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# TREADING THE ENVIRONMENT- TRADE NEXUS: COHERENCE OF EU TRADE AGREEMENTS AND WTO LAW WITH THE EUROPEAN GREEN DEAL

**Harri Kalimo, Eleanor Mateo, Simon Happersberger, Max Jansson, Klaudia Majcher**

**A report commissioned by BEUC – The European Consumer Organisation**  
The views expressed in the report do not necessarily express those of BEUC

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## **ABBREVIATIONS**

ACP	African, Caribbean, and Pacific states
AMR	Antimicrobial resistance
CBAM	Carbon Border Adjustment Mechanism
CEAP	Circular Economy Action Plan
EEA	European Environment Agency
EGD	European Green Deal
EPA	Economic Partnership Agreements
EU	European Union
FAO	Food and Agriculture Organization
F2F	Farm to Fork Strategy
FTA	Free Trade Agreements
GATT	General Agreement on Tariffs and Trade
GHG	Greenhouse Gas emissions
ILO	International Labour Organisation
PTA	Preferential Trade Agreements
SIA	Sustainability Impact Assessments
SFS	Sustainable Food Systems
SPS	Sanitary and Phytosanitary Measures
TBT	Technical Barriers to Trade
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TSD	Trade and Sustainable Development chapters
VMP	Veterinary Medicinal Products
WTO	World Trade Organisation

## **EXECUTIVE SUMMARY**

This Report analyses the coherence between the European Union's trade policy and the European Green Deal (EGD).

The European Union (EU) is faced with two fundamental developments. On the one hand, the impacts of consumption and production globally are exceeding the environmental carrying capacities of our planet on multiple fronts from climate change to biodiversity loss. On the other hand, the current paradigm of a global economy that increases economic prosperity through an open, liberal trading system is under pressure. International trade flows are increasingly intertwined with geopolitical tensions that are reflected in the partial paralysis of the World Trade Organisation (the WTO) and an increase in unilateral measures and outright protectionist policies.

The developments on the environment and trade are closely interconnected. Global value chains underpin a significant share of the environmental and social impacts that Western consumer societies cause. Addressing environmental concerns outside the EU's borders driven by EU consumption adds fuel to these tensions. The objective of this Report is to analyse the coherence of EU policies at the nexus between environment and trade. The Report was commissioned by BEUC - the European Consumer Organisation to assess specifically the coherence of the EU's bilateral trade agreements and key WTO Agreements with the European Green Deal (EGD), while excluding the reverse direction of the EGD's coherence with trade policy.

The EGD aims at addressing environmental problems, transforming the EU into a society that is prosperous, sustainable, inclusive, and climate neutral by 2050. The EGD requires all EU policy areas to contribute to its objectives. EU trade policy is one of the fields that implements the EGD externally. Environmental sustainability has indeed been acknowledged to different degrees in the EU's bilateral and multilateral trade instruments. The EU's 2021 trade policy review 'Open, Sustainable and Assertive Trade Policy' incorporates environmental sustainability as a key objective. Sustainable development is a central principle underlying the WTO agreements. But to what extent are the EU's trade instruments and the WTO law coherent with the EGD upon closer look? Coherent laws and policies positively support one another to realize a set of common principles or rationale.

The EGD covers a very wide range of policies. This Report focuses on three key environmental objectives advanced by the EGD as case studies: (1) Sustainable use of natural resources: reducing the environmental impacts of batteries through recycled-content requirements in the EU eco-design policy; (2) Public health: combatting resistance to antimicrobials in EU food policy; (3) Animal welfare: protecting the treatment of animals in EU food policy. The cases were selected using the following criteria: the relevance of the issue area for the EU consumers; the existence of recent or upcoming EGD-based legislation on the topic; a close link to EU trade agreements; and relevance from the viewpoint of WTO dispute settlement. The Report also excluded policy measures such as the EU's Carbon Border Adjustment Mechanism (CBAM) or the Deforestation Regulation, which are already researched extensively.

