

GT13:

Exploring the interface between unilateral and bilateral approaches to greening EU trade

Introduction

The European Union (EU) Green Deal represents a paradigm shift with respect to the EU's approach to trade policy.¹ While previously, the inclusion of non-trade policy objectives was mostly limited to human rights and labor issues, the Green Deal has established the importance of aligning trade and environmental objectives. In this regard,

¹ Pascal Lamy, Geneviève Pons, "After COP27: the geopolitics of the Green Deal".

the 2021 Trade Policy Review notes that "the more sustainable growth model as defined by the European Green Deal... [underscores that] the EU needs a new trade policy strategy – one that will support achieving its domestic and external policy objectives and promote greater sustainability...".²

² European Commission, 18 February 2021, "Trade Policy Review", p. 1.

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In making trade a lever for environmental action, the European Commission (Commission) has adopted a two-pronged approach.³ On the one hand, the Commission has taken the bilateral route, seeking to use Free Trade Agreements (FTAs) as a platform to advance its sustainability agenda. Key focus areas include enhancing the enforcement of the Parties' commitments in Trade and Sustainable Development (TSD) chapters in FTAs through sanctions and elevating the Paris Agreement to an essential element of its FTAs.⁴ On the other hand, the Commission seeks to strengthen the link between trade and sustainability through unilateral measures. For example, the Carbon Border Adjustment Mechanism (CBAM), the Regulation on Deforestation-free Products (Deforestation-free Products Regulation), the Directive on Corporate Sustainability Due Diligence (CSDD), and the Eco-design for Sustainable Products Regulation (ESPR) are all unilateral measures standards that once they have entered into force would condition access to the EU market on meeting minimum sustainability standards.

The EU's parallel unilateral and bilateral approaches to sustainable trade are considered complementary, as they play different roles in advancing the trade and sustainability agenda.⁵ Yet the interface between them is not always considered. For example, despite the significant implications of the EU Deforestation-free Products Regulation on trade between the EU and Mercosur, efforts to strengthen sustainability provisions in the EU-Mercosur FTA are focused on strengthening provisions within the FTA through an

additional EU-Mercosur Joint Instrument.⁶ With respect to deforestation, draft provisions revealed in a leak of the EU-Mercosur Joint Instrument focus on enhancing cooperation and implementation of sustainable supply chains, but do not provide for tailored capacity building or detailed enhanced cooperation commitments linked to the EU's Deforestation-free Products Regulation.⁷

This policy brief seeks to unpack key differences in the EU's unilateral and bilateral sustainability approaches, with a focus on the objective(s) pursued, the nature of the obligations, and avenues of enforcement. It starts with a description of the sustainability approach pursued as part of EU FTA TSD chapters and key unilateral sustainability measures, followed by a comparative overview of these two approaches, and an analysis of the implications of the differences observed with regards to ambition, legitimacy, negotiating power, and capacity building. Based on the analysis, this paper provides recommendations on how the bilateral sustainability approach, pursued through FTAs, can better complement the EU's unilateral approach – leveraging strengths and minimizing the weaknesses of each approach.

³ The Commission also pursues sustainable trade objectives through the multilateral route at the World Trade Organization (WTO), but this is beyond the scope of this paper.

⁴ Colette van der Ven, Pascal Lamy, Geneviève Pons, and Pierre Leturcq, 5 December 2022, "GT-12 - Make-or-break: Including multilateral environmental agreements as "essential elements" in EU free trade agreements". Available at: <https://www.europejacquesdelors.eu/publications/gt12--make-or-break-including-multilateral-environmental>.

⁵ European Commission, 22 June 2022, "The power of trade partnerships", p. 3.

⁶ Leaked EU-Mercosur Joint Instrument, February 2023. Available at: <https://friendsoftheearth.eu/wp-content/uploads/2023/03/LEAK-joint-instrument-EU-Mercosur.pdf>.

⁷ Statement of Climate and Trade Experts on the leaked draft EU-Mercosur Joint Instrument 24.03.23. Available at: https://drive.google.com/file/d/1iTgQSEROxYLB1s417SRkm_2WInAgj9KE/view.

Key findings and recommendations:

1. **Clarify differences between unilateral vs. bilateral approaches to sustainable trade:** This paper has identified key differences between the EU's unilateral and bilateral approaches to sustainable trade, including with regards to legitimacy, ambition, purpose, and enforceability. **In this regard, it recommends that the Commission is more explicit in explaining when it opts to pursue sustainable trade through the unilateral route, and when it considers the bilateral approach to be more suitable.** Doing so will provide stakeholders more clarity on available options, thereby enabling a more informed choice when adopting medium- and long-term sustainability strategies. Enhanced clarity with regards to the EU's unilateral and bilateral approaches would also pave the way for more deliberate, country and sector-specific approaches to capacity building in developing countries to help EU exporters comply with sustainability requirements in the EU.
2. **Improve alignment between unilateral and bilateral approaches to sustainable trade:** This paper has identified four ways in which FTAs can strengthen the EU's unilateral sustainability initiatives:
 - a. **Legitimacy deficit:** FTAs can seek to address the legitimacy deficit associated with the unilateral approach, by including provisions that seek to enhance partner engagement with respect to sector-specific sustainability issues addressed in unilateral sustainability regulations.
 - b. **Tailored commitments:** FTAs can complement the unilateral approach by including country-specific cooperation commitments that address limitations in unilateral sustainability measures.
 - c. **Targeted technical and financial support:** FTAs can be used as an instrument to develop country-specific technical and financial support focusing on specific sectors directly connected to unilateral instruments. FTAs should include provisions that would require an FTA partner to highlight specific areas where it would need assistance to meet the more stringent EU sustainability standards.
 - d. **Reduce non-tariff barriers:** FTAs can reduce the risk that unilateral sustainability approaches serve as non-tariff barriers through including stronger equivalence provisions relevant to specific sustainability regulations. FTAs, as part of Technical Barriers to Trade (TBT) chapters should include provisions that encourage the parties to participate in technical exchanges to support harmonization, equivalence and/or mutual recognition of technical regulations, standards, and conformity assessment procedures.

1.

Sustainability trends in EU FTAs

FTAs are a critical tool for aligning the EU's trade and environmental agendas. Through FTAs, the EU seeks to leverage its market power to increase environmental protection in partner countries. Specifically, through the inclusion of enhanced TSD chapters, the EU seeks broad sustainability commitments from its partners. This section provides an overview of key sustainability trends in EU FTAs. As a detailed FTA-specific analysis is beyond the scope of this paper, it provides a summary of provisions that are commonly included in TSD chapters.

