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Materials

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Strengthening Climate Protection and Development through International Trade Law

Commissioned Expert's Study for the WBGU Flagship Report „Rethinking Land in the Anthropocene: from Separation to Integration"

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Strengthening Climate Protection and Development through International Trade Law

A study of WTO, Regional Trade Agreements and EU Economic Partnership Agreements with particular reference to sustainable land use

Legal opinion

Commissioned by the Wissenschaftlicher Beirat der Bundesregierung Globale Umweltveränderung (German Advisory Council on Global Change)

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List of Abbreviations

ACCTS – Agreement on Climate Change, Trade and Sustainability

AfCFTA - African Continental Free Trade Area

BCAs – Border Carbon Adjustments

CARIFORUM – Caribbean Forum (sub-group of the Organisation of African, Caribbean and Pacific States)

CBD – Convention on Biological Diversity

CCS – Carbon Capture and Storage

CETA – Comprehensive Economic and Trade Agreement

CITES – Convention on International Trade in Endangered Species of Wild Flora and Fauna

DAG – Domestic Advisory Group

DSB – Dispute Settlement Body

EAC EPA – East African Community EPA

EPA – Economic Partnership Agreement

EPD – Environmental Product Declaration

EPI – Environmental Performance Index

ESA EPA – Eastern and Southern Africa EPA

FLEGT – Forest Law Enforcement, Governance and Trade

GATS – General Agreement on Trade in Services

GATT – General Agreement on Tariffs and Trade

GIZ – Deutsche Gesellschaft für Internationale Zusammenarbeit (German Agency for International Cooperation)

GSP – Generalised System of Preferences

ICSID – International Center for the Settlement of Investment Disputes

ICT – Information and Communication Technology

MEAs – Multilateral Environmental Agreements

NAAEC – North American Agreement on Environmental Cooperation

NAFTA – North American Free Trade Agreement

NDCs – Nationally Determined Contributions

OECD – Organization for Economic Cooperation and Development

PPMs – Process and Production Methods

REDD – Reducing Emissions from Deforestation and Forest Degradation

RTAs – Regional Trade Agreements

SACU – Southern African Customs Union

SADC EPA – Southern African Development Community EPA

SCM Agreement – Agreement on Subsidies and Countervailing Measures

SDGs – Sustainable Development Goals

SPS Agreement – Agreement on Sanitary and Phytosanitary Measures

TBT Agreement – Agreement on Technical Barriers to Trade

TED – Turtle excluder device

TFA – Trade Facilitation Agreement

TPRM – Trade Policy Review Mechanism

TRIMs Agreement – Agreement on Trade-Related Investment Measures

TRIPS Agreement – Agreement on Trade-Related Aspects of Intellectual Property Rights

UNCTAD – United Nations Conference on Trade and Development

UNEP – United Nations Environment Programme

UNFCCC – United Nations Framework Convention on Climate Change

WRI – Word Resources Institute

WTO – World Trade Organization

A. Objective of the study

This legal opinion has been drafted as part of the main 2020 expert report (Climate and Land Use) by the Wissenschaftlicher Beirat Globale Umweltveränderungen (German Advisory Council on Global Change) (WBGU). The objective of the study is to identify potential supports and barriers in international trade law in relation to climate protection and development, with particular reference to sustainable land use. The opinion analyses World Trade Organization (WTO) law, Regional Trade Agreements and Economic Partnership Agreements between the European Union (EU) and ACP States[1] in depth and Investment Protection Agreements in brief, with particular focus on the one hand on the interaction between the different trade law regimes and on the other on the challenges at the interface between environmental protection and development policy.

After a brief overview of different approaches to identifying and assessing the environmental effects of international trade, the opinion discusses in depth the above areas of international trade law. Firstly a concise overview will be given of the origin, function and current status of each regime, followed by a discussion of whether and through what instruments the regime in question contributes or can contribute to sustainable land use from the perspectives of climate protection and development.

B. Environmental effects of international trade

The emissions from transport[2] are direct environmental effects of trade. Scientists, international organisations and institutions such as the Organization for Economic Cooperation and Development (OECD), the World Resources Institute (WRI) or the United Nations Environment Programme (UNEP) have developed a range of approaches to the measurement and assessment of the indirect environmental effects of trade.[3] A distinction can be drawn between pollution effects, health and safety effects and resource effects. Pollution effects cover the increased or reduced emissions of harmful substances into their environments during the life cycle of products or services. Health and safety effects relate to the improved or reduced protection of human, animal and plant life, for example in the fields of hygiene, water supply, food quality and the prevention of epidemics. Resource effects cover the increased or reduced use of natural resources, such as raw materials, land, habitats, ecosystems, biodiversity and water, during the life cycle of products or services. Environmental effects of trade can be manifest at a local, national, cross-border regional or even global level.

In a study of the environmental effects of the NAFTA agreement[4], *Grossmann* and *Krueger* identified three mechanisms through which trade agreements have an indirect effect on the environment and

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[1] The APC group comprises 79 African, the Caribbean and the Pacific states.

[2] Altmann, Ansatzpunkte für eine stärkere Berücksichtigung von Umweltaspekten in regionalen und interregionalen Freihandelsabkommen (Integration of Environmental Aspects in Regional and Inter-regional Trade Agreements), UBA (Federal Environmental Agency) Reports 10/2002, pp. 42ff; OECD/International Transport Forum (ITF), The Carbon Footprint of Global Trade – Tackling Emissions from International Freight Transport, 2015, downloadable at: https://www.itf-oecd.org/sites/default/files/docs/cop-pdf-06.pdf.

[3] Altmann, Ansatzpunkte für eine stärkere Berücksichtigung von Umweltaspekten in regionalen und interregionalen Freihandelsabkommen, pp. 42ff, with further references.

[4] 1994 North American Free Trade Agreement, downloadable at: https://ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta.

to which economics literature regularly refers[5]: according to the scale effect liberalisation leads to an increase in trade flows. Without mitigation measures, this is accompanied by increasing transport emissions, greater depletion of resources and higher pollution levels. A correlation between increasing trade and increasing greenhouse gas emissions in recent decades can in any case be established empirically.[6] For example increasing trade results in greenhouse gas emissions from the generation of electricity from fossil fuels and deforestation[7] for the production of goods for export and transport emissions from shipping, aviation and heavy goods vehicles.[8]

Following on from Ricardo's theory of comparative cost advantage, the composition effect describes how trade agreements lead to sectoral specialisation. Depending on the environmental and land use implications of the old and the new composition of the national economy, this can have positive or negative effects on the environment. For instance, an increase in environmentally friendly products and services in the economy in question can have a positive effect. For example, the sustainability impact assessments which the EU commissions for regional trade agreements it intends to conclude predict corresponding compositions effects. However, they often prove to be small and can in the end (almost) cancel each other out.[9] Finally the technique effect implies that trade agreements result in technological innovations and technology transfer. This can be beneficial or detrimental to environmental and climate protection and sustainable land use, depending on the type of technology which is further developed and promoted. In assessing technique effects, it is important to take into account rebound effects which can cancel out efficiency gains from innovation.[10]

The OECD includes two further effect categories in its studies: general growth effects try to identify connections between general market growth and environmental quality.[11] Finally, the regulatory effects category covers environmental legislation and environmental standards associated with trade agreements.[12]

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[5] Grossmann/Krueger, Environmental Impacts of a North American Free Trade Agreement, Working Paper No. 3914, National Bureau of Economic Research, Cambridge, Nov. 1991, downloadable at: https://www.nber.org/papers/w3914.pdf. See also The Economist Intelligence Unit, Climate Change and Trade Agreements - Friends or Foes, 2019, downloadable at: https://pages.eiu.com/rs/753-RIQ-438/images/TradeandClimateChange2019.pdf.

[6] World Resources Institute (WRI) / Climate Watch, Historical GHG Emissions: https://www.climatewatchdata.org/ghg-emissions. An interesting visualisation of this data for the ten biggest emitters over the last 165 years can be seen at: https://www.wri.org/resources/data-visualizations/greenhouse-gas-emissions-over-165-years.

[7] Robalino/Herrera, Trade and Deforestation – What have we found, World Trade Report, WTO, 2010, downloadable at: https://www.wto.org/english/res_e/publications_e/wtr10_robalino_herrera_e.htm; Henders, Persson, Kastner, Trading forests: land-use change and carbon emissions embodied in production and export of forest-risk commodities, Environmental Research Letters, 10/12, 2015, downloadable at: https://iopscience.iop.org/article/10.1088/1748-9326/10/12/125012/meta.

[8] OECD/ITF, The Carbon Footprint of Trade, 2015; see also Ritchie, How do CO_2 emissions compare, when we adjust for trade? Our world in data, University of Oxford, Oct. 2019, downloadable at: https://ourworldindata.org/consumption-based-co2.

[9] See for example, with reference to individual states and in total, the composition effects for greenhouse gases predicted to be small in the EU-Mercosur free trade agreement, London School of Economics and Political Science (LSE) Consulting, Sustainability Impact Assessment in Support of the Association Agreement Negotiations between the European Union and Mercosur, Final Interim Report, Feb. 2020, pp. 83ff, downloadable at: http://www.eumercosursia.com/.

[10] For further explanation see for example Fischer-Kowalski/Swilling, Decoupling Natural Resource Use and Environmental Impacts from Economic Growth, , UNEP/International Resource Panel, 2011, pp. 67 ff., downloadable at: http://wedocs.unep.org/bitstream/handle/20.500.11822/9816/Decoupling_FReport_EN.pdf?sequence=1&isAllowed=y.

[11] With regard to the methodological challenges and contradictory results see Altmann, Ansatzpunkte für eine stärkere Berücksichtigung von Umweltaspekten in regionalen und interregionalen Freihandelsabkommen (Integration of Environmental Aspects in Regional and Inter-regional Trade Agreements), p. 45.

[12] Ibid. p 47.

In addition to these indirect effect mechanisms, the research formulates various hypotheses on the environmental effect of world trade.[13] According to the hypothesis of the environmental Kuznets curve increasing income leads to deterioration in environmental quality, but an improvements over the longer term. The "race to the bottom" hypothesis assumes that competition for investment leads to declining environmental standards. According to the "pollution havens" hypothesis increasing trade and competition lead to "pollution hotspots". Finally the "gains from trade" hypothesis concludes that increasing trade and competition lead to technical innovations, more exacting demand and thus higher environmental standards. The hypotheses already contradict one another to a certain extent in their basic assumptions. To date there has been only a small amount of empirical support for the hypotheses, limited to certain pollutants and local contexts.[14] Fundamentally it can be said that it should be almost impossible to ascribe positive or negative environmental effects to the single cause of increasing market integration and therefore separate from trade and growth occurring anyway.[15] In a study for the German Environment Agency, Altmann comes to the conclusion that successful regional free trade tends to strengthen the economic potential for improved environmental protection.[16]

The focal point of this legal opinion lies at the interface between trade, climate protection and development and in particular land use in this context. The increasing competition for land use presents an especially strong challenge here. The expansion of land for arable farming and pasture and for raw material extraction is already putting land ecosystems and biodiversity under severe pressure. In addition, climate protection scenarios for the 2° and 1.5° targets rely on large areas of afforestation or bio-energy with CCS (carbon capture and storage) and thus major changes in land use. Finally, the United Nations forecast a growth in the global population to around 10 billion in 2050 and ever-increasing per capita resource consumption in business as usual scenarios.[17] Sustainable land use which meets the equivalent needs in terms of food security, poverty alleviation, development and climate and biodiversity protection requires huge changes to conventional production and consumption models, extensive protection and restoration of land ecosystems and new (financing) mechanisms for climate justice.

International trade law has a strong influence on the production of and trade in goods and services and the regulatory scope for action with respect to national and regional environmental and development policy. It must be formulated such as to avoid the above-mentioned negative economic environmental effects and instead make trade a driving force behind socially and ecologically sustainable development.

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[13] For an overview see Onder, Trade and Climate Change: An Analytical Review of Key Issues, Economic Premise, World Bank, 2012, downloadable at: http://siteresources.worldbank.org/EXTPREMNET/Resources/EP86.pdf.

[14] See for example Grossmann/Krueger for NAZCA-based effects on SO_2 emissions in Mexico.

[15] For a view of the effects of sustainability chapters in free trade agreements see also Zurek, From "Trade *and* Sustainability" to "Trade *for* Sustainability" in EU External Trade Policy, in Engelbrekt et al. (ed.), The European Union in a Changing World Order, 2019, p. 122.

[16] Altmann, Ansatzpunkte für eine stärkere Berücksichtigung von Umweltaspekten in regionalen und interregionalen Freihandelsabkommen (Integration of Environmental Aspects in Regional and Inter-regional Trade Agreements), pp. 50f.

[17] UN Department of Economic and Social Affairs, World Population Prospects 2019, downloadable at: https://population.un.org/wpp/.

C. World Trade Organization and the GATT

The strongest trade law regime both institutionally and substantively is the World Trade Organization (WTO). It has multiple points of commonality with environmental protection and development which the dispute settlement bodies have also identified in their case law.

I. Origin, function and current status

Before the establishment of the WTO, GATT 1947 (General Agreement on Tariffs and Trade) played a central role in international trade relations for almost 50 years. Together with the World Bank and the International Monetary Fund, it was the third pillar of the new world order established after the Second World War by the *Bretton Woods* agreement.[18] The GATT 1947 member states went on to develop world trade law further in various rounds of negotiations. Initially the priority was a further reduction in tariffs, then non-tariff barriers to trade and finally further institutionalisation and the inclusion of services as well as the relationship between trade and intellectual property. At the end of the Uruguay Round (1986-1993) after difficult negotiations, the 112 founding members signed the Marrakesh Agreement, the founding charter of the WTO, in June 1994. It came into force on 1 January 1995 and is the World Trade Organization "umbrella". Since then a further 53 members – including China and Russia – have joined. The WTO currently has 164 members and accounts for over 90% of global trade.[19] Under the "umbrella" a total of some 60 further agreements regulate different aspects of trade.[20] Three central areas are the trade in goods – regulated for example in GATT 1994, the SPS Agreement (Agreement on Sanitary and Phytosanitary Measures), the TBT Agreement (Agreement on Technical Barriers to Trade), and the TRIMs Agreement (Agreement on Trade-Related Investment Measures) – the trade in services, regulated in the GATS (General Agreement on Trade in Services) and the protection of intellectual property covered in the TRIPS Agreement (Agreement on Trade-Related Aspects of Intellectual Property Rights). In addition to the multilateral agreements, which apply to all WTO members, there are currently also two plurilateral agreements in force as part of the WTO regime, including the agreement on government procurement which currently has 48 signatories.

The objective of world trade law is the liberalisation of international trade on the basis of reciprocal and mutually advantageous arrangements.[21] This is to be achieved by breaking down barriers to trade and eliminating discrimination in international trade. It covers both tariff and non-tariff barriers to trade, i.e. as well as tariffs, quantitative restrictions such as quotas and embargoes, subsidies and technical barriers. The WTO's main functions are the review of member states' trade policies with respect to compliance with WTO law and settlement of trade disputes. The two-stage dispute

[18] The aim of the negotiations at the time was to establish an International Trade Organization (ITO) at this point as the third pillar. However the negotiations failed to achieve this and so the GATT 1947 alone fulfilled the role of third pillar as a substantive legal agreement without the institutional support structure of an international trade organisation, until the founding of the WTO.

[19] World Trade Organization, WTO in Brief, 2020, downloadable at https://www.wto.org/english/thewto_e/whatis_e/in-brief_e/inbr_e.htm.

[20] All agreements in the WTO regime can be downloaded at: https://www.wto.org/english/docs_e/legal_e/legal_e.htm. The member states negotiated most of these agreements during the Uruguay Round.

[21] See for example the GATT 1994 Preamble. Behind this is the theory of comparative advantage dating back to David Ricardo, according to which free trade leads to regionally optimised specialisation and overall increase value creation. See for example Krajewski, Wirtschaftsvölkerrecht (International Economic Law), 4th edition, Heidelberg 2017, pp. 40ff with further references.

settlement mechanism is one of the most used (quasi-)judicial international dispute settlement bodies which has handled up to some 600 cases to date, leading to around 350 decisions.[22]

The most important fundamental principles of the WTO include reciprocity, i.e. the mutuality of trade concessions, the dismantling of trade barriers and non-discrimination. Non-discrimination is set out in two central principles: under the most-favoured-nation principle (Art. 1 of the GATT) trade advantages which are granted to one contracting party must also be granted to all other contracting parties; the national equal treatment principle (Art. III of the GATT) requires imported and domestic products to be treated equally. Unlike free trade agreements or a customs union, WTO law does not aspire to complete abolition, but the gradual elimination of trade barriers. This objective is also enshrined in two basic principles: under the tariff binding principle (Art. II of the GATT) the member states set the maximum tariffs in the schedule attached to the GATT and undertake not to exceed these and to reduce them gradually; under the prohibition on quantitative restrictions (Art. XI of the GATT) quotas and import quotas are not permitted. Other fundamental WTO principles are transparency with respect to internal government regulation, the special status of developing countries, exception clausess inter alia on protection of the environment and health and the proportionality principle.[23]

The most recent, still on-going and crisis-ridden so-called Doha Round of negotiations began in Qatar in 2001. In addition to trade facilitation measures for industrial and agricultural products and services, rules on anti-dumping, subsidies and simplification of customs clearance procedures, the key objectives of the Doha Round include trade facilitation measures for environmental goods and the improved integration of developing countries. The Doha negotiations have been suspended and restarted several times, but have not yet concluded. Agricultural policy is one of the main points at issue.

Unsuccessful negotiations on traditionally hotly disputed topics and increasingly protectionist strategies in many member states, in particular the USA, make it difficult for the WTO's multilateral system to evolve further. If nothing else, the trade conflicts between the USA and China and also the EU and the refusal of the USA to appoint judges to the Appellate Body of the dispute settlement mechanism are creating the greatest crisis for the WTO since its foundation.[24] The Appellate Body of the dispute settlement mechanism has had only one judge since December 2019 and is no longer to able to decide appeals.[25] One of the strongest WTO bodies is therefore currently paralysed.

Globally a marked rejection of multilateralism and focus on regionalism is evident. In her guidelines for the next European Commission 2019-2024, Ursula von der Leyen expressed her intention "to lead efforts on updating and reforming the World Trade Organisation", but at the same time also advocated a regional trade and investment protection agreement through a "strong, open and fair trade agenda".[26] The significance of regional trade agreements for environmental and climate

[22] WTO, Dispute settlement, 2020, downloadable at: https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm.
[23] Krajewski, Wirtschaftsvölkerrecht, S. 86, with further references.
[24] See for example Braml/Felbermayr, Handelskrieg und seine Folgen: Ist die WTO am Ende? (Trade War and its Consequences: Is the WTO at the End?), ifo Schnelldienst, 11/2018, downloadable at: https://www.ifo.de/DocDL/sd-2018-11-braml-felbermayr-wto-2018-06-14.pdf. Daniels/Dröge/Bögner, WTO-Streitschlichtung: Auswege aus der Krise (WTO dispute settlement: ways out f the crisis), SWP-Aktuell, Jan. 2020, downloadable at: https://www.swp-berlin.org/10.18449/2020A01/.
[25] See on the current make-up https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm.
[26] von der Leyen, A Union that strives for more – My agenda for Europa, Political guidelines for the next European Commission 2019-2024, pp. 20f, downloadable at: https://op.europa.eu/en/publication-detail/-/publication/43a17056-ebf1-11e9-9c4e-01aa75ed71a1.

protection, sustainable land use and development is discussed in Section D. Aspects of environmental and climate protection and development policy are considered in depth in the following sub-sections and conclusions are drawn – despite the difficult circumstances – on options for further developments .

II. Environmental and climate protection

Historically the various international law regimes, such as world trade law, international environmental law or human rights law, evolved separately. There is no legal instrument at international law level that integrates the different rationalities and interests of the various areas of law and ensures a reasonable balance, in the way for example that national constitutions do. The international political declaration on sustainable development issued by the international community in 1992 fulfils this umbrella and integration function. It requires development to be distributed fairly on a regional basis, taking into account the ecological, economic and social interests of present and future generations and establishing a reasonable balance between them. The 17 Sustainable Development Goals (SDGs) flesh out the declaration. Many legislators at all levels have since adopted the political declaration on sustainable development in legal texts and thus enacted it. On an international level, sustainable development has in the meantime attained the status of a principle of international (environmental) law.[27] The WTO member states are also fundamentally committed to the sustainable development declaration. The non-legally binding preamble to the Marrakesh Agreement states the following:

> "[…] 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".[28]

On a deeper level, however, the integration of ecological and social interests into a regime originally structured on economic (economically liberal) thinking presents a major challenge.[29]

In the substantive law structure of WTO law, environmental protection appears above all in exceptions. The main conflict provision is Art. XX of the GATT, which sets out various exceptions to the above-mentioned WTO principles. The exceptions relevant for environmental protection and land use are:

[27] Sands/Peel, Principles of International Environmental Law, 4th edition, Cambridge, 2019, pp. 217ff.
[28] Marrakesh Agreement, first recital.
[29] See Zengerling, Sustainable Development and International (Environmental) Law – Integration vs. Fragmentation, Zeitschrift für Europäisches Umwelt- und Planungsrecht (EurUP) (Journal of European Environmental and Planning Law), 8, 2010, pp. 175ff; for an overview of the WTO case law in relation to environmental protection see Zengerling, Greening International Jurisprudence – Environmental NGOs before International Courts, Tribunals and Compliance Committees, Boston, Leiden, 2013, 194ff. For a more concrete discussion of the further development of the WTO on the basis of the SDGs, Pitschas, Sustainable Development and the Multilateral Trading System – Options and Limits to Strengthening Sustainable Development under the WTO, GIZ, 2018, S. 93 and looking at EU external trade policy Zurek, From "Trade *and* Sustainability" to "Trade *for* Sustainability" in EU External Trade Policy, in Engelbrekt et al. (ed.), The European Union in a Changing World Order, 2019, p. 118.

> "[…] 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". [author's highlights]

National environmental regulations thus become above all the subject of disputes under WTO law if they conflict with one of the principles specified at the beginning. Often a conflict with the most-favoured-nation principle under Art. I of the GATT, the national equal treatment principle under Art. III of the GATT or the prohibition on quantitative restrictions under Art. XI of the GATT is at the basis of environmental law disputes.