## **Coherence of the EU Trade Agreements with the EGD**

Environmental sustainability is increasingly a part of the EU trade policy discourse. More and more environmental considerations have been integrated in the EU trade strategies between 1996 and 2021. Environmental objectives are reflected in trade instruments in the sustainability impact assessments and specific design elements of trade agreements, such as the chapters on Trade and Sustainable Development, or Sustainable Food Systems. These developments are to a large extent coherent with the objectives of the EGD.

The question is, however, whether these developments go far enough. Four main shortcomings on the coherence of trade agreements with the environmental objectives of the EGD were identified:

- Coherence is mostly weak. Environmental impact assessments are conducted before and during negotiations and evaluate their implementation, but the assessments are not applied consistently to all trade agreements. It remains unclear how their results are taken into account. The assessments' effectiveness and legitimacy therefore remain low. There is also much room for improvement in the trade agreements' design. Their level of ambition, precision, and obligatory nature are weak. The Trade Agreements do not increase, and may not even adopt, the EGD's level of ambition. Trade Agreement provisions that require the parties to follow international standards can also lead to incoherence on the EU side, because they can prevent the EU from following a more ambitious EGD requirement. This could be the case on the phase-out of antibiotics as growth promoters without a specific timeline, for example.
- As a so-called net importer of environmental impacts, it is particularly important for the EU to address its footprint beyond the EU's borders. The challenge is how to do this in a way that is coherent with the EGD's overall objective: the burden should not fall on other countries nor lead to unfair extraterritorial policies towards the EU's trading partners.
- Merely increasing the trade agreements' legal hardness, in particular enforceability and sanctions, may lead to an illusion that the agreements are effective in reaching the EGD's objectives. Harder Trade and Sustainable Development Chapters may namely erode the legitimacy and slow down the conclusion of trade agreements, leading to incoherence.
- If trade agreements are considered solely from the viewpoint of increasing trade, they could not include provisions that actually decrease or even ban the trade of certain goods. TSD chapters may in other words be structurally ill-suited for decreasing trade in environmentally damaging products. On the positive side, the adding of environmental considerations into trade agreements may shift the supply and demand towards more environmental products. This would make the agreements more coherent with the EGD. Further, TSD Chapters that allow both parties to maintain their chosen level of environmental protection are coherent with the aim of the EU to prohibit non-compliant imports. They are however incoherent from an extraterritorial viewpoint, because they create a tension with the parallel right of the partner country to maintain its lower level of protection.



## Coherence between the EGD and the WTO Rules

The Report also analyses the coherence between the WTO law and the EGD measures. The primary objective of WTO law is to maintain open and non-discriminatory global trade, and in some cases also to promote access to markets. The analysed EGD measures seek to apply environmental requirements on both domestic and imported products. These requirements also concern environmental impacts in the product life cycle that take place outside the EU's boundaries. The Report analyses the extent to which WTO law is coherent with such EGD requirements that govern the EU's environmental footprint outside its jurisdiction.

