



# Greening EU Trade 4

## How to “green” trade agreements?



“This paper provides recommendations on how to better align both the multilateral trading system and EU bilateral trade agreements with some key-environmental objectives.”

\_\_\_\_\_ Pascal Lamy, Geneviève Pons, Pierre Leturcq, 2020

At a time when the results of the US Presidential election allow for greater hope concerning both the environmental and trade agendas, this policy paper offers diverse proposals on how to render trade agreements more environment friendly. It is the fourth in a series on the greening of EU trade policy that Europe Jacques Delors initiated following the political reconfiguration brought about by 2019’s European elections <sup>1</sup>. While trade policy is

neither a panacea in the fight against global warming, nor a guarantor of environmental protection and biodiversity, it must nevertheless accompany domestic dynamics of ecological transition in order to ensure and further diffuse their impacts. Under the increasingly distinct pressure of public opinion on the matter, policy lines appear to be undergoing a swift transformation. The nomination of the new European Commission has brought about an

\_\_\_\_\_ [Environment](#), Institut Jacques Delors, December 2019. Lamy, P., Pons, G., Leturcq, P., [A European Border Carbon Adjustment proposal](#), Europe Jacques Delors, June 2020.

<sup>1</sup> This series is produced with the support of the European Climate Foundation. Lamy, P., Pons, G., Leturcq, P., [Time to Green the EU’s trade policy: but how?](#), Institut Jacques Delors, July 2019. Lamy, P., Pons, G., Leturcq, P., [The Economics of Trade and the](#)

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Acknowledgments

This series is produced with the support of the European Climate Foundation. The authors would like to thank Natasha Zivkovic for their contributions. They also would like thank Gabrielle Marceau, Aaron Cosbey and François Chimits for their valuable comments.

acceleration in the agenda for greening EU trade policy. In the space of only a few months, highly sensitive issues such as border carbon adjustment or the inclusion of the Paris Agreement as an essential element of trade agreements have become policy options that are now part of the Green Deal agenda and as such seriously being considered at the European level. The unexpected alliance between France and the Netherlands on the greening of European trade policy<sup>2</sup>, accompanied by the recent more negative stance taken by several national governments about the ratification of the EU-Mercosur agreement<sup>3</sup> are just two examples of this acceleration. This political momentum could start to bear fruit very soon. The trade agreement that the European Union is currently negotiating with New Zealand, a frontrunner-country on sustainable trade and climate policies<sup>4</sup>, could be the first in a series of new trade agreements including enforceable provisions in more “robust” trade and sustainable development chapters.

This greening endeavor can be approached in the two traditional dimensions of the rules-based trading system:

1. The multilateral dimension, i.e. the WTO, where ambitions to open up trade fairly are limited by the heterogeneity of members preferences and by their different levels of development.
2. The bilateral/regional dimension (“WTO +”), which allows for a greater pursuit of openness hence providing a lever for higher environmental ambitions.

<sup>2</sup> Non-paper from the Netherlands and France on trade, social economic effects and sustainable development.

<sup>3</sup> Le Monde, « Comprendre le revirement d’Emmanuel Macron sur l’accord UE-Mercosur », 26 August 2020.

<sup>4</sup> Politico, European Union-New Zealand, Natural Partners Committed to Action on Climate Change and Sustainability, September 2020.

## 01.

# Improving the articulation between Multilateral Trade and Environment Rules and Governance

## a. Bolstering mechanisms for the implementation and enforcement of multilateral environmental agreements (MEAs)

The persistence of non-compliance with the trade provisions of multilateral environmental agreements (poaching, trading of ivory and rhino tusks, sale of pangolins, etc.) illustrates the complexity of implementing and enforcing such agreements. Like about 20<sup>5</sup> out of 250 other multilateral environmental agreements, the Convention on International Trade in Endangered Species (CITES) contains binding trade-related provisions. The trade provisions of environmental agreements are

<sup>5</sup> The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention), The Convention on Biological Diversity (CBD) and its Biosafety Protocol, The Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR), The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), The International Plant Protection Convention (IPPC), The International Commission for the Conservation of Atlantic Tunas (ICCAT), The Intergovernmental Forum on Forests (IFF), The International Tropical Timber Organization (ITTO), The Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol), The Rotterdam Convention on the Prior Informed Consent (PIC) Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, The Stockholm Convention on Persistent Organic Pollutants (POPs), The United Nations Convention on the Law of the Sea (UNCLOS), The United Nations Framework Convention on Climate Change (UNFCCC), The United Nations Fish Stocks Agreement (UN Fish Stocks), The United Nations Forum on Forests (UNFF), The Minamata Convention on Mercury, The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity.

primarily intended to prohibit or regulate trade, including the circulation of endangered species or products considered dangerous. CITES, for example, makes trade in endangered species subject to mandatory control. The execution of this control, however remains the responsibility of the States.