Since the EU-Korea FTA (2009), all EU FTAs include TSD chapters, encompassing issues on the environment, labour rights, climate change, and responsible business conduct. Notwithstanding variations between TSD chapters in EU FTAs, common sustainability provisions establish the parties' Right to Regulate with regards to sustainable development objectives, strategies, and priorities; allow the parties to establish their own levels of domestic protection, including in the environment, and adopt or modify its relevant laws and policies in a manner consistent with Multilateral Environmental Agreements (MEAs) which the parties have ratified; require parties to uphold levels of environmental protection; and require that the parties do not fail to effectively enforce their environmental standards and regulations to gain a competitive advantage with regards to trade and investment.

Most TSD chapters in EU FTAs also include specific provisions on climate change, biodiversity, sustainable forest management, and the sustainable management of living marine resources and aquaculture products. Commitments in these areas typically include recognizing the importance of an environmental issue (e.g., climate change); reaffirming commitments in MEAs such as the Paris Agreement or the Convention on Biological Diversity; encouraging trade in sustainable products; promoting and encouraging sustainable use and management of natural resources;

exchanging information on best practices; adopting and implementing appropriate effective measures; and enhancing cooperation between the parties. Notably, while TSD chapters in FTAs include references to MEAs, they do not require the parties to ratify these agreements as a condition of signing the FTA.⁸ Likewise, except for egg welfare standards in the pending EU-Mercosur EU FTA,⁹ FTAs typically do not establish minimum substantive environmental standards for parties to adhere to.

Until recently, TSD provisions were not subject to general dispute settlement provisions in EU FTAs. Rather, sustainability issues had to be resolved through a TSD-specific dispute settlement system centered around consultations and, where necessary, the issuance of non-binding recommendations by an expert panel. In contrast to the general dispute settlement mechanism in EU FTAs, the TSD-specific dispute approach only allowed for the issuance of non-binding recommendations, without the opportunity to impose sanctions. This changed in June 2021, when the Commission launched a review of the effectiveness of TSD chapters in its FTAs, announcing its intent to make the Paris Agreement an essential element of EU FTAs, thereby allowing the parties to suspend the FTA in whole or in part, following a breach of the Paris Agreement.¹⁰

Another characteristic of TSD provisions in EU FTAs is its emphasis on cooperation and civil society participation. Most TSD chapters include provisions for civil society par-

⁸ This can be contrasted with the EU's Generalized System of Preferences Plus Scheme (GSP+), which renders trade preferences conditional on ratifying 32 conventions, including the Paris Agreement. An exception will be the Commission's intention to make the Paris Agreement an "essential element" of all future EU FTAs.

⁹ James Harrison, 7 January 2023, "Trade Agreements and Sustainability: Exploring the Potential of Global Value Chain (GVC) Obligations", (<https://academic.oup.com/jiel/advance-article/doi/10.1093/jiel/jgac057/6974703>).

¹⁰ For more information, please refer to Colette van der Ven, Pascal Lamy, Geneviève Pons, and Pierre Leturcq, 5 December 2022, "GT-12 - Make-or-break: Including multilateral environmental agreements as "essential elements" in EU free trade agreements".

ticipation in the monitoring and implementation of TSD provisions at the national and transnational levels, through the establishment of a Domestic Advisory Group (DAG). FTAs allow the general public, or parts of the civil society, to submit comments and views on the implementation of TSD provisions.¹¹ However, existing approaches have been found inadequate, with DAGs facing issues such as underrepresentation of environmental stakeholders and insufficient resources to investigate environmental and social concerns.¹²

To improve the effectiveness of civil society participation, the Commission has highlighted in its TSD review the importance of enhancing cooperation with trading partners, increasing monitoring and implementation of TSD commitments and reinforcing the role of civil society, and reflecting the importance of partner engagement. Indeed, the Commission has noted that “one of the lessons from the application of the 15-point action plan is that results are achieved through continuous engagement with the trade partner concerned”¹³ and that “an approach based on engagement and cooperation allows the EU and its partners to jointly take ownership of the contribution of trade agreements to promote a green and just transition and to achieve sustainable development objectives.”¹⁴ Furthermore, the Commission has expressed its intent to “use trade agreements to facilitate dialogue with partner countries and, as appropriate, assist them in meeting the

sustainability requirements of the EU trade-related autonomous instruments.”¹⁵

The Commission has further highlighted in the TSD review the importance of mainstreaming sustainability beyond TSD chapters. Specifically, it highlighted the importance of ensuring market access for environmental goods and services, including by addressing tariff and non-tariff barriers and access to investment into raw materials and goods necessary for the green transition.¹⁶ In this regard, the EU-New Zealand FTA includes provisions on the elimination of customs duties on environmental goods and promotes investment liberalization and trade of environmental services.¹⁷ FTAs thus serve as platforms to facilitate access to goods, services and investment necessary for a green transition. Finally, the TSD review highlights the importance of identifying country-specific sustainability priorities, including through pursuing targeted impact assessments on TSD.

¹¹ JB. Velut, D. Baeza-Breinbauer, M. De Bruijne, E. Garnizova, M. Jones, K. Kolben, L. Oules, V. Rouas, F. Tigere Pittet, T. Zamparutti, February 2022, “Comparative Analysis of Trade and Sustainable Development Provisions in Free Trade Agreements”, pp. 21–22, (<https://www.lse.ac.uk/business/consulting/assets/documents/TSD-Final-Report-Feb-2022.pdf>).

¹² E. Blot, February 2023, “Reflections on the new approach to the TSD Chapters for greener trade” (https://ieep.eu/wp-content/uploads/2023/02/Reflections-on-the-new-approach-to-the-TSD-Chapters-for-greener-trade_IEEP-2023-1.pdf).

¹³ European Commission, 22 June 2022, “The power of trade partnerships”, p. 8.

¹⁴ *Ibid.*, p. 5.

¹⁵ *Ibid.*, p. 5.

¹⁶ European Commission, 22 June 2022, “The power of trade partnerships”.

¹⁷ TSD Chapter, EU-New Zealand FTA.

2. Sustainability trends in unilateral trade-related measures

In parallel to strengthening sustainability provisions in its FTAs, the EU has embarked on an ambitious sustainable trade agenda through the unilateral route, i.e., regulations that are advanced through the EU legislative process that do not involve consent from trading partners. Similar to the bilateral route, the EU is pursuing the unilateral approach to advance the uptake of sustainability objectives in other partners.¹⁸ However, unlike sustainability provisions in FTAs which focus predominantly on cooperation and not lowering environmental protection, unilateral measures establish substantive sustainability standards. This reflects two key objectives: (i) ensuring that an ambitious EU climate agenda does not create a competitive disadvantage for EU producers or undermines the environmental effort all together by creating “leakage” to countries with less ambitious approaches; and (ii) ensuring that the EU’s approach to sustainability also addresses the EU’s material footprint, i.e., the environmental impact associated with material extraction and production outside the EU.

