Ministerie van Buitenlandse Zaken

Aan de Voorzitter van de
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Betreft Geannoteerde agenda voor de Raad Buitenlandse Zaken Handel van 25 mei 2023.

Geachte voorzitter,

Hierbij bied ik u de geannoteerde agenda aan voor de Raad Buitenlandse Zaken Handel van 25 mei 2023.

De minister voor Buitenlandse Handel en Ontwikkelingssamenwerking,

Liesje Schreinemacher

GEANNOTEERDE AGENDA RAAD BUITENLANDSE ZAKEN/HANDEL VAN 25 MEI 2023

Introductie

Op donderdag 25 mei a.s. vindt de formele Raad Buitenlandse Zaken Handel plaats.

Tijdens de Raad zal allereerst worden gesproken over de handelsrelatie tussen de EU en de VS, met daarbij aandacht voor de Amerikaanse *Inflation Reduction Act* (IRA) en de volgende bijeenkomst van de EU-VS *Trade and Technology Council* (TTC). Over de IRA zal de Tweede Kamer, zoals verzocht, separaat nog een brief ontvangen. Voorts zal de stand van zaken met betrekking tot de handelsbetrekkingen met China worden besproken. Vervolgens zal de Raad worden geïnformeerd over de voorbereidingen voor de 13e Ministeriële Conferentie van de WTO (MC13), die in de week van 26 februari 2024 in Abu Dhabi, Verenigde Arabische Emiraten, plaats zal vinden.

Tijdens de lunch zal de Raad stilstaan bij de bilaterale handelsrelaties, inclusief lopende en afgeronde onderhandelingen over handelsakkoorden. Naar verwachting betreft dit onder andere de onderhandelingen met Mexico, Chili en Kenia.

Handelsbetrekkingen met de Verenigde Staten

Ten aanzien van de Verenigde Staten vormen de IRA en de TTC de hoofdonderwerpen waar de bespreking van de Raad zich naar verwachting op zal richten.

Zoals ook zal worden aangegeven in de Kamerbrief die u separaat voor het aankomende Commissiedebat nog ontvangt, zijn de besprekingen tussen de EU en de VS over de IRA nog gaande. De eerste resultaten laten een gemengd beeld zien. Zo heeft de EU een betere behandeling gekregen voor elektrische bedrijfsvoertuigen die worden geïmporteerd uit de EU en wordt onderhandeld over het voldoen aan de vereisten voor een betere behandeling van elektrische consumentenauto's uit de EU. Voor andere producten waarvoor de IRA ondersteuningsregelingen biedt zal verder gesproken worden met de VS. De Raad zal stil staan bij de uitkomsten van de besprekingen tussen de EU en de VS en het verdere EU-handelingsperspectief.

Uit de besprekingen tussen de EU en de VS naar aanleiding van de IRA zijn twee nieuwe initiatieven voortgekomen om tot meer samenwerking te komen in de groene transitie. Dit zijn het *Transatlantic Initiative on Sustainable Trade* (TIST) en de *Clean Energy Incentive Dialogue* (CEID). Het TIST is tijdens de derde bijeenkomst van de *Trade and Technology Council* (TTC) in december 2022 gelanceerd om groene handel tussen de EU en de VS te stimuleren en de samenwerking op dit punt te verdiepen. Het tweede initiatief, het CEID, is bedoeld om te zorgen dat beleid en overheidsinvesteringen van de EU en de VS ten bate van de groene transitie elkaar versterken. De doelstellingen van beide initiatieven zijn in lijn met de inzet van Nederland om tot meer trans-Atlantische samenwerking te komen ten behoeve van de groene transitie. Beide initiatieven zullen verder in TTC verband uitgewerkt worden. Zo wordt tijdens de aankomende TTC een concreet werkplan voor het TIST gepresenteerd.

De aankomende vierde bijeenkomst op politiek niveau van de TTC zal op 30 en 31 mei a.s. plaatsvinden in Zweden. Van de zijde van de EU zijn de Europees Commissarissen Dombrovskis en Vestager aanwezig, van de zijde van de VS schuiven de ministers Blinken en Raimondo en *US Trade Representative* Tai aan. Na afloop van de bijeenkomst zal een *Joint Statement* worden gepubliceerd. Op het gebied van handel zal gesproken worden over beide bovengenoemde initiatieven, en daarnaast over exportcontrole en investeringsscreening. Op het gebied van technologie zal onder meer worden gesproken over kunstmatige intelligentie, 6G, online platformen, en kwantumtechnologie. Nederland steunt het bevorderen van samenwerking tussen de EU en de VS op deze onderwerpen.

Handelsbetrekkingen met China

De Raad zal spreken over de handelsbetrekkingen tussen de EU en China. In de recente speech van Commissievoorzitter Von der Leyen van 30 maart jl. over de toekomst van de betrekkingen tussen de EU en China benadrukte zij op economisch vlak het belang van *de-risking:* geen ontkoppeling van China, maar wel een herbalancering van de economische relaties.

Von der Leyen identificeert hierbij vier actiepunten: 1) De EU-economie en -industrie meer competitief en weerbaar maken middels bijvoorbeeld de *Net Zero Industry Act* en de *Critical Raw Materials Act*; 2) het beter en sneller gebruik maken van het huidige EU-handelsinstrumentarium waaronder de verordening betreffende buitenlandse subsidies en het nieuwe anti-dwang instrument; 3) onderzoeken of er behoefte is aan aanvullende instrumenten, waaronder een mogelijk *Outbound Investment Instrument*, waarover de Commissie later dit jaar in een Economische Veiligheidsstrategie ideeën zal presenteren en 4) intensivering van samenwerking met partners, specifiek met G7-,G20-landen, en landen in de regio die meer geïntegreerd zijn met de Chinese economie en over expertise beschikken in relatie tot *de-risking*.

Het kabinet zal in de Raad het voornemen van de Commissie om met een voorstel voor een Europese Economische Veiligheidsstrategie te komen steunen. Meer Europese samenwerking en coördinatie op dit vlak zal de open strategische autonomie van de EU bevorderen en de interne markt weerbaarder maken. Voor wat betreft een mogelijk instrument voor uitgaande investeringen zal het kabinet het belang onderschrijven van het goed beschermen van sensitieve technologie, maar tegelijkertijd benadrukken dat eerst het beoogde doel, de noodzaak en de handhaafbaarheid van een dergelijk instrument zorgvuldig in kaart worden gebracht.

In haar speech over de EU-Chinarelatie bevestigde Commissievoorzitter Von der Leyen tevens dat het *EU-China Comprehensive Agreement on Investment* (CAI) moet worden gerevalueerd in het licht van de bredere Chinastrategie, de veranderde positionering van China op het wereldtoneel en geopolitieke ontwikkelingen. Het CAI, waarover eind 2020 een onderhandelaarsakkoord werd gesloten, ligt stil naar aanleiding van Chinese sancties tegen Europese politici en zorgen over mensenrechtenschendingen in China. Zoals bekend steunt het kabinet de beslissing van de Europese Commissie om de besluitvormingsprocedure van het CAI stil te leggen en is er wat betreft het kabinet geen aanleiding om deze procedure te herstarten.

Wereldhandelsorganisatie: voorbereidingen voor MC13

De Commissie zal de Raad informeren over de voorbereidingen voor de 13e Ministeriële Conferentie (MC13) van de WTO, die in de week van 26 februari 2024 plaatsvindt in Abu Dhabi in de Verenigde Arabische Emiraten. Er wordt geen discussie tussen de lidstaten voorzien tijdens de Raad, gezien de grote mate van convergentie onder lidstaten op het gebied van de EU-inzet voor MC13.

Het werk aan de EU-inzet voor MC13 loopt uiteraard door, waarbij het kabinet op de al eerder geschetste prioriteiten in blijft zetten[1]. Deze prioriteiten vormen het uitgangspunt voor de op te stellen Kaderinstructie die uw Kamer in de aanloop naar MC13 zal ontvangen. Het is voor het kabinet in de eerste plaats van belang opvolging te geven aan de afspraken die zijn gemaakt tijdens de 12e Ministeriële Conferentie. Het kabinet hecht in het bijzonder aan snelle ratificatie en implementatie van de overeenkomst over visserijsubsidies. Op 19 april jl. heeft het Europees Parlement ingestemd met de sluiting van het Protocol tot wijziging van de Overeenkomst van Marrakesh wat betreft de overeenkomst over visserijsubsidies. De Raad zal naar verwachting medio mei besluiten over de sluiting van het Protocol, waarna de EU het instrument ter ratificatie van het visserijsubsidieakkoord

[1] Kamerstukken II, 21501-02, nr. 2552.

bij het WTO-secretariaat kan deponeren. Het akkoord treedt pas in werking nadat twee derde van de WTO-leden het geratificeerd hebben. Momenteel heeft slechts een handvol leden dit gedaan. Ook zet het kabinet in op totstandkoming van een vervolgakkoord op visserijsubsidies, waarin subsidies die bijdragen aan overbevissing en overcapaciteit worden ingeperkt.

Daarnaast zet het kabinet in op een ambitieuze inzet in Genève inzake WTO-hervormingen. Hervorming en herstel van het geschillenbeslechtingssysteem per 2024 - zoals overeengekomen tijdens MC12 - is hierbij een prioriteit. Ook hecht het kabinet aan een ambitieuze inzet op aangescherpte regels voor een mondiaal gelijk speelveld, in het bijzonder op het gebied van industriële subsidies. Daarnaast is verdere integratie van duurzaamheid en milieu in de WTO-agenda een belangrijk speerpunt. Het kabinet is ook voorstander van verdere plurilaterale samenwerking in de WTO waar een multilateraal verdrag niet haalbaar is, bijvoorbeeld in de vorm van een plurilateraal akkoord op E-commerce. Ten slotte ziet het kabinet belang in het versterken van de bijdrage van WTO-afspraken aan wereldwijde voedselzekerheid, het openhouden van internationale voedselmarkten en het verduurzamen van de mondiale landbouw.

Rapport over de WTO-conformiteit van productiestandaarden
In opdracht van het kabinet is vorig jaar een onderzoeksrapport opgesteld dat de juridische haalbaarheid van productiestandaarden ten behoeve van milieubescherming en arbeidsrechten onderzoekt. Het rapport spitst zich toe op een juridische analyse van de WTO-regels en bevat een aantal conclusies en beleidsaanbevelingen. De analyse en aanbevelingen worden onder andere meegenomen bij het opstellen van de Kaderinstructie voor de dertiende Ministeriële Conferentie van de Wereldhandelsorganisatie die ook met uw Kamer gedeeld zal worden. Het kabinet verwelkomt de ambitie van de beleidsaanbevelingen en wijst tegelijkertijd op het complexe krachtenveld binnen de WTO op dit beleidsgebied. Het rapport, een samenvatting en een reactie worden als bijlage meegezonden met deze geannoteerde agenda.

Lunch: Bilaterale handelsakkoorden

De Raad zal tijdens de lunch spreken over de stand van zaken van de in onderhandeling zijnde bilaterale handelsakkoorden. De Commissie zal naar verwachting met name stil staan bij de onderhandelingen met Australië, Indonesië, India en Kenia. Het interim-Economisch Partnerschapsakkoord met Kenia kan naar verwachting op relatief korte termijn voor besluitvorming aan de Raad worden voorgelegd. Datzelfde geldt voor twee akkoorden waarover de onderhandelingen al zijn afgerond, te weten de mogelijke akkoorden met Mexico en Chili. De Commissie zal ook stil staan bij de besprekingen met de Mercosur landen over een additioneel instrument bij het in 2019 bereikte onderhandelingsresultaat.

Een geactualiseerde versie van de voortgangsrapportage handelsakkoorden met een overzicht van de lopende onderhandelingen is bijgevoegd bij deze geannoteerde agenda. Ten aanzien van het bereikte akkoord met Nieuw-Zeeland heeft de Tweede Kamer separaat een appreciatie ontvangen op 11 mei jl. [2] Zoals in de Kamerbrief met kabinetsappreciatie aangekondigd, laat het kabinet onderzoek uitvoeren naar de economische effecten van een aantal handelsakkoorden, waaronder met Nieuw-Zeeland. Het eerste deel van dit onderzoek met de voorlopige resultaten t.a.v. het akkoord met Nieuw-Zeeland is te vinden op Rijksoverheid onder de titel Expected economic effects of the EU Free Trade Agreement with New Zealand[3]. Dit akkoord wordt naar verwachting medio juni voorgelegd ter besluitvorming in de Raad.

[2] Kamerbrief over besluitvorming handelsakkoord EU en Nieuw-Zeeland | Kamerstuk | Rijksoverheid.nl
[3] Expected economic effects of the EU Free Trade Agreement with New Zealand | Report | Government.nl

Zoals bekend zet het kabinet in op een actief handelsbeleid, waarin handelsakkoorden een belangrijk instrument zijn. Handelsakkoorden kunnen bijdragen aan het vergroten van de economische weerbaarheid en slagvaardigheid van de EU en zorgen voor verbeterde markttoegang voor ondernemers. Bovendien faciliteren handelsakkoorden de diversificatie van handelspartners en mitigeren daarmee de risico's van strategische afhankelijkheden. Het kabinet zal, conform de eerder toegezonden kamerbrief[4], bepleiten dat een mogelijk EU-Mercosur akkoord een integraal associatieakkoord blijft.

[4] Kamerstukken II, 21 501-02, nr. 2636.

Bijlage 1: *Voortgangsrapportage handelsakkoorden – mei 2023*

Deze bijlage bevat informatie omtrent EU-handelsakkoorden die nog niet definitief in werking zijn getreden en EU-handelsakkoorden waarbij de betrokken partijen al wel de intentie kenbaar hebben gemaakt om een handelsakkoord te verkennen. Deze rapportage wordt ieder kwartaal aan de Kamer toegezonden. Ontwikkelingen sinds het toezenden van de vorige voortgangsrapportage van de betreffende onderhandelingen zijn **dikgedrukt** weergegeven.

A. Multilaterale handelsakkoorden

Onderhandelingen over afschaffen van visserijsubsidies:
Het mandaat om binnen de Wereldhandelsorganisatie (WTO) over visserijsubsidies te onderhandelen is onderdeel van de Doha Ontwikkelingsagenda (DDA). Doel is om bepaalde vormen van subsidie af te schaffen die bijdragen aan overcapaciteit en overbevissing, een einde te maken aan illegale, niet gerapporteerde en ongereguleerde (IUU) visserij, en daarbij rekening te houden met een speciale gedifferentieerde behandeling van ontwikkelingslanden conform SDG 14.6. Tijdens de 12e ministeriële conferentie van de WTO (MC12) bereikten de WTO-leden een (deel)akkoord ter beperking van schadelijke visserijsubsidies. Het akkoord bevat belangrijke afspraken waaronder een absoluut verbod op subsidies voor illegale, ongerapporteerde en ongereguleerde (IUU)-visserij en op subsidies voor visserij op ongereguleerde volle zee evenals substantiële beperkingen op subsidies die bijdragen aan overbevissing. Daarnaast is afgesproken dat verder onderhandeld wordt over uitstaande punten, waaronder verdere inperking van subsidies die bijdragen aan overbevissing en overcapaciteit. Het bereikte akkoord kan na ratificatie door twee derde van de WTO-leden in werking treden. **Het Europees Parlement heeft op 19 april jl. ingestemd met de sluiting van het Protocol tot wijziging van de Overeenkomst van Marrakesh wat betreft de overeenkomst over visserijsubsidies. De Raad zal naar verwachting op 15 mei besluiten over de sluiting van het Protocol, waarna de EU het instrument ter ratificatie van het visserijsubsidieakkoord bij het WTO-secretariaat kan deponeren. Daarnaast wordt sinds begin dit jaar onderhandeld over een vervolgakkoord over overbevissing en overcapaciteit. Streven is om tijdens MC13 hierover een akkoord te bereiken.** In het MC12-akkoord is opgenomen dat dit akkoord beëindigd wordt als de WTO leden niet binnen vier jaar na inwerkingtreding een breder akkoord overeenkomen.

B. Plurilaterale handelsakkoorden

Milieugoederenakkoord (*Environmental Goods Agreement* (EGA)):
Sinds juli 2014 onderhandelen achttien partijen, waaronder de EU, over een milieugoederenakkoord. Dit beoogde akkoord richt zich op de vrijmaking van de handel in goederen die bijdragen aan milieu- en klimaatdoelstellingen. Hiertoe onderhandelen deelnemende partijen over een lijst van 'groene goederen'. Eveneens wordt getracht de aan deze producten gekoppelde diensten op termijn te liberaliseren. De Europese Commissie onderhandelt op basis van het mandaat vastgesteld door de Raad in 2014. Inmiddels hebben 18 onderhandelingsrondes plaatsgevonden en zijn mogelijke hoofdlijnen van een akkoord (zogenoemde '*landing zones*') geïdentificeerd. Partijen hebben gepoogd de onderhandelingen in 2016 af te ronden, maar zijn daar niet in geslaagd. Hierop zijn de onderhandelingen stilgelegd. Het is onduidelijk wanneer deze onderhandelingen worden hervat, ook gezien het veranderde internationale krachtenveld sinds 2016. In december 2021 heeft de EU samen met andere WTO-leden een verklaring inzake handel en milieu ondertekend[1]. In lijn met deze verklaring zal de Europese Commissie namens de EU inzetten op het verder brengen van de discussie over handel in groene klimaatgoederen, en -diensten. De nadruk ligt vooralsnog op het thema klimaat, non-tarifaire barrières en de ontwikkelingsdimensie. In het stimuleren van handel door tariefliberalisering lijkt momenteel nog weinig interesse onder de WTO-leden.

Verdrag over de handel in diensten (*Trade in Services Agreement* (TiSA)):
Het *Trade in Services Agreement* (TiSA) is een plurilateraal handelsakkoord over de handel in diensten waarover de EU tot december 2016 met 22 WTO-leden onderhandelde, op basis van een mandaat van de Raad uit maart 2013.[2] Het doel van het akkoord is onder meer om afspraken te maken over internationale *e-commerce*, datastromen, telecommunicatie, transport, kennismigratie en betere regelgeving. Van 2 tot en met 10 november 2016 heeft de 21e onderhandelingsronde plaatsgevonden. De Europese Commissie heeft een verslag van deze ronde op haar website

[1] https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN21/6R2.pdf&Open=True
[2] http://data.consilium.europa.eu/doc/document/ST-6891-2013-ADD-1-DCL-1/en/pdf

gepubliceerd.[3] Sindsdien zijn er in verband met het veranderde internationale krachtenveld geen onderhandelingen meer geweest. Het is onbekend wanneer deze onderhandelingen worden hervat.

Onderhandelingen over elektronische handel (*e-commerce*):
In december 2017 hebben 71 WTO-leden, waaronder de EU, de VS, Japan en China, en marge van de 11e Ministeriële Conferentie van de WTO een gezamenlijke verklaring gepubliceerd die als startschot diende voor verkennende gesprekken ten behoeve van toekomstige onderhandelingen over *e-commerce*. Het doel van het akkoord is afspraken maken over onderwerpen die *e-commerce* betreffen, zoals erkenning van elektronische handtekeningen, consumentenbescherming, bescherming van persoonsgegevens en privacy en grensoverschrijdende datastromen. In januari 2019 hebben 76 leden van de WTO, waaronder de eerdergenoemde leden, in een gezamenlijk *Joint Statement Initiative* (JSI) te Davos besloten onderhandelingen te starten over de aan handel gerelateerde aspecten van *e-commerce*. Ondertussen is het aantal deelnemers gestegen tot **89.**
De onderhandelingen vinden voor de EU plaats op basis van het mandaat voor de Doha Ontwikkelingsagenda, aangevuld met de onderhandelingsrichtsnoeren die in mei 2019 door de Raad zijn vastgelegd.[4] Naast de plenaire vergaderingen vinden op verschillende onderwerpen bijeenkomsten in kleiner verband plaats om de teksten verder te stroomlijnen. Inmiddels is op technisch niveau overeenstemming bereikt over een tekst over spam (ongewenste elektronische post), *electronic authentication and electronic signatures* (elektronische authenticatie en handtekeningen), e-*contracts* (elektronische contracten), consumentenbescherming, *open government data, paperless trade* **en elektronische facturen *(electronic invoicing)*.**
Voorzitters Australië, Japan en Singapore hebben eind 2022 een geconsolideerde versie van de onderhandelingstekst gepresenteerd. Streven is om eind 2023 over een substantieel deel van de onderwerpen overeenstemming tussen de deelnemende landen te hebben bereikt.[5]

Onderhandelingen over binnenlandse regelgeving voor diensten (*domestic regulation)*
In december 2017 hebben 59 WTO-leden en marge van de 11e Ministeriële Conferentie van de WTO een gezamenlijke verklaring gepubliceerd die als startschot diende voor verkennende gesprekken ten behoeve van toekomstige onderhandelingen over *domestic regulation.* Het betreft onder andere afspraken over transparantie van maatregelen voor autorisaties om een dienst te kunnen verlenen, zoals vergunningsvereisten en -procedures, kwalificatie-eisen en -procedures en technische normen (bijvoorbeeld de tijdige publicatie van informatie over autorisatieprocedures). Op 2 december 2021 zijn onderhandelingen afgerond. Het merendeel van de inmiddels 70 deelnemende WTO-leden is inmiddels het proces gestart om de afspraken te kunnen toevoegen aan hun dienstenschema's. Enkele leden hebben bezwaar gemaakt tegen de voorgestelde verbeteringen in de dienstenschema's van de deelnemende WTO-leden. Het is nog onduidelijk wanneer de afspraken van kracht zullen worden.

C. Bilaterale handelsakkoorden

C.1 *Afrika*:

In 2002 zijn onderhandelingen gestart met landen in Afrika, de Cariben en de Stille Oceaan (ACS-landen) over een Economisch Partnerschapsakkoord (EPA). De landen zijn verdeeld in zeven regio's, waarvan er vijf in Afrika liggen, één in de Cariben en één in de Stille Oceaan.

Economisch Partnerschap Centraal Afrika (Centraal Afrika-EU EPA):
De landen in deze regio zijn: Kameroen, Centraal-Afrikaanse Republiek, Tsjaad, Congo-Brazzaville, Congo-Kinshasa, Equatoriaal Guinee, Gabon en São Tomé & Principe. Congo-Kinshasa is lid geworden van de Oost-Afrikaanse Gemeenschap per juli 2022 en moet nog aangeven of dit lidmaatschap ook betekent dat men verschuift naar het Economisch Partnerschap met Oostelijk Afrika. In de Centraal-Afrikaanse regio is de EPA als interim-akkoord alleen in werking getreden met Kameroen, met als mogelijkheid dat andere landen in de regio op een later moment toetreden tot de EPA. Met Kameroen vindt momenteel overleg plaats over een mogelijke verdieping van de overeenkomst. Tijdens de meest recente onderhandelingsronde is overeenstemming met Kameroen bereikt over de regels van oorsprong. Er zijn nog een aantal openstaande onderwerpen, zoals diensten. Onderhandelingen met andere landen in Centraal-Afrika over toetreding tot de EPA verlopen moeizaam. Sinds 1 januari 2014 komt Gabon niet meer in aanmerking voor preferenties

[3] http://trade.ec.europa.eu/doclib/docs/2016/november/tradoc_155095.pdf
[4] https://www.consilium.europa.eu/media/39505/st08993-ad01-en19.pdf
[5] https://www.wto.org/english/news_e/news23_e/igo_20jan23_e.pdf

onder het Algemeen Preferentieel Stelsel. De overige landen van deze regio vallen onder de 'minst ontwikkelde landen' en genieten daarom rechten- en quota-vrije toegang tot de EU-markt onder het zogenoemde '*Everything but Arms*' schema.

Economisch Partnerschap Westelijk Afrika (ECOWAS-EU EPA):
De landen in deze regio zijn: Benin, Burkina Faso, Gambia, Ghana, Guinée, Guinée-Bissau, Ivoorkust, Kaapverdië, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone en Togo (verenigd in de *Economic Community of West African States*, ECOWAS). Eind 2014 is een akkoord bereikt over een EPA. Van hen hebben dertien landen het akkoord direct ondertekend. In 2018 hebben ook Gambia en Mauritanië ondertekend, waarmee Nigeria het enige land in West-Afrika is dat de EPA niet ondertekend heeft. Het akkoord komt in aanmerking voor voorlopige toepassing wanneer alle ECOWAS-lidstaten het akkoord ondertekend hebben en minimaal twee derde van de ECOWAS-lidstaten het akkoord hebben geratificeerd. In de tussentijd zijn in 2016 interim-EPA's met Ghana en Ivoorkust tot stand gekomen. Beide worden voorlopig toegepast. Onder deze akkoorden is in juni 2022 de *Alliance on Sustainable Cocoa* tot stand gekomen. In deze *Alliance* hebben de EU, Ivoorkust, Ghana en de cacaosector afspraken gemaakt over het verbeteren van het inkomen van cacaoboeren op duurzame wijze, het elimineren van kinderarbeid in de cacaosector en het tegengaan van ontbossing.

Economisch Partnerschap Oostelijk Afrika (EAC-EU EPA):
Eind 2014 is een akkoord bereikt met de toenmalige vijf leden van de Oostelijk Afrikaanse Gemeenschap (de *East African Community*, EAC) over een EPA. Op 1 september 2016 tekenden Kenia en Rwanda de overeenkomst. Ook alle EU-lidstaten en de EU hebben de overeenkomst getekend. De EAC-EPA treedt pas in werking als alle EAC-landen het verdrag hebben ondertekend en geratificeerd. Op de EAC-Top van 20 mei 2017 is de EU ingegaan op zorgpunten van enkele EAC-leden. Op de EAC-Top van 1 februari 2019 werd afgesproken om binnen vier maanden meer helderheid te krijgen over deze zorgpunten en de EU bood ook technische assistentie aan, maar voortgang is sindsdien uitgebleven.[6] Tijdens de AU-top van 28 februari 2021 riep Kenia op om individuele onderhandelingen met de EU te beginnen over een interim-EPA in afwachting van de inwerkingtreding van de regionale overeenkomst, waar andere leden van de EAC op een later moment tot zouden kunnen toetreden. De EU bevestigde overleg te kunnen starten met de landen die daartoe bereid zijn. De Europese Commissie en Kenia zijn de onderhandelingen gestart voor het sluiten van een interim EU-Kenia EPA, waarbij ook afspraken over handel & duurzame ontwikkeling zullen worden gemaakt.[7] De verwachting is dat de onderhandelingen in 2023 zullen worden afgerond. Zuid-Sudan werd in september 2016 lid van EAC. Congo-Kinshasa is in juli 2022 lid geworden maar moet nog aangeven of dit ook een verschuiving naar het EAC-EPA betekent. Beiden zijn (nog) geen partij bij de EAC-EPA, maar komen in aanmerking voor preferenties onder het Algemeen Preferentieel Stelsel.

Economisch Partnerschap Oostelijk en Zuidelijk Afrika (ESA-EU EPA):
De Comoren, Djibouti, Eritrea, Ethiopië, Madagaskar, Malawi, Mauritius, de Seychellen, Sudan, Zambia en Zimbabwe worden tot Oostelijk en Zuidelijk Afrika gerekend. Sinds 2012 wordt voor Madagaskar, Mauritius, de Seychellen en Zimbabwe een interim EPA toegepast, sinds 2017 maken de Comoren ook onderdeel uit van deze overeenkomst. In januari 2019 kwamen partijen overeen om de overeenkomst te verdiepen. De eerste onderhandelingen hierover gingen van start in oktober 2019. Inmiddels hebben negen onderhandelingsrondes plaatsgevonden, waarbij de **elfde** onderhandelingsronde plaatsvond van **29 tot 31 maart 2023.**[8] De ambitie is te komen tot een veelomvattend modern akkoord met betrokkenheid van de '*civil society*' en de parlementen. De verwachting is dat de onderhandelingen zo mogelijk eind 2023 kunnen worden afgerond, afhankelijk van de voortgang in de komende onderhandelingsrondes.

Economisch Partnerschap Zuidelijk Afrika (SADC-EU EPA):
In juni 2016 kwam een akkoord tot stand met zes landen in de Zuidelijk Afrikaanse regio: Botswana, Lesotho, Mozambique, Namibië, Zuid-Afrika en Eswatini (voorheen Swaziland). Andere landen in de SADC-regio (Comoren, de Democratische Republiek Congo, Madagaskar, Malawi, Mauritius, Seychellen, Tanzania, Zambia en Zimbabwe) maken deel uit van andere regionale groepen waarmee de EU samenwerkt. Angola heeft formeel haar '*accession negotiation letter'* ingediend en de toetredingsprocedure is in gang gezet. De SADC-EPA (*Southern African*

[6] https://trade.ec.europa.eu/doclib/docs/2009/september/tradoc_144912.pdf
[7] https://policy.trade.ec.europa.eu/news/eu-and-kenya-advance-talks-interim-economic-partnership-agreement-sustainability-provisions-2022-02-17_en
[8] https://policy.trade.ec.europa.eu/news/commission-reports-eleventh-negotiation-round-five-eastern-and-southern-african-countries-deepen-2023-04-19_en

Development Community) wordt sinds 10 oktober 2016 voorlopig toegepast. Toen ook Mozambique vanaf februari 2018 de EPA toepaste, werd dit de eerste volledig operationele regionale EPA in Afrika. De voorbereidingen voor de review van de SADC-EU EPA zijn in oktober 2021 gestart. De onderhandelingen verlopen moeizaam. Over het monitoringmechanisme is overeenstemming bereikt, waarvoor internationale statistieken gebruikt gaan worden. **Ter ondersteuning van deze onderhandelingen heeft de Europese Commissie op 22 maart jl. een tender toegekend voor een ex-post evaluatie van de huidige SADC-EU EPA.**[9] De betrokkenheid van maatschappelijk middenveld stuit op weerstand van de zijde van SADC, evenals het bespreken van handel en duurzame ontwikkeling. Ook is overeenstemming bereikt welke stappen gezet moeten worden voor de toetreding van Angola tot de EPA. De onderhandelingen over een duurzaam investeringsfacilitatieakkoord met Angola (SIFA) zijn inmiddels afgerond.[10] Dit akkoord draagt bij aan de toetreding van Angola tot de SADC-EU EPA.