- In most of the instances analysed in the case studies, the WTO law is coherent with the EGD. A general finding of coherence of the WTO law may be more unexpected than in the case of trade agreements, because WTO dispute settlement law is usually used to challenge environmental law. In each of the three case studies, there were instances of weak coherence or of incoherence.
- The case study on the recycled content requirements on batteries presented issues of incoherence typical to circular economy policies. These may combine legitimate regulatory objectives of environmental protection with illegitimate regulatory objectives, especially those on the promotion of industrial policy. WTO law would require the EU to distinguish and to substantiate its claimed environmental objectives. WTO law would therefore be likely incoherent with measures that are aimed at achieving a more 'circular economy' without being specific about the environmental contents of that objective. The EU would have the burden of providing the evidence that the proposed measure achieves its intended environmental objective.
- WTO law does not clearly define to what extent it delimits, and is therefore incoherent with, the extraterritorial dimensions of the EGD. Measures in the EGD that look inward into effects in the EU are strongly coherent with WTO law. However, for outward-looking measures that do not have any effect on the local environment of the EU, the interpretation of the WTO on the issue remains open. This poses a challenge for regulating the environmental footprint of the EU's consumption abroad. Stringent EU requirements affect particularly the smaller and less wealthy countries, charging them with the burden of compliance. The EU may thus be susceptible to being accused of violating the principles of common-but-differentiated responsibilities, i.e., Principle 7 of the United Nations Rio Declaration of 1992.
- The WTO law offers various opportunities for engaging consumers. The incorporation of consumer perspectives in a WTO analysis may hinder or strengthen coherence with EGD objectives. This will depend on whether consumer choices are coherent with the EGD's objectives; consumer behaviour may not always be rational nor environmentally sustainable. In the animal welfare example, it was visible how regulation and consumer preferences are interdependent. Environmental awareness among consumers is increasing, as is the availability of more reliable environmental information on products. It would be incoherent not to give consumer perceptions appropriate weight in the WTO law e.g., when defining if two products are 'like' and whether certain measures are 'necessary' to achieve a policy objective.
- The WTO law may create a chilling effect on the EGD in areas where the law's contents and interpretation remain uncertain. The uncertainty is mainly due to the very slow and piecemeal nature of the WTO dispute settlement process. Examples in the analysis included the uncertainties in defining a 'sufficient nexus' to the

regulated environmental issue (such as conserving resources abroad), the scope of 'public morals' (such as sentiments about the caging of animals in the importing country), and the notion of 'conservation of natural resources' (as a self-standing objective or as a proxy for an environmental or some other policy objective).

## **Recommendations**

The Report's recommendations to increase coherence can be divided into those on trade agreements, those on WTO law, and those on the structural aspects of them both.

### **Recommendations on the coherence of EU trade agreements with the EGD**

The EU should consider improving the environmental sustainability of trade agreements on three accounts:

- (i) Impact assessments.** The EU should ensure that all trade agreements are accompanied by impact assessments prior and during negotiations, and are evaluated after their implementation. There should be a mechanism to better integrate the insights of impact assessments into trade negotiations and a body responsible for periodically monitoring the mitigating measures and making their results public.
- (ii) Design of sustainability provisions.** Increased ambition and precision as well as a systematic commitment of compliance with major International Environmental Agreements is to be considered. The principles of 'Do No Significant Harm' and "Common But Differentiated Responsibilities and Respective Capabilities", as well as the adaptation costs of the developing-country partners, are also to be considered. International standards are a premise, but science-based, non-discriminatory environmental grounds should justify surpassing them.
- (iii) Reducing the environmental impacts of bilateral trade.** When establishing or updating tariff rates and quotas or liberalising trade, the EU should take the sustainability of traded products into account, encouraging trade in environmentally beneficial products and discouraging trade in the environmentally more harmful products.

### **Recommendations on the coherence of the WTO law with the EGD**

WTO law could be improved for its coherence with environmental considerations in the below three respects via an interpretative note or protocol in the WTO Agreements, in the WTO revisions, or the current WTO dispute settlement body, including the "Multiparty Interim Appeal Arbitration Arrangement" (MPIA). The European Commission should pursue a bold and active litigation and negotiation agenda in the WTO. WTO law that is environmentally progressive while rigorous on protectionism would be coherent with the EGD.

- (i) Legitimate regulatory objective.** The WTO should clarify how it addresses an issue typical to Circular Economy policies in the EGD: the pursuit of multiple objectives that may also include non-legitimate objectives, and the notion of 'conservation of natural resources'.
- (ii) Consumer preferences.** The appropriate consideration of consumer preferences would make WTO decision-making procedures more coherent with the EGD. The scope of

'public morality' as a ground of justification also deserves clarification.

- (iii) **Extraterritoriality.** For the EU to fulfil its responsibility for the environmental impacts of its activities outside of EU borders, the WTO should clarify which types of outward extraterritorial impacts on the environment a country can legitimately address through unilateral measures.