This section provides an overview of key unilateral sustainability regulations in the EU, each at different stages of the legislative process: the Carbon Border Adjustment Mechanism (CBAM); Deforestation-free Regulation; the Directive on Corporate Sustainability Due Diligence (CSDD); the Eco-design for Sustainable Products Regulation (ESPR); and “mirror clauses” for imported agri-food products.¹⁹ These unilateral sustainability (draft)

regulations can be organized into three categories: mandatory due diligence measures; equivalence standards; and a combination of both.

2.1. Mandatory due diligence measures

Mandatory due diligence measures seek to reduce the EU’s environmental externalities and seeks to raise global sustainability standards in line with EU values regarding labour, the environment, and human rights. Both the EU Deforestation-free Regulation and the CSDD fall in this category. An important feature of due diligence measures is that the onus of compliance falls on businesses and the national corporate regulator.

2.1.1 The EU Regulation on deforestation-free Products

In December 2022, the European Parliament and the Council reached a provisional political agreement on the Deforestation-free Products Regulation, which seeks to “curb deforestation and forest degradation that is provoked by EU consumption and production.”²⁰ In contrast to the CBAM, the Deforestation-free Products Regulation does not aim to establish a level playing field. Indeed, most of the targeted commodities are not produced in the EU, and those that are, are not linked to current-day deforestation practices given that EU’s agriculture-induced deforestation is mostly a *fait accompli*.²¹

of third countries and a proposal for a regulation of the European Parliament and of the Council on the protection of the Union and its Member States from economic coercion by third countries.

²⁰ Proposal for a Regulation of the European Parliament and of the Council on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) no. 995/2010, p. 1.

²¹ Krystyna Kurowska, Hubert Kryszk, Renata Marks-Bielska, Monika Mika, Przemysław Leń, June 2020, “Conversion of agricultural and forest land to other purposes in the context of land protection: Evidence from Polish experience”; Tim Searchinger, Oliver James, Patrice Dumas, March 2022, “Europe’s Land Future? Opportunities to use Europe’s land to fight climate change and improve biodiversity— and why proposed policies could undermine both”; Tobias Kuemmerle, Christian Levers, Karlheinz Erb, Stephan Estel, Martin R. Jepsen, Daniel Müller, Christoph Plutzer, Julia Stürck, Pieter J Verkerk, Peter H Verburg

¹⁸ European Commission, 11 December 2019. “The Green Deal”.

¹⁹ Other unilateral measures that are being discussed at the EU but are not covered in this paper include a proposal for a regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union’s internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets

The Deforestation-free Products Regulation covers six commodities linked to high levels of deforestation: cocoa, beef, palm oil, wood, soybeans, and coffee. The rules are also expected to apply to derived products, such as chocolate, furniture, printed paper, and selected palm oil derivatives (for instance, palm oil used in personal care products).²² When the new rules enter into force, all relevant operators placing covered products on the EU market must follow strict due diligence procedures. In particular, operators and traders registered in the EU will have to establish that the products are deforestation-free, i.e., produced on land that was not subject to deforestation after 31 December 2020, compliant with all relevant laws in force in the country of production, and meet a series of new risk management requirements. To do so, they will be required to collect geographic coordinates of the land where the commodities placed on the market were produced. The obligations on companies depend on the product's country or region of origin and the associated deforestation risk, as identified by a benchmarking system.²³

The Deforestation-free Products Regulation emphasizes the importance of technical assistance. In particular, the Commission has pledged one billion EUR to help partners reduce deforestation and forest degradation, by strengthening forest governance, develop legislation, and foster capabilities. It will also develop Forest Partnerships, to tackle deforestation.²⁴ Partnerships and cooperation mechanisms will focus on conservation, restoration, and sustainable use of forests.

and Anette Reenberg, 23 June 2016, "Hotspots of land use change in Europe".

²² European Council, 6 December 2022, "Council and Parliament strike provisional deal to cut down deforestation worldwide", (<https://www.consilium.europa.eu/en/press/press-releases/2022/12/06/council-and-parliament-strike-provisional-deal-to-cut-down-deforestation-worldwide/>).

²³ European Commission, 17 November 2021, "Questions and Answers on new rules for deforestation-free products", (https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_5919).

²⁴ *Ibid.*

2.1.2 The Directive on Corporate Sustainability Due Diligence

In February 2022, the European Commission launched a proposal for a the CSDD, in an attempt to harmonize, and strengthen enforcement of, corporate social responsibility rules adopted in Member States. Considerations about creating a level playing field matter, but not between imported and domestically produced products, as in the CBAM, but rather between different EU Member States which are at different stages of introducing mandatory CSDD requirements.

Once adopted, the CSDD will mandate companies with more than 500 employees and more than EUR 150 million in net turnover to monitor adverse impacts that may arise throughout their supply chains, from violations of treaties on human rights, labor, and the environment. In contrast to the Deforestation-free Products Regulation which focuses on specific products, the CSDD adopts a horizontal approach, addressing human rights and environmental impacts that apply to a range of EU companies and non-EU companies along the supply chain. In particular, companies that are covered will be required, inter alia, to integrate due diligence into policies; conduct due diligence to identify actual or potential adverse human rights and environmental impacts; prevent, mitigate, or end any adverse impacts; establish and maintain a complaints procedure; monitor the effectiveness of due diligence policy measures; and publicly communicate on due diligence. Adverse human rights and environmental impacts are identified based on a select number of international conventions which are annexed to the Directive.²⁵

Failure to comply with these due diligence requirements could result in fines for company directors, enforced by Member States. Moreover, the CSDD envisions introducing a civil liability regime to allow victims to sue companies for damages for harm that could have been avoided had proper due diligence been carried out.

²⁵ European Commission, 23 February 2022, "Just and sustainable economy: Commission lays down rules for companies to respect human rights and environment in global value chains", (https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145).

2.2. Equivalence standards

Equivalence standards seek to create a level playing field and reduce environmental leakage. This category covers measures that render market access conditional upon meeting standards that are equivalent to EU, including the CBAM and the various initiatives set out with regards to agri-food mirror clauses. Equivalence measures require enforcement at the EU border through customs and other controls.