Egypte (*Deep and Comprehensive Free Trade Agreement* (DCFTA)):
In 2004 trad een associatieakkoord tussen de EU en Egypte in werking. Dit heeft vrijhandel van goederen bewerkstelligd door de afschaffing van invoerrechten voor industriële producten en omvat diverse concessies voor landbouwproducten. In 2010 trad additioneel een akkoord in werking met betrekking tot landbouw en visserij. In 2011 kreeg de Europese Commissie een mandaat om te onderhandelen over verbreding en verdieping van het akkoord, met afspraken over onder meer handel in diensten en investeringen. Een dialoog daarover is gestart in juni 2013, er is nog geen zicht op opening van de onderhandelingen.

Marokko (*Deep and Comprehensive Free Trade Agreement* (DCFTA)):
Het associatieakkoord tussen de EU en Marokko is in werking getreden in maart 2000. Het akkoord heeft geleid tot de geleidelijke afbouw van invoerrechten voor industriële producten en liberalisatie voor landbouw- en visserijproducten. In 2011 kreeg de Europese Commissie een mandaat om te onderhandelen over verbreding en verdieping van het akkoord, met afspraken over onder meer handel in diensten en investeringen. De onderhandelingen daarover zijn in april 2013 van start gegaan. Sinds de vierde ronde in april 2014 liggen de onderhandelingen stil. Marokko wenste meer tijd voor interne afstemming. Tijdens de EU-Marokko Associatieraad in juni 2019 is nog gesproken over hervatting van de onderhandelingen.[11] Deze hervatting is nog niet gepland of verder besproken.

Tunesië (*Deep and Comprehensive Free Trade Agreement* (DCFTA)):
Het associatieakkoord tussen de EU en Tunesië is in 1998 in werking getreden. In 2008 zijn de douanerechten voor industrieproducten volledig afgeschaft. In 2011 kreeg de Europese Commissie een mandaat om te onderhandelen over verbreding en verdieping van het akkoord, met afspraken over onder meer handel in diensten en investeringen.[12] De vierde onderhandelingsronde vond plaats van 29 april tot en met 3 mei 2019 in Tunis.[13] Er is nog geen datum bekend voor de vijfde onderhandelingsronde.

C.2 *Azië*:

ASEAN (*Association of Southeast Asian Nations*):
In 2007 zijn de onderhandelingen gestart tussen de EU en de *Association of Southeast Asian Nations* (ASEAN)[14] om tot een regionaal handelsakkoord te komen. De basis hiervoor is het ASEAN-mandaat uit 2007. Na zeven onderhandelingsrondes hebben de EU-lidstaten in 2009 besloten om de onderhandelingen te vervolgen op het niveau van bilaterale handelsakkoorden met ASEAN-landen. Deze handelsakkoorden kunnen als bouwstenen dienen om later alsnog tot een regionaal handelsakkoord te komen. Op 1 december 2020 vond de 23e ASEAN-EU ministeriële ontmoeting (virtueel) plaats, waar ASEAN en de EU hun betrekkingen verdiepten door een strategisch partnerschap te sluiten. Ook op de *Joint Cooperation Comité* virtuele vergadering van 28 maart 2021 herbevestigden ASEAN en de EU hun intenties om uiteindelijk tot een regionaal handelsakkoord te komen. Tijdens deze vergadering werd ook de samenwerking besproken op het gebied van klimaat en duurzaamheid, zoals met betrekking tot bosbehoud, duurzame landbouw en

[9] https://ted.europa.eu/udl?uri=TED:NOTICE:172151-2023:TEXT:EN:HTML
[10] https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6136
[11] https://www.consilium.europa.eu/en/press/press-releases/2019/06/27/joint-declaration-by-the-european-union-and-the-kingdom-of-morocco-for-the-fourteenth-meeting-of-the-association-council
[12] http://trade.ec.europa.eu/doclib/press/index.cfm?id=1490
[13] https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157912.pdf
[14] De volgende landen zijn lid van ASEAN: Brunei Darussalam, Cambodja, Indonesië, Laos, Maleisië, Myanmar/Birma, de Filipijnen, Singapore, Thailand en Vietnam.

visserij. ASEAN-lidstaten (AMS) en de Commissaris van Handel van de Europese Unie (EU) vergaderden virtueel op 14 september 2021. Er werd afgesproken verder te werken aan de ontwikkeling van parameters voor een toekomstig ASEAN-EU-handelsakkoord. In september 2022 vond de *ASEAN Economic Ministers – EU Consultation* plaats. Hier werd besloten dat de EU-ASEAN Werkgroep zich niet langer zal richten op het vaststellen van parameters voor een handelsakkoord, maar zal focussen op sectorale samenwerking over digitale economie, groene technologieën en diensten, en weerbaarheid van waardeketens. De eerste vergadering is nog niet gepland, maar het doel is deze in het tweede kwartaal van 2023 te laten plaatsvinden.

China (*EU-China Investment Agreement*):
Op 30 december 2020 kondigden de EU en China aan een principeovereenkomst te hebben bereikt over het EU-China *Comprehensive Agreement on Investment* (CAI). De Kamer is hierover geïnformeerd per brief.[15] De onderhandelingen over het CAI waren gaande sinds 2013. De conceptteksten evenals de conceptversies van annexen zijn online gepubliceerd.[16] Deze teksten moeten nog juridisch opgeschoond en vertaald worden. Op basis van de tekst van de principeovereenkomst lijkt er sprake van een *EU-only* overeenkomst. Zoals vermeld in de beantwoording op Kamervragen over het CAI, kan het kabinet pas een volledige analyse van het akkoord maken als een definitieve tekst beschikbaar komt inclusief alle bijlagen.

In mei 2021 heeft de Commissie bij monde van Uitvoerend Vicepresident Dombrovskis aangegeven dat de goedkeuringsprocedure van het EU-China *Comprehensive Agreement on Investment* (CAI) wordt stilgelegd. Dit was in reactie op de Chinese sancties op Europese politici. Tevens heeft het EP uitgesloten het CAI te bespreken zolang de sancties van kracht zijn. De grote zorgen die NL al eerder had over de link tussen handel en mensenrechten in de EU-China relatie lijken daarmee binnen de EU meer tractie te hebben gekregen. Een formele kabinetspositie over het CAI zal pas aan de orde zijn als alle definitieve teksten zijn ontvangen. Voor Nederland geldt daarbij dat de mensenrechtensituatie in China zwaar weegt, waarbij in het bijzonder verbetering van de situatie t.a.v. dwangarbeid noodzakelijk is. NL zal aandacht blijven vragen voor de wisselwerking tussen handel en mensenrechten in de EU-Chinarelatie.

Filipijnen (*EU-Philippines Free Trade Agreement*):
In december 2015 zijn de onderhandelingen over een handelsakkoord tussen de EU en de Filipijnen aangekondigd. De Raad heeft eind 2015 ingestemd met een voorzitterschapsnotitie voor de start van de onderhandelingen. Deze notitie vormt een aanvulling op het mandaat van de Raad aan de Europese Commissie voor de onderhandelingen over een regionaal handelsakkoord met de ASEAN- regio uit 2007. De tweede onderhandelingsronde vond plaats van 13 tot en met 17 februari 2017. De Europese Commissie heeft het verslag van deze ronde op haar website gepubliceerd.[17] Op dit moment is geen volgende onderhandelingsronde gepland.

GCC (*Gulf Cooperation Council*)
De EU en de GCC startten onderhandelingen voor een handelsakkoord in 1990. De onderhandelingen werden echter stopgezet in 2008 vanwege verschillende redenen.

India (*India-EU Free Trade Agreement*):
De EU en India onderhandelen sinds 2007 over een handels- en investeringsakkoord. Sinds de zomer van 2013 lagen de onderhandelingen stil. Na verschillende pogingen om de *EU-India Free Trade Agreement* onderhandelingen te heropenen, is in juni 2018 besloten de onderhandelingen voorlopig niet te herstarten wegens een blijvend gebrek aan een gelijk ambitieniveau. Sindsdien heeft de Commissie de strategische dialoog met India voortgezet om de onderhandelingen in de toekomst te kunnen heropenen en de mogelijkheden bekeken om te komen tot een separaat investeringsakkoord. Tijdens de EU-India Top op 8 mei 2021 is besloten de onderhandelingen over een gebalanceerd, ambitieus, alomvattend en wederzijds voordelig handelsakkoord te hervatten. Tevens is afgesproken om de onderhandelingen over een separaat investeringsakkoord op te starten alsook over een separaat akkoord inzake de bescherming van geografische indicaties. Zowel India als de Europese Commissie hebben inmiddels een hoofdonderhandelaar aangesteld en een eerste ronde ter hervatting van de onderhandelingen vond plaats in juni 2022. Sindsdien zijn er **vier** onderhandelingsrondes geweest, waarvan de laatste van **13 tot 17 maart jl. was. De volgende ronde staat gepland in juni 2023. In deze onderhandelingen is vooralsnog weinig vooruitgang geboekt.** Op 25 april 2022 kondigden de voorzitter van de Europese

[15] Kamerstukken II, 21 501-02, nr. 2255.
[16] https://trade.ec.europa.eu/doclib/press/index.cfm?id=2237
[17] http://trade.ec.europa.eu/doclib/docs/2017/march/tradoc_155435.pdf

Commissie Von der Leyen en de Indiase premier Modi aan om een *Trade en Technology Council* te starten om de nexus tussen handel, technologie en veiligheid te bespreken. De *Trade and Technology Council* is op 6 februari 2023 opgezet en omvat drie werkgroepen. Deze gaan over strategische technologieën, *e-governance* en digitale connectiviteit, groene en schone energie technologieën en handel, investeringen en weerbare waardeketens. **De eerste bijeenkomst van de *Trade and Technology Council* vond plaats op 16 mei jl.**

Indonesië (*Indonesia-EU Comprehensive Economic Partnership Agreement* (CEPA):
De Raad heeft op 18 juli 2016 ingestemd met een voorzitterschapsnotitie voor de start van de onderhandelingen over een handelsakkoord tussen de EU en Indonesië. Deze notitie vormt een aanvulling op het bestaande ASEAN-mandaat uit 2007. Op traditionele handelsonderdelen is 80% afgerond, maar er is weinig voortgang ten aanzien van meer moderne handelshoofdstukken zoals TSD, subsidies en overheidsaanbestedingen.[18] Van 2020 tot 2022 vonden vier onderhandelingsrondes plaats, allemaal via videoconferenties vanwege COVID. In deze jaren is weinig vooruitgang geboekt. Indonesië heeft aangegeven in 2023 vier fysieke onderhandelingsrondes in te willen plannen. **Daarvan hebben er nu twee plaatsgevonden, waarvan de laatste in mei. Hoewel de onderhandelingen voorspoediger verlopen dan voorheen, blijft grote vooruitgang vooralsnog uit.**

Jordanië (*Deep and Comprehensive Free Trade Agreement* (DCFTA)):
In 2002 is een associatieakkoord tussen de EU en Jordanië in werking getreden. Afschaffing van de invoertarieven is na een transitieperiode van twaalf jaar gerealiseerd. In 2007 trad een aanvullend akkoord in werking voor liberalisatie van handel in landbouwproducten. In 2011 kreeg de Europese Commissie een mandaat om te onderhandelen over verbreding en verdieping van het akkoord, met afspraken over onder meer handel in diensten en investeringen. Er is geen eerste onderhandelingsronde gepland.

Kirgizië (*Enhanced Partnership and Cooperation Agreement* (ECPA)):
De samenwerking tussen de EU en Kirgizië is vastgelegd in een *Partnership and Cooperation Agreement* (PCA), die in 1999 in werking is getreden. Deze samenwerking omvat drie pilaren: een politieke dialoog, economische samenwerking (inclusief ontwikkelingshulp vanuit de EU) en samenwerking op een aantal concrete beleidsterreinen, zoals technologie en cultuur. Daarnaast heeft Kirgizië preferentiële markttoegang tot de EU op grond van het '*APS+*'-stelsel (Algemeen Preferentieel Stelsel). Op 2 juni 2017 heeft de Commissie een aanbeveling aan de Raad gedaan voor het openen van de onderhandelingen voor het moderniseren van het PCA, inclusief een voorstel voor een mandaat. Hierin stelt de Commissie voor om de samenwerking op alle drie de pijlers te verdiepen. De Raad heeft het onderhandelingsmandaat op 9 oktober 2017 goedgekeurd. Onderhandelingen over het handelsdeel zijn op 28 februari 2018 van start gegaan. Ten aanzien van handel zijn de onderhandelingsteksten gemodelleerd op het recent aangepaste akkoord met Kazachstan.[19] Er is geen sprake van tariefliberalisatie, omdat daarover alleen met de Euraziatische douane-unie als geheel onderhandeld kan worden. Tijdens de EU–Centraal-Azië Ministeriële bijeenkomst in 2019 hebben de EU en Kirgizië het politieke akkoord geparafeerd. Het EPCA is nu in afwachting van ondertekening. Het voorstel aan de Raad voor de ondertekening van het EU-Kirgizië EPCA is 13 juni 2022 gepubliceerd.[20]

Maleisië (*Malaysia-EU FTA* (MEUFTA)):
Onderhandelingen over een handelsakkoord tussen de EU en Maleisië zijn in oktober 2010 begonnen. Het ASEAN-mandaat uit 2007 lag hieraan ten grondslag. De onderhandelingen zijn na de zevende, en tot nu toe laatste, ronde in april 2012 stilgelegd op verzoek van Maleisië. Op dit moment is nog geen zicht op hervatting van de onderhandelingen.

Myanmar (*EU-Myanmar Investment Protection Agreement*):
In maart 2014 heeft de Raad een mandaat aan de Europese Commissie verleend en zijn de onderhandelingen tussen de EU en Myanmar over een investeringsbeschermingsakkoord begonnen. Het doel van de bilaterale investeringsovereenkomst met de EU is om investeringen te bevorderen ten behoeve van de sociaaleconomische ontwikkeling van Myanmar. Het akkoord zal hoofdstukken bevatten over transparantie, duurzame ontwikkeling, investeringsbescherming en geschillenbeslechting. Op 26 en 27 april 2017 hebben technische besprekingen plaatsgevonden.[21] Op 1 februari 2021 vond in Myanmar een staatsgreep plaats. De EU heeft in haar Raadsconclusies

[18] https://trade.ec.europa.eu/doclib/docs/2021/march/tradoc_159484.pdf
[19] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016D0123
[20] EUR-Lex - 52022PC0277 - EN - EUR-Lex (europa.eu)
[21] http://trade.ec.europa.eu/doclib/docs/2017/april/tradoc_155507.pdf

opgeroepen voor de-escalatie en aangegeven samen te willen werken met partijen die de democratie steunen.[22] Er staat geen nadere onderhandelingsronde gepland.

Oezbekistan *(Enhanced Partnership Cooperation Agreement (EPCA))*:
De samenwerking tussen de EU en Oezbekistan is vastgelegd in een *Partnership and Cooperation Agreement* (PCA), dat in 1999 in werking is getreden. Daarnaast heeft Oezbekistan sinds 10 april 2021 preferentiële markttoegang tot de EU op grond van het 'APS+'-stelsel (Algemeen Preferentieel Stelsel). De EU en Oezbekistan onderhandelen over een overeenkomst ter modernisering en vervanging van het *Partnership and Cooperation Agreement* (PCA) op basis van het mandaat dat de Raad op 16 juli 2018 heeft aangenomen. Op 23 november 2018 lanceerden de EU en Oezbekistan de onderhandelingen van het EPCA formeel en marge van de EU-Centraal-Azië Ministeriële bijeenkomst. Op 6 juli 2022 zijn de onderhandelingen voor het EU-Oezbekistan EPCA afgerond. Momenteel wordt het akkoord juridisch geschoond.

Singapore (*European Union-Singapore Free Trade Agreement* (EUSFTA)):
De EU-Singapore akkoorden zijn op 19 oktober 2018 ondertekend. Het gaat om een handelsakkoord en een investeringsakkoord. De akkoorden vormen een belangrijke kans voor het bedrijfsleven en zullen tevens een positieve impuls geven aan de bilaterale relatie tussen de EU en Singapore. Singapore heeft, net als Nederland, een bijzonder open economie. Singapore behoort tot de twintig belangrijkste exportmarkten van Nederland. Het handelsakkoord is op 21 november 2019 in werking getreden. Bij de viering van het 1-jarig bestaan van het verdrag tekenden de EU en Singapore een samenwerkingsovereenkomst "*Administrative arrangement on cluster cooperation*", een instrument voor het benutten van de voordelen van EUSFTA door middel van regelmatige uitwisselingen en *business matchmaking* voor Singaporese en Europese bedrijven. Het investeringsakkoord bevat alle vernieuwende elementen van de EU-inzet voor investeringsbescherming. Het EU-investeringsakkoord met Singapore zal het bestaande investeringsakkoord tussen Nederland en Singapore vervangen. Het Europees Parlement heeft het EU-handelsakkoord en het EU-investeringsakkoord op 13 februari 2019 goedgekeurd. Het investeringsakkoord is een gemengd akkoord en kan pas in werking treden nadat het is geratificeerd door alle EU-lidstaten. In Nederland is de goedkeuring van het investeringsakkoord in voorbereiding.

Syrië (*Euro-Mediterranean Agreement Establishing an Association*):
De bilaterale relatie is geregeld in een Samenwerkingsovereenkomst uit 1977, die in 1978 in werking trad. Onderhandelingen over een associatieakkoord zijn afgerond in 2004, maar ondertekening is uitgebleven als gevolg van de interne politieke situatie in Syrië. Tevens heeft de EU in 2011 besloten handelsrestricties in te stellen in reactie op de gewelddadige onderdrukking door het Syrische regime van vreedzame demonstraties. Deze sancties zijn sindsdien regelmatig aangepast en uitgebreid.

Tadzjikistan *((Enhanced Partnership Cooperation Agreement (EPCA))*:
De samenwerking tussen de EU en Tadzjikistan is vastgelegd in een *Partnership and Cooperation Agreement* (PCA), dat in 2010 in werking is getreden. Daarnaast heeft Tadzjikistan preferentiële markttoegang tot de EU op grond van het 'APS'-stelsel (Algemeen Preferentieel Stelsel). De EU en Tadzjikistan onderhandelen over een overeenkomst ter modernisering en vervanging van het PCA. Op 8 december 2022 heeft de Raad de Commissie en de Hoge Vertegenwoordiger het mandaat gegeven voor het voeren van de onderhandelingen over een EPCA met Tadzjikistan.

Thailand (*EU-Thailand Free Trade Agreement*):
In februari 2013 zijn de onderhandelingen tussen de EU en Thailand gestart. Het ASEAN-mandaat uit 2007 vormt hiervoor de basis. De vierde onderhandelingsronde vond plaats van 8 tot en met 10 april 2014. Na de militaire coup in mei 2014 zijn de onderhandelingen stilgelegd. Conform de Raadsconclusies van 2017 zouden de onderhandelingen slechts worden heropend op het moment dat er een democratisch gekozen regering aan de macht is. Op 24 maart 2019 zijn er in Thailand democratische verkiezingen gehouden. Naar aanleiding hiervan stelde de Raad in haar conclusies van 14 oktober 2019[23] dat de nodige stappen moeten worden gezet om de onderhandelingen over een ambitieus en alomvattend handelsakkoord te hervatten. Nederland heeft tijdens de RBZ/Handel in november 2019 gesteld dat de EU zou moeten overwegen opnieuw naar de onderhandelingsinzet te kijken. In januari 2023 hebben zowel de Europese Commissie als Thailand

[22] https://www.consilium.europa.eu/en/press/press-releases/2021/02/22/myanmar-burma-council-adopts-conclusions/
[23] https://www.consilium.europa.eu/media/41182/st13066-en19.pdf, p. 8

aangegeven consultaties te willen starten om de onderhandelingen over een handelsakkoord weer op te starten. Er staat nog geen onderhandelingsronde gepland**, het streven van beide partijen is om deze de komende maanden plaats te laten vinden.**[24]

Vietnam (*EU-Vietnam Investment Protection Agreement*):
Per 1 augustus 2020 is het EU-Vietnam handelsakkoord in werking getreden. Daarnaast is op 30 juni 2019 een investeringsakkoord tussen de EU en Vietnam ondertekend. Dit verdrag is op 12 februari 2020 door het Europees Parlement goedgekeurd. Alvorens het investeringsakkoord in werking kan treden, dient het door de nationale parlementen van de EU-lidstaten te worden goedgekeurd. In Nederland is de goedkeuring van het investeringsakkoord in voorbereiding. Het investeringsakkoord lijkt sterk op het investeringsakkoord van het EU-Singapore akkoord. Dit betekent dat het investeringsakkoord de gemoderniseerde EU-inzet voor investeringsbescherming bevat, zoals het *Investment Court System*.

C.3 *Europa:*

Andorra, Monaco en San Marino (overkoepelend *Association Agreement*):
De huidige relatie tussen de EU en de drie micro-staten Andorra, Monaco en San Marino is gebaseerd op een groot aantal afzonderlijke akkoorden. Sinds 8 maart 2015 wordt er onderhandeld om deze afzonderlijke akkoorden te integreren in, bij voorkeur, één associatieakkoord. De Raad heeft hiervoor op 4 december 2014 het mandaat verleend. Het doel van dit associatieakkoord is het vergroten van welvaart en het verder bestendigen van het goede nabuurschap, waarbij de microstaten nauwer geïntegreerd worden in de Europese Interne Markt terwijl er tegelijkertijd rekening wordt gehouden met de unieke eigenschappen van de betreffende landen. De onderhandelingen bevinden zich momenteel in de finale fase en **de Commissie streeft ernaar deze eind 2023 af te ronden**.

Azerbeidzjan (*Comprehensive Agreement*):
De huidige relatie tussen de EU en Azerbeidzjan is gebaseerd op een *Partnership and Cooperation Agreement* (PCA) uit 1996. Dit akkoord is in 1999 in werking getreden. Op 14 november 2016 heeft de Raad de Commissie en de Hoge Vertegenwoordiger het mandaat gegeven voor het voeren van de onderhandelingen voor een breed akkoord, ter vervanging van het PCA. De onderhandelingen zijn gestart op 7 februari 2017. De zevende onderhandelingsronde over het handelsgedeelte van een nieuw akkoord vond plaats van 23 tot en met 25 april 2019 in Baku. De onderhandelingen hebben vertraging opgelopen en sinds juli 2021 wordt gepoogd een nieuwe onderhandelingsronde te organiseren. Streven is dat de volgende ronde zal plaatsvinden wanneer voortgang is geboekt in technische discussies.

Gibraltar (uitvloeisel Handels- en Samenwerkingsovereenkomst EU-VK)
In het akkoord met het VK is slechts opgenomen dat over de verhouding EU-Gibraltar nadere afspraken dienden te worden gemaakt. Deze beoogde EU-VK-overeenkomst inzake Gibraltar heeft als doel fysieke grensinfrastructuur en controles voor personen- en goederencontroles op de grens tussen Spanje en Gibraltar overbodig te maken, aangevuld met afspraken o.g.v. transport, milieu & klimaat, sociale zekerheidscoördinatie en burgerrechten die noodzakelijk zijn om bij te dragen aan gedeelde welvaart in de regio. Ook voorziet het mandaat in het opnemen van vrijwaringsmaatregelen om de veiligheid van het Schengengebied te waarborgen. Deze maatregelen zien onder meer op migratie- en veiligheidsvlak. Uw Kamer heeft een BNC fiche[25] ontvangen, de onderhandelingen lopen momenteel.

Regionale Conventie over Pan-Euro-mediterrane preferentiële oorsprongsregels (PEM-Conventie)
De PEM inzake preferentiële oorsprongsregels stelt gemeenschappelijke oorsprongsprotocollen vast binnen een netwerk van vrijhandelsakkoorden tussen de verschillende verdragslanden. Dit is een brede groep landen en omvat o.a. de EU, EFTA-landen, deelnemers aan het Barcelona-proces (Algerije, Egypte, etc.) en deelnemers aan het EU stabilisatie en associatieproces (Albanië, Noord-Macedonië, etc.) De PEM Conventie werd in februari 2013 gepubliceerd. Vooruitlopend op de aanname van de herziene PEM Conventie door alle verdragslanden, onderhandelt de EU met de individuele verdragslanden over het toepassen van zogenoemde 'overgangsregels'. Deze gemoderniseerde oorsprongsregels zijn van toepassing naast de afgesproken regels in de PEM

[24] https://ec.europa.eu/commission/presscorner/detail/en/ip_23_1628
[25] Kamerstukken II, 22 112, nr. 3206.

Conventie totdat de herziene PEM Conventie in werking treedt. Deze overgangsregels zijn inmiddels van toepassing tussen de EU en een grote groep van de verdragslanden.[26]

Rusland (verdieping van het Partnership and Cooperation Agreement (PCA)):
In 1997 is het *Partnership and Cooperation Agreement (PCA)* tussen de EU en Rusland in werking getreden. In 2008 waren onderhandelingen begonnen over modernisering en uitbreiding van het PCA op basis van een mandaat van de Raad. Per besluit van de Raad zijn deze onderhandelingen sinds 2014 opgeschort. De reden hiervoor was de annexatie van de Krim door Rusland, alsook het conflict in Oost-Oekraïne. In reactie op de Russische invasie van Oekraïne heeft de EU aanvullende sancties ingevoerd die de handel met Rusland sterk beperken.

Turkije (*Modernised Customs Union*):
Sinds 1995 vormen de EU en Turkije gezamenlijk een douane-unie. Voorts is Turkije sinds 1999 kandidaat-lidstaat van de Unie en zijn in 2005 gesprekken over toetreding van start gegaan. Op 23 december 2016 heeft de Europese Commissie een aanbeveling voor een mandaat gedaan aan de Raad om de douane-unie te moderniseren. Tevens wenst de Commissie de douane-unie uit te breiden met afspraken op het gebied van landbouw, handel in diensten en overheidsaanbestedingen. De ER herhaalde in juni 2021, in lijn met zijn conclusies van maart, dat indien Turkije zich constructief blijft opstellen, de Europese Unie bereid is om op een gefaseerde, proportionele en omkeerbare wijze de samenwerking met Turkije op een aantal gebieden te intensiveren. In dat verband constateerde de ER dat op technisch niveau een begin was gemaakt met het werk aan een mandaat voor de eventuele modernisering van de douane-unie. De ER onderstreepte dat aanvullende *guidance* van de Europese Raad nodig is voordat de Raad een dergelijk mandaat mag aannemen. De ER benadrukte eveneens dat Turkije de implementatie van de douane-unie moet verbeteren. Mede op Nederlands aandringen herhaalde de ER dat een dialoog over mensenrechten en de rechtsstaat een integraal onderdeel van de betrekkingen tussen de EU en Turkije blijft.

Zwitserland *(Institutional Framework Agreement)*:
Het kader voor de betrekkingen tussen de EU en Zwitserland wordt momenteel gevormd door meer dan 100 afzonderlijke bilaterale akkoorden die over de afgelopen decennia zijn afgesloten. De EU en Zwitserland hebben eerder onderhandeld over een *Institutional Framework Agreement* (IFA) ter modernisering cq. vervanging van deze akkoorden. Zwitserland heeft op 26 mei 2021 unilateraal het besluit genomen het onderhandelingsresultaat niet vast te stellen. Deze beslissing heeft het Zwitserse binnenlandse debat over de betrekkingen tussen de EU en Zwitserland verdiept. Door het afbreken van de onderhandelingen door Zwitserland wordt momenteel niet over nieuwe bilaterale akkoorden onderhandeld, noch worden bestaande akkoorden aangepast aan voortschrijdende wet- en regelgeving. De EU en Zwitserland zijn belangrijke partners, zowel politiek als economisch. De EU blijft vastbesloten om de betrekkingen tussen de EU en Zwitserland te moderniseren, om zo een gelijk speelveld te bewerkstelligen. **Er hebben inmiddels negen rondes verkennende, technische gesprekken met Zwitserland plaatsgevonden, maar deze gesprekken hebben nog niet geresulteerd in het hervatten van de onderhandelingen**. **De verkennende gesprekken hebben wel geresulteerd in een beter begrip van elkaars posities. De Commissie streeft er naar om nog binnen haar huidige termijn tot een nieuw partnerschap met Zwitserland te komen.**

C.4 *Noord- en Midden-Amerika*:

Canada (*Comprehensive Economic and Trade Agreement* (CETA)):
Nederland heeft net als Canada, de EU en de andere EU-lidstaten het EU-handelsakkoord met Canada (CETA) in 2016 ondertekend. De handelsafspraken in het akkoord worden sinds 21 september 2017 voorlopig toegepast. Nederland heeft het verdrag geratificeerd op 23 november 2022[27] na goedkeuring door de Eerste Kamer op 12 juli 2022. CETA treedt volledig in werking na ratificatie door Canada, de EU en alle individuele EU-lidstaten.[28]

Economisch Partnerschap met de landen in de Cariben (CARIFORUM-EU EPA):
In 2008 zijn de onderhandelingen over de CARIFORUM-EU EPA afgerond, waarna de goedkeuringsprocedures zijn gestart en de EPA voorlopig wordt toegepast, behalve in Haïti. Nederland heeft het akkoord in 2013 geratificeerd. De EPA treedt definitief in werking wanneer alle

[26] EUR-Lex - 52023XC0210(01) - EN - EUR-Lex (europa.eu)
[27] Overheid.nl | Verdragenbank
[28] https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2016017

partijen hebben geratificeerd.[29] Aan implementatie van het akkoord wordt gestaag gewerkt. De meest recente bijeenkomst van de gezamenlijke CARIFORUM-EU Raad was op 13 oktober 2022 in Barbados.[30] In 2021 is het evaluatierapport van de CARIFORUM-EPA gepubliceerd over de periode 2008-2018.[31]

Mexico (modernisering *EU-Mexico Global Agreement*):
Op 23 mei 2016 heeft de Raad het onderhandelingsmandaat ten behoeve van de modernisering van het bestaande *EU-Mexico Global Agreement* uit 1997, dat sinds 2000 in werking is, goedgekeurd. Op 28 april 2020 is er een onderhandelaarsakkoord bereikt tussen de Europese Commissie en Mexico. Naar verwachting zal de Commissie dit jaar het akkoord ter besluitvorming voorleggen aan de Raad. De Commissie bespreekt momenteel met de Mexicaanse onderhandelaars de mogelijkheid om het handelsdeel van het akkoord als een op zichzelf staand interim-akkoord te ondertekenen en in werking te laten treden. Na inwerkingtreding van het *Global Agreement* als geheel zal het interim-akkoord dan kunnen vervallen. Dat zou betekenen dat het handelsgedeelte van de Global Agreement als tussentijds handelsakkoord aan de Raad wordt voorgelegd. Het kabinet zal bij de voorlegging een standpunt innemen over de vorm en inhoud van het akkoord zoals aangeboden door de Europese Commissie aan de Raad. Het handelsdeel van de *Global Agreement* zet in op 97% liberalisering van de handel in goederen. Voor Nederland is van belang het wegnemen van onnodige belemmeringen, zoals niet-tarifaire obstakels, het openstellen van aanbestedingsprocedures op sub-federaal niveau en de afspraken voor vergrote markttoegang voor landbouwproducten, zoals zuivel, pluimvee, varkens, eierproducten, aardappelen, bloembollen en granen. Ten opzichte van de bestaande EU-Mexico overeenkomst zijn nu ook anti-corruptiebepalingen en een hoofdstuk over duurzame ontwikkeling opgenomen. Ook zal voor het eerst het maatschappelijk middenveld een rol krijgen in de monitoring van het akkoord. Voor wat betreft het investeringsdeel van het *Global Agreement* is Mexico akkoord gegaan met het voorstel van de EU voor de oprichting van het *Investment Court System*.

