

# PROMOTING SUSTAINABLE FOOD SYSTEMS THROUGH PREFERENTIAL TRADE AGREEMENTS: LIMITS OF THE EUROPEAN UNION'S SUSTAINABILITY CHAPTERS AND PROSPECTS FOR REFORM

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## ABSTRACT

*The development of sustainable food systems is a major challenge of our times. Sustainable food systems are strictly connected with the fight for food security and the achievement of the United Nations' Sustainable Development Goals. In this context, trade law can contribute to designing sustainable food systems. Given the stalemate at the World Trade Organization (WTO), this Article takes a regional approach by examining the preferential trade agreements (PTAs) stipulated by the European Union (EU) with third countries. The exclusive focus on the EU stems from the belief that it could take the lead in advancing sustainable food systems thanks to its high sustainability standards and its extensive experience in negotiating PTAs.*

*The Article first sets the stage by defining sustainable food systems and providing a theoretical framework against which the EU's internal and external sustainability obligations can be evaluated and their suitability to promote sustainable food systems assessed. Upon examining the sustainability chapters in the EU PTAs in light of the established theoretical framework, it becomes evident that these chapters fall short of effectively advancing sustainability in food systems due to their broadness, ambiguity, and lack of enforcement mechanisms. Accordingly, this Article contends that the EU should shift from promoting cooperation by means of sustainability chapters to adopting legally binding trade measures.*

*The Article presents the differentiation of agricultural and food product tariffs based on the environmental and social processes and production methods (PPMs) adopted in the exporting country as an alternative to the sustainability chapters. Tariff differentiation is a flexible tool that nudges compliance with higher sustainability standards by providing for lower corresponding tariffs. If properly designed, environmental and social PPMs can pass WTO scrutiny under the General Agreement on Tariffs and Trade (GATT 1994), in light of both classic*

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and recent WTO case law. The Article finally explores how the EU should design and implement tariff differentiation based on PPMs in its future PTAs.

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I. INTRODUCTION

According to the 2021 “State of Food Security and Nutrition in the World” report of the U.N. Food and Agriculture Organization (FAO), food insecurity further deteriorated in comparison to the previous year.<sup>1</sup> Almost 3.1 billion people around the world do not have access to healthy diets.<sup>2</sup> The fight for food security is directly connected to the fight for

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1. FAO ET AL., THE STATE OF FOOD SECURITY AND NUTRITION IN THE WORLD 2022: REPURPOSING FOOD AND AGRICULTURAL POLICIES TO MAKE HEALTHY DIETS MORE AFFORDABLE I (2022).

2. *Id.*

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sustainability: in the long term, the economically, environmentally, and socially unsustainable production of food will undermine food security. From a broader perspective, sustainability in food production is crucial for achieving the U.N.'s Sustainable Development Goals (SDGs).<sup>3</sup> Specifically, SDG 2 aims to create a world free of hunger and malnutrition by 2030.<sup>4</sup> Thus, with less than seven years remaining to achieve this goal, decisive action is needed now more than ever.

In this context, the contribution that trade law can provide in designing sustainable food systems is especially relevant, as trade law is one of the most developed and technical areas of international law, and it cuts across several legal disciplines. At the multilateral level, the WTO's 12th Ministerial Conference focused extensively on food security and achieved an unprecedented Agreement on Fisheries Subsidies.<sup>5</sup> Despite this sectorial achievement, little has been done to establish a comprehensive framework that broadly promotes sustainability in food systems. The Ministerial Declaration on the Emergency Response to

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3. SDGs 2 ("End hunger, achieve food security and improved nutrition and promote sustainable agriculture") and 12 ("Ensure sustainable consumption and production patterns") cannot be achieved without sustainable food systems. More generally, sustainability in food systems broadly helps to achieve critical progress on all 17 SDGs. For the complete SDGs list, see G.A. Res. 70/1, at 15, 22, *Transforming our World: The 2030 Agenda for Sustainable Development* (Oct. 21, 2015). According to the 2019 UN Global Sustainable Development Report, authored by an independent group of scientists, under "business-as-usual" farming systems, "an estimated 637 million people will be undernourished [in 2050], and the environmental impacts of increased production would eliminate any chance of achieving the Goals of the 2030 Agenda." Consequently, "business-as-usual pathways and upscaling current practices are not options if the global food system is to sustainably and equitably meet the needs of the global population in the future." Independent Group of Scientists appointed by the U.N. Secretary-General, *Global Sustainable Development Report 2019: The Future is Now—Science for Achieving Sustainable Development*, xxv (2019).

4. SDGs target 2.1 is "[b]y 2030, end hunger and ensure access by all people, in particular the poor and people in vulnerable situations, including infants, to safe, nutritious and sufficient food all year round" and 2.2 is "[b]y 2030, end all forms of malnutrition, including achieving, by 2025, the internationally agreed targets on stunting and wasting in children under 5 years of age, and address the nutritional needs of adolescent girls, pregnant and lactating women and older persons." G.A. Res. 70/1, *supra* note 3, at 15.

5. See World Trade Organization, Ministerial Declaration of 17 June 2022, WTO Doc. WT/MIN(22)/33, WT/L/1144 (2022). The Agreement on Fisheries Subsidies "prohibits subsidies contributing to (1) [illegal, unreported, and unregulated] fishing, (2) already overfished stocks, and (3) fishing and related activities located outside a member or regional fisheries management organization's jurisdiction." It also "establishes a voluntary funding mechanism to provide technical assistance and capacity building to developing country members and a Committee on Fisheries Subsidies to implement the agreement." The commitments are subject to the WTO dispute settlement system. LIANA WONG, CONG. RSCH. SERV., IF11929, WORLD TRADE ORGANIZATION FISHERIES SUBSIDIES NEGOTIATIONS 2 (2022).

Food Insecurity only contains vague commitments to “[promote] sustainable agriculture and food systems” and “implement resilient agricultural practices,” but it does not specify what sustainable food systems mean, nor does it provide an action plan to work toward that goal.<sup>6</sup>WTO)

In light of the multilateral stalemate, this Article addresses the contribution that the EU could make to advance sustainable food systems through its PTAs, which are aimed at enhancing economic cooperation and reducing barriers to trade with third countries.<sup>7</sup> As a region in the world with high sustainability standards and one of the largest economies, the EU should lead the way in promoting sustainable food systems in third countries through its trade policy. The EU also has extensive experience in negotiating PTAs. That experience can be a test case for other countries that may wish to find inspiration for their own PTAs.

Based on these premises, the Article proceeds as follows. Part II sets the stage by defining the concept of sustainable food systems. This is necessary to build a theoretical framework against which the sustainability obligations of the EU can be evaluated. Part II proceeds to analyze the EU’s internal and external sustainability obligations and commitments, as outlined in treaties and in secondary legislation, and in assessing their suitability to promote sustainable food systems. The internal obligations and commitments refer to initiatives that are implemented within the EU’s Member States (EU’s internal action). Particular attention is devoted to the internal Common Agricultural Policy (CAP). The external obligations and commitments pertain to the EU’s activities outside its borders, undertaken to advance its interests and values globally, including through its trade policy (EU’s

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6. World Trade Organization, Ministerial Declaration of 17 June 2022, WTO Doc. WT/MIN(22)/28, WT/L/1139 1 (2022). The SPS Declaration is, to some extent, more detailed. It provides that the SPS Committee should explore how the implementation of the SPS Agreement can “facilitate global food security and more sustainable food systems, including through sustainable growth and innovation in agricultural production and international trade, and through the use of international standards, guidelines, and recommendations developed by the Codex Alimentarius Commission, the World Organization for Animal Health and the International Plant Protection Convention as the basis of harmonized SPS measures to protect human, animal or plant life or health.” *Id.* ¶ 8.

7. The EU has concluded a variety of treaties aimed at enhancing economic cooperation with third countries and reducing barriers to international trade. These treaties can be categorized as free trade agreements, economic partnership agreements, and association agreements. In the present Note, the term preferential trade agreements (PTAs) will be adopted to encompass all these types of treaties.

external action). Particular attention is devoted to the external Common Commercial Policy (CCP).

Building from this analysis, Part III evaluates the sustainability commitments in the EU PTAs based on the argument that the EU should pursue sustainability objectives internally and externally with the same intensity. Part III provides a critical analysis of the sustainability chapters included in the new-generation PTAs concluded by the EU with both developed and developing countries; namely, the Trade and Sustainable Development (TSD) chapters and the Sustainable Food Systems (SFS) chapters (together, the “sustainability chapters”). The analysis shows that these chapters are inadequate to effectively promote sustainability in food systems due to their broadness, ambiguity, and lack of enforcement mechanisms. Moreover, sustainability concerns flow from all parts of PTAs and cannot be confined to those single chapters. Accordingly, the Article contends that the EU’s approach needs a substantial paradigm shift to adequately promote sustainability in food systems. The approach should shift from promoting cooperation by means of sustainability chapters to adopting legally binding trade measures.

Part IV presents the differentiation of agricultural and food product tariffs based on the environmental and social processes and production methods (PPMs) adopted in the exporting country as an alternative to the TSD and SFS chapters. Tariff differentiation is a promising tool for promoting sustainable food systems, rewarding compliance with high sustainability standards, and preventing negative economic, environmental, and social externalities. It is preferable to other trade measures due to its flexible approach. It promotes adherence to higher sustainability standards by offering reduced corresponding tariffs. This approach prevents the need for harsher trade measures like import bans or quota restrictions, while also avoiding less stringent measures that leave the final decision to consumers, such as requirements for labeling and packaging. To assess the possibility of introducing tariff differentiation in PTAs based on the quality of the PPMs, Part IV tests the WTO compliance of PPM-based trade measures in light of both already established and more recent WTO case law. The analysis reveals that, if properly designed, environmental and social PPMs can pass WTO scrutiny and comply with the provisions of the GATT 1994,<sup>8</sup> especially with the rules prohibiting discrimination between “like” products

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8. *See generally* General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 [hereinafter GATT 1994].

(Articles I, III, and XI) or, in case of their violation, with the general exceptions in Article XX. This part ends with some reflections on how the EU should design and implement tariff differentiation based on PPMs in its future PTAs.

Part V concludes by urging EU negotiators to bring the suggested new approach to the negotiating table. In an international context where, despite little progress, the WTO is increasingly supportive of trade measures that address environmental and social concerns, the EU should lead the way in the adoption of ambitious trade policies that effectively improve sustainability in food systems in third countries.

## II. SUSTAINABLE FOOD SYSTEMS AND THE SUSTAINABILITY OBLIGATIONS OF THE EU

To analyze the sustainability obligations and commitments of the EU and assess their suitability to promote sustainable food systems, it is first necessary to outline a theoretical framework against which those obligations can be evaluated. For this reason, the following part provides a theoretical definition of the notion of sustainable food systems before addressing the EU's sustainability obligations in the food sector.

### A. *Defining Sustainable Food Systems*

A comprehensive definition of sustainable food systems helps to identify how trade and food systems are interconnected and shape long-term objectives for the global trading system. Without such alignment between a comprehensive definition and long-term objectives, policies in different sectors will continue to clash. A widely accepted definition of sustainable food systems is necessary to coordinate policymakers at different levels and from different sectors to pursue a shared vision of the future of food systems and trade.<sup>9</sup> At the EU level, it also helps to evaluate the effectiveness of the EU's sustainability obligations and commitments, identify their weaknesses, and suggest proposals for improvement.

Although there is no settled and globally shared definition of what constitutes a sustainable food system, FAO provides the most authoritative definition from a global perspective. The FAO definition enunciates that a sustainable food system is one that “delivers food security

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9. The advantages of definition setting are evidenced by some precedents. For examples of established frameworks and criteria that have been widely adopted at the national level by the participating parties, see the Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 1522 U.N.T.S. 3; the Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 993 U.N.T.S. 243.

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and nutrition for all in such a way that the *economic, social and environmental* bases to generate food security and nutrition for future generations are not compromised.”<sup>10</sup> According to FAO, sustainable food systems shall (i) generate economic value-added for all stakeholders, wages for workers, taxes for states, profits for companies, and food supply improvements for consumers (economic sustainability); (ii) distribute in an equitable way the economic value added, with special consideration for vulnerable groups, and contribute to the advancement of socio-cultural outcomes, including health, nutrition, labor conditions, and animal welfare (social sustainability); and (iii) ensure that the environmental impact of food production activities is neutral or positive, taking into account biodiversity, water, soil, animal, and plant health (environmental sustainability).<sup>11</sup>

Through the definition of sustainable food systems provided by FAO, the following part analyzes the sustainability obligations of the EU regarding all three aspects of sustainability highlighted above. To understand the approach taken in the external action in Part II, the analysis will move from the EU’s approach to sustainability at the internal level. This is necessary to assess whether and to what extent the EU “exports” its model of sustainable food systems to third countries.

### B. *The Sustainability Obligations and Commitments of the EU*

The following parts analyze the sustainability obligations and commitments of the EU both in its internal and external action, as outlined in treaties and secondary legislation, with a focus on the agricultural sector. This analysis helps set the background to evaluate the sustainability commitments in the EU PTAs.

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10. Food & Agric. Org. of the U.N. (FAO), *Sustainable Food Systems: Concept and Framework*, at 1, FAO Doc. CA2079EN/1/10.18 (2018) (emphasis added).

11. *See id.* at 1, 4. A similar definition, focused on all the three dimensions of sustainability—economic, social, and environmental—is provided by the EU’s Scientific Advice Mechanism, which defines a sustainable food system as a system that “provides and promotes safe, nutritious and healthy food of low environmental impact for all current and future EU citizens in a manner that itself also protects and restores the natural environment and its ecosystem services, is robust and resilient, economically dynamic, just and fair, and socially acceptable and inclusive. It does so without compromising the availability of nutritious and healthy food for people living outside the EU, nor impairing their natural environment.” SCIENCE ADVICE FOR POLICY BY EUROPEAN ACADEMIES, *A SUSTAINABLE FOOD SYSTEM FOR THE EUROPEAN UNION* 68 (Apr. 9, 2020), <https://www.sapea.info/wp-content/uploads/sustainable-food-system-report.pdf>.

1. The Treaty Framework

Under the EU treaties, agriculture is largely conceived of as an economic phenomenon.<sup>12</sup> Article 38 of the Treaty on the Functioning of the European Union (TFEU) extends the rules of the internal market to agriculture, and Article 40 of the TFEU provides for the establishment of a common organization of agricultural markets for the attainment of the objectives of the EU's CAP, laid down in Article 39 of the TFEU.<sup>13</sup>

In defining the objectives of the CAP, Article 39 of the TFEU complements the economic focus with a social one.<sup>14</sup> The objectives can be grouped into three categories: (i) political-economic objectives (i.e., contributing to the economic growth of the Member States);<sup>15</sup> (ii) socio-political objectives (i.e., ensuring a fair standard of living for the rural population);<sup>16</sup> and (iii) socio-economic objectives (i.e., ensuring supplies for consumers).<sup>17</sup> The different aims pursued by Article 39 TFEU can easily conflict.<sup>18</sup> When conflict arises, EU institutions are allowed to grant temporary priority to some of the objectives to address

12. LUCHINO FERRARIS, *THE PURSUIT OF SUSTAINABLE AGRICULTURE IN EU FREE TRADE AGREEMENTS* 39 (2020).

13. Consolidated Version of the Treaty on the Functioning of the European Union arts. 38-40, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

14. *Id.* art. 39(1):

The objectives of the common agricultural policy shall be: (a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour; (b) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture; (c) to stabilise markets; (d) to assure the availability of supplies; (e) to ensure that supplies reach consumers at reasonable prices.

