Sant'Anna
School of Advanced Studies – Pisa

Academic Year
2019/2020

Phd Course
Human Rights and Global Politics: Legal, Philosophical and Economic Challenges

The Pursuit of Sustainable Agriculture in EU Free Trade Agreements

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ISBN: XXXXXXXXXXXX

*Acknowledgements**

The long journey towards the conclusion of this dissertation was enabled by the constant support of many people.

First of all, I would like to thank my supervisor, Dr. Mariagrazia Alabrese from the Sant'Anna School of Advanced Studies.

Apart from her, I would like to thank the other members of my thesis committee, and in particular Prof. Saverio Di Benedetto and Prof. Paolo Davide Farah, for their insightful comments and suggestions to widen my research from various perspectives.

I am particularly grateful to all my colleagues at the European Commission, for the long discussions and fruitful advice constantly provided to me on several of the topics related to this dissertation and more generally to my research activity. Amongst them, I would particularly like to express my gratitude to Gianluca Frinzi, Michael Niejahr, Cristina Carrasco Lorente, Meike Wolf, Helena Meyer, Willi Schulz-Greve, Nuno Vicente, Dangiris Nekrasius and Nicolas Verlet from DG AGRI; Jacqueline Acquilina from the Legal Service; and Walter Van Hattum from DG TRADE. A big 'thanks' goes to Sara Samuels, for her deep editorial support.

Throughout these years, I have received help from a number of scholars who have greatly contributed to improving the quality of my work on the occasion of conferences, colloquia, seminars and other more or less formal gatherings. Amongst them, special thanks go to Wybe Douma from the T.M.C Asser Institute, who came on purpose to see me in the suffocating heat of Milan to thoroughly discuss my dissertation in person.

Likewise, I cannot forget about my friends and classmates with whom I shared the period of my LL.M. on 'Global Environment and Climate Change Law' at the University of Edinburgh, as well as my teachers there. My passion for this field of study has been fed by all the discussions we have had on the future of Europe and the global environment, started in Edinburgh and continued in Brussels.

Last but not least, I would like to thank my family and all the other people who have closely followed me in this adventure, particularly Anne Brigot-Laperrousaz, for supporting me throughout writing this thesis and my life in general.

* Disclaimer: the information and views set out in this dissertation are those of the author and do not necessarily reflect the official opinion of the European Commission, for which the author has collaborated while drafting this dissertation.

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List of Abbreviations

AA: Association Agreement

AoA: (WTO) Agreement on Agriculture

ACP: African, Caribbean and Pacific (group of countries)

AfCFTA: African Continental Free Trade Area

CAP: Common Agricultural Policy

CBDR: (Principle of) Common But Differentiated Responsibilities

CCP: Common Commercial Policy

CETA: Comprehensive Economic and Trade Agreement (between the EU and Canada)

CJUE: Court of Justice of the European Union

CMO: Common Market Organisation

CSR: Corporate Social Responsibility

DCFTA: Deep and Comprehensive Free Trade Agreement (between the EU and Ukraine)

DSM(s): Dispute Settlement Mechanism(s)

EBA: Everything But Arms

ENP: European Neighbourhood Policy

EPA: Economic Partnership Agreement

EMA: European Model of Agriculture

EVFTA: EU-Vietnam FTA

FA: (EU-South Korea) Framework Agreement

FTA: Free Trade Agreement

GAEC: Good Agricultural and Environmental Conditions

GATS: General Agreement on Trade in Services

GATT: General Agreement on Tariffs and Trade

GMO(s): Genetically Modified Organism(s)

GHG: Greenhouse Gas

GSPs: Generalised System of Preferences

ICJ: International Court of Justice

ISDS: Investor-State Dispute Settlement

JII: (CETA) Joint Interpretative Instrument

LDC(s): Least Developed Country(ies)

MEA(s): Multilateral Environmental Agreement(s)

MFN: Most Favoured Nation

NTB(s): Non-tariff Barrier(s) to trade

PCA: (Framework Agreement on) Comprehensive Partnership and Cooperation (between the EU and Vietnam)

PEI: Principle of Environmental Integration (Article 11 TFEU)

PPM(s): Processes and Production Method(s)

SADC: Southern African Development Community

SDS: Sustainable Development Strategy

SIA: Trade Sustainability Impact Assessment

SPS (measure[s]): Sanitary and Phytosanitary (measure[s])

SMR(s): Statutory Management Requirement(s)

TBT: Technical Barriers to Trade

TRQ: Tariff Rate Quota

TSD (chapter): Trade and Sustainable Development (chapter)

TTIP: Transatlantic Trade and Investment Partnership

WTO: World Trade Organisation

Abstract

Further to the stalemate in multilateral trade negotiations, the last couple of decades have seen a great deal of Free Trade Agreements (FTAs) proliferate all over the world. The EU has quickly adapted to this trend and nowadays has concluded (or is in the course of negotiating) bilateral trade agreements with virtually all potential third country parties. These agreements present a number of opportunities and challenges for the EU. Amongst the latter, there is the issue of ensuring that the EU succeeds in promoting its political and legal flagships in the outside world. This is particularly true for EU environmental integration in the agricultural sector, in so far as the EU can arguably boast of the highest standards in terms of sustainable development. If, on the one hand, the fact that the EU is bound by its own Treaties to promote its main values (including those relating to environmental protection) is uncontested, what is less clear, on the other hand, is the extent to which this should happen. Against this background, the fundamental research question of this work concerns the extent to which the EU pursues sustainable agriculture in third countries by means of its FTAs. While an argument is made in favour of the duty for the EU to pursue environmental protection with equal intensity in internal and external action, the hypothesis brought forward by this work is that the attention towards the environmental dimension of FTAs is on the rise and that the EU FTAs concluded after the 2006 Commission Communication 'Global Europe: Competing in the world' undoubtedly contribute enormously towards this aim. However, these efforts seem insufficient to reverse the negative impacts such agreements may have on the environment.

This dissertation is structured in three Parts. Part A sets the scene, identifying the notions of sustainable development and sustainable agriculture and depicting the state of play of their integration in EU law; Part B identifies the notion of EU FTAs in the context of EU trade policy and focuses on the key aspects to assess in each agreement the pursuit of sustainable agriculture in third countries, namely the Trade and Sustainable Development (TSD) chapter, the effects produced by regulatory cooperation and the enforcement mechanisms; Part C selects three case studies of agreements concluded between the EU and developed country parties (the relationships between the EU and, respectively, Canada, South Korea and Ukraine) and three case studies of agreements concluded between the EU and developing country parties (the relationships between the EU and, respectively, Chile, the Southern African Development Community – SADC – and Vietnam).

Introduction

On 12 December 2018, the day of approval by the European Parliament of the EU-Japan Strategic Partnership Agreement,[1] the EU Commissioner for Trade, Cecilia Malmström, declared: "*Our economic partnership with Japan – the biggest trade zone ever negotiated – is now very close to becoming a reality. This will bring clear benefits to our companies, farmers, service providers and others. Those benefits also go hand in hand with a commitment on both sides to uphold the highest standards for our workers, consumers and the environment. That's good news for the EU and all supporters of an open and fair international trading system"* (emphasis added).[2]

The determination of what is meant by the 'highest standards for the environment', particularly as regards sustainable agricultural practices, is one of the key problems of this dissertation. What does this phrase mean? Should this be understood in the sense that EU commercial parties will be bound to the same obligations concerning environmental protection as those in force within the EU legal system? Or does it mean that environmental protection requirements will be upheld to the highest extent possible, on the basis of the circumstances in which negotiations take place? Or, finally, does it mean that environmental standards should simply be taken into consideration, without a minimum threshold to respect?

Without intending to force Commissioner Malmström's declaration beyond the scope of what she purported to state, the questions at stake constitute a real dilemma for EU policy-makers and consumers, as well as for third countries' protection of natural resources. As can be seen from the EU regulatory framework as a whole the EU openly commits itself to pursuing environmental protection on a global scale. The problem is thus to what extent and how. Preliminarily, it must be reminded that the export of standards in another jurisdiction is not straightforward in international law, which is dominated by the idea of the 'reserved domain of domestic jurisdiction'; as a corollary of the general principle of sovereignty of states – which, in turn, carries with it their independence and equality – it is *a priori* not allowed that a nation intervenes in the national affairs of another nation.[3] The principle is also fully endorsed by the UN Charter.[4] The pursuit by the EU

[1] Strategic Partnership Agreement between the European Union, on the one part, and Japan, on the other, signed 17 July 2018, in force 1 February 2019.

[2] Press Release, 12 December 2018 <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1954> accessed 8 March 2019.

[3] The concept of 'reserved domain of domestic jurisdiction' is a fundamental cornerstone of international law and has been dedicated long-standing attention by the scholars. *Ex multis*, see Malcolm N Shaw, *International Law* (7th edn, Cambridge University Press 2014), 471; Patrick Dailler, Mathias Forteau and Alain Pellet, *Droit international public* (9th

of its core values outside its boundaries is therefore limited in various ways by the respect of this fundamental rule. This fact is particularly problematic for environmental protection, which requires by definition that action is taken to a large extent across every country's boundaries, due to the transboundary nature of environmental harm. Agriculture is particularly concerned by this issue. It is well-known that there is a two-way relationship between agriculture and the environment, quite apart from its relationship with climate change. While agriculture is certainly a major source of greenhouse gas (GHG) and a massive driver for other harmful effects on the environment, climate change itself, in turn, impairs the survival of the agricultural sector as a whole.[5] More than ever, it is now high time to rethink the role of agriculture in our society in order to reconcile this vicious circle and to give way to a paradigm shift towards more sustainable models of agricultural production on the global scale, such as agroecology.[6] These challenges need to be taken into account in the context of population growth which is expected to reach 9.6 billion by 2050.[7]

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edn, LGDI 2009), 483. For the notion of sovereignty as the pre-condition for the understanding of the 'reserved domain of domestic jurisdiction', see Saverio Di Benedetto, *Sovranità dello Stato sulle risorse naturali e tutela degli equilibri ecologici nel diritto internazionale generale* (Giappichelli 2018) 18-24.

[4] Charter of the United Nations (1945), Article 2(7), states that '[n]othing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter'. See Ian Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press 2008), 292 and 294. The author argues that the apparent flexibility of the provision and the conviction that in practice the latter would not conflict with any other international legal rule ended up determining on the contrary a progressive erosion of the 'reserved domain of domestic jurisdiction'. For an all-time-classic on Article 2(7) of the UN Charter, see also Mannaraswamighala Sreeranga Rajan, *United Nations and Domestic Jurisdiction* (2nd edn, Asia Publishing House 1961).

[5] According to the IPCC, Agriculture, Forestry and Other Land Use (AFOLU) contributes to about 24 % of the overall GHG emissions worldwide. See AA. VV, *Climate Change 2014: Mitigation of Climate Change Working Group III Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2014) 1454 <https://www.ipcc.ch/report/ar5/wg3/> accessed 11 March 2019; at the same time, agriculture alone contributes by 10.3 % in the EU. See EEA, *Agriculture and Climate Change* (2015) <http://www.eea.europa.eu/signals/signals-2015/articles/agriculture-and-climate-change> accessed 11 March 2019; on the relationship between agriculture and climate change at global level, see more extensively FAO, 'The State of Food and Agriculture: Climate Change, Agriculture and Food Security' (2016) 194 <http://www.fao.org/3/a-i6030e.pdf> accessed 11 March 2019. Concerning the other negative effects of agriculture on the environment, other than climate change, see Mustafa Önder, Ercan Ceyhan and Ali Kahraman, 'Effects of Agricultural Practices on Environment' (2011) 24 ICPBEE 28.

[6] An agricultural model centred on the ecosystem services would require structuring the whole system around the concept of agro-biodiversity. The latter can be defined as 'the diversity of the species cultivated in agriculture, in which the cultural factor makes a crucial contribution, so that domestication has been called the foundations of the biodiversity of crops'. cf Maurizia Pierri, 'Agrobiodiversity, Intellectual Property Rights and Right to Food: the Case of Andean Countries' in Massimo Monteduro, Pierangelo Buongiorno, Saverio Di Benedetto and Alessandro Isoni (eds), *Law and Agroecology: a Transdisciplinary Dialogue* (Springer 2015) 451, 452. The concept of eco-system services may be described as 'the benefits people obtain from ecosystems, including provisioning (for instance, of food and water), regulating (for instance, of climate and diseases), supporting (such as nutrient cycling and crop pollination), and cultural services (like cultural diversity and spiritual benefits)'. Otto Hospes, 'Addressing Law and Agroecosystems, Sovereignty and Sustainability from a Legal Pluralistic Perspective' in Massimo Monteduro, Pierangelo Buongiorno, Saverio Di Benedetto and Alessandro Isoni (eds), *Law and Agroecology: a Transdisciplinary Dialogue* (Springer 2015) 47, 50. On the redefinition of agricultural identity on the basis of ecosystem services, see also Massimo Monteduro,

In light of the conviction that the harmful effects that agricultural activities have on the environment can be minimised, the EU has taken significant steps to integrate sustainable development into the design of EU agriculture during the course of the last three decades.[8] This is true in every policy domain, both internally and in the EU's external action. Trade is therefore no exception. On the contrary, by stipulating international (commercial) treaties that two or more nations may derogate from the principle of 'reserved domain of domestic jurisdiction'.[9] However, in practice many countries are often reluctant to accept to comply with another country's standards that may constrain in various ways their scope of action.

In this work, one specific topic of EU international trade will be focused upon, ie EU Free Trade Agreements (FTAs) and their agri-environmental dimension. However, the environment-related issues of WTO law, the economic impact of the EU Common Agricultural Policy (CAP) on third countries and EU international cooperation will not be explored further – though account will be taken of them as appropriate.[10]

'Environmental Law and Agroecology. Transdisciplinary Approach to Public Ecosystem Services as a New Challenge for Environmental Legal Doctrine' (2013) 22(1) European Energy and Environmental Law Review 2.

[7] United Nations Department of Economic and Social Affairs – Population Division, Population Estimates and Projections Sections, 'World Population Prospects: The 2012 Revision' (2013) <https://population.un.org/wpp/Publications/Files/WPP2012_HIGHLIGHTS.pdf> accessed 11 March 2019.

[8] On the literature review concerning the efforts made by the EU policy-makers to 'green' the EU agricultural sector, see Luchino Ferraris, 'The Role of the Principle of Environmental Integration in Maximising the 'Greening' of the Common Agricultural Policy' (2018) 1 European Law Review 408. See also Angela Liberatore, 'The Integration of Sustainable Development Objectives into EU Policy-making: Barriers and Prospects' in Susan Baker *et al* (eds), *The Politics of Sustainable Development: Theory, Policy and Practice within the European Union* (Routledge 1997) 107; Nicolas de Sadeleer, 'Sustainable Development in EU Law: Still a Long Way to Go' (2015) 6 Jindal Global Law Review 39; Gracia Marín Durán and Elisa Morgera, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions* (Hart Publishing 2012); Jan H Jans and Hans H B Vedder, *European Environmental Law: After Lisbon* (4th edn, Europa Law Publishing 2012); Maria Kenig-Witkowska, 'The Concept of Sustainable Development in European Union Policy and Law' (2017) Journal of Comparative Urban Law and Politics 64.

[9] The same result would be obtained in the case of the development of a customary international rule affirming the obligation for each state to protect its own environment, but from state practice it seems difficult to affirm the existence of such a rule. See, on this point, Saverio Di Benedetto, *Sovranità dello Stato sulle risorse naturali e tutela degli equilibri ecologici nel diritto internazionale generale* (Giappichelli 2018); the point was also made that in international environmental law international conventions play overall a higher role than international customary law. See Pierre-Marie Dupuy and Jorge E Viñuales, *International Environmental Law* (Cambridge university Press 2015) 34.

[10] The reasons for not focussing upon these subject matters are as follows: firstly, the research question of this work would become too broad in scope if other aspects of sustainability in agriculture were looked at other than in EU FTAs; secondly, as far as the environment-related issues of WTO law are concerned, a vast scientific production is already available in legal scholarship, not to mention that its most salient aspects in relation with the core issues of this work will be considered *infra*, §3.1.2.; lastly, as far as the economic impact of the CAP on third countries and EU international cooperation are concerned, it is the author's opinion that authoritative and exhaustive studies on the matter have already covered the most relevant legal questions at stake. For the economic impact of the CAP on third countries, see Melaku Gaboye Desta, 'The European Union Common Agricultural Policy: Contributing towards the Millennium Development Goal on the Reduction of Hunger' in Joseph A McMahon and Michael N Cardwell (eds) *Research Handbook on EU Agricultural Law* (Edward Elgar Publishing 2015) 463. On EU international cooperation in its connection with environmental sustainability, see Gracia Marín Durán and Elisa Morgera, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions* (Hart Publishing 2012).

Throughout the years, the goals and the scope of EU FTAs have gone through a marked shift. While initially they were conceived to regulate the relationship between the EU and former colonies and neighbour countries, from the 1990s bilateral arrangements of the EU with third countries were reconceived primarily in economic terms. The real game changer was however the 'Global Europe' Communication by the Commission, which purported to establish a new, holistic approach in EU trade policy where trade is part of a bigger picture that also includes environment and social concerns.[11] For environmental protection, this also implied – *inter alia* – the introduction of a full chapter dedicated to sustainable development, ie the TSD chapter. Therefore, it is currently possible to distinguish between a pre-Global Europe and a post-Global Europe era when considering environmental issues in EU FTAs. As a result, nowadays negotiations are not only about tariffs and quotas, but also regulatory issues, product standards, sustainable development and other governmental concerns.[12]

While the potential environmental repercussions of free trade are obvious,[13] the nexus between trade and agriculture and its environmental connection is under-researched in scholarship. On the contrary, trade in agricultural products is currently on the rise, having reached 7.4 % of total EU international trade with non-EU countries in 2017.[14] It follows that the impact that EU FTAs have on third countries' regulatory framework on agricultural production – if any – will play a significant role in enhancement/mitigation of environmental degradation. Against this background, the fundamental research question of this work concerns the extent to which the EU pursues sustainable agriculture in third countries by means of its FTAs. This research question moves from two main assumptions.

[11] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 4 October 2006 'Global Europe: Competing in the world' COM (2006) 567 final.

[12] The path towards post-Global Europe FTAs will be dealt with extensively *infra*, but for an overview cf Yelter Bollen, 'EU Trade Policy' in Huber Heinelt and Sybille Münch (eds), *Handbook of Interpretive Approaches to the EU* (Edward Elgar Publishing 2018) 191.

[13] Scientific literature on the relationship between free trade and environmental protection will be extensively cited as appropriate throughout this work. As a preliminary conceptualisation of this general problem, cf Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3rd edn, Oxford University Press 2009) 753; Werner Antweiler, Brian R Copeland and Taylor M Scott, 'Is Free Trade Good for the Environment?' (2001) 91(4) American Economic Review 877; Brantley Liddle, 'Free Trade and the Environment-Development System' (2001) 39(1) Ecological Economics 21; Mehdi Nemati, Wuyang Hu and Michael Reed, 'Are Free Trade Agreements Good for the Environment? A Panel Data Analysis' (2019) 23 Review of Development Economics 435; Harry Clarke, 'Trade Policy and the Global Environment' (2010) 3(2) SAPIENS online <https://journals.openedition.org/sapiens/1069> accessed 24 July 2019.

[14] cf the data circulated by Eurostat: <https://ec.europa.eu/eurostat/statistics-explained/index.php/Extra-EU_trade_in_agricultural_goods>.

The first assumption is that EU environmental standards are arguably the highest in the world.[15] Owing to an increasing cultural awareness of environmental matters, it is hard to find a regulatory framework in any other industrialised country or group of countries where environmental protection is provided for so thoroughly. Although, of course, this contention is to be assessed separately for each and every different component of the natural environment in question (such as air, water, soil, biodiversity and landscape), as a general statement it is hard to see it contested. The evidence provided in support of such a claim consists of the bulk of legislation that is currently in force in the EU territory and that is simply non-existent, or at least not in the same terms, in most (if not all) of the EU commercial partners, where such concerns have not emerged yet or at least not to this point.

The second assumption is that the EU is indeed bound to pursue sustainable agriculture outside its boundaries. Indeed, the absence of such a duty would make the research question interesting only from the empirical point of view, whereas such a question is intended to be phrased in normative terms. While the fact that the EU is bound by its own Treaties to promote its main values is uncontested,[16] what is less clear is the extent to which this should happen. In other words, it is not clear whether the EU is legally bound to pursue sustainable agriculture with the same intensity within and outside its boundaries or if this can occur at different paces in the two different spheres. Although to date the issue has not yet been clarified in conclusive terms in EU law, this work – based on a combined interpretation of Articles 3(5) TEU, 21(2) TEU, 11 TFEU and 207(1) TFEU, of which account will be extensively given (particularly *infra*, §3.3.2.) – will argue in favour of the equal intensity in internal and external action.[17] This process will enable us to draw a trajectory between the extent to which – in the writer's view – sustainable agriculture *should* be pursued by the EU outside its boundaries and the extent to which this *is* done. Free from any political-ideological influence, the views expressed in this work on evaluating the EU's approach will be developed solely on this basis. It should be noted that this approach is, of course, with no prejudice

[15] Ludwig Krämer, *EU Environmental Law* (7th edn, Sweet & Maxwell 2012); on the role of the EU in international environmental law, see – more generally – Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (3rd edn, Cambridge University Press 2012) 847; cf also the analysis of the achievements in terms of agricultural innovation across the world in Andy Hall and Kumuda Dorai, 'The Greening of Agriculture: Agricultural Innovation and Sustainable Growth' (2010) Paper prepared for the OECD Synthesis Report on Agriculture and Green Growth <https://www.oecd.org/greengrowth/sustainable-agriculture/48268377.pdf> accessed 20 December 2019; for a comparison of the environmental achievements of each country (for each component of the natural environment), cf the Environmental Performance Index <https://epi.envirocenter.yale.edu/> accessed 20 December 2019.

[16] cf Article 3(1 and 3(5) TEU. The wording of this Article uses the expression 'promote', which is therefore formally the correct one. However, due to the higher level of EU standards, in practice this promotion often takes the form of an export. Thus, in this work the words 'promote' and 'export' will be used indifferently in this respect.

[17] While not arguing explicitly in this connection, an evolutionary approach suggesting the progressive integration of EU environmental policies in its external relations was proposed in the above-mentioned book by Marín Durán and Morgera, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions* (No 9).

to the limit of the 'reserved domain of domestic jurisdiction' (see *supra*, Introduction), which thus can only be overcome by the conclusion of an *ad hoc* international agreement (or by international customary law).[18] Because this work focuses on EU FTAs, the promotion should not – in principle – pose problems in relation to the 'reserved domain of domestic jurisdiction'. Nevertheless, this may potentially be the case if an environmental commitment to comply with one party's environmental standards is interpreted restrictively; not to mention that the more this 'promotion' occurs, the less it will be politically acceptable, as far as third country parties will be reluctant to commit to ambitious 'European' environmental standards.

A review of the literature shows that the research question formulated above has not yet been addressed in legal scholarship. Narrowing down the huge scope of scientific literature on EU trade policy to the area of trade in agricultural commodities (which also includes, by way of an example, research on agricultural trade and the relationship between trade and food security) and then again to the even smaller ambit of the role of institutional actors in shaping this policy,[19] this work hinges on the branch of research that has explored the behaviour of the EU as an actor vis-à-vis third countries and in particular the values and models that it exports and the kind of relationships that it establishes.[20] Within this already restricted ambit, this dissertation has an even narrower focus, centred around the issue of sustainability applied in the context of the agricultural sector. In fact, even compared to the most recent studies investigating the issue of environmental protection in EU FTAs, this work is innovative in that it places focus on the impacts of EU FTAs on third countries' sustainability of agricultural practices.[21]

The hypothesis proposed by this dissertation is that attention on the environmental dimension of FTAs is on the rise and that the post-Global Europe EU FTAs undoubtedly contribute enormously

[18] *Ex multis*, see – again – Malcolm N Shaw, *International Law* (7th edn, Cambridge University Press 2014), 471; Patrick Dailler, Mathias Forteau and Alain Pellet, *Droit international public* (9th edn, LGDI 2009), 483.

[19] See in particular the literature reviews conducted by Jan Orbie and Bart Kerremans, 'Theorizing European Union Trade Politics: Contending or Complementary Paradigms?' (2013) 9(4) Journal of Contemporary European Research 493; and Gabriel Siles-Brügge, *Constructing European Union Trade Policy - A Global Idea of Europe* (Palgrave Macmillan 2014). See also Marìa Garcìa, 'EU Trade Policy from a Political Perspective' in Sangeeta Khorana and Marìa Garcìa (eds) *Handbook on the EU and International Trade* (Edward Elgar Publishing 2018); Manfred Elsig, *The EU's Common Commercial Policy: Institutions, Interests and Ideas* (2nd edn, Routledge 2018).

[20] This categorisation is based on the conceptualisation elaborated by Yelter Bollen, 'EU Trade Policy' in Huber Heinelt and Sybille Münch (eds), *Handbook of Interpretive Approaches to the EU* (Edward Elgar Publishing 2018) 191, 196. One author came to the point of properly indicting the EU. cf Lucy Ford, 'EU Trade Governance and Policy: a Critical Perspective' (2013) 9(4) Journal of Contemporary European Research 578. See, more generally, Michael Emerson *et al*, *Upgrading the EU's Role as Global Actor: Institutions, Law and the Restructuring of European Diplomacy* (Centre for European Policy Studies 2011).

[21] Apart from the numerous contributions that will be recalled throughout the paper, to date the study that focuses on EU trade and environment in the most thorough and comprehensive way is Marín Durán and Morgera (No 9). However, by comparison to that, this work is more interested in the environmental repercussions on the agricultural sector and can draw on more recent developments coming from the conclusion of the latest agreements.

to this aim. However, such efforts do not seem enough to reverse the negative impacts that such agreements cause to the environment. In essence, such effects are mainly of two kinds. First, they will stem from an increase in production that naturally follows enhanced trade flows. Second, they are caused by increased transportation, which has direct repercussions on air and water pollution, not to mention environmental disasters occasioned by catastrophic events. In order to do this, such effects should be either taken into account as such and regulated in the agreements through *ad hoc* provisions or resolved by means of the 'export' of standards in force in the EU at the moment of the conclusion of the agreement in the regulatory framework of the third countries. On this latter point, it is worth anticipating that, since the Global Europe Communication and its follow-up developments, EU FTAs (since known as 'new-generation' FTAs) have been conceived with a view to undertaking the so-called 'deep integration', namely a closer and more thorough cohesion between the EU and its counterparts, in order to cover aspects of their relationships that are not exclusively trade-related. In theory, this 'deep integration' should mean at least three things: export of the Union's fundamental values to partner countries; enhancement of protection for EU citizens, because the fact that imports in the EU will increase and will thus be accessible to European citizens poses additional problems in terms of consumer protection; and finally, the EU Charter of Fundamental Rights' recognition of certain Union objectives over trade policy.[22] In practice, it is not easy to pin down the way in which this integration should take place and in particular what standards should be exported and how. As will be seen, regardless of the political will that may be lacking, it is sometimes objectively complicated to export such standards due to their high implementation costs and/or the technical expertise and the administrative capacity required to put them in place. In the EU agricultural sector, whose policies are mainly based on subsidies rather than top-down command-and-control measures, this issue is particularly pertinent. Turned in other words, the research question of this paper can also be read as: to what extent is the integration of sustainable agriculture 'deep' in EU FTAs and what does this imply for the pursuit of sustainable agriculture by third country parties to the EU's FTAs? As clarified above, EU sustainability standards are supposedly higher and therefore such integration should have the result of approximating the non-EU countries' standards towards the EU's ones. Thus, this paper will identify the main axes on which sustainable agriculture is dealt with in EU FTAs and will compare several recent agreements in order to pinpoint differences and similarities. On this basis, some overall conclusions on the state of play will be drawn. This will enable not only speculation on the

[22] Sieglinde Gstöhl and Dominik Hanf, 'The EU's Post-Lisbon Free Trade Agreements: Commercial Interests in a Changing Constitutional Context' (2014) 20(6) European Law Journal 733, 735.

potential key features of future EU FTAs,[23] but also – from a broader perspective – outlining the role that the EU purports to have in the geo-political arena vis-à-vis promotion of its core values.

In light of the above, the work will be structured by three 'Parts', each of which will contain two 'Sections'. Each 'Section' will contain three 'paragraphs', each in turn sub-divided into three 'sub-paragraphs'. Part A will set the scene, identifying the notions of sustainable development and sustainable agriculture and depicting the state of play of their integration into EU law. This will enable pinpointing a European model of sustainability in agriculture that will serve as a basis for comparison of the assessment of results achieved in the EU FTAs that have been already concluded. On this point, it is appropriate to put forward from the outset that although – as will be explained in depth – sustainable development is made up of three dimensions (economic, social and environmental), at the same level and supporting each spur; because of the close attention paid in this work to the environmental sphere, reference to the latter concept is meant to be implicit where sustainable development or sustainable agriculture are mentioned without any further specification. Part B will first identify the notion of EU FTAs in the context of EU trade policy and review their historical developments up to conceptualisation of the 'new-generation' FTAs, particularly in their relationship with WTO law. In the same vein, the fundamental question of the extent to which sustainable development *shall* be promoted outside EU boundaries will be addressed. The second section of Part B will then dwell on the three aspects that have been identified as the key ones to assess pursuit of sustainable agriculture in third countries by means of EU FTAs. These ambits are therefore not only the obvious TSD chapter (where present), but also the effects produced on the regulatory framework of the EU commercial counterpart through regulatory cooperation and, finally, the institutional setup of the agreements, namely the set of mechanisms conceived to ensure that environmental provisions laid down by the agreements will be implemented and later enforced. Part C will then choose three case studies of agreements concluded between the EU and developed country parties (the relationships between the EU and, respectively, Canada, South Korea and Ukraine) and three case studies of agreements concluded between the EU and developing country parties (the relationships between the EU and, respectively, Chile, the Southern African Development Community – SADC – and Vietnam). Each of the paragraphs dedicated to the case studies will be divided into three sub-paragraphs where, after having briefly given an overview of the agreement and of its key elements, the TSD chapter, regulatory cooperation and the institutional framework of the agreements will be respectively focused upon. There will follow some concluding remarks to wrap up the main findings of the research and some reflections on what this might mean

[23] This is particularly the case with regard to the political agreement reached on 28 June 2019 by the EU and Mercosur on a future FTA. See more at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=2039>.

for the future of EU trade policy and environmental protection in the agricultural sector outside EU boundaries.

In carrying out the analysis, this work will follow classic doctrinal legal methodology, ie will examine EU FTAs as a written body of rules and principles which can be discerned using mainly legal sources (including case-law). The primary aim of this research will thus be to systematise and describe EU FTAs' legal rules and to comment on their significance with a view to identifying an underlying system within the broader context of international trade law. Therefore, the analysis will not be directly based on findings stemming from utilization of qualitative and quantitative methods, although relevant studies based on such methods will be resorted to as appropriate. This dissertation will thus prioritise the normative effect of the law in theory rather than the application of the law in action, although this does not mean that moral, political and sociological considerations will be marginalised. Moreover, such legal methodology will strongly be shaped in comparative terms: in general, with reference to the internal EU legal system, to assess to what extent the level of agricultural sustainability achieved in EU FTAs corresponds to the paradigm of agricultural sustainability established in the internal EU framework; and in particular, with reference to the comparison between the EU FTAs chosen as case studies. While the methodology used will then be primarily normative in nature, it will also reflect the inter-disciplinarity of the approach taken. As a result, only the investigation of subjects relating to agro-sciences, and in particular agroecology,[24] enables one to establish the effective notion of 'sustainability', which is an indispensable point of reference to judge to what extent EU policy-makers have pursued and/or achieved the target(s). Moreover, as will be seen, FTAs are the result of a jumble of legal, political and economic considerations and their observation from only one of such visual angles would only provide a superficial overview of all the problems that concern them. The perspective chosen will therefore take into account the main achievements obtained in the matter in the fields of political economy, foreign policy and international relations.

Furthermore, it will be necessary to explore the interlinkages between European and international legal issues vis-à-vis sustainable agriculture, which implies an in-depth understanding of the relationship between EU law and international law that will be thus conceptualized in the text. The extent to which EU internal and external actions coincide in the pursuit of sustainable agriculture will indeed be decisive to address the research question raised by this work.

[24] On the interlinkages between law and agroecology, see Massimo Monteduro, Pierangelo Buongiorno, Saverio Di Benedetto and Alessandro Isoni (eds), *Law and Agroecology: a Transdisciplinary Dialogue* (Springer 2015).

PART A

FROM SUSTAINABLE DEVELOPMENT TO SUSTAINABLE AGRICULTURE: AGRICULTURAL SUSTAINABILITY IN THE EU

SECTION I

SUSTAINABLE DEVELOPMENT AND EU AGRICULTURAL LAW

In the last three decades, the European Union has been trying to integrate environmental protection in the design of the CAP. Indeed, sustainable agriculture is first and foremost the idea of sustainable development applied to agricultural matters. Sustainable development is therefore the necessary starting point of the analysis, as questions arising from understanding the concept as well as its legal normativity end up having repercussions on the notion of sustainable agriculture and its implementation at EU level.

As a result, the way and the extent to which sustainable development is implemented at EU level contribute to shaping the model endorsed by the EU to green agriculture, internally and externally. The identification of such a model is absolutely necessary in order to assess whether and to what extent the EU purports to export sustainability in agriculture through its FTAs with third countries.

In light of the above, in this section the concept of sustainable development will be briefly outlined and its legal normativity evaluated, particularly with reference to its endorsement at EU level. In addition, the analysis will focus on integration of sustainable development in EU Treaty law on agriculture. In the face of lack of any mention of environmental concerns amongst the objectives of the EU CAP, the potential of this legal basis for adoption of agro-environmental measures will be investigated, in particular in connection with the legal basis established for environmental measures (Article 192 TFEU), which could sometimes be used to achieve sustainability in agricultural matters. Against this background, the principle of environmental integration (Article 11 TFEU) has

to bridge this gap and will be carefully assessed. Indeed, such a tool could – in theory – both enhance judicial review by the CJEU on secondary legislation which does not take sufficient account of sustainable development and trigger environmentally sound interpretation. At the end of this section, it will be possible to assess whether and to what extent EU constitutional law fosters or hinders the pursuit of sustainability in agriculture within the EU territory. This is a necessary step to later assess the extent to which this happens outside its boundaries, which will be examined more closely in the subsequent Parts of this work.

§1.1. The Concept of Sustainable Development and its Relevance in EU Law

§1.1.1. *The Concept of Sustainable Development*

The definition of sustainable development most commonly understood is still the one used in the 1987 Brundtland Report, ie 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[25] According to the way in which the above-mentioned definition is usually understood, the core of sustainable development lies in a balance among three main dimensions, namely an economic, an environmental and a social dimension.[26] It should be pointed out since the very beginning that *a priori* none of these three dimensions should in principle prevail over the others; on the contrary, what matters is the idea of 'balance' between them. However, an authoritative view was advanced in scholarship according to which ecological considerations are somehow a pre-condition for carrying out the assessment in questions, as in the absence of the stability of natural functions it is not even possible to consider social and economic issues.[27] This does not mean that sustainable development should then coincide with 'environmentalism', ie the activism to protect nature against the disasters provoked by human activities; in fact, sustainable development structurally does not focus on one specific point, but

[25] World Commission on Environment and Development (WCED), *Our Common Future* (Oxford University Press 1987) Chapter 2, para 1.

[26] On the relationship between economic growth and environmental protection, cf the opposing views of – on the one hand - Terry L Anderson and Lea-Rachel Kosnik, 'Sustainable Skepticism and Sustainable Development' (2002) 53 Case Western Reserve Law Review 439, who defend the view that higher income in general is correlated with higher environmental sustainability; on the other hand, John C Dernbach, 'Sustainable Versus Unsustainable Propositions' (2002) 53 Case Western Reserve Law Review 449.

[27] It was noted that '[s]ustainable development […] implies that ecological functions exist that are indispensable for a durable and globally equitable human society. […] It requires nations to set out and implement concrete goals that that submit all other activities under the protection of those essential natural conditions on which human societies depend'. See, for this conceptualisation and the related debate, Christina Voigt, *Sustainable Development as a Principle of International Law: Resolving Conflicts between Climate Measures and WTO Law* (Martinus Nijhoff Publishers 2009) 38.

rather introduces a new holistic approach towards redesigning the whole human impact on the planet.[28] Likewise, it was also argued that the concept of sustainable development is nothing but the application of a more general 'principle of sustainability'; and that therefore the original meaning of sustainable development is 'ecologically sustainable development'.[29] On the basis of this doctrine, without thereby questioning the idea of 'balance' that is essential for the understanding of sustainable development, this work however will put particular emphasis on the idea of environmental sustainability; as a result, when sustainable development is mentioned without any further specification, it will be meant to coincide with environmental sustainability.

Traditionally, the main problem with this definition has been its broad and ambiguous wording, with many uncertainties revolving around both the scope of the concept and its legal significance, as well as the belief that sustainability is linked to tackling and solving global environmental problems.

Indeed, as regards the latter, some economists and philosophers – particularly those followers of the concept of 'degrowth' – are persuaded that the idea of sustainable development is structurally incapable of preventing worldwide pollution. In their view, sustainable development would only be a front hiding the interests of capitalist economy behind an illusion of public interest, keeping profits up without changing consumers' habits.[30] Therefore, the radical change would not be towards green growth, but towards reducing its importance in our daily life.[31] To do otherwise would only represent an attempt to pollute less so as to pollute longer.[32] Some other authors believe that the problem does not reside in the concept of sustainable development but in the way it is commonly interpreted, hoping for the endorsement of a more eco-centric approach.[33] Indeed, in the writer's view, it is true that sustainable development is a tricky concept, since on the one hand free trade and growth have a harmful effect on the environment, so that sustainability is required to set a

[28] ibid 48.

[29] Klaus Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (2nd edn, Routledge 2016). This book introduces a new brilliant critical perspective on how ecology should inform jurisprudence at international and domestic level, including on human rights, territorial sovereignty and citizenship. On a similar line is Saverio Di Benedetto, *Sovranità dello Stato sulle risorse naturali e tutela degli equilibri ecologici nel diritto internazionale generale* (Giappichelli 2018) 7.

[30] Hervé Kempf, *Comment les riches détruisent la planète* (Editions Seuil 2007) 33.

[31] Cornelius Castoriadis, *Démocratie et relativisme* (Mille et une nuit 2010) 131; Jean-Pierre Dupuy, *Pour un catastrophisme éclairé* (Editions Seuil 2004) 59.

[32] Serge Latouche, *Le pari de la décroissance* (Fayard 2006) 6.

[33] On the problem of interpretation of sustainable development, see Andrea Ross, 'Modern Interpretations of Sustainable Development' (2009) 36(1) Journal of Law and Society 32, where the author points the finger against the little effort made by government to reduce consumption; Sophia Imran, Khorshed Alam and Narelle Beaumont, 'Reinterpreting the Definition of Sustainable Development for a More Ecocentric Reorientation' (2014) 22 Sustainable Development 134, where emphasis is put on the absence of ecological ethics in the definition of sustainable development; Peter Haas, 'Is "Sustainable Development" Politically Sustainable?' (1996) 3(2) Brown Journal of World Affairs 239, who denounces the convergence of states on other priorities.

limit to it; on the other hand, sustainable development is not even imaginable outside the paradigm of growth. As a result, it is questionable as to whether it is worthwhile insisting on a concept that is only ancillary to something that has an intrinsic negative effect on the environment. That said, it is absolutely clear that the international community has made a definitive choice of sustainable development as the tool to green market economy.[34] Thus, for the purposes of this work, rather than focusing on the philosophical or political legitimacy of sustainability, it is definitely more important to explore the scope of this concept as well as its legal normativity.

§1.1.2. *Philosophical and Legal Theory on Sustainable Development*

Such a tripartite structure made up of an economic, a social and an environmental dimension was drawn into the first – and maybe most important – inclusion of sustainable development in an international convention, ie the 1992 Rio Declaration on Environment and Development. Sustainable development was also mentioned in the 1972 Stockholm Declaration on the Human Environment, but the 27 principles of the Rio Declaration aim at integrating systematically the needs of economic development and environmental protection in a single document. In this respect, it was pointed out that the text embodies an ensemble of uneasy compromises, contradictions and ambiguous wording.[35] The concept of sustainable development is called upon several times, although never defined explicitly. From then onwards, the concept has been referred to by a plethora of conventions and other international legal documents.[36] Amongst these landmarks, the ILA New Delhi Declaration of Principles of International Law relating to Sustainable Development plays a prominent role.[37] The Declaration considers that the application and, where relevant,

[34] The reasons for such a worldwide endorsement is explained by Hermann E Daly, *Beyond Growth: The Economics of Sustainable Development* (Beacon Press 1997), where is illustrated how growth is still seen – particularly by the World Bank – as the solution to poverty in developing countries. This also shows why growth is not something that can be renounced, so that sustainable development is necessary because of its compatibility with economic growth. In the climate regime, this is embodied by the principle of Common But Differentiated Responsibilities (CBDR). On this point, see Dimitri D'Andrea, 'Global Warming and European Political Identity' in Furio Cerutti and Sonia Lucarelli (eds), *The Search for a European Identity: Values, Policies and Legitimacy of the European Union* (Routledge 2008) 77, 82.

[35] Ileana Porras, 'The Rio Declaration: A New Basis for Environmental Cooperation' in Philippe Sands (ed) *Greening International Law* (Routledge 1993) 20.

[36] The inclusion of the principle in the 2015 Paris Agreement appears particularly important. Amongst the other provisions, Article 2(1) affirms that '[t]his Agreement […] aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty […]'. On the inception of sustainable development in international conventions and other international legal documents, cf Marie-Claire Cordonier Segger, 'Sustainable Development in International Law' in Hans Christian Bugge and Christina Voigt (eds) *Sustainable Development in International and National Law* (Europa Law Publishing 2008) 87.

[37] The text of the New Delhi Declaration is a sort of codification of international legal principles that are functional to the pursuit of sustainable development and after each principle a brief commentary is provided. cf <https://www.ecolex.org/details/literature/new-delhi-declaration-of-principles-of-international-law-relating-to-sustainable-development-mon-070850/> accessed 10 December 2019.

consolidation and further development of a series of international legal principles would be instrumental in pursuing the objective of sustainable development in an effective way. These are the duty of States to ensure sustainable use of natural resources; the principle of equity and the eradication of poverty; the principle of common but differentiated responsibilities; the principle of the precautionary approach to human health, natural resources and ecosystems; the principle of public participation and access to information and justice; the principle of good governance; and the principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives.

Despite the fact that it is still rather blurred in scope, the concept has been gaining relevance in the case-law of international Courts.[38] To a certain extent, a 'right to sustainable development' has been recognized at international level.[39]

In spite of these recognitions, sustainable development, now introduced into EU law (se *infra*, §1.1.3.) as well as in virtually all domestic jurisdictions, remains a concept on which there is still no consensus regarding its legal nature and normative value (a mere 'non-mandatory' concept, a policy goal or a binding principle?). It is therefore fundamental to give account of the numerous ways by which the international legal doctrine has characterised the theoretical foundations of this principle. On this point, there are mainly two conflicting views. On the one side stand those who believe that sustainable development has a clear normative value consisting of the mere integration between economic and environmental considerations (the 'integration theory'). This is the idea expressed in the well-known separate opinion of Judge Weeramantry in the case *Gabčikovo-Nagymaros*, where he believed sustainable development to be a principle 'by reason not only of its inescapable logical

[38] Indeed, in the two most important cases that coped with sustainable development in depth, the latter was not referred to as a 'principle'. Particularly important, in this connection, are two decisions issued by the International Court of Justice (ICJ): *Gabčikovo-Nagymaros Project* (*Hungary v Slovakia*), Merits, ICJ Rep. 1997 (September 25), para 140, where sustainable development was referred to as a 'concept'; *Pulp Mills case (Argentina v Uruguay),* Final judgment, ICJ Rep. 2010 (April 20), paras 68-84 (and para 177, where the Court stresses the 'interconnectedness between equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection that is the essence of sustainable development'); cf also *Pulp Mills case (Argentina v Uruguay),* Provisional Measures, ICJ Rep. 2006 (July 13), para 80. Sustainable development is phrased in similar terms in WTO Appellate Body Reports, United States — Import prohibition of certain shrimp and shrimp products (*Shrimp-Turtle*), WT/DS58/AB/R [1998], adopted 6 November 1998, paras 126-130. In apparent contrast with this 'cautious' jurisprudence seems to be the *Ogoniland* case, where for the first time an international tribunal seems to reach the point of questioning the economic development of one country on the basis of sustainability concerns, although in an admittedly extreme scenario. cf *The Social and Economic Rights Action Center and the Center for Economic and social Rights v Nigeria* (*Ogoniland*), African Commission on Human and Peoples' Rights (ACHPR) Communication 155/96 (2002) paras 52-55. See the analysis of this case in the context of sustainable development in Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3rd edn, Oxford University Press 2009) 126.

[39] On the interpretation of sustainable development by international courts, cf Alan Boyle, 'Between Process and Substance; Sustainable Development in the Jurisprudence of International Courts and Tribunals' in Hans Christian Bugge and Christina Voigt (eds) *Sustainable Development in International and National Law* (Europa Law Publishing 2008) 203.

necessity, but also by reason of its wide and general acceptance by the global community'.[40] This view recognises that the law of the environment and the law of development are two vital areas of law requiring, however, the existence of a principle that harmonises their (often conflicting) needs. This stance is echoed by a number of scholars, for whom the concept *per se* is already fully-fledged to carry with it a nucleus of normativity that can be phrased in a normative language.[41] This approach is – persuasively – opposed by those who believe that sustainable development cannot be considered as a principle due to the lack of any norm-creating character, being on the contrary only a tool of interstitial nature that can at most orientate states' behaviour ('theory of the interstitial character').[42] This school of thought does not deny the normativity of the concept, but recognises it to a lower extent and in any case in a different way. Accordingly, sustainable development should be regarded as a 'meta-principle, acting upon other legal rules and principles'.[43] In any case, both stances agree that in the hand of the judges sustainable development may work as a mediator 'between the interstices of potentially legal principles'.[44] This leads to the observation that sustainable development clearly has at least some legal effect. First, it can foster further implementation, so that the spirit of the concept is progressively integrated in supranational and national legislation. In fact, even if there is no legal obligation to develop sustainably, there may still be a creation of law in the field of sustainable development.[45] Secondly, in line with the 'theory of the interstitial character' of sustainable development, the latter should be correctly phrased as a meta-principle in the interpretation of laws and implementation of policies by contributing to defining the scope of legal norms.[46] Finally, sustainable development implies already a procedural

[40] *Gabčikovo-Nagymaros Project* (Hungary v Slovakia), Merits, ICJ Rep. 1997 (September 25), Separate Opinion of Vice-President Weeramantry, 95.

[41] Christina Voigt, *Sustainable Development as a Principle of International Law: Resolving Conflicts between Climate Measures and WTO Law* (Martinus Nijhoff Publishers 2009), 168.

[42] This view was conceptualised by Vaughan Lowe, 'Sustainable Development and Unsustainable Arguments' in Alan Boyle and David Freestone (eds) *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press 2012) 20, 30. The same approach was endorsed by Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3rd edn, Oxford University Press 2009) 127.

[43] ibid 31.

[44] Alhaji B M Marong, 'From Rio to Johannesburg: Reflections on the Role of International Legal Norms in Sustainable Development' (2003) 16(1) Georgetown International Environmental Law Review 21, 45. See also extensively Jonathan Verschuuren, 'Sustainable Development and the Nature of Environmental Legal Principles' (2006) 9 Potchefstroom Electronic Law Journal 1.

[45] Philippe Sands, 'International Law in the Field of Sustainable Development' (1994) 65 British Yearbook of International Law 303.

[46] The author who best phrased this theory, as sees above is Vaughan Lowe, 'Sustainable Development and Unsustainable Arguments' in Alan Boyle and David Freestone (eds) *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press 2012) 20. See also Günther Handl, 'Sustainable Development: General Rules versus Specific Obligations' in Winfried Lang, *Sustainable Development and International Law* (Springer 1995). According to Gillroy, such a meta-principle gives rise to a set of sub-principles sometimes at odds with each other, namely prevention, precaution, the right to equitable development, the right to use internal resources so as not to harm other states, integration of environment and development, concern for future

obligation to at least take into account environmental protection. It is therefore virtually impossible to assess when sustainable development is pervasively taken into consideration, but it is possible to say when this has not been the case, namely when no balance at all between economic growth and environmental protection has been struck by the law-maker or the judicial authority.

In more detail, the legal doctrine has identified five main components of sustainable development, namely: the integration of environmental protection and economic development, the right to development, sustainable utilization and conservation of natural resources, intra-generational equity and inter-generational equity.[47]

For some of such components, there is no dispute. For instance, the integration of environmental protection and economic development was clearly provided for in Principle 4 of the Rio Declaration.[48] However, this integration does not seem sufficient in order to phrasing sustainable development as a principle. This seems clearly confirmed in the *Iron Rhine Arbitration*; in this case, the arbitrators recognised the idea of a necessary integration in line with Principle 4 of the Rio Declaration, but phrased sustainable development as a 'trend' rather than a 'principle'.[49] What makes this trend a principle is an additional, extra component, constituted by the duty to prevent harm 'where development may cause significant harm to the environment […]. This duty, in the opinion of the Tribunal, has now become a principle of general international law'.[50] This nuance is important, in relation to what was discussed above. Reading between the lines of the judgment, it would appear that the mere 'integrative dimension' of the concept would not be sufficient to make sustainable development a 'principle'. This aspect appears to supply another argument to the supporters of the 'theory of the interstitial character' of sustainable development.

On the contrary, for some other components it has proved contentious to pin down even a basic understanding, particularly those of sustainable use and intergenerational equity. As for the former,

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generations and their welfare, the CBDR and the polluter-pays. See John Martin Gillroy, 'Adjudication Norms, Dispute Settlement Regimes and International Tribunals: the Status of "Environmental Sustainability" in International Jurisprudence' (2006) 42 Stanford Journal of International Law 1, 12.

[47] For extensive guidance on these elements, see Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3rd edn, Oxford University Press 2009) 116.

[48] 1992 Rio Declaration on Environment and Development, Principle 4: 'In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it'.

[49] *Iron Rhine Arbitration (Belgium v Netherlands)*, Award, ICGJ 373 (PCA) 2005 (May 24), para 59.

[50] ibid. It may be worth clarifying that by virtue of this judgement this duty may be considered applicable only as regards transboundary harm and not within the domestic jurisdiction of each country, which is therefore – within its territory – not bound to prevent harm. As part of the principle of state sovereignty, there is the faculty of each state to determine its desired level of environmental protection, though with the limits enshrined in international law. cf Saverio Di Benedetto, *Sovranità dello Stato sulle risorse naturali e tutela degli equilibri ecologici nel diritto internazionale generale* (Giappichelli 2018) 24 *et seq*, 73 *et seq* and 11 *et seq*.

it was highlighted from the viewpoint that denies 'integration' the status of a principle that sustainable development does not contain sufficient guidance enabling challenging the exploitation policies of other states, as well as the unsustainable use produced as a result of development policies.[51] Even more complex is the identification of inter-generational equity. Here, philosophical and legal perspectives seem unable to find a satisfactory convergence. Well-made philosophic Rawlsian arguments deriving a moral responsibility to future generations from a more general theory of justice have been raised.[52] Hans Jonas tried to link this problem to the broader challenge of building ethics in the technological age: moving from the intrinsic vulnerability of nature and the link between responsibility and ability to take action, he argued that the technological society has changed the nature of human behaviour; in the technological age, the presence of man on earth is not only the point of reference for human behaviour, but also the subject of an obligation to ensure in the future the point of reference of human behaviour.[53]

Anchoring such philosophic arguments to the international legal order is, however, highly contentious, particularly as to whether or not future generations can be considered as bearer of rights. The argument was made that the rights enshrined in the Universal Declaration on Human Rights apply by definition to the whole world where humans live. As a result, the spatial universalism to be assigned to the word 'everyone' would also include a sort of time universalism, extending the scope of the rights to future generations.[54] Such arguments are still more persuasive from a moral point of view than the ability to fit in the normative schemes of the Rule of Law. Many questions are left open and in particular: how future generations can be bound by present norms; how to face potential changes in the political boundaries of states for future generations; how future generations can be accorded standing in the international legal order and particularly how to hold previous generations accountable.[55]

In sum, it can be observed that the international legal order gives little guidance on the shape of sustainable development as such. As brilliantly shown by the view that emphasises the interstitial

[51] Vaughan Lowe, 'Sustainable Development and Unsustainable Arguments' in Alan Boyle and David Freestone (eds) *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press 2012) 20, 29.
[52] John Rawls, *A Theory of Justice* (Oxford University Press 1972); Gail E Henderson, 'Rawls & Sustainable Development' (2011) 7(1) McGill International Journal of Sustainable Development Law & Policy 3; Alexander Gillespie, *International Environmental Law, Policy and Ethics* (2nd edn, Oxford University Press 2014).
[53] Hans Jonas, *The Imperative for Responsibility: In Search of an Ethics for the Technological Age* (University of Chicago Press 1985) 15.
[54] Furio Cerutti, 'Humankind's First Fundamental Right: Survival' (2015) 22(1) Constellations 59, 65.
[55] Vaughan Lowe, 'Sustainable Development and Unsustainable Arguments' in Alan Boyle and David Freestone (eds) *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press 2012) 20, 29; Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3rd edn, Oxford University Press 2009) 121.

character of sustainable development, the definition of its scope will thus mostly depend on the implementation of the concept by regional and national legal systems.[56] Therefore, for our purposes, it is indispensable to evaluate sustainable development in the context of the EU legal framework.

§1.1.3. *Sustainable Development in the EU Constitutional Framework*

Unsurprisingly, at EU level sustainability was linked to economic growth all along. Sustainable development was first mentioned in the 1992 Maastricht Treaty, which included in Article 2 EC Treaty the reference to 'harmonious, balanced and sustainable development of economic activities'. At present, Article 3(3) TEU lays down the foundations of the internal market on the 'sustainable development of Europe' based on three objectives: 'Balanced economic growth and price stability; a highly competitive social market economy aimed at achieving full employment and social progress; a high level of protection and improvement of the quality of the environment'.

The international dimension of sustainable development is discussed at paragraph 5 of the same Article, which establishes a duty by the EU to contribute to 'the sustainable development of the Earth' in the international arena.[57] The international dimension of sustainable development is completed by Article 21(2)(d) TEU, which imposes on Member States the obligation to 'foster the sustainable economic, social, and environmental development of developing countries, with the primary aim of eradicating poverty. Furthermore, international cooperation should have as its aim to 'preserve and improve the quality of the environment and the sustainable management of global natural resources'.[58] Article 21(2) TEU – as will be seen (*infra*, §3.3.) – represents therefore a fundamental legal basis for action taken by the EU to promote sustainable development in its FTAs. The EU legal framework is completed by the principle of environmental integration embodied in Article 11 TFEU and Article 37 of the Charter of Fundamental Rights and Freedoms (see *infra*,

[56] See, once again, Vaughan Lowe, 'Sustainable Development and Unsustainable Arguments' in Alan Boyle and David Freestone (eds) *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press 2012) 20.

[57] Article 3(5) TEU so provides: 'In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter'.

[58] Article 21(2)(f) TEU.

§1.3.: as will be seen, Article 11 TFEU creates a bridge at Treaty level between sustainable development and environmental protection that is absent in the Title on 'Agriculture').[59]

The ambiguity of the concept of sustainable development is confirmed by the fact that the above-mentioned provisions refer to a concept which is basically not defined in EU law.[60] Even the frequent reference made in EU policy documents to the definition of the Brundtland Report falls short of providing guidance on how such principles should be implemented in practice, which enhance the sensation of vagueness surrounding this concept. The most developed EU document on sustainable development is indisputably the 'Renewed EU Sustainable Development Strategy' (SDS), which lays down eight 'policy-guiding principles' supposed to tailor the EU´s approach towards sustainable development.[61] This does not mean, however, that the content of such principles is explained in detail; likewise, no workable reference to their application at decision-making level is provided.[62]

In conclusion, at EU level sustainable development is a broad concept which has not been fully operationalized yet.[63] In any event, accent falls on the concept of development and it is highly likely that future interpretations at law-making as well as at judicial level will take this consideration as a starting point.[64] It is worth noting that such a conceptual breadth is likely to have an impact on the

[59] Ludwig Krämer, 'Sustainable Development in EC law' in Hans Christian Bugge and Christina Voigt (eds), *Sustainable Development in International and National Law* (Europa Law Publishing 2008) 379, arguing for the absolute isolation of sustainable development and environmental protection at EU Treaty level.

[60] It was defined in two pieces of legislations, none of which are into force anymore. cf Regulation of the European Parliament and of the Council (EC) No 2493/2000 on measures to promote the full integration of the environmental dimension in the development process of developing countries [2000] OJ L288, Article 2 (end of validity date: 31 December 2006); and Regulation of the European Parliament and of the Council (EC) 494/2000 on measures to promote the conservation and sustainable management of tropical forests and other forests in developing countries [2000] OJ L288, Article 2 (end of validity date: 31 December 2006).

[61] Council of the European Union, 'Renewed EU Sustainable Development Strategy' (Annex to Council Note 10917/2006). The principles are: policy integration and policy coherence; the polluter-pays principle; the precautionary principle and the taking of preventive action; use of best available knowledge; involvement of business and social partners; involvement of citizens and creation of an open and democratic society; promotion and protection of fundamental rights; solidarity within and between generations. See also the Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Mainstreaming sustainable development into EU policies: 2009 Review of the European Union Strategy for Sustainable Development, COM (2009) 400 final.

[62] For an assessment of the Renewed EU SDS, see Camilla Adelle and Marc Pallemaerts, 'Sustainable Development Indicators: Overview of Relevant FP-Funded Research and Identification of Further Needs' (2009) Institute for European Environmental Policy papers <https://ieep.eu/archive_uploads/443/sdi_review.pdf> accessed 20 March 2019, who assess the main projects which have examined indicators supporting the renewed SDS.

[63] For the review of CJEU case-law, see Luis A Avilès, 'Sustainable Development and the Legal Protection of the Environment in Europe' (2012) 12(3) Sustainable Development Law and Policy 29, 32.

[64] Some authors, in the light of this observation, tried to come up with a more precise definition of sustainable development. See, in particular, Sander R W van Hees, 'Sustainable Development in the EU: Redefining and Operationalizing the Concept' (2014) 10(2) Utrecht Law Review 60, 72.

identification of an EU model of agricultural sustainability, as sustainable agriculture – however defined or described – remains a specific expression of the broader idea of sustainable development.

§1.2. Treaty Foundations for EU Agriculture: Any Space for Sustainable Development?

§1.2.1. *Treaty Provisions on EU Agriculture*

In order to understand the relationship between sustainable development and the agricultural sector, a preliminary outline of the EU constitutional framework of the latter is necessary. Agricultural law can be generally understood to be the body of law governing agricultural activity, namely the 'production, rearing or growing of agricultural products, including harvesting, milking, breeding animals, and keeping animals for farming purposes'.[65]

Since the very establishment of the European Economic Community (EEC), the European agricultural policy has always been its cornerstone, taken further as no other policy ever before and being the one in which most of the resources have traditionally been invested.[66] The objectives of Article 39 TFEU must be understood in the context of the whole Title III on 'Agriculture and Fisheries' (Articles 38 to 44 TFEU). What is apparent in the outline of EU Treaty law on agriculture is its consideration as – first and foremost – a pure economic phenomenon. Article 38 TFEU extends to agriculture the rules on internal market, save as otherwise provided for in the Title. As a result, the rules on free movement of workers and services, as well as freedom of establishment, apply without restriction to agriculture, while the rules on free movement of goods only apply with certain reservations.[67] On the other hand, Article 40 TFEU provides the establishment of a Common Market Organization (CMO) for the pursuit of the objectives laid down by Article 39 TFEU. Finally, Article 43 TFEU constitutes the actual legal basis of the EU CAP, outlining the procedure for adoption of legal acts, in accordance with the objectives of Article 39 TFEU. The latter objectives shall be: '(a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilization of the

[65] European Parliament and Council Regulation (EU) No 1307/2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy (Direct Payments Regulation) [2013] OJ L347, Article 4(1)(a)(i).

[66] Ian S Stephenson, *The Law Relating to Agriculture* (Saxon House Studies 1975) 381. The view of agriculture as the means to fulfil purely economic functions at EEC and national level clearly emerges from several early scholarly works, such as Christopher P Rodgers, *Agricultural Law* (Butterworths 1991).

[67] Fabrice Picod, 'Libre circulation des produits agricoles et organisations communes de marchés' in Wolfgang Heusel and Anthony M Collins (eds), *Agricultural Law for the European Union – Current Problems and Future Prospects* (Trinity College Dublin 1999) 223.

factors of production, in particular labour; (b) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture; (c) to stabilise markets; (d) to assure the availability of supplies; (e) to ensure that supplies reach consumers at reasonable prices'.

The second paragraph integrates the above-mentioned aims by making sure that in the implementation of the CAP account is taken of: '(a) the particular nature of agricultural activity, which results from the social structure of agriculture and from structural and natural disparities between the various agricultural regions; (b) the need to effect the appropriate adjustments by degrees; (c) the fact that in the Member States agriculture constitutes a sector closely linked with the economy as a whole'.

The economic theory sums up the five objectives of Article 39(1) TFEU into three prime factors, ie a politico-economic factor – to contribute to the overall economic growth of the Member States, expressed by Articles 39(1)(a), (c) and (2)(c) TFEU; a socio-political factor – caring about the welfare of the rural population – provided for by Articles 39(1)(a), (b), (2)(a) and (b) TFEU; and a socio-economic factor – to ensure supplies for consumers, reflected in Articles 39 (1)(d) and (e) TFEU.[68]

The aim to increase agricultural productivity seems to refer broadly to the economic relevance of agricultural activities, leaving the EU legislator the option of carrying out this task through public or private initiative.[69] According to the preferred interpretation, the objective to ensure a fair standard of living – linked to paragraph a) by virtue of the word 'thus' – should be an achievement of increased productivity, technical progress and optimum use of production factors.[70] As widely known, the rationale for this is that agricultural incomes are unstable in nature as characterized by the simultaneous irregularity of the offer – depending on unpredictable factors such as weather conditions – and inelasticity of the demand – as the variation of the latter is not influenced by the

[68] Ali M El-Agraa, *The Economics of the European Community* (4th edn, Harvester Wheatsheaf 1994); John S Marsh and Pamela J Swanney, *Agriculture and the European Community* (Allen & Unwin 1980) 98, 12.
[69] Giancarlo Olmi, 'Politique agricole commune', in AA. VV., *Commentaire Megret: le droit de la CEE - Vol. 2* (Editions de l'Université de Bruxelles 1991) 15.
[70] Joseph A McMahon, *EU Agricultural Law* (Oxford University Press 2008) 456, 22. The author himself proposes an alternative interpretation as a result of the second part of paragraph (b), which seems to suggest that the fair standard of living should represent a sort of income guarantee for farmers. However, the latter was repeatedly excluded by the CJEU, which openly declared that Article 39 (1)(b) TFEU (former Article 33(1)(b) EC) does not constitute an income guarantee for farmers, particularly because measures that reduce such an income for producers are justified by the aim to stabilize markets, recognized under Article 39 (1)(c). See Case C-281/84 *Bedburg* [1987] ECR 00049; Case C-46/86 *Romkes* [1987] ECR 02671; Case C-250/84 *Eridania* [1986] ECR 00117; Case C-138/78 *Stölting* C-138/78 [1979] ECR 00713; Case C-2/75 *Mackprang* [1975] ECR 00607.

variation of the offer.[71] Paragraphs c) and d) are connected as they are both designed to face the adverse effects of market fluctuations, although no particular technique is prescribed by the Treaty to this aim. In the early days of the CAP – in the 1960's – food security was clearly the main worry of EU policy-makers and the Treaty provisions seem designed primarily in this connection. Nowadays, the traditional presumption that the availability of supplies necessarily requires over-production is in the course of being reviewed in the light of the overarching challenges of the 21st century, such as climate change, world hunger, environmental protection, food waste and energy efficiency.[72] Finally, the objective to ensure that supplies reach consumers at reasonable prices has to be considered taking into account the agricultural policy overall as laid down by the Treaties and does not refer to the lowest possible price.[73]

The broad scope of the objectives as outlined by the wording of Article 39(1) TFEU is given even more substance by the special considerations of Article 39(2), which enhance the flexibility accorded to the EU legislator. First, account shall be taken of the particular nature of agricultural activity, with a view to smoothing out the social and regional disparities amongst the various areas of the EU territory. For instance, it is by virtue of such a provision that the 2013 CAP establishes payments for areas with natural constraints and payments for young farmers.[74] Likewise, the need to make appropriate adjustments by degrees is embodied – amongst other things – by the multiannual structure of the CAP (the current programming period is 2014-2020). Finally, the requirement to take into account the link between agriculture and the economy as a whole seems to emphasize the economic relevance of the agricultural sector, as well as its multi-functionality.[75]

It is clear from the above that the potential conflict between the numerous aims pursued by Article 39 TFEU is concrete.[76] On this point, the Court has accepted that EU institutions allow one or more objectives temporary priority so as to duly take into account the fluctuating economic and social

[71] Francesco Martinelli, *Manuale di diritto dell'Unione Europea* (Edizioni Giuridiche Simone 2015) 297. See also Alberto Germanò, *Manuale di diritto agrario* (8th edn, Giappichelli 2016) Alberto Germanò and Eva Rook Basile, *Manuale di diritto agrario comunitario* (3rd edn, Giappichelli 2014); Isabelle Piot-Lepetit and Robert M'Barek, 'Methods to Analyze Agricultural Commodity Price Volatility', in Isabelle Piot-Lepetit and Robert M'Barek (eds), *Methods to Analyze Agricultural Commodity Price Volatility* (Springer 2011) 1.

[72] Such a debate is long-lasting. Traditionally in favour of over-production, see John A Usher, *EC Agricultural Law* (Oxford University Press 2001) 37; against, see Réné Barents, *The Agricultural Law of the EC – An inquiry of the Administrative Law of the European Community in the Field of Agriculture* (Wolters Kluwer 1994) 35, who emphasizes the fact that supply can also be obtained from imports.

[73] Case 34/62 *Germany v Commission* [1963] English special edition 00131.

[74] European Parliament and Council Regulation (EU) No 1305/2013 on support for rural development by the European Agricultural Fund for Rural Development (Rural Development Regulation) [2013] OJ L347, Articles 19 and 31.

[75] On the concept of multifunctionality, see *infra*, §2.2.2.

[76] A classic example is that of the milk-quota system, which – put simply – aimed at stabilizing markets, but limited agricultural productivity. For the potential conflict among the scope of such objectives, see in more detail Paul Craig, *EU Administrative Law* (Oxford University Press 2012) 80.

context.[77] However, this is true as far as the emphasis put on one of them does not render impossible the realization of other objectives.[78]

§1.2.2. *Lack of Reference to Environmental Considerations in the Treaty Objectives on EU Agriculture: Causes*

Against this background, the issue of the lack of any reference to environmental protection amongst the objectives is understandable in the light of historic, economic and cultural issues .[79] It is fairly straightforward that at the time of the adoption of the EEC Treaty, environmental concerns were not considered yet as crucial for the development of contemporary societies, nor was there any kind of political pressure in this regard. Less evident are the reasons why such concerns were not subsequently integrated in the text of the Treaties, further to the scientific findings on the relationship between agricultural activities and environmental degradation, as well as the enhanced social alarm and attention paid by the media. Indeed, it is a matter of fact that CAP objectives have remained unaltered since their first establishment. Notwithstanding this – as will be seen *infra* (§2.3.) – nowadays the CAP *does* also pursue environmental aims.

The causes of this long-term endurance are still to a certain extent unknown, but were perceptively suggested to be attributable to 'either a reflection of the wisdom of original drafters or the collective satisfaction among the EU's farming community and consumers that the current CAP fulfils these objectives'.[80] With regard to the environment specifically, however, there may simply be not enough political will among the EU policy-makers to push the 'greening' of the CAP further. As will be seen *infra* (§1.3.), EU policy-makers are now keen to integrate environmental protection within the CAP only to the extent that – on the one hand – this does not hamper economic production and – on the other – the EU can make agricultural payments fall within the 'Green Box' in order to comply with the WTO legal order.[81]

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[77] Case C-5/73 *Balkan-Import-Export* [1973] ECR 01091. Since this case, the so called "Balkan doctrine" was constantly followed: see, amongst the others, Joined Cases C-133, 300 and 362/93 *Crispoltoni* [1994] ECR I-04863.

[78] Joined Cases C-197, 198, 199, 200, 243, 245 and 247/80 *Ludwigshafener Walzmühle* [1981] ECR 01041.

[79] In this as well as in the next sub-paragraphs, the author will use some ideas developed in his past work, Luchino Ferraris, 'The Role of the Principle of Environmental Integration in Maximising the "Greening" of the Common Agricultural Policy' (2018) 1 European Law Review 408.

[80] Bernard O'Connor, 'The Impact of the Doha Round on the European Union's Common Agricultural Policy' in Joseph A McMahon and Michael N Cardwell (eds) *Research Handbook on EU Agricultural Law* (Edward Elgar Publishing 2015) 409.

[81] On this point, an author rightly asserted that 'Article 39 TFEU […] disregards [the] multi-functional purpose of agriculture which the Union seeks to defend and to promote within the ambit of the World Trade Organization'. Nicolas de Sadeleer, *EU Environmental Law and the Internal Market* (Oxford University Press 2014) 167. The analysis of the consistency between EU agricultural subsidies and WTO law was brilliantly carried out by Fiona Smith, 'Mind

Regardless of the causes, the important question to resolve is whether such a persistent shortcoming has an impact on secondary legislation or not and, if yes, to what extent. The solution also requires an in-depth analysis of Article 43 TFEU – which constitutes the legal basis for EU agricultural legislation – as well as of the other legal bases available for EU policy-makers to make EU agriculture more sustainable.

§1.2.3. *Lack of Reference to Environmental Considerations in the Treaty Objectives on EU Agriculture: Repercussions on the Legal Basis for Secondary Agricultural Legislation - Article 43 TFEU*

Article 43 TFEU outlines the rules for the exercise of the legislative power by EU institutions in agricultural matters.[82] The Treaty of Lisbon generalized the ordinary legislative procedure for the adoption of acts implementing the CAP. Such a novelty brought remarkable changes in the institutional dynamics between the Parliament and the Council. Nevertheless, the state of play is more bittersweet than it seems, at least in terms of enhancement of environmental standards.[83]
In fact, EU institutions have a very wide brief while legislating on agricultural matters. Indeed, the role of the Court in reviewing agricultural legislation is limited to the assessment of whether there is a manifest error or a misuse of power.[84] In theory, additional limits to the discretion of EU institutions derive from other general principles of EU law, such as the principle of equal treatment, the principle of proportionality, the principle of legitimate expectations, fundamental rights and the

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the Gap: "Greening" Direct Payments and the World Trade Organization' in Joseph A McMahon and Michael N Cardwell (eds) *Research Handbook on EU Agricultural Law* (Edward Elgar Publishing 2015) 417.

[82] The second and the third paragraphs of Article 43 TFEU may indeed create problems of demarcation. Since this choice does not seem directly relevant for agri-environmental measures, the question will not be deepened further in this work. On this point, see Jef Vandenberghe, 'The Single Common Market Organization Regulation', in Joseph A McMahon and Michael N Cardwell (eds), *Research Handbook on EU Agricultural Law* (Edward Elgar Publishing 2015) 62, 64-68.

[83] It is true, on the one hand, that transparency and accountability are likely to have been enhanced, therefore facilitating the relationship between non-institutional actors and the Parliament; that co-decision strengthens the involvement of civil society actors and stakeholders at European level, increasing their say in the negotiations; and that the Parliament ends up enjoying more powers, as demonstrated by the fact that more than half of its amendments were incorporated into the final outcome; however, on the other hand, the so called 'compromise culture' results reinforced – as testified by the higher number of amendments – which can negatively impact the efficiency and the smoothness of negotiations and increase the risk of watering down more ambitious Commission proposals – as happened during the 2013 reform. Compared to the EU Parliament, the Council can dispose of a special legislative procedure established by Article 42(3), which entitles it to adopt measures on fixing prices, levies, aid and quantitative limitations. The detailed assessment of the impact of the introduction of the ordinary legislative procedure in Article 43(2) TFEU on the 2013 CAP reform is conducted by EU Commission – Directorate General Internal Policies, 'The First CAP Reform under the Ordinary Legislative Procedure: a Political Economy Perspective' (2014) Study <http://www.europarl.europa.eu/RegData/etudes/STUD/2014/529067/IPOL_STU(2014)529067_EN.pdf> accessed 20 March 2019.

[84] This was first held in Case C-138/79 *Roquette* [1980] ECR 03333; it was then repeatedly reaffirmed in particular in Joined Cases C-267 and 285/88 *Wuidart* [1990] ECR I-00435; see, more recently, Case C-189/01 *Jippes* [2001] ECR I-05689.

TFEU rules on the establishment of the internal market in the area of agriculture.[85] Nevertheless, the discretion that EU institutions can enjoy remains high and it is difficult to think that the simple mention of environmental concerns would have cancelled that. Therefore, normatively speaking, the introduction of sustainable development in Article 39 TFEU would not determine a radical change. It is true, however, that more than a normative impact such a shortcoming has a huge political impact. In fact, it removes pressure from EU institutions and makes it difficult to hold them politically accountable for the lack of ambitious climate and environmental measures in agricultural-related pieces of legislation. In fact, in the absence of a strict priority constitutionalized in the TFEU, any environmentally friendly measure would likely be presented as the result of an 'all-the-better logic', namely as a plus that is granted and not a duty that is fulfilled.

The purported change that the inclusion of a reference to sustainable development in Article 39 TFEU would bring can also be assessed, although somewhat, indirectly by looking at the introduction of the aim to combat climate change in the Title on 'Environment' (Articles 191 to 193 TFEU). Again, it would appear that this breakthrough is more political than legal, since previously Articles 174 and 175 of the Treaty Establishing the European Community had been used as the legal bases for EU competence on climate and energy issues at internal or international level.[86] However, it was rightly emphasized that this clearly indicates the stance to 'shield climate change from the vagaries of short-term policies'.[87] The legal basis provided by the Title on 'Environment' is particularly important for the issue at stake as several pieces of legislation decisive for EU agriculture have been adopted under this legal basis.[88] This raises the problem of the choice of the legal basis and makes one wonder whether and to what extent a wider resort to this legal basis would be more appropriate to address the negative impact on the environment of European agriculture.

On this point, the CJEU is constant in repeating that the main criterion to determine the correct legal basis of a legislative act is its object and purpose,[89] or the *main* purpose if there are more than one of them.[90] In exceptional cases a legislative measure can be issued on a dual legal basis.[91] It must

[85] See, for extensive details, Jens H Danielsen, *EU Agricultural Law* (Wolters Kluwer 2013) 30.

[86] Agnethe Dahl, 'Competence and Subsidiarity Perspective in EU Climate Change Policy: from Harmonisation to Differentiation?' (1999) 10(3) Energy & Environment 333.

[87] Maria Lee, 'The Environmental Implications of the Lisbon Treaty' (2008) 10(2) Environmental Law Review 131, 133.

[88] A remarkable example is that of the European Parliament and of the Council Directive 2009/128/EC establishing a framework for Community action to achieve the sustainable use of pesticides (Sustainable Use of Pesticides Directive) [2009] OJ L309.

[89] Among the most recent: Case C-176/03 *Commission v Council* [2005] ECR I-07879; Case C-94/03 *Commission v Council* [2006] ECR I-00001; Case C-166/07 *Parliament v Council* [2009] ECR I-07135.

[90] Case C-336/00 *Huber* [2002] ECR I-7699; Case C-338/01 *Commission v Council* [2004] ECR I-04829.