Centraal Amerika (EU-*Central America Association Agreement*):
De EU en de Midden-Amerikaanse regio (Guatemala, Costa Rica, El Salvador, Honduras, Nicaragua en Panama) zijn een associatieakkoord, inclusief een *Deep and Comprehensive Free Trade Agreement,* overeengekomen dat in juni 2012 is ondertekend. Doel ervan is om de economische groei, de democratie en de politieke stabiliteit in Midden-Amerika te ondersteunen. De handelspijler van het associatieakkoord wordt sinds augustus 2013 voorlopig toegepast met Honduras, Nicaragua en Panama, sinds oktober 2013 met Costa Rica en El Salvador, en sinds december 2013 met Guatemala. Nederland heeft het akkoord in 2014 geratificeerd.[32] In 2022 **kwam het Associatiecomité bijeen ter ere van het tienjarig jubileum van het akkoord. Ook** werd een evaluatie van het akkoord gepubliceerd.[33]

Verenigde Staten:
Op 15 april 2019 is een Raadsbesluit aangenomen waarmee twee mandaten aan de Europese Commissie zijn verleend voor onderhandelingen met de Verenigde Staten. Het gaat om (1) een mandaat voor onderhandelingen over een handelsakkoord beperkt tot tariefverlaging voor industriële goederen, inclusief visserij, en (2) een mandaat voor onderhandelingen over een akkoord met betrekking tot erkenning van elkaars conformiteitsbeoordeling.[34] Er zijn geen ontwikkelingen geweest met betrekking tot de nieuwe twee mandaten. In het Raadsbesluit van 15 april 2019 is tevens het onderhandelingsmandaat voor de *Transatlantic Trade and Investment Partnership* (TTIP) als verouderd en niet meer relevant verklaard.

C.5 Oceanië:

Australië (*EU-Australia Free Trade Agreement*):
Het mandaat om te onderhandelen over een handelsakkoord tussen de EU en Australië is op 22

[29] https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2008034
[30] https://international-partnerships.ec.europa.eu/news-and-events/news/european-union-and-cariforum-ministers-launch-ambitious-new-eu-caribbean-partnerships-under-global-2022-10-12_en
[31] https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159354.pdf
[32] https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2012001
[33] https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/e8ee321b-09c6-4d09-b08e-74d037339f39/details
[34] https://www.consilium.europa.eu/nl/press/press-releases/2019/04/15/trade-with-the-united-states-council-authorises-negotiations-on-elimination-of-tariffs-for-industrial-goods-and-on-conformity-assessment/

mei 2018 door de Raad vastgesteld.[35] Er wordt onderhandeld over een handelsakkoord binnen de exclusieve competentie van de EU. Er is geen sprake van onderhandelingen over investeringsbescherming. Op 18 juni 2018 zijn de onderhandelingen tussen de EU en Australië officieel begonnen. **De meest recente en vijftiende onderhandelingsronde vond plaats van 24 tot 28 april 2023. Streven is om rond deze zomer tot een onderhandelaarsakkoord te komen, echter een aantal inhoudelijke punten staan nog open.**

Nieuw-Zeeland (*EU-New Zealand Free Trade Agreement*):
Het mandaat om te onderhandelen over een handelsakkoord tussen de EU en Nieuw-Zeeland is op 22 mei 2018 door de Raad vastgesteld.[36] Op 21 juni 2018 zijn de onderhandelingen tussen de EU en Nieuw-Zeeland officieel begonnen. Er wordt onderhandeld over een handelsakkoord binnen de exclusieve competentie van de EU. Er is geen sprake van onderhandelingen over investeringsbescherming. De Europese Commissie en Nieuw-Zeeland hebben op 30 juni 2022 een onderhandelaarsakkoord bereikt. Op vrijdag 17 februari 2023 heeft de Europese Commissie de concept Raadsbesluiten ter ondertekening en sluiting van het handelsakkoord met Nieuw-Zeeland aan de Raad gestuurd. De Raad is nu aan zet om op basis van deze documenten te besluiten over de ondertekening en sluiting van het akkoord. De Europese Commissie heeft de hoop uitgesproken dat de Raad in juni 2023 een besluit neemt, zodat de ondertekening kort daarna kan plaatsvinden. Na de ondertekening is goedkeuring door het Europees Parlement vereist alvorens het verdrag daadwerkelijk in werking kan treden.[37] **Uw Kamer heeft separaat een brief met de appreciatie van het akkoord ontvangen inclusief toelichting van de positie die het kabinet voornemens is in te nemen (PM: link wanneer de brief is verzonden).**

Economisch Partnerschap met de ACP-landen in de Stille Oceaan (*Pacific-EU EPA*):
De onderhandelingen over een regionale EPA met de ACP-landen in de Stille Oceaan worden gevoerd met de Cookeilanden, Fiji, Kiribati, de Marshalleilanden, de Federale Staten van Micronesië, Nauru, Niue, Palau, Papoea-Nieuw-Guinea, Samoa, de Solomon-eilanden, Oost-Timor, Tonga, Tuvalu en Vanuatu. Er wordt momenteel geen voortgang geboekt.
Met Papoea-Nieuw-Guinea, Fiji, Samoa en de Solomon-Eilanden is een interim-EPA overeengekomen die voorlopig wordt toegepast.[38] De verwachting is dat Niue, Oost-Timor, Tonga, Tuvalu en Vanuatu op korte termijn toetreden tot deze interim-EPA.

C.6 Zuid-Amerika:

Chili (modernisering *Association Agreement*):
Het associatieakkoord tussen de EU en Chili kwam in 2002 tot stand en is in 2005 in werking getreden. De EU en Chili besloten in 2013 de mogelijkheden te verkennen om onder andere het handelsgedeelte van het bestaande associatieakkoord te moderniseren. Om de toegevoegde waarde, de omvang en de ambitie te verkennen, werd in 2014 een gezamenlijke werkgroep opgericht. De Europese Commissie heeft in 2016 de *stakeholders* consultatie en het *scoping paper* afgerond. Op 13 november 2017 werd het onderhandelingsmandaat door de Raad goedgekeurd. Het mandaat is openbaar.[39] Op 9 december 2022 hebben de EU en Chili de onderhandelingen over een gemoderniseerd associatieakkoord inhoudelijk afgerond. Het gaat om een "Advanced Framework Agreement" (AFA) met twee delen: a) een politiek partnerschapsdeel en b) een handels- en investeringendeel. Daarnaast is overeenstemming bereikt met Chili over een interim handelsakkoord dat de handelsafspraken van het AFA repliceert. Momenteel worden de teksten juridisch opgeschoond en vertaald. Het streven van de Europese Commissie is om deze zomer tegelijkertijd het interim handelsakkoord en de Advanced Framework Agreement ter besluitvorming aan de Raad voor te leggen.[40]

Colombia, Peru en Ecuador (*EU-Colombia/Peru/Ecuador Free Trade Agreement*):
De onderhandelingen tussen de EU en de Andesgemeenschap (Bolivia, Colombia, Ecuador en Peru) over een associatieovereenkomst zijn in juni 2007 van start gegaan op basis van een mandaat uit april 2007. Deze onderhandelingen zijn in juni 2008 stilgelegd. In januari 2009 werden, op basis

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[35] http://ec.europa.eu/transparency/regdoc/?fuseaction=list&n=10&adv=0&coteId=1&year=2017&number=472
[36] http://ec.europa.eu/transparency/regdoc/?fuseaction=list&n=10&adv=0&coteId=1&year=2017&number=469
[37] https://ec.europa.eu/commission/presscorner/detail/en/ip_23_921
[38] https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2009024
[39] https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/chile/eu-chile-agreement_en
[40] Kamerstukken II, 21 501-01, nr. 2583.

van een nieuw mandaat, onderhandelingen over een meerpartijenhandelsovereenkomst hervat met Colombia, Ecuador en Peru. Bolivia bleef buiten deze onderhandelingen. De onderhandelingen werden met Colombia en Peru in mei 2010 en met Ecuador in juli 2014 succesvol afgesloten. Voorlopige toepassing geldt met Peru per maart 2013, met Colombia per augustus 2013 en met Ecuador per 1 januari 2017. Het verdrag treedt in werking als alle verdragspartijen geratificeerd hebben.[41] In oktober 2022 werd het eindbericht van de ex-post evaluatie over de implementatie van het handelsverdrag gepubliceerd.[42]

Mercosur (*Comprehensive Free Trade Agreement* als onderdeel van *Association Agreement*):
In 2000 zijn de EU en Mercosur gestart met onderhandelingen over een associatieakkoord met als onderdeel daarvan een handelsakkoord.[43] Op 28 juni 2019 werd een onderhandelaarsakkoord bereikt, waarbij een aantal voorlopige teksten door de Europese Commissie is gepubliceerd.[44] De Commissie werkt aan de juridische opschoning en vertaling van de teksten. Ter uitvoering van een kamermotie[45] voerde Wageningen Universiteit een studie uit over de mogelijke effecten van het handelsakkoord voor de Nederlandse landbouw.[46] De Commissie heeft haar *Sustainability Impact Assessment* in maart 2021 samen met een eigen positie paper gepubliceerd.[47] Onder andere vanwege zorgen over de toename van ontbossing in met name Brazilië, spreekt de Commissie met Mercosur-landen en EU-lidstaten over mogelijke aanvullende bindende afspraken die EU-zorgen over het akkoord moeten wegnemen. De Europese Commissie heeft begin 2023 lidstaten geïnformeerd over de status van het werk aan een aanvullend instrument met duurzaamheidsafspraken. In aanloop naar de EU-CELAC Top op 17 en 18 juli 2023 zal de Europese Commissie de komende maanden over het aanvullende instrument onderhandelen met de Mercosur-landen.

D. Bilaterale investeringsakkoorden

Argentinië:
Op 2 en 3 mei 2019 zijn eerste gesprekken gevoerd met Argentinië. De gesprekken verliepen in positieve en constructieve sfeer. Argentinië gaf aan open te staan voor een heronderhandeling van het bestaande investeringsakkoord op basis van de Nederlandse modeltekst. Sindsdien zijn er geen verdere stappen ondernomen.

Burkina Faso:
Het oude investeringsakkoord met Burkina Faso is beëindigd per 1 januari 2019. Burkina Faso en Nederland hebben de wens uitgesproken om een nieuw modern investeringsakkoord te sluiten. Op 2 en 3 mei 2019 zijn de eerste gesprekken daartoe gevoerd. Nederland heeft daarbij de nieuwe Nederlandse inzet gepresenteerd en toegelicht. Burkina Faso heeft in december 2019 een eigen inzet gedeeld. Sindsdien zijn er geen verdere stappen ondernomen.

Ecuador:
Ecuador heeft de IBO (tot stand gekomen op 27-6-1999, in werking getreden op 1-7-2001) opgezegd in 2017. De IBO is **vanaf** 1-7-2021 buiten werking. Op 29 en 30 april 2019 zijn de eerste gesprekken gevoerd met Ecuador. De gesprekken verliepen in een positieve en constructieve sfeer. Nederland heeft daarbij de nieuwe Nederlandse inzet gepresenteerd en toegelicht. Ecuador gaf aan open te staan voor een heronderhandeling van het bestaande investeringsakkoord op basis van de Nederlandse modeltekst. Sindsdien zijn er geen verdere stappen ondernomen.

Ghana:
In april 2023 zijn de eerste verkennende gesprekken gestart tussen Nederland en Ghana om het huidige investeringsakkoord (dat dateert uit 1989) te vervangen door een gemoderniseerd investeringsbeschermingsakkoord. De eerste verkennende gesprekken waren positief en constructief. Wanneer de goedkeuring van de Europese Commissie

[41] https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2011057
[42] Te vinden op de EU Delegates portal.
[43] De volgende landen zijn lid van Mercosur: Argentinië, Brazilië, Paraguay, Uruguay en Venezuela. Het lidmaatschap van Venezuela is op 1 december 2016 geschorst (eerst tijdelijk, in augustus 2017 bevestigd). Het land is niet betrokken bij de onderhandelingen.
[44] https://ec.europa.eu/trade/policy/countries-and-regions/regions/mercosur/
[45] Kamerstukken II, 21 501-02, nr. 2328.
[46] Kamerstukken II, 31 985, nr. 68.
[47] https://trade.ec.europa.eu/doclib/press/index.cfm?id=2260

verkregen is, zullen de onderhandelingen officieel van start gaan. De verwachting is dat dit in de loop van 2023 zal plaatsvinden.

Irak:
Op 21 november 2019 is een voorstel van Irak binnengekomen om te onderhandelen over een investeringsakkoord, nadat eerder de Nederlandse modeltekst met de Iraakse autoriteiten was gedeeld. Er is nog geen datum voor een eerste gesprek bekend en er zijn sindsdien geen verdere stappen ondernomen.

Verenigde Arabische Emiraten (VAE):
Nederland en de VAE hebben in 2013 een Investeringsbeschermingsovereenkomst (IBO) ondertekend. Deze IBO is door VAE geratificeerd. NL heeft deze IBO niet geratificeerd maar een wijzigingsprotocol geformuleerd op basis van de nieuwe modeltekst dat is voorgelegd aan het VAE. Het VAE heeft nog niet op het wijzigingsprotocol gereageerd.

Annex – kabinetsappreciatie van rapport over WTO-conformiteit van productiestandaarden

Tijdens de Begrotingsbehandeling BHOS van 2 december 2020 (Handelingen II 2020/21, nr. 32, Debat over de Begroting Buitenlandse Handel en Ontwikkelingssamenwerking 2021) heeft de toenmalige Minister voor Buitenlandse Handel en Ontwikkelingssamenwerking aan de Kamer toegezegd te kijken naar de mogelijkheden binnen de Wereldhandelsorganisatie (WTO) voor het weren van producten op basis van productiewijze. In lijn met deze toezegging heeft het vorige kabinet in de Geannoteerde Agenda van 22 februari 2021 toegezegd onderzoek te laten doen naar de juridische haalbaarheid van het stellen van productiestandaarden ten behoeve van milieubescherming en arbeidsrechten binnen de WTO-regels. Het onderzoek is eind 2021 aanbesteed. In het voorjaar van 2022 heeft het Ministerie van Buitenlandse Zaken het definitieve rapport over productiestandaarden en WTO-regels ontvangen. Het rapport heeft geen betrekking op de noodzaak tot c.q. de wenselijkheid van het treffen van specifieke unilaterale maatregelen.

Het rapport geeft aan dat het al dan niet reguleren van bepaalde kwesties rondom productieomstandigheden een soevereine keuze is van overheden. De regels onder de WTO-akkoorden doen hier niets aan af. Wel bepalen deze regels de kaders voor vormgeving en implementatie van wetgeving met een handelseffect. De WTO-regels zijn bedoeld om een voorspelbaar en niet-discriminerend kader voor de handel tot stand te brengen en tegelijkertijd te waarborgen dat elk land het recht behoudt om regelgeving vast te stellen overeenkomstig zijn eigen maatschappelijke voorkeuren. Maatregelen dienen non-discriminatoir en evenredig te zijn, teneinde onnodige verstoring van de handel te voorkomen. Er is in de loop der tijd de nodige WTO jurisprudentie ontstaan op dit punt.

De auteurs doen vier beleidsaanbevelingen:

- Ten eerste zou Nederland (en de EU, gezien het gemeenschappelijke handelsbeleid) zich in kunnen zetten voor een herziening en update van het WTO-akkoord inzake technische handelsbelemmeringen (TBT), en het opstellen van verklarende notities.
- Ten tweede raden de auteurs aan om zoveel mogelijk voor procedurele verplichtingen te kiezen, indien productiestandaarden worden toegepast op geïmporteerde producten. Een fictief voorbeeld hiervan is dat land A verplicht dat alle voetballen op de eigen markt aantoonbaar door volwassenen gemaakt worden. Het gaat de auteurs erom dat land A duidelijk maakt welke procedurele stappen moeten worden doorlopen om aan te tonen dat een product hieraan voldoet (dataselectie, verificatie van data). Vervolgens benadrukken de auteurs dat land A en B elkaars nationale procedures als gelijkwaardig kunnen erkennen, wat de onvoorspelbaarheid voor export vanuit land B reduceert. Zulke procedurele verplichtingen verkleinen de kans dat sprake is van discriminatoire toepassing en faciliteren interactie met derde landen, wat bevorderlijk is voor het behalen van de onderliggende doelen van de regelgeving.
- Ten derde raden de auteurs aan om, indien productiestandaarden worden opgelegd, monitorings- en evaluatieprocessen vast te leggen op basis waarvan kan worden vastgesteld dat de beoogde doelen daadwerkelijk worden gediend en beleid kan worden verbeterd.
- Ten slotte zou de EU moeten streven naar non-discriminatoire plurilaterale initiatieven over het gebruik van productiestandaarden binnen en buiten de WTO. Zo kunnen landen ervaringen en goede voorbeelden delen en samen optrekken ten behoeve van bepaalde beleidsdoelen.

Het kabinet beschouwt het rapport als een relevante bijdrage aan de discussie over productiestandaarden en verwelkomt de analyse en aanbevelingen van de auteurs. Zoals het rapport uiteenzet, zou het in sommige gevallen gerechtvaardigd kunnen zijn om non-discriminatoire productiestandaarden als voorwaarde voor het op de markt plaatsen van producten te stellen ten behoeve van de bescherming van het milieu. Dergelijke non-discriminatoire maatregelen dienen op basis van het WTO kader proportioneel en zo min mogelijk handelsbelemmerend te zijn. Op basis van het rapport concludeert het kabinet dat elke maatregel voor een gesteld beleidsdoel op eigen merites beoordeeld moet worden, om zeker te stellen dat de

maatregel niet discriminerend van aard is en om te bezien of bijvoorbeeld niet een minder handelsverstorend alternatief mogelijk is om het beleidsdoel te behalen.

Nederland heeft groot belang bij het voorkomen van arbitrair gebruik van handelsmaatregelen en zet ten volle in op een op regels gebaseerd handelssysteem als basis voor de wereldhandel. Het scenario dat derde landen discriminatoire maatregelen toepassen op exportproducten vanuit de EU is immers zeer onwenselijk. Het kabinet zal zich in EU-verband blijven inzetten voor het behoud van het op regels gebaseerde handelssysteem, het voorkomen van protectionisme en van arbitrair gebruik van handelsmaatregelen dat de sterkste economische spelers ten goede komt.

Kabinetsreactie op de aanbevelingen:

- De aanbeveling om in te zetten op het verbeteren van het TBT-akkoord past in de brede inzet van het kabinet en de EU ten aanzien van de modernisering en hervorming van de WTO en haar rule-book. De aanbevelingen voor het verbeteren van het akkoord kunnen meer duidelijkheid creëren over de interpretatie en toepassing van de regels. Tegelijkertijd is het openbreken van het akkoord een moeizaam en langdurig proces, waarbij rekening moet worden gehouden met het complexe krachtenveld binnen de WTO. De haalbaarheid van het maken van nieuwe afspraken acht het kabinet op dit moment beperkt. Een eventuele EU-inzet ten behoeve van het TBT-akkoord moet dan ook in het kader van de bredere EU-inzet en prioritering binnen de WTO worden bezien. Het kabinet zal in EU-verband eerst de haalbaarheid en wenselijkheid verkennen.
- Het kabinet omarmt de gedachte dat procedurele verplichtingen voor productiestandaarden wenselijk zijn. Bij voorkeur wordt daarbij voortgebouwd op internationale afspraken, zoals het rapport ook aangeeft. Ook moet er oog zijn voor proportionaliteit en een nauwe relatie tussen het gestelde doel en de maatregel.
- Het kabinet deelt de aanbeveling van de auteurs wat betreft het vastleggen van monitorings- en evaluatieprocessen van EU-maatregelen, zoals opgenomen voor het EU Carbon Border Adjustment Mechanisme en de ontbossingswetgeving. Dit is belangrijk om inzichtelijk te maken dat de maatregelen inderdaad bijdragen aan het bereiken van het gestelde beleidsdoel.
- Het kabinet streeft ernaar dat de EU zich inzet voor plurilaterale samenwerking op het gebied van productiestandaarden binnen en buiten de WTO. De EU kan onder andere in WTO-verband inzetten op het delen van beleidsvoorbeelden, transparantie bij het instellen van milieumaatregelen, en het bevorderen van transparantie en coherentie in het gebruik van standaarden. Belangrijk is ook de synergie met initiatieven in andere fora.

Production Requirements and WTO Rules: The Case of Environmental and Labor Standards*

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Revised

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Contents

List of Abbreviations

AB	Appellate Body
CAFTA-DR	Dominican Republic–Central America Free Trade Agreement
CBAM	Carbon Border Adjustment Mechanism
CETA	Comprehensive Economic and Trade Agreement
CJEU	Court of Justice of the European Union
COOL	country of origin labeling
CPTPP	Comprehensive and Progressive Trans-Pacific Partnership
DAG	Domestic Advisory Group
EC	European Commission
EU	European Union
EBA	Everything But Arms
EUTR	EU Timber Regulation
FLEGT	Forest Law Enforcement Governance and Trade
FTA	free trade agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GSP	Generalized System of Preferences
IEC	International Electrotechnical Commission
ILO	International Labor Organization
ISO	International Organization for Standardization
MEA	Multilateral Environmental Agreement
MFN	most-favored-nation
MRA	mutual recognition agreement
NAFTA	North American Free Trade Agreement
NGO	nongovernmental organization
NTPO	nontrade policy objective
OECD	Organization for Economic Cooperation and Development
OPA	open plurilateral agreement
PPM	process and production method
RED	Renewable Energy Directive
SDO	Standard Development Organization
SPS	sanitary and phytosanitary
STCs	Specific Trade Concerns
TBT	technical barriers to trade
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TSD	Trade and Sustainable Development
VPA	Voluntary Partnership Agreement
VSS	voluntary sustainability standards
WTO	World Trade Organization

Executive Summary

Production requirements pertaining to how imported goods and services are produced, have become an area of policy focus, motivated by a desire to combat climate change and/or improve labor standards in foreign countries. This report analyzes the extent to which the Netherlands (and the EU, given the common commercial policy) is legally constrained by WTO rules in its ability to condition access to its market on specific production requirements.

Major findings are that WTO members are in principle free to adopt production requirements as long as these are applied in a ***nondiscriminatory*** manner and constitute the ***least trade restrictive*** means ***necessary*** to attain a specified regulatory objective. Nondiscrimination requires that a production standard apply equally to domestic (EU) and all foreign producers.

The extant case law – both under the WTO and bilateral trade agreements – has created uncertainty regarding how adjudicators will determine whether a specific production requirement conforms with applicable trade rules. This uncertainty arises especially regarding the core WTO nondiscrimination requirement, in part because WTO panels do not first ask if a contested measure is necessary.

In principle, legal uncertainty is reduced if production requirements are based on international standards. A presumption in WTO case law is that using international standards satisfies the least trade restrictiveness and necessity requirements. What constitutes an international standard or standardizing body is not explicitly defined in the WTO, creating an additional source of uncertainty. Private sustainability standards are not covered by the WTO.

These features put a greater burden on WTO members seeking to apply production requirements on imports as not only do they need to ensure measures are nondiscriminatory, least trade restrictive and necessary, but there is no certainty that doing so will ensure the measures withstand scrutiny by adjudicators, increasing the prospect disputes may be brought by trading partners.

The report makes four recommendations.

First, launch a process to update and clarify the TBT Agreement, focusing on defining what constitutes an international standard and clarifying the relationship between standardizing bodies, private standards and the TBT Agreement.

Second, when imposing production requirements on imports, include obligations of a procedural nature as these are less prone to discretionary interpretation by adjudicators. Given empiricalresearch finding that conditioning market access on production requirements is likely to be insufficient to address global commons problems or project EU norms and values, it is important to engage with trading partners to improve labor and environmental protection. This can be done by putting in place mechanisms to assist partner countries to pursue environmental and/or labor-related objectives.

Third, because WTO law is not concerned with whether a legitimate measure serves to promote the realization of the underlying policy objective, complement production requirements with monitoring and evaluation processes to learn whether they achieve their intended effect and if not, inform adjustments to policies over time.

Fourth, the EU should pursue open, nondiscriminatory plurilateral issue-specific agreements on the use of production requirements. These may be sectoral or horizontal in nature, for example, bringing together countries that have included labor provisions in their trade agreements to exchange experience, identify good practices and pursue joint action to attain shared policy objectives.

Introduction

Product standards have long been used as an instrument to protect the health and safety of consumers. Such standards apply to both domestically produced goods and imports. Often the norms that are applied are developed by international standards-setting bodies, but states are free to establish and apply national product standards if their application satisfies the conditions established in the multilateral agreements of the World Trade Organization (WTO). Product standards increasingly have come to be complemented by requirements that pertain not to what is produced but how it is produced. Such production requirements are similar to product standards in that they are motivated by public policy objectives but differ in having a broader focus. Production requirements may reflect a desire to contribute to global public goods (such as combating climate change), to support the implementation of international conventions regarding human rights, or to attain or protect national ethical norms in countries that export to the EU. The focus is on the production process – the techniques used to produce goods or services, including the factors of production (such as the characteristics of the workers engaged and the conditions of their employment, the natural resources used, or the source of capital used to finance the associated economic activity) and the intermediate inputs that are used in the production process, independent of where these originate. A feature of such policies is that they focus not only on production processes in specific sector-countries, but on the value chains and networks used to produce a good or service. Such value chains often span multiple countries.

Production requirements are increasingly a feature of EU trade policy, reflecting both European values and concerns (demands) by citizens that trade be consistent with and support the realization of a range of nontrade policy objectives (NTPOs). In the Communication about an Open, Sustainable andAssertive Trade Policy, published in February 2021, the European Commission (EC) stated that it is incertain cases appropriate for the EU to require that imported products comply with certain production requirements. This EC communication followed the announcement of a planned Carbon Border Adjustment Mechanism (CBAM) and trade measures to combat deforestation. The intention of the EC to introduce major legislative proposals that include unilaterally defined trade measures related to production requirements marks a potential change in emphasis for EU trade policy. However, as we will note in this report, unilateral measures have long been a feature of EU policy. Examples include the Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan, proposals for a Timber

Regulation [1] and measures concerning the placing of products related to forest degradation and deforestation on the EU market, and the Generalized System of Preferences (GSP)+ programme – policies that either condition access to the EU market on production standards or that provide trade incentives (tariff preferences) that are conditional on adoption of policies by eligible (developing) countries to protect labor rights or the environment.

One of the main underlying arguments for such conditionality on production requirements, is that this helps attain global public goods and merit EU action. In the case of climate or biodiversity the measures are argued not to be designed or motivated by a desire to protect EU producers or consumers. The goal is to benefit the planet. In the case of labor rights, the focus of policy is to protect both EU producers and consumers as well as foreign workers employed in production of goods (and services) imported by the EU by ensuring these satisfy minimum (international) human rights standards. Protection of labor rights also corresponds to the moral beliefs of the EU citizenry at large. The question of interest to this report is the extent to which the Netherlands (and the EU, given that the EU has a common commercial policy) is legally constrained in its ability to condition access to its market on specific production requirements. This is determined by the commitments that the Netherlands and the EU have made in the WTO and how the dispute settlement mechanism of the WTO has ruled in relevant cases. A necessary condition for a trading partner to contest production requirements in the WTO is to demonstrate that the measure that has been applied (or is being considered) is incompatible with WTO disciplines. Conversely, when applying or considering the adoption of production requirements, the Netherlands (and the EU) must consider if and how the WTO constrains the use of such measures, whether domestically defined or international in nature.

Several WTO agreements address the use of product standards, requiring such measures to be applied in a transparent manner on a nondiscriminatory basis. An extensive case law exists pertaining to trade restrictive measures that have been justified by WTO members as necessary to achieve domestic nontrade objectives. In contrast to what is sometimes argued, the WTO case law offers some guidance for the design of production requirements to be in conformity with the WTO framework, but as we discuss in this report, this is an area that is complex and context specific. This report largely comprisesa legal analysis of the extent to which domestic production standards and requirements (nontrade regulations) are (or can be made) consistent with WTO law. In addition, it discusses options for international cooperation to support the use of production process standards as a tool to achieve

[1] https://ec.europa.eu/environment/forests/deforestation-proposal.htm; https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12137-Deforestation-and-forest-degradation-reducing-the-impact-of-products-placed-on-the-EU-market_en

underlying nontrade objectives. We do so because existing empirical research in this area suggests that unilateral measures are likely to be inefficient – and possibly ineffective – in generating global public goods or to project EU norms and values beyond its territory.

International cooperation is called for given that the underlying problems are international in nature (at least in the case of climate change) and require action in and by EU trading partners (for both labor and environment). In terms of rule-setting and enforcement a potential mechanism for such cooperation is the pursuit of plurilateral agreements with like-minded countries under WTO auspices. Such cooperation by necessity must extend beyond trade and trade agreements and include a focus on international regulatory cooperation. WTO members have begun to use a broader range of instruments to support trade-related regulatory cooperation, including open, nondiscriminatory plurilateral agreements. Examples are so-called structured discussions and joint statement initiatives. These types of initiatives offer a path for issue-specific, open, nondiscriminatory agreements on production requirements that are distinct from standard trade agreements.[2]

A key message emerging from the analysis is that the decision whether to enact domestic measures regulating the process of production of goods and services that are offered for sale and consumed in a WTO member's jurisdiction depends exclusively on the volition of the government concerned. While the choice to regulate or not is a sovereign, non-justiciable choice, WTO disciplines set a legal framework for the design and implementation of such regulatory measures, once a decision to regulate has been made. In the realm of the WTO, multilateral disciplines generally are limited to an obligation to avoid discriminatory behavior, without prejudging the content of intervention – i.e., governments are free to regulate but must design regulatory measures to apply equally to domestic and foreign products/producers and ensure that the measures constitute the *least trade restrictive* means *necessary* to attain their regulatory objective. Moreover, they must also ensure that they apply such necessary measures in a nondiscriminatory manner, i.e., that the measure applies equally to all sources of supply: the most-favored-nation (MFN) rule. Thus, WTO members are free to enact environment- and/or labor standards as long as when doing so they use measures that constitute the least restrictive means to achieve their objectives, while ensuring that they have applied them in a nondiscriminatory manner.