### **Structural recommendations for coherence**

- (i) **Consider 'Sustainability and Trade Agreements' (STAs).** The EU should review the structural limitations of its trade agreements in promoting a sustainability agenda. The EU thus should assess the option of shifting the design of its trade agreements towards STAs to reduce trade in unsustainable products and to promote environmentally more sustainable products without engaging in discriminatory or protectionist measures.
- (ii) **Persistent efforts for a multilateral dispute settlement.** The EU should continue to work towards a balanced, legitimate, and timely international resolution of disputes based on the rule of law. Supporting research projects and experiments such as the MPIA would contribute to that.
- (iii) **Collection and utilisation of comprehensive, up-to-date data on environmental impacts.** Such data is important for all three fields – trade agreements, WTO law and the EGD – and has potential for increasing coherence between the three fields. To have an impact, data must however also be actively integrated and used after its collection.

## 1 INTRODUCTION

This Report assesses the coherence of the EU's bilateral and multilateral trade policy with the European Green Deal. The Report was commissioned by the European Consumer Organisation (BEUC). This introduction provides the necessary background on the environment-trade-nexus and the European Green Deal, as well as explains the structure of the Report.

### 1.1 The European Union and the environment-trade nexus

The European Union (EU) is faced with two fundamental developments. On the one hand, the impacts of consumption and production globally are exceeding the environmental carrying capacities of our planet on multiple fronts from climate change to biodiversity loss.<sup>1</sup> On the other hand, the current paradigm of a global economy that increases economic prosperity through an open, liberal trading system is under pressure. International trade flows are increasingly subject to geopolitical tensions that are reflected in the partial paralysis of the World Trade Organisation (the WTO) and an increase in unilateral measures<sup>2</sup> and outright protectionist policies.

The developments on the environment and trade are closely interconnected. Global value chains underpin a significant share of the environmental and social<sup>3</sup> impacts that Western consumer societies cause.<sup>4</sup> The nexus between the EU's environmental and trade policies is apparent in at least five ways

(1) The EU is a so-called 'net importer of environmental impacts'. The environmental impacts related to the consumption of goods and services in the EU are higher than the footprint of the EU's domestic production. 30-60% of the total environmental footprint associated with European consumption occurs outside of the EU.<sup>5</sup> Environmental impacts must be considered beyond the EU territory.

(2) The European Commission presented the European Green Deal (EGD) as a 'growth strategy'.<sup>6</sup> The EGD aims at decoupling economic growth from an increasing environmental footprint. While the EU's environmental impacts have decreased by 12% during the period 2010-2018, the decrease is only 6% if one includes the impacts of trade flows.<sup>7</sup> The effective reduction of the environmental externalities of EU production and consumption requires that the effects are not merely shifted to other countries ('offshoring').

1 European Environment Agency (EEA), 'The European environment – state and outlook 2020: knowledge for transition to a sustainable Europe' (2019).

2 Ferdi De Ville, Simon Happersberger, and Harri Kalimo, 'A unilateral turn in EU trade policy? The origins and characteristics of the EU's new trade instruments' (2023) 28 *The European Foreign Affairs Review* 15, Special Issue.

3 This Report focuses on the environmental aspects and will for that reason not refer to the as such very important economic and social justice aspects of sustainable development.

4 Jing Meng et al., 'The rise of South-South trade and its effect on global CO<sub>2</sub> emissions' (2018) 9 *Nature Communications*; International Labour Organization, 'Global Supply Chains' <<https://www.ilo.org/global/topics/dw4sd/themes/supply-chains/lang-en/index.htm>> accessed 13 December 2023.

5 EEA (n 1), at 49.

6 European Commission, 'The European Green Deal', COM(2019) 640 final.

7 Esther Sanyé Mengual and Serenella Sala, 'Consumption Footprint and Domestic Footprint: Assessing EU consumption and production' (2023) JRC Science for Policy Report, EUR 31390.

(3) Policies that set environmental requirements on products are in the short- or medium-term likely to lead to adaptation costs for the concerned industries. EU manufacturers may consider relocating production to sites outside of the EU, where they can avoid costs caused by environmental standards and adaptation ('leakage'). In the long term, companies and industries that adapt to regulatory changes earlier than their competitors will gain a competitive advantage, which also affects trade flows.