If national or sub-national environmental, animal or climate protection regulations are in conflict with WTO law in the first instance, they can exceptionally be upheld if all the factual preconditions of Art. XX of the GATT are fulfilled. The Appellate Body, the appeal tribunal of the WTO dispute settlement mechanism, has interpreted the above preconditions of Art. XX of the GATT in a number of decisions. Classic examples are the *Tuna-Dolphin* and *Shrimp-Turtle* cases from the field of animal protection.[30] Other cases of conflict occurred above all in questions of risk prevention (*Biotech Products* and *Beef Hormones* cases – SPS agreements)[31] and renewable energy incentives such as feed-in tariffs (for example *Canada – Renewable Energy/Feed-in Tariff Program* – SCM agreement).[32]

The subject of the dispute in the cases brought by Japan and the EU in 2011 *Canada – Renewable Energy/Feed-in Tariff Program* was the "Feed-in Tariff (FIT)" programme of the Province of Ontario and in particular a provision under which the FITs were only counted if the renewable energy plants contained a certain proportion of local products, i.e. produced in Canada (so-called "local content clause"). The Appellate Body decided that limiting the incentive to renewable electricity which came from plants which contained locally produced products was in conflict inter alia with the national equal treatment principle and therefore against WTO law. Ontario implemented the decision and amended the FIT programme such that incentives were no longer available only to plants that contained locally produced products.

The WTO database has a total of seven cases relating to renewable energy.[33] The number of cases relating to environmental and animal protection is more difficult to conclude from the database, as there is no "environment" menu tab; it must be around 12-15 – depending on how they are counted.[34] The tab "Agricultural and Food" lists a total of 109 cases, underlining the significance of

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[30] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 06.11.1998; *United States – Restrictions on Imports of Tuna*, DS21/R (1991) und DS29/R (1994). For an overview of case law relating to environmental matters see Zengerling, Greening International Jurisprudence, pp. 201 ff.

[31] *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, 21.11.2006; *European Communities – Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, WT/DS48/AB/R, 13.02.1998.

[32] *Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R, WT/DS426/AB/R, 06.05.2013.

[33] An indexed case overview is available at: https://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm. However the classification is somewhat opaque. Renewable energy cases are accessible via "Energy" and "Renewable Energy".

[34] Ibid., see also WTO, Environmental disputes in GATT/WTO, 2020 at: https://www.wto.org/english/tratop_e/envir_e/edis00_e.htm. Some cases are missing there.

this classic area of conflict, which is also evident in the negotiations.[35] Authors in the scientific and policy advisory communities calculate that with implementation of "Nationally Determined Contributions" (NDCs) under the Paris Agreement the number of climate related cases will increase, especially in the area of support for renewable energies.[36] Ways out of this "regulatory chill" effect of WTO law and the remaining scope for action with respect to national and regional environmental and climate protection policy are discussed in depth in sub-section VI.

Institutionally the WTO addresses the relationship between world trade and environmental protection in three main ways. Various committees operate under the WTO General Council, one of which explicitly focuses on trade and the environment (Committee on Trade and Environment). This committee's role is to discuss and further develop the relationship between trade and the environment. Its work programme includes topics such as sustainable development, environmental protection and market access, labelling requirements and environmental audits.[37] The committee has indeed produced numerous publications but its work has not to date led to greater integration of environmental protection interests into WTO law. In addition, the WTO concluded a cooperation agreement with UNEP, the United Nations Environment Programme, in 1999 and the two organisations have held numerous joint seminars. Finally the Committee on Trade and Environment also cooperates with the secretariats of multilateral environmental agreements. The WTO has agreed reciprocal observer status with both UNEP and the secretariats of multilateral environmental agreements.

The WTO maintains an environment database in which all environment related notifications by member states and all environment related measures and policies in the Trade Policy Reviews are documented.[38]

Since 2014, 46 WTO members to date (including the EU and its member states) have been negotiating a plurilateral Environmental Goods Agreement with the aim of strengthening trade in environmental and climate protection goods, such as wind turbines and solar panels. The negotiations were broken off in 2016 and have not so far restarted. A core point of disagreement was the definition of "environmental goods", for example China's wish to facilitate the trade in bicycles through agreement met with resistance from the EU.[39]

III. Development policy

The liberalisation of world trade can on the one hand have a positive effect on economic growth in the developing countries – for example through the dismantling of the industrialised countries'

[35] Indexed case overview, tab "Agricultural and Food": https://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm.
[36] Dröge/van Asselt/Das/Mehling, Mobilizing Trade for Climate Action under the Paris Agreement, SWP Research Paper, Berlin, Feb. 2020, downloadable at: https://www.swp-berlin.org/en/publication/mobilising-trade-policy-for-climate-action-under-the-paris-agreement/; Economist Intelligence Unit, Climate Change and Trade Agreements, 2019.
[37] The work programme and activities of the CTE can be downloaded at: https://www.wto.org/english/tratop_e/envir_e/wrk_committee_e.htm.
[38] The environment database can be s=consulted at: https://edb.wto.org/. For a comprehensive overview of the WTO's activities in the field of environmental protection see https://www.wto.org/english/tratop_e/envir_e/envir_e.htm.
[39] Documentation on the parties negotiating and the latest steps in the process can be downloaded at: WTO, Environmental Goods Agreement (EGA), https://www.wto.org/english/tratop_e/envir_e/ega_e.htm.

protectionist agricultural subsidies. On the other hand, free trade also carries the risk of maintaining and reinforcing existing power imbalances and pollution and exploitation models. Special measures to protect the developing countries are, therefore, required.

The special status of the developing countries is a WTO principle. In addition to the sustainable development declaration referred to above, which also requires fair regional distribution of development, the member states stressed in a separate paragraph in the preamble to the Marrakesh Agreement that positive efforts were required in order to ensure that the national economies of developing countries benefit from international trade:

> "Recognizing further that there is need for positive efforts designed to **ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development**" [author's highlight]

In terms of substantive law, the special status of the developing countries was already enshrined in the original GATT. In 1966 the member states inserted a Part IV on trade and development (Arts. XXXVI-XXXVIII) and agreed the principle of "special and differential treatment". In addition to declarations of intention and rules with little of binding substance, the paragraph in Art. XXXVI:8 of the GATT contains an exemption from the principle of reciprocity. Developing countries do not have to give equivalent concessions in negotiations and can maintain their own trade barriers to a certain degree. Though no obligations on the actions of the industrialised countries are agreed.

Other examples of the special status of the developing countries in the GATT are flexible tariff rates, exemptions from the prohibition on non-tariff trade barriers (Art. XVIII of the GATT) and permission for industrialised countries to grant preferential tariffs to developing countries (Art. XXV:5 of the GATT) which is such incompatible with the most-favoured-nation principle. On this basis, supported initially by exception permits in individual cases, some industrialised countries negotiated generalised systems of preferences for goods from developing countries which included preferential tariffs and other preferences. In 1979 the member states drew up a so-called Enabling Clause, in order to enable systems of preferences for developing countries generally. Under it, preferential tariffs are permitted as part of a generalised system of preferences provided that they do not discriminate between developing countries in comparable economic positions. The EU Economic Partnership Agreement with the ACP states also relies on these exceptions. The effectiveness of these provisions was, therefore, limited inter alia because important areas for the developing countries, such as agricultural products and textiles, were often excluded from the systems of preferences.

In addition, concessions are found in most supplementary agreements on trade in goods[40], and also in the fields of services[41] and the protection of intellectual property[42] and in the dispute settlement mechanism.[43]

[40] For example extended implementation periods pursuant to Art. 10.2 of the SPS Agreement or relief with respect to certain obligations pursuant to Arts. 12.4 and 12.8 of the TBT Agreement.
[41] For example special market access for services pursuant to Arts. V:3 lit a, XIX:2 of the GATS.
[42] For example extended implementation periods pursuant to Arts. 65, 66 of the TRIPS.
[43] With regard to the composition of panels, deadlines and sanctions pursuant to Arts. 8.10, 12.10, 21.10, 24 of the DSU.

Institutionally, the Committee on Trade and Development is responsible for the discussion and further development of development policy topics within the WTO.[44] UNCTAD (United Nations Conference on Trade and Development), which was founded in 1964 as a permanent body of the General Assembly, also plays an important role in this context. Its job is to integrate developing countries into the trade system such that they benefit from trade and achieve their development goals.[45] UNCTAD undertakes relevant analysis and enables information exchange and technical support, but has no mandate to negotiate legally binding agreements.

The Trade Facilitation Agreement (TFA) which was concluded by the member states in 2013 and came into force in February 2017 is also relevant with respect to development policy. The aim of the agreement is to simplify and harmonise import and export procedures. The agreement also includes two chapters on capacity building and technical support to developing countries. The Committee on Trade Facilitation established under the agreement is there to support its implementation which is now beginning. The TRIPS Amendment which came into force in January 2017 was the first and to date only amendment to a WTO agreement. The amendment is intended to facilitate access to generic medicines above all for developing countries with no significant domestic pharmaceuticals industry.

The Economic Partnership Agreement between the EU and the ACP states is discussed in depth in Section F. as a specific form of trade liberalisation and development cooperation.

IV. Proposals for strengthening environmental and climate protection on an international level

Various authors in the scientific and policy advisory communities have developed proposals on how WTO law could be further developed in order to take greater account of environmental and climate protection issues and thus also sustainable land use.[46] One the one hand, this involves enacting proactive trade law regulations which have environmental or climate protection effects or strengthening procedures in this direction. On the other hand, it means inserting rules into the WTO regime which clearly provide for a legally secure and reasonably broad scope for action with respect to national environmental and climate protection measures. Key regulatory proposals with proactive, international effect will be discussed in the sub-section below on scope for action.

Essentially it must be said that in the current political environment an expansion of WTO law in the short and medium term is highly unlikely. Depending on the subject of the regulation, it requires either a ⅔ majority or unanimity of the WTO member states (Art. X of the Marrakesh Agreement). The TRIPS Amendment referred to above is to date the only amendment to WTO law which the member states have been able to agree since 1995. Many of the approaches outlined here in brief have been or are the subject of controversial discussion in the Committee on Trade and Environment. The developing countries above all have concerns about attempts to strengthen environmental and climate protection since they fear further disadvantages through green

[44] Documents and activities of the Committee on Trade and Development can be downloaded at: https://www.wto.org/english/tratop_e/devel_e/d3ctte_e.htm.
[45] For an overview of the work of UNCTAD see https://unctad.org/en/Pages/aboutus.aspx.
[46] See for example Das/van Asselt/Dröge/Mehling, Towards a Trade Regime that Works for the Paris Agreement, Economic and Political Weekly, 54/50, Dec. 2019, pp. 25ff; dies. Making the International Trade System Work for Climate Change: Assessing the Options, Climate Strategies, Jul. 2018, downloadable at: https://climatestrategies.org/wp-content/uploads/2018/07/CS-Report-_Trade-WP4.pdf; Dröge/van Asselt/Das/Mehling, Mobilizing Trade, 2020; Economist Intelligence Unit, Climate Change and Trade Agreements, 2019.

protectionism. “Special and differential treatment” clauses and economic incentive mechanisms could provide some redress.

Closer cooperation between climate and trade regimes

Improved cooperation between climate and trade regimes could be implemented in the short to medium term. In doing so, no new bodies must or should be established, but solely the exchanges between existing bodies intensified.[47] The aim of increased cooperation should be to develop concrete measures which the trade regime can use in order to achieve the goals of the Paris Agreement.

Reduction in or abolition of environmentally damaging subsidies

The dismantling of environmentally damaging subsidies is very much an area of synergy between environmental and climate protection and trade liberalisation. From the perspective of the agriculture sector, it can also contribute to sustainable land use. Political sensitivity has meant that less progress has been made here to date than with the trade in environmental goods. Subsidies damaging to the environment and climate are to be found above all in the energy, transport, agriculture, forestry and fishing industries, but also in the construction and housing sectors. The negotiations on the abolition of environmentally damaging subsidies in the fishing industry are the most advanced.

The Regional Trade Agreement between the EU and Singapore is the only one that explicitly addresses but does not compel the dismantling of fossil fuel subsidies.[48] In addition, the dismantling of fossil fuel subsidies is one of the three key negotiating points in the ACCTS Agreement begun in 2019 and discussed in brief below. Corresponding provisions could be introduced into WTO law in various ways. For example a ⅔ majority of WTO members could amend the SCM Agreement accordingly. Or a smaller group of member states could negotiate a plurilateral agreement like the ACCTS for example.

Facilitation of trade in environmental goods and environmental services

A reduction in or abolition of tariff and non-tariff barriers to trade in environmental goods and environmental services could provide significant support for the spread of green products and services.[49] For example renewable energy, recycling or energy efficiency technologies or organic farming or bioeconomy products could thus increase their market share. Negotiations on an Environmental Goods Agreement under the WTO have been suspended since 2016, but could be restarted. Expressions of intent to work and cooperate on the dismantling of tariff and non-tariff barriers to trade in environmental goods and services have been included in some more recent free trade agreements but no binding rules have been agreed.[50] This is also one of the three key negotiating points in the ACCTS Agreement.

Promotion of eco-labelling

Eco-labelling has to date been made more difficult rather than promoted by WTO law, especially the TBT Agreement. This could be reversed by including corresponding provisions in the TBT Agreement for example or initially through a plurilateral agreement. Such provisions should on the one hand

[47] Das/van Asselt/Dröge/Mehling, Trade Regime that Works for Paris, 2019, p. 27.
[48] See sub-section D.2 below.
[49] Economist Intelligence Unit, Climate Change and Trade Agreements, 2019, p. 21 with further references
[50] Ibid. (RTAs: EU-Singapore, CETA, KAFTA and CPTPP). See also sub-section D.2.

state that eco-labels are explicitly not to be seen as trade barriers. On the other hand the parties should promote eco-labelling in different sectors.

Promotion of eco-friendly procurement

A total of 48 WTO members, including the EU and its member states, are parties to the WTO Agreement on Government Procurement and have opened their procurement markets to each other. The agreement expressly permits environment-related tender and evaluation criteria, but it could go further and not just permit them, but promote or even require them, perhaps by specifying minimum requirements. Common eco-labels could also be strengthened and extended in this context. It is conceivable that "local content" requirements could be permitted as an exception here in order to promote the domestic development and expansion of sustainable products and services.

Some regional trade agreements permit and to varying degrees promote eco-friendly procurement. Corresponding changes could become part of WTO law either through an amendment to the plurilateral procurement agreement or initially through a smaller plurilateral agreement. So far as is apparent, however, this has not been on the ACCTS negotiation agenda.

Reinforcement of the implementation of environmental and climate protection measures

The developing countries in particular should be supported in the implementation of the environmental and climate protection measures described above through increased cooperation and financing mechanisms.

Review of the climate and environmental protection effect of trade policy

One of the WTO's key roles is the review of national trade policies under the TPRM (Trade Policy Review Mechanism). A review of the climate and environmental protection effects of trade policies is to be undertaken under the mechanism. Member states are also to report subsidies damaging to climate and environmental protection in this context.[51] A corresponding expansion of the review and reporting obligation is more realistic in the medium term. Prior to this, as many WTO member states as possible could voluntarily provide information on trade policies of relevance to the environment and climate and thus indirectly draw attention to them/subject them to review.

Strengthening of compliance monitoring and law enforcement

Experts at the interface between environmental protection and trade or environmental organisations could support the work of the TPRM with respect to environmental and climate protection requirements.

Law enforcement proceedings in the context of dispute settlement can only be brought by states. States do not bring actions based on the protection of resources, but only on the use of resources.[52] For trade law provisions on environmental and climate protection to be proactively enforced, there would have to be an independent trigger for proceedings to be brought before the WTO's Dispute Settlement Body (DSB). Such a trigger might be, for example, a committee of experts that assesses national trade reports from an environmental perspective. Since it has almost always been impossible to agree such an independent trigger even in the context of environmental protection

[51] Cf. ibid., pp. 27f.

[52] Overview of environment-related case law from 14 international (arbitration) courts and compliance monitoring processes, Zengerling, Greening International Jurisprudence, 2012, pp. 93ff.

agreements[53], it is currently politically highly unlikely that such an agreement could be reached in the WTO context. But it would be significant and useful.

V. Excursus: ACCTS – Agreement on Climate Change, Trade and Sustainability

In September 2019, New Zealand, Fiji, Costa Rica, Norway and Iceland embarked on an initiative – independent of the r WTO – for a new plurilateral agreement on climate change, trade and sustainability.[54] The aim of the agreement is to implement measures in three synergistic areas: the elimination of tariffs on environmental goods and new obligations in relation to environmental services, abolition of fossil fuel subsidies and the development of guidelines for voluntary eco-label programmes and associated mechanisms.[55] The agreement is intended to pave the way and serve as a template for future, potentially multilateral solutions. As a "living agreement" it is open for the inclusion of other items. The five ACCTS countries' new trading terms and conditions for environmental goods and services are to apply to all WTO member states – in accordance with the most-favoured-nation principle.[56]

In the process envisaged, the ACCTS Agreement is initially to be negotiated and concluded between the five founding members. Then other WTO members could join the Agreement if they are prepared to meet the terms and conditions negotiated. The negotiations between the five founding countries are due to begin in spring 2020. If the founding members succeed in concluding the negotiations quickly and other especially economically influential countries join, the initiative could be decisive in providing impetus to the process of further development of the trade regime.

VI. Scope for action on environmental and climate protection at national and regional level

WTO law reduces the scope for action in national and regional environmental and climate protection legislation. The number of cases in the field of environmental and animal protection and support for renewable energies is still small but is already creating a "regulatory chill" effect.[57] This is worrying from the climate protection perspective, especially as the national legislation on implementation of the NDCs under the Paris Agreement, which is in progress and still requires considerable work, does not need any further hurdles to overcome.

1. Measures to counter the "regulatory chill" effect

Various approaches to countering (temporarily) the deterrent effect of WTO law on national and regional climate legislation are discussed in the literature. As identified above, all the measures proposed in this context, which require a ⅔ or ¾ majority or even unanimity, are not politically achievable in the short and medium term. It is pointed out that the case law of the Appellate Body

[53] Exceptions are principally the compliance monitoring bodies under the Aarhus Convention (NGO trigger) and the Kyoto Protocol (ERT – expert review team – trigger), see Zengerling, Greening International Jurisprudence, 2012, pp. 128ff, 282ff.
[54] Joint Trade Ministers' Statement on ACCTS 2020, downloadable at: https://www.mfat.govt.nz/assets/Trade/ACCTS-FINAL-Joint-Statement.pdf.
[55] For a more comprehensive description see Steenblik/Droege, Time to ACCTS? Five countries announce new initiative on trade and climate change, International Institute for Sustainable Development (IISD), Sep. 2019, downloadable at: https://www.iisd.org/blog/time-accts-five-countries-announce-new-initiative-trade-and-climate-change.
[56] Ibid.
[57] For an overview of potential conflicts and case law in this context see Dröge/van Asselt/Das/Mehling, Mobilizing Trade for Climate Action, 2020 .pp. 21ff.

cannot be described as harmful to environmental and climate protection.[58] The Appellate Body has always endeavoured to uphold environmental and climate protection interests within the possibilities afforded by substantive law and, in the view of many WTO member states, has gone beyond what is reasonable in quite a few cases. The "judicial activism" of which the Body is accused is also a key reason for the USA's present intransigent stance. Nevertheless, the Appellate Body is subject to the economically liberal rationalities of WTO law and this is reflected in its decision-making.

Climate waiver

Under "exceptional circumstances" pursuant to Art. IX.3 of the WTO Agreement, the application of certain WTO rules can be suspended for a limited time with a ¾ majority – in practice, however, by means of a consensus decision. The particular challenge of meeting climate protection targets could be considered such exceptional circumstances. A "climate waiver" would deem certain WTO rules temporarily inapplicable to national or regional climate protection measures.[59]

Peace clause

Through a peace clause, the WTO Member States could for a limited time waive the right to take proceedings against climate protection measures under the dispute settlement mechanism or to take counter-measures.[60] The challenge for a climate waiver and peace clause lies in defining the exceptions appropriately.

Introduction of a provision on the relationship between multilateral environmental protection agreements and WTO law

A fundamental regulation, which would give weight to the implementation of Multilateral Environmental Agreements (MEAs) or in the case of the Paris Agreement potentially even (temporary) priority over WTO principles, could support national implementation.

Supplement to Art. XX of the GATT providing for an exception for climate protection measures

The WTO member states could insert an explicit exception for climate protection measures into Art. XX, which would leave legally certain and appropriate scope at a national or regional level.[61]

Decision on an authoritative interpretation of Art. XX of the GATT

Likewise through a ¾ majority, in practice to date through a consensus decision, the WTO member states could define an "authoritative interpretation" of the criteria of Art. XX of the GATT.[62] This would have the advantage of providing greater legal certainty in the drawing up of national climate measures.

Insertion of an exception for climate protection subsidies into the SCM Agreement

[58] Howse, The World Trade Organization 20 Years On: Global Governance by Judiciary, European Journal of International Law, 27/1, 2016, pp. 9ff, pp. 36ff.
[59] Bacchus, The Case for a Climate Waiver, Special Report, Centre for International Governance Innovation, 2017, downloadable at: https://www.cigionline.org/publications/case-wto-climate-waiver; Das/van Asselt/Dröge/Mehling, Trade Regime that Works for Paris, p. 26; Economist Intelligence Unit, Climate Change and Trade Agreements, 2019, pp. 17, 30.
[60] Das/van Asselt/Dröge/Mehling, Trade Regime that Works for Paris, p. 26. Such a peace clause has been in force for several years in the field of agricultural subsidies.
[61] Ibid.
[62] Ibid.

The WTO member states could also create legally certain and appropriate scope for action for national climate protection subsidies, such as feed-in tariffs, through a corresponding exception in the Subsidies Agreement.[63]

Presence of environmental and climate protection experts in dispute settlement

A procedural proposal, which is easier to implement but not as effective, would be to ensure the presence of technical experts on questions of climate protection regulations in the dispute settlement mechanism.[64] The dispute settlement bodies are, however, already free to call on experts.

As discussed above, none of these measures is likely to be feasible politically in either the short or medium term. WTO law also leaves plenty of scope for national and regional climate protection legislation. It is, however, to be expected that such measures will be challenged by WTO members through the dispute settlement mechanism if they have a sufficiently significant effect on the international economy/economies affected. As the legality of climate protection measures that restrict trade depends on compliance with numerous criteria of WTO law and case law in this field is still limited, there is legal uncertainty over the outcome of such cases and thus the risk that the Appellate Body classifies national or regional measures as (in part) against WTO law. The key conditions for the formulation of national or regional climate protection measures that comply with WTO are outlined below through two examples, import certification requirements and Carbon Border Adjustments.