[2] Hoekman and Sabel (2021).

The plan of the report is as follows. Section 1 provides context and sets the scene for what follows, drawing on research on both the prevalence and effects of policies that link market access to production requirements. The aim is not to be comprehensive but to provide some salient background for the legal and policy analysis undertaken subsequently. While the question of interest in the report concerns the ability (legality) of use of unilaterally defined and imposed production requirements, many jurisdictions, including the EU, have signed trade agreements that go beyond the WTO. We therefore start with a brief discussion of the state of play in bilateral and regional trade agreements and then discuss two disputes on labor rights that have been brought in the framework of bilateral trade agreements to illustrate the type of issues that arise in the use of trade policy as a tool to enforce production requirements in the pursuit of nontrade objectives. As the legislative function of the WTO has been moribund for some time, bilateral and regional trade agreements have become the locus for regulatory initiatives in the realm of environment- and/or labor standards. We also briefly discuss several unilateral trade instruments and voluntary sustainability standards (VSS) systems under which producers in trade partner countries can be certified as having complied with (attained) specific production requirements. The latter types of systems are used in both the EU and the rest of the world. They mostly are private but in practice can become de facto mandatory if the associated standards are incorporated into legislation by reference or if the associated labels have a large market footprint in an importing country. There are lessons from the experience obtained with these voluntary systems that are relevant for the design of unilateral mandatory production requirements (conditionality), notably in the areas of governance.

In Section 2 we turn to the WTO legal regime, and analyze the extent to which unilateral production requirements for imports motivated by global environmental protection, to combat climate change and safeguard labor and other human rights, can be justified under WTO principles and rules. As the relevant disciplines are contained in the WTO Agreement on Technical Barriers to Trade (TBT), this agreement is therefore the main focus of this section.

Section 3 discusses possible complements and alternatives to unilateral action that could be considered to bolster the international framework of rules to support the use of production standards. Given that actions to protect the environment, climate and labor rights through production requirements will need to be applied on a nondiscriminatory basis and be proportional, the main focus of this part of the report is to characterize alternative approaches and instruments beyond trade policy. Policy coherence calls for trade policy to be complemented by external cooperation

instruments, including plurilateral agreements that encourage the application by like-minded countries of nontrade production standards to trade goods and services.

Section 4 recaps main findings and puts forward several policy recommendations suggested by the analysis. Our main recommendations, regarding the design of policies making imports conditional on satisfying labor and/or environmental production requirements, are that such policies include procedural obligations and procedures and institutional mechanisms to promote a focus on monitoring, diagnostics and dialogue aimed at problem solving and cooperation as opposed to a framework that privileges enforcement through formal adjudication.

1. Production requirements in trade: a multifaceted arena

Over the course of the past three decades, many Organization for Economic Cooperation and Development (OECD) member countries, including the United States, Canada, Japan, Australia, Chile and the European Union, have incorporated provisions on labor and the environment in their trade agreements.[3] These jurisdictions increasingly include 'nontrade' provisions, such as requirements that parties ratify, enforce, or respect environmental and/or labor obligations reflected in other international agreements or in the text of those trade agreements themselves. In parallel, many states have put in place unilateral measures and supported the spread of VSS that aim at improving outcomes for workers and the environment in exporting countries.[4] The latter cover a broad range of standards, ranging from workers' rights to forest protection and biodiversity and have been applied to more than 600 product groups and more than 150 countries. Significant shares of global production of cocoa (27%), coffee (21%), cotton (18%), tea (16%) and palm oil (15%) are certified by VSS systems.[5] VSS are also used to certify the production and trade of forestry, fisheries, electronics, textiles & clothing and mining products.[6]

1.1 Labor and environmental provisions in trade agreements

Environmental and labor provisions have been incorporated in recent trade agreements, either as integral chapters (e.g. US-Colombia FTA), as dedicated trade and sustainable development (TSD)

[3] Comprehensive studies of the incorporation of trade and sustainable development provisions in trade agreements include LSE (2022) and Mattoo et al. (2020).

[4] VSS are widely used to govern environmental, social, and ethical dimensions of international production. The Standards Map database of the International Trade Centre (ITC) includes almost 300 active VSS systems. See https://www.standardsmap.org

[5] Bissinger et al. (2020). Data are for 2018. See https://www.sustainabilitymap.org/trends [4] LSE (2022), p. 13.

[6] Auld (2015).

chapters (e.g. EU-Korea FTA), or as a side agreement (e.g. Canada-Honduras FTA).[4] This may be done with the caveat that they are activated only when there is a breach of an obligation 'in a manner affecting trade' while at other times they are incorporated as directly binding, independent of any trade effects. Some treaties have as an objective to enhance or further strengthen obligations under certain international instruments or to go beyond best efforts-type provisions.[7] We provide some illustrative examples of recent trade agreements that include language on nontrade objectives in Annex 1.

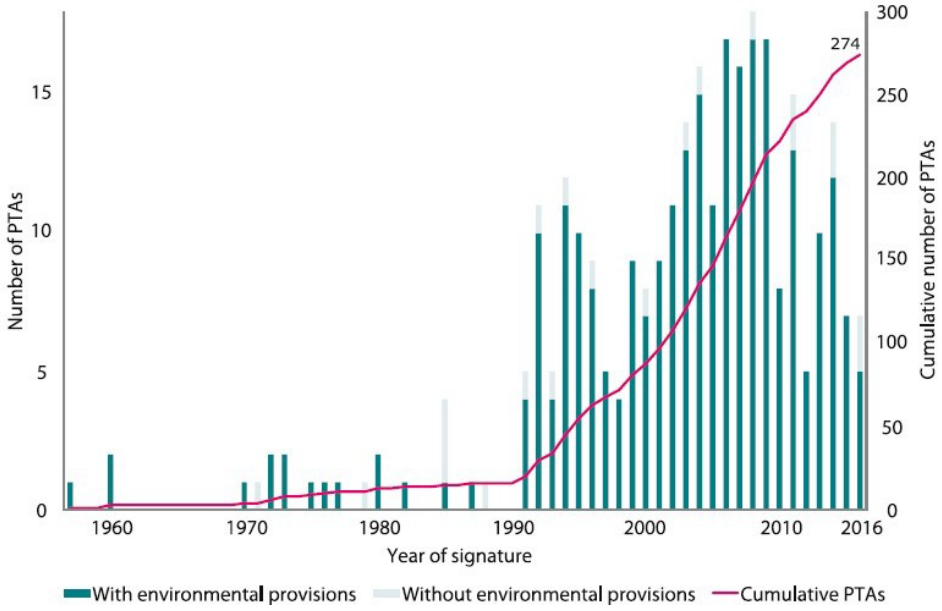
There is robust evidence that trade is associated with higher levels of national income (economic growth), but there is equally robust evidence that there may be losers and that the total gains generally are distributed (very) asymmetrically within and across countries. What is relevant for the subject of this report is that global trade can be associated with environmental degradation, forced labor, child labor and social downgrading as well as economic upgrading, poverty reduction and enhanced access to technologies that reduce carbon emissions.[8] Different approaches have been taken to incorporate environmental and labor provisions in trade agreements. In some cases, mainly at the early stages, use was made of side agreements, or agreements only referenced such standards in the preamble as aspirational provisions. More recent agreements incorporate labor and environment-related provisions in the main body of the treaty texts. In many cases the language is still aspirational (non-binding best endeavors) but an increasing number of trade treaties are making these binding obligations, for example, by referring to other international agreements (and an obligation to ratify or respect), including provisions of the agreements themselves, or creating an obligation to enforce or not to dilute domestic legislation.[9]

While much of what is included in a trade agreement may be considered to have a bilateral character, given that both Parties would be obligated by any incorporation of standards in the agreement, the coverage of trade agreements is relevant for this report in that the more agreements encompass production requirements the less likely it becomes that unilateral application of such standards lead

[7] The European Commission is currently engaged in a review of the Trade and Sustainable Development chapters included in its trade agreements. See: https://trade.ec.europa.eu/consultations/index.cfm?consul_id=301.
[8] Barrientos et al. (2011; 2016).
[9] The database associated with Mattoo et al. (2020) provides detailed information on the coverage of trade agreements in these areas.

to contestation by trading partners.[10] Prior to the 1990s environmental provisions tended to be incorporated as exceptions to trade policy commitments. From the 1990s onwards and particularly since the late 2000s provisions have directly related to environmental commitments. Often such commitments relate or refer to multilateral environmental agreements (MEAs).[11] The same is true for labor provisions, where ILO (International Labor Organization) Conventions are often referenced. Figures 1 and 2 provide a snapshot of the coverage of trade agreements in terms of environmental and labor provisions. Much of the increase occurred after 1990.

Figure 1: Number of regional trade agreements with environment-related provisions



Source: Monteiro and Trachtman (2020).

The first trade agreement with environmental and labor provisions was the North American Free Trade Agreement (NAFTA). Rather than being included in the text of the agreement, these provisions were enshrined in separate side agreements finalized in 1993, one year after the main text. Since then, a range of environmental and labor provisions have been included in trade agreements.[12] Yet, while there has been a trend toward inclusion of such provisions in trade and investment agreements, the practice is not universal. Some important modern treaties, such as the 2020 Regional Comprehensive Economic Partnership Agreement between Australia, China, Japan, South Korea, New Zealand, and

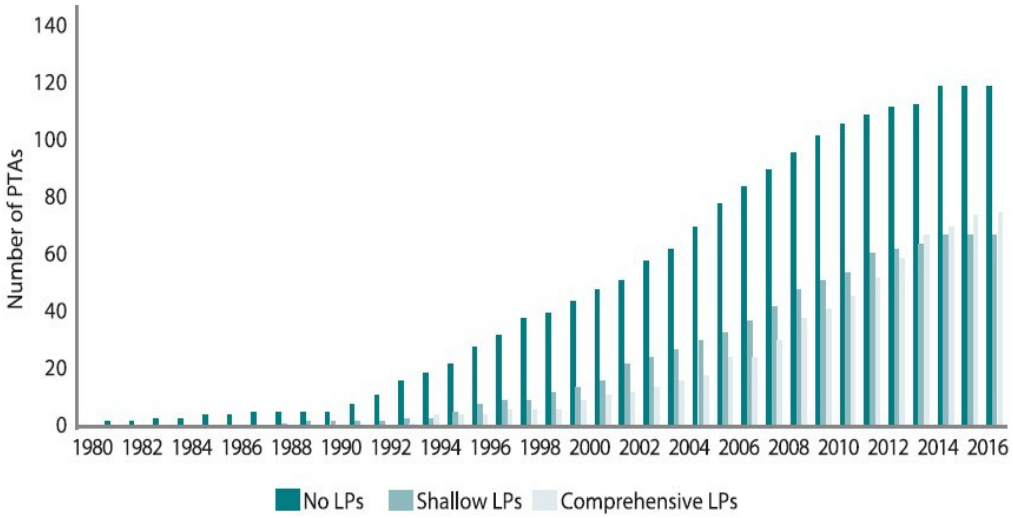
[10] The more trade agreements include labor and environmental standards the more feasible it may also become to engage in plurilateral cooperation regarding the application of such standards to trade – a form of international collaboration that we discuss in Section 3 as a complement to unilateral measures.

[11] Examples of MEAs include the Convention on International Trade in Endangered Species, the Montreal Protocol on ozone-depleting substances, the Basel Convention on the transboundary movement of hazardous waste, the UN Convention on the Law of the Sea, the UN Fish Stocks Agreement, the International Convention on the Regulation of Whaling (IWC) and the Paris Agreement.

[12] Charnovitz, S. (1994). ILO (2017, p. 11) reports that as of 2016, 29% of all regional trade agreements included labor provisions.

the ten members of the Association of Southeast Asian Nations, do not even contain soft labor or environmental provisions. Additionally, some agreements will contain one type of provision (e.g., environmental) but not the other (e.g., labor).

Figure 2: Number of trade agreements without, with shallow, and comprehensive labor provisions



Source: Raess and Sari (2020).

In the case of the EU, the link between trade and labor and environmental standards is explicit. The Treaty on European Union (TEU) commits the EU to protect and promote human rights globally when developing and implementing its foreign policies (Art. 21 TEU), as do the Charter of Fundamental Rights of the EU, and commitments made by EU member states enshrined in international law – e.g., the Universal Declaration of Human Rights and the International Covenant on Civil and Political rights. The Treaty on the Functioning of the European Union (TFEU) calls on the EU's external trade policy (the common commercial policy) to be implemented in accordance with Art. 21 TEU and to support and promote the Union's values and standards relating to human rights, environmental, health and consumer protection, and sustainable development (Art. 207).[13]

The labor and environmental standards included by the EU in its trade agreements refer to both international agreements as well as domestic legislation. The EU-Korea FTA,[14] the EU-Colombia-Peru-

[13] Art. 21(2) TEU reads the 'Union shall define and pursue common policies and actions and shall work for a high degree of cooperation in all fields of international relations,' i.e. a commitment to 'protect and promote human rights globally when developing and implementing its foreign policies', the references to the environment are specifically in Art. 21(2)(d) and (f).

[14] Chapter 13, EU-South Korea FTA.

Ecuador FTA,[15] EU-Central America Association Agreement,[16] EU-Ukraine Association Agreement,[17] EU-Georgia Association Agreement,[17] EU-Moldova Association Agreement, [18] EU-Canada Comprehensive Economic and Trade Agreement (CETA), [19] EU-Japan Economic Partnership Agreement,[20] EU-Singapore FTA,[21] EU-Vietnam FTA,[22] and EU-UK Trade and Cooperation Agreement,[23] include provisions on both environmental and labor aspects. Below, we will refer to examples of the types of provisions used in these agreements.

In general, in its TSD chapters, in relation to labor, the EU has focused its attention on the core ILO Conventions, while in relation to environmental commitments, all EU trade agreements include a commitment to effectively implement MEAs. [24] The EU requests that partners 'restate their commitment to the Paris Agreement on climate change and the underlying framework agreement as well as to other MEAs to which they are party.'[25] With regard to domestic legislation, each party's right to regulate labor and environmental issues is confirmed upfront, subject to the proviso that such domestic laws and policies need to be consistent with that party's international commitments and an obligation on each party not to lower the level of domestic labor and environmental protection. Domestic advisory groups (DAGs) are meant to advise both sides on how well they're doing on environmental and labor promises. In the view of the European Social and Economic Committee, 'DAGs should be advisory, consultative, institutionalised, competent to cover all provisions in the agreement, made up of a balance membership of all three sectors, representative, responsible and independent role in monitoring and evaluating EU agreements'.[26] FTAs do not establish procedures on how to appoint members of DAGs, however, so each FTA party appoints members through its own procedures. As a result, the nomination of DAG members sometimes happens in a non-transparent way, arguably excluding important (especially, critical) civil society voices. These transparency and

[15] Title IX, EU-Colombia/Peru/Ecuador FTA.
[16] Part IV, Title VIII; Part III, Titles III, V, and VI, EU-Central America Association Agreement.
[17] Title IV, Chapter 13; Title V, Chapters 6, and 21, EU-Ukraine Association Agreement. [17]
Title IV, Chapter 13; Title V, Chapters 3, 4 ad 14, EU-Georgia Association Agreement.
[18] Title V, Chapter 13; Title IV, Chapters 4, 16 and 17, EU-Moldova Association Agreement.
[19] Chapters 22, 23 and 24, EU-Canada CETA.
[20] Chapter 16, EU-Japan Economic Partnership Agreement.
[21] Chapter 12, EU-Singapore trade agreement.
[22] Chapters 13 and 16, EU-Vietnam free trade agreement.
[23] Part 2, Title XI, Chapters 6, 7, 8, and 9, EU-UK Trade and Cooperation Agreement.
[24] LSE (2022), p. 30.
[25] Netherlands input for the review of the 15-point action plan on Trade and Sustainable Development, p. 3.
[26] EESC, Opinion, The role of Domestic Advisory Groups in monitoring the implementation of Free Trade Agreements, European Parliament Referral (23 January 2019).

representation problems as well as differences regarding the exact purpose of DAGs, have been argued to reduce their effectiveness.[27]

As regards labor standards, the EU has included in several of its trade agreements provision language referring to a commitment by the parties to 'effectively implement in its domestic laws and regulations and practice the ILO conventions ratified by…'[28] or to make 'continued and sustained efforts on its own initiative to pursue ratification of the fundamental ILO Conventions or other ILO Conventions which each Party considers appropriate to ratify.' [29] Notably, these appear to be best efforts obligations with regard to existing international agreements or attempts to impulse their ratification.[30] In attempting to enforce these best-efforts obligations, the EU has insisted that the FTA partner ratify certain international conventions before the EU will ratify the FTA, as was the case, for example, for the EU-Vietnam FTA.[31] The EU-Korea FTA has stronger language in relation to these obligations as theParties appear to incorporate standards specifically in the agreement by setting out commitments 'to respecting, promoting and realizing in their laws and practices, the principles concerning the fundamental rights, namely: (a) the freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labor; (c) the effective abolition of child labor; (d) the elimination of discrimination in respect of employment and occupation.'[32] As discussed below, the EU-Korea dispute settlement panel found these to be legally binding (enforceable) obligations.

In relation to environmental agreements the EU-Cameroon and the US-Peru regional trade agreements are examples in which reference is made to other international instruments and domestic legislation. [33] In the case of the EU-Cameroon FTA, the agreement refers to the Treaty on the Conservation and Sustainable Management of Forests in Central Africa (COMIFAC) and the Subregional Convergence Plan.[34] The Preamble to the EU-Cameroon Free Trade Agreement (2009)

[27] Ashraf and van Seters (2020); Martens, Potjomkina and Orbie (2020).
[28] Art. 13.4(4) EU-Vietnam FTA, Art. 23.3(4) CETA.
[29] Art. 16.3(3) EU-Japan FTA, Art. 12.3(4) EU-Singapore FTA, Art. 23.3(4) CETA, Art. 13.4(3) EU-Korea FTA.
[30] Bronckers and Gruni (2021), p. 26.
[31] European Commission, *Report on the Implementation of EU Trade Agreements, COM (2020) 705 Final*, adopted 12 November 2020, at 29.
[32] Art. 13.4(3) EU-Korea FTA.
[33] Mattoo et al. (2020).
[34] Interim Agreement with a view to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the Central Africa Party, of the other part, signed on 15 January 2009, entered into force on 4 August 2014, Art. 52.

constrains the parties' ability to downgrade their environment or labor regulations, e.g., committing themselves not to encourage foreign direct investment by making their domestic regulations less stringent.[35] Such non-lowering of standards clauses are commonly included in EU trade agreements.

The US-Peru FTA establishes that '[a] Party shall adopt, maintain, and implement laws, regulations, and all other measures to fulfill its obligations under multilateral environmental agreements listed in Annex 18.2.' [36] In addition, the US-Peru FTA provides for monetary assessments in response to persistent violations of environmental standards.[37] As regards labor obligations, the US-Peru FTA states that '[e]ach Party shall adopt and maintain its statutes and regulations, and practices thereunder, the following rights as stated in the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up*.'[38]

The EU has pushed for effective implementation of environmental obligations in several of its trade agreements but has not engaged in the practice of making ratification of an agreement conditional on the ratification of MEAs. [39] Considering the dispute panel's findings on the labor provisions incorporated in the EU-Korea agreement, an insistence on effective implementation requirement would be to harden, through the trade agreement, the voluntary commitments under the Paris Agreement. The TSD chapter of the draft EU-Mercosur agreement (which has not been signed) notes that the 'Parties shall: (a) effectively implement the UNFCCC and the Paris Agreement established thereunder.'[40] A possible reading of this text in light of the EU-Korea panel decision, would be that the trade agreement(s) reinforces national laws and policy commitments. While not necessarily entailing new obligations, trade and investment agreements provide a mechanism for bilateral obligations to implement ILO Conventions or nationally determined contributions under the Paris Agreement.

EU treaties have focused more on promotion of better labor and environment-related regulation than on sanctions. An exception is the EU-UK Trade and Cooperation Agreement which includes a longer list of international labor and environmental agreements than is usual in the EU's trade agreements,

[35] Interim Agreement with a view to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the Central Africa Party, of the other part, signed on 15 January 2009, entered into force on 4 August 2014.
[36] United States-Peru Trade Agreement, entered into force on 1 February 2009, Art. 18.2.
[37] Arts. 18.12(6) and 21.16 US-Peru Trade Agreement.
[38] Art. 17.2 US-Peru Trade Agreement.
[39] Bronckers and Gruni (2021).
[40] Draft Art. 6(2)(1), Chapter on Trade and Sustainable Development, EU-Mercosur FTA.

but also that both parties may take 'rebalancing measures' in case there is a breach of a non-regression clause 'in a manner affecting trade'. [41] The US and Canada have had a more sanctions-based approach.[42] The US has developed a TSD model over time. This has three central features. The first is the importance of the pre-ratification process which may require reforms in labor laws and practices. The second is the ability of civil society to file complaints about the failure to enforce labor and environmental obligations and the evolution of trade agreements to include explicit references to international labor standards. The third is the potential use of trade sanctions as an enforcement tool.

In the case of Canada, labor provisions are subject to trade sanctions, whereas its environmental provisions are not. The Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) reflects a hybrid approach to the issue of sanctions, much in line with Canada's position. On the one hand, "cooperative labor consultations" remain the first step in the case of a dispute settlement on labor issues. On the other, CPTPP includes provisions for sanctions – including the suspension of benefits – as a last resort. CETA has three chapters related to trade and sustainable development (Chapters 22, 23 and 24): one on trade and sustainable development, one on trade and labor, and one on trade and the environment. The obligations include to 'promote compliance with and effectively enforce labor laws by maintaining a system of labor inspection, and they must ensure that their environmental authorities give due consideration to alleged violations of environmental law brought to their attention.'[43]

The EU is conducting a comprehensive review of trade and sustainable development dimensions of its trade agreements,[44] with the public consultation phase having closed in November 2021. For its part,the Netherlands' position when giving input on the review for the 15-point action plan on Trade and Sustainable development, stresses the importance of trade agreements to achieve global labor and environmental objectives. Though not the 'primary instrument' in these objectives, the Netherlands emphasizes that they 'should leverage what has been agreed upon in dedicated multilateral bodies.'[45] It further argues that '[i]t is important that such provisions are based on international norms countries

[41] Art. 387(2) EU-UK Trade and Cooperation Agreement.

[42] What follows draws on LSE (2022).

[43] EU-Canada CETA, Chapter 23, Arts. 23.4 and 23.5; Chapter 24, Arts. 24.5 and 24.6.

[44] It has recently been put forward that the process for EU Trade Sustainability Impact Assessments ought to be revisited. Bernard Hoekman, Hugo Rojas-Romagosa, 'EU Trade Sustainability Impact Assessments: Revisiting the Consultation Process'.

[45] Netherlands input for the review of the 15-point action plan on Trade and Sustainable Development, p. 2.

have agreed upon, and that they leave sufficient room and time to formulate national policies in line with those norms.'[46]

1.2 Enforcing labor requirements in trade agreements

EU agreements generally include aspirational language on labor and other values, but this is often argued by critics to be too vague and difficult if not impossible to enforce.[47] Two relatively recent key decisions in this area illustrate what happens when a panel is convened to resolve a dispute in relation to issues related to labor and the environment provisions incorporated in trade agreements. Though the panel found that there had been breaches of labor rights in one of these cases, it found that they were not 'in a manner affecting trade'. In the other case, the panel held that there had been a breach of labor provisions expressly incorporated in the agreement. On the basis of the objective to be achieved, these may guide how states approach these obligations in future negotiations.

The first of these cases was the Guatemala-US case, *In the Matter of Guatemala – Issues Relating to the Obligations Under 16.2.1(a) of the CAFTA-DR*, decided by Professor Kevin Banks (Chair), Mr. Theodore Posner and Professor Ricardo Ramírez Hernández, within the framework of the Dominican Republic–Central America Free Trade Agreement (CAFTA-DR) in June 2017. Chapter 16 of CAFTA-DR reaffirms the parties' obligations 'as members of the ILO and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its FollowUp (1998) (ILO Declaration)'. Art. 16.2.1(a) stipulates that '[a] Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.' The US requested the establishment of a panel pursuant to Art. 20.6.1 of the CAFTA-DR to consider whether Guatemala was conforming to its obligations under Art. 16.2.1(a). In particular, the US complained about 'the effective enforcement of Guatemalan labor laws related to the right of association, the right to organize and bargain collectively, and acceptable conditions of work.'[48]

The panel went through a textual interpretative approach, interpreting each phrase of the proposed provision on the basis of the ordinary meaning of the words, much in the style of WTO interpretative analysis. It found that the requirement of Art. 16.2.1(a) requires that a party 'not fail to effectively

[46] Ibid. p. 2.

[47] E.g., Lamy et al. (2021).

[48] In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR, Final Report of the Panel (June 14, 2017), para 2.

enforce its labor laws',[49] 'imposes an obligation to compel compliance with labor laws … in a manner that is sufficiently certain to achieve compliance that it may reasonably be expected that employers will generally comply with those laws, and employers may reasonably expect that other employers will comply with them as well'[50], and refers to a 'repeated behavior which displays sufficient similarity' or 'prolonged behavior in which there is sufficient consistency'. [51] The key discussion on the interpretation of the term 'in a manner affecting trade', did cause the panel to refer to WTO case law, distinguishing it for the purposes of interpreting the CAFTA-DR text.[52] The panel then interpreted the 'in a manner affecting trade' text to mean if 'it confers some competitive advantage on an employer or employers engaged in trade between the Parties',[53] though it also clarified that there was no intent requirement in the provision. The panel found that there had been abuses of workers' rights, but that the US failed to demonstrate that these infractions had been carried out in a manner that affected trade. This indicates some of the limitations of unilateral provisions. Interestingly, one of the panelists of the Guatemala case later compared US/Canada trade agreements with EU trade agreements indicating that 'neither U.S. nor Canadian trade agreements pay attention to development agendas. If they did, one would expect to find direct reference to them as in EU trade agreements.'[5455]

The latter of these cases is the EU-Korea case, decided by Dr. Jill Murray (Chairperson), Professor Laurence Boisson de Chazournes and Professor Jaemin Lee, within the framework of the EU-Korea FTA in January 2021.[53] The dispute was initiated by the EU in relation to the Trade Union and Labor Relations Adjustment Act and Art. 13.14.1 of the EU-Korea FTA. In its ruling of January 2021, the EU-Korea panel held that though there was an ongoing obligation to make efforts to ratify certain ILO Conventions there was no specific timeframe imposed to ratify said conventions. The panel's interpretation in that case emphasized that 'the incorporation of the ILO's Declaration and rights "clearly indicate[s] that any obligation arising from the first sentence has been defined by the Parties

[49] Ibid, para 121.
[50] Ibid, para 139.
[51] Ibid, para 152.
[52] Ibid, paras 187-189.
[53] Ibid, para 190.
[54] LeClercq (2022).
[55] Republic of Korea: compliance with obligations under Chapter 13 of the EU–Korea Free Trade Agreement—Request for the establishment of a Panel of Experts by the European Union (4 July 2019) <https://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_157992.pdf> (hereafter Republic of Korea: compliance with obligations under Chapter 13 of the EU–Korea Free Trade Agreement). The relevant obligations are contained in Free Trade Agreement Between the European Union and the Republic of Korea (signed 6 October 2010) art 13.4(3) (hereafter EU-Korea BIT).

to the full extent of their internationally accepted meaning".'[56] The panel rejected the EU's claims that Korea had violated the FTA by failing in its treaty obligations to 'make continued and sustained efforts towards ratifying the fundamental ILO Conventions.'[57] Nevertheless, it agreed with the EU that Korea had not acted consistently with certain labor obligations under the agreement. More specifically, the panel determined that several aspects of Korea's domestic labor legislation were inconsistent with the country's commitments under the EU-Korea FTA to respecting, promoting, and realizing rights of freedom of association. The panel found against Korea, calling for it to adjust its labor legislation and practices and to continue swiftly the process of ratifying the four outstanding ILO conventions to be in compliance with the agreement.[58]

Arguably, this report is open to criticism. First, the panel's interpretation of certain ILO rules differed from the ILO's own interpretation (the 1998 Declaration). Second, the panel seemingly appointed itself as 'ILO enforcer' even vis-à-vis a country, Korea, that had not yet ratified, let alone implemented the relevant ILO agreements. The panel's interpretation was not limited to the Declaration, although the EU did not make this point in its submissions. The report was drafted far more expansively, as if all ILO Conventions must be implemented by Korea by virtue of its status as an ILO member. However, each ILO Convention is a separate treaty that ILO members must sign and ratify separately before it can become binding. Third, the panel's understanding of the term 'trade-related' could be viewed as over-expansive. The panel, in §§66 et seq., adopted a very broad interpretation of specific provisions of the EU-Korea trade agreement, understanding these to require signatories to bolster their labor laws across the board, that is, irrespective whether the raising of labor protection was trade-related or not. This understanding is difficult to reconcile with the case law of the CJEU (Court of Justice of the European Union) in very similar cases. For example, in its Opinion 2/15, regarding the interpretation of the trade agreement signed between the EU and Singapore, [59] the CJEU adopted a narrower understanding of the same provision that had been embedded in the EU-Korea agreement, and held that:

> '164. It is true that the exclusive competence of the European Union referred to in Article 3(1)(e) TFEU cannot be exercised in order to regulate the levels of social and environmental protection in the Parties' respective territory. The adoption of such rules would fall within the division of competences between

[56] LeClercq (2022).

[57] EU-Korea trade agreement (2010), art. 13.4.3.

[58] Report, Panel of Experts Proceeding Constituted under 13.15 of the EU-Korea Free Trade Agreement (hereafter: EU-Korea Panel Report), adopted January 20, 2021 available at https://trade.ec.europa.eu/doclib/press/index.cfm?id=2238.

[59] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62015CV0002%2801%29.

the European Union and the Member States that is laid down, in particular, in Article 3(1)(d) and (2) and Article 4(2)(b) and (e) TFEU. Article 3(1)(e) TFEU does not prevail over these other provisions of the FEU Treaty, Article 207(6) TFEU indeed stating that 'the exercise of the competences conferred … in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States …'.