[91] In such a case, where there is no incompatibility of decision-making procedures or prejudice to the rights of the Parliament, the most specific legal framework is the one that is applied. See C-300/89 *Commission v Council* [1991]

also be added that the progressive shift towards multi-functionality (see *infra*, § 2.2.) is likely to further erode the scope of Article 43 TFEU, as an increasing number of policies will cease to be purely agricultural.[92]

Far from being only a theoretical matter for legal scholars, the choice of the legal basis has consequences from both a procedural and a substantial point of view. Article 192(1) TFEU prescribes the ordinary legislative procedure as the main rule. However, Article 192(2) TFEU prescribes unanimity within the Council in accordance with a special legislative procedure for measures of a fiscal nature (paragraph a)), those affecting town and country planning, management and availability of water resources, land use – with the exception of waste management (paragraph b)) – and those significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply (paragraph c)). When unanimity is required, Member States end up having a *de facto* right to veto and therefore a strong say in negotiations, since it is obviously more difficult to reach unanimity and therefore to legislate at Union level in such areas. As a result, measures issued under this legal basis are 'often vague as they are necessarily compromises between all Member States'.[93] How this can affect the fight against climate change is testified by the opposition from a small group of States in 1992 to a directive introducing a tax on CO^2 emissions, which is not likely to be adopted in the near future.[94]

In conclusion, it is neither always possible – in the light of the settled case-law of the CJEU mentioned above – nor necessarily convenient for environmental purposes to argue in favour of an enhancement of Article 192 TFEU to regulate environmental and climate issues in agricultural matters. That being said, the fact remains that the lack of an environmental dimension in the EU Treaties for agriculture end up affecting politically (and partly legally) the ambition of secondary legislation vis-à-vis environmental protection. At Treaty level, other than the legal bases on agriculture and environment, the last resort to enhance integration of environmental considerations in EU agriculture is provided by the principle of environmental integration (Article 11 TFEU).

ECR I-02867; Case C-338/01 *Commission v Council* [2004] ECR I-04829; Case C-178/03 *Commission v Parliament and Council* [2006] ECR I-00107; Case C-271/94 *Parliament v Council* [1996] ECR I-01689.

[92] Michael N Cardwell, *The European Model of Agriculture* (Oxford University Press 2004) 408.

[93] Leonie Reins, 'In Search of the Legal Basis for Environmental and Energy Regulation at the EU Level: the Case of Unconventional Gas Extraction' (2014) 23(1) RECIEL 125, 129; For an extensive analysis, see Alexander Proelss, 'The Scope of the EU's Competences on the Field of the Environment' in Yumiko Nakanishi (ed), *Contemporary Issues in EU Environmental Law: EU and Japan* (Springer 2016) 15.

[94] Sebastian Oberthür and Marc Pallemaerts, 'The EU's Internal and External Climate Policies: an Historical Overview', in Sebastian Oberthür and Marc Pallemaerts (eds), *The New Climate Policies of the European Union: Internal Legislation and Climate Diplomacy* (VUB Press 2010) 27, 31; Jørgen Wettestad, 'The Complicated Development of EU Climate Policy' in Joyeeta Gupta and Michael Grubb (eds), *Climate Change and European Leadership: a Sustainable Role for Europe?* (Springer 2000) 25.

§1.3. The Principle of Environmental Integration (Article 11 TFEU)[95]

§1.3.1. *Notion of the Principle: Applicability in EU External Action, Content and Legal Significance*

As is clear from the above, the legal foundations for integration of sustainable development into EU agricultural policies – at internal and external level – cannot be found in Articles 38 to 44 TFEU. However, a link between environmental protection, sustainable development and EU policies that are not carried out under the Title on 'Environment' is established by the principle of environmental integration (hereinafter PEI – Article 11 TFEU). The latter provides that 'environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development'.

The Lisbon Treaty's version of the principle significantly strengthened its wording by comparison with the original version introduced in the Single European Act.[96] Conversely, it is arguable whether the provision is given stronger teeth than the pre-Lisbon Article 6 EC Treaty. Those who question this argument emphasize the loss by the PEI of the status of 'general principle of EC law' in the post-Lisbon regime,[97] as well as the weaker wording of the PEI in Article 37 of the Charter of Fundamental Rights of the European Union.[98] On this point, it is up for contention whether a purely normative approach may be the most meaningful way to get a thorough understanding of the weight of the PEI in current EU law, as demonstrated by the marginal role the principle has been playing – before and after Lisbon – in triggering judicial review (see *infra*, §1.3.2.).[99]

For the purposes of this work, the fundamental question is: what role does the PEI play in enhancing agricultural sustainability in EU FTAs with third countries? While the integration of

[95] In this paragraph, the author will draw extensively on Luchino Ferraris, 'The Role of the Principle of Environmental Integration in Maximizing the "Greening" of the Common Agricultural Policy' (2018) 1 European Law Review 408.
[96] Article 130r of the Single European Act provided that 'environmental protection requirements shall be a component of the Community's other policies'.
[97] Amongst other things, this appears to be particularly true in the light of the proliferation of integration clauses. cf Jan H Jans, 'Stop the Integration Principle?' (2010) 33 Fordham International Law Journal 1533, 1544.
[98] Charter of Fundamental Rights of the European Union [2000] OJ C 364, Article 37: 'A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development'. cf Jan H Jans and Hans H B Vedder, European Environmental Law: After Lisbon (4th edn, Europa Law Publishing 2012) 29 where the authors stress the sole reference of the Charter to 'EU policies' and not 'EU activities', claiming that an interpretation of Article 11 TFEU in line with the Charter would result in further downgrading the principle.
[99] The conclusion that the political role played by the principle is bigger that its legal impact is perhaps also supported by reading between the lines of Yoichiro Usui, 'The Principle of Environmental Integration in the European Union: From a Discursive Constructivism' (2005) 8 Bulletin of Niigata University International and Information Studies: Department of Information Culture 89, 110.

environmental concerns in EU FTAs will be focused upon *infra*, in this and forthcoming paragraphs light will be shed on the role of Article 11 TFEU within the EU internal legal framework.

Because of its wording – made up of both hard-law and aspirational elements – the scope of such a provision leaves some aspects open to interpretation. Three of them are of decisive importance, namely whether the principle also refers to EU external action, its content and its legal significance.

As regards the first aspect, it can be asserted that the wording of Article 11 TFEU definitely applies to both EU internal and external actions. In fact, the PEI must be read in conjunction with Articles 3(5) and 21(2) TEU (see *supra*, §1.1.3.), which in establishing the agenda of EU external action clearly dwell on the promotion of global sustainability. The fact that such objectives shall be pursued in every single part of EU external action is made clear by Article 21(3) TEU. More generally, a gap between EU internal and external actions would constitute a breach of Article 7 TFEU, which ensures consistency between policies and activities pursued at EU level.

The determination of the content of the principle has proved to be highly contentious, as little guidance is provided as to what should be integrated. It is beyond dispute that objectives for environmental policy laid down by Article 191(1) TFEU are to be included. Such objectives represent the starting point of the 'greening' of every policy and give substance to the meta-principle of sustainable development (see *supra*, §1.1.2.). EU environmental law includes four main principles: the precautionary principle; the prevention principle; the source principle; and the polluter-pays principle.[100] The general framework of EU environmental law is completed by 'the aim at a high level of protection' provided for by several Treaty provisions such as Article 3(3) TUE, Article 191(2) TFEU and Article 114(3) TFEU.[101] In particular, Article 191(2) establishes that the EU *shall aim* at a high level of environmental protection. The aspirational tone of the wording makes it difficult to avoid such aims and therefore to give substance to the PEI.[102]

However, there are good arguments to endorse the view that the phrase 'environmental protection requirements' go further than the simple reference to environmental legal principles enshrined in Article 192(2) TFEU, otherwise a more specific reference to these sole objectives would have been

[100] The detailed analysis of EU environmental legal principles lies outwith the scope of this dissertation. On this point, the all-time-classic is Nicolas de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford University Press 2005).

[101] Jan H Jans and Hans H B Vedder, *European Environmental Law: After Lisbon* (4th edn, Europa Law Publishing 2012) 41-43, consider this as a proper environmental principle on the same level as the other ones, but the author of this dissertation fails to see how this principle could ever be enforced, which is on the contrary what – at least in abstract terms – can be guaranteed for the other consolidated principles of EU environmental law.

[102] On the contrary, such an aim to enhance environmental protection mainly *depends* on the enhancement of the PEI (and of the precautionary principle): cf Hannes Veinla, 'Determination of the Level of Environmental Protection and the Proportionality of Environmental Measures in Community Law' (2004) 9 Juridica International 89, 90.

made.[103] This does not mean that environmental objectives play a marginal role in this provision (see *infra*, in this sub-paragraph). On the contrary, it means that the provision plausibly aims at covering *every* environmental requirement of the Treaty and not only those enshrined in the Title on Environment. This include, *inter alia*, the reference to a 'high level of protection' enshrined in Article 3(3) TUE. This holistic approach is, of course, not in conflict with pursuing the objectives of the Title on environment, but purports to create an environmental policy for each and every Union policy and activity.

Indeed, the rider 'with a view to promoting sustainable development' appears to be particularly significant for interpretation of the content of the clause, as it introduces the idea of *balance* that the legislator and the interpreter must necessarily bear in mind while dealing with sustainability. Indeed – as seen *supra* (§1.1.) – sustainable development and environmental protection are not synonyms and the former is not necessarily – *per se* – environmentally friendly, as confirmed by Advocate General Léger in the case of *First Corporate Shipping*.[104] The above-mentioned observations may seem to give an answer to the matter of whether Article 11 TFEU requires environmental protection to be given priority vis-à-vis other objectives pursued in the Treaties, which has proved to be highly contentious in legal doctrine.[105] However, there is a series of arguments demonstrating that environmental protection might deserve preferential treatment by virtue of this provision. Firstly, the fact that Article 11 TFEU evokes sustainable development does not mean that the former should overlap with the latter, otherwise Article 11 TFEU would have no reason to exist as it would reiterate something already provided for in other Treaty provisions. Secondly, even if Article 11 TFEU and the concept of sustainable development were meant to overlap with each other, arguments have been raised in order to identify within the core meaning of sustainable development an idea of 'ecologically sustainable development' that puts an emphasis on the environmental dimension of the concept over its other components (see *supra*, §1.1.1.); lastly, Article 11 TFEU puts an emphasis on *environmental* protection requirements, rather than on social or economic ones, that are instead addressed in other Treaty provisions. This should pave the way to considering that the enforcement of Article 11 TFEU may purport – *prima facie* – to integrate environmental

[103] Tobias Schumacher, 'The Environmental Integration Clause in Article 6 of the EU Treaty: Prioritising Environmental Protection' (2001) 3 Environmental Law Review 29, 34.

[104] Case C-371/98 *First Corporate Shipping* [2000] ECR I-9235, Opinion of AG Léger para 54. The Advocate General affirmed: 'The concept 'sustainable development' does not mean that the interests of the environment must necessarily and systematically prevail over the interests defended in the context of the other policies pursued by the Community. On the contrary, it emphasizes the necessary balance between various interests which sometimes clash, but which must be reconciled'. On this point, cf also Nicolas de Sadeleer, 'Sustainable Development in EU Law: Still a Long Way to Go' (2015) 6 Jindal Global Law Review 39, 51.

[105] In favour: Tobias Schumacher, 'The Environmental Integration Clause in Article 6 of the EU Treaty: Prioritising Environmental Protection' (2001) 3 Environmental Law Review 29; against: Jan H Jans and Hans H B Vedder, *European Environmental Law: After Lisbon* (4th edn, Europa Law Publishing 2012) 23.

requirements, albeit not unconditionally; by virtue of the reference to sustainable development a balance should still be struck. As clarified above, this may also lead – in theory – to eventually prioritising other considerations than environmental ones, when the social and economic interests at stake in a given case are so overwhelming, by comparison to the environmental ones, that the former have to be prioritised (as happened in the case of *First Corporate Shipping*). However, the fact remains that – in principle – Article 11 TFEU should be seen primarily as a safeguard for the inception of environmental considerations in EU policies and activities.

Once the content of the PEI is defined, the big challenge is to establish its legal value. Indeed, its legally binding nature cannot be seriously put up for discussion, as the recognition of the PEI in the TFEU is clearly a decisive argument in this respect. However, it was perceptively suggested that such a legal effect does not automatically imply a punchy legal significance, as a principle may set limits on its own scope or may be phrased in terms too broad for displaying legal consequences.[106]

Therefore, as an environmental legal principle, the PEI does formally introduce procedural and substantial obligations for EU institutions, as well as for Member States; however, the extent to which this occurs may vary significantly, particularly in light of the nature of Article 11 TFEU as an 'obligation of means', which does not set numerical targets or other explicit results to be achieved. In legal theory, an obligation of result exists when the law requires that a result must follow from the conduct of the obligator; on the contrary, an obligation of means (or obligation of diligent conduct) exists when the law only impose a certain conduct in itself, irrespective of its outcome. In other words, 'the obligation of result is an obligation to "succeed", while the obligation of diligent conduct is an obligation to "make every effort"'.[107] Conceptually, the two kinds of obligations can be distinguished on the basis of the risk/probability to attain the result wanted by the law; this risk is certainly higher for the obligations of means, where the realisation of the purpose presupposes not only the absence of adverse events, but also a particular effort of diligence and the interplay of certain objective factors.[108] As will be seen, this has important repercussions on the judicial review of this kind of obligations (see *infra*, §1.3.2. and §3.3.2.).

[106] Ruxandra Malina Petrescu-Mag and Philippe Burny, *The Principle of Environmental Integration Under Scrutiny. An Analytical Legal Framework on How EU Policies are Becoming Green* (Accent 2015) 59.
[107] Riccardo Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States' (1992) 35 German Yearbook of International Law 9, 48. The author uses the distinction between obligation of means and obligation of results in order to show that the scope of the 'due diligence rule' in international law should be determined depending on the nature of the obligation underlying it.
[108] ibid.

The legal significance of the PEI may be particularly assessed from three points of view: the law-making process, the judicial review and the environmentally sound interpretation of EU agricultural legislation.

As regards the law-making perspective, the integration of environmental considerations in European agriculture is carried out by means of many different instruments and is thus influenced by a wide range of environmental and non-environmental policy measures. The latter, *inter alia*, include agro-environmental regulations; legislation on water, groundwater and nitrates; nature conservation legislation; air-related directives; soil-related policies; climate action; food safety, animal welfare and organic agriculture.[109] However, in order to gain a deeper understanding of the model put in place by the EU to green its agriculture, this work will mainly focus on the CAP.[110] In general terms, it can be said that efforts to green the CAP have been made – particularly by means of the 'greening measures' in Pillar I and other project-based measures in Pillar II – but the environmental delivery still appears to be very low. On this point, detailed examination of the integration of environmental considerations in the 2013 CAP reform will be carried out *infra*, §2.3. Therefore, the next two sub-paragraphs will focus on the impact of the PEI on judicial review and environmentally sound interpretation of existing legislation.

§1.3.2. *The Legal Significance of the Principle: Judicial Review*

As regards the judicial review, the PEI demands that environmental requirements must be considered to be an integral part of every policy area. Thus, the principle should exert a horizontal effect and cover all areas with potential environmental impact. It was effectively affirmed that the systematic pursuit of environmental objectives, principles and criteria in all EU policies and activities determines an 'amplifying effect' on EU environmental policy.[111] This means that any legal basis present in the Treaties also constitutes a legal basis for environmental protection.[112]

The PEI consists not only of procedural obligations – even when not used as a legal basis, it implies the duty to state reasons – but also and foremost of substantial ones. Such obligations are to be

[109] Ruxandra Malina Petrescu-Mag and Philippe Burny, *The Principle of Environmental Integration Under Scrutiny. An Analytical Legal Framework on How EU Policies are Becoming Green* (Accent 2015) 89-92.
[110] The matter of how legal instruments can promote sustainable agriculture was deeply studies by Glória Teixeira and Lígia Carvalho Abreu, 'Legal Perspective of Sustainable Agriculture' in Helena Pina, Felisbela Martins and Cármen Ferreira, *The Overarching Issues of the European Space: Strategies for Spatial (Re)planning based on Innovation, Sustainability and Change* (Ed. Faculdade de Letras da Universidade do Porto 2013) 118.
[111] Elisa Morgera, 'European Environmental Law' in Shawkat Alam *et al* (eds), *Routledge Handbook of International Environmental Law* (Routledge 2012) 427.
[112] Case C-440/05 *Commission v Council* [2007] ECR I-09097; Case C-300/89 *Commission v Council* [1991] ECR I-02867; Case C-62/88 *Greece v Council* [1990] ECR I-01527.

respected by every EU institution – particularly those involved in the legislative procedure and the European Council – including the CJEU,[113] which must check whether the principle was duly taken into account while reviewing the validity of EU agricultural legislation.[114]

Indeed, the restricted justification of the principle is demonstrated both by limited case-law and its content, which reveals that the CJEU will hardly ever annul an act on the basis of Article 11 TFEU. In the *Bettati* case – concerning the legislation on ozone – the Court considered itself unentitled to review the exercise of the wide discretion accorded to EU institutions, which also includes the choice of measures to adopt in order to implement the environmental policy.[115] The CJEU also clarified that a review under Article 11 TFEU is generally limited to where there is a manifest inappropriateness, having regard to the aim pursued, or an obvious error of appraisal.[116] Accordingly, in the agricultural sector the role of the Court in reviewing agricultural legislation is confined to assessment as to whether there is a manifest error or a misuse of power.[117] More generally, the CJEU recognizes a wide discretion to EU institutions while striking a balance between the various policy objectives and principles in the Treaties.[118] It is therefore not surprising that the same treatment also applies to other environmental principles. This is particularly true with regards to its assessment of the precautionary principle. When the latter principle is invoked by EU institutions to justify legislative acts, the CJEU acknowledges that the Commission has a wide discretion when it adopts risk management measures, including political choices on its part and complex assessments, while the validity of a measure adopted in that area can be affected only if the measure is manifestly inappropriate.[119]

It could therefore be concluded that the chance to see EU agricultural legislation reviewed, for reason of a lack of sufficient integration of environmental concerns, is rather limited.[120] The CJEU

[113] Beate Sjåfjell, 'The Legal Significance of Article 11 TFEU for EU Institutions and Member States' in Beate Sjåfjell and Anja Wiesbrock (eds), *The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously* (Routledge 2015) 51, 57.
[114] Article 264 TFEU.
[115] Case C-341/95 *Bettati v Safety Hi-Tech Srl* [1998] ECR I-4355, para 32.
[116] ibid paras 32 and 35.
[117] This was first held in Case C-138/79 *Roquette Frères v Council* [1980] ECR 03333; it was then repeatedly reaffirmed in particular in Joined Cases C-267-285/88 *Wuidart* and others [1991] ECR I-00435; see, more recently, Case C-189/01 *Jippes and others* [2001] ECR I-05689.
[118] Among the others, cf Case C-00120/97 *Upjohn v The Licensing Authority* [1999] ECR I-00223, para 34; Case C-180/96 *United Kingdom v Commission* [1998] ECR I-02265, para 60; Case C-405/92 *Etablissements Armand Mondiet v Société Armement Islais* [1993] ECR I-06133, para 32; Joined Cases C-331/88 *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others* [1990] ECR I-04023, para 8.
[119] Joined Cases C-78/16 and C-79/16 *Pesce and others/Serinelli and other*s [2016] *not yet published*, para 49; Case C-477/14 *Pillbox 38* [2016] *not yet published*, para 49; Case C-77/09 *Gowan Comércio Internacional e Serviços* [2010] ECR I-13533, para 82.
[120] This is also the conclusion of Jan H Jans and Hans H B Vedder, *European Environmental Law: After Lisbon* (4th edn, Europa Law Publishing 2012) 26.

will plausibly only review legislation which does not provide for environmental integration at all, but not that which claims to take the environment into account, the actual environmental benefit being rather restricted in practice.[121] In other words, the substantial side of Article 11 TFEU is mostly disregarded.

On the one hand, it could be argued that such case-law is indeed in line with the spirit of Article 11 TFEU, which after all only lays down an 'obligation of means'. In fact, while the *content* of the principle should – in the author's view – see environmental considerations prioritised, and while its *legal value* as a 'principle' (and not a 'meta-principle' like sustainable development) is uncontested, the *legal significance* attributed to it by the jurisprudence makes its aim hardly enforceable. Only an unexpected reform at Treaty level could change the state of play, through the insertion of defined standards to be adhered to, or to be achieved, in respect of secondary legislation. It is therefore true that, being more the 'fossilisation' of a political slogan than a fully-fledged legal rule, the PEI will always have more potential to influence the EU legislator than to trigger judicial review.

On the other hand, though, it may be said that the EU framework is already structured in such a way as to provide for a substantial side of Article 11 TFEU other than for its procedural one. Even assuming that sustainable development does not always imply that environmental objectives must be prioritised as such, it is also true that such objectives must not be *a priori* side-lined vis-à-vis other objectives. According to EU institutions a wide discretion in the development of EU policies is only meaningful if the latter can choose how to strike a balance between the components of sustainable development, the proviso being that in the end such a balance is *actually* struck. If no balance is struck at all, the obligation arising from sustainable development – however broad – cannot be said to have been respected. Now, the question is if and how this balance can ever be *reviewed*. Even if we admit that environmental concerns will have to be prioritised and that this will have to occur taking into consideration environmental principles and standards as enshrined in EU law, Article 11 TFEU says nothing on the *extent to which* such requirements have to be integrated. This is because Article 11 TFEU, being an obligation of means, does not lay down results to achieve, in the form of numerical thresholds that work as benchmarks for the introduction of environmental targets in all Union policies and activities. As a result, as long as the integration of such requirements cannot be checked in numerical terms, there will always be room to argue that environmental considerations have been prioritised, even when this is not the case; it will therefore be extremely difficult to prove the opposite in a judicial forum, as clear from the scant CJEU case-

[121] This is the case of European Parliament and Council Directive 2004/25/EC on takeover birds (Takeover Directive) [2004] OJ L142. See the analysis developed by Beate Sjåfjell, *Towards a Sustainable European Company Law: A Normative Analysis of the Objectives of EU Law* (Wolters Kluwer 2009).

law available on the matter. Politically speaking the EU would significantly gain in legitimacy and credibility from a judicial review that enables pieces of legislation to be declared void – such as those parts of the 2013 CAP – that purport to pursue environmental protection without setting either targets to achieve or measures scientifically able to reach the projected targets. This should be the outcome of a meaningful interpretation – suggested by the consideration of Article 11 TFEU itself – of the concept of 'high level of protection and improvement in the quality of the environment' enshrined in Article 3(3) TUE. However – as seen above – the examination of CJEU case-law shows that the time is not yet ripe for a full judicial review of EU legislative acts on the basis of this concept. This is true in spite of the remarkable progress and consideration acquired in CJEU case-law, where there is evidence that the concept of 'high level of protection and improvement in the quality of the environment' has fostered teleological interpretations by the Court.[122] As a result, it would appear that the judicial review of environmental measures in the CAP will keep on being limited, as well as characterized by the ample discretion attributed to the EU institutions.

§1.3.3. *The Legal Significance of the Principle: Environmentally Sound Interpretation of EU Agricultural Legislation*

The above leads us to the third and last ambit through which Article 11 TFEU may play a role in 'greening' EU agricultural law. Besides the development of environmentally sound secondary legislation and its potential review, the PEI would also have a limited influence in determining a more environmentally friendly interpretation of the relevant legal provisions. This means that – in every policy area – environmental protection shall at least be taken into account in the decision as to which is the preferred interpretative solution, where several options are available according to the wording of the text. It is indisputable that a conflict may potentially arise from Treaty objectives, secondary legislation and even Member States' choices of implementation.

This is the so-called 'guidance function' of the PEI, which has for example impacted upon the generalisation of the precautionary principle outside environmental law and more particularly in relation to public health and food law.[123]

[122] Delphine Misonne, 'The Importance of Setting a Target: The EU Ambition of a High Level of Protection' (2015) 4(1) Transnational Environmental Law 11, 26 and case-law cited therein.

[123] See Joined Cases T-74, 76, 83, 85, 132, 137, 141/00 *Artegodan GmbH v Commission* [2002] ECR II-04945, para 183. As regards food law the precautionary principle is now included in European Parliament and Council Regulation (EC) No 178/2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (General Food Law) [2002], Article 7; cf the most

The strength of the 'environmental factor' depends on the context and may vary from time to time. Again, what matters is the idea of balance and – even while interpreting existing legislation – EU institutions are accorded a wide discretion. However, an argument could be made in favour of an increased consideration of environmental protection with regards to the interpretation of measures that are aimed at enhancing such a protection. One example could be taken from the provision of the CAP on permanent grassland, one of the three 'greening' measures introduced in Pillar I (see *infra*, §2.3.2.). Article 4(1)(h) of the Direct Payments Regulation defines 'permanent grassland and permanent pasture (together referred to as 'permanent grassland') [as] land used to grow grasses or other herbaceous forage naturally (self- seeded) or through cultivation (sown) and that has not been included in the crop rotation of the holding for five years or more'. However, the environmental delivery of such a measure is influenced, *inter alia*, by the broad definition of permanent grassland, which may also end up including pasture that is not genuinely permanent.[124] In this case, as the measure in question is primarily – if not exclusively – conceived to ensure environmental protection, priority should be given to the strictest interpretation of permanent grassland.

In conclusion, the analysis showed that the PEI may have a significant potential to positively influence EU legislation and has triggered the insertion of environmental principles and measures into virtually all policies developed by the EU. However, the provision is structured more as an 'obligation of means' than an 'obligation of result' and the lack of clear, scientifically-determined targets set to be achieved in respect of every individual component of the natural environment (such as water, soil, air and so forth) makes it very difficult to review the adequacy and legitimacy of a measure, as there is no real parameter to refer it to. Notwithstanding this, an argument was raised according to which the EU legal system already contains sufficient elements for an enhancement of the PEI in judicial review.

At present, the PEI entails – in theory – finding the most environmentally friendly way to pursue the chosen objectives or, at least, pursuing them in the least environmentally damaging way.[125] In practice, it is impossible to assess whether this task is being carried out properly by the EU legislator.

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recent application (at the time of writing) of the precautionary principle in Case C-282/15 *Queisser Pharma GmbH & Co. KG* [2017] *not yet published*.

[124] In this connection, the European Forum on Nature Conservation and Pastoralism (EFNCP) proposed to adopt a stricter definition which only comprises 'the land used to grow grasses or other herbaceous forage (self-seeded or sown) and that has not been included in the crop rotation of the holding, ploughed or reseeded, for 5 years or longer'. See EFNCP, *Permanent Pastures and Meadows: Adapting CAP Pillar 1 to Support Public Goods* (2011), 2 <http://www.efncp.org/download/Permanent_Pastures_and_Meadows_adapting_CAP_Pillar.pdf> accessed 23 March 2019.

[125] Nele Dhondt, *Integration of Environmental Protection in Other EC Policies* (Europa Law Publishing 2003) 468.

Ultimately, it would appear that the PEI still exerts more of a political importance than a veritable legal significance. It is therefore not surprising that the outcomes that PEI has given rise to have been more remarkable at law-making level than with reference to judicial review and environmentally sound interpretation of existing legislation.

SECTION II

IN SEARCH OF AN EU MODEL FOR SUSTAINABLE AGRICULTURE

In section I, attention was paid to the conceptualisation of sustainable development and the legal instruments by which its inception into EU agricultural policy is possible. In other words, the main problem of section I was to show how sustainability concerns *can* be integrated into EU agriculture according to EU constitutional law. On the contrary, in section II the core of the analysis will be how such sustainability concerns *are* integrated in EU agriculture.

To this end, the definition of sustainable agriculture in its connection with sustainable development and problems related to the operationalization of the concept shall preliminarily be explored. In fact, while this dissertation does not seek to focus on agricultural sustainability from a scientific point of view, the matter of what sustainable agriculture is and what it implies is essential in order to acquire a thorough understanding of what options are available for EU policy-makers as well as the limits determined by agricultural sciences.

Secondly, the approach taken by the EU will be identified by means of the numerous policy documents issued in this ambit by EU institutions – particularly the Commission.

Finally, the writer will examine whether the stances expressed in such policy documents have led to substantive 'greening' of the CAP currently in force. In so doing, the extent to which the latter contributes to the shaping of an EU model of sustainability will emerge as well.

§2.1. What is Sustainable Agriculture?

§2.1.1. *Notion of Sustainable Agriculture*

Historically speaking, the idea of agricultural sustainability traces back to Malthus' well-known *An Essay on the Principle of Populatio*n, where it is implicitly seen as the solution to an uncontrolled

population growth that would lead to starvation and war.[126] However, this is an 'early' idea of sustainability which, in accordance with the cultural context of the time, was more based on social and economic concerns, while environmental considerations entered the debate much later.

Nowadays, the starting point of the analysis is that to date no unique, universally agreed upon definition of sustainable agriculture has been given by the scientific community. As a result, the concept endorsed at policy level across the world has been very diverse. What every single definition appears to have in common with the others is its link to sustainable development (*supra*, §1.1.). The three dimensions of sustainable development – economic, environmental and social – are embodied by the demand for a viable, market-oriented production of safe and secure food, ensuring sustainable management of natural resources, and satisfying society's needs.[127] In this sense, it can be said that sustainable agriculture is nothing but sustainable development applied in an agricultural context. Again, like sustainable development, there is little agreement on the degree to which its three elements should overlap and which one should prevail, which seems to be something that must be assessed on a case-by case basis.

Conceptualizations of agricultural sustainability – both from a legal and a philosophical point of view – are abundant. Overall, there are mainly two paradigms that catalyse any such conceptions: namely that of 'resource efficiency' and that of 'functional integrity'.[128] The first approach would imply focusing on measuring the rate at which a given production or consumption practice depletes or utilizes resources and estimating the stock or store of resources available; on the contrary, 'functional integrity' implies withdrawal from the notion of sustainability a practice jeopardizing the system's capacity for reproducing itself over time.[129]

Methodologically, one can look at sustainability in agriculture in two ways, ie adopting a goal-oriented approach or putting the emphasis on a system-oriented property of agriculture. While the first aims at motivating the adoption of alternative attitudes towards agriculture in light of its highly harmful impact on the environment, the second is constituted by either an ability to satisfy a diverse set of goals or an ability to continue satisfying them through time.[130]

[126] Thomas Malthus, *An Essay on the Principle of Population* (first published 1798, Cambridge Texts in the History of Political Thought 1992).
[127] István Fehér and Judit Beke, 'The Rationale of Sustainable Agriculture' (2013) 9(3) Iustum Aequum Salutare 73, 74.
[128] Paul B Thompson, 'Agricultural Sustainability: What it is and What It Is Not' (2007) 5(1) International Journal of Agricultural Sustainability 5, 8.
[129] ibid.
[130] James W Hansen, 'Is Agricultural Sustainability a Useful Concept?' (1996) 50 Agricultural Systems 117, 119 and 127.

Against this background, more specific definitions have been proposed since the 18th century.[131] The most persuasive and generally accepted definition nowadays is based on the idea of developing agricultural practices which protect the environment while preserving the economic profitability of farmers.[132] Emphasizing the environmental dimension, it can be said that sustainable systems are those that aim to make the best use of environmental goods and services while not damaging them.[133] For the purposes of this work, legal definitions are perhaps more relevant than those elaborated by natural scientists, as what matters here is the legal significance of the concept. In this connection, the FAO definition of sustainable agriculture was given on the occasion of Baltic 21 – An Agenda 21 for the Baltic Sea Region.[134] Article 4.6 of the Agenda provides that '[s]ustainable agriculture is the production of high quality food and other agricultural products/services in the long run with consideration taken to economy and social structure, in such a way that the resource base of non-renewable and renewable resources is maintained. Important sub-goals can be described as follows:

- The farmers income should be sufficient to provide a fair standard of living in the agricultural community;
- The farmers should practise production methods which do not threaten human or animal health or degrade the environment including biodiversity and at the same time minimise the environmental problems that future generations must assume responsibilities for;
- Non-renewable resources have to gradually be replaced by renewable resources and recirculation of non-renewable resources should be maximised;
- Sustainable agriculture meets societies' needs for food and recreation and preserve the landscape, cultural values and the historical heritage of rural areas and contribute to creating stable well-developed and secure rural communities;
- The ethical aspects of agricultural production are secured'.[135]

However broad in its wording, such a definition shows what the key principles of sustainable agriculture are. The latter have been identified as the need to:

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[131] Thomas Jefferson in 1789 provided a useful conceptualisation based on the legal concept of usufruct, namely the right to make all use and profit of a thing that can be made without injuring the substance of the thing itself. cf Julian P Boyd *et al* (eds), *The Papers of Thomas Jefferson: 16 November 1803 to 10 March 1804 - Vol 42* (Princeton University Press 2016).

[132] Neil D Hamilton, 'Feeding Our Future: Six Philosophical Issues Shaping Agricultural Law' (1993) 72 Nebraska Law Review 210, 239.

[133] Miguel A Altieri, *Agroecology: the Science of Sustainable Agriculture* (2nd edn, Westview Press 1995).

[134] An Agenda 21 for the Baltic Sea Region - Baltic 21, Adopted at the 7th Ministerial Session of the Council of the Baltic Sea States, Nyborg, June 22-23, 1998.

[135] Christine Jakobsson, 'Definitions of the Ecosystems Approach and Sustainability' in Christine Jakobsson (ed) *Sustainable Agriculture* (The Baltic University Programme - Uppsala University 2012) 13.

- integrate biological and ecological processes such as nutrient cycling, nitrogen fixation, soil regeneration, allelopathy, competition, predation and parasitism into food production processes;

- minimize the use of those non-renewable inputs that cause harm to the environment or to the health of farmers and consumers;

- make productive use of the knowledge and skills of farmers, thus improving their self-reliance and substituting human capital for costly external inputs;

- make productive use of people's collective capacities to work together to solve common agricultural and natural resource problems, such as for pest, watershed, irrigation, forest and credit management.[136]

§2.1.2. *What Sustainable Agriculture Entails at Farm Level*

So, what does sustainable agriculture conclusively entail to put in practice at farm level? Indeed, it is clear from the broad notion outlined above that sustainable agriculture consists more of an 'umbrella concept' than normative, imperative, ready-to-use behaviour in agricultural activities. This also explains the difference between sustainable agriculture and other disciplines often referred to it such as organic farming, alternative agriculture, ecological agriculture, low-input agriculture, biodynamic agriculture, regenerative agriculture, permaculture and agroecology.[137] In particular, agroecology and organic agriculture seem particularly 'trendy' in today's discussions. As for the former, it is generally intended to be the application of ecology and its principles to the design, setting up and management of agroecosystems.[138] Agroecology is therefore one possible systematic scientific application of the more general idea of sustainable agriculture. Unlike agroecology – which is disappointingly still ignored by the EU legislator – EU law already encompasses a fully-fledged regulation on organic farming, setting out the principles, aims and overarching rules of

[136] Jules Pretty, 'Agricultural Sustainability: Concepts, Principles and Evidence' (2008) 363 Philosophical Transactions of the Royal Society B 447, 451. On similar terms, cf Olaf Christen, 'Sustainable Agriculture: History, Concept and Consequences for Research, Education and Extension' (1996) 74(1) Berichte Uber Landwirtschaft 66.

[137] Terry Gips, 'What is a Sustainable Agriculture?' in Patricia Allen and Debra van Dusen (eds) *Global Perspectives on Agroecology and Sustainable Agricultural Systems* (Proceedings of the Sixth International Conference of the International Federation of Organic Agriculture Movements 1988) 63.

[138] Andrea Pronti, 'L'agroecologia come nuovo paradigma per l'agricoltura sostenibile. Un breve quadro teorico' (2016) Working Paper IRCrES, n. 05/2016, 5 <http://www.ircres.cnr.it/images/wp/WP_05_2016_PRONTI.pdf> accessed 23 March 2019; Miguel A Altieri, *Agroecologia. Prospettive scientifiche per una nuova agricoltura* (Franco Muzzio & C. Editore spa 1991); more recently, see Fabio Caporali, 'History and Development of Agroecology and Theory of Agroecosystems' in Massimo Monteduro, Pierangelo Buongiorno, Saverio Di Benedetto and Alessandro Isoni (eds), *Law and Agroecology: a Transdisciplinary Dialogue* (Springer 2015) 3.

organic production and defining how organic products are to be labelled.[139] Organic agriculture and sustainable agriculture are not synonyms though, since various ecosystems are possible and not all of them replicate traditional farming practices. For instance, organic agriculture can rely heavily on fossil fuels and on high import to farms of organic material potentially harmful to health and may lead to significant agricultural biodiversity and wildlife loss.[140] Likewise, sustainable agriculture is often defined by contrast to conventional agriculture.[141] This does not mean, however, that it is by definition incompatible with intensive agriculture. On the contrary, extensive research shows that sustainability is more the result of a shift in the factors of agricultural production than of a net reduction in input use.[142] Therefore, intensification can be sustainable whether and insofar as it eliminates or substantially reduces the harm to the environment, while making best use of technology and inputs.[143]

In light of the above, it is now clear that there is very weak agreement on what practices are conclusively included in the concept of agricultural sustainability. In other words, 'it is very difficult to create a single formula for success or to define the practical guidelines which may serve as standardised, acceptable guidance on farming issues for every farmer'.[144] There is, however, a set of practices which are universally considered as expression of sustainable agriculture, which include: crop rotation; planting cover crops; reducing or eliminating tillage; use of integrated pest management; integrating livestock and crops; adoption of agroforestry practices; ecological systems (such as riparian buffers or prairie strips) and landscape management.[145] It must be pointed out that agricultural sustainability has more to do with a holistic approach rather than with individual or sets of individual techniques. This is the reason why stewardship and system's perspective are the two key notions to make the most out of the implementation of sustainable practices. Likewise, the expected benefits germinate from a suitable regulatory framework in several areas of concern

[139] Council Regulation (EC) No 834/2007 on organic production and labelling of organic products [2007] OJ L189.
[140] Clem Tisdell, 'Sustainable Agriculture' (2009) Working Papers on Economics, Ecology and the Environment, Working Paper No 126, 8 <http://ageconsearch.umn.edu/record/55335/files/WP%20154.pdf> accessed 24 March 2019.
[141] Conventional agriculture is defined as 'capital-intensive, large-scale, highly mechanized agriculture with monocultures of crops and extensive use of artificial fertilizers, herbicides and pesticides, with intensive animal husbandry' with a paradigm of 'strength through exhaustion'. See James W Hansen, 'Is Agricultural Sustainability a Useful Concept?' (1996) 50 Agricultural Systems 117, 120.
[142] James Pretty *et al*, 'An Assessment of the Total External Costs of UK Agriculture' (2000) 65(2) Agricultural Systems 113.
[143] Drew L Kershen, 'Sustainable Intensive Agriculture: High Technology and Environmental Benefits' (2007) 16 Kansas Journal of Law & Public Policy 424.
[144] István Fehér and Judit Beke, 'The Rationale of Sustainable Agriculture' (2013) 9(3) Iustum Aequum Salutare 73, 76.
[145] cf the article posted on the website of the Union of Concerned Scientists, 'What is Sustainable Agriculture?' <http://www.ucsusa.org/food-agriculture/advance-sustainable-agriculture/what-is-sustainable-agriculture#.WU497Wjyg2w> accessed 24 March 2019. The detailed explanation of the requirements to implement such practices and their effects at farm level from a scientific point of view lies outside the aims of this work. However, on these points, cf Eric Lichtfouse *et al* (eds), *Sustainable Agriculture* (Springer 2009).

(particularly within food and agricultural policy) and are intertwined with other factors, such as land use, labour, rural development and consumer's protection.[146]

§2.1.3. *How Sustainable Agriculture can be Translated in Legal Standards*

As seen above, there is no conclusive agreement in science as to what *exactly* sustainable agriculture entails, except for some broad assumptions. This observation shows how difficult it is to make the concept '*implementable*', ie put into practice at policy level and transferred into legal standards. Such an operation involves only considering sustainability in agriculture as something literal, system-oriented, quantitative, predictive, stochastic and diagnostic:[147] in one word, scientific. However, this is not sufficient to derive standards for the enshrinement of sustainable agriculture in the legislation into force.[148]

Measurements and indicators have indeed been progressively implemented to establish whether agricultural businesses are conducted sustainably or not.[149] Developing an agricultural model of sustainability also involves developing an indicator system tailored for the economic, social and agricultural features of the territory concerned. Not only do agri-environmental policies differ sharply from one country to another,[150] even the development of such indicators shows big differences amongst the systems adopted by each state or organization. Remarkable examples include the 'OECD Sustainability Indicators' and – at EU level – the 'Elisa Project' and the EU 'PAIS Programme'. The 'Elisa Project' – launched in 1998 – had the main purpose of providing institutions, and especially the EU Commission and the European Environment Agency, with adequate tools to understand, monitor and evaluate the link between agricultural practices on the environment; moreover, it aimed at establishing adequate Community programmes with regard to sustainable agriculture. On the contrary, the 'PAIS Programme' – started in 2000 – set a list of almost 500 indicators covering the fields of landscape protection, agricultural practices and rural

[146] Sustainable Agriculture Research and Education Programme (SARE), 'What Is Sustainable Agriculture?' (1997) <http://www.sare.org/publications/whatis/whatis.pdf> accessed 24 March 2019.
[147] James W Hansen, 'Is Agricultural Sustainability a Useful Concept?' (1996) 50 Agricultural Systems 117, 138.
[148] Sabine von Wirén-Lehr, 'Sustainability in Agriculture: an Evaluation of Principal Goal-Oriented Concepts to Close the Gap Between Theory and Practice' (2001) 84 Agriculture, Ecosystems and Environment 115.
[149] Katie Reytar, Craig Hanson and Norbert Henninger, *Indicators of Sustainable Agriculture: a Scoping Analysis* (2014) Working Paper World Resources Institute <https://www.wri.org/sites/default/files/wrr_installment_6_sustainable_agruiculture_indicators.pdf> accessed 24 March 2019.
[150] cf Philipp Aerni, 'What Is Sustainable Agriculture? Empirical Evidence of Diverging Views in Switzerland and New Zealand' (2009) 68 Ecological Economics 1872.

development. Such indicators are grouped together in categories (35 for landscapes, 23 for agricultural practices and 58 for rural development).

In general, it can be said that while these indicator systems should encompass the three pillars of sustainability, it would however appear that they are mostly concerned with economic or environmental-based approaches; moreover, some of them are open to criticisms and particularly the PAIS Programme, whose indicators were deemed to be complicated, inappropriate and unmanageable.[151]

It is hard to forecast what the future of agricultural sustainability will be in the long run.[152] The main conclusion that can be drawn from the above is that – to a certain extent – agricultural sustainability is a matter of judgement as it depends on the *baseline* chosen.[153] It is thus possible to deduce – precisely as seen for sustainable development in §1.1. – that while it should always be possible to assess when a set of agricultural practices is unsustainable, because sustainability was not taken into account at all, it is more difficult to identify the extent to which such practices may be actually sustainable. Indeed, it can be anticipated that the EU has clearly affirmed that it is willing to pursue this path, although it is not clear to what extent. The identification of the baseline chosen by the EU is therefore essential to review its endorsement of agricultural sustainability, not only judicially (which – as seen in §1.3. – has proved to be complicated), but also politically and scientifically. With the specification that, given the blurred line between what is sustainable and what is not, 'scientific' review of the implementation of sustainable agriculture is to a certain extent ontologically impossible.

§2.2. Sustainability in Theory: The Model Chosen by the European Union to Achieve Sustainable Agriculture

§2.2.1. *In Search of a European Model of Agriculture: Retrospective on the CAP*

In this paragraph, the choices made by the EU vis-à-vis sustainable agriculture will be explored, by comparison with the options and within the limits outlined in the previous paragraph.

[151] István Fehér and Judit Beke, 'The Rationale of Sustainable Agriculture' (2013) 9(3) Iustum Aequum Salutare 73, 79.
[152] Ruttan foresees three possible scenarios: Conventional reference to sustainable agriculture, barbarization and shift towards sustainability. See Vernon W Ruttan, 'The Transition to Agricultural Sustainability' (1999) 96 Proceedings of the National Academy of Science of the USA 5960.
[153] Also acknowledged by Jules Pretty, 'Agricultural Sustainability: Concepts, Principles and Evidence' (2008) 363 Philosophical Transactions of the Royal Society B 447, 453.

In fact, as seen earlier (*supra*, §1.2. and §1.3.), the broad terms set by EU constitutional law do not appear to tie the EU to the establishment of a strict baseline for sustainable agriculture in EU law. On the contrary, the extent to which EU action can be judged depends on which targets EU institutions from time to time voluntarily commit to pursue vis-à-vis agricultural sustainability. The assessment of such commitments implies the identification and evaluation of the 'model' chosen by the EU to 'green' its agriculture.

In order to understand the role played by sustainable agriculture in EU external relations, it is thus essential to identify the approach taken internally in this respect. This will enable us to assess whether and to what extent the EU can export its model of sustainable agriculture in the making of the FTAs to which it is a party – not to mention that, as will be seen *infra*, this European Model of Agriculture (EMA) is also the result of the influences exerted by the international arena.

In the common language, a conceptual model can be defined as a representation of a system using general rules and concepts. Since this dissertation only aims at identifying this model from the perspective of agricultural sustainability, what will be mainly sought are the features characterising the action taken by the EU in this regard. The translation of such an approach into actual measures will be dealt with in the next paragraph. As a result, after a brief historic overview of the CAP, this paragraph will try to identify the current EMA and – in the last sub-paragraph – to isolate from such an EMA the approach specifically taken with regard to environmental sustainability of the CAP.

The problem of the existence and the definition of the main features of a model in EU agriculture has already been addressed in legal scholarship.[154] Its conformation can be outlined on the basis of the action taken by the EU to regulate the agricultural sector since the establishment of the Treaty of Rome – in first instance in the form of the Title on Agriculture in the (now) TFEU (*supra*, § 1.2.). The essence of such a regulation is located 'at the interface between agriculture and society as a whole'.[155] This implies that any model is made up of a number of contextual elements, which change every time that society changes. In this sense, it may be argued that there is more than one model.

[154] The milestone in this regard is Michael N Cardwell, *The European Model of Agriculture* (Oxford University Press 2004), which also carries out an extensive literature review on the topic. See also Stanisław Kowalkzyk and Roman Sobiecki, 'European Model of Agriculture In Relation To Global Challenges' (2014) Working Paper IAFE-NRI n 235229 <http://ageconsearch.umn.edu/record/235229> accessed 26 March 2019; Jan Douwe van der Ploeg *et al*, 'The European Agricultural Model: Perspectives, Prospects and Research Needs' (1999) Position paper Wageningen University and Research Center, 6 <http://jandouwevanderploeg.com/EN/doc/THE_EUROPEAN%20AGRICULTURAl.pdf> accessed 26 March 2019.

[155] ibid.

Today's EMA is mainly the result of political choices shaped by the numerous reforms that have been forming the structure of the CAP until the 2013 reform. Although what matters for the purpose of this work is only the model currently ongoing, past ones may be of interest as far as they have influenced the present one. Indeed, the development of agriculture from an economic, social and cultural point of view and its regulation – in the EU as anywhere else – move simultaneously.

It must be acknowledged that the CAP has been on quite a long journey, in terms of the improvements that have been achieved, in comparison with the intensive and environmentally destructive model of the early years.[156] It was in 1985 that the Commission first issued a Green Paper on the future of the CAP. In so doing, it drew attention to its unsustainable structure which was then based on the intensive agriculture that characterized the 70s and the early 80s.

On the basis of the objectives outlined by Article 39 TFEU (see *supra*, §1.2.), the CAP has seen a gradual shift from price support to coupled payments, and then later to decoupled payments. While the 1992 MacSharry reform attempted to give prices a stronger role in determining production, the 1995 WTO Agreement on Agriculture (AoA) imposed a reduction of agricultural support, strict limits on trade restrictions, as well as on domestic support and export subsidies.[157] The environmental focus of the CAP was introduced by Agenda 2000, which was the starting point of environmental integration in subsequent reforms (see, in more detail, next sub-paragraph).[158] The subsequent step was the 2003 Fischer Boel reform, which was mainly marked by decoupling (ie making direct payments not associated with production). The logic followed by the legislator – mindful of WTO law – is that no distorting effect could derive from payments to farmers that are not related to production. Indeed, a link still remains because the payments are tied to the proviso that land is kept in 'good agricultural and environmental conditions' (GAEC), namely ready to produce.[159] Another outcome of the 2003 reform was an increase in the funding for strengthening rural development policy. Such tendencies were given even more substance in the 2008 Health Check, which – amongst other things – pushed decoupling further and raised to 10 % the amount of money that should have been transferred from Pillar I to Pillar II.

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[156] For the early developments of EU agriculture, cf Michael N Cardwell, *The European Model of Agriculture* (Oxford University Press 2004) 7 *et seq*; more in short, see Alan Matthews, 'Greening Agricultural Payments in the EU's Common Agricultural Policy' (2013) 2 Bio-Based and Applied Economics 1.

[157] Agreement on Agriculture (AoA - Marrakesh, Morocco, 15 April 1994), Marrakesh Agreement Establishing the World Trade Organization.

[158] Agenda 2000 – For a Stronger and Wider Union (1997) Document Drawn up on the Basis of COM (1997) 2000, Bulletin of the European Union – Supplement 5/97.

[159] According to the CAP Glossary, 'Farmers are obliged to maintain their land in "good agricultural and environmental condition". This concept includes the following: the protection of soil against erosion, the maintenance of soil organic matter and soil structure, and the safe-guarding of landscape features. It is the member states – not the European Union – which decide the exact specification of these parameters'. cf <https://ec.europa.eu/agriculture/glossary_en> accessed 26 March 2019.

§2.2.2. *Key Features Determining the European Model of Agriculture*

So, what does this model look like today – particularly in light of the 2013 reform? Other than global legal, economic and political phenomena, the EMA is influenced firstly by the specificities of European agriculture. Such specificities produced values, which are the benchmark of the system. In fact, though with great differences between one country and another, there have always been common features across the continent. Traditionally, the latter have been identified as the great deal of landscapes produced by European agriculture and the associated biodiversity and natural values; the accessibility to this 'capital' (in the form of agro-tourism or local specialities); highly diversified and qualitative supply of food; and the medium-scale, intensive agriculture built upon the framework of the family-farm.[160] Naturally, modern agriculture needs to be framed taking into account some contextual elements that by definition are contingent according to the historic period considered. Some of the most remarkable of these elements today are the increasing complexity of the food chain, the progressive concentration of financial power, world hunger, demographic growth, international trade, the increasing preoccupation of consumers with quality and health and, of course, environmental protection.[161] These are, in a nutshell, the factors that contribute to the shaping of the model. As a result, we can say that EU farming is traditionally characterized on average by the small unit potential of the individual farm, high share of family labour and part-time work, low volume of production and low level of specialization, a strong relationship with surroundings, the environment and the farming community.[162]

Although in practice an EU model of agriculture has always existed, the concept of EMA was officially launched in 1997 by the Agricultural Council while discussing future reforms. Such discussions triggered the most important paradigm shift in European agriculture, ie Agenda 2000. Thus, the first step to pinpointing the current EMA is indeed Agenda 2000. This is a Commission Communication in which was contained a policy review, perspectives for financing and for the operation of the CAP following the 1992 reforms, and recommendations for the way forward. On this occasion, environmental concerns entered into the EU policy agenda for agriculture from the main door. The proposed changes in EU policies were deemed to be characterized by market orientation and increased competitiveness, food safety and quality, stabilisation of agricultural incomes, development of the vitality of rural areas, simplification and strengthened decentralisation.

[160] Jan Douwe van der Ploeg *et al*, 'The European Agricultural Model: Perspectives, Prospects and Research Needs' (1999) Position paper Wageningen University and Research Center, 3 <http://jandouwevanderploeg.com/EN/doc/THE_EUROPEAN%20AGRICULTURAl.pdf> accessed 26 March 2019.
[161] ibid 5.
[162] Stanisław Kowalkzyk and Roman Sobiecki, 'European Model of Agriculture In Relation To Global Challenges' (2014) Working Paper IAFE-NRI n 235229 <http://ageconsearch.umn.edu/record/235229> accessed 26 March 2019.

Such ideas inspired the subsequent CAP reforms. Likewise, they were emphasised in Fischer Boel's speech of 2006 as being part of the desired future EMA.[163]

Other than competitivity, the key concept embedded in Agenda 2000 for agriculture is that of multi-functionality. Multi-functional agriculture can be defined as the sustainable way in which to integrate the inter-related objectives of farmers and society in three functions. These are:

- production: to provide consumers with secure and stable supplies of healthy quality products and to develop its competitive position on the world market based on sustainable production methods;

- territorial: to safeguard the countryside delivering environmental services valuable for the public, while enhancing the economy and employment homogeneously in EU villages;

- social: to contribute to reinforcing cohesion between groups and regions – reducing disparities between the richer and poorer regions of the EU.[164]

In conclusion, it can be said that the EMA is based on a special status accorded to agriculture, which revolves more and more around multi-functionality than on mere production-related concerns.[165] In other words, the problem at stake consists of adopting measures that fulfil the task of giving substance to the new focus, product/function-oriented – and not commodity-oriented anymore. Other than environmental protection, this has determined an increasing regulation of matters such as food safety, animal welfare, Genetically Modified Organisms (GMOs) and the demands of the consumer to circumscribe freedom of action of the food industry.[166] Thus, multi-functionality is now seen by EU policy-makers as the only possible solution to the challenges for the future of agriculture – the first of which is increasing trade liberalisation.

§2.2.3. *The European Model of Agriculture Today: Analysis of the Most Recent EU Policy Documents*

Against this general background, the policy documents adopted from Agenda 2000 onwards inspired successive reforms.

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[163] Mariann Fischer Boel, The European Model of Agriculture, Informal Ministerial Meeting, SPEECH/06/531, Oulu, Finlande, 26 September 2006 <https://agriregionieuropa.univpm.it/sites/are.econ.univpm.it/files/FinestraPAC/Editoriale_4/Collegamenti/speech_MFB_modello_agricolo_europeo.pdf> accessed 26 March 2019.

[164] Committee of Agricultural Organisations in the European Union - General Committee for Agricultural Cooperation in the European Union, 'The European Model of Agriculture: The Way Ahead' (1999) Policy Paper Pr(99)88F1 - P(99)89F1 <http://trade.ec.europa.eu/doclib/docs/2005/april/tradoc_122241.pdf> accessed 26 March 2019.

[165] Michael N Cardwell, *The European Model of Agriculture* (Oxford University Press 2004) 405.

[166] ibid 263, 264 and 312.

The first remarkable cornerstone in the development of an EU stance on agricultural sustainability was set by a Commission Communication in 1999 which displayed the 'Directions Towards Sustainable Agriculture'.[167] The first important element that needs to be stressed is the link established between sustainable agriculture and sustainable development, considered the theoretical benchmark of EU action in this respect. As a result, sustainable agriculture as such *only* involves managing natural resources in a way which ensures that they are available in the future.[168] After that, the relationship between farming and its harmful effect on the environment is reviewed, particularly by isolating five critical areas, namely water, land use and soil, air and climate change, biodiversity and landscape.[169] Mindful of Agenda 2000, the main logic underpinning the integration of environmental considerations in the CAP is clearly established: 'The philosophy underpinning the environmental aspects of CAP reform is that farmers should be expected to observe basic environmental standards without compensation. However, wherever society desires that farmers deliver an environmental service beyond this base-line level, this service should be specifically purchased through the agri-environment measures'[170] This certifies the pursuit of a balance between the two main concerns of Agenda 2000, namely competitiveness and multi-functionality. Another key element of the system are the so-called agro-environmental indicators, which are also given substance by the Commission in its Communications of 2000 and 2006.[171] These are the efforts demanded by the European Council at Cardiff in 1998 to every EU policy sector with the following aims:

- 'to identify the key agri-environmental issues that are of concern in Europe today;

- to understand, monitor and evaluate the relationship between agricultural practices and their beneficial and harmful environmental effects;

- to assess the extent to which agricultural policies respond to the need to promote environmentally friendly agriculture and to communicate this to policymakers and the wider public;

– to monitor and evaluate the site-specific environmental contribution of Community programmes to sustainable agriculture;

[167] Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of Regions on the Directions Towards Sustainable Agriculture, COM (1999) 22 final.
[168] ibid 5-6.
[169] ibid 8-18.
[170] ibid 20.
[171] Communication from the Commission to the Council and the European Parliament on Indicators for the Integration of Environmental Concerns into the Common Agricultural Policy, COM (2000) 20 final; Communication from the Commission to the Council and the European Parliament on Development of agri-environmental indicators for monitoring the integration of environmental concerns into the common agricultural policy, COM (2006) 508.

– to map the diversity of agri-ecosystems in the European Union and Candidate Countries'.[172]

As seen *supra* (§1.1.), it is a necessary feature of every environmental policy – if not of every policy *tout court* – to provide for mechanisms capable of monitoring and assessing its outcomes. However, the role of such indicators must be circumscribed. Regardless of the problem of their scientific reliability, as well as that of Member States' willingness to accurately collect data, agri-environmental indicators may at best enhance monitoring and information, as well as keeping track of the progress made as regards implementation of some measures. They cannot, on the contrary, serve the purpose of evaluating the ambition of such measures or their adequacy vis-à-vis the more general policy targets pursued by the EU. Furthermore, as can be seen from the data made available by the Commission,[173] the results shown are very generic and do not allow judging the cost-effectiveness of environmental measures. Indeed, the setting up of clear numerical targets and efforts to achieve them are still not apparent in the CAP.

In 2010, prior to the 2013 reform, the Commission issued another very important Communication focused on the need to 'Meeting the Food, Natural Resources and Territorial Challenges for the Future'.[174] The priorities of the future CAP – what we can identify as the 'values' of the European model for sustainability in agriculture – shall be to guarantee a long-term food security, to provide EU citizens with quality, healthy and diversified food produced sustainably and to ensure the employment of the agricultural sector.[175] In this connection, a mandatory 'greening' component of direct payments is foreseen for future amendments of the CAP.[176] Methodologically, such a Communication sets out three broad options to make the CAP more sustainable: introducing gradual adjustments to the current framework ('Adjustment'); more radically overhauling the current policy with major amendments ('Integration'); and adopting a far-reaching new CAP where environmental and climate change concerns are central and where there is a progressive move-away from income support and market measures ('re-focus').[177] As will be seen, the 2013 CAP reform seems more inspired by the first option (and perhaps by the second, to a certain extent), while the command-and-control model suggested in the third option appears to have been fundamentally set

[172] Communication from the Commission to the Council and the European Parliament on Indicators for the Integration of Environmental Concerns into the Common Agricultural Policy, COM (2000) 20 final, 8-9.
[173] cf the table at page 21 of Communication from the Commission to the Council and the European Parliament on Development of agri-environmental indicators for monitoring the integration of environmental concerns into the common agricultural policy, COM (2006) 508.
[174] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions on the CAP towards 2020: Meeting the Food, Natural Resources and Territorial Challenges of the Future, COM (2010) 672 final.
[175] ibid 3-4.
[176] ibid 9.
[177] ibid 13.

aside. The Impact Assessment issued on the eve of the 2013 reform aims at evaluating the possible scenarios under each option.[178] For instance, it made clear that some of the targets set in other environmentally-related policy areas, such as biodiversity and climate change, would be difficult to reach if the first option were to be endorsed.[179]

In light of this review of EU documents, it is now high time to draw some conclusions on the EMA as regards agricultural sustainability.

Firstly, throughout all the documents examined there is not even one mention of one scientific study underpinning the rationale of the proposed action to be taken for the 'greening' of the CAP, neither is there any mention of the expected outcome of the measures in question. In other words, it is not clear – *precisely* – to what extent (and at what cost) the proposed measures are *a priori* supposed to be beneficial to the environment. It is true that the Impact Assessment of the 2013 reform seeks to evaluate – among others – the environmental impact of the measures that may have been taken according to each of the three broad options available. However, this only happens in a rather generic way, where variations of every coefficient relating to each component of the natural environment are only predicted very broadly and not in firm, numerical terms. It is therefore correct to say that the 'targets' set out in the EU policy documents and legislation in the area of agriculture are not fleshed out in detail. On this point, it must be recalled that the EU Parliament, in its response to COM (2010) 672, warned the Commission that environmental measures should be relevant from an agronomic point of view.[180]

Secondly, there would appear that a very limited choice of the numerous techniques outlined in the previous paragraph (§2.1.) has been made. Some of them ended up being incorporated into the CAP – though without quantifying their expected environmental outcome. However, overall the impression remains that the EU approach on sustainable agriculture does not preconize the adoption of specified sustainability practices. More generally – with the exception of organic farming, which is regulated separately – there is no endorsement of any specific methods developed by natural

[178] COM SWP, Impact Assessment - Common Agricultural Policy towards 2020, Accompanying the document 'Proposals for a Regulation of The European Parliament and of The Council:
- establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy;
- establishing a common organisation of the markets in agricultural products (Single CMO Regulation);
- on support for rural development by the European Agricultural Fund for Rural Development (EAFRD);
- on the financing, management and monitoring of the common agricultural policy; and the 'Proposal for a Council Regulation determining measures on fixing certain aids and refunds related to the common organisation of the markets in agricultural products {COM (2011) 625; COM (2011) 626; COM (2011) 627; COM (2011) 628; COM (2011) 629; SEC (2011) 1154 final.

[179] ibid 51.

[180] European Parliament Resolution of 23 June 2011 on the CAP Towards 2020: Meeting the Food, Natural Resources and Territorial Challenges of The Future (2011/2051(INI)), paras 30 and 31.

sciences to operationalize the 'umbrella concept' of sustainable agriculture (*supra*, §2.1.). The absence of any consideration of agroecology from the whole EU law is very critical. In particular, concerning the relations between law and agroecology, studies have shown how the current CAP is not apt to address convincingly the problem of ensuring ecosystem services.[181] The EU Parliament encouraged the endorsement of 'precision agriculture', but no follow up was given to that call.[182]

Thirdly, the greening of direct payments – as seen above – was suggested already in COM (2010) 672 and thus the measures subsequently taken in the 2013 reform were already inspired by that up-stream policy guideline. A far better policy option in terms of environmental benefit would have been to introduce payments to reward the positive externalities of ecosystem services provided at farm level.[183] The great merit of this choice would have been to tie the amount of money given to farmers to the degree of environmental benefit produced. On the contrary, greening through direct payments disregards the problem of the implementation of measures, which is the most important factor from the perspective of the environment.

Finally, the EU approach to sustainable agriculture seems to be outlined in rather generic terms, so as to take advantage of the flexibility of the concept, without establishing elements that would allow review – if not legally, at least politically – of its action in this respect. Once again, the link between sustainable development and sustainable agriculture is apparent. Indeed, it would appear that the structural ambiguity of the former is perfectly functional to enable the latter to hide behind it (or to blur inside it).

The model currently – *de facto* – enshrined in EU agriculture is likely to change substantively further to the new Commission legislative proposal for the CAP 2021-2027, published on 1 June 2018.[184] The input for the reform was given by the Communication on the future of food and

[181] Brian Jack, 'Ecosystem Services: European Agricultural Law and Rural Development' in Massimo Monteduro, Pierangelo Buongiorno, Saverio Di Benedetto and Alessandro Isoni (eds), *Law and Agroecology: a Transdisciplinary Dialogue* (Springer 2015) 127. cf also Alessandro Isoni, 'The Common Agriculture Policy (CAP): Achievements and Future Prospects' in Massimo Monteduro, Pierangelo Buongiorno, Saverio Di Benedetto and Alessandro Isoni (eds), *Law and Agroecology: a Transdisciplinary Dialogue* (Springer 2015) 185.

[182] ibid para 34.

[183] Brian Jack, 'Ecosystem Services and the Rural Environment: Reforming European Agricultural Law' (2012) 21(6) European Energy and Environmental Law Review 258, 261.

[184] Proposal for a Regulation (EU) of the European Parliament and of the Council establishing rules on support for strategic plans to be drawn up by Member States under the Common agricultural policy (CAP Strategic Plans) and financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) (CAP Plan Regulation), COM(2018) 392 final. The proposed reform of the CAP for the period 2021-2027 is completed by: Proposal for a Regulation (EU) of the European Parliament and of the Council amending Regulations (EU) No 1308/2013 establishing a common organisation of the markets in agricultural products, (EU) No 1151/2012 on quality schemes for agricultural products and foodstuffs, (EU) No 251/2014 on the definition, description, presentation, labelling and the protection of geographical indications of aromatised wine products, (EU) No 228/2013 laying down specific measures for agriculture in the outermost regions of the Union and (EU) No

farming published in November of the previous year, where the Commission took stock of some of the persisting problems of EU agriculture and proposed a new model based essentially on the pursuit of simplification, increased subsidiarity and the so-called 'delivery model'.[185] In particular, the latter concept is potentially the most revolutionary since it purports to produce a shift from a 'compliance-based' approach to a 'result-based' approach. In this connection, the target is to assess the fulfilment of Member States' duties on the basis of their performances and outcomes and not simply their compliance with a pre-set of standards. The legislative proposal for the new CAP is, at the time of writing, in the course of being discussed by the EU Parliament and the Council and it is still uncertain if and how such a proposal ever goes through their formal scrutiny. However, the paradigm shift from compliance to result in the political debate may be taken as a sign of an equally changing paradigm in the international arena. In other words, a change in strategy at internal level may have repercussions on the way through which future negotiations will address sustainability in agriculture, thereby contributing to shaping the future EMA. This process might even be fostered by the recent nomination of Phil Hogan, previous Commissioner for Agriculture and Rural Development and great supporter of the post-2020 CAP reform, as Commissioner for Trade for the Commission mandate 2019-2024. At the same time, not being yet in force, the proposal of reform has not played any role in the shaping of the EMA used as a benchmark for agreements concluded before the publication of the Commission Communication on the future of food and farming. This work will thus take as a starting point the CAP as in force in the current programming period (2014-2020), which will form the object of the next paragraph; however, references to the content of the legislative proposal will also be included therein (*infra*, §2.3.3) in order to highlight a (possible) change in paradigm.

229/2013 laying down specific measures for agriculture in favour of the smaller Aegean islands, COM(2018) 394 final; and the Proposal for a Regulation (EU) of the European Parliament and of the Council on the financing, management and monitoring of the common agricultural policy, COM(2018) 393.

[185] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Future of Food and Farming, COM(2017) 713 final. On the analysis of the content of the Communication and the prospects for the 'delivery model', see Luchino Ferraris, 'La protezione dell'ambiente nella PAC che verrà' (2016) 2 Agricoltura Istituzioni Mercati 175.

§2.3. Sustainability in Practice: How Sustainable Agriculture is Pursued in the 2013 CAP Reform

§2.3.1. *The 2013 CAP Reform as a Benchmark to Assess the Sustainability of EU External Action*

The choice of taking the CAP as a benchmark must be justified. Indeed – as seen *supra*, §1.3.2. – there are several other important pieces of legislation that definitely contribute to the pursuit of sustainable agriculture. This is particularly true as regards agro-environmental regulations; legislation on water, groundwater and nitrates; nature conservation legislation; air-related directives; soil-related policies; climate action; food safety, animal welfare and organic agriculture.[186] However, since the main scope of this dissertation is the pursuit of sustainable agriculture in EU external action, it is here of limited interest to map the achievement of sustainability in each and every piece of EU legislation – such a task would probably require a separate piece of work.[187] On the contrary, the logic of this paragraph is to acquire a practical insight taking as a basis the theoretical background outlined in the previous paragraph. Not only will this show whether and to what extent the 2013 reform is in line with previous attempts to green EU agriculture; it will also make it possible to assess the positive contribution of the 2013 reform to the pursuit of sustainability as a whole. It is therefore the sole CAP that will be considered in this paragraph. Accordingly, the coherence between – on the one hand – the model and/or the standards set at internal level and – on the other hand – EU external action will be considered from this perspective exclusively in the next Parts.

§2.3.2. *Environmental Measures in the CAP 2014-2020*

In the 2013 CAP reform, the fight against climate change becomes one of the leading values, together with viable food production, sustainable management of natural resources and balanced territorial development.

[186] The matter of how legal instruments can promote sustainable agriculture was deeply studies by Glória Teixeira and Lígia Carvalho Abreu, 'Legal Perspective of Sustainable Agriculture' in Helena Pina, Felisbela Martins and Cármen Ferreira, *The Overarching Issues of the European Space: Strategies for Spatial (Re)planning based on Innovation, Sustainability and Change* (Ed. Faculdade de Letras da Universidade do Porto 2013) 118.

[187] It is worth noting that some pieces of legislation are somehow 'absorbed' in the CAP by means of cross-compliance. This is the case, *inter alia*, of the European Parliament and of the Council Directive 2009/147/EC on the conservation of wild birds (Wild Birds Directive) [2009] OJ L20; Council Directive on the conservation of natural habitats and of wild fauna and flora (Habitat Directive) [1992] OJ L206; European Parliament and Council Directive 2006/118/EC on the protection of groundwater against pollution and deterioration (Groundwater Directive) [2006] OJ L372; Council Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources (Nitrates Directive) [1991] OJ L375.

Amongst the four regulations of which the CAP is currently made up, two of them are particularly important for the purposes of this analysis:[188]

- the 'Direct Payments Regulation', which establishes common rules on payments granted directly to farmers (direct payments) and additional payments triggered in specific circumstances (eg basic payment scheme, payments for farmers in areas with natural constraints, young farmers, etc.). This regulation constitutes the finance of the CAP under Pillar I;[189]

- the 'Rural Development Regulation', which lays down general rules, objectives and measures to be adopted in order to implement rural development policy programmes financed by the European Agricultural Fund for Rural Development (EAFRD), with the contribution of Member States. Such a regulation gives substance to Pillar II.[190]

Against this background, the attempt to integrate environmental concerns in the CAP is not a novelty of the 2013 reform (see *supra*, §1.3.). Within Pillar I, there are many environmental 'dimensions'.

First of all, the trend towards the so-called 'decoupling' – ie the removal of the link between the receipt of a direct payment and the production of agricultural goods – is confirmed.[191] From an environmental point of view, decoupling is supposed to be overall beneficial as it reduces the

[188] The CAP Reform is completed by:
- European Parliament and Council Regulation (EU) 1306/2013 on the financing, management and monitoring of the common agricultural policy (Horizontal Issues Regulation) [2013] OJ L 47.
- European Parliament and Council Regulation (EU) 1308/2013 establishing a common organisation of the markets in agricultural products (Market Measures Regulation) [2013] OJ L347.
The CAP also encompasses the European Parliament and Council Regulation (EU) 1310/2013 laying down certain transitional provisions on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) [2013] OJ L347. See more on the structure of the CAP in Nicola Cantore, Jane Kennan and Sheila Page, CAP Reform and Development: Introduction, Reform Options and Suggestions for Further Research (2011) Working Paper ODI <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/7245.pdf> accessed 18 September 2019.

[189] European Parliament and Council Regulation (EU) No 1307/2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy (Direct Payments Regulation) [2013] OJ L347.

[190] European Parliament and Council Regulation (EU) No 1305/2013 on support for rural development by the European Agricultural Fund for Rural Development (Rural Development Regulation) [2013] OJ L347.

[191] Article 1 of the Direct Payments Regulation provides for a long series of decoupled payments (the basic payment scheme, the single area payment scheme, a voluntary transitional national aid for farmers, a voluntary redistributive payment, a payment for farmers observing agricultural practices beneficial for the climate and the environment, a voluntary payment for farmers in areas with natural constraints, a payment for young farmers commencing their agricultural activity, a crop-specific payment for cotton, a voluntary simplified scheme for small farmers, a framework within which Bulgaria, Croatia and Romania may complement direct payments), but also a voluntary coupled support scheme.

market price received from producers and therefore fosters less intensive production (but see *infra*, §2.3.3).[192]

Direct payments allow conditions to be attached to the receipt of subsidies. The aim of these conditions is to trigger the delivery of public goods, in order to set standards not only for the environment and the climate, but also food safety, animal health and water protection. The ensemble of these conditions is the so-called 'cross compliance', which is therefore the second important element currently used in Pillar I to green the CAP. Cross compliance is indeed made up of two branches, namely Statutory Management Requirements (SMRs) and GAEC. The former are now listed in Annex II of Regulation (EU) No 1306/2013 and consist of the grouping of provisions relevant for the above-mentioned aims and already existent in EU law; the latter relate to the protection of soil against erosion, the maintenance of soil organic matter and soil structure, and the safe-guarding of landscape features. Unlike SMRs, GAEC standards are not already existent in EU law and are specified by Member States. The fact that they only apply to farmers receiving payments means that farmers who do not receive direct payments are not obliged to comply with them. This implies that the GAEC do not form part of the environmental baseline and polluters may not be liable for the environmental costs incurred due to their breach.[193]

The third element of the greening of Pillar I is constituted by the so called 'greening measures', which are the real novelty of the 2013 reform. It is provided that Member States shall use 30 % of their annual ceiling for the implementation of three 'greening measures', namely crop diversification, permanent grassland and ecological focus areas. It is worth – at least – spending a few more words on each of them.[194]

Article 44(1) of the Direct Payments Regulation establishes that there should be at least two crops on any arable land that covers between 10 and 30 hectares – three crops if the land covers more than 30 hectares. The main crop shall not cover more than 75 % of that arable land (95 % if the land covers more than 30 hectares).

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[192] Alan Matthews, 'Greening Agricultural Payments in the EU's Common Agricultural Policy' (2013) 2(1) Bio-Based and Applied Economics 1. Some scholars have indeed underlined the negative repercussions of decoupling, particularly as regards the abandonment of marginal farming areas and biodiversity loss. On this point, see Mark Brady, Konrad Kellermann, Cristoph Sahrbacher and Ladislav Jelinek, 'Impact of Decoupled Agricultural Support on Farm Structure, Biodiversity and Landscape Mosaic: Some EU Results' (2009) 60(3) Journal of Agricultural Economics 583.

[193] Alan Matthews, 'How to Interpret Cross Compliance' (2014) Blog Post on CapReform.eu <http://capreform.eu/how-to-interpret-cross-compliance/> accessed 28 March 2019.

[194] For a detailed review of each 'greening measure', see EU Commission – Directorate General for Internal Policies, 'Environmental Public Goods in the CAP: Impact of Greening Proposals and Possible Alternatives' (2012) Note <https://www.researchgate.net/publication/270158168_Environmental_public_goods_in_the_new_CAP_Impact_of_greening_proposals_and_possible_alternatives> accessed 28 March 2019.

According to Article 45(1) of the Direct Payments Regulation, Member States are supposed to identify areas to designate as 'permanent grassland' – ie land under permanent pasture so defined by Regulation (EU) No 73/2009 in accordance with the Habitat Directive and the Directive on the conservation of wild birds. Permanent pastures may be also identified outside this ambit to the extent that the protection of environmentally valuable permanent grassland is ensured. Farmers shall not convert or plough such areas and Member States shall make sure that the ratio of areas of permanent grassland to the total agricultural areas does not decrease by more than 5 % compared to the 2015 baseline.

Article 46(1) of the Direct Payments Regulation provides that 'where the arable land of a holding covers more than 15 hectares, the farmer shall ensure that, from 1 January 2015, an area corresponding to at least 5 % of the arable land […] is ecological focus area'. The subsequent paragraph lists the categories of eligible land, including – *inter alia* – land lying fallow, terraces, ecological set-aside, production on arable land with no use of fertiliser, buffer strips including those covered by permanent grassland, keeping arable peaty or wet soils under grass, areas with catch crops and areas with nitrogen fixing crops, as well as other agroforestry practices.

In its Impact Assessment, the Commission underlined the scientifically-proven positive effects of these three measures on soil organic matter and structure, reduction of soil erosion and nutrient leaching, nutrients management and input reduction, pest and weed control, water quality and quantity, climate change mitigation and adaptation, and improved habitats and landscape diversity.[195] Alternatively, Pillar I allows farmers to undertake some 'equivalent practices', namely similar measures that yield an equivalent or higher level of benefit for the climate and the environment compared to the three regular 'greening measures'. Such practices may be either 'Agro-Environmental Measures' under Pillar II (in this case they would be of course, only funded within Pillar I) or national or regional environmental certification schemes. However, available data

[195] COM SWP, Impact Assessment - Common Agricultural Policy towards 2020, Accompanying the document 'Proposals for a Regulation of The European Parliament and of The Council:
- establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy;
- establishing a common organisation of the markets in agricultural products (Single CMO Regulation);
- on support for rural development by the European Agricultural Fund for Rural Development (EAFRD);
- on the financing, management and monitoring of the common agricultural policy; and the 'Proposal for a Council Regulation determining measures on fixing certain aids and refunds related to the common organisation of the markets in agricultural products {COM (2011) 625; COM (2011) 626; COM (2011) 627; COM (2011) 628; COM (2011) 629; SEC (2011) 1154 final.

shows very little success of such measures – mainly due to the additional costs that farmers should bear in order to set them up – as acknowledged by the Commission itself.[196]

On the other hand, there are Pillar II payments, which are related to additional funding granted for more targeted, project-based measures developed and implemented at farm level.[197] Such measures are adopted as a result of Member States, or their regions' Rural Development Programmes dealing with organic farming, agroforestry, genetic resources, agri-environment climate and so forth. Notwithstanding their voluntary nature, their importance is not to be set aside since they concern about 20.9 % of EU agricultural land.[198] However, it is fairly evident how Pillar I remains predominant if one looks at the overall money flow. Of the sum of 362.787 billion euros made available under the EU Multiannual Financial Framework for the period 2014–2020, 277.85 billion euros are for Pillar I and 84.94 billion euros are for Pillar II.