(4) The import of certain materials and products is necessary to accomplish the green transformation of EU consumption and production systems, because not all the resources required for the transformation are available in the EU. Critical raw materials for wind, solar and other renewable energy technologies are a prominent example. Supporting trade in such goods or other 'green' goods can positively contribute to the environmental transformation.

(5) Measures such as government subsidies that support environmentally sustainable technologies and products may inadvertently or, in an era of geopolitical tensions and increasing protectionism quite purposefully, provide local actors undue advantages. Such advantages divert trade flows on the global markets in contradiction to commonly agreed-upon trading rules. The outcome may be detrimental both to the environment and more efficient market players.

## **1.2 Governing the environment-trade nexus: are the EU's trade agreements and the WTO law coherent with the European Green Deal?**

The evolution of the environment-trade nexus influences EU policy-making. The effects are visible in the EU's current strategy, the European Green Deal (EGD). The EGD has introduced a package of environmental legislation in diverse policy areas with the primary aim to address environmental problems and to transform the EU into a society that is prosperous, sustainable, inclusive, and climate neutral by 2050. While focusing on carbon neutrality, the EGD consists of legislative initiatives on supplying clean energy, fostering a circular economy, enabling a sustainable and resource efficient building industry, promoting a shift to smart and sustainable mobility, designing a healthy and environmentally-friendly food system ('Farm to Fork', 'F2F'), preserving and restoring ecosystems and biodiversity, as well as eliminating pollution. EU trade policy is one of the means mentioned in the EGD to reach these environmental objectives.<sup>8</sup>

EU trade policy means the measures that the EU takes to govern its trade relations with other trade actors. The EU conducts its trade policy unilaterally, bilaterally, and multilaterally. Unilateral instruments such as the Carbon Border Adjustment Mechanism (CBAM)<sup>9</sup> are one-sided actions that the EU takes without the need for consent of other trading actors. Unilateral instruments offer the EU flexibility but need to be in line with the international trading system, in particular as codified under the central multilateral trade agreements of the World Trade Organisation (WTO). The EU and its member states are parties to the WTO. The third group of the EU's trade policy instruments are the agreements between the EU and one other party (bilateral) or multiple (but not all) parties (regional or plurilateral agreements). Environmental sustainability has been acknowledged to different degrees in these trade instruments. For example, while the WTO has been created to promote open

<sup>8</sup> European Green Deal (n 5), at 20-21.

<sup>9</sup> Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism (CBAM) [2023] OJ L 130.

trade, the WTO expressly acknowledges sustainable development as a central principle underlying the WTO agreements.<sup>10</sup> Environmental sustainability has also been flagged as a key objective in the EU's 2021 trade policy review entitled 'Open, Sustainable and Assertive Trade Policy'.<sup>11</sup> According to the EGD,<sup>12</sup> the EU's trade policy facilitates trade in sustainable goods and services, addresses harmful practices such as illegal logging, and promotes positive actions, such as the development of international standards with ambitious levels of environmental protection.

From the foregoing one could be led to believe that environmental and trade policies are relatively well aligned for reaping mutual benefits. Yet, on a closer look, how far does this coherence between the two fields actually extend? In particular – and as enquired by BEUC – are EU and global trade policies really coherent with the EGD? The primary objective of trade agreements and of the WTO has been, after all, trade facilitation. The different WTO Agreements have rules that its member countries are to respect: the members cannot treat imported products worse than they treat their domestic products. They are also prohibited from favouring one trading partner's imports over those of another. In case they do, the discriminated country can bring the issue to the WTO's dispute settlement system. The WTO rules may thus be incoherent with policies established under the EGD.

This report aims to provide varied and instructive viewpoints on the coherence of EU trade law with the EGD in two contexts: (1) trade agreements negotiated by the EU with third countries and (2) the WTO's rules on the global trading system.

