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GREEN-TAPING

THE SINGLE MARKET

**Walling-Off or gates
to sustainable globalization?**

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Abbreviations

CBAM	Regulation (EU) of the European Parliament and of the Council establishing a carbon border adjustment mechanism
CS3D	Directive (EU) of the European Parliament and of the Council on Corporate Sustainability Due Diligence
EU	European Union
EUDR	European Regulation on deforestation-free products
EUFL	Regulation (EU) of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market
EUTR	European Timber Regulation
GDPR	Regulation (EU) of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data
GHG	Greenhouse Gas
GMO	Genetically Modified Organisms
GSP	EU Generalized System of Preferences
ILO	International Labour Organization
MFN	Most Favourite Nation
NCA	National Competent Authority
NT	National Treatment
OECD	Organization for Economic Cooperation and Development
OSA	Open Strategic Autonomy
RoHS	Directive (EU) of the European Parliament and of the Council on the restriction of the use of certain hazardous substances in electrical and electronic equipment
SME	Small and Medium Sized Enterprises
TSD	Trade and Sustainable Development
WTO	World Trade Organization

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From Trade for all to Open Strategic Autonomy

In the beginning of 2016 the European Commission published a communication titled 'Trade for all'. The strategy proposes the use of 'trade agreements and trade preference programmes as levers to promote, around the world, values like sustainable development, human rights, fair and ethical trade and the fight against corruption.'¹ While at the time, the EU had already been promoting its notion of 'sustainability' through the EU's General System of Preferences + (GSP+) programme and the inclusion of Trade and sustainable development (TSD) Chapters in EU Free-Trade-Agreements, this paper will highlight a severe policy change towards unilateral policymaking.

The COVID-19 pandemic as well as several wars and conflicts in the European neighbourhood have resulted in an increased fear of supply chain disruptions and a potential lack of access to critical resources. In line with this, the United States introduced the Inflation Reduction Act to support US-businesses, regain manufacturing capabilities, and thereby increasing supply chain resilience. The People's Republic of China is also trying to limit dependence on global supply chains, while at the same time offering huge direct foreign investment opportunities to the Global South.

Following these developments, the previous European elections empowered the European Commission to take a stronger role in the fight against climate change and sustainability as part of the European Green Deal. The European Union (EU) Trade Policy Review from 2021, titled 'An Open, Sustainable and Assertive Trade Policy' outlines a way to achieve 'Open Strategic Autonomy' (OSA). OSA reflects the EU's desire to chart its own course on the global stage, shaping the world through leadership and engagement while preserving its interests and values.²

While some of the underlying premises remain similar to prior strategies, the document effectively reshuffled the agency

of the EU in the field of trade. One of its core objectives is to 'shape global rules for a more sustainable and fairer globalization', 'using all EU trade policy tools at its disposal to support social fairness and environmental sustainability'.³ Actions speak louder than words and so the EU made wide use and implemented an array of various trade-related instruments. The regulation on deforestation-free products (EUDR) was adopted in 2022, the carbon border adjustment mechanism (CBAM) in 2023, and recently the directive on corporate due diligence (CS3D), as well as a regulation on a ban on products made with forced labour (EUFL) were concluded in 2024. What they have in common is that they all aim at 'making globalization more sustainable and fairer' while disregarding the role of international cooperation previously attributed. This paper will refer to these unilateral measures collectively as 'green-tape', as they introduce bureaucratic requirements to enforce and safeguard compliance set to eventually result in promoting 'sustainability'.

For the first time in decades, this introduced the use of unilateral measures to combat social and environmental issues through trade policy. At the same time it displays a more assertive notion to external trade policy, shifting away from multi- or bilateral cooperation to achieve the EU's geopolitical interests.

The aim of this policy paper is not to provide an in-depth description of EU trade and sustainability legal acts, but rather to define an emerging trend unilateral action of the EU in contrast to prior approaches of multi- and bilateral initiatives. By introducing the concept of 'green-tape' as bureaucratic requirement to safeguard sustainability, an economic impact analysis, as well as World Trade Law compliance, will look to answer whether this 'green-taping' legitimately contributes to a more sustainable global economy or whether it is just a veil for protectionism, in an effort to re-shore production back to the continent.

1 European Commission, *Trade for All: Towards a More Responsible Trade and Investment Policy* (Publications Office 2014) 1.

2 European Commission, 'Trade Policy Review - An Open, Sustainable and Assertive Trade Policy' (European Commission 2021) Communication COM(2021) 66 final <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52021DC0066>; Accessed 1 March 2024.

3 *ibid* 6–8.

Sovereign Sustainability – Reciprocity and beyond

Cooperation through multi- and bilateralism is one of the cornerstones of European trade external policy. Thus, the EU has been engaged in a variety of measures to promote human rights and sustainability standards abroad. In the following chapter the EU's role in multilateral and bilateral initiatives will be described. Starting with a brief description of sustainability in the WTO, EU preference systems and Free-Trade Agreements (FTA) will be highlighted as drivers of achieving sustainability through reciprocal trade commitments.

The Social Clause in the WTO

Already during the negotiations of the precursor of the WTO, the inclusion of a social clause sparked significant discussions. The Havana Charter from 1948 proposed that 'all countries have a common interest in the achievement and maintenance of fair labour standards'.⁴ To achieve the elimination of unfair labour conditions parties to the agreement would be allowed to 'take whatever action may be appropriate and feasible'.⁵ This broad provision, however, never saw the light of the day, as the Havana Charter did not enter into force. It resulted in the General Agreement on Tariffs and Trade (GATT), which would guide global trade until the Marrakesh round.

Albeit many civil society organizations and governments argued for a stronger social and environmental clause in the negotiations establishing the WTO in the 1990s, negotiators were largely divided on the issue. The final text only included references to goods produced with prison labour and the exhaustion of natural resources as part of the GATT General Exceptions clause.⁶ Subsequent ministerial meetings also dealt with the matter of sustainability in the WTO, but its members continue the effort to keep sustainability matters out of the organization's scope. Particularly countries with weak governance argue against more sustainability provisions in the WTO, fearing unfair and unpredictable trade barriers under the guise of protecting the environment, social rights or the climate.⁷ Some argue that the WTO is not the right forum for discussing those matters and thus there has only been a 'commitment to the observance of internationally recognized core labour standards' as part of a Ministerial Declaration without any subsequent action.⁸

Recognizing the gridlock on multilateral level, the EU went on to develop other methods in its pursuit to connect human rights and the environment to trade.

The EU General System of Preferences

The GATT introduced the concept of special and differential treatment, recognizing the needs of developing countries for less stringent time regimes and schedules. Based on this, two waivers for WTO rules were issued in 1971, eventually creating the 'enabling clause'.⁹ From 1979 this permitted countries to grant special tariff preferences for developing country goods, i.e. the EU could therefore grant tariff-free imports of some product lines to developing countries, but its own companies would still be subject to tariffs when exporting to those states. In order to avoid a limitation to certain developing countries to favour particular trade relations or further specific policy goals, these preferences had to be implemented in a 'generalized, non-discriminatory and non-reciprocal' manner.¹⁰

Thus, the EU introduced its 'Generalised System of Preferences' (GSP), granting developing countries unilateral trade preferences to enter the European market. To empower sustainable development, the EU went beyond the sole reduction of tariffs and developed three different regimes. 'Everything but arms' introduced in 2001 provides duty-free and quota-free access to the EU market for all products except arms and ammunition for Least-Developed-Countries (LDCs).¹¹ Once countries graduate from LDC status, they automatically fall under the Generalized System of Preference (GSP), where around two-thirds of tariff lines are liberalized. While those regimes also require the participating countries to respect the values of fundamental human and labour rights, the EU wanted to go a step further. It tried including labour and environmental rights into its trade and development policy in 2002, but a case brought by India to the WTO¹² confirmed a certain level of non-compliance with WTO law. In 2006 the EU updated its rules and developed GSP+. This system offers as a possibility of leveraging more tariff reductions by ratification and implementation of 27 international conventions related to labour and human rights, environmental and climate protection, as well as good governance. GSP+ is currently used

4 Havana Charter for an International Trade Organization (*Havana Charter*, ITO Charter 1948) (United Nations [UN]) UN Doc E/CONF.2/78 art 7 para 1.

5 *ibid.*

6 Article XX GATT.

7 Bram Vingerling, 'The EU and the Prohibition on Goods Produced by Child Labour and Forced Labour' (2013) <<https://repository.gchumanrights.org/items/a203548a-6b63-4bec-a205-488ac0c56412>> accessed 1 March 2024; Ernst-Ulrich Petersmann, 'THE "HUMAN RIGHTS APPROACH" ADVOCATED BY THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS AND BY THE INTERNATIONAL LABOUR ORGANIZATION: IS IT RELEVANT FOR WTO LAW AND POLICY?' (2004) 7 *Journal of International Economic Law* 605; World Trade Organization (n 6).

8 World Trade Organization (n 7); KD Raju, 'Social Clause in WTO and Core ILO Labour Standards: Concerns of India and Other Developing Countries' in Dipankar Sengupta, Debashis Chakraborty and Pritam Banerjee, *Beyond the Transition Phase of WTO: An Indian Perspective on Emerging Issues* (2006).