2.2.1 The Carbon Border Adjustment Mechanism

The CBAM, which is expected to be introduced on 1 October 2023, aims to prevent carbon leakage, i.e., the offset of EU carbon reduction efforts by the relocation of companies to non-EU countries with less ambitious carbon policies; or through increased imports of carbon-intensive products. In the words of EU climate chief Frans Timmermans, the CBAM is a critical tool “to ensure that what we do in the EU does not push up emissions abroad but rather becomes an incentive to replicate our ambition.”²⁶

Goods that are produced in the EU are subject to the Emission Trading Scheme (ETS), a cap-and-trade system that caps the total amount of overall emissions, lowers that cap over time, and sells the right to emit carbon at an increasing price.²⁷ The CBAM seeks to create a level playing field between domestic and imported products, by requiring importers into the EU of covered products²⁸ to buy carbon emission certificates to cover the price between the

carbon price that is paid in the country of production, and the price of carbon allowances in the EU ETS. Companies in countries with a domestic carbon pricing regime equivalent to the EUs are not required to buy carbon certificates. Failing to comply with the CBAM, either by not surrendering CBAM certificates corresponding to emissions embedded in goods or by submitting false information to the relevant authorities, will result in the payment of a penalty. Rules to prevent circumvention are also envisioned. While it has been suggested that the EU seeks to use CBAM revenue to provide financial support to LDCs, a clear mechanism to mobilize these funds to increase the EU’s contribution to international climate finance has yet to be developed.

2.2.2 Mirror clauses on agri-food

As set out in the Farm to Fork Strategy, trade policy will play an important role in promoting the greening of agricultural production. One approach that has received increasing attention with regards to sustainable agriculture are “mirror clauses”, i.e., unilateral measures that require imported agri-food products to comply with environmental production standards that are equivalent to the standards EU farmers must comply with. Indeed, the Farm to Fork strategy highlights that it will obtain ambitious commitments from third countries in key areas such as animal welfare, the use of pesticides, and the fight against antimicrobial resistance.²⁹

Similar to the CBAM, through the introduction of mirror clauses for agri-food products, the Commission seeks to create a level playing field between EU farmers and farmers in third countries that are importing to the EU. Moreover, it seeks to reduce environmental leakage, i.e., when the environmental impact of agri-food consumption in the EU would result in further externalisation.³⁰ The section highlights several mirror clauses initiatives that have been developed, or that are currently being discussed.

²⁶ Linda A. Thomson, 30 January 2023, “The Brussels Effect 2.0: Is the EU Trying to Export its Rules Globally?”, (https://www.law.com/international-edition/2023/01/30/the-brussels-effect-2-0-is-the-eu-trying-to-export-its-rules-globally/?cmp_share&slreturn=20230101042820).

²⁷ European Commission, “EU Emissions Trading System (EU ETS)”, (https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets_en#a-cap-and-trade-system).

²⁸ The CBAM will initially apply to the following products: cement, iron and steel, aluminium, fertilizers, electricity, and hydrogen. In addition, certain precursors and a limited number of downstream products, such as screws, bolts and similar articles of iron and steel, will also be covered.

²⁹ Alan Matthews, May 2022, “Implications of the European Green Deal for agri-food trade with developing countries”, p. 6.

³⁰ TULIP Consulting, Institute for European Environmental Policy (IEEP), 7 January 2022, “Designing Environmental Regulation of Agricultural Imports: Options and Considerations for the UK”.

Antimicrobials: The Veterinary Medicinal Products Regulation, which entered into force in January 2022, prohibits (i) the use of antimicrobials for promoting growth or yield in livestock farming, and (ii) the use of antimicrobials critical for human medicine from any use in animal husbandry. The Regulation specifically highlights that these two prohibitions shall also apply to operators in third countries. The Regulation also envisions sanctions for non-compliance. The delegated act required to operationalize this Regulation is, however, yet to be published.³¹

Pesticides: As per EU Regulation, feed or food products cannot contain pesticide residue that exceeds the Maximum Residue Limits (MRLs) set by the Commission and the Council. However, if pesticides are not approved in the EU for reasons other than public health (e.g., the environment), operators can apply for an import tolerance, i.e., authorization to exceed the MRL. Momentum is building to ensure that importers cannot easily exceed MRL levels through requesting import tolerances when pesticide are not approved in the EU for environmental reasons. Indeed, in the Farm to Fork Strategy, the Commission indicated its willingness to consider environmental risks when assessing requests for import tolerances for pesticide residues in imported food.³² An EU draft Regulation proposes that, in examining whether import tolerances shall be granted for neonicotinoids – which are not-approved for outdoor usage in the EU due to their harmful impact on pollinators – the importer must demonstrate that the use of the active substances is safe for pollinators.³³

Animal welfare: The Commission is in the process of revising its animal welfare legislation, which covers standards at the farm level, during transport, and slaughter. In July 2021,

the Commission published an inception impact assessment on its proposed revision of animal welfare legislation, proposing two options to address differences between domestic and imported products: (i) requiring that similar animal welfare standards are applied to animals within the EU and imported animals and animal products; and (ii) introducing a labelling system that contains information on whether or not products have been raised in accordance with the EU's animal welfare standards.³⁴ An earlier example of a mirror clause for animal welfare concerns EU Directive 1099/2009, which requires that meat imported to the EU comes from animal slaughtered under conditions which offer guarantees of humane treatment at least equivalent to those required in the EU.³⁵

2.3. Mixed due diligence and product sustainability standards

The third category of EU unilateral sustainability measures contains elements of both due diligence requirements and sustainable product standards. The Commission's draft proposal for the Eco-design for Sustainable Products Regulation (ESPR), which was submitted on March 30, 2022, falls in this category. As noted in the draft proposal, the ESPR aims to "reduce the negative life cycle environmental impacts of products and improve the functioning of the internal market".³⁶ It contains three different sets of requirements: (i) eco-design requirements, which specify both performance requirements and information requirements; (ii) the requirement to establish a digital passport; and (iii) transparency requirements pertaining to the destruction of unsold goods. The ESPR has a due diligence component as it requires that production processes will meet minimum resource efficiency standards and places

³¹ Alan Matthews, May 2022, "Implications of the European Green Deal for agri-food trade with developing countries", p. 16.

³² Alan Matthews, May 2022, "Implications of the European Green Deal for agri-food trade with developing countries", p. 46.

³³ Commission Regulation amending Annexes II and V to Regulation (EC) no. 396/2005 of the European Parliament and of the Council as regards maximum residue levels for clothianidin and thiamethoxam in or on certain products.

³⁴ European Commission, 2021, "Inception Impact Assessment. Revision of the EU legislation on animal welfare", (https://ec.europa.eu/info/law/better-regulation/have-your-say/%20initiatives/12950-Animal-welfare-revision-of-EU-legislation_en).

³⁵ European Council Regulation No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing.

³⁶ Proposal for a Regulation of the European Parliament and of the Council establishing a framework for setting ecodesign requirements for sustainable products and repealing Directive 2009/125/EC, p. 1.

the onus of compliance on the EU importer. It goes beyond due diligence, however, as the ESPR also establishes minimum eco-design standards in accordance with which products must be designed. In contrast to the CBAM and mirror clauses, these are not standards that set out process and production methods (PPMs) but are focused on product characteristics, with requirements that range from minimum recycled content in a product to ensuring that the product is easy to recycle and repair.