*Id.* art. 39(2):

In working out the common agricultural policy and the special methods for its application, account shall be taken of: (a) the particular nature of agricultural activity, which results from the social structure of agriculture and from structural and natural disparities between the various agricultural regions; (b) the need to effect the appropriate adjustments by degrees; (c) the fact that in the Member States agriculture constitutes a sector closely linked with the economy as a whole.

15. *See id.* arts. 39(1)(a), 39(1)(c), 39(2)(c).

16. *See id.* arts. 39(1)(a)–(b), 39(2)(a)–(b).

17. *See id.* arts. 39(1)(d)–(e). *See also* FERRARIS, *supra* note 12, at 40.

18. For example, the system of milk quota, used by EU governments to bring rising milk production under control, stabilized the market but at the same time limited agricultural production. For more details on the potential conflict among the objectives of Article 39 of the TFEU, see PAUL CRAIG, *EU ADMINISTRATIVE LAW* 80 (2d ed. 2012).



more pressing economic and social needs.<sup>19</sup> However, none of the objectives can be completely forgone.<sup>20</sup>

A major shortcoming of Article 39 of the TFEU is that it lacks a reference to environmental protection among the CAP's objectives. This may be understandable in light of the historical context in which the first version of the treaty was drafted, but it is less evident why environmental protection was not introduced through later amendments.<sup>21</sup>

Article 39 of the TFEU also lacks any reference to sustainability in agricultural systems. However, CAP's objectives are, at least in part, consistent with the economic and social dimensions of sustainability outlined by FAO. The emphasis placed on the need to ensure economic growth across all EU Member States, a fair standard of living for the rural population, and supplies for consumers signals implied attention to the economic and social dimensions of sustainable development. What is missing, however, is the environmental dimension.

The following part analyzes the 2023-2027 CAP to assess its suitability to promote the three dimensions of sustainability in food systems outlined by FAO and the impact, if any, of the lack of an environmental dimension in the EU treaties on the ambition of the CAP.

## 2. The EU's Common Agricultural Policy 2023-2027

On December 2, 2021, the European Parliament and the Council of the EU adopted the new 2023-2027 CAP.<sup>22</sup> Despite the lack of reference

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19. See Case C-5/73, *Balkan-Import-Export GmbH v. Hauptzollamt Berlin-Packhof*, 1973 E.C.R. I-091, para. 24; Case C-311/90, *Josef Hierl v. Hauptzollamt Regensburg*, 1992 E.C.R. I-2061, para. 13; Joined Cases C-133/93, 300/93 and 362/93, *Antonio Crispoltoni v. Fattoria Autonoma Tabacchi and Giuseppe Natale and Antonio Pontillo v. Donatab Srl.*, 1994 E.C.R. I-486, para. 32.

20. See André Bouquet et al., *Article 39 TFEU*, in *THE EU TREATIES AND THE CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY* 555–57 (Manuel Kellerbauer et al. eds., 2019). See also Joined Cases 197 to 200, 243, 245 and 247/80, *Ludwigshafener Walzmühle Erling KG v. Comm'n*, 1981 E.C.R. 3211, para. 41; Joined Cases C-133/93, 300/93 and 362/93.

21. Since CAP's introduction in 1962, its objectives have never been amended.

22. The CAP for the period 2023–2027 was formally adopted in December 2021 by way of three regulations that have been applied since 1 January 2023. See Commission Regulation 2021/2115 of Dec. 2, 2021, *Establishing Rules on Support for Strategic Plans to be Drawn Up by Member States under the Common Agricultural Policy (CAP Strategic Plans) and Financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) and Repealing Regulations (EU) No 1305/2013 and (EU) No 1307/2013*, 2021 O.J. (L 435) 1; Commission Regulation 2021/2116 of Dec. 2, 2021, *On the Financing, Management and Monitoring of the Common Agricultural Policy and Repealing Regulation (EU) No 1306/2013*, 2021 O.J. (L 435) 1, 187; Commission Regulation 2021/2117 of Dec. 2, 2021, *Amending Regulations (EU) No 1308/2013 Establishing a Common Organisation of the Markets in Agricultural Products*, (EU) No 1151/2012 on *Quality Schemes for Agricultural Products and Foodstuffs*, (EU) No 251/2014 on

to environmental protection in Article 39 of the TFEU, the 2023-2027 CAP encompasses several objectives to foster the environmental dimension of sustainability in agriculture.<sup>23</sup> These include contributing to climate change mitigation and adaptation, as well as sustainable energy; fostering sustainable development and the efficient management of natural resources such as water, soil, and air; contributing to the protection of biodiversity, enhancing ecosystem services, and preserving habitats and landscapes.<sup>24</sup>

The new CAP also devotes attention to social and economic objectives.<sup>25</sup> The former include supporting viable farm income and resilience across the EU to enhance food security; attracting young farmers and facilitating business development in rural areas; promoting employment, growth, social inclusion, and local development in rural areas, including bio-economy and sustainable forestry; improving the response of EU agriculture to societal demands on food and health, including safe, nutritious and sustainable food as well as animal welfare.<sup>26</sup> The latter include enhancing market orientation and increasing competitiveness, as well as improving the position of farmers in the value chain.<sup>27</sup> A cross-cutting objective is to foster knowledge, innovation, and digitalization in agriculture.<sup>28</sup>

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the Definition, Description, Presentation, Labelling and the Protection of Geographical Indications of Aromatised Wine Products and (EU) No 228/2013 Laying Down Specific Measures for Agriculture in the Outermost Regions of the Union, 2021 O.J. (L 435) 1, 262.

23. See Commission Regulation 2021/2115, *supra* note 22, art. 6.

24. For a detailed analysis of the objectives, see the following policy briefs of the European Commission: KOEN MONDELAERS ET AL., EUROPEAN COMMISSION, CAP SPECIFIC OBJECTIVE: ENSURING VIABLE FARM INCOME (2018); BARTHÉLEMY LANOS ET AL., EUROPEAN COMMISSION, CAP SPECIFIC OBJECTIVE: INCREASING COMPETITIVENESS (2019); MARIUSZ LEGOWSKI ET AL., EUROPEAN COMMISSION, CAP SPECIFIC OBJECTIVE: FARMER POSITION IN VALUE CHAINS (2019); BENJAMIN VAN DOORSLAER ET AL., EUROPEAN COMMISSION, CAP SPECIFIC OBJECTIVE: AGRICULTURE AND CLIMATE MITIGATION (2019); PANOS PANAGOS ET AL., EUROPEAN COMMISSION, CAP SPECIFIC OBJECTIVE: EFFICIENT SOIL MANAGEMENT (2018); MIKE MACKENZIE, EUROPEAN COMMISSION, CAP SPECIFIC OBJECTIVE: BIODIVERSITY AND FARMED LANDSCAPES (2019); CHIARA DELLAPASQUA ET AL., EUROPEAN COMMISSION, CAP SPECIFIC OBJECTIVE: STRUCTURAL CHANGE AND GENERATIONAL RENEWAL (2019); BARTHÉLEMY LANOS ET AL., EUROPEAN COMMISSION, CAP SPECIFIC OBJECTIVE: JOBS AND GROWTH IN RURAL AREAS (2019); AURORA IERUGAN, EUROPEAN COMMISSION, CAP SPECIFIC OBJECTIVE: HEALTH, FOOD & ANTIMICROBIAL RESISTANCE (2018); SYLVIE BAREL ET AL., EUROPEAN COMMISSION, CAP CROSS-CUTTING OBJECTIVES: DRIVING SIMPLIFICATION (2019). The briefs are available at [https://agriculture.ec.europa.eu/common-agricultural-policy/cap-overview/new-cap-2023-27/key-policy-objectives-new-cap\\_en#documents](https://agriculture.ec.europa.eu/common-agricultural-policy/cap-overview/new-cap-2023-27/key-policy-objectives-new-cap_en#documents) (last visited Oct. 9, 2022).

25. See Commission Regulation 2021/2115, *supra* note 22, art. 6.

26. See *id.* arts. 6(1)(a), 6(1)(g)–(i).

27. See *id.* arts. 6(1)(b)–(c).

28. See EUROPEAN COMMISSION, EU AGRICULTURE IN NUMBERS: PERFORMANCE ON THE NINE SPECIFIC OBJECTIVES OF THE CAP 32 (2020), [https://agriculture.ec.europa.eu/cap-my-country/performance-agricultural-policy/agriculture-country/cap-specific-objectives-country\\_en](https://agriculture.ec.europa.eu/cap-my-country/performance-agricultural-policy/agriculture-country/cap-specific-objectives-country_en).

Notably, the 2023-2027 CAP shifts its strategy from compliance with eligibility rules to targets to achieve.<sup>29</sup> As a result, the EU sets targets, while the Member States choose the suitable means to achieve them.<sup>30</sup> Only time will tell whether the measures implemented at the national level will successfully promote sustainability in agricultural systems across the EU. The fact remains, however, that EU institutions are committed to pursuing the three dimensions of sustainability simultaneously in the internal market. In developing the 2023-2027 CAP, the EU has gone beyond the objectives in Article 39 of the TFEU by making the environmental dimension of sustainability actionable through setting targets.

The following part assesses whether the EU's external action—specifically the CCP—should be informed by the principles inspiring the sustainability policies adopted at the internal level. If it should, the following part will further assess to *what extent* those principles should shape the CCP and whether, in its trade relations with third countries, the EU should pursue sustainability in food systems to the same extent as in its internal market.

### 3. The EU's Common Commercial Policy

Pursuant to Articles 3(5) and 21(2) of the Treaty on European Union (TEU),<sup>31</sup> in its external action, the EU shall, among other obligations, “promote its values,” contribute to “free and fair trade,” “foster. . . sustainable *economic, social and environmental* development,”<sup>32</sup> and “help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources.”<sup>33</sup> These principles also apply to the CCP, as acknowledged by Article 207(1) of the TFEU.<sup>34</sup> Treaty language is clear in requiring that the external action—and thus the CCP—be informed

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29. Roberto Cagliero et al., *The Evaluation Framework in the New CAP 2023–2027: A Reflection in the Light of Lessons Learned from Rural Development*, 13 SUSTAINABILITY 1, 2 (2021).

30. The documents summarizing the national action plans of each EU country are available at *CAP Strategic Plans*, EUR. COMM'N, [https://agriculture.ec.europa.eu/cap-my-country/cap-strategic-plans/approved-csp-0\\_en](https://agriculture.ec.europa.eu/cap-my-country/cap-strategic-plans/approved-csp-0_en) (last visited Oct. 9, 2022).

31. Consolidated Version of the Treaty on European Union, June 7, 2016, 2016 O.J. (C 202) 13 [hereinafter TEU].

32. *Id.* arts. 3(5), 21(2)(d) (emphasis added).

33. *Id.* art. 21(2)(f).

34. The aims of the CPP are set out in Article 206, according to which “[b]y establishing a customs union . . . the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers.” TFEU art. 206. Article 207(1) describes the measures to be adopted within the framework of the CCP:

by the same principles inspiring the internal action.<sup>35</sup> That is crucial to ensure consistency between internal and external policies.<sup>36</sup> This also applies to the trade policies adopted by the EU to promote sustainable food systems in its relations with third countries.<sup>37</sup>

The question that remains is to *what extent* the principles shaping the EU's internal action vis-à-vis sustainable development should also shape the EU's external action and the CCP. In other words, in its trade relations with third countries, should the EU pursue sustainability in food systems to the same extent as it does internally? This question does not find clear answers in EU treaties nor in secondary legislation. Limited guidance is provided by Opinion 2/15 of the Court of Justice of the European Union (CJEU), the only case in which the CJEU has touched upon the thoroughness of the sustainability obligations in EU PTAs with respect to the 2018 EU-Singapore Free Trade Agreement (FTA).<sup>38</sup> The CJEU acknowledged that “the objective of sustainable development [...] forms an integral part of the common commercial policy,”<sup>39</sup> but it also noted that the exclusive aim of sustainable development commitments is to discourage “trade by reducing the levels of social and environmental protection [...] below

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The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

*Id.* art. 207(1). The CCP, which is under exclusive EU competence, covers both unilateral measures and conventional measures negotiated with third countries, such as trade agreements. See PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES AND MATERIALS* 319–20 (5th ed. 2011).

35. Piet Eeckhout, *A Normative Basis for EU External Relations? Protecting Internal Values Beyond the Single Market*, in *SERVICES OF GENERAL INTEREST BEYOND THE SINGLE MARKET: EXTERNAL AND INTERNATIONAL LAW DIMENSIONS* 219, 224–25 (Markus Krajewski ed., 2015).

36. Ian Manners, *The Normative Ethics of the European Union*, 84 *INT'L AFFS.* 45, 56 (2008).

37. See FERRARIS, *supra* note 12, at 21–22.

38. In Opinion 2/15, the European Commission, the European Parliament, the Council of the European Union, and the Member States litigated whether the EU was exclusively competent to conclude the EU-Singapore FTA alone, or whether the EU ought to involve the Member States as independent parties to a “mixed” agreement. See David Kleimann, *Reading Opinion 2/15: Standards of Analysis, the Court's Discretion, and the Legal View of the Advocate General I* (Eur. Univ. Inst. Robert Schuman Ctr. for Advanced Stud., Working Paper No. 23, 2017). The CJEU found that, with the exception of some provisions, the EU-Singapore FTA fell within the exclusive competence of the EU. See Case C-2/15, Opinion pursuant to Article 218(11) TFEU, 2017 ECLI:EU:C:2017:376 (May 16, 2017).

39. Case C-2/15, ¶¶ 147, 163.

the *standards laid down by international commitments*.”<sup>40</sup> This means that the CCP need not be shaped by the sustainability standards adopted at the internal level, as the accepted baseline consists of international commitments, which often set looser standards.<sup>41</sup>

The conclusion reached by the CJEU is questionable on three main legal grounds. First, Article 21(3) of the TEU requires consistency between internal and external policies.<sup>42</sup> Second, Article 7 of the TFEU similarly requires the EU to ensure consistency between its policies.<sup>43</sup> Third, the Charter of Fundamental Rights of the European Union (CFREU) includes a legal obligation to ensure that all EU policies pursue “[a] *high level of environmental protection*. .. in accordance with the principle of sustainable development,” which shall be promoted across all EU policies.<sup>44</sup> Accepting international commitments as the baseline for the sustainability obligations embodied in EU PTAs prevents consistency between internal policies—based on higher standards—and external policies—based on looser standards—and also undermines the goal of pursuing a *high level of environmental protection*.<sup>45</sup> For these reasons, from the perspective of EU law, the EU should

40. *Id.* ¶ 158 (emphasis added). For a comprehensive analysis of the Opinion, see Fernando Castillo de la Torre, *The Opinion on the Free Trade Agreement with Singapore and Its Aftermath: Some Personal Reflections*, in *THE CONCLUSION AND IMPLEMENTATION OF EU FREE TRADE AGREEMENTS: CONSTITUTIONAL CHALLENGES* 23 (Isabelle Bosse-Platière & Cécile Rapoport eds., 2019).