9 GATT 1994: General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT] art 1 para 2 (a).

10 GATT Document, Generalized System of Preferences ('GSP Decision'), Decision of 25 June 1971, BISD 18S/24.

11 European Union, 'THE EUROPEAN UNION GENERALISED SCHEME OF PREFERENCES' (GSP Hub, 2023) <<https://gsphub.eu/>> accessed 1 March 2024.

12 WTO, *European Communities: Conditions for the Granting of Tariff Preferences to Developing Countries – Report of the Appellate Body* (7 April 2002) WT/DS246/AB/R.

by nine countries, effectively promoting the implementation through monitoring and civil society engagement. Furthermore, it provides a mechanism to withdraw tariff preferences in the case of a breach of those agreements.¹³ The GSP+ regime is currently under revision and the European Commission recommended extending the list of international conventions to 32, including the Paris Agreement¹⁴ to align it with the EU Green Deal objectives.¹⁵

Interestingly, the ratification rate of fundamental ILO and environmental conventions is quite high even among the 57 non-GSP+ countries,¹⁶ however there is no further research on actual implementation of the agreements. While, there seems to be a high degree of acceptance of various international conventions, most developing countries profit from the more extensive EBA scheme and therefore lack an incentive to join GSP+.

Trade and Sustainability Chapters

Since the EU-Korea Free-Trade-Agreement (FTA) has been signed in 2009, the inclusion of Trade and Sustainable Development (TSD) chapters became a staple in the Union's Common Commercial Policy. TSD chapters have been included in FTAs with Canada, Central America, Colombia/Peru/Ecuador, Georgia, Japan, Korea, Moldova, Ukraine, Singapore, United Kingdom and Vietnam.¹⁷ EU FTAs now include obligations to ratify and implement international agreements relating to labour, environment, biodiversity, forest management, marine resources and climate change, as well as safeguarding effective enforcement of national labour and environmental laws.¹⁸ Although the nature of FTA negotiations causes the provisions to vary in scope,¹⁹ their common aim is to strengthen sustainability governance. Newer agreements, such as the EU-Vietnam FTA also establish a permanent mechanism of cooperation on sustainability issues through a periodical impact assessment on sustainable development, a TSD Committee and a system of domestic advisory groups, composed of various stakeholders.²⁰

Although the aspirational and therefore soft language in regards to tackling climate change and promoting corporate social responsibility has been criticized, the main caveat has been weak enforcement. With the exception of the most recent FTA with New Zealand, TSD chapters are excluded from the general dispute settlement mechanisms of the FTA and therefore lack any effective sanctioning mechanism.²¹ In case of a breach of a TSD provision, the only available repercussions are the establishment of a panel of experts, followed by a report and a mediation procedure. Without any potential withdrawal of trade preferences, some argue a lack of incentive to actually follow the TSD provisions. Furthermore, the EU has been hesitant in addressing TSD breaches and only recently started initiating a procedure concerning the breach of labour commitments under the EU-Korea FTA. The case eventually led to the establishment of an action plan to ensure the adjustment and implementations of ILO conventions.²² However, non-compliance with this action plan would still not grant any remedies.

Brussels Effect

EU standards are often the most stringent rules in a given policy-area. As companies may not enter the single market without complying with them, in many instances it appears to be more economical to adjust the whole production process in order to adhere to European standards. This in turn leads multinational companies to lobby for coherent standards abroad to level the playing field with non-exporting businesses, effectively promoting European standards.²³

The so-called Brussels effect creates transnational standard setting through high European standards in certain areas, such as competition, privacy, environment, chemicals and food regulation.²⁴ A prominent example of this is the European General Data Protection Regulation (GDPR). Following its adoption by the EU, over thirty countries, including most countries of the OECD used it as a template for domestic data protection laws.²⁵ Also the EU's strict standards and rules on

13 European Union (n 11).

14 European Commission, Proposal for a revised GSP Regulation [COM/2021/579 final].

15 European Commission, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on applying a generalised scheme of tariff preferences and repealing Regulation (EU) No 978/2012 2021 [COM/2021/579 final].

16 European Commission. Directorate General for Trade. and BKP Economic Advisors., *Study in Support of an Impact Assessment to Prepare the Review of GSP Regulation No 978/2012: Final Report. Volume 2, Annexes.* (European Union Publications Office 2021) <<https://data.europa.eu/doi/10.2781/88074>> accessed 1 March 2024.

17 Marianne Kettunen and others, 'An EU Green Deal for Trade Policy and the Environment: Aligning Trade with Climate and Sustainable Development Objectives' (Institute for European Environmental Policy 2020); Stefanie Schacherer and Tensin Studer, 'Trade and Sustainable Development Chapters in EU FTAs: Adapting Enforcement Methods to the Purpose(s)?' (*Centre for International Law*, 2022) <<https://cil.nus.edu.sg/blogs/trade-and-sustainable-development-chapters-in-eu-ftas-adapting-enforcement-methods-to-the-purposes-by-stefanie-schacherer-and-tensin-studer/>> accessed 1 March 2024.

18 Schacherer and Studer (n 17); Marco Bronckers and Giovanni Gruni, 'Retooling the Sustainability Standards in EU Free Trade Agreements' (2021) 24 *Journal of International Economic Law* 25.

19 Arlo Poletti, Daniela Sicurelli and Aydin B Yildirim, 'Promoting Sustainable Development through Trade? EU Trade Agreements and Global Value Chains' (2021) 51 *Italian Political Science Review/Rivista Italiana di Scienza Politica* 339.

20 Nguyen Thi Thu Trang, 'EU-VIETNAM FREE TRADE AGREEMENT: Challenges of the "New-Generation" European Union-Vietnam Free Trade Agreement (EVFTA)' (Friedrich-Naumann-Foundation 2023) <<https://www.freiheit.org/vietnam/eu-vietnam-free-trade-agreement-evfta>> accessed 1 March 2024.

21 Gracia Marín Durán, 'The EU's Evolving Approach to Environmental Sustainability in Free Trade Agreements' (UCL 2023) 3 <<https://ssrn.com/abstract=4373632>> accessed 1 March 2024.

22 European Commission, 'Korea Labour Commitments' (25 January 2021) <https://policy.trade.ec.europa.eu/enforcement-and-protection/dispute-settlement/bilateral-disputes/korea-labour-commitments_en> accessed 1 March 2024.

23 Elisabeth Christen and others, 'The Brussels Effect 2.0: How the EU Sets Global Standards with Its Trade Policy' (Austrian Institute of Economic Research 2022) 7 <<https://www.econstor.eu/bitstream/10419/278200/1/1819336239.pdf>> accessed 13 March 2024.

24 Anu Bradford, 'The Brussels Effect' (2012) 107 *Northwestern University Law Review* 1, 11–12; Kai Purnhagen and Dominique Sinopoli, 'Reversed Harmonization or Horizontalization of EU Standards? Or: Does WTO Law Facilitate or Constrain the Brussels Effect?' [2016] *Wisconsin International Law Journal*.

25 David Bach and Abraham Newman, 'The European Regulatory State and Global Public Policy' (2007) 14 *Journal of European Public Policy - J EUR PUBLIC POLICY* 827, 827, 831.

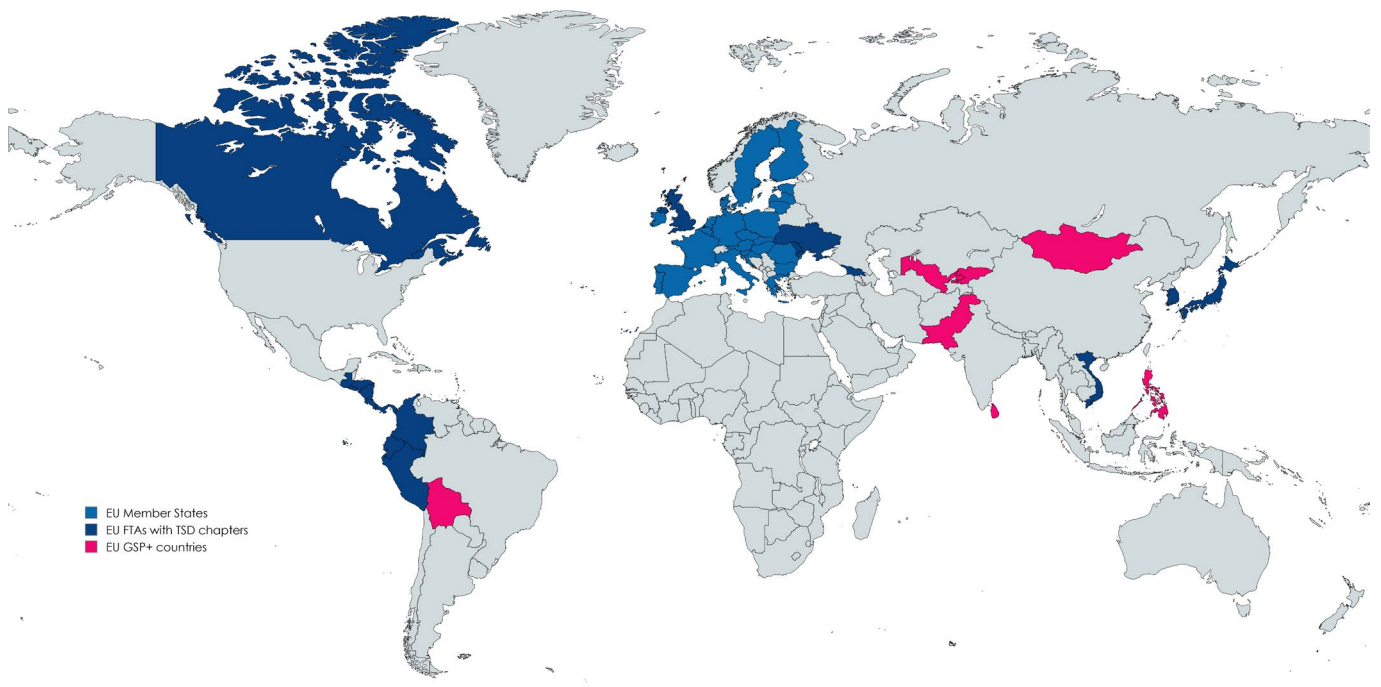
genetically modified organisms (GMO) lead many farmers outside of Europe to conform with the EU’s rules, as technical and economic non-divisibility of crops leads to higher costs and risks.²⁶ Similarly, third-country manufacturers have been using the EU Directive on Restriction of Hazardous Substances in Electrical and Electronic Equipment (RoHS).²⁷