§2.3.3. *Assessment of the Environmental Sustainability of the CAP 2014-2020. Prospects of reform of the CAP post-2020*

The first and most straightforward observation which shall be raised as regards the 'greening' of the CAP is that environmental delivery of the measures taken appears to be very low.[199] On this point, it is sufficient to remark that the EU Court of Auditors in its *ex post* review has been very negative on the environmental performances of the CAP for the current programming period.[200] An in-depth investigation on the causes of such shortcomings – other than having already been extensively explored by the legal doctrine – does not represent the main purpose of this work.[201] However, it may be interesting to point out only those of them which contribute to shape the model of agriculture concretely pursued by the EU.

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[196] Such a conclusion was drawn in the Commission Staff Working Document on the Review of the Greening after One Year, COM SWG (2016) 218 final, 10.

[197] For an assessment of sustainability in Pillar II, cf Janet Dwyer, 'Transformation for Sustainable Agriculture: what Role for the Second Pillar of CAP?' (2013) 2(1) Bio-based and Applied Economics 29.

[198] EU Commission – Directorate General for Agriculture and Rural Development, 'Rural Development in the European Union – Statistical and Economic Information' (2011) 27 <https://ec.europa.eu/agriculture/sites/agriculture/files/statistics/rural-development/2011/full-text_en.pdf> accessed 28 March 2019.

[199] ibid.

[200] EU Court of Auditors, 'Greening: a more Complex Income Support Scheme, not yet Environmentally Effective' (2017) Special Report No 21/2017 of 12 December 2017 <https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=44179> accessed 28 March 2019.

[201] See a thorough analysis in Giuliana Strambi, 'Condizionalità e greening nella PAC: è abbastanza per il clima?' (2016) 2 Agricoltura Istituzioni Mercati 64.

First of all, there is a methodological mistake in the *modus operandi* of the EU. In fact, the 'greening measures' are supposed to be generically beneficial for the environment by the scientific community, but the EU did not take account of what their actual impact would be when applied at farm-level. This was pointed out by the Court of Auditors even before the very beginning of the current programming period.[202]

Second, the choice to focus most of the resources on greening the CAP on Pillar I instead of Pillar II shall be criticised, as pointed out by many scholars.[203] It would appear that the EU was particularly attracted by the 'compulsory' nature of 'greening measures' (ie if a farmer receives the payment, he is forced to implement the 'greening measures' or the 'equivalent practices') and by the increased visibility of this novelty amongst public opinion. However, the main problem of investing in Pillar I to contribute to environmental protection concerns the decoupled nature of income support. In fact, as it is impossible to foster any kind of production pattern, it is also impossible to encourage any specific cropping pattern which can mitigate GHG emissions.[204] Moreover, such a 'one-size-fits-all approach' – according to which farmers of every EU country shall implement the same measures in spite of huge differences in agricultural conditions – largely disregards the specific features present at local level.[205] Such observations lead to concluding that in the current version of the CAP there is weak promotion of good environmental management. In fact, 'greening measures' are 'prescriptive measures' in nature which farmers can comply with at minimum cost, whereas there is no real resort – at least in Pillar I – to selected practices and techniques.[206] The 'greening measures' are indeed provided for only in general terms, without setting targets or guidelines to follow. Moreover,

[202] This is what the Court of Auditors highlighted: 'Scientific evidence exists which justify […] the effectiveness and necessity of measures such as crop diversification and ecological focus areas (for biodiversity, the quality of water, for soil etc.). However, the regulation does not specify the concrete objectives, which should be achieved by the farming community'. This observation seems to endorse the view expressed in this work concerning the problematic character of the absence, in Article 11 TFEU, of every sort of benchmark that can work as a numerical target to achieve in order to assess the environmental delivery of a certain policy (cf *supra*, §1.3.2.). cf EU Court of Auditors, 'Is Agri-Environment Support Well Designed and Managed?' (2011) Special Report No 7/2011 of 19 September 2011 <https://www.eca.europa.eu/en/Pages/NewsItem.aspx?nid=1228> accessed 29 March 2019.

[203] The debate is long-lasting. Amongst the several contributions against this choice, cf Alan Matthews, 'Greening Agricultural Payments in the EU's Common Agricultural Policy' (2013) 2(1) Bio-Based and Applied Economics 1; see also the extensive analysis on advantages and disadvantages of investing in Pillar I and/or Pillar II to green EU agriculture, though drawing the same conclusion, in Michael N Cardwell, 'European Union Common Agricultural Policy and Practice: the New Challenge of Climate Change' (2011) 13 Environmental Law Review 271.

[204] Michael N Cardwell, 'European Union Common Agricultural Policy and Practice: The New Challenge of Climate Change' (2011) 13 Environmental Law Review 271, 282.

[205] As will be seen *infra*, an agricultural model based on the 'one-size-fits-all' approach is more likely to pose problems of legal transplant in other jurisdiction in case the EU wishes to promote its standards through its FTAs, as much more effort will be required by the third country in question to adapt such standards to its local features (see Parts B and C).

[206] EU Commission – Directorate General Internal Policies, 'Environmental Public Goods in the CAP: Impact of Greening Proposals and Possible Alternatives' (2012) Note 48 <https://www.researchgate.net/publication/270158168_Environmental_public_goods_in_the_new_CAP_Impact_of_greening_proposals_and_possible_alternatives> accessed 28 March 2019.

some measures have proved to deliver an insignificant degree of environmental benefit, though implying high administrative and bureaucratic costs.[207] This means that as regards Pillar I there is no coherent model followed by the EU in application of the specific set of practices of sustainable agriculture as outlined by the scientific literature, if not only superficially. It is therefore possible to conclude that – although Pillar II suffers from the drawback of being dependent on Member States contributions and efforts – a greater economic focus on the latter would have probably been more promising in terms of sustainability requirements. As seen earlier (*supra*, §2.1.), sustainable agricultural practices imply a holistic approach and their management at farm level in order to be effective. This only seems compatible with the project-based nature of measures under Pillar II. The excessive role played by Pillar I is particularly striking if one thinks that this choice had been authoritatively discouraged prior to the submission of the CAP proposal.[208] It is thus evident how the final outcome of the 2013 reform – and, to a certain extent, of every reform – is determined by a delicate compromise between conflicting political interests, institutional arrangements and policy needs.

As regards political interests, the general aversion of farmers vis-à-vis environmental measures is long-lasting, as the latter are often believed to result in an increase in costs. However, the resources made available for direct payments also depend on the lobbying put in place by large-scale farmers, which are known to be their main beneficiaries.[209] This creates a somehow perverse effect, as a consistent bulk of EU farming is traditionally small-scale based (see *supra*, §2.1.). Though, the dichotomy between many small-scale farmers with low share of agricultural output and few large-scale farmers with a large share is engrained in EU agriculture.[210]

Institutional processes did play an important role, particularly since evidence shows how the Commission proposal for the 2013 CAP reform was watered down by the Parliament, particularly

[207] This is clearly the case of crop diversification. Indeed, the Commission itself revealed it only applies to 1.4 % of EU farms. The Commission came to this figure on the basis of Farm Accountancy Data Network data, although at national level some other studies arrive at different conclusions using a restrictive definition of 'diversification': cf Alan Matthews, 'Greening the Common Agricultural Policy Post-2013' (2012) 47 Intereconomics 326.
[208] Amongst the others, this is the case of the recommendations made by the OECD. See Alan Matthews, 'Greening Agricultural Payments in the EU's Common Agricultural Policy' (2013) 2(1) Bio-Based and Applied Economics 1, 17.
[209] David Harvey, 'What Does the History of the Common Agricultural Policy Tell Us?' in Joseph A McMahon and Michael N Cardwell (eds) *Research Handbook on EU Agricultural Law* (Edward Elgar Publishing 2015) 3.
[210] Stefan Tangermann and Stephan von Cramon-Taubadel, 'Agricultural Policy in the European Union: An Overview' (2013) Department für Agrarökonomie und Rurale Entwicklung Universität Göttingen Research Paper 6 <https://www.uni-goettingen.de/de/document/download/468756dd26772ba40606fb7034c7995d.pdf/Diskussionsbeitrag-1302.pdf> accessed 29 March 2019.

through – amongst other things – the ruling out of the Water Framework Directive and the Sustainable Use of Pesticide Directive from cross compliance.[211]

Thirdly, it was rightly argued that major reforms of the CAP mostly occur on the occasion of powerful external shocks.[212] In this case, one major factor for the choice of decoupling direct payments was plausibly the need to comply with WTO law, namely to make income support under the CAP fall within the 'Green Box' established by the WTO Agreement on Agriculture (AoA).[213] In particular, in order to be compatible with the 'Green Box', paragraph 6 of Annex II of the AoA makes clear that 'no production shall be required in order to receive such payments'. It is therefore clear that international trade law still exerts an influence on the design of the CAP, including any resulting negative environmental spill-overs.[214] This remark is particularly important as WTO also entails substantial limits on the EU in its external action, so that it is possible to speak about a two-fold impact of WTO law on EU agricultural sustainability.

In conclusion, it would appear that – beyond any criticism vis-à-vis the effectiveness of the 'greening' in the CAP – it is almost impossible to detect and unravel a consistent model of sustainability in agriculture pursued by the EU which goes beyond political slogans. There are efforts – in some cases remarkable – to progressively integrate environmental considerations in the CAP, but outcomes and methods are erratic. The conflict between different political forces ends up determining contradictory targets which explains why in the 2013 reform, alongside with beneficial measures, there are other provisions with negative or unpredictable effects on the environment.[215]

Against this background, the legislative proposal for a CAP post-2020 wishes to address some of the most problematic features of the current regime and to enhance environmental considerations in

[211] Every component of such a watering down was brilliantly isolated by Alan Matthews, 'Greening Agricultural Payments in the EU's Common Agricultural Policy' (2013) 2(1) Bio-Based and Applied Economics 1, 20.
[212] Stefan Tangermann and Stephan von Cramon-Taubadel, 'Agricultural Policy in the European Union: An Overview' (2013) Department für Agrarökonomie und Rurale Entwicklung Universität Göttingen Research Paper, 6 <https://www.uni-goettingen.de/de/document/download/468756dd26772ba40606fb7034c7995d.pdf/Diskussionsbeitrag-1302.pdf> accessed 29 March 2019.
[213] Agreement on Agriculture (Marrakesh, Morocco, 15 April 1994), Marrakesh Agreement Establishing the World Trade Organization, Annex 2 (Domestic Support – The Basis for Exemption from The Reduction Commitments), para 6.
[214] Michael N Cardwell, 'The Direct Payments Regime: Delivering 'a Fair Standard of Living for the Agricultural Community'' in Joseph A McMahon and Michael N Cardwell (eds) *Research Handbook on EU Agricultural Law* (Edward Elgar Publishing 2015) 41, 52.
[215] David Blandford and Katharine Hassapoyannes, 'The Common Agricultural Policy in 2020: Responding to Climate Change' in Joseph A McMahon and Michael N Cardwell (eds) *Research Handbook on EU Agricultural Law* (Edward Elgar Publishing 2015) 187, 200.

EU agriculture.[216] Beside the long-lasting call to increase simplification, two intertwined concepts are inspiring the reform, ie subsidiarity and the 'delivery model'. While the former concept is already rooted in the EU legal lexicon, the latter notion is (relatively) new and deserves some clarifications. According to this concept, the new CAP will have to be result-oriented and more efficient, focusing more on the targets to achieve than on the compliance with certain eligibility rules. As a result, the Union will have to set objectives, while Member States will choose the means with which to achieve these aims. Taking into account the respective national and regional differences, Member States will thus have to design and implement a 'cocktail' of measures – compulsory and voluntary, within both the first and second pillars – in order to achieve both the general and specific aims of the CAP. The 'delivery model' is therefore functional in the pursuit of subsidiarity. In fact, by putting the emphasis on performances, Member States become more actively involved and, to a certain extent, have more discretion in establishing the means and resources to achieve their targets. In practice, this entails important novelties in the design of the legislation: for instance, there will be one single piece of legislation for direct payments and rural development (proposed 'CAP Plan Regulation') and not two separate Regulations anymore; the structure of rural development based on 'priorities - focus areas - measures' will replaced by the structure 'general objectives - specific objectives - types of interventions', passing from twenty 'measures' to eight 'types of intervention' that are more targeted on environmental, climate and management commitments, investments, installation of young farmers and rural business start-ups, payments for natural or other area-specific constraints, risk management tools, cooperation and knowledge exchange and information.[217] In addition, the three greening measures described above are re-incorporated within the 'conditionality' (former cross-compliance) and all of the exemptions to limit their scope of application (such as organic farms, farms below a certain size or below a certain arable area) have been eliminated. The green architecture of the CAP is completed by a voluntary Eco-scheme financed under Pillar I, the content of which will be however detailed by Member States in their strategic Plans;[218] and by a Performance Bonus, that would be attributed to Member States in the year 2026 to reward satisfactory performance in relation to the environmental and climate targets.[219] While this environmental architecture does not seem to be less ambitious than the one currently in place, only time will tell the tangible delivery, depending on its concrete implementation by Member States.

[216] For an analysis of the new legislative proposal and in particular its repercussions on shared management, see Luchino Ferraris, 'The 2021-2027 EU Rural Development Policy: a New Paradigm of Shared Management?' (2019) 44(6) European Law Review 855.
[217] Respectively, Proposal for a CAP Plan Regulation, Article 5; Article 6; and Articles 64 to 72.
[218] Proposal for a CAP Plan Regulation, Article 28.
[219] ibid Article 123.

In sum, the focuses on the theoretical as well as the practical framework of sustainability in agriculture in the EU reveal a high level of uncertainty as to the outline of a European model of agricultural sustainability to be proposed and – in case – 'exported' in the EU external relations. This is even more so with regard to the CAP post-2020 which is neither adopted nor implemented. However, at least an argument can be made that in the light of the legislative proposal there is a chance that the EMA can change significantly, with remarkable impacts on future negotiations of FTAs. In fact, the emphasis on results as regards environmental delivery in the CAP may push negotiators to follow the same logic in trade negotiations. This shift would be particularly beneficial for some group of provisions that, as will be seen, directly purport to green the FTAs without however being stringent enough, such as the TSD chapters (see *infra*, §4.1). For this to happen, it would certainly be required that the PEI in EU external action becomes more an obligation of results rather than one of means. On this point, a clue is given by Recital 16 of the legislative proposal for a CAP Plan Regulation, which states that '[b]y virtue of the delivery model, action taken to tackle environmental degradation and climate change should be result-driven and Article 11 TFEU should, for this purpose, be considered as an obligation of result'.

Part A: Summary of Findings

The analysis carried out hitherto enables us to draw some conclusions:

- Although there is no complete agreement in science on what sustainable agriculture implies in practice, what all proposed definitions have in common is the idea of developing agricultural practices which protect the environment while preserving the economic profitability of farmers. Therefore, it can be said that sustainable agriculture is an expression of sustainable development applied to agricultural matters;

- Albeit the normative and philosophical foundations of sustainable development are questionable, it would appear that this path constitutes the only possible option to 'green' the agricultural sector on a global scale and in accordance with market economy. However, given the intrinsic ambiguity of both sustainable development and sustainable agriculture, further specification is required from the law in order to ensure meaningful legal significance. The analysis showed that sustainable development as such should be regarded more as a 'meta-principle' than a ready-to-use normative principle of law. Unsurprisingly, even the concept of sustainable agriculture consists more of an 'umbrella concept' than a normative, ready-to-use manual to comply with. Although some practices are universally recognised as ascribable to this concept, their implementation is not sufficient without adequate management and stewardship at local level;

- Sustainable development is explicitly included in the EU legal order through its reference in several Treaty provisions – particularly Article 3(5) TEU – as well as in secondary legislation. Particularly relevant here is the duty of the EU to pursue sustainable development even in its external action, enshrined in Articles 21(2) and 21(3) TEU. However, there is neither an official definition, nor a clear operationalisation of such a concept in EU law. Such a shortcoming hampers the establishment of a benchmark at constitutional level to assess and review the respect of this 'meta-principle' in secondary legislation;

- In the specific case of the agricultural sector, there is no reference at all to sustainable development amongst the objectives of the CAP laid down by Article 39 TFEU. Although it is difficult to imagine that the simple mention of the principle would significantly impact upon the wide discretion enjoyed by EU institutions while legislating on agricultural matters, its formal recognition in the Title on Agriculture would constitute a strong political message;

- The foregoing does not imply, however, that EU Treaty law is incompatible with the pursuit of sustainability in agriculture. This should be on the contrary ensured thanks to the PEI (Article 11 TFEU), which evokes sustainable development while putting a special emphasis on environmental protection and which also applies to EU external action. However, the analysis showed that Article 11 TFEU only gives rise to an obligation of means, unable to set numerical achievement targets in terms of environmental protection. Thus, no penetrating threshold is established vis-à-vis the desired degree of 'greening' of the agricultural sector, as can be seen from the absence of any judicial review of agricultural legislation on these grounds. As a result, the PEI exerts more a political importance rather than a thorough legal significance;

- The broad terms set by EU constitutional law as regards the pursuit of (agricultural) sustainability do not appear to compel the EU to adhere to the establishment of a strict baseline. On the contrary, the extent to which EU action can be judged depends on what targets the EU institutions have 'voluntarily' committed to pursue in this regard. The assessment of such commitments implies the identification and evaluation of the 'model' chosen by the EU to 'green' its agriculture – if the proper *choice* of a model can be deemed to be possible at all;

- The EU legislator has been progressively considering environmental protection in the design of its agricultural policy, particularly since the adoption of Agenda 2000. Moving from the concept of multi-functionality, the policy framework developed by the EU in the last 20 years has been explicitly inspired by the will to pursue long-term food security, production of quality food and sustainable agriculture. However, such targets are not fleshed out in detail and they remain more similar to political slogans. Moreover, the system contains at most mechanisms – the agro-environmental indicators – to monitor the degree of implementation of the measures taken. On the contrary, there are no instruments to review the adequacy of such measures to attain the (however) generic aims of the EU legislator. The absence of any scientific study illustrating the expected environmental outcomes of the new rules of the 2013 CAP reform shows the lack of a thorough strategy by the EU in this respect;

- In the 2013 reform, the 'greening measures' introduced within Pillar I are generically ascribable to sustainable agricultural practices. Therefore – though only in abstract terms – their positive effect on the environment is demonstrated in natural sciences. However, little attention was paid to good environmental management at farm level, so that such measures end up providing very low levels of environmental delivery with huge administrative and bureaucratic costs;

- The overall model of EU agriculture vis-à-vis agricultural sustainability appears to be deeply biased by conflicting interests and divergent political forces. In particular, one of the most criticised big political choices – the use of Pillar I as the main tool to 'green' the CAP – appears to have been influenced, on the one hand, by the lobbying of the farming sector and, on the other hand, by the need to comply with the WTO system;

- In spite of the difficulties in depicting a detailed, coherent EU model of agricultural sustainability, the fact remains that *de facto* the whole efforts put in place by the EU in this regard end up *giving substance* to a model. This is true as far as many environmental standards have been actually introduced in EU agriculture. Notwithstanding the criticisms, such standards seem to make EU agriculture more sustainable than that of several countries parties to the EU FTAs.

The challenge of the up-coming Parts of this work will thus be to see whether and to what extent bilateral agreements concluded by the EU in the agri-food sector are structured in such a way as to bind the contracting parties to at least reaching the same level of agricultural sustainability as that put in place by the EU – and possibly to overcome it.

PART B

EU FREE TRADE AGREEMENTS AND THE CHALLENGES FOR AGRICULTURAL SUSTAINABILITY

SECTION III

EU FREE TRADE AGREEMENTS IN AGRICULTURAL COMMODITIES IN THE CONTEXT OF THE EU COMMON COMMERCIAL POLICY

The extent to which the EMA can be 'exported' in the legal system of the EU's commercial counterparts requires previous identification of the rules to which FTAs are subject. These rules are not only legal, but also economic and political and thus their consideration necessarily entails the adoption of an interdisciplinary approach. This is particularly true for the agricultural sector, which must be looked at in its specificities. This challenge will be at the core of the first paragraph of this section, focusing on the politics and economics of FTAs, their relationship with WTO law and the impact of trade liberalisation in the agricultural sector.

Subsequently, due attention will be paid to the regulatory framework of the EU Common Commercial Policy (CCP). Finally, the matter of whether EU law somehow 'binds' the EU to export its standards on sustainable development in its commercial relations will be explored.

§3.1. The Notion of Free Trade Agreements: Political, Economic and Legal Challenges. Trade Liberalisation in the Agricultural Sector

§3.1.1. *FTAs in their Political and Political Economic Dimension*

Research into a technical definition of FTAs would largely be wasteful since – put simply – FTAs are international agreements aiming at enhancing free trade.

Therefore, there are mainly two elements to be highlighted. First, from an international legal perspective, such agreements are subject to the rules of the Vienna Convention on the Law of the Treaties, particularly Articles 31 and 32 on interpretation.[220] Second, free trade requires a holistic approach to be understood in its economic rationale, as well as in its philosophical and political meaning. Against this background, FTAs are compatible with a great deal of patterns and are recognised as being practically universal, economically significant and no longer geographically regional.[221] It is also for this reason that in this work the broad denomination 'FTAs' will be preferred over those of 'Regional Trade Agreements' and 'Preferential Trade Agreements' that are misleading as they put the emphasis on a specific (and/or non-essential) aspect.[222]

In terms of political economy, there are several reasons that have been thoroughly identified by the scholarship as to why such agreements are concluded. They can be summarised as follows:[223]

- The so-called 'marginalisation syndrome'. From a constructivist point of view,[224] this means that states will enter into FTAs because they fear being marginalized from the most powerful international economic and political developments;

[220] Locknie Hsu, 'Applicability of WTO Law in Regional Trade Agreements: Identifying the Links' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press 2006) 526. The author also makes reference to case-law confirming the applicability of the Vienna Convention in WTO law.
[221] Lorand Bartels and Federico Ortino, 'Introduction' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press 2006) 1.
[222] Indeed, even the definition of 'FTAs' may be treacherous. It is correct in the sense that they cannot be understood outside the context of free trade, not in the sense that – as will be seen – they necessarily bring more free trade than the multilateral arena. See the reconstruction of pros and cons of every terminological choice in Mariagrazia Alabrese, 'Gli accordi commerciali "mega-regionali" e l'elaborazione del diritto agroalimentare' (2017) 1 Rivista di Diritto Agrario 136, 137.
[223] Chad Damro, 'The Political Economy of Regional Trade Agreements' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press 2006) 23, 30 *et seq*.
[224] In international relations, constructivism is the view that the most remarkable aspects of relations between international actors are historically and socially constructed, rather than being essential characteristics of world politics. cf Maya Zehfuss, *Constructivism in International Relations: The Politics of Reality* (Cambridge University Press 2008).

- Security via economic means. The enhanced economic cooperation is deemed to be an investment to boost confidence in the international arena;

- The need for certain states to address security threats (not necessarily military ones, but also environmental and humanitarian ones) that would otherwise backfire on them in the short or long run;

- The 'negotiating leverage'. Very often, states enter into FTAs because they are persuaded that this will increase their bargaining power, particularly by fostering alliance with another international actor;

- When governments are willing to trigger a neoliberal turn at domestic level, the conclusion of FTAs may make it more difficult for future governments to reverse the political and economic agenda;

- The pressure of domestic public opinion, particularly through the promotion of certain key electoral constituents;

- The lack of time, knowledge and economic resources may induce some states to prefer FTAs to the multilateral arena, as they are easier to negotiate and conclude.

As regards the specific case of the EU (as will be better seen *infra*, §3.2) it may be pointed out that – officially – the main determinants seem to have to do with the more general targets to ensure economic growth, consumer benefits and employment.[225] However, an analysis of the determinants of FTAs cannot disregard purely political considerations. Political scientists have highlighted a key component to facilitate the conclusion of FTAs is the pressure exerted by the industry's special interests that translates into lobbying operations (it therefore goes beyond the mere will of the governments to please a part of its electorate).[226] Such a doctrine explains the conclusion of FTAs as being exclusively due to political reasons, setting aside any other economic – as well as political economic – consideration. In two cases only, according to this theory, a government may end up concluding such an agreement: first, when the FTA would generate substantial welfare gains for the

[225] James Thuo Gathii, 'The Neoliberal Turn in Regional Trade Agreements' (2011) 86 Washington Law Review 421, 434.

[226] Andrey Stoyanov, 'Trade Policy of a Free Trade Agreement in the Presence of Foreign Lobbying' (2009) Journal of International Economics 37; Zhen Hua Gu and Yao Shen, 'Political and Economic Determinants of Free Trade Agreements: In the Presence of Foreign Lobbying (2014) 7(2) Journal of Chinese Economic and Foreign Trade Studies 110; Gene M Grossman and Elhanan Helpman, 'The Politics of Free Trade Agreements' (1993) Working Paper No 4597, National Bureau of Economic Research, 42 <https://econpapers.repec.org/article/aeaaecrev/v_3a85_3ay_3a1995_3ai_3a4_3ap_3a667-90.htm> accessed 3 April 2019; for the view that a lobby-supported FTA is more sustainable than a lobby-opposed FTA, see Larry D Qiu, 'Lobbying, Multisector Trade, and Sustainability of Free-Trade Agreements' (2004) 37(4) Canadian Journal of Economics 1061.

average voter, while at the same time adversely affected lobbies fail to block the accord; second, when the agreement would benefit potential exporters and such profits exceed by far the losses that would be borne by import-competing industries and harm the welfare of the average voter.[227]

In any event – irrespective of whether the process is entirely or only partly politically driven – these observations lead to the key point of who benefits from these agreements.[228] In other words, are they welfare-improving or concluded for the sake of specific political and economic interests? Assuming that there is a relationship between trade and welfare,[229] the problem is thus interlinked with the matter of whether FTAs are drivers for trade creation or trade distortion. In principle, if FTAs foster the creation of trade, then wider beneficial effects (at least from the perspective of the free trade theory) may be expected for the society as a whole, whereas trade distortion would mainly play into the hands of specific interest groups. In favour of the latter hypothesis, it was argued that 'a country that eliminates a tariff for imports from a producer of a given good, but maintains under the tariff the imports from a lower-cost producer, may end up substituting the latter from the former supplier, thus reducing productivity and welfare'.[230] However, the *ex ante* and the *ex post* econometric analyses lead to less one-sided results. Some studies based on these methods have revealed that the proliferation of FTAs does not appear to have diverted trade.[231] Equally, it has been shown that stock markets of poorer country parties to the agreements react positively to the conclusion of the agreement itself, especially if the commercial partner has more exports, which would stimulate the poorer country's potential in the international arena.[232] Indeed, most of the time FTAs do not lay down a 'black-or-white' situation regarding the dichotomy welfare-improvement vs benefit of interest groups, in the sense that the two things are often co-existent, though to

[227] ibid.

[228] The idea of the predominance of politics in the development of FTAs seems to be implicitly questioned in Viet D Do and William Watson, 'Economic Analysis of Regional Trade Agreements' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press 2006) 7, 22 when the authors provocatively ask: '[…] if member-nations could summon the will to restrict [Regional Trade Agreements] in any meaningful way, would they not also have the political will to provide the multilateral liberalization that would make such action unnecessary?'.

[229] This relationship is considered as existent, on certain conditions, by the FAO, *Trade Reforms and Food Security: Conceptualising the Linkages* (FAO Publishing 2003). On the overall welfare implications of trade liberalisation (particularly in connection with the labour market), see Kyu Yub Lee, 'International Trade, Welfare, and International Labor Market Spillovers' (2015) Job Market Paper <https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=MWITFall2014&paper_id=31> accessed 3 April 2019.

[230] Alberto Trejos, 'Bilateral and Regional Free Trade Agreements, and their Relationship with the WTO and the Doha Development Agenda' (2005) 5(4) Global Economy Journal 1.

[231] Detailed references on the technical functioning of these models is provided in Viet D Do and William Watson, 'Economic Analysis of Regional Trade Agreements' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press 2006) 7, 13 *et seq*.

[232] Christoph Moser and Andrew K Rose, 'Who Benefits from Regional Trade Agreements? The View from The Stock Market' (2011) Working Paper 17415 National Bureau of Economic Research, 7 <http://www.nber.org/papers/w17415> accessed 3 April 2019.

different extents. A study expresses this relation by suggesting that 'the FTA will be endorsed if and only if the aggregate welfare under FTA, combining lobby contributions with social welfare of both pair nations, is higher than the counterpart without FTA'.[233] This means that the conclusion of an FTA follows an overall cost/benefit logic in its promoters. However, it would appear difficult to aggregate two parameters which are by nature conflicting. Thus, in the writer's opinion, the most persuasive view is that – on the one hand – FTAs may be trade-creating or trade-distorting depending on the specific circumstances, to be assessed on a case-by-case basis; however – on the other hand – FTAs are trade-diverting when their conclusion is inspired more by special interest groups than by the wish to enhance welfare. In fact, if the latter circumstance does not occur, domestic firms will not have anything to gain.

As a result, FTAs face a paradox, as they seem to be politically acceptable only when they are socially harmful.[234] Thus, regional trade has an overall effect of distorting and therefore limiting free trade at global level, to an extent which will depend on the level of narrowness of such a sub-system. This conclusion needs to be carefully taken into account while assessing the effects of trade liberalisation on agricultural markets (*infra,* §3.1.3.).

§3.1.2. *FTAs in their Relationship with WTO Law. The Regulation of Sustainable Agriculture in International Trade Law*

FTAs are also subject to legal rules. From a legal perspective, other than the above-mentioned Vienna Convention on the Law of the Treaties, FTAs cannot be considered in isolation from the broader context of international trade law – particularly WTO law.

Since trade liberalisation and the provision of market access are seen by the scholars as the two main purposes of WTO law,[235] it is clear that the possibility to opt out of the multilateral 'playground' shall be regimented, so as to avoid – or to confine – the harmful effects on free trade highlighted above.

In fact, although in principle FTAs are only a sub-set of WTO law, in practice they extensively derogate from it.[236] The reason resides in the key legal feature of FTAs, ie the move-away from the

[233] Zhen Hua Gu and Yao Shen, 'Political and Economic Determinants of Free Trade Agreements: In the Presence of Foreign Lobbying (2014) 7(2) Journal of Chinese Economic and Foreign Trade Studies 110, 122.
[234] Caroline Freund and Emanuel Ornelas, 'Regional Trade Agreements' (2009) CEP Discussion Paper No 961 <http://eprints.lse.ac.uk/28697/1/dp0961.pdf> accessed 3 April 2019.
[235] Silke Trommer, 'The WTO in an Era of Preferential Trade Agreements: Thick and Thin Institutions in Global Trade Governance' (2017) 16(3) World Trade Review 501, 507.
[236] ibid.

so-called 'Most Favoured Nation' (MFN) clause, which has always been the cornerstone of WTO law.[237] It is clear that the elimination of tariff and non-tariff barriers between certain countries only is not compatible with the MFN clause.[238]

The dispute on the complex relationship between multilateral and regional trade – as well as the reasons for the progressive shift from the former to the latter – are long-lasting in legal scholarship.[239] Thus, the two more specific, crucial questions that this sub-paragraph aims at giving an answer to are:

- May FTAs – theoretically – go further than WTO law in terms of environmental and agricultural sustainability?

- If the answer to the above is positive, then what is the 'sustainability baseline' of WTO law that FTAs are supposed to push further – if such a baseline can be deemed to exist at all?

In order to reply to the first question, one must look at the legal bases. The main legal basis relies in Article XXIV(5) of the General Agreement on Tariffs and Trade (GATT),[240] which provides that 'this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area'. The Article also lays down several conditions, differentiated for customs unions and free-trade areas. As to the former, it is relevant that 'the duties and other regulations of commerce imposed […] shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce […] prior to the formation of such union'; equally important is that the FTA should concern 'substantially all trade'.[241] In a few words, the GATT seems to be worried that preferences translate into the erection

[237] By virtue of the MFN, the country which is the recipient of this treatment must nominally receive equal trade advantages as the 'most favoured nation' by the country granting such treatment. cf Yong Shik Lee, 'Regional Trade Agreements in the WTO System: Potential Issues and Solutions' (2015) 8 Journal of East Asia & International Law 353.
[238] The contrast between FTAs and the MFN clause is brilliantly exemplified by Lee: '[S]uppose country A and country C are both subject to a tariff rate of 7 percent ad valorem on the export of its automobiles to country B under the MFN requirement. Suppose also that country B and country C form a [Regional Trade Agreement] liberalizing trade between them, but country A does not participate in the [Regional Trade Agreement]. After the formation of the [Regional Trade Agreement], which eliminates the 7 percent tariff on the export of automobiles between countries B and C, the automobile exporters of country A will be disadvantaged in its automobile exports to country B; its exports of automobiles are still subject to the 7 percent tariff rate while no tariffs are applied to the automobiles from country C as a result of the [Regional Trade Agreement]'. See Yong Shik Lee, 'Regional Trade Agreements in the WTO System: Potential Issues and Solutions' (2015) 8 Journal of East Asia & International Law 353, 358.
[239] *Inter alia*, cf Petros C Mavroidis, 'Always Look on the Bright Side of Non-Delivery: WTO and Preferential Trade Agreements, Yesterday and Today' (2011) 10(3) World Trade Review 375.
[240] General Agreement on Tariffs and Trade (Geneva, 30 October 1947) 55 U.N.T.S. 187, provisionally entered into force on 1 January 1948, superseded by Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (Marrakesh, Morocco, 15 April 1994), 1867 U.N.T.S. 14, 33 I.L.M. 1143, on 1 January 1995.
[241] Article GATT XXIV8.

of protectionist trade barriers for countries outside the trading bloc (typically by means of tariffs).[242] For developing countries, this worry is slightly more nuanced. As will be discussed *infra* (§6.2.1.), more openness vis-à-vis trade preferences to these countries may still be granted in some cases, although such preferences will have to be given equally to all developing countries and not only to a selected group of them. In particular, these trade preferences may be justified by virtue of the 1979 Enabling Clause,[243] under the condition that an additional waiver is granted, like the one given for the Generalised System of Preferences (GSPs).[244] A particular form of this special treatment for developing countries is the Everything but Arms (EBA) regime, where the EU establishes duty-free and quota-free for all imports to the EU from the Least Developed Countries (LDCs), except for armaments, as part of the WTO-led initiative to support such countries.[245] As made clear – *inter alia* – by the whole development of the Cotonou regime, the trend is however to progressively move away from preferential treatment in order to achieve wider compliance with global trade liberalisation, even for developing countries. Moreover, it is important to mention that special treatments are a double-edged sword for the EU, since they can foster trade with developing countries but can also trigger market shocks for some specific products. This is the case when an increase in imports of any product is causing, or risks causing, serious injury to a domestic industry. Therefore, even the remaining regimes inspired by a logic of special treatment are virtually always accompanied by 'safeguard measures' that – in accordance with GATT Article XIX(1a) – can be actioned by one of the parties in order to reset market stability for a given product.[246] On this point,

[242] For a detailed analysis of such notions, see Yong Shik Lee, 'Regional Trade Agreements in the WTO System: Potential Issues and Solutions' (2015) 8 Journal of East Asia & International Law 353, 359.

[243] The so-called 'Enabling Clause' is a Decision of 28 November 1979 (L/4903) which allows derogations to the MFN (non-discrimination) treatment in favour of developing countries. cf <https://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm> accessed 3 April 2019. After the creation of the WTO, the Enabling Clause is one of the 'other decisions of the contracting parties' within the meaning of paragraph 1(b)(iv) of Annex 1A incorporating the GATT 1994 into the WTO Agreement. For more on the Enabling Clause, see Peter van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organisation* (3rd edn, Cambridge University Press 2013) 330. Compared to GATT Article XXIV, the main differences are that the Enabling Clause does not impose reciprocity of commitments and does not compel to cover 'substantially all trade'. As a result, trade can be liberalised only partially and/or in a more targeted way. On this point, see the review of negotiations carried out before the Uruguay round, particularly in relation to the relationships with developing countries, in Mariagrazia Alabrese, *Il regime della food security nel commercio agricolo internazionale: dall'Havana Charter al processo di riforma dell'Accordo agricolo WTO* (Giappichelli 2018) 59.

[244] For details regarding this waiver, see *infra* §6.2.1. For more information on the EU GSPs, see *infra* §3.2.2.

[245] Sheila Page and Adrian Hewitt, 'The New European Trade Preferences: Does 'Everything But Arms' (EBA) Help the Poor?' (2022) 20(1) Development Policy Review 91; Gerrit Faber and Jan Orbie, 'Everything But Arms: Much More than Appears at First Sigh' (2009) 47(4) Journal of Common Market Studies 767.

[246] According to GATT Article XIX(1a), 'If as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or

the example of the application by the EU of safeguard measures in relation to the import of rice from Cambodia and Myanmar (who are beneficiary of the EBA) is particularly explanatory.[247] This is important, as it shows that special preferential treatment, other than being (perhaps) old-fashioned, is coupled with limits and conditions that circumscribe its scope of action and its potentially harmful effects for regional/world trade.

In any of the above-mentioned scenarios, none of the conditions listed in the said legal bases stop FTAs going beyond the baseline set at WTO level in terms of environmental care. On this point, it should be clarified that sustainability of agricultural production is basically unregulated at WTO level. When we refer to a so-called 'sustainability baseline' of WTO law we cannot think of a sub-set of environmental legal norms enshrined in WTO law, very simply because WTO agreements do not aim at directly improving environmental standards in international trade. On the contrary, it is correct to state that WTO law purports to liberalise trade while not disregarding environmental considerations. This is clearly suggested by the reference to sustainable development in the Preamble of the 1994 Marrakesh Agreement establishing the WTO.[248] Here, sustainable development is referred to as an 'objective' and is treated in holistic terms, clarifying that trade and environment should not be seen in isolation but rather simultaneously in the making (and interpretation) of WTO law.[249] This idea is often referred to as the principle of 'mutual supportiveness' that should inspire (among others) the relationships between trade and environment

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remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession'. On the functioning of safeguard clauses as trade remedies, see Nozomi Sagara, 'Provisions for Trade Remedy Measures (Anti-dumping, Countervailing and Safeguard Measures) in Preferential Trade Agreements' (2002) RIETI Discussion Paper Series 02-E-13, 7 <https://ideas.repec.org/p/eti/dpaper/02013.html> accessed 19 November 2019; Chad P Bown and Mark Wu, 'Safeguards and the Perils of Preferential Trade Agreements: Dominican Republic–Safeguard Measures' (2014) 13(2) World Trade Review 179.

[247] When an investigation conducted at EU level revealed that a significant increase of imports of 'Indica' rice from Cambodia and Myanmar into the European Union had caused economic damage to European producers, the EU decided to reinstate, as of 18 January 2019, the normal customs duty on this product of 175 euros per tonne in year one, progressively reducing it to 150 euros per tonne in year two, and 125 euros per tonne in year three. cf Commission Implementing Regulation (EU) No 2019/67 imposing safeguard measures with regard to imports of Indica rice originating in Cambodia and Myanmar/Burma [2019] C/2019/79, OJ L15.

[248] 1994 Marrakesh Agreement Establishing the World Trade Organization, para 1: 'Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development'.

[249] Christina Voigt, *Sustainable Development as a Principle of International Law: Resolving Conflicts between Climate Measures and WTO Law* (Martinus Nijhoff Publishers 2009) 129. See also the conceptualisation of Edith Brown Weiss, 'Environment and Trade as Partners in Sustainable Development: a Commentary' (1992) 86(4) American Journal of International Law 728, 731. The Appellate Body has elaborated on this Recital in WTO Appellate Body Report, *EC—Tariff Preferences*, WT/DS246/AB/R, adopted 20 April 2004, para 94.

in WTO law.[250] According to this principle, the trade and the environmental regime should be seen as part of a single legal system which is international (WTO) law; therefore, such regimes should not be regarded as conflictual, but mutually reinforcing towards the achievement of the common goal of sustainable development.[251] The principle is not only a political slogan serving the purpose of harmonising apparently conflicting narratives in WTO talks (which indeed have often proved to be contentious), but (should) exert(s) tangible normative effects on law making and legal interpretation.[252] This was also suggested by the EU Commission Communication 'Trade for all'.[253]

Nonetheless, it is clear that this sole recital, other than being suspiciously isolated in the WTO agreements,[254] cannot in any case be sufficient to build a 'sustainability baseline' alone. This baseline will be then *de facto* determined by the role played by one of the exceptions to the two main principles of WTO law (ie the MFN clause and the 'national treatment' rule)[255] as laid down

[250] Originally, the principle stems from Agenda 21, adopted by the 1992 UN Conference on Environment and Development, where Article 2.3(b) provides that '[t]he international economy should provide a supportive international climate for achieving environment and development goals by […] making trade and environment mutually supportive'. The idea of 'mutual supportiveness' is now rooted in international law as a general principle, not only relating to the relationship between trade and environment. For this latter relationship, the legal reference in the WTO system may be retraced in the first Recital of the 1995 Marrakesh Agreement Establishing the WTO, recognising the key objective of sustainable development, but the principle was reiterated in many other instances and particularly at paragraph 6 of the Doha Ministerial Declaration WT/MIN(01)/DEC/W/1 (14 November 2001). In international environmental law, the mutual supportiveness of trade and environment is evoked in a number of other conventions such as the 2000 Cartagena Biosafety Protocol, the 2004 Rotterdam PIC Convention and the 2006 Strategic Approach to the International Chemical Management (SAICM).

[251] Franz Xaver Perrez, 'The Mutual Supportiveness of Trade and Environment' in AA. VV., *Proceedings of the Annual Meeting (American Society of International Law)* Vol. 100 (Cambridge University Press 2006) 26. Concerning the difficulties of giving substance to the principle of mutual supportiveness for the developing countries, see Anuj J Mathew and Santiago Fernández de Córdoba, 'The Green Dilemma about Liberalization of Trade in Environmental Goods' (2009) 43(2) Journal of World Trade 379.

[252] Roberto Pavoni, 'Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the 'WTO-and-Competing-Regimes' Debate?' (2010) 21(3) European Journal of International Law 649.

[253] There the Commission states that '[o]ne of the aims of the EU is to ensure that economic growth goes hand in hand with social justice, respect for human rights, high environmental standards […]'. See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Trade for All – Towards a more responsible trade and investment policy, COM (2015) 497 final, 22.

[254] One author pointed out that the reference to sustainable development in the Preamble is not repeated in other parts of the WTO agreements. cf Christina Voigt, *Sustainable Development as a Principle of International Law: Resolving Conflicts between Climate Measures and WTO Law* (Martinus Nijhoff Publishers 2009) 128. It was also suggested that this might be due to the will of some parties to postpone discussions on the 'greening' of the multilateral trade system to a later date, in some cases in the hope to remove this point from the whole agenda. See, on this point, Wolfgang Benedek, 'Implications of the Principle of Sustainable Development, Human Rights and Good Governance for the GATT/WTO' in Wolfgang Benedek, Hubert Isak and Renate Kicker (eds) *Development and Developing International and European Law: Essays in Honour of Konrad Ginther on the Occasion of his 65th Birthday* (Peter Lang 1999) 276.

[255] For the meaning of the MFN clause, enshrined in GATT Article I, see *supra* in this sub-paragraph. The national treatment rule, enshrined in GATT Article III, essentially requires equal treatment between imported and domestic products in every respect, including taxes, charges and all manners of regulations.

in GATT Article XX and in particular: human, animal or plant life or health;[256] conservation of exhaustible natural resources;[257] and public morals (which may have a potential effect in relation to animal welfare).[258] The structure of GATT Article XX and the scope of the exceptions will be examined extensively *infra*, §3.3.2. For now, what matters is that by means of one or more of these exceptions it will be possible for WTO Members to adopt trade-restrictive measures justified by the aim of protecting the environment, provided that the measures in question do not give rise to arbitrary or unjustifiable discrimination between countries and are not more trade-restrictive than necessary.[259] In sum, there are no environmental commitments in WTO law; however, by elaborating on one of the exceptions, it will be possible for WTO Members to pursue environmental policies, while being compliant with the WTO system. When these measures are not adopted unilaterally, but agreed bilaterally in an FTA, their *unjustified* trade-restrictiveness should be checked against the rights of WTO Members that are not party to the agreement; on the contrary, as far as the relationship between the two country parties is concerned, it is certainly possible to 'advance' their environmental integration by agreeing on environmental standards that are in line with the exceptions of GATT Article XX and with the legal basis for regional cooperation of GATT Article XXIV – or in the similar clauses present in the General Agreement on Trade in Services (GATS)[260] and in the Enabling Clause. Such rules may be phrased more often as 'WTO+' (ie provisions that go beyond the regular standards enshrined in WTO agreements), but potentially also as 'WTOx' (ie provisions that relate to issues not touched upon by WTO agreements).[261]

However, WTO Members willing to draw on the exceptions have to respect a number of limits laid down in GATT Article XX. On this point, particularly relevant for the purposes of this work is the debate surrounding the Processes and Production Methods (PPMs). While the interlinkages between agricultural sustainability and PPMs in EU FTAs will be dealt with more extensively *infra* (§3.3.2.), it is worth anticipating that the inclusion of environmentally sound PPMs – simply defined as standards focused on production methods rather than on the characteristics of the products – in EU FTAs may produce the effect of raising the environmental standards within the regulatory

[256] GATT Article XX(b).
[257] GATT Article XX(g).
[258] GATT Article XX(a).
[259] This latter condition is contained in the so-called '*chapeau*' of GATT Article XX (see again *infra*, §3.3.2.). For an overview, see extensively, Elisa Baroncini, 'L'Organo di appello dell'OMC e il rapporto tra commercio e ambiente nell'interpretazione dell'articolo XX GATT' in Lucia Serena Rossi e Elisa Baroncini (eds), *Rapporti tra ordinamenti e diritti dei singoli: studi degli allievi in onore di Paolo Mengozzi* (Editoriale Scientifica 2010) 429, 452-454.
[260] General Agreement on Trade in Services (Marrakesh, Morocco, 15 April 1994), Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, The Legal Texts: the Results of The Uruguay Round Of Multilateral Trade Negotiations 284 (1999), 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994).
[261] On the notions of 'WTO+' and 'WTOx', see Henrik Horn, Petros C Mavroidis and Andre Sapir, 'Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements' (2010) 33(11) The World Economy 1565.

framework of the EU commercial counterpart. However, some measures may be presented as inspired by environmental protection-related aims, while they constitute in reality disguised Non-Tariff Barriers to trade (NTBs), therefore in breach of GATT Article XX.[262] In fact, if the effects of the measures only have an impact on the country parties to the FTA, this does not pose problems of WTO compatibility, due to the possibility to derogate WTO obligations *inter partes*.[263] The matter of whether a certain measure (established unilaterally or in an FTA) is compatible with GATT Article XX can only be assessed on a case-by-case basis. As will be seen in the case studies (*infra*, Part C), the Trade and Sustainable Development chapters of EU FTAs commonly contain provisions to reiterate that for no reason the pursuit of sustainable development may legitimise trade protectionism. In practice, for instance, a certain group of countries may trade their respective commodities under the regular WTO discipline, or it may set up a system of preferences amongst them. Such a system may include – for example – a reduction in tariffs accompanied by the duty to ensure certain additional environmental and food safety standards for the products traded amongst them. WTO law would not as such be breached, but the aim to enhance environmental standards cannot translate in an unjustified barrier to trade. It is important to point out that while PPMs were originally viewed with suspicion, they are now increasingly accepted as an instrument to promote measures to tackle transboundary environmental harm. Depending on the individual legitimacy of each PPM, this constitutes therefore potentially an asset for the chance that WTO members have to push further environmental and agricultural sustainability standards through the conclusion of FTAs.

Another question – which will be investigated in the upcoming section – is whether or not in practice FTAs *as a whole* produce the effect of enhancing environmental protection. Whatever the answer may be, however, it does not detract from the fact that – theoretically – any individual agreement may push the level of WTO sustainability standards further.

This provisional conclusion leads us to the second question: how can the 'sustainability baseline' of WTO rules (in the sense described above) be determined in order to establish whether or not FTAs promote higher standards?

[262] On this point, cf Robert E Kohn, 'Environmental Standards as Barriers to Trade' (2003) 37(3) Socio-Economic Planning Sciences 203.

[263] For an analysis concerning the matter of whether WTO obligations can be derogated *inter partes*, see Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (Cambridge University Press 2003) 52 *et seq*.

As already mentioned *supra* (§2.3.3.), the main agreement concerning agriculture concluded under the auspices of WTO is the AoA.[264] Without going in too much detail regarding the numerous provisions laid down by this agreement, it is sufficient to remember that the latter is mostly focused on purely trade-related aspects. Thus, it provides for extensive commitments on market access, export subsidies and the progressive reduction of domestic support.[265] It goes without saying that the AoA *de facto* exerts an *indirect* influence on agricultural production. For instance, there is a clear relationship between export competition and food security. It has been argued that there are some provisions that may indirectly hinder the pursuit of a sustainable agriculture, such as – to begin with – the definition itself of 'agricultural product'.[266] However, apart from some very specific aspects, the AoA is not concerned with agricultural sustainability simply because this is not the purpose of its regulation, which is vice versa that some measures adopted in any economic sector may unlawfully distort trade in agricultural products. Another important agreement in the WTO legal system that indirectly has an impact on the regulation of the agricultural sector is the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).[267] The SPS Agreement mainly focuses on some features that final products should possess, particularly as regards health and food safety. In particular, it aims at balancing 'the sometimes-conflicting interests of the protection of health against SPS risks and the liberalisation of trade in food and agricultural products'.[268] In line with GATT Article XX(b), this Agreement legitimises that WTO Members adopt SPS measures necessary for the protection of human, animal and plant life or health as long as they are in line with the conditions of the agreement (and in particular in relation to their trade-restrictiveness and the need to be based on scientific justifications).[269] Environmental protection is considered by Article 5(2) – where it is established that in carrying out the risk assessment WTO Members shall take into account 'relevant ecological and environmental conditions '; moreover, as recognised by the Appellate Body in the *Beef Hormones* case and in other subsequent jurisprudence, Article 5(7) shall be deemed to incorporate and give a specific

[264] Agreement on Agriculture (Marrakesh, Morocco, 15 April 1994), Marrakesh Agreement Establishing the World Trade Organization.
[265] For an extensive analysis of the content of the AoA, cf Fiona Smith, 'Regulating agriculture in the WTO' (2011) 7(2) International Journal of Law in Context 233.
[266] Michael N Cardwell and Fiona Smith, 'Renegotiation of the WTO Agreement on Agriculture: Accommodating the New Big Issues' (2013) 62(4) International & Comparative Law Quarterly 865.
[267] Agreement on the Application of Sanitary and Phytosanitary Measures (Marrakesh, Morocco, 15 April 1994), Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: the Results of the Uruguay Round of Multilateral Trade Negotiations 59 (1999), 1867 U.N.T.S. 493.
[268] Peter van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organisation* (3rd edn, Cambridge University Press 2013) 896.
[269] Agreement on the Application of Sanitary and Phytosanitary Measures, Article 2.1.

meaning to the precautionary principle.[270] Even setting aside the matter of the scope of the precautionary principle in the SPS Agreement, it follows from a systematic consideration of the latter that SPS measures taken by the parties by means of an FTA will be justified if based on sufficient scientific standards, even if they have trade-restrictive effects on other WTO members. A limit may be identified in the need to refer to international standards, but even this limit does not seem insurmountable (see *infra*, §3.3.3.). More importantly, the Appellate Body has affirmed that WTO Members have an autonomous right to determine their desired level of SPS protection for different risks.[271]

As a result, because environmental protection is regulated in WTO law virtually exclusively by means of exception clauses, in principle there would be a big margin for FTAs to go beyond that threshold. In the case of EU FTAs, the easiest way one can think of is the inclusion of EU standards (with the limits identified *supra* in this sub-paragraph).

This is certainly true as regards an individual FTA in comparison with WTO law as such. However, does the functioning of the global market – to which FTAs are obviously subject – practically enable FTAs to reach higher standards of agricultural sustainability?

[270] WTO Appellate Body Report, European Communities - Measures Concerning Meat and Meat Products (*Beef Hormones*) DS26/AB/R [1998], adopted 13 February 1998, para 120. Other WTO cases are on a similar vein: WTO Appellate Body Report, Japan — Measures Affecting the Importation of Apples (*Japan Apples*) DS245/AB/R [2003], adopted 10 December 2003, para 179-185, where the Appellate Body ruled that the 'relevant scientific evidence' will be insufficient if the available body of evidence does not allow the performance of an adequate assessment of risks. Therefore, if there is margin to carry out a risk assessment, the precautionary approach cannot be invoked. This still represents a broader approach compared to the narrower Panel's finding that Article 5.7 SPS can only be invoked in situations where little or no reliable evidence was available (para 8.219 of the Panel Report). On the contrary, the Appellate Body would also potentially encompass in the scope of Article 5.7 SPS cases where the available evidence is more than minimal in quantity but has not led to reliable or conclusive results; WTO Panel Report, European Communities — Measures Affecting the Approval and Marketing of Biotech Products (*EC-Biotech*), DS291/R [2006], adopted 21 November 2006, para 7.1522, where the Panel found that the fact that the precautionary approach cannot yet be attributed a clear status in international customary law shall not be viewed as an obstacle for adopting a precautionary and prudent approach in identifying, assessing and managing risks to human health and the environment. It should be noted that the value of this latter case as a precedent may be questionable since the parties decided not to appeal the ruling, therefore leaving the doubt of the way the Appellate Body will draw on this case in the future. One author concludes from this overall case-law that '[t]he precautionary principle does not provide a separate basis for the adoption of SPS measures where the underlying science is uncertain, though a precautionary approach to risk assessment may be warranted in such circumstances'. See Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (3rd edn, Cambridge University Press 2012) 847.

[271] WTO Appellate Body Report, European Communities - Measures Concerning Meat and Meat Products (*Beef Hormones*) DS26/AB/R [1998], adopted 13 February 1998, para 194.

§3.1.3. *The Effects of Trade Liberalisation on Sustainable Agriculture*

This question can only be replied to when one considers the overall effects of trade liberalisation on agriculture as a whole.

Trade liberalisation reflects an inspiration for free trade. At international level – no differently than at individual level – the historical dilemma is between those who consider free trade as something able to generate economic growth, development and employment,[272] and those considering it as the weapon used by strong economic actors to impose their dominance by means of multilateral trade.[273]

Regardless of such an old-fashioned debate, it is important to clarify that in abstract terms trade liberalisation may occur both at multilateral and bilateral/regional levels; however, while such a phenomenon is for multilateral trade the main purpose and feature of the system, at bilateral/regional level – as seen above – the picture is more nuanced. In any case, what is almost completely uncontested is that trade liberalisation proceeds at a different pace for developed and developing countries.

As regards the situation of the agricultural sector, this – as seen *supra* (§1.2.) – has some specific features that do not make it completely comparable to any other market business. In the European context, partial assimilation of the CAP to market is only a recent and still limited aspect, inspired by the will to move away from price support and embrace income support. Amongst others, food security and sustainable development are paramount non-trade concerns suitable to discourage a full liberalisation of the agricultural sector.[274]

This explains why, from a certain point of view, it can be said that agriculture has widely resisted free trade. One author has argued that in the regulation of agriculture protectionism remains the highest across the world.[275] His argument also relies on the diminished agriculture's share in international commerce, which has decreased from 22 % in the 1960's to 10 % in 2000.[276] There would be four factors explaining this trend: the governments' preference for domestic production than reliance on foreign resources; the effort to soften market fluctuations in the agricultural sector;

[272] Michael Hart and Bill Dymond, 'Special and Differential Treatment and the Doha 'Development' Round' (2003) 37 Journal of World Trade 395, 397;
[273] Bashar H Malkawi, 'Sustainable Agriculture within WTO Law and Arab Countries' (2011) 17(1) International Trade Law & Regulation 1, 5.
[274] On the increasing attempt of national governments to include a strong value component in their trade policies, see Paolo Davide Farah, 'Trade and Progress: the Case of China' (2016) 30(1) Columbia Journal of Asian Law 51.
[275] Wanki Moon, 'Is Agriculture Compatible with Free Trade?' (2011) 71 Ecological Economics 13, 15.
[276] Kym Anderson and Will Martin, 'Agricultural Trade Reform and the Doha Development Agenda' (2005) 28(9) The World Economy, 1301.

the need to tweak market failures associated with agricultural multi-functionality; and the pressures of interest groups.[277] Thus, agriculture has been referred to as an example of 'asymmetric liberalisation', the proof of which is given by the fact that it is a matter of fact that trade in agriculture has not been liberalised to the same extent as trade in industrial products, intellectual property and services.[278] The available data seem to give heed to this observation. In fact, according to Eurostat, it would appear that agricultural primary products account for 'only' 11.9 % of the total value of EU production in 2015.[279] The data made available by the WTO Trade Statistical Review 2019 are even more explicit, showing that agricultural products' world merchandise exports account for 'only' 2000 billion dollars; definitely a low figure compared – for instance – to manufactures, accounting for 12.500 billion dollars.[280] These figures show clearly that, notwithstanding the efforts of the WTO Uruguay and Doha Rounds to substantially liberalise trade in the agricultural sector, the latter across the world remains heavily protected – which, in turn, explains the difficulties encountered with signature of the AoA. As just seen above, some of the reasons for this protectionism can be linked to legitimate societal concerns, while others respond to the political power of interest groups to lobby in favour of vigorous governmental intervention.[281] Therefore, to a certain extent there are still strong barriers retaining this sector from full liberalisation, which is thus not foreseeable in the short run.

Whereas the above is at least to a certain extent indisputable, there is reason to believe that the wall of protectionism in agriculture has been somehow already broken down. As testified by the WTO Trade Statistical Review 2019, the world export of agricultural products grew by 36 % between 2008 and 2018.[282] This is particularly true in the case of Europe, which is a massive importer and even the first exporter of agri-food products worldwide.[283] In particular, the WTO Trade Statistical Review 2019 reveals that the EU has an export of agricultural products worth 681 billion dollars,

[277] Wanki Moon, 'Is Agriculture Compatible with Free Trade?' (2011) 71 Ecological Economics 13, 15 and 16.
[278] James Thuo Gathii, 'The Neoliberal Turn in Regional Trade Agreements' (2011) 86 Washington Law Review 421, 467.
[279] EU Commission – Directorate General Agriculture and Rural Development, 'Agricultural and Food Trade' (2017) 2 <https://webcache.googleusercontent.com/search?q=cache:dx8vfh6e9-0J:https://ec.europa.eu/agriculture/sites/agriculture/files/statistics/facts-figures/agricultural-food-trade.pdf+&cd=4&hl=it&ct=clnk&gl=be> accessed 18 November 2019.
[280] WTO, *World Trade Statistical Review* (2019) WTO Publications 10 <https://www.wto.org/english/res_e/statis_e/wts2019_e/wts19_toc_e.htm> accessed 18 November 2019.
[281] Tim Josling, Kym Anderson, Andrew Schmitz and Stefan Tangermann, 'Understanding International Trade in Agricultural Products: One Hundred Years of Contributions by Agricultural Economists' (2010) 92 American Journal of Agricultural Economics 424.
[282] WTO, *World Trade Statistical Review* (2019) WTO Publications 30 <https://www.wto.org/english/res_e/statis_e/wts2019_e/wts19_toc_e.htm> accessed 18 November 2019.
[283] In 2015, agricultural food and feed products represent about 80 % of all imports; likewise, agri-food exports reached 129 billion euros in 2015, more than 7 % of all goods exported from the EU. cf Annual Agri-food trade report 2015: EU first exporter worldwide - Brussels, 14 July 2016, EU Commission – Press Release <file:///C:/Users/Luchino%20Ferraris/Downloads/IP-16-2525_EN.pdf> accessed 22 September 2019.

much higher than the 172 billion dollars of the US.[284] This progressive shift is also pretty much rooted in the consumers' habits and mindset and is reflected – for instance – by the (by now) widespread expectation amongst them to find almost every kind of fruit and vegetable at every moment of the year. Thus, trade liberalisation may have occurred quantitatively less and qualitatively peculiarly compared to other sectors, but it is already reality. Unsurprisingly, the 2013 version of the CAP gave rise to the most market-oriented policy ever in the history of Europe.

Should one consider it more or less strong, the push for trade liberalisation in the agricultural sector lays down big concerns for agricultural sustainability. As a first stab at the issue, the enhanced production that this process triggers is *per se* sufficient to represent a veritable challenge for environmental protection. However different effects may be for developed and developing countries, in principle an overall context of free trade would spontaneously inspire agricultural producers to undertake sustainable practices only in limited hypotheses, namely when the deterioration of soil health and water negatively affects farm incomes during their lives or for their offspring – namely only *their* future generations! – willing to take over the land.[285] Apart from very niche sectors where sustainable agriculture can be encouraged by free trade (typically goods labelled for the allegedly sustainable practices adopted while producing them), the market system very simply is unable to internalise the stock externalities related to natural resources such as soil, water and biodiversity.[286] Moreover, consumers' perception is altered by the fact that for some of the resources that are deteriorating it is not possible to notice any trace of such harmful effects in the final product. In fact, whereas soil degradation normally tends to adversely affect agricultural production, this is less true for air and biodiversity; the average consumer will only have a (though limited) chance to detect the former, but not the latter. As a result, international actors – commonly prone to be seduced by short-terms logics – are not under a great pressure to struggle for fights whose results would be beneficial only to future generations.[287] Generally speaking, it is thus evident that free trade is unlikely to *naturally* foster the long-term nature of agricultural sustainability targets, unless appropriate non-market corrections are introduced in legislation.

That having been said, it must be borne in mind that although trade might not end up being liberalised through FTAs at global level, this is at least the case with the groups of countries who conclude preferential agreements amongst them. Thus, harmful effects of free trade on agricultural

[284] WTO, *World Trade Statistical Review* (2019) WTO Publications 31 <https://www.wto.org/english/res_e/statis_e/wts2019_e/wts19_toc_e.htm> accessed 18 November 2019.
[285] Wanki Moon, 'Is Agriculture Compatible with Free Trade?' (2011) 71 Ecological Economics 13, 17.
[286] Tony Weis, *The Global Food Economy: The Battle for the Future of Farming* (2007 Zed Books).
[287] Michael R Darby and Edi Karni, 'Free Competition and the Optimal Amount of Fraud' (1973) 16 Journal of Law and Economics 67.

sustainability are still likely to be enhanced in such countries. Since preferential agreements are, by now, widespread in the world and are in the course of replacing multilateral trade, it can be said that FTAs have as much potential to impair the environment as multilateral trade.

The above leads to the conclusion that, although in theoretical terms every single agreement may incorporate high sustainability standards for agricultural production, in practice the tendency towards FTAs is characterised by such political and economic features that the overall environmental standards are not likely to be *naturally* enhanced.

Of course, legal instruments are still at the disposal of the contracting parties to cushion such harmful effects and the identification of such instruments will be the core of section IV. In preparation for that, in the next paragraph the main features of the EU Common Commercial Policy will be examined, as far as relevant for our purposes.

§3.2. Free Trade Agreements in the Context of EU Trade Policy: EU Counterparts and Types of Agreements

§3.2.1. *EU FTAs in the Context of the EU CCP*

EU FTAs are only one of the tools that the EU can draw on to substantiate its CCP. Thus, in order to fully understand EU FTAs, the main axes of the EU CCP must be preliminarily recalled; at the same time, FTAs are also shaped as a complement to and by reaction to dynamics occurring in other fora – most notably the multilateral arena – as well as in different policy domains.

As regards the first point, the main principles of the CCP are outlined in Articles 206 and 207 TFEU. Article 206 TFEU lays down the general framework by stating that '[b]y establishing a customs union in accordance with Articles 28 to 32, the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers'. Article 207(1) TFEU has a more operational nature and provides that '[t]he common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted

in the context of the principles and objectives of the Union's external action'. It goes without saying that the last sentence constitutes a key starting point of this work and will be examined in depth in the next paragraph, together with the institutional arrangements provided for the concrete operationalisation of the CCP.[288] The EU CCP appears thus to be based – *inter alia* – on two fundamental principles. On the one hand, the principle of uniformity follows directly from the wording of Article 207 TFEU and implies that all essential rules concerning external trade should give rise to a uniform regime of imports and exports, so as not to distort trade; on the other hand, the principle of assimilation was developed through CJEU case-law and entails that every good imported from outside EU boundaries benefits from the internal market once it has cleared customs.[289]

As regards the second point, the EU CCP is also intertwined with other policies, first in line with foreign policy,[290] as well as other EU priorities, such as environmental protection, respect of human rights and progress of developing countries. More importantly, there are several ways for the EU to carry out its CCP and the EU makes somehow use of all of them. The basic choice is between unilateral, bilateral and multilateral trade. Unlike unilateral agreements – mainly concluded with developing countries (see *infra*, §3.2.2.) – bilateral and multilateral (which also include regional) agreements are characterised by the fact that their benefits are shared by exporters and importers of each country on a reciprocal basis. There are a number of factors that the policy-makers take into account while deciding what the most appropriate instrument – or 'cocktail' of instruments – should be on each occasion. Such elements include – *inter alia* – the economic power of the counterpart, but also its natural resources, import and export volumes, as well as its political conditions.[291] In the particular case of the EU, there are many reasons to explain the progressive shift towards FTAs. Beyond the fact that the move away from multilateral trade seems to be a common trend,[292] other factors were identified as being the need to catch up with the path undertaken by other big trade counterparts such as the US and some domestic dynamics relating to the turnover of different

[288] In this ambit, a remarkable role is played – after the Treaty of Lisbon – by the European Parliament (*infra*, §3.3.). cf Martin Janků, 'The Lisbon Treaty and Changes in the Legal Rules on the Common Commercial Policy' (2017) 6(1) EU Agrarian Law 10.

[289] For a detailed analysis of these two principles, with reference to case-law, see Piet Eeckhout, *EU External Relations Law* (2nd edn, Oxford University Press 2011) 440 *et seq*.

[290] There is a wide consensus amongst the scholars that trade policy has always dominated foreign policy and that the EU has always exploited its commercial hegemony as a proper foreign policy instrument. See, in this respect, Paola Conconi, 'The EU Common Commercial Policy and Global/Regional Trade Regulation' (2009) ULB Institutional Repository - Université Libre de Bruxelles <https://ideas.repec.org/p/ulb/ulbeco/2013-13344.html> accessed 4 April 2019.

[291] Anne van de Heetkamp and Ruud Tusveld, *Origin Management: Rules of Origin in Free Trade Agreements* (Springer 2011) 35.

[292] Alberto Trejos, 'Bilateral and Regional Free Trade Agreements, and their Relationship with the WTO and the Doha Development Agenda' (2005) 5(4) Global Economy Journal 1. See also the analysis conducted *supra*, §3.1.2.

Commissioners with diverging political orientations vis-à-vis FTAs.[293] The fact that FTAs are not only inspired by purely commercial reasons, but are on the contrary more and more about regulatory integration amongst countries,[294] suggests that there may be an additional reason: the dissatisfaction of many trading parties – including the EU – with the level of harmonisation of agri-food standards provided by the SPS agreement,[295] which has failed to bring about sufficient equivalence of standards and non-tariff barriers.[296] This would explain, at least with regard to trade in agri-food products, the momentum towards deeper integration.

The overall and current strategy of the Commission vis-à-vis FTAs is clearly exemplified – *inter alia* – in two recent Communications that outline EU priorities and approach, namely COM (2012) 22 final,[297] followed by the well-known 'Trade for All' – COM (2015) 497 final.[298] It clearly emerges from them that trade and investment are seen as a fundamental tool – both at bilateral and multilateral level – to ensure growth and job creation, to be conducted with transparency and aiming at the promotion of core EU values, particularly sustainable development, human rights and good governance. This confirms that current and future FTAs shall be regarded with an increasingly holistic approach that not only takes into account trade-related concerns, but also the promotion of an overall model of development based on values and commitments. As far as agricultural sustainability is concerned, this would imply promotion on a global scale of the significant efforts displayed within EU borders, which will require differentiated approaches according to – *inter alia* – the type of commercial counterpart.

[293] Stephen Woolcock, 'European Union Policy towards Free Trade Agreements' (2007) ECIPE Working Paper No 03/2007 <http://ecipe.org//app/uploads/2014/12/european-union-policy-towards-free-trade-agreements.pdf> accessed 4 April 2019.

[294] This regulatory integration may be desired in order to bring closer the commercial counterpart, therefore strengthening diplomatic relations. In this sense, FTAs are also an instrument of foreign policy. For the legal options to give substance to this aim, see *infra*, §4.2.

[295] Agreement on the Application of Sanitary and Phytosanitary Measures (Marrakesh, Morocco, 15 April 1994), Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: the Results of the Uruguay Round of Multilateral Trade Negotiations 59 (1999), 1867 U.N.T.S. 493.

[296] This is suggested by Mariagrazia Alabrese, 'Gli accordi commerciali "mega-regionali" e l'elaborazione del diritto agroalimentare' (2017) 1 Rivista di Diritto Agrario 136, 147.

[297] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on Trade, Growth and Development — Tailoring trade and investment policy for those countries most in need, COM (2012) 22 final.

[298] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Trade for All – Towards a more responsible trade and investment policy, COM (2015) 497 final.

§3.2.2. *The Nature of EU Trade Partners and their Importance for EU FTAs*

The nature of a trading partner at international economic level is strictly linked to the long-standing distinction between developed and developing countries. Indeed, as also acknowledged by the EU itself,[299] the straightforwardness of such a bipartition is deeply questioned nowadays. This is particularly true with regard to 'developing' countries, where some of those traditionally considered as such (like China, India and Brazil) are now some of the most competitive global economies. By contrast, some other low-income countries are instead part of the sub-group of the LDCs, the identification of which is a little less problematic.[300] Thus, it is not surprising that systems diverge as to the classification of countries and are often at odds with each other.[301] Particularly, it is emblematic that from 2016 onwards, the 'World Development Indicators' of the World Bank no longer provide for the distinction between developing (previously associated with the now low- and middle-income countries) and developed countries (what are now high-income countries).[302] It must be noted, however, that such a distinction is still rooted in the international debate and still used in international negotiations – also by virtue of the political advantages originating from the self-designation of a country as 'developing'.[303]

In the presence of such an uncertainty, it should be remembered that for the purpose of this work it is not essential to force the identification of each country into a category. As will be seen (*infra*, §3.2.3.), the approach of the EU is not a fixed one and does not vary *automatically* according to whether a country is *labelled* as developed or developing. As a result, apart from specific cases in which special conditions are applicable to certain countries (and which determine, for instance, the

[299] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee – Trade, Growth and Development — Tailoring trade and investment policy for those countries most in need, COM (2012) 22 final, 2.

[300] The United Nations have drawn a list of 47 LDCs, revised every three years by the Committee for Development, <https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/ldc_list.pdf> accessed 4 April 2019.

[301] The United Nations have adopted some arrangements to draw this distinction, although no official convention has been established yet. On the contrary, the World Bank uses mainly gross national income per capita in US dollars. The International Monetary Fund's definition is often considered to be the most comprehensive as it considers per capita income, export diversification, and the degree of integration into the global financial system.

[302] cf <https://datahelpdesk.worldbank.org/knowledgebase/articles/906519> accessed 4 April 2019.

[303] How more beneficial it is for a country to present itself as a developing one is clear if one takes a look at the climate negotiations. On the basis of the principle of CBDR, consolidated in the UNFCCC regime, efforts to combat climate change shall be directly proportionate to the capabilities of the countries concerned. Therefore, developing countries will be required to make fewer commitments. Hence, it is not surprising that countries such as China, India and Brazil are still keen to present themselves as such, in spite of the evident changes occurred in the last decades. More generally, the more a country is developed, the more the international public opinion demands action on environmental problems. For a review of the CBDR, see Imad Ibrahim, Thomas Deleuil and Paolo Davide Farah, 'The Principle of Common But Differentiated Responsibilities in the International Regime of Climate Change' in Paolo Davide Farah and Elena Cima (eds), *China's Influence on Non-Trade Concerns in International Economic Law* (Routledge 2016) 146.

consideration of Ukraine as a 'developed country' for the purpose of this work – see *infra*, §5.3.1.), the designation 'developing' will be utilized in this work only whether and to the extent that a country is subject to political and economic *vulnerability*. In fact, the relevance, for our purposes, of the distinction stems from the fact that developing countries' vulnerability translates into a weaker bargaining position. Vulnerability can be defined as the risk for a certain country to see its development hampered by shocks.[304] Such a risk is particularly tangible in the presence of – *inter alia* – non-diversified economies, commodity dependence on other countries, erratic price fluctuations, low level of interregional trade, high business costs, poor infrastructure, possible regional conflicts and nature disasters.[305]

It follows that bilateral and regional trade between developed and developing countries (in the sense clarified above) have some very specific features that inevitably influence the final outcome of the negotiations. When such an asymmetry is present, a higher level of complementarity may be expected between partners and non-trade benefits may be searched for (for instance, decrease in migration flows from the developing country to the developed one, boost in diplomatic relations and so forth).[306] Therefore, it cannot be surprising that the Commission recognises that a more targeted approach is needed vis-à-vis developing countries,[307] although the action taken with this aim in view varies according to the instrument chosen.

In fact, the EU substantiates its commitment in this respect primarily through unilateral agreements. The latter mainly consist of trade incentives (*in primis*, duty rates tied to certain conditions) that one party offers with a view to provoking the counterpart to commit to some practices that will play into the hands of the exporting country's economy. The most common program is the EU GSPs, a broad and complex program set up in order to foster developing countries' economies – as well as LDCs – by providing an exemption to many rules formally recognized by WTO law, following a logic of 'special treatment'. Under the latter, the legal basis is provided by the 1979 Enabling Clause (see also *supra*, §3.1.2.), which pins down the rules for developing countries as contracting parties in the WTO framework. However, there are also agreements in place between the EU and developing countries that are based on GATT Article XXIV. This is particularly true for the ACP group of

[304] United Nations University, 'Vulnerability in Developing Countries' (2008) Research Brief No 02/2008 <https://collections.unu.edu/eserv/UNU:2548/ebrary9789280811711.pdf> accessed 4 April 2019.
[305] Viera Dobošová, 'The European Union and Partnerships with Developing Countries – The Case of ACP Region' (2007) 7(1) Romanian Journal of European Affairs 1.
[306] Rolf Langhammer, 'The Developing Countries and Regionalism' (1992) 30(2) Journal of Common Market Studies 211, 226.
[307] Such concerns are repeated, for instance, in Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Trade for All – Towards a more responsible trade and investment policy, COM (2015) 497 final.

countries after the case *EC – Bananas III*,[308] so that GATT Article XXIV continues to be the most important legal basis for agreements concluded with them. In fact, by dismissing the preferential treatment accorded by the EU to the ACP countries, the WTO Appellate Body redressed EU action towards more 'reciprocal', rather than 'unilateral/preferential', relations with developing countries.[309] Thus, it can be said that bilateral/regional agreements also play an essential role in the relationships between the EU and developing countries. This opens the problem of whether or not FTAs constitute an opportunity or only a costly 'trap' for developing countries. As seen *supra* (§3.1.), there are many political and economic reasons encouraging a (developing) country to conclude an agreement and the effects of each FTA shall be evaluated taking into account the specific circumstances. That said, there is evidence showing that, generally speaking, trade liberalisation – supposing, for the sake of argument, that trade is actually liberalised – may potentially reduce developing countries' vulnerability, particularly for LDCs.[310] This would mainly occur – in theory – through the reduction of uncertainty and the increase in credibility of their economic policies.[311] Nevertheless, in practice very often FTAs end up negatively affecting developing countries, mainly – as demonstrated by a study conducted by the EU Parliament – because of overlapping agreements with several different trading partners, lack of adequate technical assistance for the mitigation of compliance costs and insufficient regulatory convergence on SPS and TBT standards.[312]

In light of the above, the nature of EU trade partners is an important factor to take into account while evaluating the extent to which the EU is able to promote its values and rules in the agreements. In principle, the more the economic and political weight of a party, the more its contractual power in the negotiations. While dealing with developing countries, however, an opposite force is the fear that too many regulatory constraints may hamper economic growth –

[308] WTO Appellate Body Report, European Communities – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, adopted 25 September 1997, 591. In this case, the Appellate body found that the preferential treatment granted by the EU to the ACP countries since 1975 for their export of bananas to Europe was distorting the competition and indirectly damaging the US economy. cf Simon A B Schropp and David Palmeter, 'Commentary on the Appellate Body Report in EC–Bananas III (Article 21.5): Waiver-thin, or Lock, Stock, and Metric Ton?' (2010) 9(1) World Trade Review 7.

