1999/74/EC, the Agreement in Principle incorporates it by reference, making it the negotiated standard between the parties.

⁴⁹ *ibid.*

Pursuant to this jurisprudence, the WTO Agreements permit members to adopt measures to pursue sustainability objectives having a highly trade-restrictive effect, provided that the measures are applied ‘in an even-handed manner’ to domestic and imported products.⁵⁰ This includes measures that apply solely to imported products, such as the ban on the importation of retreaded tyres in *Brazil—Retreaded Tyres*, if there is a rationale according to which the importation of the relevant products poses an aggravated risk when compared to non-affected products (in this case, retreaded tyres were affected, but not new tyres).⁵¹

Despite the openness in WTO jurisprudence to such measures, they remain contentious. During the G20 meeting of 2023, for example, 17 developing countries—in Latin America, Africa, and Southeast Asia—challenged the EU Deforestation Regulation. Their Joint Letter criticized the regulation’s ‘one-size-fits-all’ approach, its ability to contribute to halting deforestation, its ‘immense costs on exporting and importing countries alike, as well as on producers and consumers’, and its disproportionate impact on smallholders.⁵² The following week, Mercosur responded to the European Union that it believes the EU–Mercosur AA must be ‘equipped with a mechanism to rebalance trade concessions negotiated under the Agreement, should these concessions be nullified or impaired as a result of EU domestic law.’⁵³

To address these matters, it seems possible for TAs to feature provisions conveying agreement between parties to specific regulations, so as to avoid contestation and litigation. Most TSD Chapters contain generic provisions in this regard, which obscure more than they clarify. The EU–Mercosur Agreement in Principle, for example, includes a provision entitled ‘Right to regulate and levels of protection’, which enshrines a reciprocal recognition of:

the right of each Party to determine its sustainable development policies and priorities, to establish the levels of domestic environmental and labour protection it deems appropriate and to adopt or modify its law and policies . . . consistent with each Party’s commitment to the international agreements and labour standards referred to [in the TA].⁵⁴

⁵⁰ See (n 7), (n 8), and (n 9).

⁵¹ Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, 3 December 2007, WT/DS332/AB/R.

⁵² Letter to President of the European Parliament, President of the European Council, President of the European Commission and Presidency of the Council of the European Union, 7 September 2023. The letter was later submitted to the WTO Committee on Agriculture and is available as Doc G/AG/GEN/223/Rev.1 (26 September 2023).

⁵³ Letter from Mercosur Member States to the European Union and its Member States, 25 September 2023 (on file with author).

⁵⁴ EU–Mercosur Agreement in Principle, TSD Chapter, art 2(1).

Provisions such as this do little to clarify what is permissible regulation and enforcement. They may be read as meaning that both parties, in particular the less developed among them, may ‘establish the levels’ they deem appropriate for domestic environmental and labour protection, without being subject to trade restrictions by the other party. But they may, equally logically, mean that both parties, and in particular the more developed among them, may enact regulations demanding compliance, by imported products and perhaps even exporting countries as a whole, with certain production standards aimed at enforcing the regulating party’s individually established levels of protection. In other words, the provision does little to resolve any specific interpretative disagreements, potentially giving rise to challenges and litigation. The panel in *Ukraine—Wood Export Ban* accorded limited, if any, interpretative value to the ‘right to regulate’ provision in the EU–Ukraine AA, noting that it did not establish any ‘immediate and precise obligations’ and, partially for this reason, did not provide either a self-standing exception or particularly relevant context for the interpretation of the regular exceptions in the agreement.⁵⁵

In this regard, more specific provisions could be helpful in establishing, *ex ante*, specific permissible regulatory measures affecting trade between the parties, as well as specific requirements attached to the adoption and implementation of these measures.

V. Conclusion

While adding decentralized enforcement mechanisms to TAs remains uncommon, most agreements that contain these mechanisms are very recent. They demonstrate that the horizon of enforceability of sustainability commitments in international TAs is not restricted to enforcement through adjudication. Decentralized enforcement may take place through measures affecting parties, their nationals, or specific products that the enforcing party believes are failing to abide by certain sustainability requirements.

Some forms of decentralized enforcement could be lawful under general international law or conform to WTO jurisprudence on legitimate trade-restrictive regulation. Their addition to TAs has the advantage of securing consent for their use, legitimizing conduct that might be unlawful or simply clarifying the permissible conditions for, and modes of, sustainability enforcement.

Decentralized enforcement mechanisms may be powerful means for strengthening the enforcement of sustainability commitments. They avoid the challenging road of resort to adjudication under TAs and permit targeting specific products or

⁵⁵ Panel Report, *Ukraine—Wood Export Ban*, paras 250–51.

facilities in which sustainability issues arise. On the other hand, in the absence of available adjudication, they may give rise to abuse. Sustainability standards may become a pretext for, rather than the motivation behind, trade-restrictive measures, leading to TA-sanctioned protectionism, or worse, economic coercion.

For this reason, it is crucial for these mechanisms to include the possibility of adjudication, resort to which must be concretely available for those affected by consented decentralized enforcement that they deem unjustifiable. In this case, the mechanism is no longer fully decentralized: instead, its effect is to reverse the burden of resorting to adjudication, requiring the party perceived to be adopting or permitting unsustainable production in its territory to challenge the adoption by the other party of decentralized enforcement measures.