The Cartagena Protocol on Biosafety (2000) allows countries to ban the import of genetically modified organisms (GMOs) if it is believed that there is insufficient scientific evidence proving the product is safe. The Protocol also requires that exporters label shipments containing genetically modified products (e.g. maize or cotton). In its "Ban Amendment", The Basel Convention (1989)<sup>6</sup> outlines the prohibition of all hazardous waste exports and other types of waste covered by the Convention destined for final disposal, reuse, recycling and recovery from the countries listed in Annex VII of the Convention (Parties and other States that are members of the OECD, EC, Liechtenstein but not the USA), to all other countries.

A number of prohibitions are in place to ensure that hazardous waste is not exported to **a)** the Antarctic, **b)** a State that is not a party to the Basel Convention, or **c)** a party that has prohibited the import of hazardous waste. Parties may nevertheless enter into bilateral or multilateral agreements on hazardous waste management with other Parties or non-Parties, provided that such agreements are "not less environmentally sound" than the Basel Convention.

The provisions of the Multilateral Environmental Agreements are aptly explicit, and their ambitions are not in question. Their efficacy, however, remains limited by individual States' capacity to properly implement them, including deficiencies in financial, material, administrative and human resources.

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<sup>6</sup> Which entered into force in 1989 and has been ratified by 99 countries.

In terms of implementation, the aforementioned agreements could be strengthened along the lines of the following triptych: notification (transparency), monitoring, and assistance. As regards transparency and monitoring, notification and reporting mechanisms exist. The resources allocated to them, however, are insufficient and allow for the continuation of illegal trafficking of protected animals, resources such as ivory, and/or harmful substances.

Assistance rather than coercion? To address the inefficiencies of multilateral environmental agreements, two types of solutions can be identified. The first option would be to strengthen international environmental law by introducing binding mechanisms. This could be accomplished either by granting sanctioning powers to the bodies responsible for overseeing the implementation of environmental agreements, or by extending the jurisdiction of the WTO dispute settlement mechanism to the trade provisions of multilateral environmental agreements. The second option is that of dialogue and assistance. As it stands, the second option appears to be the most relevant for the following reasons.

The lack of efficiency plaguing multilateral environmental agreements is not characterised by the willingness of some signatory members to shirk their obligations under the provisions of these agreements; it is rather spurred by the persistence of illegal and underground phenomena against which members with the least developed economies have little to no means of combating. One possible solution under this 'second option' could be to direct development aid towards the capacity building objectives of recipient States. This could involve opening a specific chapter in the work programme of the WTO's "Aid for Trade" initiative. This chapter would be specifically devoted to the implementation of multilateral environmental agreements by beneficiaries, thereby increasing the transparency of development policy effects on the implementation of these agreements.

It could also consist of intensified dialogue between the WTO and MEA governance bodies (a combination of dialogues between the secretariats and members of the different agreements). To this end, the WTO and the governing bodies of MEAs with trade-related provisions could intensify and systematize cross-observations into each other's activities. Several MEA Secretariats and international organizations have already been granted observership in the WTO Committee on Trade and Environment and Regular discussion sessions with representatives of MEAs are already part of the activities of the WTO Committee on Trade and Environment. Their frequency and their scope could be increased to include a deep and regular assessment of the implementation of these agreements, the issues to be addressed, and possible connections with other WTO's committees' activities.

In the more immediate future, progress can be made in the field of monitoring through regular Trade Policy Reviews provided that capacity building and cooperation programmes between countries (on legislation and actions) are strengthened.

Specific assistance measures for the poorest countries in implementing the commitments made in the MEAs could also be increased in the short term. This would include support in strengthening their legislation, as well as the consolidation of procedures dealing with illegal trafficking control. Demand-oriented measures also have a very important role to play in combating trade in goods and services involving endangered species and their products, and control or prohibition measures are starting to be taken by States of destination. The implementation of each of this triptych's elements will therefore require tailored aid mostly geared towards developing countries. This includes technical assistance for the local implementation of environmental agreement trade provisions, financial aid for the implementation of control measures (armed forest guards, education campaigns,

etc.), and specific measures to increase the viability and profitability of sustainable use and management of natural resources by local communities.

## B. Improving Multilateral Trade agreements

### a. Multilateral rules

The first paragraph of the Marrakesh Agreement's (1994) Preamble explicitly enshrines in the WTO the principles and pursuit of the Sustainable Development Goals<sup>7</sup>. The "environmental" exceptions (b) and (g) of GATT Article XX<sup>8</sup> authorize WTO Members to adopt restrictive measures if deemed necessary for the protection of human, animal or plant life or health (exception b), or if they relate to the conservation of exhaustible natural resources applied in conjunction with restrictions on domestic production or consumption (exception g). As with other exceptions outlined in Article XX, those mentioned above are subject to compliance with the WTO's fundamental principle prohibiting unjustified

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<sup>7</sup> Preamble to the Marrakesh Agreement : "Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.