While formal regulatory cooperation has been a cornerstone of the EU’s external reach, some also attribute its internal regulation a meaningful impact on global harmonization. Nonetheless, the EU’s influence in these areas is hard to

measure and varies strongly across different fields.²⁸ It is also limited by existing international standards, the rules of international bodies, such as the WTO as well as geopolitical aspects.

This chapter has shown that the EU has not been able to embark further on its mission to spread sustainability through trade, as it has been stagnating in the process of negotiating new agreements and updating older FTAs. This in turn led the Union to a new approach to foster sustainability abroad, which will be characterized in the following chapter.

Image 1 | Bilateral trade preferences with sustainability provisions of the EU



Source: mapchat.net

26 Alasdair R Young, 'Political Transfer and "Trading Up"?: Transatlantic Trade in Genetically Modified Food and U.S. Politics' (2003) 55 World Politics 457, 467–468.
 27 Henrik Selin and Stacy Vandevver, 'Raising Global Standards: Hazardous Substances and E-Waste Management in the European Union' (2006) 48 Environment 6, 14.
 28 Alasdair Young, 'The European Union as a Global Regulator? Context and Comparison' (2015) 22 Journal of European Public Policy 1, 19–20.

My market, my rules – sustainability requirements as gates to the single market

Before the introduction of Open Strategic Autonomy (OSA) in 2021, the EU's trading partners were offered a degree of sovereignty to design their own 'sustainability' framework. The EU incentivized this through a variety of measures, including TSD chapters in FTAs and GSP+, offering important trade preferences. Goods and services were still able to enter the European market, even if that meant potentially losing a competitive edge in the form of higher tariffs. After the significant slowdown of successful FTA negotiations and the sluggish effect of GSP+, the EU found a new approach in how to promote sustainability through its trade policy. The following chapter will describe the EU Conflict Minerals Regulation, the EU Carbon Border Adjustment (CBAM), the EU Regulation on deforestation-free products (EUDR), the EU Corporate Sustainability Due Diligence Directive (EU CS3D) and the EU Forced Labour Regulation (EUFL) and analyse their impact on third countries, as well as actors in the EU. The number of unilateral measures, ranges from pure due diligence requirements, over financial obligations to import bans, thereby affecting suppliers, who want to enter the European market. All of these measures have the potential to transform global supply chains.

Conflict Minerals

In reaction to the financing of armed groups through mineral trade in conflict-affected areas, the EU Conflict Minerals Regulations can be seen as the first of those measures, predating OSA, while entering into force in 2021.²⁹ It covers tin, tungsten, tantalum and gold and is aimed at limiting trade in minerals contributing to forced labour and financing armed conflict. Based on the OECD Due Diligence Guidelines for Responsible Supply Chains of Minerals from Conflict-Affected High-Risk Areas,³⁰ it obliges EU companies to exercise stronger and more transparent due diligence and to ensure that their supply chains are conflict-free and cause no adverse impacts.³¹

The importer of the minerals must provide supporting documentation, including the country of origin, date of extraction, address and name of suppliers, location of processing, and fees paid, which must be publicly available for external review. Contrary to the Dodd Frank Wall Street Act in the US³² it is not limited to only one region, namely the Democratic Republic of Congo and its neighbouring countries. It applies to imports from all countries with an indicative and non-exhaustive list devised by a panel of experts and published by the European Commission. In addition, there is also a white-list of compliant smelters to facilitate procurement.³³

However, the regulation only applies to the four minerals listed and does not cover any downstream products. This means that products containing conflict minerals at the point of import, such as batteries, are not captured by the regulation. Thus, downstream companies outside the EU have no obligation to follow these due diligence requirements before importing into the EU.³⁴

Deforestation-free products

Emissions from land use and land-use change, in large part due to deforestation, remain the major contributing factor to climate change behind burning fossil fuels,³⁵ accounting for around 12% of global greenhouse gas emissions.³⁶ Moreover the loss of a forest area of 1.3 million square kilometres between 1990 and 2016,³⁷ has been mainly driven by agricultural expansion³⁸ and also significantly contributed to a decline in biodiversity.

Based on the EU Timber Regulation (EUTR) from 2013,³⁹ the European Commission thus introduced the EU Regulation on deforestation-free products (EUDR),⁴⁰ which entered into force in mid-2023 with an 18 month implementation timeline for most operators and importers and an additional year for implementation among Small and Medium-sized Enterprises (SMEs).⁴¹

29 Regulation (EU) 2017/821 of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas L:2017:130:TOC.

30 OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (OECD Publishing 2016) <<https://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf>> accessed 1 March 2024; Frank Hoffmeister, 'The European Regulatory Approach on Supply Chain Responsibility' (2022) 2 *Zeitschrift für Europarechtliche Studien* <<https://www.nomos-elibrary.de/10.5771/1435-439X-2022-2-221.pdf>> accessed 1 March 2024.

31 Hoffmeister (n 30) 232–238.

32 Geographical scope is limited to the Democratic Republic of Congo in Dodd-Frank Wall Street Reform and Consumer Protection Act 124 Stat. 1376 section 1502.

33 Lena Partzsch and Martijn C Vlaskamp, 'Mandatory Due Diligence for "Conflict Minerals" and Illegally Logged Timber: Emergence and Cascade of a New Norm on Foreign Accountability' (2016) 3 *The Extractive Industries and Society* 978.

34 Kettunen and others (n 17).

35 Eduardo Sonnewend Brondizio and others (eds), *The Global Assessment Report of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* (Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) 2019) <<https://zenodo.org/records/6417333>> accessed 1 March 2024.

36 Pete Smith and others, 'Agriculture, Forestry and Other Land Use (AFOLU)' [2014] *Climate Change 2014: Mitigation of Climate Change*.

Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change 811.

37 Florence Pendrill and others, 'Agricultural and Forestry Trade Drives Large Share of Tropical Deforestation Emissions' (2019) 56 *Global Environmental Change* 1; Tariq Khokhar and Mahyar Eshragh Tabary, 'Five Forest Figures for the International Day of Forests' (*World Bank Blogs*, 21 March 2016)

<<https://blogs.worldbank.org/opendata/five-forest-figures-international-day-forests>> accessed 1 March 2024.

38 Yvonne Wolfmayr and others, 'Trade and Welfare Effects of New Trade Policy Instruments' [2024] *Austrian Institute of Economic Research*.

39 Regulation (EU) 995/2010 of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market OJ L 295 12.11.2010, p. 23–34.

40 Regulation (EU) 2023/1115 of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 OJ L 150, 9.6.2023, p. 206–247 [hereinafter EUDR].

41 Wolfmayr and others (n 38).

The EUTR was limited to timber imports and required importers to provide documentation on the origin of the wood, a risk assessment and a description of risk mitigation. The EUDR drastically widens the scope of products and introduces due diligence requirements for all wood products, soy, beef, coffee, palm oil, cocoa and rubber. Going forward, importers must provide certification that their goods are deforestation-free, meaning that *'the relevant products contain, have been fed with or have been made using, relevant commodities that were produced on land that has not been converted from forest to agricultural use, whether human-induced or not, after 31 December 2020'*.⁴² Furthermore, the importer must prove that the good has been 'produced in accordance with the relevant legislation of the country of origin'.⁴³

The EUTR was focused on cooperation and provided for Voluntary Partnership Agreements (VPA) to improve their forest governance. These were negotiated successfully with six countries, with Indonesia being the only country currently fully applying its VPA.⁴⁴ This showcases the lack of commitment of the EU's trading partners. As the EUDR does not foresee joint engagement and the language on partnership as well as its weak cooperation mechanisms, it can be seen as a direct example of how recent regulation deviates from a reciprocal approach.⁴⁵ Moreover, the EUDR also includes provisions on the protection of human rights and indigenous peoples' rights in the production process without considering any civil society engagement on the matter.⁴⁶

Compliance with the EUDR requires companies to submit declarations to a digital platform. This includes confirming that the products meet EU production standards and providing due diligence, including a risk assessment as well as documentation on the status of mitigation measures, monitoring and a report on progress made.