165. In the present instance, however, it is apparent from Article 13.1.4 of the envisaged agreement that it is not the Parties' intention 'to harmonise the labour or environment standards of the Parties' and from Article 13.2.1 thereof that the Parties recognise their mutual right to establish their own levels of environmental and social protection, and to adopt or modify accordingly their relevant laws and policies, consistent with their international commitments in those fields.

166. It follows from all of those factors that ***the provisions of Chapter 13 of the envisaged agreement are intended not to regulate the levels of social and environmental protection in the Parties' respective territory but to govern trade between the European Union and the Republic of Singapore*** by making liberalisation of that trade subject to the condition that the Parties comply with their international obligations concerning social protection of workers and environmental protection.

167. In the light of all the foregoing, Chapter 13 of the envisaged agreement falls, in accordance with the criteria recalled in paragraph 36 of this opinion, within the common commercial policy and, therefore, within the exclusive competence of the European Union referred to in Article 3(1)(e) TFEU.' (emphasis added)

The different approaches/arguments made by panels in Guatemala-US and EU-Korea illustrate the need to go beyond the bilateral setting to reduce uncertainty for businesses and governments – if not via plurilateral rulemaking then at least using a plurilateral platform to discuss/learn from experience/problems coming from bilateral agreements. The apparent inconsistencies in these decisions could be indicative of the need for a potential plurilateral approach to reduce the scope of conflicting case law at a bilateral level, an issue not solely related to these agreements. This might be particularly beneficial where there is a call for a trade-based panel to resolve a conflict that is not trade-based as it could draw guidance from a plurilateral institution to assist in the interpretation of provisions in which the panel members are not, perhaps, as well-versed as in trade-related matters.

1.3 Unilateral labor/environmental production requirements on traded goods

The EU, as do other jurisdictions, applies labor and environmental standards to traded goods through trade policy independent of trade agreements. In this section, we briefly discuss three examples to illustrate what is already being done through unilateral trade action, as well as recent proposals that have been made to expand the use of trade policy to pursue nontrade goals. In these examples, there

is often dialogue and cooperation with affected trading partners, but the key dimension of interest to this report is that the action is unilaterally (autonomously) undertaken by the EU.

Tropical timber, biodiversity and deforestation

The EU's concerns with deforestation, for example, have led it to attempt to regulate the imports of palm oil, and palm oil-based products.[60] The Forest Law Enforcement Governance and Trade (FLEGT) Action Plan is an example of an initiative of the EU that aims to reduce illegal logging by strengthening sustainable timber through voluntary partnerships that are agreed with partner countries.[61] In these types of cases, satisfying production requirements is a condition for the products concerned to be permitted to be placed on the EU market. Other advanced countries, including Australia and South Korea, [62] have enacted outright prohibitions or legislation with deterrent effect on the import of illegally harvested wood.

FLEGT creates preferential or expedited access to the EU market for developing countries that cooperate with the EU in fostering sustainable forestry and deterring illegal logging.[60] FLEGT, which dates back to 2003, was reinforced by an EU Timber Regulation (EUTR) a decade later. The EUTR creates incentives for compliance with the standards required by the EU by imposing potentially substantial penalties on firms that introduce timber into the EU from non-cooperating exporters, or that fail to exercise due diligence in ascertaining that the products they commercialize in fact meet the agreed requirements. The EUTR encourages operators to rely on qualified, private legality standard setters and verification organizations such as the FSC, while assigning continuing responsibility for ascertaining the reliability of private system. Under FLEGT, timber exporting countries are invited to enter bilateral Voluntary Partnership Agreements (VPAs) with the EU. These are in fact binding agreements. A party to a VPA agrees to review and periodically revise its current forestry law and administration with national stakeholders to achieve the aims of FLEGT and

[60] European Parliament resolution of 4 April 2017 on palm oil and deforestation of rainforests (2016/2222(INI)); European Parliament resolution of 6 September 2020 on the EU's role in protecting and restoring the world's forests (2019/2156(INI)). In particular, it has been argued that the Commission Delegated Regulation (EU) 2019/807 singles out oil palm crop-based biofuels as requiring certification as low indirect land use change risk in order to be used for meeting the EU renewable energy targets and benefit from EU Member States' support schemes.

[61] For more information about FLEGT visit http://euflegt.efi.int. [60]
What follows draws on Hoekman and Sabel (2019).

[62] For Australian legislation, see: https://www.awe.gov.au/agriculture-land/forestry/policies/illegal-logging; for South Korean legislation, see: https://www.s-ge.com/en/article/news/20193-c4-korea-mem-new-regulation-timber-imports.

international agreements to which it is a signatory; it must also establish a corresponding timber legality assurance system —under the oversight of an independent auditor, but increasingly with civil society participation—to ensure the revised legal requirements are respected from harvesting to export. For its part the EU, to induce agreement to the terms of VPA, facilitates access for FLEGT licensed timber to its market through capacity building of public and private actors needed for compliance. A joint committee of representatives of the EU and the partner country monitor implementation of the agreement. The joint nature of FLEGT governance and provision of technical and adjustment assistance assuaged concerns about the WTO conformity of the VPAs.[63] As of March 2022, seven countries, Cameroon, the Central African Republic, Liberia, Guyana, Honduras, Indonesia and Vietnam had agreed VPAs.[62]

Biofuels: palm oil

The 2009 EU Renewable Energy Directive (RED I) provided a policy framework to encourage greater use of biofuels to reduce carbon emissions. In 2018, this directive was revised. RED II reduces the incentive for EU member states to use biofuels in the transport sector.[64] A goal of RED II is to phase out the use of bio fuels that give rise to significant risk of indirect land-use change away from food production that results in greater carbon emissions. The main crop considered to generate such risks is palm oil, a product that is not produced in the EU.

The imposition of performance or sustainability standards in relation to the EU measures in relation to palm oil and palm-oil based biofuels have been challenged in the WTO by Indonesia and Malaysia. In these cases, the complainants held that these measures are inconsistent with the MFN and national treatment articles of the GATT, as well as the TBT and Subsidies and Countervailing Measures agreements.[65] These procedures are currently pending. The EU is using trade measures to push its agenda on environmental protection, i.e., it is regulating the use/import of palm oil(-based) products because of the potential environmental externalities production may cause in the exporting countries. An implication is that the EU does not consider that palm oil is 'like' other biofuels like rapeseed oil-

[63] Recent initiatives under FLEGT include joint assessments of progress with the partner countries to establish multi-year roadmaps for implementation and monitoring; creation of tools for early detection of problems; and, in partnership with expert, outside organizations, programs to extract and make available for general use practical lessons of experience under the VPAs in areas such as shipment testing and timber traceability.

[62] See: https://www.euflegt.efi.int/vpa; For in-depth discussion of FLEGT see McDermott, et al. (2019); Myers et al. (2020) and Woolfrey (2021).

[64] Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources [2018] OJ L328/82.

[65] EU and Certain Member States – Palm Oil, WT/DS600/1 (Malaysia); EU – Palm Oil, WT/DS593 (Indonesia). The provisions invoked were Arts. I:1, III:4, X:3(a), XI:1 of the GATT 1994, Arts. 2.1, 2.2, 2.4, 2.5, 2.9, 5.1.1, 5.1.2, 5.2, 5.6, 5.8, 12.1 and 12.3 of the TBT Agreement, Arts. 3 and 5 of the SCM Agreement.

based biofuel and soya bean oil-based biofuel.[66] In fact, the EU has specifically argued in the Malaysia case that the EU Biofuels regime 'is designed to contribute to achieving the climate change mitigation objectives of the European Union in terms of the reduction of greenhouse gas emissions, whilst at the same time contributing to wider environmental objectives, and in particular the prevention of biodiversity loss.'[66] The US third party submission in this case also appears to focus on the objective of the measure 'if the regulatory purpose invoked bears a rational relationship to the measure at issue' or 'if the measure is apt to advance the regulatory purpose identified by the regulating Member'.[67]

Carbon Border Adjustment Mechanism

Most recently the EU has put forward novel proposals to incorporate environmental concerns in traded goods. A prominent example is the suggestion to implement a CBAM as a 'climate measure that should prevent the risk of carbon leakage and support the EU's increased ambition on climate mitigation, while ensuring WTO compatibility'.[68] The proposed mechanism is for EU importers to purchase carbon certificates corresponding to the carbon price that would have been paid, had the goods been produced under the EU's carbon pricing rules, which are determined by the Emissions Trading Scheme.

Multilateral Environmental Agreements

More generally, the Netherlands have proposed to introduce Multilateral Environmental Agreements (MEA)-type of provisions in all new EU trade agreements. In its review of the EC's 15-point action plan on Trade and Sustainable Development, the Netherlands requested in the context of unilaterally imposed environmentally motivated standards, that the Commission explore the value of 'explicitly committing to ratification and implementation of a list of MEAs.' In particular, the Netherlands noted that '[t]he EU would thus send a strong political signal to its partners and civil societies by demonstrating that it now wishes to negotiate trade agreements only with partners that are wholeheartedly committed to combating climate change.'[69] Evidently, insofar as third countries are willing to accept such obligations, there is no problem, but the question is what should happen to the FTA, should it not be possible to reach agreement on such provisions.

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[66] EU and Certain Member States – Palm Oil, WT/DS600/1 (Malaysia), First Submission by the EU (30 November 2021), para 630.
[66] Ibid, para 4.
[67] EU and Certain Member States – Palm Oil, WT/DS600/1 (Malaysia), Third Party Submission of the USA (14 December 2021), para 19.
[68] For more details, see: https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_3661.
[69] p. 5, see https://www.rijksoverheid.nl/documenten/publicaties/2021/12/03/bijlage-1-netherlands-input-for-the-review-of-the-15-point-action-plan-on-trade-and-sustainable-development

The Generalized System of Preferences: labor and environmental requirements

The GSP is a mechanism through which importing states provide tariff preferences to developing countries. The extent of such preferences is a matter for importing jurisdictions to determine autonomously.[70] The EU has put in place a so-called GSP+ arrangement under which GSP eligible (developing) countries are granted better (more) preferences if they accept to ratify and implement 27 international conventions dealing with protection of human rights, labor standards and the environment.[71] In addition to the GSP+, the EU also grants import duty- and quota-free access to the EU market for the UN-defined group of Least Developed Countries under the Everything But Arms (EBA) initiative. Least developed countries are not required to adopt any of conventions that apply to GSP+ countries, but trade preferences are conditional on the human rights situation prevailing in beneficiary countries: preferences may be reduced or withheld if human and/or labor rights are violated in a systematic fashion. [72] The EU may use trade sanctions (withdraw preferences) if beneficiaries violate human rights, labor or environmental standards. To date tariff preferences havebeen (partially) withdrawn by the EU in the cases of Myanmar (1997), Belarus (2007), Sri Lanka (2010), and Cambodia (in 2020) because of sustained violations of human/labor rights.[73]

Mandatory due diligence on labor and environment in supply chains

Another form of unilateral policy measure that links trade to production standards is the draft EU directive on corporate sustainable due diligence. This would apply to companies based in or doing business in the EU whom will have to exercise due diligence of their suppliers and subcontractors, 'to identify and confirm the business practices' to prevent 'harm to human rights, the environment and good governance.'[74] This proposal was released in February 2022. It aims to foster sustainable and responsible corporate behavior throughout global value chains.[75] If adopted, such a Directive would

[70] Bartels (2007).

[71] There is nothing wrong with GSP+ as long as it relies on "objective criteria", a term that the Appellate Body invented in its report on EC-Tariff Preferences (where a GSP+ scheme of the EU had been challenged), and did not interpret any further. The most reasonable understanding of the term should be that, through similar schemes, the identity of beneficiaries has not been prejudged ex ante.

[72] The EU is of course not the only jurisdiction that conditions preferential access to its market satisfaction of workers' rights. The US, for example, has done so for decades, e.g., in the context of the Caribbean Basin Initiative (Charnovitz 1986).

[73] Borchert et al. (2021).

[74]See https://www.cbi.eu/news/european-due-diligence-act; https://www.europarl.europa.eu/legislativetrain/theme-an-economy-that-works-for-people/file-corporate- due-diligence.

[75] https://ec.europa.eu/info/publications/proposal-directive-corporate-sustainable-due-diligence-and- annex_en

open large companies to the risk of being challenged in court if they 'fail to do enough to crack down on human rights or environmental abuses in their supply chains'.[76] It remains to be determined what the required standard of due diligence will be, e.g., the extent to which it will incorporate the principles developed in the OECD (2016) and that have become the basis of supply chain due diligence monitoring and reporting by many large multinational enterprises.

1.4 Market-based tools: voluntary sustainability standards

The proposal for mandatory due diligence of the production processes that are employed in international supply chains would be an important extension of trade-nontrade policy linkage. While it would be a new dimension of trade policy for the EU, it builds on the approach taken to regulate trade in timber (EUTR – see above) and mechanisms as part of private VSS systems. The latter center on certification that production processes satisfy specific standards. The standards involved span a variety of sustainability standards, including on the treatment of workers, labor standards and environmental protection. VSS differs from trade-labor policy linkages and due diligence in that they sometimes go beyond labor and environmental standards to target the prices of traded products, seeking to increase the return to producers in poor countries. Examples include the Roundtable on Sustainable Palm Oil, the Forest Stewardship Council and the International Social and Environmental Accreditation and Labelling Alliance. VSS schemes related to working conditions and the protection of basic human rights include the Ethical Trading Initiative Base Code, Social Accountability 8000 Standard, and the Business Social Compliance Initiative Code of Conduct.

Ruben and Zuniga (2011) categorize VSS into two groups: fair trade VSS and corporate-backed VSS systems. Fair trade standards tend to be rooted in NGO sponsorship, with the primary goal to increase the income gains from trade for small producers in developing countries. Corporate VSS differ from fair trade VSS by having strong corporate backing, although in practice some corporate VSS systems with focus on sustainability may be based on or accept certification by NGOs. Fiorini et al. (2020) argue these two types of VSS systematically differ in key provisions that affect market access – ranging from price policy, through supply chain factors to investment and capacity-building support given to producers – but that both include a focus on labor and the environment.

Most VSS systems are non-governmental and therefore fall in the category of private standards. They may be led by industry, NGOs or involve a partnership between business and civil society. Although

[76] Valentina Pop, 'European companies could be sued for environmental, human rights violations in their supply chain' Financial Times (24 January 2022).

private, as do the autonomous and reciprocal trade instruments discussed above, VSS frequently reference international standards, e.g., the core ILO Conventions. VSS systems often include a focus on the value chain and on supply chain management and monitoring. This is the case in particular for specific production activities and products that are associated with high risk of environmental degradation or exploitation of workers, including possible use of child labor. [77] In practice VSS certification may be used as a complement or substitute for supply chain due diligence insofar as thelatter aim at managing supply chain risks while sourcing of products that are certified by VSS schemescan be used to guarantee that specific sustainability-related production requirements have been satisfied.[78]

1.5 Evidence on trade conditionality and achievement of nontrade objectives

The forgoing examples of instruments that condition trade (market access) on commitments to (enforcement of) production requirements that are linked to nontrade objectives (labor, environment) make clear that this is a common feature of trade policies and supply chain governance systems. They illustrate the prevalence of a complex landscape reflected in a range of alternative instruments that link market access to production standards. In some cases, the links are solely market determined (VSS), in others they are imposed by government, with standards compliance enforced either unilaterally (GSP+) or through dispute settlement mechanisms that are associated with trade agreements. In all cases, there is a need for monitoring and feedback channels to register and convey information on instances when standards are not implemented.

An important issue from a policy perspective, one that arguably is salient to the subject matter of this report is whether trade-nontrade linkage strategies work. This discussion has different dimensions. For partner countries, there is a question whether preferential access to the market and/or certification of compliance with standards is economically beneficial, or to put it more negatively, whether the threat of market closure or withdrawal of trade preferences is sufficiently costly to induce countries to improve performance on labor rights or environmental protection – i.e., whether trade incentives can address (overcome) the political economy drivers that underlie non-enforcement of labor or environmental regulation. From the perspective of the Netherlands (and the EU), it is important to determine whether trade conditionality is an effective means to improve labor and environment outcomes.

[77] See e.g., Borsky and Leiter (2022) on the Kimberley Process Certification Scheme for rough diamonds.
[78] van den Brink et al. (2019).

The effects of linking trade (market access) to production requirements can be expected to be heterogeneous, and this is indeed what emerges from the empirical research literature. Research in this area finds that linking trade (market access) to production requirements is likely to be inefficient – and possibly ineffective – in generating global public goods or projecting EU norms and values.[79] Much of the literature is limited to the analysis of a single nontrade issue, with studies suggesting that the strategy only works under certain conditions. Tariff preferences or market access may not be an effective instrument to change behavior and improve outcomes if the EU market accounts for a relatively small share of a nation's exports, and, as is generally the case, MFN tariffs are low. Removal of tariff preferences may not be very costly unless the EU is both a large export market for the country concerned, and MFN tariffs are high. This will be very country- and product/sector dependent, e.g., more likely to apply for certain agricultural products. A general weakness of the literature is that assessing the causal nature of the relationship between trade, trade-labor/environment linkages, and labor/environment outcomes confronts serious difficulties as a result of weakness in available data that and problems of endogeneity. Thus, early research by Hafner-Burton (2005) arguing that hard human rights clauses in trade agreements lead to compliance has been questioned by Spilker and Böhmelt (2013), who show that the positive effect decreases if account is taken of the selection process of human rights clauses in trade agreements.

Research employing empirical methodologies that are designed to rigorously identify the direction of causality generally find weak, inconsistent or no evidence that labor and environmental production requirements – proxied by provisions in trade agreements – improves outcomes in these areas. Ferrari et al. (2021) apply a synthetic control methodology on a large sample of EU trade partners and find no evidence of a systematic positive impact of including nontrade issues in EU trade agreements on partner countries performance on related nontrade outcome indicators. One reason for this may be that agreements that have more NTPOs embodied in them are of recent vintage and it may be too soon to pick up the effects of the subset of agreements that have more extensive coverage of NTPOs.

[79] Research suggesting positive effects includes Brandi et al. (2020), who find that environment-related provisions help to reduce dirty-exports from trade partners, conditional on the initial level of environmental protection in the exporting country; Kis-Katos and Sparrow (2015) analyze the effects of the additional trade generated by tariff preferences in Indonesia on child labor and poverty and conclude that sectors most impacted by tariff cuts experience the largest improvements, partly mediated by improvements in labor standards; Abman, Lundberg and Ruta (2021) find that inclusion of environmental provisions in trade agreements is effective in mitigating deforestation, offsetting the rise in forest loss due to greater trade resulting from the agreements. See also LSE (2022).

For a trade-NTPO issue linkage strategy to be effective, the EU must be able to use trade sanctions as a mechanism to enforce NTPOs. Whether sanctions generate incentives that are substantial enough to induce partner countries to implement NTPO-related commitments is an important dimension of any assessment of the effectiveness of the linkage strategy. Borchert et al. (2021) find that the unilateral nature of GSP programs implies that the EU can use these more easily to enforce production requirements than is the case for trade agreements. They also argue trade conditionality should be administered in a more consistent and rules-based way, with beneficiary countries regularly monitored and their trade preferences more systematically revoked or suspended in cases of noncompliance. Gnutzmann and Gnutzmann-Mkrtchyan (2022) examine the effect of trade preferences withdrawal in Belarus and find no decline in total exports to the EU. Although industries benefiting from the program were affected, this seems to suggest that any political leverage deriving from the EU GSP program cannot rely on aggregate economic effects. Limited tariff sectoral coverage and low preference margins are the key obstacles. This leaves only sectoral impacts as an alternative leverage channel – if politically connected industries stand to lose from GSP withdrawal, they may lobby national governments to satisfy GSP requirements.

The relevance of empirical research of this type for policy is reduced by a lack of attention (mostly driven by data limitations) to whether production requirements (labor and environment standards) are implemented. Legal scholars have stressed that many of the efforts to link trade to labor and environment standards are imperfectly monitored and often cannot be enforced. Clearly the effectiveness of linkage strategies will be influenced by the monitoring and enforcement systems that apply – although we would again note that the magnitude of the trade carrot/preference withdrawal threat depends on the margin of preference and the ease of redirecting exports to other markets. Monitoring of compliance and enforcement is being given greater attention. In 2020, the EU created a Single-Entry Point mechanism through which EU actors can file complaints that trade partners are not complying with provisions in TSD chapters (in the case of countries that have signed trade agreements) or GSP eligibility requirements. This complements the use of this mechanism as the primary vehicle through with EU firms can complain about partner country policies that inhibit trade (market access). The mechanism is only open to entities based in the EU and EU citizens, not to actors based in EU trading partners.[80]

[80] Van der Loo (2022).

2. Multilateral (WTO) disciplines on use of production requirements

The main source of multilateral constraint on the use of production requirements is the WTO Agreement on Technical Barriers to Trade (TBT). To understand the legal disciplines that are created by this agreement, we start with a short discussion on what the TBT Agreement aims to accomplish. Why, in other words, was the TBT Agreement negotiated?

2.1 The rationale for the TBT Agreement

The TBT is not the first agreement under the aegis of the multilateral trading regime regulating product and production standards. In fact, the first agreement of the sort was signed already in 1979, during the Tokyo round. While its official name was 'Technical Barriers to Trade', it was widely known as the 'Standards Code'. [81] Participation in the Standards Code was optional, and its raison d'être was encapsulated in various parts of the Preamble (which is of limited legal value, but which routinely explains the rationale for signing an agreement):

> Recognizing the important contribution that ***international standards*** and certification systems can make in this regard by improving efficiency of production and facilitating the conduct of international trade;
>
> Desiring therefore to encourage the ***development of such international standards*** and certification systems;
>
> Desiring however to ensure that ***technical regulations and standards***, including packaging, marking and labelling requirements, and methods for certifying conformity with technical regulations and standards do not create unnecessary obstacles to international trade; …
>
> Recognizing the contribution which ***international standardization*** can make to the transfer of technology from developed to developing countries;
>
> Recognizing that developing countries may encounter special difficulties in the formulation and application of ***technical regulations and standards*** and methods for certifying conformity with technical regulations and standards, and desiring to assist them in their endeavours in this regard; (emphasis added)

Why did the framers of the Standards Code feel that a separate agreement was necessary? Alternatively put, why did the GATT not suffice? In large part because the GATT contracting parties involved wanted to underscore the legitimacy of international standards. The counterfactual (e.g., if

[81] Winham (1986).

no Standards Code had been enacted) would have been for a WTO member to introduce an international standard as a behind-the-border measure. In case of a dispute, the measure incorporating the international standard would not have benefitted say from a presumption of necessity, that (national) measures conforming to international standards actually now do by virtue of the TBT Agreement. Complainants would undeniably have found it easier to challenge similar measures, which begs the question why standardize processes of production internationally in the first place?

The Standards Code would do just that: it would provide national measures conforming to international standards with a "thick" layer of legality, as we will see in what follows. Why was this feature considered desirable? International standardization can not only reduce transaction costs, but also act as mitigating factor fending off divergent domestic political economy influences.[82] Standardsthus, can facilitate trade, and the world trading community has always placed a value on this element.

The WTO TBT Agreement kept the same rationale as the original Standards Code. In fact, it reproduced verbatim the passages from the Preamble of the Standards Code that we have already quoted above. It further continued to (practically) shield off national measures conforming to international standards from challenges to the effect that they are unnecessary.[83] The one important feature that changed dramatically through the passage from the Standards Code to the WTO TBT Agreement, was that, contrary to the former (where participation was optional), the latter is a multilateral agreement that all WTO members must observe, as a result of the agreement to subsume almost all Uruguay round agreements under the heading 'single undertaking'.[84]

2.2 What is covered by TBT?

Of interest for this report is how environment- and labor standards are treated under the TBT. To address this, we need to first delve into the coverage of the TBT Agreement and the legal disciplines it establishes. Four types of policy instruments fall under the TBT: (i) international standards; (ii) technical regulations; (iii) standards; and (iv) conformity assessment procedures. While what is

[82] This is distinct from the argument of Büthe and Mattli (2011) that international standardization process can fall prey to political economy concerns. The point is that the outcome is agreed by participants as opposed to being defined unilaterally.

[83] We say 'practically', since as we explain below, the TBT Agreement establishes a presumption only that national measures conforming to international standards are necessary to achieve the stated objective. In practice, nevertheless, there is not one single dispute where a complainant has managed to successfully rebut this statutory presumption.

[84] Wolfe (2009) provides a persuasive discussion of the origins of this concept.

understood under the last three measures is clear, the TBT does not define what constitutes an international standard. While an exhaustive definition is impossible (not least because new standards continued to be adopted after the advent of the WTO Agreement), the TBT Agreement did not do enough to provide a comprehensive definition of international standards. This omission is important for the subject of this report since many environment standards and/or labor rights are agreed in international frameworks and contexts. A problem with the TBT agreement is that we have neither a definition of 'international standard' nor an exhaustive list of international Standard Development Organizations (SDOs), the bodies that are deemed to develop and adopt international standards. And yet the TBT Agreement links international standards to international SDOs.

The WTO panel on EC-Sardines, simply defined 'international standards' as 'standards that are developed by international bodies'.[85] The Appellate Body did not dismiss this interpretation.[86] The panel in US – Tuna II (Mexico) adopted the same approach: it confirmed that a standard qualifies as 'international' when it is 'adopted by an international standardizing/standards organization; and [is] made available to the public'.[87] To reach this conclusion, it relied on the definition of 'international standard' in the ISO/IEC (International Organization for Standardization, and International Electrotechnical Commission, respectively) Guide 2, since Annex 1 of the TBT Agreement states that the terms used therein 'shall […] have the same meaning as given in the definitions in the said Guide', unless they are differently defined in Annex 1.[88] According to the ISO/IEC Guide 2, an 'international standard' is:

> a standard that is adopted by an international standardizing/ standards organization and made available to the public.[89]

The Appellate Body confirmed that 'it is primarily the characteristics of the entity approving a standard that lends the standard its 'international' character'.[84] It further noted that the TBT Agreement hints to the institution issuing the standard. Despite being silent on the notion of 'international standard', Annex 1§4 to the TBT Agreement defines an 'international body or system' as a 'Body or system whose membership is open to the relevant bodies of at least all Members'. Consequently, all these reports

[85] §7.63.
[86] §§221 and 225.
[87] §7.664.
[88] §354. Annex 1 of the TBT Agreement refers to the 1991 version of the ISO/ IEC Guide 2. This document has been updated in 1996 and in 2004, but only the definition of conformity assessment procedures has been amended.
[89] ISO/ IEC Guide 2, §3.2.1.1, p 10
[84] §353.

insisted on procedural aspects to define an 'international standard': as long as an international body has prepared it, it international. But this begs the question what comprises an international body, to which Annex 1§4 does not respond in satisfactory manner.

In Australia-Tobacco Plain Packaging, the panel followed a different approach. In fact, it added a bit of information by holding that, for a measure to be considered an 'international standard', it must cumulatively satisfy two conditions:[90]

(a) It must be a (domestic) 'standard' as per the definition embedded in Annex 1§2 of the TBT Agreement (which we reproduce verbatim, shortly); and

(b) It must be international, that is it must have been adopted by an international standardizing body.

Point (b) above takes us right back to the question: how, in light of the absence of statutory definition, to understand what constitutes an international standardizing body, an SDO? The definition from Annex 1§4 is not self-interpreting. In principle, it is left to panels to decide what an international standard is. Panels had very limited guidance to this effect. In various parts in Annex 1 and Annex 3, the TBT Agreement mentions two SDOs, the ISO and the IEC. This provides panels with useful information so that any time they confront a standard developed by the ISO/IEC, they know that they are dealing with an international standard. Furthermore, any time panels are facing a standard developed by an SDO with characteristics comparable to the ISO/IEC, they can confidently assert that they are dealing with an international standard in the sense of the TBT Agreement.

In 2000, the TBT Committee adopted a decision[91] that establishes a threshold condition, which must be observed, otherwise the entity issuing a document would not be considered an SDO that issues an international standard' as per the TBT Agreement. For a document to be considered an international standard, the relevant SDO must observe six principles embedded in this decision. Furthermore, the opening sentence of this decision, leaves no doubt that the six principles must be observed cumulatively. Specifically, §1 of the TBT Committee Decision enumerates the six principles:

> The following principles and procedures should be observed, when international standards, guides and recommendations (as mentioned under Articles 2, 5 and Annex 3 of the TBT Agreement for

[90] §7.286.

[91] Decision by the Committee on Principles for the Development of International Standards, Guides and Recommendations in Relation to Articles 2, 5 and Annex 3 of the Agreement, featured in Annex 4 of WTO Doc. G/TBT/9 of November 13, 2000.

> the preparation of mandatory technical regulations, conformity assessment procedures and voluntary standards) are elaborated, to ensure ***transparency, openness, impartiality and consensus, effectiveness and relevance, coherence***, and to address the ***concerns of developing countries***. (emphasis added)

This is considerable guidance, but of course, panels retain discretion to decide whether the principles have been met. Here is an illustration. In US-Tuna II (Mexico), the Appellate Body rejected the Mexican contention that an AIDCP (Agreement on International Dolphin Conservation Program) standard was an international standard, since AIDCP is a regional organization comprising states bordering on the Pacific Ocean, with no universal participation.[92]

A few paragraphs before, the Appellate Body had left no doubt as to the legal relevance of the 2000 Decision,[93] when it held that it constituted 'subsequent agreement' as this term is used in Article 31 of the Vienna Convention on the Law of Treaties. The consequence of this statement is that, from that moment onward, panels and the Appellate Body would have to ensure that an SDO meets the six principles or criteria embedded in the decision, otherwise, they could not conclude that the document before them was an international standard. Recourse to the elements included in Article 31 of Vienna Convention is compulsory for panels. Article 3.2 of the Dispute Settlement Understanding leaves no one in doubt in this respect.

As noted, international standards are of interest to this report as both environment- and/or labor standards are often negotiated internationally. TSD provisions in trade agreements often reference international standards. Protection of the environment is the international concern par excellent, as very few environmental hazards are self-contained and do not exhibit trans-boundary effects. Labor standards have become internationalized since 1919, when the ILO was founded under the aegis of the League of Nations. Its mission is the promotion of labor standards worldwide. There is no doubt that the ILO qualifies as an international SDO as it meets all of the six criteria enunciated in the 2000 Decision. When it comes to environment standards, panels will need to apply the six criteria on a case-by-case basis.

[92] §343 et seq. and 399.

[93] §372.