<sup>8</sup> GATT Article XX: "Subject to the requirement that such measures are not applied 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, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (b) necessary to protect human, animal or plant life or health; (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

discrimination, while recognizing Members' right to prioritize non-trade concerns.

The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) sets out a range of disciplines on measures applied to protect animal and plant life/health on a member's territory from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms, or disease-causing organisms. It also serves to protect human or animal life or health on a Member's territory from risks arising from additives, contaminants, toxins, or disease-causing organisms in food, beverages, or animal feed. These disciplines also fall within the legal framework of the principles of arbitrary non-discrimination and necessity but are nevertheless based on science-based international standards adopted by international institutions identified in the SPS Agreement: the Joint FAO/WHO Codex Alimentarius Commission (Codex), the World Organization for Animal Health (OIE) and the International Plant Protection Convention (IPPC, FAO)<sup>9</sup>.

The Agreement on Technical Barriers to Trade (TBT) covers generally regulations on products and standards not covered by the SPS Agreement and is supplemented in the annex by a code of good practice applicable to standards. Unlike the SPS Agreement, however, the TBT does not include a list of international standardization organizations, which it ought to. This would imply a modest technical revision of the TBT Agreement.

WTO rules leave the question of compatibility between trade openness and environmental protection open to interpretation. The proof lies in the evolution of case law surrounding this issue since the foundation of WTO's dispute settlement mechanism. On the compatibility of rules directing international trade law with the requirements of environmental protection, two suggestions have been put forward:

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<sup>9</sup> SPS Agreement, Annex A, §3

- The first is that WTO agreements are not explicit enough on the relationship between international trade rules and environmental protection. It calls for the renegotiation of agreements to strike a clearer balance between trade openness and environmental measures.
- - The second tends to consider that reopening WTO agreements would be tantamount to opening Pandora's box given that once stirred, a renegotiation of all provisions would be up for debate. It adds that the process would take too long to deliver results within a reasonable amount of time. A renegotiation of the agreements could then be replaced by a Ministerial Declaration. As indicated by Deputy Director General of the WTO Alan Wolff, it is reasonable to assume that this initiative could take place within a relatively short period of time, i.e. before 2025. This second solution could prove sufficient, particularly since case law has evolved positively in its approach to the trade/environment relationship. It would mean going further than simply affirming that the institution is based on the idea of mutually beneficial open trade and sustainable development. Such a declaration would serve as a reminder that the fight against climate change and the protection of the environment are among the main missions of the institution. The FAST group (Friends for Advancing Sustainable Trade), an informal group created in July 2018 to discuss and address the trade and environment nexus at the WTO and beyond, has brought significant progress in the discussions. Members include the EU, but also Costa Rica, Switzerland, Canada and New Zealand, among others. Their efforts toward the creation of a bloc of WTO members committing on a broad agenda of reforms (from SDGs implementation to encouraging circular economy or phasing out fossil fuels subsidies)

could start to bear fruits at the next ministerial conference of June 2021 in Kazakhstan.

### **b. Their interpretation by the WTO Appellate Body**

The WTO jurisprudence can be regarded as having been able to adapt to the emergence of an international consensus on the importance to be given to the environment and sustainable development. The Appellate Body's jurisprudence demonstrates that the WTO system is supportive of environmental justifications for trade restrictions. According to the famous quote from the US-Gasoline Appellate Body report, "WTO law cannot be interpreted in clinical isolation from public international law"<sup>10</sup>. The Appellate Body raised in this case the importance of sustainable development including of its environmental component but crucially at that time, public international law was shifting towards a stronger recognition of environment as a global public good. In a way, the WTO Appellate Body tried to ensure an equilibrium between trade rules and environmental protection. One can then either consider that the legal framework provides sufficient guarantees ensuring that states are free to decide trade restrictions on environmental grounds, or that the balance should tip even more clearly in favour of the environment. Joël Trachtman described the Appellate Body's attitude towards this as "selective textualism"<sup>11</sup>.

In the Tuna-Dolphin case<sup>12</sup>, the GATT panel had rejected the invocation of Article XX's exceptions b and g on the

grounds that the environmental threat was not located on the Member initiating the trade restrictions' territory.

With the Shrimp-Turtles case, the Appellate Body noted that since the protected turtles were present in "all oceanic regions of the world" there was significant interest by the US in their protection, and affirmed that countries have the right to take trade measures that protect the environment as well as endangered species and exhaustible resources. It is not for the WTO to "grant" them – as States, WTO Members have the right to adopt environment measures. Over time, case law has thus acknowledged greater flexibility in the ability of members to impose unilateral environmental protection measures.

The Tuna case confirmed that a WTO Member can determine the level of protection it wants even if it goes beyond what had been agreed in a previous relevant treaty. In this case the US had imposed 0 dolphin mortality rate to grant their exporters "Dolphin Safe" label, which exceeded the requirements of the bilateral treaty signed with Mexico. The Appellate Body reminded that the Members have the possibility to impose higher unilateral environmental standards provided that they are not discriminatory.