2. Certification requirement for forestry and agricultural imports

In order to support climate protection through sustainable land use, imports of agricultural or forestry products could be subject to certification requirements. For example, since 2013 the EU Timber Regulation has prohibited the import of timber and timber products from illegal logging. Those in the market must exercise due diligence to ensure that illegal timber is not part of their supply chain. Timber or timber products with a FLEGT (Forest Law Enforcement, Governance and Trade) licence or a CITES (Convention on International Trade in Endangered Species) permit are considered to have been produced legally, but these are not an absolute precondition for import. The EU Timber Regulation has not been challenged before the WTO, although there was some controversial discussion as to its compatibility with WTO law at the time of its introduction.[65] It would be conceivable to strengthen import requirements, for example through a concrete certification mechanism which defines sustainability requirements in addition to legality.

Depending on the actual formulation of such certification requirements, the import stipulation may conflict with the national equal treatment principle (Art. III of the GATT) or the prohibition on quantitative restrictions (Art. XI of the GATT). In this context, the prohibition on discrimination between “like” goods enshrined in Art. III of the GATT is problematic from an environmental perspective. The term “like” is not legally defined in the GATT. According to interpretation of the case law and also prevailing opinion in the literature, non-product related process or production methods (PPMs) are not relevant in establishing whether two products are “like”. Only the end product itself is relevant. For example in the Tuna-Dolphin and Shrimp-Turtle cases, the decisive factor was that from

[63] Ibid.
[64] Ibid.
[65] Fishman/Obidzinski, European Timber Regulation: Is it legal?, RECIEL 23(2), 2014, downloadable at: http://www.ci-for.org/publications/pdf_files/articles/AObidzinski1402.pdf.

the end consumer's perspective tuna or shrimps caught by dolphin or turtle safe and unsafe methods are "like" products under WTO law.[66] On this basis, a sustainable timber or agricultural product is essentially "like" a non-sustainable timber or agricultural product. If a national regulation makes these like products subject to different requirements internally and externally, this conflicts with the prohibition on discrimination and for example – depending on its formulation – is in breach of Arts. III or XI of the GATT.

Assuming that a certification requirement linked to specific sustainability criteria is in conflict with one of the WTO principles referred to, it can nevertheless be compatible with WTO law if all justification prerequisites are met.[67] The Appellate Body has developed the so-called "two-stage test" for the purposes of its decision-making. In the first stage, all criteria of the exception provision in question must be fulfilled. In the second stage, the test is whether the conditions in the chapeau of Art. XX are also present.[68] A certification requirement could fall at either stage.

The exception provisions in question are Art. XX(b) and (g) of the GATT. Under Art. XX(b) of the GATT measures are justified if they are "necessary" to protect human, animal or plant life or health. "Climate" protection is not explicitly listed here and there has not yet been an Appellate Body decision as to whether the climate is a legitimate object of protection under Art. XX. In a decision in 2017, however, a WTO panel ruled that the reduction in CO_2 emissions was one of the policies that came under paragraph (b) of Art. XX and thus at least opened up a route to an interpretation of Art. XX of the GATT in favour of climate protection.[69] In the case of certification requirements for forestry or agricultural products, a link to the protection of humans, animals or plants and perhaps climate would first have to be established. Depending on the actual formulation of the certification requirements, the protection of humans from climate change or for example the protection of biodiversity or endangered animal or plant species would be a legitimate protective purpose of the certification under Art. XX(b) of the GATT.

In the next step, it must be verified that the certification requirement for imports is "necessary" in order to achieve the objective. The necessity test in WTO law is comparable with the second and third stages of the proportionality test in German law.[70] First it must be established that there is no equivalent or less trade-restrictive instrument (less severe measures) by which the objective can be achieved. In addition, the measure must also be reasonable in the narrower sense, i.e. reasonable in comparison to the limitation of WTO law. Here again, the actual formulation of the certification requirements is key. The more important the protective purpose and the greater (and more clearly demonstrable) the contribution to achieving the protective purpose, the more likely it is that the certification requirement will fulfil the "necessity" criterion.

Art. XX(g) of the GATT does not contain the requirement "necessary" and could therefore be a lower hurdle for certification requirements to overcome. Under it, measures "relating to" the conservation

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[66] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 06.11.1998, all decisions from the proceedings are downloadable at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm; *United States – Restrictions on Imports of Tuna*, DS21/R (1991) and DS29/R (1994).

[67] For a summary of Appellate Body case law on the interpretation of the individual criteria of Art. XX of the GATT see https://www.wto.org/english/tratop_e/dispu_e/repertory_e/g3_e.htm.

[68] See for example the overview in Krajewski, Wirtschaftsvölkerrecht (International Economic Law), p. 102, Zengerling/Buck, Umweltschutz und Freihandel (Environmental Protection and Free Trade), margin nos. 96ff. And specifically *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 06.11.1998, paras. 117ff.

[69] *Brazil – Certain Measures Concerning Taxation and Charges*, WT/DS472/R, WT/DS497/R, 30.08.2017, para. 7.880.

[70] See Krajewski, Wirtschaftsvölkerrecht (International Economic Law), p. 103. For more detail Vranes, Trade and the Environment – Fundamental Issues in International Law, WTO Law, and Legal Theory, 2009, pp. 269 ff.

of "exhaustible natural resources" are justified.[71] The protection of forests, in particular the protection of rainforests, and also the protection of biodiversity could come under this exception provision. In the case of agriculture a corresponding relationship must be established. In the *US-Gasoline* case, the Appellate Body already regarded clean air as an exhaustible natural resource. There has been no decision on the climate as yet, but there are good reasons for classifying the climate as an exhaustible natural resource.[72] The second prerequisite of Art. XX(g) of the GATT is: "if such measures are made effective in conjunction with restrictions on domestic production or consumption". This can be met by formulating the national regulations accordingly, for example if domestic timber or agricultural products are subject to the same certification requirements.[73]

A further challenge for the certification requirement for forestry or agricultural imports lies in its extraterritorial effect.[74] According to general international law provisions, a state can only legislate in respect of a particular circumstance if it has a genuine link to that circumstance. This is conventionally justified by sovereignty over territory or people, i.e. the state can legislate with respect to its territory and the behaviour of its people.[75] In the *Shrimp-Turtle* case, the USA could demonstrate a sufficient link to the protected object insofar as sea turtles as a "highly migratory species" sometimes also inhabit US territorial waters.[76] If the purpose of a certification requirement for forestry or agricultural products is climate protection, the protection of rainforests and/or biodiversity, it can be argued that these are global objects of protection and their condition affects German or EU territory. At first glance this is truer for climate change than for biodiversity. There has not to date been an Appellate Body decision on the permissibility of extraterritorial measures that goes beyond the Shrimp-Turtle decision. This would be an area of uncertainty in a dispute over a certification requirement.

In the second stage of the test, the certification requirement would have to satisfy the conditions of the "chapeau" – introductory paragraph – of Art. XX of the GATT.[77] Under it, on the one hand the measure should not discriminate arbitrarily or unjustifiably between countries where the same conditions prevail. On the other hand, the measure should not be a disguised restriction on trade. The *Shrimp-Turtle* decisions provide valuable insights in respect of both criteria. In the first instance, the US ban on the import of shrimps failed to meet the criteria of the chapeau clause.[78] On the one hand, the US regulation prescribed a specific technical fishing method (with a TED) – used by the US fishing industry – and left no room for other comparably effective protective measures. On the other hand, the USA had granted longer transition times and financial and technical support in converting their fishing methods to the TED method to the Caribbean states in particular but not to the complainant Asiatic states and did not seek an international solution at the same level with all WTO members. The US government removed both weak points in a revision of the import ban which,

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[71] For an overview of the Appellate Body's interpretation of „conservation of exhaustible natural resources" see https://www.wto.org/english/tratop_e/dispu_e/repertory_e/g3_e.htm#G.3.7.

[72] *United States – Standards of Reformulated and Conventional Gasoline*, para. 6.37, AB Report, WT/DS2/AB/R, 20.05.1996.

[73] For an overview of the Appellate Body's interpretation of "measures made effective in conjunction with…" see https://www.wto.org/english/tratop_e/dispu_e/repertory_e/g3_e.htm#G.3.8.

[74] See overview in Zengerling/Buck, Umweltschutz und Freihandel (Environmental Protection and Free Trade), margin nos. 103 f.

[75] See for example Krajewski, Wirtschaftsvölkerrecht (International Economic Law), pp. 107f.

[76] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 06.11.1998, para. 133 ("sufficient nexus").

[77] See the requirements in the overview in Krajewski, Wirtschaftsvölkerrecht (International Economic Law), pp. 102 ff; Zengerling/Buck, Umweltschutz und Freihandel (Environmental Protection and Free Trade), margin nos. 105ff.

[78] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 06.11.1998, paras. 156ff, 187.

under a review process pursuant to Art. 21.5 of the DSU, the Appellate Body now classed as complying with WTO law.[79]

In the case of a certification requirement, this means that fairness and a certain flexibility should be available in the means of providing proof. Comparable certification costs for all those affected are indeed a step in the right direction, but in the final analysis could not be sufficient to create "fair" conditions between countries which are very different in terms of wealth. In addition therefore, it should be possible for example for a country to prove by other means that the product to be imported satisfies the relevant sustainability requirements. It is also important to support the certification requirement through fair international negotiations which treat all WTO members equally and seek an international solution.

The review shows that whether the requirements of WTO law are met or not depends fundamentally on the actual formulation of the certification requirement and its implementation. The main challenges must lie in the proof of "necessity", justification of the extraterritorial effect and the requirements of the "chapeau". From the perspective of enormous importance of protection of (rain)forests in achieving the goals of the Paris Agreement, it appears possible that a certification requirement, formulated in relation to a protective purpose and to be non-discriminatory, can be compatible with WTO law.

3. Border Carbon Adjustment (BCA)

The EU Commission cites "border tax adjustments" as a fundamental instrument of the European new green deal. The aim of such border tax adjustments is to adjust for differences in national climate protection regulations and thus prevent "carbon leakage" – i.e. the relocation of an emission-intensive industry to countries with less stringent greenhouse gas emission requirements. Border tax adjustments are one variant of different border adjustment instruments which have been discussed in policy and the literature over many years but have not been implemented.

The variant discussed in the EU for over 10 years provides for importers of emission-intensive products, such as steel and cement, to be subject to the emissions trading system. Depending on its actual formulation, the danger of such a regulation conflicting with WTO principles, in particular national equal treatment or the most-favoured-nation principle cannot be ruled out in the current legal situation. In this case, whether a CO_2 border adjustment is compatible with WTO law would again depend on whether the prerequisites of the two-stage test of Art. XX of the GATT are met. In order to avoid repeating the detailed review above, only a few key determinants of compatibility with WTO law will be outlined in brief here.[80]

Firstly limiting BCAs to imports offers greater certainty, as applying them to exports risks conflict with the SCM Agreement, which does not contain the type of justification provision in Art. XX of the

[79] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/RW, 22.10.2001, para. 153. The Appellate Body report and preceding Panel report in the implementation process pursuant to Art. 21.5 of the DSU are downloadable at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm.

[80] For a comprehensive review of different variants see for example Mehling/van Asselt/Das/Dröge/Verkuijl, Designing Border Carbon Adjustments for Enhanced Climate Action, American Journal of International Law, 113/3, 2019, 434; Pauwelyn, Carbon Leakage Measures and Border Tax Adjustments under WTO Law, in: van Calster/Prévost, Research Handbook on Environment, Health and the WTO, 2013, 448-506; Trachtman, WTO Law Constraints on Border Tax Adjustments and Tax Credit Mechanisms to Reduce the Competitive Effects of Carbon Taxes, Discussion Paper, Resources for the Future, Jan. 2016, downloadable at: https://media.rff.org/documents/RFF-DP-16-03.pdf, and Zachmann/McWilliams, A European carbon border tax: much pain, little gain, Policy Contribution, 5, Bruegel, March 2020, downloadable at: https://www.bruegel.org/2020/03/a-european-carbon-border-tax-much-pain-little-gain/.

GATT.[81] In formulating import-based BCAs it is advisable to restrict the BCAs to emission-intensive sectors in order to provide better justification for their "necessity" under Art. XX(b) of the GATT.[82] In order to meet the requirements of the "chapeau" of Art. XX of the GATT, it is important above all that their application does not discriminate between different countries. Greater certainty will also be provided by linking differences to the emission intensity of the products and not to the countries of origin. An exception to protect LDCs should, however, be possible in principle. Moreover, importers should be free to provide proof that their product meets the BCAs' benchmark and thus allow a certain degree of flexibility in their application. In parallel with the introduction of BCAs, the EU should also endeavour to create an international solution to CO_2 pricing. It is not possible to predict whether the climate protection negotiations under Paris Agreement are sufficient or if the Appellate Body will interpret the "chapeau" of Art. XX of the GATT such that more concrete pricing instruments are required.

4. Climate clubs

The following must be considered in the context of the debate about "climate clubs" as a coalition of countries with ambitious climate protection targets and measures. *Nordhaus* differentiates between two different "sticks" in the objective and constitution of a climate club. On the one hand "carbon duties" which – like BCAs – are linked to the CO_2 content of products and restrict their import accordingly and on the other hand "uniform penalty tariffs" which are applied equally to all imports from all countries which do not belong to the climate club.[83] He concludes that the "carbon duties" variant is not rational from an economic perspective, as it would be complicated to formulate and would have little effect in guiding towards a growing, ambitious climate club.[84] The uniform penalty tariffs route would also not be compatible with WTO law for a number of reasons, in particular conflict with the most-favoured-nation, tariff binding, non- discrimination and proportionality principles.[85] Since the instrument has little economic effect due to its simplicity, there is no scope for a different legal formulation which would not at the same time undermine the economic effectiveness.[86] *Nordhaus*, therefore, proposes "climate amendments" already in WTO law, which expressly permit uniform penalty tariffs for the purposes of climate protection.[87] A "climate clause" of this type could be agreed in the same way as a "climate waiver" or peace clause described in sub-section C.VI.1 above. However, owing to the expected and already expressed concerns of many newly industrialised and developing countries, it is politically somewhat unlikely or at least diplomatically very challenging to achieve the necessary majority for such an amendment to WTO law.

For the "carbon duties" or BCA variants, it is possible to develop a formulation which has some chance of being compatible with current WTO law. Economists would have to assess whether such an instrument would be sufficiently effective from an economic perspective. There is no legal impediment to all countries in a climate club introducing BCAs – in as close as possible to the same form. This would not require any further formal coalition. Likewise, it would be possible to agree

[81] Mehling/van Asselt/Das/Dröge/Verkuijl, Designing Border Carbon Adjustments, 2019, pp. 473f.
[82] Ibid. p. 474.
[83] Nordhaus, Climate Clubs: Overcoming Free-riding in International Climate Policy, American Economic Review, 105/4, 2015, 1339, p. 1348, downloadable at: https://www.aeaweb.org/articles?id=10.1257/aer.15000001.
[84] Ibid.
[85] Cf. Ibid., p. 1349, Pauwelyn, pp. 465f.
[86] Cf. Ibid.
[87] Ibid., p. 1349.

under a free trade agreement, for example between the EU and other countries, that the contracting parties use BCAs as an instrument of their national or EU policy.

Politically it is very important to bear in mind that for example China, India and other newly industrialised and developing countries are very much opposed to the "penalty" element of climate clubs and thus also the BCA.[88] Within the WTO it is possible – as explained above – to conclude agreements with a limited number of WTO members and to extend these to other countries if required. Thus it is at least established that a plurilateral move can be embedded into a multilateral system and constructive communication maintained with the overall system. It is advisable that climate clubs are integrated into a multilateral system in order not to undermine political trust and the work towards a common goal.[89]

[88] Das, Climate Clubs – Carrots, Sticks and More, Economic and Political Weekly, 1/34, Aug. 2015, 24, pp. 25f

[89] Cf. Ibid., pp. 26f.

D. Regional Trade Agreements

The negotiation of bi- and plurilateral regional trade agreements (RTAs) has gained increasing momentum in recent years. Regional trade agreements cover a wide range of issues on which the WTO members were unable to agree in multilateral negotiations or were not even part of the negotiations in the Doha Round. Accordingly, RTAs contain wider reaching regulations in the areas of environmental protection and development policy than WTO law. There is, however, disagreement as to their effectiveness.

I. Origin, function and current status

The number of bi- and plurilateral regional trade agreements has continued to increase sharply since the mid-1990s. The WTO requires notification of regional trade agreements and maintains a database which currently contains 304 regional trade agreements.[90]

Opinions differ on these regional development trends versus multilateral integration. According to one opinion, regional agreements in the end support multilateral integration.[91] Representatives of this point of view see RTAs as "building blocks" towards multilateral integration. A greater degree of liberalisation can be negotiated in smaller rounds; this can gradually be extended either by expanding a regional free trade area or by transferring progressive regulations to other regional alliances and in the end can smooth the way for multilateral integration. From a different perspective, RTAs are seen more as "stumbling blocks" to multilateral integration. According to this opinion, RTAs lead to regional trade blocks, which in the end undermine WTO law through the superimposition of regulations on it, have the effect of diverting trade, i.e. to the disadvantage of third countries, and allow interest in multilateral integration to dwindle.[92]

From a legal perspective, RTAs generally conflict with the WTO's most-favoured-nation principle, as they give the contracting parties trade advantages which do not apply to third countries. However, a series of exception provisions in WTO law allows regional trade agreements to be concluded under certain circumstances (primarily Art. XXIV: 4-8 of the GATT, Arts. V and Vbis of the GATS and the agreement on interpretation of Art. XXIV of the GATT). The permissibility of regional trade agreements by exception in specific circumstances reflects the compromise in the tense economic policy relationship between the "building" and "stumbling" block approaches. Regional integration should be enabled in a way that has the least negative consequences possible for international trade. The wording of Art. XXIV:4 of the GATT makes clear this approach:

> "The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories."

[90] See overview of numbers and development over the years: http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx.
[91] See Krajewski, Wirtschaftsvölkerrecht (international Economic Law), pp. 297ff.
[92] Ibid.

Essentially, Germany and the European Union give priority to multilateral trade relationships and the successful conclusions of the WTO'S Doha Round.[93] However, since important trading partners such as the USA increasingly have concluded and are concluding regional trade agreements and competitive disadvantages to European companies operating internationally should be prevented, the EU has also been negotiating RTAs increasingly since 2007.[94]

Regional trade agreements aim for "in-depth integration".[95] Their regulations can be divided roughly into WTO+ and WTOx regulations.[96] WTO+ regulations go more deeply into areas already covered by WTO law, for example trade in services (GATS), protection of intellectual property (TRIPS), dismantling of technical barriers (TBT), state aid and public procurement law. WTOx regulations relate to the so-called "Singapore issues", which were again excluded from the Doha negotiations, primarily competition, public procurement and the dismantling of bureaucratic trade barriers. In addition, many regional trade agreements also have chapters on investment protection.

The European Union has three types of trade agreements: firstly customs unions, which abolish tariffs in a bilateral relationship and agree common external tariffs; secondly association, stabilisation, free trade and economic partnership agreements, which abolish or reduce tariffs in bilateral trade; and thirdly partnership and cooperation agreements, which create a framework for bilateral trading relations but do not alter tariffs.[97] This legal opinion deals exclusively with trade agreements in the second group. Table 1 below provides an overview of the EU's association, stabilisation, and free trade agreements differentiated according to the status of the negotiations. Economic Partnership Agreements are discussed in Section F.

RTA	Contracting partner(s)	Agreement type	Status
Algeria	Algeria	Association Agreement	In force since 2005
CETA	Canada	Comprehensive and Economic Trade Agreement	Provisionally in force since 2017
Chile	Chile	Association Agreement and Additional Protocol	In force since 2003, modernisation negotiations began in 2017, broken off since 2019
Central America	Costa Rica, El Salvador, Honduras	Association Agreement with strong trade component	Provisionally in force since 2013
Colombia, Ecuador, Peru	Colombia, Ecuador, Peru	Trade Agreement	Provisionally in force since 2013
Egypt	Egypt	Association Agreement	Provisionally in force since 2004
Faroe Islands	Faroe Islands	Agreement	In force since 1997
Georgia	Georgia	Association Agreement	In force since 2016
Israel	Israel	Association Agreement	In force since 2000
Jordan	Jordan	Association Agreement	In force since 2002

[93] See for example BMWi (German Federal for Economic Affairs) presentation at https://www.bmwi.de/Redaktion/DE/Artikel/Aussenwirtschaft/freihandelsabkommen-aktuelle-verhandlungen.html.
[94] Ibid.
[95] Zengerling/Buck, Umweltschutz und Freihandel (Environmental Protection and Free Trade), in: H.-J. Koch /E. Hoffmann/M. Reese, Handbuch Umweltrecht (Environmental Law Handbook), 5th edition, 2018, margin nos. 169ff. See also World Bank overview and graph on RTAs at: https://www.worldbank.org/en/topic/regional-integration/brief/regional-trade-agreements.
[96] Zengerling/Buck, Umweltschutz und Freihandel (Environmental Protection and Free Trade), margin no. 169; for a basic overview of WTO+ and WTOx regulations in EU and US Regional Trade Agreementsder see Horn/Mavroidis/Sapir, An anatomy of EU and US preferential trade agreements, Bruegel Blueprint 7, 2009, downloadable at: https://www.bruegel.org/wp-content/uploads/imported/publications/bp_trade_jan09.pdf.
[97] See EU overview: https://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/#_under-adoption. On the different degrees of regional integration (preferential areas, free trade areas, customs union, common market, economic union, currency union) see Krajewski, Wirtschaftsvölkerrecht (International Economic Law), p. 296.