2.3 Technical regulations and product standards

International standards, when implemented by a WTO member, can take the form of a technical regulation, or a standard. These two instruments have to observe the same discipline: they must be necessary to achieve the stated objective and applied in nondiscriminatory manner. Since all TBT measures are behind the border measures, nondiscrimination should be understood as covering both MFN as well as national treatment (Article 2.1 of the TBT Agreement).

The difference between a technical regulation and standard is quite straightforward in law: conformity with a technical regulation is threshold condition for accessing a market, whereas goods that do not conform to a standard, can still be sold in that market without however, profiting from the market recognition that a standard inherently carries. Annex 1 of the TBT Agreement, pertinently reads:

> 1. Technical regulation
>
> Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which **compliance is mandatory**.
>
> 2. Standard
>
> Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which **compliance is not mandatory**. (emphasis added)

With respect to both environment- as well as labor standards, it is left to the discretion of the regulating state to decide which of the two instruments it will be using. The legal intensity will be function of the importance of a particular social preference. Assuming for example, that observing an environmental standard is an important social choice, a WTO member can enact a technical regulation (and embed in it an international standard). If, conversely, observing a fair labor standard issued by the ILO is desirable but nothing beyond that, the same WTO member can couch it in terms of a domestic standard.

Technical regulations and standards can equally well take the form of a totally unilateral act. This can be the case if no appropriate international standard exists, or, if no international standard exists at all. This works as follows. When enacting a technical regulation, WTO members must first check whetheran international standard exists. If yes, and assuming it can be appropriately used, WTO members

must use it (Article 2.4 of TBT Agreement). If the technical regulation is in accordance with the international standard, it will

> be rebuttably presumed not to create an unnecessary obstacle to international trade. (Article 2.5 of TBT Agreement)

WTO members cannot benefit from this presumption if the international standard has been simply the basis of the technical regulation. Since, as per the Appellate Body report on EC-Sardines, the burden of production of proof rests always with the complainant even when the respondent has deviated from an international standard, complainants will face a substantially higher burden to demonstrate that a technical regulation is unnecessary, when the challenged instrument has been adopted in accordance with the international standards. We will explain this point in more detail below.

When enacting a standard, standardizing bodies must use international standards, as §F of the Code of Good Practices mentions, if, of course, they are effective or appropriate:

> F. Where international standards exist or their completion is imminent, the standardizing body shall use them, or the relevant parts of them, as a basis for the standards it develops, except where such international standards or relevant parts would be ineffective or inappropriate, for instance, because of an insufficient level of protection or fundamental climatic or geographical factors or fundamental technological problems.

Nevertheless, there is a difference between this provision, and Art. 2.4 of TBT Agreement, which we have discussed above. Members incur an obligation similar to that embedded in Art. 2.4, only with respect to central government (standardizing) bodies: central government bodies must use international standards, if they are effective and/or appropriate for the intended use.

With respect to local government, and non-governmental standardizing bodies, WTO members do not incur the same obligation. They must take reasonable, only, measures to ensure that these two types of standardizing bodies use international standards, but are not obliged to ensure that this has been the case. Art. 4.1 of the TBT Agreement reads:

> Members shall ensure that their central government standardizing bodies accept and comply with the Code of Good Practice for the Preparation, Adoption and Application of Standards in Annex 3 to this Agreement (referred to in this Agreement as the “Code of Good Practice”). They shall take such reasonable measures as may be available to them to ensure that local government and nongovernmental standardizing bodies within their territories, as well as regional standardizing

bodies of which they or one or more bodies within their territories are members, accept and comply with this Code of Good Practice.

The rationale for this dichotomy, has to do with the fact that some WTO members might not possess the legal authority to compel a legally binding outcome with respect to non-central government standardizing bodies.[94]

If there is no international standard addressing a specific regulatory concern, or if a WTO member takes the view that the existing international standard is not appropriate (e.g., because it embeds a very 'low' standard of environmental protection, or does not rise to the wished level of protection of labor), it may enact its own technical regulation and/or standard.[95] If it does so, TBT requires that their (unilateral) measures be necessary, and have been applied in a nondiscriminatory manner. We will discuss these two obligations in more detail later in this report.

Conformity assessment procedures (Arts 5-10 of TBT Agreement) are the institutional vehicle to guarantee that a given product meets the terms and qualifications of a technical regulation/standard (irrespective whether it incorporates an international standard, or not). If there is international standardization of (some) conformity assessment procedures, then, as discussed already, WTO members must use them (just like any other international standard), if they think that it is appropriate to use these procedures.

[94] Article 14.4 of the TBT Agreement, an idiosyncratic provision reads: 'The dispute settlement provisions set out above can be invoked in cases where a Member considers that another Member has not achieved satisfactory results under Articles 3, 4, 7, 8 and 9 and its trade interests are significantly affected. In this respect, such results shall be equivalent to those as if the body in question were a Member'. There is no case law under this provision, which, prima facie at least, looks like a non-violation complaint.

[95] In US – Tuna II, Mexico argued that the US 'tuna-safe' label was not a standard but a technical regulation, even though Mexican firms could still sell their non-conforming tuna as tuna in the US market. The panel (by majority) had found in favor of Mexico. The Appellate Body confirmed. It held that any 'producer, importer, exporter, distributor or seller' of tuna products must comply with the measure at issue to claim access to the 'dolphin-safe' label (§196). It also held that, a single and legally mandated definition of a 'dolphin-safe' tuna product disallows the use of other labels on tuna products that do not satisfy this definition (§199). This is an odd interpretation. Allowing for sales of 'dolphin-unsafe' tuna is proof in and of itself that the 'dolphin-safe' label is a standard. It would have been a technical regulation only if 'dolphin-unsafe' tuna could never access the US market. It is one thing to request from the US to do conformity assessment to verify whether products conforming to another standard still meet the US 'dolphin-safe' label. A complainant can legitimately request this. It is a different thing to ask from the US to have an open standard, that anyone can access even with no prior conformity assessment, as this undercuts the raison d'être of standards. Why enact a standard if anyone can profit from it even without meeting its prescriptions? Not to mention that open standards could be challenged under many domestic laws for deceiving consumers.

These procedures are particularly important for environment- and/or labor standards, as conformity assessment (determination of equivalence) is a core feature of enforcement and the channel through which allegations of discrimination or other violation of WTO disciplines may occur. To illustrate this point, suppose Home, a WTO member, requests that all imports of cement must carry a label that demonstrates that a fixed quantity of the produced good has not resulted in emissions higher than X grammes of carbon dioxide (CO_2). As there is scientific evidence that cement production is an important contributor to the overall volume of emissions of CO_2,[96] the measure can be justified as based on scientific evidence (as it facilitates measurement). In this case, conformity assessment would require that exports of cement to Home (just like all Home domestic production) are tested to verify that this emission limit has not been exceeded. If recourse to the ISO standard for conformity assessment has been made, then the conformity assessment procedure would include:

- Selection of data;
- Information for assessment;
- Sampling;
- Determination whether the product fulfills requirements through testing;
- Inspection;
- Review and attestation: attest that it conforms through a statement of conformity;
- Surveillance that the product continues to conform (when warranted).

The way these various dimensions are implemented can increase uncertainty regarding the export transaction (Box 1).

Box 1. Conformity assessment-related uncertainty

Conformity assessment processes might require on-site visits and cooperation with the domestic authorities. Suppose Foreign refuses on-site inspection, it risks being asked to prove that its cement meets Home's standard. Even though the allocation of the burden of proof under the TBT Agreement has not been discussed in depth in WTO case law,[89] presumably Foreign will be asked to supply information regarding the amount of emissions released in the atmosphere during production. Absent cooperation, it will be impossible for Home to verify whether the label indicates correct information. Panels can draw adverse inferences, if Foreign refuses to supply information and to allow on-site

[96] Marland et al. (1989) have estimated that 2.4% of all carbon dioxide emissions are due to cement production.
[89] Horn and Mavroidis (2009) provide a survey of case law in this respect. We return to this issue below. [90] Evidence is relevant, if it makes the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Evidence is material if it relates to one of the particular elements necessary for proving or disproving a case. WTO case law uses the term "prima facie" evidence to signal that the complainant has adduced enough evidence to shift the proof to the other party. We will return to this matter below.

verifications. And of course, depending on the reliability (relevance, and materiality) of the information submitted,[90] the burden might shift to Home, in case it wants to rebut the information.

To facilitate this process and, in more general terms, to reduce uncertainty with respect to trade transactions, WTO members can have recourse to recognition agreements, and sometimes mutual recognition agreements (MRAs) regarding not only standards of production (substantive standards), but also conformity assessment mechanisms (the procedural steps associated with certification). The latter are often denoted as MRA+.[97] Home and Foreign, for example, might agree ex ante that they agree each other's (divergent) environmental standards as equivalent to each other (MRA). They may also agree that Foreign can export goods to Home, and vice-versa, if the conformity of exported goods has been assessed under its own domestic procedures (MRA+).[98]

Suppose now that Home requires that all footballs circulating in its market are produced by adults, i.e., incorporates ILO Convention No. 138 on Minimum Age into a domestic technical regulation. Again, cooperation with Foreign is necessary to ensure that footballs produced there, and exported to Home, observe the ILO Convention, even though conformity assessment is substantially less cumbersome (as no scientific measurement of emissions is required). To this effect, Home and Foreign can sign an MRA+, whereby Foreign's verification that footballs produced in its territory meet the ILO Convention requirements, suffices for the product concerned to be exported to Home.

2.4 Scope and form of instruments covered

Recall the definition of "technical regulation" in Annex 1 §1 of the TBT Agreement:

> Document which lays down ***product characteristics or their related processes and production methods*** … (emphasis added)

Recall also the definition of "standard" in Annex 1 §2 of the TBT Agreement:

> Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or ***characteristics for products or related processes and production methods*** … (emphasis added)

The terms emphasized and the disjunctive 'or' suggest that 'characteristics' on the one hand, and 'production and processing methods' (PPMs) on the other, refer to different features of traded goods. Unfortunately, the negotiating history behind the two terms is not very clear on this point, and in any case, arguments based exclusively on the negotiating record have consistently been downplayed in WTO case law. Nevertheless, practice leaves no doubt that both incorporated (into the final, traded good) as well as non-incorporated PPMs can lawfully take the form of a technical regulation and/or a standard.

[97] CETA for example includes MRA+ provisions, as did the draft of the TTIP (Trans-Atlantic Trade and Investment Partnership).

[98] MRAs and MRA+ arrangements must conform to the MFN rule, i.e., be open (accessible) to any WTO member desiring to participate on equal terms as incumbents. There is no case law where a WTO member has challenged a refusal to conform with MFN obligations in the context of an MRA/MRA+.

In US-Clove Cigarettes, the panel and the Appellate Body dealt with a US measure banning the sale of clove cigarettes. Clove is included in the final good that is being traded (cigarettes). Neither the panel, nor the Appellate Body saw anything wrong with this requirement per se. The US lost its argument on different grounds. The first case of this type would have been EC-Asbestos. In this case, Canada was challenging the consistency of a French measure, prohibiting the sale in France of asbestos-containing bricks with the TBT Agreement. However, the panel decided to adjudicate the dispute under the GATT, and even though the Appellate Body thought this was the wrong decision, it did not disturb the approach chosen by the panel.[99]

In both US-Clove Cigarettes, as well as in EC-Asbestos, the process of production (cloves; asbestos) had been incorporated in the final product that was being traded. This was not the case in US-Shrimp. In this case Mexico challenged the consistency of the 'dolphin-safe' label with the WTO rules. In this case, the US conditioned access to the label upon satisfaction of a specific process for harvesting tuna: fishermen should avoid accidentally taking the life of dolphins when harvesting tuna. The process of production (harvesting) is a fishing method that is not incorporated in tuna, the good traded. Eventually, the US prevailed. Consequently, the panel and the Appellate Body did not see anything wrong with the US enacting a non-incorporated PPM in terms of consistency to the relevant rules of the TBT Agreement.

We can thus conclude that, irrespective how the terms 'characteristics' on the one hand, and 'processes and production methods' on the other, are understood, both incorporated- as well as non-incorporated production processes (have already) come under the aegis of the TBT Agreement. This means that environmental measures, irrespective whether the environment-friendly component has been incorporated or not in the traded good, can come under the TBT Agreement. In similar vein, labor-related requirements, which of course are non-incorporated PPMs, can equally come under the TBT Agreement.

Both the definition of 'technical regulation' as well as that of 'standard' include the same sentence, namely:

> It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

[99] EC-Asbestos signals the last panel report that reviewed the consistency of a production process under the GATT and not the TBT (2003).

While TBT measures can take a different form (since the word 'may' ensures that what follows is an indicative list), it is usually through labelling, packaging, and marking that TBT measures are communicated to the wider public. The indicative list anyway ensures that a judge will not commit a false negative when in presence of a measure regarding labelling, packaging, or marking, and will subject it to scrutiny under the TBT Agreement. Furthermore, the list informs what else can come under the TBT Agreement. It is requirements akin to labelling, marking and packaging that should alert those entrusted with the enforcement of the TBT Agreement about the applicability of the agreement. Technical regulations taking the form of labelling are of course the means to pursue an objective. The question thus arises what kind of objectives can be legitimately pursued through the enactment of measures coming under the aegis of the TBT Agreement? As far as the focus of this report is concerned, the question can be further disaggregated: does the pursuance of environment- and/or labor standards come under (one of) the objectives that are considered legitimate under the TBT Agreement? Art. 2.2 of the TBT Agreement reads:

> For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia:* national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia:* available scientific and technical information, related processing technology or intended end-uses of products.

Whereas protection of environment is explicitly mentioned in the body of this provision, the promotion of labor standards is not. It would be erroneous, however, to think that protection of workers' rights does not constitute a 'legitimate objective' in the sense that this term is used in the TBT Agreement. One reason is that the list embedded in this provision is non-exhaustive. WTO case law has recognized policy objectives that do not feature in the list of Art. 2.2 of TBT as being legitimate. Examples include the fight against tobacco consumption (US – Clove Cigarettes; Australia – Plain Packaging);[100] consumer information [US – Country of Origin Labeling (COOL); US – Tuna II (Mexico)][101] and, of course, protection of dolphins (US – Tuna II).[102] Another reason is that some workers' rights are intimately linked to protection of human health and safety, which does feature in the list. More importantly, the GATT/WTO is a predominantly negative integration contract. Apart from the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), WTO members are free to decide whether to use the policy instruments that are covered by GATT/WTO agreements and free

[100] Report of the Panel, US – Clove Cigarettes, §7.347; Report of the Panel, Australia – Plain Packaging, §7.251.
[101] Report of the Panel, US – Tuna II (Mexico), §7.437; Report of the Panel, US – COOL, §7.651.
[102] Report of the Panel, US – Tuna II (Mexico), §7.437.

to determine the objective they wish to pursue. What the GATT/WTO agreements do, is to impose constraints on the means they employ when doing so. Nothing stops a WTO member to protect labor standards or the environment, as long as it complies with the obligations it has assumed by acceding to the WTO. The case law regarding challenges to (national) legislation promoting labor standards has invariably centered on complaints that the regulating state did not adhere to its obligation to avoid discrimination (without questioning the right to protect or promote workers' rights).[103]

2.5 TBT, SPS and the GATT

The GATT and the Agreements on TBT and Sanitary and Phytosanitary (SPS) measures overlap in the subject matter covered but embody different legal disciplines. The main GATT obligation is nondiscrimination (national treatment and MFN – Arts. I and III GATT)). GATT Art. XX, the general exceptions provision, with its analogues in the General Agreement on Trade in Services (GATS) and the TRIPS Agreement, calls for nondiscrimination and necessity – a trade restrictive measure must be necessary to attain the objective of the government. The TBT agreement adds consistency requirements while the SPS agreement additionally requires interventions to be based on scientific evidence. The legal relationship across the three agreements is a key issue for the purposes of this report.

The TBT and SPS Agreements serve the same purpose as the national treatment and exceptions provisions in the GATT (Arts III/XX), but are narrower in coverage.[104] This means there is an important role for the GATT (Arts I, III, XI, XX) to play in the context of environmental- and labor standards. The scope of the GATT is much larger than that of the TBT (and SPS) Agreements, as it covers measures that are unrelated to the process of production.[105] The definition of technical regulation and standard appearing in Annex 1 of the TBT Agreement also defines its scope:

> 1. *Technical regulation*
>
> Document which lays down ***product characteristics or their related processes and production methods***, including the applicable administrative provisions, with which compliance is mandatory. It ***may*** also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

[103] Howse (1999) provides a comprehensive account of cases relating to workers' rights adjudicated in the first five years of the operation of the WTO.

[104] Were we to draw a Venn diagram, GATT and TBT would partially overlap. There is an aspect of TBT, a small aspect that is, that is not covered by the GATT Article III, namely the legal significance of harmonization (international standards).

[105] Annex 1 of the TBT Agreement defines the coverage of the agreement.

…

2. *Standard*

Document approved by a recognized body, that provides, for common and repeated use, ***rules, guidelines or characteristics for products or related processes and production methods***, with which compliance is not mandatory. It ***may*** also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method. (emphasis added).

Labelling and/or packaging etc. are not essential features of a measure coming under the aegis of the TBT Agreement. What matters is that a measure regulates the production process. TBT comes into play when the conditions for offering goods for sale in a given market are predicated on their process of production. If, for example, the EU imposes an environmental tax under the proposed CBAM on imports because their process of production does not match the corresponding process that EU production must comply with, then, in case of litigation, a WTO panel will resolve the matter by applying the TBT provisions. But if the EU adopts a 'mirror clause', and refuses to trade with other WTO members that have not enacted their own CBAM, then, in all likelihood, it is the GATT that applies.

The scope of the SPS Agreement is quite clearly defined, comprising measures to protect animal or plant life or human health **from** entry of pests and diseases (e.g., emerald ash borer, ash trees); other damage **from** entry of pests (e.g., damage on agricultural land from use of genetically modified organisms); human/animal life or health **from** additives and contaminants (e.g., risks to human health from consumption of hormone-treated beef); and human life or health **from** diseases carried by animals/plants (e.g., risks to human health from avian flu).

Some measures may be difficult to characterize as either TBT or GATT measures. Take for example the recent US measure to ensure that goods made with forced labor in the Xinjiang Uyghur Autonomous Region of the People's Republic of China do not enter the United States market. [106] Key to the legislation is a 'rebuttable presumption' that assumes all goods from Xinjiang, where Beijing has established detention camps for Uyghurs and other Muslim groups, are made with forced labor. It bars imports unless it can be proven otherwise. Now this measure could be seen as an import restriction (GATT Art. XI); it could be a ban on sales of goods made with forced labor (GATT Art. III/XX); or, it could be a TBT measure, if US requests that similar goods carry a label indicating the PPM that was used. All this to say that the actual formulation of the measure matters when it comes to classifying it under the GATT or the TBT. This is not an inconsequential observation. As the legal

[106] HR6256, 117th Congress 2021-2022.

disciplines of GATT and of TBT are not identical, the proper classification of challenged measures matters.

When scrutinizing the legitimacy of a measure, panels usually apply a high degree of deference, continuing the practice under GATT Art. XX.[107] Deference in this respect seems well embedded in WTO jurisprudence. It is common practice also in other international courts, such as the European Court of Human Rights. Its 'margin of appreciation' doctrine acknowledges that national legislators are 'better placed' than international adjudicators to establish social preference in their jurisdiction.[108] A non-intrusive standard of review emerges thus, under the circumstances, as the obvious choice for judges asked to pronounce on the legitimacy of an objective pursued.

The relationship between the TBT and SPS agreements is addressed in Art. 1.5 of the TBT Agreement, which reads:

> The provisions of this Agreement do not apply to sanitary and phytosanitary measures as defined in Annex A of the Agreement on the Application of Sanitary and Phytosanitary Measures.

Measures that qualify as SPS measures thus, will be subjected to scrutiny only under the SPS Agreement. But what about the relationship between the GATT and the TBT? There is no statutory provision discussing their relationship. This issue was resolved in case law. In EC–Asbestos, the Appellate Body, reversing the panel in this respect, concluded that a measure that revealed the characteristics of a technical regulation and thus, simultaneously fell under the TBT and the GATT, should have been reviewed under the TBT Agreement, and not under the GATT as the panel had originally done. [109] The subsequent panel report on EC–Sardines contains an even more explicit reflection of this approach:

> ... The AB suggests that where two agreements apply simultaneously, a panel should normally consider the more specific agreement before the more general agreement. Arguably, the TBT Agreement deals "specifically, and in detail" with technical regulations. If the AB's statement in EC—Bananas III is a guide, it suggests that if the EC Regulation is a technical regulation, then the analysis under the TBT Agreement would precede any examination under GATT 1994.[110]

[107] Report of the Panel, US – COOL, §7.612; Report of the Panel, Colombia – Textiles, §7.338.

[108] See Handyside v UK 1 EHRR 737 (1976), §48. The importance of this issue should not be underestimated, as it practically gives WTO members a free hand as to the ends sought (but not as to the means). International public law scholars are unanimous on this front. Compare, for example, Gerards (2011); Legg (2012); Letsas (2006); and Shany (2005).

[109] §§59 et seq., and especially §§80–81.

[110] §7.15; AB stands for Appellate Body in all panel reports.

On appeal, the Appellate Body did not reverse the order of analysis. Subsequent panel reports [US–Tuna II (Mexico); US–Clove Cigarettes] have followed this order of analysis, and it is now commonplace that panels will start reviewing claims under the TBT Agreement. It is equally clear by now that this is no longer an issue of mere order of analysis. Panels view the TBT Agreement as a one-stop shop. Measures that are scrutinized under its purview will not be scrutinized under GATT as well. Thus, GATT Art. XX cannot serve as exception to violations of the TBT Agreement. The preamble to the TBT Agreement explicitly mentions all Art. XX grounds that could be relevant to it:

> Recognizing that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement.

This explicit mention of items featured in GATT Art. XX, denotes that the framers of the TBT Agreement had in mind a construction where no recourse to GATT Art. XX would be possible. Practice confirmed. In US–COOL (country of origin labeling), the panel held that the interpretation of the 'necessity-requirement' featured in Article 2.2 of TBT Agreement should be symmetric to the interpretation of the same term under GATT Art. XX .[111] In EC–Seal Products, the panel did not use GATT Art. XX as justifying grounds to a violation of Art. 2.1 of TBT that it had already established anyway.[112] The Appellate Body picked up from where the panel had left off. It did not explicitly state that GATT Art. XX could not serve as an exception to violations of obligations assumed under the TBT Agreement. It did everything but that, however, and its analysis should leave no doubt that in its view, GATT Art. XX could not serve as an exception to obligations assumed under the TBT Agreement.[113]

At stake was the interpretation of the term 'likeness' (GATT Arts I and III), and more precisely, the question whether detrimental impact on imported like goods could be justified if it stemmed from legitimate regulatory distinctions. The Appellate Body rejected arguments by the EU to this effect. It

[111] §§7.667 et seq.

[112] §§7.648 et seq.

[113] The Appellate Body decision to uphold the Panel's finding that the EU Seal Regime was 'necessary to protect public morals' within the meaning of GATT Art. XX(a) is of limited salience for production requirements. Following EC-Asbestos, it is not possible to use Art. III (national treatment), which is the pathway to an Art. XX defense when dealing with a process issue, whether embedded in the final product or not. In process-related cases, as we have argued above, which will characterize both environmental and labor standards cases, the provisions of the TBT agreement apply, not Art. XX.

relied heavily on the fact that WTO members could invoke GATT Art. XX as a means to justify violating their obligations assumed under GATT Arts I and III, whereas a similar possibility did not exist for the violation of Art. 2.1 of TBT. In various paragraphs of its report,[114] the Appellate Body underscored this point.

In US–Clove Cigarettes, the panel came close to discussing this issue, but in the end, it did not have to do so, since the US (the defendant) had invoked GATT Art. XX only as an exception to GATT Art. III, not as an exception to the TBT.[115] The Appellate Body, without deciding the issue head on, drew some parallels between GATT Art. XX and the TBT Agreement, again suggesting that the former could not serve as an exception to the latter:

> A panel adjudicating a claim under Article 2.2 of the TBT Agreement must seek to ascertain to what degree, or if at all, the challenged technical regulation, as written and applied, actually contributes to the legitimate objective pursued by the Member. The degree of achievement of a particular objective may be discerned from the design, structure, and operation of the technical regulation, as well as from evidence relating to the application of the measure. As in other situations, such as, for instance, when determining the contribution of a measure to the achievement of particular objective in the context of Article XX of the GATT 1994, a panel must assess the contribution to the legitimate objective actually achieved by the measure at issue.[116]

In two previous paragraphs, the Appellate Body had alluded to the conclusion that GATT Art. XX could not justify violations of the TBT Agreement:[117]

> The balance set out in the preamble of the TBT Agreement between, on the one hand, the desire to avoid creating unnecessary obstacles to international trade and, on the other hand, the recognition of Members" right to regulate, is not, in principle, different from the balance set out in the GATT 1994, where obligations such as national treatment in Article III are qualified by the general exceptions provision of Article XX.
>
> …
>
> Finally, we observe that the TBT Agreement does not contain among its provisions a general exceptions clause. This may be contrasted with the GATT 1994, which contains a general exceptions clause in Article XX.

[114] §§5.109, 5.110, 5.117, and 5.125.
[115] §§7.305 et seq.
[116] §317.
[117] §§ 96, 101.

In a subsequent report (China–Rare Earths), the Appellate Body explicitly referred to these two paragraphs to find in the most categorical manner that WTO members could not justify TBT violations through GATT Art. XX:

> For example, Article XX of the GATT 1994 has been found by the Appellate Body not to be available to justify a breach of the Agreement on Technical Barriers to Trade (TBT Agreement).[118]

With this finding, the issue was resolved.[119] Thus, extant case law implies that the consistency of environment- and/or labor standards with the TBT Agreement will stand and fall by using only the provisions of the TBT Agreement as legal benchmark.

2.6 The TBT legal discipline as understood in case law

In what follows, we elaborate and examine all issues that have arisen in case law under the TBT Agreement of relevance to environment- and/or labor standards.

Conformity with an international standard

This point was discussed above, so here we provide further context. There are two distinct issues:

- What constitutes consistency with an international standard?
- Who carries the associated burden of proof?

The leading case on the first question is India-Agricultural Products. This was a dispute under the SPS Agreement, which nevertheless, emulates the TBT approach towards consistency with international standards: it distinguishes between cases where national measures are based on international standards, and cases where measures are in accordance with international standards.

The panel and Appellate Body report held that the latter term (e.g., in accordance with) should be understood as if a national measure had practically copied the formulation embedded in the international standard. If so, then the national measure at hand, will benefit from the presumption of consistency with the necessity principle (that is, it will be considered the least restrictive option to achieve the stated objective). Conversely, a measure that is based upon an international standard, does not benefit from the same presumption. This might seem odd, and indeed it is. This issue has been largely overlooked in the literature. As far as can be determined from the negotiating history of the WTO TBT (the GATT era Tokyo Round Standards Code did not contain any presumption), there is

[118] §5.56.

[119] Of course, whether it will be sustained is somewhat moot given the AB is no longer operative. Presumably this reasoning will be applied in cases involving MPIA signatories.

no reason why Art. 2.5, second sentence, benefits only technical regulations, and why no similar provision exists for conformity assessment procedures (under Art. 5 of TBT), or standards (under Art. 4, and Annex 3 of TBT).

In fact, ***not even all technical regulations can benefit from such a rebuttable presumption***. This 'privilege', as the Appellate Body referred to it in its report on US-Tuna II (Mexico),[120] is available only to those technical regulations that have been prepared, adopted and applied by central government bodies (see heading of Art. 2) and those technical regulations, the legitimate objective of which are explicitly mentioned in Art. 2.2 (that is, national security requirements; the prevention of deceptive practices; the protection of human health or safety, animal or plant life or health, or the environment).[121]

It remains unclear if ***local*** government as well as ***non-governmental*** technical regulations adopted under Art. 3 TBT can benefit from this presumption which, as per statutory language, only concerns technical regulations adopted by central governments. One could make the case that technical regulations adopted by bodies enlisted in Art. 3, can still benefit from this presumption. Art. 3.1 expressly states which Art. 2 provisions are excluded from its coverage (Arts 2.9.2 and 2.10.1). It follows that the rest of Art. 2 has been transposed *mutatis mutandis* into Art. 3 (the rebuttable presumption under Art. 2.5, second sentence, included). Indeed, the panel on Australia-Plain Packaging (not the Appellate Body, as this finding was not appealed) assessed in detail Art. 2.5, second sentence, and even made a minor observation, leaving this issue open. We quote from footnote 465 to §7.38(a):

> 'The second sentence of Article 2.5 does not therefore concern the other two types of TBT measures: "standards" and "conformity assessment procedures". We also note that the second sentence of Article 2.5, on its face, only concerns technical regulations that, like the TPP measures, have been prepared, adopted or applied by ***central government bodies***. Technical regulation from ***local*** or ***non-governmental*** bodies are disciplined in a separate provision, Article 3. The present proceedings, we note, do not involve such types of measures. Therefore, we need not, and do not, examine the question of whether Article 2.5 can be also invoked with respect technical regulations from ***local*** or ***non-governmental*** bodies.' (italics in the original)

[120] §§ 379 and 390.

[121] See the panel report on Australia-Plain Packaging, §7.272. Incidentally, it is odd that the 6th and 7th recitals of the Preamble of the TBT Agreement, repeat all these objectives and then add one more objective, which is not expressly mentioned in Art. 2.2, namely, ensuring quality exports.

Finally, as also noted by the panel in its report on Australia-Plain Packaging, the scope of the presumption under Art. 2.5, second sentence, is narrower when compared to its SPS counterparts (Arts 2.4 and 3.2). The two SPS provisions presume compliance with the SPS and GATT in full, and not only with the necessity-obligation (as Art. 2.5 of TBT does). This has been noted by the panel in its report on Australia-Plain Packaging.[122] While the Appellate Body in its report on EC-Hormones held that the presumptions under SPS is 'rebuttable',[123] there is no statutory basis for that. Unlike Art. 2.5 of TBT, nowhere does the SPS Agreement use the term 'rebuttable'.