The objective of this Report is not to establish the positions of different stakeholders on the question of coherence. The Report will also not seek to discuss issues of coherence that may arise between trade and environmental policies as a two-directional relationship. The commission for this analysis was to focus on the direction of how EU trade policy and international trade law may be (in)coherent with, and could be made more coherent, with the EGD. The Report therefore discusses only in passing and where unavoidable issues arising in the other direction, i.e. whether the EGD is (in)coherent with EU trade policy or whether the relationship between the two is coherent and potentially mutually beneficial.

### **1.3 Structure of the Report**

Our Report sheds light on the coherence of EU trade policy and WTO agreements with the EGD in five steps.

Section 2 explains the methodology and describes the three consumer concerns that form the case studies of the Report. The case studies are selected so as to illustrate issues where the EU's trade policy is incoherent with the EGD.

Section 3 provides concise summaries of the essential aspects of the EGD, focusing on the two fields that are the focus of the Report: eco-design and the F2F strategy.

Section 4 first introduces EU's trade agreements as a part of the EU's trade policy. The analysis then proceeds to a more detailed analysis of how the EU's trade agreements have evolved as a means to promote the EGD's sustainability considerations. The coherence

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10 World Trade Organization, WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994), Recital.

11 European Commission, 'Trade Policy Review - An Open, Sustainable and Assertive Trade Policy', COM/2021/66 final, at 1.

12 European Green Deal (n 5), at 20-21.

of key elements and design features of selected trade agreements with the EGD is analysed through the three consumer cases studies.

In Section 5, the Report provides a brief introduction to WTO law. It then discusses how WTO law may support or limit the ability of the EU to pursue the objectives of the EGD. The analysis is again structured around the three case studies. The consumer concerns addressed in each of the cases bring forth topical and controversial issues of potential (in)coherence of the WTO law with the EGD.

In the concluding Section 6, the Report summarises our findings on the coherence of the EU's trade agreements and of the WTO law with the EGD. The Report also provides recommendations in Section 7 for solving and further researching the observed points of incoherence.

## **2 METHODOLOGY**

The research was conducted in five steps between June and December 2023. The steps included a bibliometric analysis, a literature review, a policy and legal analysis, 10 semi-structured expert interviews and three case studies. The methods are summarised in Annex 1.

### **2.1 The selection of case studies**

The EGD as the EU's central strategy covers a wide range of sectors and products. Practically any of the measures adopted in relation to those products could be challenged in the WTO's dispute settlement system, which draws only few limitations on the scope of products covered by the WTO Agreements.

To provide a detailed yet varied analysis of coherence in this broad field of enquiry, this Report focuses on three consumer concerns. The issues were chosen in collaboration with BEUC and based on the multi-methods analysis described briefly in Annex 1. The selection was based on five criteria. 1) They speak to the concerns of European consumers as opposed to emphasising the business-to-business interface. 2) The issues are diverse and subject to new sustainability-related legal requirements as a part of the EGD. 3) The requirements are of relevance for the EU's trade agreements, while raising varied questions of coherence regarding the different, most novel parts of the agreements: the Chapter on Trade and Sustainable Development (TSD), Technical Barriers to Trade (TBT), Sanitary and Phytosanitary (SPS) and the Sustainable Food Systems (SFS), as well as the *ex ante* Sustainability Impact Assessments (SIAs). We sought issues that would be expressly taken up in the text of these Chapters in the (draft) trade agreements. 4) The regulation of the issue in the EGD raises instructive questions of compatibility (coherence) regarding WTO law. In particular, we sought topics that fall under different WTO agreements on goods (GATT, SPS and TBT) while bringing forth the latest controversies regarding the WTO law doctrine. 5) The Report prioritises issues that have thus far received less attention in public debates. Thus, the already much discussed EU regulations on e.g. Carbon Border Adjustment Measures (CBAM)<sup>13</sup> and Deforestation<sup>14</sup> are excluded from the selection. The cases – batteries; anti-microbials and animal welfare – are explained in detail in Section 3.2

<sup>13</sup> CBAM (n 8).

<sup>14</sup> Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 [2023] OJ L 150.