WTO case law has also acknowledged the option of members to impose unilateral trade restriction measures based on international environmental commitments, including on members that have not adhered to such commitments (US-Shrimp, 1998). In the case of European Communities - Brazil - Retreaded Tyres (2008), Brazil invoked GATT Article XX exception (b) and (g) in support of an import ban on retreaded tyres. It argued that the ban was necessary to prevent the accumulation of scrap tyres which, in addition to their environmental effects, would serve as a breeding ground for mosquitoes and were therefore a source of mosquito-borne diseases such as malaria and dengue fever. The report on this case

<sup>10</sup> United States - Standards for Reformulated and Conventional Gasoline, 29 April 1996, AB-1996-1, Report of the Appellate Body, ARTICLE 31 WT/DS2/AB/R, p 17. "The WTO Law cannot be interpreted in clinical isolation from international public law".

<sup>11</sup> Trachtman, J., (2017) WTO Trade and Environment Jurisprudence: Avoiding Environmental Catastrophe, Harvard International Law Journal.

<sup>12</sup> GATT Panel Report, United States – Restrictions on Imports of Tuna, DS21/R, 3 September 1991, unadopted, BISD 39S/155.

reiterates<sup>13</sup> that a necessary measure is not limited to what is “indispensable”<sup>14</sup>.

In the event that the ministerial declaration on trade and the environment referred to above is not sufficient to clarify WTO rules in the eyes of the judge, an additional path may be considered. WTO members could enact an “authoritative” interpretation of select rules to better clarify the WTO judge’s reading of specific rules such as the exceptions stated in GATT Article XX. However, such decision requires the consensus of Members.

### c. Processes and institutional organization

Two avenues in the WTO’s internal procedures would reinforce – alongside the duties of the institution – the importance of environmental protection:

1. **Transparency:** Improve the processes for mandatory reports to the Committee on Trade and the Environment, the Committee on Technical Barriers to Trade and the Committee on Sanitary and Phytosanitary Measures, including the addition of elements related to environmental protection and sustainable development.
2. **Include a chapter on trade and the environment in member’s Trade Policy Reviews (TPR),** an essential tool for the monitoring of trade behavior by all members, although more frequent for larger and developed members than for smaller and poorer ones. This specific chapter on Trade and

Environment in TPRs could include for instance progress made on reduction of trade-distorting fossil fuel subsidies, on the evolution and application of domestic norms and standards on plastic-use, circular economy, deforestation...etc.

### d. Other possible multilateral avenues

- **A “code of conduct” (plurilateral) on border carbon adjustment measures**

Such a measure is in line with Europe Jacques Delors’ proposal for a carbon adjustment mechanism at the EU’s borders<sup>15</sup> by responding to the necessity of developing a “cooperative approach” to border carbon adjustment mechanisms. The proposal could be initiated without delay within the WTO framework and executed by the EU and other members that have already introduced a CO2 pricing system (Canada, New Zealand, etc.).

This initiative would also promote the idea of establishing an independent evaluation agency. This could only be achieved by the presence of key players in a plurilateral agreement, that would provide better guarantees of transparency and fairness on the issue of carbon adjustment.

- **“A green waiver” or a green subsidies taxonomy**

Members could decide to reinstate a similar type of (temporary) waiver on “green subsidies”, such as that of the ASCM agreement for the period 1995-1999. The intrinsic problem with a subsidy waiver is that it would give an advantage to countries with the strongest subsidy capacity in sectors related to ecological transition. An alternative to an overly broad waiver could be to implement a system of graduation of the level of allowed countervailing duties according to the objectives that the prohibited subsidies pursue. It is of particular

<sup>13</sup> First enunciated in : [Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef - Agreement under Article 21.3\(b\) of the DSU, 2001.](#)

<sup>14</sup> Marceau, G. & Marquet, C. (2017). [La jurisprudence de l’OMC et la recherche d’un équilibre entre développement économique et considérations non-commerciales : le cas de l’environnement.](#) *Revue québécoise de droit international / Quebec Journal of International Law / Revista quebequense de derecho internacional*, 30 (2), 119–149.

<sup>15</sup> Lamy, P., Pons, G., Leturcq, P., [A European Border Carbon Adjustment Proposal](#), Europe Jacques Delors, June 2020

importance to take into account the legitimacy of certain subsidies that pursue objectives defined in international agreements (e.g. environmental). The WTO would send a clear signal that it is making progress in addressing climate and environmental challenges if it established, on a temporary basis, a taxonomy of green box subsidies with a progressive scale of countervailing measures.

- **Strengthen disciplines on fossil fuel subsidies and harmful fisheries subsidies**

#### » Fossil fuel subsidies

In 2017, New Zealand and 11 other WTO members launched an initiative to reform the treatment of fossil fuel subsidies by the WTO. Launched at the Ministerial Conference, this initiative was preceded by a commitment made by G7 members to end fossil fuel subsidies by 2025. Covid-19 crisis and the subsequent political upheaval has revealed a new window of opportunity for the issue to be addressed at the ministerial conference of June 2021 in Kazakhstan.