The ESPR contains obligations on product manufacturers, importers, and distributors. For example, it requires that the importer only place products on the market if they are covered by a delegated act that complies with the eco-design requirement set out in the regulation. It further requires that importers ensure that appropriate conformity assessment procedures are carried out, that products are accompanied by the required information, and that a product passport is made available. The ESPR draft regulation further notes that importers shall comply with national authorities in case of non-compliance, but it does not specify what remedial action can be taken against the importer, or how often inspections will be carried out.

3.

Comparing and contrasting EU unilateral and bilateral approaches to trade and sustainability

This section analyses differences and similarities between the EU's unilateral and bilateral sustainability approaches described above, with a focus on (i) the environmental objective(s) pursued; (ii) the nature of the obligations (the targeted party, substantive sustainability standards, and territorial reach); and (iii) avenues of enforcement (legal enforcement and data verifications).

3.1 The objective(s) pursued

Looking at it from a bird's eye view, sustainability provisions in unilateral and bilateral approaches share a common objective, i.e., leveraging the EU's market power to raise global sustainability standards. Bilaterally, the EU is doing so by requiring that all FTAs include TSD chapters and relevant environmental provisions – for example, a reaffirmation of the parties' commitment to implementing MEAs they have ratified; committing to cooperate on various environmental challenges; and establishing that the parties have policy space to adopt measures that reflect their preferred environmental protection. Unilaterally, the EU seeks to raise global sustainability standards by making market access conditional upon compliance with due diligence requirements and minimum environmental standards.

There are also differences in the objectives pursued through unilateral and bilateral routes. While unilateral sustainability measures examined in this policy paper seek to address the environmental footprint outside the EU linked to EU consumption or production, environmental provisions in TSD chapters focus exclusively on sustainability with regards to trading partners' national territories. Moreover, a key objective of unilateral measures is to create a level playing field between EU-based and non-EU based production. While sustainability provisions in TSD

chapters aim to prevent a race to the bottom by requiring the parties not to lower their respective levels of environmental protection, these provisions do not go as far as seeking to establish a level playing field.

Conversely, the EU is using FTAs a platform to facilitate a green transition by reducing tariffs and non-tariff barriers on goods and services critical to advancing the green transition. This is not an objective advanced by unilateral sustainability measures.

3.2 The nature of the obligations

This section compares the nature of the obligations in unilateral and bilateral approaches to sustainability, with a focus on environmental challenges addressed, the target of the obligations, their substantive nature, and their territorial reach.

3.2.1 Types of environmental challenges

When focusing on the type of environmental challenges targeted, TSD chapters and unilateral measures can be considered complementary. For example, TSD chapters refer to the parties' recognition of various environmental objectives, such as sustainable forest management, conserving and sustainably using biological diversity, taking action to combat climate change, conserving and sustainably managing marine biological resources, fostering the transition to a circular economy, and responsible management of supply chains through responsible business conduct. Unilateral sustainability instruments address similar environmental issues, but tend to be more specific and direct in their focus: the Deforestation-free Products Regulation seeks to advance sustainable forest management and reduce deforestation; mirror clauses in areas such as pesticides or neonicotinoids seek to advance biological diversity conservation; the CBAM aims to reduce climate change through monetizing greenhouse gas emissions, including in imported products; the CSDD requires sustainable supply chain management, and the ESPR aims to accelerate a circular economy transition.

3.2.2 Substantive sustainability standards

Beyond these broad similarities, an important difference between unilateral and bilateral approaches concerns

the creation of new substantive environmental standards. Bilateral approaches set out sustainability-related obligations that are very general. For instance, they focus on cooperation; information exchange; the promotion of trade in sustainably produced goods; effective implementation of MEAs that the parties have ratified or upholding its relevant laws and policies to encourage high levels of environmental protection; and the aspiration to improve these levels.³⁷ They do not, however, establish minimum substantive environmental standards the parties must adhere to as a condition for market access.³⁸ By contrast, many of the unilateral sustainability regulations proposed by the Commission establish minimum sustainability standards – most of them set out process and production methods (PPMs), while some also establish product standards. Companies that seek to enter the EU market must demonstrate compliance with these standards.

3.2.3 The target of the obligation

Important differences can be identified with regards to the target of sustainability obligations in unilateral and bilateral approaches. Governments are responsible for implementing the commitments made in FTAs TSD chapters – even if these commitments are businesses-centric, such as corporate social responsibility. By contrast, the onus of implementation in unilateral sustainability measures falls on businesses, i.e., manufacturers, EU importers, operators – not governments. Indeed, the measures' unilateral nature restricts – both practically and legally – the extent to which it can impose obligations on third country governments. This will be further elaborated upon below.

³⁷ See, e.g., EU-New Zealand FTA.

³⁸ There are two exceptions: the Paris Agreement in the EU-New Zealand FTA and the EU-UK TCA, given its status as essential element of the agreement, and the EU-Mercosur pending FTA, which includes a provision that specifies that for Mercosur egg producers to benefit from duty-free access to the EU market, they would have to certify they respect laying hen welfare rules equivalent to the EU rules, as set out in the European Council Directive 1999/74/EC of 19 July 1999 laying down minimum standards for the protection of laying hens.

3.2.4 Territorial reach

Unilateral and bilateral approaches also differ with regards to their territorial reach. Environmental obligations set out in TSD chapters in EU FTAs focus on the parties' national territories. For example, the CBD and the Paris Agreement set out environmental obligations relevant to a country's territory. Therefore, FTA provisions that require parties to recognize the importance of implementing the obligations set out in the CBD, or the Paris Agreement are limited to a parties' territories). Similarly, FTA provisions that encourage parties to take action with regards to deforestation, the circular economy, sustainable marine ecosystems, or climate change focus on the parties' efforts within their own territory.

By contrast, many of the unilateral sustainability measures have a so-called "territorial extension", as the application of the measure is triggered by a territorial connection (i.e., entering the EU market) but conduct or circumstances abroad are considered in applying the measure.³⁹ For example, the Deforestation-free Products Regulation requires that key agricultural commodities imported into the EU are produced without generating deforestation along the supply chain. This means that, in establishing whether a product complies with the Deforestation-free Products Regulation, conduct and circumstances abroad (i.e., the product's production process) is considered. Similarly, adopting mirror clauses would require production changes in third countries in order to access the EU market, whereas the ESPR would implicate the manufacturing process outside the EU.