## 2.2 Choice of Trade Agreements

To enable a detailed assessment of the coherence of the legal design of specific chapters of the EU trade agreements with the EGD in Section 4.3.2, the Report focused on the following EU Free Trade Agreements ('FTA'): with India, Indonesia, Australia, Chile and New Zealand. The trade agreements were chosen based on (i) temporal relevance, including thus a recently updated and concluded agreement (Chile and New Zealand) and three currently negotiated FTAs (India, Indonesia, Australia); and (ii) the importance for the trading partner of the sectors covered by the case studies. Moreover, the EU-New Zealand FTA is often used as a 'gold standard' benchmark in terms its sustainability requirements.

## 2.3 The notion of 'coherence' as used in this Report

Besides the EU Treaties' provisions that link the fields of environmental sustainability and trade, according to Article 7 of the Treaty on the Functioning of the EU (TFEU), '[t]he Union shall ensure [coherence<sup>15</sup>] between its policies and activities, taking all of its objectives into account'. Further, the Treaty on the European Union (TEU) requires the EU to ensure [coherence] between the different fields in its external actions (Article 21(3)). The latter article contains a list of common principles and objectives for all EU foreign policy as well as the external aspects of the EU's other policies. This list includes, on the one hand, the development of international measures to improve the quality of the environment and the sustainable management of resources, as well as the promotion of environmental development in developing countries. On the other hand, Article 21(3) TEU also refers to the progressive abolition of restrictions on international trade. In other words: the EU's environmental and trade policies are to be coherent in the EU's external relations.<sup>16</sup>

The Report's analysis of the interactions between the EGD and the EU's trade policy is thus grounded in the theoretical concept of coherence. A widely shared view is that policies and laws are coherent if they positively support one another in their pursuit to realize a set of common principles or rationale.<sup>17</sup> A broad consensus also exists that coherence denotes a higher level of mutual support than the related notion of consistency. Coherence requires the creation of synergies, consistency merely a reduction of conflicts.<sup>18</sup> So, the absence of conflicts between the policies or legal rules is not sufficient to achieve coherence.<sup>19</sup> The majority of theories

15 The English language version uses in fact the term 'consistency', unlike e.g. the French, Italian and Spanish versions. We understand that the term 'coherence' better reflects what the Treaties aim to achieve. Also, we use the term coherence in this Report for the reasons explained further below. To avoid confusion, we have thus changed the term consistency for coherence in this sentence in deviation from the Treaty text.

16 Marise Cremona, 'Coherence Through Law: What Difference Will the Treaty of Lisbon Make?' (2008) 3 *Hamburg Review of Social Sciences* 11, Special Issues on Revisiting Coherence in EU Foreign Policy, at 30-31.

17 E.g., Neil MacCormick, 'Coherence in Legal Justification' in Aleksander Peczenik, Lars Lindahl, and Bert van Roermond (eds), *Theory of Legal Science* (D Reidel Publishing 1984); Stefano Bertea, 'The Argument from Coherence: Analysis and Evaluation' (2005) 25 *Oxford Journal of Legal Studies* 369; Peter J. May, Joshua Sapotichne, and Samuel Workman, 'Policy Coherence and Policy Domains' (2006) 34 *Policy Studies Journal* 381; Måns Nilsson et al., 'Understanding Policy Coherence: Analytical Framework and Examples of Sector-Environment Policy Interactions in the EU' (2012) 22 *Environmental Policy and Governance* 395.

18 MacCormick (n 16); Stefano Bertea, 'Looking for Coherence within the European Community' (2005) 11 *European Law Journal* 154; Simon J. Nuttall, 'Coherence and Consistency' in Christopher Hill and Michael Smith, *International Relations and the European Union* (Oxford University Press 2005); Cremona (n 15); Leonhard den Hertog and Simon Stroh, 'Coherence in EU External Relations: Concepts and Legal Rooting of an Ambiguous Term' (2013) 18 *European Foreign Affairs Review* 373.