41. Consider, for example, that there is no multilateral agreement on the “greening” of agriculture, which is basically unregulated under WTO law. It follows that the EU, through its CAP, undoubtedly sets higher standards if compared to international commitments. Similarly, with regard to multilateral environmental agreements, negotiations on climate change are one example that shows that the EU is generally the leader on the international scene.

42. See Stefan Oeter, *Article 21 [The Principles and Objectives of the Union’s External Action]*, in *THE TREATY ON EUROPEAN UNION (TEU): A COMMENTARY* 833, 867–71 (Hermann-Josef Blanke & Stelio Mangiameli eds., 2013).

43. Article 7 of the TFEU states that “[t]he Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.” TFEU art. 7.

44. Charter of Fundamental Rights of the European Union, pmbl., art. 37, Oct. 26, 2012, 2012 O.J. (C 326) 391 [hereinafter CFREU] (emphasis added).

45. Other objections can be raised to question the outcome reached by the CJEU. First, non-EU goods benefit from the internal market after clearing customs. As a result, foreign producers not required to comply with EU sustainability standards might enjoy a comparative advantage thanks to the lack of investments in sustainable practices for food production. Second, it is unclear why entering products must comply with certain food safety requirements but not with EU sustainability standards. Third, inconsistencies between internal and external policies on sustainability cause disharmony and conflicts in the attainment of sustainability goals. Conflicts between the internal and external action have already emerged in other fields of EU policy, which might provide some lessons for the trade and sustainability sector. On this latter point, see Patrik

pursue sustainability in food systems with the same intensity both internally and externally. Future CJEU opinions should clarify this issue.

The following part analyzes the sustainability chapters in new-generation EU PTAs. The sustainability commitments in the TSD and SFS chapters are evaluated on the basis of the standards set by the EU at the internal level through the CAP rather than the looser international commitments.

### III. THE SUSTAINABILITY CHAPTERS IN THE NEW-GENERATION PREFERENTIAL TRADE AGREEMENTS OF THE EU: A CRITICAL ANALYSIS

For more than ten years, the EU has been including TSD chapters in its PTAs to protect environmental and labor standards in third countries.<sup>46</sup> In 2021, an SFS chapter was proposed for inclusion in future PTAs.<sup>47</sup> The following parts analyze the sustainability obligations contained in both chapters to assess their contribution to promoting sustainable food systems.

#### A. *The Trade and Sustainable Development Chapters*

The environmental and social (including labor) dimensions of sustainability are crucial components of well-designed sustainable food systems.<sup>48</sup> Therefore, evaluating the environmental and labor rights protection in TSD chapters in PTAs is necessary to assess the extent to which the EU promotes sustainable food systems in third countries. The following parts assess the effectiveness of TSD chapters by looking at both their substantive obligations and their enforcement mechanisms.<sup>49</sup>

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Taufar, *Tackling Coherence and Consistency in the EU's External Human Rights Policy* (Global Campus of Hum. Rts., Working Paper No. 4, 2017).

46. The first trade agreement encompassing a TSD chapter was the European Union-South Korea Free Trade Agreement. See Free Trade Agreement Between the European Union and the Republic of Korea, E.U.-S. Kor., Oct. 15, 2009 E.T.S. No. 127 [hereinafter EU-Korea FTA].

47. See Robert Francis, *EU FTAs: Commission Unveils New Chapter on Sustainable Food Systems*, BORDERLEX (June 14, 2021), <https://borderlex.net/2021/06/14/eu-ftas-commission-unveils-new-chapter-on-sustainable-food-systems/>.

48. See *supra* Section II.A.

49. This Note analyzes thirteen new-generation trade agreements concluded by the EU over the past twelve years. Trade agreements concluded with both developed and developing countries located in different regions of the world have been selected. For the purpose of country classification, reference is made to the 2022-2023 World Bank country classifications by income. See *World Bank Country and Lending Groups*, WORLD BANK, <https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups> (last visited Oct. 12, 2022). Low- and middle-income countries are referred to as developing, while upper-middle and high-income countries are referred to as developed. The World Bank's classification is more reliable than the classification at the WTO, where countries self-designate as developing. The

analysis will cover the following trade agreements with developed countries: EU-Korea FTA, *supra* note 46; Trade Agreement Between the European Union and Colombia and Peru, June 26, 2012, E.T.S. No. 354 [hereinafter EU-Colombia-Ecuador-Peru FTA]; Comprehensive Economic and Trade Agreement (CETA) Between Canada and the European Union and its Member States, Oct. 30, 2016, 2017 O.J. (L 11) 23 [hereinafter CETA]; Association Agreement Between the European Union and Mexico, E.U.-Mex., Ch. 27: Trade and Sustainable Development, Agreement in Principle Reached Apr. 2018, [https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mexico/eu-mexico-agreement/agreement-principle\\_en](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mexico/eu-mexico-agreement/agreement-principle_en) [hereinafter EU-Mexico AA]; Economic Partnership Agreement Between the European Union and Japan, E.U.-Japan, July 17, 2018, E.T.S. No. 56661 (entered into force Feb. 1, 2019) [hereinafter EU-Japan EPA]; Free Trade Agreement Between the European Union and the Republic of Singapore, E.U.-Sing., Oct. 19, 2018, 2019 (L 294) 3 (entered into force Nov. 21, 2019) [hereinafter EU-Singapore FTA]; Association Agreement Between the European Union and Mercosur, Trade and Sustainable Development Ch., Agreement in Principle Reached June 2019, [https://web.archive.org/web/20191204021800/https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc\\_157964.pdf](https://web.archive.org/web/20191204021800/https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157964.pdf) [hereinafter EU-Mercosur AA]; Trade and Cooperation Agreement Between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, E.U.-U.K., Dec. 30, 2020, O.J. (L 149) (entered into force May 1, 2021) [hereinafter EU-U.K. TCA]; Free Trade Agreement Between the European Union and New Zealand, E.U.-N.Z., July 9, 2023, <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/new-zealand-european-union-free-trade-agreement/nz-eu-free-trade-agreement-by-chapter/> (negotiations concluded June 30, 2022) [hereinafter EU-New Zealand FTA]. The analysis will cover the following trade agreements with developing countries: Economic Partnership Agreement Between the West African States, the Economic Community of West African States (ECOWAS) and the West African Economic and Monetary Union (UEMOA), of the one part, and the European Union and its Member States, of the other part, Dec. 3, 2014, E.T.S. No. 13370/14, <https://data.consilium.europa.eu/doc/document/ST-13370-2014-ADD-1/en/pdf> [hereinafter EU-West Africa EPA]—all the countries of the Economic Community of West Africa (Benin, Burkina Faso, Cabo Verde, Côte d’Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Togo) are developing countries; Economic Partnership Agreement Between the East African Community Partnership States and the European Union, Negotiations Finalized Oct. 16, 2014, <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/4f8d4f46-48ba-45d8-a1d2-a1a934b56949/details?download=true> [hereinafter EAC-EU EPA]—all the countries of the East African Community (Burundi, Kenya, Rwanda, Tanzania, Uganda) are developing countries; Free Trade Agreement Between the European Union and the Socialist Republic of Viet Nam, E.U.-Viet., June 30, 2019, 2023 O.J. (L 186) 3 (entered into force Aug. 1, 2020) [hereinafter EU-Vietnam FTA]. The Economic Partnership Agreement Between the European Union and its Member States, of the one part, and the SADC [Southern African Development Community] EPA States, of the other part, June 10, 2016, O.J. (L 250) [hereinafter EU-SADC EPA] will also be analyzed—half of SADC countries qualify as developing (Lesotho, Mozambique, Eswatini), the other half as developed (Botswana, Namibia, South Africa). The EU-West Africa EPA and the EAC-EU EPA do not contain a dedicated TSD chapter. However, their analysis is relevant to evaluate the extent to which the EU pursues sustainability objectives in many African countries.

## 1. The Substantive Obligations

Sustainable development comprises three interrelated dimensions—economic, social, and environmental<sup>50</sup>—that shall be addressed simultaneously to effectively promote sustainable food systems.<sup>51</sup> This section evaluates the substantive obligations on economically, socially, and environmentally sustainable development contained in TSD chapters.

TSD chapters only touch upon the economic dimension of sustainable development. They generally acknowledge the importance of “economic development” and sometimes refer to international instruments, such as the Agreement Establishing the WTO, where the economic dimension of development has been historically dominant.<sup>52</sup> Supposedly, this is why little emphasis has been given to this dimension of development: since its inception, international trade law has been conceived of as a tool to promote economic development.<sup>53</sup> Accordingly, TSD chapters focus on the dimensions of sustainable development that have been historically overlooked at the multilateral level, namely, the environmental and social ones—with a focus on labor rights within the latter.<sup>54</sup> The environmental and labor obligations contained in TSD chapters can be divided into three groups: obligations based on international conventions, obligations based on domestic legislation, and aspirational provisions referring to levels of protection exceeding international standards.<sup>55</sup>

50. See *supra* Section II.A.

51. See *supra* Section II.A. The approach adopted by the EU in the 2023-2027 CAP is centered on addressing simultaneously the three interrelated dimensions of sustainable development. See *supra* Section II.B.2.

52. See EU-Korea FTA, pmbL, art. 13.1(2); EU-Colombia-Ecuador-Peru FTA, pmbL; EU-SADC EPA, pmbL, art. 6(2); CETA art. 22.1(1); EU-Mexico AA art. 1(3) of ch. 27; EU-Japan EPA art. 16.1(1)–(2); EU-Vietnam FTA art. 13.1(3); EU-Singapore FTA arts. 12.1(1)–(2); EU-Mercosur AA art. 1(3) of TSD ch.; EU-UK TCA, art. 355(2); EU-New Zealand FTA arts 19.1(1)–(2); see also Marrakesh Agreement Establishing the World Trade Organization, pmbL, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].

53. According to the preamble of the Marrakesh Agreement, countries should conduct their trade relations “[W]ith 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 . . . .” Marrakesh Agreement, pmbL; see also GATT 1994 arts. XXXVI, XXXVII (emphasizing the importance of raising the standards of living, increasing export earnings, enhancing economic diversification, and prioritizing the reduction of trade barriers); *id.* art. XXXVIII (stating that the contracting parties shall collaborate to improve market access for primary products of interest to less-developed countries).

54. See Kateřina Hradilová & Ondřej Svoboda, *Sustainable Development Chapters in the EU Free Trade Agreements: Searching for Effectiveness*, 52 J. WORLD TRADE 1019, 1021–22 (2018).

55. Marco Bronckers & Giovanni Gruni, *Retooling the Sustainability Standards in EU Free Trade Agreements*, 24 J. INT’L ECON. L. 25, 26 (2021).



The first group of obligations in TSD chapters is based on international standards.<sup>56</sup> Within this first group, some obligations cover the ratification of international conventions on environmental and labor protection. With regard to labor standards, trade agreements may mandate that the contracting parties ratify specific International Labour Organization (ILO) conventions if they have not already done so. Nevertheless, these ratification obligations are spelled out only as best-effort commitments.<sup>57</sup> Notably, the EU-Southern African Development Community Economic Partnership Agreement (EU-SADC EPA) (2016) does not contain such commitments.<sup>58</sup> These provisions are of limited value, as demonstrated in a recent decision in a labor dispute under the EU-Korea FTA (2010).<sup>59</sup> In this dispute, the EU contended that Korea's efforts to ratify four of the eight core ILO Conventions had fallen short of the standard of "continued and sustained efforts" required under the FTA.<sup>60</sup> The Panel rejected the EU's complaint, finding that, even though the FTA imposed an "on-going obligation for the Parties" to ratify the conventions, "Korea ha[d] not committed to a specific timeframe."<sup>61</sup> Best-effort obligations to ratify international conventions usually address the eight core ILO Conventions.<sup>62</sup> In contrast, no

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56. *See id.* at 26-28.

57. *See* EU-Korea FTA art. 13.4(3); CETA art. 23.3(4); EU-Mexico AA art. 3(4) of ch. 27; EU-Japan EPA art. 16.3(3); EU-Vietnam FTA art. 13.4(3); EU-Singapore FTA art. 12.3(4); EU-Mercosur AA art. 4(4) of TSD ch.; EU-UK TCA art. 399(3); EU-New Zealand FTA art. 19.3(5).

58. Article 8(2) only reaffirms the parties' commitments to implement their obligations in respect of the ILO conventions that they have *already* ratified. *See* EU-SADC EPA art. 8(2).

59. *See generally* JILL MURRAY ET AL., PANEL OF EXPERTS PROCEEDING CONSTITUTED UNDER ARTICLE 13.15 OF THE EU-KOREA FREE TRADE AGREEMENT (2021), <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/d4276b0f-4ba5-4aac-b86a-d8f65157c38e/details> [hereinafter EU-KOREA PANEL REPORT].

60. *Id.* ¶ 264.

61. *Id.* ¶¶ 278, 291.

62. For the eight core ILO Conventions, see Convention Concerning Forced or Compulsory Labour, 1930 (No. 29), June 28, 1930, 39 U.N.T.S. 55; P29, Protocol of 2014 to the Forced Labour Convention, 1930, June 11, 2014, 3175 U.N.T.S. 1; Convention Concerning Freedom of Association and Protection of the Right to Organise, 1948 (No. 87), July 9, 1948, 68 U.N.T.S. 17; Convention Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, 1949 (No. 98), July 1, 1949, 96 U.N.T.S. 257; Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, 1951 (No. 100), June 29, 1951, 165 U.N.T.S. 303; Convention Concerning the Abolition of Forced Labour, 1957 (No. 105), June 25, 1957, 320 U.N.T.S. 291; Convention Concerning Discrimination in Respect of Employment and Occupation, 1958 (No. 111), June 25, 1958, 362 U.N.T.S. 31; Convention Concerning Minimum Age for Admission to Employment, 1973 (No. 138), June 26, 1973, 1015 U.N.T.S. 297; Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 1999 (No. 182), June 17, 1999, 2133 U.N.T.S. 161.

PTA mandates the ratification of multilateral environmental agreements (MEAs).<sup>63</sup> Within this first group, another group of obligations mandates the contracting parties to respect, promote, and realize fundamental principles outlined in specific international conventions, even if a party has not ratified them.<sup>64</sup> Finally, within this first group, a last group of obligations mandates the contracting parties to effectively implement the environmental and labor conventions already ratified.<sup>65</sup>

The second group of obligations in the TSD chapters covers domestic legislation.<sup>66</sup> As a general rule, the contracting parties' right to regulate environmental and labor issues is confirmed, subject to consistency with international commitments.<sup>67</sup> In other words, any lowering of national environmental or labor standards that constitutes a failure to implement the international commitments embodied in a given PTA amounts to a treaty breach. Non-regression and non-enforcement clauses further prevent the parties from lowering environmental and labor protections even when this does not constitute a failure to implement the international commitments embodied in the PTA.<sup>68</sup> Non-regression clauses prevent a weakening of national environmental and labor laws.<sup>69</sup> Non-enforcement clauses mandate the enforcement of those laws.<sup>70</sup> However, both non-regression and enforcement obligations are conditioned on intended or actual effects on trade or

63. Note, however, that according to the WTO most of the MEAs relevant for international trade have been widely ratified. *See generally* Comm. on Trade & Env't, *Matrix on Trade Related Measures Pursuant Selected Multilateral Environmental Agreements*, WTO Doc. WT/CTE/W/160/Rev.9 (Mar. 19, 2021).