There are two main ways in which the territorial extension of a unilateral measure manifests. The first one includes situations where the EU importer must consider conduct or circumstances taking place outside the EU in so far as these

pertain to a specific company. For example, this is the case in the CSDD, the Deforestation-free Products Regulation, the ESPR and possibly mirror clauses – depending on their design. The second one concerns situations where laws and regulations adopted in a third country must be considered in the application of a unilateral measure. For example, the CBAM exempts countries that have in place laws and regulations equivalent to the EU ETS, whereas the Deforestation-free Products Regulation assesses third countries' deforestation regulations in determining a country's deforestation risk, and therefore the level of scrutiny that must be applied. The difference between these two has implications for enforcement, as further discussed below.

3.3 Enforcement

3.3.1 Legal enforcement

Enforcement of sustainability obligations differ between unilateral and bilateral approaches. In an FTA, Parties can seek to enforce TSD commitments through state-to-state dispute settlement mechanism, which comprises of consultations and, if necessary, a review by a panel of experts that issues recommendations. In the TSD review, the Commission has announced its intent to strengthen implementation of dispute settlement in the TSD context by requiring that the party in violation informs the expert panel on how to implement the panel report.⁴⁰ In addition, for violations of core TSD commitments, such as the International Labour Organization (ILO) principles and the Paris Agreement, sanctions may now be applied when a party is found to materially defeat the object and purpose of the agreement. Moreover, the Commission has announced its intention to elevate the Paris Agreement to an essential element clause in future FTAs, which would allow the parties to unilaterally suspend the FTA if it considers the other party to be in breach of the Paris Agreement.⁴¹

³⁹ This can be contrasted to the definition of extraterritoriality, which is "the application of a measure triggered by something other than a territorial connection with the regulating state." Joanne Scott, 19 December 2013, "Extraterritoriality and Territorial Extension in EU Law", (<https://ael.eui.eu/wp-content/uploads/sites/28/2016/04/EU-03-Scott-Scott-1.pdf>).

⁴⁰ European Commission, 22 June 2022, "The power of trade partnerships".

⁴¹ Despite the Commission's resolve to strengthen the enforcement of TSD commitments, enforceability will likely remain a challenge. This is because, as set out above, many of the TSD obligations fail to identify a specific course of action for state parties to undertake to comply with the sustainability provisions

Because of their non-reciprocal design, EU unilateral measures, by contrast, are enforced not through dispute settlement but through EU Member States – either through market surveillance or company level investigations. For example, enforcement under both the Deforestation-free Products Regulation and CSDD is done on the basis of company level checks, requiring EU Member States to devise a risk-based plan that includes performing checks on operations, with a focus on the examination of their due diligence system and risk assessment procedures, and records that demonstrates compliance. The Deforestation-free Products Regulation sets out minimum levels of inspection - which are higher when high-risk countries are involved - dissuasive sanctions, mandatory exchange of information between customs and other authorities, and an obligation for enforcing authorities to react to substantiated concerns raised by civil society.⁴²

To ensure compliance with the CSDD, Member States must appoint supervisory authorities tasked with carrying out company investigations. Moreover, the CSDD establishes civil liability for companies if they fail to prevent or adequately mitigate potential adverse human rights impacts and adverse environmental impacts, and, due to their failure, adverse impact occurred and led to damage.⁴³ Enforcement of the CBAM is likewise done by the competent authorities of the Member States, with a focus

in the TSD. Language typically focuses on commitments to “cooperate”, “exchange information”, “take efforts towards” etc. Legally, demonstrating that a party has “failed to cooperate” will be very difficult to prove, as this obligation does not correspond to clearly defined set of “dos” and “don’ts” – unlike, for instance, rules that prohibit certain types of subsidies or discrimination between like products. Moreover, establishing a violation of key elements of the Paris Agreement will likewise be challenging, since countries establish their own set of obligations through NDCs.

⁴² European Commission, 17 November 2021, “Questions and Answers on new rules for deforestation-free products”, (https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_5919).

⁴³ Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Article 20.

on the authorised declarants. Member States may apply administrative or criminal sanctions in the case of failure to comply with the CBAM.⁴⁴

Enforcement under the ESPR is product-focused, as opposed to company or declarant-focused. It requires Member States to carry out market surveillance checks. In the case of non-compliance, for instance, because the EU declaration of conformity has not been drawn up, the EU Member States would be required to take appropriate measures to restrict or prohibit the product from being made available on the market.⁴⁵ Verification of compliance is envisioned by the Digital Product Passport, which will make product information digitally available to market surveillance authorities and possibly customs authorities. Mirror clauses would be enforced by customs authorities. For example, for a manufacturing site that produces veterinary medicinal products, it must have a “certificate of good manufacturing practice.”⁴⁶ Similarly, existing animal welfare requirements that imported meat must come from animals slaughtered under conditions of humane treatment requires that meat from third countries be supplemented by an attestation certifying that requirements at least equivalent to EU slaughtering regulations are met.⁴⁷ If environmental implications of neonicotinoids were to be taken into account for imported products requesting import tolerances, this would also be done by EU customs agencies.

Enforcement of unilateral measures is much stronger compared to enforcement of sustainability provisions in TSD

⁴⁴ Proposal for a Regulation of the European Parliament and of the Council establishing a carbon border adjustment mechanism, Article 26.

⁴⁵ Proposal for a Regulation of the European Parliament and of the Council establishing a framework for setting ecodesign requirements for sustainable products and repealing Directive 2009/125/EC, Article 65.

⁴⁶ Regulation 2019/6 of the European Parliament and of the Council of 11 December 2018 on veterinary medicinal products and repealing Directive 2001/82/EC, Article 94.1.

⁴⁷ European Council Regulation No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing, Article 12.

chapters of FTAs. This is because enforcement is not contingent upon a government's decision to bring a dispute, but rather forms an integral part of the sustainability measure itself. Moreover, some unilateral measures, i.e., the CBAM, the CSDD and the Deforestation-free Products Regulation, envision the application of civil liability, administrative or criminal sanctions in case of non-compliance, further incentivizing compliance. While TSD chapters in future EU FTAs will allow for the application of sanctions for failure to comply with the Paris Agreement, this will likely not significantly impact governments' choices. Indeed, it will be challenging to delineate what would constitute a violation of the Paris Agreement, and the sanctions imposed might not serve as a sufficient deterrent for a country to induce a behavioural change.

3.3.2 Verifying data and information in third countries

When unilateral measures have an extraterritorial extension, a prerequisite for effective enforcement is the authorities' ability to verify relevant data and information in third countries. While the right to verify claims or inspect regulatory systems has, in specific areas, been build into existing bilateral and multilateral provisions, this is not the case in the unilateral context.