Kosovo	Kosovo	Stabilisation and Association Agreement	In force since 2016
Mexico	Mexico	Global Agreement	In force since 2000, modernisation negotiations since 2016, ‚Agreement in Principle' on trade reached in 2018
Moldova	Moldova	Association Agreement	In force since 2016
Morocco	Morocco	Association Agreement	In force since 2000, modernisation negotiations since 2013, broken off since 2014
Palestinian Authority	Palestinian Authority	Interim Association Agreement	In force since 1997
Singapore	Singapore	Trade and Investment Agreement	In force since 2019
South Korea	South Korea	Free Trade Agreement	In force since 2015
Switzerland	Switzerland	Agreement	In force since 1973
Tunisia	Tunisia	Association Agreement	In force since 1998, modernisation negotiations since 2015, broken off since 2019
Ukraine	Ukraine	Deep and Comprehensive Free Trade Agreement Association Agreement	Provisionally in force since 2016
Western Balkans	Albania, Bosnia and Herzegovina, Montenegro, North Macedonia, Serbia	Stabilisation and Association Agreement	In force since 2010 or later depending on the country
Mercosur	Argentina, Brazil, Paraguay, Uruguay	Mercosur Association Agreement	Negotiations concluded in June 2016
Vietnam	Vietnam	Free Trade Agreement	Council of Ministers signature and Vietnam ratification still outstanding
Australia	Australia	Australia Agreement	In negotiation since 2018
Indonesia	Indonesia	Free Trade Agreement	In negotiation since 2016
New Zealand	New Zealand	New Zealand Agreement	In negotiation since 2018
Philippines	Philippines	Free Trade Agreement	In negotiation since 2015
GCC	Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, United Arab Emirates	Free Trade Agreement	Negotiations begun in 1990, suspended since 2008
India	India	Free Trade Agreement	Negotiations begun in 2007, suspended since 2013
Malaysia	Malaysia	Free Trade Agreement	Negotiations begun in 2010, suspended since 2012
Thailand	Thailand	Free Trade Agreement	Negotiations begun in 2013, no new negotiation date set since 2014
TTIP/USA	USA	Transatlantic Trade and Investment Partnership	Negotiations begun in 2013, suspended since 2016

Legend:

In force	In the process of adoption or ratification	In negotiation	Negotiations suspended

As the overview shows, there are a total of 21 association and free trade agreements in force between the EU and 29 countries or areas. In four cases modernisation negotiations are in progress, though broken off in three cases. The association agreement with the Mercosur countries and the free trade agreement with Vietnam are in the process of adoption and ratification. Four trade agreements are in negotiations and in five further cases negotiations are suspended. The EU and China are negotiating an investment protection agreement which will be discussed in Section E.

The process of negotiating Regional Trade Agreements has in the past often rightly been criticised for lack of transparency.[98] For example neither the negotiating directives from the Council of Ministers to the Commission nor the negotiation texts were publicly accessible. EU trade Commissioner Cecilia Malmström, therefore, began her term of office from 2015 to 2019 with "Trade for all", a transparency drive; she published numerous new documents and initiated an even greater number of "civil society dialogues".[99] The process currently operates such that the Council of Ministers authorises the Commission to conduct agreement negotiations.[100] This authorisation may include so-called negotiating directives, often termed a negotiating mandate. As a result of the transparency drive, the negotiating directives are now generally published – though not in all cases.[101] During the negotiations, the Commission works closely with the Council's Trade Policy Committee, informs the European Parliament, meets representatives of civil society and publishes EU position papers, the original draft texts with which the EU begins the negotiations, reports on the negotiations, (provisional) impact assessments, background papers and fact sheets. Once the negotiations have concluded, the Commission publishes the finalised agreement text and presents it to the Council of Ministers and the European Parliament. If it is approved by the Council of Ministers and the European Parliament, the EU can sign the agreement. As regional trade agreements are generally to be classed as so-called "mixed agreements"[102], all Member States must sign and ratify them before they finally come into force.

Critics note that, despite some progress, the degree of transparency is not sufficient for effective democratic control and a trade policy centred on the common good.[103] They point inter alia to the fact that only the initial draft but no interim negotiating texts are published. The more in-depth impact assessments, such as that on sustainability, are only published after conclusion of the negotiations. "Civil society dialogues" during the negotiations are predominantly with corporate and trade association lobbyists. Meaningful public participation in the negotiation process at a time when it is still possible to influence the outcome of the negotiations is impossible on this basis.[104]

Institutionally, each regional trade agreement generally establishes a trade committee and a series of sub-committees topics covered in the different chapters, the main functions of which include supporting implementation in the contracting countries and compliance monitoring. For example, a sub-committee on trade and sustainable development is responsible for the implementation and monitoring of the provisions of the sustainability chapter. The trade committee is also tasked with further development of the agreement. Civil society actors participate in implementation and

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[98] See more generally Stolper, Die Geheimhaltung ist ein Geburtsfehler in: Dossier – Freihandel vs. Protektionismus (Secrecy is a Birth Defect in: Dossier – Free trade vs. Protectionism), bpb, 09.11.2016, downloadable at: https://www.bpb.de/politik/wirtschaft/freihandel/237009/die-geheimhaltung-ist-ein-geburtsfehler and in detail from a legal perspective Lübbe-Wolff, Democracy, Separation of Powers, and International Treaty-Making – The example of TTIP, Current Legal Problems, 69/1, 2016, 175, 183ff, downloadable at: https://search.proquest.com/openview/d30cac2f75feb9ca0b3d9809d2dcccf9/1?pq-origsite=gscholar&cbl=2032116.

[99] DG Trade, Trade for all, downloadable at: https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf.

[100] General overview of the process with further references: https://ec.europa.eu/trade/policy/policy-making/.

[101] See here for example for the ongoing negotiations with Australia and New Zealand: https://www.consilium.europa.eu/en/press/press-releases/2018/06/25/trade-with-australia-and-new-zealand-negotiating-directives-made-public/. The directives cover the negotiating objectives which the Commission should achieve. It is noted that they are kept somewhat brief in comparison with the overall agreement and the content kept very general (negotiating mandate of some 20 pages vs. up to 1,000 pages for an FTA).

[102] ECJ, ruling of 16.05.2017, opinion 2/15.

[103] See for example Große, Cecilias Vermächtnis – Unsere Bilanz zum Amtsende der EU-Handelskommissarin (Cecilia's legacy – our balance sheet at the end of the EU Trade Commissioner's term of office), Lobby Control, Sept. 2019, at: https://www.lobbycontrol.de/2019/09/cecilias-vermaechtnis/.

[104] Ibid.

compliance monitoring of the sustainability chapter, but not the other chapters, through Domestic Advisory Groups (DAGs).[105]

In contrast to the WTO or many other investment protection agreements, there is no strong institutional framework for dispute settlement. This is generally set out in more detail in a separate chapter and annex and has two stages. Firstly, the parties should try through consultation to reach a unanimous solution. If this fails, a three-member arbitration panel is established at the request of one of parties to the dispute. After hearing the parties, the arbitration panel draws up an interim report and, after hearing further arguments, a final report. Documents and hearings are in principle publicly available unless the parties agree on private proceedings. In reaching its decision, the arbitration panel is free to call experts and amici curiae submissions (for example from environmental associations). If a party does not implement the legally binding arbitration ruling in due time, the other party can in certain circumstances suspend trade facilitation measures for a certain period of time. In the event of dispute, the arbitration panel again decides on the reasonableness of the suspension.[106] The dispute settlement mechanism applies in principle to all chapters of a free trade agreement, however the sustainability chapter is expressly excluded from this – as discussed in more detail in the following sub-section.[107]

II. Environmental and climate protection

As the overview table shows, there are different "generations" of association and free trade agreements. As far as can be seen, all RTAs concluded or negotiated by the EU contain provisions on environmental protection. In the early agreements this is generally limited to a few provisions, but for about the last ten years the EU RTAs have contained a complete chapter on sustainable development the content of which is tending to grow.[108] The following table gives an overview of the environmental and climate protection provisions in the following EU free trade or association agreements: the three most recent to come into force (Singapore, Mexico, CETA), the two essentially negotiated but not yet ratified (Mercosur and Vietnam) and three of the four under negotiation (Australia, New Zealand, Indonesia).[109] Free trade agreements together with appendices often run to

[105] See for example the opinion of the European Economic and Social Committee (EESC), The role of Domestic Advisory Groups in the monitoring and implementation of free trade agreements, REX/150, 23.01.2019, downloadable at: https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/role-domestic-advisory-groups-monitoring-implementation-free-trade-agreements/timeline. The EESC advocates strengthening civil society participation and, for example, extending the compliance monitoring role of Domestic Advisory Groups from the sustainability chapter to all chapters, ibid., point 1.6. It is also problematic that, for example in the case of the RTAs with Peru and Columbia, no DAG was established by the agreement parties. Malmström launched enquiries in 2017 and 2018.

[106] For example, the agreement between the EU AND Singapore provides for such a dispute settlement process in Chapter 14 and Annex 14-A.

[107] In the field of human rights, there is already a suspension clause in many cases. However, it is very rarely used.

[108] See for example Zurek, From "Trade *and* Sustainability" to "Trade *for* Sustainability" in EU External Trade Policy, p. 119.

[109] The German Institute for Development Policy and Jean-Fréderic Morin, Laval University, set up a comprehensive database on environmental protection provisions in around 730 RTAs (TREND – Trade and Environment Database) https://www.die-gdi.de/en/trend/. Building on these data, *Morin* and *Jinnah* examined the regulatory contribution of 688 RTAs signed between 1947 and 2016 to global climate governance from the point of view of innovation, legalisation, replication and dissemination. They come to the conclusion that climate protection clauses in RTAs do show a high degree of regulatory innovation, but so far make only a weak contribution to climate governance because they are formulated in a way that is weakly "legalized" – i.e. barely legally binding – and moreover they are neither replicated in the world trade system or agreed by the major GHG emitters, Morin/Jinnah, The untapped potential of preferential trade agreements for climate governance, Environmental Politics, 27/3, 2018, 541, 543, downloadable at: https://www.tandfonline.com/doi/full/10.1080/09644016.2017.1421399. Also interesting are the differences found in the use of climate protection clauses in RTAs of the EU, USA and Japan, ibid. p. 557, and the results of the network analysis of increasing dissemination, ibid. p. 558. For a view on environmental protection components in more recent US RTAs see

more than 1,000 pages and are divided into different chapters – largely based on the topics covered by the WTO. The overview is restricted to some of the chapters central to the issues considered here.

In the case of the free trade or association agreements under negotiation, only the texts with which the EU began the negotiations are accessible. The currently status of the negotiations is not published. The accessible starting texts for the negotiations with the Philippines are very different from the drafts published for Australia, New Zealand and Indonesia. As they probably do not reflect the current status, they are not included in the evaluation. Table 2 below shows the provisions on environmental and climate protection and sustainable land use in the various chapters of selected RTAs.[110]

RTAs / Clauses	Singapore	Mexico	CETA	Mercosur	Vietnam	Australia	New Zealand	Indonesia
Trade and Sustainable Development								
Objective SD	x	x	x	x	x	x	x	x
Right to regulate	xx	xx	xx	xx	xx	xx	xx	xx
Non derogation	xx	xx	xx	xx	xx	xx	xx	xx
Enhan. prot. levels	xx	xx	xx	xx	xx	xx	xx	xx
MEAs	xxx	xxx	xxx	x	x	xxx	xxx	xxx
Climate change, PA	xx	xxx	-	xx	xx	xxx	xxx	xxx
Forests / timer trade	xx	xx	xx	x	xx	xx	xx	x(x)
Biodiversity	-	xx	-	x	xx	xx	xx	xx
Supply chain mgt.	-	x	-	x	x	x	x	x
Precaution. principle	x	x	x	x	x	x	x	x
Environmental goods	x	x	x	-	-	-	-	-
Review impact on SD	x	-	-	-	-	-	-	-
Cooperation	x	x	x	x	x	x	x	x
Contact points	x	x	x	x	x	x	x	x
Consultations	x	x	x	x	x	x	x	x
Panel of experts	x	x	x	x	x	x	x	x
Civil society	x	x	x	x	x	x	x	x
No regular DS	x	x	x	x	x	x	x	x
Trade in Goods								
General exception	x	*	x	x	x	x	x	x
Technical Barriers to Trade (TBT)								
Transparency	x	x	x	x	x	x	x	x
Marking / labelling	-	x	-	x	x	x	x	x
Techn. Regulations	-	-	-	-	-	x	x	-
Sanitary and Phytosanitary Measures (SPS)								
Objective	x	x	x	x	x	x	x	x
General exception	-	-	x	-	-	-	-	-
Trade in Services								
Licensing	-	-	-	x	-	-	x	x
Right to regulate	-	-	-	-	x	-	x	x
Env. Services	-	-	-	-	x	-	-	-
General exception	-	-	-	-	-	x	-	-
Public Procurement								
General exception	-	-	-	x	x	-	-	-
Env. considerations	-	xx	-	-	-	xx	xx	xx
Techn. specifications	xx	xx	xx	xx	xx	-	-	-
Eval. criteria tenders	xx	xx	xx	xx	xx	-	-	-

Meidinger, The Trans-Pacific Partnership Agreement and Environmental Regulation, in Kingsbury et al. (ed.), Megaregulation Contested: Global Economic Ordering After TPP, Oxford University Press, 2019, pp. 175-195, downloadable at: https://digitalcommons.law.buffalo.edu/cgi/viewcontent.cgi?article=1375&context=book_sections and Laurens et al., NAFTA 2.0: The Greenest Trade Agreement Ever? World Trade Review, 18/4, 2019, pp. 659-677.

[110] The agreement texts negotiated and drafts are downloadable at: https://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/.

Cooperation	-	-	-	x	-	-	-	-
Competition/Subsidies								
Public policy goals	-	-	-	x	-	-	-	-
Env. Purposes	-	-	-	-	x	-	-	-
Transparency	-	-	-	-	x	-	-	-
Cooperation	-	-	-	x	-	-	-	-
Non-tariff Barriers to Trade and Investment in Renewable Energy Generation								
Standards, tech. reg.	x	/	/	/	x	/	/	/
Energy and Raw Materials								
Principles/objectives	/	x	/	/	/	/	x	-
EIA	/	-	/	/	/	/	x	-
Stand., tech. reg.	/	x	/	/	/	/	x	x
Renewable Energies	/	x	/	/	/	/	x	x
RE grid access	/	-	/	/	/	/	xx	-
Innovation/Cooperation	/	x	/	/	/	/	xx	x
Good Regulatory Practices								
Impact assessment	/	x	/			/	x	x
Dialogue / Cooperation and Capacity Building								
Animal welfare	/	/	-	x	-	/	/	/
Biotechnology	/	/	x	-	-	/	/	/
Agricult. biotech	/	/	-	x	-	/	/	/
Scient. mat. food safety, animal and plant health	/	/	-	x	-	/	/	/
Forestry	/	/	x	-	x	/	/	/
Raw materials	/	/	x	-	-	/	/	/
Sust. development	/	/	-	-	x	/	/	/

Legend:

Status of negotiations:

In force	In the process of adoption or ratification	Under negotiation

Clause type:

***	**	*	-	/
Binding "shall implement"	Supporting "shall promote/support"	Cooperating, voluntary "cooperate, discuss"	No clause	No chapter in the agreement

All agreements studied have a chapter expressly devoted to the relationship between trade and sustainable development. This is where by far the greatest number of regulations relating to environmental and climate protection and sustainable land use are to be found. In terms of substantive law, all sustainability chapters contain a general statement of intent on the objective of sustainable development.[111] All sustainability chapters also contain a "right to regulate" and "levels of protection" clause.[112] This provides in particular that each of the contracting parties is free to set its own environmental protection level and legislate accordingly. Existing national environmental law should not be weakened or less stringently implemented for reasons of trade facilitation. The parties to all agreements listed also endeavour to raise the overall level of national environmental protection. The clauses cited are to be classed as mildly or moderately effective, as either they are mere declarations of intent or the degree of implementation depends very much on national political will.

[111] See for example Art. 1 para. 1 of the sustainability chapter of the EU-Mercosur RTA.
[112] See for example Art. 2 of the sustainability chapter of the EU-Mercosur RTA.

All agreements also contain a clause on international environmental treaties, which is formulated as binding ("shall implement") in all cases considered except the agreements with Mercosur and Vietnam.[113] With the exception of the CETA, all agreements also contain a clause or article on climate protection with a strongly or moderately binding clause on implementation of the Paris Agreement, in some case with explicit reference to the NDCs submitted.[114] Finally all agreements listed include a clause or article on sustainable forestry, which cannot however be classed as strong as they only express an intention to provide support ("shall promote/support").[115] With the exception of the agreements with Canada and Singapore all agreement texts contain articles on biodiversity and supply chain management, but also only with the objective of support (biodiversity) or cooperation (supply chains).[116] The precautionary principle has found its way into all agreements – but only for specific qualifying cases.[117] The applicability of the precautionary principle in the other chapters, especially in cases of dispute, is not completely clear however.[118] Declarations of intent to promote trade in environmental goods or exchange views are part of the agreements with Singapore, Canada and Mexico, which are already inforce, but not – as far as can be seen – of more recent agreements.[119] Commitments to review and assess the impact of the agreements on sustainable development are found in various places with slightly different significance.[120]

All clauses in the sustainability chapters directed at the implementation and enforcement of agreed substantive regulations are to be classed as weak.[121] The implementation and conflict resolution process is indeed clearly regulated and binding, but due to its nature it is merely cooperative and "toothless".[122] All agreements create a Committee on Trade and Sustainable Development to monitor implementation and establish national contact points.[123] All regulations in the sustainability chapters are explicitly excluded from the normal dispute settlement mechanism which applies to the other provisions of the agreement.[124] A two-stage consultation process replaces the normal arbitration panel mechanism, which also enables the imposition of sanctions.[125] If the consultations requested by a contracting party do not lead to an amicable agreement, a contracting party can ask for an expert panel to be established, which can indeed make recommendations on settlement of the dispute, but is not able to impose sanctions in respect of breaches of commitments under the sustainability chapter.[126] Representatives of civil society can submit their views on implementation to

[113] See for example Art. 5 para. 3 of the sustainability chapter of the EU-Mercosur RTA which says […] each Party reaffirms its commitments to promote and effectively implement, multilateral environmental agreements (MEAs), protocols and their amendments to which it is a party."
[114] See for example Art. 6 of the sustainability chapter of the EU-Mercosur RTA.
[115] See for example Art. 8 of the sustainability chapter of the EU-Mercosur RTA.
[116] See for example Arts. 7 and 11 of the sustainability chapter of the EU-Mercosur RTA.
[117] See for example Art. 10 para. 2 of the sustainability chapter of the EU-Mercosur RTA.
[118] The TBT and SPS chapters provide for their own risk analyses and do not mention or refer to the precautionary principle.
[119] See for example the formulation limited to the exchange of views die in Art. 12.10 lit. (j) in the sustainability chapter of the EU Singapore RTA („exchange views on the liberalisation of environmental goods and services").
[120] See for example Art. 12.14 of the sustainability chapter of the EU-Singapore RTA.
[121] See for example Arts. 14-17 of the sustainability chapter of the EU-Mercosur RTA.
[122] For more detail on cooperation vs. Sanctions-based control mechanisms Zurek, From "Trade *and* Sustainability" to "Trade *for* Sustainability" in EU External Trade Policy, in Engelbrekt et al. (ed.), pp. 129ff.
[123] See for example Art. 14 of the sustainability chapter of the EU-Mercosur RTA.
[124] See for example Art. 15 of the sustainability chapter of the EU-Mercosur RTA.
[125] See for example Arts. 16 and 17 of the sustainability chapter of the EU-Mercosur RTA.
[126] The question of the formulation of the control mechanism has the subject of intense discussion in the EU, with the result so far of adhering to the soft cooperation mechanism. See first Non-paper of the Commission services, Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs), 11.07.2017, downloadable at http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf and compilation of all feedback at https://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157122.pdf. For a critical examination see for example: European Economic and Social

the Committee on Trade and Sustainable Development through an advisory body (civil society forum in the case of the CETA, DAGs in the other cases).[127] They also have an observer role in respect of the implementation of the expert panel's recommendations.[128]

There are strong grounds for concluding that this soft implementation and dispute settlement mechanism is ineffective. Countries have never previously instigated monitoring or dispute settlement proceedings on environmental protection grounds.[129] As long as there is no trigger independent of governments – such as an expert committee or (recognised) environmental organisations – which can instigate the dispute settlement process, it is most likely that there will be no or very little monitoring. In the context of European free trade agreements, the EU has to date only initiated a consultation process in three cases relating to workers' rights. It requested the establishment of an expert panel for the first time in July 2019 in a case against South Korea.[130] Trade law (soft law) regimes such as NAFTA/NAAEC (North American Agreement on Environmental Cooperation) and the OECD Guidelines for Multinational Companies, which allow an NGO trigger but are weak in terms of further proceedings and options for decisions and sanctions, could also not effectively enforce the implementation of agreed environmental protection provisions.[131]

So far, there are very few environmental and climate protection regulations in free trade and association agreements outside the sustainability chapter. Many chapters, for example on Trade in Goods, contain a general exception clause corresponding to Art. XX of the GATT, which – as described in the previous section – can justify trade restrictions on environmental and climate protection grounds.[132] The chapters on Technical Barriers to Trade (TBT) contain transparency clauses which require the contracting parties to make trade barriers based on environmental protection apparent.[133] Thus they primarily serve free trade interests rather than environmental protection interests. The clauses concerning labelling obligations also implicitly permit labelling requirements based on environmental protection, but above all serve the purpose of minimising barriers to trade resulting from labelling requirements.[134] The situation is similar in the case of the clauses on

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Committee, Opinion, Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs), 19.10.2017, downloadable at https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/trade-and-sustainable-development-chapters-tsd-eu-free-trade-agreements-fta-own-initiative-opinion. Based on the feedback, the Commission published a second non-paper: Non-paper of the Commission services, Feedback and way forward on improving implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements, 26.02.2018, downloadable at: http://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf.

[127] See for example Art. 16 para. 6 of the sustainability chapter of the EU-Mercosur RTA.

[128] See for example Art. 17 para. 11 of the sustainability chapter of the EU-Mercosur RTA. On the role of civil society, particularly with reference to the conflict between support for implementation on the one hand and the legitimisation of neoliberal structures on the other, see Orbie et al. Promoting sustainable development or legitimizing free trade? Civil society mechanisms in EU trade agreements, Third World Thematics, 1/40, 2016, 526-546, downloadable at: https://www.tandfonline.com/doi/full/10.1080/23802014.2016.1294032. See also Hinze, Trade: Do participatory provisions enhance civil society participation?, TREND Analytics, 23 May 2019, downloadable at: https://klimalog.die-gdi.de/trend/stories/trade-and-civil-society-participation/.

[129] Zengerling, Greening International Jurisprudence, 2012, pp. 93ff.

[130] See EU Commission press release, EU-Korea dispute settlement over workers' rights in Korea enters next stage, 19. December 2019, downloadable at: https://trade.ec.europa.eu/doclib/press/index.cfm?id=2095.

[131] Zengerling, Greening International Jurisprudence, pp. 125ff, 152ff; Joint Public Advisory Committee, 20 Years of NAFTA and the NAAEC, CEC, 2016, downloadable at: http://www.cec.org/sites/default/files/documents/summary-of-comments-oct16.pdf. See also Zurek, From "Trade *and* Sustainability" to "Trade *for* Sustainability" in EU External Trade Policy, in Engelbrekt et al. (ed.), pp. 129f.