64. *See* EU-Korea FTA art. 13.4(3). Such commitments shall be considered binding obligations. *See* EU-KOREA PANEL REPORT, *supra* note 59, ¶¶ 120–22.

65. *See* EU-Korea FTA arts. 13.4(3), 13.5(2); EU-Colombia-Ecuador-Peru FTA art. 270(2); EU-SADC EPA art. 8(2); CETA, arts. 23.3(4), 24.4(2); EU-Mexico AA arts. 3(3), 4(2) of ch. 27; EU-Japan EPA arts. 16.3(5), 16.4(2); EU-Vietnam FTA arts. 13.4(4), 13.5(2); EU-Singapore FTA arts. 12.3(3), 12.6(2); EU-Mercosur AA arts. 4(7), 5(3) of TSD ch.; EU-UK TCA arts. 399(5), 400(2); EU-New Zealand FTA arts. 19.3(7), 19.5(2). Several PTAs also mandate to effectively implement the Paris Agreement on climate change. *See* EU-Mexico AA art. 5(2) of ch. 27; EU-Japan EPA art. 16.4(4); EU-Vietnam FTA art. 13.6(1); EU-Singapore FTA art. 12.6(3); EU-Mercosur AA art. 6(2) of TSD ch.; EU-UK TCA art. 401(2); EU-New Zealand FTA art. 19.6(2). Notably, the EU-SADC EPA does not contain any reference to the Paris Agreement. *See* EU-SADC EPA art. 8.

66. *See* Bronckers & Gruni, *supra* note 55, at 30–33.

67. EU-Korea FTA art. 13.3; EU-Colombia-Ecuador-Peru FTA, art. 268; EU-SADC EPA art. 9(1); CETA, arts. 23.2, 24.3; EU-Mexico AA art. 2(1) of ch. 27; EU-Japan EPA art. 16.2(1); EU-Vietnam FTA art. 13.2(1); EU-Singapore FTA art. 12.2(1); EU-Mercosur AA art. 2(1) of TSD ch.; EU-New Zealand FTA art. 19.2(1).

68. *See* Bronckers & Gruni, *supra* note 55, at 30.

69. *Id.*

70. *Id.*

investments.<sup>71</sup> This condition is problematic. On the one hand, prohibiting regression and non-enforcement on the basis of an *intent* to affect trade or investments without evidence of actual effects could have a far-reaching impact and hinder the domestic policy space, with negative consequences, especially in times of crisis. On the other hand, providing evidence of the effects on trade or investments of a weakening of national environmental or labor laws may be so difficult as to render the clauses inoperable.<sup>72</sup> At the time of this writing, there is no guidance on how the trade or investment effects test in the EU PTAs should be interpreted.

The third group of obligations in TSD chapters comprises vaguer provisions aimed at raising the standards of environmental and labor protection beyond international standards by means of a cooperative approach.<sup>73</sup> Supposedly, the EU was able to include these aspirational provisions thanks to the lack of a sanctions-based model of enforcement.<sup>74</sup> In its TSD chapters, the EU has preferred what is often referred to as a “promotional” approach, as opposed to a “sanctions-based”

71. See EU-Korea FTA art. 13.7; EU-Colombia-Ecuador-Peru FTA, arts. 277(1)–(2); EU-SADC EPA art. 9(3); CETA arts. 23.4, 24.5; EU-Mexico AA arts. 2(3)–(5) of ch. 27; EU-Japan EPA art. 16.2(2); EU-Vietnam FTA arts. 13.3(1)–(3); EU-Singapore FTA arts. 12.1(3), 12.12; EU-Mercosur AA art. 2(3)–(5) of TSD ch.; EU-UK TCA arts. 387(2), 391(2); EU-New Zealand FTA arts. 19.2(3)–(5); see also Bronckers & Gruni, *supra* note 55, at 30.

72. For an explanatory example of this risk, see In the Matter of Guatemala – Issues Relating to Obligations Under Art 16.2.1(a) of the CAFTA-DR (Guat./U.S.), Final Report of the Panel, ¶¶ 190, 463 (June 14, 2017), [https://www.trade.gov/sites/default/files/2020-09/Guatemala%20%E2%80%93%20Obligations%20Under%20Article%2016-2-1%28a%29%20of%20the%20CAFTA-DR%20%20June%2014%202017\\_1\\_0.pdf](https://www.trade.gov/sites/default/files/2020-09/Guatemala%20%E2%80%93%20Obligations%20Under%20Article%2016-2-1%28a%29%20of%20the%20CAFTA-DR%20%20June%2014%202017_1_0.pdf). In this case, the Panel dismissed the USA’s claim under Article 16.2 of the Central America Free Trade Agreement (CAFTA) noting that the USA had failed to prove that Guatemala did not enforce its labor laws “in a manner affecting trade” between the two States. *Id.* para 190. The Panel held that the USA should have proved that Guatemala’s labor practices had given “some competitive advantage on an employer or employers engaged in trade [with the United States].” *Id.* This looks like a low threshold if compared, for instance, to the injury test under Article 4 of the WTO Safeguards Agreement. The Panel, however, did not formulate a rigorous trade effects test. For a critical analysis of the case and its consequences, see Kathleen Claussen, *Reimagining Trade-Plus Compliance: The Labor Story*, 23 J. INT’L ECON. L. 25, 33–39 (2020).

73. See Bronckers & Gruni, *supra* note 55, at 33; EU-Korea FTA art. 13.11; EU-Colombia-Ecuador-Peru FTA, art. 286; EU-SADC EPA art. 12; CETA art. 22.3; EU-Mexico AA arts. 10, 13 of ch. 27; EU-Japan EPA art.16.12; EU-Vietnam FTA arts. 13.10, 13.14; EU-Singapore FTA arts. 12.4, 12.10; EU-Mercosur AA art. 13 of TSD ch.; EU-UK TCA arts. 399(8), 400(5), 401(3); EU-New Zealand FTA arts. 19.3(10), 19.5(5), 19.6(5).

74. See EUROPEAN COMMISSION, FEEDBACK AND WAY FORWARD ON IMPROVING THE IMPLEMENTATION AND ENFORCEMENT OF TRADE AND SUSTAINABLE DEVELOPMENT CHAPTERS IN EU FREE TRADE AGREEMENTS 3 (2018), [https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc\\_156618.pdf](https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf).

approach, often favored by the United States.<sup>75</sup> A chapter with a promotional focus centers around dialogue and cooperation, primarily involving knowledge-sharing and development assistance, and it does not typically encompass sanctions or prescriptive enforcement processes.<sup>76</sup> The lack of sanctions as an enforcement tool has made it easier for the EU to introduce provisions aimed at raising the standards of environmental and labor protection in its PTAs, as third countries are unlikely to oppose these provisions that lack enforcement mechanisms. There is no evidence, however, that these aspirational and unenforceable provisions have produced any meaningful result in promoting environmental and labor protection.<sup>77</sup>

The analysis above reveals five major shortcomings affecting the substantive obligations in TSD chapters. First, TSD provisions do not meaningfully address the economic pillar of development. The EU missed an opportunity to develop the economic pillar by not including in it the sustainability dimension outlined in the FAO definition, thus implicitly relying on the traditional conception of economic development characterizing international trade law—focused mainly on growing the volume of trade without necessarily ensuring that economic value-added is created for all stakeholders.<sup>78</sup> Moreover, the three pillars of sustainable development (economic, social, and environmental) are meant to work together, and overlooking the economic pillar might negatively affect the attainment of social and environmental goals.

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75. Bronckers & Gruni, *supra* note 55, at 25.

76. MADELAINE MOORE & CHRISTOPH SCHERRER, FRIEDRICH EBERT STIFTUNG, *CONDITIONAL OR PROMOTIONAL TRADE AGREEMENTS—IS ENFORCEMENT POSSIBLE? HOW INTERNATIONAL LABOUR STANDARDS CAN BE ENFORCED THROUGH US AND EU SOCIAL CHAPTERS 2* (2017).

77. Bronckers & Gruni, *supra* note 55, at 33.

78. See *supra* Section II.A. From an economic perspective, FAO holds that sustainability should generate economic value-added for all stakeholders. “Economic value-added” refers to the increase in economic value resulting from an economic activity. Economic value-added should benefit all stakeholders involved in the activity. This includes not only the producers and suppliers but also consumers, workers, and communities. In other words, the economic gains should be distributed in a way that contributes to the well-being and prosperity of everyone involved. On the other hand, the traditional conception of economic development underlying international trade law revolves around expanding the volume of trade, streamlining trade processes, and diminishing trade barriers between countries. This approach primarily prioritizes the quantitative growth of trade activities and the overall flow of goods and services across borders. However, this approach may not inherently guarantee the creation of economic value-added for all stakeholders involved. While the emphasis on boosting trade can lead to increased economic activity and potentially larger gross economic figures, it does not automatically ensure that the benefits of this economic growth are distributed among all participants in the trade process.

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Second, by setting international commitments as the benchmark for environmental and social obligations, the EU is not pursuing sustainability in third countries to the same extent as in its internal market. International commitments often set looser standards as compared to the EU, especially those set in the three regulations that make up the 2023-2027 CAP.<sup>79</sup> At least in the aspirational provisions of the third group of substantive obligations described above, the EU could have fixed its internal standards as the relevant benchmark.

Third, because the ratification of international conventions is not mandated for MEAs and is only a best-effort commitment for labor conventions, international standards are loosely promoted, resulting in poor adherence and ineffective results. Stricter provisions on the ratification of those conventions, coupled with capacity building and technical assistance where appropriate, could have fostered better adherence to international standards.

Fourth, the reference in all PTAs to the international environmental and labor commitments as the benchmark for each party's conduct denotes that the EU is not willing to differentiate its approach to sustainability according to the different potentials of its contracting parties. Tailoring the commitments to the specificities of each contracting party could lead to more effective outcomes by acknowledging the different levels of development and the different environmental and social challenges that each country faces. When commitments are tailored to a country's specific context, they are more likely to be seen as relevant and achievable, leading to greater compliance.

Fifth, the lack of a results-driven approach—as the one adopted in the 2023-2027 CAP—has likely undermined the inclusion of more stringent sustainability provisions.<sup>80</sup> A results-driven approach with specific targets to be reached and periodic reviews of the commitments based on the progress could lead to the progressive inclusion of more ambitious sustainability provisions in the PTAs.

An exception to the *modus operandi* described above is exhibited by the EU's approach toward sustainability in Africa, where three agreements in the Western, Eastern, and Southern parts of the continent are in place. The 2016 EU-SADC EPA is the only one that contains a TSD chapter. However, its content is less stringent compared to other PTAs.<sup>81</sup> The 2014 EU-West Africa EPA and the 2014 East African

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79. See *supra* Section II.B.3.

80. See *supra* Section II.B.2.

81. See *supra* Section III.A.1 and notes 48, 55.

Community-EU EPA (EAC-EU EPA) only affirm general commitments to “contribute to economic growth and development,” including “sustainable development,” in their preambles, objectives, and in some other provisions, such as those on fisheries and agriculture.<sup>82</sup> They do not refer to international conventions on environmental and labor protection. Social issues are treated generically under the notion of sustainable development, which is not supported by implementation mechanisms.<sup>83</sup> However, some fundamental labor rights are recognized through reference to the Cotonou Agreement.<sup>84</sup> Neither of the two EPAs contains provisions prohibiting parties from weakening their environmental or social standards. This is a major difference in the extent to which sustainability is promoted in Africa compared to other regions of the world.<sup>85</sup>

Some hypotheses can be made about the reasons why the EU has adopted weaker sustainability provisions in its PTAs with African countries. First, the three trade agreements in Africa were finalized between 2014 and 2016. In 2014, the EU had concluded only two agreements containing TSD chapters, namely, the 2010 EU-Korea FTA and the 2012 EU-Colombia-Ecuador-Peru FTA.<sup>86</sup> At that time, the EU’s strategy to pursue sustainability objectives through its PTAs was still under development.

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82. See EU-West Africa EPA, pmbi, arts. 1(2)(c), 3, 46, 48(2), 49; EAC-EU EPA, pmbi., arts. 2, 51, 63–64, 83(2)(c), 83(2)(e). Article 63 EAC-EU EPA states that “[t]he Parties shall cooperate in achieving sustainable agricultural development with special focus on supporting vulnerable rural population . . .” *Id.* art. 63.

83. Note, however, that the EAC-EU EPA has a “sectoral” coverage regarding social standards in the Marine Fisheries chapter and also recognizes the social dimension in agriculture. See EAC-EU EPA arts. 55(2), 57(2), 59(3), 72(1)(a).

84. The Cotonou Agreement is aimed at the reduction and eradication of poverty while promoting sustainable development and at the integration of the African, Caribbean, and Pacific countries into the world economy. Articles 9 and 50 address some fundamental human rights and labor standards related to trade. The reference to Article 9, however, is insufficient to prevent the use of labor standards in a trade-distorting way. Partnership Agreement Between the Members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, arts. 9, 50, June 23, 2000, 2000 O.J. (L 317) 3 [hereinafter Cotonou Agreement].

85. For a detailed analysis of the sustainability standards in EU EPAs, see SANOUSSI BILAL & ISABELLE RAMDOO, EUR. CTR. FOR DEV. POL’Y MGMT., SUSTAINABILITY AND HUMAN RIGHTS IN EPAS: A COMPARATIVE ANALYSIS BETWEEN THE CARIBBEAN AND AFRICAN EPAS 17–21, 23–25 (2016).

86. See *Sustainable Development in EU Trade Agreements*, EUR. COMM’N, [https://policy.trade.ec.europa.eu/development-and-sustainability/sustainable-development/sustainable-development-eu-trade-agreements\\_en](https://policy.trade.ec.europa.eu/development-and-sustainability/sustainable-development/sustainable-development-eu-trade-agreements_en) (last visited Oct. 22, 2022).

## PROMOTING SUSTAINABLE FOOD SYSTEMS

Second, given that the levels of industrialization and intensive agricultural production remain low in most African states,<sup>87</sup> the environmental threat is lower than in other regions of the world. However, it should not be ignored that other activities, such as the exploitation of natural and mineral resources, have led to extreme pollution of the environment. The impact of deforestation, land degradation, biodiversity loss, and water scarcity should also not be underestimated.<sup>88</sup>

Third, in order to be implemented, sustainability standards require regulatory, technical, and financial capacity. The parties might have realized the difficulties of introducing more ambitious standards due to the institutional fragilities and lack of financial resources affecting numerous African countries.<sup>89</sup> Without a package of measures to help build capacity, higher standards would have hardly made any difference, especially with regard to least-developed countries.