[309] ibid.

[310] This conclusion is carefully weighed up net of the analysis of the potential positive and negative effects that trade liberalisation may produce in the study conducted by Sena Kimm Gnangnon, 'Trade Openness and Structural Vulnerability in Developing Countries' (2016) 43(1) Journal of Economic Studies 70, 75, 76 and 84.

[311] Matthew McQueen, 'The EU's Free-Trade Agreements with Developing Countries: A Case of Wishful Thinking?' (2001) 25 The World Economy 1369, 1374.

[312] EU Parliament – Directorate General External Policies, 'Cross-cutting Effects of the EU´s Preferential Trade Agreements (PTAs) on Developing Economies' (2015) Study, <http://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO_STU(2015)549047> accessed 4 April 2019. Interestingly, it was seen above (*supra*, §3.2.1.) how the insufficient harmonisation of SPS standards is precisely one of the reasons having inspired the EU turn towards bilateral/regional negotiations.

moving from the assumption that environmental protection measures often imply an increase in producers' costs. In fact, it is not uncommon that developing countries see with distrust measures proposed by developed countries to address non-trade concerns in FTAs, precisely because they look at them as a threat for some other more pressing needs that they have to face.[313] For these reasons, the case studies chosen in Part C will give account of the nature of the trade partners, by giving equal space to agreements concluded by the EU with developed as well as with developing country parties.

§3.2.3. *Types of FTAs: Distinctions and Classifications*

Not only does the nature of the trade partner exert a big influence on the content of FTAs, but also on their modelling.

Since no official classification of the types of agreements is established at international level, many conceptualisations are possible in this respect according to the perspective chosen by the interpreter.

At global level, one option is to draw a large distinction between – on the one hand – agreements without duty reduction schemas, often concluded as a preliminary step to the negotiation of an FTA in the future (bilateral investment treaties, foreign investment and protection agreements, economic partnership agreements [EPAs], trade and investment framework and so forth); and – on the other hand – agreements with duty reduction schemas, that can be assimilated into proper FTAs (economic completion agreements, economic cooperation agreements, customs unions, common tariffs and so forth).[314] This approach is, of course, meaningful if one wants to stress the different extents to which trade is liberalised. Nonetheless, broadly speaking, the types of agreements mentioned above are all FTAs, in the sense that they all purport to liberalise trade amongst the contracting parties. Likewise, this distinction says nothing on the level of advancement of the agreement in terms of agricultural sustainability.

At EU level, although the Treaties are not explicit on this point, three formal categories may be derived from the wording of the text on the basis of the complexity of the institutional arrangements: 'generic' trade agreements, cooperation agreements and association agreements.

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[313] On the inception of non-trade concerns in FTAs, see Paolo Davide Farah and Elena Cima, 'Introduction and Overview' in Paolo Davide Farah and Elena Cima (eds), *China's Influence on Non-Trade Concerns in International Economic Law* (Routledge 2016) 1.

[314] Anne van de Heetkamp and Ruud Tusveld, *Origin Management: Rules of Origin in Free Trade Agreements* (Springer 2011) 29 *et seq*.

'Generic' trade agreements are the 'regular' way of carrying out EU trade policy and are negotiated directly by the Commission, while the EU Parliament has only the power to give its consent, though without making amendments. The coverage of these agreements is therefore in principle limited to strictly commercial aspects. Cooperation agreements have a broader coverage, since they add to commercial purposes' arrangements in the field of environmental and social policies, justice and home affairs, as well as political cooperation.

In light of the above, it is argued that cooperation agreements go beyond 'generic' trade agreements and therefore need another legal basis other than Article 207 TFEU, which will depend on the type of cooperation; and that association agreements go even further, in the sense that they provide for preferential market access, various types of economic, financial or technical cooperation and a political dialogue which requires more complex institutional setups.[315]

Association agreements have therefore an *ad hoc* legal basis in Article 217 TFEU, which states that '[t]he Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure'.

In practice, the final outcome is directly proportionate to the level of integration that the parties aim at attaining. For this reason, FTAs have been described as a sort of 'pyramid of trade preferences', where at the top of the scale there is the EU membership; one step below, there are the association agreements, then customs unions and free trade areas (including EPAs, 'generic' and cooperation agreements, unless they are non-reciprocal in nature), then non-reciprocal preferences (mainly carried out through unilateral agreements, as in the case of the GSP) and at the bottom the MFN clause, which is the baseline established in WTO law.[316]

Against this background, association agreements represent the most fully-fledged format used by the EU to establish trade preferences. Within this category, association agreements may be further differentiated. Depending on the kind of economic, political and geographic relationship that the EU has with third parties, four sub-groups may be identified according to the legal scholarship:[317]

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[315] Sieglinde Gstöhl and Dominik Hanf, 'The EU's Post-Lisbon Free Trade Agreements: Commercial Interests in a Changing Constitutional Context' (2014) 20(6) European Law Journal 733, 738.

[316] The 'pyramid of trade preferences' is described in minute detail by Paola Conconi, 'The EU Common Commercial Policy and Global/Regional Trade Regulation' (2009) ULB Institutional Repository - Université Libre de Bruxelles, 13 <https://ideas.repec.org/p/ulb/ulbeco/2013-13344.html> accessed 3 April 2019.

[317] Dominik Hanf and Pablo Dengler, 'Accords d'Association' (2004) 1 College of Europe Research Paper in Law 9. The classification is also accepted – *mutatis mutandis* – by Gracia Marín Durán and Elisa Morgera, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions* (Hart Publishing 2012) 57 *et seq*; Raymond J Ahearn, 'Europe's Preferential Trade Agreements: Status, Content, and Implications' (2011) Congressional Research

- Agreements with neighbours, where the association is conceived as a prelude to membership with countries that are seen at least as potential candidates (for instance, Turkey and Albania);

- Agreements that substitute membership, in the sense that the trade partners are geographically nearby countries that do not wish to enter the EU or that the EU does not wish to accept in the Union (for instance, Norway and Israel);

- Agreements purporting to promote development in countries with a long and often complex historical relationship with Europe. The primary example is the Cotonou Agreement with the ACP group of countries.

- Agreements with remote regions of the world where the EU purports to support a process of inter-regional cooperation (for instance, Chile and South Africa). The EU seeks thereby to take advantage of the commercial benefit arising from the relationship with these 'emerging economies'.

Notwithstanding, albeit association agreements do constitute the most advanced format to pursue political integration of the EU in its external relations, this does not mean that analysis of the pursuit of agricultural sustainability should be confined to them. In fact, it is true that – on the one hand – there are some common features in the association agreements, most notably the fact that they tend to be 'comprehensive', as Article 217 TFEU sets no limit on their scope. However, on the other hand, the precise content of each agreement eventually depends on the specific case. Indeed, it is a matter of fact that – unlike the US – the EU does not have a standard approach vis-à-vis trade negotiations that applies *mutatis mutandis* on every occasion. On the contrary, the content and the dynamics of each FTA seem to be inspired by great flexibility and appear to be influenced by the subjective and objective circumstances of the situation.[318] Furthermore, the use of an association agreement does not entail *per se* that the FTA will be more ambitious in terms of environmental protection, as there is no reason why trade and cooperation agreements should not attain a higher level in this regard.

In conclusion, there is no clear relationship between the extent to which agricultural sustainability is considered and the type of agreement chosen. The latter may, at most, exert an influence on the

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Service <https://webcache.googleusercontent.com/search?q=cache:hf7jOG3d60UJ:https://fas.org/sgp/crs/row/R41143.pdf+&cd=1&hl=it&ct=clnk&gl=be> accessed 4 April 2019; Ludmila Borta, 'The European Union's Bilateral Approach' (2014) 4(4) CES Working Papers 6, 11 <https://ideas.repec.org/a/jes/wpaper/y2014v6i4p6-17.html> accessed 4 April 2019.

[318] In this connection, one author concluded that the EU does not make an aggressive use of the *acquis communautaire* in its negotiations. cf Stephen Woolcock, 'European Union Policy towards Free Trade Agreements' (2007) ECIPE Working Paper No 03/2007, 4 <http://cris.unu.edu/european-union-policy-towards-free-trade-agreements> accessed 4 April 2019.

matter of *how* this value is provided for in the text, particularly in connection with the arrangements made with a view to subsequently implementing it.

Although sustainable development (and sustainable agriculture) are in principle – directly or indirectly – almost always touched upon, the agreements with developed countries chosen as case studies in Part C will be some of the so-called 'new-generation' agreements. The latter were born in 2006 with the Global Europe Communication,[319] through which the EU Commission gave substance to the mandate given by the European Council in order to integrate environmental considerations in FTAs more systematically. This designation does not have any legal implication, but only indicates the most recent and fully-fledged trade agreements concluded by the EU in the light of the new policy objectives. In fact, while before that date environmental provisions were framed in general terms and were only occasionally provided for, from this moment onwards environmental protection has been dealt with systematically in each EU FTA, particularly through a whole chapter dedicated to it (the 'Trade and Sustainable Development Chapter' – see *infra*, §4.1.). In this line, the orientation was taken since 2010 to adopt a more holistic approach in ensuring 'reciprocity and mutual benefit' of the 'new' FTAs.[320] Thus, 'new-generation' FTAs mark the intention to take the path of the 'deep integration' with the EU contracting parties,[321] so that European standards can represent a benchmark for the elaboration of rules applicable in major global markets.

It is thus the fact that an agreement is a 'new-generation' one – irrespective of whether it is an association, cooperation or 'generic' trade one – that makes it particularly interesting for our purposes. In other words, the recent Communications – mentioned above – that have indicated the main tendencies of EU trade policy reveal that 'new-generation' agreements have at least three constitutional dimensions: the 'export' of the Union's fundamental values to the partner countries; the enhancement of protection for EU citizens, as imports in the EU will increase and will thus be accessible to EU citizens; finally, the EU charter of fundamental rights' recognition of certain Union objectives over trade policy.[322] As will be seen in the next paragraph, this shift in the EU political approach vis-à-vis FTAs has also determined a modification of the decision-making rules with regard to their negotiation and conclusion.

[319] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on Global Europe: Competing in the world, COM (2006) 567 final.
[320] Communication from the Commission to the Council, the European Parliament, the European Social and Economic Committee and the Committee of the Regions on Trade, Growth and World Affairs – Trade policy as a core component of the EU's 2020 Strategy, COM (2010) 612 final.
[321] This concept will be a key one to cope with the problem of regulatory cooperation and will be analysed *infra*, §4.2.
[322] Sieglinde Gstöhl and Dominik Hanf, 'The EU's Post-Lisbon Free Trade Agreements: Commercial Interests in a Changing Constitutional Context' (2014) 20(6) European Law Journal 733, 735.

§3.3. Judicial Review of EU External Action: the 'Sustainability Test'

§3.3.1. *The Conclusion of an FTA under EU Law*

As previously mentioned, a decisive aspect of the EU CCP as designed by Article 207 TFEU is the promotion of a number of EU fundamental values outside EU boundaries. 'New-generation' FTAs particularly emphasize this aspect. Since, however, the Treaties are unclear as to the extent to which such values should be promoted, the judicial review provided for as part of the decision-making procedure for the conclusion of international agreements may play a role on this point. This is particularly true vis-à-vis the assessment of the compatibility of an agreement with EU commitments versus sustainable development. In other words, are the provisions of FTAs compatible with the duty for the EU to pursue sustainable development even in EU external action and not only within its territory? Such an assessment may be dubbed the 'sustainability test'.

Preliminarily, it must be borne in mind that according to Article 3(1)(e) TFEU the EU has an exclusive competence to carry out its CCP, within the principles and limits described above.[323] When the development of the CCP requires the conclusion of an international agreement, Article 3(2) TFEU establishes that EU exclusive competence is recognised when this outcome 'is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope'.

As was the case before Lisbon, there is no doubt that the EU also has an external competence regarding environmental protection and sustainable development.[324] Naturally, the fact remains that, when an agreement falls under a competence shared between the EU and Member States (Article 4 TFEU),[325] such a 'mixed agreement' will require ratification by both of them.[326] It must be borne in

[323] Although the actual delimitation of competences between the EU and Member States lies outside the purpose of this work, it should be recalled that such an exclusivity is subject to a number of limits developed by the case-law. Apart from what stated by the recent Opinion 2/15 – that will be analysed *infra* – the Court in its Opinion 1/13 had already confirmed the validity of its case-law which had not been superseded by the entry into force of the Treaty of Lisbon. cf Inge Govaere, '"Setting the International Scene": EU External Competence and Procedures Post-Lisbon Revisited in the Light of CJEU Opinion 1/13' (2015) 52 Common Market Law Review 1277, 1306; Piet Eeckhout, *EU External Relations Law* (2nd, Oxford University Press 2011) 11 *et seq*.

[324] Sometimes the legal basis for this kind of action is explicit, some other times it is implied. cf Hans Vedder, 'The Formalities and Substance of EU External Environmental Competence: Stuck between Climate Change and Competitiveness' in Elisa Morgera (ed) *The External Environmental Policy of the European Union: EU and International Law Perspectives* (Cambridge University Press 2012) 18.

[325] Assessing the extent to which a competence is exclusive or shared may be problematic in some cases, for which the CJEU has developed a 'triple test'. cf Lourdes Catrain, Christopher Lock and Eleni Theodoropoulou, 'EU-Singapore FTA: Opinion of the Court of Justice' (2017) Hogan Lovells Research Paper <http://www.hoganlovellsbrexit.com/_uploads/downloads/11732_CM_EU-SingaporeOpinion_NL_E-jjwjl.PDF> accessed 8 April 2019.

mind that according to Article 207(6) TFEU 'the exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation'.

However, 'mixed' or not, the conclusion of an international agreement follows the procedure outlined in Article 218 TFEU, which mostly traces what has already been provided by Article 300 of the Treaty Establishing the European Community.

The opening of negotiations is decided by the Council on a recommendation by the Commission.[327] The Council also gives guidance to the negotiator – namely the Commission – and subsequently authorises signature by a qualified majority. Unanimity is only needed for association agreements and trade agreements which include provisions for which EU Treaties establish that unanimity is necessary. This happens in a number of matters which Member States consider to be sensitive, such as EU membership, EU finance and harmonisation of national legislation in the field of social security and social protection.

The most remarkable changes brought about by the Treaty of Lisbon concern the role of the EU Parliament. Article 218(6) establishes that the conclusion of the agreement is subject to its consent in a number of situations.[328] In every other case, the Parliament needs at least to be consulted. Moreover, Article 218(10) imposes the duty to inform the EU Parliament at all stages of the procedure. Overall enhancement of the role of the European Parliament is in line with a general trend of the Treaty of Lisbon, although it must be noted that there is still no power for the Parliament to amend a proposed trade agreement.

Finally, the EU Parliament shares with any Member State, the Council and the Commission another crucial function – at least for the present topic. In fact, Article 218(11) TFEU gives these actors the power to obtain the opinion of the Court of Justice concerning the compatibility of the agreement

[326] A 'mixed agreement' refers to an agreement which touches both on powers, or competencies, exclusive to the EU and on competencies exclusive to EU Member States. As a result, each EU Member State will have to individually sign and ratify it together with the EU as a whole in order for the agreement to enter into force.

[327] When the agreements relate to the common foreign and security policy of the EU, the Council decides on the recommendation of the High Representative for Foreign and Security Policy. cf Article 218(3) TFEU.

[328] The cases are the following: association agreements, accession to the European Convention on Human Rights, organisation of cooperation procedures, agreements with budgetary implications for the Union and agreements on subjects where either the ordinary legislative procedure applies or the consent of the EU Parliament within a special legislative procedure is required.

with the Treaties. If the opinion is negative, the agreement may not enter into force unless properly amended.[329]

This judicial function of the Court is potentially decisive in contributing towards answering the research question of this work. The fundamental problem here is: to what extent can the CJEU judicially review the content of an FTA because the latter does not sufficiently take into account sustainable development (and therefore sustainable agriculture)? As thoroughly analysed *supra* (§1.3.), the Court has not yet reached the point of making the PEI justiciable at internal level. Should the situation change in the context of EU external action? The determination of the thoroughness of the judicial review of the Court under Article 218(11) TFEU when sustainable development is at stake – in other words, the 'sustainability test' – will be at the core of analysis in the rest of this paragraph.

§3.3.2. *Should EU Principles Applicable in Union Territory be Necessarily Pursued to the Same Extent in EU External Action?*

Beyond the simple analysis of the compatibility between legal provisions, from a broader perspective what the CJEU is entitled to assess is whether the EU institutions have been capable of ensuring policy coherence by virtue of the conclusion of an international agreement.

Policy coherence generally expresses the need that EU policies are not contradicting each other, both in terms of principles and concrete instruments utilized. What matters in our analysis is more the 'horizontal coherence' – between policies and activities – rather than the 'vertical coherence' – between Union action and Member States' action. Methodologically, there are three categories of rules that should ensure such a coherence: rules of hierarchy ensuring consistency between norms; rules setting limits on powers and allocation of tasks; the principles of cooperation, loyalty and unity, so as to guarantee complementarity between norms, actors and instruments.[330]

[329] This may be the case even with reference to a non-compliance with the Charter of Fundamental Rights and Freedoms. This was the case of Opinion 1/15, *EU-Canada PNR Agreement* [2017], Digital Reports; cf Chiara Graziani, 'PNR EU-Canada, la Corte di Giustizia blocca l'accordo: tra difesa dei diritti umani e implicazioni istituzionali' (2017) 4 Diritto Pubblico Comparato ed Europeo 960.

[330] For this conceptualisation, see Marise Cremona, 'Coherence and EU External Environmental Policy' in Elisa Morgera (ed) *The External Environmental Policy of the European Union: EU and International Law Perspectives* (Cambridge University Press 2012) 33 *et seq*.

A general call for coherence within EU policies is contained in Article 7 TFEU.[331] There are, however, a number of additional sector-specific provisions giving more substance to this duty. In the field of environmental protection, the first one to be mentioned is, of course, the PEI (Article 11 TFEU). As seen above (*supra*, §1.3.), there is no doubt that such an integration also concerns external action. The provision needs to be read alongside Article 3(5) TEU, which requires the EU to contribute to 'the sustainable development of the Earth' in its relations to the wider world. Furthermore, Article 21(2) TEU is even more specific in setting the objectives of EU external action. *Inter alia*, the latter include the need to:

- 'foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty' (Article 21(2)(d) TEU);

- 'help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development' (Article 21(2)(f) TEU);

As seen above (*supra*, §3.2.), the EU CCP makes explicit reference to these principles by affirming – in Article 207(1) TFEU – that the CCP 'shall be conducted in the context of the principles and objectives of the Union's external action'.[332]

There is therefore no doubt that the same principles inspiring EU internal legislation vis-à-vis sustainable development should also shape EU external action – and particularly the CCP. The real question, then, is: to what extent should it be so? In other words: should these principles be *necessarily* pursued to the same extent as in the EU territory or even to a lower level?

As might be clear already, the dilemma widely replicates – in its essence – the same problem underlying the 'justiciability' of Article 11 TFEU and, just like in that case, depends on whether the wording of the Treaties places on the EU an obligation of means or an obligation of results. From the conceptualisation of the distinction between obligations of means and obligations of result (see *supra*, §1.3.1.), it follows that the threshold for judicial review would be definitely higher in the case of obligations of means. In fact, the rationale behind each obligation of means is that in a series of given scenarios identified by the legislature a certain conduct, although usually sufficient, cannot guarantee the desired result, since it depends also on uncertain factors that cannot be shouldered on

[331] Article 7 TFEU establishes that '[t]he Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers'.
[332] cf an analysis of the relationship between the CCP and sustainable development in Balázs Horváthy, 'Sustainable Development and Common Commercial Policy' (2012) 53(4) Acta Juridica Hungarica 334.

the entity on which the obligation is placed.[333] Accordingly, when assessing the respect of an obligation of means before a judicial body, as long as the EU legislature can show that it did *take into consideration* the policy objectives in question, it cannot be deemed accountable even if the environmental delivery that was pursued by the measure has not eventually been achieved.

Indeed, the Treaties do not give unambiguous guidance as to which external policies should be prioritised over the others. Thus, unsurprisingly, it is also unclear if the objectives established for EU internal action should be pursued *to the same level* in EU external action.

Neither the Treaties, nor EU secondary legislation, nor the CJEU have provided an explicit answer to this problem to date. Nevertheless, in the writer's view there are at least three persuasive arguments to endorse the opinion that EU objectives set both internally and externally – including sustainable development – should be pursued with the same level of intensity without either the internal dimension prevailing on the external one or vice-versa.

First, FTAs are the typical example of instrument through which goods produced abroad may more easily access EU market and be purchased by EU consumers. Thereby, these goods become, somehow 'European', as a consequence of the principle of assimilation endorsed by the EU CCP (*supra,* §3.2.). Accepting that lower standards may apply to these goods implies accepting that on the same (European) market there are also goods produced abroad that, compared to those produced in Europe, are subject to lower standards. Apart from sanitary and phytosanitary measures, which concern the final product, integration of environmental considerations in EU law also concerns the productive process that leads to the final product. As we have seen in more detail *supra* (§2.3.), in the EU CAP this means – *inter alia* – subsidising practices that are supposedly beneficial to the environment and the climate. The measures outlined both in Pillar I and Pillar II purport to attain a higher level of environmental quality which cannot (always) be directly perceived in the final product as such, since these measures often concern air quality, soil, biodiversity and so forth. As a result, different products may apparently look identical on the EU market from a food safety point of view; however, the productive process of agricultural products farmed in the presence of weaker environmental standards may have been more polluting than that of agricultural products farmed in the EU. Moreover, such measures cost a great deal of money to EU farmers (and indirectly to EU taxpayers), so that refusing the mandatory compliance with EU environmental standards may provide foreign producers with a comparative advantage stemming from the non-investment in sustainable agricultural practices. While this need is therefore evident, international trade law makes

[333] Riccardo Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States' (1992) 35 German Yearbook of International Law 9, 48.

things a bit more complicated. This is due to the long-lasting debate surrounding PPMs. PPMs are very simply standards focused on production methods rather than on the characteristics of the products and may technically be defined as 'the sum of all activities necessary to place the product on the market'.[334] Traditionally, there are several reasons why legislators wish to link measures to non-physical assets like production;[335] the pursuit of transboundary environmental protection is just one of those. The view was also advanced that the existence itself of environmental PPMs is nothing but the demonstration of the failure to achieve a homogeneous global environmental governance, since PPMs only reflect the disagreement amongst countries that are at different stages of development over the desired level of environmental protection.[336] In fact, in the absence of bilateral or multilateral cooperation that sets limits on the source of environmental harm, trade restrictions may be useful and sometimes even necessary.[337]

Paradoxically, one country may violate the principle of state sovereignty even by merely imposing some PPMs only to enterprises located on its territory. In fact, the extraterritoriality of this action may stem from the fact that there could be an interference with other countries' regulation of production, since the economic effects would be strong enough to make the PPMs *de facto* compulsory for the other countries even though they are not formally binding outside the borders of the country which set them.[338] That said, as far as domestic measures apply only to national producers, nobody will likely complain about them, whereas trade conflicts are more likely to arise when PPMs are also applicable to imported products – which may easily be the case, since otherwise foreign producers would gain a competitive advantage.[339]

From the legal point of view, the structure of GATT obligations is as follows: a PPM (adopted at domestic level or in a FTA between two or more countries) may violate GATT Article I (MFN), III (national treatment rule) or XI (elimination of quantitative restrictions); if this is the case, it would

[334] Christiane R Conrad, *Processes and Production Methods (PPMs) in WTO Law: Interfacing Trade and Social Goals* (Cambridge University Press 2011) 28.
[335] ibid 28. The author points out that, in particular, such reasons are commonly related to the encouragement/discouragement of certain aspects of production; the satisfaction of calls from civil society or domestic interest groups; the protection of a country's economy from foreign competition, especially where foreign standards are lower and thus less expensive to comply with; and the pursuit of properly protectionist approaches.
[336] Steve Charnovitz, 'The Law of Environmental "PPMs" in the WTO: Debunking the Myth of Illegality' (2002) 27(1) Yale Journal of International Law 59, 70.
[337] David Sifonos, 'Introduction' in David Sifonos (ed) *Environmental Process and Production Methods (PPMs) in WTO Law* (Springer 2018) 1, 5.
[338] Christiane R Conrad, *Processes and Production Methods (PPMs) in WTO Law: Interfacing Trade and Social Goals* (Cambridge University Press 2011) 106-107.
[339] Steve Charnovitz, 'The Law of Environmental "PPMs" in the WTO: Debunking the Myth of Illegality' (2002) 27(1) Yale Journal of International Law 59, 62.

need to be reviewed to see if it fits into one of the exceptions of GATT Article XX.[340] As stated above (*supra*, §3.1.2.) the main exceptions that are relevant for the environment are GATT Article XX(b) and (g). In fact, while GATT Article XX does not explicitly include the broad concept of environmental protection amongst the policy reasons that can justify an exception, it does so with reference to human, animal or plant life or health (potentially useful with regard to animal welfare);[341] or conservation of exhaustible natural resources.[342] The scope of the exceptions, in turn, is limited by the so-called '*chapeau*' of GATT Article XX, which is a safeguard against *abus de droit*, ie against measures that, while apparently qualifying as exceptions, constitute in reality arbitrary or unjustifiable discriminations and/or restrictions to international trade. Therefore, it is – firstly – necessary to check if a measure is ascribable to one of the exceptions and – secondly – evaluate its application at domestic level in the light of the *chapeau* (so-called 'two-tier analysis').[343]

While always viewed suspiciously as a protectionist instrument that would hamper multilateral trade and therefore in contrast with the GATT, PPMs have become increasingly accepted in WTO law as a legitimate way to fight transboundary pollution through national policies. A review of the GATT/WTO case-law may enable one to understand the interpretative evolution that concerned PPMs throughout time and its relevance for global environmental protection. The most relevant

[340] The scholarship which focused on the exceptions of GATT Article XX is extensive. A special mention deserve the studies of some authors who played a major role in the future debate by suggesting that PPMs are not – contrary to a widespread common feeling – *per se* incompatible with WTO law. See Steve Charnovitz, 'The Law of Environmental "PPMs" in the WTO: Debunking the Myth of Illegality' (2002) 27(1) Yale Journal of International Law 59; Aaron Cosbey, 'The WTO and PPMs: Time to Drop a Taboo' (2001) 1 Bridges Monthly Review, International Centre for Trade and Sustainable Development <http://www.ictsd.org> accessed 19 December 2019; see also the review of the environmental case-law for each component of GATT Article XX in Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3rd edn, Oxford University Press 2009) 753 *et seq*; Christiane R Conrad, *Processes and Production Methods (PPMs) in WTO Law: Interfacing Trade and Social Goals* (Cambridge University Press 2011); Jason Potts, *The Legality of PPMs under the GATT: Challenges and Opportunities for Sustainable Trade Policy* (International Institute for Sustainable Development Publishing 2008); Christina Voigt, *Sustainable Development as a Principle of International Law: Resolving Conflicts between Climate Measures and WTO Law* (Martinus Nijhoff Publishers 2009) 223; Elisa Baroncini, 'L'Organo di appello dell'OMC e il rapporto tra commercio e ambiente nell'interpretazione dell'articolo XX GATT' in Lucia Serena Rossi e Elisa Baroncini (eds), *Rapporti tra ordinamenti e diritti dei singoli: studi degli allievi in onore di Paolo Mengozzi* (Editoriale Scientifica 2010) 429; on the need to interpret GATT Article XX more broadly with a view to including in its scope human right concerns, see Paolo Davide Farah, 'L'Unione Europea e i valori non commerciali nel sistema globale degli scambi' in Louis Godart and Sandro Gozi, *Cittadinanza Europea e diritti umani* (Gangemi Editore 2017) 103, 108.

[341] GATT Article XX(b).

[342] GATT Article XX(g).

[343] WTO Appellate Body Report, United States Standards for Reformulated and Conventional Gasoline (*Gasoline Standards*), WT/DS2/AB/R [1996], adopted 20 May 1996, para IV (page 22). See the analysis carried out on this point by Elisa Baroncini, 'L'Organo di appello dell'OMC e il rapporto tra commercio e ambiente nell'interpretazione dell'articolo XX GATT' in Lucia Serena Rossi e Elisa Baroncini (eds), *Rapporti tra ordinamenti e diritti dei singoli: studi degli allievi in onore di Paolo Mengozzi* (Editoriale Scientifica 2010) 429, 436.

cases on GATT Article XX exceptions in the environmental field are the *Tuna-Dolphin I*,[344] the *Tuna-Dolphin II*,[345] the *Gasoline Standards* case,[346] the *Shrimp-Turtle* case,[347] the *Asbestos* case (not a case on PPMs, but with some implications for them)[348] and the *Retreaded Tyres* case.[349] It is also important to mention the recent *US – Tuna II (Mexico)* case,[350] which focused mainly on the TBT but is certainly relevant for the debate on PPMs. At the beginning, the approach vis-à-vis PPMs was very restrictive, with both GATT Panels in *Tuna-Dolphin* I and II refusing to apply the exceptions for the import bans at stake.[351] However, none of these Reports as adopted and in any case they pre-dated the establishment of the new dispute settlement of the WTO, which showed much more openness in this respect. The breakthrough occurred with the *Shrimp-Turtle* case, where

[344] GATT Panel Report, US – Restrictions on Import of Tuna (*Tuna-Dolphin I*) DS21/R [1991], not adopted. In this case, the United States imposed an import ban on tuna from countries that did not have a regime in place to protect dolphins comparable to its domestic framework; Mexico, one of the countries affected, complained that this law violated GATT Article III. On the contribution of this case to international environmental law, see Ted L McDorman, 'The 1991 U.S.-Mexico GATT Panel Report on Tuna and Dolphin: Implications for Trade and Environment Conflicts' (1992) 17 North Carolina Journal of International Law and Commercial Regulation 461.

[345] GATT Panel Report, US – Restrictions on Imports of Tuna (*Tuna-Dolphin II*) DS29/R [1994], not adopted. The underlying facts of the dispute were similar to *Tuna-Dolphin I*, but it focused more on the intermediary embargo and the plaintiffs were the European Communities and the Netherlands (acting for the Netherlands Antilles).

[346] WTO Appellate Body Report, United States Standards for Reformulated and Conventional Gasoline (*Gasoline Standards*), WT/DS2/AB/R [1996], adopted 20 May 1996. The core question of this case concerned the alleged discrimination of the US measure against imported gasoline and in favour of domestic refineries. The country's right to set environmental standards was not challenged.

[347] WTO Appellate Body Report, United States — Import prohibition of certain shrimp and shrimp products (*Shrimp-Turtle*), WT/DS58/AB/R [1998], adopted 6 November 1998. India, Malaysia and Pakistan lodged a WTO complaint against the US ban for shrimps fished without the so-called 'turtle excluder device', which was found to violate the *chapeau*'s criteria against arbitrary and unjustifiable discrimination.

[348] WTO Appellate Body Report on European Communities — Measures Affecting Asbestos and Asbestos-Containing Products (*Asbestos*), WT/DS135/AB/R, [2001], adopted 5 April 2001. The case originated from France's ban over all forms of asbestos products for health-related reasons. There was recognised the primacy of national policies over non-governmental agreements setting health and safety standards.

[349] WTO Appellate Body, Brazil — Measures Affecting Imports of Retreaded Tyres (*Retreaded Tyres*), WT/DS332/AB/R, [2007], adopted 17 December 2007. In this case, the European Communities had challenged a measure by which Brazil established an import ban for retreaded tyres, therefore breaching GATT Article XI on quantitative restrictions. Moreover, the Appellate Body found that Brazil also violated the national-treatment rule, as following a decision of the MERCOSUR Tribunal it granted access to this product to all states which signed the 1991 Treaty of Asunción. See for extensive comments on this case Elisa Baroncini, 'L'Organo di appello dell'OMC e il rapporto tra commercio e ambiente nell'interpretazione dell'articolo XX GATT' in Lucia Serena Rossi e Elisa Baroncini (eds), *Rapporti tra ordinamenti e diritti dei singoli: studi degli allievi in onore di Paolo Mengozzi* (Editoriale Scientifica 2010) 429.

[350] WTO Appellate Body Report, United States – Restrictions on Import of Tuna (No 2), Mexico v United States, DS381 [2012], adopted 16 May 2012. In this decision, the WTO Appellate Body ruled on a US labelling scheme that prohibited the misleading use of the term 'dolphin-safe' and introduced new rules on certifying tuna. It found that US 'dolphin-safe' labelling provisions are inconsistent with Article 2.1 of the TBT Agreement. For a commentary on this case, quite critical on the Appellate Body's consideration of sustainable development concerns, see Elisa Baroncini and Claire Brunel, 'A WTO Safe Harbour for the Dolphins The Second Compliance Proceedings in the US–Tuna II (Mexico) Case' (2019) Robert Schuman Centre for Advanced Studies Research Paper No RSCAS 75 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3451516> accessed 19 December 2019.

[351] GATT Panel Report, US – Restrictions on Import of Tuna (*Tuna-Dolphin I*) DS21/R [1991], not adopted, paras 5.26 ND 5.31; cf GATT Panel Report, US – Restrictions on Imports of Tuna (*Tuna-Dolphin II*) DS29/R [1994], not adopted, para 5.24 stating that the embargos 'were taken so as to force other countries to change their policies with respect to persons and things within their own jurisdiction'.

the Appellate Body did not consider the ban consistent with GATT Article XX(g) as US measures were arbitrarily discriminatory (in the light of the *chapeau*), but recognised that they were 'reasonably related' to the conservation of endangered sea turtles, which are exhaustible sources.[352] Notwithstanding the final outcome, the case may thus be regarded as the first one recognising that environmental considerations are legitimate concerns of WTO Members. In other words, by virtue of this case GATT Article XX(g) – and impliedly, *mutatis mutandis*, GATT Article XX(b) – are given extraterritorial scope, being applicable to (exhaustible) domestic resources, as well as those beyond national jurisdiction.[353] From then on, the WTO case-law became increasingly open vis-à-vis the consideration of environmental measures in the WTO system, as can be seen from the case *Retreaded Tyres*.[354] Against this background, it is also very useful to bring in the discussion the above-mentioned 2012 *US – Tuna II (Mexico)* case, where the Appellate Body ruled that the US 'dolphin safe' labelling scheme violated the national-treatment rule of the TBT, but rejected Mexico's argument that the labelling was 'more trade-restrictive than necessary' to fulfil the US objectives; thereby, the Appellate Body fully recognises that environmental PPMs may constitute 'legitimate objectives' for the purpose of Article 2.2 TBT, as far as they are not 'more trade-restrictive than necessary'.[355] This conclusion supports the legitimacy of environmental PPMs even in the context of the TBT Agreement and not only within the GATT system.[356] This is extremely relevant for our purposes because if – on the one hand – the EU has to promote its standards on sustainable agriculture outside its boundaries if it wishes to pursue environmental protection in third countries through FTAs, it is also true that EU action is not without limits and that such measures

[352] WTO Appellate Body Reports, United States — Import prohibition of certain shrimp and shrimp products (*Shrimp-Turtle*), WT/DS58/AB/R [1998], adopted 6 November 1998, para 141.

[353] Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3rd edn, Oxford University Press 2009) 773.

[354] In fact, the Appellate Body – drawing extensively on *Gasoline Standards* – recognised, on the one hand, that the contribution of the environmental measure to the objective of protecting human, animal or plant life or health could also not be immediately observable and could be susceptible to be ascertained even only with the benefit of time, such as climate measures; on the other hand, it acknowledged that WTO Members have a great discretion in the definition of their environmental policy, which should be taken into account in the assessment of potential reasonably available alternative measures. See WTO Appellate Body Report, United States Standards for Reformulated and Conventional Gasoline (*Gasoline Standards*), WT/DS2/AB/R [1996], adopted 20 May 1996, para 30; WTO Appellate Body, Brazil — Measures Affecting Imports of Retreaded Tyres (*Retreaded Tyres*), WT/DS332/AB/R, [2007], adopted 17 December 2007, paras 151, 157 and 170-175.

[355] WTO Appellate Body Report, United States – Restrictions on Import of Tuna (No 2), Mexico v United States, DS381 [2012], adopted 16 May 2012, para 407(d).

[356] The Appellate body also established a link between the TBT and the exceptions of GATT Article XX, by stating that it may be permissible to rely on reasoning developed in the context of one agreement for purposes of conducting an analysis under the other. See WTO Appellate Body Report, United States – Restrictions on Import of Tuna (No 2), Mexico v United States, DS381 [2012], adopted 16 May 2012, paras 317-318. On this point, see more generally Brendan McGivern, 'The TBT Agreement Meets the GATT: The Appellate Body Decision in US – Tuna II (Mexico)' (2012) 7(9) Global Trade and Customs Journal 350, where the author concludes that The Appellate Body rooted the TBT national treatment disciplines within the jurisprudence of the GATT.

will have to comply with GATT Article XX. This is also true with regard to the other legal instruments of WTO system such as the SPS – see *supra*, §3.1.2. – and the TBT Agreement.[357] Concerning, in particular, the SPS Agreement, its consideration is particularly important for the purpose of this work. In fact, the rules laid down for the compatibility of the sanitary and phyto-sanitary measures adopted by WTO Members with the WTO system are mainly addressed to agricultural products, which makes them specifically relevant for the promotion of sustainable agricultural standards beyond one Member's boundaries. Moreover, the whole agreement is overall conceived to give substance to GATT Article XX(b) and can thus be understood as a 'specification' of the latter in the context of the agricultural sector.

Taking into account all these sets of rules, it can be certainly concluded that WTO law generally recognises the right of each WTO Member to develop an environmental policy and determine the desired levels of protection, while just ensuring that the *means* on the basis of which this is done are based on sound scientific assessments and respect more generally the requirements of the *chapeau*.[358] Thus, while evaluating the commitment of the EU to undertake 'deep integration' (see *infra*, §4.2.), this discussion must be permanently kept in mind.

A second argument showing that sustainable development should be equally pursued internally and externally moves from the observation that the idea to modulate the promotion of EU values to different extents and degrees internally and externally does not conceptually make any sense. The typical example is that of human rights. What would it mean to recognise that the EU has to promote – for instance – the ban on torture in its external relations, but to a lesser extent that in the EU territory? It may be argued that the ban on torture is ascribable to a norm of *jus cogens*, whereas sustainable development is not;[359] however, the same considerations would also apply, for instance, with the promotion of democracy. Either the EU commits to the promotion of *its* standards, or it is just not exporting them at all. Environmental protection, like sustainable development, human rights

[357] Other than the principles established through the WTO's case-law, it is important to consider that the multilateral approval of PPMs is a key factor to assess their legitimacy. In fact, if a plethora of states have accepted them, they are likely to be less trade distorsive. See Steve Charnovitz, 'The Law of Environmental "PPMs" in the WTO: Debunking the Myth of Illegality' (2002) 27(1) Yale Journal of International Law 59, 105-106. See also the analysis carried out by Robert Read, 'Process and Production Methods and the Regulation of International Trade' in Nicholas Perdikis and Robert Read, *The WTO & the Regulation of International Trade: Recent Trade Disputes Between the European Union & the United States* (Cheltenham 2005) 239.

[358] Elisa Baroncini, 'L'Organo di appello dell'OMC e il rapporto tra commercio e ambiente nell'interpretazione dell'articolo XX GATT' in Lucia Serena Rossi e Elisa Baroncini (eds), *Rapporti tra ordinamenti e diritti dei singoli: studi degli allievi in onore di Paolo Mengozzi* (Editoriale Scientifica 2010) 429, 464-465.

[359] For an authoritative overview of *jus cogens* in international law, see – *ex multis* – Jochen A Frowein, 'Ius Cogens' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2013); Antonio Gomez Robledo, 'Le *ius cogens* international : sa genèse, sa nature, ses fonctions' (1981) 172 Collected Courses of the Hague Academy of International Law 12.

and democracy, is mentioned in Article 21(2) TEU and nothing in the whole provision suggests that the extent to which these principles are pursued at internal level should be watered down while acting in the international arena.

Third, it is the EU itself that implicitly recognises that its approach abroad should not be evaluated less strictly than in EU territory. In its Communication 'Trade for All', the Commission states that '[o]ne of the aims of the EU is to ensure that economic growth goes hand in hand with social justice, respect for human rights, *high* environmental standards […]' (emphasis added) and so forth.[360] Is not the locution 'high […] environmental standards' analogous to the one used while preconizing a 'high level of protection and improvement of the quality of the environment' required by Article 3(3) TEU?

For all these reasons, the hypothesis that can be built from a purely legal point of view, would be that sustainability in agriculture should not be pursued less intensively at the external level than at the internal one. Accordingly, in light of Article 218(11) TFEU the Court should prevent any FTA from entering into force every time there is no reciprocity with EU standards regarding the promotion of sustainable development. In this sense it can be said that the above-mentioned provisions calling for policy coherence in sustainability matters are obligations of results:[361] not in absolute terms, but only with reference to the need to live up to the baseline made up of the requirements set to pursue sustainable development in the EU legal system. The case studies developed in Part C will assess to what extent this happen in practice.

§3.3.3. *The 'Sustainability Test' in the Case-law of the CJEU*

Against this background, the approach concretely taken by the CJEU seems to be far from the one suggested in the previous sub-paragraph. This is not surprising if one considers the lesson learnt with Article 11 TFEU (*supra*, §1.3.).

The case-law of the Court, delivered through Opinions pursuant to Article 218(11) TFEU, is very limited and the Court does not seem to have focused yet on the thoroughness of obligations regarding environmental protection in its FTAs. Although in principle coping with different issues,

[360] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Trade for All – Towards a more responsible trade and investment policy, COM (2015) 497 final, 22.

[361] cf Riccardo Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States' (1992) 35 German Yearbook of International Law 9, 48. On the whole discussion on obligations of means and obligations of result, see *supra* §1.3.1. and in this sub-paragraph.

the case which to date appears to have touched most upon the problem is the recent Opinion 2/15 - *EU-Singapore Free Trade Agreement*.[362]

This FTA is an example of 'new-generation' agreement, covering a number of areas that go beyond purely trade-related matters. Other than trade in goods and services, it concerns investments, government procurement, intellectual property, transparency, as well as trade and sustainable development and environmental protection. In its application, the Commission asked the Court to state – for each chapter of the Agreement – whether the competence was exclusive to the EU or shared with the Member States. Thus, as clarified by the Court while determining the scope of the request,[363] the dispute does not concern in any case the appropriateness of the standards enshrined in the agreement for each subject matter with EU law. Notwithstanding this, the Court *incidentally* gives some insightful indications. First of all, it asserts that the EU enjoys exclusive competence over the FTA chapters on sustainable development and environmental standards, together with other Chapters,[364] because they are 'intended to promote, facilitate or govern trade and have direct and immediate effects on [trade]'.[365] In fact, a combined reading of Articles 205 TFEU, 207(1) TFEU and 21 TEU suggests that the Treaty of Lisbon created a link between the EU CCP and general external policy principles, particularly as regards sustainability matters. In this connection, the Court emphasised that the objective of sustainable development forms an integral part of common commercial policy'.[366]

However, the Court does not question the extent to which such an objective is provided for in the agreement. On the contrary, it accepts the view that such commitments only aim at discouraging the enhancement of trade through the reduction of social and environmental standards *below the levels set out in international commitments*.[367] The role and function of the Trade and Sustainable Development chapters in FTAs will be investigated in more depth *infra* (§4.1.). For the purpose of this paragraph, it is crucial to observe that the baseline accepted by the Court for the promotion of

[362] Opinion 2/15 *EU-Singapore Free Trade Agreement* [2017] Digital Reports.
[363] ibid paras 50 and 51.
[364] The other chapters of the agreement for which the EU enjoys exclusive competence are those covering trade in goods, services, establishment and e-commerce, government procurement, intellectual property, foreign direct investment, competition and labour and standards. On the contrary, the Court found that the participation (and thus the subsequent ratification) of Member States is necessary for the commitments relating to portfolio investment and investor-state dispute settlement. On this point, it was noted by an author that by virtue of this decision the EU will be free to conclude very ambitious FTAs without any involvement of Member States if only provisions on portfolio investment and investor-state dispute settlement are left out, so that the Opinion may pave the way for 'EU-only trade agreements'. See Guillaume van der Loo, 'The Court's Opinion on the EU-Singapore FTA: Throwing off the Shackles of Mixity?' (2017) CEPS Policy Insights No 2017/17 <https://www.ceps.eu/publications/court's-opinion-eu-singapore-fta-throwing-shackles-mixity> accessed 10 April 2019.
[365] Opinion 2/15 *EU-Singapore Free Trade Agreement* [2017] Digital Reports, para 37.
[366] ibid para 147.
[367] ibid para 148.

sustainability in EU external action does not consist of EU standards, but international commitments. On this point, it should be noted that the reference to international standards may be encouraged by WTO law. In particular, Article 3(1) of the SPS agreement clarifies that the parties shall base their SPS measures on international standards; likewise, Article 3(2) adds that SPS measures based on international standards presumed to be consistent with the GATT and the SPS Agreement. However, Article 3(3) also enables the parties to adopt SPS measures that go beyond this threshold 'if there is a scientific justification' for doing so. It can therefore be concluded that the reference to international standards is not necessarily set in stone for SPS measures.

The matter of whether the baseline revolves around EU or international standards is crucial because the latter are overall definitely looser than the former.[368] It would thus appear that the Court – although only commenting incidentally on the issue in question – does not consider that the standards of sustainable development elaborated within the EU legal system should also be taken as a baseline for EU external action.

It must be borne in mind that the Court was not directly focusing on this problem in the present case, so it would be interesting to see how it would react to an application directly lodged to this aim. However, it is a matter of fact that – at the time of writing – there is no precedent showing that the Court has carried out a proper 'sustainability test' on FTAs concluded with third countries. Therefore, it would appear that the content of the commitments made by the EU in FTAs is only reviewed – at most – to a superficial extent, at least for what concerns sustainable development.

In sum, the obligations that the Treaties place on the EU for development of the CCP are not considered as obligation of results, not even in the sense specified above (*supra*, §3.3.2.). In conclusion, such a light approach – totally in line with the CJEU interpretation of the principle of environmental integration (*supra*, §1.3.) – makes it impossible to ensure, at EU level, a judicial

[368] For the consideration of EU environmental standards in the international arena (also vis-à-vis other countries), see Ludwig Krämer, *EU Environmental Law* (7th edn, Sweet & Maxwell 2012); on the role of the EU in international environmental law, see – more generally – Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (3rd edn, Cambridge University Press 2012) 847. Strictly speaking, the matter of whether EU standards are overall higher than international ones could only be assessed by comparing each EU standard with its corresponding international one, if existing. However, the conclusion that EU environmental standards, particularly in agriculture, are higher than international ones can be inferred simply from the fact that there is no international agreement regulating the 'greening' of world agriculture, so that EU standards enshrined in the CAP definitely set the bar higher. On the contrary, as discussed extensively *supra,* §3.1.2., in WTO law the greening of agriculture is basically unregulated in direct terms. Outside the CAP, also by virtue of the PEI which is certainly not acquired in international law, for each component of the natural environment (land, air, water and so forth) the EU sets standards in its legislation that most of the time are not derived from international obligations, but rather fixed unilaterally (such as organic farming, sustainable pesticide use, clean water and drinking water, sustainable production and consumption requirements, energy performance of buildings; renewable energies and so forth). As far as international environmental agreements (especially the multilateral ones) are concerned, the climate negotiations are only one example that teaches us how the EU is generally prone to take the lead in the international arena.

review of the environmental dimension of FTAs. However, this does not *automatically* mean that FTAs conflict with environmental protection, as the extent to which the latter is considered will depend on each individual agreement and the mechanisms envisaged therein to ensure this objective. It just means that, in case such a target is disregarded in a given FTA, it is likely that no EU-based judicial mechanism will prevent entry into force of the agreement in question. It should be noted that, other than being legally unprecedented, the 'sustainability test' would perhaps find a sharp resistance at the political level. As seen *supra*, (cf Introduction), while international agreements can derogate the general rule of the 'reserved domain of domestic jurisdiction', thereby exporting environmental standards in other regulatory frameworks, in practice states are still reluctant to accept this inception of 'foreign' standards in their domestic systems. Therefore, the 'sustainability test' may also be politically difficult to accept by third countries. It may then – paradoxically – even backfire on the pursuit of sustainable development outside EU boundaries, as far as the prospect of a stricter review of the environmental dimension of the agreement may discourage third countries to commit ambitiously in this respect.

SECTION IV

KEY ISSUES FOR AGRICULTURAL SUSTAINABILITY IN FTAs

After having examined the broad political, economic and legal context – especially at international and EU levels – in which FTAs are elaborated, attention must now be turned towards the key aspects that, in each agreement, determine whether or not sustainable agriculture is pursued directly or indirectly – and to what extent.

Firstly, in 'new-generation' agreements concluded by the EU, environmental protection is openly incepted in the content of the agreement in the form of the TSD chapter.

Secondly, there are more indirect ways of enhancing environmental standards – or, at least, to ensure that the EU baseline in this regard is not watered down. This is the result of the extent to which the parties decide to undertake 'regulatory cooperation' in order to harmonise their respective rules in certain sectors – and particularly, for our purpose, the agricultural one.

Thirdly, no rule is meaningful without appropriate institutional arrangements set up in order to ensure its respect. Thus, the analysis of each mechanism enshrined with a view to ensuring the implementation of the agreements, as well as compliance and dispute settlement mechanisms will be examined separately.

On the basis of this premise, the next three paragraphs will be focused on evaluation of the provisions relating – respectively – to each of the above-mentioned key aspects.

§4.1. The 'Trade and Sustainable Development (TSD)' Chapter

§4.1.1. *TSD Chapters: Notion and Purpose*

Environmental provisions have always been present in EU FTAs. At international level this has happened since the NAFTA,[369] thereby giving substance to GATT Article XX. However, the structure and weight of such provisions have changed considerably further to the Global Europe Communication in 2006, which inaugurated the era of 'new-generation' FTAs (see *supra*, §3.2.3.).

[369] North American Free Trade Agreement (NAFTA), Washington, DC, US-Canada-Mexico, US Government Printing Office (1992), signed 12 December 1992, in force 1 January 1994.

One of the most prominent features of this kind of FTA is precisely the existence of a whole chapter dedicated to the need to regulate trade and sustainable development in a harmonious manner, ie the TSD chapter. Thus, while beforehand the environmental dimension of FTAs was mainly limited to the commitment to cooperate on various matters, FTAs concluded on the impetus of that change of approach started providing for sustainable development in a more systematic way.

Whether scattered in the text of the agreement or grouped together, such environmental provisions are supposed to move forward from the 'baseline' (in the sense explained *supra*, §3.1.2) of the (voluntary) protection set out at WTO level (see, in this respect, *supra*, §3.1.). In fact, irrespective of the extent to which sustainable development should be integrated into the agreements, the presence of TSD chapters would not make any sense if they did not purport to add anything new to the *status quo*.

At the same time, it is not possible to assign to TSD chapters a place that goes beyond their recognised aim, particularly at EU level. In fact, high expectations are commonly placed on this kind of provisions by public opinion, looking at them as the guarantee that thanks to them somehow sustainable development will not be disregarded. On the contrary, it is crucial to clarify that at present TSD chapters are seen as having a different purpose. This was recently clarified by the CJEU in Opinion 2/15 on the EU-Singapore FTA.[370] In this FTA – similar to other 'new-generation' FTAs such as those with South Korea,[371] Ukraine[372] and Canada[373] – the TSD chapter was included as part of the new approach of the EU – allegedly – in order to foster environmental protection. This aim seems to imply straightforward consequences, but it does not. In particular, does it mean – as one might think – that the parties must introduce precise standards to be mutually respected as part of an overall, common 'sustainable development strategy'? The CJEU did not endorse this view, ruling that the provisions in question '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' (emphasis added).[374]

[370] Opinion 2/15 *EU-Singapore Free Trade Agreement* [2017] Digital Reports.
[371] Free Trade Agreement between the EU and its Member States, on the one part, and South Korea, on the other, signed 6 October 2010, in force 13 December 2015.
[372] Association Agreement between the European Union and the European Atomic Energy Community and their Member States, on the one hand, and Ukraine, on the other, signed 27 March 2014, in force 1 September 2017 (provisionally applied since 1 November 2014).
[373] Comprehensive Economic and Trade Agreement between the EU and its Member States, on the one part, and Canada, on the other (CETA), signed 30 October 2016, not in force (provisionally applied since 21 September 2017).
[374] Opinion 2/15 *EU-Singapore Free Trade Agreement* [2017] Digital Reports, para 166.

It is then clear that sustainable development is – once again – not given the task of improving existing environmental standards beyond the level established by international environmental agreements (and, as will be seen in the case studies, only by those to which the trade partners are already a party), but to facilitate a convergence between different and sometimes conflicting objectives. In other words, the CJEU certifies the ancillary function of sustainable development vis-à-vis the smooth government of trade between the parties. Such a stance explains why the potential of sustainable development to enhance environmental protection across the globe is seen with mistrust by several philosophers and economists (*supra*, §1.1). According to some authors, it also shows why there is a gap between 'governments' decisions' and 'citizens' preferences' vis-à-vis the nexus trade-environment.[375] In fact, while the latter would commonly expect sustainable development to push upward existing environmental standards by virtue of international agreements, the former only commit to respecting internationally agreed standards which should already be binding on them. On the contrary, the statement of the CJEU is crucial to understanding what can and what cannot be expected from a TSD chapter. It is ironic that the lack of any reference to either sustainable development or environmental protection in the CAP's Treaty objectives did not prevent such values to penetrate into secondary legislation, giving rise to standards of protection that – more or less, depending on the case – are higher than in the vast majority of the legal framework of the EU's commercial partners (*supra*, §2.3.). On the other hand, a clear reference to sustainable development in the principles of EU CCP and the duty to integrate environmental considerations in every Union policy and activity (Article 11 TFEU) appear not to be enough to give rise to the same outcome in the ambit of EU external action.

Notwithstanding this, two considerations need to be made while assessing the content and the legal consequences of TSD chapters.

First, it must be borne in mind that, in the same Opinion 2/15, the CJEU also made clear that TSD provisions shall not encourage trade by reducing the level of protection 'below the standards laid down by international commitments'.[376] However objectionable the setting of this baseline could be (*supra*, §3.3.3.), this requirement still constitutes a *substantial* bottom line that cannot be disregarded by the parties.

Second, the main purpose of TSD clauses may not be to *increase* environmental standards in the event that there is no uplift from the regulatory baseline established by internationally agreed

[375] Thomas Bernauer and Quynh Nguyen, 'Free Trade and/or Environmental Protection?' (2015) 15(4) Global Environmental Politics 105, 126.
[376] Opinion 2/15 *EU-Singapore Free Trade Agreement* [2017] Digital Reports, para 158.

standards already binding on the parties; however, this *does not automatically prevent* such clauses from introducing more ambitious measures in a certain agreement, which has to be evaluated in each case. In other words, every agreement can introduce on one or more parties additional standards which go beyond those already endorsed by the parties in question at international level.

§4.1.2. *Content and Recurrent Features of TSD Chapters*

As regards the shape and design of TSD chapters, a 'non paper' of the Commission services has clarified that the approach is generally based on three pillars: binding commitments relating to Multilateral Environmental Agreements (MEAs); structures that involve civil society organisations in the implementation of the agreements; and Dispute Settlement Mechanisms (DSMs).[377] Preliminarily, it must be observed that such chapters firstly depend on what was evaluated prior to the conclusion of the agreement by means of an impact assessment. The 'Trade Sustainability Impact Assessment' (SIA) is the process undertaken while a negotiation is being conducted so as to endeavour to pinpoint potential economic, social and environmental impacts of a trade agreement on the EU as well as on its commercial partners and follows a methodology spelt out in great detail by the EU itself.[378] This process aims at informing both negotiators and stakeholders, particularly on the possible consequences of the agreement. It also purports to provide recommendations to the policy-makers and give the possibility of interested public and private entities of being involved in the negotiation of the agreement. The final outcome should illustrate, on the basis of a qualitative, quantitative and legal analysis for every sector, the expected scenarios in the event of conclusion and non-conclusion of the agreement.

It is clear how this instrument constitutes a key tool for the overall assessment of sustainable agriculture in an FTA, as the extent to which the recommendations and the concerns raised in the SIA have been taken on board in the final text gives a clear picture of the importance attributed to

[377] EU Commission, 'Feedback and Way Forward on Improving the Implementation and Enforcement of Trade and Sustainable Development Chapters in EU Free Trade Agreements' (2018) Non paper of the Commission services of 26 February 2018, 1 <https://webcache.googleusercontent.com/search?q=cache:Zu0ZqZr3RRwJ:https://www.politico.eu/wp-content/uploads/2018/02/TSD-Non-Paper.pdf+&cd=1&hl=it&ct=clnk&gl=be> accessed 12 April 2019. See also the similar categorisation elaborated by Dale Colyer, 'Environmental Provisions in Free Trade Agreements' (2004) Paper presented at the short course 'Trade and the Environment: Dealing with Pollution and Natural Resource Management in a Globalizing World', World Bank, Washington, DC, 5 <https://ageconsearch.umn.edu/bitstream/19103/1/cp04co02.pdf> accessed 1 April 2019.

[378] EU Commission, 'Handbook for Trade Sustainability Impact Assessment: Second Edition' (2016) <http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154464.PDF> accessed 12 April 2019. It is worth noticing that the SIA complements the general impact assessment that is conducted in-house and is carried out before making a recommendation for a negotiating authorisation under Article 218(3) TFEU.

this objective in practice. It must be borne in mind, however, that SIAs are reliable only to a certain, variable extent. In fact, criticisms have been raised vis-à-vis their capability to actually involve civil society and exert a real influence on the negotiations,[379] particularly since SIAs are often concluded towards the end of the negotiations and in some cases after their conclusion. More generally, it was stated that the Commission is available to modify the negotiating position only if it considers the results of the SIA 'to be robust, otherwise it may not'.[380]

Other than the impact assessment, the periodic release of drafts of the agreements may boost transparency and citizens' pressure on negotiators, especially by means of civil society organisations. Moreover, commitments on inter-institutional dialogue – particularly at intergovernmental level – may help national environmental authorities and agencies to have a bigger say and may also enhance reciprocal capacity building and technical assistance.[381]

As regards substantial provisions, the TSD chapters of 'new-generation' FTAs are more all-inclusive than pre-Global Europe agreements, where the core of the regulation revolved around environmental cooperation between the parties. An environmental cooperation mechanism continues to be used nowadays, although its outcomes are dependent on a number of factors and particularly the matter of whether EU trade partners have comparable levels of development or not – in which case cooperation will mostly focus on capacity-building.[382]

The measures in question do not appear to be inserted randomly into the FTAs, but follow a structure that – generally speaking – tends to replicate recurrent patterns.[383] As the OECD has remarked, virtually all TSD chapters contain more or less open commitments to maintain high levels of environmental protection (or at least not to lower it); likewise, they strive to harmonise

[379] Ingmar von Homeyer, Matthew Collins and Wesley Ingwersen, 'Improving Public Participation in Sustainability Impact Assessments of Trade Agreements' in Paul Ekins and Tancrede Voituriez (eds), *Trade, Globalization and Sustainability Impact Assessment: A Critical Look of Methods and Outcomes* (Earthscan 2009) 189.
[380] Colin Kirkpatrick and Clive George, 'Have Sustainability Impact Assessments of Trade Agreements Delivered on Development Issues: A Reflexive Analysis of the Emergence and Main Contributions of Trade SIAs' in Paul Ekins and Tancrede Voituriez (eds) *Trade, Globalization and Sustainability Impact Assessment: A Critical Look of Methods and Outcomes* (Earthscan 2009) 79.
[381] Marie-Claire Cordonier Segger, 'Sustainable Development in Regional Trade Agreements' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press 2006) 313, 323.
[382] OECD, 'Environment and Regional Trade Agreements' (2007) Report – 15 June 2007 <http://www.oecd.org/env/environmentandregionaltradeagreements.htm> accessed 12 April 2019.
[383] See the extensive analysis of Rok Žvelc, 'Environmental Integration in EU Trade Policy: the Generalised System of Preferences, Trade Sustainability Impact Assessments and Free Trade Agreements' in Elisa Morgera (ed) *The External Environmental Policy of the European Union: EU and International Law Perspectives* (Cambridge University Press 2012) 174 *et seq*.

environmental standards, while holding the right to regulate in this ambit and using as a benchmark the achievements obtained at the level of MEAs.[384]

In more detail, it can be said that all TSD chapters begin with a general provision setting the context and the objectives, normally recalling the main foundations of sustainable development in international law.[385]

A recurrent provision reiterates the parties' rights to establish their own levels of environmental protection, the limit being – as seen *supra*, §3.3. – respect of recognised international standards.[386]

A separate provision is normally dedicated to MEAs that the parties commit to respect and implement, although in some instances it is not clear if such a commitment only concerns MEAs ratified by every party to the agreement or every MEA ratified by at least one party to the FTA.[387]

Finally, a frequent statement concerns the commitment not to lower the parties' respective domestic framework vis-à-vis environmental law,[388] which obviously also touches upon environmental measures and standards integrated in the agricultural sector (this is linked to the so-called principle of 'standstill', or '*non-régression*' in French, for which see more extensively *infra*, §5.1.1.). Sometimes, this is followed by a reference – more or less vague – to the precautionary principle,

[384] OECD, 'Environment and Regional Trade Agreements' (2007) Report – 15 June 2007 <http://www.oecd.org/env/environmentandregionaltradeagreements.htm> accessed 12 April 2019.
[385] *Inter alia*, Free Trade Agreement between the EU and its Member States, on the one part, and the Republic of South Korea, on the other, signed 6 October 2010, in force 13 December 2015, Article 13(1); Association Agreement between the EU and its Member States, on the one part, and Central America, on the other, signed 29 June 2012, not in force (provisionally applied for some parties), Article 284; Trade Agreement between the EU and its Member States, on the one part, and Peru and Colombia, on the other, signed 26 June 2012, not in force (provisionally applied since 1 March 2013 and 1 August 2013 respectively), Article 267.
[386] *Inter alia*, Free Trade Agreement between the EU and its Member States, on the one part, and the Republic of South Korea, on the other, signed 6 October 2010, in force 13 December 2015, Article 13(3); Association Agreement between the EU and its Member States, on the one part, and Central America, on the other, signed 29 June 2012, not in force (provisionally applied for some parties), Article 285; Trade Agreement between the EU and its Member States, on the one part, and Peru and Colombia, on the other, signed 26 June 2012, not in force (provisionally applied since 1 March 2013 and 1 August 2013 respectively), Article 268.
[387] Rok Žvelc, 'Environmental Integration in EU Trade Policy: the Generalised System of Preferences, Trade Sustainability Impact Assessments and Free Trade Agreements' in Elisa Morgera (ed) *The External Environmental Policy of the European Union: EU and International Law Perspectives* (Cambridge University Press 2012) 174, 197.
[388] *Inter alia*, Free Trade Agreement between the EU and its Member States, on the one part, and the Republic of South Korea, on the other, signed 6 October 2010, in force 13 December 2015, Article 13(7); Association Agreement between the EU and its Member States, on the one part, and Central America, on the other, signed 29 June 2012, not in force (provisionally applied for some parties), Article 291; Trade Agreement between the EU and its Member States, on the one part, and Peru and Colombia, on the other, signed 26 June 2012, not in force (provisionally applied since 1 March 2013 and 1 August 2013 respectively), Article 277.

duties of information, transparency in communications, public consultations and monitoring and evaluation mechanisms.[389]

Other than these common patterns, every FTA has some specificities. Against this background, the experience of past FTAs (not only EU ones) shows that many options are available for the policy-makers. *Inter alia*, an FTA may be designed in such a way as to include: exception clauses through which it is ensured that one of the regimes provided for in the agreements – trade liberalisation, social development, environmental protection and so forth – does not conflict with the others, so that governments have enough leeway to prioritise one or the other, in the event that the circumstances so require; the deferral to parallel cooperation agreements on social and environmental matters; and technical operative provisions to avoid overlaps between international agreements, as well as rules on the relationship between treaties.[390]

It has to be clarified, however, that it is very unlikely that a set of detailed provisions to directly enhance sustainable agriculture – namely those described *supra*, §2.1. – may ever be provided for in an agreement, as this may – at most – be foreseen by each party at domestic level so as to comply with the broad requirements laid down in the treaty in question. As will be seen (see *infra*, §6.1.), one exception is the agreement between the EU and Chile, in which the parties commit 'to support and stimulate agricultural policy measures in order to promote and consolidate the Parties' efforts towards sustainable agriculture, and agricultural and rural development'.[391] However, as a general remark, keeping in mind the content of the practices meant to foster sustainable agriculture is

[389] *Inter alia*, various provisions of the Free Trade Agreement between the EU and its Member States, on the one part, and the Republic of South Korea, on the other, signed 6 October 2010, in force 13 December 2015; Association Agreement between the EU and its Member States, on the one part, and Central America, on the other, signed 29 June 2012, not in force (provisionally applied for some parties); Trade Agreement between the EU and its Member States, on the one part, and Peru and Colombia, on the other, signed 26 June 2012, not in force (provisionally applied since 1 March 2013 and 1 August 2013 respectively).

[390] Marie-Claire Cordonier Segger, 'Sustainable Development in Regional Trade Agreements' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press 2006) 313, 324. On the content of the TSD chapter, see (more recently) Clive George, 'Environment and Regional Trade Agreements: Emerging Trends and Policy Drivers' (2014) OECD Trade and Environment Working Papers <https://www.oecd-ilibrary.org/trade/environment-and-regional-trade-agreements_5jz0v4q45g6h-en> accessed 21 December 2019. For an analysis of the content followed by considerations on the implementation, see Inmaculada Martínez-Zarzoso, 'Assessing the Effectiveness of Environmental Provisions in Regional Trade Agreements: an Empirical Analysis' (2018) OECD Trade and Environment Working Papers <https://www.oecd-ilibrary.org/environment/assessing-the-effectiveness-of-environmental-provisions-in-regional-trade-agreements_5ffc615c-en> accessed 21 December 2019; Clive George and Shunta Yamaguchi, 'Assessing Implementation of Environmental Provisions in Regional Trade Agreements' (2018) OECD Trade and Environment Working Papers <https://www.oecd-ilibrary.org/environment/assessing-implementation-of-environmental-provisions-in-regional-trade-agreements_91aacfea-en> accessed 15 April 2019; Kateřina Hradilová and Ondřej Svoboda, 'Sustainable Development Chapters in the EU Free Trade Agreements: Searching for Effectiveness' (2018) 52(6) Journal of World Trade 1019. For studies on the content of TSD chapters in the context of each specific agreement, see extensively *infra*, Part C.

[391] Agreement establishing an association between the European Community and its Member States, on the one part, and the Republic of Chile, on the other, signed 18 November 2002, in force 1 February 2003, Article 24(1).

important because the overall design of the treaty may be more or less suitable to their subsequent implementation at national or regional level.

§4.1.3. *How to Review the Effectiveness of TSD Chapters*

It goes without saying that the actual surplus in terms of environmental delivery stemming from all these provisions is still to be seen in a specific case. The key question is of course whether or not such measures state something which goes beyond the *status quo* of the existing baseline of international and domestic law into force. In order to reply to this question, it must be borne in mind that FTAs face a number of challenges that are not exclusively related to their environmental dimension. It is clear that the main obstacle to every provision of the FTAs aiming at setting limits to free trade encounters the big problem of effectiveness. The latter depends on a number of factors, the first of which is the wording of the measures concerned, ie the accuracy or the legal drafting, which has to prove to be capable of avoiding problems of interpretation and misunderstandings. Other factors are of a more institutional and procedural nature and include the appropriateness of the mechanisms to ensure – *inter alia* – correct implementation, monitoring and technical assistance (such mechanisms will be explored *infra*, §4.3.). Scholars agree that the evaluation of environmental performances of FTAs across the world is still generally dissatisfactory, apart from some remarkable exceptions such as the NAFTA.[392] This is indeed one of the main counterarguments against those who would praise a regionalisation of the climate regime in line with what happened with world trade.[393] Monitoring and reporting is indeed a key step to undertaking a result-based approach in environmental matters.[394] As is apparent from the review carried out by the EU Commission in its 'non paper' of 2017, the EU has recently undertaken a

[392] Joy A Kim, 'Harnessing Regional Trade Agreements for the Post-2012 Climate Change Regime' in Benjamin Simmons, Harro van Hasselt and Fariborz Zelli (eds), *Climate and Trade Policies in a Post-2012 World* (United Nations Editions 2009) 63. On the evaluation of the environmental performances of the FTAs, see also Inmaculada Martínez-Zarzoso, 'Assessing the Effectiveness of Environmental Provisions in Regional Trade Agreements: an Empirical Analysis' (2018) OECD Trade and Environment Working Papers <https://www.oecd-ilibrary.org/environment/assessing-the-effectiveness-of-environmental-provisions-in-regional-trade-agreements_5ffc615c-en> accessed 21 December 2019; Karolina Zurek, 'From "Trade *and* Sustainability" to "Trade *for* Sustainability" in EU External Trade Policy' in Antonina Bakardjieva Engelbrekt *et al* (eds), *The European Union in a Changing World Order; Interdisciplinary European Studies* (Springer 2019) 115, 127; Clive George and Shunta Yamaguchi, 'Assessing Implementation of Environmental Provisions in Regional Trade Agreements' (2018) OECD Trade and Environment Working Papers <https://www.oecd-ilibrary.org/environment/assessing-implementation-of-environmental-provisions-in-regional-trade-agreements_91aacfea-en> accessed 15 April 2019.

[393] Rafael Leal-Arcas, 'Climate Change Mitigation from the Bottom Up: Using Preferential Trade Agreements to Promote Climate Change Mitigation' (2013) 7(1) Carbon & Climate Law Review 34.

[394] This seems to have been particularly understood by the EU Commission in its internal action, as clear from the launch of the so-called 'delivery-model' in its 2017 Communication on the future of food and farming (see *supra*, §2.2.3.). The performance-based structure of the CAP triggered thereby is unconceivable with a strict system of indicators set out to measure and evaluate environmental delivery.

thorough assessment of compliance with and performances of provisions contained in the TSD chapters; in this connection, it has started sending out letters outlining the actions to be taken by a number of trading partners whose accomplishment of the TSD chapter has not yet been satisfactory.[395] The EU Commission is also of the view that the review of TSD chapters implementation should be enhanced, consistently proposing to EU trade partners clauses which oblige them to draw up annual implementation reports end thorough ex-post evaluations.[396] However, considering the reluctance of EU trade partners to accept trade sanctions and the difficult quantification of a potential compensation for breach of a provision contained in the TSD chapter, it is to be seen how such resolutions can be enforced.

Amongst the mechanisms that should be strengthened to help achieve higher review standards there are civil society mechanisms. Such tools are designed – in different ways – to enhance public participation and generally revolve around the need to carry out public consultations and the attribution of powers to NGOs and other similar entities, which should act as intermediaries between civil society and institutions. Such instruments are a double-edge sword, because if not well structured they may end up becoming drivers to co-optation allied to interests of the lobbies. This is particularly true when roles are recognised in theory, but powers are not assigned in practice, which may surreptitiously pave the way to silencing opposition towards neo-liberal approaches.[397] Thus, the appropriateness of such measures depends on the overall organisation of the mechanism, the transparency of the selection procedures for representatives and the means to ensure accountability to governments. Against this background, the EU Commission committed itself to facilitate the monitoring role of civil society, attributing to them stringent powers and perhaps extending their scope even outside the TSD chapter; on this point, the Commission envisaged including progress on the implementation of TSD chapters in the Civil Society Dialogue meetings organised by DG Trade twice per year.[398]

In conclusion, the success of the TSD chapter will depend both on the level of ambition of the measures provided for therein and on the mechanisms provided to give substance to them. What matters is therefore the extent to which – from a normative point of view – the TSD chapter is

[395] EU Commission, 'Feedback and Way Forward on Improving the Implementation and Enforcement of Trade and Sustainable Development Chapters in EU Free Trade Agreements' (2018) Non paper of the Commission services of 26 February 2018, 8 <https://webcache.googleusercontent.com/search?q=cache:Zu0ZqZr3RRwJ:https://www.politico.eu/wp-content/uploads/2018/02/TSD-Non-Paper.pdf+&cd=1&hl=it&ct=clnk&gl=be> accessed 12 April 2019.
[396] ibid 9.
[397] Jan Orbie, Deborah Martens, Myriam Oehri and Lore Van den Putte, 'Promoting Sustainable Development or Legitimising Free Trade? Civil Society Mechanisms in EU Trade Agreements' (2016) 1(4) Third World Thematics: A TWQ Journal 526, 532.
[398] ibid 2.

designed to have a positive impact on agricultural sustainability in third country parties. In the case studies, what will be looked for is not just *the number* of provisions and solutions that – in abstract terms – may be theoretically beneficial for the environment, as what matters is *the overall setting up* of the measures, in order to check whether there is a real added value or that they just replicate – best case scenario! – the *status quo*. In this assessment, the effectiveness of review will play a fundamental role. As pointed out in a recent study conducted by the OECD, the review of implementation records is still the key point to solve for FTAs.[399] In fact, it was observed that out of 177 FTAs analysed with substantive environmental provisions, only 18 could count on implementation and evaluation reports.[400] For TSD chapters, this is complicated by the fact that their observed effects on the environment may not be tangible and identifiable, particularly due to the multiplicity of causes playing a role on the final result.[401]

§4.2. Regulatory Cooperation

§4.2.1. *The Pursuit of Deep Integration and Approximation of Laws*

TSD chapters are not the only feature influencing the pursuit of sustainable agriculture in third country parties through FTAs. On the contrary, as will be seen, the promotion of EU standards may occur through more indirect yet more powerful means. As long as the domestic legal framework of the EU commercial partners changes because of the obligations of an FTA, the rules laid down therein to regulate the relationship between the two legal orders is of crucial importance.

In international economic law, the problem stems from the fact that regulatory divergences represent non-tariff barriers that are one of the main obstacles to global trade. In fact, the diversity of rules and technical standards enshrined in domestic legislation determines an increase in costs and constraints for exporting enterprises, which is the reason why WTO law aims at their elimination. At the same time, such different standards are often set to preserve important societal values, including food safety, health and environmental protection, so that their removal or retrenchment may result in worse living conditions for citizens. In the agricultural sector, the most straightforward example is that of cross-compliance (see *supra*, §2.3.), which is conceived as

[399] Clive George and Shunta Yamaguchi, 'Assessing Implementation of Environmental Provisions in Regional Trade Agreements' (2018) OECD Trade and Environment Working Papers <https://www.oecd-ilibrary.org/environment/assessing-implementation-of-environmental-provisions-in-regional-trade-agreements_91aacfea-en> accessed 15 April 2019.
[400] ibid 24.
[401] ibid 25.

contributing to the overall sustainability of European agriculture, but is often costly for economic actors and administratively burdensome for public entities, so that complying with such standards may be rather complicated for a potential EU commercial partner.[402]

In abstract terms, the two extreme solutions would be either universal harmonisation of any technical standard at global level, which is indeed highly unlikely; or – the other end of the spectrum – a sort of 'institutional deference', which would preserve full national sovereignty in establishing technical standards, but would entail an exponential increase in technical barriers to trade, which would not necessarily benefit public interest as it may also backfire on consumers themselves as well as on agricultural sustainability globally considered.

A happy medium between these two important exigencies is therefore required. This debate is indeed directly linked to the limits to which the setting of PPMs is subject in international trade law (see *supra*, §3.3.2.). Mindful of such limits, it is however true that international trade law has elaborated smoother forms of more or less reciprocal integrations between the domestic legislation of the country parties. Regulatory cooperation can be thus defined as the objective to liberalise trade while still achieving the underlying public policy objectives.[403] Such intermediate solutions essentially revolve around the three basic paradigms of mutual recognition, equivalence and harmonisation, which – at least theoretically – designate as many progressive levels of regulatory cooperation between different regulatory frameworks. The analysis of these three essential concepts will be at the core of the next sub-paragraph. For now, what is important to underline is that in any event the solution chosen would imply a certain level of approximation of laws, because even the lowest level of regulatory cooperation (namely, mutual recognition) would cause the acceptance of goods produced in accordance with different standards, which in turn may generate a certain regulatory homogenisation of rules in the long run. Such an approximation of technical standards has a twofold relevance for sustainable agriculture. On the one hand, as mentioned above, these technical standards may be precisely environmental ones, so that any regulatory convergence may be for better or worse in terms of environmental protection depending on the viewpoint chosen. On the other hand, the approximation of other standards, apparently not linked to agricultural sustainability, may have a more or less detrimental effect for the environment if free trade is pursued (and production is fostered) without sufficient counterbalances for the preservation of environmental integrity.