[132] See for example Art. 13 Trade in Goods chapter of the EU-Mercosur agreement.

[133] See for example Art. 8 TBT chapter of the EU-Mercosur agreement.

[134] For example the wording in Art. 9 TBT chapter of the EU-Mercosur agreement: "[…] the Party shall, in cases where it considers that the protection of public health and the environment […] are not compromised thereby, endeavour to accept

technical regulation. The chapters on Sanitary and Phytosanitary Measures (SPS Chapter) concern the trade in animals and plants and products made from them. They serve to protect humans, animals and plants, but the focus is above all on the protection of health. The precautionary principle is not embodied in the chapters and climate protection and social aspects of agriculture, for example, cannot be taken into account in the risk assessment.[135]

The provisions relevant to environmental protection in the chapters on trade in services are limited to the general exception clause corresponding to Art. XX of the GATT and variants of the above clauses on the right to regulate. The chapters on public procurement in the most recent agreements contain clauses which explicitly permit (technical) requirements aimed at environmental protection in tenders and evaluation criteria. The chapters on competition and subsidies contain only a very few clauses explicitly mentioning environmental protection. Here reference is always "only" to establishing environmental protection as a permitted reason for the distortion of competition and provision of subsidies. So far, there has been no move to dismantle subsidies damaging to the climate and land use.

The agreements concluded with Singapore and Vietnam contain a chapter specifically devoted to non-tariff barriers to trade and investments in renewable energy generation.[136] The contracting parties wish actively to support the expansion of renewable energy by reducing non-tariff-barriers and facilitating investment. The agreements with Mexico, New Zealand and Indonesia contain chapters on energy and raw materials, though the focus is generally on the dismantling of barriers to trade in the energy and raw materials markets. Renewable energies are indeed explicitly mentioned, but the fossil fuel market is also targeted. The same agreements contain a chapter on good regulatory practice which requires assessments of the (environmental) impact of the regulations. Finally the agreements with Canada, Mercosur and Vietnam have chapters on dialogue, cooperation and capacity building. On the one hand, environmental and climate protection issues are listed here as a subject for dialogue and cooperation processes which could be agreed in binding form in the preceding chapters in agreements with other contracting parties. On the other hand, they refer to "future subjects" on which there are no binding regulations as yet even in other agreements.

III. Development policy

North-North, North-South and South-South regional trade agreements have been concluded. The number of South-South agreements increased most rapidly in recent years and in absolute terms makes up the majority share of regional trade agreements.[137]

Many developing and newly industrialised countries were previously party to the EU's Generalised Scheme of Preferences (GSP). The GSP is a non-reciprocal agreement which gives the developing countries favourable access unilaterally to the EU's markets, but does not require this for EU

non-permanent or detachable labels, rather than labels physically attached to the product, or inclusion of relevant information in the accompanying documentation."

[135] See for example the decision *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, 21.11.2006 (at the interface between the SPS agreement of the WTO and the Cartagena Protocol of the CBD).

[136] In each case Chapter 7 of the EU-Singapore and EU-Vietnam RTAs (Non-tariff Barriers to Trade and Investment in Renewable Energy Generation), downloadable at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22019A1114(01)&from=EN#page=26 (EU-Singapore) and https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157353.pdf (EU-Vietnam).

[137] DiCaprio/Santos-Paulino/Sokolova, Regional trade agreements, integration and development, UNCTAD Research Paper No. 1, July 2017, downloadable at: https://unctad.org/en/PublicationsLibrary/ser_rp2017d1_en.pdf.

exports.[138] Following fundamental reform of the GSP in 2014, the EU reduced the number of beneficiary countries from 176 originally to 87. The EU is negotiating or has negotiated reciprocal regional trade agreements with many countries no longer in the GSP, such as Peru and Columbia.[139] Table 1 (sub-section D.I.) gives an overview of the agreements concluded or currently being negotiated with the EU. Each agreement provides individually and reciprocally for the gradual reduction and elimination of trade barriers. For example, the chapter on the trade in goods covering industrial and agricultural products in the EU-Mercosur agreement provides on a product group specific basis for the progressive percentage reduction of trade barriers over time on both sides.[140] Very occasionally, the chapters contain "special and differential treatment" clauses for tightly defined exceptional cases.[141] The different levels of development are also taken into account in the sustanability chapter (Arts. 1 IV c and V of the EU-Mercosur RTA), but more with a tendency towards justification of weaker protection standards.[142]

Essentially the effect of regional trade agreements on development policy can be examined from two different perspectives. On the one hand, there is the question of how agreements with developing and newly industrialised countries contribute to meeting development policy goals.

In the case of the North-South EU-Mercosur agreement the development predictions vary widely. While the London School of Economics and Political Sciences consultancy (LSE Consulting) predicts (slightly) positive economic and social effects and negligible negative effects on climate protection[143], critical NGOs and trade unions fear an entrenchment of existing economic asymmetries, i.e. the expansion of Mercosur raw materials exports from agriculture and mining and of the agribusiness models damaging to society, the environment and in particular the climate, the continuing destruction of the Amazon, the unilateral preferential treatment of larger companies compared to small and medium-sized enterprises, the endangering of domestic food security programmes, the destruction or dismantling of regional value-added chains laboriously built up within Mercosur in recent years, inter alia in textiles and mechanical engineering and the jeopardising of the public sector's leading role in the purchase of locally produced environmentally and socially acceptable products.[144] The political changes in Brazil show that the negotiation of the EU-Mercosur RTA could

[138] An overview of the GSP can be found for example at: https://ec.europa.eu/taxation_customs/business/calculation-customs-duties/rules-origin/general-aspects-preferential-origin/arrangements-list/generalised-system-preferences_de.

[139] Fritz, Fünf Jahre Freihandelsabkommen mit Kolumbien und Peru – Europäische Werte auf dem Prüfstand (Five years of free trade agreements with Columbia and Peru – European values put to the test) , fdcl, Misereor, Brot für die Welt (Bread for the World) inter alia 2018, p. 6, downloadable at: https://www.fdcl.org/wp-content/uploads/2018/10/F%C3%BCnf-Jahre-EU-Freihandelsabkommen-mit-Kolumbien-und-Peru.pdf.

[140] See for example the summary at: https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157964.pdf.

[141] For example Art. 17 of the SPS chapter of the EU-Mercosur agreement for Paraguay.

[142] "Recognizing the differences in their levels of development, the Parties agree that this Chapter embodies a cooperative approach based on common values and interests." (Art. 1 V EU-Mercosur TSD Chapter, identical wording in EU-Vietnam).

[143] LSE Consulting, SIA EU-Mercosur RTA, 2020.

[144] Ghiotto/Echaide, Analyses of the agreement between the European Union and the Mercosur, 2019, published by The Greens/EPA und PowerShift, downloadable at: https://www.annacavazzini.eu/wp-content/uploads/2020/01/Study-on-the-EU-Mercosur-agreement-09.01.2020-1.pdf. See also Fritz, Research on the impacts of the EU-Mercosur trade negotiations, Analysis of draft texts, especially the chapters on goods, SPS, TBT and government procurement, 2017, downloadable at: https://thomas-fritz.org/english/research-on-the-impacts-of-the-eu-mercosur-trade-negotiations; Idem, Das EU-Mercosur Abkommen auf dem Prüfstand – soziale, ökologische und menschenrechtliche Folgen (The EU-Mercosur Agreement put to the test – social, ecological and human rights consequences), Misereor 2017, downloadable at: https://www.misereor.de/fileadmin/user_upload/Studie_MERCOSUR_Misereor.pdf. From the perspective of the connection between soya bean cultivation and deforestation see Trase – Transparency for Sustainable Economies, Sustainability in forest-risk supply chains: Spotlight on Brazilian soy, Trase Yearbook 2018, downloadable at: https://yearbook2018.trase.earth/. For the connection between sugar cane cultivation and deforestation in the Amazon see Jusys, A confirmation of the indirect impact of sugarcane on deforestation in the Amazon, Journal of Land Use Science, 12/2-3, 2017, pp. 125-137.

indeed exert sufficient political pressure to prevent Brazil from leaving the Paris Agreement. Internally, however, the Bolsonaro government is taking policy decisions which appear incompatible with effective climate protection.[145] *Harstad* nevertheless sees ways in which the EU-Mercosur RTA could act as a "carrot and stick" for effective forest and climate protection. To do so, market access must be strictly coupled with sustainable commercial practices – going beyond the wording adopted. The agreement should not come into force until the environmental protection policies and laws are effectively implemented and enforced once again, rights of the indigenous population are guaranteed and this is subject to transparent and trusted monitoring.[146] Together with *Mideska*, he argues for "conservation contracts" as an effective instrument for the sustainable use of resources.[147]

The NGOs foodwatch and PowerShift assess the effect of the agreements with Mexico, Japan, Vietnam and Indonesia in a similarly critical manner to that described for the EU-Mercosur RTA. For example increasing palm oil exports and with this increasing slash-and-burn of forests and peatlands are to be expected.[148]

Critical studies of the effects of EU North-South free trade or association agreements concluded and (provisionally) applied some years ago come to the same conclusions.[149] Taking as an example the agreement between the EU, Peru, Columbia and Ecuador, which has been inforce provisionally since 2103[150], they point out particularly that, with the conclusion of the agreement involving only a few countries, the aim of strengthening regionalisation in the Andean region could not be achieved, the balance of trade shifted in favour of the EU, rather than the Latin American contracting parties, the agreement led to so-called re-primarisation, i.e. an increase in exports from agriculture and mining, and not to diversification, the growth sectors were precisely those associated with massive environmental and social conflicts and human rights violations, and finally the expansion of free trade corresponded with an increase in the black economy (drug trade, money laundering, tax evasion).[151] An examination of whether environmental protection clauses in North-South RTAs result in "greener" exports from developing countries or have the effect of restricting exports, on the one hand comes to the conclusion that environmental protection clauses in RTAs do not significantly restrict exports and that the fear of negative effects of "green protectionism" could not be confirmed.[152] On the other hand the study shows that environmental protection clauses in RTAs can reduce environmentally harmful exports and encourage "green" exports, in particular in countries

[145] Rodríguez, Bolsonaros Anti-Klimapolitik für Brasilien: Düstere Aussichten auf Nachhaltigkeit (Bolsonaro's anti-climate policy for Brazil: bleak prospects for sustainability), Brasilicum, 252, March 2019, pp. 13-14; Teixeira, Brazil cancels decree barring sugarcane cultivation in the Amazon, Reuters, 6. November 2019, downloadable at: https://www.reuters.com/article/us-brazil-environment-agriculture/brazil-cancels-decree-barring-sugarcane-cultivation-in-the-amazon-idUSKBN1XG311.

[146] Harstad, Trade deals could combat Brazil's Amazon deforestation, Opinion Brazil, Financial Times, 22. August 2019, downloadable at: https://www.ft.com/content/5f123000-bf5e-11e9-9381-78bab8a70848.

[147] Harstad/Mideska, Conservation Contracts and Political Regimes, Review of Economic Studies, 84, 2017, 1708-1734, downloadable at: https://academic.oup.com/restud/article-abstract/84/4/1708/3069929?redirectedFrom=fulltext.

[148] Fritz, Handel um jeden Preis? Report über die Freihandelsabkommen der Europäischen Union mit Mercosur (Brasilien, Argentinien, Uruguay, Paraguay), Mexiko, Japan, Vietnam und Indonesien Trade at any price? Report on the European Union free trade agreements with Mercosur (Brazil, Argentina, Uruguay, Paraguay), Mexico, Japan, Vietnam and Indonesia) published by foodwatch and PowerShift, 2018, downloadable at: https://www.foodwatch.org/fileadmin/Themen/TTIP_Freihandel/Dokumente/2018-02_foodwatch-powershift-Report_Handel-um-jeden-Preis_de.pdf.

[149] Fritz, Fünf Jahre Freihandelsabkommen mit Kolumbien und Peru (Five years of free trade agreements with Columbia and Peru), 2018.

[150] An overview and the text on the agreement are downloadable at: https://ec.europa.eu/trade/policy/countries-and-regions/regions/andean-community/.

[151] Ibid.

[152] Brandi et al, Do Environmental Provisions in Trade Agreements Make Exports from Developing Countries Greener? World Development, 129, 2020, downloadable at: https://www.sciencedirect.com/science/article/pii/S0305750X20300255.

that already pursue a strong environmental protection agenda nationally.[153] *Morin* and *Jinnah* point to individual positive effects of RTA environmental protection clauses on biodiversity governance.[154] *Peinhardt*, *Kim* and *Pavon-Harr*, in contrast, were unable to establish any positive effects of the US-Peru RTA in limiting deforestation in the Amazon. They conclude that forest protection clauses in RTAs are ineffective if they do not coincide with domestic political interests.[155]

South-South agreements appear to come out somewhat more positively as regards assessment of their consequences for development policy.[156]

On the other hand, free trade agreements affect development policy in that developing countries are not party to regional trade agreements. While the WTO's multilateralism focuses on equally distributed trade facilitation measures, from which all member states (theoretically) benefit, positive effects on growth are generally predicted for the parties to regional trade agreements, but negative effects for the countries not involved.[157]

IV. Proposals for strengthening environmental and climate protection

During her term of office as EU Commission President (2019 – 2024), Ursula von der Leyen intends to progress a European Green Deal, i.e. an ecological shift in industrial society.[158] In her political guidelines for the next European Commission she says:

> "Trade is not an end in itself. It is a means to deliver prosperity at home and to export our values across the world. I will ensure that every new agreement concluded will have a dedicated sustainable-development chapter **and the highest standards of climate, environmental and labour protection, with a zero-tolerance policy on child labour**. With the increased wealth that trade generates comes increased responsibility. I will appoint a Chief **Trade Enforcement Officer** to improve the compliance and enforcement of our trade agreements, and regularly report back to the European Parliament."[159] [highlights in the original text]

The criticisms and proposed solutions set out here and in the following sections may on the one hand still feed into the formation of opinion in the context of the ratification of the EU free trade agreements with Mercosur and Vietnam. On the other hand, they may be incorporated into the negotiations currently underway (Australia, New Zealand, Indonesia, Philippines) or to be embarked

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[153] Ibid.

[154] Morin/Jinnah, The untapped potential of preferential trade agreements for climate governance, p. 542 with further references. They cite on the one hand the support provided by the US-Peru RTA for the implementation of the regulations on mahogany in CITES and on the other hand clauses to protect genetic resources and traditional know-how in more recent RTAs which go beyond the provisions of the 2010 Nagoya Protocol.

[155] Peinhardt/Kim/Pavon-Harr, Deforestation and the United-States-Peru Trade Promotion Agreement, Global Environmental Politics, 19/1, 2019, 53-76.

[156] See for example Agitello, Is South-South Trade the Answer to Bringing the Poor into the Export Process? 2006; Bernhardt, South-South trade and South-North trade: which contributes more to the development in Asia and South America? Insights from estimating income elasticities of import demand, CEPAL Review 118, Apr. 2016, neither however with consideration of environmental aspects.

[157] See for example Prognose des ifo für TTIP (ifo prediction for TTIP), Felbermayr/Kohler, TTIP und die Entwicklungsländer: Gefahren, Potentiale und Politikoptionen (TTIP and the developing countries: dangers, potential and policy options), ifo Schnelldienst 2/2015, downloadable at: https://www.ifo.de/DocDL/ifosd_2015_02_3.pdf.

[158] von der Leyen, A Union that strives for more, 2019. See also Commission document, The European Green Deal, COM(2019) 640 final, of 11.12.2019, downloadable at: https://eur-lex.europa.eu/resource.html?uri=cellar:b828d165-1c22-11ea-8c1f-01aa75ed71a1.0021.02/DOC_1&format=PDF.

[159] von der Leyen, A Union that strives for more, 2019, pp. 20f.

on in the future or resumed (GCC, Malaysia, India, Thailand, USA) or into modernisation negotiations on agreements already concluded (Mexico, Morocco, Tunisia). In the case of current negotiations, their lack of transparency and accessibility is problematic. A change to the process is urgently required to enable the public and agencies representing public interest to obtain an insight into the current status of the negotiations and submit opinions. In addition, it is important that the EU's negotiating mandates are further developed in order to enable new subjects to be introduced into the negotiations.

Closer cooperation between climate and trade regimes

As proposed in section C.IV.

Make the negotiation process more open

The transparency drive of the Directorate General (GD) for Trade should be expanded. Representatives of environmental and climate protection interests should have the same access to the negotiation process as representatives of trade and industry. In any event, the interim status of the negotiations should be made public on one or two occasions before conclusion of the negotiations.

Strengthen negotiating mandates

The EU's negotiating mandates should be further developed to include additional recommendations on climate and environmental protection and sustainable land use.

Improve ex-ante assessment methods

Appropriate modelling methods should be further developed in order to address the criticisms of ex-ante assessments of RTAs, which are indeed already extensive but as yet far from optimum in terms of methodology.[160] A comparison with ex-post analyses, which are increasingly being made, could be instructive here.[161] In order to take the results of the ex-ante assessments into account in the negotiation process and in the formulation of climate and environmental protection measures, they should be carried out as early as possible in the negotiation process and made publicly accessible.

Identify the most important import and export streams relevant to the climate and address these in the agreement

As part of the negotiation process, the contracting parties should identify the most important import and export streams relevant to the climate at regional and national level (climate protection and adaptation to climate change), perhaps supported by the ex-ante assessments, and actively address these as a priority in the agreement. Local business and environmental agencies and private sector and civil society stakeholders in the EU and contracting country(countries) should be involved in this process and should develop locally acceptable approaches to minimising greenhouse gas emissions and maximising the ability to adapt to climate change with respect to the key import and export streams.

Identify the most important land eco-systems and economic drivers of land degradation at regional level and address these in the agreement

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[160] See for example, taking the EU-Africa EPAs as an example, Tröster/von Arnim/Staritz/Raza/Grumiller/Grohs, Delivering on Promises? The Expected Impacts and Implementation Challenges of the Economic Partnership Agreements between the European Union and Africa, Journal of Common Market Studies, 58/2, 2020, 365ff., downloadable at: https://onlinelibrary.wiley.com/doi/abs/10.1111/jcms.12923.

[161] See for example Zurek, From "Trade *and* Sustainability" to "Trade *for* Sustainability" in EU External Trade Policy, in Engelbrekt et al. (ed.), p. 127.

Also as part of the negotiation process, the contracting parties should identify the most important land eco-systems and economic drivers of land degradation relevant for trade at regional and national level (climate protection and adaptation to climate change), perhaps supported by the ex-ante assessments, and actively address these in the agreement. Here too, local business and environmental agencies, in particular in the forestry and agriculture sectors, and private sector and civil society stakeholders should be involved in this process and should (further) develop and strengthen local strategies and concrete instruments for protection and sustainable management. Land degradation neutrality by 2030 should be the guiding objective of these efforts in accordance with SDG 15.3.

Strengthening the significance of MEAs

The contracting parties should expressly commit to the goals of the MEAs applicable to them and undertake to implement their own promised contributions ("shall implement").

Strengthening of climate protection

In addition to commitment to the goals of the climate protection regime (United Nations Framework Convention on Climate Change - UNFCCC and Paris Agreement) and undertaking to implement the NDCs ("shall implement"), the contracting parties could also include a clause on certification obligations for timber imports and BCAs. It could, for example, provide that both contracting parties introduce certification obligations for timber imports and BCAs or work together with the aim of introducing these or in any event not acting against the relevant policy of one contracting party.

Cooperation on climate protection should be expanded in RTAs with newly industrialised and developing countries and financially supported.

Embed the precautionary principle without restrictions in the whole RTA

The precautionary principle should apply without restrictions and embedded such that it applies to the whole RTA, not just the sustainability chapter.

Strengthen sustainable forestry and protection of biodiversity

The regulations on sustainable forestry and the protection of biodiversity should be strengthened by including the following topics with as much force as possible ("shall implement", "shall protect"): commitment to the goals of the Convention on Biological Diversity (CBD) and obligation to implement their own implementation goals, commitment to the goal of "land degradation neutrality" of SDG 15.3, expansion of protected forests and protected areas, creation, expansion and protection of a network of protected areas (similar to Natura 2000), concrete protection and reforestation targets in agreements or reference to and integration of any existing goals, perhaps the establishment or expansion of buffer zones around protected forests and other protected areas, the use of financial incentive models for the protection and sustainable management of forests, such as REDD+ (Reducing Emissions from Deforestation and Forest Degradation) and perhaps (international) conservation management agreements, agreements on the prevention of illegal logging which go beyond the EU Timber Regulation and FLEGT, for example agreement to trade (exclusively or partially) in certified timber and penalties for trade in illegally harvested timber.

Strengthen supply chain management

The initial approaches to cooperation on supply chain management[162] should be extended and consolidated. The supply chains relevant for climate change should be identified and prioritised.

Adopt core provisions from ACCTS in RTAs

In order to make stronger proactive use of trade law for the purpose of environmental and climate protection, the RTAs should adopt all if possible, or at least some, of the elements of the planned ACCTS agreement (dismantling of barriers to trade in environmental goods and services, abolition of fossil fuel subsidies and development of guidelines for voluntary eco-labelling). Alternatively or additionally, the contracting parties should consider joining ACCTS.

Strengthen regional and international trade in sustainable products and services

RTAs should target strengthening the regional and international trade in sustainable goods and services and the establishment of corresponding business models. A range of measures on both the supply and the demand side can contribute to this.

For example, certification systems for sustainable agriculture, foods, construction materials, textiles and other products and product declarations (e.g. Environmental Product Declarations, EPDs) should be expanded. It is important here to strengthen the demand side for such products on the regional markets in question and to keep transport emissions demonstrably as low as possible.

Expansion of the tertiary sector and, for example, ICT (Information and Communications Technology) initiatives and sectors with "leapfrogging" potential should be strengthened and protected by RTAs with newly industrialised and developing countries.

The contracting parties should consider extending options for the protection of developing and newly industrialised countries from European competition in the establishment and expansion of sustainable infant industries or the services sector. Trade in products damaging to the environment and based on fossil fuels should be restricted as much as possible. The contracting parties should perhaps create the opportunity for imposing tariffs on a common scale on products and services damaging to the environment and the climate.

Strengthen sustainable consumption

The sustainability chapters should include an article on the promotion of sustainable consumption, which also includes in particular healthy, climate-friendly foods.

Align risk assessment in the SPS chapter with the Cartagena Protocol

Formulate risk assessment in the SPS chapter in line with the CBD/Cartagena Protocol such that ecological and socio-economic aspects are taken into account.