Verifying production data and information in third countries often requires inspection visits or audits to be carried out. Indeed, the possibility of carrying out inspection visits and/or audits is acknowledged in some of the unilateral measures analysed in this policy brief. The Deforestation-free Products Regulation refers to the possibility of carrying out spot checks such as field audits, "including where appropriate in third countries through cooperation with the administrative authorities of third countries."⁴⁸ Similarly, the Veterinary Medicinal Products Regulation provides, in the context of inspecting manufacturing sites to provide certifies of good manufacturing practices, that

it "may require a manufacturer established in a third country to undergo an inspection [], without prejudice to any arrangements which may have been concluded between the Union and a third country."⁴⁹

The EU authorities cannot unilaterally establish the right to carry out inspection visits and audits in third countries; rather, they must receive permission from the partner country to do so. This is reflected by caveats in the references to inspection visits in unilateral measures: the Deforestation-free Products Regulation's reference to the possibility of inspection visits notes that these will be carried out "through cooperation with the administrative authorities" while the Veterinary Medicine Product Regulation highlights that visits will take place "without prejudice to any arrangements which may have been concluded between the Union and a third party". This significantly hampers the EU's enforcement abilities in unilateral sustainability measures that have a territorial extension. For example, if the authorities in a country designated as "high-risk" in a country benchmarking program does not allow for EU officials to carry out spot checks, such as field audits, there is little EU authorities can do, as the right to audit a third country cannot be unilaterally imposed.

Bilateral approaches, by virtue of their negotiated nature, do not have this limitation. This is well illustrated in the context of Sanitary and Phytosanitary (SPS) Agreement chapters, which aim to ensure that traded food products are safe for consumption. For example, the EU-Vietnam FTA notes that the importing Party has the right to carry out verifications to obtain or maintain confidence in the effective implementation of the SPS Chapter. It specifies that verification visits may be conducted in accordance with relevant international standards and guidelines; and that the importing party can request information to the exporting party with respect to its control system and the results of control carried out. Likewise, the SPS chapter in EU-New Zealand FTA provides that "each Party has the right to

⁴⁸ Proposal for a Regulation of the European Parliament and of the Council on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) no. 995/2010, Article 15.1(h).

⁴⁹ Regulation 2019/6 of the European Parliament and of the Council of 11 December 2018 on veterinary medicinal products and repealing Directive 2001/82/EC, Article 94.4.

carry out a systems-based audit of all, or part of, the control system of the competent authority of the other party...⁵⁰ It specifies that such checks must be conducted in line with the WTO SPS Committee and international standards, guidelines, and recommendations.

Thus, while bilateral and multilateral trade agreements can facilitate establishing the right to inspect and/or carry out audits in third countries, unilateral measures with territorial extension are limited with regards to data verification. In specific instances, technology can address some of these limitations. For example, the Copernicus Land Monitoring, which monitors the condition of land surface vegetation daily and provides information relevant to tree coverage and also degradation, can verify deforestation and land degradation claims under the Deforestation-free Products Regulation.⁵¹ Likewise, the ESPR requires that products are accompanied by Digital Product Passports, an interoperable, machine-readable, and searchable set of data specific to a product that allows companies to digitally record and share information about the product's origin and production. A Digital Product Passport enhances transparency in the sharing of product information and enables relevant stakeholders to determine whether the product complies with the requirements of the ESPR, without having to conduct inspection visits. Other approaches that could be explored involve linking unilateral sustainability measures to existing voluntary sustainability standards, e.g., Max Havelaar or UTZ, which rely on third parties to audit and verify compliance with the standard.

3.4 Summary

Differences between unilateral and bilateral sustainability approaches with regards to objective, substantive obligations, and enforcement, makes each approach better suited to advance certain aspects of the EU's sustainable trade agenda, and more limited with regards to others. The unilateral route appears to be better suited to creating a level playing field between EU domestic and imported

products, and to establish substantive sustainability standards. This is because the unilateral route (i) does not require partner consent, and thus, enables the establishment of substantive sustainable product standards; and (ii) addresses sustainability more systematically, given that it focuses on value chains rather than specific trading partners or sectors. The unilateral approach is also favourable with regards to addressing the EU's material consumption footprint, given that sustainability provisions in FTAs address sustainability obligations within a partner's territory – not with regards to the external footprint. By contrast, unilateral sustainability measures are designed to have an extraterritorial extension.

While the unilateral approach enables the pursuit of a more ambitious climate agenda, an important advantage of the bilateral approach rests in its legitimacy. From an input legitimacy perspective, which focuses on the participatory nature of the decision-making process,⁵² FTAs are considered more legitimate. Similarly, with respect to output legitimacy, i.e., benefits of the outcomes produced for the wider public,⁵³ the EU's unilateral measures suffer from a legitimacy deficit. This is reflected in the retaliatory measures that countries are in the process of taking in response to EU unilateral measures. For instance, Malaysia is considering stopping exports of palm oil to the EU after the Deforestation-free Products Regulation was agreed,⁵⁴ while India has expressed concerns regarding the compatibility of the CBAM with WTO rules.⁵⁵ Sustainability provisions in TSD chapters are considered more legitimate, because they were the result of a negotiated agreement by FTA partners.

⁵² Silvia Karlsson-Vinkhuyzen, 'Legitimacy', in Christopher Ansell, Jacob Torfing (eds.), June 2016, "Handbook on Theories of Governance".

⁵³ *Ibid.*

⁵⁴ "Malaysia says it could stop palm oil exports to EU after new curbs", 13 January 2023 (<https://www.euractiv.com/section/energy-environment/news/malaysia-says-it-could-stop-palm-oil-exports-to-eu-after-new-curbs/>).

⁵⁵ World Trade Organization, 30 March 2021, "Report of the meeting of the WTO Committee on Trade and Environment", WT/CTE/M/71, para. 1.121.

⁵⁰ EU-New Zealand FTA, Article 6.11.

⁵¹ "OBSERVER: CLMS monitors the heartbeat of our vegetation", 5 May 2022, (<https://www.copernicus.eu/en/news/news/observer-clms-monitors-heartbeat-our-vegetation>).

At the same time, the unilateral approach is not well-suited for bespoke, country-specific approaches to sustainable development – one of the key elements the TSD reform highlighted that must be improved.

4.

Strengthening the link between unilateral and bilateral approaches to sustainable trade

To ensure a comprehensive approach to trade and sustainability, it would be important to better align unilateral and bilateral approaches, reflecting their respective strengths and weaknesses. In this regard, FTAs can play an important role in enhancing the legitimacy deficit associated with the EU's unilateral approach, ensuring a more individualized approach vis-à-vis the partner country, and by creating country-specific capacity building mechanisms which will be critical in preparing businesses in developing countries to comply with EU sustainability requirements.