[402] Alberto Alemanno, 'Le principe de la reconnaissance mutuelle au-delà du marché intérieur : phénomène d'exportation normative ou stratégie de « colonialisme » réglementaire ?' (2006) 2 Revue du Droit de l'Union Européenne 273, 277.

[403] OECD, *International Regulatory Co-operation: Addressing Global Challenges* (OECD Publishing 2013) 15.

Officially, the approximation of laws through promotion of EU standards on foreign countries is a specific feature of 'new-generation' EU FTAs. Amongst the specific characteristics of such a new policy trend, there is the concept of the so-called 'deep integration', ie a level of integration that goes beyond purely commercial-related purposes, also seeking to pursue political and social aims. In practice, such an integration is achieved through the provision in an FTA of the incorporation of an EU *acquis* in the legal framework of the commercial partner. This provision is compatible with the principle of reciprocity as long as the EU commits to ensure corresponding commercial advantages to its commercial counterpart, so that the 'regulatory efforts' of the latter find an economic justification reflected in the agreement.[404] Such an EU *acquis* is concretely made up of a selection of standards considered by the EU as essential to export its political, social and economic model. Naturally, it is not sufficient to include a couple of standards as *acquis* to have 'deep integration'. Although the ways through which this occurs are very diverse, some criteria should be respected, namely: future incorporation of the EU *acquis* by the EU commercial counterpart should be established through legally binding provisions in the agreement; the selection of *acquis* should always be predetermined; mechanisms to ensure consistency of the interpretation and application of such an *acquis* should be ensured; finally, a system to periodically review and update the *acquis* (without however automatically incepting in the *acquis* rules unilaterally produced at EU level after the conclusion of the agreement, which might be questionable from the viewpoint of the principle of 'reserved domain of domestic jurisdiction') should be put in place, particularly through an *ad hoc* institution which can take legally binding decisions.[405] If this is not the case, integration cannot be regarded as 'deep' as too unstable and/or weak in producing legal effects in the EU counterpart's domestic framework. It is therefore clear that the matter of whether the EU is exporting its sustainability standards in agriculture will not only have to be considered from a static point of view

[404] The principle of reciprocity is a cornerstone of WTO law and implies that the tariff reductions requested have an equivalent value to the tariff reductions offered. The reference to 'reciprocal and mutually advantageous arrangements' is made both in the GATT preamble and in GATT Article XXVIIIbis and is substantiated in a plethora of other WTO agreements. It should be noted that there is no agreed method for measuring reciprocity and the final assessment of the acceptability of the outcome ends up being political in nature. See Peter van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organisation* (3rd edn, Cambridge University Press 2013) 429. For an analysis of the principle of reciprocity from an economic perspective, see David R DeRemer, 'The Principle of Reciprocity in the 21st Century' (2016) Institute of Economics, Centre for Economic and Regional Studies, Hungarian Academy of Sciences – Discussion Paper MT-DP 2016/13 <https://ideas.repec.org/p/has/discpr/1613.html> accessed 7 January 2020. The principle of reciprocity finds some limits in the relationships between developed and developing countries (cf GATT Article XXXIV(8) and paragraphs 5, 6 and 7 of the Enabling Clause); for the application of reciprocity in the relationships between the EU and the ACP group, see *infra*, §6.2.

[405] Guillaume Van der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Trade Area: a New Legal Instrument for EU Integration without Membership* (Brill 2016) 28 *et seq*.

(the identification of the standards which will constitute selection of the *acquis*), but also from a dynamic one (the legal instruments through which this can be done in practice).[406]

Moving from the assumption that the EU is incontrovertibly a very stringent food safety and environment regulator – this dissertation openly endorses the view that the more EU standards are promoted, the better for improvement of sustainable agriculture in third country parties.[407] As a result, whether or not in the *acquis* there are practices beneficial to the climate and the environment, such as those currently in force for EU agriculture (*supra*, §2.3.), is of crucial importance. In fact, however mindful of the necessity to be compliant with GATT Article XX (see *supra*, §3.3.2.), hitherto the standards relating to the *product* have side-lined those relating to agricultural *production* as such. Although it is of obvious importance to guarantee that products marketed across EU borders are healthy and viable for EU consumers, from the environmental point of view this is far from ensuring overall agricultural sustainability. The latter concerns first and foremost the process of production of agricultural goods, but also the environmental costs linked to the transport of such goods to the final consumer (for instance the air and marine pollution released in the atmosphere while a ship is carrying a stock from one continent to the other). An example may help clarification. If – say – an apple imported by the EU from a foreign country arrives at consumer level with acceptable standards of quality and safety, such an apple – from the perspective of the consumer – is comparable to any other similar apple produced and marketed within EU borders; this does not mean, however, that the production of such an apple had the same environmental costs if production standards are lower in the exporting country than in the EU. Product standards, as they are often verifiable through the sight and/or taste, are relatively easier to apply and control, whereas most of the time it is impossible for the final consumer to detect what was the environmental cost of

[406] The matter of whether the EU is promoting its standards in a more or less aggressive way lies outside the scope of this paper. Amongst those in favour of this view, cf Simone Claar and Andreas Nölke, 'Deep Integration in North–South Relations: Compatibility Issues Between the EU and South Africa' (2013) 40(136) Review of African Political Economy 274; against, cf Alasdair R Young, 'Liberalizing Trade, not Exporting Rules: the Limits to Regulatory Co-ordination in the EU's 'New Generation' Preferential Trade Agreements' (2015) 22(9) Journal of European Public Policy 1253. However, this opposition between these two authors is more apparent than real. Indeed, the EU by fostering deep integration is enlarging its market and exporting its idea of capitalism. This, at the same time, does not mean that in so doing it is unilaterally imposing to third parties the standards enshrined in its sustainable agricultural practices beside what is established in its FTAs; nor may the EU impose as part of the *acquis* rules that are created in its legal system subsequent to the conclusion of an agreement (and therefore to the establishment of the scope of the *acquis* itself), which as clarified above might not be compatible with the principle of the 'reserved domain of domestic jurisdiction' of the EU counterpart (cf *supra*, Introduction). That having been said, it is worth reminding that there is still no systematic, theory-driven study on the impact of deep integration on national regulations. On this last point, cf Simone Claar and Andreas Nölke, 'Deep Integration in North–South Relations: Compatibility Issues Between the EU and South Africa' (2013) 40(136) Review of African Political Economy 274, 278.

[407] Amongst the others, cf Anu Bradford, 'The Brussels Effect' (2012) 107(1) Northwestern University Law Review 1; David Vogel, *The Politics of Precaution: Regulating Health, Safety, and Environmental Risks in Europe and the United States* (Princeton University Press 2012).

the product he is consuming. It is therefore essential that the *acquis* fairly represents such EU agricultural production standards – and possibly include all of them. Such environmental measures, when touching upon PPMs, can and should be justifiable under GATT Article XX(b) and (g) and under the SPS Agreement. This is particularly relevant as far as, to tell the truth, the bulk of the approximation of laws originates more from the need to reduce trade conflicts rather than from achieving ambitious environmental goals.[408]

In theory, the standards in question may be:[409] 'ambient standards', relating to each component of the natural environment (water, soil, air and so forth); 'process standards', that concern production methods such as emission standards; 'economic instruments', namely tools that exert an influence on the market and on behaviour of its actors, such as carbon taxes and emission charges; and 'life-cycle management approaches', ie voluntary setups that help consumers choose products on the basis of environmental considerations such as eco-labels and eco-packaging.[410] Although it may be tempting to call for a universal harmonisation of such standards, it must be remembered that very often their definition is dependent on local conditions, availability of resources in a certain area and their importance in a given economy. Therefore, as will be seen in the next sub-paragraph, a full harmonisation of the above-mentioned environmental standards applying to agricultural production may have both advantages and disadvantages.

In practice, that having been said, the standards which will be carefully looked for in the case studies are those pointed out *supra*, §2.3., since they are already included in EU legislation and thus 'ready' to be exported.

§4.2.2. *The Paradigms of Mutual Recognition, Equivalence and Harmonisation*

As clarified above, regulatory cooperation should be thought of as a ladder with progressive steps of integration between the two opposites of institutional deference and full harmonisation.

The first step after institutional deference is mutual recognition. As widely known, the principle was first recognised in the EU legal order through the famous decision '*Cassis de Dijo*n',[411] which later constituted one of the bases of the foundations of the EU.[412] At international level, there are some

[408] Candice Stevens, 'Harmonization, Trade and the Environment' (1993) 5(1) International Environmental Affairs 42.
[409] ibid.
[410] ibid.
[411] Case 120/78 *Rewe v Bundesmonopolverwaltung für Branntwein* [1979] ECR 1979-00649.
[412] For the analysis of the impact of this decision in EU agricultural law, see Alberto Germanò, *Manuale di diritto agrario* (8th edn, Giappichelli 2016); Luigi Costato, 'Sull'interpretazione dell'art. 30 del Trattato CEE' (1981) 2 Rivista di diritto agrario 26; Luigi Costato, 'Troppo (o troppo poco) Cassis de Dijon' (1998) 2 Rivista di diritto agrario 3; Luigi

different nuances compared to what is recognised in EU law,[413] but the essence of the principle stays the same. In fact, mutual recognition means first of all that two or more parties mutually accept each other's rules in their trade relationships. In this sense, mutual recognition implies that producers who comply with the regulatory requirements of an exporting country are automatically allowed into an importing country. At international level, mutual recognition may also mean something more, namely that parties mutually accept each other's conformity assessment procedures as equivalent in order to ensure compliance with prevailing regulatory requirements. In this case, the exporting country controls conformity according to the rules or standards of the importing country and products can then be approved before export in the country of production reducing or eliminating the need to check conformity with the rules of the importing country again at arrival; this avoids duplication of inspections and fees and speeds up the process to reach the market.[414] At the same time, from the environmental point of view, this system heralds a dangerous deregulatory potential, as accepting products in a certain territory entirely relying on the foreign country standards entails a risk that imported agricultural commodities are produced according to lower food safety and sustainability standards. However, it is rare that mutual recognition is provided for in its basic form in EU FTAs, whereas it often goes along with additional arrangements (for instance, elements of equivalence, exceptions relating to some goods and/or pieces of legislation, elements of compliance and so forth). In any case, it is clear that mutual recognition ensures the 'most shallow' level of integration.

Equivalence is commonly supposed to constitute one step further on the regulatory cooperation scale.[415] It implies that the same regulatory goals are fulfilled through different kinds of measures.[416] Therefore, it is based on acceptance of standards on the basis of their effects, since standards may still differ if results are the same. There are, however, two types of equivalence, which may have different impacts on sustainability. In fact, equivalence may be agreed on rules (such as regulations) and/or on conformity assessment systems (accreditation, certification, test

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Russo and Luigi Costato, *Corso di diritto agrario italiano e dell'Unione Europea* (4th edn, Giuffrè 2015). The influence of this decision on EU law is of course of general interest in European studies and literature is boundless. See, *inter alia*, Alfonso Mattera, 'L'arrêt "Cassis de Dijon": une nouvelle approche pour la réalisation et le bon fonctionnement du marché intérieur' (1980) 23 Revue du Marché Commun 505.

[413] On this point, see Kalypso Nicolaïdis, 'Non-Discriminatory Mutual Recognition: an Oximoron in the New WTO Lexicon?' in Thomas Cottier, Petros Mavroidis and Patrick Blatter, *Regulatory Barriers and the Principle of Non–Discrimination in World Trade Law* (Michigan University Press 2000) 282. In WTO law, the legal basis for mutual recognition is Article 6.3 of the TBT Agreement, whereas the principle is not mentioned in the SPS Agreement.

[414] Frode Veggeland and Christel Elvestad, *Equivalence and Mutual Recognition in Trade Arrangements: Relevance for the WTO and the Codex Alimentarius Commission* (Norwegian Agricultural Economics Research Institute 2004) 10.

[415] Bernard Hoekman, 'Trade Agreements and International Regulatory Cooperation in a Supply Chain World' (2015) EUI Working Paper RSCAS 2015/04, 4 <http://cadmus.eui.eu/handle/1814/34207> accessed 16 April 2019.

[416] In WTO law, the legal bases for equivalence are Article 4.1 of the SPS Agreement and Articles 2.7 and 6.1 of the TBT Agreement.

results and so forth). In the latter case, equivalence does not concern standards at all (or at most very indirectly), because what is at stake is the equivalence of control programmes and procedures.[417]

The flexibility of the approach based on equivalence – which in principle allows maintaining distinct national regulatory measures while at the same time removing the measures' trade restrictive effects – is appreciated by economic operators as no (or little) costs of compliance with new legislation are required. This may also speed up negotiations because no remarkable changes in the respective domestic frameworks are required. At the same time, equivalence is not without risk for sustainability in agriculture. First of all, it is not easy to certify that different standards guarantee the same level of protection and therefore methodologies for measuring it, as well as adequate and effective dispute settlement procedures, are needed.[418] Second, in theory equivalence testifies to a higher level of regulatory integration amongst the parties, given that with mutual recognition there is reciprocal acceptance of different rules or conformity assessment procedures, but without at the same time asserting that they have the same practical effect in each domestic framework. However, in practice this is not necessarily the case.[419] In fact, mutual recognition and equivalence become almost synonyms when the parties *arbitrarily decide* that the other party's rules are equivalent in effect, without actually this being the case in practice. From an environmental perspective, this is very treacherous, as potentially it may be estimated that two different standards pursue the same regulatory goal although one may in reality be more harmful than the other to the environment. As a result, every time equivalence is established in an FTA there must be shown in practice that in that specific case the effect is *really* equivalent, particularly when the regulatory capacity of the two parties is not comparable.

Finally, the highest level of integration is constituted by harmonisation, whose goal is to attain complete uniformity of trade measures at international level. This would – from a free trade perspective – be to the benefit of all the consumers, while, of course, removing any cost of compliance with different regulatory frameworks, simplifying assessments and enhancing legal certainty. However, full harmonisation at global level is not achievable in practice due to the

[417] Alberto Alemanno, 'Le principe de la reconnaissance mutuelle au-delà du marché intérieur : phénomène d'exportation normative ou stratégie de « colonialisme » réglementaire ?' (2006) 2 Revue du Droit de l'Union Européenne 273, 296.
[418] Candice Stevens, 'Harmonization, Trade and the Environment' (1993) 5(1) International Environmental Affairs 42.
[419] On the difference between equivalence of technical regulations and mutual recognition of technical regulations, see Anabela Correia de Brito, Céline Kauffmann and Jacques Pelkmans, 'The Contribution of Mutual Recognition to International Regulatory Co-operation' (2016) OECD Regulatory Policy Working Papers No 2, 44 <https://www.oecd-ilibrary.org/governance/the-contribution-of-mutual-recognition-to-international-regulatory-co-operation_5jm56fqsfxmx-en> accessed 16 April 2019.

difficulty of applying identical rules to different national circumstances and – above all – to reconcile the differences across the world regarding the perceptions of what are acceptable protection levels. In terms of environmental protection, the definition of common standards worldwide would unavoidably be subject to the 'lowest common denominator' logic as regards their setting. Moreover, environmental policies and related standards will always somehow reflect each nation's political, economic and geographic situation.[420] The situation is, of course, different when harmonisation is pursued at bilateral level, because in this case the 'race to the bottom' of regulatory standards tends to give way to the export of the standards of country with the higher economic and political power into the weaker one's domestic framework. Also, it must be borne in mind that a simple convergence – without full harmonisation – may constitute a softer version of the latter, as it implies that parties' rules become more similar without being the same. This in some cases may also be a preliminary step to equivalence (which formally can be considered as such only if no change in the regulatory framework occurs). This is particularly true in the event of the establishment of certain international standards (for instance, the FAO Codex Alimentarius) used as a benchmark by the parties for assessment of the equivalence. In case the need to comply with these international standards requires an adaptation of the domestic legislation, convergence will occur. In conclusion, only if and insofar as the legal obligation to comply with one or more EU rules – enshrined in an FTA – determines the need to modify the counterpart's legal framework, it can be said that the EU is exporting its rules.[421]

§4.2.3. *Which Form of Regulatory Cooperation is more Suitable to Foster Sustainable Agriculture in Third Country Parties?*

So, what form of regulatory cooperation is more suitable to foster sustainable agriculture in third country parties? As pointed out above in this paragraph, this paper openly endorses the view that, since EU sustainability standards are on average more advanced than those of the EU commercial counterparts, the more such standards are exported, the better for sustainable agriculture. In this connection, the above should automatically lead to the conclusion that harmonisation (or convergence) are the only ways to make this operation of 'regulatory export' happen. However, the answer is not so simple and a number of factors have to be taken into account.

[420] Candice Stevens, 'Harmonization, Trade and the Environment' (1993) 5(1) International Environmental Affairs 42.
[421] This is – *mutatis mutandis* – also the conclusion of Alasdair R Young, 'Liberalizing Trade, not Exporting Rules: the Limits to Regulatory Co-ordination in the EU's 'New Generation' Preferential Trade Agreements' (2015) 22(9) Journal of European Public Policy 1253, 1257.

First, if from the static point of view only harmonisation (or convergence) determine immediate modifications in the other party's domestic framework, from a dynamic perspective very often equivalence occurs after significant steps taken by one party to approximate its legislation to a level considered acceptable by the other party. This is not legally reflected in the text of the agreement, but still has to be taken into consideration in assessing the impact on agricultural sustainability of a certain agreement, as it reveals different levels of approximation of laws and thus of influence exerted by a party on the other.

Second, not only – as seen above – all the three forms of regulatory cooperation have advantages and disadvantages for environmental sustainability in absolute terms, but suitable circumstances are also needed in order for the expected advantages to occur. In particular, as far as the 'soft' forms of regulatory cooperation are involved – mutual recognition and equivalence – there are indeed some conditions for success, namely: an appropriate cost-benefit analysis should identify the nature and intensity of trade problems, also quantifying the volume of trade and potential economic benefits; the divergences in the regulatory frameworks of the parties should not be too marked; it should be previously assessed that there are sufficient resources for negotiations and implementation; the scope of the agreement should be well-defined, as the broader the scope, the less manageable the regulatory cooperation; and, finally, mutual trust, technical efficiency of the respective services and the capacity to learn from past experiences are always a very important aspect.[422] As regards harmonisation, the circumstances of the case are not less important. The EU subsidises its agriculture with huge financial resources – although now decreasing, but still huge. As seen in §2.3, the environmental baseline of the CAP (in Pillar I) is financed to a large extent by national allocations within direct payments, destined (at least partly) for the 'compensation' for the extra costs that farmers have to bear for implementation of those expensive environmental measures at farm level. Additional money is also provided within Pillar II for rural development. In total, at the time of writing, this makes about 38 % of the EU budget. The point is that few of the EU trade partners can afford these standards. Therefore, it is not realistic to think that harmonisation through establishment *en bloc* of a pre-set of EU rules as provided for in the CAP, even assuming that they are all compatible with GATT Article XX, may easily occur. It is fairly evident that the best agreement will be the one which manages to find a happy medium between a long series of conflicting elements, making use of the best options provided by the law. That said, it must be borne in mind that the elements to be taken into account while evaluating which form of regulatory

[422] Frode Veggeland and Christel Elvestad, *Equivalence and Mutual Recognition in Trade Arrangements: Relevance for the WTO and the Codex Alimentarius Commission* (Norwegian Agricultural Economics Research Institute 2004) 50 *et seq*; Linda R Horton and Kathleen E Hastings, 'A Plan That Establishes a Framework for Achieving Mutual Recognition of Good Manufacturing Practices Inspections' (1998) 53(3) Food and Drug Law Journal 527.

cooperation is more suitable to a specific case seem to be considered by policy-makers (and to a large extent by the scholars) only from the perspective of trade facilitation. On the contrary, very little consideration seems to be generally attributed to the matter of which regime is more likely to enhance environmental sustainability and what are the conditions for this to occur.

Third, there are circumstances that objectively influence the choice towards one regime or the other. In particular, scholarship highlighted three decisive factors that incontrovertibly play a huge role in this respect: market size, rule stringency and regulatory capacity.[423] All of them tend to bring more or less (in)direct consequences. For instance, the larger the non-EU market, the greater the costs for EU firms to access it, so that the EU may be tempted to round off those of its standards that most complicate access to foreign markets as a sort of 'compensation'. Likewise, the greater the differences in rule stringency, the higher the costs of adjustment towards the legislation of the country with stricter rules. If such costs – on the basis of the cost-benefit analysis – are deemed to outweigh the benefits of market access, harmonisation (or convergence) will be unlikely to occur.[424] Regulatory capacity is a sort of booster of rule stringency, in the sense that it will be even more difficult for a country with low regulatory capacity to adopt stringent standards.[425] This means that if the EU negotiates – for example – with an LDC with a very low level of regulatory capacity, the power to export its standards is high, but a targeted approach will be needed to ensure that the standards exported are within the reach of the LDC's regulatory capacity.[426]

The consideration of these factors shows that most of the time the choice of the level of regulatory cooperation depends on objective factors, as the regime which is the most appropriate in certain circumstances tends to apply *de facto*. It also shows that, having a large market, strict environmental standards and a highly-developed regulatory capacity, the EU should be able to have the political and economic power to export a great deal of standards in most of its trade partners' domestic legislation and thus influence the type of regulatory cooperation eventually endorsed. As a result, if really motivated to take this direction, the EU would definitely have the strength to promote harmonisation through establishment of EU rules in most of the FTAs, although, to different extents depending on the kind of trade partner. In fact, as seen above, only harmonisation (or convergence)

[423] Alasdair R Young, 'Liberalizing Trade, not Exporting Rules: the Limits to Regulatory Co-ordination in the EU's 'New Generation' Preferential Trade Agreements' (2015) 22(9) Journal of European Public Policy 1253, 1258.
[424] Daniel W Drezner, *All Politics is Global: Explaining International Regulatory Regimes* (Princeton University Press 2007) 46.
[425] Alasdair R Young, 'Liberalizing Trade, not Exporting Rules: the Limits to Regulatory Co-ordination in the EU's 'New Generation' Preferential Trade Agreements' (2015) 22(9) Journal of European Public Policy 1253, 1258.
[426] This is also why the imposition of PPMs to LDC is seen as a form of 'eco-imperialism' by some scholars. cf David Sifonos, 'Introduction' in Sifonos D (ed) *Environmental Process and Production Methods (PPMs) in WTO Law* (Springer 2018) 1, 5;

may formally give substance to the paradigm of 'deep integration'. On the contrary, equivalence and mutual recognition may not in principle (ie when they are not the result of a regulatory convergence carried out prior to the conclusion of the agreement) determine a change in the domestic framework of the other party. In other words, 'deep integration' implies that one or more parties do by means of the FTA something that it/they would not do without the conclusion of such an agreement – namely something that goes beyond applicable international environmental rules. In this perspective, in order to bring regulatory convergence, it is not enough to impose the enforcement of existing international agreements (for instance, the 2015 Paris Agreement on climate change) already binding on the parties; on the contrary, convergence would occur if a party were agreed through an FTA to ratify an environmental agreement which is not yet binding at the time of the conclusion of the FTA.

In sum, only the endorsement of EU sustainable agricultural practices by the trade partner, able to make an actual change in its domestic legislation, consisting of the subsequent adoption of such EU standards at national level can be considered as promoting sustainable agriculture outside EU boundaries. In practice, this can happen directly, through harmonisation (or convergence) provided for in the agreement; and indirectly, through equivalence and even mutual recognition, if preceded by regulatory convergence towards EU sustainability standards prior to the conclusion of the agreement. Subsequently, the appropriateness of the formula chosen will in any case depend on the specific circumstances of the case. In fact, as will be seen from the case studies analysed in Part C, every agreement brings forward different levels of regulatory cooperation on the basis of the factors identified above, but also on the specific background of each trade negotiation. To this picture, an observation should be added stemming from what has been seen *supra*, §3.2., where it was pointed out that the EU does not have a standard approach vis-à-vis trade negotiations with third countries. On the contrary, the idea itself of categorising EU FTAs ends up being *per se* problematic, not to mention the important role played by the nature of the EU counterpart in the choice of the agreement and the determination of its content. This gives rise to a lack of certainty in EU action vis-à-vis FTAs, which, unsurprisingly, are often negotiated autonomously by different teams within the various Commission services.[427] To an extent, by virtue of this case-to-case approach, the EU seems to rather shape its priorities to a different extent for each agreement and not – vice versa – to establish a detailed set of priorities that it would like to reaffirm externally (ie, the *acquis*) prior to the conclusion of the agreement (except for some very basic components, such as human rights, rule

[427] This was pointed out by van der Loo thanks to the collection of some interviews with EU officials. cf Guillaume van der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area: a New Legal Instrument for EU Integration without Membership* (Brill 2016) 222.

of law and so forth, whereas this is certainly not the case for sustainability standards in agriculture). From the viewpoint of 'deep integration' this lack of consistency is likely to be problematic, as it hampers the clear definition of an ambitious *acquis* that should become the 'bottom line' for the negotiation of each FTA.[428]

§4.3. Enforcement Mechanisms

§4.3.1. *Legal Theory around Enforcement. The First Ambit: Implementation*

No rule – not even the most ambitious one – makes sense in the absence of appropriate mechanisms to guarantee its respect. Indeed, neither the provisions on TSD chapters nor those on regulatory cooperation are self-implemented, but require a follow up. In the case of the former, consisting more often than not of 'commitments to undertake certain commitments' in the future rather than strict standards to comply with immediately, the absence of institutional structures would leave such commitments to the free will of the parties. In the case of regulatory cooperation, actions are equally needed to ensure that the EU *acquis* is being adequately and progressively introduced into the domestic framework of the EU counterpart.

Such mechanisms broadly fall within the concept of 'enforcement', ie the act of compelling compliance with the law. While it is indisputable that every agreement needs somehow to be enforced, many are the divergences on the conception of the role of enforcement and the best ways to ensure it. The theory of self-enforcement assumes that any threat of punishment will definitely be sufficient to guarantee that any party to the agreement will abide by its rules, with no need to foresee specific institutions charged with the task of overseeing enforcement.[429] This theory indeed is based on a set of assumptions that have proven to be far from unchallenged and namely: that the threat of ceasing cooperation as a reaction to a violation of the treaty will be a sufficient deterrent anyway; that external circumstances never change between the conclusion of the agreement and the rest of its life; that players possess symmetric information and always act rationally; and that disputes are costless and frictionless.[430] On the contrary, the above does not take into account all

[428] In this connection, one author concluded that the EU does not make an aggressive use of the *acquis communautaire* in its negotiations. cf Stephen Woolcock, 'European Union Policy towards Free Trade Agreements' (2007) ECIPE Working Paper No 03/2007, 4 <http://cris.unu.edu/european-union-policy-towards-free-trade-agreements> accessed 4 April 2019.
[429] Alexander Keck and Simon Schropp, 'Indisputably Essential: The Economics of Dispute Settlement Institutions in Trade Agreements' (2008) 42(5) Journal of World Trade 785, 789.
[430] ibid.

concrete unexpected problems and imperfections that may always occur before and after the conclusion of the agreement, such as mistakes made by negotiators, change in economic situation, turnover of political power, modifications in geopolitical balances and so forth.[431] Trade negotiations are a complex world influenced by an endless list of contingent circumstances, so that it is unconceivable to give substance to the provisions of an agreement without the presence of adequate institutional arrangements to oversee its respect. On this point, it was rightly argued that FTAs are implicitly affected by a certain degree of institutional 'thinness', by comparison to the 'thickness' of the WTO legal system.[432] In fact, whereas the latter is an international organisation with legal personality, FTAs have more precarious and less powerful institutions. This encourages trade relations between the parties to be more power-based, to the detriment of stability and overall transparency. It follows that institutional 'thinness' should be avoided as much as possible. Institutional 'thickness' is pursued through bodies taking care – first of all – of the *implementation* of the agreements. It is also necessary to appoint bodies to ensure *compliance* and – as appropriate – *dispute settlement mechanisms*. Enforcement revolves around these three concepts, which will be focused upon – respectively – in this and in the next two sub-paragraphs.

The preliminary step vis-à-vis enforcement is thus implementation, which is normally made up of three steps: the adoption of national legal measures, the subsequent enforcement of these measures at national level and final reporting on the implemented measures.[433] Given that – as seen *supra*, §3.1 – the EU does not have a 'template' of FTA that it uses for negotiations with every commercial partner,[434] implementation may occur in different ways. However, there are still some common elements. The latter include, *inter alia*: contact points set up especially in the first phase after conclusion of the agreement to assist the parties as regards the implementation of the TSD chapters and enhance communication between them; committees and/or bodies competent to oversee the implementation of a certain set of provisions grouped per subject, made up of representatives of the relevant national authority, in order to provide a forum for discussion, enhance coordination and

[431] ibid. A good example in this regard is the announcement – in December 2011 – of Canada's withdrawal from the Kyoto Protocol by the (then) Minister of the Environment Peter Kent, without any apparent consequences either in terms of sanctions or in terms of political power and credibility in subsequent climate negotiations.
[432] Silke Trommer, 'The WTO in an Era of Preferential Trade Agreements: Thick and Thin Institutions in Global Trade Governance' (2017) 16(3) World Trade Review 501, 505.
[433] Ministry for Foreign Affairs – Department for Trade Agreements and Technical Rules, Sweden, 'Implementation and enforcement of Sustainable Development provisions in Free Trade Agreements – Options for Improvement' (2016) Kommerscollegium (National Board of Trade) publication, 4 <https://www.kommers.se/Documents/dokumentarkiv/publikationer/2016/publ-implementation-and-enfocement-of-sustinability-provisions-in-FTAs.pdf> accessed 17 April 2019.
[434] See Debra Steger, 'Institutions for Regulatory Cooperation in 'New Generation' Economic and Trade Agreements' (2011) 39(1) Legal Issues of Economic Integration 109, 117.

specialised expertise necessary to resolve more complex interpretative issues;[435] cooperation activities between the parties – sometimes also under the auspices of international organisations or other multilateral agreements – in the form of information exchange, joint projects and common actions, partnerships and other events to involve the private sector, as well as – especially for developing countries – structures to ensure the transfer of knowledge; and mechanisms to enhance public participation and civil society involvement (on this last point, see *supra*, §4.1.).[436]

Key to ensure appropriate implementation are the provisions on monitoring and evaluation, which are somehow halfway between implementation and enforcement. Apart from the *ex ante* assessment relating to the SIA and other impact assessments (see *supra*, §4.1.), it must be said that the presence of monitoring structures and strategies is relatively poor in EU FTAs. Scholars have been striving unsuccessfully to give explanations to justify this shortcoming,[437] which – in the author's view – must be at least partly linked to the reluctance of states to be accountable vis-à-vis the commitments made. Very often, the monitoring mechanisms chosen are weak and rely on self-reporting by states,[438] although the 'new-generation' FTAs may foreshadow a new tendency towards increased attention paid to this issue.[439] At the same time, it is important to stress that assessing the effectiveness of environmental provisions is often problematic due to the lack of available empirical data and the troubles in identifying the causal link between environmental obligations and the increase in environmental delivery.[440] In any event, as monitoring strategies are essential to ensure adequate implementation of the environmental dimension of EU FTAs, this point will be carefully investigated in the case studies.

Finally, the choice to have a secretariat that oversees the implementation of the agreement is an important option to consider in order to ensure overall consistency and coordination. Generally, the EU has not drawn a lot on this possibility, having rather preferred to establish treaty bodies that *can*

[435] This is – for instance – the case of the 'trade and sustainable development body' established to check the implementation of the TSD chapter in the FTA between the EU and South Korea, Article 13.12.
[436] Ministry for Foreign Affairs – Department for Trade Agreements and Technical Rules, Sweden, 'Implementation and enforcement of Sustainable Development provisions in Free Trade Agreements – Options for Improvement' (2016) Kommerscollegium (National Board of Trade) publication, 4 <https://www.kommers.se/Documents/dokumentarkiv/publikationer/2016/publ-implementation-and-enfocement-of-sustinability-provisions-in-FTAs.pdf> accessed 17 April 2019; Dale Colyer, 'Environmental Provisions in Free Trade Agreements' (2004) Paper presented at the short course 'Trade and the Environment: Dealing with Pollution and Natural Resource Management in a Globalizing World', World Bank, Washington, DC, December 8, 2004, 11 <https://ageconsearch.umn.edu/bitstream/19103/1/cp04co02.pdf> accessed 12 April 2019.
[437] Andrew T Guzman, 'The Design of International Agreements' (2005) 16(4) European Journal of International Law 579, 594.
[438] Brett Frischmann, 'A Dynamic Institutional Theory of International Law' (2003) 51 Buffalo Law Review 679.
[439] See for instance EU- South Korea FTA, Article 13.10.
[440] Jacques Bourgeois, Kamala Dawar and Simon J Evenett, 'A Comparative Analysis of Selected Provisions in Free Trade Agreements' (2007) Report to the EU Commission – DG Trade.

create *ad hoc* sub-committees for monitoring and reviewing regulatory cooperation, although in practice this has not happened.[441]

It is interesting to note that the EU Commission presents the 'thickening' of FTAs' institutional setup for implementation as a key feature of 'new-generation' FTAs, supposedly more advanced than those concluded in the pre-Global Europe period.[442] As will be seen in case studies (*infra*, Part C), this assumption is indeed rather questionable.

§4.3.2. *The Second Ambit: Enforcement*

Compliance mechanisms vary – primarily – according to the nature of the obligations imposed on the parties. In the case of pre-ratification 'conditionality' the fulfilment of such obligations is assessed before the conclusion (or, at most, the ratification) of the agreement, whereas in the case of post-ratification 'conditionality' one or more parties agree that it/they will give substance, within a certain time period, to the commitments made. While the first approach may ensure a higher level of harmonisation before the agreement is concluded, it may also discourage the parties from negotiating if there is no chance of reaching the required regulatory targets in the near future.[443] As far as compliance is involved, in the second case the institutional structure will obviously require to be 'thicker' than in the first one, where the achievement of targets had been supposedly assessed before the signature (or, in case, the ratification).

Traditionally, there are two approaches in legal scholarship on what causes compliance and thus on how non-compliance should be tackled. According to the school of rationalism, international actors comply because they fear sanctions or other repercussions if they do not; on the other hand, according to the school of constructivism, states comply with international law because they want to follow norms in order to conform their behaviour to that of other states and to the international legal

[441] Debra Steger, 'Institutions for Regulatory Cooperation in "New Generation" Economic and Trade Agreements' (2011) 39(1) Legal Issues of Economic Integration 109, 121.

[442] EU Commission – Directorate General Trade, 'Report from the Commission to the European Parliament, the Council, the European Social and Economic Committee and the Committee of Regions on Implementation of Free Trade Agreements 1 January 2016 - 31 December 2016', COM(2017) 654 final, 29 <https://publications.europa.eu/en/publication-detail/-/publication/d584b228-d96f-11e7-a506-01aa75ed71a1> accessed 17 April 2019.

[443] The pre- and post-ratification conditionality present interesting conceptual interlinkages with the notion of cross-compliance developed in the EU CAP (see *supra*, §2.3.). The latter revolves around a set of standards that farmers have to abide by prior to the granting of direct payments (and indirectly of Pillar II payments as well). The system hence is already made up of a set of standards ready to be exported and is therefore particularly suitable to the inclusion as part of the EU *acquis* either in the form of pre- or in the form of post-ratification conditionality.

order in general.[444] While both these approaches have been criticised in the past,[445] it would appear that the EU attitude is closer to a constructivist model, particularly as opposed to the US rationalism. Instead of imposing sanctions, the EU's softer approach as regards environmental provisions consists of different mechanisms, such as the Civil Society Dialogue (or Forum), aiming at bringing together civil society members and national authorities from both the EU and its trading partners to take steps together on the effective implementation of trade agreements (on civil society mechanisms, see *supra*, §4.1.3.).[446] Such an institutional setup creates a network of agents that meet on a regular basis and hold the EU trade partner's hand towards the effective compliance with the agreement. Such an *ex post* activity is made necessary by the post-ratification conditional nature of most of the environmental commitments made by the EU trade partners.

This approach taken by the EU – particularly so in the relations with developing countries – seems to be justified by other policy priorities that the EU is seeking to pursue and that are sometimes non-trade related. This comprises of the need to ensure positive diplomatic relations with neighbouring countries, the difference in regulatory capacity of developing countries, as well as developmental concerns, such as the need to boost the socio-economic fabric of developing countries and to eradicate hunger. This reasoning may constitute, however, a double-edge sword. In many developing countries – where limited pluralism and weak civil society structures are rooted – the lobbying effectiveness of environmental organizations may be inhibited. More generally, the real problem of the European approach vis-à-vis compliance in environmental matters is that it does not appear capable of passing the 'sustainability test' proposed *supra* (§3.3.) and may not therefore be in line with EU law. Similar observations made in that context with regard to the substance of environmental provisions shall be reiterated with regard to the institutional setup to ensure compliance. In fact, such a choice *de facto* allows products to access the EU market without having previously ensured compliance with EU sustainability standards and in particular those standards and obligations the respect of which is agreed in the agreement itself. As a result, the problem of ensuring compliance with TSD obligations and with the EU *acquis* is *de facto* postponed in time, to a future and indefinite moment. Without detracting from the importance of putting in place 'bottom-up' mechanisms – and that of differentiating the approach between developed and developing countries – the need to introduce 'top-down' elements in EU FTAs remains essential. In their

[444] Benedict Kingsbury, 'The Concept of Compliance as a Function of Competing Conceptions of International Law' (1998) 19 Michigan Journal of International Law 345.
[445] For a detailed review of these two theories, cf Shima Baradaran *et al*, 'Does International Law Matter?' (2013) 97 Minnesota Law Review 743.
[446] Ida Bastiaens and Evgeny Postnikov, 'Greening up: the Effects of Environmental Standards in EU and US Trade Agreements' (2017) 26(5) Environmental Politics 847, 853.

absence, the EU may be able to guarantee – at most – policy convergence in the long run, but not the export of legal rules in other domestic frameworks. On the contrary, it was rightly argued that the credible threat of sanctions will manage to mobilize governments even without strong pressure from civil society, since the prospect of losing trade privileges would alone touch upon government officials and business groups.[447]

Hence, the alternative to 'soft' approaches passes – at least partly – by the application of trade sanctions directly foreseen in the agreement.[448] It must be clarified from the outset that the EU Commission openly rejects the use of trade sanctions.[449] Apart from the fact that the EU Commission is aware that negotiating parties would not accept an approach based on trade sanctions, any 'compensation' stemming from a violation of environmental rules would not solve the main problem, namely the introduction of effective, sustainable and lasting improvement of social and environmental standards on the ground.[450] In the broader context of international trade law, while violations are hardly ever compensated through a money transfer, two types of sanctions are mostly applied, namely direct sanctions and 'reputational' ones. Direct sanctions are explicit punishments for the violation; they can take various forms, although the most common is probably

[447] ibid 855.

[448] A different (and very complex) problem concerns the compatibility of unilateral sanctions with WTO law. Many WTO agreements (cf GATT Article XXI; Article XIVbis GATS; Article 73 TRIPS) provide for the opportunity to take measures which would be at odds with the respective party's obligations when this is considered necessary for the essential security interests of the party in question. However, there is sharp disagreement in the international legal doctrine as regards the scope of these exceptions. In particular, for some scholars these exceptions are worded in such a way as to provide a 'discretionary right' of the state to define its essential security interests (see, for instance, Andrew Emmerson, 'Conceptualizing Security Exceptions: Legal Doctrine or Political Excuse' (2010) 11 Journal of International Economic Law 135); for others, the security exception is reviewable and criteria should be set to assess whether or not it is justified (see, for instance, Susan Rose-Ackerman and Benjamin Billa, 'Treaties and National Security' (2008) 40 International Law & Politics 437). For a review of the whole debate, including more generally in relation to the compatibility of unilateral trade sanctions with the paradigm of free trade, see Rostam J Neuwirth and Alexandr Svetlicinii, 'The Economic Sanctions over the Ukraine Conflict and the WTO: "Catch-XXI" and the Revival of the Debate on Security Exceptions' (2015) 49(5) Journal of World Trade 891, 894 and 905. The matter was also discussed with regard to the trade sanctions recently adopted by the EU and the US against Russia: in favour of the legality of these actions, see Łukasz Gruszczyński and Marcin Menkes, 'The Legality of the EU Trade Sanctions Imposed on the Russian Federation under WTO Law' in Władysław Czapliński *et al* (eds), *The Case of Crimea's Annexation under International Law* (Scholar Publishing House 2017) 237; against the legality of these actions, see John J A Burke, 'Economic Sanctions against the Russian Federation Are Illegal under Public International Law' (2015) 3(3) Russian Law Journal 126. The same scholarly conflict covers the possibility to use these exceptions for human rights purposes – in favour: Sarah H Cleveland, 'Human Rights Sanctions and International Trade: A Theory of Compatibility' (2002) 5(1) Journal of International Economic Law 133; against: Tilahun W Hindeya, 'Unilateral Trade Sanctions as a Means to Combat Human Rights Abuses: Legal and Factual Appraisal' (2013) 7(1) Mizan Law Review 101.

[449] EU Commission, 'Feedback and Way Forward on Improving the Implementation and Enforcement of Trade and Sustainable Development Chapters in EU Free Trade Agreements' (2018) Non-paper of the Commission services of 26 February 2018, 3 <https://webcache.googleusercontent.com/search?q=cache:Zu0ZqZr3RRwJ:https://www.politico.eu/wp-content/uploads/2018/02/TSD-Non-Paper.pdf+&cd=1&hl=it&ct=clnk&gl=be> accessed 12 April 2019.

[450] ibid.

retaliation; they are not indeed very common in international agreements.[451] On the contrary, 'reputational' sanctions may either consist of actual 'blame and shame' strategies conducted through international media or may be more indirect, namely consisting of a sort of 'label of unreliability' that impacts upon states' credibility. This will be a price to pay in future negotiations, as potential partners will be less willing to offer concessions because the unreliability of the party makes it more likely that the agreement will be violated. In the worst cases, the other potential partners may refuse to negotiate *tout court* – but this will also depend on the sanctioned party's political and economic power.[452] However, it must also be considered that the EU's choice to avoid putting in place top-down approaches is not a matter of pure naivety. The most convincing explanation on the reluctance to introduce credibility enhancing mechanisms such as trade sanctions is that such mechanisms are actually quite costly for every party: for the victim of sanctions, of course, but also for the others, because the costs suffered from the former are not absorbed by the latter as positive outputs, especially in the case of reputational sanctions.[453] In sum, it is a lose-lose exercise. Furthermore, it is far from granted that such sanctions may also effectively apply to the breach of sustainability provisions. Such provisions are indeed set to drive trade liberalisation in a certain direction; as a result, they may not be suitable for protection by trade sanctions, mostly conceived to deter trade restricting practices. The fact remains, however, that an approach which is only made up of 'soft' tools may pave the way to two dangerous consequences. First, in the short run, EU sustainability standards in third countries may not be effectively pursued. Second, in the long run, EU sustainability standards applicable to EU territory – and later 'exported' in EU FTAs – may be lowered in ambition, in order to ease regulatory convergence with third countries party to EU FTAs.

Therefore, a balance should be struck between these conflicting exigencies, so that the rule of law is re-affirmed and compliance with environmental standards is not neglected. This balance seems after all easier to achieve if the sanctions applied have the potential to benefit the parties – as the case may be, at least in principle, for retaliation – and if they are structured in such a way as to take into consideration the specificity of sustainability provisions and environmental problems in general.[454] It is thus not surprising that the debate concerning the opportunity to move towards a more

[451] Andrew T Guzman, 'The Design of International Agreements' (2005) 16(4) European Journal of International Law 579, 596.
[452] ibid *mutatis mutandis*.
[453] ibid.
[454] Ministry for Foreign Affairs – Department for Trade Agreements and Technical Rules, Sweden, 'Implementation and enforcement of Sustainable Development provisions in Free Trade Agreements – Options for Improvement' (2016), Kommerscollegium (National Board of Trade) publication, 13 <https://www.kommers.se/Documents/dokumentarkiv/publikationer/2016/publ-implementation-and-enfocement-of-sustinability-provisions-in-FTAs.pdf> accessed 17 April 2019.

sanction-based system is still ongoing in the EU.[455] That said, it must be borne in mind that an appropriate compliance setup does not only include sanctions, but other arrangements such as positive incentivising associated with the respect of sustainability provisions, the strengthening of existing committees and – above all – the establishment of a committee specifically tasked with the consideration of the environmental dimension of the FTA, provided with both a facilitative branch and an enforcement branch. The TSD committee often established in the TSD chapters of 'new-generation' FTAs, as will be seen, has definitely more a facilitative than an enforcement function. In case the latter is called upon, measures different from trade sanctions may revolve around the withdrawal of cooperation assistance.

§4.3.3. *The Third Ambit: Dispute Settlement Mechanisms*

Regardless of the debate on the desirability of sanctions, it appears in any case reasonable to consider the latter as a last resort. A different tool that may contribute to the enforcement of an FTA and may also prevent the application of sanctions is the DSM. There are indeed many good reasons for providing for a DSM in an agreement. First, the body established as DSM may act as 'information gatherer' and thus avoid application of unfair punishments; second, in the case of a (legitimate or illegitimate) domestic policy that affects the other parties, a neutral body is needed to ensure equitable calculation of damages, as asymmetric information of the parties may make it difficult for them to have a broader perspective; thirdly, a DSM may have its typical judicial role of adjudicator, through which it can serve the function of gate-keeper of the original understanding of the agreement.[456]

However, if the above is true, it is then quite surprising that DSMs are not often introduced in FTAs. While there is an open debate over the possible explanations,[457] the real problem rather seems to be that amongst all the DSMs in place, none is used.[458] This is mainly due to the overall

[455] When interviewed on this point by the EU Parliament, the Commission replied that fines pose problems concerning budgetary procedures, fairness, equity and enforceability, but flagged its availability to further discuss the issue. cf EU Commission, 'Follow up to the European Parliament Resolution on Human Rights and Social and Environmental Standards in International Trade Agreements', 2 March 2011, 5.

[456] Alexander Keck and Simon Schropp, 'Indisputably Essential: The Economics of Dispute Settlement Institutions in Trade Agreements' (2008) 42(5) Journal of World Trade 785, 801.

[457] In legal scholarship, the two main reasons suggested are the will of states to maintain the control over a dispute and the fear to lose the case. cf, however, the refutation of these arguments in Andrew T Guzman, 'The Design of International Agreements' (2005) 16(4) European Journal of International Law 579, 593.

[458] This is the conclusion spelt out by the EU Commission – Directorate General Trade, 'Report from the Commission to the European Parliament, the Council, the European Social and Economic Committee and the Committee of Regions on Implementation of Free Trade Agreements 1 January 2016 - 31 December 2016', COM(2017) 654 final, 39 <https://publications.europa.eu/en/publication-detail/-/publication/d584b228-d96f-11e7-a506-01aa75ed71a1>

preference of the parties for the DSM provided for within the WTO system, as far as possible, instead of the *ad hoc* DSM of the FTA.[459] The main reasons for such a preference are to be identified in the overall WTO's 'thicker' institutionalism and in particular: the WTO's 'familiar institutions' and 'unblockable' dispute settlement procedures; the possibility to suspend MFN tariffs and other WTO obligations; the broader pool of neutral panellists; the broader issue scope of the WTO; the possibility of forming alliances and the alleviated power imbalance in the WTO as compared to FTAs (but see *infra* in this sub-paragraph); access to assistance from the Advisory Centre on WTO Law; the multilateral surveillance process; the institutionalised framework for taking countermeasures; and the lower cost of WTO dispute settlement, included in an annual membership.[460] However good or bad these reasons may be, it should be underlined that Article 3.2 of the WTO Dispute Settlement Understanding is clear in limiting the scope of the WTO DSM to the WTO agreements. As a result, the WTO DSM cannot be resorted for disputes relating to the interpretation of the provisions of the individual FTAs; however, the WTO DSM may still be 'preferred' by the parties to the FTAs as far as there are overlaps between these FTAs and WTO law.[461] At the same time, experience has shown that the WTO institutional setup is not really helpful for developing countries, which neither tend to initiate cases before the WTO nor are often challenged before it by developed countries. It was highlighted that poor countries only made limited commitments in the WTO and can thus only claim the respect of those provisions that offer them special and differential treatment; moreover, litigation is expensive and often not justified in comparison with the potential gains to foreign exporters; finally, it may be considered as politically incorrect by public opinion that high-income nations 'pick on' developing countries for breach of WTO provisions – and, in any case, this is clearly not the approach followed by the EU.[462] This may suggest that developing countries may feel more protected by a tailor-made DSM setup in the

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accessed 17 April 2019. As a (partial) exception, in the relationships between the EU and Colombia, the former requested the establishment of a WTO Panel to complain against an allegedly discriminatory Colombian regime on spirits, following which Colombia adopted a law which is currently being monitored by the EU.

[459] Claude Chase *et al*, 'Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements – Innovative or Variations on a Theme?' (2013) WTO Working Paper, 48 <https://www.wto.org/english/res_e/reser_e/ersd201307_e.htm> accessed 17 April 2019.

[460] Amelia Porges, 'Dispute Settlement' in Jean-Pierre Chauffour and Jean-Cristophe Maur (eds), *Preferential Trade Agreement Policies for Development* (The International Bank for Reconstruction and Development/The World Bank 2011) 472 *et seq*.

[461] As brilliantly illustrated by an author, 'the substantive law of free trade agreements is very largely influenced – and, indeed, dependent upon – WTO law'. This may be the case when: bilateral provisions independent from WTO obligations share with the latter common legal concepts; the FTA confirms WTO obligations; WTO+ or WTOx provisions contained in the FTA; or the FTA reproduces (without referring to) WTO provisions. See Ignacio Garcia Bercero, 'Dispute Settlement in European Union Free Trade Agreements: Lessons Learned?' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press 2006) 383, 399 *et seq*.

[462] Chad P Bown and Bernard M Hoekman, 'Developing Countries and Enforcement of Trade Agreements: Why Dispute Settlement is Not Enough' (2008) 41(1) Journal of World Trade 177, 179.

FTA, but may be uneasy politically and in practice for the EU to require the enforcement of sustainability standards in developing countries through a DSM. This is why fewer outcomes should be expected from judicial enforcement in FTAs between the EU and a developing country, compared to the same arrangements between the EU and developed countries. That said, providing for such a DSM in EU FTAs would do no harm, since even if the DSM shows little or no activity, it may still exert a deterrent effect.[463] Therefore, the inclusion of an *ad hoc* DSM in the FTAs may certainly help 'thicken' their institutional setup. This leads to the conclusions that it is overall desirable to include a general DSM in an FTA and a separate *ad hoc* one for the TSD chapter. This is indeed what most of the 'new-generation' FTAs provide for.

In terms of policy options for the insertion of a DSM, there are mainly three theoretical approaches. The plurality of attitudes in this respect is somehow related to different policy options observed as regards compliance. Under the 'diplomatic' model, the resolution of disputes relies basically on consultations and diplomatic negotiations. Arbitration procedures are not excluded, but require mutual consensus of the parties. The last resort in case of disagreement is a unilateral measure of non-execution, which has a high diplomatic cost and is thus seldom used.[464] All EU agreements concluded before the year 2000 were following more or less this model, mainly because such agreements had been negotiated with Eastern European countries right after the fall of the Berlin wall primarily for political purposes.[465] The agreements with neighbouring countries (Tunisia,[466] Israel,[467] Morocco,[468] Jordan[469] and Egypt[470]) follow a similar logic. The structural weaknesses of these mechanisms inspired the EU to adopt a stricter approach. The agreements with South

[463] Claude Chase *et al*, 'Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements – Innovative or Variations on a Theme?' (2013) WTO Working Paper, 47 <https://www.wto.org/english/res_e/reser_e/ersd201307_e.htm> accessed 17 April 2019.
[464] Ignacio Garcia Bercero, 'Dispute Settlement in European Union Free Trade Agreements: Lessons Learned?' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press 2006) 383, 389.
[465] ibid.
[466] Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, on the one part, and the Republic of Tunisia, on the other, signed 17 July 1995, in force 1 March 1998.
[467] Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, on the one part, and the State of Israel, on the other, signed 20 November 1995, in force 1 June 2000.
[468] Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, on the one part, and the Kingdom of Morocco, on the other, signed 26 February 1996, in force 1 March 2000.
[469] Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, on the one part, and the Hashemite Kingdom of Jordan, on the other, signed 24 November 1997, in force 1 May 2002.
[470] Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, on the one part, and the Arab Republic of Egypt, on the other, signed 25 June 2001, in force 1 January 2004.

Africa[471] and Chile,[472] as well as the Cotonou Agreement,[473] respond to the so called 'quasi-judicial' model, which is characterised by the presence of a third-party adjudicator. Such agreements contain different forms of dispute settlement procedures, although generally confined to trade-related provisions and not applicable to regulatory cooperation or environmental matters. Moving from the pattern of the WTO DSM, the parties brought in some innovative elements conceived to make the procedures faster, introduce more detailed rules for arbitration procedures, for the appointment of the arbitration panels and for compliance.[474] A step further is the 'judicial model', the difference with the 'quasi-judicial' one being the greater degree of independence and institutional stability of the adjudicator. This is normally permanent and thus directly affected by the bad functioning of the treaty, so it has an autonomous interest in pursuing violations.[475]

The advantages of having a 'judicial' DSM are evident in terms of chances of seeing the treaty properly implemented. At the same time – as seen above – in some instances, depending on the diplomatic relationship with the counterpart, as well as on the political and economic conditions of the latter, softer approaches may be advisable, especially with developing countries. Overall, the 'judicial' DSM approach is not widespread as it requires a very high level of political integration between the parties. Generally speaking, the 'diplomatic' model of settling disputes is the most common solution, especially in the European Economic Area, in EU Stabilisation Agreements and in FTAs with neighbouring countries, whereas with other trade partners the panorama is more diversified, although purely 'judicial' DSM clauses are rare and overall institutionalism is 'thin' in this respect.[476] In 'new-generation' FTAs, it can be said that the DSMs are essentially of 'quasi-judicial' nature, although increasing attention is paid to the independence of the DSM bodies.

Hence, with reference to agricultural sustainability, two considerations should be made. On the one hand, quite obviously, the stronger the DSM type chosen, the 'thicker' the overall institutional dimension of the FTA, the higher the chances of developing the correct implementation of the

[471] Agreement on Trade, Development and Cooperation between the European Community and its Member States, on the one part, and the Republic of South Africa, on the other, signed 11 October 1999, in force 1 May 2004.
[472] Agreement establishing an association between the European Community and its Member States, on the one part, and the Republic of Chile, on the other, signed 18 November 2002, in force 1 February 2003.
[473] Partnership Agreement between the members of the ACP group of states, on the one part, and the European Community and its Member States, on the other, signed 23 June 2000, in force 1 April 2003.
[474] Ignacio Garcia Bercero, 'Dispute Settlement in European Union Free Trade Agreements: Lessons Learned?' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press 2006) 383, 389.
[475] Claude Chase *et al*, 'Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements – Innovative or Variations on a Theme?' (2013) WTO Working Paper, 13 <https://www.wto.org/english/res_e/reser_e/ersd201307_e.htm> accessed 17 April 2019.
[476] Ignacio Garcia Bercero, 'Dispute Settlement in European Union Free Trade Agreements: Lessons Learned?' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press 2006) 383, 384.

agreement. In this regard, the argument that 'hard' DSM may discourage parties to undertake ambitious commitments is not persuasive, as no commitment may be considered really ambitious if taken in the absence of compelling mechanisms to guarantee a follow up. On the other hand, the real problem is that it is far from certain if and to what extent these mechanisms are structurally suitable to contribute to promoting sustainable agriculture. Because of their broader formulation and projection towards the future, environmental provisions are often less detailed and justifiable than the trade-related ones. This is especially true for TSD chapters, where the bulk of environmental delivery expected further to the implementation of such provisions is not quantified (or quantifiable) in minute terms. Carrying out this quantification may be slightly easier for the control of the implementation of the EU *acquis*, but assessing the final environmental delivery of the measures adopted will always be problematic. Moreover, very often FTAs provide that the possibility of activating the DSM is conditional to the demonstration of a link between the violation of a sustainability commitment and damage to trade flows between the parties.[477] Virtually always, as will be seen in case studies, sustainability provisions are even left out of the scope of the jurisdiction of the DSM body; whereas, where sustainability provisions are covered by the jurisdiction of the DSM body, it is far from evident that sanctions will be applied in case a breach is found. This is precisely the case of one of the few EU FTAs where the general DSM mechanism covers sustainability provisions (the EU-CARIFORUM), where the possibility of applying trade sanctions is not foreseen.[478]

[477] Ministry for Foreign Affairs – Department for Trade Agreements and Technical Rules, Sweden, 'Implementation and enforcement of Sustainable Development provisions in Free Trade Agreements – Options for Improvement' (2016), Kommerscollegium (National Board of Trade) publication, 14 <https://www.kommers.se/Documents/dokumentarkiv/publikationer/2016/publ-implementation-and-enfocement-of-sustinability-provisions-in-FTAs.pdf> accessed 17 April 2019.

[478] Economic Partnership Agreement between the CARIFORUM States, on the one part, and the European Community and its Member States, on the other, signed 15 October 2008, not in force, Article 213(2).

Part B: Summary of Findings

The analysis carried out in Part B enables us to draw some conclusions:

- FTAs can and should be understood from an interdisciplinary perspective. While they implicitly respond to a free-trade logic, the matter of whether and to what extent such agreements may benefit society as a whole or only of some industries' special interests – as well as the matter of whether and to what extent they facilitate or divert trade – are highly disputed by scholars and eventually depend – at least partly – on the specific circumstances of each situation. The two problems are linked: the FTA will be particularly likely to be trade-diverting precisely when its conclusion is inspired more by special interest groups than by the wish to enhance welfare;

- In terms of environmental (and agricultural) sustainability, any single FTA may in principle go further than WTO law in terms of environmental protection, which is basically unregulated in the WTO system. Whether FTAs can – in practice – give rise to higher standards compared to existing applicable international environmental rules is more complicated. In fact, apart from very niche sectors where sustainable agriculture can be encouraged by free trade (typically goods labelled for the allegedly sustainable practices adopted while producing them), the market system is generally unable to internalise the stock externalities related to natural resources such as soil, water and biodiversity. Therefore, in practice the tendency towards FTAs is characterised by such political and economic features that the overall environmental standards are not likely to be *naturally* enhanced, without appropriate corrections;

- FTAs – as part of the broader EU CCP – are part of a strategy that sees trade and investment as a fundamental tool – both at bilateral and multilateral levels – to ensure growth and job creation, to be conducted with transparency and aiming at the promotion of core EU values, particularly sustainable development, human rights and good governance. This confirms that current and future FTAs shall be regarded with an increasingly holistic approach, that does not only take into account trade-related concerns, but also the promotion of an overall model of development based on values and commitments;

- The EU does not have one model of FTA that is proposed to every trade partner, but has a diversified approach for every case. Amongst the numerous factors that determine this approach, the fact that the trade partner is a developing country plays a major role. While the overall benefit of developing countries deriving from the conclusion of an FTA is controversial, it appears natural that

compelling such trade partners to strict environmental standards may be more complicated in view of the overarching priority to ensure development. For this reason, the examination of the potential to export sustainable agriculture in EU FTAs with developing countries requires to be dealt with separately in the case studies chosen in the next Part;

- While the EU Treaties formally provide for 'generic' trade agreements, cooperation agreements and association agreements, in practice the final outcome is directly proportionate to the level of integration that the parties aim at attaining. For this reason, FTAs have been described as a sort of 'pyramid of trade preferences', where at the top of the scale there is EU membership; one step below, there are the association agreements, then free trade areas (including EPAs, 'generic' and cooperation agreements, unless they are non-reciprocal in nature), followed by non-reciprocal preferences (mainly carried out through unilateral agreements, as in the case of the GSP) and at the bottom the MFN clause, which is the baseline established in WTO law. Further differentiation derives from the relationship that the EU has with its trade partners (neighbouring countries, pre-accession parties and so forth) and, recently, from the notion of 'new-generation' FTAs, which have as one of the main features the 'export' of the Union's fundamental values to the partner countries;

- Absent all these differentiations, the final content of each agreement will always depend on the circumstances of the specific case. In other words, there is no clear relationship between the type of agreement chosen and the extent to which agricultural sustainability is considered. The latter may, at most, exert an influence on the matter of *how* this value is provided for in the text, particularly in connection with the arrangements made with a view to subsequently implementing it;

- EU FTAs shall be compatible with EU law and particularly with the Treaty provisions in the EU CCP. Within the latter – and in a number of other Treaty provisions – an obligation is established for the EU to pursue sustainable development even in its external action. In this connection, Article 218(11) TFEU gives any Member State, the Council and the Commission the power to obtain the opinion of the Court of Justice concerning the compatibility of the agreement with the Treaties. Therefore, we have called the 'sustainability test' the judicial check that the CJEU may (or should?) carry out to assess whether and to what extent sustainable development (and thus sustainable agriculture) were appropriately taken into consideration in the text of the agreement. More generally, what the CJEU needs to judge is whether the EU institutions have been capable of ensuring policy coherence by virtue of the conclusion of an international agreement;

- It was argued that there is reason to believe that EU objectives – including sustainable development – should be pursued with the same level of intensity at internal and external level. On

the contrary, reading between the lines of Opinion 2/15 – on the FTA between the EU and Singapore – suggests that the CJEU does not consider that the standards of sustainable development elaborated within the EU legal system should also be taken as a baseline for EU external action. More generally, it does not seem that the 'sustainability test' on FTAs concluded with third countries has ever been conducted at all by the CJEU within its jurisdiction under Article 218(11) TFEU. As a result, the obligations that the Treaties place on the EU for the development of the CCP are not considered as obligations of results. It follows that, in the event that such EU policy targets are disregarded in a given FTA, it is likely that no EU-based judicial mechanism will prevent the entry into force of the agreement in question;

- In order to assess the consideration that sustainable agriculture is attributed in EU FTAs, three fundamental aspects have been identified and isolated. First, quite obviously, the TSD chapter in 'new-generation' FTAs, by covering sustainable development, has high potential for the enhancement of sustainable agricultural practices. Second, regulatory cooperation may determine the export of EU sustainability standards supposedly higher than those adopted by third country parties. Finally, the appropriateness and 'thickness' of legal enforcement should be considered as a *condicio sine qua non* for the effectiveness of the improvements brought by the first two key aspects. These three elements will be prioritised in the analysis of case studies in Part C;

- Far from being a miracle cure, the TSD chapter has indeed a theoretical potential – also depending on the elements it contains and the way it is designed – but it should not be expected from it more than what it can give. The function of the TSD chapter was clarified by the CJEU as being that of contributing to 'governing trade'. Thus, they shall not encourage trade by reducing the level of protection 'below the standards laid down by international commitments'. The key question is then whether or not the measures enshrined in the TSD chapter state something which goes beyond the *status quo* of the existing baseline of applicable international and domestic environmental law into force. This will depend both on the level of ambition of the measures and on the mechanisms developed to give substance to them. The actual surplus in terms of environmental delivery stemming from all these provisions is still to be seen in every specific case;

- Mutual recognition, equivalence and harmonisation are three forms of regulatory cooperation that, while governing in different terms the reduction of non-tariff barriers aimed by FTAs, have different impacts on the pursuit of sustainable agriculture in the regulatory framework of the trade partner of the EU. Moving from the assumption that the EU is incontrovertibly a very stringent food safety and environment regulator, this paper has moved from the assumption that the more EU standards are promoted – in the form of 'deep integration' – the better for the improvement of

sustainable agriculture in third country parties. This *acquis* should be also composed of EU standards on the sustainability of agricultural production and not only, as mostly happens, of food safety rules on the final product. While international trade law on PPMs sets limits on the possibility of intervening on third countries' production standards, even by means of international agreements, in the case studies special attention will be paid to inclusion of standards relating to agricultural production, particularly those provided for in the EU CAP (pointed out *supra*, §2.3);

- EU measures for sustainable agriculture are very expensive and very few of the EU trade partners would be able to afford these standards. Therefore, it is not realistic to think that harmonisation through establishment *en bloc* of a pre-set of EU rules as provided for in the CAP may easily occur. It is evident that the best agreement will be the one which manages to find a happy medium between a long series of conflicting elements, making use of the best options provided by the law.

- The model of regulatory cooperation chosen in the agreement is also partially imposed *de facto* by the combination of the parties' respective market size, rule stringency and regulatory capacity. Having the EU as a large market, strict environmental standards and a highly-developed regulatory capacity, it should be able to have the political and economic power to export significant standards in most of its trade partners' domestic legislation and thus to influence the type of regulatory cooperation eventually endorsed. As a result, if really motivated towards this direction, the EU would definitely have the strength to promote harmonisation through progressive convergence towards EU rules in most of the FTAs, although, of course, to different extents depending on the nature of trade partner;

- Only the endorsement of EU sustainable agricultural practices by the trade partner, able to provoke an actual change in its domestic legislation and consisting of the subsequent adoption of such EU standards at national level can be considered as to be promoting sustainable agriculture outside EU boundaries. In practice, this can happen directly, through harmonisation (or convergence) provided for in the agreement; and indirectly, through equivalence and even mutual recognition, if preceded by regulatory convergence towards EU sustainability standards prior to the conclusion of the agreement. Then, the appropriateness of the formula chosen will in any case depend on the specific circumstances of the case;

- In order to give substance to the provisions of an agreement, it is essential to provide for the presence of adequate institutional arrangements to oversee their adherence. Such arrangements should encompass the need to ensure implementation, reaction against non-compliance and DSMs.

While implementation may be pursued in various forms, it is important in any event that the FTAs enhance monitoring and evaluation, which are on the contrary sometimes neglected in EU FTAs.

- As regards non-compliance, the EU is more inclined to avoid trade sanctions – particularly in light of the political relationship with many of its trade partners (neighbouring countries, developing countries and so forth). However, an argument was made to call for the introduction of tougher elements to react to non-compliance, as the exclusive presence of soft mechanisms does not ensure that EU provisions in FTAs pass the 'sustainability test'. In fact, products are *de facto* allowed to access the EU market without having *previously* ensured compliance with EU sustainability standards. As a result, the problem of ensuring compliance with TSD obligations and the EU *acquis* is in practice postponed in time, to a future and indefinite moment. At the same time, trade sanctions may not necessarily be appropriate in any case, particularly because of their political and economic cost and their little suitability to addressing environmental problems. It must be borne in mind that an appropriate compliance setup does not only include sanctions, but other arrangements such as positive incentivising associated with respect of sustainability provisions, the strengthening of existing committees and – above all – the establishment of a committee specifically tasked with consideration of the environmental dimension of the FTA, provided with both a facilitative branch and an enforcement branch. The TSD committee often established in the TSD chapters of 'new-generation' FTAs, as will be seen, has definitely more a facilitative than an enforcement function. Should the latter be called upon, measures different from trade sanctions may revolve around the withdrawal of cooperation assistance;

- In spite of their numerous advantages, DSMs are virtually never used in FTAs and the parties tend to have an overall preference for the DSM established under WTO law (which cannot, however, be resorted to for disputes relating to the interpretation of an FTA). In any case, providing for such a DSM in EU FTAs would not be harmful, since even if the DSM shows little or no activity, it may still be a deterrent. This may follow a 'diplomatic', a 'quasi-judicial' or a properly 'judicial' model. While the latter may seem more attractive to ensure adhesion to the sustainability provisions of an agreement, diplomatic relations and the political and economic conditions of the EU trade partner may not always make it feasible to set up a pure 'judicial' DSM, which is in fact very rare. At the same time, it may be hard to evaluate in judicial terms the breach of provisions that – as in the case of most of the TSD chapters – are often too loosely worded.

In light of the above, in Part C some case studies will be chosen, in which the correspondence between the elements highlighted in this Part and the provisions of agreements will be carefully evaluated.

PART C

EU FREE TRADE AGREEMENTS AND COUNTERPART COUNTRIES' SUSTAINABLE AGRICULTURE: SELECTED CASE STUDIES

SECTION V

EU FREE TRADE AGREEMENTS WITH DEVELOPED COUNTRIES: EU-CANADA, EU-SOUTH KOREA AND EU-UKRAINE

In this section, three case studies in the context of EU negotiations with developed countries will be presented. As shown above, there is indeed reason to believe that, in spite of the differences among the different FTAs, there is a common denominator in EU approach depending on the degree of development of its commercial counterpart.

Each paragraph will be structured in three sub-paragraphs dedicated, after a short presentation of each agreement in the first of them, respectively to the three themes identified in the previous section as crucial for achievement of sustainable agriculture in third countries, namely the TSD chapters, regulatory cooperation and enforcement mechanisms. While this will constitute the broad line of analysis, common for each case study, the specific features of each agreement will be highlighted as appropriate.

§5.1. The Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada

§5.1.1. *Presentation of the Agreement and TSD Chapter*

The Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada arguably enshrines most of the specific features of new-generation FTAs recently concluded by the EU with developed countries.[479] It was signed on 30 October 2016 and has been provisionally in force since 21 September 2017. As a mixed agreement (see *supra*, §3.3.1.), its definitive entry into force will be subject to the resolution of some contentious issues among EU Member States, particularly problematic following the concerns brought forward by Wallonia.[480] It eliminates more than 99 % of custom duties and enhances the opportunities to access each country's market, thus intervening on tariff and non-tariff barriers; it purports to remove obstacles to investments and to boost trade in goods and services and contains specific rules for intellectual property rights and geographical indications.[481] The agreement is made up of about 230 pages and a long list of annexes. A Joint Interpretative Instrument (JII) pins down the authentic (though not exclusive) interpretation of the agreement. Eventually, there are 38 declarations made by the EU and its Member States that deal with matters of competence, administrative procedures, re-affirmation of key principles and clarification of commitments. A decisive aspect for our purposes is the attention paid, compared to previous EU FTAs, to sustainable development and environmental matters. There is one full chapter (22) dedicated to trade and sustainable development and one (24) entirely devoted to environmental protection, which will be examined in parallel in this sub-paragraph. The latter is a unique feature of CETA by comparison with any other FTA in place and shows a special care by the parties in this respect. Equally fundamental for the research question of this paper are chapters 21 (regulatory cooperation), 26 (institutional framework) and 29 (DSM).[482]

The parties are willing to promote 'trade […] that contributes to environmental protection, including by […] promoting the improvement of environmental performance goals and

[479] Comprehensive Economic and Trade Agreement between the EU and its Member States, on the one part, and Canada, on the other (CETA), signed 30 October 2016, not in force (provisionally applied since 21 September 2017).
[480] On the Wallonian refusal to ratify CETA, which keeps the come into force of the agreement stuck due to the veto power that *de facto* Wallonia has in the Belgian constitutional system, cf Paul Magnette, *CETA: quand l'Europe déraille* (Editions Luc Pire 2017).
[481] The detailed description of the content of CETA lies outside the scope of this work. For a general presentation of the agreement, cf Xavier van Overmeire, 'L'ancrage d'un accord de libre-échange entre l'Union européenne et le Canada' (2013) Working Paper Dentons <https://tinyurl.com/ya8quh7p> accessed 18 November 2018.
[482] Chapters 4 (SPS measures) and 5 (technical barriers to trade) are also important, but only indirectly related to the research question and thus will not be focused upon in depth.

standards'.[483] This goes along with the parties' 'right to regulate' in environmental matters, which also covers the attempt to improve existing standards.[484] However, albeit this right being 'recognised', there is no legal obligation to put it in place and improve environmental standards, as demonstrated by the weak wording of the provisions. In fact, in spite of the apparent use in Article 24.3 of the normative form 'shall', parties are indeed only bound to the obligation to 'seek to ensure' the implementation of these policies and 'strive to promote' their improvement – which clearly indicates that at most it will be necessary for them to show that such a concern was broadly taken into account in the decision-making process. Arguably more substantial is the provision of Article 24.5.1, which states that a party 'shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental law, to encourage trade or the establishment, acquisition, expansion or retention of an investment in its territory'. This sentence, constituting the so-called 'no backsliding principle', indeed sets limits to investments, bringing out the most authentic spirit of sustainable development structured around the idea of balance among economic, social and environmental concerns (see *supra*, §1.1.). Although it is doubtful that such a principle (also known as 'standstill' or '*non-régression*' in French)has already gained the status of 'general principle of international environmental law',[485] it is increasingly endorsed in several domestic legal systems and often evoked in the international fora and is fully in line with the structural mission of environmental law, ie to progressively strengthen protection through time; it also has an economic rationale, since it ensures free competition by preventing 'free riders' to unlawfully attract investments through a decrease in environmental standards.[486] There is, however, a general issue of effectiveness with this principle. In fact, and paradoxically, while international law as well as other domestic legal systems recognise this principle,[487] other rules within these same legal orders, for the

[483] EU-Canada CETA, Article 22.3.
[484] ibid Article 24.3.
[485] Amedeo Postiglione, *Diritto internazionale dell'ambiente* (Aracne Editrice 2013) 160; the resort to the principle seems to be more systematic in international investment law. See, on this point, Andrew D Mitchell and James Munro, 'No retreat: A Principle of Non-Regression from Environmental Protections in International Investment Law' (2019) Georgetown Journal of International Law (forthcoming) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3338055> accessed 10 January 2020; for a comparative perspective on the principle of non-regression, see Luigi Colella, 'Il principio di "non regressione ambientale" al centro del Global Pact of Environment. Il contributo dell'esperienza francese al diritto ambientale comparato' (2019) 2 Diritto e giurisprudenza agraria, alimentare e dell'ambiente <https://www.rivistadga.it/il-principio-di-non-regressione-ambientale-al-centro-del-global-pact-of-environment-il-contributo-dellesperienza-francese-al-diritto-ambientale-comparato/> accessed 10 January 2019.
[486] Michel Prieur, 'La non-régression, condition du développement durable' (2013) 1(3) Vraiment Durable 179, 182. See also Michel Prieur, 'Vers la reconnaissance du principe de non-régression' (2012) 4(37) Revue juridique de l'environnement 615.
[487] cf Free Trade Agreement between the Government of the People's Republic of China, on the one part, and the Government of Georgia, of the other, signed 13 May 2017, in force 1 January 2018, Article 9(2); Strategic Partnership Agreement between the European Union, on the one part, and Japan, on the other, signed 17 July 2018, in force 1

sake of protection of other legitimate interests, enable them to modify the level and type of protection even downward.[488] On this point, it remains uncertain from the wording mentioned above whether the non-backsliding from Canada's environmental law is only meant to refer to the framework in force at the time of the ratification of the agreement or also to future environmental laws and policies. The preparatory works of the agreement do not help clarify this doubt, but the latter interpretation appears more in line with the spirit of sustainable development as a flexible tool to govern trade in evolutionary terms.[489] Moreover, the effectiveness of the principle is affected by the fact that in practice it may be problematical to prove that environmental standards are actually being lowered and thus the provision may end up having a limited effect. Furthermore, its scope is more confined than it seems as it only concerns the (blatant) scenario of lowering existing standards, while minimum thresholds on future commitments are cut off. As for the latter, there is only a 'recognition of inappropriateness' vis-à-vis trade facilitation through the weakening of environmental standards, but nothing is foreseen in the event of measures that will be subsequently adopted to that effect.[490] There is the same solution, *mutatis mutandis*, as regards MEAs, for which 'each party reaffirms its commitment to effectively implement in its law and practices, in its whole territory' agreements to which it is already a party.[491] Thus, the environmental baseline is not brought forward, as only existing commitments are provided for if we exclude the broad obligation to exchange information with the other party on the respective implementation of such agreements.[492] More generally, the aim to promote sustainable development is mostly substantiated by the parties through their endeavour to cooperate amongst each other through the 'encouragement' of voluntary schemes and best practices, as well as integration of sustainable development in other policies and cross-cutting issues such as corporate social responsibility, activity in international fora dealing with issues relevant for both trade and environmental policies, including in particular the WTO, the OECD and the UNEP, trade-related aspects of the

February 2019, Article 16(2)(2); Comprehensive & Progressive Agreement on Trans-Pacific Partnership, signed 8 March 2018, in force 30 December 2018, Article 20(3)(6).