One last observation regarding standards seems warranted. Art. 4.2 TBT states that:

> Standardizing bodies that have accepted and are complying with the Code of Good Practice ***shall be acknowledged by the Members as complying with the principles of this Agreement***. (emphasis added)

What do the terms 'shall be acknowledged' really mean, besides some best-endeavors obligation? And which principles does this provision refer to? TBT does not contain a list of principles. As there is no case law so far, we cannot exclude that in future practice, this provision could be used as platform to pronounce in favor of domestic standards benefitting from the presumption embedded in Art. 2.5 of TBT. But this remains to be seen. As for conformity assessment procedures, nothing equivalent to Art. 2.5, second sentence, exists. With this in mind, we turn to the interpretation of the term 'based upon'. Recall technical regulations/standards/conformity assessment procedures can either be in accordance with or based upon international standards. We will show in what now follows, that 'based upon' is quite a high threshold. The Appellate Body, in its report on EC–Sardines, imposed limits on national discretion in this respect when it held that the term 'basis' (featuring in Art. 2.4) entails that a technical regulation should, at the very least, not contradict the relevant international standard.[124]

But this was not all. The Appellate Body further pointed out, that the phrase the 'relevant parts' of an international standard (included in Art. 2.4) is not inconsequential. WTO members must base their measures on all, and not only some of, the parts of an international standard that are relevant.[125] By judging this way, the Appellate Body wanted to avoid that WTO members immunize their interventions from eventual challenges, even when they have only selectively based their measures on international standards. We quote §250 in its entirety, because of its importance:

[122] footnote 961 to §7.275.
[123] §170.
[124] §248.
[125] §250.

> In making this determination, we note at the outset that Article 2.4 of the TBT Agreement provides that "Members shall use [relevant international standards], or the relevant parts of them, as a basis for their technical regulations". In our view, the phrase " relevant parts of them" defines the appropriate focus of an analysis to determine whether a relevant international standard has been used "as a basis for" a technical regulation. In other words, the examination must be limited to those parts of the relevant international standards that relate to the subject-matter of the challenged prescriptions or requirements. In addition, the examination must be broad enough to address all of those relevant parts; the regulating Member is not permitted to select only some of the "relevant parts" of an international standard. If a "part" is "relevant", then it must be one of the elements which is "a basis for" the technical regulation.

It is therefore clear that even the lower standard (when measures are based on international standards) is quite demanding. This also helps to understand better why the 'in accordance' standard amounts to practically a verbatim reproduction of the international standard into the domestic legislation.[126] Recall, when a measure is only based upon an international standard, it cannot benefit from the presumption of compliance with the necessity-principle. All this is of immediate interest to the question of the WTO-compatibility of environment- and/or labor production requirements.

The allocation of the burden of proof to show that a measure is based upon or is in accordance with an international standard, is unclear in case law. The panel in its report on India-Agricultural Products seems to have allocated most of the burden on India, whereas the Appellate Body made no pronouncement on this effect. But India was the respondent, and, under standing case law, it should have been the complainant tasked with making a prima facie case that the Indian measure was inconsistent with the TBT Agreement. When it comes to allocating the burden of proof, there is clarity in case law with respect to one element only: if a WTO member deviates from an international standard and adopts a technical regulation the consistency of which with the TBT Agreement has been challenged, it is still for the complainant to demonstrate that the international standard was appropriate and effective to use in the specific circumstances. This might sound odd, and indeed it is an odd allocation of the burden of proof. Here is how it happened.

[126] In Australia-Tobacco Plain Packaging, the panel reproduced the spirit of the passage above, holding that for a measure to be "in accordance with" an international standard, a "closer" connection between the measure and the international standard was required (§§7.273-7.275). This finding was not appealed.

In EC-Sardines, Peru was challenging the consistency of an EU regulation which deviated from a Codex Alimentarius standard, which states that:

- Sardina Pilchardus is a 'sardine', whereas Sardinops Sagax, is 'X sardine';
- Pilchardus swims in the Atlantic, whereas Sagax in the Pacific;
- Both types could be marketed as 'sardines' in any given market, but Sagax (Peruvian) should be marketed as Peruvian sardine (or by its type, e.g., Sagax)

The EU regulation allows only Pilchardus to be marketed as sardine. Peru complained that the EU had deviated from the Codex standard (under which both types qualify as 'sardines'), asking it to explain why the standard was ineffective and/or inappropriate for it (the EU) to meet its regulatory objective (consumer protection). The Appellate Body, reversing the panel in this respect, agreed that the EU had deviated from an international standard, but still requested from Peru to demonstrate that the international standard was indeed appropriate and/or effective for the EU to have reached its objective.[127] The rationale for this finding, the Appellate Body held, was that there were enough transparency obligations embedded in the TBT Agreement, sufficient for Peruvian exporters to become well acquainted with the details and the workings of the challenged measure.

Irrespective of how well-founded this approach is, this is the state of play in terms of case law evolution. What is the relevance of the discussion above to environment- and/or labor standards? First, assuming an international environment and/or labor standard exists, Home must use it at the very least as basis for its measures (assuming it finds it appropriate and/or effective). Recall from our discussion above, that 'basis' is quite a high threshold.

Second, it is clear, for the reasons mentioned above, that Home will benefit from the presumption of conformity with the necessity-principle, if its measure is in accordance with the relevant international standard. Conversely, Home will not profit from the same presumption, if it has not used the international standard as basis for its intervention. But, in light of the finding embedded in §250 of the Appellate Body report on EC-Sardines, a WTO panel will not lightheartedly knock down a defense that a national measure that used an international standard only as basis for the domestic measure enacted, should still be considered necessary to achieve the stated objective.

[127] §282.

Third, if Home wishes to deviate from the international standard, it does not have to explain ex ante its choice. But it must take implicitly the view, that the standard at hand is not adequate and/or effective. Deviations usually occur when the regulating state is a developed country. This is so, because international standards often are minimum standards, as far as developed countries are concerned, for they represent a compromise between high- and low-level protection countries. In case of SPS standards, by statutory fiat (Art. 3.3), deviations are permissible only when a higher standard of protection is sought. This is not the case for TBT standards. In practice, one would expect more deviations from labor- than from environment standards. Even though both ILO and ISO are open to all countries, it is the ILO where we observe more active participation from the developing world. The ISO incites participation by developing countries but is usually driven by leaders in a specific industry. In case of deviation from an international standard, it is the complainant that will continue to assume the burden of production of proof to show that the adopted measure is unnecessary and/or discriminatory.

Incorporated vs. non-incorporated processes

As discussed above, both are covered. Production requirements can pertain to both incorporated- as well as non-incorporated PPMs. This observation is important for both labor standards (which are exclusively non-incorporated PPMs), as well as environment standards (which can be both).

Nondiscrimination

The legal discipline embedded in the TBT is two-fold: measures must be necessary and applied in nondiscriminatory manner. In what follows, we will assume that the measure challenged is not a measure taken in accordance with an international standard, as such measures are presumed necessary.

Nondiscrimination is discussed in Art. 2.1 of TBT:

> Members shall ensure that in respect of technical regulations, products imported from theterritory of any Member shall be accorded treatment no less favourable than that accorded to likeproducts of national origin and to like products originating in any other country.

[128] Mavroidis (2019) advances the opposite view.

A determination whether nondiscrimination applies therefore, rests on two legs: goods (imported, domestic) must be 'like', and if so, imported goods must not be treated less favorably than domestic 'like' goods. Assuming that two goods are considered 'like', the importer must treat domestic and foreign goods in nondiscriminatory manner (apply no less favorable treatment). The definition of 'like' goods is the key in understanding the obligation embedded in this provision.

In US – Tuna II (Mexico), the most recent judicial pronouncement on this score, the Appellate Body made it clear that it is consumers that will decide on likeness. It asked, consequently, whether US consumers would treat dolphin-safe and dolphin-unsafe tuna as like products. What mattered thus, was not 'regulatory likeness', e.g., does the US measure request from tuna harvested in US and/or in Mexico (or anywhere else for that matter) to observe the same requirements in order to access the 'dolphin-safe' label? What mattered was whether US consumers perceived 'dolphin-safe' (as defined in the US standard), and 'dolphin-unsafe' tuna to be like products.[129] It is not the US law that mattered, in other words, but consumers' preferences. In line with prior case law, the Appellate Body did not base its opinion of consumers' preferences on empirical evidence, e.g., a survey conducted to this effect in the US market. This is the most untenable of all findings in this report (and, it bears repetition, it is the last word on this score). We will come return to this issue later on, as it has important ramifications for the subject of this report, namely the treatment of environment- and/or labor standards under the TBT Agreement.

Returning to US-Tuna II (Mexico), having responded affirmatively to the question whether dolphin-safe and -unsafe tuna are like goods because consumers so think, the Appellate Body went on to ask whether the regulatory distinction operated by the US afforded less favorable treatment to Mexican tuna. To do that, it asked whether the (disparate) trade impact on Mexican producers was exclusively due to the legitimate regulatory distinction operated in US law. It went ahead to find that this measure was discriminatory because most Mexican vessels were fishing in the area with a high concentration of dolphins and, hence, had to observe the (relatively speaking) more onerous reporting requirements. But this was not the end of the story. For the Appellate Body, a measure producing detrimental effects would still not be considered to accord less favorable treatment to imported goods, if the detrimental impact was due exclusively to a legitimate regulatory distinction.[130]

[129] §§7.238, 7.266, 7.340, 7.360.
[130] §297.

The Appellate Body held that, unlike what is the case under GATT Art. III.4, the policy rationale matters when asking the question whether less favorable treatment had been afforded to imported (like) goods. The term 'less favorable treatment' in the TBT-context thus, combines elements of both GATT Art. III (disparate trade effects), as well as GATT Art. XX (policy rationale offered as justification). This is good news for WTO members adopting TBT measures, since they can rely on their policy rationale to justify (disparate) trade effects that say the adoption of an environment- and/or labor standard might cause.

The bad news comes next. In the same passage,[131] the Appellate Body held that treatment would not be less favorable, if disparate effects are the effect of exclusively one cause: the policy rationale offered. This is a very demanding standard. From an economic impact evaluation perspective, elaborate econometrics are likely to be required to isolate the effects of the policy rationale, especially since it is quite often the case in similar occurrences that there will be collinearity and multi-collinearity (association between two explanatory variables). The allocation of the burden of proof will be critical here, as, if assigned to complainant, it will face an almost impossible task. Normally, it should be the complainant that should carry the burden of proof, but in practice WTO adjudicating bodies invite submission of evidence by both complainant and respondent, and then weigh their relative persuasive effect. In practice, in US-Tuna II (Mexico), the Appellate Body concluded that the US measure was in violation of the nondiscrimination requirement, without however, inviting elaborate(econometric) evidence by the litigating parties.

When recourse is made to environment- and/or labor standards, what matters is the specifics of the governmentally imposed standards that apply. Whether these conform to consumer preferences for a given good is irrelevant. In any event, consumer preferences are heterogeneous. To the extent that there are externalities (from physical to moral) stemming from private actions, governments might find it appropriate to intervene and impose requirements on production (i.e., regulate via standards setting) to assure socially desirable outcomes. Consumers may display revealed preferences that are at variance with the policy preferences embodied in regulation for many reasons, including lack of information, non-willingness to pay for goods that satisfy standards, and simple opportunism.

In the world of TBT, what matters is the applicable government regulation, not consumers' preferences as reflected in market outcomes (purchases). The question is whether government

[131] §§297 et seq.

actions conform to the TBT legal disciplines. As stated at the outset of this section, these disciplines are two-fold: measures must be necessary and be applied in a nondiscriminatory manner. Case law has not considered there to be a sequence from necessity to nondiscrimination. It has understood necessity and nondiscrimination as two distinct obligations, with no hierarchy in the order of analysis between them.[132] This construction is in and of itself problematic.

Necessity

In practice, necessity is an issue only when a measure is not in accordance with an international standard, otherwise the challenged measure is presumed necessary. The presumption is rebuttable, but there is no case where the complainant managed to rebut such a presumption. Turning to other cases, necessity is embedded in Art. 2.2 of TBT Agreement. Consistent case law has drawn parallels between the understanding of this principle under the TBT Agreement, and under GATT Art. XX. This would mean that, as originally established in US-Gambling, a measure is necessary if it is the reasonably (and not absolutely) least restrictive option that a regulatory agency can apply to achieve its legitimate objective. The allocation of the burden of proof goes as follows:

- Assume Home adopts an environment TBT, whereby all soft drinks sold in its territory must indicate on a label that their packaging is recyclable material;
- Assume further that Foreign challenges the consistency of this measure with the TBT Agreement, as it imposes a cost on its own producers that risks driving its exports outside Home's market;[133]
- Foreign will have to show that Home's measure is either discriminatory or unnecessary
    - Assume Home applies the measure in nondiscriminatory manner;
    - In this case, Foreign will have to show that the measure is unnecessary, otherwise its complaint will fail;
- To show violation of the necessity-requirement, Foreign will have to point to an alternative means (other than packaging in recyclable material) that would still allow Home to achieve its objective (protection of environment), without imposing the same heavy burden on Foreign (as made evident in a reduction in exports);

[132] We have advanced the opposite view in Mavroidis (2019).

[133] These are highly realistic assumptions. This is exactly what Mexico had argued in US-Tuna II (Mexico), where it provided statistical evidence to the effect that its sales of tuna in the US market had dwindled down to almost no trade at all, following the adoption of the "dolphin-safe" legislation by the US.

- Foreign could, in theory, request from Home to subsidize producers of Foreign so that they acquire recyclable material without adding to their production cost. Thus, trade would continue in roughly the same volumes, and Home's consumers could still profit from competition between soft drinks originating in both Home and Foreign, since both would be commercializing their goods in recyclable material;
- The burden would then shift to Home, which would have to show that this option was not a reasonably available alternative. This is what has been termed 'hardship test', in the sense that Home might find it too hard (onerous) to employ the suggested means, and might, for this reason alone, abandon its objective altogether. Case law has suggested that this is an unwanted outcome. WTO members should be allowed to pursue their objectives even if they do not employ the absolutely least restrictive option, as long as they employ the reasonably available to them least restrictive option:
    - If Home does not persuade the WTO panel, then Foreign prevails;
    - If on the other hand, Home manages to persuade the panel that subsidizing is not reasonably available to it (in light of the opportunity cost of the budgetary outlays involved), then Home prevails.

But even the reasonably available least restrictive option must observe the 'exclusivity'-test: it must be the sole explanatory variable for the trade damage involved. This is why, we re-iterate, the allocation of burden of proof is crucial in this respect. Reasonable availability, we conclude, points to endogenous factors, that is, features which are particular to the regulating state. What is reasonably available to Home might not be to Foreign, and vice-versa.

2.7 Applying law and case law to environment- and labor production standards

The safest way to immunize interventions from possible legal challenges is to implement them in accordance with international standards. There has been no case so far where a measure that was based on international standards was found to be inconsistent with the TBT. Recall that the presumption of consistency concerns only the necessity-requirement. Still, no measure that was either based on or adopted in accordance with an international standard, has been found to be discriminatory. Complainants have refrained from challenging such measures.

The situation is different when challenges focus on measures adopted either because the regulating member deviated from an international standard, or because no international standard existed. Complainants have challenged such measures repeatedly. It is difficult to decide what a TBT dispute

is, as various benchmarks seem, prima facie at least, appropriate to qualify a dispute as a 'TBT dispute'. Does it suffice that one claim (among many) has been raised that invokes inconsistency with a TBT provision? Or, that the panel has entertained one claim to this effect? Or should it be that the relative majority of claims invoked/entertained come under the aegis of the TBT Agreement?

Be that as it may, as of the time of writing, the WTO webpage classifies 57 disputes as TBT disputes.[134] Out of the 57 disputes, only one focused on a claim regarding an international standard, the EC-Sardines dispute (DS231).[135] The remaining 23 disputes led to the issuance of a report but in none of these cases was Art. 2.4 TBT an issue.[136] In the one case involving an international standard, the complainant prevailed. Recall, however, that the EU had not based its measure on the Codex standard, let alone adopting a measure in accordance with it. Although it thus is difficult to qualify what constitutes a victory before a WTO panel, [137] WTO members that have adopted measures in accordance with international standards, seem to have fared well in relevant WTO practice.

TBT concerns are in practice also discussed in the realm of STCs (Specific Trade Concerns) before the TBT Committee. Nevertheless, while STCs certainly contribute to removing items from the docket, the outcome there does not at all bind discretion by a panel.[138] Panels asked to pronounce on a TBT dispute, do not even have to pay lip service to discussions before the TBT Committee. This is appropriate as otherwise the result could easily be to inhibit discussion and deliberation in the Committee.

What about the cases where unilateral measures have been adopted? While those deviating from standards have often lost their argument before a WTO panel, it is not all doom and gloom for unilateral measures. This is so, because, in our view, case law has committed in the realm of TBT, some errors that are simply not sustainable in the medium run, when dispute adjudication in the WTO will be revived. In what now follows, we go through these errors, which, when corrected, will make it likelier for WTO members adopting unilateral TBT measures, to prevail in the realm of WTO litigation.

[134] https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm

[135] In 33 disputes, no report has been issued at all (DS 3; 4; 5; 7; 12; 14; 20; 41; 61; 72; 77; 85; 100; 134; 137; 144; 151; 203; 210; 232; 233; 263; 279; 389; 446; 459; 463; 506; 525; 532; 593; 597; 600).

[136] DS 2; 26; 48; 56; 135; 290; 291; 292; 293; 369; 381; 384; 386; 400; 401; 406; 434; 435; 441; 458; 467; 484; 499.

[137] See the discussion on this score in Hoekman et al. (2009).

[138] See Horn et al. (2013). Karttunen (2020) provides a comprehensive survey of the subject-matter of STCs.

Areas where case law risks evolving in the absence of clarification by WTO members

We concentrate on the key issues, and by no means provide an exhaustive list in what follows. In short, the problem with case law is that it transposed GATT case law into the realm of the TBT Agreement without paying sufficient attention to the simple fact that if TBT and GATT were pursuing exactly the same objective, there would have been no need to duplicate efforts.

GATT does not prejudge the content of regulation, TBT does (to some extent)

As stated above, the GATT does not prejudge at all the content of behind-the-border regulatory interventions. It is negative integration par excellence: all WTO members must do when adopting a measure under GATT Art. III, is to ensure that it has been applied in nondiscriminatory manner. This is simply not the case when it comes to measures coming under the TBT Agreement. While the decision to enact (first step) or not a measure is sovereign (and in that, the TBT Agreement as well, is a negative-integration contract), once the decision to enact a measure has been taken, national discretion is automatically prejudged. WTO members must use an international standard, if appropriate and/or effective. This second step could be described as some sort of conditional positive integration. WTO members are not free anymore to adopt any measure they might wish to adopt. They must (at the very least) contemplate whether existing international standards can do the job for them. They can discard them only if the available international standards are inappropriate and/or ineffective (and of course, their decision to do so, is justiciable, as we have seen in EC-Sardines).

International standards are deemed necessary to achieve their stated objective. Domestic measures deviating from them could not be otherwise. The whole idea of the TBT Agreement was to strive for necessary measures, and it is epitomized through the recognition of the pre-eminence of international standards. It would have been odd, if WTO members could deviate from them, and enact instead measures that impose a disproportionate restriction on trade. Thus, unlike the GATT, the nature of every TBT measure is prejudged in the statute: all TBT measures must be necessary (and not simply applied in nondiscriminatory manner, as under GATT Art. III); international standards are presumed to be necessary, whereas national measures must observe this principle, even if they do not enjoy this presumption.

What is the consequence of this statement? What matters is not just the nondiscriminatory application of any measure. What matters is only the nondiscriminatory application of necessary measures. The threshold condition thus, is that measures adopted are necessary to achieve an objective that governments have set. There are two consequences. First, the obvious point: the

analysis of nondiscrimination follows that of necessity. Second, what matters are government preferences as expressed in the challenged legislation. Consumer preferences (behavior) are not relevant. As long as a WTO member has adopted a measure necessary to achieve its (legitimate) objective, all it has to do is apply it to domestic and imported goods alike. If consumers were to become the legal benchmark to evaluate a government regulation (as has been argued by in WTO case law), the whole purpose of the TBT would be defeated, since governments would be allowed to deviate only if consumers consented to that. The TBT Agreement acknowledges the right of governments to deviate from consumers' (i.e., market determined) preferences, as long as they haveadopted the (reasonably available) least restrictive measures to this effect. Nondiscrimination thus, concerns merely the application of similar measures.

While governments are free to regulate, they cannot behave in an arbitrary manner so as to frustrate the outcome of trade negotiations. The TBT Agreement aims to strike a balance and separate two equilibria: one where governments authentically pursue their objectives, and one where under the guise of pursuing a legitimate objective, they regulate in a manner that is aimed to protect or support a domestic constituency (i.e., discriminate). The instrument to distinguish wheat from chaff is necessity cum nondiscriminatory application of (necessary) measures.

In this setting, it is the government definition of 'likeness' that matters. Likeness in the TBT world is not market likeness. It is policy likeness. Going back to market-determined likeness of products is tantamount to questioning the right of a WTO member to distinguish between an environment-friendly and an environment-unfriendly good based on the externalities generated during production and allow only the former to be commercialized in its market. Consumers might not be aware of the environmental hazard associated with consuming the latter product, thereby imposing a social externality whether they are aware of the consequences of their action or not. This is of course the rationale for regulation in the first place: to address a market failure. There is an additional reason why the argument advanced so far is sensible. For goods to enter a market, conformity assessment is necessary. There is a binary possibility in the realm of technical regulations: either imports are assessed as conforming to regulatory prescriptions and enter a market, or they do not, and stay out. But it is not consumers' perceptions that are decisive in the realm of conformity assessment. It is conformity with regulatory prescriptions or preferences that matters.

Measures coming under the TBT Agreement often cut across various distinct product markets. The marketplace test to decide on likeness of goods in the GATT is predicated on the existence of a

precisely defined market, and is ill-suited to decide 'likeness' under the TBT. Think of requirement to label the environmental footprint of all goods circulating in a WTO member – e.g., amount of CO_2 emitted in production. Under the TBT the question then will not be whether, say, shoes and water bottles are like. The question will be whether labelling of the environmental footprint is necessary to achieve the regulatory objective sought. The same reasoning applies mutatis mutandis to stronger forms of regulation of production processes – e.g., a requirement that foreign producers pay for CO_2 emitted during production (or a broader set of greenhouse gasses) at the same rate as do domestic producers, or mandatory due diligence requirements for production processes in supply chains. Implementing these types of production requirements in a way that is consistent with the nondiscrimination and necessity prescriptions will inevitably be more challenging than e.g., the imposition of a labeling requirement, and be more likely to give rise to disputes. As we discuss in Section 3 this is an important reason why governments should engage with trade partners in both the design of the production requirements and their implementation, including associated conformity assessment processes.

The TBT provides scope for necessary measures to be found discriminatory, in case imported goods are conforming to the substantive requirements that the regulating state has enacted, but do not profit from the same treatment as domestic products conforming to the same requirements. This is a case where discrimination exists even though regulatory likeness has been established. We illustrate using two examples. First, assume Home enacts ISO 14001:2015, an international standard that includes requirements for the use an environmental management system. Since it is an ISO standard, it is presumed necessary. Thus, the only remaining question, in case of challenge, would be whether it has been applied in nondiscriminatory manner. All enterprises coming under the purview of this standard will need to be certified following conformity assessment with this standard. Consumers might not be in position to distinguish between say two pairs of shoes originating in two distinct companies that will be called to implement this standard. But this is immaterial. What matters is regulatory likeness. Have all companies (domestic, foreign) coming under its purview implemented ISO 14001:2015? If yes, then Home has adhered to the nondiscrimination obligation even if consumers think otherwise (in that, they do not distinguish between the two pairs of shoes in our example) or the companies called to implement the ISO standard operate in sectors that consumers would never regard as 'like'.

Second, assume that Home wants to deviate from ILO Convention No. 138, which specifies the minimum age for child labor, and establishes a minimum age of 17. It then requires that all goods

circulating in its market include a label to the effect that they have not been produced by under-aged workers. Assume further that the national measure reproduces all other elements of the ILO standard, and that it thus meets the necessity test. The question will then be to what extent the measure is applied in a nondiscriminatory manner. Were a panel to ask consumers whether two footballs (one produced by laborers older than 17, and another by laborers younger than 17 years old) are like, theirresponse will be in the affirmative in the absence of a label providing the requisite information. Moreover, even with knowledge that one football was produced by under-aged workers, some consumers might still prefer to buy it if it is cheaper. This is precisely the socially undesirable behaviorthat the deviation from the ILO standard aims to sanction. The Home government and some Home consumers have divergent preferences, and it is the right of Home of course to regulate the behaviorof its citizenry (within constitutional and international public law limits).

The examples illustrate that sequencing nondiscrimination to the necessity-analysis will bring the understanding of the TBT Agreement closer to the original intent. It will also have a beneficial impact on regulatory initiatives, removing the suspicion with which current WTO case law views initiatives targeting production requirements like 'dolphin-safe' tuna.[139]

Less favorable treatment

The test for reviewing the consistency of a measure with the less favorable treatment requirement is as follows:

- The challenged measure modifies the conditions of competition to the detriment of imported goods; and
- The detrimental impact results
    - exclusively from a legitimate regulatory distinction;
    - in part from a legitimate regulatory distinction.

Recall, that we have highlighted the uncertainty regarding the allocation of the burden of proof. Even though on paper (following the landmark ruling in US-Wool Shirts and Blouses by the Appellate Body, which has been quoted in each and every subsequent case dealing with burden of proof), it is for the complainant to show that two goods (imported, domestic) are like, and that the former is treated less favorably than the latter, in practice, panels invite submissions by both complainant and respondent

[139] These were only partially addressed by the WTO adjudicators called to resolve the second US-Tuna dispute brought by Mexico.

as well, before deciding whether the complainant has made a prima facie case, that the respondent has not managed to overturn (or vice-versa).[140]

Under the circumstances, it is probably wise to re-think the wisdom of the current approach (where treatment is not less favorable only if trade effects are caused exclusively because of adherence to the stated policy objective), as this is an unworkable test by any reasonable benchmark. Indeed, it is unclear what kind of econometrics can help isolate the impact of the policy rationale from any other factor (monetary resources; elasticity of consumption; cultural/religious beliefs; market disruptions, etc.) that might affect the market outcome. Two independent variables might as well, be impacting one upon the other, and thus make the econometric analysis aiming to disentangle one variable from all others before measuring its effect even more cumbersome. And what if, assuming similar elaborate econometrics have been employed, the policy rationale is the overwhelmingly important causal factor, whereas other factors are totally ancillary? Should we conclude based on evidence along these lines that the government at hand was not genuinely pursuing the stated regulatory objective, and did not employ the requisite necessary measures to this effect?

The requirement to attribute trade effects exclusively to the policy rationale was an unnecessary exaggeration by the Appellate Body. It works of course, at the advantage of the regulator, if the burden is allocated to the complainant. But this is not necessarily the case in practice. Indeed, citing prior case law, the panel report on Turkey-Rice, which discussed the issue of the allocation of burden proof in some detail and in hindsight with the benefit of various reports that had debated this point time andagain, reached this conclusion. It paid particular attention to §154 of the Appellate Body report on Japan-Apples, which reads:

> … not imply that the complaining party is responsible for providing proof of all facts raised in relation to the issue of determining whether a measure is consistent with a given provision of a covered agreement. In other words, although the complaining party bears the burden of proving its case, the responding party must prove the case it seeks to make in response.

Since respondents (regulators) might be also called to demonstrate whether the policy rationale is exclusively responsible for the (adverse to the complainant) trade outcome, it is wiser to attempt to undo this case law, which is not set in stone, and in practice could anyway prove to be a quixotic test.

[140] Prima facie is a technical term denoting the evidentiary standard needed for a panel to uphold a claim. In practice, it comes very close to a preponderance of evidence.

Private standards in the WTO

As noted in Section 1, numerous environmental- and (fair) labor standards have been developed and adopted by private entities,[141] raising the question whether these come under the disciplines of the TBT Agreement. This matter has not been the subject of WTO adjudication to date, so there is no case law to draw on. What can be said is that the language of the TBT Agreement is wanting when it comes to private standards. TBT does mention that non-government bodies could act as standards development organizations, but whether this suffices to conclude that such standards are covered by the TBT disciplines is open to question.

Mavroidis and Wolfe (2017) argue that, unless attributed to a government, private standards are not a matter of concern for WTO disciplines because WTO law does not pertain to private behavior but to state actions.[116] Attribution, as per the test developed in a pre-WTO GATT panel report (Japan-Trade in Semiconductors), which has been consistently replicated in subsequent dispute settlement cases, entails that a measure is considered governmental, even if implemented by a private agent, if the latter would not have acted upon it but for the government's intervention. This 'but for' test, the same panel ruled, is satisfied, when the government has compelled behavior to this effect. There is no need to compel behavior to this effect, e.g., by sanctioning cases of disobedience. Assuming this approach is followed by panels in the realm of environment- and/or labor standards, then, depending on the factual circumstances, some private environment- and/or labor standards might be considered 'governmental'. The likelihood of such a finding rises if a private standard is referenced explicitly in domestic regulation or legislation. As already noted, in the absence of relevant practice, it is wiser for now to keep this analysis in mind, while awaiting the first litigation.

3. Production requirements in trade: good governance considerations

The basic takeaway from the forgoing legal analysis is that in principle unilateral imposition of production requirements relating to labor standards (values) or environmental protection (the global commons; climate change mitigation) to products entering the market, if necessary to achieve a clearly defined regulatory objective and applied transparently on a nondiscriminatory basis (i.e., consistent with MFN and national treatment) is unlikely to be constrained by extant WTO disciplines. These disciplines arguably are beneficial constraints from the perspective of good governance and

[141] See for example, Marx and Wauters (2013) who provide an excellent account on sustainability standards.

[116] Dumping is of course private behavior, but the Antidumping Agreement does not scrutinize dumping. It scrutinizes the government response to it, namely the conditions for imposing antidumping duties.

efficiency. They require clarity in the definition of the goal and the measures applied (transparency), as the necessity of the measures can only be determined considering the objective motivating the regulation. Nondiscrimination is unambiguously desirable. The goal of labor and environmental production requirements should not be improving the terms of trade but the promotion of EU values and/or protecting the global commons (combat climate change; protect biodiversity, etc.).