While the enforcement lies with the national customs authorities, the frequency of investigations is guided by a three-tiered list on the risk of reforestation, issued by the European Commission.⁴⁷

Penalties for non-compliance range from fines,⁴⁸ confiscation of the relevant commodities and revenues, temporary exclusion of public procurement to a temporary prohibition from placing goods in the European Single Market.⁴⁹

The introduction of the regulation sparked a lot of controversy, particularly from Brazil, who accounts for nearly half of EU soy imports and is an important supplier of cattle and coffee.⁵⁰ The country stressed the inadequacy of the regulation to address environmental concerns and even signalled a downward spiral leading to increased impoverishment and potential negative effects on forests.⁵¹ As the EU's palm oil is sourced mainly from Indonesia and Malaysia, both countries already led a charge against the EU to fight the regulation.⁵² The introduction of the EUDR also led to difficulties in the EU-MERCOSUR FTA negotiations, effectively leading to a halt in the ratification process. To tackle this, the EU proposed granting further concessions as part of an additional protocol.⁵³

Carbon Border Adjustment Mechanism

As part of the fight against climate change, there are over 73 carbon pricing schemes world-wide, covering 23.2% of global greenhouse gas (GHG) emissions.⁵⁴ The EU Emission Trading System (ETS) requires businesses in the EU to buy certificates to compensate for the carbon used in the production of their goods. These certificates are traded publicly, so in theory, the price should increase according to demand. So far, these were complemented by a number of free certificate allowances based on business's needs. This led to a relatively low certificate price. As part of the EU 'Fit-for-55' package launched in 2022,⁵⁵ the European Commission seeks to strengthen the effectiveness of the system by consecutively limiting the amount of free certificates until 2034. This might incentivize businesses to relocate their production as a whole or in parts to countries outside the EU. This so-called carbon leakage has so far not materialized, but many argue this is due to the low ETS certificate prices. Therefore, higher prices and subsequent outsourcing might lead to a loss of jobs and in turn weaken domestic support for the fight of climate change.⁵⁶

42 Article 2 para 13 lit b EUDR.

43 Hoffmeister (n 30); Geneva Forwood and others, '10 Key Things to Know about the New EU Deforestation Regulation' (White & Case, 21 July 2023) <<https://www.whitecase.com/insight-alert/10-key-things-know-about-new-eu-deforestation-regulation>> accessed 1 March 2024.

44 Ionel Zamfir, 'Towards a Mandatory EU System of Due Diligence for Supply Chains' (I European Parliamentary Research Service 2020) Briefing PE 659.299 <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659299/EPRS_BRI\(2020\)659299_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659299/EPRS_BRI(2020)659299_EN.pdf)> accessed 1 March 2024.

45 Durán (n 21); Annalisa Savaresi, 'EU External Action on Forests: FLEGT and the Development of International Law' in Elisa Morgera (ed), *The External Environmental Policy of the European Union: EU and International Law Perspectives* (Cambridge University Press 2012) <<https://www.cambridge.org/core/product/E74AA30FE8F131ECA451C2AFB3989CAF>>.

46 Article 10 para 2 lit e, Article 12 para 4 lit c, Article 29 para 4 lit d EUDR.

47 Hanns-Günther Hilpert and Bettina Rudloff, 'EU-Handelspolitik: Die neue Nachhaltigkeitsfalle für handelspolitische Partnerschaften'.

48 Maximum amount is 4 % of the operator's or trader's total annual Union-wide turnover in the financial year preceding the fining decision Article 25 para 2 lit a EUDR.

49 Article 25 para 2 EUDR.

50 Wolfmayr and others (n 38) 108.

51 Governments of Indonesia and Brazil, 'Joint Letter on the European Proposal for a Regulation on Deforestation-Free Products' (WTO 2022) Committee on Agriculture G/AG/GEN/213 <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/AG/GEN213.pdf&Open=True>> accessed 1 March 2024.

52 Camille Gijs, 'Ursula von Der Leyen's Vanishing Trade Legacy' *Politico.eu* (Brussels, 5 December 2023) <<https://www.politico.eu/article/ursula-von-der-leyen-vanishing-trade-legacy/>> accessed 1 March 2024.

53 Hilpert and Rudloff (n 47).

54 World Bank, 'Carbon Pricing Dashboard' (*World Bank*, 2024) <<https://carbonpricingdashboard.worldbank.org/>> accessed 1 March 2024.

55 European Council, 'Fit for 55' (*European Council*, 22 February 2023)

<<https://www.consilium.europa.eu/en/policies/green-deal/fit-for-55-the-eu-plan-for-a-green-transition/>> accessed 1 March 2024.

56 Timothy Meyer and Todd N Tucker, 'A Pragmatic Approach to Carbon Border Measures' (2022) 21 *World Trade Review* 109; Stefano Verde, 'THE IMPACT OF THE EU EMISSIONS TRADING SYSTEM ON COMPETITIVENESS AND CARBON LEAKAGE: THE ECONOMETRIC EVIDENCE' (2020) 34 *Journal of Economic Surveys*; Tobias Nielsen and others, 'The Risk of Carbon Leakage in Global Climate Agreements' (2021) 21 *International Environmental Agreements: Politics, Law and Economics* 1.

To avoid carbon leakage, the EU introduced the [Carbon Border Adjustment Mechanism \(CBAM\)](#).⁵⁷ Its aim is to impose a tax on imported emissions. The scope of the regulation covers cement, iron and steel, aluminium, fertilisers, electricity and hydrogen and some downstream products. While this is an exhaustive list for the moment, the regulation has a build-in review mechanism that delegates authority to the European Commission, which may extend the scope of products at a later stage to match the EU ETS scheme. Potentially, the pharmaceutical and chemical sector, but also electricity and heat generation, aviation, maritime transport and other energy intensive sectors might fall under the CBAM in the future.⁵⁸

While the regulation entered into force in 2023, there is a transition phase for data collection until 2026 with limited reporting requirements and without an obligation to buy certificates. During this period, businesses already have to calculate the theoretical emissions and amount of certificates, as well as register on the EU CBAM online platform to submit reports. In order to calculate emissions properly, downstream suppliers will need to be identified and the production methods thoroughly laid out.

EU importers will have to surrender a number of certificates based on the direct and indirect GHG emissions annually. In order to participate in the reporting, importers will need to register on the CBAM platform and submit quarterly reports starting in 2024. The EU will assist with the initial reporting phases through publishing default reference values based on country averages for an initial period. From 2025 onwards, companies will only be able to declare 20% of GHG emissions of their goods based on default values, necessitating a high level of supplier transparency to properly calculate the duties.⁵⁹

The price of the certificates will be calculated depending on the weekly average auction price of EU ETS allowances and the direct and indirect emissions of the good imported.⁶⁰ While the free EU ETS certificates will be gradually phased out until 2034, the CBAM will only apply to the share of emissions that do not benefit from ETS free allowances, eventually leading to its full implementation in 2034.

National Competent Authorities (NCA) are charged with monitoring the CBAM reporting platform⁶¹ and the collection of

CBAM certificates. In case of non-compliance, declarants penalties ranging between EUR 10 and EUR 50 per tonne of unreported emissions. National legislators are encouraged to introduce domestic regimes for non-compliance. This might introduce stringent penalties, showcased by the Netherlands, where a failure to submit reports can result in a fine of up to 40% of annual turnover.⁶²

The regulation also aims to incentivize third countries to implement domestic carbon emission schemes through its accreditation of carbon taxes paid abroad.⁶³ Although an important feature in order to remain WTO compliant, some argue that this might also lead to closer trade relations to countries with such a scheme, potentially further side-lining trade partners without a domestic carbon tax.

Some important EU trade partners already announced that they would tackle climate change through different means.⁶⁴ It also remains doubtful, where there is enough incentive to implement a carbon tax domestically. Only a number of export-oriented businesses would be confronted with CBAM, so it seems unlikely that the EU as a market will be a driver to introduce a carbon tax on an entire economy.

On the international stage, this already led to ample opposition. China and other countries also vocally opposed CBAM⁶⁵ arguing that CBAM enables the EU to penalize behaviour it deems non-compliant and warning of trade tensions with third countries and retaliatory tariffs.⁶⁶ Other large, emerging economies, such as Brazil, India and South Africa wanted to add a provision on their concern with 'unilateral carbon border taxes and their potential adverse impact on equitable and just transitions' to the COP28 conference.⁶⁷

Forced Labour

According to the International Labour Organization, in 2021 around 49.6 Million people were living in modern slavery worldwide. 27.6 million people were in situations of forced labour, with most people affected working in the Asia-Pacific region.⁶⁸

In September 2022, the European Commission also proposed a regulation to ban products made using forced labour,⁶⁹ which was eventually adopted in March 2024. The

57 Regulation (EU) 2023/956 of 10 May 2023 establishing a carbon border adjustment mechanism OJ L 130/5 [hereinafter CBAM].

58 Article 30 para 2 lit a (iii) CBAM.

59 Article 7 CBAM.

60 Article 21 CBAM.

61 In Germany this is the German Emissions Trading Authority (Deutsche Emissionshandelsstelle), see https://taxation-customs.ec.europa.eu/document/download/5595ce5b-9fd2-42f6-9908-ed6325338ffa_en?filename=20240220%20Updated%20provisional%20list%20of%20NCAs%20for%20CBAM.pdf.