Fourth, private firms and industries might have exercised pressure on trade policymakers to benefit from looser environmental and social standards, thus decreasing the cost of doing business. Their lobbying power should not be underestimated.<sup>90</sup>

### 2. Enforcement and Dispute Settlement

For the time being, most TSD chapters have separate dispute settlement mechanisms that differ from the arrangements for settling disputes arising under other chapters of PTAs.<sup>91</sup> There are two major differences between dispute settlement with respect to sustainability standards and regular dispute settlement. First, an infringement finding with respect to TSD chapters, unlike other chapters of PTAs, is not

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87. See Helen Hai, *Making Industrialization in Africa Sustainable*, UN CHRONICLE (Dec. 1, 2020), <https://www.un.org/en/un-chronicle/making-industrialization-africa-sustainable>; OECD & FAO, OECD-FAO AGRICULTURAL OUTLOOK 2016-2025, 59–93 (2016).

88. See generally Abioye Fayiga et al., *Environmental Pollution in Africa*, 20 ENV'T., DEV. & SUSTAINABILITY 41 (2018).

89. See AFRICAN DEVELOPMENT BANK GROUP, BANK GROUP'S STRATEGY FOR ADDRESSING FRAGILITY AND BUILDING RESILIENCE IN AFRICA (2022-2026) 1 (2022); Matilda Moyo, *Africa Can Finance Its Development but Needs a Paradigm Shift*, UN: AFR. RENEWAL (Nov. 28, 2022), <https://www.un.org/africarenewal/magazine/november-december-2020/africa-can-finance-its-development-needs-paradigm-shift>.

90. See generally Cornelia Woll, *Trade Policy Lobbying in the European Union: Who Captures Whom?*, in LOBBYING THE EUROPEAN UNION: INSTITUTIONS, ACTORS, AND ISSUES 277, 277–97 (David Coen & Jeremy Richardson eds., 2009).

91. See generally Lorand Bartels, *Human Rights and Sustainable Development Obligations in EU Free Trade Agreements*, in GLOBAL GOVERNANCE THROUGH TRADE: EU POLICIES AND APPROACHES 73, 73–91 (Jan Wouters et al. eds., 2015).

binding.<sup>92</sup> It is solely an additional element for the parties' consideration during conciliation.<sup>93</sup> The lack of binding effect undermines the impact of the rulings. Second, if the losing party refuses to comply with the sustainability standards, no sanctions are applied.<sup>94</sup> The rulings on environmental and labor disputes may not even be published since PTAs do not always prescribe publication.<sup>95</sup> This approach is undesirable and weakens the credibility of TSD chapters by undermining transparency, accountability, enforcement, stakeholder engagement, and deterrence against future violations.<sup>96</sup> However, despite the promotional nature of TSD provisions and the lack of enforcement mechanisms, panels have ruled that TSD chapters shall provide relevant "context" to evaluate the lawfulness of trade restrictions<sup>97</sup> and might have binding force.<sup>98</sup>

In its latest PTAs, the EU has embraced a new approach. The 2022 EU-New Zealand FTA provides a uniform dispute settlement mechanism, which also applies to the TSD chapter. The recommendations in the panel's final report are mandatory, and, in case of lack of compliance, the complaining party may request compensation or suspend the application of other obligations.<sup>99</sup> Similarly, the 2020 EU-United

92. See EU-Korea FTA arts. 13.15(2), 13.16; EU-Colombia-Ecuador-Peru FTA, art. 285; CETA, arts. 23.10(11)–(12), 24.15(10)–(11); EU-Mexico AA art. 17(9) of ch. 27; EU-Japan EPA arts. 16.18(5)–(6); EU-Vietnam FTA arts. 13.17(8)–(9); EU-Singapore FTA arts. 12.17(8)–(9); EU-Mercosur AA art. 17(11) of TSD ch.

93. See EU-Korea FTA arts. 13.15(2), 13.16; EU-Colombia-Ecuador-Peru FTA, art. 285; CETA, arts. 23.10(11)–(12), 24.15(10)–(11); EU-Mexico AA art. 17(9) of ch. 27; EU-Japan EPA arts. 16.18(5)–(6); EU-Vietnam FTA arts. 13.17(8)–(9); EU-Singapore FTA arts. 12.17(8)–(9); EU-Mercosur AA art. 17(11) of TSD ch.

94. Bronckers & Gruni, *supra* note 55, at 37.

95. See Denise Prévost & Iveta Alexovičová, *Mind the Compliance Gap: Managing Trustworthy Partnerships for Sustainable Development in the European Union's Free Trade Agreements*, 6 INT'L J. PUB. L. & POL'Y 236, 251 (2019).

96. See MARIANNE KETTUNEN ET AL., INST. FOR EUR. ENV'T POL'Y, AN EU GREEN DEAL FOR TRADE POLICY AND THE ENVIRONMENT: ALIGNING TRADE WITH CLIMATE AND SUSTAINABLE DEVELOPMENT OBJECTIVES 19–20 (2020); *Non-Paper from the Netherlands and France on Trade, Social Economic Effects and Sustainable Development*, at 1, <https://www.permanentrepresentations.nl/documents/publications/2020/05/08/non-paper-from-nl-and-fr-on-trade-social-economic-effects-and-sustainable-development> (last visited Oct. 22, 2022) [hereinafter *Netherlands and France Non-Paper*].

97. See Final Report of the Arbitration Panel, *Restrictions Applied by Ukraine on Exports of Certain Wood Products to the European Union* (adopted Dec. 11, 2020), ¶ 251.

98. See EU-KOREA PANEL REPORT, *supra* note 59, ¶¶ 120–22.

99. See EU-New Zealand FTA arts. 26.2, 26.16; see also Carlotta Ceretelli, *EU-New Zealand FTA: Towards a New Approach in the Enforcement of Trade and Sustainable Development Obligations*, EJJL TALK! BLOG OF THE EUR. J. OF INT'L L. (Sept. 28, 2022), <https://www.ejiltalk.org/eu-new-zealand-fta-towards-a-new-approach-in-the-enforcement-of-trade-and-sustainable-development-obligations/>.



Kingdom Trade and Cooperation Agreement (EU-UK TCA) envisages the possibility of suspending the observance of trade obligations when the final report is not properly implemented.<sup>100</sup>

B. *The Sustainable Food Systems Chapters*

For over ten years, TSD chapters have been the only mechanism envisaged in new-generation EU PTAs to promote sustainability. In 2021, however, the European Commission published a proposal for an SFS chapter.<sup>101</sup> To date, the only finalized (but not yet in force) agreement containing an SFS chapter is the 2022 EU-New Zealand FTA.<sup>102</sup> The EU is proposing to its trading partners to include SFS chapters in the agreements that are currently under negotiation, such as those with India and Indonesia.<sup>103</sup>

SFS chapters are based on cooperation between the contracting parties rather than binding commitments. Their objective is to strengthen policies and define programs that contribute to the development of sustainable, inclusive, healthy, and resilient food systems by way of stronger cooperation,<sup>104</sup> which is the only means provided to “implement” the chapter.<sup>105</sup> Accordingly, the parties shall promote cooperation on several topics, including the efficient use of natural resources and agricultural inputs; the environmental and climate impacts of food production; contingency plans to protect food supply chains in times of crisis; sustainable food processing and transport; sustainable

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100. See EU-UK TCA art. 410(3). Note, however, that the TSD chapter maintains a separate dispute settlement mechanism which is collaborative in nature. See *id.* arts. 408–09.

101. See Francis, *supra* note 47.

102. See EU-New Zealand FTA, ch. 7.

103. See Resolution of 5 July 2022 on EU-India Future Trade and Investment Cooperation, ¶ 10, Eur. Parl. Doc. 2021/2177(INI) (2022); *Report from the Commission to the European Parliament and the Council—Application of EU Health and Environmental Standards to Imported Agricultural and Agri-Food Products*, at 17, COM (2022) 226 final (June 3, 2022).

104. See EU-New Zealand FTA arts. 7.1(1), 7.2(1); European Union’s Proposal for a Legal Text on Sustainable Food Systems for the EU-India Trade Agreement, arts. 17.1, 17.2 (proposed Mar. 29, 2022), <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/1687c203-bbdd-42ef-8c6d-e99a8cf102fa/details> [hereinafter EU-India SFS Proposal]; European Union’s Proposal for the Chapter on Sustainable Food Systems for the EU-Indonesia Free Trade Agreement, arts. 1, 2 of SFS ch. (proposed May 26, 2021), <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/ec65b593-e035-4425-8dd0-3cf74edb8115/details> [hereinafter EU-Indonesia SFS Proposal].

105. See EU-New Zealand FTA art. 7.4(1); EU-India SFS Proposal, *supra* note 104, art. 17.2; EU-Indonesia SFS Proposal, *supra* note 104, art. 2 of SFS ch.

and healthy diets; food loss and waste.<sup>106</sup> A dedicated committee that lacks any enforcement power monitors the implementation of the chapter.<sup>107</sup> Lastly, it is provided that SFS provisions shall not restrict the parties' regulatory space by obliging them to modify their import requirements, take action that would undermine the adoption of domestic regulatory measures aimed at achieving public policy objectives, or adopt specific regulatory outcomes.<sup>108</sup>

The lack of binding obligations and benchmarks to assess the parties' progress toward realizing sustainable food systems is a major shortcoming of SFS chapters, which renders them weaker than TSD chapters and, in practice, inoperable.<sup>109</sup>

In light of the weaknesses affecting both the TSD and SFS chapters described above, the following part focuses on the reasons why the EU should adopt a new approach to the promotion of sustainable food systems. This serves as a foundation for delineating the characteristics of this new approach.

### C. *The Need for a New Approach*

The sections above have shown that the substantive obligations and the enforcement mechanisms of both the TSD and SFS chapters have numerous weaknesses. When the objectives of sustainable development and sustainable food systems are pursued through broad and ambiguous clauses, such as those in the TSD and SFS chapters, the difference between stringent chapters and lenient ones is rather negligible. Indeed, virtually any counterparty would be fit to agree to such commitments, regardless of its regulatory or technical capacity.<sup>110</sup> The recently adopted new approach to the enforcement of TSD chapters will hardly

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106. See EU-New Zealand FTA art. 7.4(4); EU-India SFS Proposal, *supra* note 104, art. 17.4; EU-Indonesia SFS Proposal, *supra* note 104, art. 4 of SFS ch.

107. See EU-New Zealand FTA art. 7.4(2); EU-India SFS Proposal, *supra* note 104, art. 17.9; EU-Indonesia SFS Proposal, *supra* note 104, art. 9 of SFS ch.

108. See EU-New Zealand FTA art. 7.5(2); EU-India SFS Proposal, *supra* note 104, art. 17.11(3); EU-Indonesia SFS Proposal, *supra* note 104, art. 11(3) of SFS ch.

109. To achieve the objectives set in the 2023-2027 CAP, some consumer groups have suggested that the EU trade policy shall ensure that third countries wanting to export food into the EU abide by the same standards as those that apply to EU food producers. See BUREAU EUROPÉEN DES UNIONS DE CONSOMMATEURS [THE EUROPEAN CONSUMER ORGANISATION], PUBLIC CONSULTATION ON TRADE AND SUSTAINABLE DEVELOPMENT IN EU TRADE AGREEMENTS: REVIEW OF CURRENT APPROACH 1–2 (2021). This approach, however, might be inconsistent with WTO law. See *infra* Section IV.C.

110. See FERRARIS, *supra* note 12, at 239.

bring any significant improvement.<sup>111</sup> Irrespective of enforcement issues, the substantive obligations in TSD chapters are limited in their effectiveness and enforceability. For example, TSD provisions only touch upon the economic dimension of development; the ratification of international conventions is not mandated for MEAs and is only a best-effort commitment for labor conventions; and a result-driven approach in the achievement of sustainability standards is missing.<sup>112</sup> Moreover, accepting international commitments as the baseline for sustainability obligations prevents consistency between the EU's internal policies, based on higher standards, and external policies, based on looser standards.<sup>113</sup> With regard to food, SFS chapters do not contain substantive obligations, which makes it even less likely that they can bring about any improvement.

In light of the foregoing, the way forward should not be focused on reforming TSD and SFS chapters.<sup>114</sup> The EU approach needs a substantial paradigm shift toward sustainability in food systems. Rather than strengthening TSD and SFS chapters to sanction non-compliance with sustainability standards, parties should prevent infringements and their negative economic, environmental, and social spillovers *ex ante*. This can be done by rewarding contracting parties that live up to the highest sustainability commitments, thus inducing compliance (rather than sanctioning non-compliance).

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111. See *supra* Section III.A.2.

112. See *supra* Section III.A.1.

113. See *supra* Section III.A.1. I have argued that, under an EU law perspective, the EU shall pursue sustainability in food systems with the same intensity both internally and externally. See *supra* Section II.B.3. From a practical perspective, this objective shall be gradually achieved by diversifying the sustainability standards established according to the development level of each third country. If the standards set are realistic, their actual implementation by third countries becomes more likely, and an incremental strategy can be adopted on the basis of the progress made. Accordingly, a tailor-made approach would be more effective in pursuing sustainability goals, as opposed to a standardized approach based on international standards.

114. For a different view, see Bronckers & Gruni, *supra* note 55; Marco Bronckers & Giovanni Gruni, *Improving the Enforcement of Labour Standards in the EU's Free Trade Agreements*, in RESTORING TRUST IN TRADE: LIBER AMICORUM IN HONOUR OF PETER VAN DEN BOSSCHE 157, 157–72 (Denise Prévost et al. eds., 2019); Marco Bronckers & Giovanni Gruni, *Taking the Enforcement of Labour Standards in the EU's Free Trade Agreements Seriously*, 56 COMMON MKT. L. REV. 1591 (2019); Giovanni Gruni, *The Unsustainable Lightness of Enforcement Procedures: Environmental Standards in the EU-Mercosur FTA*, BLOG DROIT EUROPÉEN (May 13, 2020), <https://blogdroiteuropeen.com/2020/05/13/the-unsustainable-lightness-of-enforcement-procedures-environmental-standards-in-the-eu-mercotur-fta-by-giovanni-gruni/>. The solutions suggested are the following: (i) tightening and clarifying the legal standards; (ii) improving the involvement of private stakeholders; (iii) integrating dispute settlement regarding all PTAs commitments; and (iv) adding sanctions to labor and environmental standards.

An effective way to reward compliance with high sustainability standards would be to link trade measures with the quality of the PPMs adopted in the exporting country. Among the different trade measures that could be adopted, the preferable option would be to differentiate tariffs based on environmental and social PPMs.<sup>115</sup> Tariff differentiation is preferable to other trade measures due to its flexible approach. It encourages compliance with higher sustainability standards by providing for lower corresponding tariffs, thus avoiding, on the one hand, harsher measures, such as import bans or quota restrictions, and on the other hand, weaker measures that leave the final choice to consumers, such as labeling and packaging requirements.

To assess the possibility of introducing tariff differentiation based on the quality of PPMs in EU PTAs, the following part tests the WTO compliance of PPM-based trade measures in light of both classic and recent WTO case law.