Fossil fuel subsidies worldwide amount to more than \$500 billion a year. They create market distortions, inefficiencies and bias consumer choices. Two schools of thought respond to these challenges. The first believes that the current subsidy agreement framework is insufficient in preventing the employment of these subsidies and that it is necessary to clarify the scope of ASCM article 5 by adding terms of environmental protection and highlighting the fight against climate change.

The second considers that, on the basis of the current text, a political declaration committing WTO members to greater transparency and controls, phasing out subsidies and providing for political and technical solutions could be sufficient. This second option, which has recently gained substance, seems more realistic than the first.

#### » Harmful fisheries subsidies

Following more than 20 years of negotiations on harmful fisheries subsidies, the coming months could be decisive. According to a draft text published in June 2020<sup>16</sup> by Santiago Wills, chair of the WTO negotiations on fisheries subsidies, subsidies that contribute to IUU fishing (Illegal, Unreported, and Unregulated fishing), overfishing, or increasing fishing capacity will be discussed at the next WTO ministerial conference. As outlined in the draft paper, the scope of discussions to be had will nevertheless be limited to “at sea” fishing, therefore excluding inland waters and aquaculture. The heads of delegation at the WTO announced their intention to reach a consolidated text before the end of 2020, as well as an agreement at the next Ministerial Conference. The negotiating group is due to meet four times between September and November 2020. Proposals include, for example: the option of banning a pre-determined list (*ex ante*) of operating and investment subsidies that encourage overfishing by increasing fishing capacity; the option of prohibiting any subsidies targeting a stock already fished at unsustainable levels; and finally, the option of banning fishing subsidies altogether unless the state concerned can demonstrate that it has put a proper management system in place. To speed up the transition of the fisheries sector, one of the key-elements of these negotiations could be the defining of a “green box”, allowing a limited set of positive subsidies such as those for R&D, those that reduce fishing capacity, or those that favour small-scale fishing activities.

The conclusion of these negotiations must be speeded up. To this end, a key element could be the definition of a “green box”, which would allow a limited

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<sup>16</sup> A restricted consolidated 7 pages draft text has already been put on the table by Ambassador Santiago Wills at an informal Heads of Delegations meeting on 2 November 2020 and will guide the negotiations to come. Cf. [WTO news](#).

number of positive subsidies, such as those relating to R&D, those that reduce fishing capacity, or those favouring small-scale fishing activities.

- **Rebranding the Environmental Goods Agreement (EGA)?**

Launched in 2014 by 14 States committed to liberalizing trade in environmental goods, the EGA negotiations were interrupted in 2016. At fault included the complexity of defining “environmental” goods, the lack of consensus on the goods to be included in the EGA list and whether to include or not process and production methods (PPM). In fact, when negotiations broke down, the parties were generally supporting the inclusion of goods that favored their individual situations (e.g. China pushing for bicycles due to its overcapacity in bike production), thus placing domestic industrial policies before environmental concerns. As the EGA is in deadlock, an effective solution could involve the complete redefinition of the agreement, with the ambitious addition of environmental services in the negotiations (e.g. water/waste treatment, air pollution control). To facilitate the discussions, the parties should define “environmental” goods and services from the start. Further, to help the negotiations, the new agreement could be launched on the basis of eliminating barriers to trade on a series of goods directly related to the energy transition such as wind turbines or solar panel components. A renewed and more ambitious agreement would thus break the current deadlock and provide a more robust solution for the environment.

- **A plastics specific initiative**

Every year, more than 8 million tonnes of plastics are dumped into the oceans, responsible for the death of hundreds of thousands of marine organisms as well as the disruption of marine ecosystems and contributing to global warming. The majority of plastic waste dumping in oceans comes from developing countries.

Trade plays a fundamental role in the circulation of plastics and plastic waste throughout the world. In the absence of international coordination, China’s 2018 ban measures on imports of plastic waste have highlighted the responsibility of exporters but have also redirected plastic flow to Thailand, Malaysia, Indonesia and Vietnam. The latter have in turn put in place restrictive measures to protect themselves. In total, more than 120 million tonnes of mixed or contaminated plastics will have to find another recipient by 2030 as a result of new Chinese policy. However, on 10 May 2019, 180 countries agreed to add mixed plastics waste to the Basel Convention. Exporters of mixed plastic waste and non-recyclable plastics will now have to obtain permission from the governments of the countries to which these plastics are sent. This amendment to the Basel Convention will provide progress in transparency on both the origin and treatment of exported plastic waste.