[488] An author argued that '[a]lors que les conventions sur l'environnement comme les lois nationales, proclament la volonté de protéger l'environnement, de ne pas le détruire, de l'améliorer systématiquement voire même de le renforcer, les principes traditionnels de ces mêmes droits permettent, par un acte contraire, d'abroger ou modifier la règle en faisant marche arrière dans les niveaux ou modes de protection'. See Michel Prieur, 'Une vrai fausse création juridique : le principe de non-régression' (2016) HS16 Revue juridique de l'environnement 319, 323

[489] A supporting argument for this reading may be offered by the Preamble of the JII, which mentions as a principal purpose of trade that of creating 'sustainable economic growth'. Because 'growth' by definition occurs throughout a certain period of time, it may be argued that a non-regression that is limited to the environmental law in force before the conclusion of the agreement would betray this dynamic character.

[490] EU-Canada CETA, Article 22.3.3. cf Nils Meyer-Ohlendorf, Christiane Gerstetter and Inga Bach, 'Regulatory Cooperation under CETA: Implications for Environmental Policies' (2016) Ecologic research paper <https://www.ecologic.eu/14187> accessed 19 November 2018.

[491] EU-Canada CETA, Article 24.4.2.

[492] ibid Article 24.4.3.

conservation and sustainable use of biological diversity and promotion of life-cycle management of goods.[493] The same wording is utilized for trade in environmental goods and services and the trade in forest products, for which the only tangible commitment is that of exchanging information, since acknowledgement of the 1973 *Convention on International Trade in Endangered Species of Wild Fauna and Flora* shall only be 'promoted' and the trade of products from sustainable forests 'encouraged'.[494] As much as one can consider the text binding, the obligations in question do not give rise to clear commitments for the simple reason that it is hard to determine to what extent one party is supposed to be 'promoting' or 'encouraging' a certain activity. Broadly speaking, every party will have no trouble in showing that it is actually somehow fulfilling these obligations. The same considerations apply, *mutatis mutandis*, to the trade in fisheries and aquaculture products, for which at least there is a duty to adopt or maintain effective monitoring, control and surveillance measures.[495] The relatively short chapters 22 and 24 are then completed by the reference to institutional mechanisms and – in the case of chapter 22 – civil society forum (for which see *infra*, §5.1.3.).

All in all, three statements may be made to evaluate the content and impact of chapters 22 and 24 of the agreement.

First, the parties show an evident political will to bring environmental sustainability to the centre of attention, giving the impression that the idea is to foster trade and environment harmoniously. Indeed, never in the past have environmental provisions occupied as much space as in the CETA.[496]

The second observation suggests, however, discouraging enthusiasm. Notwithstanding appearances, the analysis conducted above demonstrates that the sole tangible obligation concern the upholding of (existing) levels of protection in environmental law at domestic level and the duty to exchange information. For the rest, everything is based on permissive slogans revolving around encouragement, promotion and other concepts the legal significance of which is hard to pin down. It

[493] ibid Articles 22.3.2 and 24.12.1.
[494] ibid Articles 24.9 and 24.10.
[495] ibid Article 24.11.2.a.
[496] cf, for instance, the environmental dimension of CETA with that of some earlier agreements such as – *ex multis* – the Agreement establishing an association between the European Community and its Member States, on the one part, and the Republic of Chile, on the other, signed 18 November 2002, in force 1 February 2003; Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, on the one part, and the State of Israel, on the other, signed 20 November 1995, in force 1 June 2000; Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, on the one part, and the Kingdom of Morocco, on the other, signed 26 February 1996, in force 1 March 2000. The conclusion that CETA's provisions on the environment surpassed those of earlier agreements is also made by Emily R Hush, 'Where No Man Has Gone Before: The Future of Sustainable Development in the Comprehensive Economic and Trade Agreement and New Generation Free Trade Agreements' (2019) 43(1) Columbia Journal of Environmental Law <https://doi.org/10.7916/cjel.v43i1.3741> accessed 11 January 2020.

seems therefore that the parties were much more prone to *show* environmental engagement in aspirational terms rather than to *undertake* them in practice through clear commitments. In fact, the provisions of the agreements do not in any way constitute a step forward for the parties' environmental laws and policies since no additional commitment is established other than the *status quo*.[497] Against this background, one's attention is drawn to the limited consideration of climate change mitigation since climate action is only mentioned *en passant* in Article 24.12. This means that in practice nothing more is provided other than the commitments made by the parties within the climate regime and other MEAs. While such observations may appear as a reproach to the parties, the EU-Singapore ruling of the European Court of Justice (see *supra*, §4.1.) reminds us that TSD chapters (and thus partly also the chapters on environmental protection) are more about governing trade rather than directly serving the purpose of pursuing sustainability. In this line, it should be normal then that overall sustainability is not improved by virtue of the agreement.

Third, it is quite remarkable that nothing is contemplated to offset or at least confine the pollution created by the agreement itself, namely the negative externalities on the environment stemming from the increase in trade flows between the two countries – both in terms of international transport and application of the agreement at national level. Indeed, it is virtually impossible to measure this extra pollution precisely, owing to the number and unpredictability of factors involved. Moreover, it may also be argued that such an increase should also be evaluated in light of the introduction of environmental standards that normally end up appearing in over-polluted society under the pressure of ecological groups. However, evidence suggests that the final balance will be quite negative, particularly because of the strong impact of international (maritime) transport on GHG emissions.[498]

§5.1.2. *Regulatory Cooperation*

From the previous sub-paragraph, it should be clear that the rules directly set out by chapters 22 and 24 are likely to exert only a limited relevance on the enhancement of agricultural sustainability in Canada. On the contrary, the latter is much more susceptible to be impacted upon indirectly by regulatory cooperation (or by the lack of provisions on regulatory cooperation). Being a

[497] A partial step forward may indeed be constituted by the commitment to not backslide on environmental laws and policies, but this depends on the determination of the actual scope of non-regression as endorsed in the agreements (see *supra*, in this sub-paragraph).

[498] Jean-Luc Angot, Geneviève Bastid Burdeau, Christophe Bellmann, Sophie Devienne, Lionel Fontagné, Roger Genet, Géraud Guibert, Sabrina Robert-Cuendet, Katheline Schubert (Commission Indépendante), 'L'impact de l'Accord Économique et Commercial Global entre l'Union européenne et le Canada (AECG/CETA) sur l'environnement, le climat et la santé' (2017) Rapport au Premier Ministre, 54-55 <https://www.gouvernement.fr/sites/default/files/document/document/2017/09/rapport_de_la_commission_devaluation_du_ceta_-_08.09.2017.pdf> accessed 21 November 2018.

'comprehensive' agreement, CETA dedicates one full chapter specifically to regulatory cooperation. For this reason, the content of the EU-Canada Strategic Partnership Agreement, negotiated and concluded in parallel with CETA in order to upgrade cooperative actions between the parties mostly in voluntary terms, will not be deepened further in this paragraph.

First of all, it is important to make clear that the general rule chosen by the parties to govern regulatory conflicts is equivalence. Article 5.6 of the CETA pretty much replicates Article 4 of the SPS agreement, which states that 'Members shall accept the sanitary or phytosanitary measures of other Members as equivalent, even if these measures differ from their own or from those used by other Members trading in the same product, if the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member's appropriate level of sanitary or phytosanitary protection'. From a CETA-supporter perspective, it was argued that despite detractors' claim that through this provision mutual recognition is squeezed in the agreement, there is no automatic recognition of foreign SPS measures, as the attainment of appropriate level of SPS protection is subject to the objective demonstration to the importing Member.[499] While it is true that in principle there is a radical difference between mutual recognition and equivalence (see *supra*, §4.2.), the two concepts may become synonyms if the importing country adopts a very low threshold in assessing the equivalence. Although there is no evidence that this will be the case for CETA, the anxiety stems from the trade-enhancing spirit of the agreement, which may result in a temptation to push to the bottom such a threshold in order to optimise trade flows between the two countries.

As regards regulatory cooperation as such, among the numerous examples of domains concerned listed in Article 21.4, only one point (Article 21.4.n.vi) establishes a relation between the need to minimise differences between the parties and improve at the same time health, safety and environmental protection. In this chapter, several means are provided to give substance to such a cooperation: exchange of information, permanent dialogues, consultations regarding domestic legislative proposals, mechanisms aiming at approximating respective laws in the long term and so

[499] Luigi Cerciello Renna, 'Il caso CETA EU-Canada. Analisi di una polemica giuridicamente infondata' (2017) Agricolae.eu, 9 <https://www.agricolae.eu/ceta-dossier-giuridico-pro-analisi-polemica-giuridicamente-infondata/> accessed 21 November 2018. This publication represents an important achievement for the pro-CETA movement in Italy and had a lot of visibility, particularly due to the recognised authoritativeness of the author. The underlying assumption of the paper is that virtually every criticism on CETA should be dismissed by reason of the fact that CETA is indeed fully compliant with the international trade legal order. Regardless of the merit of this conclusion, the author fails to take into account that other than the international legal order, the EU is also bound to some rules laid down by the Treaties regarding its external action. It is also bound to and by some principles the respect of which should not be pursued less in the external action than in the internal one (for instance, sustainable development) and more generally it is bound to the duty to ensure policy coherence of its external action with its internal one. The present work adopts therefore a different approach and often comes to different conclusions (for example, see *infra* in this sub-paragraph on the application of the precautionary principle).

forth, but never are there provisions stipulating the automatic, unconditional mutual recognition between the parties.

Article 21.1 depicts a broad scope for regulatory cooperation, with no activity that *a priori* falls outside it unless explicitly prohibited. For example, Article 1.9 excludes 'water in its natural state',[500] so that chapters enumerated in Article 21.1 are only exemplary. Article 21.2 lays down the principles. Here, one can notice – at point 2 – that 'the Parties are committed to ensure high levels of protection for human, animal and plant life or health, and the environment in accordance with the TBT Agreement, the SPS Agreement, the GATT 1994, the GATS, and this Agreement'. This clearly confirms that the EU accepted to take as a benchmark the standards laid down in international trade law and not its standards implemented at internal level. From the perspective of the EU, this may imply a shift towards the bottom, precisely because EU standards are higher than those established by international trade law. From the perspective of third countries – more importantly – this may imply a shift towards the top in case their standards are lower than those enshrined in international trade law, but not above that level. Of course, third countries will always be able to unilaterally push forward their standards outside the framework of regulatory cooperation. It is significant that Articles 21.2.4 and 21.2.6 clarify that no prejudice shall be brought to the parties with regard to their freedom to carry out their regulatory, legislative and policy activities. Equally, a party will never be required to compulsorily enter into regulatory cooperation against its will to do so – at most there would be a duty to state reasons in case of refusal. However, the reference to 'standards laid down in international trade law' is more likely to encourage third parties to set standards that are lower than those applied in EU law.

At the same time, Article 21.2.4.a also sets out the target to 'prevent and eliminate unnecessary barriers to trade and investment', in line with the structure of GATT Article XX and other related WTO rules. This means that existing domestic rules may undergo an actual removal. It goes without saying that interpretation of the term 'unnecessary' will obviously be crucial to determine the extent to which reducing environmental standards in the name of trade liberalisation will be allowed. Indeed, Article 21.3.a establishes as one of the objectives of regulatory cooperation that to

[500] From the environmental point of view, this exclusion is remarkable as it embodies the suspicion that commercial use of water in its natural state may impair essential and basic public goods services such as the use of natural water. This is why commercial use of a specific water source, while not being completely forbidden, may not constitute a result stemming from an obligation included in the agreement. It is in this connection that Article 1.9 affirms that 'water in its natural state, including water in lakes, rivers, reservoirs, aquifers and water basins, is not a good or a product. Therefore, only Chapters Twenty-Two (Trade and Sustainable Development) and Twenty-Four (Trade and Environment) apply to such water'. On the contrary, the right of each party to protect and preserve its natural water resources is reaffirmed. The rules of Article 1.9 express the idea that water in its natural state should escape purely commercial logics, unless this is carefully examined and explicitly desired by one or more of the parties.

'contribute to the protection of human life, health or safety, animal or plant life or health and the environment'. This general rule is also echoed by several provisions in chapters 22 and 24.[501] It must thus be borne in mind that regulatory cooperation may also theoretically lead to the enhancement of sustainable agriculture in Canada. This is not only a purely hypothetical scenario, as demonstrated by the findings having brought to light such examples.[502] Yet a careful look obliges us to partly reconsider the scope of this statement. First, the same Article 21.3.a subsequently clarifies that such objective is indeed to be pursued only by means of two very specific activities and not in absolute terms.[503] Furthermore, there seems to be a contradiction – not clarified by the JII – between this assertion and the absence of a parallel reference in the regulatory agenda set out by Article 21.2.4. In any event, it is clear that there is no commitment to pursue higher environmental standards through regulation. In this connection, while it is clear that the no-backsliding principle should forestall evident decreases in environmental standards, regulatory cooperation may still be used to ensure that under the pretext of progressive approximation of laws one party takes additional higher measures on environmental protection.[504] In the end, it should be remembered that the overall design and economic rationale of regulatory cooperation is to facilitate trade and break down normative and technical barriers between the parties. The question is therefore the direction – towards the top or the bottom – where such a regulatory convergence will lead sustainability standards of Canada. In practice, achieving trade facilitation will be much more easily achieved by lowering rather than heightening environmental standards, which are most of the time phrased as limits to free trade that translate into additional costs for agricultural enterprises (and for which, unsurprisingly, the EU gives subsidies). Even if Canadian standards did not decrease by means of CETA, it would be thus unlikely to see Canadian agriculture getting closer to EU sustainability standards *by reason* of the provisions analysed above. This, of course, depends on a number of factors that are not only normative, but also economic, social and cultural and that concern the structural divergences existing between Canadian and EU agriculture. Indeed, not only does this

[501] cf EU-Canada CETA, Articles 22.1, 24.2 and 24.5.1.

[502] See for example the example of chemical safety: OECD, *International regulatory cooperation – Case Studies, Volume 1: Chemicals, Consumer Products, Tax and Competition* (OECD Publishing 2013) 15 <http://www.oecd.org/regreform/regulatory-policy/international-regulatory-co-operation-case-studies-vol-1-9789264200487-en.htm> accessed 26 April 2019.

[503] Namely by:
'(i) leveraging international resources in areas such as research, pre-market review and risk analysis to address important regulatory issues of local, national and international concern; and
(ii) contributing to the base of information used by regulatory departments to identify, assess and manage risks'.

[504] Jean-Luc Angot, Geneviève Bastid Burdeau, Christophe Bellmann, Sophie Devienne, Lionel Fontagné, Roger Genet, Géraud Guibert, Sabrina Robert-Cuendet, Katheline Schubert (Commission Indépendante), 'L'impact de l'Accord Économique et Commercial Global entre l'Union européenne et le Canada (AECG/CETA) sur l'environnement, le climat et la santé' (2017) Rapport au Premier Ministre <https://www.gouvernement.fr/sites/default/files/document/document/2017/09/rapport_de_la_commission_devaluation_du_ceta_-_08.09.2017.pdf> accessed 21 November 2018.

make it even more difficult to promote the EU's higher standards, but also renders the whole operation conceptually problematic. Some examples show how this alignment with EU standards may be complicated.

First, the EU is concerned with every single step of the food chain, from production to consumption (including the HACCP set of standards). On the contrary, the north-American conception focuses on decontaminating the product at a given step of its lifecycle, without considering its treatment up-stream and down-stream. While these approaches reflect two different role models, it is undeniable that the European one ensures better consumer protection at the final stage (among others, because the product may be re-contaminated after decontamination). Therefore, in this case regulatory convergence would be more easily ensured if Europe progressively lowered its standards in the long run, because for Canada such a convergence would imply entirely rethinking its production system.

Another example is sustainability of agricultural production as such. A comparative study reveals how Canada lags behind Europe with regard to every component of sustainable agriculture (such as air, water, climate change and biodiversity) and in particular that Canada still authorises 46 substances that have long since been prohibited in Europe.[505] A crucial point in the reasoning of this work is that Canada is far from subsidising green practices to the same extent that Europe does, as depicted *supra*, §2.3.3.[506] While Canadian exporters may gain a competitive advantage from the higher production costs of the European CAP, this is not likely to translate into increase in environmental standards of Canadian agriculture: on the contrary, the lower standards would precisely be the reason for this competitive advantage for Canadian farmers. And again, PPMs such as those included in the EU CAP should pass under the scrutiny of WTO law.

An interesting theme concerns the production of bovine meat, where a side-effect of the increase in quotas may result in encouragement for Canadian exporters to produce more hormone-free meat.[507] The import of such products in Europe would put a downward pressure on EU producers, but may also result in a positive turn for Canadian agriculture. This introduces the paradoxical yet fascinating subject of the economic disadvantages that the EU may get from an improvement in the sustainability in agriculture of third country commercial partners. Having said that, the concrete sustainability of the change shall be assessed carefully. In the case of bovine meet, in the EU

[505] David R Boyd, *Cleaner, Greener, Healthier: A Prescription for Stronger Canadian Environmental Laws and Policies* (UBC Press 2015).
[506] Alison J Eagle, James Rude, Peter C Boxallb, 'Agricultural Support Policy in Canada: What are the Environmental Consequences?' (2016) 24(1) Dossiers environnement 13.
[507] Berit Thomsen, 'CETA's Threat to Agricultural Markets and Food Quality' (2016) Friends of the Earth policy papers <https://www.foeeurope.org/sites/default/files/eu-us_trade_deal/2016/10_cetas_threat_to_agricultural_markets_and_food_quality.pdf> accessed 21 November 2018.

animals are kept, compared to Canada, more often in permanent pastures treated in such a way as to ensure a high level of carbon storage (especially as regards N_2O emissions), a fair variety of biodiversity and an attractive landscape.[508] Moreover, procedural rules are less stringent for meat carcasses in Canada, that are usually cleaned with chemicals such as chlorine. This is a reason of concern of some organisations, which are afraid that such divergences may pave the way for eventually deregulating the meat sector's PPMs in Europe, in particular vis-à-vis food safety requirements.[509]

An apparently opposite kind of concern may be raised with regard to the dairy sector, as identified by some producers' organisations.[510] At present, milk prices are lower in Europe than in Canada mainly due to the abolition of milk quotas in Europe since 2015, whereas Canada still has an income support scheme in place. Indeed, doubts can be cast on the compatibility of this Canadian policy with WTO and dairy continues to be perhaps overprotected in Canada.[511] For the same reasons why milk quotas in the EU were questionable from the point of view of trade restrictiveness, the analogous measures put in place by Canada to support the price of milk that is currently (unsurprisingly) higher than in the EU can be questioned. However, one merit that undoubtedly needs to be recognised in the use of quotas is the limit on overproduction. Overproduction carries with it concrete risks of air and water pollution, as well as potential biodiversity loss, stemming (*inter alia*) from the increased disposal of manure and fertilisers.[512] Moreover, Canadian dairy policies are at least partly socially oriented because they aim at ensuring that the supply of dairy products is aligned with domestic demand. Therefore, however problematic income support may be depicted from the point of view of sustainability, it is clear that the EU does

[508] Michel Doreau, Anne Farruggia and Patrick Veysset, 'Aménités et impacts sur l'environnement des exploitations françaises élevant des bovins pour la viande' (2017) 30(2) INRA Productions Animales 165.

[509] Berit Thomsen, 'CETA's Threat to Agricultural Markets and Food Quality' (2016) Friends of the Earth policy papers, 53 <https://www.foeeurope.org/sites/default/files/eu-us_trade_deal/2016/10_cetas_threat_to_agricultural_markets_and_food_quality.pdf> accessed 21 November 2018.

[510] cf Wally Smith and Richard Doyle, 'Canada-European Union Comprehensive Economic and Trade Agreement & the Effects of it on the Canadian Agriculture Sector' (2013) Dairy Farmers of Canada (DFC) Working paper - Presentation to the House of Commons Standing Committee on Agriculture And Agri-Food, 5 <https://www.dairyfarmers.ca/content/download/2110/30478/version/2/file/Presentation-to-the-HOC-AGRI-COMM_CETA-EFFECTS_EN_FINAL-1.pdf> accessed 21 November 2018. The authors here pinpointed Commission Regulation (EU) No 101/2013 concerning the use of lactic acid to reduce microbiological surface contamination on bovine carcases [2013] OJ L34, as a sign towards this progressive deregulation.

[511] This is the conclusion drawn by the Hoowegt Group, 'Dairy Remains Highly Protected in Canada' (2018) 15(1) Horizons Working Papers – Market Matters <https://hoogwegt.com/media/2492/horizons_january-2018.pdf> accessed 28 April 2019. The authors do not draw conclusions on the compatibility of the overall Canadian dairy policy with WTO, but remind that the newly introduced export class milk price may not be compatible with WTO law as was the case for a similar measure which was found WTO incompatible in 2003.

[512] Majlind Dibra, 'EU Milk Production Industry, the Potential Economic and Environmental Impacts of the Abolishment of Milk Quotas' (2014) Seminar Paper Submitted for International Economic Development Theory, Evidence and Policy on 10 October 2014, 12 <file:///C:/Users/Luchino%20Ferraris/Downloads/EUMilkProductionIndustry.pdf> accessed 28 April 2019.

not interfere with Canadian dairy policies for the sake of the environment or that of the diligent application of WTO law, but only to export its surpluses, which became particularly remarkable since the end of milk quotas in its internal system.[513]

Animal welfare, whose standards are being developed internationally by the World Organisation for Animal Health since 2002, also deserves some observations.[514] There is an evident regulatory gap between the thorough consideration of EU food and agricultural law (where such practices are also subsidised within Pillar II of the CAP) and the mostly voluntary standards applied by Canada.[515] Nothing in the agreement suggests that Canadian standards in this respect will be raised further to its application, particularly because the only commitment consists of the simple obligation to exchange information on the matter (Article 21.4.s).

Finally, Canadian green procurements are susceptible to being impacted upon as well. Through CETA, EU firms will access, on the same level as Canadian firms, a public procurement market that is estimated to be worth several billion dollars per year. The 'national treatment rule' basically requires non-discrimination of parties in procurement contracts based on the provision of goods and services (Article 19.4.1). This is related to the other general principle of the prohibition of offsets in public procurements (Article 19.4.6). In Article 19.1, offsets are defined as 'any condition or undertaking that encourages local development or improves a Party's balance-of-payments accounts, such as the use of domestic content, the licensing of technology, investment, counter-trade and similar action or requirement'. It follows that municipal entities would be prevented from setting conditions in public procurement selections that are aimed at fostering local development and in particular local food economy.[516] However, it is now realised that accurate rural development policies are a key component of sustainable agriculture, as demonstrated by the numerous efforts made by the CAP in this regard.

In conclusion, it is fairly evident that the impact of the above-mentioned kinds of problem on sustainable agriculture are therefore linked not only to the provisions of the agreement concerning regulatory cooperation, but also the structural divergences between the EU's and Canada's

[513] Berit Thomsen, 'CETA's Threat to Agricultural Markets and Food Quality' (2016) Friends of the Earth policy papers, 53 <https://www.foeeurope.org/sites/default/files/eu-us_trade_deal/2016/10_cetas_threat_to_agricultural_markets_and_food_quality.pdf> accessed 21 November 2018.

[514] On the assessment of the conflicts between public and private animal welfare standards and the problem of their coordination, see Diane Ryland, 'Animal Welfare Standards in Agriculture: Drivers, Implications, Interface?' in Mariagrazia Alabrese *et al*, *Agricultural Law* (Springer 2017) 181.

[515] Regulation (EU) No 1305/2013 of the European Parliament and of the Council on support for rural development by the European Agricultural Fund for Rural Development (Rural Development Regulation) [2013] OJ L347, Article 33.

[516] Ramani Nadarajah, 'CETA's Implications on Sustainable Development and Environmental Protection in Canada' (2015) Canadian Environmental Law Association papers, 9 <http://www.cela.ca/publications/ceta-s-implications-sustainable-development-and-environmental-protection-canada> accessed 21 November 2018.

agricultural systems which are not addressed explicitly or reconciled by the agreement. This gap cannot be covered by the broad recognition of the principle of equivalence, which in any case struggles to encompass purely production-related issues. Among other things, many of the instances mentioned above are at the same time occasions missed by the EU to make an effort to raise its counterpart's regulatory standards in agriculture. The most blatant example is that of the precautionary principle. This principle still carries with it some open interpretative problems in international as well as European law, but the key issue is always to find a balance between its potential as a useful preventive risk management tool in cases of scientific uncertainty and a pretext to arbitrarily derogate free movement of goods.[517] In this connection, the parties follow in their internal regulatory frameworks two very different models of precautionary principle. While the EU has endorsed a 'proactive approach' (Article 191 TFEU and Commission Communication No 2000/1),[518] the SPS agreement (Article 5.7) adopts a 'passive approach', only allowing taking action temporarily when scientific evidence is insufficient while trying to obtain supplementary information.[519] To tell the truth, the 'proactive approach' followed by the Commission is not an absolute, particularly since the Commission is quite careful in avoiding making reference to the principle without a clear reason for doing so, as doing otherwise may still be considered as a surreptitious form of protectionism;[520] moreover, even in EU law, the principle overall gives more rise to 'faculties' than to 'duties' to act;[521] however, the divergence between the EU and the SPS approach is still tangible. Since CETA in Article 24.8 refers to the SPS agreement, it is clear that

[517] Alberto Alemanno, 'Le principe de précaution en droit communautaire : stratégie de gestion des risques ou risque d'atteinte au marché intérieur ?' (2001) 4 Revue du droit de l'Union européenne 917.

[518] Communication from the Commission on the precautionary principle, COM/2000/0001 final. cf in particular paragraphs 3 and 5 of the executive summary.

[519] While the fact that the EU system seems more advanced than the WTO system in terms of recognition of the precautionary principle, it is also true that such a principle has been widening its scope throughout time on the basis of WTO jurisprudence, particularly in the cases *Japan Apples* and *EC – Biotech* (see also *supra*, §3.1.2.). cf WTO Appellate Body Report, Japan — Measures Affecting the Importation of Apples (*Japan Apples*) DS245/AB/R [2003], adopted 10 December 2003, para 179-185, where the Appellate Body adopted a broader approach compared to the Panel, ruling that Article 5.7 SPS may also potentially cover cases where the available evidence is more than minimal in quantity but has not led to reliable or conclusive results; WTO Panel Report, European Communities — Measures Affecting the Approval and Marketing of Biotech Products (*EC-Biotech*), DS291/R [2006], adopted 21 November 2006, para 7.1522, where the Panel found that the fact that the precautionary approach cannot yet be attributed a clear status in international customary law shall not be viewed as an obstacle for adopting a precautionary and prudent approach in identifying, assessing and managing risks to human health and the environment. On the precautionary principle in the context of the SPS agreement, see also Luigi Cerciello Renna, 'Il caso CETA EU-Canada. Analisi di una polemica giuridicamente infondata' (2017) Agricolae.eu, 11 <https://www.agricolae.eu/ceta-dossier-giuridico-pro-analisi-polemica-giuridicamente-infondata/> accessed 21 November 2018. Paolo Borghi, 'Il principio di precauzione tra diritto comunitario e Accordo S.P.S.' (2003) 12(10) Diritto e giurisprudenza agraria e dell'ambiente 535; Francesco Bruno, 'Il principio di precauzione tra diritto dell'Unione Europea e WTO' (2000) 10 Diritto e giurisprudenza agraria, alimentare e dell'ambiente 569.

[520] Luigi Costato, 'Il principio di precauzione nel diritto alimentare' (2008) Atti dei Georgofili 2008 153, 158 <http://www.georgofili.net/File/Get?c=60c7218c-92a4-4b81-bce3-0846511d0a6f> accessed 28 April 2019.

[521] Paolo Borghi, 'Le declinazioni del principio di precauzione' (2005) 1 Rivista di diritto agrario 711.

the version of the principle adopted by the agreement will not be the stronger European one, but the one of the SPS agreement. It is thus possible to say that the EU is not breaching international trade law, but that this also constitutes an example of backsliding in EU standards in the international trade arena. In fact, nothing in WTO law would have prevented the parties from phrasing a precautionary principle in the version adopted in internal EU law. In this connection, little attention is paid overall to the sustainability of *procedures*, which goes beyond the mere sustainability of *products* and cannot be solved through the simple application of the principle of equivalence. While sometimes it may be problematic to promote its internal PPMs (for legal or practical reasons – see *supra*, §3.3.2.), the latter is still the main tool to attain a 'deep integration' between the parties which is not of a purely economic nature. On the contrary, economic considerations may encourage the parties to progressively relax their standards in the long run in order to foster regulatory convergence and therefore make equivalence easier to attain.

§5.1.3. *Enforcement Mechanisms*

Enforcement passes first of all through appropriate monitoring and evaluation activities of environmental provisions. Article 22.3.3 CETA provides that 'each Party commits to review, monitor and assess the impact of the implementation of this Agreement on sustainable development' and that such assessments may be carried out jointly. Article 10 of the JII further states that the parties 'are committed to initiating an early review of these provisions, including with a view to the effective enforceability of CETA provisions on […] trade and the environment'. Likewise, Article 24.12.1.a CETA reiterates the same exigency in the environmental chapter. Monitoring and evaluation are key components of the environmental impact of an FTA and may help detect flaws in the previous steps (for instance, the Trade SIA), but it is regrettable that nothing is said vis-à-vis the follow-up activities to undertake once a shortcoming is found.[522]

The institutional setup of the CETA is marked by the establishment of the Joint Committee. Article 26.1 states that such a committee is made up of representatives of both the EU and Canada and that it meets once a year or at the request of one party. According to Article 26.1.3, the Joint Committee is 'responsible for all questions concerning trade and investment between the Parties and the implementation and application of this Agreement' and each party may refer to it at any time. Amongst the functions conferred on it, some are particularly salient for the pursuit of sustainable

[522] Nils Meyer-Ohlendorf, Christiane Gerstetter and Inga Bach, 'Regulatory Cooperation under CETA: Implications for Environmental Policies' (2016) Ecologic research paper, 22 <https://www.ecologic.eu/14187> accessed 19 November 2018.

agriculture. First, the Joint Committee is in charge of supervising the implementation and application of the agreement. In this ambit, it can be referred to by the parties at any time. Second, it is entitled to make amendments to protocols and annexes. This may be the case for sectors which have a direct impact on the environment.[523] On this point it is uncertain whether this choice may be unilateral or still subject to the agreement of the parties.[524]

It is also in charge of giving interpretations that are binding on the parties. This is perhaps the most important power of the Joint Committee, in line with a practice which is not unheard of in international law.[525] As we saw above, several provisions in the TSD chapter and the environmental protection chapter are really broad in scope and this task of the Joint Committee may play a decisive role. Crucially, Article 26.3.2 stipulates that 'the decisions made by the CETA Joint Committee shall be binding on the Parties, subject to the completion of any necessary internal requirements and procedures, and the Parties shall implement them'. While it is clear that each party in the Joint Committee has a veto power (which suggests that extreme decisions to the detriment of one party or the other may be unlikely), it is uncertain if such binding decisions can be taken even when the agreement does not confer explicitly on the Joint Committee the power of taking a legally binding decision or that of taking a decision at all. Furthermore, the Joint Committee has the duty to supervise the work of all specialised committees, change their tasks and establish new ones. Of course, it cannot go as far as eliminating committees provided for by the agreement, but it can reshape their tasks so radically that this may result in a *de facto* dissolution. Finally, it may take any other action 'in the exercise of its functions as decided by the parties', which widens its mandate beyond the tasks explicitly assigned by the agreement.

In sum, the Joint Committee is a key institutional actor of the CETA and through its interpretations and other tasks it will be fundamental to determine the final environmental impact of the agreement.

An important role is also conferred on the Regulatory Cooperation Forum, to which Article 21.6 assigns the task of facilitating regulatory cooperation amongst the parties, particularly encouraging discussions, reviewing developments and activities and reporting everything to the Joint Committee. Although in principle the Regulatory Cooperation Forum has no power to take legally binding decisions, it has to prepare draft decisions for the Joint Committee and thus it may exert an

[523] For example: annexes on cooperation in the field of motor vehicle regulations (Annex 4A), recognition of SPS measures (Annex 5-E) and the Protocol on the mutual acceptance of the results of conformity assessments.
[524] Nils Meyer-Ohlendorf, Christiane Gerstetter and Inga Bach, 'Regulatory Cooperation under CETA: Implications for Environmental Policies' (2016) Ecologic research paper, 25 <https://www.ecologic.eu/14187> accessed 19 November 2018.
[525] A few examples are: EU-South Korea FTA, Articles 15.1, 15.4.1 and 15.4.2; EU-Singapore FTA, Articles 17.1, 17.2 and 17.4; EU-Colombia, Peru and Ecuador FTA, Articles 12, 14.1 and 14.2.

indirect influence on the latter. In fact, very often regulatory cooperation-related issues are very technical and the determinations of such a technical body may be hard to challenge by the Joint Committee. Time will reveal the extent to which the Joint Committee will rely on the drafts prepared by the Regulatory Cooperation Forum.

A specialised committee, the TSD committee, was established by Article 26.2.1.g and according to Article 24.2.1 is responsible – amongst others – for matters covered by chapters 22 and 24. However, its tasks are basically limited to oversight and facilitation with regard to the implementation of the agreement, including cooperative activities and the review of the impact of this Agreement on sustainable development. It ends up being, in essence, an operational tool with no decision-making power.

Part of the overall institutional setup is also the mechanisms laid down to enhance dialogue with civil society. According to Article 22.5 it is compulsory for the parties to facilitate (whatever this may mean in this case) the joint Civil Society Forum that enhances discussions on the sustainable development-related aspects of the agreement. Although the JII reaffirms that the parties are fully committed to this aim, it remains to be seen to what extent involvement of civil society will exert an effect on the agreement. On the same line, Article 21.8 clarifies that 'in order to gain non-governmental perspectives on matters that relate to the implementation of this Chapter, each Party or the Parties may consult, as appropriate, with stakeholders and interested parties, including representatives from academia, think-tanks, non-governmental organisations, businesses, consumer and other organisations'. As the word 'may' makes clear, this is indeed only an option for the parties. In sum, the concrete application of the agreement bears on the impact of these provisions, although empirical evidence suggests that their effect is usually limited, particularly in comparison with lobbies.[526]

The most substantive enforcement mechanisms contained in the CETA are however clearly the DSMs. In fact, the presence of enforcement mechanisms is at least to a certain extent fundamental to give teeth to the environmental obligations enshrined in the agreement. There are indeed three main kinds of DSMs provided for in CETA that may be relevant for sustainable agriculture.

First, there is a DSM *ad hoc* for issues related to trade and environment, which is indeed of a non-judicial nature. TSD disputes are bound to the general DSM by Article 24.16. The mechanism provided for this chapter is split into two branches. Article 24.14 lays down a consultative mechanism under which the parties may refer to the other party for claims arising from this chapter.

[526] Maria Lee, *EU Environmental Law, Governance and Decision-Making* (2nd edn, Hart Publishing 2014) 194.

At most, 'if a Party considers that further discussion of the matter is required, that Party may request that the Committee on Trade and Sustainable Development be convened to consider the matter'.[527] However, there is no real enforcement in the event of persistent disagreement. The subsequent step is recourse to the Panel of Experts. Article 24.15 provides that 'for any matter that is not satisfactorily addressed through consultations under Article 24.14, a Party may, 90 days after the receipt of the request for consultations under Article 24.14.1, request that a Panel of Experts be convened to examine that matter, by delivering a written request to the contact point of the other Party'. Three panellists are appointed by the parties. However, what the Panel can do is only 'deliver a report in accordance with Article 24.15 (Panel of Experts) of Chapter Twenty-Four (Trade and Environment), that makes recommendations for the resolution of the matter'.[528] There cannot be sanctions or compensations, unlike the general DSM of chapter 29. On this point, the CETA is totally in line with other recent EU FTAs, although in some other instances (such as the NAFTA agreement) there are more ambitious provisions regarding the possibility for environmental NGOs to lodge complaints;[529] besides this, another critical factor for the effectiveness of this DSM is the fact that TSD chapters do not oblige any party to take action although it is aware of environment-related breaches by the other party.[530]

As mentioned above, CETA also has a general DSM valid for all the agreement (except for explicit derogations, like chapter 22). This DSM (set out in chapter 29 of the agreement) is not directly relevant for environmental provisions, but it shall be borne in mind that the latter may also become indirectly crucial as far as it may create a jurisprudence on the scope of the declaration of equivalence. The system had as a model the WTO DSM and a certain measure adopted by one of the parties can be qualified/challenged either under this CETA DSM or under the WTO DSM as long as there is correspondence between CETA's rules and other WTO rules.[531] As made clear by

[527] EU-Canada CETA, Article 24.14.4.
[528] EU-Canada CETA, Article 24.15.8.
[529] North American Free Trade Agreement (NAFTA) between US, Canada and Mexico, Washington, D.C., signed 12 December 1992, entered into force 1 January 1994.
[530] Axel Marx, Franz Ebert, Nicolas Hachez and Jan Wouters, 'Dispute Settlement in the Trade and Sustainable Development Chapters of EU Trade Agreements' (2017) Leuven Centre for Global Governance Studies papers, 22-23 and 26 <https://ghum.kuleuven.be/ggs/publications/books/final-report-9-february-def.pdf> accessed 22 November 2018.
[531] EU-Canada CETA, Article 29.2 states that 'recourse to the dispute settlement provisions of this Chapter is without prejudice to recourse to dispute settlement under the WTO Agreement or under any other agreement to which the Parties are party'. A complex problem, to date still without a clear solution in international law, would arise if conflicting interpretations are given by different DSMs on the same provisions, given the absence of a uniform mechanism in international law to regulate the jurisdiction of the different international legal courts and tribunals. On this subject, cf, *ex multis*, Hugh Thirlway, 'The Proliferation of International Judicial Organs and the Formation of International Law' in Wybo P Heere (ed), *International Law and the Hague's 750th Anniversary* (1999) 433; Tullio Treves, 'Le Tribunal International du Droit de la Mer et la multiplication des juridictions internationales' (2000) 83

Article 29.4 *et seq*, a party may request in writing consultations with the other Party. Alternatively, the parties may have recourse to mediation if they believe that a certain measure adversely affects trade and investment between them. For matters for which it was not possible to agree on consultations, parties may resort to the DSM, which is structured around a body made up of three arbitrators appointed by the parties.[532] The final ruling is binding on the parties, who have to comply with it within 20 days or within the different date established on the basis of the rules set out by Article 29.13. Article 29.14 lays down several other requirements for the case of non-compliance with the ruling, mainly revolving around the suspension of the treaty obligations for one party.

The general DSM of chapter 29 of CETA contains the set of provisions that give most teeth to the agreement. Additionally, sanctions for non-compliance can be activated without an additional authorisation, unlike in the WTO system. On the other hand, it does not foresee an appeal similar to the one that can be triggered before the WTO Appellate Body. The real open question of this DSM concerns the usefulness of this procedure in regulatory cooperation-related matters. As mentioned above, this may absolutely be the case if one party refuses a request for equivalence of an SPS measure submitted by another party. On the basis of chapter 29, it may be concluded that the arbitration panel will not be able to impose on a party the acceptance of the equivalence, although of course, it may exert an influence in this regard. That being said, it must also be acknowledged that presumably the parties will be scarcely keen to engage a DSM procedure for regulatory cooperation issues that, as seen above, are optional in nature.[533]

Finally, the CETA gives birth to an Investor-State Dispute Settlement (ISDS) which may be insightful for environmental matters. In essence, chapter 8 of the agreement allows investors to by-pass the host government's judicial system and bring cases before the international arbitration tribunals for violations allegedly concerning investors' rights under the agreement. Further to claims submitted under Article 8.23, a Tribunal is established pursuant to Article 8.27, composed of five EU nationals, five Canadian nationals and five members from third countries. An Appellate

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Rivista di diritto internazionale 726; Jonathan I Charney, *Is International Law Threatened by Multiple International Tribunals?* (Martinus Nijhoff 1999).

[532] EU-Canada CETA, Article 29.6.

[533] Jean-Luc Angot, Geneviève Bastid Burdeau, Christophe Bellmann, Sophie Devienne, Lionel Fontagné, Roger Genet, Géraud Guibert, Sabrina Robert-Cuendet, Katheline Schubert (Commission Indépendante), 'L'impact de l'Accord Économique et Commercial Global entre l'Union européenne et le Canada (AECG/CETA) sur l'environnement, le climat et la santé' (2017) Rapport au Premier Ministre, 26 <https://www.gouvernement.fr/sites/default/files/document/document/2017/09/rapport_de_la_commission_devaluation_du_ceta_-_08.09.2017.pdf> accessed 21 November 2018.

Tribunal is established to review awards rendered by the Tribunal.[534] In-depth analysis of the numerous rules relating to access, transparency, standing and procedure merit separate treatment outside the scope of this work. However, it must be considered that the ISDS already has an impact on the environment to the extent that on the basis of Article 18.8 the state may be forced to pay compensation, but never to modify a public policy pursuing environmental protection. This means that in case a measure damages natural resources, no corrective measure could be ordered to reverse it. Of course, a negative opinion may still encourage parties to remove certain measures spontaneously in order to avoid further condemnations in the future. For sustainability in agriculture, the relevance of this kind of mechanisms would then exponentially increase if the latter were to be introduced in the TSD and environmental chapters of future agreements. The advantage would be that private parties' DSMs such as the ISDS are quick, their decisions have a very high compliance rate and rules are laid down for arbitrators that enhance the perception of their independence; on the other hand, this may constitute an erosion of the classic jurisdictional power of Member States, since a portion of the environmental litigation would be clearly eaten away; moreover, widening the scope of the ISDS would require a larger expertise for arbitrators and would imply that a much broader number of beneficiaries would be entitled to sue a state, with obvious negative effects on legal certainty.[535] Finally, not every environmental obligation is justiciable, particularly as regards those enshrined in the TSD chapter.[536] It would thus have to be seen how the arbitrators would be able to adjudicate such claims. It is to be noted that initially assessment of the legitimacy of this ISDS seemed to be greatly influenced by the findings of the *Achmea* case, in which the CJEU found that the ISDS established in the bilateral investment treaty between the Netherlands and Slovakia is incompatible with EU law as it would impair the EU's unity in international representation.[537] The reasoning of the Court was based on the fact that Member States should refrain from any measure which could jeopardise the attainment of the Union's objectives; in this connection, the establishment of an arbitral tribunal created under an international agreement between two Member States could impair the unity of the EU order by

[534] EU-Canada CETA, Article 8.28.

[535] See in greater detail Axel Marx, Franz Ebert, Nicolas Hachez and Jan Wouters, 'Dispute Settlement in the Trade and Sustainable Development Chapters of EU Trade Agreements' (2017) Leuven Centre for Global Governance Studies papers, 45-46 <https://ghum.kuleuven.be/ggs/publications/books/final-report-9-february-def.pdf> accessed 22 November 2018.

[536] A similar conclusion may be reached for the references to environmental protection contained in the investment chapter of CETA (chapter 8) and in particular Articles 8.4.2.d and 8.9.1. On this point, see Stefanie Schacherer, 'The CETA Investment Chapter and Sustainable Development: Interpretative Issues' in Makane Moïse Mbengue and Stefanie Schacherer (eds), *Foreign Investment under the Comprehensive Economic and Trade Agreement (CETA)* (Springer 2019) 207.

[537] Case C-284/16 *Slovak republic v Achmea BV* [2018] *not yet published*.

jeopardising its judicial system.[538] Indeed, the arbitral tribunal at the core of *Achmea* is clearly not entirely comparable to the ISDS of CETA. Apart from the fact that the ISDS is built around higher standards of rule of law and independence of the arbitrators, the main difference is that the Netherlands and Slovakia are both EU Member States. This makes them accountable for obligations – vis-à-vis themselves and the EU – that cannot be phrased in the same way for the EU as a whole and certainly even less for Canada. However, a key part of the reasoning of the CJEU in *Achmea* is based on the assumption that the EU judicial system is undermined if disputes could be re-assigned to external arbitral tribunals on the basis of non-EU rules and without the possibility for such tribunals to resort to the CJEU's preliminary rulings.[539] This is certainly a ground that the agreement between the Netherlands and Slovakia shares with CETA. However, every doubt cast on the legality of the ISDS foreseen in the CETA was wiped out by the assessment rendered by the CJEU in Opinion 1/17, where this mechanism was deemed fully compatible with EU law and in particular with the exclusive jurisdiction of the CJEU over the definitive interpretation of EU law.[540]

§5.2. The EU-South Korea Free Trade Agreement

§5.2.1. *Presentation of the Agreement and TSD Chapter*

There are manifold reasons to take the EU-South Korea FTA as a case study.[541] First, and most evidently, it is the pioneer of EU 'new-generation' FTAs, being the first to be negotiated and concluded further to the Union's Global Europe strategy launched in 2006. Second, the EU-South Korea FTA is highly representative due to the nature of the counterpart. South Korea has rapidly transformed from a very poor country to a well-advanced economy, although it can still be

[538] ibid para 45.
[539] ibid paras 50-52.
[540] Opinion 1/17 *Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (CETA) — Investor-State Dispute Settlement (ISDS)* [2019] Digital reports, para 39 *et seq*. The CJEU came to the conclusion that that the CETA does not confer on the envisaged tribunals any jurisdiction to interpret or apply EU law other than that relating to the provisions of that agreement. In particular, the agreement was deemed to confer on the EU the power to determine, when a Canadian investor seeks to challenge measures adopted by a Member State and/or by the EU, whether the dispute is, in the light of the rules on the division of powers between the EU and its Member States, to be brought against that Member State or against the EU. The exclusive jurisdiction of the Court to give rulings on the division of powers between the EU and its Member States is thereby preserved.
[541] Free Trade Agreement between the EU, on the one part, and South Korea, on the other, signed 6 October 2010, in force 13 December 2015.

considered as an emerging market, which is still not as large as the EU's.[542] Historic economic developments of South Korea also explain why this country moved from a firm preference for multilateral trade to the acceptance of shaping its trade policy through bilateral FTAs and thus align with the global trend. Indeed, while at the beginning South Korea was convinced that multilateral trade would better secure the closure of sensitive sectors such as agriculture, it later realised that Korean firms were at risk of losing competitiveness if the trade race with other countries were missed.[543] This shift in trade policy may now determine a domino effect for other Asian countries.[544] Nowadays, South Korea is the EU's 10th world trade partner and available data testifies the intrinsic economic interest in the conclusion of such an agreement, as well as the positive forecasts.[545]

As regards agricultural products, the FTA provides for the elimination of 98.7 % of duties (in trade in value) for agricultural products within five years from the agreement's entry into force (seven years for Korea). Although trade in agricultural goods seems as overall marginal in the agreement, the sector remains strategic for Korea, particularly because of the risks of food insecurity and the effects of climate change.[546] The latter has indeed recently undertaken thorough agricultural policies focused on reduction of income disparity between urban and rural areas, agricultural competitiveness, agro-food and environmental actions and rural development.[547] This explains why some sensitive products such as rice were excluded from the agreement, some others have a longer transition period than seven years and for other products safeguard measures can be triggered by South Korea under certain conditions.[548] That said, a study has highlighted the vast

[542] Korea has been since 1996 one of the OECD countries. For information on South Korea's economy, cf <http://www.oecd.org/about/membersandpartners/> accessed 12 December 2018.
[543] cf Vinod K Aggarwal and Shujiro Urata (eds), *Bilateral Trade Agreements in Asia-Pacific: Origins, Evolution, and Implications* (Routledge 2006).
[544] Ludo Cuyvers, 'The Sustainable Development Clauses in Free Trade Agreements of the EU with Asian Countries: Perspectives...' (2014) 22(4) Journal of Contemporary European Studies 427; Dick Gupwell and Natalie Gupta, 'EU FTA Negotiations with India, ASEAN and Korea: the Question of Fair Labour Standards' (2009) 7(1) Asia Europe Journal 79.
[545] According to the figures available for 2011, Korea is ranked 10th in import and 11th in exports with the EU. The value of bilateral trade in goods is estimated to be 68.476 million euros. Compared to the 19.23 billion dollars of Foreign Direct Investments located in the EU, the investments of EU firms located in South Korea are relatively small (6.86 million dollars). This shows the big potential of the deal for (large) European enterprises to access the (so far) protectionist Korean market. Thus, unsurprisingly, Korean exports are expected to rise by 38 % and EU ones by 82.6 %. See for complete data and forecast Grzegorz Mazur, 'The European Union–South Korea Free Trade Agreement. A New Model of Trade and Economic Cooperation between Developed Countries' (2012) 257 Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu 33.
[546] Maria Bruna Zolin and Bernadette Andreosso-O'Callaghan, 'The Korea-EU FTA: New Prospects for and Patterns of Agricultural and Agrifood Trade?' (2013) 1(2) Journal of Global Policy and Governance 129, 133. The paper also contains a review of the most common indicators to compare the policy developments in the agricultural sectors of the EU and South Korea.
[547] ibid 136 and 141.
[548] Annex III (Agricultural Safeguard Measures) lists the goods that may be subject to agricultural safeguard measures in Korea under Article 3.6 and the conditions and the extent to which this is possible. The agricultural products

complementarity between the EU and South Korea in the agricultural sector and therefore the margin for reciprocal gains from the planned FTA.[549]

Generally speaking, it can be said that the TSD chapter is the most prominent environment-related feature of the agreement. In South Korean FTAs, TSD chapters became widespread after the conclusion of the agreement with the US.[550] Compared to CETA, the EU-South Korea FTA does not have an environmental chapter separated from the TSD one. As a result, the TSD chapter of this agreement (chapter 13) also contains provisions that in CETA were relocated to an *ad hoc* chapter, without being treated less extensively. The most important provision of the chapter is – in the writer's opinion – Article 13.1.3, which makes immediately clear that '[t]he Parties recognise that it is not their intention in this Chapter to harmonise the […] environment standards of the Parties, but to strengthen their trade relations and cooperation in ways that promote sustainable development'. As will be shown in the next sub-paragraph, this approach may be problematic from the standpoint of regulatory cooperation. As far as sustainable development is considered, it appears evident that the parties set out a goal, rather than a way to achieve this goal. In so doing, sustainable development looks more like a general value charged with the task of facilitating trade and stabilising tensions with the potential negative externalities of free trade than as a tool to bolster environmental protection as such. The impression is that the EU was so worried about showing to its public opinion that EU standards would not be lowered in Europe that it took a stance that neutralised its chance to take the lead in the promotion of higher environmental standards outside its boundaries. On the same line is Article 13.2.2, stating that '[t]he Parties stress that environmental […] standards should not be used for protectionist trade purposes'. If trade is the priority, environmental policies may be pursued only to the extent that they are not trade-diverting. The above-mentioned understanding also seems to be confirmed by the declaratory wording of most of the provisions contained in the chapter (the parties 'recognise', 'stress', 'seek to ensure' and so forth).

Another important provision is parties' right to regulate, in line with what was stated in CETA. Article 13.3 links this prerogative with the duty to 'seek to ensure that those laws and policies provide for and encourage high levels of environmental […] protection, consistent with the

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included in this Annex are: beef (16 years), pork (11 years), apples (24 years), malt and malting barley (16 years), potatoes (16 years), ginseng (19 years), sugar (21 years), alcohol (16 years) and dextrins (13 years).

[549] Bernadette Andreosso-O'Callaghan, 'Economic Structural Complementarity: How Viable is the Korea-EU FTA?' (2009) 36(2) Journal of Economic Studies 147.

[550] Free Trade Agreement between the US, on the one part, and South Korea, on the other, signed 30 June 2007, ratified 15 March 2012. For the evolution of South Korean policy vis-à-vis sustainable development in FTAs, see Jun Ha Kang, 'Environment Chapter in Korea's FTA: Suggestions for Korea's Model Text' (2015) Indiana University – Maurer School of Law, Digital Repository, Theses and Dissertations, 28.

internationally recognised standards or agreements referred to in Articles 13.4 and 13.5, and […] strive to continue to improve those laws and policies'.

One exception to the average lenient wording of provisions of the TSD chapter is constituted by Article 13.7 ('Upholding levels of protection in the application and enforcement of laws, regulations or standards'), which can be phrased as the completion of the parties' right to regulate. The rationale therefore seems to be to avoid preferential treatment stemming from the failure to enforce environmental laws. Preliminarily, it should be noted that – unlike CETA – 'environmental law' is not defined, thereby rendering more uncertain the scope of the provision. This scope is further confined by the fact that the provision does not cover every non-enforcement of environmental law, but only the one potentially affecting trade and investment between the parties. Moreover, what is sanctioned by Article 13.7.1 is 'a sustained or recurring course of action or inaction', thereby clarifying that the violation needs to be systematic. Occasional breaches and/or non-enforcement will thus not be covered. Finally, according to the same provision, '[a] Party shall not fail to *effectively* enforce […]' (emphasis added). The interpretation of effective enforcement will therefore be crucial and no parameter seems to be given to the interpreter. What is clear is that the wording of Article 13.7 opens the door to certain non-enforcements of environmental law that will not constitute a breach of the provision.

Setting aside the issue of the reference to international agreements as a regulatory baseline (which will be dealt with in the next subparagraph), from a normative perspective there is not much else in the TSD chapter of EU-South Korea FTA. Overall, the conclusion drawn as regards CETA can be confirmed, namely that it is mostly a political exercise phrased in aspirational terms. Normatively speaking, this TSD chapter brings little to environmental protection.

§5.2.2. *Regulatory Cooperation*

Regulatory cooperation is not a big issue for the EU-South Korea FTA, or certainly not as much as for CETA, where an entire chapter is dedicated to it. On the contrary, very few provisions touch upon it, the rest being transferred into another agreement. In fact, the EU-South Korea FTA is only one piece of a global 'Common Institutional Framework' which also includes a Framework Agreement (FA) and other sectoral agreements.[551] This was the result of a compromise between the EU, who would have wished to construct a unified framework, and South Korea, who on the

[551] Framework Agreement between the European Union and its Member States, on the one part, and the Republic of Korea, on the other, signed 10 May 2010, in force 1 June 2014.

contrary wanted separate agreements.[552] The FA provides a permanent institutional and legal framework for enhanced cooperation amongst the parties in a wide range of subjects (including sustainable development – Title 5), replacing a similar agreement concluded in 1996. While some provisions compel the parties to act together, this does not create any obligation to reach an agreement.[553] As noted above (*supra*, §5.1.2.), the EU-Canada Strategic Partnership Agreement, although legally binding, lays out a regulatory agenda indicating a strategic direction for stronger future collaborations, while key issues for regulatory cooperation and trade remain enshrined in the relevant chapter of CETA. The same structure and nature of the EU-Canada Strategic Partnership Agreement is replicated in the EU-South Korea FA. However, with regard to the relations between EU and South Korea, owing to the lack of a dedicated chapter in the FTA, the FA gains more importance, as specific issues of regulatory cooperation were delegated to it by the FTA. For this reason, contrary to the case of Canada, the EU-South Korea FA will be focused upon specifically in this sub-paragraph, alongside the EU-South Korea FTA.

As far as the FTA is concerned, the first thing that one remarks is that the parties recognise the importance of bilateral cooperation for trade-related aspects of environmental policies and set out an indicative list of areas in which cooperation may be pursued (Annex 13).[554] These thematic areas are in various respects related to sustainability in agriculture (for instance, bio fuels, illegal logging, pesticides and so forth) and actions required to give substance to the duty to cooperate range from exchange of views on legislative projects to mutual assistance in international fora. However, though formally presented in binding terms, such activities end up being mostly voluntary by virtue of the absence of any sanction in case no cooperation is carried out. It is thus a bottom up approach that does not even bind the parties to the conclusion of subsequent sectoral agreements and that does not establish detailed rules for the development of such projects.

Moreover, unlike CETA, which contains some specific rules in this respect, the EU-South Korea FTA does not add anything to the regulatory framework of WTO law in terms of regulatory cooperation. As a result, general rules on the circulation of goods and related exceptions as set out in WTO law apply. There are, of course, exceptions, where specific arrangements are made towards the direction of harmonisation of standards.[555] However, this only happens when the purpose is to

[552] James Harrison, 'Overview of the EU-Korea Framework Agreement' in James Harrison (ed), *The European Union and South Korea: The Legal Framework for Strengthening Trade, Economic and Political Relations* (Edinburgh University Press 2012) 149.

[553] This was clearly stated by the Permanent Court of International Justice in the Advisory Opinion on Railway Traffic between Lithuania and Poland (1931) PCIJ Reports 108, Series A/B, No 42, 116.

[554] EU-South Korea FTA, Article 13.11.

[555] This is the case of the car sector, where the parties committed to refer to the World Forum for Harmonisation of Vehicle Regulations as a standard-setting body. cf Article 2 of Annex 2-C on 'Motor Vehicles and Parts'; similar

facilitate trade, not uphold or raise environmental protection. In some other, sectorial instances regulatory cooperation is addressed specifically. For example, Article 5 of Annex 2-D ('Pharmaceutical products and medical devices') encourages the parties to take into account international standards and to facilitate regulatory cooperation in international bodies, for which a Working Group is established. Likewise, Article 4.3.2.a states that the parties shall seek to identify, develop and promote regulatory cooperation with a view to improving the quality of their technical regulations, which implicitly encompass the progressive removal of technical barriers to trade. However, regulatory cooperation is not treated systematically and it is therefore not a major issue compared to CETA. In this respect, it may be argued that the insertion of the EU-South Korea FTA in the legal order of international trade is much smoother and less problematic than CETA. This is the case precisely because the former purports to carry out a much lower degree of integration between the parties. From the perspective of sustainability, integration is good news only if it occurs towards the top. As seen in the previous paragraph, this is far from being the case for CETA. However, the environmental dimension is more sophisticated there, whereas in the EU-South Korea arrangement the EU's willingness to step back is more apparent. Something which is far from being touched upon, for instance, is the precautionary principle for which thus general WTO rules apply. The only mild form of precautionary approach may be seen in Article 2.15.2 as a general exception in the area of market access to goods, but is not contextualised in the environmental ambit. For the rest, the EU-South Korea FTA is as indifferent to regulatory divergences in environmental matters as CETA and identical considerations should be reiterated. Just to take a random example, animal welfare is not addressed at all, only being mentioned in Article 5.1.2 as something on which, broadly speaking, parties are willing to engage further cooperation.

The FA does not contain many more references to regulatory cooperation. In the specific context of agriculture, rural development and forestry, Articles 25(f), (g) and (i) give rise to an environmental integration clause that may be seen as an application of Article 11 TFEU at external level. Nonetheless, the clause is phrased in lenient terms and mostly consists of intangible commitments such as exchange of information and development of cooperation – therefore, nothing strictly and directly binding. Notwithstanding, the approach taken by the FA helps understanding what the parties really have in mind as regards regulatory cooperation. Contrary to the Euro-Mediterranean context and in the case of Partnership and Cooperation agreements with the Commonwealth of

approach is taken as regards chemicals (Annex 2-E), where the parties 'recognise the importance of seeking international harmonisation of approaches'.

Independent States,[556] the FA does not contain any reference to the 'approximation of laws'. There is, on the contrary, a systematic reference to international agreements as the benchmark for environmental standards endorsed by the parties. This confirms the impression had while reading the TSD chapter in the FTA. Article 13.5.2 of the FTA provides that '[t]he Parties reaffirm their commitments to the effective implementation in their laws and practices of the multilateral environmental agreements to which they are party'. Apart from the fact that limiting the pursuit of sustainability standards to MEAs to which *both* EU and South Korea are parties excludes the respect of the agreements to which only one of them is a party, this approach has important consequences from the perspective of 'deep integration'. The fact that – for good or bad reasons – the EU did not translate its own standards into the agreement does not fit into this paradigm. Nevertheless, this would be acceptable if South Korea had committed to raise otherwise its standards *towards the level* of the EU, though using different means. In other words, the purpose of carrying out harmonisation (which, as seen *supra*, §4.2.2., also carries with it several drawbacks) may be legitimately disregarded if it were replaced by (real) South Korean environmental laws and policies in agriculture that are equivalent to those of the EU. However, the loose wording of the provisions analysed above leads to the conclusion that 'the TSD chapter does not purport to serve as vehicle for the EU to use its relative economic size and leverage to enforce international standards of environmental […] protection against its regional partners'.[557] However, is this sufficient to attain the level of environmental protection required by the Treaties for EU external action? While the answer to this seems to be negative, one may then ask the reason for such an approach. In this connection, regulatory cooperation and the TSD chapter are deeply interconnected. The 'right to regulate' is established because it would be hard to gain consensus on the adoption of certain standards that a country cannot 'afford' itself. Indeed, in market economies one key driver for the determination of environmental standards is constituted by the capabilities of the party to ensure such standards. Strictly speaking, such 'capabilities' appear to be related to a country's technical means, but in practice this concept indicates the extent to which one party can afford to limit its growth to give substance to environmental concerns. This extent is highly variable between one country and another and even though South Korea has rapidly become a developed country, the

[556] The Euro-Mediterranean Partnership is a Free Trade Area, which aims at removing barriers to trade and investment between both the EU and Southern Mediterranean countries and between the Southern Mediterranean countries themselves. Euro-Mediterranean Association Agreements are in force with most of the partners (with the exception of Syria and Libya) and represent about 9.4 % of total EU external trade in 2016; the Commonwealth of Independent States is an alliance of former Soviet republics formed in December 1991, including: Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russian Federation, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan.
[557] Gracia Marín Durán, 'Innovations and Implications of the Trade and Sustainable Development Chapter in the EU–Korea Free Trade Agreement' in James Harrison (ed), *The European Union and South Korea: The Legal Framework for Strengthening Trade, Economic and Political Relations* (Edinburgh University Press 2012) 124, 138.

discrepancy between its economy and that of the EU is still striking. Although Canada has belonged to the group of developed countries longer, similar considerations may apply to CETA, where – as seen *supra*, §5.1. – there are analogous provisions. While it seems reassuring on the fact that a party will not be forced to lower its own environmental standards by reason of the agreement, the right to regulate in reality takes stock of the parties' different capabilities, in order to avoid the comparative disadvantage that complying with higher standards would imply for the weaker counterpart. As a result, instead of securing environmental protection, this clause 'locks' in the agreement the regulatory discrepancies of the parties in the field of environmental law. These discrepancies will thus be exponentially wider in relation to market size, rule stringency and regulatory capacity (see *supra*, §4.2.3.). For South Korea, the matter of how low the economic capability of the EU's commercial partner is appears particularly relevant. There are authors seeing in this mild approach a positive trend of 'new-generation' trade agreements that marks 'a more appropriate course of action to legitimise the EU's efforts to promote environmental protection outside its borders and avoid criticisms on the grounds of extraterritoriality or even neo-colonialism'.[558] This contention cannot be shared. EU standards are not desirable as such or because they are of European provenance, but because they are *higher* than most (if not all) of those adopted by the EU's regional partners. Not establishing the same standards on commercial partners implies exposing EU farmers (especially small farmers) to high market pressure against products that were produced at lower costs because environmental standards in agricultural production are lower. Apart from a few exporters that have sufficient economic means, this is overall likely to damage EU producers. Moreover, here we are talking about technical standards that might have less strong cultural roots and that would not require a *qualitative change* in the production patterns, but only a *quantitative increase* of certain parameters. Assuming that the aim is seriously that of furthering environmental protection, the risk to trigger 'neo-colonialist' approaches is thus only theoretical, unless we admit that food safety and environmental protections are only whims originating from the gentrified, over-educated European culture. 'Neo-colonialism' – whatever this may mean – is likely to be an issue stemming from trade liberalisation as such and not from the efforts to green the latter as much as possible. Furthermore, if international standards are taken as a benchmark, South Korea will still need to adjust its regulatory framework to a different set of standards – the internationally agreed ones – though towards lower, less ambitious levels. Of course, this applies only in the event that international standards are higher than South Koreans', otherwise the agreement would only ensure business as usual and the environmental impact of its provisions would be close to zero.

[558] Elisa Morgera, 'Environmental Cooperation between EU and Korea' in James Harrison (ed), *The European Union and South Korea: The Legal Framework for Strengthening Trade, Economic and Political Relations* (Edinburgh University Press 2012) 194, 198.

The superficial degree of cooperation can also be seen as regards climate change. Article 24 of the FA sets out the basis for cooperative endeavours, without, of course, committing the parties to any mitigation action. On the contrary, it was insightfully pointed out that 'states and international organisations are well aware of the possible negative impacts on trade that would stem from increased national mitigation efforts'.[559] This clearly suggests that cooperation on climate change is not really an effort that the parties are making to advance emission reduction, but rather to constrain the other party's action in this domain, preventing it from adopting unilateral mitigation measures that would impair trade liberalisation, unless the measures are taken with mutual concertation. Therefore, cooperation in climate change, phrased in these terms, looks more as a safeguard for trade than as a tool to commit further into this challenge. The additional boomerang effect may also be that EU climate policy and strategy (which, as widely known, is much more structured and ambitious than that of an emerging market such as South Korea) will end up being limited in its future steps.

In conclusion, while in CETA the concrete risk that may be pinpointed concerns the fact that a pervasive structure of regulatory cooperation is set up to pursue trade-related benefits to the detriment of environmental protection, for the EU-South Korea FTA the matter is rather that of insufficient cooperation on environmentally-related standards. In fact, on the one hand, the EU contents itself to rest on the regulatory baseline of international standards of environmental protection already agreed and endorsed by the parties without taking a proactive role; on the other hand, the FTA and the FA only bind South Korea to aspirational commitments on future cooperation on environmental matters, with no substantive obligations in this respect. Against this background, regulatory cooperation in the EU-South Korea FTA and FA shows very little political will to pursue deep integration *vis-à-vis* EU standards related to agricultural sustainability. As a result, the whole discussion regarding the extent to which PPMs may be acceptable in international agreements becomes void. It is indeed quite symptomatic that the phrase 'sustainable agriculture' is not mentioned even once in the FTA. While sustainable development refers to a broad concept suitable in every context for its structural vagueness, sustainable agriculture appears to put more emphasis on the sustainability of *agricultural production*, which is something that the parties carefully avoided to touch upon in the text of the agreement.

[559] David Rossati, 'The Legal Framework for EU–Korea Climate Change Cooperation: Opportunities and Challenges under the Framework Agreement and the Free Trade Agreement' in James Harrison (ed), *The European Union and South Korea: The Legal Framework for Strengthening Trade, Economic and Political Relations* (Edinburgh University Press 2012) 212, 228.

§5.2.3. *Enforcement Mechanisms*

Institutional setup and DSM in the EU-South Korea FTA are quite conventional and in line with the trends of 'new-generation' FTAs. In parallel with CETA's Joint Committee, a Trade Committee is foreseen as an umbrella treaty body charged with overall implementation of the FTA and supervision of sectoral committees, sub-committees and working groups. Its functions are also similar to those of the Joint Committee in CETA. In particular, it may decide to establish and delegate responsibilities to specialised committees, working groups or other bodies; communicate with all interested parties including private sector and civil society organisations; consider amendments in cases specifically provided for; adopt interpretations of the provisions; make recommendations or adopt decisions; adopt its own rules of procedure; and take such other action in the exercise of its functions as the parties may agree.[560] As in CETA, the Trade Committee can establish new specialised committees, change their tasks or dissolve existing ones,[561] but the same limits identified for the Joint Committee in CETA also apply here. The most salient competences have to do with the possibility of considering amendments to the treaty and adopt interpretations of its provisions. In this connection, the activity of the Trade Committee may exert a huge influence on the application of the agreement. There is however one big difference with the Joint Committee in CETA, namely that the Article does not say that its interpretations and recommendations are binding on the parties. This evidently renders its 'jurisprudence' less penetrating.

As in CETA, there is a TSD Committee that oversees the implementation of the TSD chapter and related provisions and reports to the Trade Committee.[562] There are, however, two novelties that in CETA are absent, ie a Contact Point for each party and a Domestic Advisory Group.[563] While the former is conceived to be typically set up within the Ministry of Environment or Trade of the parties (in the EU it is established at national level for each Member State), the latter is made up of environment specialists, entrepreneurs, and non-governmental organizations so that opinions from different fields can be taken into account in a balanced way. Their powers are not substantial and they serve mostly as administrative facilitative and advisory bodies. The Domestic Advisory Group also takes part in the Civil Society Forum, in order to conduct a dialogue encompassing sustainable development aspects of trade relations between the Parties.[564] While provisions in the Civil Society Forum are not very pervasive, it must be acknowledged that this is a new feature of South Korean trade. The institutional setup is reinforced by another Joint Committee provided for by the FA,

[560] EU-South Korea FTA, Article 15.1.4.
[561] ibid Articles 15.2.2 and 15.2.5.
[562] ibid Article 13.12.2.
[563] ibid respectively Articles 13.12.1 and 13.12.3.
[564] ibid Article 13.13.1.

composed of representatives of the Council and the Commission and members of the South Korean government. Overall, taking into account the FTA and the FA together, the institutional setup seems to be weaker than in CETA and thus the margin to effectively ensure the fulfilment of environmental commitments by the parties wider. Furthermore, these treaty bodies are broadly responsible for implementation, but the agreement does not lay down any compliance mechanism other than some rules on compliance with the rulings given as a result of the general DSM. This leads to the observation that institutionalism is even thinner in this FTA than in CETA (see *supra*, §5.1.3.).

As regards dispute settlement, the general idea for environment-related provisions is to set up procedures that are cooperative and non-confrontational in nature. As provided for by the CETA, disputes arising from chapter 13 of the EU-South Korea FTA are derived from the general DSM of Chapter 14 and can only be settled through inter-governmental consultations and expert panels procedures.[565] On this point, the procedure is analogous to the one provided for by CETA and the same considerations in that regard should be reiterated, *mutatis mutandis*. Compared to CETA, the panellists are more impartial because five of them shall be non-nationals of the two parties; they might be, however, perhaps less competent, since a specific knowledge of environmental law is not explicitly required.[566] This is partly compensated for by the possibility for both the TSD committee and the Panel of Experts to consult the Domestic Advisory Group in order to receive advice on technical issues. Experience with this *ad hoc* DSM for sustainable development has shown, on the one hand, little amount of litigation, which in turn gives rise to the lack of a significant number of precedents; and, on the other hand, cases in which the treaty bodies have been accused of being indifferent to civil society allegations.[567]

Unsurprisingly, a general DSM is also provided in the FTA. Prior to it, the parties are required to undergo consultations, in order to reach mutually agreed solutions; only if these fail, can they initiate an arbitration process largely modelled on the WTO system.[568] Since the FTA does not establish SPS standards that go beyond the WTO baseline, the general DSM (which is in any case

[565] ibid Articles 13.14 and 13.15.
[566] ibid Article 13.15. cf CETA, Article 24.15.7.
[567] For an example in the case of labour, cf Axel Marx, Franz Ebert, Nicolas Hachez and Jan Wouters, 'Dispute Settlement in the Trade and Sustainable Development Chapters of EU Trade Agreements' (2017) Leuven Centre for Global Governance Studies papers, 26 <https://ghum.kuleuven.be/ggs/publications/books/final-report-9-february-def.pdf> accessed 22 November 2018.
[568] There are however some differences. For instance, there is no appeal and the deadline for the DSM body to issue a decision is 120 days instead of the nine months provided in the WTO system, which may be attractive for the parties as it may enable them to have the final outcome more quickly. cf James Harrison, 'Overview of the EU-Korea Free Trade Agreement' in James Harrison (ed), *The European Union and South Korea: The Legal Framework for Strengthening Trade, Economic and Political Relations* (Edinburgh University Press 2012) 57.

excluded for SPS measures) is of limited pertinence for the purposes of this work.[569] It may – in absolute terms – become relevant for matters relating to harmonisation on the basis of international standards, rule development and animal welfare, but the provisions in question are unlikely to give rise to abundant litigation.[570] The general DSM established for the FA also covers environment-related disputes. For a dispute on any provision of the FA, there may be first consultations (including mediation if the Parties agree) in the Joint Committee; where settlement is not reached, it may be pursued through arbitration leading to a final decision (by majority voting) that is binding on the parties; however, the FA, as seen above, mostly deals with cooperation measures conceived in cooperative terms that have weak teeth impact on the parties; moreover, while the decision is binding, there are no mechanisms providing for temporary remedies in case of non-compliance and the possibility of adopting unilateral 'appropriate' measures is rather limited.[571]

Finally, it is worth mentioning that the EU-South Korea FTA does not contain anything similar to the CETA's ISDS, presumably due to the fact that measures for protection of investments are already handled by bilateral investment treaties between Korea and individual EU Member States and therefore the FTA contains no investment chapter.[572]

§5.3. The Association Agreement between the EU and Ukraine

§5.3.1. *Presentation of the Agreement and TSD Chapter*

The Deep and Comprehensive Free Trade Agreement (DCFTA) between the EU and Ukraine can be seen, in some respects, as a landmark in EU trade policy. It is a mixed agreement, part of the broadest Association Agreement ever negotiated with a third country,[573] for the first time concluded using as legal basis both the 'regular' Article 217 TFEU and Articles 31(1) and 37 TEU on

[569] William H Cooper et al, 'The EU-South Korea Free Trade Agreement and Its Implications for the United States' (2011) Congressional Research Service – Working Paper, 14 <https://fas.org/sgp/crs/row/R41534.pdf> accessed 3 May 2019.
[570] cf EU-South Korea FTA, Articles 5.6 and 5.9.
[571] EU-South Korea FA, Articles 45 and 46. cf Gracia Marín Durán and Elisa Morgera, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions* (Hart Publishing 2012) 127;
[572] cf Jun Ha Kang, 'Environment Chapter in Korea's FTA: Suggestions for Korea's Model Text' (2015) Indiana University – Maurer School of Law, Digital Repository, Theses and Dissertations, Paper No 25, 105.
[573] Association Agreement between the European Union and the European Atomic Energy Community and their Member States, on the one hand, and Ukraine, on the other, signed 27 March 2014, in force 1 September 2017 (provisionally applied since 1 November 2014). Part of it (Title IV) is the Deep and Comprehensive Free Trade Agreement between the European Union and its Member States, on the one part, and Ukraine, on the other, signed 27 June 2014, in force 1 September 2017 (provisionally applied since 1 January 2016).

Common Foreign and Security Policy.[574] This is a fundamental point as the origin, nature and purpose of the extensive approximation of laws carried out by the agreement can only be fully understood if seen in conjunction with penetrating foreign policy considerations. These derive from the special status of Ukraine of 'neighbouring country', potentially to be considered for membership (for more on the relationship between 'deep integration' and the European Neighbouring Policy [ENP], see *infra*, §5.3.2.). The DCFTA (which constitutes Title IV of the Association Agreement) is made up of 15 chapters.[575]

One may question the choice to include the FTA concluded with Ukraine in the section dedicated to the agreements between the EU and developed countries. Indeed, on the basis of some available indicators, Ukraine seems to perform worse than other countries that were included in the section of this dissertation dedicated to the agreements between the EU and developing countries. In fact, according to the World Bank's estimates, Ukraine had a GDP *pro capita* of about 3.095 dollars in 2018, against the about 15.923 dollars of Chile;[576] moreover, on the basis of 2017 data, Ukraine has a Human Development Index of 0.75, against the 0.84 of Chile;[577] in addition, Ukraine is not an OECD member and its political relations and energetic dependence from Russia arguably place this country in vulnerable conditions. However, first of all, Ukraine is an EU neighbouring country. This allows Ukraine to benefit from the EU ENP and in particular to take advantage of a wide array of policy initiatives and economic options. Furthermore, and above all, as will be seen, the DCFTA between the EU and Ukraine is entirely structured in a way as to 'project' Ukraine towards a much-desired EU membership. Although this is likely to be a long-term process and it is too early to make predictions in this respect, the unprecedented integration brought forward by this EU FTA is such as to phrase Ukraine as an economic actor that, precisely by virtue of the agreement itself, may be able to become part of the EU internal market more than any other EU commercial counterpart across the globe. This suggests to include Ukraine in this section – therefore more for the way this FTA characterises this country in the long run than for reason of its current status, which presumably would not otherwise justify this choice. At the same time, it was clarified *supra* (§3.3.2.) that the distinction between developed and developing countries should not be understood in excessively

[574] It was argued that Article 8 TEU (the 'Neighbouring Clause') could be used as a legal basis in similar agreements, but both the Commission and the Council discarded this option. On the arguments in favour, cf Roman Petrov and Peter van Elsuwege, 'Article 8 TEU: Towards a New Generation of Agreements with the Neighbouring Countries of the European Union' (2011) 36 European Law Review 688.

[575] National Treatment and Market Access for Goods; Trade Remedies; Technical Barriers to Trade; Sanitary and Phytosanitary Measures; Customs and Trade Facilitation; Establishment, Trade in Services and Electronic Commerce; Current Payments and Movement of Capital; Public Procurement; Intellectual Property; Competition; Trade-related Energy; Transparency; Trade and Sustainable Development; Dispute Settlement; and Mediation Mechanism.

[576] cf <https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=UA> against <https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=CL> accessed 11 January 2020.