Align public procurement and investments with climate and environmental protection

Public procurement chapters should strengthen the role of the public sector as a model of good practice in the procurement of sustainable products and services or make them conditional. Ambitious sustainability and environmental and climate protection requirements should essentially be part of public tender criteria in order to establish and strengthen sustainable local, regional and international value chains.

[162] See corresponding agreements in the sustainability chapters of the EU RTAs with Mexico, Mercosur, Vietnam, Australia, New Zealand and Indonesia.

Similar provisions should apply to any investment protection chapters. Here stricter environmental and climate protection requirements in each case should apply where possible to foreign investors. The standards should apply to both the production process and the products (for example vehicle emissions). Environmental dumping should be explicitly prohibited.

Include an energy transition chapter

RTAs should specifically promote the expansion of renewable energy, the associated network infrastructure and sustainable business models if possible in a new energy transition chapter or a modern energy (transition) and raw materials chapter. Local production, maintenance services and recycling should be supported. Exception provisions should permit "local content" clauses to a certain degree in national renewable energy support mechanisms in order to enable the establishment of a local (supply) industry.

An energy transition chapter should also include agreement on the disclosure and gradual abolition of fossil fuel subsidies.

Include a chapter on resource efficiency with a focus on sustainability in the trade in raw materials

In the key area of the trade in raw materials, RTAs should promote the protection of human rights, the rights of indigenous peoples, workers' rights and environmental and climate protection and the prevention of land degradation. For example they could also support the use of modern technologies that protect health and the environment. In the case of fossil fuel raw materials, "keep it in the ground" initiatives and mechanisms should be strengthened. Corresponding provisions could be enshrined in forward-looking chapters on energy and raw materials, which already exist in – in conventional form – in many free trade agreements. This should be done if possible in agreement with national or regional strategies for raw materials and with the responsible authorities and stakeholders.

Improve monitoring and assessment

The Committee on Trade and Sustainable Development should provide effective monitoring of the environmental and climate protection requirements of the sustainability and other chapters and contribute to their successful implementation. Here it is important that all contracting parties and DAGs are actively involved in the process and inter alia support data collection. It should be possible to ascertain that all contracting parties have established a DAG soon after the RTA comes into force. During the negotiations, agreed sustainability indicators, which take into account the trade flows relevant to climate protection and environmental goods concerned, could be set out in an appendix to the RTA and serve as the basis for ongoing monitoring.[163]

Strengthen compliance monitoring and dispute settlement

Environmental and climate protection requirements in the sustainability and other chapters should have a degree of legal protection consistent with that which applies to the trade-related provisions. There are a number of options for strengthening compliance monitoring and dispute settlement. One possible way would be to align the consultative process before the expert panel provided for to date more closely with advanced compliance review mechanisms under MEAs, such as the Kyoto Protocol or the Aarhus Convention.[164] In order to ensure that compliance review mechanisms are actually

[163] See GIZ initiative on EPAs in Section F.III.

[164] For an overview of the compliance review mechanisms under the Kyoto Protocol and the Aarhus Convention see Zengerling, Greening International Jurisprudence, pp. 128ff (Aarhus Convention), 282ff (Kyoto Protocol).

used, there should be a trigger independent of any one of the contracting parties. For instance, the body responsible for monitoring and assessment, i.e. the Committee on Trade and Sustainable Development, and/or an expert group and/or (recognised) environmental organisations could initiate compliance review mechanisms.[165] The compliance monitoring body, for example a variant of the already established expert panel, should be able to respond to infringements of the law through support measures or (temporary) punitive sanctions. In addition to the compliance monitoring bodies, the dispute settlement bodies should also be able to enforce regulations on environmental and climate protection. To date RTAs have provided for ad hoc arbitration panels for this purpose. In order to strengthen (arbitration) panel independence, consistency in decision-making, transparency and the "building block" components of the RTAs in relation to the WTO, the dispute settlement chapters of the RTAs could be further developed such that they also provide the option of bringing disputes before the WTO dispute settlement mechanism – perhaps alongside the option of an ad hoc arbitration panel. In the medium to long term, it would be desirable to establish an international environmental court which could for example give advisory or binding rulings on the environmental law aspects in trade law proceedings in a type of preliminary process.[166]

The need for "tailor-made enforcement structures" is also noted by Zurek, From "Trade *and* Sustainability" to "Trade *for* Sustainability" in EU External Trade Policy, p. 119.

[165] Cf. also the fourth recommendation in Zurek, From "Trade *and* Sustainability" to "Trade *for* Sustainability" in EU External Trade Policy, in Engelbrekt et al. (ed.), p. 140.

[166] See for example proposals on the formation of an international environmental court in Zengerling, Greening International Jurisprudence, 2013, pp. 302ff.

E. Excursus: Investment protection agreements

International trade law also includes investment protection law, which will only be discussed in brief here. As already mentioned above, many regional trade agreements contain chapters on investment protection. Originally and still today, these are primarily concluded as stand-alone bilateral and plurilateral agreements under international law.

I. Origin, function and current status

Investment protection agreements protect foreign direct and portfolio investments in host countries from expropriation, expropriation-type measures and unfair treatment. Germany concluded the world's first investment protection agreement with Pakistan in 1959. The number of bilateral and plurilateral investment protection agreements has increased sharply in recent years and now stands at more than 2,600.[167] Germany has concluded more than 130 investment protection agreements. Countries signed 40 new investment protection agreements in 2018.[168] An example of a major investment protection agreement currently under negotiation is the EU-China Investment Agreement.[169] Development continues at pace.

The strongest institutional manifestation of the investment protection regime is the arbitration court attached to the World Bank, the ICSID (International Center for the Settlement of Investment Disputes). It is based on the 1956 ICSID Convention ratified by 152 countries and is one of the most active international dispute settlement bodies. A few years ago, it overtook the number of cases handled by the WTO, which can be attributed above all to the fact that private investors as well as governments can bring proceedings before the ICSID.

II. Environmental and climate protection and development policy

Out of a total of approximately 950 investor-state arbitration proceedings recorded before the ICSID and other arbitration courts up to the end of 2018, almost 400 on a conservative count, had some relationship to protection of the environment or resources.[170] The type of cases which are problematic as far as environmental protection is concerned are those where an investor claims large damages against the host states based on the implementation or enforcement of the provisions of environmental law. The investor argues that the application of the host state's environmental legislation constitutes an expropriation, expropriation-type measure or in any event unfair treatment and thus a violation of the investment protection agreement triggering entitlement to

[167] UNCTAD, World Investment Report 2019, p. xii, downloadable at: https://unctad.org/en/PublicationsLibrary/wir2019_en.pdf.
[168] Ibid.
[169] See https://ec.europa.eu/trade/policy/countries-and-regions/countries/china/ for further information.
[170] Attac, BUND, Forum Umwelt und Entwicklung, (Environment and Development Forum), Power Shift, Mit Konzernklagen gegen Umweltschutz (Corporate Actions against Environmental Protection), Factsheet, 16.05.2019, with further references downloadable at: https://power-shift.de/wp-content/uploads/2019/05/Mit-Konzernklagen-gegen-Umweltschutz-web.pdf. The figure does not yet include the estimated number of unknown proceedings.

compensation.[171] Arbitration processes of this type led to discussion of a so-called "regulatory chill" effect of the investment protection agreement on national and local legislators and administration.[172]

Unlike WTO law or regional trade agreements, investment protection agreements did not previously contain rules or conflict provisions in relation to environmental protection. As a reaction to the relevance in dispute settlement, many contracting states have in the meantime included an indication that investment protection objectives should be achieved consistent with environmental protection in the peamble and also the above-mentioned clause on the right to legislate on environmental matters in the text of the agreement. These first steps are certainly to be welcomed, but they are not sufficient to counter the "regulatory chill" effect and ensure that investment protection agreements contribute to sustainable development, which gives as much weight to the ecological and social dimension as to the economic aspect.[173]

An additional problem with the ICSID arbitration process is that public interests are negotiated in proceedings that are not public. Complaints, responses, comparisons and decisions are generally not available to public scrutiny. Moreover under the dispute settlement rules in investment protection agreements, the investor does not have to exhaust domestic legal avenues before turning to the international arbitration court. This creates a sort of parallel legal system and can result in contradictory decisions on the same case in the domestic jurisdiction and the international arbitration court. The absence of clear rules on environmental protection and the constantly changing membership of the arbitration court mean that there is little consistency in rulings on environmental matters – as far as can be seen. Finally conflicts of interest can arise as lawyers appear in different roles sometimes as advocates and sometimes as arbitrators. In order to counter this last criticism inter alia, the EU agreed with the contracting parties in the investment protection chapters of more recent regional trade agreements or investment protection agreements – for example with Canada and Singapore – to establish a new multilateral investment court.[174] This would probably contribute to greater independence, transparency and consistency in decision-making, but would not address the other criticisms.[175]

From a development perspective, foreign direct investment has positive and negative effects.[176] The main positive effects may be seen in economic growth, the influx of capital, increase in jobs, transfer of technology and know-how, improvement in the balance of payments due to increased domestic production and the replacement of imports and opportunities for the creation and expansion of

[171] See for example Técnicas Medioambentales Tecmed, S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, 29.05.2003; Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany, ICSID Case No. ARB/09/6, 11.03.2011. For an overview and assessment from an environmental protection perspective see Zengerling, Greening International Jurisprudence, pp. 267ff.

[172] Tienhaara, The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy, Cambridge University Press, 2009.

[173] See for example on the EU Commission's more recent reform proposals in the context of the investment protection chapters of the TTIP and CETA and in relation to public interests in general, i.e. employment, social and environmental protection legislation, Krajewski/Hoffmann, Der Vorschlag der EU-Kommission zum Investitionsschutz in TTIP (The EU Commission's proposal on investment protection in the TTIP), Friedrich Ebert Stiftung 2017, downloadable at: https://library.fes.de/pdf-files/wiso/12379.pdf.

[174] See for example Art. 8.29 of the CETA RTA and Art. 3.12 of the Investment Protection Agreement between the EU and Singapore.

[175] For a summary of the criticisms see BUND, Das Investitionsgerichtssystem (ICS)(Investment Court System): Die ISDS-Reform der EU Kommission ist das alte System im neuen Gewand (The EU Commission's ISDS reform is the old system in a new guise), December 2015, downloadable at: https://www.bund.net/fileadmin/user_upload_bund/publikationen/ttip_und_ceta/ttip_und_ceta_isds_reform.pdf.

[176] See for example OECD Overview, Foreign Direct Investment for Development - maximising benefits, minimising costs, OECD 2002, downloadable at: https://www.oecd.org/investment/investmentfordevelopment/1959839.pdf.

infrastructure, for example in water, sewage, waste and energy management. The main potential negative effects include the suppression or takeover of domestic economic activities and infrastructure, loss of government control, the outflow of capital due to the transfer of profits to the investor's home country, increased corruption, depletion of resources and lowering of employment and environmental protection standards. Investment protection agreements should be designed such that the negative effects are avoided and the positive ones facilitated.

III. Proposals for strengthening environmental and climate protection

Various parties have already put forward a wide range of proposals in the current debate on the further development of the investment protection regime.[177] A few of the central recommendations are summarised in brief here:

Expressly specify sustainable development as a goal

Investment protection agreements – like WTO law and regional trade agreements – should expressly commit to sustainable development as a goal and in particular recognise the importance of the social and ecological dimensions. This should be set out expressly in the preamble and one of the first articles of investment protection agreements or chapters. The SDGs should also be expressly referred to and their implementation actively supported.

Recognise and support the implementation of the objectives of the Paris Agreement and other MEAs

The objectives of the Paris Agreement and other MEAs should be recognised and enshrined in a new clause such that investment protection law is not an obstacle to but a driver behind the implementation of corresponding national measures.

Prevent the "regulatory chill" effect

Various options can be considered here. "Right to regulate" clauses, especially with the requirement for "necessity", are not sufficient to counter the regulatory chill effect. They should therefore either be replaced by genuine exception clauses ("This agreement shall not apply to … environmental regulation and related implementation and enforcement measures") or at least they should dispense with the necessity criterion and should be expanded through "enhanced levels of protection" clauses.[178]

Include environmental protection obligations on investors

Current investment protection law contains numerous special rights for investors but almost no obligations. In order to avoid the potential negative effects of foreign direct investment, corresponding obligations, in particular obligations in relation to environmental and climate protection, should be introduced into investment protection law. There are various options for how and where such obligations should be enshrined, for example in international investment protection agreements themselves or in national investment legislation.[179]

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[177] A good overview of the reform options can be found in UNCTAD, Investment Policy Framework for Sustainable Development, 2015, downloadable at: https://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf.

[178] Cf. Krajewski/Hoffmann, Der Vorschlag der EU-Kommission zum Investitionsschutz in TTIP (The EU Commission's proposal on investment protection in the TTIP), Friedrich Ebert Stiftung 2017, p. 9, downloadable at: https://library.fes.de/pdf-files/wiso/12379.pdf and UNCTAD Report, p. 103 https://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf.

[179] A current contribution which discusses the various options from the perspective of human rights: Krajewski, A Nightmare or a Noble Dream? Establishing Investor Obligations Through Treaty-Making and Treaty-Application, Business and Human

Reform legal protection

No parallel international legal regime is required in order to settle legal disputes between states with well-functioning legal regimes. In this case, the substantive law provisions of investment protection agreements should be applied solely by national courts. In all other cases, the investor should first have to exhaust domestic legal avenues before being able to bring proceedings before the arbitration court. Completely abolishing investors' complaint rights should also be considered. In serious cases, the investor's home country could bring arbitration proceedings against the host country. This would significantly reduce the number of investment law disputes and thus also the "regulatory chill" effect. Corresponding provisions could be restricted to specific subjects, which should in any event include the protection of the environment, climate and workers' and human rights.

Rights Journal, 5/1, 2020, 105-129, downloadable at: https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/nightmare-or-a-noble-dream-establishing-investor-obligations-through-treatymaking-and-treatyapplication/D38968B6D2D29658FF6506B02A6C8CEE.

F. EU Economic Partnership Agreements (EPAs)

Economic Partnership Agreements (EPAs) between the EU and the ACP countries have a special role in the international trade regime.[180] Their overriding objectives are poverty alleviation and sustainable development. These objectives are to be achieved above all through regional economic and political integration of the ACP states and their increased participation in international value chains. EPAs are a specific form of economic and development cooperation not found between other regional blocks and countries. The effectiveness of the EPAs in terms of their economic, development and environmental policy objectives is difficult to assess and controversial.

I. Origin, function and current status

The 79 ACP countries comprise essentially the former French, Belgian and British colonies in Africa, the Caribbean and the Pacific. Strong bilateral relationships existed after independence and these developed into a special form of cooperation between the EU and ACP countries. Initially the central legal framework for such cooperation was the Yaoundé Agreements I and II (1964-1975) and the Lomé Agreements I-IV (1975-2000). Both generations of agreements were designed to be preferential, not reciprocal and thus required a waiver under the GATT and WTO law. While the Yaoundé Agreements essentially continued colonial trade models, the Lomé Agreements were increasingly oriented towards development policy and incorporated elements of the so-called New International Economic Order.[181] The ACP countries were given largely tariff-free access to the EU market – with the exception of a few sensitive agricultural products – without having to open their markets to EU exports. In addition to this preferential access, the EU and ACP countries agreed fixed prices for minerals and agricultural products as well as clauses on the advancement of democracy, human rights and the rule of law. Despite this new approach, the Lomé Agreements were unable to diversify import and export structures and thus could not break down colonial trade models.

In 2000 the EU and the ACP states concluded a new framework agreement in the capital of Benin, once again with a fundamentally different approach (the Cotonou Agreement).[182] Above all the WTO pushed for no more agreements to be signed that provided for unilateral trade preferences on purely political, not economic grounds, thus violating the most-favoured-nation principle under WTO law.[183] However consideration of different stages of development in the sense of the "special and differential treatment" principle continued to be possible. The most significant objectives of the Cotonou Agreement include the alleviation of poverty, sustainable development – explicitly also environmental and climate protection – greater regional integration, improved integration of the ACP states into global value chains and the strengthening of good government (Art. 1 of the Cotonou Agreement). The economic partnership agreements with the different regions of the ACP states form

[180] With regard to various topics addressed in this Section, I would like to extend my thanks for the valuable pointers received in discussions with Rainer Engels (GIZ, Head of the sector project Sustainable Economic Development), Dr Tobias Leeg (GIZ, sector project Trade and Investment for Sustainable Development), Dr Leonor von Limburg (GIZ, Team Leader Global Project "Sustainability aspects in EU Economic Partnership Agreements") and Dorothea Groth (Head of the Department for Development Cooperation, German Embassy Kigali, Rwanda).

[181] For an introductory definition of the term New International Economic Order see Klein, Neue Weltwirtschaftsordnung (New International Economic Order), Gabler Wirtschaftslexikon (dictionary of economics, downloadable at: https://wirtschaftslexikon.gabler.de/definition/neue-weltwirtschaftsordnung-40013/version-263408.

[182] Cotonou Agreement, Partnership Agreement 2000/483/EC – between the ACP States and the EU, downloadable at: https://eur-lex.europa.eu/legal-content/DE/TXT/?uri=LEGISSUM%3Ar12101.

[183] As a basis *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, 25.09.1997.

the trade law support structure of the cooperation agreed in the Cotonou framework agreement. Given the new rationale, they are designed to comply with WTO law, i.e. essentially reciprocal, but also contain asymmetric elements such as relaxed rules of origin, long transition periods for the dismantling of trade barriers and accompanying "Aid for Trade" agreements on financial support and capacity building in favour of the ACP states. For example, ACP countries can protect infant industries or take measures to ensure food security. The principle of reciprocity, however, requires that – contrary to the provisions of the previous agreements – the ACP states have to open their markets, gradually and with some exceptions, to EU exports.[184] The most-favoured-nation principle is enshrined in the EPAs insofar as the ACP states have an obligation also to grant to the EU trade preferences which they grant to other trading partners, for example in any South-South agreements.

The following Table 3 provides an overview of the current status of the economic partnership agreements concluded between the EU and ACP states since 2002.[185]

EPA	Contracting partner(s)	Agreement type	Status
Central Africa[186]	Cameroon	Interim EPA	Provisionally in force since 2014
Eastern and Southern Africa (ESA)	Comoros, Madagascar, Mauritius, Seychelles, Zimbabwe	Interim EPA	Provisionally in force since 2012 Deepening negotiations in progress since 2019
Southern African Development Community (SADC) EPA Group	Botswana, Eswatini, Lesotho, Mozambique, Namibia, South Africa	EPA	Provisionally in force since 2016 Angola applied to join in 2020
Cote d'Ivoire	Cote d'Ivoire	Stepping-stone EPA	Provisionally in force since 2016
Ghana	Ghana	Stepping-stone EPA	Provisionally in force since 2016
Caribbean (CARIFORUM)	Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Dominican Republic, Grenada, Guyana, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago	EPA	Provisionally in force since 2008
Pacific	Fiji, Papua New Guinea, Samoa, Solomon Islands	EPA	In force since 2011 Tonga applied to join in 2018
West Africa	Benin, Burkina Faso, Cabo Verde, Cote d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, Togo (ECOWAS member states), Economic Community of West African States (ECOWAS), West African Economic and Monetary Union (WAEMU), Mauritania	EPA	Negotiations concluded in 2014, signed by all member states except Nigeria; Ratification process will only begin once Nigeria has signed
East African Community (EAC)	Burundi, Kenya, Rwanda, Tanzania, Uganda	EPA	Negotiations concluded in 2014, Kenya, Rwanda, EU together with EU member states have signed, the other East African countries

[184] The requirement is that "substantially all trade" (Art. XXIV of the GATT) is to be liberalised. In practice this should amount to around 90 %, the compromise in the EPAs being that the EU liberalises 100% of its trade and the ACP states 80%.
[185] European Commission, Overview of Economic Partnership Agreements, March 2020, downloadable at: https://trade.ec.europa.eu/doclib/docs/2009/september/tradoc_144912.pdf.
[186] The other Central African countries which could join include the Central African Republic, Chad, Republic of the Congo, Democratic Republic of the Congo, Equatorial Guinea, Gabon and Sao Tome & Principe. As a country with middle to high income under the World Bank classification, Gabon no longer comes under the EU's generalised system of preferences. All other countries cited, as LDCs (Least Developed Countries), come under the EU's Everything but Arms programme EU and thus have tariff and quota free access to the EU market.

			have not signed. The DRC applied to join the EAC in 2019.
Zambia	ESA	Interim EPA	Negotiation of the ESA- EPA concluded in 2007 but not signed

Legend:

In force	In the process of adoption or ratification

The regional gaps among the African countries are evidence of difficult negotiations, but can also be attributed to the fact that the LDCs (Least Developed Countries) have tariff-free access to the EU market under the EU's "Everything but Arms" (EBA) programme[187] and therefore have little incentive to join an EPA. Since (interim) EPAs are now essentially in negotiation or in force with all regions of ACP countries, there will be no new EPAs in future. However the countries which have not yet joined have the option to join the EPA for their region. The potential for further development exists in the context of deepening negotiations in the case of the stepping-stone and interim EPAs and in any later modernisation negotiations in the case of EPAs that are already fully negotiated.

From the EU's perspective, the EPAs with African countries are also important components of the African Continental Free Trade Area (AfCFTA). AfCFTA is the free trade area between 54 of the 55 countries in the African Union (AU).[188] The AfCFTA Agreement came into force in May 2019 following 22 ratifications, with trade under the agreement expected to begin from mid-2020.[189] From a longer term perspective, after the implementation of AfCFTA, the EU aspires to a free trade agreement with Africa.[190]

It should be noted that the EPAs can only have limited effects. Trade flows depend on numerous factors that lie outside the scope of the EPAs. In addition many liberalisation measures have long transition periods. Finally it should be made clear that the ACP countries already had free access to the EU market under the Lomé Agreements and the EPAs have therefore primarily expanded access to markets in the ACP countries for EU exporters.[191]

II. Environmental and climate protection

The fundamental elements of the Cotonou Agreement, in particular Arts. 1, 2 and 9 are generally incorporated into the EPAs. Art. 1 of the Cotonou Agreement expressly cites the principle of sustainable resource and environmental management and as part of this climate change:

> "The principles of sustainable management of natural resources and the environment, including climate change, shall be applied and integrated at every level of the partnership."