The promotion of the circular economy and the fight against plastics are already under discussion in the WTO Committee on Trade and Environment. Under a common initiative led by China and Fiji<sup>17</sup>, the Committee on Trade and Environment has intensified its work on plastic-related issues since its last meeting on 3 July 2020. The opening of a discussion platform exclusively dedicated to plastics and feeding the relevant committees with negotiating proposals could be announced not during the next Ministerial Conference (MC12) in June 2021 in Nur-Sultan. As Carolyn Deere-Birkbeck points out in a recent plea for the opening of a plastics initiative<sup>18</sup>, the most obvious aspects in the fight against non-recycled plastics at the WTO are the prohibition of subsidies for non-recycled plastics, the reduction of tariffs for products

<sup>17</sup> WTO, [Members discuss how WTO can support efforts to create a circular economy, tackle plastic pollution](#).

<sup>18</sup> BIRKBECK, C.D. (2020) “[Strengthening international cooperation to tackle plastic pollution: options for WTO](#)”, *Graduate Institute of Geneva, Global Governance Brief No.1, January 2020*.

from the circular economy and the establishment of new standards of transparency and information sharing on the composition of plastics products.

- *Proposals for “Climate waivers” or for a “green peace clause”*

In a series of publications issued in 2018, James Bacchus advocated for the introduction of a “climate waiver”. Although temporary in nature and confined to domestic measures taken as part of the fight against global warming, this proposal would further set apart the trade and environmental regimes by implying that certain trade measures should be waived to protect the environment. The same applies to the “peace clause” option, which specifies that WTO Members will not take any legal action through the WTO dispute settlement system on trade-related climate measures. These two options go against the conciliation between trade and environmental rules. Further, such initiatives would disarm the WTO and provide opportunities for environmental free riding, thus raising suspicion on the side of WTO members, mostly in the developing world, who have long insisted on avoiding what they see as “green protectionism”.

## 02.

# Further greening the EU’s bilateral trade agreements

## A. Recent progress within the framework of the “new generation” FTAs

So far, the European approach to the integration of environmental provisions into trade agreements has been “cooperative”, based on cooperation and political dialogue, as opposed to the “sanction” approach adopted by the United States. Existing European agreements do not integrate Trade and Sustainable Development chapters into the general dispute settlement mechanism. They provide for a

specific mechanism based on the meeting of a panel of experts and representatives of civil society. However, they harness trade partners to a large number of multilateral environmental agreements. US agreements on the contrary tend to target a more limited number of environmental objectives and render the granting of trade preferences conditional on their fulfilment. Thus, for example, as part of the United States-Peru trade agreement negotiations concluded in 2007, the United States secured Peru’s accession to CITES, leading – among other measures- to the creation of Peru’s first Ministry of the Environment<sup>19</sup>.

Notable advancements made in the framework of the EU “new generation” Agreements notably include the following:

- The presence of chapters dedicated to Trade and Sustainable Development (the first time in 2011 with the EU-Korea agreement).
- The establishment of a “Trade and Sustainable Development Committee” in charge of monitoring and a Domestic Advisory Group, and the convening of a civil society forum. The “TSD” part of these new-generation agreements is premised on better inclusion of civil society organizations in agreement implementation monitoring, including their social and environmental impacts.
- Sustainability Impact Assessment (SIA) carried out systematically before or after the conclusion of the agreement

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<sup>19</sup> Cf. the excellent [comparative study of the American and European approaches to environmental issues](#) in FTAs, In JINNAH, S. and MORGERA, E. (2013) “Environmental Provisions in American and EU Free Trade Agreements: A Preliminary Comparison and Research Agenda”, *Review of European, Comparative & International Environmental Law*, 22(3), November 2013, pp. 324-339.

- Non-derogation clauses from the Parties' domestic environmental law for trade and investment purposes,
- Cooperation provisions on biodiversity, sustainable forest management, but also provisions on Corporate Social Responsibility, sustainable management of marine resources, explicit references to the Paris Agreement (after 2017) and the precautionary principle, detailed provisions on climate protection, transparency.

## **B. New avenues to greening bilateral EU trade agreements**

### **a. Compliance with the Paris Agreement as an "essential clause" of the European trade agreements.**

Since the May 2019 elections and the inauguration of the Von der Leyen Commission by the newly elected European Parliament, a rapid increase in support from European leaders for this proposal has been observed. Former EU Trade Commissioner Phil Hogan mentioned it almost systematically when it came to strengthening the trade and sustainable development chapters of European trade agreements. It consists of the possibility as a last resort for one of the parties to unilaterally withdraw from the trade agreement in the event of withdrawal of the other party from the Paris Agreement or the failure to comply with its legally binding commitments<sup>20</sup>.

This would align these provisions of last resort with the EU's human rights and armaments provisions. A similar provision could be introduced for the Convention on Biodiversity (CBD).