62 Ernst and Young, 'Compliance Obligations for EU CBAM' (*Tax News Update*, 16 October 2023) <<https://globaltaxnews.ey.com/news/2023-1719-eu-compliance-obligations-for-eu-cbam>> accessed 1 March 2024.

63 Article 9 CBAM.

64 The US announced that it would support its climate change ambitions through the IRA, instead of introducing a carbon tax; Wolfmayr and others (n 38) 127–130.

65 Gijs (n 52).

66 Wolfmayr and others (n 38) 127.

67 Government of Brazil, 'Brazil Submission to SBI/SBSTA, COP28 and CMA5' <<https://unfccc.int/sites/default/files/resource/Brazil%20-%20agenda%20item%20-%20Mission%201.5%20and%20positive%20incentives.pdf?download>> accessed 1 March 2024; Zia Weisse, 'Brazil's Anger over EU Carbon Tax Infiltrates COP28' *Politico.eu* (Brussels, 5 December 2023) <<https://www.politico.eu/article/brazil-anger-eu-carbon-tax-infiltrates-cop28-luiz-ignazio-lula-da-silva-china-india-south-africa/>> accessed 1 March 2024.

68 ILO, IOM, and Walk Free, 'Global Estimates of Modern Slavery Forced Labour and Forced Marriage' (International Labour Organization 2022) <https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@ipecc/documents/publication/wcms_854733.pdf> accessed 1 March 2024.

69 Proposal for a Regulation (EU) on prohibiting products made with forced labour on the Union market COM/2022/453 final [hereinafter EUFLR].

regulation bans products, including their components, of any type, manufactured by using forced labour,⁷⁰ defined as ‘forced labour is a work performed involuntarily and under the menace of any penalty’.⁷¹

Member states shall appoint a NCA to enforce the regulation and remove goods from the EU market.⁷² NCAs will follow a risk-based approach, focussing on the economic operators closest to the risk of forced labour. The Commission also proposed a database of forced labour risk areas and products. A newly created EU Forced Labour Product Network shall ensure structured cooperation and coordination between NCAs and the Commission. Fines and penalties will be introduced according to national law.

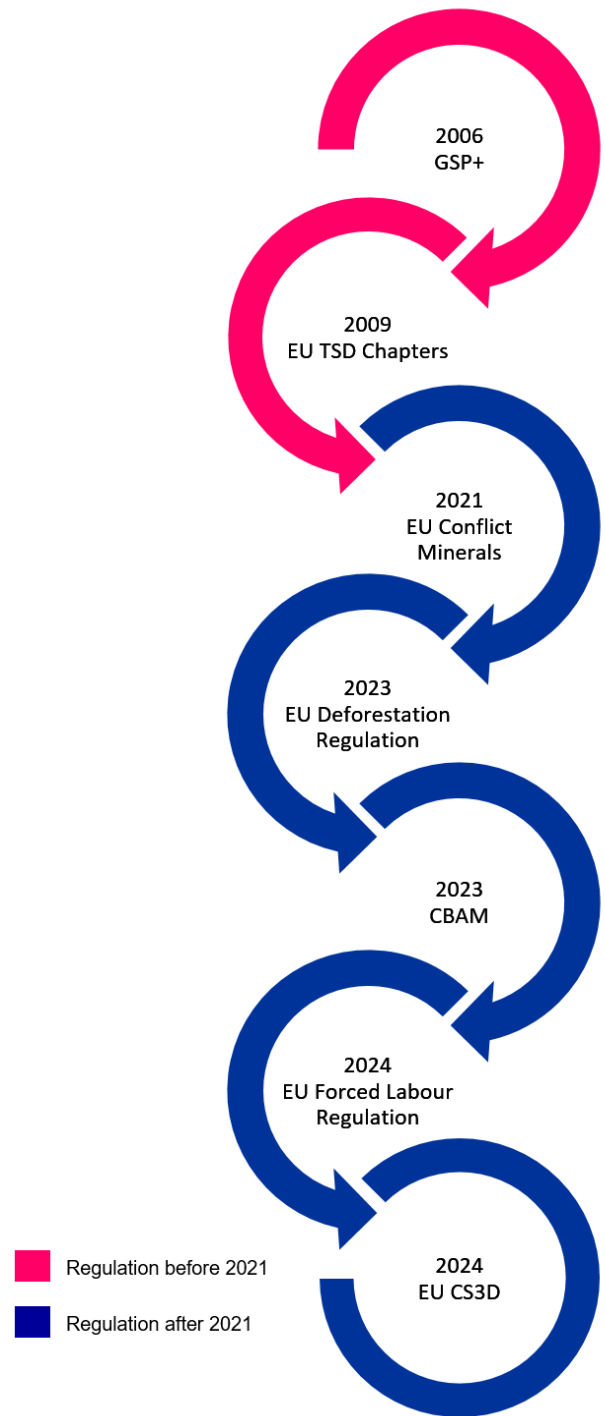
CS3D

Following national initiatives, such as the French Law on the duty of care of parent companies and contractors (Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre) in 2017,⁷³ the Dutch Child labour due diligence law (Wet Zorgplicht Kinderarbeid) from 2019⁷⁴ and the German Supply Chain Law (Lieferkettensorgfaltspflichtengesetz) from 2021,⁷⁵ the European Commission proposed to harmonize due diligence requirements⁷⁶ regarding human and environmental rights for businesses in order to create a level-playing field in the EU.⁷⁷ It aims to oblige certain companies to monitor their supply chains and production in order to ‘ensure that their activities are not based on child labor, forced labor, exploitation, pollution, or other damage to ecosystems’.⁷⁸

The directive has been adopted in March 2024 and lays out reporting requirements to European companies with a net turnover of over EUR 450 Mio and more than 1000 employees.

The CS3D extends the due diligence to direct and indirect suppliers and therefore covers the whole supply chain. Companies are obliged to integrate human and environmental rights into their policies; identify actual and potential adverse human rights and environmental impacts, as well as prevent and mitigate those impacts; establish and maintain a procedure for complaints; monitor and publicly communicate their due diligence policy and measures; and devise a plan of how to adapt their business in line with the 1.5°C global temperature goal of the Paris Agreement.⁷⁹

Image 2 | Timeline of EU trade and sustainability initiatives



70 Article 3 EUFLR.
 71 Article 2 lit a EUFLR; Article 2 para 1 Convention (No. 29) concerning forced or compulsory labour, as modified by the Final Articles Revision Convention, (adopted 28 June 1930) 39 UNTS 55.
 72 Article 12; Article 30 EUFLR.
 73 LOI n° 2017-399 of 27 March 2017 relative au devoir de vigilance des sociétés mères et entreprises donneuses d’ordre.
 74 Wet of 24 October 2019 houdende de invoering van een zorgplicht ter voorkoming van de levering van goederen en diensten die met behulp van kinderarbeid tot stand zijn gekomen Staatsblad 2019, 401.
 75 Gesetz of 16 July 2021 über die unternehmerischen Sorgfaltspflichten zur Vermeidung von menschenrechtsverletzungen in Lieferketten BGBl. I S. 2959.
 76 Proposal for a Directive (EU) on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 COM/2022/71 final [hereinafter CS3D].
 77 Claire Bright and Lise Smit, ‘The New European Directive on Corporate Sustainability Due Diligence’ (British Institute of International and Comparative Law 2022) <https://www.biicl.org/documents/11164_ec_directive_briefing_bright_and_smit_1_march_update.pdf> accessed 1 March 2024; Stefano Spinaci, ‘Corporate Sustainability Due Diligence How to Integrate Human Rights and Environmental Concerns in Value Chains’ (European Parliamentary Research Service 2023) PE 729.424 <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729424/EPRS_BRI\(2022\)729424_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729424/EPRS_BRI(2022)729424_EN.pdf)> accessed 1 March 2024.
 78 European Parliament, ‘Corporate Due Diligence Rules Agreed to Safeguard Human Rights and Environment’ (European Parliament Website, 14 December 2023) <<https://www.europarl.europa.eu/news/en/press-room/20231205IPR15689/corporate-due-diligence-rules-agreed-to-safeguard-human-rights-and-environment>> accessed 1 March 2024.
 79 Article 15 CS3D.

To mitigate adverse impact, companies shall seek to cooperate with their suppliers, including contractual obligations, investment and an action plan. In case of continued non-compliance, companies shall temporarily or permanently cut ties with the relevant supplier(s).

Penalties for non-compliance with the CS3D shall be enforced through national authorities and include ‘naming and shaming’, the removal of the company’s goods from the market and the exclusion of public procurement in the EU. Moreover, fines of a minimum of 5% of net annual worldwide turnover, with the possibility of even higher domestic penal-

ties and an inclusion of a civil liability clause to fully compensate any damage under national law have been included in the proposal.⁸⁰

This chapter has outlined an increase of unilateral measures in the EU external trade policy. An increase in bureaucratic requirements shall incentivize companies to integrate sustainability into its business practices. Following widely used notion of ‘red-tape’ to describe bureaucracy, this paper will refer to the measures collectively as ‘green-tape’, as they aim at promoting ‘green sustainability’.