#### IV. PPM-BASED TRADE MEASURES TO PROMOTE SUSTAINABLE FOOD SYSTEMS

The primary concern with PPM-based trade measures is how to design them to ensure compliance with WTO law. The following questions arise regarding food systems: how can governments differentiate between sustainable and unsustainable food imports in a fair manner that is respectful of the sovereignty of partner countries? How can proportionate and non-discriminatory sustainability distinctions be drawn?<sup>116</sup>

To reply to these questions, the following Parts analyze how the WTO treats PPMs and whether its case law has evolved over time<sup>117</sup> with special attention to non-product-related PPMs (i.e., methods and

115. For a taxonomy of PPM-based trade measures, see JASON POTTS, INT'L INST. FOR SUSTAINABLE DEV., *THE LEGALITY OF PPMs UNDER THE GATT: CHALLENGES AND OPPORTUNITIES FOR SUSTAINABLE TRADE POLICY* 8 (2008).

116. See Elisabeth Bürgi Bonanomi & Theresa Tribaldos, *PPM-Based Trade Measures to Promote Sustainable Farming Systems? What the EU/EFTA-Mercosur Agreements Can Learn from the EFTA-Indonesian Agreement*, 11 EUR. Y.B. INT'L ECON. L. 359, 362 (2020).

117. A comprehensive analysis of the lawfulness of PPM-based trade measures under all the relevant WTO agreements is beyond the scope of this Note, which addresses exclusively the GATT 1994 compliance of these measures. For an overview on the compliance of PPM-based trade measures with the General Agreement on Trade in Services, see General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 [hereinafter GATS]; Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120 [hereinafter TBT Agreement]; Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493 [hereinafter SPS Agreement]. See generally María Alejandra Calle Saldarriaga, *Sustainable Production and Trade Discrimination: An Analysis of the WTO Jurisprudence*, 11 ANUARIO COLOMBIANO DE DERECHO INTERNACIONAL 221 (2018); CHRISTIANE R.

techniques employed in the production of goods that can affect the environment, human health, or animal welfare, but that leave no trace in the final product).<sup>118</sup> In contrast to product-related PPMs, which primarily focus on addressing externalities related to consumption, non-product-related PPMs tackle production externalities, encompassing the moral, social, or environmental impacts stemming from the production process.<sup>119</sup> For this reason, non-product-related PPMs are especially relevant to promoting sustainability in food systems. The significance of the debate on the lawfulness of PPM-based trade measures will likely increase in the future, as lifecycle-based tools that take into account the lifecycle of products are increasingly favored by policymakers for sustainability purposes.<sup>120</sup>

### A. *The Classic WTO Cases on PPMs*

The legality of PPMs primarily relates to the GATT 1994 provisions (Articles I, III, and XI)<sup>121</sup> that prohibit discrimination between

CONRAD, PROCESSES AND PRODUCTION METHODS (PPMs) IN WTO LAW: INTERFACING TRADE AND SOCIAL GOALS 374–422 (2011).

118. See Andreas Oeschger & Elisabeth Biirgi Bonanomi, *PPMs Are Back: The Rise of New Sustainability-Oriented Trade Policies Based on Process and Production Methods*, INT’L INST. FOR SUSTAINABLE DEV. (Apr. 14, 2023), <https://www.iisd.org/articles/policy-analysis/ppms-rise-new-sustainability-oriented-trade-policies-process-production-methods>. On the contrary, the so-called product-related PPMs impact the final product’s physical characteristics. For some examples of product-related and non-product-related PPMs, see BARBARA COOREMAN, *GLOBAL ENVIRONMENTAL PROTECTION THROUGH TRADE: A SYSTEMATIC APPROACH TO EXTRATERRITORIALITY* 19 (2017).

119. Kateryna Holzer, *Reconciling Trade Measures with Development and Sustainability Concerns: The Case of Process and Production Methods*, CTR. FOR CLIMATE CHANGE, ENERGY & ENV’T L. (Sept 5, 2023).

120. See *Communication from the Commission to the Council and the European Parliament—Integrated Product Policy: Building on Environmental Life-Cycle Thinking*, at 3, COM (2003) 302 final (June 18, 2003); see also Daniel Szabo, *Sustainable Trade, Renewable Energy and the WTO*, in *SUSTAINABLE TRADE, INVESTMENT AND FINANCE: TOWARD RESPONSIBLE AND COHERENT REGULATORY FRAMEWORKS* 31, 32 (Claire Gammage & Tonia Novitz eds., 2019); Steven Alan Cohen, *Life Cycle Assessment and the US Policy-Making Context*, in *EMERGING TECHNOLOGIES: SOCIO-BEHAVIORAL LIFE CYCLE APPROACHES* 217, 219–22 (Nora Savage et al. eds., 2013).

121. Article I contains the “most-favoured-nation” clause. The central rule is that “any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.” GATT 1994 art. I. Article III contains the “national treatment” clause. The central rule is that “[t]he products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.” *Id.* art. III(4). Article XI forbids quantitative restrictions such as quotas, import bans, and export bans. *Id.* art. XI.

“like” products.<sup>122</sup> If products are “like” and a PPM-based measure violates Articles I, III, or XI, the measure may be justified under the exceptions in Article XX.<sup>123</sup> The two key questions of the debate around PPMs are thus the following. First, should products produced with different PPMs be considered “like” products, in which case differential treatment is prohibited? Second, if they are “like” products, can different treatments be justified under one of the exceptions?<sup>124</sup>

### 1. “Likeness” in Cases Involving PPMs

The concept of “likeness” is a relative one,<sup>125</sup> and therefore, there is no obvious answer to the above question, even in the case of products with different product-related PPMs. In the early case of *Japan—Alcoholic Beverages II*, two products were considered “like” if they shared the same end-use and physical characteristics.<sup>126</sup> The common end-uses of sochu and vodka led the Panel to affirm their “likeness” under Article III(2), despite slight differences in the chemical compositions, brewing methods, filtration, and alcoholic strength.<sup>127</sup>

Along the same line of arguments, in *US—Gasoline*, the Appellate Body found domestic and imported gasoline to be “like” products because they served the same end use and were indistinguishable from a commercial viewpoint, despite differences in their chemical composition.<sup>128</sup>

Later, in *Mexico—Taxes on Soft Drinks*, adjudicators developed the above-mentioned conditions and included channels of distribution, consumer preferences, tariff classifications, price relationships, competition in the marketplace, and substitutability as relevant aspects to be analyzed.<sup>129</sup> However, it is unclear how many of these aspects must be

122. See Karsten Engsig Sørensen, *Trade in Goods*, in *WTO LAW: FROM A EUROPEAN PERSPECTIVE* 113, 113–16 (Birgitte Egelund Olsen et al. eds., 2012).

123. Steve Charnovitz, *The Law of Environmental “PPMs” in the WTO: Debunking the Myth of Illegality*, 27 *YALE J. INT’L L.* 59, 110 (2002).

124. Szabo, *supra* note 120, at 34; OLIVIER DE SCHUTTER, *TRADE IN THE SERVICE OF SUSTAINABLE DEVELOPMENT: LINKING TRADE TO LABOUR RIGHTS AND ENVIRONMENTAL STANDARDS* 49, 53 (2015).

125. Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, at 21, WTO Doc. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted Nov. 1, 1996).

126. Panel Report, *Japan—Taxes on Alcoholic Beverages*, ¶¶ 6.22–6.23, WTO Doc. WT/DS8/R, WT/DS10/R, WT/DS11/R, (adopted Nov. 1, 1996).

127. See *id.* ¶¶ 6.20–6.23.

128. See Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, at 7, WTO Doc. WT/DS2/AB/R (adopted May 2, 1996) [hereinafter Appellate Body Report, *US—Gasoline*].

129. See Panel Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, ¶¶ 4.6–4.49, WTO Doc. WT/DS308/R (adopted Mar. 24, 2006).

substantially different to find two products not to be “like.” In the dispute, soft drinks using non-cane sugar sweetener and cane sugar were considered to be “like” products despite minor differences in chemical composition.<sup>130</sup> On this basis, differences in PPMs do not prevent two products from being considered “like” even if their characteristics are not identical, especially if their end uses are similar.<sup>131</sup> The intent behind the PPM does not influence the determination of “likeness.”

The findings above, if applied to non-product-related PPMs, lead to the conclusion that products with similar features but produced through different PPMs are likely to be considered “like” products under the GATT 1994.<sup>132</sup> In one of the earliest cases, *US—Tuna (Mexico)*, the Panel found that non-product-related PPMs are irrelevant for the determination of “likeness.”<sup>133</sup> However, the report was never adopted.<sup>134</sup>

In sum, classic WTO disputes suggest that “likeness” is determined mainly based on end uses and consumer tastes and habits, together with physical characteristics. This suggests that discrimination based on environmental or social PPMs (both product-related and non-product-related) alone cannot be justified by simply claiming that products produced in a more sustainable way and competing products are not “like,” unless they have different end uses and consumers regard them as not being substitutes.<sup>135</sup>

## 2. Exceptions Available for PPMs

Because two similar products that differ only in their environmental or social PPMs tend to be considered “like” products, this section will examine the general exceptions to the national treatment and most-favored-nation rules under Article XX to determine the GATT 1994-consistency of PPM-based trade measures.<sup>136</sup>

In the classic WTO cases, the disputing parties tried to justify environmental measures under Article XX(b), pertaining to the protection of

130. *See id.* ¶ 8.136.

131. Szabo, *supra* note 120, at 35–36.

132. *Id.* at 37.

133. *See* Report of the Panel, *United States—Restrictions on Imports of Tuna*, ¶¶ 5.15–5.16, DS21/R - 39S/155 (Sept. 3, 1991). The draft report states that “[r]egulations governing the taking of dolphins incidental to the taking of tuna could not possibly affect tuna as a product,” and therefore both dolphin-safely taken tuna and tuna taken through dolphin-deadly purse seine nets shall be treated similarly. *Id.* ¶ 5.15.

134. *See* Elisa Baroncini & Claire Brunel, *A WTO Safe Harbour for the Dolphins: The Second Compliance Proceedings in the US—Tuna II (Mexico) Case*, 19 WORLD TRADE REV. 196, 198 (2020).

135. *See* Szabo, *supra* note 120, at 37–38.

136. *See* Bradley J. Condon, *Climate Change and Unresolved Issues in WTO Law*, 12 J. INT’L ECON. L. 895, 926 (2009); DE SCHUTTER, *supra*, note 124, at 53–54.

human, animal, or plant life or health, and Article XX(g), pertaining to the conservation of exhaustible natural resources.<sup>137</sup> In *US—Gasoline*, the Panel found that clean air can be considered an “exhaustible natural resource” under Article XX(g).<sup>138</sup> It held that clean air is a resource, that such a resource is natural, and that it *could* be exhausted.<sup>139</sup> It is not necessary that the resource has already been exhausted.<sup>140</sup>

In *US—Shrimp*, the Appellate Body went further by ruling that Article XX(g) protects not only non-living natural resources but also living species that, despite being in principle capable of reproduction, are susceptible to “exhaustion,” frequently because of human activities.<sup>141</sup> Accordingly, sea turtles, incidentally taken by certain nets intended to catch shrimp, were recognized as an “exhaustible natural resource.” The fact that sea turtles are protected under the Convention on the Conservation of Migratory Species of Wild Animals<sup>142</sup> supported this

137. See Charnovitz, *supra* note 123, at 110. The wording of the two provisions is slightly different. Whereas Article XX(b) refers to a measure that is “*necessary* to protect human, animal or plant life or health[.]” Article XX(g) refers to a measure “*relating* to the conservation of exhaustible natural resources.” GATT 1994 arts. XX(b), XX(g) (emphasis added). The necessity test is stricter, but there is no need to demonstrate that no other measure would have successfully fulfilled the objective. It is sufficient to show that the measure is “apt to produce a material contribution to the achievement of the objective. . . .” Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 152, WTO Doc. WT/DS332/AB/R (adopted Dec. 17, 2007). The same applies to the “public morals” exception under Article XX(a). For more details, see DE SCHUTTER, *supra* note 123, at 66–67, 74; Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶¶ 164, 166, WTO Doc. WT/DS161/AB/R, WT/DS169/AB/R (adopted Jan. 10, 2001); Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 305–07, WTO Doc. WT/DS285/AB/R (adopted Apr. 20, 2005).

138. See Panel Report, *United States—Standards for Reformulated and Conventional Gasoline*, ¶ 6.37, WTO Doc. WT/DS2/R (adopted May 20, 1996) [hereinafter Panel Report, *US—Gasoline*].

139. See *id.* The Appellate Body did not address the issue of the interpretation of “exhaustible natural resource” since the US did not appeal that section of the Panel’s ruling. See Appellate Body Report, *US—Gasoline*, at 9–10.

140. See Report of the Panel, *United States—Restrictions on Import of Tuna*, ¶ 5.13, DS29/R (June 16, 1994) [hereinafter *US—Tuna (EEC)*]; DE SCHUTTER, *supra* note 124, at 59.

141. See Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 127–28, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998) [hereinafter Appellate Body Report, *US—Shrimp*]; see also Fabrizio Meliadò, *Fisheries Management Standards in the WTO Fisheries: Learning How to Discipline Environmental PPMs?*, 46 J. WORLD TRADE 1083, 1123 (2012).

142. Convention on the Conservation of Migratory Species of Wild Animals, app. I, Nov. 6, 1979, 1651 U.N.T.S. 333.



conclusion.<sup>143</sup> Reliance on agreements negotiated outside the WTO as evidence is in line with the 1996 Report of the Committee on Trade and Environment, which encouraged the consideration of MEAs in WTO dispute settlement.<sup>144</sup>

The growing importance of environmental considerations as accepted justifications for trade-restrictive measures further emerged in *EC—Asbestos*, where the Appellate Body found that a measure banning the import of asbestos-containing products was necessary to protect human, animal, or plant life or health under Article XX(b).<sup>145</sup> However, the exception was used solely for the domestic protection of life and health.<sup>146</sup>

While the cases above show that Articles XX(b) and XX(g) can justify environmental or social PPMs, the same cannot be said for Article XX(d). In *Mexico—Taxes on Soft Drinks*, the Appellate Body held that the exception in Article XX(d), pertaining to the necessity to secure compliance with laws or regulations, cannot justify unilateral measures seeking to secure compliance by another WTO Member with its other international obligations, including environmental and social ones.<sup>147</sup> Therefore, Article XX(d) seems less likely to justify environmental or social PPMs.

Classic WTO cases also addressed the issue of the extraterritorial application of Article XX. If granted extraterritorial effect, Article XX would authorize WTO Members to protect interests located outside their territorial jurisdiction (e.g., in the exporting country).<sup>148</sup> *US—Tuna (EEC)* analyzed the extraterritorial application of Article XX.<sup>149</sup> The purpose of the U.S. measure was to protect dolphins affected by the fishing of tuna outside its territorial jurisdiction.<sup>150</sup> The

143. See Appellate Body Report, *US—Shrimp*, ¶ 168.

144. See Comm. on Trade & Env't, *Report (1996) of the Committee on Trade and Environment*, ¶ 40, WTO Doc. WT/CTE/1 (Nov. 12, 1996).

145. See Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶¶ 162–75, WTO Doc. WT/DS135/AB/R (adopted Apr. 5, 2001) [hereinafter Appellate Body Report, *EC—Asbestos*]; see also Christine Kaufmann & Rolf H. Weber, *Carbon-Related Border Tax Adjustment: Mitigating Climate Change or Restricting International Trade?*, 10 WORLD TRADE REV. 497, 522 (2011).