This often-rejected solution is now gathering more and more supports and, as part of the Green Deal, should be implemented within the framework of the Commission's

<sup>20</sup> i.e. to submit a National Determined Contribution (NDC) every five years representing a progression beyond the Party's then current NDC and reflecting its highest possible ambition (in accordance with Art 4.3 Paris Agreement).

von der Leyen mandate. That said, what treatment should be given to agreements already negotiated and concluded with states that distinctly fail to respect obligations under the Paris Agreement? This question will continue to surface and will particularly concern Brazil in the context of the EU-Mercosur agreement.

Compliance with the Paris Agreement is also an issue likely to be raised in the context of recent trade agreements, including those recently concluded (EU-Vietnam FTA) as well as those in the process of being concluded (EU-China agreement on investments).

### **b. Systematize the publication of an ex-ante Sustainability Impact Assessment on the social and environmental impacts of agreements under negotiation**

This measure would ensure that the constant demand from green NGOs would be met as well as allow for the irrigation the public debate with of scientific evidence during trade agreement negotiations. The systematic publication of a Sustainability Impact Assessment (SIA) report is one of the major advances of "new generation" European trade agreements. However, the necessary step of ensuring the availability of the report before the agreement is signed has yet to be taken.

### **c. Introduce environmental and climate-related tariff conditionality**

In order to link tariff preferences to the achievement of commonly agreed environmental objectives, the agreements could include tariff preference release clauses. It is unlikely that there would be consensus among Member States on this measure if it were to be presented negatively, i.e. as a reduction of tariff preferences. The EU should therefore move towards a constructive (positive) approach, providing for preferential graduation which does not affect the content of the agreement and simply rewards the realization of environmental and climate objectives. This measure can be designed in a general way for all EU trade agreements

and for predefined objectives: combating deforestation, soil protection, waste management, integration of the main principles of the circular economy into production systems, etc.

#### **d. Reinforce mechanisms to enforce the provisions of "tailored" trade and sustainable development chapters**

Under the current dispute settlement mechanism of the European Trade Agreements, in order to request a suspension of preferences, the requesting Party must prove a loss of a commercial nature.

Enforcement of TSD provisions (ie the possibility to sanction a violation of TSD commitment)) is not a consensual solution at the moment but this option is currently gaining support, especially among academics and Parliaments. It is not to the liking of northern European countries, which are mostly in favor of open trade principles due to the belief that it would place too great a burden on trade relations.

Other avenues than sanctions could prove more consensual in this endeavor, taking inspiration for instance on American trade agreements such as the United States-Mexico-Canada Agreement (USMCA) which reversed the burden of proof of the commercial incidence of the violation from the complainant party to the incriminated party and which has also softened the notion of commercial incidence. In the USMCA, commercial incidence is established when the violation involves a person or an industry producing a good or service traded between the Parties or competing with the good or service of another Party.

As Voituriez and Laurans (2020) point out, it is important to put TSD Chapter dispute resolution into context. On the one hand, the TSD Chapter is not the sole subject of an ad hoc dispute mechanism. On the other hand, there is nothing to prevent the parties from submitting a dispute to the WTO as it relates to environmental protection, particularly in the context of the chapters on

technical barriers to trade. Another question raised is whether providing mechanisms for the quick suspension of trade preferences in the event of proven environmental damage or the withdrawal, for example, of multilateral environmental agreements would be efficient. As the case of the EU-Mercosur agreement illustrates, navigating trade/environment relations is complex. According to a recent article in Science review titled "The rotten apples of Brazil's agribusiness", nearly 20% of soybean exports to the EU could contribute to illegal deforestation. Moreover, a report from the WWF and the Boston Consulting Group issued during the summer of 2020 shows that forest-loss in the first six months of the year totaled 307,000 hectares, a figure 26% higher than that of the same period in 2019<sup>21</sup> and an expert report commissioned by the French government and published September 18, 2020 recommends not ratifying this agreement and points out the responsibility the agreement would have in the progression of deforestation in the Amazonian rainforest<sup>22</sup>. As shown by the symbolic but solid vote made by the European Parliament<sup>23</sup> opposing any ratification of the EU-Mercosur agreement as it stands, it would be vain to believe that the EU could break the deadlock with political declarations (even if mutual) or technical solutions such as the one to split the agreement in two parts (association agreements / trade agreement) to bypass the National ratification requirement.

The establishment of additional conditions and mechanisms rewarding or sanctioning the behaviour of trading partners in terms of respect for the environment

<sup>21</sup> WWF-BCG, [Fires, Forests and the Future: A crisis ranging out of control?](#), 2020.