[577] cf <https://ourworldindata.org/human-development-index> accessed 11 January 2020.

strict terms for the purpose of this work, as the content and design of each agreement does not stem automatically from this classification. On the contrary, this agreement is unique in the roster of EU FTAs precisely in that due to geo-political considerations its content was not really determined by Ukraine's vulnerability as such and by the weak bargaining power that derives from it, but was rather shaped (also) with a view to removing Ukraine's vulnerability vis-à-vis another country (ie Russia).

While the 'comprehensive' nature of the agreement is for the first time made clear in the title, having been already undertaken since the Communication on Global Europe, the 'deep' character represents the first and – thus far – the most advanced level of integration ever achieved by the EU outside its boundaries. Indeed, if one had to choose two concepts to summarise the essence of this agreement, these would probably be 'deep integration' and 'aspirations to membership', although – as will be seen – the characterisation of the agreement in these terms is not clear-cut. The 'integration without membership' dimension appears already in the Preamble, where the parties affirm their will to strengthen their relationship in an 'innovative way'.[578] Similarly, the EU 'acknowledges the aspirations of Ukraine and welcomes its European choice' and leaves open 'future developments in EU-Ukraine relations'.[579] While avoiding explicit reference to accession, it is clear that, just like for the very similar arrangements between the EU and Moldova,[580] the integration of Ukraine into the EU economy is a key aspect of this agreement. This marks the fundamental difference between these two agreements and the third one negotiated in parallel, ie the association agreement with Georgia.[581] It was observed that the latter agreement is equally 'comprehensive', but less 'deep' than the previous two as far as it shows more caution in the use of approximation clauses and has a more restricted coverage.[582] This can probably be explained through foreign policy/neighbouring policy considerations. While the explicit reference to accession is not present in any of the three agreements, Ukraine and Moldova are seen as two possible candidates and therefore merit a deeper integration being carried out as preparation, should they ever aspire to full membership. This is not the case for Georgia, which is defined in the preamble as

[578] EU-Ukraine Association Agreement, Recital 1.
[579] ibid respectively Recitals 6 and 28.
[580] Association Agreement between the European Union and the European Atomic Energy Community and their Member States, on the one part, and the Republic of Moldova, on the other, signed 27 June 2014, in force 1 July 2016 (provisionally applied since 1 September 2014).
[581] Association Agreement between the European Union and the European Atomic Energy Community and their Member States, on the one part, and Georgia, of the other part, signed 27 June 2014, in force 1 July 2016.
[582] Guillaume van der Loo, 'The EU's Association Agreements and DCFTAs with Ukraine, Moldova and Georgia: a Comparative Study' (2017) CEPS Research Papers, 18-19 <http://www.3dcftas.eu/system/tdf/Comparitve%20GVDL%2024.6.17_final_0.pdf?file=1&type=node&id=360> accessed 6 May 2019.

an ‘Eastern European country’ and not as a ‘European country’ *tout court* like Ukraine and Moldova, which can be interpreted as precluding any accession perspective for Georgia.[583]

Taking into account that trade in agriculture is traditionally liberalised more slowly than the rest of the economy, previous experience with neighbouring countries (particularly in the Mediterranean area) shows that the ‘Tariff Rate Quota (TRQ) system’ remains the preferred solution by the EU to import agricultural products from third countries.[584] The Trade SIA forecasted that the agreement would result in an increase by 2.26 % in the short run in welfare gains and by 5.29 % in the long run in cumulative gains, with limited impact on the Ukrainian economy.[585] On the contrary, some more recent studies carried out right before the conclusion of the agreement predicted, on the one hand, that both the EU and Ukraine would benefit from trade liberalisation in agricultural products, but that for Ukraine this is subject to its capability to undertake adequate institutional reforms and improvement in its productivity;[586] and, on the other hand, that while bringing an increase in agricultural producer revenue of 393 million euros (+2,6 %) in Ukraine and of 860 million euros (+0,4 %) in the EU, producers of some specific commodities (such as wheat for both the EU and Ukraine, butter and pork for Ukrainian producers) will end up being penalised, in particular due to decreases in producer prices and/or quantity produced.[587]

The TSD chapter is included in Title IV, chapter 13. Provisions strictly relating to the environment are neither included in the same chapter, nor placed in another dedicated chapter of the same nature as the TSD chapter, but are rather included within the framework of cooperation (Title V, chapter 6 – see *infra*, §5.3.2.). It is thus a different solution compared both to CETA and the EU-South Korea. For the rest, the TSD chapter follows the scheme of the other ‘new-generation’ FTAs, with a couple of specificities. The right to regulate is provided for in the usual terms and also includes the duty to

[583] ibid 6. On the EU-Georgia relations, see also Michael Emerson and Tamara Kovziridze, *Deepening EU-Georgian Relations: What, Why and How* (Rowman & Littlefield International 2016).
[584] From a political economic perspective, it is argued that the third country’s exporters can benefit from this regime as long as it can fill the quota attributed to it. See Stephan von Cramon-Taubadel, Sebastian Hess and Bernhard Brümmer, ‘A Preliminary Analysis of the Impact of a Ukraine-EU Free Trade Agreement on Agriculture’ (2010) The World Bank Development Research Group, Agriculture and Rural Development Team & Europe and Central Asia Region – Policy Research Working Paper, 18 <http://documents.worldbank.org/curated/en/116301468233089916/A-preliminary-analysis-of-the-impact-of-a-Ukraine-EU-free-trade-agreement-on-agriculture> accessed 7 January 2019.
[585] ECORYS and CASE, ‘Trade Sustainability Impact Assessment for the FTA between the EU and Ukraine within the Enhanced Agreement’ (2007) TRADE06/D01, 17 December 2007.
[586] Stephan von Cramon-Taubadel, Sebastian Hess and Bernhard Brümmer, ‘A Preliminary Analysis of the Impact of a Ukraine-EU Free Trade Agreement on Agriculture’ (2010) The World Bank Development Research Group, Agriculture and Rural Development Team & Europe and Central Asia Region – Policy Research Working Paper, 32 <http://documents.worldbank.org/curated/en/116301468233089916/A-preliminary-analysis-of-the-impact-of-a-Ukraine-EU-free-trade-agreement-on-agriculture> accessed 7 January 2019.
[587] Olexandr Nekhai, Thomas Fellmann and Stephan Hubertus Gay, ‘A Free Trade Agreement between Ukraine and the European Union: Possible Outcomes for Agricultural Producers’ (2015) 1 Вісник Дніпропетровського державного аграрно-економічного університету 86, 92.

ensure 'high levels of environmental […] protection'.[588] The main novelty is represented by an 'approximation clause' in Article 290(2), according to which '[a]s a way to achieve the objectives referred to in this Article, Ukraine shall approximate its laws, regulations and administrative practice to the EU *acquis*'. The notion and the functioning of 'approximation of laws' will be further specified in the next sub-paragraph. For now, it is worth anticipating that the TSD chapter is not one of those chapters covered by the so-called 'market access conditionality' and thus the system does not contain an automatic sanction (consisting of the loss of market access) in the event of a breach. This renders the provision inherently weaker. Moreover, it is to be noticed that this 'approximation clause' is quite vague, because it does not make any explicit reference to the *acquis* that needs to be incorporated.[589] It is therefore difficult to be made operational. The problematic applicability is enhanced by its relationship with the right to regulate enshrined in the first paragraph of the same Article. If a party were free to regulate its own level of environmental protection, to what extent can it be obliged to approximate to the other party's standards? From a normative perspective, the right to regulate appears to be worded more precisely than the 'approximation clause'. It does spell out clearly what the parties can and/or must do. Furthermore, the structure of the article is consolidated, being now used in many agreements and 'settled' in the mind of policy-makers. On the contrary, the vagueness of the 'approximation clause' risks rendering it merely an aspiration, at most attributing an 'environmental aura' to the approximation already occurring by virtue of different legal bases in the agreement. While this reading might not be good news for the inception of EU sustainability standards in Ukraine's agriculture, on the contrary the reference to 'high levels of environmental […] protection' should be considered – in light of the 'approximation clause' – as equivalent to the same expression used in Article 3(3) TEU. If the practice confirms this interpretation, the agreement will have brought a remarkable breakthrough. In fact, this may set a limit to the benchmark represented by internationally agreed standards and would suggest that the environmental baseline for EU-Ukraine relationships is higher than the one set in general international environmental law.

The other great novelty of the chapter is the clear reference to the principles of EU environmental law. Article 292 confirms the duty to effectively implement MEAs to which the EU and Ukraine are party, but contrary to CETA (that only provides for a shallow version of the precautionary principle) and the EU-South-Korea FTA (that does not provide for anything in this respect), Articles 292(4) and (5) fully recognise every environmental principle of EU law (the precautionary

[588] EU-Ukraine DCFTA, Article 290(1).
[589] While the TSD chapters of the agreements with Georgia and Moldova do not contain an 'approximation clause', the commitments included therein seem to be identified more precisely. cf Chapter 13 of each agreement.

principle, the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source, that the polluter should pay, as well as the prudent and rational utilization of natural resources). This was unheard of in EU trade policy at the time of signing this agreement. This aspect and the reference to 'high levels of environmental protection' (in the interpretation proposed above) may really represent a step forward in the external component of the PEI (Article 11 TFEU).

Besides these two remarkable novelties, the rest of the TSD chapter appears to be in line with the 'new-generation'-FTA pattern. Articles 293 ('Trade Favouring Sustainable Development') and 294 to 295 (regarding trade in forest and fish products) are aspirational in nature and are worded weakly (parties 'commit to work together […]'). Article 296 binds the parties to upholding their levels of environmental protection and replicates *mutatis mutandis* the same provision of the EU-South Korea FTA, so the same considerations expressed *supra* (§5.2.1.) are to be reiterated.

§5.3.2. *Regulatory Cooperation*

Because of the very nature of this FTA as 'deep and comprehensive', regulatory cooperation may be regarded as its most remarkable part. In a 'deep and comprehensive' FTA, regulatory cooperation mainly revolves around the concept of 'approximation of laws'. The latter concept is indeed neither defined explicitly in the text nor used exclusively, being on the contrary utilized interchangeably with other locutions and thus sometimes creating some issues of legal clarity.[590] In any case, at least for the purpose of this work, approximation may be considered – *mutatis mutandis* – as an equivalent concept of the 'harmonisation' referred to *supra*, §4.2.2.

In theory, legal approximation requires first and foremost the incorporation of the *acquis* as provided for in the agreement, but also the execution of administrative and institutional reforms that are preparatory to such an incorporation and the setting up of a transparent and effective administrative system.[591] In the practical context of this agreement, legal approximation may or may not take the form of 'market access conditionality'. Such mechanism refers to the progressive opening of the EU internal market further to the fulfilment of certain conditions that in essence

[590] Other expressions used refer to the need to 'align to', 'achieve conformity with', 'incorporate' and so forth. This is a common feature of many EU Association Agreements and appear to be due to the fact that the texts were negotiated by different teams and services. The position taken was to leave these inconsistencies as long as they did not create any legal problem. See interviews with EU officials collected by Guillaume van der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area: a New Legal Instrument for EU Integration without Membership* (Brill 2016) 222.

[591] Roman Petrov, 'Approximation of Laws in the EU-Ukraine Association Agreement' (2014) Наукові Записки. Том 155. Юридичні науки 24, 25.

consist of the implementation of an *acquis*. Conditionality is therefore typically combined with a suspension clause disabling the effects of the agreement in the case of breach of those essential elements. In more detail, such elements consist – on the one hand – of basic common values, such as democratic principles, human rights and fundamental freedoms as recognised by international agreements;[592] and – on the other hand – of market access, which is unprecedented before the EU-Ukraine DCFTA. Therefore, while it is no coincidence that 'conditionality' is also extensively used in the broader context of the ENP, the specific pattern of 'market access conditionality' constitutes the first legally binding instrument for legal approximation in the context of the ENP and Eastern Partnership. In fact, unlike any previous agreement, market access is not given automatically after the entry into force of the agreement, but only at a second stage, further to the positive assessment of some competent bodies that the *acquis* has been adequately incorporated. From the perspective of regulatory cooperation then, chapters of the DCFTA can be divided into those with and without market access conditionality, namely between those for which, respectively, approximation to the EU *acquis* is a *condicio sine qua non* and those for which this does not apply. As seen above, the TSD chapter falls under the second category. The obvious consequence is that EU *acquis* is incepted more thoroughly when tied to market access.

The EU-Ukraine relationship also provides for a third category halfway between the two identified above. Title V of the Association Agreement ('Economic and Sector Cooperation'), therefore outside the DCFTA, gives rise to a 'softer' degree of integration. In fact, virtually every chapter of this Title contains a standard 'approximation clause' binding parties to gradually integrate a sector-by-sector selected *acquis* foreseen in the corresponding Annex and a timetable in which to do it; however, implementation of these commitments will not open the doors to additional market access for Ukraine.[593] There is therefore reason to believe that this form of approximation is softer, in the sense that it does not give Ukraine a 'reward' for implementation. Neither can the provisions of this Title be challenged via the general DSM established for the DCFTA, which only covers Title IV. In light of the above, sectors included in the scope of market access conditionality are to be analysed separately from those included in Title V (which includes the chapters on environment and agriculture), while chapters outside the scope of market access conditionality other than the TSD chapter will not be focused upon further.

[592] Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford University Press 2005) 23.

[593] Guillaume van der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area: a New Legal Instrument for EU Integration without Membership* (Brill 2016) 291.

Among the chapters in Title IV which are under the regime of market access conditionality, approximation of laws in the field of technical barriers to trade (TBT – Chapter 3), sanitary and phytosanitary measures (SPS – Chapter 4) and public procurement (Chapter 10) are worth a mention, owing to their indirect interlinkages with sustainable agriculture. According to the available data, TBT and SPS measures are in fact largely inspired by the aim to safeguard the health and life of humans, animals and plants and the environment and therefore in principle fit in with the concept of sustainable agriculture.[594] While TBT and SPS measures may also sometimes hide protectionist purposes, it can be said that in the first instance the approximation of Ukraine to the higher European TBT and SPS standards may result in an improvement of the overall sustainability of the Ukrainian agricultural sector.

With regard to TBT, legal approximation is particularly pervasive, because Ukraine is not only obliged to incorporate the relevant EU *acquis* into its legislation, but also to 'progressively transpose the corpus of European standards […] as national standards'.[595] Indeed, the legislation in question is not listed in detail, but rather evoked by means of broad 'areas' of legislation mentioned in Annex III, therefore rendering the identification of the *acquis* to be incorporated less clear. The additional market access given to Ukraine will consist of an Agreement on Conformity Assessment and Acceptance of Industrial Products that is essentially a mutual recognition agreement. However, it is to be noted that in substance this mutual recognition looks more like an equivalence, since it will be preceded by extensive regulatory convergence.

The 'determination of equivalence' is also the condition prior to the recognition of additional market access given further to the approximation in SPS measures. These measures include, for instance, the commitment to align with EU animal welfare standards.[596] As for the TBT area, standards are not listed in the relevant Annex V, which on the contrary sets out a 'Comprehensive Strategy for the Implementation of Chapter IV'. Public procurement is approximated on the basis of the principle of national treatment. While the principle is the same as used for CETA, in the latter version there was also a prohibition on offsets.[597] As mentioned above (*supra*, §5.1.2.), such prohibition may have some harmful effects on local development – a key component of sustainable agriculture – that in the DCFTA seems to be excluded. Moreover, here approximation of laws is likely to partly cushion the imbalances created by the national treatment rule, in the sense that

[594] Agnieszka Sapa, 'International Agri-Food Trade and Sustainable Agriculture – the Reason for Protection?' (2017) 5 Roczniki (Annals), Polish Association of Agricultural Economists and Agribusiness - Stowarzyszenie Ekonomistow Rolnictwa e Agrobiznesu (SERiA) 218, 222.
[595] EU-Ukraine Association Agreement, Article 56.
[596] ibid Articles 59(2), 64(1), Annex IV-B to chapter 4 and Annex V to chapter 4.
[597] CETA, Article 19.4.6.

Ukraine might not be preferred for public procurements by EU firms for having lower standards on green procurements compared to the EU. Contrary to TBT and SPS, here the *acquis* is identified in more detail by Article 148 and Annex XXI-A and there are also mechanisms to ensure its uniform interpretation and application.[598] The opening of the EU's public procurement market will go hand in hand with the opening of the Ukrainian's, subject to achievement of such milestones.

As mentioned above, Title V provides for a 'softer' form of approximation, but still deserves to be remembered – despite being outside the DCFTA – by reason of the provisions laid down therein on environment, on the one hand, and agriculture and rural development, on the other. While the former only lays down the foundations for enhanced cooperation in environmental matters (without any specific focus on its links with the agricultural sector), the latter is more relevant for our purposes.

Article 403 of the Association Agreement provides that '[t]he Parties shall cooperate to promote agricultural and rural development, in particular through gradual approximation of policies and legislation'. Article 404 makes clear that this also concerns – *inter alia* – 'modern and sustainable agricultural production, respectful of the environment and of animal welfare, including extension of the use of organic production methods and the use of biotechnologies'. Annex XXXVIII to Title V lists the pieces of legislation that 'constitute the legislative references when gradual approximation of legislation in a specific sector or product is considered by the Ukrainian side'. A closer look reveals that in reality the approximation to EU agricultural sustainability standards is weaker than one might think. Apart from the inclusion of provisions on legal approximation in agricultural matters in Title V instead of Title IV, some key provisions are either not included in the Annex or otherwise taken into consideration. While some key environmental measures in EU agriculture were not put into force at the time of the conclusion of the agreement under the previous programming period (the 'greening measures'), the inclusion of the old regime for direct payments and rural development would have certainly implied the absorption in the agreement of some environmental measures in force at the time – not to mention that provisions in force at present would have been incorporated in the *acquis* in so far as the new regulations had repealed the old ones.[599] Apart from

[598] EU-Ukraine Association Agreement, Article 153 states that '[i]n this process, due account shall be taken of the corresponding case-law of the European Court of Justice and the implementing measures adopted by the European Commission as well as, if this should become necessary, of any modifications of the EU acquis occurring in the meantime'.

[599] For direct payments, Council Regulation (EC) No 73/2009 establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes for farmers, amending Regulations (EC) No 1290/2005, (EC) No 247/2006, (EC) No 378/2007 [2009] OJ L30; for rural development, Council Regulation (EC) No 1698/2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) [2005] OJ L277.

some references to organic legislation, rules on cross-compliance and other rules tying support to specific practices beneficial to the climate, environment and rural development are mostly ruled out of the agreement. If this is the case, then the brilliant solution to the general problem of inception of EU PPMs in Ukrainian law, achieved in this agreement through resort to the concept of 'approximation of laws', is of limited relevance for the sustainability of agricultural production in Ukraine. It can be observed that the predominance of the EU over Ukraine in terms of political power produces the effect of a double-edged sword. On the one hand, it is precisely by virtue of its political strength that the EU is able to 'impose' its standards on Ukraine and not the other way around; however, on the other hand, many countries, especially developing countries and economies in transition such as Ukraine, do not have enough financial resources to subsidise agriculture and tie such a support to (costly) practices beneficial for the environment. Whatever the reason, it is to be concluded that in this respect Article 11 TFEU is not entirely exerting its powers in the EU external action.

Notwithstanding such criticisms, overall the Association Agreement still represents a benchmark for 'deep integration'. On this point, this paper has taken the view that this concept represents by and large the most suitable means to enhance the EU's flagship in sustainable agriculture over most (if not all) of its commercial partners. However, the matter of whether 'deep integration' is more desirable than 'shallow integration' is an empirical question depending on the specific case concerned. In the EU-Ukraine DCFTA, there are uncertainties stemming from the capability of Ukraine to carry out such a large, costly and evolving bulk of legislation.[600] More generally, integration is not equally deep between one sector and the other. For example it was argued that environmental policy conditionality remains overall weak and essentially consists in the incorporation of certain directives that leave broad leeway in domestic implementation.[601]

A last, significant remark should be made on the relationship between 'deep integration' and the EU ENP. On the one hand, trade policy is increasingly contextualised within a broader ENP agenda (and, in the case of developing countries, within the pursuit of development purposes), to the point of leading one author to argue that in the case of the EU-Ukraine DCFTA such foreign policy

[600] Guillaume van der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area: a New Legal Instrument for EU Integration without Membership* (Brill 2016) 319 *et seq*. The author also raises questions of constitutional legitimacy of EU action vis-à-vis the domestic Ukrainian legal system, originating from the possibility that the pressure of implementing the agreement within the timetables will trigger a process dominated by the executive, to the detriment of the legislative ('*Verkhovna Rada*'). Whatever well-founded, this worry lies entirely within the Ukrainian responsibility because such a prospect would not be a side effect of the agreement, but rather a risk that the Ukrainian negotiators have consciously (and legally) accepted without the EU being accountable at all for this.

[601] Aron Buzogány, 'Selective Adoption of EU Environmental Norms in Ukraine. Convergence *à la carte*' (2013) 65(4) Europe-Asia Studies 609, 613.

considerations are predominant over purely economic ones.[602] This may lead to the conclusion that the chances to see sustainable agriculture enhanced (albeit with the limitations identified above) increase when regulatory cooperation is included in the agreements with neighbouring countries. In these cases, there is the tangible interest of the EU in having the commercial partner's environmental standards approximated. This interest might be directly proportionate to the prospect of a future accession. On the other hand, there is scepticism in scholarship about externally-induced policy changes without the promise of membership.[603] Whether this is justified or not, the degree of approximation will be arguably lower without accession and strongly dependent on the economic size and political power of the counterpart. Ukraine's smaller economy vis-à-vis the EU and the critical geo-political position – particularly in its relations to Russia – lay down pre-conditions for a particularly thorough approximation with EU legal order. It is difficult to believe that other large EU counterparts (such as China and the US) would ever accept negotiating with the EU on a similar basis. More generally, because of the specificity of EU-Ukraine political relations, the extent to which the type of regulatory cooperation provided for in this DCFTA, in many respects revolutionary, will form a blueprint for future agreements with neighbouring countries is still to be seen.

§5.3.3. *Enforcement Mechanisms*

In line with many other association agreements, the institutional framework of the DCFTA is dominated by an Association Council made up of members from the two institutions. Unlike many other agreements, the Association Council can take binding decisions on the parties.[604] It is also the master of the implementation of the agreement, for which it exerts extensive supervisory tasks. It can also delegate to special committees that it can create *ad hoc*.[605] Compared to the CETA and the EU-South Korea FTA, between the main institutional body of the agreement and the special committees there is an intermediary body, which in this case is named 'Association Committee'. The latter is a general supporting body for the Association Council, but can also create *ad hoc* committees to assist it in the implementation of Title V. Although in the EU-Ukraine Association Agreement the Association Committee presents itself as an intermediary body, its functions are in essence equivalent to those of the Joint Committee in CETA and to those of the Trade Committee in

[602] Guillaume van der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area: a New Legal Instrument for EU Integration without Membership* (Brill 2016) 219.
[603] Aron Buzogány, 'Selective Adoption of EU Environmental Norms in Ukraine. Convergence *à la carte*' (2013) 65(4) Europe-Asia Studies 609, 609.
[604] EU-Ukraine Association Agreement, Article 463(1).
[605] ibid Article 466(1).

the EU-South Korea FTA.[606] Amongst these numerous special committees,[607] there is the TSD sub-committee that shall report to the Association Committee on the implementation of the TSD chapter, assisted by a Contact Point.[608] An anomalous provision is included in Article 300(2), according to which 'the parties *may* monitor the progress' of the implementation of the TSD chapter (emphasis added). If a party 'may' do it, it is therefore not clear if it can also avoid doing it. *Inter alia*, this would seem to be at odds with the second sentence ('[a] Party may request the other Party to provide specific and reasoned information on the results of implementation'), because if one party *may* request the other to provide specific and reasoned information on the results of the implementation, how *may* the other party at the same time not be bound to monitor the progress in implementation?

The institutional setup on environmental matters is completed by an Advisory Group that meets in a Civil Society Forum and issues advisory opinions as part of the civil society mechanisms.[609] As can be seen, the institutional setup of this agreement is more complex than in the case studies encountered hitherto and follows more a hierarchical structure. This 'pyramidal shape', the binding powers of the Association Council and the density of committees and bodies make the institutional framework of this agreement the thickest analysed so far in this work, in line with the 'deep integration' brought forward by this agreement.

Dispute settlement can be avoided through the mediation procedure on the basis of Article 329, which is not necessarily a first step towards a dispute settlement but rather an alternative to it. A mediator will evaluate the submissions of the party, particularly assessing whether and to what extent a certain measure taken by one party affects trade and will look for a mutually agreed solution. General dispute settlement is a last resort. A specific DSM is only provided for the non-DCFTA part of the Association Agreement;[610] however, even the DCFTA has a specific DSM, which is rather standard in the post-Global Europe panorama and as usual does not cover the TSD chapter. As regards the latter, it only foresees three steps: namely consultations amongst the parties, the convocation of the TSD Sub-committee and the reference to a Group of Experts in the event that the foregoing fails to result in a satisfactory outcome.[611] Unlike in the CETA, but like the EU-South Korea FTA, there shall be at least five non-nationals out of the 15 members. Unlike the EU-South

[606] ibid Article 464.
[607] Amongst others, the role of the Parliamentary Association Committee is not to be neglected. cf EU-Ukraine Association Agreement, Article 468.
[608] ibid Article 300.
[609] ibid Article 299. Article 469 also establishes a Civil Society Platform.
[610] ibid Article 477.
[611] ibid Articles 300 and 301.

Korea FTA, it is requested that all members have expertise on the issues covered by the TSD chapter. The decision is not binding, but the parties 'shall make their best efforts to accommodate advice or recommendations'.[612] Enforcement of the TSD chapter is, therefore, overall soft as usual.

In the general DSM for the DCFTA, the parties shall first seek to come to an agreement through consultations, otherwise a panel will rule on the dispute. This DSM, although being quite classic in its structure, still provides for unique features, namely an urgent procedure for energy disputes and a DSM for legal approximation.[613] The latter applies to disputes regarding 'the interpretation and application of a provision of this Agreement relating to regulatory approximation' in relation to some chapters specifically identified by Article 322(1); it also applies to the interpretation or application of a provision based on 'an obligation defined by reference to a provision of EU law'.[614] This is therefore a sort of preliminary ruling that the arbitration panel is obliged to set in motion. Not providing for this procedure as an obligation would undermine the uniformity of application of EU law, because there could be decisions which interpret the *acquis* in divergent ways. This is a fundamental point of arrival for EU integration outside its boundaries. Amongst other things, it implies that the broad terms by which the *acquis* is sometimes identified in the Annexes may be given concrete substance by the determinations of the CJEU. This can also be seen as a proof of Ukraine's profound will to integrate in the EU system and market.

A remarkable feature of the DCFTA is the presence of sanctions. Such sanctions can be adopted if after three months from notification of a formal request for a DSM the issue is not settled; however, in the case of violation of 'essential elements' of the agreement or of 'denunciation of the Agreement not sanctioned by the general rules of international law', countermeasures can be taken immediately.[615] On the basis of a 'suspension clause', such a violation can thus lead to the suspension of rights and obligations enshrined in the DCFTA. This system is, of course, in addition to the basic reaction to non-fulfilment of conditionality, which consists of denial to market access. Depending on the point of view, this refusal can be seen as a non-reward or a sanction.

Notwithstanding the presence of such top-down elements, the enforcement of 'deep integration' in the field of sustainable agriculture suffers from a structural problem in this agreement. Incorporating the EU *acquis* may be an attractive choice, but the more the standards of incorporation, the more pervasive the controls on implementation. Standards relating to food safety might be slightly easier to oversee because of the presence of alert systems in place. On the

[612] ibid Article 301(2).
[613] ibid Article 305 *et seq* and, respectively, Article 322 *et seq*.
[614] ibid Article 322(1) and (2).
[615] ibid Article 478.

contrary, what happens if the third country is polluting the environment throughout the production process with no immediate, direct repercussion on the product, in breach of EU standards to be complied with? This concern applies typically vis-à-vis agricultural production, but generally concerns every production process. Regardless of the presence of sanctions, in the form of appropriate measures adopted by the other party or in the form of the suspension of rights and duties linked to the agreement, such violations will always be particularly difficult to detect being 'intangible by definition'. For instance, Annex XXX to chapter 6 of Title V includes the Water Framework Directive amongst the pieces of EU legislation that compose the *acquis*, but it is hard to state what happens if Ukraine does not implement and later enforce this piece of legislation.

SECTION VI

EU FREE TRADE AGREEMENTS WITH DEVELOPING COUNTRIES: EU-CHILE, EU-SADC AND EU-VIETNAM

In this section, three case studies in the context of EU negotiations with developing countries will be presented. As extensively pointed out throughout the analysis conducted above, negotiations with such kind of counterparts follow different dynamics, particularly due – on the one hand – to the imbalances of political bargaining between the parties and – on the other – the lower capacity of such EU counterparts to make ambitious commitments with regard to sustainable agricultural production.

While all the FTAs proposed in this section were concluded with developing countries, they all have their specificities. Hence, the relatively old (and currently under review) agreement with Chile will be followed by the FTA negotiated with the heterogeneous SADC group, ending with the EU-Vietnam FTA, which (at the time of writing) may be regarded as the most recent FTA concluded by the EU with a developing country.

§6.1. The Association Agreement between the EU and Chile

§6.1.1. *Presentation of the Agreement and TSD Chapter*

The Association Agreement (AA) between the EU (then EC) and Chile was concluded in 2002, following a Framework Cooperation Agreement concluded in 1996.[616] Thereafter, many things have changed in the context of EU trade policy.[617] While the EU-Chile AA is not a 'new-generation' FTA, many reasons justify its choice as a case study. Firstly, it is one of the few (if not the only) FTA where 'sustainable agriculture' is explicitly provided for as an autonomous concept from 'sustainable development'; secondly, it is interesting to see how arrangements on environmental sustainability were in the pre-Global Europe context; finally, Chile was clearly a

[616] Agreement establishing an association between the European Community and its Member States, on the one part, and the Republic of Chile, on the other, signed 18 November 2002, in force 1 February 2003.
[617] For a review of Chilean trade policy before the conclusion of the FTA with the EU, see Glenn W Harrison, Thomas F Rutherford and David G Tarr, 'Trade Policy Options for Chile: The Importance of Market Access' (2002) 16(1) The World Bank Economic Review 49.

developing country at the time of the conclusion of the agreement, which makes it relevant to see how this feature is actually reflected in the text. Nowadays, its characterisation as a developing country is more controversial,[618] which also constitutes one of the reasons why discussions are ongoing to update the agreement. On this point, the EU has already carried out an Impact Assessment and delivered a 'Negotiating Mandate' thereafter.[619] These documents will be duly considered in the analysis, as appropriate.

Chile's choice to conclude an FTA with the EU hinges on the firm trade policy choice undertaken since the 1990's to intensify bilateral trade with its commercial partners, on the spur of the conviction that this will be to the benefit of the nation as a whole even for trade-unrelated purposes, as well as pursuant to domestic pressures exerted by stakeholders.[620] In 2007, Chile decided to abandon the EU's GSPs, which can be taken as a sign that its development progressed since 2003. If an update to the agreement occurs, this change of status will plausibly be reflected in the new text. At the same time, Chile was already in 2002 an appealing trade partner for the EU, particularly because of the market potential of Latin American countries and the related competition with the US to access those markets, not to mention its historical investor-friendliness and political and financial stability.[621]

Apart from the FTA, the AA also contains three other chapters. Other than agricultural products, there are arrangements on services, government procurement, intellectual property rights, competition, customs procedures and, in annexed agreements, wine and spirits and SPS

[618] According to the World Bank, 'Chile has been one of Latin America's fastest-growing economies in recent decades thanks to a solid macroeconomic framework, which enabled the country to reduce the population living in poverty (on US$ 5.5 per day) from 30 percent in 2000 to 6.4 percent in 2017'. cf <https://www.worldbank.org/en/country/chile/overview> accessed 25 September 2019. However, Chile was still considered as a developing country by the United Nations in 2014: cf <https://www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf> accessed 25 September 2019.

[619] Commission Staff Working Document Impact Assessment Accompanying the document Joint Recommendation for a Council Decision authorising the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy to open negotiations and negotiate a modernised Association Agreement with the Republic of Chile, SWD(2017) 173 final; Council of the European Union, EU-Chile Modernised Association Agreement - Directives for the negotiation of a Modernised Association Agreement with Chile, 13553/17 ADD 1 DCL 1 COLAC 108 CFSP/PESC 914 RELEX 892 WTO 255.

[620] cf the thorough analysis of Leslie Wehner, 'Chile's Rush to Free Trade Agreements' (2011) 31(2) Revista de Ciencia Politítica 207.

[621] On Chile's potential as a commercial partner, see Maria J Garcia, 'Trade in EU Foreign Relations: The EU-Chile Free Trade Agreement' (2004) Post-Graduate Student Conference on European Foreign Policy LSE, July 2-3, 2004 <http://www.lse.ac.uk/internationalrelations/centresandunits/efpu/efpuconferencepapers2004/garcia.doc> accessed 30 January 2019.

standards.[622] Agricultural products are, , an important part of the liberalisation pursued by the agreement, also due to the inverted growing season which guarantees complementarity between the two markets.[623] The evaluations of the effects of the agreement have been divergent depending on the viewpoint and the methods used,[624] but what is certain is that bilateral trade in goods between the two countries rose from 7.7 million in 2003 to 16.6 billion euros in 2015; and that the EU is Chile's third largest trading partner (14.4 % of Chile's total trade), while Chile was in 2017 the EU's 38th trading partner (0.5 % of total EU trade).[625] Moreover, such effects can only be evaluated in detail by singling them out separately for each specific sector.[626] Whatever the final evaluation of the agreement, it can be seen that the difference in economic power is still striking nowadays, though it could not be otherwise.

While the EU-Chile FTA was arguably the most comprehensive ever concluded by the EU at the time of signing it, its environmental dimension is rather weak. In general, it relies on exception clauses for goods modelled on the basis of the GATT, without any reference to the environment.[627]

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[622] On the coverage of EU-Chile AA in detail, cf Bettina Rudloff and Johannes Simons, 'Comparing EU Free Trade Agreements' (2004) InBrief 6A, European Centre for Development Policy Management <https://ecdpm.org/publications/comparing-eu-free-trade-agreements-agriculture/> accessed 24 January 2019.

[623] The achievement of full trade liberalisation for agricultural commodities was foreseen to be reached in ten years at different speeds for the two parties: for the EU transitional periods of 0, 4, 7 and 10 years (depending on the products) were established prior to the total elimination of tariffs; for Chile such periods were 0,5 and 10. The AA also contains (Article 73) an 'emergency clause' that regulates the measures to be taken in case of urgency. Such an urgency may be essentially due either to market instability or price volatility affecting certain agricultural goods, for which the agreement gives the opportunity to 'react'. In such cases, that may potentially impact upon food security and determine food crises, the parties can safeguard their agricultural markets by raising tariffs to the pre-liberalisation levels, or adopt provisional measures that will apply up to 120 days or even, in some cases, seek compensation by the other party (cf Article 73).

[624] On the one hand, a study based on the decomposition method found that the growth in Chilean economy as a result of the entry into force of the agreement was limited, without however calculating the indirect effects sparked by the FTA in the economy as a whole. See the study in Sébastien Jean, Nanno Mulder and María Priscila Ramos, 'A General Equilibrium, Ex-post Evaluation of the EU–Chile Free Trade Agreement' (2014) 41 Economic Modelling 33; on the other hand, it was concluded that between 2003 and 2012 Chilean exports of fruit and vegetables to Europe almost doubled. See the relevant data in the table proposed by Jaime de Pablo Valenciano, Miguel Angel Giacinti Battistuzzi, and Tomás Garcia Azcaráte, 'Chile-EU Trade Agreement: What Can We Learn from Trade Statistics?' (2015) 6(1) International Journal of Food System Dynamics 12, 13.

[625] Commission Staff Working Document Impact Assessment Accompanying the document Joint Recommendation for a Council Decision authorising the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy to open negotiations and negotiate a modernised Association Agreement with the Republic of Chile, SWD(2017) 173 final, 6.

[626] For instance, a number of opportunities and challenges were identified with reference to the mussel market, which is of paramount importance for Chile. See Fernando González Laxe, Federico Martín Palmero and Domingo Calvo Dopico, 'Liberalization and Tariff Dismantling Effects on the Competitiveness of Mussel Cultivation Industry in Spain' (2016) 118(2) British Food Journal 250. Among other things, the authors insist on the the minimal difference perceived by consumers between imported mussels (especially canned) and nationally produced mussels. On the ethno-centrism of consumers, cf Chandrama Acharya and Greg Elliot, 'Consumer Ethnocentrism, Perceived Product Quality and Choice: an Empirical Investigation' (2003) 15(4) Journal of International Consumer Marketing 87.

[627] It was observed that this may give rise to disputes similar to those encountered at WTO level. See Aaron Cosbey *et al*, 'The Rush to Regionalism: Sustainable Development and Regional/Bilateral Approaches to Trade and Investment Liberalisation' (2005) International Institute for Sustainable Development policy papers, 11

Apart from the environmental rules on cooperation (that will be analysed *infra*, §6.1.2.), few provisions provide for sustainable development and virtually none of them in stringent terms. The Preamble of the AA mentions it as a value that needs to be 'taken into account', together with environmental protection requirements, while promoting economic and social progress. The formulation is quite standard, but considering that the AA was concluded 10 years after the 1992 Rio Declaration on Environment and Development, it would have been legitimate to expect something more ambitious on the part of the EU. Article 1(2) evokes the principle of 'sustainable economic and social development' as a guidance value for implementation of the agreement. While at first sight this may be seen as a strong statement, in reality upon closer examination the parties appear to have 'forgotten' the third dimension of sustainable development, ie the environmental one (*supra*, §1.1.). As a result, it can be easily said that environmental protection is not a guiding principle of the agreement. It is only a general principle of economic cooperation (Article 16(1)(b)) and a value governing triangular and regional cooperation in the international fora (Article 50). Apart from those broad references, the AA does not contain anything else on sustainable development, which means that no provision of the agreement may constitute a legal basis for carrying out environmental activities in any of the two countries. In this respect, this agreement is not even comparable to the 'new-generation' ones examined thus far. While such a divergence is mainly due to the pre-Global Europe trading context, it must be borne in mind that this state of play is in stark contrast with the trading arrangements in place in other agreements at the time of signing the AA between them (for instance NAFTA). It is particularly striking – among other things – with regard to the absence of any commitment to implement MEAs (especially as regards the climate regime) and corporate social responsibility (CSR).[628] It is therefore not surprising that the AA was criticised prior to its ratification by Chilean social and environmental groups, in particular regarding its alleged negative effects on indigenous communities.[629]

<https://www.iisd.org/library/rush-regionalism-sustainable-development-and-regionalbilateral-approaches-trade-and> accessed 9 July 2019.

[628] Rodrigo Polanco, 'Analysis of the Prospects for Updating the Trade Pillar of the European Union-Chile Association Agreement' (2014) European Parliament Directorate-General for External Policies - Study, 34 <http://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO_STU(2016)535013> accessed 25 January 2019. On CSR, see also Elisa Morgera, *Corporate Accountability in International Environmental Law* (Oxford University Press 2009).

[629] For instance, the representatives of indigenous community Mapuches denounced the additional commercial activities in ancestral territories that would stem from the agreement, as well as the virtually unlimited access that multinational corporations and other investors would have to natural resources, on which they had not been consulted. See in this regard Jorge Calbucura, Reynaldo Mariqueo and Gaston Lion, 'Mapuches Oppose the Agreement between the European Union and Chile', Press Release 3 September 2002 <https://mapuche-nation.org/english/html/news/pr-41.htm> accessed 25 January 2019.

Unsurprisingly, the agreement had very limited impact on sustainable agricultural practices in Chile and – more generally – on its environmental policies.[630] Sectoral studies have highlighted a slight change of approach at the level of Chilean government officials with regard to the legitimization of environmental issues;[631] an indirect pressure exerted on Chilean exporters in compliance with EU food safety standards (which in turn might have also indirectly led to an improvement of some production standards), but not as a result of the agreement itself and rather due to the will to comply with importers' expectations;[632] and that although some improvements have been remarked regarding some environmental aspects, it is hard to link them to the action of the agreement.[633]

Unsurprisingly, sustainable development is at the core of the discussion for a modernised EU-Chile FTA, together with the protection of other public goods related to biodiversity, forests and climate change, for which the AA is entirely silent. The Negotiating Mandate is clear in stating that this will has to take the form of a TSD chapter, with the same structure as the other recent 'new-generation' FTAs, but tailor-made depending on the outcome of the SIA to be undertaken in parallel with the negotiations.[634] On this point, the status of Chile as an economy in transition and vulnerability to climate change would plausibly pave the way for extensive technical and financial support for adaptation measures from the EU. Concerning the environmental baseline that would form the legal reference, the Negotiating Mandate contains an ambiguous formulation on promotion and effective implementation of 'international environmental […] agreements and standards consistent with the EU *acquis*'.[635] The door remains thus open as to whether the benchmark of a future agreement will be constituted by international standards or by the EU *acquis*. It is likely that the former solution will be finally endorsed, because in Chile there is neither the interest nor the exigency to foster approximation to EU laws and policies, mainly due to the lack of any prospect of membership. A set-up closer to the EU-South Korean pattern is therefore more likely to occur, rather than the EU-Ukrainian one. Studies have already been conducted as to the potential effects of a new agreement

[630] For an overview of the environmental performances of some (more or less) recent EU FTAs, including Chile, see Clive George and Shunta Yamaguchi, 'Assessing Implementation of Environmental Provisions in Regional Trade Agreements' (2018) OECD Trade and Environment Working Papers, 16-17 <http://dx.doi.org/10.1787/91aacfea-en> accessed 25 January 2019.
[631] Ida Bastiaens and Evgeny Postnikov, 'Greening up: the Effects of Environmental Standards in EU and US Trade Agreements' (2017) 26(5) Environmental Politics 847, 857.
[632] Ergon Associates Ltd, 'Trade and Labour: Making effective Use of Trade Sustainability Impact Assessments and Monitoring Mechanisms' (2011) Final Report to DG Employment, Social Affairs and Inclusion <https://ergonassociates.net/wp-content/uploads/2012/02/Final-report-from-a-study1.pdf?x74739> accessed 25 January 2019.
[633] ITAQA Sarl, 'Evaluation of the Economic Impact of the Trade Pillar of the EU-Chile Association Agreement' (2012) Final Report <http://trade.ec.europa.eu/doclib/docs/2012/august/tradoc_149881.pdf> accessed 25 January 2019.
[634] Council of the European Union, EU-Chile Modernised Association Agreement - Directives for the negotiation of a Modernised Association Agreement with Chile, 13553/17 ADD 1 DCL 1 COLAC 108 CFSP/PESC 914 RELEX 892 WTO 255, 12.
[635] ibid 5.

on the environment. In particular, a study carried out by ECORYS/CASE in 2017 drew the conclusion that in the case of a renegotiated agreement 'the environmental effects […] are likely to be limited in Chile, and almost negligible in the EU. Without mitigating measures, CO^2 emissions are likely to increase slightly in both regions because of the scale and technique effects, and by the projected increase in transportation. Other environmental issues that may require attention owing to the expected increase in agricultural activities in Chile are water (due to higher water requirements), increase in some of the drivers of biodiversity loss in Chile (linked to agricultural activities and associated use of land, water, fertilisers and pesticides), and land use. Increase in agricultural output may add pressure to the ongoing land conversion in central and northern Chile'.[636] While it is certain that the impact of a potential new agreement would not be neutral for the environment,[637] it is not clear what is the term of comparison of the *limited environmental effects* mentioned by the study: would that be the current agreement or a no-agreement scenario? Since the agreement in force at present is not doing much for the environment, it is not surprising that a renegotiated agreement would have a limited (negative?) impact. At the time of writing, it is however unclear if/when the re-negotiation process ever comes to an end.[638]

§6.1.2. *Regulatory Cooperation*

The EU-Chile AA includes few provisions on regulatory cooperation, the main one being a general statement on cooperation on standards, technical regulations, and conformity assessment procedures (Article 18), while some other similar specific rules are foreseen in sectoral and agricultural-unrelated sectors. In practice, Article 87 provides for exchange of information, experiences and data, as well as scientific and technical cooperation as the regular means to achieve a higher quality of technical regulations. It is entirely left to the parties, without prejudice to WTO law, to decide which legal regime they will use to give substance to regulatory cooperation in their bilateral relations (progressive convergence, equivalence of technical regulations and standards, reference to

[636] Commission Staff Working Document Impact Assessment Accompanying the document Joint Recommendation for a Council Decision authorising the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy to open negotiations and negotiate a modernised Association Agreement with the Republic of Chile, SWD(2017) 173 final, 29.

[637] The interlinkages between trade integration and environmental degradation in Chile have been explored by John C Beghin *et al*, 'Trade Integration, Environmental Degradation, and Public Health in Chile: Assessing the Linkages' (2002) 7(2) Environment and Development Economics 241.

[638] On the contrary, it was argued that objective, economic-based reasons for updating the agreement do not justify the effort, so that the decision is mainly political. See Rodrigo Polanco, 'Analysis of the Prospects for Updating the Trade Pillar of the European Union-Chile Association Agreement' (2014) European Parliament Directorate-General for External Policies - Study, 61
<http://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO_STU(2016)535013> accessed 25 January 2019.

international standards, use of declarations of conformity given by the suppliers, or simply additional recognition agreements). There is no evidence that such provisions led to remarkable policy changes vis-à-vis the sustainability of the agricultural sector in Chile – and it must be seen how it could be otherwise. It is unsurprising then that regulatory cooperation was identified as one of the main areas that would require an update of the AA.[639] This does not mean, however, that efforts are likely to be taken in order to export EU production standards to Chile's legal system. In fact, it must be borne in mind that the first priority for regulatory cooperation is to secure an adequate business environment for investors and regulatory standards are likely to be coordinated mainly on the basis of the pursuit of this aim.[640]

Apart from regulatory cooperation, the AA contains however some more detailed provisions on 'Economic Cooperation' (Title I). While domestic measures are aimed at enhancing several features such as technical assistance related to productivity and food quality and projects to support compliance with SPS measures (Article 24), arrangements on sustainable agriculture and agricultural development, as well as conservation and improvement of the environment (Article 28) are particularly pertinent for the purpose of this work.

As regards economic cooperation on agriculture, Article 24 of the AA explicitly states that '[c]ooperation in this area is designed to support and stimulate agricultural policy measures in order to promote and consolidate the Parties' efforts towards a sustainable agriculture and agricultural and rural development'. The reference to sustainable agriculture is remarkable and unique and places this agreement at the forefront of the panorama of EU FTAs. However, the policy reforms described in the rest of the Article seem more focused on the restructuring of the agricultural sector as a whole rather than on the integration of environmental considerations therein. Moreover, the Title on 'Economic Cooperation' does not consist of binding commitments and sustainable agriculture is not mentioned elsewhere in the agreement. As a result, nothing substantive in terms of improvement of environmental standards in agriculture corresponds to this pioneering reference.

With relation to economic cooperation on environment, the music does not change. *Mutatis mutandis*, the same considerations made with regard to agriculture can be reiterated. Interestingly, Article 28(2)(d) provides for the possibility to reinforce Chile's environmental structures and policies. This is very important since it can be seen as a reflection of the lower political power of Chile compared to the EU, who is in charge of the task of supporting Chile's transition towards

[639] ibid 38.

[640] For a reading of EU trade policy as the result of lobbying by pressures by EU exporters (particularly in its relations with Chile), see Andreas Dür, 'EU Trade Policy as Protection for Exporters: the Agreements with Mexico and Chile' (2007) 45(4) Journal of Common Market Studies 833.

sustainable development. It reveals that the influence that the policies of one country may exert over the other is asymmetric: the EU has to 'do more'. At the same time, this is far from exporting a selection of EU *acquis* and therefore the provision has mainly aspirational terms. Nevertheless, it remains thought-provoking because it explains the lack of strong environmental commitments obtained by Chile. This is not only the result of the pre-Global Europe context, but also (and above all) the consequence of Chile's (self) configuration as a developing country (or at least at that time), on which the pressure to undertake major, costly environmental reform is removed with a view to fostering economic growth. As a result, the reference to 'technical assistance' in Article 28(2)(g) must be mostly seen as the EU's assistance towards Chile rather than vice-versa.

The weak consideration of environmental protection in the agreement can also be seen from other sectoral issues indirectly touching upon regulatory cooperation amongst the parties. One example is public procurement (Title IV, Articles 136 to 162), where amongst the measures that can derogate from the rules laid down by the agreement there is no mention of those inspired by the objective of ensuring environmental protection.[641] Moreover, as in CETA, offsets are prohibited, which may result in local development of rural areas being put at risk.[642] The steps forward towards 'green procurements' seem therefore manifold, but it is far from granted that a new agreement would address these specific concerns.[643]

Similarly, the EU-Chile AA does not have an investment chapter, which can be explained by the reluctance of Member States to question their bilateral investment treaties.[644] While such a chapter is not a necessary feature of 'new-generation' FTAs (EU-South Korea FTA does not have one), CETA seems to have triggered a tendency for the future in this regard. It is thus probable that this subject would be extensively covered should there be an update, but its consequences on the sustainability of the agricultural sector would be uncertain. The same applies to NTB-related provisions. The Negotiating Mandate sets out extensive regulatory cooperation and coordination,

[641] cf EU-Chile AA, Article 161.
[642] ibid Article 140.
[643] In this respect, the Impact Assessment seems rather focused on identifying several elements that represent a barrier to the access to Chilean market by European firms, for instance national component requirements, discrimination against experience abroad, local presence requirements for registration of suppliers, limitations to register workers from an office abroad and requests for official translations into Spanish or for documents in original form. cf Commission Staff Working Document Impact Assessment Accompanying the document Joint Recommendation for a Council Decision authorising the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy to open negotiations and negotiate a modernised Association Agreement with the Republic of Chile, SWD(2017) 173 final, 11 (particularly footnote No 7).
[644] Rodrigo Polanco, 'Analysis of the Prospects for Updating the Trade Pillar of the European Union-Chile Association Agreement' (2014) European Parliament Directorate-General for External Policies - Study, 22 <http://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO_STU(2016)535013> accessed 25 January 2019.

but it must be borne in mind that their comprehensive widening would not be neutral for the agricultural sector. The Impact Assessment reported that under the current regime 'some specific EU exports such as beef and fresh fruits and vegetables have been denied access to the Chilean market due to sanitary and phytosanitary-related issues and other requirements'. Depending on the specific case, NTB can only be undesirable hurdles or, on the contrary, proper garrisons of quality in food and agricultural production.[645] Enhanced cooperation on NTB would improve sustainability standards in agriculture only if standards were adjusted towards the EU regulatory baseline, but it is perhaps wishful thinking to expect this due to the increase in costs that would presumably derive for Chilean stakeholders.

§6.1.3. *Enforcement Mechanisms*

The institutional structure of the AA sees an Association Council as the highest body in charge of general coordination and administration of the agreement.[646] It has the power to take binding decisions over the parties,[647] but it does not contain special rules on independence and transparency for its members. The Association Committee carries out the tasks delegated by the Association Council and oversees the general implementation of the agreement.[648] As usual, several sectoral committees are dependent on the Association Council and are responsible for monitoring the implementation of specific chapters (such as the Joint Committee on Sanitary and Phytosanitary Measures, the Measures Committee of Standards and Technical Regulations Conformity Assessment, the Special Committee on Customs Cooperation and Rules of Origin, the Joint Committee on Trade in Wines, and the Committee Set on Trade and Flavoured Spirits).[649] Other specialised committees can be set up by the Association Council, which in this case also determines their composition and functions.[650] As there is not a TSD chapter, of course, there is neither a TSD Committee nor any other body in charge of overseeing the implementation of the environmental dimension of the agreement (that – as seen above – is not really tangible anyway). In this respect, positive results have been observed with regard to the functioning of these committees, particularly

[645] Commission Staff Working Document Impact Assessment Accompanying the document Joint Recommendation for a Council Decision authorising the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy to open negotiations and negotiate a modernised Association Agreement with the Republic of Chile, SWD(2017) 173 final, 10.
[646] EU-Chile AA, Article 3.
[647] ibid Article 5.
[648] ibid Article 6.
[649] ibid Article 7.
[650] ibid Articles 7(2) and 7(3).

within the ambit of animal welfare.[651] Apart from that, the overall institutional set-up of the AA is quite in line with the other EU FTAs. This leads us to two provisional conclusions. Firstly, the Global Europe Strategy has not thoroughly covered the institutional set-up of FTAs if agreements concluded before and after 2006 have the same or similar institutional structure. However, the option to increase institutionalism should be considered carefully, particularly in light of the lack of evidence of any instance where one of the highest bodies of an FTA has compelled one of the parties to comply. The second conclusion is a follow-up to the first one, in the sense that if the general pattern for EU FTAs passed through the 2006 breakthrough without major revisions, then it might not be expected that a potential renegotiation of the agreement would rethink this paradigm in depth either. This seems to be confirmed by the Negotiating Mandate, which only calls for identification of ways in which to make the work of the Association Committee more dynamic and effective.[652]

The absence of thorough provisions on mechanisms to ensure participation of civil society in decision-making (apart from the vague recognition of Article 48) deserves a special mention. It was remarked that 'the lack of organizational capacity of Chilean civil society, coupled with the unwilling government, resulted in only two Civil Society Dialogue meetings in more than a decade, despite the stipulation that they need to be held annually'.[653] Needless to say, it can easily be asserted that such 'Dialogues' did not bring anything tangible in terms of improvement of environmental delivery. Interestingly, agreements concluded by the US are also weak in terms of civil society mechanisms, but at least their implementation is directly enforced through the pressure of sanctions. From a comparative perspective, this is something that the EU may consider for the future. Regardless of the pros and cons in basing the enforcement on top-down machineries such as sanctions (*supra*, §4.3.), it needs to be seen how mechanisms set up to ensure civil society participation can still be implemented without sanctions established for the case that the latter are not put in place. In absolute terms, through their activity of monitoring and outreach, civil society groups can ensure control of the implementation of the environmental provisions of an agreement and put pressure in the event of present or potential breach. However, in countries where the environmental movement lacks capacity even such mechanisms are toothless. Moreover, when the

[651] Cédric Cabanne, 'The EU-Chile Association Agreement: A Booster for Animal Welfare' (2003) 7(1) Biores <https://www.ictsd.org/bridges-news/biores/news/the-eu-chile-association-agreement-a-booster-for-animal-welfare> accessed 9 July 2019.
[652] Council of the European Union, EU-Chile Modernised Association Agreement - Directives for the negotiation of a Modernised Association Agreement with Chile, 13553/17 ADD 1 DCL 1 COLAC 108 CFSP/PESC 914 RELEX 892 WTO 255, 34.
[653] Ida Bastiaens and Evgeny Postnikov, 'Greening up: the Effects of Environmental Standards in EU and US Trade Agreements' (2017) 26(5) Environmental Politics 847, 859.

environmental dimension of the agreement is so shallow, their role is certainly not decisive enough to reverse the trend of environmental degradation. As a result, the presence of substantive civil society mechanisms should go along with the presence of equally substantive environmental provisions, since only the synergy of the two of them may trigger positive policy outcomes. What will happen in the event of renegotiation is not clear, but presumably there would be a broader recognition, as usually is the case within TSD chapters.

The establishment of a detailed institutional structure also aims at preventing dispute settlement.[654] Concerning DSMs, it is worth briefly mentioning a general DSM for trade-related issues (Title VIII, Articles 181 *et seq*). Indeed, in spite of the weak environmental dimension of the agreement it may be of interest to appreciate the extent of the change of 'new' DSMs by comparison with the pre-Global Europe context. As usual, this DSM is structured as an escalation: dispute avoidance first (consultation with the Association Committee – Article 183) and the actual judicial proceeding later, where disputes are handled by three arbitrators appointed by the Association Committee through a procedure that should ensure their expertise in international legal matters, as well as their independence.[655] The ruling of the arbitrator panel is issued 'as a general rule' no later than three months from the establishment of the panel itself and no appeal is foreseen.[656] The idea is to set up an attractive and quick option for the parties. The parties shall ensure compliance with the ruling.[657] If they fail to do so within a reasonable timeframe established by the party complained against, and if no compromise is otherwise found, the complaining party may 'suspend the application of benefits granted under this Part of the Agreement equivalent to the level of nullification and impairment caused […]'.[658] As for the institutional framework, the structure of this DSM is *mutatis mutandis* in line with the post-Global Europe pattern and the same observations apply. However, here the Negotiating Mandate suggests that novelties may be more significant, through the introduction of mediation and special procedures for NTB-related disputes.[659]

Finally, it must be noted that the absence of the TSD chapter implies that there is no such thing as an *ad hoc* DSM mechanism provided for therein. However lenient such arrangements may end up being in 'new-generation' FTAs in terms of enforcement of environmental protection, their absence

[654] An argument on this line of thought was formulated by Stefan Szepesi, 'Comparing EU Free Trade Agreements: Dispute Settlement' (2004) European Centre for Development Policy Management papers <https://www.eldis.org/document/A16377> accessed 9 July 2019.
[655] EU-Chile AA, Article 185.
[656] ibid Article 187.
[657] ibid Article 188.
[658] ibid Article 188(6).
[659] Council of the European Union, EU-Chile Modernised Association Agreement - Directives for the negotiation of a Modernised Association Agreement with Chile, 13553/17 ADD 1 DCL 1 COLAC 108 CFSP/PESC 914 RELEX 892 WTO 255, 33.

contribute to 'thickening' the institutional framework, as seen in the others encountered so far amongst the selected case studies.

§6.2. The Economic Partnership Agreement (EPA) between the EU and the Southern African Development Community (SADC) Group

§6.2.1. *Presentation of the Agreement and TSD Chapter*

After more than 10 years of negotiations, the EPA between the EU and the SADC Group provisionally entered into force in 2016.[660] Besides the matter of the impact on trade flows that this agreement will have on SADC countries that are parties to the agreement, there are at least two main reasons which make this FTA a particularly reliable test bed for the treatment of sustainability in agriculture in EU FTAs. These relate, on the one hand, to the heterogeneity of EU counterparts and, on the other hand, to the peculiarity of the international agreement used, namely the EPA. The two aspects are inherently intertwined, since the historical, political and legal evolution of EPAs are tied to the nature of the relationships between the EU and the commercial partners in question.[661] Moreover, the EU-SADC EPA now also needs to be understood taking into account that on 30 May 2019 the African Continental Free Trade Area (AfCFTA), concluded under the auspices of the EU Commission as part of the EU-Africa Alliance, entered into force.[662] The accord only establishes a free trade area and is therefore not a proper FTA, but it is expected that it will exert a remarkable impact on trade in Africa.[663] While there is no dedicated chapter to agriculture in the AfCFTA, among the objectives of the agreement there is the pursuit of agricultural development and food security.[664] Since the agreement does not dedicate any space to environmental protection or sustainable development, that are at most generically referred to in the Preamble and broadly mentioned with relation to the Sustainable Development Goals, the content of the AfCFTA does not have any impact on the arrangements of the SADC EPA in this respect. However, it is important to

[660] Economic Partnership Agreement between the European Union and its Member States, on the one part, and the SADC EPA States, of the other part, signed 10 June 2016, not in force (provisionally applied since 10 October 2016).
[661] Martin Adelmann, 'SADC - an Actor in International Relations? The External Relations of the Southern African Development Community' (2012) PhD dissertation – Freiburg Arnold Bergstraesser Institut.
[662] Agreement Establishing the African Continental Free Trade Area, signed 21 March 2018, in force 30 May 2019. At the time of writing, the agreement has been signed by 53 African states and ratified by 25.
[663] For the importance of the AfCFTA for African regional integration and for its expected effects on regional trade, see the thorough analysis of David Luke and Jamie Macleod (eds), *Inclusive Trade in Africa: The Continental Free Trade Area in Comparative Perspective* (Routledge 2019).
[664] According to Article 3(g) of the AFCFTA, among the general objectives of the AfCFTA there is that to promote industrial development through diversification and regional value chain development, agricultural development and food security.

keep the developments of this agreement in mind for their potential indirect effects on the increase in trade flows in intra- and extra-SADC agricultural trade and, as a result, on the additional pressure on the environment that normally follows such an increase.[665]

EPAs can be defined as 'reciprocal trade agreements between the EU and a number of regional groupings from among the African, Caribbean and Pacific (ACP) countries under which all parties commit to trade liberalisation, but under which ACP countries can exempt sensitive products from liberalisation so as to take account of their level of development'[666]. Therefore, EPAs mark, after four decades, the end of the complete asymmetric relationship with ACP countries, which now no longer enjoy free access to the European market without in parallel facing the obligation to liberalise their own markets. This was the result of the passage from the Lomé Convention to the Cotonou Agreement,[667] which now establishes a framework for development cooperation, political cooperation and economic and trade cooperation.[668] EPAs are the instruments that are supposed to give concrete substance to these broad commitments.[669] Amongst the reasons that determined the shift from a unique, 'post-colonial' approach based on unconditional (and asymmetric) access to the EU market towards a more reciprocal layout of EU-ACP relationships, it is worth mentioning that non-preferential market access is not compatible with WTO by default. Even if concessions are made in the WTO system, on the basis of GATT Article I these cannot discriminate, ie if preferences are given for developing countries, they have to be given equally to all of them and not

[665] It is estimated that intra-SADC agricultural trade alone represents 47 % of the total agricultural trade for Africa. See AA. VV., *Agriculture and the African Continental Free Trade Area* (Tralac Publishing 2018), 13.

[666] Gijs Berends, 'What does the EU-SADC EPA Really Say? An Analysis of the Economic Partnership Agreement between the European Union and Southern Africa' (2016) 23(4) South African Journal of International Affairs 457.

[667] Lomé Convention between the European Economic Community and its Member States, on the one part, and the ACP group of states, on the other, signed 28 February 1975, in force 1 April 1976 (no longer in force since 23 June 2000). The Lomé Convention gathers a series of agreements that are central in the relationships of the EU (then EEC) with ACP states, based on Articles 131 to 136 of the Treaty of Rome. The convention was renegotiated and renewed three times. From the early 1990s, the EU made progressively clear that the system based on complete asymmetric relationships would need to be revised. Moreover, this system turned out to be questionable under WTO rules (see *infra* in this subparagraph). The negotiations for a new agreement came to an end in the year 2000, with the conclusion of the Cotonou Agreement, which also replaced the old regime. cf Partnership Agreement between the members of the ACP group of states, on the one part, and the European Community and its Member States, on the other, signed 23 June 2000, in force 1 April 2003. The Cotonou Agreement was concluded by the EU and all the 78 ACP states for 20 years from March 2000 (therefore until February 2020), with the possibility to review it every five years (this occurred in 2005 and 2010).

[668] For a reflection on the shift from the Lomé to the Cotonou regime, see Kunibert Raffer, 'Cotonou: Slowly Undoing Lome's Concept of Partnership' (2001) European Development Policy Study Group discussion papers No 21.

[669] EPAs are adopted on the basis of the Cotonou Agreement (other than GATT Article XXIV), but the relationship between the two instruments may vary from time to time. In the case of the EU-SADC EPA, Article 110 states that: '1. With the exception of development cooperation provisions provided for in Title II of Part 3 of the Cotonou Agreement, in case of any inconsistency between the provisions of this Agreement and the provisions of Title II of Part 3 of the Cotonou Agreement, the provisions of this Agreement shall prevail to the extent of such inconsistency; 2. Nothing in this Agreement shall be construed so as to prevent the adoption by either Party of appropriate measures pursuant to the Cotonou Agreement'.

only to the ACP group. That said, for developing countries, the WTO system has partly accepted a certain margin of departure from the MFN clause, in particular as justified by the Enabling Clause,[670] but a specific waiver will still be necessary, such as the one given for the GSP.[671] A waiver was then required by the EU and granted in December 1994 for five years,[672] although it did not cover a derogation to every WTO obligation.[673] Because the waiver also applied to the EU banana regime, the US and other states challenged the validity of the waiver and obtained a victory before the Panel,[674] which definitely played a role in the progressive move away from preferential treatment.[675] Whatever the reasons, it is clear that the rationale of the Cotonou Agreement was to lock in the EU-ACP relationships a neoliberal reform, 'ensuring the wider compliance of the developing world with multilateral liberalisation'.[676] In this respect, today the special relationship that characterised the EU-ACP has substantially eroded and the SADC group is a trading bloc similar to any other.[677]

While formally unified, the SADC bloc is peculiar in its composition and this has important consequences on the content of the agreement. Indeed, the SADC group comprises 15 states, but

[670] On this point, see the review of negotiations carried out before the Uruguay round, particularly in relation to the relationships with developing countries, in Mariagrazia Alabrese, *Il regime della food security nel commercio agricolo internazionale: dall'Havana Charter al processo di riforma dell'Accordo agricolo WTO* (Giappichelli 2018), 59.

[671] GATT – Decision of the Contracting Parties of 28 November 1979, 26S203.

[672] L/7604, 19 December 1994, GATT secretariat.

[673] The waiver did not grant a derogation to the respect of GATT Articles XI and XIII and the waiver from GATT Article I came with the condition that preferences were only granted 'to the extent necessary', which in the WTO system is to be interpreted restrictively.

[674] WTO Appellate Body Report, European Communities – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, adopted 25 September 1997, 591. In this case, the Appellate body found that the preferential treatment granted by the EU to the ACP countries since 1975 for their export of bananas to Europe was distorting the competition and indirectly damaging the US economy. cf Simon A B Schropp and David Palmeter, 'Commentary on the Appellate Body Report in EC–Bananas III (Article 21.5): Waiver-thin, or Lock, Stock, and Metric Ton?' (2010) 9(1) World Trade Review 7; Roman Grynberg, 'The WTO Incompatibility of the Lomé Convention Trade Provisions' (1998) Asia Pacific School of Economics and Management Working Paper No 98/3, 11 *et seq* <https://crawford.anu.edu.au/pdf/wp98/sp98-3.pdf> accessed 10 July 2019.

[675] Other reasons are merely political and historical, in particular: the oil crises of the 1970s and a collapse in global commodity prices, which dramatically altered the balance of power between the two blocs (see Adrian Flint, 'The End of a 'Special Relationship'? The New EU-ACP Economic Partnership Agreements' (2009) 36(119) Review of African Political Economy 79, 87); the inefficient system of trade relations based on the Lomé Convention, which failed to bring the desired economic advantages to the ACP group and the EU, which in turn wanted to keep its position as main importer and exporter of the ACP region, especially in an anti-Chinese perspective (see Małgorzata Czermińska and Joanna Garlińska-Bielawska, 'The Pros and Cons of the Economic Partnership Agreement (EPA) for the Southern African Development Community (SADC) in the Context of Member States' Trade Relations with the European Union (EU)' (2018) 23(1) Central European Review of Economics & Finance 69, 74); finally, it was observed that 'the end of the Cold War meant additional uncertainty regarding the continued willingness of foreign donors to provide essential resources to an organisation, which depended for up to 90 per cent of its budget on external funding, yet had lost its geostrategic importance'. (cf Tobias Lenz, 'Spurred Emulation: The EU and Regional Integration in Mercosur and SADC' (2012) 35(1) West European Politics 155, 162).

[676] Alex Nunn and Sofia Price, 'Managing Development: EU and African Relations through the Evolution of the Lomé and Cotonou Agreements' (2004) 12(4) Historical Materialism 203, 219.

[677] On the essence of EU-SADC relationship, see Johannes Muntschick, *The Southern African Development Community (SADC) and the European Union (EU): Regionalism and External Influence* (Palgrave Macmillan 2018).

only 7 of them engaged in the EPA with the EU: Angola (as an observer), Mozambique, Lesotho, Swaziland, Namibia, Botswana and South Africa. It is clear at first sight how differentiated such group is in terms of economic development, political priorities and disparity of objectives.[678] At one extreme, LDCs such as Lesotho and Mozambique, previously under the EBA regime,[679] move towards the loss of any tariff-derived income, with uncertain gains in exchange; at the other extreme, South Africa's prominent role determines at the same time a threat for regional integration and promising opportunities for regional development.[680] On this point, it was argued that due to the different priorities for industrial policy amongst the SADC EPA group there was a fragmentation that affected the group's negotiating capacity and coherence of action vis-à-vis the EU.[681]

The result of all this on the text was a substantial opening to reciprocal market access, although not full. The EPA gave rise to duty-free and quota-free access to the EU market for virtually all goods for Botswana, Lesotho, Mozambique, Namibia and Swaziland. The latter group, in turn, in spite of extensive liberalisation, excluded most of agricultural products, still considered as sensitive. As a result, while such countries enjoy full duty-free and quota-free access to the EU, they opened only 85 % of their tariff lines vis-à-vis the EU. For South Africa, liberalisation was furthered by reference to the previous agreement between the EU and South Africa for selected agricultural products and on the basis of TRQs, but South Africa does not enjoy full duty-free, quota-free access

[678] Dimpho Motsamai, 'SADC 2014–2015: Are South Africa and Zimbabwe Shaping the Organisation?' (2014) Pretoria Institute for Security Studies - Policy Brief No 70 <https://webcache.googleusercontent.com/search?q=cache:NiuiOa4YN6sJ:https://www.files.ethz.ch/isn/185878/PolBrief70.pdf+&cd=1&hl=it&ct=clnk&gl=be accessed> 11 July 2019.

[679] As briefly mentioned in §3.1.2., Everything but Arms is a trade scheme launched by the EU establishing duty-free and quota-free for all imports to the EU from the LDCs, except for armaments, as part of the WTO-led initiative to support such countries. cf Sheila Page and Adrian Hewitt, 'The New European Trade Preferences: Does 'Everything But Arms' (EBA) Help the Poor?' (2022) 20(1) Development Policy Review 91; Gerrit Faber and Jan Orbie, 'Everything But Arms: Much More than Appears at First Sigh' (2009) 47(4) Journal of Common Market Studies 767.

[680] Lisa Borgatti, 'Economic Integration in Sub-Saharan Africa' in Miroslav N Jovanović (ed), *International Handbook on the Economics of Integration – Volume I* (Edward Elgar Publishing 2011) 457, 471. It is worth noticing that the previous agreement between the EU and South Africa (Agreement on Trade, Development and Cooperation between the European Community and its Member States, on the one part, and the Republic of South Africa, on the other, signed 11 October 1999, in force 1 May 2004) is not entirely replaced by the EU-SADC EPA. The latter agreement, at Article 111, provides that the relationships between the two instruments are governed by Protocol 4 to the EU-SADC EPA.

[681] In scholarship, this was explained as due to the stark opposition between the sector-based industrial policy of South Africa, which aims to use financial incentives and tariff reforms to trigger industrial development and export diversification, and the struggle of the other small states to liberalise import tariffs and diversify trade and investment. See Peter Draper and Nkululeko Khumalo, 'The Future of the Southern African Customs Union' (2009) 8(6) Trade Negotiation Insights <https://www.ictsd.org/bridges-news/trade-negotiations-insights/news/the-future-of-the-southern-african-customs-union> accessed 6 February 2019. It was then added that small states were simply caught between the EU and South Africa in an agreement that highlighted the very low level of political and economic integration of the region. See Brendan Vickers, 'Between a Rock and a Hard Place: Small States in the EU–SADC EPA Negotiations' (2011) 100(413) The Round Table 183, 194.

to the EU.[682] At the same time, the agreement is quite generous in according safeguard clauses, also in the agricultural sector.[683]

While there is significant literature on the political and economic consequences of the agreement on the SADC EPA group, at the time of writing nothing has been researched as regards the impacts of this EPA on environment and in particular sustainable agriculture.

The TSD chapter comprises Articles 6 to 11 of the agreement. Notwithstanding the peculiarity of the EPA and the heterogeneity of its EU counterparts, the TSD chapter seems structured following the 'regular' line and content of 'new-generation' EU FTAs. Therefore, as usual the main worry is to find a compromise between the fear that one party is tempted to gain competitive advantage by lowering environmental standards and, on the other hand, the other fear that one party uses environmental standards as a disguised form of protectionism. Compared to the EU-Chile AA, here the three dimensions of sustainable development are all present and are explicitly mentioned.[684] Article 7(1) contains a strong political commitment, since '[t]he Parties reaffirm that the objective of sustainable development is to be applied and integrated at every level of their economic partnership'. This could have a normative effect while interpreting the agreement, but it is more framed as a political slogan and therefore an actual normative effect in practice is unlikely. Article 8(2) reiterates the commitment to implement MEAs that the parties have already ratified, thereby not that of moving forward the already existent baseline. Article 9 contains the 'right to regulate' in rather standard terms. In this connection, Article 9(2) sounds totally superfluous, since it cannot be seen how the recognition of importance of 'protection as afforded in […] environmental laws' may have any meaningful normative impact, particularly through such an ambiguous formulation.[685] Article 9(3), more than to ensure the respect of environmental laws, seems rather justified by the intention to open the door to their violation in the name of trade enhancement. In fact, it provides that '[r]ecognising that it is inappropriate to encourage trade or investment by weakening or reducing domestic levels of […] environmental protection, a Party shall not derogate from, or persistently fail to effectively enforce, its environmental […] laws to this end'. Read the other way

[682] As a result, access to the EU market for South Africa's products increased from 95 % to 99 % by virtue of the EU-SADC EPA. cf Małgorzata Czermińska and Joanna Garlińska-Bielawska, 'The Pros and Cons of the Economic Partnership Agreement (EPA) for the Southern African Development Community (SADC) in the Context of Member States' Trade Relations with the European Union (EU)' (2018) 23(1) Central European Review of Economics & Finance 69, 79.
[683] EU-SADC EPA, Article 35. More generally, every time a safeguard clause is provided, the agreement refers to it by stating that if, 'as a result of the obligations incurred under the Agreement', a product will enter a country's market 'in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry', the parties are authorised to reintroduce import duties to stabilise the markets.
[684] EU SADC- EPA, Articles 6(2) and 10(1).
[685] The provision says: 'The Parties reaffirm the importance of protection as afforded in domestic labour and environmental laws'.

around, this basically equals saying that any failure to enforce environmental laws in order to encourage trade is allowed, as far as it is not systematic.

Article 11(2) is equally broad in saying that '[t]he Parties *may* exchange information and share experience' (emphasis added) on practical implementation of sustainable development, while Article 11(3) makes clear that 'the Parties *may* cooperate' (emphasis added) in a number of policy areas related to sustainable development and environmental protection (such as CSR, conservation and sustainable use of biological diversity, sustainable forest management and fishing practices). In sum, in addition to the usually lenient wording of TSD chapters, the EU-SADC EPA introduces a *quid* of further 'optionality' for the parties to undertake a consistent path towards sustainable development. In this respect, compared to its predecessors, this TSD chapter can be seen as a step backwards for the integration of environmental considerations outside EU boundaries.

The reasons for the leniency of the TSD chapter can perhaps be better understood if considered in combination with the matter of (still, partly) asymmetric liberalisation and heterogeneous economic development that the agreement brings forward. In fact, from an *a priori* and theoretical point of view, two scenarios may arise as regards the layout of environmental commitments for the SADC EPA countries. The first option would be to provide that every SADC EPA state takes the same environmental commitments, to the same level and extent. In this case, for determination of the regulatory threshold that underpins the commitments, a happy medium amongst the capacity of all countries must be found. The second option would be that every SADC EPA state takes different environmental commitments depending on their capacity. In this case, South Africa should take the lead. Thus, it is worth noting that arrangements for trade in goods are indeed diversified, with different commitments depending on the country. This may lead to thinking that environmental commitments are also differentiated, which would give substance to the principle of CBDR enshrined in climate law (but never recalled in EU FTAs). However, it is clear that the TSD chapter does not provide for any differentiation in this respect. Therefore, a sort of 'balance towards the bottom' is struck, which reflects the capacity of the poorest countries of the SADC EPA group, but does not represent the higher potential of countries – such as South Africa – that could have the instruments to undertake a more ambitious environmental breakthrough in the agricultural sector.