Art. 32A subsequently added to the Cotonou Agreement is explicitly devoted to climate change and requires inter alia climate protection to be taken into account in all development strategies and

[187] Further information on EBA is downloadable at: https://trade.ec.europa.eu/tradehelp/everything-arms.
[188] The agreement can be downloaded at: https://au.int/en/treaties/agreement-establishing-african-continental-free-trade-area. Eritrea is the only African Union country not to have signed the free trade agreement.
[189] However it should be noted that the agreement is not yet finally negotiated and implementation will also take some time.
[190] European Commission, Economic Partnership Agreements (EPA), Factsheet, September 2019, p. 5, downloadable at: https://trade.ec.europa.eu/doclib/docs/2017/february/tradoc_155300.pdf.
[191] See for example for CARIFORUM: ECORYS, Ex-post evaluation of the EPA between the EU and its Member States and the CARIFORUM Member States, Revised interim report, February 2020, S. 83, downloadable at: https://trade.ec.europa.eu/doclib/docs/2020/february/tradoc_158657.pdf.

renewable energy to be promoted. However this provision is not part of the fundamental elements of the Cotonou Agreement and therefore not part of the EPAs.

Environmental protection requirements are enshrined to different degrees in the individual economic partnership agreements. The agreements differ significantly in their basic structure. The following Table 4 gives an overview of the most important environmental protection provisions in the various chapters of key EPAs.[192]

EPAs / Clauses	CARIFORUM	ESA	Central Africa (Cameroon)	SADC	West Africa	EAC
Trade Partnership for Sustainable Development / SD and other areas of cooperation						
Objective SD	x	x	x	x	x	x
MDGs	x	x	x	x	preamble	-
Cotonou Agreement (Art. 1, 2, 9)	x	x	x	x	x	x
Monitoring	x	-	-	x	x	-
Natural Resources / Water / Environment / SD						
Integration clause, overriding commitment to SD	x	-	-	x	/	-
MEAs	-	-	-	x	/	x
Protect environment	-	-	-	-	/	x
Conserve, protect and improve environment	x	x	-	-	/	-
Enhance biodiv conservation and genetic preservation	-	-	-	-	/	x
New industries related to env.	-	x	-	-	/	x
Trade in env. goods and services	x	-	-	-	/	-
Trade and investment pro SD	-	-	-	x	/	-
(Upholding) Levels of protection	x	-	-	x	/	-
Right to regulate	x	-	-	x	/	-
Use of int env standards in regional integration	x	-	-	-	/	-
Precautionary principle	x	-	-	-	/	-
Transparency on env. measures	x	-	-	-	/	-
Monitoring	x	-	-	-	/	-
Consultation	x	-	-	x	/	-
Committee of Experts	x	-	-	-	/	-
Cooperation (in SADC, EAC incl. sust. forest mgt. and sust. use of biodiv, in ESA also env. goods)	x	x	-	x	/	x
Financial undertakings	-	x	-	-	/	-
Rendez-vous clause	-	x	x	-	/	x
Sust. mgt. of forests	-	-	-	-	x	
Economic and Development Cooperation / Coop. for Implementation of Development						
Promote sust. development, env.	/	-	/	/	x	x
Mainstream env. issues into trade and development in various sectors (biodiv, agriculture etc.)	/	x	/	/	/	-
Industrial dev., take env. protection into account	/	x	/	/	/	-
Env. friendly tech in mining	/	x	/	/	/	-
Energy, RE	/	x	/	/	/	x
Support climate change adapt. and mitigation options	/	-	/	/	/	x

[192] The texts of all agreements examined are downloadable at https://ec.europa.eu/trade/policy/countries-and-regions/development/economic-partnerships/.

Joint Impl. Committee monitors and assesses impact of EPA on SD	/	-	/	/	x	-
Rendez-vous clause	/	-	/	/	x	-
Agriculture, fisheries and food security						
Trade in agricult., food + fisheries products consistent with SD	/	/	/	/	x	x
Precautionary principle in fisheries	/	/	/	/	x	x
Cooperation sust. agriculture	/	/	/	/	x	x
Trade in Goods / Free Movement of Goods						
Objective: maintain and increase capacity to protect env	x	/	-	-	/	-
New export duties or taxes only if necessary for prot. of infant industry., env., food security[193]	-	/	x	x	/	x
Sust. forest mgt.	-	-	x	-	/	-
Increase market-confidence in legal and/or sustainable origin of forest products	-	-	x	-	/	-
Facilitate assistance with a view to strengthen implementation of COMIFAC[194]	-	-	x	-	/	-
TBT / SPS						
Env measures may not restrict trade more than strictly necessary	/	/	-	/	x	-
Inform on env. measures	/	/	-	/	x	-
Rights and obligations MEAs (env. and biodiv)	/	/	-	/	-	x
Investment, Trade in Services, E-Commerce						
Int. environmental obligations	x	/	-	-	/	/
Maintenance of env. legislation and standards	x	/	-	-	/	/
Environmental and quality standards re tourism services	x	/	-	-	/	/
Innovation and Intellectual Property						
Coop eco-innovation and RE	x	/	/	-	/	/
Exclude products and processes from protection if necessary to protect environment etc.	x	/	/	-	/	/
General Exceptions						
General exception	x	x	x	x	x	x
Institutional Provisions						
Consultative Committee	x	-	-	-	-	-
Committee of Senior Officials	-	-	-	-	-	x
Joint bodies of EPA	-	-	-	-	x	-
Development Matrix (Annex)						
Sustainable/RE energy sources	/	x	/	/	/	x
Env. sustainable mining	/	x	/	/	/	-
Env. friendly mining tech	/	x	/	/	/	-
Env. plants / manufacturing	/	x	/	/	/	-
Mgt. of env. and nat. resources	/	x	/	/	/	-
Reservations (Annex)						
Agriculture, hunting, forestry	x	/	/	/	/	/
Mining and quarrying	x	/	/	/	/	/
Manufacturing	x	/	/	/	/	/

[193] The exception provision applies in the case of the SADC EPA only to five countries.

[194] Central African Forestry Commission, Treaty on the Conservation and Sustainable Management of Forests in Central Africa, downloadable at: http://extwprlegs1.fao.org/docs/pdf/mul71928.pdf.

Own prod., transm., distrib. of electric., gas, steam, hot water	x	/	/	/	/	/

Legend:

Negotiation status:

In force	In the process of adoption or ratification

Clause type:

*** Binding "shall implement"	** Supporting "shall promote/support"	* Cooperating, voluntary "cooperate, discuss"	- No clause	/ No chapter in the agreement

The environmental protection provisions contain either mere declarations of intent or justification provisions and are therefore extremely weak. All EPAs cite sustainable development as a general objective, incorporate the core elements of the Cotonou Agreement and agree an exception clause broadly in line with Art. XX of the GATT. Most EPAs acknowledge the Millennium Development Goals. Only the CARIFORUM and SADC EPAs provide for monitoring of the sustainability effects. International environmental protection agreements are mentioned in brief only in the SADC and EAC EPAs. With the exception of a weak clause in the EAC EPA, no EPAs contain an explicit provision on climate protection. Sustainable land use is not expressly addressed in any EPAs. Only the CARIFORUM and ESA EPAs provide for cooperation in the field of renewable energy.

The largest number of provisions relating to environmental protection is to be found in the CARIFORUM EPA, i.e. the oldest EPA, which contains a very differently formulated chapter on the protection of natural resources and is the only EPA that generally enshrines the precautionary principle. Although the African EPAs came into force later, they sometimes contain fewer provisions relating to environmental protection. The EPA with Central Africa, which has so far only come into force for Cameroon, includes in its territory the Central African rainforest; the chapter on the trade in goods contains weak provisions on sustainable forestry and a reference to the work of the Central African forestry commission COMIFAC[195]. Only the West Africa EPA contains a general declaration of intent on sustainable forestry. Only the EAC EPA states that the protection of biodiversity should be strengthened, but it is the subject of cooperation in the SADC and ESA EPAs. Protected natural resources of global importance such as the Central African rainforest or the "Caribbean Biological Corridor" are not directly cited as such.

The EPAs with Cameroon, SADC and EAC essentially prohibit the introduction of new tariffs or taxes on exports. The only exceptions to this are tariffs or taxes that are necessary to protect infant industries, the environment or food security. In the case of the SADC EPA, this exception only applies to five countries. The "necessity" criterion has sometimes been narrowly interpreted in a trade law context and can prove a genuine obstacle to the introduction of new tariffs and taxes for the reasons in question.

Overall, it can be said that the environmental protection provisions in EPAs predominantly come out significantly weaker than those in more recent regional trade agreements. This must be due on the one hand to a need to prioritise other issues and on the other hand to concerns on the part of the

[195] On the work of the forestry commission see https://www.comifac.org/.

developing countries about stricter requirements that are difficult for them to meet and thus could be barriers to trade.

An ex-post evaluation of the EU-CARIFORUM EPA for the period 2008 to 2018 commissioned by the EU contains a separate chapter on sustainable development.[196] The sustainability evaluation uses a range of methodological approaches and considers inter alia the development of the "Environmental Performance Index""(EPI)[197] by the CARIFORUM parties during the period covered by the study. The EPI comprises two elements "environmental health" (air, water and sanitation, heavy metals, etc.) and "ecosystem vitality" (air pollution, forests, biodiversity, habitats, climate and energy, etc.). The evaluation shows a slight improvement in the EPI in all but four CARIFORUM states in the period 2008 to 2018. In the four states that show a deterioration – Bahamas, Belize, Suriname and Trinidad & Tobago – this is due to a decline in "ecosystem vitality". [198] The influence of the EPA on the overall ecological footprint of the CARIFORUM states is unclear owing to lack of data. The most important export products and services traditionally are raw materials and agricultural products (in particular bananas from the Dominican Republic), oil and chemicals (primarily from Trinidad & Tobago) and tourism generally. All these exports have a sizeable ecological footprint. As traditional exports have fallen slightly, this would also suggest a reduction in the ecological footprint. However, this is not certain since the ecological footprint of the sectors which have grown is difficult to determine.[199] It should be noted that the ex-post evaluation does not draw any conclusions on causality. The development of the EPI only coincides with the EPA; whether and to what extent the EPA was (partly) instrumental in bringing about the change is unclear.

The private sector stakeholder consultations conducted as part of the study have given indications of increased environmental awareness on the part of producers, which is attributable in part to interaction with the EU market.[200] The study's authors also conclude that ecological sustainability is a priority in most CARIFORUM countries, as is also evident in cooperation projects, committees and collaboration on development. The strengthening of the Caribbean Biological Corridor is cited as an example.[201]

An overview by DG Trade of the product exports from the ACP states to the EU shows that mineral products represent by far the largest share in monetary terms, followed by pearls, noble metals and products made from them and the foods, drinks and tobacco group.[202] The three main EU export categories are machines and equipment, followed by mineral products and transport equipment.[203] Products are, therefore, traded in both directions which must have a not negligible ecological footprint. For example the level of CO_2 emissions and land degradation resulting from the individual products or product groups has not so far been determined.

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[196] ECORYS, Ex-post evaluation of the EPA between the EU and its Member States and the CARIFORUM Member States, Revised interim report, February 2020, downloadable at: https://trade.ec.europa.eu/doclib/docs/2020/february/tradoc_158657.pdf. The study was preceded by an Inception Report (2014), which explained the different methodologies, downloadable at: https://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_158300.pdf.

[197] On the EPI approach see https://epi.envirocenter.yale.edu/, the method is explained at: https://epi.envirocenter.yale.edu/2018-epi-report/methodology.

[198] ECORYS, Ex-post evaluation CARIORUM EPA, p. 97.

[199] Ibid. p. 98.

[200] Ibid. pp. 97f.

[201] Ibid.

[202] European Commission, DG Trade, European Union, Trade in goods with ACP Total (African Caribbean and Pacific Countries), April 2020, downloadable at: https://webgate.ec.europa.eu/isdb_results/factsheets/region/details_acp-total-african-caribbean-and-pacific-countries_en.pdf.

[203] Ibid., p. 6.

III. Development policy

All EPAs contain comprehensive provisions on cooperation and collaboration on development, which should eventually contribute to achieving the overriding objectives of the EPAs, i.e. in particular poverty alleviation, stronger regional markets and better integration of the ACP countries into international value chains. Opinions differ as to their effectiveness.

In a current summary of the implementation of the EPAs, the EU highlights the fact that trade between the EU and the ACP countries has increased by 46% in recent years and ACP exports of agricultural products to the EU have grown by 36% and industrial products by 48%.[204] The document is limited, however, to a brief introduction to the implementation status and individual examples from various ACP countries. The statistics on trade between the EU and ACP countries published by DG Trade in June 2019 shows that the EU had a trade deficit for 2008 and has had trade surpluses since 2015.[205] No significant diversification effects have been identified as yet.[206]

The EU reports in more depth on developments under the EPAs in question in its annual trade reports.[207] The most recent report published in October 2019 states that in the case of the SADC EPA for example total trade between the parties in 2018 increased by 2.7%, in particular due to the 5.5% increase in EU imports from SADC countries, primarily cars from South Africa and diamonds and noble metals from South Africa and Lesotho. Collaboration also increased on an institutional level and the Joint Council developed the principles for future joint monitoring and dispute settlement.

The SADC EPA is also the first to have a case of conflict. In June 2019, the EU requested consultations with the Southern African Customs Union (SACU) on account of its ongoing import ban on frozen poultry products from the EU.[208] The import ban originally affected eight EU countries, but was lifted in respect of two countries in 2018. The EU maintains that the continuing import ban against the other six countries is incompatible with the provisions of the EU-SADC EPA. The facts and legal situation are complex. EU poultry exports to South Africa increased from approx. 5,000 tonnes in 2009 to approx. 270,000 tonnes in 2016 based on the EPA and led to economic and health conflicts in various African countries.[209]

The ex-post evaluation of the EU CARIFORUM EPA already referred to in the environment sub-section reports separately on changes in different trade flows. The overview of the period from when the EPA came into force in 2008 to 2018 shows that in the case of the trade in goods the export surplus of the CARIFORUM countries in 2008 became an export surplus in favour of the EU countries in 2018.[210] An expert report commissioned by the Caribbean Export Development Agency comes to the same conclusion. It also highlights the fact that little has changed in the export structure of the

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[204] European Commission, Putting Partnerships into Practice, 2020 edition, p. 10 downloadable at: https://op.europa.eu/en/publication-detail/-/publication/c973c81f-4bc5-11ea-8aa5-01aa75ed71a1/language-en.
[205] European Commission, DG Trade, European Union, Trade in Goods with ACP Total, June 2019, p. 3 downloadable at: https://webgate.ec.europa.eu/isdb_results/factsheets/region/details_acp-total-african-caribbean-and-pacific-countries_en.pdf.
[206] Ibid. p. 7.
[207] European Commission, Report on Implementation of Free Trade Agreements, COM(2019) 455 final, 14.10.2019, pp. 22ff, downloadable at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019DC0455&qid=1571406458279&from=EN.
[208] See EU Commission press release and consultation request at http://trade.ec.europa.eu/doclib/press/index.cfm?id=2031.
[209] For a summary of the dispute and further context with further references see EPA Monitoring, EU Formally Challenges Application of SACU Safeguard Duties in the Poultry Sector, 27 June 2019, downloadable at https://epamonitoring.net/eu-formally-challenges-application-of-sacu-safeguard-duties-in-the-poultry-sector/.
[210] ECORYS, Ex-post evaluation of EU-CARIFORUM EPA, p. 38.

CARIFORUM countries in the last 20 years, and that the EPA has not so far led to a diversification of products and services.[211] There are marked differences between export development and export goods in the case of the individual countries. The position of the Dominican Republic in particular is very different.

With respect to collaboration on development and the overriding objectives of the agreement, the authors of the ex-post study come to the conclusion that they could indeed identify different activities at project level but no actual effect of the agreement on the alleviation of poverty or better integration of the CARIFORUM countries into international value chains.[212] In the case of cooperation projects with the private sector in particular, there were few attempts to review and evaluate the consequences of the individual projects and programmes more thoroughly beyond workshop reports etc.[213] The GIZ has a current project to support the establishment of participative monitoring and sustainability indicators in the CARIFORUM and SADC EPAs.[214]

To date there have been few studies of the effect of the EPAs on Africa independent of the EU and these create a mixed picture from different perspectives. Roughly speaking, they share the view that the direct effects of the EPAs on the improved participation of African countries in international value chains have so far been small, that above all the indirect effects are difficult to quantify and that the "aid for trade" elements are important for achieving the objectives.[215] *Tröster et. al* criticise the methods of assessing the consequences supported by modelling, which have predominated to date, for evaluating the EPAs. They apply a more developed method (structuralist computable general equilibrium model) to three African EPA regions and show consistently negative macroeconomic and distribution effects and significant adaptation costs.[216] A contribution from Africa sharply criticises the EPAs. *Gumede* highlights in particular the fact that the regional amalgamations were imposed by the EU and have led to more disputes than integration. In addition, the EPAs threaten African farmers and infant industries through the export of cheaper, often heavily subsidised products from the EU to the ACP countries. The loss of tariffs as important government income also undermines Africa's (economic) development.[217]

IV. Proposals for strengthening environmental and climate protection

The advancement of sustainable development is the prime objective of economic partnership agreements. To date the economic dimension of sustainability has predominated in the actual

[211] Chaitoo, CARIFORUM-EU Economic Partnership Agreement: A Firm-Level Review Focused on Trade and Investment, October 2019, p. 4, downloadable at: https://www.carib-export.com/businessforum/.
[212] ECORYS, Ex-post evaluation of EU-CARIFORUM EPA, p. 31.
[213] Ibid.
[214] See the project description at: https://www.giz.de/de/weltweit/60150.html and report of the EU-SADC Committee for Trade and Development, 6th meeting, 19 and 20 February 2020, in which the agreement on sustainability indicators is confirmed, downloadable at: https://sadc-epa-outreach.com/images/files/Adopted_Joint_Communique_6th_TDC_meeting.pdf.
[215] Woolfrey/Bilal, The impact of Economic Partnership Agreements on the development of African value chains, Case studies of the Kenyan dairy value chain and Namibian fisheries and horticulture value chains, Discussion paper, ecdpm, June 2017, downloadable at https://ecdpm.org/wp-content/uploads/DP213-Impact-EPAs-African-Value-Chains.pdf; Melo/Regolo, The African Economic Partnership Agreements with the EU: Reflections inspired by the case of the East African Community, Journal of African Trade, 2014, pp. 15 ff, downloadable at: https://www.sciencedirect.com/science/article/pii/S2214851514000048.
[216] Tröster et al., Delivering on Promise?, pp. 365 ff.
[217] Gumede, European Partnership Agreements: Good for Africa? World Commerce Review, 11/3, 2017, pp. 56 ff. The regional groupings of the EPAs are based on existing regional blocks, the country borders themselves of course have a colonial past.

formulation of the EPAs, but in the context of cooperative collaboration and regional and national initiatives in the ACP countries there are numerous approaches that put social and ecological aspects into sharper focus. In order to live up to the claim of sustainable development in actual fact, instruments of environmental and climate protection and sustainable land use can and should be integrated more forcefully into the EPAs. However it is important not to apply double standards and in particular to subject EU exports to strict sustainability requirements. CO_2 emissions and the ecological footprint are many times greater per capita in the EU than in the ACP countries.

EPAs also have the potential to contribute to a sensible integration of the different rationale behind the three aspects of sustainability through a combination of market-based approaches and those based on cooperation. Ideally they can thus facilitate "leapfrog" developments in the ACP countries for example.

As regards effectiveness, it should be noted that strengthening these areas in the EPAs alone will not be sufficient as EPAs by their nature can only have limited influence on trade flows and local production standards and models. As the above points show, their practical significance has so far been small. Although the future of EPAs is uncertain, further development seems sensible as this could then be adopted in new schemes such as a future agreement between the EU and the African Union or interim arrangements.

The current ESA-EPA deepening negotiations, completion of the stepping-stone (Cote d'Ivoire, Ghana) and interim EPAs (in addition to ESA also Central Africa/Cameroon), any later modernisation negotiations in the case of EPAs that are already fully negotiated and the current negotiation of a post-Cotonou agreement, the core elements of which could also be part of the EPA, all offer concrete opportunities for further development. The objectives on green alliances between the EU and its partner countries set out in the EU Green Deal require ambitious further development of the current status.[218]

Taking this objective seriously, the following aspects should feed into further developments of the EPAs:

Strengthening of the environmental and climate protection clauses in the post-Cotonou agreement

[218] European Commission, The European Green Deal, COM(2019) 640 final, 11.12.2019, p. 25: "**Likewise, the forthcoming Comprehensive Strategy with Africa**, and the 2020 summit between the African Union and the EU, should make climate and environmental 30 United Nations Environment emissions gap report 2019 21 issues key strands in relations between the two continents. In particular, the Africa-Europe Alliance for sustainable investment and jobs will seek to unlock Africa's potential to make rapid progress towards a green and circular economy including sustainable energy and food systems and smart cities. The EU will strengthen its engagement with Africa for the wider deployment and trade of sustainable and clean energy. Renewable energy and energy efficiency, for example for clean cooking, are key to closing the energy access gap in Africa while delivering the required reduction in CO2. The EU will launch a "NaturAfrica" initiative to tackle biodiversity loss by creating a network of protected areas to protect wildlife and offer opportunities in green sectors for local populations. More generally, **the EU will use its diplomatic and financial tools to ensure that green alliances are part of its relations with Africa and other partner countries and regions**, particularly in Latin America, the Caribbean, Asia and the Pacific." [highlights in the original text], downloadable at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2019%3A640%3AFI. The communication "Towards a comprehensive Strategy with Africa" published in March 2020 contains numerous elements of a partnership for "green transition" but only refers to the AfCFTA and briefly to the post-Cotonou negotiations, and not to any role for the EPAs, downloadable at: https://ec.europa.eu/international-partnerships/system/files/communication-eu-africa-strategy-join-2020-4-final_en.pdf.

The environmental and climate protection clauses should be strengthened in the current negotiations on a post-Cotonou agreement.[219] The post-Cotonou agreement is, however, "only" a framework agreement. It will only extend legal effectiveness of the EPAs if – like the current Cotonou Agreement – its essential elements are incorporated into the EPAs. Only those provisions which are included in these essential elements will then have legally binding effect. Environmental and climate protection provisions should therefore be adopted as essential elements in a post-Cotonou agreement. The EU's negotiating mandate already offers wide scope here.[220] It expressly says:

> "The objective of the agreement is to promote sustainable and inclusive development based on implementation of Agenda 2030 for sustainable development and the Paris Climate Agreement as the overarching framework for the partnership."[221]

The agreement is to comprise a principles section and three regional partnerships. The strategic priorities in the principles section include ecological sustainability, climate change and the sustainable management of natural resources (Section IV).

Strengthening of the environmental and climate protection through cooperation and in the negotiations

As proposed under sub-section D.IV. on RTAs.