146. The Appellate Body did not address the issue of the extraterritorial application of Article XX, despite its importance for cases involving global issues such as biodiversity and climate change. See Appellate Body Report, *EC—Asbestos*.

147. See Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, ¶ 79, WTO Doc. WT/DS308/AB/R (adopted Mar. 24, 2006).

148. Lorand Bartels, *Article XX of GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights*, 36 J. WORLD TRADE 353, 357–58 (2002).

149. See *US—Tuna (EEC)*.

150. Baroncini & Brunel, *supra* note 134, at 197–99.

position of the Panel on the issue of extraterritoriality is inconsistent. On the one hand, the Panel noted that Article XX(g) is silent with respect to the “location of the exhaustible natural resources”<sup>151</sup> and that other provisions of Article XX can apply “with respect to things located, or actions occurring, outside the territorial jurisdiction of the party taking the measure.”<sup>152</sup> As a result, it held that “no valid reason” could support the conclusion that Article XX(g) applies “only to policies related to the conservation of exhaustible natural resources located within the territory of the contracting party invoking the provision.”<sup>153</sup> On the other hand, however, the Panel held that if Article XX permitted the enactment of trade measures aimed at forcing other contracting parties to change policies within their jurisdiction, the balance of rights and obligations among the contracting parties would be “seriously” impaired.<sup>154</sup> Despite the contradictory nature of the two statements, the ruling suggests that the use of Article XX to justify trade restrictions regarding issues located in the territorial jurisdiction of the state affected by the restriction is subject to limitations.

In *US—Shrimp*, the fact that the sea turtles protected by the U.S. measure migrated and crossed waters under U.S. jurisdiction was considered sufficient to justify the invocation of Article XX(g).<sup>155</sup> This reasoning should be extended to all measures aimed at fighting climate change by reducing greenhouse gas emissions: clean air is an “exhaustible natural resource,”<sup>156</sup> and a failure by one country to effectively reduce emissions has worldwide effects.<sup>157</sup>

In sum, settled case law suggests that measures based on PPMs are more likely to be justified under the exceptions in Article XX if they are not unilateral—that is, that they are adopted along the lines of an existing international instrument to which both disputing parties are parties.<sup>158</sup> Transparent standard-setting of trade-restrictive measures also

151. *US—Tuna (EEC)*, ¶ 5.15.

152. *Id.* ¶ 5.16. An example is the provision in GATT 1994 Article XX(e) relating to products of prison labor. GATT 1994 art. XX(e).

153. *US—Tuna (EEC)*, ¶ 5.20.

154. *Id.* ¶ 5.26.

155. See Appellate Body Report, *US—Shrimp*, ¶ 133. However, the Appellate Body declined to “pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation.” *Id.*

156. Panel Report, *US—Gasoline*, ¶ 6.37. The Appellate Body did not address the issue of the interpretation of “exhaustible natural resource” since the US did not appeal that section of the Panel’s ruling. See Appellate Body Report, *US—Gasoline*, at 9–10.

157. See DE SCHUTTER, *supra* note 124, at 64.

158. Robert Howse and Donald Regan have argued that the suspicion against unilateralism is unjustified. In their view, prohibiting the imposition of PPMs to imported products simply

encourages their justification.<sup>159</sup> In addition, the extraterritorial application of Article XX might be justified to prevent foreign harm that has repercussions in the importing country.

B. *The Most Recent WTO Cases on PPMs*

Recent WTO cases have provided additional clarification on the scope of the application of the exceptions in Article XX and the requirements of its chapeau. Other issues, such as the extraterritorial effect of that provision, have not been addressed.

The exception on the conservation of “exhaustible natural resources” in Article XX(g) was discussed in *US—Tuna II*. According to a non-product-related PPM adopted by the United States, tuna products produced or imported in the United States were allowed to be labeled as “dolphin-safe” only if tuna was harvested according to certain procedures.<sup>160</sup> The labeling scheme was voluntary, and, as in previous disputes, the tuna products were considered “like” products according to Articles I(1) and III(4), regardless of the harvesting procedure.<sup>161</sup> The Appellate Body held that the U.S. measure was related to the conservation of “exhaustible natural resources” but failed to meet the requirement of non-arbitrary or unjustifiable discrimination of Article XX’s chapeau for the following reasons: the treatment applied to fisheries varied according to the region; the measure did not take into account developments in dolphin protection techniques other than those supported by the measure itself; and the measure did not rely on an international agreement negotiated after the first tuna dispute.<sup>162</sup>

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replaces one unilateralism with another. In their words, “in the absence of negotiated rules or norms [on environmental protection], leaving the country of production to make these determinations [on the level of global externalities that the country generates by allowing specific economic activities] on its own, unconstrained by stipulations imposed by its trading partners who are importing the product, would itself be countenancing ‘unilateralism’, in this case, the unilateral determination by the country of production of matters that affect the global commons.” Robert Howse & Donald Regan, *The Product/Process Distinction: An Illusory Basis for Disciplining ‘Unilateralism’ in Trade Policy*, 11 EUR. J. INT’L L. 249, 251 (2000).

159. See Szabo, *supra* note 120, at 40–41; see also Susanne Dröge et al., *National Climate Change Policies and WTO Law: A Case Study of Germany’s New Policies*, 3 WORLD TRADE REV. 161, 184 (2004); Meliadò, *supra* note 141, at 1128–29.

160. Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶¶ 1.2–1.3, 1.7, WTO Doc. WT/DS381/AB/R (adopted June 13, 2012).

161. See *id.* ¶¶ 7.272, 7.276.

162. See *id.* ¶¶ 7.341–7.360; see also Szabo, *supra* note 120, at 42. The Appellate Body did not directly rule on the consistency of the measure with the GATT 1994 provisions. However, the Appellate Body examined the exceptions under Article XX for the purpose of extending its

In *EC—Seal Products*, the adjudicators discussed the “public morals” exception under Article XX(a).<sup>163</sup> The disputed measure was an EU ban on the importation and marketing of seal products, with certain exceptions, including for seal products derived from hunts conducted by Inuit or Indigenous communities.<sup>164</sup> This amounted to a ban based on non-product-related PPMs. As in previous cases, the different seal products were considered “like” products, and the ban was in breach of Articles I and III(4).<sup>165</sup> The Panel and the Appellate Body accepted the “public morals” exception invoked by the EU as a provisional justification for the ban.<sup>166</sup> However, the measure did not meet the requirements of Article XX’s chapeau because the EU failed to show that the different treatment of seal products derived from Indigenous communities’ hunts, as opposed to commercial hunts, could be reconciled with the objective of addressing public moral concerns on seal welfare.<sup>167</sup>

In sum, recent cases reveal that voluntary standards and schemes that restrict trade might be GATT 1994-inconsistent. However, adjudicators have accepted the possibility that trade restrictions based on environmental PPMs may address “public morals” concerns. With regard to the

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application and considering it in assessing the lawfulness of the measure under the TBT Agreement. See Armin Rosencranz & Aditya Vora, *Two Decades of the Tuna-Dolphin Dispute: A New Wrinkle*, 46 ENV’T POL’Y & L. 213, 215–16 (2016).

163. The notion of “public morals” was defined in the context of GATS art. XIV(a). In *US—Gambling*, the Panel found that “the term ‘public morals’ denotes standards of right and wrong conduct maintained by or on behalf of a community or nation.” Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 6.851, WTO Doc. WT/DS285/R (adopted Apr. 20, 2005).

164. See Paola Conconi & Tania Voon, *EC—Seal Products: The Tension Between Public Morals and International Trade Agreements*, 15 WORLD TRADE REV. 211, 212 (2016).

165. See Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 5.96, WTO Doc. WT/DS400/AB/R, WT/DS401/AB/R (adopted June 18, 2014) [hereinafter Appellate Body Report, *EC—Seal Products*]; Panel Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶¶ 7.604–7.609, WTO Doc. WT/DS400/R, WT/DS401/R (adopted June 18, 2014); see also Petros C. Mavroidis, *Sealed with a Doubt: EU, Seals, and the WTO*, 6 EUR. J. RISK REGUL. 388, 393–94 (2015).

166. Appellate Body Report, *EC—Seal Products*, ¶¶ 5.289–5.290.

167. See *id.* ¶¶ 5.328, 5.338; see also Conconi & Voon, *supra* note 164, at 221–24. Scholars reacted differently to the ruling. Gabrielle Marceau suggested that the distinction between product-related and non-product-related PPMs may no longer be relevant because Article XX is open to a series of policy considerations, without any distinction of whether such policies affect the products subject to the challenged measure. Therefore, the focus should shift from the debate around product/non-product-related PPMs to clarifying which policy considerations are admissible under Article XX. Petros Mavroidis went further and held that the Appellate Body “created confusion” by issuing a report “which is hardly reconcilable with prior case law.” Mavroidis, *supra* note 165, at 394. For more details, see Gabrielle Marceau, *A Comment on the Appellate Body Report in EC-Seal Products in the Context of the Trade and Environment Debate*, 23 REV. EUR. CMTY. INT. ENV’T L. 318, 326 (2014).

extraterritorial application of Article XX, adjudicators missed an opportunity to shed light on the lawfulness of outward-looking trade restrictions—in other words, restrictions that address matters located in the territorial jurisdiction of the exporting country.<sup>168</sup>

C. *Designing GATT 1994-Compliant PPM-Based Trade Measures*

Classic and recent case law shows that “likeness” has become a marginal issue in assessing the GATT 1994-consistency of PPM-based measures since products are often found to be “like.”<sup>169</sup> However, since consumer tastes and habits are central in establishing “likeness” and consumers are increasingly interested in the quality of the products they buy (especially food products) and their environmental and social impact,<sup>170</sup> products that differ exclusively for their PPMs (including non-product related PPMs) might not be considered “like” products anymore in the years to come.<sup>171</sup> Technology is also helping distinguish apparently “like” products by detecting genetically modified organisms (GMOs).<sup>172</sup> The absence of “likeness” would facilitate the justification of PPM-based measures under the GATT 1994. Until this happens, however, the emphasis will be on Article XX for the purpose of justifying measures that would otherwise be in violation of Articles I, III, or XI.

Restrictions based on a failure to comply with environmental or labor standards might be particularly difficult to justify because they often target non-product-related PPMs and are outward-looking.<sup>173</sup> However, even-handed measures that do not arbitrarily or unjustifiably discriminate between “like” products can more likely be justified. To be “even-handed,” PPM-based measures should be grounded in “an existing international instrument, if possible, capable of achieving its goals,” no more restrictive than necessary, and transparent.<sup>174</sup> In addition,

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168. See DE SCHUTTER, *supra* note 124, at 64.

169. See *supra* Sections IV.A–B.

170. See Mariana Toussaint et al., *What About the Consumer Choice? The Influence of Social Sustainability on Consumer’s Purchasing Behavior in the Food Value Chain*, 27 EUR. RSCH. MGMT. BUS. ECON. (2021).

171. See Robert Howse, *Regulatory Measures*, in THE OXFORD HANDBOOK ON THE WORLD TRADE ORGANIZATION 441, 446 (Amrita Narlikar et al. eds., 2012).

172. See generally Javier Lezaun, *Creating a New Object of Government: Making Genetically Modified Organisms Traceable*, 36 SOC. STUD. SCI. 499 (2006).

173. See DE SCHUTTER, *supra* note 124, at 76.

174. Szabo, *supra* note 120, at 49. Note, however, that the necessity test under some of the exceptions in Article XX produces paradoxical results when applied to measures adopted by a state to put pressure on another state to comply with sustainability standards—including environmental and labor standards. That is because the more restrictive the trade measure is, the

sustainability criteria should be flexibly adapted to cover different socio-environmental contexts and production conditions, building on transformation processes already taking place on the ground. Accordingly, a requirement to comply with the domestic standards of the importing country—for instance mandating foreign production according to EU organic standards or banning the import of any GMO—would not be acceptable.<sup>175</sup> While it may be unreasonable to demand that an exporting country adopt the same domestic standards as an importing country, requiring equivalence for imported products can be “reasonable, proportionate, and non-discriminatory.”<sup>176</sup> Sustainability criteria imposed on exporters should also be equally applied to domestic producers for the measure to be consistent.<sup>177</sup> Finally, PPM-based measures follow the spirit of trade law if they effectively facilitate market access for sustainably produced products. Accordingly, trade measures accompanied by burden-sharing measures—including adequate financing to support reform towards sustainable development, transfer of clean technologies, capacity-building, and measures to increase the ability of exporters to comply with labor standards—are easier to justify under WTO law and are politically more acceptable.<sup>178</sup> These burden-sharing measures can also help counter allegations of protectionism and discrimination by the exporting country. If properly designed, therefore, outward-looking trade measures aimed at preventing foreign harm that has cross-border effects should be justified.

In light of the above, non-discriminatory and even-handed environmental PPMs should be justified under Article XX(b) and (g) when imported products negatively affect domestic human and animal health and the environment (e.g., plant pests or hazardous wastes and chemicals), and when the environmental impact is cross-boundary (e.g., transmitted air, water, or land pollution), affects more jurisdictions beyond national borders (e.g., conservation and management of migratory animals), or is global (e.g., depletion of the ozone layer, harm to biodiversity, climate change, threats on endangered species).<sup>179</sup> For trade-restrictive measures to be justified under Article XX

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greater will be the pressure on the exporting country. In other words, less restrictive measures are less effective as regards the aim pursued. *See* DE SCHUTTER, *supra* note 124, at 74–75.

175. *See* Bonanomi & Tribaldos, *supra* note 116, at 375.

176. CHRIS FISHER, WHO’S AFRAID OF PPMs? 2 (2001), [https://trade.ec.europa.eu/doclib/docs/2005/april/tradoc\\_122187.pdf](https://trade.ec.europa.eu/doclib/docs/2005/april/tradoc_122187.pdf).

177. *See* Bonanomi & Tribaldos, *supra* note 116, at 375.

178. *See id.*; DE SCHUTTER, *supra* note 124, at 77.

179. *See* MONIKA TOTHOVA, ORG. FOR ECON. COOP. AND DEV. [OECD], THE TRADE AND TRADE POLICY IMPLICATIONS OF DIFFERENT POLICY RESPONSES TO SOCIETAL CONCERNS 48 (2009).