First, FTAs can address the legitimacy deficit associated with the unilateral approach. Conceptually, when parties to an FTA recognize the role of trade in addressing climate change or biodiversity preservation, it could increase acceptance of unilateral approaches that seek to advance sustainability objectives through trade. Concretely, FTAs could be used to complement unilateral approaches by including provisions that seek to enhance partner engagement with respect to sector-specific sustainability issues reflected in the EU's unilateral sustainability regulations. This has also been highlighted in the TSD review, with the Commission announcing its intent to facilitate dialogue with partner countries and, as appropriate, assist them in meeting the sustainability requirements of the EU trade-related autonomous instruments.⁵⁶ In particular, in the

context of FTAs, this could include detailed, enhanced, sector-specific cooperation commitments directly relevant to one or more EU sustainability instruments most important to trade between the FTA partner countries.

Second, FTAs can complement the EU's unilateral sustainability measures by creating a more country-specific approach that can address limitations in unilateral measures. For example, the EU Deforestation-free Products Regulation focuses on whether a product comes from a location which was subject to deforestation over the past three years, without taking into account a country's ongoing and future efforts related to forest management. In this regard, FTAs could include provisions that highlight specific actions that the partner country can take regarding ongoing and future efforts relevant to halting commodity-driven deforestation, which must be considered by the EU in revisiting the level of deforestation "risk" under the benchmarking approach set out in the EU Deforestation-free Products Regulation.

Third, FTAs can serve as a critical instrument to develop country-specific and sector-specific technical and financial support. One way to do so could be by including sector-specific capacity building provisions to address priority sustainability issues in that sector. The Voluntary Partnership Agreements (VPAs) under the Forest Law Enforcement Governance and Trade (FLEGT) scheme are examples of such sector-specific sustainability initiative. While VPAs have major limitations, it could nevertheless serve as a model for technical assistance that is sector-specific – while altering the mechanism to address its limitations. In addition, FTAs could include provisions that would require an FTA partner to highlight specific areas where it would need

⁵⁶ European Commission, 22 June 2022, "The power of trade partnerships", p. 5.

assistance to ensure the export of deforestation-free products. For example, this could include capacity building for smallholder farmers in FTA partner countries, which need training with respect to complying with the EU's deforestation requirements, as well as assistance with regards to mapping of farms. Programs could also focus on supporting smallholder farmers to join producer associations that could provide traceability data.⁵⁷ These types of support will be critical to enhance capacity in developing countries to comply with the EU's unilateral sustainability approaches.

Fourth, FTAs can reduce the risk that unilateral sustainability approaches serve as non-tariff barriers through including stronger equivalence provisions relevant to specific sustainability regulations. Doing so would allow for the consideration of whether technical regulations and standards adopted in partner countries adequately fulfil the objectives of the EU's Deforestation-free Products Regulation. FTAs could also include provisions that encourage the parties to participate in technical exchanges to support improvement and greater alignment of technical regulations, standards, and conformity assessment procedures. These provisions could be included in the Technical Barriers to Trade (TBT) chapter of an FTA, including through sector-specific annexes. The Comprehensive and Pacific Trans-Pacific Partnership Agreement (CPTPP) includes sector-specific annexes for a variety of products that could serve as examples. By focusing on TBT chapters, this approach would also align with the focus of the TSD Review, which seeks to ensure sustainability considerations are not limited to the TSD chapter but reflected throughout the FTA.

5.

Conclusion

This policy brief has examined the similarities and differences between the EU's unilateral and bilateral approaches. While similarities exist with regards to the environmental issues addressed, it has identified differences with regards to the sustainability objectives pursued, the extraterritorial reach of the measure/regulation, the target of the obligation, the substantive sustainability standards pursued, enforcement, and the ability to verify data and information. Based on these differences, unilateral measures appear to be better suited to advance an ambitious sustainable trade agenda than bilateral approaches but suffer from a legitimacy deficit. Conversely, bilateral approaches pursued through FTAs appear more suitable to develop country-specific, and sector-specific approaches to cooperation, implementation and capacity building and do not suffer from the same legitimacy deficit associated with unilateral approaches.

For the EU to align its trade and sustainability agendas in accordance with the objectives set out in the EU Green Deal, it is critical to ensure that bilateral approaches pursued through FTAs complement the EU's unilateral agenda. This can be done, in part, by including provisions in TSD chapters in FTAs sector-specific and detailed cooperation provisions; including additional, sector-specific details relevant to addressing compliance with an EU sustainability measure; and by including sector-specific capacity building provisions. In addition, sector-specific equivalence provisions and/or annexes could be included in TBT chapters to reduce the risk of unilateral sustainability measures becoming non-tariff barriers.

An enhanced awareness of the strengths and weaknesses of the EU's unilateral and bilateral approaches should lead to a more deliberate choice of when to employ which instrument in advancing the EU's sustainable trade agenda. In this regard, the Commission must be more explicit in explaining when it opts to pursue sustainable trade objec-

⁵⁷ Hans Nicholas, (January 2023). "For Indonesian smallholders, EU deforestation rule is a threat – and an opportunity". Available at: <https://news.mongabay.com/2023/01/for-indonesian-smallholders-eu-deforestation-rule-is-a-threat-and-an-opportunity/>.

tives through the unilateral route, and when it considers the bilateral approach to be more suitable. Doing so will provide stakeholders more clarity on available options, thereby enabling a more informed choice when adopting medium- and long-term sustainability strategies. In particular, enhanced clarity with regards to the EU's unilateral and bilateral approaches would pave the way for more deliberate, country and sector-specific approaches to capacity building in developing countries to help EU exporters comply with sustainability requirements in the EU.

Ultimately, while both the EU's unilateral and bilateral approaches play an important role in advancing a sustainable trade agenda, they are also limited. To address this, it is critical to establish multilateral fora where partners can discuss policy options, share best practices, and harmonize different approaches to sustainable trade. In this regard, the EU's unilateral and bilateral approaches to sustainable trade can be leveraged as a stimulus to further advance international cooperation on critical sustainability issues. The Inclusive Forum for Carbon Mitigation Approaches (IFCMA), launched at the Organization for Economic Cooperation and Development (OECD)⁵⁸ on 9 February

⁵⁸ OECD, Inclusive Forum on Carbon Mitigation Approaches, (<https://www.oecd.org/climate-change/inclusive-forum-on-carbon-mitigation-approaches/>).

2023 to improve the global impact of emissions reduction efforts, data sharing, and evidence-based mutual learning – echoes recommendations made in a previous publication by Europe Jacques Delors⁵⁹ – is an example of what such a multilateral platform could look like. Nevertheless, this initiative is also limited, given that it has been developed under the auspices of the OECD as opposed to the WTO, whose membership is less exclusive and more representative of developing countries.

⁵⁹ Pascal Lamy, Geneviève Pons & Pierre Leturcq, GT6 – Towards a European CBAM – Three 'Ds' to overcome the EU's first mover disadvantage, Europe Jacques Delors, Policy Paper, July 2021 (<https://www.europejacquesdelors.eu/publications/gt6-towards-a-european-carbon-border-adjustment-mechanism>)

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