An implication is that applying production requirements to imports should be done through regular trade policy mechanisms and not through instruments such as antidumping or countervailing duties. These trade defense policies are premised on specific imported goods distorting competition on the market. Regulating trade to ensure goods are produced using techniques and processes that satisfy international agreed norms on environmental protection or human rights on the basis should not be confounded with unfair trade. It is important not to conflate the competitive spillovers that may be created by non-application of international standards or national production process requirements, whether for labor or to protect the environment, with dumping or subsidization. The latter two concepts are clearly defined in international trade law. Both are premised on specific actions as opposed to the absence of action which lies at the heart of labor or environmental concerns. Dumping is private practice in which a firm sells products abroad at prices that are less than those it changes at home or, if it does not sell in its home market, at a price below the cost of production. There are many good economic reasons why firms may engage in dumping which we will not go into here.[142] In order to use antidumping procedures against foreign products, it would be necessary to define costs of production so as to include a per unit estimate of the cost that should have been incurred if the country in which production occurred (as well as all locations from which inputs were sourced) if the importing jurisdiction's production requirements had been applied. This would be inherently arbitrary and discretionary, and result in WTO disputes because the WTO Antidumping Agreement does not make provision for such additional imputed costs to be included in investigations. Moreover, it would further hollow out the original premise that dumping involves private behavior not government behavior – or lack thereof.

Treating an absence of specific labor rights and standards in an exporting country (e.g., not having ratified or implemented ILO Conventions) or weak regulation of greenhouse gas emissions as a de facto subsidy and therefore countervailable is also problematical, both as a matter of law and economics. The WTO Agreement on Subsidies and Countervailing Measures definition of a subsidy does not consider nonregulation or ineffective regulation in a trading partner as a subsidy. From an

[142] See e.g., Hoekman and Kostecki (2009).

economic policy perspective, similar problems arise as with suggestions to use antidumping as a remedy—the determination of the magnitude of the implied subsidy and its incidence on exports will be difficult to determine objectively. The likelihood of violating nondiscrimination is very high, and thus WTO disputes. Another consideration not to consider antidumping or countervailing duties as a remedy is that the problem, a perceived lack of regulation in foreign jurisdictions, to a greater or lesser degree will affect all exports originating in a given country of concern. This in turn implies taking into account the actual production technologies used by sectors and firms within sectors.

3.1 Policy design considerations

The promotion of EU values or protecting the global commons can be sufficient cause for imposing production requirements, but it must be recognized that in practice meeting the criteria imposed by the WTO often will either be difficult politically or economically costly. Assume, for example, that the Netherlands wants to make imports from foreign countries conditional on the country of origin of a given product (or all) goods) have signed and ratified the core ILO Conventions. Given that the EU has done so (e.g., it has signed and ratified the ILO Conventions), the national treatment rule is satisfied, and assuming the EU applies this measure to all foreign countries equally, the MFN rule is met as well. In this case, the EU could defend itself from challenge by invoking GATT Art. XX. The constraint on implementing this policy is not legal but political: all EU members must be willing to accept the very high cost of no longer importing from countries that have not signed and ratified the core ILO Conventions (e.g., not only China, but also the United States). Whether agreement to this effect could be obtained is unlikely. Cherry picking countries to apply the measure would violate the WTO agreements (MFN). The ILO example is a relatively 'easy' one – in practice EU member state interests and positions may not be aligned on the substance of a measure and seek – and obtain – exceptions to the internal application of a measure. The EC-Seals case is illustrative in this regard: the measures did not apply equally to all EU member states and foreign countries. Note that intent does not matter. Measures may be argued, justifiably, as being necessary to achieve a global public good or a societal moral concern but if they do not satisfy the nondiscrimination requirements it will be found to violate the EU's WTO commitments.[143]

While in principle the nondiscrimination and necessity conditions are not problematic from a normative perspective, in practice designing and implementing mandatory production requirements

[143] This was the case in EC-Seals. Conconi and Voon (2016) note that political economy factors resulted in the applicable EU regulation exempting transit of seal products for re-exportation and processing from the import ban reflecting the considerable economic interests within several EU member states in such activities.

that satisfy these core WTO disciplines may be challenging. The devil is likely to be in the detail. For example, the design of the proposed CBAM can easily give rise to disputes that the EU may lose if exports from and imports into the EU are treated asymmetrically,[144] and if the mechanism treats regulatory regimes in partner countries as not being equivalent in effect without determining whether this is in fact the case. For example, a country may rely on regulatory measures and provide fiscal incentives (tax subsidies; transfers) to firms in a sector to reduce emissions without explicitly pricing or taxing carbon. Such differences in policy regimes – and in principle, actual emissions generated during production – should be taken into account in the application of border measures. The carbon price at a given point in time is endogenous to demand and supply factors in the EU due to the reliance on a market mechanism to determine prices, whereas other countries may apply a carbon tax. Whether these two measures are equivalent in effect will play a role if a dispute is brought to the WTO. Procedural rules requiring an objective assessment of the magnitude of emissions and the equivalence of regulatory regimes in incentivizing less carbon intensive techniques will be needed. Disputes alleging violation of nondiscrimination can also arise if use is made of recognition arrangements regarding production requirements implied by regulatory regimes in partner countries that are not based on fully transparent processes that are equally accessible on the same terms to all countries desiring to engage in recognition or regulatory equivalence arrangements. Recognition and equivalence decisions are quite likely to be used for conformity assessment/certification and may also be applied to the regulatory regime more broadly, although recognition is more likely to arise with conformity assessment than with regulatory standards per se, especially if use is made of international standards as opposed to national, idiosyncratic production requirements.

These challenges do not arise anywhere to the same extent when it comes to the use of production requirements in reciprocal trade agreements, as a condition for granting tariff preferences to developing countries under the GSP, or in the context of VSS systems and private standards (given that these have yet to be challenged in the WTO). Most straightforward is to link production requirements to tariff preferences, as has been done in the GSP+, which is likely to expand to encompass additional international conventions after the latest review.[145] Free trade agreements ('reciprocal market access conditionality') are unconstrained as all parties by construction agree to whatever is negotiated. While this does not insulate signatories from WTO challenges, in that claims of violation of the nondiscrimination rule can still be brought in principle – e.g., in the areas of

[144] Martin (2022).
[145] Van der Loo (2022).

conformity assessment or mutual recognition –, to date WTO members have refrained from doing so. Presumably one reason for restraint has been that most countries are party to trade agreements.

Trade agreements, sectoral initiatives such as FLEGT, GSP and VSS systems are all useful instruments to promote greater attention for improving labor and environmental outcomes associated with economic production. They have different strengths and weaknesses which should be considered in the design and use of autonomously applied production requirements. A strength of the GSP+ is that there is a clear enforcement device – withdrawal of preferences. In the case of trade agreements this instrument is not as readily available – the focus will instead be on bringing measures into compliance if a dispute panel finds a provision has not been implemented. Many labor and environmental provisions in EU trade agreements are not enforceable. Even if formally binding and subject to dispute settlement provisions, in practice it may be more difficult to impose sanctions in the framework of a trade agreement than in the context of non-reciprocal arrangements like the GSP+. A design characteristic of the GSP+, FLEGT-type and VSS systems discussed in Section 1, is that there is generally a focus on the use of international standards, cooperation, e.g., provision of technical assistance to attain standards. That is, the emphasis is on improving non-economic outcomes in the partner country as opposed to a narrow focus on implementing specific commitments with respect to labor or environmental legislation or regulations.

As was noted in Section 2, from a WTO law perspective the need to demonstrate the necessity of production requirements to attain a regulatory objective is paramount. This is made much easier if a jurisdiction uses international standards. From a policy perspective, this raises several issues. Are international standards available? If so, are they adequate/appropriate to achieve the regulatory goal? Will they be effective? If standards do not exist or are likely to be ineffective/inappropriate, how might the development of an international standard be supported? The WTO puts a premium on cooperation between states to define standards. It also privileges cooperation between jurisdictions in conformity assessment. An implication is that a state seeking to apply production requirements toimports (and domestic production) is well advised to engage in dialogue and cooperate with trading partners to agree on standards in a collaborative manner rather than define idiosyncratic requirements that are implemented unilaterally. Aside from the associated presumption that the resulting standards will be deemed necessary by WTO adjudicating bodies, cooperation in the designand application of standards has equity (all have a say) and efficiency (more information and scrutiny;learning) benefits, increasing the prospect of ‘ownership’ by all concerned of the use of production

requirements. The same applies to MRAs and equivalence arrangements for conformity assessment and certification systems.

3.2 Plurilateral cooperation

Pursuit of international cooperation that focuses specifically on production requirements aimed at improving labor and environmental outcomes has an added potential advantage insofar as extant international legal conventions may not be very effective in improving outcomes. For example, in the case of labor rights, full compliance with all ILO core Conventions need not improve worker conditions. Similarly, not signing all ILO Conventions need not be associated with worse labor outcomes. What matters are outcomes, which will invariably reflect and be conditioned by country-specific circumstances. Collaboration between governments, businesses and civil society groups that complement 'generic' good practice standards with joint actions that address political economy constraints that impede their application will often be needed to make a difference on the ground.

One mechanism that can be used to support the use of production process standards as a tool to nontrade objectives are open plurilateral agreements. There are two flavors/options in this regard: (i) initiatives under the umbrella of the WTO – along the lines of the structured discussions that are currently being pursued by groups of WTO members; and (ii) cooperation outside the WTO. The former include the joint statement initiatives on services domestic regulation (concluded at the end of 2021), on E-commerce-related regulation, investment facilitation and measures to enhance the ability of micro and small and medium enterprises to utilize the opportunities offered by the rules-based trading system. More recently, three new Ministerial statements were issued by groups of WTO members on Trade and Environmental Sustainability, [146] Plastics Pollution and Environmentally Sustainable Plastics Trade,[147] and Fossil Fuel Subsidies.[148]

Plurilateral cooperation of regulatory policies and trade outside the WTO is most actively being pursued in the Asia-Pacific region. Examples include the Digital Economy Partnership Agreement between Chile, New Zealand and Singapore,[149] the Digital Economy Agreement between Australia and

[146] WTO, WT/MIN(21)/6/Rev.2 (2021).
[147] WTO, WT/MIN(21)/8/Rev.2 (2021).
[148] WTO, WT/MIN(21)/9/Rev.1 (2021).
[149] https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-inhttps://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/digital-economy-partnership-agreement/force/digital-economy-partnership-agreement/.

Singapore,[150] the Japan-US Agreement on Digital Trade,[151] and negotiations between Singapore and South Korea on a digital partnership agreement.[152] Particularly salient for the subject of this report is the initiative the ongoing negotiations between several Asia-Pacific and EFTA countries (New Zealand, Costa Rica, Fiji, Iceland, Norway, and Switzerland) on a plurilateral Agreement on Climate Change, Trade and Sustainability. [153] The goal of participants in these negotiations is an open plurilateral agreement that includes commitments on measures to reduce greenhouse gas emissions through specific policy commitments, including trade and subsidy policies. Examples of possible areas for concerted action include reductions in fossil fuel subsidies and the removal of import tariffs on environmental goods.

The EU has chosen not to participate in or launch such initiatives outside the WTO, instead limiting its plurilateral engagement to the WTO joint statement initiatives and the recently launched structured discussions on environment-related subjects. Using such vehicles to discuss and agree on specific approaches to regulate production processes to reduce greenhouse gas emissions and to extend the focus of such deliberation on potential agreements aimed to improve labor conditions – such as the EC supply chain due diligence proposal mentioned previously – would seem both appropriate and feasible. Experience with the Paris Agreement makes clear that common approaches reflected in binding multilateral agreements are unlikely to be feasible given the difficulty of attaining consensus. Conversely, a unilateral approach that relies on the EU's purported regulatory market power – the 'Brussels effect' reflecting the size of the European market – neglects the complementarities and positive spillovers from working with other countries, including developing nations, to set and implement standards. Governments confront significant uncertainty how best to design production requirements to attain underlying policy objectives. The EU is no exception.

[150] https://www.dfat.gov.au/trade/services-and-digital-trade/Pages/australia-and-singapore-digital-economyhttps://www.dfat.gov.au/trade/services-and-digital-trade/Pages/australia-and-singapore-digital-economy-agreementagreement

[151] https://ustr.gov/sites/default/files/files/agreements/japan/Agreement_between_the_United_States_and_Japan_concerning_Digital_Trade.pdf

[152] https://www.mti.gov.sg/-/media/MTI/Newsroom/Press-Releases/2020/06/22-Jun-2020-Singapore-andhttps://www.mti.gov.sg/-/media/MTI/Newsroom/Press-Releases/2020/06/22-Jun-2020-Singapore-and-the-Republic-of-Korea-launch-negotiations-on-Digital-Partnership-Agreement.pdfthe-Republic-of-Korea-launch-negotiations-on-Digital-Partnership-Agreement.pdf.

[153] https://www.mfat.govt.nz/en/trade/free-trade-agreements/trade-and-climate/agreement-on-climatehttps://www.mfat.govt.nz/en/trade/free-trade-agreements/trade-and-climate/agreement-on-climate-change-trade-and-sustainability-accts-negotiations/change-trade-and-sustainability-accts-negotiations/

Engaging with trade partners in and outside the WTO on the design and operational implementation of mechanisms such as carbon border adjustment and monitoring of activities in international supply chains in ways that ensure nondiscrimination, reduce costs for firms and incentivize joint action by state and non-state actors in foreign countries will increase the prospects for achieving underlying policy objectives (improving labor rights, reducing carbon emissions). A first step in this direction would be to discuss planned initiatives (such as the CBAM and supply chain due diligence) in WTO fora, including the TBT Committee, and to signal interest in cooperation with like-minded WTO members in these areas. Workable cooperative solutions are more likely to emerge through encouragement of plurilateral initiatives (clubs).

The shift to clubs in and outside the WTO to define good regulatory practices is in part a reflection of the difficulty of obtaining consensus but may also be more equitable and efficient. Contrary to arguments that plurilateral initiatives are second best in a world where consensus is not obtainable, open plurilateral agreements (OPAs) can be a first-best response. Cooperation aimed at identifying good regulatory practice and processes to determine whether different regulatory regimes are equivalent does not require all WTO members to participate. Problems involving regulatory design and cooperation to respond to climate change or to strengthen oversight and control of supply chain processes call for cooperation to identify what constitutes good practice and balancing the achievement of noneconomic objectives against competitive spillovers. OPAs can help parties understand and learn about the effectiveness of alternative policy options and their effects on trade, and to identify approaches that are effective and efficient.

Plurilateral initiatives under the umbrella of the WTO have been contested by some WTO members, notably India and South Africa.[154] These countries argue that the WTO membership as a whole must mandate the launch of any such efforts and that a focus on plurilateral cooperation ignores and undermines the multilateral mandate for negotiations established in the 2001 Doha Development Agenda and associated work programs. They also point out that the WTO does not make provision for negotiation of agreements on regulatory matters among a subset of WTO members that bind only signatories, even if associated benefits are extended equally to all WTO members, including those that do not join them. While the purported arguments are cast as legal objections, these have been rejected by expert practitioners, who point out that plurilateral initiatives have a long history in the

[154] The Legal Status of "Joint Statement Initiatives" and Their Negotiated Outcomes, WT/GC/W/819, 19 Feb. 2021. At https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/GC/W819.pdf&Open=True

GATT/WTO, have often been used in tariff negotiations, are explicitly foreseen in several areas, especially the GATS, and are always subject to dispute settlement procedures if a WTO member believes they violate WTO rules.[155]

What matters for sustaining an open, rules-based multilateral trading system – a core external policy objective of the European Union – is that efforts to mitigate climate change through trade policy and to improve labor conditions and environmental degradation through supply chain due diligence requirements do not become an additional source of trade tensions. On climate change, for example, the Paris Agreement provides a basis for the formation of linked OPAs to support domain-specific decarbonization regimes.[156] The Paris Agreement authorizes countries to set national decarbonization targets and to form sector-specific 'climate clubs' for joint pursuit of national targets outside Paris and to count progress achieved there towards their voluntary goals. An implication of the voluntary nature of national commitments under Paris is that any penalty defaults defined by climate clubs involving trade restrictions fall outside the Paris Agreement. Although countries can invoke the general exceptions provision of the WTO to justify the use of trade measures as part of decarbonization initiatives, an OPA can make explicit how trade sanctions will be applied among members of the OPAto attain decarbonization targets that they have agreed to. Given that the EU – and any other WTO member – can impose production requirements for imports as long as these also apply to domestic production and satisfy the nondiscrimination rule, any trade sanctions agreed upon by club memberswould not violate WTO agreements as long as all members satisfy national treatment and MFN obligations in the application of the pertinent domestic regulations. Joint action by club members would entail coordination costs but have the benefit of increasing the policy effect of border measures and reducing circumvention effects, while the cooperative nature of the OPA would signal that the goal is not protectionism but fighting climate change. Moreover, given that any such club must confront and address regulatory heterogeneity across members, such as club would help identify effective operational approaches to determining equivalence of regulatory regimes. Such approaches also entail separating the objective of determining equivalence from efforts to raise the ambition of policy intervention over time. Pursuit of plurilateral cooperation by the EU in this area would help to

[155] See e.g., Hoekman and Mavroidis (2015; 2017), Mamdouh (2021), Biryukova (2021). Hoekman and Sabel (20221) propose a set of governance principles that would apply to OPAs and address some of the legitimate concerns that non-members have regarding the systemic implications of plurilateral initiatives.
[156] Sabel and Victor (2022).

legitimize the use of carbon border adjustments as proposed by the Union and provide a stronger basis to address allegations that the EU is acting unilaterally and in a discriminatory manner.[157]

4. Conclusion

4.1 Recap of main findings

There is robust evidence that trade is associated with higher levels of national income (economic growth), but there is equally robust evidence that there may be losers and that the total gains generally are distributed (very) asymmetrically with and across countries. What is relevant for the subject of this report is that global trade can be associated with environmental degradation, forced labor, child labor and social downgrading as well as economic upgrading, poverty reduction and enhanced access to technologies that lower carbon emissions.

Environmental and labor provisions have been incorporated in recent trade agreements, either as integral chapters (e.g. US-Colombia FTA), dedicated trade and sustainable development chapters (e.g. EU-Korea FTA), or a side agreement (e.g. Canada-Honduras FTA). The EU has pushed for effective implementation of environmental obligations in several of its trade agreements but has not engaged in the practice of making ratification of an agreement conditional on the ratification of MEAs. EU agreements generally include aspirational language on labor and other values, but this is often argued by critics to be too vague and difficult if not impossible to enforce.

The EU increasingly applies labor and environmental standards to traded goods through trade policy independent of trade agreements. Examples to illustrate what is already being done through unilateral trade action, as well as recent EU proposals that have been made to expand the use of trade policy to pursue non-trade goals, include tropical timber, biodiversity and deforestation, biofuels (palm oil), a Carbon Border Adjustment Mechanism, labour and environmental requirements in the Generalized System of Preferences and mandatory due diligence on labor and environment in supply chains.

The relevant international law that applies to these measures is the WTO TBT Agreement. This serves the same purpose as the national treatment and general exceptions provisions of the GATT, but has a narrower scope. In determining whether and to what extent international legal norms relating to environmental protection, climate or labor rights are accepted as potentially justifying measures on imports, based on the need to safeguard global public goods or otherwise, WTO law specifies that

[157] See e.g., Hoekman and Sabel (2021), Sabel and Victor (2022), Bronckers and Gruni (2021).

production requirements applied on imports are permitted if the measures comply with the criteria specified in the relevant trade agreements. The WTO imposes two criteria for production requirements to be justified: (i) they must be necessary, i.e., constitute the least trade restrictive option to achieve the stated regulatory objective, and (ii) they must apply in a nondiscriminatory manner.

While legislative activity has been mushrooming, adjudication of disputes concerning labor and/or environmental clauses is scarce, especially on labor rights. There is a major difference between the two policy areas: no labor rights-related dispute has ever been submitted to the WTO. The few labor cases adjudicated so far have occurred through invocation of a bilateral trade agreement. Conversely, several environmental disputes, some high profile, have been submitted for adjudication before the WTO. The common denominator, the scarcity of observations notwithstanding, is that adjudicators across different fora have simply failed to put together a rational test to decide whether a measure satisfies the nondiscrimination requirement. The clarity of the legal norms laid out in WTO agreements has been muddied by the extant case law, creating uncertainty regarding the tests that may be applied by adjudicators to determine the consistency of a given production requirement with WTO provisions. Case law has created uncertainty notably as regards whether a measure satisfies the core nondiscrimination and necessity requirements. Such uncertainty also affects adjudication of labor standards-related disputes under bilateral trade agreements. A consequence is to increase the probability of regulatory measures that in principle are permitted under the WTO will be contested, with an accompanying risk of adjudicators wrongly finding against measures that have been designed to comply with WTO legal requirements.

WTO law is deficient in a several respects. It is unclear whether the output of local- and or non-governmental bodies benefits from the presumption embedded in the TBT that this meets the necessity-requirement. It is equally unclear whether standardizing bodies that comply with the Code of Good Practice by that very fact also comply with the principles of the TBT Agreement. The Agreement does not contain a consistency requirement, potentially impacting negatively on the analysis of nondiscrimination by adjudicating bodies.

Using international standards provides a stronger legal basis for the use of production requirements and reduces the risk of disputes, given the presumption in WTO case law that doing so has the benefit of satisfying the necessity requirement (independent of other benefits of relying on international standards, including legitimacy, that further attenuate the risk of conflict). The term ‘international

standard' is not defined in the TBT Agreement, and efforts to establish criteria in this regard did not resolve the matter. The 2000 Commission adopted by the TBT Committee constituted some progress. The six criteria that must be complied with for a measure to be considered an international standard, especially the 'openness' criterion. This implies that for a standard to be 'international', all countries should be able to participate in its elaboration.

Private standards are not covered by the TBT Agreement notwithstanding that this is a vehicle through which much standards-setting activity occurs, including by consortia and NGOs. Although it is clear that the WTO sanctions only acts by members, the TBT Agreement would benefit from a clarification regarding the treatment of private standards, given that private acts can be attributed to a WTO member, as per standard case law.

Case law has not managed to provide a coherent legal test by which to adjudicate disputes coming under the aegis of the TBT Agreement. The nondiscrimination obligation has been the major casualty, in two respects. First, Panels and the Appellate Body have insisted on understanding 'like goods' on the basis of a 'market test', focusing on what consumers consider to be like products. For all practical purposes this reverses the burden of proof, requiring WTO members, in case of a challenge, to justify each and every intervention which is at odds with consumer preferences. This construction is highly debatable when it comes to product standards. It is clearly inappropriate to assess production requirements. Second, the 'no less favorable treatment' standard of nondiscrimination has been understood in very restrictive manner. The allocation of burden of proof in case of deviation from international standards is equally problematic, as it reduces their relevance. Finally, the distinction between technical regulation and (domestic/municipal) standards is unclear, and thus another source of legal uncertainty.

4.2 Recommendations

The report suggests several areas for action.

1. Launch a process to update and clarify the TBT Agreement, focusing on defining what constitutes an international standard and clarifying the relationship between standardizing bodies, private standards and the TBT Agreement. A TBT Agreement 2.0 should:

A. Include a definition of international standards. In this vein, the framers should identify the SDOs that could be accepted as 'international SDOs' and the characteristics (criteria) of (for) acknowledging their output as international standard.

B. Clarify whether local- and non-governmental bodies can benefit from the presumption embedded in the TBT Agreement when adopting international standards.
C. Clarify the relationship between standardizing bodies and the principles of the TBT Agreement.
D. Introduce a consistency-requirement similar to that already included in the SPS Agreement.
E. Clarify that private standards do not come under the aegis of the TBT Agreement.
F. Introduce three interpretative notes:
    a. First, to explain that panels should first ask whether a challenged measure meets the necessity-requirement, before asking whether it has been applied in nondiscriminatory manner. Thus, the marketplace-test for likeness will be removed from the legal analysis of claims under the TBT Agreement;
    b. Second, to introduce a more informative definition of 'technical regulations' and (domestic/municipal) 'standards' so as to ensure the concept that these instruments could be identical content-wise, and differ only with respect to their legal intensity, e.g., that goods not meeting a standard can still be legally commercialized in a given market, whereas this can never be the case when a technical regulation has been enacted;
    c. Third, to explain that it is for the complainant to show that a measure does not meet the criteria for an international standard, while in cases where an international standard is not used, it is for the importing country to explain why the deviation was justified.

2. When considering the imposition of labor and/or environmental production requirements on imports, privilege obligations of procedural nature, which, by construction, as these are less open to discretionary interpretation by adjudicators. Doing so has added benefits: procedural obligations invite engagement by the trading partner and the actors that have a stake in improving performance and outcomes on labor and environmental protection. Embedding procedural obligations that apply to both the importing jurisdiction and the exporting countries that are asked to comply with production requirements will ensure that there are mechanisms and levers for dialogue and engagement to resolve problems and make progress in promoting the pursuance of environmental and/or labor objectives.

3. Because the focus of WTO law is on (potential) effects on trade (least trade restrictiveness), not on whether a legitimate measure serves to promote the realization of the underlying objective. The effectiveness of a measure is a matter for the imposing jurisdiction. An implication for policy design is

that measures should include monitoring and evaluation processes to learn if they have their intended effect and inform deliberation on possible policy reform if they do not. One reason for this, is that it would enhance the perceived legitimacy and credibility of the measures, signaling that there is a serious concern to ensure that the measures are effective in achieving desired outcomes.

4. Support the pursuit by the EU of open, nondiscriminatory plurilateral issue-specific agreements on the use of production requirements. These may be sectoral or horizontal in nature, for example, bringing together countries that have included labor provisions in their trade agreements to exchange experience, identify good practices and pursue joint action to attain shared policy objectives. The different approaches and arguments of dispute settlement panels in Guatemala-US and EU-Korea illustrate the need to go beyond the bilateral setting to reduce uncertainty for businesses and governments – plurilateral initiatives to discuss and learn from experience can help to identify ways to do so that are adopted by participating jurisdictions, increasing consistency of case law and reducing uncertainty for companies – and governments. This might be particularly beneficial where there is a call for a trade-based panel to resolve a conflict on a nontrade matter as it could draw guidance from plurilateral agreements to assist in the interpretation of provisions in which the panel members are not, perhaps, as well-versed as in trade-related matters.

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Annex 1. Examples of trade agreements with 'nontrade' provisions

Chile – Viet Nam FTA (2011)

> "Aware that economic development, social development and environmental protection are components of sustainable development and that free trade agreements can play an important role in promoting sustainable development; "

India – Singapore CECA (2005)

> "RECOGNISING that economic and trade liberalisation should allow for the optimal use of natural resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment; "

United States – Jordan FTA (2000)

> "Desiring to promote higher labor standards by building on their respective international commitments and strengthening their cooperation on labor matters;
>
> Wishing to promote effective enforcement of their respective environmental and labor law; "

EFTA-Indonesia FTA

> That agreement limits tariff preferences for Indonesian palm oil to those imports that comply "laws, policies and practices aiming at 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." (EFTA-Indonesia CEPA (2018), art. 8.10(2):a and 8.10(2):e)
>
> Whether products comply with that standard is to be verified by the importing parties, Switzerland, Iceland, Norway, and Liechtenstein. For its part, Switzerland has adopted measures providing that products will meet the FTA's requirements and benefit from preferential treatment if the importers can prove the products have been certified under the sustainability standard established by the Roundtable on Sustainable Palm Oil.

EU – Singapore FTA (2018)

> Preamble
>
> DETERMINED to strengthen their economic, trade, and investment relations in accordance with the objective of sustainable development, in its economic, social and environmental dimensions, and to promote trade and investment in a manner mindful of high levels of environmental and labour protection and relevant internationally-recognised standards and agreements to which they are party;
>
> DESIRING to raise living standards, promote economic growth and stability, create new employment opportunities and improve the general welfare and, to this end, reaffirming their commitment to promoting trade and investment liberalisation;
>
> …
>
> REAFFIRMING each Party's right to adopt and enforce measures necessary to pursue legitimate policy objectives such as social, environmental, security, public health and safety, promotion and protection of cultural diversity;
>
> REAFFIRMING their commitment to the Charter of the United Nations signed in San Francisco on 26 June 1945 and having regard to the principles articulated in the Universal Declaration

of Human Rights adopted by the General Assembly of the United Nations on 10 December 1948;

EU – China CAI (2020) [Agreement in principle, not signed]

Preamble

REAFFIRMING their commitment to the Charter of the United Nations, signed in San Francisco on 26 June 1945, and having regard to the principles articulated in the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on 10 December 1948;

DETERMINED to strengthen their economic, trade and investment relations in accordance with the objective of sustainable development, and to promote investment in a manner supporting high levels of environmental and labour rights' protection, including fighting against climate change and forced labour, taking into account the relevant international standards and agreements;

COMMITTED to encourage enterprises to respect corporate social responsibility or responsible business conduct;

Section IV, Article 1

1. The Parties recall the relevant international documents with regard to sustainable development in particular the Agenda 21 on Environment and Development of 1992, the Johannesburg Plan of Implementation on Sustainable Development of 2002, the Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work of 2006, the International Labour Organisation (ILO) Declaration on Social Justice for a Fair Globalisation of 2008 and the Outcome Document of the UN Conference on Sustainable Development of 2012 entitled "The Future We Want", the UN 2030 Agenda for Sustainable Development and its Sustainable Development Goals, and the 2019 ILO Centenary Declaration for the Future of Work and reaffirm their commitment to promote the development of investment in such a way as to contribute to the objective of sustainable development, for the welfare of present and future generations, and to ensure that this objective is integrated and reflected in their investment relationship.

Section IV, Article 4: Multilateral environmental agreements

Each Party is committed to effectively implement the multilateral environmental agreements to which it is a party. The Parties shall regularly exchange information on their respective situation and developments as regards ratifications and implementation of Multilateral Environmental Agreements or amendments to such agreements in a manner complementary to the exchanges under the multilateral mechanisms.

Section IV, Article 6: Investment and Climate Change

Recognising the importance of pursuing the ultimate objective of the United Nations Framework Convention on Climate Change (UNFCCC) and the purpose and goals of the Paris Agreement adopted by the Conference of the Parties to the UNFCCC at its 21st session (the Paris Agreement) in order to combat climate change and its impacts and committed to enhance the contribution of investment to climate change mitigation and adaptation, each Party shall:

a. effectively implement the UNFCCC and the Paris Agreement adopted thereunder, including its commitments with regard to its Nationally Determined Contributions;

b. promote and facilitate investment of relevance for climate change mitigation and adaptation; including investment concerning climate friendly goods and services, such as renewable energy, low-carbon technologies and energy efficient products and services, and by adopting policy frameworks conducive to deployment of climatefriendly technologies;

c. cooperate with the other Party on investment-related aspects of climate change policies and measures bilaterally and in international fora, as appropriate.

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Art. 7.16: Environmental Matters

Each Party recognizes that it is inappropriate to encourage investments by investors by relaxing its environmental measures. To this effect, each Party should not waive or otherwise derogate from such environmental measures as an encouragement for establishment, acquisition or expansion of investments in its territory.