<sup>22</sup> Gouvernement de la République Française, [Rapport au Premier ministre, Dispositions et effets potentiels de la partie commerciale de l'Accord d'Association entre l'Union européenne et le Mercosur en matière de développement durable](#), 07/04/2020

<sup>23</sup> [European Parliament resolution of 7 October 2020 on the implementation of the common commercial policy – annual report 2018.](#)

and the fight against climate change is necessary to bolster the environmental approach of European trade policy. It is necessary, however, to ensure that sufficient room for maneuver is maintained in order to maintain pressure on most reluctant States. By way of illustration, a potential rupture with Brazil could lead Bolsonaro to withdraw Brazil from the Paris agreement, a point often made by some Brazilian pro-environment organisations. Navigating a sensitive situation as such is tricky and requires that Europe be vigilant, prepared but also to work on additional unilateral instruments allowing for greater guarantees and controls regarding sensitive issues, of which deforestation or the use of antibiotics on animals are included

#### **e. Advancing generalized preferences and sectoral cooperation initiatives with developing countries**

A more tailored approach could also establish closer and more explicit links between EU trade agreements and national financial support in order to help countries attain their environment commitments and broaden their achievements, thus emulating the “Aid for trade” strategy initiated in 2005 at the WTO.

On 1 September, the European Commission’s DG DEVCO announced the establishment of an initiative on cocoa aimed at strengthening dialogue with two major cocoa producers: Ghana and Ivory Coast. Sector-specific initiatives of sorts are indeed multiplying. They provide new platforms for exchanges with public and private stakeholders and help advance the Commission’s reflections on other initiatives (deforestation for instance). Such initiatives also offer an added layer of detail regarding responsible practices and potential support projects to improve supply chain sustainability. Finally, they pave the way for further collaboration on the creation of environmental norms and standards.

Regarding developing countries, there is a unilateral component with bilateral consequences falling within

the purview of the European Commission Directorate General for Trade that should also be mentioned. This unilateral component is titled the Generalised Scheme of Preferences (GSP) of the European Union, currently established by Regulation (EU) No 978/2012 of 25 October 2012<sup>24</sup>. Similar to the implementation of export aid schemes by 10 other developed (including the United States, Russia, Switzerland and Japan), the European Union has implemented an export aid scheme for developing countries since 1971. The European scheme includes a special incentive arrangement for sustainable development and good governance (GSP+). This special scheme is based on the granting of tariff preferences to developing countries that meet a series of conditions relating to sustainable development. The conditions for access to GSP+ include ratification of 27 international conventions listed in Annex VIII of Regulation (EU) 978/2012, the implementation of which is regularly verified by the GSP monitoring body. The 27 conventions include 10 of the main multilateral environmental conventions (CITES, Montreal Protocol, Basel Convention, Cartagena Protocol, United Nations Framework Convention on Climate Change, etc.). 8 countries currently benefit from GSP+: Cape Verde, Armenia, Kyrgyzstan, Mongolia, Pakistan, Philippines, Sri Lanka and Bolivia. Based on the counsel of the monitoring body and an expert enquiry indicating serious systematic violations of the above-mentioned international conventions, the Commission may decide to remove a current member of the GSP+ scheme. The GSP Regulation will expire on 31 December 2023, and its revision will undoubtedly trigger new debates on the environmental conditions imposed on beneficiaries. The revision of the GSP is an additional unilateral opportunity available to the EU in accordance with WTO rules to create a win-win dynamic

<sup>24</sup> [Regulation \(EU\) No 978/2012 of the European Parliament and of the Council of 25 October 2012](#) repealing Council Regulation (EC) No 732/2008 and applying a generalised tariff preferences scheme.



for environmental protection and the opening of trade. It ensures that the most vulnerable countries ratify and comply with the aforementioned 10 main international environmental conventions and encourages European importers to source from developing countries. The 2023 revision could either broaden the list of environmental conditions or strengthen the means of ensuring their effective implementation.

Unilateral European measures such as standards, certifications and labels to ensure that foreign products imported on the European market comply with European environmental standards will be the subject of further policy discussions in the EU as well as in the fifth and final paper in this series on trade and the environment.

“Greening” the European Union’s trade policy could here, as Voituriez and Laurans suggest<sup>25</sup>, take shape as closer cooperation in tackling the environmental challenges facing the EU’s trading partners. Rather than imposing automatic sanctions, trade negotiations should make it possible to shape and/or consolidate environmental coalitions around mutual obligations. These negotiations should make trade relationships an opportunity for all parties to reaffirm and strengthen detailed environmental commitments, all while avoiding punitive logic and Europe’s transformation into a “global environmental policeman”.

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<sup>25</sup> Cf. notably the idea of including detailed “climate action plans” in trade agreements.

However, unilateral European measures, such as standards, certifications and labels to ensure that foreign products imported into the European market comply with European environmental standards, have an important role to play. They will continue to be discussed politically within the EU, as the recent Parliament’s Resolution<sup>26</sup> calling for legislation to ensure that products entering the European market are free from deforestation just demonstrated. These issues will be further developed in the 5th and final policy paper in this series on trade and environment. As advocated in our policy paper on carbon adjustment at borders, in designing and implementing these measures the EU will need to cooperate with its trading partners and pay particular attention to developing countries.

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<sup>26</sup> [European Parliament resolution of 22 October 2020 with recommendations to the Commission on an EU legal framework to halt and reverse EU-driven global deforestation, 2020/2006\(INL\)](#)

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