(g), it is also necessary that importing countries adopt equivalent restrictions on domestic production or consumption.<sup>180</sup> When the negative environmental impact is exclusively local (e.g., pollution of the soils in exporting countries alone), PPMs are harder to justify due to the limited extraterritorial application of Article XX. However, the fact that an exporting country does not address local environmental pollution caused by specific economic activities might affect its trading partners insofar as it gives a competitive advantage to the businesses in its jurisdiction (and this could be treated as an “externality”).<sup>181</sup>

PPM-based trade measures aimed at fighting these negative spillovers have the potential to prevent a number of environmentally unsustainable agricultural practices. These include the use of polluting chemicals, fertilizers, and GMOs that hinder the health of humans and the environment, as well as the cultivation of monoculture crops that cause deforestation and contribute to destroying soil structure.<sup>182</sup> Fighting these practices can contribute to reducing the power disparity between global agribusiness corporations and small local farmers, thus promoting economic sustainability.<sup>183</sup>

Assessing the GATT 1994 compliance of PPMs related to labor standards is more complicated, as case law addressing this issue is lacking. However, some of the findings in the environmental cases can be translated to the realm of labor standards despite their different contexts.<sup>184</sup> Recourse to “public morals” under Article XX(a) provides a door of entry to consider ethical concerns in the trading system.<sup>185</sup> It is the most suitable exception to justify trade restrictions based on labor rights concerns. “Public morals” can reflect not only core labor rights but also labor standards contained in international instruments and acknowledged by numerous countries, in addition to domestic

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180. According to Article XX(g), measures relating to the conservation of exhaustible natural resources shall be “made effective in conjunction with restrictions on domestic production or consumption.” GATT 1994 art. XX(g); *see also* Appellate Body Report, *US—Gasoline*, at 20–22.

181. *See* DE SCHUTTER, *supra* note 124, at 54.

182. *See generally* Sonja Brodt et al., *Sustainable Agriculture*, 3 NATURE EDUC. KNOWLEDGE 1 (2011).

183. *See generally* GEORGE RAPSOMANIKIS, FAO, *THE ECONOMIC LIVES OF SMALLHOLDER FARMERS: AN ANALYSIS BASED ON HOUSEHOLD DATA FROM NINE COUNTRIES* (2015).

184. As a general remark, what is valid for animal welfare standards should *a fortiori* be valid for core labor and human rights. *See generally* Appellate Body Report, *EC—Seal Products*.

185. *See* Thomas Cottier, *The Implications of EC—Seal Products for the Protection of Core Labour Standards in WTO Law*, in *LABOUR STANDARDS IN INTERNATIONAL ECONOMIC LAW* 69, 85 (Henner Gött ed., 2018).

standards.<sup>186</sup> The more broadly a standard is accepted, the less frequent the invocation of “public morals,” as its foundation should be contestable.<sup>187</sup> The extraterritorial application of Article XX might be justified by invoking the domestic interest to avoid wages and benefits being forced down by unfair competition from countries with lower labor costs—so-called social dumping.<sup>188</sup> To meet the requirements of Article XX’s chapeau, those designing labor standards-based restrictions should avoid arbitrary discrimination and disguised protectionism between members where the same conditions prevail.

PPM-based trade measures related to labor standards have the potential to prevent a number of unsustainable, unfair, and often unlawful labor practices in food systems. These include human trafficking, the use of forced and child labor, and the denial of workers’ rights, including the freedom of association and collective bargaining, the right to a safe and healthy working environment, and the right to fair pay.<sup>189</sup> That is because PPM-based trade measures incentivize transparency in value chains, traceability in the production process, and adherence to internationally recognized labor standards.

#### D. *Implementing GATT 1994-Compliant PPM-Based Trade Measures in the Preferential Trade Agreements of the EU*

In its future PTAs, the EU should introduce tariff differentiation based on PPMs by adopting the strategies outlined in the previous section to pass WTO scrutiny. For this alternative approach to be effective, the EU should diversify the tariff commitments on food and agricultural imports on the basis of the qualitative level of the PPMs adopted

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186. According to most commentators, the notion of “public morals” includes universally acknowledged human rights. By definition, universal human rights are a reference to norms that all states have recognized and are thus not imposed unilaterally. See Robert Howse, *The World Trade Organization and the Protection of Workers’ Rights*, 3 J. SMALL & EMERGING BUS. L. 131, 143–44 (1990); STEVE CHARNOVITZ, *TRADE LAW AND GLOBAL GOVERNANCE* 361 (2002); Robert Howse, *Back to Court After Shrimp/Turtle? Almost but Not Quite Yet: India’s Short Lived Challenge to Labor and Environmental Exceptions in the European Union’s Generalized System of Preferences*, 18 AM. U. INT’L L. REV. 1333, 1337–38 (2003); SARAH JOSEPH, *BLAME IT ON THE WTO? A HUMAN RIGHTS CRITIQUE* 109 (2011).

187. See Cottier, *supra* note 185, at 87.

188. See Gregory Shaffer, *Retooling Trade Agreements for Social Inclusion*, 2019 U. ILL. L. REV. 1, 38 (2019).

189. See UNITED NATIONS PRINCIPLES FOR RESPONSIBLE INVESTMENT, FROM FARM TO TABLE: ENSURING FAIR LABOUR PRACTICES IN AGRICULTURAL SUPPLY CHAINS 7 (2020), <https://www.unpri.org/download?ac=10533> (last visited Nov. 7, 2022).



in the exporting country: the higher the sustainability standards, the lower the tariffs applied (and vice versa).<sup>190</sup>

The EU should also diversify the standards “exported” and the tariffs applied according to the development level of the counterparty. In its trade relations with the most developed countries, the EU could aim to negotiate sustainability standards that are equivalent to its internal standards, especially those articulated in the 2023-2027 CAP—at least for applying a zero-tariff. The same cannot be held true for most developing and least-developed countries. In other words, an incremental approach is desirable. For this reason, PTAs should also include sunset clauses aimed at bringing the parties together to re-discuss the treaty.<sup>191</sup> In this way, sustainability standards could be periodically reshaped and adjusted to the progress made.

In the medium to long term, this incremental approach would facilitate the alignment of internal and external EU policies on sustainable food systems, which is a desirable objective from the perspective of EU law.<sup>192</sup> When needed, tariff differentiation should be accompanied by capacity-building measures to support the transition toward sustainable food systems and ensure fairness and equity. This new approach is promising and should rapidly be brought to the negotiating table since PTAs are currently being negotiated with Andorra, Australia, India, Indonesia, Monaco, the Philippines, and San Marino.<sup>193</sup>

The Philippines might be the most promising contracting party for the implementation of this alternative approach for the following reasons. First, the negotiations are at a very early stage (two rounds have been conducted). Second, the contracting parties have not yet exchanged proposals for TSD and SFS chapters, meaning that there is still room for alternatives. Third, both the EU and the Philippines have declared that leveraging trade to achieve sustainable development is a

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190. In a similar fashion, France and the Netherlands suggested linking tariff reduction to the effective implementation of TSD chapters. *See Netherlands and France Non-Paper, supra* note 96.

191. *See, e.g.*, Agreement Between the United States of America, the United Mexican States, and Canada (USMCA), art. 34.7, Dec. 10, 2019.

192. I have argued that, under an EU law perspective, the EU shall pursue sustainability in food systems with the same intensity both internally and externally. *See supra* Section II.B.3. From a practical perspective, this objective shall be gradually achieved by diversifying the sustainability standards established according to the development level of the third country. By setting realistic standards, their actual implementation by the third country becomes more likely.

193. Agreements with several other countries are currently on hold. For an overview, see *Overview of FTA and other Trade Negotiations*, EUR. COMM'N., [https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/negotiations-and-agreements\\_en](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/negotiations-and-agreements_en) (last visited 2022).

common endeavor.<sup>194</sup> Fourth, agriculture is a key sector of the Philippine economy.<sup>195</sup>

Negotiations with India, relaunched in June 2022, might also be promising. The EU submitted its proposals for TSD and SFS chapters to India in 2022,<sup>196</sup> but the latter raised concerns about having a different vision for the promotion of sustainability.<sup>197</sup> There might be, therefore, some room for dialogue to find an alternative to the sustainability chapters.<sup>198</sup>

Recently, tariff differentiation along the lines of non-product-related PPMs has been adopted in the 2018 European Free Trade Association (EFTA)-Indonesia Comprehensive Economic Partnership Agreement (CEPA) to support the sustainable production of palm oil in Indonesia.<sup>199</sup> Despite tariff differentiation being very limited in scope,

194. See *Report from the Second Round of Negotiations for a Free Trade Agreement Between the European Union and the Philippines*, EUR. COMM'N. (Aug. 12, 2022), <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/f096fd9a-f553-4aad-afc9-db4467d2b538/details>.

195. According to the World Bank, agriculture amounts to 10.1% of the GDP (2021) and employs 23% of the population (2019). See *Agriculture, Forestry, and Fishing, Value Added (% of GDP) - Philippines*, WORLD BANK, <https://data.worldbank.org/indicator/NV.AGR.TOTL.ZS?locations=PH> (last visited Jan. 14, 2023); *Employment in Agriculture (% of Total Employment) (Modeled ILO Estimate) - Philippines*, WORLD BANK, <https://data.worldbank.org/indicator/SL.AGR.EMPL.ZS?locations=PH> (last visited Jan. 14, 2023).

196. For the textual proposals for TSD and SFS chapters, see *EU Proposal on EU-India Trade and Sustainable Development Chapter*, EUR. COMM'N (Sept. 22, 2022), <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/2db52ef6-a1fc-4245-85d8-f622c21bdebf/details?download=true>; *EU Proposal on EU-India Sustainable Food Systems Chapter*, EUR. COMM'N (Mar. 29, 2022), <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/1687c203-bbdd-42ef-8c6d-e99a8cf102fa/details>.

197. See *Report of the Third Round of Negotiations On a Free Trade Agreement Between the European Union and India* EUR. COMM'N (2022), [https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/india/eu-india-agreement/documents\\_en](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/india/eu-india-agreement/documents_en).

198. The other countries with whom the EU is currently negotiating PTAs (Andorra, Australia, Indonesia, Monaco, and San Marino) appear less suitable to implement the suggested new approach to promote sustainability in food systems. Andorra, Monaco, and San Marino are negotiating an association agreement with the EU. Despite negotiations being launched in 2015, no significant progress has been made to date. Moreover, the three microstates have very limited agricultural production due to their reduced areas. With respect to Australia, the EU submitted its proposal for a TSD chapter in 2019. In the twelfth round of negotiations (February 2022), negotiators made significant progress in consolidating the text of the TSD chapter. It is therefore unlikely that the contracting parties would agree on an alternative approach at this stage. Lastly, with respect to Indonesia, the EU submitted its proposals for a TSD chapter in 2017 and for an SFS chapter in 2021. Since then, however, disagreement between the parties on sustainability issues has prevented the identification of possible ways forward.

199. See *Comprehensive Economic Partnership Agreement Between the Republic of Indonesia and the EFTA States*, art 2.2, Dec. 16, 2018 [hereinafter EFTA-Indonesia CEPA]. EFTA is the intergovernmental organization of Iceland, Liechtenstein, Norway, and Switzerland.

as it applies only to palm oil, the agreement provides a good example of an alternative approach that does not rely exclusively on TSD chapters.<sup>200</sup> This might be an interesting precedent for the EU to look at when implementing tariff differentiation in its new PTAs.

## V. CONCLUSIONS

Food sustainability is a major challenge of our time. As a region of the world with high sustainability standards and one of the largest economies, the EU can lead the way in promoting sustainable food systems in third countries through its trade policy. The foregoing analysis has shown that current TSD and SFS chapters cannot effectively incentivize the products that perform most sustainably. Moreover, sustainability concerns flow from all parts of PTAs, meaning that sustainability issues cannot be merely confined to a couple of chapters. To promote sustainability, the formulation of enforceable provisions that link sustainability and trade measures is more important than the formulation of broad TSD and SFS chapters that lack detail and are largely unenforceable. Accordingly, the approach should shift from the promotion of cooperation by means of sustainability chapters to the adoption of binding PPM-based trade measures.

Overall, tariff differentiation related to product differentiation on the basis of inclusive environmental and social PPMs, combined with a

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200. The approach adopted in the EFTA-Indonesia CEPA is quite unique and deserves some attention since it might be extended to other products in the future. To ensure the economically, environmentally, and socially sustainable management of the vegetable oils sector, Article 8.10(2) (e) prescribes that “vegetable oils and their derivatives traded between the Parties are produced in accordance with the sustainability objectives referred to in subparagraph (a),” which include “protecting primary forests, peatlands, and related ecosystems, halting deforestation, peat drainage and fire clearing in land preparation, reducing air and water pollution, and respecting rights of local and indigenous communities and workers.” *Id.* arts. 8.10(2)(a), 8.10(2)(e). The provision, included in the TSD chapter, is however excluded from dispute settlement. Instead of burdening Indonesia with the enforcement of Article 8.10, EFTA States established domestic control systems to ensure that only palm oil produced in line with Article 8.10 benefits from preferential treatment. In Switzerland, for example, importers have to prove RSPO certification, if they want to benefit from tariff reductions. *See id.* art. 8.10. The domestic processes of import control are established in a separate ordinance. *See id.* annex V; Verordnung über die Einfuhr von nachhaltig produziertem Palmöl aus Indonesien zum Präferenz-Zollansatz [Regulation on the Import of Sustainably Produced Palm Oil from Indonesia for Preferential Tariff Treatment], Dec. 2020, arts. 1, 3, 6 (Ger.), <https://www.news.admin.ch/news/message/attachments/67846.pdf>. For more details, see Charlotte Sieber-Gasser, *EFTA-Indonesia: Accelerating the Transition to (More) Sustainable Trade?*, SIEBER CONSULTING & L. RSCH. (Mar. 3, 2021), <https://sieber-consulting.ch/2021/03/03/efta-indonesia-accelerating-the-transition-to-more-sustainable-trade/>; Bonanomi & Tribaldos, *supra* note 116, at 371–73.

package of measures that supports regulatory, technical, and financial capacity-building when necessary, appears promising to incentivize sustainable food systems and promote respective transformation processes.<sup>201</sup> EU negotiators should start discussing this new approach with the countries with which future PTAs are currently being negotiated. In doing so, the EFTA-Indonesia CEPA (2018) might be an interesting precedent to look at.<sup>202</sup>

The emphasis of the present Note has been on trade concessions negotiated by the EU in its PTAs rather than on unilateral measures. PTAs are typically less scrutinized when compared to domestic measures since the parties have agreed to their terms.<sup>203</sup> This renders PTAs an appropriate tool for testing new approaches. In any case, the foregoing analysis has tested the GATT 1994 compliance of product-related and non-product-related PPM-based trade measures and has revealed that, if properly designed, environmental and social PPMs can pass WTO scrutiny. Moreover, WTO jurisprudence has constantly evolved and will hopefully continue to do so in the future—at least at the Panel level and through the Multiparty Interim Appeal Arbitration Arrangement until the Appellate Body crisis is solved. In view of the SDGs, the WTO is also increasingly supportive of trade measures that seek to address environmental and social concerns, and it is moving from a trade-liberalization paradigm to a more articulated trade-regulation paradigm.<sup>204</sup>

In this evolving context, increasingly open to protecting non-trade concerns through the rules of the international trading system, the EU should dare to lead the way in the adoption of ambitious trade policies that effectively improve sustainability in food systems in third countries.

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201. Bonanomi & Tribaldos, *supra* note 116, at 373.

202. *See generally* EFTA-Indonesia CEPA.

203. *See also* GATT 1994 art. XXIV.

204. *See generally* Elisabeth Buergi Bonanomi & Irene Musselli, *HRIA of Trade Agreements Involving Agriculture: Enabling Innovative Trade Options That Protect Human Rights*, in *HANDBOOK ON HUMAN RIGHTS IMPACT ASSESSMENT* 219, 219–37 (Nora Götzmann ed., 2019).