WTO Compliance of EU Sustainability Provisions

Many commentators feared that the absence of an independent judiciary might lead to the disregard of the international trade rulebook. While the WTO Appellate Body remains dysfunctional since 2019, *prima-facie* the EU seems to stay committed to the multilateral order. In its recent communication on trade, an entire annex was added to outline possible options for multilateral cooperation and reform of the WTO to incorporate sustainability.⁸¹ As the EU repeatedly assured the WTO compliance of its new trade-related initiatives, it is worth to briefly evaluate this statement and investigate whether recent regulatory action has been following WTO law.⁸²

One of the WTO’s foundational concepts is non-discrimination laid out in the General Agreement on Tariffs and Trade (GATT). This is embodied by establishing national treatment (NT), as the prohibition of discrimination of foreign companies with domestic companies, as well as most-favoured nation treatment (MFN), preventing discrimination of foreign companies with other foreign companies.⁸³

In light of this, a long-standing debate in the WTO has been ongoing on whether products can be discriminated against based on their methods of production or processing. Some

argue this could create a slippery slope for the potential misuse and disguise protectionism. The prevailing case law has not been supporting non-product related processes or production methods. This means that, for example, products produced in an environmentally harmful way cannot be treated differently than those produced in a more environmentally sound fashion.⁸⁴

Many of the outlined initiatives could be deemed at odds with those core GATT provisions. The EUDR does not consider local legislation and realities of land occupation.⁸⁵ The extra-territorial application of the EUFL does not necessarily reflect an equally applied domestic measure and the EU CS3D might be deemed a non-tariff trade barrier.⁸⁶

Another provision relevant for the introduction of ‘green-tape’ would be Article XI GATT, prohibiting the introduction or maintenance of non-tariff trade barriers on the form of quotas, import or export licenses or other measures in a broad manner.⁸⁷ This might concern the CS3D, as well as EUTR, EUDR and EUFL, as all of the regulations introducing new obligations for companies to submit documentation on their international business and imports.⁸⁸

80 Article 20 CS3D.

81 European Commission, ‘Trade Policy Review - An Open, Sustainable and Assertive Trade Policy’ (n 2).

82 Preamble 15 CBAM.

83 Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases, and Materials* (5th edn, Cambridge University Press 2021) 337–455 <<https://www.cambridge.org/core/product/E809B5B4F9978949103F1609A3067D05>>.

84 *ibid* 377–430; Christine Frohn, ‘Klimazoll vs. WTO’ (Friedrich-Naumann-Foundation 2020) 9 <<https://shop.freiheit.org/#!/Publikation/929>> accessed 11 March 2024.

85 Bruno Capuzzi, ‘Is the European Union Deforestation Regulation WTO-Proof? The Context of EU’s Green Agenda and an Exercise of WTO Compatibility’ [2023] SSRN Electronic Journal <<https://www.ssrn.com/abstract=4443139>> accessed 13 February 2024; Gracia Marín Durán, ‘Editorial: Towards Reducing the EU’s Global Deforestation Footprint?’ (2022) 27 *European Foreign Affairs Review* 437; 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.

86 for WTO Compliance of CS3D see Rüdiger Wolfrum, Peter-Tobias Stoll and Holger Hestermeyer, *WTO - Trade in Goods*, vol 5 (1st edn, Brill) Article XX GATT, para 6 <<https://brill.com/edcollbook/title/12243?language=en>> accessed 4 March 2024; Wolfgang Weiß, Christoph Ohler and Marc Bungenberg, *Welthandelsrecht* (3rd edn, CH Beck 2022); *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products* [2014] WTO Appellate Body WT/DS400/AB/R [5.201].

87 Van den Bossche and Zdouc (n 83) 522–590; Wolfrum, Stoll and Hestermeyer (n 86) 281–295; *Argentina - Hides Leather* [2000] WTO Appellate Body WT/DS155/R [11.17].

88 Gabriel Felbermayr and others, ‘Economic Evaluation of a Due Diligence Law’, Partzsch and Vlakamp (n 33); Dylan Geraets and Bregt Natens, ‘Governing through Trade in Compliance with WTO Law: A Case Study of the European Union Timber Regulation’ in Jan Wouters and others, *Global Governance through Trade* (Edward Elgar Publishing 2015).

In the *Shrimp-Turtle* case,⁸⁹ the WTO Appellate Body permitted US trade-related measures to safeguard turtles abroad. This was based on the provision on general exceptions in Article XX GATT. This list of exceptions include public morals, the protection of human, animal or plant life or health, relation to the products of prison labour, and the conservation of exhaustible natural resources.⁹⁰ Beyond this, albeit a contentious issue, some of the legislative acts might even be legitimized by Security Exceptions in Article XXI, particularly if they are based on UN Security Council Resolutions.⁹¹

The chapeau of Article XX hinders any measure to be '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'.⁹² Thus it must be assured that the package of 'green-tape' measures is not deemed discriminatory in its formulation and application.

While it is likely that some of the legal acts, such as the forced labour ban,⁹³ are WTO-compliant under the current rules, the compliance of other regimes, notably CBAM, seems to be much more controversial.⁹⁴

Even though the EU continuously stresses the importance of a rules-based multilateral trade order with the WTO Appellate Body at the centre,⁹⁵ it seems that the absence of the body has empowered the EU to put its own ambitions at centre stage. There is no independent judiciary to judge on the compliance of the EU's legal acts.⁹⁶ Even though the EU might be pioneering this field and its self-declared goal remains to be WTO-compliant, other countries might use green-tape for protectionism disguised as sustainability legislation in the future.

89 *United States – Import Prohibition of Certain Shrimp and Shrimp Products* [2000] WTO Appellate Body WT/DS58/R; Frohn (n 84) 9.

90 Article XX GATT; Hoffmeister (n 30).

91 Van den Bossche and Zdouc (n 83) 591–688.

92 Article XX GATT.

93 Tibusay Morgandi, 'WTO Law Aspects of Import Prohibitions on Products and Services Made Using Forced Labour' (International Lawyers Assisting Workers Network 2022) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4115803> accessed 4 March 2024; Klaus Friesenbichler and others, 'Trade-Related Policy Options of a Ban on Forced Labour Products' (European Parliamentary Research Service 2022) PE 702.570 <[https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702570/EXPO_IDA\(2022\)702570_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702570/EXPO_IDA(2022)702570_EN.pdf)> accessed 4 March 2024.

94 Ingo Venzke and Geraldo Vidigal, 'Are Trade Measures to Tackle the Climate Crisis the End of Differentiated Responsibilities? The Case of the EU Carbon Border Adjustment Mechanism (CBAM)' [2022] SSRN Electronic Journal; Joost Pauwelyn and David Kleimann, 'Trade Related Aspects of a Carbon Border Adjustment Mechanism. A Legal Assessment' (European Union 2020) EP/EXPO/INTA/FWC/2019-01/Lot5/1/C/02 <[https://www.europarl.europa.eu/cmsdata/210514/EXPO_BRI\(2020\)603502_EN.pdf](https://www.europarl.europa.eu/cmsdata/210514/EXPO_BRI(2020)603502_EN.pdf)> accessed 3 March 2024; James Bacchus, 'Legal Issues with the European Carbon Border Adjustment Mechanism' (Cato Institute 2021) 125 <<https://www.cato.org/briefing-paper/legal-issues-european-carbon-border-adjustment-mechanism#>> accessed 3 April 2024; *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products* (n 86) para 5.108; Bart LeBlanc, 'Potential Conflicts between the European CBAM and the WTO Rules' (Norton Rose Fulbright, February 2023) <<https://www.nortonrosefulbright.com/en/knowledge/publications/9c5d9ec6/potential-conflicts-between-the-european-cbam-and-the-wto-rules>> accessed 4 March 2024; Andrei Marcu, Michael Mahling and Aaron Cosbey, 'Border Carbon Adjustments in the EU: Issues and Options' (ERCST, Roundtable on Climate Change and Sustainable Transition 2021) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3703387> accessed 4 March 2024.

95 Annex I European Commission, 'Trade Policy Review - An Open, Sustainable and Assertive Trade Policy' (n 2).

96 'Appellate Body' (WTO Website, 26 January 2024) <https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm> accessed 4 March 2024.

97 Wolfmayr and others (n 38) 89.

The economic impact of green-tape

All of those regulatory initiatives serve the wide array of EU sustainability ambitions. With its focus on high-value-added products and a huge consumer market, the EU understands itself at the centre of global trade. In the past year, it imported around 42 Percent of goods in high-impact sectors from high-risk countries.⁹⁷ Thus, as one of the most important buyers, particularly in high-risk sectors, it adheres to a stronger role in regulating imports it deems unsustainable. On a normative level, the EU should be commended for its role in pioneering the combat of adverse human rights, environmental and climate impact. It becomes clear that the EU is willing to green-tape its market through the introduction of stricter financial and non-financial measures, such as due diligence requirements, reporting and product bans, to achieve its sustainability ambitions. However, there is contrasting evidence on the economic effect of those regulations.