Identify the most important import and export streams relevant to the climate and address these in the agreement

As proposed under sub-section D.IV. on RTAs. These also include EU exports damaging to the environment and climate.

Identify the most important land eco-systems and economic drivers of land degradation at regional level and address these in the agreement

As proposed under sub-section D.IV. on RTAs.

For example in its Agenda 2063 the African Union expressly addresses the sustainable management of natural resources and the protection of biodiversity as one of its main environmental objectives.[222] Effective existing initiatives should be strengthened and explicitly embedded in the cooperation programme. For example some ACP countries have signed up to the Bonn Challenge and have already launched protection and sustainable management initiatives with AFR100 – the African Forest Landscape Restoration Initiative – or the African Resilient Landscape Initiative (ARLI). An important initiative in the Caribbean is the Caribbean Biological Corridor. There should be particular focus on financing mechanisms for protection and sustainable management (REDD+ etc.). The design of these should build on experience with various forest protection initiatives. Positive examples but smaller in scope are the implementation of agroforest belts as buffer zones around the Foret de

[219] See a timeline of the negotiations at https://www.consilium.europa.eu/de/policies/cotonou-agreement/timeline-new-cotonou-agreement/.

[220] Council of the European Union, Negotiating guidelines for a partnership agreement between the European Union and its Member States on the one hand and the countries in the African, Caribbean and Pacific Group of States on the other hand, 8094/18 ADD 1, 21.06.2018, downloadable at: https://data.consilium.europa.eu/doc/document/ST-8094-2018-ADD-1/de/pdf.

[221] Ibid. p. 3.

[222] In its Agenda 2063 the African Union expresses its „aspiration" as follows: „Environmentally sustainable climate and resilient economies and communities: putting in place measures to sustainably manage the continent's rich biodiversity, forests, land and waters and using mainly adaptive measures to address climate change risks.", Agenda 2063, downloadable at: https://au.int/agenda2063/goals.

Nyungwe cloud forest and Cyamudongo forest in Rwanda.[223] A larger initiative, though not at all a positive example, is the Congo Basin Forest Fund financed primarily by the UK and Norway and administered by the African Development Bank from 2008 to 2018.[224]

In this context, the "NaturAfrica" initiative planned by the EU as part of the Green Deal may be of particular significance. The aim is to establish a network of protected areas and create local jobs in green sectors.[225] Here (international) forms of nature conservation agreements could also be used. Likewise land-use and environmental planning instruments could play an important role.

Finally, it is important to combat illegal logging more effectively, to go beyond FLEGT and to implement the older proposals from the German draft of a primary forest protection act as part of the current initiatives for a (German) supply chain act.

Strengthening of the environmental and climate protection clauses in regional EPAs

Expansion of the environmental and climate protection clauses should cover the following in particular: commitment to the objectives of the climate protection regime (UNFCCC and Paris Agreement), obligation to implement the NDCs, corresponding commitment to the objectives of and obligation to implement contributions made to other environmental protection agreements (above all the UN Convention on Biological Diversity, UN Convention to Combat Desertification together with Protocols). The contracting parties should expressly commit to the SDGs, especially the "land degradation neutrality" goal of SDG 15.3.

In order to address the justifiable concerns of the developing countries with respect to high or unfairly distributed environmental and climate protection requirements, it is important to identify the most significant synergy effects between economic development, poverty alleviation, workers' rights, social standards and environmental protection in the local context in question and to work together in these areas. National environmental and climate protection policies in the ACP states are pioneering in this respect. In addition, there must be sufficient financial support and incentives.

Adopt core provisions from ACCTS in EPAs

As proposed under sub-section D.IV. on RTAs.

Strengthen sustainable forestry and protection of biodiversity

As proposed under sub-section D.IV. on RTAs.

Strengthen regional and international trade in sustainable products and services

EPAs should target strengthening the regional and international trade in sustainable goods and services and the establishment of corresponding business models. A range of measures on both the supply and the demand side can contribute to this.

With regard to the remaining options, the ACP countries should target the protection of infant sustainable industries or service sectors from European competition through tariffs or other trade

[223] The projects are financed by the IKI (German International Climate Initiative), see project descriptions at: https://www.international-climate-initiative.com/de/details/project/schutz-der-biodiversitaet-der-natuerlichen-ressourcen-und-des-klimas-durch-nachhaltige-land-und-forstwirtschaftliche-nutzung-am-cyamudongowald-ruanda-16_III_083-499/ and https://www.international-climate-initiative.com/en/news/article/forest_protection_is_climate_protection/.

[224] For a project evaluation see African Development Bank, Independent Evaluation of the Congo Basin Forest Fund, Summary Report, July 2018, downloadable at: https://idev.afdb.org/sites/default/files/documents/files/CBFF%20Evaluation.pdf.

[225] European Commission, The European Green Deal, COM(2019) 640 final, 11.12.2019, p. 25.

restrictions. Increasing the protection options for local markets in the ACP countries or an extension of transition periods should also be considered. It is also important here that the EPAs enable the ACP countries to protect themselves against exports of European products harmful to the environment such as frozen chickens or vehicles powered by fossil fuels. The imposition of tariffs on products damaging to the environment or climate would also be a source of government income for the ACP countries which has come under pressure as a result of the EPAs.

In addition, expansion of the certification system for sustainable farming, foodstuffs, construction materials, textiles and other products and product declarations (e.g. EPDs) are recommended. Through collaboration on development, support could be provided for meeting standards and (partially) covering certification costs. It is also important to strengthen the demand side for such products in regional markets and in the EU.

Expansion of the tertiary sector and for example ICT initiatives in the ACP counties and sectors with leapfrogging potential should be strengthened and protected by the EPAs.

Strengthen sustainable consumption and food security

The sustainability chapter should include an article promoting sustainable consumption, which should also cover healthy, environmentally friendly food. In addition, sustainable regional food security should be strengthened and not jeopardised by EU exports.

Align risk assessment in the SPS chapter with the Cartagena Protocol

As proposed under sub-section D.IV. on RTAs.

Align public procurement and investments with climate and environmental protection

As proposed under sub-section D.IV. on RTAs. Here it should be possible for the ACP countries to give priority in procurement to local suppliers.

Include an energy transition chapter

As proposed under sub-section D.IV. on RTAs. The ACP countries should include "local content" clauses in their policies to promote renewable energy. For example the expansion of renewable energy is also one of the goals of the African Union's Agenda 2063.

Include a chapter on resource efficiency with a focus on sustainability in the trade in raw materials

In the key area of the trade in raw materials, EPAs should promote the protection of human rights, the rights of indigenous peoples, workers' rights and environmental and climate protection and the prevention of land degradation. For example they could also support the use of modern technologies that protect health and the environment. In the case of fossil fuel raw materials, "keep it in the ground" initiatives and mechanisms should be strengthened. Corresponding provisions could be enshrined in forward-looking chapters on energy and raw materials, which already exist in – in conventional form – in many free trade agreements. This should ideally be done in agreement with national or regional strategies for raw materials, such as the African strategy for raw materials which is a flagship initiative of the African Union's Agenda 2063.[226]

Improve monitoring and assessment

As proposed under sub-section D.IV. on RTAs.

[226] Sse description of the flagship initiative at: https://au.int/agenda2063/flagship-projects.

Strengthen compliance monitoring and dispute settlement

As proposed under sub-section D.IV. on RTAs.

Expand Aid for Trade

An expansion of Aid for Trade measures should target the creation and expansion of sustainable production, services and consumption models. Aid for Trade measures should no longer apply to non-sustainable products or only if these are aimed at putting a sector on to a sustainable basis. The contracting parties could perhaps set up a new EPA fund and use this for example to promote the maintenance of protected areas and sustainable forestry.

G. Summary of the results

As part of the main WBGU (German Advisory Council on Global Change) 2020 expert report (Climate and Land Use), this legal opinion examined potential supports and barriers in international trade law in relation to climate protection and development with particular reference to sustainable land use. The opinion considered WTO law, Regional Trade Agreements and Economic Partnership Agreements between the European Union (EU) and ACP States and – in brief – International Investment Agreements.

Overall, it can be said that all four legal regimes still have considerable potential to strengthen environmental and climate protection and sustainable land use. As they all, with the exception of many investment protection agreements, essentially commit to the objective of sustainable development, there is already a legal and political remit to address the ecological and social dimension of sustainability through trade law instruments. A lack of political will and the need to further develop, the economically liberal system rationale in the direction of an "embedded sustainability" rationale, which views an intact environment and society as the basis for economic activity, are among the major obstacles to a reform of international trade law.

The Paris Agreement has more member states that the WTO, or to put it another way all WTO member states are member of the Paris Agreement. They are therefore aware that in the course of the next three decades it will be necessary, for example, largely to cease production of fossil fuels, fundamentally to transform energy generation and production and consumption models and to protect and reforest large areas of forest in order to meet the 1.5° or 2° target. International trade law must not be not an obstacle to, but a driver behind, meeting these targets. A brief overview of the proposals developed in this legal opinion for strengthening environmental and climate protection and in particular sustainable land use is given below.

I. World Trade Organisation and the GATT

Level	Measures	Amendment/Supplement
Process	• Closer collaboration between climate and trade regimes	Process rules, practice
Temporary amendments	• Climate waiver	Decision
	• Peace clause	Decision
Substantive law	• Recognise the objectives of the Paris Agreement, the CBD and other MEAs and actively support their implementation • Perhaps explicitly prioritise (temporarily) the objectives of the PA • Recognise the SDGs and actively support their implementation	Marrakesh Agreement and perhaps other key agreements
	• Reduce and abolish subsidies damaging to the environment and climate • Allow climate-friendly subsidies	SCM Agreement New plurilateral agreement (see ACCTS)
	• Facilitate trade in environmental goods and services	Resume EGA negotiations New plurilateral agreement (see ACCTS)

	• Promote the use of eco-labelling	TBT Agreement New plurilateral agreement (see ACCTS)
	• Ensure climate and eco-friendly procurement	Procurement agreement New plurilateral agreement (if applicable include in ACCTS)
	• Include climate protection as an exception in Art. XX of the GATT	GATT and other agreements
Monitoring	• Include a reporting obligation on subsidies damaging to the environment and climate and dismantling them, if applicable voluntary reporting initially	Trade Policy Review Mechanism (TPRM)
	• Audit of the effects of trade policy on climate and environmental protection	TPRM
Compliance monitoring and law enforcement	• Trigger independent of governments for compliance monitoring processes and dispute settlement in relation to environmental issues	DSU
	• Authoritative interpretation of Art. XX of the GATT	Decision
	• Ensure environmental and climate protection expertise in dispute settlement	DSU

Implementation prospects:

Short term	Medium term	Long term

Thestudy also addressed the question of whether the EU or individual countries could include a certification obligation for timber and agricultural imports or Border Carbon Adjustments as part of their climate protection policies without breaching WTO law. In both cases there are a number of obstacles to be overcome and legal uncertainty remains. A certification obligation for timber products related to climate protection and formulated to be non-discriminatory (in particular for the protection of rainforests) and also Border Carbon Adjustments could be compatible with WTO law. In both cases, it is likely that WTO member states which are sufficiently negatively affected by the provisions in economic terms would bring dispute settlement proceedings before the WTO.

Countries could also agree, as members of a climate club, to introduce certification obligations for timber imports and Border Carbon Adjustments in as much the same form as possible. This would not require any further formal coalition. Likewise the EU and other countries could agree in free trade agreement to use the corresponding instruments as part of their national climate protection policies.

The introduction of “uniform penalty tariffs” by members of a climate club prioritised by *Nordhaus* from an economic perspective breaches WTO law in a number of respects. As the instrument works economically precisely because of its simplicity, there is no scope for a different legal formulation which would not at the same time undermine the economic effectiveness. The route proposed by *Nordhaus* can therefore only be pursued if the WTO members (temporarily) incorporate a

corresponding “climate waiver” or a peace clause into WTO law and expressly permit or tolerate the penalty tariffs (of a climate club).

II. Regional Trade Agreements

The analysis of the environmental and climate protection provisions in selected EU RTAs showed that it has already been possible here to agree some rules on climate and environmental protection, in particular on sustainable forestry and the protection of biodiversity, which go (far) beyond the position in WTO law. Although it is important to continue actively to support multilateral processes under the WTO, the fundamentally more dynamic development of regional trade agreements should be used in order to ensure economic management that protects and is compatible with climate and environmental protection – in the sense of “building blocks” towards medium to long term multilateral development.

The following measures should be considered in negotiations currently underway (Australia, New Zealand, Indonesia, Philippines) and to be embarked on in the future or resumed (GCC, Malaysia, India, Thailand, USA) and in modernisation negotiations on agreements already concluded (Mexico, Morocco, Tunisia). They may also still feed into the formation of opinion in the context of the ratification of the EU free trade agreements with Mercosur and Vietnam.

Level	Measures	Amendment/Supplement
Process	• Closer collaboration between climate and trade regimes • More openly structured negotiating process • Strengthen negotiating mandate in terms of climate and environmental protection and sustainable land use • Publish ex-ante evaluations earlier and improve methodology • Identify the most important import and export flows relevant from a climate perspective and address these in the agreement • Identify the most important land eco-systems and economic drivers of land degradation at regional level and address these in the agreement	Process rules, practice, negotiating mandate
Substantive law	• Recognise the objectives of the Paris Agreement, the CBD and other MEAs and actively support their implementation • Recognise the SDGs and actively support their implementation • Strengthening of sustainable forestry and the protection of biodiversity with the objective of “land degradation neutrality”	Sustainability chapter

	• Strengthening of supply chain management • Strengthen regional and international trade in sustainable products • Strengthen sustainable consumption, in particular in the field of healthy, climate-friendly foods • Embed the precautionary principle unrestricted such that it applies to the whole RTA	
	• Explicitly prioritise (temporarily) the objectives of the PA • Agree certification obligations for timber imports and BCAs as climate protection policies • Conclude concrete agreements on reforestation or BECCS goals, protected areas and if applicable financing mechanisms or refer to corresponding objectives in other policy fields	Sustainability chapter
	• Adopt key provisions from ACCTS or agree to join ACCTS (trade in environmental goods and services, dismantling of fossil fuel subsidies, expansion of eco-labelling programmes)	Sustainability chapter, chapter on the trade in goods, TBT, subsidies and services
	• Further develop risk assessments such that ecological and socioeconomic aspects are taken into account	SPS chapter
	• Align public procurement and investments with environmental and climate protection	Chapters on procurement and investment
	• Rename chapters on energy and raw materials as energy transition and resource efficiency and adapt the content accordingly • Promote the expansion of renewable energies and corresponding business models • If applicable, permit “local content” clauses to a certain extent • Agree disclosure and dismantling of fossil fuel subsidies • Agree protection of human rights and rights of indigenous peoples • Strengthen “Keep it in the ground” initiatives and financing mechanisms, perhaps include	Chapters on energy and raw materials

	corresponding reciprocal obligations	
	• Insert climate protection as an exception into the clauses corresponding to Art. XX of the GATT • The exception clause should be applicable to the whole agreement	Generally at the beginning of the RTAs or in all chapters
Monitoring	• Include a reporting obligation on subsidies damaging to the environment and climate and dismantling them • Review environmental and climate protection effects using sustainability indicators • Actively involve DAGs	Committee on Trade and Sustainable Development
Compliance monitoring and law enforcement	• Introduce trigger independent of governments for compliance monitoring processes and dispute settlement in relation to environmental issues • Insert an option to use the WTO dispute settlement mechanism • Advocate the establishment of an international environmental court	Sustainability chapter/process regulations

Implementation prospects:

Short term	Medium term	Long term

III. Investment Protection Agreements

Investment protection agreements were only considered in brief in this legal opinion. Foreign direct investment can play an important role in sustainable development, for example in the creation and expansion of infrastructure, such as water, sewage and waste and energy management. In order to prevent negative effects, such as the depletion of resources and lowering of employment and environmental protection standards, and to encourage investment in climate protection and energy transition, the following provisions could be incorporated into new or modernised investment protection agreements:

Level	**Measures**	**Amendment/Supplement**
Substantive law	• Expressly specify sustainable development as an objective • Recognise the SDGs and actively support their implementation	Relevant chapter of the investment protection agreement

	• Recognise the objectives of the Paris Agreement, the CBD and other MEAs and actively support their implementation • Prevent the "regulatory chill"-effect in environmental and climate protection: delete "necessity" from the "right to regulate" clauses or include genuine exception clauses ("this agreement shall not apply…") • Insert "enhanced levels of protection" clauses • Include environmental and climate protection obligations on investors	
Monitoring	• Introduce obligation on investors to report the climate and environmental effects of their activities • Review environmental and climate protection effects of foreign investments using sustainability indicators • Involve civil society stakeholders	Through a new or existing committee
Compliance monitoring and law enforcement	• Abolish international dispute settlement between countries with well-functioning national/regional legal regimes • In all other cases: introduce an obligation to exhaust domestic legal avenues or abolish investors' complaint right, if necessary abolish complaint rights only for cases involving protection of the environment, climate and workers' and human rights	Sustainability chapter/process regulations

Implementation prospects:

Short term	Medium term	Long term

IV. EU Economic Partnership Agreements

Negotiations of the EPAs between the EU and ACP countries were bumpy, particularly in the case of the African countries, the effectiveness of the EPAs is disputed and their future unclear. However further development is sensible and necessary as they should actually make an effective contribution to meeting self-formulated objectives – poverty alleviation, sustainable development, regional integration and stronger participation by the ACP countries in international value chains.

The economic dimension of sustainability has predominated the actual formulation of the EPAs. In the context of cooperative collaboration and regional and national initiatives in the ACP countries, there are numerous approaches that put social and ecological aspects into sharper focus. In order to live up to the claim of sustainable development in actual fact, instruments of environmental and climate protection and sustainable land use can and should be integrated more forcefully into the EPAs. However it is important not to apply double standards and in particular to subject EU exports to strict sustainability requirements.

EPAs also have the potential to contribute to a sensible integration of the different rationale behind the three aspects of sustainability through a combination of market-based approaches and those based on cooperation. Ideally they can thus facilitate "leapfrog" developments in the ACP countries for example.

The current ESA-EPA deepening negotiations, completion of the stepping-stone (Cote d'Ivoire, Ghana) and interim EPAs (in addition to ESA also Central Africa/Cameroon), any later modernisation negotiations in the case of EPAs that are already fully negotiated and the current negotiation of a post-Cotonou agreement, the core elements of which could also be part of the EPA, all offer concrete opportunities for further development. The objectives on green alliances between the EU and its partner countries set out in the EU Green Deal require ambitious further development of the current status.

The proposed measures focus on the one hand largely on the approaches developed for regional trade agreements. On the other hand, they should strengthen collaboration on development, capacity building and financing elements, give the ACP countries sufficient scope to protect their domestic markets and halt EU exports to the ACP countries that are damaging to the environment and climate.

Level	Measures	Amendment/Supplement
Process	• Closer collaboration between climate and trade regimes • More openly structured negotiating process • Strengthen negotiating mandate in terms of climate and environmental protection and sustainable land use • Publish ex-ante evaluations earlier and improve methodology • Identify the most important import and export flows relevant from a climate perspective and address these in the agreement • Identify the most important land eco-systems and economic drivers of land degradation at regional level and address these in the agreement	Process rules, practice, negotiating mandate
Substantive law	• Strengthen climate and environmental protection clauses as part of the "essential elements"	Post-Cotonou agreement

	• Recognise the objectives of the Paris Agreement, the CBD and other MEAs and actively support their implementation • Recognise the SDGs and actively support their implementation • Strengthening of sustainable forestry and the protection of biodiversity with the objective of "land degradation neutrality" • Strengthen mechanisms to prevent illegal logging • Strengthen regional and international trade in sustainable products • Strengthen sustainable consumption, in particular in the field of healthy, climate-friendly foods (especially in the EU) • Strengthen food security (especially in the ACP states) and do not jeopardise this through EU exports • Embed the precautionary principle unrestricted such that it applies to the whole EPA	Sustainability chapter
	• Conclude concrete agreements on reforestation or BECCS goals, protected areas and financing mechanisms (REDD+, conservation management agreements) • Strengthening of supply chain management	Sustainability chapter
	• Adopt key provisions from ACCTS or agree to join ACCTS (trade in environmental goods and services, dismantling of fossil fuel subsidies, expansion of eco-labelling programmes)	Sustainability chapter, chapter on the trade in goods, TBT, subsidies and services
	• Further develop risk assessments such that ecological and socioeconomic aspects are taken into account	SPS chapter
	• Align public procurement and investments with environmental and climate protection • Permit "local content" clauses for ACP states	Chapters on procurement and investment
	• Rename chapters on energy and raw materials as energy transition and resource efficiency and adapt the content accordingly	Chapters on energy and raw materials

	• Promote the expansion of renewable energies and corresponding business models • Permit "local content" clauses for ACP states • Agree disclosure and dismantling of fossil fuel subsidies • Agree protection of human rights and rights of indigenous peoples • Strengthen "Keep it in the ground" initiatives and financing mechanisms, possibly include corresponding reciprocal obligations	
	• Design all content as much as possible in line and through exchange with ACP states' national climate and environmental policies and accompany these with collaboration on development and financing models	Chapters on cooperation and financing
	• Insert climate protection as an exception into the clauses corresponding to Art. XX of the GATT • The exception clause should be applicable to the whole agreement	Generally at the beginning of the EPAs or in all chapters
Monitoring	• Review environmental and climate protection effects using sustainability indicators • Actively involve stakeholders	Committee on Trade and Sustainable Development
Compliance monitoring and law enforcement	• Introduce trigger independent of governments for compliance monitoring processes and dispute settlement in relation to environmental issues • Insert an option to use the WTO dispute settlement mechanism • Advocate the establishment of an international environmental court	Sustainability chapter/process regulations
Financing	• Expand Aid for Trade • Perhaps set up a new EPA fund and use this to promote the maintenance of protected areas and sustainable forestry	Programme / fund

Implementation prospects:

Short term	Medium term	Long term

Interviews

In drafting this legal opinion I was able to discuss with Rainer Engels (GIZ, Head of the sector project Sustainable Economic Development), Dr Tobias Leeg (GIZ, sector project Trade and Investment for Sustainable Development), Dr Leonor von Limburg (GIZ, Team Leader Global Project "Sustainability aspects in EU Economic Partnership Agreements") and Dorothea Groth (Head of the Department for Development Cooperation, German Embassy Kigali, Rwanda) their expert view and development policy perspective on regional trade agreements and economic partnership agreements and their implementation locally. I am most grateful for the valuable assessments and information on current projects and additional literature.

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