§6.2.2. *Regulatory Cooperation*

In the agreement, apart from SPS- and TBT-related provisions,[686] there is no direct handling of regulatory cooperation. The future progressive development of a framework for regulatory cooperation is provided for at Article 18(2) of the 'Protocol on Trade in Services' to the AfCFTA, but to date no influence on the relations among the SADC EPA group stems from this provision. There is, however, room for developmental cooperation, which finds its source in the Cotonou Agreement.[687] Some of these areas of cooperation are particularly relevant for the agricultural sector, particularly with regard to the diversification, rehabilitation and development of private enterprises; the reinforcement of institutional capacity and effectiveness in triggering substantive policy reforms; the technology and financial transfer; and the development and improvement of infrastructures.[688] The EPA translates this in further, more detailed provisions. As Article 12(1) makes clear, '[t]he Parties commit to cooperating in order to implement this Agreement and to support the SADC EPA states' trade and development strategies within the overall SADC regional integration process. The cooperation may take both financial and non-financial forms'. This certifies that notwithstanding the end of the Lomé Convention's 'special relationship', the SADC EPA group is still recognised as subordinated compared to the EU, which on the contrary is in charge of carrying out their transition to the global economic integration, *inter alia* through conspicuous financing through the European Development Fund. On the one hand, it must be borne in mind that such commitments are not binding and are only the starting point of future talks. On the other hand, even without a 'direct' regulatory cooperation on law-making that applies immediately as of the entry into force of the agreement, such arrangements may produce 'indirect' benefits for sustainable agriculture in the long run. This is certainly the case for cooperation in agriculture which is the object of chapter VII to Part II ('Trade and Trade-related Matters'), which is made up of Article 68 only. The latter provision, in its first paragraph, foresees that '[t]he Parties underline the importance of the agricultural sector to the SADC EPA states for food security, generating rural employment, increasing incomes of farm households, creating an inclusive rural economy, and as a basis for wider industrialisation and sustainable development, as well as to

[686] Articles 51 to 67 essentially reaffirm the commitments taken by the parties within the WTO system and purport to undertake further cooperation to achieve additional convergence in these respects.
[687] In general, the Cotonou Agreement identifies five areas of cooperation: peace building, conflict prevention and resolution, respect for human rights, democratic principles and the rule of law and good governance; involvement of non-state actors in ACP-EU development cooperation; poverty reduction and progressive integration of economic, social, cultural, and environmental issues in all aspects of development; economic and trade cooperation shaping EU-ACP trade relations in global trade; and financial cooperation to ensure that EU assistance to ACP states.
[688] Tebogo B Seleka, 'Challenges for Agricultural Diversification in Botswana under the Proposed SADC-EU Economic Partnership Agreement (EPA)' (2005) BIDPA Working Paper 27, 14 <https://opendocs.ids.ac.uk/opendocs/handle/123456789/3663> accessed 7 February 2019.

contribute to the objectives of this Agreement'. There is a clear link with sustainable development, which reveals that the path is drawn towards a more environmentally sound model. However, as usual for this kind of cooperation, the wording is very generic and does not go in depth regarding the practices that should be adopted to pursue sustainable agriculture.[689] The fact that in some of the SADC EPA states agriculture is no longer the main point of their economy does not mean that there would not be good reasons to undertake such a policy change, particularly in a delicate region such as Southern Africa.[690]

As a result of the above, it can be concluded that in the EU-SADC EPA regulatory cooperation is virtually non-existent. At the same time, economic cooperation directly or indirectly linked to agricultural matters, by virtue of its non-binding and aspirational character, is not likely to spark a sustainability breakthrough in the agricultural sector of the SADC EPA group. While the impact of cooperation activities on sustainable agriculture will depend on the good use that SADC countries make of financial and other technical assistance, the regulatory baseline for sustainable agricultural practices in the agreement is still quite low. This suggests that in order to maximise the effects of trade liberalisation, sustainable development was partially disregarded.

On this point, since trade in goods is liberalised asymmetrically and to different extents depending on each member of the SADC EPA group, the economic impact produced on each of them will vary accordingly.[691] This calls into question the matter of who will benefit from the agreement. According to the Commission, by 2035 each SADC EPA country will benefit from a GDP growth of between 0.01 % and 1.18 %, compared to a no-EPA scenario.[692] However, as regards the *share* of benefits between the EU and the SADC EPA group, views are divergent in scholarship. On the one hand, it was argued that the EPA eventually purports to create foreign investment opportunities

[689] The only indication can be perhaps inferred from Article 16(3) of the EPA, where the parties recognise the importance of geographical indications for sustainable agriculture and rural development.

[690] For example, in Botswana after the discovery of minerals in the 1970's, the importance of agriculture started to decline falling from earlier 70 % to current 2.4 % in terms of contribution to total GDP. However, most of the rural households are still dependent on agriculture for food employment. Moreover, the weakening of the agricultural sector may alter the sustainable flow of rural-urban migration, not to mention the relevance of agricultural products for other sectors, such as manufacturing. cf Tebogo B Seleka, 'Challenges for Agricultural Diversification in Botswana under the Proposed SADC-EU Economic Partnership Agreement (EPA)' (2005) BIDPA Working Paper 27, 3 *et seq* <https://opendocs.ids.ac.uk/opendocs/handle/123456789/3663> accessed 7 February 2019.

[691] For the estimated benefits of the agreement for each SADC EPA country in detail, particularly by reference to a no-EPA scenario, see Małgorzata Czermińska and Joanna Garlińska-Bielawska, 'The Pros and Cons of the Economic Partnership Agreement (EPA) for the Southern African Development Community (SADC) in the Context of Member States' Trade Relations with the European Union (EU)' (2018) 23(1) Central European Review of Economics & Finance 69, 83.

[692] EU Commission, Directorate General Trade, 'The Economic Impact of the SADC EPA Group – EU Economic Partnership Agreement' (2016) <http://trade.ec.europa.eu/doclib/docs/2016/june/tradoc_154663.pdf> accessed 7 February 2019.

in services in the SADC region, on which EU firms are strong;[693] and that, notwithstanding appearances, the agreement will end up increasing the trade deficit of the SADC EPA group vis-à-vis the EU, undermining local businesses.[694] On the other hand, particularly from a WTO-friendly perspective, it was remarked that although the GDP growth is Southern Africa primarily depends on multilateral liberalisation, an agreement with a big economic player such as the EU represents a step towards that goal;[695] and that SADC EPA countries can draw on benefits that are exclusive to them and not to the EU (such as more safeguards to protect domestic markets and derogations from agreed rules), which testifies to the strong developmental character of the agreement.[696]

This tension is relevant for our purposes because the EU could have been politically and economically strong enough to equally 'impose' its *acquis* in the pursuit of sustainable agriculture. The fact that this did not happen can perhaps be explained simply by the fact that to a certain extent EU commercial benefits precisely derive from the fact that SADC products are produced cheaply and follow lower environmental standards. At the same time, it may also be pointed out that the end of the 'special relationship' embedded in the Lomé Convention *de facto* frames the SADC EPA group as a more 'horizontal' partner compared to the EU in terms of economic development. This, in turn, would suggest a substantive upgrade in the capacity of the members of the group to make environmental commitments. In fact, the more its political and economic capacity is effective and allows the group to affirm its priorities in negotiations, the more it becomes legitimate to expect ambitious efforts to restore each country's agricultural sector towards sustainable patterns. Whatever the truth is of the share of benefits, only time will tell. However, the weak efforts made to 'set the bar higher' in terms of regulatory convergence on environmental standards appears difficult to justify on the basis of the political and economic divide between the parties.[697] In fact, in spite of the discrepancies, both appeared capable of undertaking more ambitious commitments, though of

[693] Stephen R Hurt, 'The EU–SADC Economic Partnership Agreement Negotiations: 'Locking in' the Neoliberal Development Model in Southern Africa?' (2012) 33(3) Third World Quarterly 495, 504.
[694] Alfredo C Robles Jr, 'EU FTA Negotiations with SADC and Mercosur: Integration into the World Economy or Market Access for EU Firms?' (2008) 29(1) Third World Quarterly 181, 194.
[695] Alexander Keck and Roberta Piermartini, 'The Economic Impact of EPAs in SADC Countries' (2005) WTO Staff Working Paper No ERSD-2005-04, 36 <https://www.wto.org/english/res_e/reser_e/ersd200504_e.doc> accessed 7 February 2019. In order to assess the effects of the agreement, the authors used empirical simulations obtained with a Computable General Equilibrium model.
[696] Gijs Berends, 'What does the EU-SADC EPA Really Say? An Analysis of the Economic Partnership Agreement between the European Union and Southern Africa' (2016) 23(4) South African Journal of International Affairs 457, 468; Peter von Ahn and Leo Willman, 'The EU-SADC Economic Partnership Agreement: Reciprocity or Proportionality?' (2015) Master Thesis – Umeå Universitet <http://umu.diva-portal.org/smash/get/diva2:902928/FULLTEXT01> accessed 8 February 2019.
[697] On the general problem of enforcing regulatory cooperation, see Kal Raustiala, 'Compliance & Effectiveness in International Regulatory Cooperation' (2000) 32(2) Case Western Reserve Journal of International Law 387.

course, to different extents. Without adequate countermeasures, the consequences of trade liberalisation on the SADC EPA group can end up being dire.[698]

§6.2.3. *Enforcement Mechanisms*

Articles 100 to 103 of the agreement are dedicated to the institutional set-up. There are indeed only four provisions, which is already significant *per se* regarding the 'institutional thinness' of the agreement. The structure is quite classic. A Joint Council will oversee and administer the implementation of the agreement.[699] Without prejudice to the functions of the Council of Ministers defined in Article 15 of the Cotonou Agreement, the Joint Council exerts the type of functions that are generally attributed to the highest treaty body, particularly vis-à-vis monitoring activities and review of progress in the implementation of the agreement. Remarkably, amongst those is the duty to 'monitor and assess the impact of the cooperation provisions of this Agreement on sustainable development'.[700] As a structural deficiency of EU FTAs, the Joint Council does not have strong follow-up powers to enforce poor implementation and to set a remedy for deficiencies detected in its monitoring activities. At most, it can provide periodic reports on the operation of this Agreement to the Council of Ministers.[701] While such Council of Ministers, set up at Cotonou Agreement level, is empowered to adopt binding decisions, the latter are only taken 'by common agreement of the Parties'.[702] This is symptomatic of the issues at stake which will be mostly resolved politically and that without the agreement of the parties it will be very unlikely to remedy even severe deficiencies in the implementation by virtue of intervention of the treaty bodies. According to Article 103, a Trade and Development Committee is set up to assist the Joint Council. It is the classic 'intermediary' body between the highest treaty body and the special committees. Compared to the other 'new-generation' EU FTAs, there is no 'Trade and Sustainable Development Committee' (or similar body) to preside over implementation of the TSD chapter, since the corresponding functions are indeed assigned to the Trade and Development Committee. This may be a handicap, as the Trade and Development Committee may be less specialised in TSD-related issues. At the same

[698] Taking the example of Botswana, it was observed that through the reduction of external tariffs and the removal of quantitative import restrictions, small-scale farming units will be decimated and this will worsen the situation of poverty and unemployment in the country. See Tebogo B Seleka, 'Challenges for Agricultural Diversification in Botswana under the Proposed SADC-EU Economic Partnership Agreement (EPA)' (2005) BIDPA Working Paper 27, 11-12 <https://opendocs.ids.ac.uk/opendocs/handle/123456789/3663> accessed 7 February 2019.
[699] EU-SADC EPA, Article 100.
[700] ibid Article 101(3)(f).
[701] ibid Article 101(4).
[702] Cotonou Agreement, Article 15(3).

time, limits on the proliferation of sub-committees may foster better coordination in the carrying out of the implementation tasks.

The procedural relevance of civil society mechanisms is not sufficient to bridge the gap of the absence of a special committee in the TSD chapter. Article 10(3) provides that '[d]ialogue and cooperation on this Chapter by the Parties, through the Trade and Development Committee, *may* involve other relevant authorities and stakeholders' (emphasis added). This provision says two things. First, the participation of such 'other relevant authorities and stakeholders' is only optional; second, civil society mechanisms are not mentioned at all. This may be a strong drawback for NGOs set on protection of the environment and indigenous peoples' rights, which are definitely active in Southern Africa, though still scarcely represented.[703]

While the institutional set-up is not a guarantee of enhancement of sustainable agriculture, it is a matter of fact that the EU managed to 'export' a consolidated approach vis-à-vis institutional arrangements that can be found in similar terms in the vast majority of EU FTAs.[704] However, being able to 'impose' institutional patterns does not also entail being able to do so with *substantive* environmental standards. While the former are a key component to ensure – *inter alia* – the implementation of environmental provisions, such arrangements also constitute a separate, 'internal' dynamic of FTAs as such. The inclusion of sustainability standards also follows different dynamics, more complex than the capacity of the EU to simply ensure diffusion of its preferred institutional models, which in the end are nothing more than a safeguard for survival of the agreements themselves.

The same attempt to export EU-like systems in the SADC context can also be seen with regard to dispute settlement. In order to gain credibility vis-à-vis the EU, the SADC region progressively emulated its judicial court system until the foundation of the SADC Tribunal.[705] Although the latter is not competent for issues rising from the EPA, the same rationale can perhaps be retained for the establishment of a DSM in the agreement, provided by Articles 79 to 87. This mechanism replicates – *mutatis mutandis* – the scheme of the regular DSM seen in the other agreements analysed so far, particularly in terms of dispute avoidance, dispute settlement, reasonable time to comply with the

[703] Crawford Young, 'In Search of Civil Society' in John W Harbeson, Donald Rothchild, and Naomi Chazan Boulder (eds), *Civil Society and the State in Africa* (Lynne Rienner 1994).
[704] According to an author, this diffusion of EU models for institutional provisions in FTAs is most likely to occur with commercial partners affected by serious regional crises. See Tobias Lenz, 'Spurred Emulation: The EU and Regional Integration in Mercosur and SADC' (2012) 35(1) West European Politics 155, 169.
[705] ibid 164-165. More generally, on this point see Karen J Alter, 'The Global Spread of European Style International Courts' (2012) 35(1) West European Politics 135; Oliver Ruppel and Francois Bangamwabo, 'The SADC Tribunal: A Legal Analysis of its Mandate and Role in Regional Integration', in Anton Bösl *et al* (eds), *Monitoring Regional Integration in Southern Africa Yearbook* (Tralac Publishing 2008), 179.

ruling and the reaction to non-compliance. The observations previously made are to be reaffirmed. Indeed, DSMs are designed in line with the patterns of market liberalisation pursued by the agreements and to a large extent in order to ensure their credibility.[706]

However, it may be worth noting that the agreement constitutes an upgrade by comparison with the arrangements in this regard enshrined in the previous agreement between the EU and South Africa, where dispute settlement provisions are definitely more lenient. This is presumably due to the same process of emulation that the SADC group has undertaken as regards EU-like structures. As a result, this FTA has the merit of raising the standards in this regard (at least) to the level of 'new-generation' EU FTAs. Moreover, it should be noted that the AfCFTA has a dedicated 'Protocol on Rules and Procedures on the Settlement of Disputes' that will add an additional layer of thickness to the institutional and judicial settings available for the SADC EPA countries. While the latter setup will not have a direct impact over the DSM system of the EU-SADC EPA, its jurisprudence in the two DSM bodies may trigger interlinkages, potentially in mutually reinforcing terms.

The TSD chapter is not subject to any DSM, but provisions included therein may only form the object of consultations with the Trade and Development Committee and with the other party.[707]

§6.3. The Free Trade Agreement between the EU and Vietnam (EVFTA)

§6.3.1. *Presentation of the Agreement and TSD Chapter*

The EU-Vietnam FTA (EVFTA) is, at the time of writing, the latest FTA negotiated by the EU with a third country, though still not in force.[708] Regardless of future steps, the text at the time of the signature (30 June 2019) is remarkable in many respects. On the one hand, it is the most recent EU

[706] This view is brought forward by James Smith, 'The Politics of Dispute Settlement Design: Legalism in Regional Trade Pacts' (2000) 54(1) International Organization 137.
[707] EU-SADC EPA, Article 10(2).
[708] The deal is made up of two separate agreements: FTA between the EU, on the one part, and the Socialist Republic of Viet Nam, on the other, signed 30 June 2019, not yet in force; and Investment Protection Agreement between the EU and its Member States, on the one part, and the Socialist Republic of Viet Nam, on the other, signed 30 June 2019, not yet in force. As clarified on the website of the EU Parliament, 'to enable the provisions on free trade to come into force as quickly as possible, the Commission decided to split the original text into two parts, an FTA which includes only exclusive EU competences and can therefore be ratified relatively quickly by the EU alone, and a separate Investment Protection Agreement. The two texts were adopted by the European Commission on 17 October 2018 and submitted to the Council of the EU on 12 November'. cf <http://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-eu-vietnam-fta> accessed 26 September 2019. The framework of EU-Vietnam relations, as far as relevant for this paragraph, is completed by the Framework Agreement on Comprehensive Partnership and Cooperation (PCA) between the European Union and its Member States, on the one part, and the Socialist Republic of Viet Nam, on the other, signed 27 June 2012, in force 1 October 2016.

FTA ever negotiated with a developing country; on the other hand, there is evidence that the environmental dimension of the agreement is particularly complex and merits in-depth analysis.

As a preliminary remark, the agreement should be considered in the light of Vietnam's recent economic developments as an emerging market.[709] However, while the EU GSP system currently in place with Vietnam is destined to end when an FTA enters into force,[710] the persisting fulfilment of the criteria for this programme by Vietnam testifies to the economic and social gap between the two parties. Currently, the EU and Vietnam seem to have perfectly matching economic profiles and the steady increase in trade flows between the two countries demonstrates it.[711]

As with every FTA, the EVFTA purports to bring further trade liberalisation, by contributing to enhancing market access and removing tariffs from the vast majority of goods, although such a liberalisation will start more 'cautiously' for Vietnam, with transition periods of up to 10 years for full liberalisation of EU products in its territory.[712] It is estimated that Vietnam will see its real GDP

[709] On the political strategy of Vietnam in the international trade arena, see Sophie Deprez, 'The Strategic Vision behind Vietnam's International Trade Integration' (2018) 37(2) Journal of Current Southeast Asian Affairs <https://journals.sagepub.com/doi/full/10.1177/186810341803700201> accessed 16 July 2019.

[710] Confindustria, 'Free Trade Agreement EU-Vietnam: analisi e osservazioni' (2015) Position paper, 15 <http://www.aib.bs.it/Allegati/2015/wdm_doc_allegati_57858_allegati.pdf> accessed 21 February 2019. In principle, the mutual benefits for the parties stemming from the conclusion of an FTA should be clear in that the EU will get preferential access to Vietnamese products and Vietnam will have open access to European products beside those established unilaterally by the EU. cf Delegation of the European Union to Vietnam, 'Guide to the EU-Vietnam Free Trade Agreement' (2016) Policy paper, 23 <http://eeas.europa.eu/archives/delegations/vietnam/documents/eu_vietnam/evfta_guide.pdf> accessed 21 February 2019.

[711] It was found that '[t]he total trade value between the partners has almost quadrupled in the past ten years, increasing from 7.6 billion euros to 28.3 billion euros between 2004 and 2014. Out of this amount, 22.1 billion euros of imports were from Vietnam into the EU and 6.2 billion euros of exports from the EU to Vietnam'. See Free Trade Association, 'EU-Vietnam Free Trade Agreement: Status Report' (2016) FTA Insight, 2-3 <https://www.amfori.org/sites/default/files/FTA%20Insight%20-%20EU-Vietnam%20trade%20agreement%20-.pdf> accessed 21 February 2019. On the effects of the Agreement on EU Economy, see also Marek Maciejewski, 'EVFTA Agreement (between the EU and Vietnam). An Opportunity for the Development of Polish Export' (2015) 413 Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu 73; for the effects of the agreement on Vietnam, particularly on pharmaceutical products, see Huong Thanh Vu, 'Assessing Potential Impacts of the EVFTA on Vietnam's Pharmaceutical Imports from the EU: an Application of SMART Analysis' (2016) 5 Springer International Publishing 1503.

[712] About 99 % of the tariffs are removed, where for goods partially liberalised zero-duty TRQs are established. The path through liberalisation is however differentiated for the EU and for Vietnam, since the latter will start with a 65 % liberalisation on EU products (the rest planned to be eliminated over 10 years), while the former will liberalise all its import duties in 7-year time. cf Free Trade Association, 'EU-Vietnam Free Trade Agreement: Status Report' (2016) FTA Insight, 4 <https://www.amfori.org/sites/default/files/FTA%20Insight%20-%20EU-Vietnam%20trade%20agreement%20-.pdf> accessed 21 February 2019.

increase by 8.1 %,[713] although the extent of the benefits for Vietnam stemming from the agreement will, of course, depend on its capability to overcome its major challenges at internal level.[714]

However, these broad efforts that Vietnam is supposed to make in order to achieve high trade liberalisation are not without impact on the protection of its natural resources. Agricultural production fostered by the agreement may increase pollution, use of pesticides and fertilizers, emissions adversely affecting water and air quality, let alone overexploitation of forests. To make matters worse, research showed that the 'legal framework for environmental management and protection consists of an impossible tangle of laws, decrees and circulars that are not only inconsistent but also, and here remains the main challenge, hardly implemented or enforced'.[715] In this connection, a study conducted by ECORYS concludes that, while the final outcome will depend on a number of developments, on balance negative environmental effects resulting from the FTA, in particular with respect to industrial emissions, will likely be predominant.[716]

However, it cannot be said that the agreement does not contain a complex environmental structure to react to this.[717] As usual, the TSD chapter contains two kinds of provisions. On the one hand, there are rules to protect, directly or indirectly, the environment; on the other hand, there are others that pave the way for subsequent cooperation on environmental matters. First of all, it is important to stress that Article 13.1(3) underlines the three dimensions of sustainable development, including thus the environmental one missing from the EU-Chile AA (see *supra*, §6.1.1.); it is also stressed

[713] Tomoo Kikuchi, Kensuke Yanagida, Huong Vo, 'The Effects of Mega-Regional Trade Agreements on Vietnam' (2018) 55 Journal of Asian Economics 4, 15.

[714] An author identified, as main challenges for Vietnam to make the most of the agreement, the need to put in place more efficient mechanisms to support business; better preparation for FTA implementation; improvement of enterprises competitiveness; and amelioration of cooperation between Vietnamese enterprises. The author also underlines that, beside the opportunities, a key task for Vietnam will be to face external pressures on the domestic market. See Nguyen Binh Duong, 'Vietnam-EU Free Trade Agreement: Impact and Policy Implications for Vietnam' (2016) Foreign Trade University (FTU), Working Paper No 07/2016, 20 *et seq* <http://seco.wti.org/media/filer_public/ad/81/ad812dd7-54e1-4a02-93d0-e0e1fdbec68d/working_paper_no_7_2016_duong.pdf> accessed 21 February 2019. See also the historic review on Vietnamese trade carried out in Philip Abbott, Jeanet Bentzen and Finn Tarp, 'Trade and Development: Lessons from Vietnam's Past Trade Agreements' (2009) 37(2) World Development 341.

[715] Heidi Stockhaus, 'The EU-Vietnam Free Trade Agreement – A Successful Attempt to Protect Vietnam's Environment While Pushing for Economic Integration?' (2017) 14 Journal for European Environment and Planning Law 208, 210.

[716] ECORYS, 'Trade Sustainability Impact Assessment of the FTA between the EU and ASEAN' (2009) Final Report Volume I – Main Findings and Recommendations, TRADE07/C1/C01 – Lot 2 <ec.europa.eu/smart-regulation/evaluation/search/download.do?documentId=3986> accessed 21 February 2019.

[717] See the analysis on the impact of the agreement on Vietnam, including a part on sustainable development, carried out by Nghiêm Xuân Khoát and Laura Mariana, 'The EU-Vietnam Free Trade Agreement (EVFTA): Opportunity and Challenges for Vietnam' (2019) 8(2) Ecoforum Journal <http://www.ecoforumjournal.ro/index.php/eco/article/view/967> accessed 18 July 2019; Bernard Tröster *et al*, 'Combining Trade and Sustainability? The Free Trade Agreement between the EU and Vietnam' (2019) Policy Note, Austrian Foundation for Development Research (ÖFSE) No 29/2019 <https://webcache.googleusercontent.com/search?q=cache:NubZ1aFd0PoJ:https://www.econstor.eu/bitstream/10419/192973/1/1048633047.pdf+&cd=27&hl=it&ct=clnk&gl=be> accessed 18 July 2019.

that the three of them are 'mutually reinforcing' and therefore on the same level. Beside the standard formulation of the right to regulate in Article 13.2, Article 13.3 ('Upholding Levels of Protection') is very similar to CETA, with the difference that here there is no definition of 'environmental law'. It is therefore harder to identify the scope of the provisions in question. Compared to CETA, it adds a fourth paragraph according to which '[a] Party shall not apply environmental […] laws in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties or a disguised restriction on trade', on the same line of the other case studies examined hitherto. As usual, the implementation of MEAs is limited to those to which the EU and Vietnam are already a party, thus not adding anything to the existing regulatory baseline.[718] Instead, the layout of climate change is much richer in this agreement than in any other analysed so far, even by comparison with the allegedly 'avant-garde' CETA. Article 13.6(1) sets out that '[t]he Parties shall cooperate on the implementation of the UNFCCC, the Kyoto Protocol and the Paris Agreement. The Parties shall, as appropriate, cooperate and promote the positive contribution of this Chapter to enhance the capacities of the Parties in the transition to low greenhouse gas emissions and climate-resilient economies, in accordance with the Paris Agreement'. It must be noted that this statement falls under the second category of TSD-chapter provisions, since no pledge to reduce Vietnam's impact on GHG is made through the agreement. However, the importance of this political commitment is not to be underestimated given the delicacy of the debates surrounding climate negotiations. A proof of the increasing unavoidability of the link between trade agreements and the commitments of EU commercial partners towards the combat against climate change is given by the recent Council Decision according to which 'negotiating directives for the Transatlantic Trade and Investment Partnership (TTIP) [between the EU and the US] must be considered obsolete and no longer relevant'.[719] In fact, the Decision also states that '[t]he United States has announced its intention to withdraw from the Paris Agreement on climate change, while the Union seeks the negotiation of deep and comprehensive free trade agreements only with Parties to that Agreement'.[720] The appropriate value of the statement enshrined in the EVFTA can be appreciated if only one thinks that in CETA a developed country like Canada commits to even fewer efforts.[721]

[718] EVFTA, Article 13.5(2).

[719] Council authorising the opening of negotiations with the United States of America for an agreement on the elimination of tariffs for industrial goods 6052/19 of 9 April 2019, Recital 3. The decision not only certifies the withdrawal from the TTIP but thereby authorises the opening of the negotiations for an agreement with the US on the elimination of tariffs for industrial goods.

[720] ibid Recital 2.

[721] In CETA, climate change is mostly disregarded and basically mentioned only *en passant* in Articles 24.12(1)(e) and 24.9(2).

Similar considerations apply to biological diversity. Article 13.7 EVFTA does not set out stringent commitments, the latter being limited to exchange of information and sharing experience, let alone the 'encouragement' and 'promotion' of sustainable practices. The same observations are valid, *mutatis mutandis*, for sustainable forest management and trade and sustainable management of living marine resources and aquaculture products.[722]

Finally, it is important to stress that Article 13.11 recognises the precautionary principle, but unlike the agreement with Ukraine, other principles of EU environmental law are not incorporated in the agreement.

All in all, the approach chosen in the EVFTA is quite all-inclusive in the sense that it covers a great deal of the aspects the consideration of which is fundamental for enhancement of sustainable agriculture. What is particularly remarkable, is that the attention paid to sustainable development in the EVFTA is not lower than in other EU FTAs with countries that are much more equipped economically to face environmental challenges. In the writer's opinion, this demonstrates that the potential, in terms of environmental delivery, that can be reached through the use of TSD chapters is inherently limited. Therefore, once the usual recurrent formulae have been used, there is not much more that can be added to achieve environmental outcomes by means of a TSD chapter. The subsequent step would be to thoroughly review production practices in agriculture (PPMs) but this, as seen above (*supra*, §3.3.2.) is neither legally nor politically straightforward. On the contrary, when the objective of sustainable development is mainly, if not exclusively, pursued through broad and often ambiguous clauses such as those normally used in the TSD chapters, the range between a very stringent TSD chapter and a very lenient one will be rather insubstantial. In fact, in order to agree on such commitments, virtually any commercial counterpart could be fit for purpose, regardless of its regulatory capacity and level of development. That said, in terms of shaping the content of the TSD chapter, this agreement may become a landmark for EU future negotiations. However, overall, the wording of several provisions remains as lenient as usual for TSD chapters and most – if not all – of the rules are self-regulatory measures that in many cases will require the action of private actors to give substance to them. This, in turn, implies a civil society engagement that in Vietnam is simply not present at the moment (see *infra*, §6.3.3.). As already seen, this soft, bottom-up model reflects some EU convictions on development, foreign and trade policy, but it

[722] EVFTA, Articles 13.8 and – respectively – 13.9.

must be recalled that the outcomes attained by the US with a much more 'conditional' approach are not less satisfactory.[723]

§6.3.2. *Regulatory Cooperation*

Unlike CETA (but similar to the EU-South Korea FTA), the EVFTA does not have a chapter dedicated to regulatory cooperation. For the environment, this is not *per se* something positive or negative – it depends on the specific circumstances of the case. Moreover, this does not exclude that future developments on regulatory cooperation are triggered *indirectly*.[724]

First of all, to ensure that the Parties retain their right to adopt and enforce environmental protection measures, the EVFTA incorporates relevant clauses from WTO law that allow countries to make exceptions justified by the right to adopt or enforce measures aiming at protecting the environment: GATT Article XX, as well as Articles 2.2 and 5.4 TBT Agreement. As a result, by virtue of GATT Article XX, furthering environmental protection may justify an exemption from the requirements of chapter 2 ('National Treatment and Market Access for Goods').[725] Likewise, Articles 2.2 and 5.4 TBT Agreement are recalled on several occasions in chapter 5 of the EVFTA ('Technical Barriers to Trade').

Second, development cooperation is made necessary by the need to adjust some of the side-effects of the agreement (for example, unemployment stemming from pressure on domestic market, revenue losses due to tariff reduction and so forth), but also to give substance to some of the commitments made in the TSD chapter. To this end, chapter 16 ('Cooperation and Capacity Building') mentions, amongst the areas within which the parties commit to cooperate, 'sustainable development, in particular in its environmental […] dimensions',[726] as well as 'trade-related aspects

[723] On the specific point of labour (extendable by analogy to environment), it was argued that '[…] in the now suspended TPP, […] the bilateral labor chapter negotiated with Vietnam obliged the parties to meet certain labor standards before the agreement would come into effect. While this 'conditional' approach can potentially strengthen domestic regulations in developing countries, there can be weak implementation and enforcement of those laws. Thus, trade unions and civil society actors become significant players in pressuring governments to uphold the enforcement of reforms'. See Jan Grumiller *et al*, 'The Economic and Social Effects of the EU Free Trade Agreement with Vietnam' (2018) ÖFSE – Austrian Foundation for Development Research, 08/2018 Research Report, 16 <https://webcache.googleusercontent.com/search?q=cache:mce2ECrMnSgJ:https://www.oefse.at/fileadmin/content/Downloads/Publikationen/Studien/8_Vietnam_Study.pdf+&cd=1&hl=it&ct=clnk&gl=be> accessed 22 February 2019.
[724] Emphasis was put by some authors on the pressure put by the EU on Vietnam to adjust its regulatory standards. See Ha Hai Hoang and Daniela Sicurelli, 'The EU's Preferential Trade Agreements with Singapore and Vietnam. Market vs. Normative Imperatives' (2017) 23(4) Contemporary Politics 369.
[725] EVFTA, Article 2.22.
[726] ibid Article 16.2(2)(e).

of agriculture, fishery and forestry'.[727] Though not referred to explicitly in the FTA, sustainable agriculture appears to be covered by the combined reading of such provisions. Moreover, according to Article 16.3, '[t]he Parties agree to cooperate on animal welfare as necessary, including technical assistance and capacity building for the development of animal welfare standards'. Albeit the numerous areas covered, it is rather striking that no practical arrangement seems to have been made in this chapter concerning technical assistance and the provision of financial resources to achieve the proposed objectives. This is even more surprising if one considers that since 1988 a European Trade Policy and Investment Support Programme (EU-MUTRAP) has been already in place.[728]

Third, the FTA contains just a part of the overall framework for cooperation between the EU and Vietnam. As far as is relevant for our purposes, the picture is completed by the above-mentioned EU-Vietnam PCA, whose scope also covers cooperation on the environment and protection of natural resources.[729] The aim of the agreement is to ensure that the parties are kept reciprocally informed on the development of 'trade and trade-related policies such as the agricultural policy […] and environmental policy'.[730] In Article 30 PCA, the parties identify several areas of cooperation in the field of environmental protection and sustainable development, including the protection of soil functions and sustainable land management.[731] Cooperation also involves climate change mitigation and adaptation activities and, more importantly, agricultural practices. Amongst other things, Article 32(1)(f) refers to the 'development of sustainable and environmentally-friendly agriculture and on the transfer of bio-technologies'. While the impact of this statement is, of course, to be seen, it is certain that this provision would provide a legal basis for the development of any kind of sustainable agricultural practices.

More generally, cooperation in these areas may occur at bilateral and multilateral level, including technical assistance and transfer of environment-friendly technologies.[732] This partially fills the gap in the absence of analogous provisions in the EVFTA. The existence *per se* of the EU-Vietnam PCA and the way its provisions on the environment are phrased suggests that the EU strategy to raise commercial partners' standards towards the top follows a bottom-up rather than a top-down

[727] ibid Article 16.2(2)(d).
[728] This lead some authors to conclude that the provisions on development cooperation in EU-FTA are often formulated in the form of 'unenforceable intentions'. See Jan Grumiller *et al*, 'The Economic and Social Effects of the EU Free Trade Agreement with Vietnam' (2018) ÖFSE – Austrian Foundation for Development Research, 08/2018 Research Report, 18 <https://webcache.googleusercontent.com/search?q=cache:mce2ECrMnSgJ:https://www.oefse.at/fileadmin/content/Downloads/Publikationen/Studien/8_Vietnam_Study.pdf+&cd=1&hl=it&ct=clnk&gl=be> accessed 22 February 2019.
[729] EU-Vietnam PCA, Articles 2(g) and 6(d).
[730] ibid Article 12(5).
[731] ibid Article 30(4)(i).
[732] ibid Article 30(5).

approach. Standards are not imposed by means of the conclusion of the FTA or after a transitional period, but incentives are given to undertake cooperation.[733] The problem with this approach is that solutions to improve the third countries' regulatory framework on sustainable agriculture are postponed to a later date, without any binding indications of how or when this cooperation should occur. The risk is twofold. First, the parties may feel more tempted to undertake cooperation only on activities that are trade-enhancing, to the detriment of the others (including environmental measures that are very often costly and as such seldom trade-enhancing). Second, this deferral to a later stage may not be fully compatible with EU Treaty law, which – according to the interpretation brought forward by this work – would require pursuing sustainable development to the same extent within and outside EU boundaries. It is to be noted that (at least) for the period going from the conclusion of the PCA to its implementation, this has not been the case, with free trade being enhanced by virtue of the FTA without sufficient counterweights to foster sustainable development in parallel. That said, the proactivity of Vietnam in seizing the opportunities available under the arrangements on cooperation will play a major role on the final outcomes of the EVFTA and the PCA.

Last but not least, although no standard in agriculture is imposed on Vietnam in conditional terms, it is worth mentioning the case of the so-called 'Green Tech Annex', dedicated to combating NTBs in the renewable energy sector. While this Annex is mostly focused on non-discriminatory treatment and on the respect of international standards, it can be regarded as a good example of incepting European know-how in a context in which otherwise it would have not plausibly been applied. This way, the EU's advanced experience might steer Vietnam towards higher levels of efficiency and performance.

§6.3.3. *Enforcement Mechanisms*

The institutional structure is quite classic and mostly follows the paradigm seen in previous case studies. A Trade Committee exerts all the classic functions of the highest treaty body and in particular manages, oversees and monitors the implementation of the agreement, supervises special committees and establishes new ones (as appropriate) and takes decisions that are binding on the parties.[734] Its function of dispute avoidance is particularly important. Article 17.1(3)(e) contends

[733] It is therefore interesting that, on the contrary, Vietnamese elites see the EU as a stronger promoter of standards in the international trade arena. See Daniela Sicurelli, 'The EU as a Norm Promoter through Trade. The Perceptions of Vietnamese Elites' (2015) 13(1) Asia Europe Journal 23.
[734] EVFTA, Article 17.1.

that the Trade Committee shall 'without prejudice to Chapter 15 ('Dispute Settlement'), seek to solve problems which might arise in areas covered by this Agreement, or resolve disputes that may arise regarding the interpretation or application of this Agreement'. This provision increases the prospects of review and in a way 'thickens' the institutionalism of the agreement, although it must be borne in mind that every decision of the Trade Committee shall be made by mutual consent with the parties.[735] As usual, the FTA puts in place a mechanism to ensure overall coordination between the different levels of the institutional structure governing EU-Vietnam relations. As a result, Article 17.1(5) EVFTA provides that '[t]he Trade Committee shall inform the Joint Committee set up under the Partnership and Cooperation Agreement as part of the common institutional framework on its activities and those of its specialised committees, as relevant, at the regular meetings of the Joint Committee'. The institutional framework of the agreement is completed by five special committees and two working groups, which meet periodically and as appropriate.

The specific institutional framework of the TSD chapter is way more elaborated than in any other agreement seen in this section. Particularly, the comparison with the EU-SADC EPA is striking. First of all, '[t]he Parties shall, jointly or individually, review, monitor and assess the impact of the implementation of this Agreement on sustainable development through their respective policies, practices, participative processes and institutions'.[736] Although it is not clear to what extent the parties' carrying out of their review will be subject to scrutiny, this provision shows a result-based approach that is not always adopted in this regard. Moreover, the Committee on Trade and Sustainable Development is established with the main task of reviewing the implementation of the FTA, also with regard to cooperation activities.[737] The duty to provide technical advice and expertise on the implementation of the chapter is provided by a Domestic Advisory Group that each party has to set up and consult on its own side.[738] If the two parties agree, the two Domestic Advisory Groups can meet together in a Joint Forum, with the possible participation of other stakeholders, selected taking into account economic and social balance.[739] In the Joint Forum progress made in the implementation of the TSD chapter is presented and a report sent to the Committee on Trade and Sustainable Development. On this point, an author commented that the role of Domestic Advisory Groups to influence implementation of environmental provisions is

[735] ibid Article 17.4(3).
[736] ibid Article 13.13.
[737] ibid Article 13. 15(3).
[738] ibid Article 13.15(4). Such Domestic Advisory Groups can also issue pieces of advice and make recommendations to the parties on their own initiative.
[739] ibid Article 13.15(5).

limited.[740] Moreover, the role recognised by the agreement for civil society mechanisms finds a counter-alter in the structural weakness of the same mechanisms, as also acknowledged by the EU Commission.[741] That said, it must be recognised that in spite of the drawbacks this FTA constitutes a step forward compared to the much lower relevance of these mechanisms in the EU-SADC EPA.

This institutional structure for the TSD chapter strongly reminds us of that of the EU-South Korea FTA, although the differences in economic development between South Korea and Vietnam are still remarkable and therefore it is interesting how the thoroughness of the obligations and related institutional structures in this regard tend to be similar. With all the limits that the layout in question may have, at present it would appear that no other EU FTA goes further than the EVFTA in terms of 'thickness' of the institutional framework.

Similar considerations apply with regard to the judicial dimension of the agreement. First of all, there is a general DSM which does not apply to the TSD chapter, but may be of interest in relation to other aspects of the agreement. Other than all the typical features of general DSMs in EU FTAs, here there is also mediation and the possibility for private parties, under certain conditions, to contribute through *amicus curiae* submissions.[742] Other than the state-to-state DSM, the agreement also provides for an ISDS, with the same structure and purpose of that in CETA.[743] In this respect, Vietnam has accepted the EU's approach consisting of the setting up of a permanent tribunal for investments rather than the deferral of the dispute to *ad hoc* panels. This is justified by the greater attention paid to investments by the agreement, where the EU establishes a centralised approach which is opposite to the one followed in the EU-South Korea FTA, where investments keep on being managed at bilateral level by the individual Member States. For environmental protection, this is relevant because despite the high level of protection of the investments assured by Chapter 8 of the EVFTA, Article 8.1(2) contends that 'each Party retains the right to adopt, maintain and

[740] It was remarked that, unlike the EU-South Korea FTA, the Committee on Trade and Sustainable Development does not consider all communications received from the Domestic Advisory Group. cf Lore van den Putte, 'Involving Civil Society in Social Clauses and the Decent Work Agenda' (2015) 6(2) Global Labour Journal 220, 228.

[741] EU Commission, 'Trade and Sustainable Development (TSD) Chapters in EU Free Trade Agreements (FTAs)' (2017) Non-paper of the Commission Services <http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf> accessed 24 February 2019.

[742] EVFTA, Annex 15A, point 40. Annex 15A to the agreement lays down the rules of procedure of the general DSM.

[743] For a comparison between the ISDS of the EVFTA, the CETA and the EU-Singapore FTA, see EU Parliament – Directorate General for External Policies, 'In Pursuit of an International Investment Court: Recently Negotiated Investment Chapters in EU Comprehensive Free Trade Agreements in Comparative Perspective' (2017) Policy Department Study <https://publications.europa.eu/en/publication-detail/-/publication/97eecc0d-6dbf-11e7-b2f2-01aa75ed71a1/language-en> accessed 16 July 2019. See also Elsa Sardinha, 'The New EU-led Approach to Investor-State Arbitration: The Investment Tribunal System in the Comprehensive Economic Trade Agreement (CETA) and the EU-Vietnam Free Trade Agreement' (2017) 32(3) ICSID Review 625. The positive assessment given by the CJEU on the ISDS of the CETA, rendered in Opinion 1/17, seems to eliminate any doubt on the compatibility of this mechanism with EU Treaties even for the one contained in the EVFTA (cf *supra*, §5.1.3.).

enforce measures necessary to pursue legitimate policy objectives such as the protection of the environment'. The fact that in the ISDS the legitimacy of those environmental measures is to be scrutinised has in the past been a sufficient deterrent for not adopting those measures,[744] but the additional nuance added to environmental protection must be registered.[745]

Second, an *ad hoc* DSM is set up in the TSD chapter. If the Contact Point, the Committee on Trade and Sustainable Development and the Domestic Advisory Groups do not manage to find a solution to the dispute through consultations,[746] a party may request that a Panel of Experts be convened to examine the disagreement.[747] The Panel takes a stance 'in the light of the relevant provisions of the Trade and Sustainable Development Chapter' and issues 'reports […] making recommendations for the solution of the matter'.[748] However, it must be borne in mind that due to the aspirational terms of several commitments contained in the TSD chapter, there are only a few obligations that are truly enforceable. Furthermore, the cogent force of rulings of the Panel of Experts is softer here than in the general DSM of Chapter 15, where '[t]he Party complained against shall take any measure necessary to comply promptly and in good faith with the final report'.[749] On the contrary, nothing similar happens in Chapter 13, where at most on the basis of the report of the Panel of Experts, '[t]he Parties shall discuss appropriate actions or measures to be implemented'.[750] At the same time, instead of foreseeing sanctions, the main tools to ensure compliance consist of the submissions from the Domestic Advisory Groups and the Joint Forum to the Committee on Trade and Sustainable Development in order to report non-compliance. On the contrary, as just seen above, relying on the effectiveness of civil society mechanisms can be dangerous in Vietnam even more than elsewhere.[751] This choice may at least to a certain extent be strategic on the side of the EU.[752] On

[744] Simon Terry, 'The Environment under TPPA Governance' (2016) Trans-Pacific Partnership Agreement: New Zealand Expert Paper Series, Expert Paper #4, 11 <https://tpplegal.files.wordpress.com/2015/12/tpp-environment.pdf> accessed 24 February 2019.
[745] On the possible application of the ISDS in the TSD chapter, see *supra* §5.1.3.
[746] EVFTA, Article 13.16.
[747] ibid Article 13.17.
[748] ibid Article 13.17(6).
[749] ibid Article 15.12.
[750] ibid Article 13.17(9).
[751] On the progressive development of cross-sectoral social networks in a non-democratic state such as Vietnam, particularly in the ambits of health and environment, see Andrew Wells-Dang, *Civil Society Networks in China and Vietnam: Informal Pathbreakers in Health and the Environment* (Palgrave Macmillan 2012); Thiem H Bui, 'The Development of Civil Society and Dynamics of Governance in Vietnam's One Party Rule' (2013) 25(1) Global Change, Peace & Security 77; Michael L Gray, 'Creating Civil Society? The Emergence of NGOs in Vietnam' (1999) 30(4) Development and Change 693; Carlyle A Thayer, 'Vietnam and the Challenge of Political Civil Society' (2009) 31(1) Contemporary Southeast Asia 1; Irene Norlund, 'Filling the Gap: the Emerging Civil Society in Viet Nam' (2007) Report <https://webcache.googleusercontent.com/search?q=cache:bTpSc4JSyB8J:https://www.undp.org/content/dam/vietnam/docs/Publications/6810_Filling_the_Gap__E_.pdf+&cd=12&hl=it&ct=clnk&gl=be> accessed 16 July 2019.
[752] To a certain other extent, the reduction of the influence of stakeholders on EU trade negotiations, particularly on human rights, is part of a consolidated trend. See Daniela Sicurelli, 'The EU as a Promoter of Human Rights in Bilateral

this point, it was rightly observed that 'the incentive for Vietnam to avoid a violation of the commitments under Chapter 15 EVFTA strongly depends on the capacity of the domestic advisory groups to make disputes known to a wider public and the interests of civil society to pick up and discuss the topics. The design of the dispute settlement mechanism reflects the European Union's belief that a dialogue – backed up by an *ad hoc* arbitration mechanism and linked with public review – is more likely to achieve progress on environmental issues'.[753] In any event, it must be recalled that at the time of writing experience has shown neither the utilization of consultations nor the accomplishment of DSM procedures provided for in TSD chapters in any EU FTAs.[754]

Lastly, an important development concerning enforcement must be flagged with reference to the relationship between the FTA and the PCA. The EU Commission has clarified that the EVFTA 'does not stand in isolation, but is integrated with the PCA. This ensures a continuous link between political and economic aspects in the relationship between the EU and Vietnam'.[755] Amongst other things, this also implies export of the non-execution clause of the PCA into the context of the FTA. Article 57 PCA allows the parties to take appropriate measures if they consider that one has failed to fulfil any of its obligations under the PCA. In respect of violations of the PCA, the parties can take appropriate measures even in the context of the EVFTA by virtue of the bridge established by Article 17.18(2) of EVFTA.[756] This means that, while 'sanctions' (broadly speaking) are still unknown in the TSD chapter of the FTA, violations of provisions concerning environmental protection and sustainable agriculture as laid down in the PCA may be liable to sanctions that may affect the parties' trade benefits under the EVFTA. Though only partial, such a role played by sanctions vis-à-vis environmental commitments is unprecedented in EU FTAs.

Trade Agreements: The Case of the Negotiations with Vietnam' (2015) 11(2) Journal of Contemporary European Research 230.

[753] Heidi Stockhaus, 'The EU-Vietnam Free Trade Agreement – A Successful Attempt to Protect Vietnam's Environment While Pushing for Economic Integration?' (2017) 14 Journal for European Environment and Planning Law 208, 221-222.

[754] Axel Marx, Franz Ebert, Nicolas Hachez and Jan Wouters, 'Dispute Settlement in the Trade and Sustainable Development Chapters of EU Trade Agreements' (2017) Leuven Centre for Global Governance Studies papers, 26 <https://ghum.kuleuven.be/ggs/publications/books/final-report-9-february-def.pdf> accessed 22 November 2018.

[755] European Commission, 'Commission Staff Working Document: Human Rights and Sustainable Development in the EU-Vietnam Relations with Specific Regard to the EU-Vietnam Free Trade Agreement', Brussels, 26.1.2016 SWD(2016) 21 final, 7.

[756] This provision contends that '[i]f a Party considers that the other Party has committed a material breach of the Partnership and Cooperation Agreement, it may take appropriate measures with respect to this Agreement in accordance with Article 57 of the Partnership and Cooperation Agreement'.

Part C: Summary of Findings

The analysis carried out in Part C enables us to draw some conclusions from each of the three key elements analysed in each case study:

- Every 'new-generation' EU FTA contains a TSD chapter outlining provisions on sustainable development. In some cases, additional provisions on environmental protection are added outside the TSD chapter. In the case of CETA, there is an *ad hoc* chapter on the environment; in the case of the EU-South Korea FTA, provisions on environmental protection are included in the TSD chapter, with equivalent results; in the case of the EU-Ukraine relations, extra rules are enshrined outside the FTA, in the broader framework of cooperation within the Association Agreement. This is also what happens in EU FTAs with developing countries. The EU-Chile AA is a special case, since this agreement is a pre-Global Europe one and does not have a TSD chapter;

- The structure of the TSD chapter is rather common and does not change dramatically depending on the nature of the EU counterpart. A constant presence is the right to regulate, though with some variations between one FTA and another. Generally, this carries with it the attempt to improve existing standards, without however any legal obligation to do so. The case of the EU-Ukraine DCFTA is peculiar, since the presence of the approximation clause may not leave Ukraine totally free to regulate, if it is bound to approximate certain standards. The approximation clause is specific to this DCFTA and marks a stark difference with other agreements, where the parties carefully avoided the imposition of any European standard, referring at most to internationally-agreed ones. That said, the clause ends up being rather vague, particularly due to the lack of a clearly identified *acquis* to approximate the Ukrainian regulatory framework to. This also implies that only in the EU-Ukraine DCFTA there is room to interpret the reference to 'high levels of environmental […] protection' in the light of Article 3(3) TEU, because of the 'approximation structure' of the agreement;

- Only CETA contains a clear and unequivocal no-backsliding clause in environmental protection for the purpose of fostering trade, although even in this case it remains difficult to prove the backsliding in practice. In most of the other cases, the violations of environmental law, in order to be prohibited, must be repeated or systematic. In the case of the EU-SADC EPA, the duty to enforce environmental laws is watered down by ambiguous provisions;

- The commitment to implement and enforce MEAs is also widespread, but in all cases it only refers to agreements to which the EU counterpart is already a party. Therefore, this – so to say – commitment does not bring anything more to the existing regulatory baseline;

- An equally widespread feature concerns the leniency of the wording of the TSD chapter, which consists more of political slogans than binding rules. Moreover, at no time did the parties seem to be aware of the pollution generated by the agreement itself, namely stemming from the increased trade flows fostered by the agreement, which has an effect – *inter alia* – on transportation.

- Only the EU-Ukraine DCFTA clearly incorporated the principles of EU environmental law. The EVFTA recognises the precautionary principle, whereas only a shallow version of the same principle is included in CETA. The EU-South Korea FTA, the EU-Chile AA and the EU-SADC EPA do not explicitly recognise any principle of EU environmental law;

- The EU-Chile AA does not contain a TSD chapter and its environmental dimension is overall weak, since few provisions encompass sustainable development and not in stringent terms. If the Negotiating Mandate ends up leading to a new agreement, this will plausibly come along with *ad hoc* arrangements for the environment, but it is unclear if the benchmark for environmental protection is international standards or an EU *acquis*, though the former is more likely than the latter to occur;

- The treatment of sustainable development in the EU-SADC EPA is particularly shallow, especially by comparison with another agreement with a developing country such as the EVFTA. It is legitimate to think that the weak capacity of some country members of the SADC EPA group pushed the overall ambition of commitments vis-à-vis sustainable development to the bottom despite the fact that some parties – in particular South Africa – were equipped to commit to higher standards. On the contrary, the same differentiation in obligations that the same agreement provides for in many respects relating to trade in goods does not apply for the environment;

- Amongst the agreements with developing countries, the EVFTA has the most elaborated layout for the environment. There are also detailed arrangements on climate change, biodiversity and forest management, though only in cooperative terms and without binding commitments. Overall, the EVFTA does not take environmental protection into account any less than other agreements – even those concluded with developed countries, politically and economically more equipped to take up ambitious environmental commitments;

- The research carried out on every agreement analysed shows that the impact of such FTAs on the environment is likely to be negative. The TSD chapter is not *per se* sufficient to reverse the impact of externalities determined by enhanced free trade;

- As regards regulatory cooperation, in some cases it is directly provided for (like in the CETA and EU-Ukraine DCFTA); in the others there are only indirect effects that can affect the regulatory framework of the EU commercial party by reason of its cooperation with the EU;

- The general regime chosen for trade in goods is equivalence, except for some limited cases. While there is no evidence that equivalence will be used as a form of 'certified mutual recognition', the trade-enhancing spirit of the agreement may result in the temptation to water down the threshold of equivalence in order to optimise trade flows;

- Regulatory cooperation is apparent in a great deal of sectors in CETA, but there is no reason to believe that sustainability of agricultural production in Canada will be positively impacted upon by the agreement. The consideration of EU higher standards was most of the time disregarded and little effort was made to approximate to them. The principle of equivalence can serve a limited purpose in production-related issues;

- Regulatory cooperation is not a significant component of the EU-South Korea FTA, which seems dominated by the idea of stimulating the economy in a country that, in spite of the economic development reached in recent times, does not have a long-lasting status of a developed country. For this reason, the agreement does not have a chapter on regulatory cooperation. In the broader EU-South Korea Common Institutional Framework, there is mainly a vague recognition of the importance of cooperation on trade-related aspects of environmental policy and an indicative list of areas in which cooperation may be pursued. This cooperation is however voluntary in nature due to the lack of sanctions should it not be carried out;

- While for the model of cooperation endorsed by CETA the risk is that a pervasive structure of regulatory cooperation is set up to pursue trade-related benefits to the detriment of environmental protection, for South Korea the issue is rather that of insufficient cooperation on environmentally-related standards;

- In the agreements with developing countries, the solution chosen is closer to the model pursued with South Korea. The EU-Chile AA includes few provisions on regulatory cooperation as such, but some detailed rules (including on the environment and the agricultural sector) are laid down for 'economic cooperation'. The agreement explicitly provides for the concept of sustainable agriculture as autonomous from sustainable development. However, the policy reforms described in

the rest of the Article seem more focused on the restructuring of the agricultural sector as a whole, rather than on the integration of environmental considerations therein. Therefore, beside this pioneering reference, it is unlikely that any environmental improvement in Chilean agriculture has been sparked by the agreement, in spite of the technical assistance that the EU committed to supply to Chile;

- Likewise, in the EU-SADC EPA regulatory cooperation is not explicitly covered, but there is the so-called 'developmental cooperation' – the equivalent of the 'economic cooperation' of the EU-Chile AA. While cooperation in agricultural matters is provided for in detail, this will not be sufficient to trigger a sustainability breakthrough in agricultural production. The impact of these provisions, just like for the other developing country parties to EU FTAs, will mainly depend on the capability of those countries to seize the opportunities given to them by means of the agreements.

- The EVFTA does not have a chapter on regulatory cooperation either – here the equivalent of 'economic cooperation' and 'developmental cooperation' is constituted by the chapter on 'cooperation and capacity building'. Moreover, the framework is completed by the EU-Vietnam PCA, which fleshes out cooperation in several sectors such as the environment, protection of natural resources, sustainable land management and climate change, as well as sustainable agriculture. Just as in the other instances with developing countries and in the EU-South Korea FTA, instead of adopting a 'conditional' approach which would have required the fulfilment of some environmental obligations prior to the entry into force of the agreement or after a transitional period, the EU endorsed a 'bottom-up' approach, the outcomes of which are, however, inherently uncertain. In this way, it cannot be ensured that sustainable development is pursued to the same extent within and outside EU boundaries;

- The EU-Ukraine DCFTA is a totally different story. Regulatory cooperation is very 'deep' and the paradigm followed is harmonisation, rather than equivalence. Although the legal approximation is to be taken gradually and to different degrees following the sector concerned, the agreement is a benchmark for 'deep integration'. Only in this case study was there a proper 'imposition' of EU standards on the EU's commercial partner in question, but this is primarily due to the peculiar geo-political position of Ukraine vis-à-vis the EU and it is therefore difficult to state if this agreement can become a blueprint for future negotiations with neighbouring countries;

- Title V of the EU-Ukraine DCFTA provides for extensive cooperation on agricultural matters, but – in spite of the presence of an approximation clause – implementation of these commitments will not open the door to additional market access and therefore the incentives are lower. The degree of

integration is thus more thorough in chapters covered by market access conditionality (such as TBT, SPS and public procurement). Moreover, there is neither an obligation to approximate, nor reference to the EU legislation which gives substance to the most far-reaching forms of environmental integration in the EU CAP (such as 'greening', cross-compliance and measures to enhance local development under rural policies). If it is true that at the time of the conclusion of the agreement some of these provisions were not yet adopted by the EU CAP, the inclusion of (at least part of) CAP regulations of the previous programming period in the *acquis* would have determined absorption of the current ones when the latter entered into force and repealed the former. That said, it is important to bear in mind that as far as practices that are beneficial to the environment are incepted into agricultural legislation through subsidies instead of 'command-and-control' policies, very few EU counterparts would have the financial means to introduce similar instruments in their domestic frameworks;

- Overall, regulatory cooperation in EU FTAs – whether directly or indirectly pursued – does not represent a guarantee that agricultural production standards of EU counterparts will be improved. Apart from the very specific case of the EU-Ukraine DCFTA, efforts towards 'deep integration' are to date insufficient to expect the integration of EU environmental standards and principles into the third countries' agricultural sectors. In this regard, it must be concluded that the principle of environmental integration (Article 11 TFEU) has so far been just a little more than a political slogan in its external dimension. On the contrary, it was argued that the correct interpretation of EU law should lead to the opposite conclusion;

- With regard to the institutional framework of the FTAs and DSMs, there are definitely fewer divergences amongst the agreements analysed. Generally speaking, there is always the highest treaty body who is in charge of the supervision, general coordination and administration of the agreement. When the FTA is part of a broader framework (such as an Association Agreement), the highest treaty body oversees the whole framework. A treaty body at FTA level exerts tasks delegated to it by the highest treaty body and some others related to monitoring and implementation. While the highest treaty body usually has the power to take binding decisions, this mostly happens by mutual consent with the parties and therefore it is unlikely that the institutional structure of the agreement will ever be sufficient to compel an unwilling party to compliance. This reveals the substantial 'thinness' of the institutionalism of EU FTAs. This is less true for the EU-Ukraine DCFTA, where the characterisation of the agreement in terms of 'deep integration' gives more authority to the institutional treaty bodies;

- Specific committees and sub-committees are established to carry out such tasks for each sectoral area and report to the higher bodies. Amongst these, it is common to have one for the TSD chapter (when this chapter is present). The exception is the EU-SADC EPA, where no *ad hoc* committee is established for the TSD chapter;

- The institutional framework in the EU-Chile AA is similar to that of 'new-generation' FTAs, which suggests that the Global Europe strategy did not touch upon the consolidated structure of the institutional setup. Moreover, the model is rather similar for developed and developing country parties.

- Civil society mechanisms are always recalled, but are on average poorer in developing country parties, mainly due to the weaker capacity of civil society organisations in the developing world. The examples of Chile and SADC countries are emblematic. That said, the FTA can have a say in bolstering the mechanisms. There is, therefore, a significant difference between the void of the EU-SADC EPA and the structured arrangements of the EVFTA;

- Disputes on issues relating to the TSD chapter are not within the scope of the general DSMs provided for by the agreements. On the contrary, *ad hoc* DSMs for TSD chapters are based on consultations and – in case these fail – on the referral of the dispute to a semi-judicial Panel, without proper resort to litigation or use of sanctions. While this scheme is widespread for developed country parties, for developing ones there are variations. The EU-Chile AA does not have such a mechanism, not having a TSD chapter. The EU-SADC EPA only provides for consultations, without the possibility to resort to the Panel of Experts that is otherwise foreseen for the EVFTA. However, to date, there is no evidence, even in the FTAs in which the *ad hoc* DSM of the TSD chapter is more developed, of any use of these mechanisms. This is mainly due to the leniency of several provisions, which are not suitable to display strict normative consequences. Notwithstanding this, the brand-new EVFTA may still become a landmark for future negotiations with developing countries in this regard;

- Every agreement has a general DSM, largely modelled on WTO law, although generally faster and thus more attractive for the parties. In the case of non-compliance with rulings of the Panel, the complaining party may eventually take 'appropriate measures'. In the EU-Ukraine DCFTA, the prospect of the loss of benefits deriving from market access conditionality works as an additional deterrent from non-compliance. Another (political) incentive is Ukraine's strong will to undertake the path towards EU integration. Mechanisms to ensure compliance with the ruling are generally stronger in the general DSM than in the *ad hoc* DSM of the TSD chapter – this is particularly

apparent in the EVFTA, where at most the DSM of the TSD chapter enables the Domestic Advisory Group to make submissions to the Committee on Trade and Sustainable Development in cases of non-compliance;

- An interesting development concerning sanctions must be flagged with regard to the EVFTA. Because of the link between this agreement and the EU-Vietnam PCA, the parties are allowed to take appropriate measures in the ambit of the EVFTA, if they consider that one has failed to fulfil any of its obligations under the PCA. In other words, violations of provisions concerning environmental protection and sustainable agriculture as laid down in the PCA may be liable to sanctions that may affect the parties' trade benefits under the EVFTA. Even in this respect, the EVFTA might become a blueprint for future negotiations;

- CETA and EVFTA provide for an ISDS. While in some respects the ISDS risks undermining the prerogatives of national jurisdictions, Opinion 1/17 rendered by the CJEU on 30 April 2019 certified the legality of this mechanism under EU law. In any event, the ISDS does not have a direct impact on the pursuit of sustainable agriculture. On the contrary, it has been argued that the use of this instrument for disputes related to sustainable development would overall not be advisable;

- The EU-Ukraine AA, other than a general DSM for the DCFTA part of the Association Agreement and another one for the non-DCFTA part, provides for an innovative procedure on legislative approximation, where the CJEU has the final say on the interpretation of the EU *acquis*. This is a fundamental achievement for EU integration and for the uniformity of application of EU law.

- Generally speaking, for the way they are structured practically and for the generally scarce use of DSMs in FTAs, it is to be seen if this tool proves to provide a substantive contribution to the enhancement of environmental obligations under the agreements.

Concluding Remarks and Outlooks

The analysis conducted hitherto enables us to provide a final answer to the fundamental research question of this work, ie whether and to what extent the EU pursues sustainable agriculture in third countries through its FTAs.

First of all, it was noticed how difficult it is already to conceptualise sustainable agriculture in science and to pin it down to a conclusive set of practices to be endorsed by the policy-makers. This resulted in shaping the concept as a corollary of sustainable development. In the Union legal system, there is therefore no official definition of sustainable agriculture, but only its common understanding as the idea of developing agricultural practices which protect the environment while preserving the economic profitability of farmers. In fact, despite being supposed to be the synthesis between economic, social and environmental considerations, the second and third ambits are arguably lagging behind compared to the first one. If this can be said for Europe, it is even more so in the external world and particularly for developing countries, where the paradigm of pure economic growth is still seen as the way out of poverty.

Giving teeth to this broad concept has been as hard as with sustainable development itself. The boundary between its nature of political slogan and that of legal rule is still blurred, both at international and EU level, and it is still unclear as to what extent the principle can be invoked to spread legal effects and compel policy-makers to raise environmental standards in its name. In EU law, although Title III of the TFEU, dedicated to agriculture, does not cite sustainable development in the EU agricultural sector, a bridge is created by Article 11 TFEU, which purports to integrate environmental protection requirements in every policy area. However, the provision is overall structured as an obligation of means and never did the CJEU take the view that the principle could limit the discretion of the EU policy-makers. The fact remains that – regardless of the criticisms of the current CAP (let alone the assessment of the legislative proposal for the future CAP for the period 2021-2027 based on the new ‘delivery model’), the EU’s integration of environmental protection into its agricultural law is arguably unprecedented compared to the rest of the world. In spite of its ‘unofficial’ recognition in EU law, this layout constitutes a *de facto* model for sustainable agriculture. Therefore, if the EU aims at taking the lead in achieving sustainable agriculture on a global scale, EU policy-makers should take the CAP as a bottom line during trade negotiations. In this context, FTAs are a very peculiar instrument that can only be fully understood in an interdisciplinary perspective. Law alone cannot explain everything, but must be mixed with

economic and (geo-)political considerations – not to mention the scientific-agronomic open issues revolving around the concept of sustainable agriculture and its consideration in the agreements. Moreover, the EU – unlike the US – does not have a one-size-fits-all model for FTAs with third countries. However, there are still some recurring patterns influencing negotiations – and thus also having an impact on the configuration of sustainable agriculture. Amongst these, the nature of the counterpart (developed or developing country) was singled out as a factor that may justify the distinction of EU FTAs in the two corresponding categories, identified respectively in Sections V and VI. In fact, at least in principle, one can expect that the fundamental asymmetry between the EU and a developing country gives rise to an agreement which reflects the difference in power bargaining and a limited capacity for developing countries to undertake ambitious environmental commitments. However, while this is true as a general trend, it is not an absolute rule, since some FTAs with developing countries are at least as ambitious as others concluded with developed ones (cf the EVFTA vis-à-vis the EU-South Korea FTA). Moreover, there are other factors that also exert a significant impact on final provisions, such as the fact of trading with a neighbouring country, the type of agreement chosen, the framework of political relations, as well as some sectoral features of the EU commercial partner (in particular: market size, rule stringency and regulatory capacity).

In the end, the final outcome will always depend on the specific circumstances of the case. This complicates somewhat the attempt to give a final answer to the research question of this work. Before asking to what extent environmental considerations *are* provided for in EU FTAs vis-à-vis the agricultural sector, a different question should be preliminarily replied to: to what extent environmental considerations *shall be* provided for in EU FTAs vis-à-vis the agricultural sector?

EU FTAs must be compatible with EU law and particularly with the Treaty provisions on the EU CCP. Within the latter policy, an obligation is established for the EU to pursue sustainable development even in EU external action. This is thus not only the result of the application of the principle of environmental integration (Article 11 TFEU), which also has an external dimension, but also of a number of other Treaty provisions. In this connection, Article 218(11) TFEU gives any Member State, the Council and the Commission the power to obtain the opinion of the Court of Justice concerning the compatibility of the agreement with the Treaties. Therefore, we have called the ‘sustainability test’ the judicial check that the CJEU may (or should?) carry out to assess whether and to what extent sustainable development (and thus sustainable agriculture) were appropriately taken into consideration in the text of the agreement. More generally, what the CJEU needs to judge is whether the EU institutions have been capable of ensuring policy coherence by

virtue of the conclusion of an international agreement. It was argued that there is reason to believe that the EU objectives – including sustainable development – should be pursued with the same level of intensity at internal and external level. On the contrary, reading between the lines of Opinion 2/15 – on the FTA between the EU and Singapore – suggests that the CJEU does not consider that the standards of sustainable development elaborated within the EU legal system should also be taken as a baseline for EU external action. More generally, it does not seem that the 'sustainability test' on FTAs concluded with third countries has ever been conducted at all by the CJEU within its jurisdiction under Article 218(11) TFEU. As a result, the obligations that the Treaties place on the EU to shape the CCP are not considered as an obligation of results and – in case such targets are disregarded in a given FTA – it is likely that no EU-based judicial mechanism will prevent the entry into force of the agreement in question.

In light of the above, contrary to what one might expect, 'deep integration' is not a paradigm that is supposed to trigger the export of a selected *acquis* of EU law to third countries through FTAs. This would only be the case if full harmonisation were undertaken. To a lesser extent, this would also be the case of regulatory convergence (and in theory even equivalence and mutual recognition, if preceded by thorough regulatory convergence undertaken unilaterally at domestic level). In practice, amongst the agreements analysed, only the EU-Ukraine DCFTA shows signs towards that direction – and still, with many controversial points. The other FTAs, especially those embodying the model of the new-generation FTAs, purport to improve environmental standards and most of the time enshrine a significant bulk of efforts (varying from one agreement to the other), but certainly do not push integration to the level of 'depth' indicated above.

It is therefore not surprising that, since EU law as currently interpreted does not require that sustainable development and environmental protection requirements shall be pursued to the same extent internally and externally, this does not happen in practice. A summary of the main findings in the case studies enables us to give substance to this claim.

As far as the TSD chapter is concerned, a suggestion would be that it would not be correct to expect from it more than what it can bring. As clarified by the CJEU in Opinion 2/15 on the EU-Singapore FTA, the provisions in question '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' (emphasis added).[757] Thus, on the one hand, the TSD chapter is supposed to act as a 'fluidifier' in the relationships between trade and environment, but not to raise environmental standards *per se*. On the other hand, the regulatory baseline is always constituted by international standards (and mostly those standards to which the two parties have already committed) and not by the higher standards enshrined in EU law. As a result, the provisions of the TSD chapters, however important in many respects, most of the time do not bring regulatory changes, but rather keep the *status quo*. This is also due to the fact that such provisions are drafted in rather lenient terms and when this is the case it is hard to turn them into binding commitments for the parties. Overall, while the scientific research carried out on every agreement analysed shows that the impact of such FTAs on the environment is likely to be negative, the TSD chapter does not in principle appear *per se* sufficient to reverse the impact of externalities determined by enhanced free trade.

For regulatory cooperation, the picture is more diversified, because in some instances it is dealt with directly with a dedicated chapter (cf CETA), but in most of the others the text of the agreement only wishes to build up a 'platform' for future cooperation between the parties, with no binding commitments to do so. Agricultural sustainable practices, as well as purely environmental considerations, are often provided for in minute detail and would constitute a sufficient legal basis, but this would imply that the parties were willing to undertake such reforms. As a result, there is no export of EU standards to be placed on the third parties within the framework of harmonisation. While the latter is not necessarily advisable in every single situation, it was argued that it is the only regime that would be suitable for substantiating the paradigm of 'deep integration'. On the contrary, the general regime chosen for trade in goods is equivalence, except for some limited cases (once again, mostly concerning the EU-Ukraine DCFTA). While there is no evidence that equivalence will be used as a form of 'certified mutual recognition', the trade-enhancing spirit of the agreement may result in a temptation to water down the threshold of equivalence in order to optimise trade flows. Moreover, and more importantly, the principle of equivalence is meaningful in order to ensure the respect of food safety requirements and more generally standards relating to a *product*; it can, on the contrary, serve only a limited purpose for standards relating to the *production* process as such.

On the institutional framework and the existence of DSMs, their importance was underlined as the 'guardians' of the functioning of environmental provisions of the agreements. Overall, the difference between an FTA and the other types of agreement (including those, such as the EU-Chile

[757] Opinion 2/15 *EU-Singapore Free Trade Agreement* [2017] Digital Reports, para 166.

AA, that were concluded in the pre-Global Europe era) is not clearly defined. In all cases, the institutional structure is similar and hardly ever powerful enough to compel an unwilling party to comply with the agreement. The institutionalism of these agreements is therefore generally 'thin' rather than 'thick'. The role of DSMs goes towards the same direction. While the general DSM provided for in every FTA mostly replicates the blueprint of the WTO DSM and is judicial in nature, in the TSD chapter there are 'softer' *ad hoc* DSMs that are rather inspired by the quasi-judicial model and sometimes just by the diplomatic model (as in the EU-SADC EPA). However, the EU has clearly preferred a bottom-up approach based on incentives to comply rather than a top-down approach revolving around sanctions. The possibility of the parties to take appropriate measures is thus very restricted and essentially limited to the situations in which the party complained against does not respect the ruling of the judicial panel. More generally, it is important to underline the extremely limited use that parties make of DSMs and in particular within the context of the TSD chapter, whose measures – as mentioned above – are often unenforceable. In the end, though essential in nature, DSMs enshrined in the FTAs do not play a major role to defend the environmental dimension of the agreement, even if it may be argued that the fact of having them in is already a sufficient deterrent for the parties in order to avoid non-compliance.

These being the main conclusions to be drawn from our analysis, it may be asked what are the prospects for the future, since negotiations for new EU FTAs are ongoing all over the world. At the time of writing, the most recent step has been the political agreement reached on 30 June 2019 by the EU and Mercosur for a future FTA.[758] Notwithstanding the increased importance of environmental considerations in EU FTAs, the effect of the provisions laid down in this connection is still far from the ability to reverse the negative effects of trade externalities on the environment. Much therefore needs to be done, but it is unlikely that a breakthrough towards the idea of 'deep integration', suggested in this work, will occur in the near future. In this respect, as far as agriculture is concerned, a fundamental line must be drawn between standards relating to the final product and those relating to the production process. As regards the former, FTAs have managed to attain levels of protection that are arguably acceptable and consumers can – though always to a limited extent – at least partly assess them at the moment of purchasing foodstuffs. Therefore, at least in principle, it can be expected that consumers 'review' standards related to products. On the contrary, the agreements are not concerned sufficiently with adjusting agricultural production of third country parties and veering them towards the standards adopted at EU level. However, this sphere is as important as the one relating to the final product, though the final consumer, of course,

[758] See more at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=2039> accessed 26 September 2019.

cannot 'review' it, if not to an extremely limited extent (for instance through certification schemes, purchase of organic products and so forth). On this point, two fundamental observations must be made. First, nothing different from the state of play can occur as far as the principle that the EU should pursue sustainable development to the same extent within and outside EU boundaries is not clearly established in EU law. As seen above, in light of the position taken by the CJEU, this is not likely to happen soon. Second, and equally important, the export of EU agricultural production standards that purport to 'green' the CAP may be problematic for some EU commercial counterparts. Measures such as 'greening', cross-compliance and rural development policies imply drawing on a huge pot of economic resources that are not in the reach of some developing countries. However, in this way European small farmers, although being subsidised, still face very high production costs and their average revenue is below the levels of the economy as a whole.[759] The competition coming from third countries, where production costs are lower (also) by virtue of more lenient regulatory requirements and cheaper supplies, puts strong pressure on these European producers, who risk being overcome by the economies of scale of industrial producers coming from such deregulated countries. Moreover, environmental pollution is transboundary by definition and therefore the sustainability of the agricultural production processes of third countries must be an immediate concern for the EU.

It is hard to foresee future developments of EU FTAs and it is difficult to predict the role played by the EU in the international arena in the near future. The stability and layout of the geo-political situation will play a key role for upcoming negotiations. On this point, the two opposite examples of the US and Japan explain how divergent future scenarios can be. While trade talks with the former for the project of a TTIP seem to be definitively over further to the decision of the EU to withdraw from the negotiations,[760] the latter has just actively promoted a trade agreement with the EU, which entered into force on 1 February 2019.[761]

As far as it is possible to make assumptions on the basis of the analysis conducted hitherto, the state-of-the-art setup does not seem ripe to ensure adequate consideration of environmental protection, both in general terms and in particular in the case of the agricultural sector. However, we can still terminate this study with two optimistic observations, based on the conclusions drawn

[759] cf, for the most recent data in this regard, the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions the Future of Food and Farming, COM(2017) 713 final.
[760] Council authorising the opening of negotiations with the United States of America for an agreement on the elimination of tariffs for industrial goods 6052/19 of 9 April 2019, Recital 2.
[761] Strategic Partnership Agreement between the European Union, on the one part, and Japan, on the other, signed 17 July 2018, in force 1 February 2019.

above. First, the example of the EU-Ukraine DCFTA demonstrates that a 'deep integration' of European standards and prerogatives into a third country's regulatory framework is not a utopia, but actually within reach. Although in that agreement this has not determined the inception of EU sustainable agricultural practices in a country whose environmental laws and regulations are arguably not as developed as in the EU, this has at least laid down the foundations for progress in this regard – as testified by the reference to all EU principles of environmental law. Second, the EVFTA brings forward a particularly comprehensive approach vis-à-vis environmental matters. While the export of EU standards is more complicated in developing countries, the arrangements taken with Vietnam show at least the clear intention to accompany this country towards a sustainable economic path inspired by 'development' rather than the simple 'growth'. Net of all the shortcomings identified in the text, these two FTAs would represent an encouraging starting point for future EU negotiations with developed and developing country parties.

As a concluding remark, this research has reached the point of identifying, in normative terms, the *potential* expected effect (*a priori*) of EU FTAs on third countries' agricultural sectors in terms of sustainability. Now, it is the duty of social sciences other than law to identify the *actual* impact of such agreements in practice (*a posteriori*) and see if and to what extent sustainable agriculture has been enhanced (or watered down). From the viewpoint of legal research, future studies are called to assess if the trends identified in this work are confirmed in the near future, particularly with regard to the possible signature of an FTA with Mercosur. For the time being, there does not seem to be any kind of sharp paradigm shift on the horizon; however, if the 'delivery model' brought forward in the legislative proposal for a CAP reform for 2021-2027 becomes reality, this might also trigger a change of approach in EU external action, as the gap between a result-oriented approach at internal level and the absence of concerns for final environmental delivery of EU FTAs would become even more striking than it is at present. Finally, legal research is called upon to monitor CJEU case-law delivered on the basis of Article 28(11) TFEU. A decisive observation of this dissertation was that the so-called 'sustainability test' has not been carried out as yet by the Court. Opinion 1/17 delivered on 30 April 2019 on CETA, focusing exclusively on the compatibility of the ISDS with EU law, confirms that this issue is still disregarded by the Court, but any change of approach in this respect may have an enormous impact on the agricultural sustainability of future EU FTAs.

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