1. Initially, due to the high administrative burden caused by green-tape, businesses might be incentivized to reduce the number of suppliers to be able to better monitor their activities. This could mean decoupling from countries with weak governance, particularly low-income countries might be particularly pronounced in some high-risk sectors.⁹⁸
2. Survey results based on the German Supply Chain Law also indicate that Small and Medium-sized enterprises (MSMEs) are indirectly affected by these initiatives as either customers or suppliers. A third of surveyed companies indicated that they are not directly affected, but nonetheless needs to conform to report to their customers. Particularly, 56 Percent of mid-sized firms had to report on due-diligence standards.⁹⁹ This led to close to a quarter of indirectly affected businesses decision to source from countries with a higher environmental and labour standard.¹⁰⁰ This effect might be exacerbated by the fact that some of the regulations, such as the Forced Labour Ban, have no exceptions for SMEs.
3. In line with this, companies might increasingly procure from countries with a good human rights or environmental record.¹⁰¹ An early analysis of the German supply chain law already indicated a reduction of imports from countries with a low human rights record, such as a 20 Percent reduction of apparel exports from Bangladesh and Pakistan to Germany after the introduction of the law.¹⁰² Similar findings materialized with the French Supply Chain law.¹⁰³

This effect might be amplified by financial incentives, such as accreditation of paid carbon taxes abroad and certain whitelist schemes.¹⁰⁴ This relocation of production and supply to higher-wage countries would also foster more capital-intensive production and might of intermediary products.¹⁰⁵ By contrast, the labour costs in some countries might still permit profitability, even with additional administrative costs.

4. Companies might increasingly move production to countries in the European Neighbourhood, as those might offer lower labour costs, as well as moderate transport costs due to proximity. Potentially, a closer relationship with suppliers might be forged and FTAs and Partnership agreements with the region already offer reduced tariffs.¹⁰⁶
5. Particularly for countries with a low diversification of exported goods, the reduction of suppliers or withdrawal of EU companies from certain markets might aggravate the labour situation and could thereby contradict the EU's ambitions.¹⁰⁷ On the other hand, existing greenfield investments and established production sites by EU companies could swiftly elevate the labour and environmental situation. In general, the high administrative burden might promote the importance of FTAs with developing countries to achieve a similar level of protection and reduce non-tariff barriers, as the example of the EU-Vietnam FTA showcases.¹⁰⁸

Overall, while the economic impact assessments of the various regulatory initiatives vary in their predictions,¹⁰⁹ the number of recently introduced green-tape, ranging from EUDR to CBAM might have a compounding effect on the economy. Some argue that successful implementation has an overall positive impact on trade and welfare, while at the same time encouraging sustainability. Others deem that this will lead to the exit from certain markets, separating European companies from important suppliers, thus curtailing European competitiveness and leading to a potential loss in GDP. Coming back to initial debates on the use of sustainability regulation in the WTO and international trade, supportive claims describe an underlying trend of EU companies re- and friendshoring production in reaction to 'green-tape'. In an increasingly multipolar world, this can be one way to limit supply chain disruptions and strengthen domestic manufacturing. On a global stage, however, other countries might be ready to take the place of European companies in those supply chains, effectively weakening the positioning for future standard setting of the EU.

98 *ibid* 85–95.

99 Galina Kolev-Schaefer and Adriana Neligan, 'Data-Based Results on the Effects of the German Supply Chain Act' Due Diligence 18.

100 Kolev-Schaefer and Neligan (n 99).

101 Felbermayr and others (n 88).

102 Kolev-Schaefer and Neligan (n 99).

103 Kolev and Neligan (2021b).

104 See Article 9 CBAM on Carbon price paid in a third country; Article 9 CMR on global responsible smelters; and Article 29 para 2 EUDR on low-risk countries.

105 Kolev-Schaefer and Neligan (n 99); Felbermayr and others (n 88).

106 Kolev-Schaefer and Neligan (n 99) 17.

107 Wolfmayr and others (n 38) 2.

108 Kolev-Schaefer and Neligan (n 99).

109 Wolfmayr and others (n 38) 115; Felbermayr and others (n 88).

110 Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 *International Organization* 887; Partzsch and Vlaskamp (n 33) 978–986.

Conclusion: Building walls with good intentions

As this paper has shown, initial approaches of the EU tried to spread sustainability through reciprocity. By offering trade preferences to a strong internal market in exchange for following sustainability regulation, many countries were willing to improve their governance. This strengthened public ownership and contributed to the international acceptance of certain principles and values. In the past the EU actively engaged international partners to mainstream certain regulatory initiatives, such as conflict minerals and timber.¹¹⁰ After the 'An Open, Sustainable and Assertive Trade Policy' document from 2021, the EU shifted its approach and now increasingly tries to implement unilateral sustainability regulations. The economic impact of each regulation might be limited, however jointly they might erect stringent requirements to the EU single market by imposing mostly bureaucratic obligations on importers.

While some argue that multinational due-diligence requirements are an answer to closing the 'global-governance gap',¹¹¹ it can be seen as a decisive move away from the current state-centred human rights regime.¹¹² By obliging multinational corporations to apply laws extraterritorially, the EU puts exclusive territoriality and international consensus as core pillars of the international order into question.¹¹³ Some trade partners see this new kind of green-taping as an intrusion of sovereignty and might be reminded of their colonial past through the enforcement of unilateral rules and the negative conditionality without reciprocity.¹¹⁴

A reciprocal approach through GSP+ and TSD chapters in FTAs was the basis of EU trade and sustainability policy prior to the current EU-legislative period. Nowadays, there is barely any participation of trade partners in the unilateral policy making of the EU,¹¹⁵ as well as a deficit in incentivizing compliance with green-tape apart from the very access to the EU market. This lack of coordination is also at odds with cooperative approaches to tackle the climate crisis.¹¹⁶ Effectiveness of the regulations is thus solely dependent on the strength and attractiveness of the internal market and the importance for global supply chains.¹¹⁷ This is amplified by countries, who might prohibit the implementation of certain international rules by multinational companies, putting com-

panies into a difficult spot potentially leading to cutting ties with the European market.

While the stated goal of the regulatory initiatives is to improve sustainability. Following the emerging field of green trade law will incur significant compliance costs, particularly if there is no harmonization across the various regulations, resulting in parallel reporting requirements and potentially even contradictory obligations.¹¹⁸ In certain sectors, there appears to be a clear economic stimulant to 're-' or 'friends-hore' supply chains due to the increased regulatory burden.¹¹⁹ Initiatives, such as the climate clubs and the crediting of CO-2 levies paid abroad as part of CBAM, might further incentivize cooperation with certain countries, while at the same time disentangling relationships with others.

The green-taping effect could also endanger the competitiveness of European companies, as there will be a reduction in intermediaries and suppliers, as well as a potential discontinuation of business relationships with certain companies and even countries.¹²⁰ This might also limit access of EU companies to goods that are exclusively harvested or manufactured in a non-compliant context. At the same time it also bears the potential of establishing sustainable business practices and closer supplier relationships, promoting long-term thinking over short-term profits.

The WTO is currently not a driver for global trade and as the EU-Mercosur negotiations have shown, more green-tape might pose an additional obstacle to future FTA negotiations. The regulatory burden of the EU is already quite high and further expanding due diligence requirements for foreign goods might limit the attractiveness and effectiveness of FTAs.¹²¹ FTAs can set the rules and aim to offer a harmonized set of rules as well as a common rulebook. Unilateral measures are at odds with regulatory commitments of trading partners, as they hinder or hamper the import of certain products, without prior consultation. Moreover, it might limit the value of tariff concessions, as even with an according reduction in financial costs, businesses might not be able to meet the sustainability requirements of the EU and thus still be excluded from access to the market.¹²² It also puts into question recently concluded

111 Partzsch and Vlaskamp (n 33).

112 Yen Kong Ngangjoh-Hodu and others, 'The Proposed EU Corporate Sustainability Due Diligence Directive and Its Impact on LDCs A Legal Analysis' (Ministry for Foreign Affairs Finland 2023) 1226 <<https://julkaisut.valtioneuvosto.fi/handle/10024/164784>> accessed 3 April 2024.

113 Kirsten Schmalenbach, 'Völker- und unionsrechtliche Anstöße zur Entterritorialisierung des Rechts' in Stephan Breitenmoser and others, *Grenzüberschreitungen* (De Gruyter 2017) 245. 262.

114 Jonathan Packroff, 'EU Kontert Wirtschaftliche Erpressung, Steht Aber Selbst in Der Kritik' EURACTIV (Brussels, 4 October 2023) <https://www.euractiv.de/section/handel-und-industrie/news/eu-kontert-wirtschaftliche-erpressung-steht-aber-selbst-in-der-kritik/?_ga=2.142980790.261092996.1705910904-1709926092.1700047802> accessed 4 March 2024.

115 Hilpert and Rudloff (n 47).

116 Frohn (n 84) 7.

117 Felbermayr and others (n 88).

118 Wolfmayr and others (n 38).

119 Claudia DeMeulenmeester, 'Will Due Diligence Legislation Further Recalibrate Supply Chains?' (*Sustainable Views*, 28 November 2023) <<https://www.sustainableviews.com/will-due-diligence-legislation-further-recalibrate-supply-chains/>> accessed 4 March 2024.

120 Kolev-Schaefer and Neligan (n 99).

121 Bettina Rudloff and Tobias Stoll, 'EU-Mercosur Agreement: Partnership for Sustainability Instead of Unilateralism' (*SWP*, 14 March 2023) <<https://www.swp-berlin.org/publikation/eu-mercrosur-agreement-partnership-for-sustainability-instead-of-unilateralism>> accessed 4 March 2024.

122 John Clarke, 'International Trade: It's Time for an Argumentative European' (*Borderlex*, 30 January 2024) <<https://borderlex.net/2024/01/30/comment-international-trade-its-time-for-an-argumentative-european/>> accessed 4 March 2024; Hilpert and Rudloff (n 47).

FTAs and negatively impacts the EU's leverage in FTA negotiations, as it might have to offer far-going tariff concessions solely to convince third countries to abide by the regulations in place.¹²³ To counterbalance this development the EU could offer compensation mechanisms, as it has done with the EU-Mercosur FTA and increased administrative cooperation and mutual recognition.¹²⁴

While it has been publicly stated that the unilateral obligations are in line with the multilateral system, due to the WTO Appellate Body crisis there is no mechanism to assure compliance with WTO law. A potential reinstatement of the WTO Appellate Body might force the EU to revise some of its measures. Generally, legal concerns with WTO rules should be avoided to support the EU's aim of trade for all and reoccurring support for multilateralism.¹²⁵ This would prove that the EU's aims are not just lip-service to the multilateral order.

Simultaneously, these initiatives can be seen as a driver for domestic reform, thereby enshrining certain rights to the country as a whole. This might depend on the export dependence of the country, but could certainly increase the quality of livelihoods for millions.¹²⁶ Also some of the regulations might embolden the local recognition of certain rights and support civil society organisations in their fight for a more sustainable economy.¹²⁷

Given the important role of EU companies in the developing world, creating higher paying jobs and promoting better working conditions,¹²⁸ withdrawing from certain markets might make certain countries more susceptible for a takeover from companies coming from markets without stringent environmental and human rights obligations. This can have a transformative impact on entire regions, weakening social endeavours¹²⁹ and potentially pushing former employees into the informal sector or contributing to unemployment.¹³⁰ By contrast, low labour costs and existing investments might lead

to a swift improvement of the situation for workers and the environment. Additionally, putting climate and ESG goals on the agenda of multinational companies will further integrate those issues into policies, creating higher ownership in the EU and abroad.

Finally, there might be trade-offs between the different instruments, which should be recognized and prioritized.¹³¹ In an increasingly multipolar world, the EU might be faced with other actors, particularly the US and China, gladly taking over its position in global value chains. The EU should seek more regulatory cooperation and try to find multi- or bilateral solutions instead of embarking on its journey by itself. This would not just create more legitimacy, contribute to broader ownership and include a diverse array of positions, but would also preserve the benefits of a rules-based international trading system, minimize barriers and shield it from retaliation from countries who might not support the EU's climate, social and environmental ambitions.¹³²

The EU legitimizes its green-tape with undertones of normative desirability and universal applicability. Without relying on conventional sources of authority, the EU achieves its most significant global impact by disseminating norms within its jurisdiction. Devoid of military might or unrestrained economic influence, the EU can assert true unilateral authority solely by establishing behavioural standards for the international community.¹³³ The EU's projection of its regulatory preferences signifies the altruistic intentions of a benevolent hegemon. As an advocate for norms that promote global well-being, the EU aims to foster a rule-based global order and present an alternative to the more contentious and self-interested worldview promoted by other actors on a global stage. Using sustainability as a veil to disguise its geopolitical intention, the EU may overlook the possibility that eventually it could become indistinguishable from the others and find itself isolated.¹³⁴

123 Vivienne Halleux, 'Towards Deforestation-Free Commodities and Products in the EU' (European Parliamentary Research Service 2023) Briefing PE 698.925 <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/698925/EPRS_BRI\(2022\)698925_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/698925/EPRS_BRI(2022)698925_EN.pdf)> accessed 3 March 2024.

124 Rudloff and Stoll (n 121).

125 Wolfmayr and others (n 38).

126 Werner Raza, 'Eigenverantwortung Bei Lieferketten Ist Zu Wenig' *Der Standard* (Wien, 16 January 2024) <<https://www.derstandard.at/story/3000000203230/eigenverantwortung-bei-lieferketten-ist-zu-wenig>> accessed 3 April 2024.

127 Zamfir (n 44).

128 Eric A Verhoogen, 'Trade, Quality Upgrading, and Wage Inequality in the Mexican Manufacturing Sector*' (2008) 123 *The Quarterly Journal of Economics* 489; Andrew B Bernard and others, 'Firms in International Trade' (2007) 21 *Journal of Economic Perspectives* 105; Andrew B Bernard, J Bradford Jensen and Robert Z Lawrence, 'Exporters, Jobs, and Wages in U.S. Manufacturing: 1976-1987' (1995) 1995 *Brookings Papers on Economic Activity, Microeconomics* 67.

129 Präsidium der FDP, 'EU-Lieferkettenrichtlinie Stoppen, Bürokratie-Burnout Verhin- Dern' (Präsidium der FDP 2024) Beschluss <<https://www.fdp.de/beschluss/beschluss-des-praesidiums-eu-lieferkettenrichtlinie-stoppen-buerokratie-burnout>> accessed 3 March 2024.

130 Felbermayr and others (n 88) 45.

131 *ibid* 43.

132 Georg Zachmann and Zach McWilliams, 'A European Carbon Border Tax: Much Pain, Little Gain' (Bruegel) 5 <https://www.bruegel.org/sites/default/files/wp_attachments/PC-05-2020-050320v2.pdf> accessed 4 March 2024; Matthias Bauer and Dyuti Pandya, 'EU Autonomy, the Brussels Effect, and the Rise of Global Economic Protectionism' (European Centre for International Political Economy 2024) 01/24 <https://ecipe.org/publications/eu-autonomy-brussels-effect-rise-global-economic-protectionism/?mc_cid=97fe6c3935&mc_eid=201f566834> accessed 4 March 2024; Wolfmayr and others (n 38) 2.

133 Laidi Zaki, 'The Unintended Consequences of European Power' (2007) 5 8 <<https://sciencespo.hal.science/hal-01066072/document>> accessed 4 April 2024.

134 Stiglitz Joseph, 'The EU's Global Role' *The Guardian* (London, 29 March 2007) <<https://www.theguardian.com/commentisfree/2007/mar/29/theeusglobalmission>> accessed 4 April 2024; IAN MANNERS, 'The Normative Ethics of the European Union' (2008) 84 *International Affairs* 45.

Policy recommendations

1. Cooperation should be at the heart of the EU's efforts. The EU has to re-focus on free trade agreements and on finding other, sectoral, partnerships to combat sustainability challenges. „Green tape“ should be systematically integrated as part of new and existing agreements. Individual solutions for partner countries should promote implementation and mainstreaming of sustainability provisions and regulatory cooperation on those issues should be included. At the same time, a revision on the list of commitments would avoid double obligations, particularly with regard to the chapters on trade and development.
2. The EU should devise a new strategy for the implementation of its sustainability provisions in trade policy. A comprehensive list of values and core standards would prevent progressive regulation and constant expansion. In particular, cooperation with actors outside the EU in the implementation of those initiatives should be outlined and the impact on SMEs analyzed.
3. The establishment of a global dialogue platform for sustainability and trade promotes exchange with civil society and the private sector. In particular, however, the focus should also be on exchanging with representatives of other countries to prevent future trade conflicts.
4. Harmonizing the relevant labour, climate and environmental rights across the EU's various sustainability initiatives, such as GSP+, TSD and unilateral actions creates a clear rulebook. This will provide importers with transparent rules and limit the regulatory burden, while offering highest sustainability compliance. Fostering a harmonized approach with implementation guidelines would also create a level-playing field across companies and potentially promotes certain due diligence standards globally.¹³⁵
5. Sensible consensus on the inclusion of a balanced sustainability provision in the WTO should be fast-tracked. The organization should also be used as a platform to integrate sustainability and economic issues through multi- and plurilateral agreements. Failing to do so will continue the gridlock on the organization and will lead to the potential misuse of 'green tape' to further protectionist tendencies.¹³⁶
6. Instating a single digital platform with unified legal requirements and processes for upload and management of all relevant documentation would particularly benefit SMEs. This avoids multiple accesses and offers a one-stop-shop for all due-diligence and export related documentation. Additionally, it would streamline documentation and formats to avoid various formats and reporting standards.
7. Bilateral Dialogue platforms should be established to address sustainability issues and early identification of additional non-tariff barriers. An example could be the EU-US Trade and Technology Council, which already has a working group on Climate and Green Tech, as well as on Global Trade Challenges. Working with civil society organizations and the private sector to effectively monitor the rules, as well as establishing intra- and extra-European administrative cooperation.
8. Sensitizing the private and public sector abroad on new trade regulations in order to retain access to critical markets and trade relations. Aid-for-trade and other financing instruments could be used to support the implementation of rules abroad and promote a swift transition. These flanking measures should also aim to promote regulatory cooperation.
9. Member States should avoid 'gold-plating', i.e. going beyond the core provisions to establish a harmonized level-playing field and homogenous interpretation. Existing member state regulation should be suspended to avoid double-reporting standards and foster a European level-playing field.
10. Including SMEs as part of the policy-making and implementation process through committees and multi-stakeholder-dialogues. Particularly on a member-state level, NCAs should consult regularly with SME association and foster a 'SME-friendly' implementation

¹³⁵ Ngangjoh-Hodu and others (n 112); Felbermayr and others (n 88).

¹³⁶ European Commission, 'Trade Policy Review - An Open, Sustainable and Assertive Trade Policy' (n 2).

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