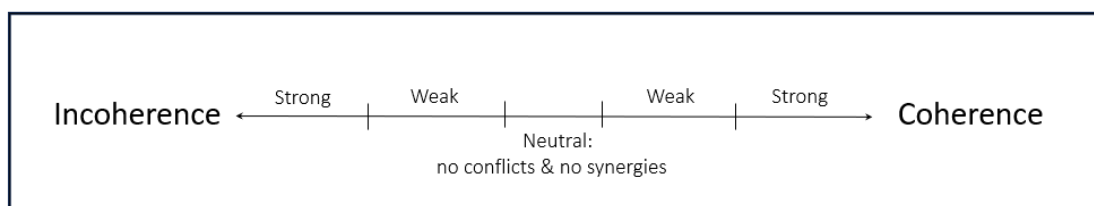
19 Alexander Peczenik, *On Law and Reason* (Kluwer Academic Publishers 1989), at 158; Alexander Peczenik, 'Law, morality, coherence and truth' (1994) 7 *Ratio Juris* 146, at 167; Ida Mae de Waal, 'Coherence in law: A



consider consistency nonetheless a preliminary and necessary condition of coherence.<sup>20</sup> For the sake of clarity, in this Report we use the notion of coherence to indicate positive synergies, and the notion of incoherence to describe a situation of conflicts. In addition to the horizontal (i.e. external) coherence between fields of law and policy, the Report analyses the vertical coherence between the EU-level and the international level of trade agreements and WTO law.

Important to note is also that (in)coherence is a matter of degree:<sup>21</sup> there is a spectrum between the most coherent and the most incoherent elements of a system. The Report uses a scale to provide a rough quantitative indication of the extent to which the EGD and trade policy do or do not cohere: weak or strong (in)coherence.

Figure 1. Degrees of Coherence



Source: Own compilation

Table 1. Defining the Degrees of Coherence of Trade Policy Instruments with the European Green Deal

<b>Strong Coherence</b>	Trade Policy Instruments are explicitly promoting the European Green Deal
<b>Weak Coherence</b>	Trade Policy Instruments are implicitly promoting also the European Green Deal
<b>Neutral (Consistency)</b>	Trade Policy Instruments are neither promoting nor contradicting the European Green Deal
<b>Weak Incoherence</b>	Trade Policy Instruments hinder the European Green Deal
<b>Strong Incoherence</b>	Trade Policy Instruments directly contradict the European Green Deal

Source: Own compilation

In accordance with the instructions of BEUC, the Report focuses on the (in)coherence of EU Trade Agreements and WTO law with the EGD, not vice versa. The term coherence, as indicated earlier, is used to describe the existence of positive synergies. The term incoherence is used in the Report to describe the scenarios where trade policy not only fails to mutually support one another, but also conflict. Weak incoherence implies that a policy or legal measure hinders the realisation of another one. Strong incoherence, on the other hand, means the existence of direct contradiction.

way to stimulate the transition towards a circular economy? A critical analysis of the European Commission's aspiration to achieve full coherence between chemicals regulation and waste legislation – and product legislation' (2021) 28 *Maastricht Journal of European and Comparative Law* 741, at 764.

20 E.g., Aleksander Peczenik, 'Coherence, Truth and Rightness in the Law' in Patrick Nerhot (ed), *Law, Interpretation and Reality. Essays in Epistemology, Hermeneutics and Jurisprudence* (Springer 1990), at 297.

21 Luc J. Wintgens, 'Coherence of the Law' (1993) 79 *Archives for Philosophy of Law and Social Philosophy* 483; Igor Douven and Wouter Meijs, 'Measuring Coherence' (2007) 156 *Synthese* 405.

### 3 OVERVIEW OF THE ANALYZED POLICIES ON THE ENVIRONMENT

This Section discusses briefly how protection of the environment is a crosscutting objective in EU policies, and how that objective is pursued through the EGD. The researched policy areas, as well as the specific consumer concerns that are the Case studies of the Report, are also introduced.

#### 3.1 Environmental protection and its integration in the other policy fields in the EU

Protection of the environment is an objective of the EU laid down in the TEU and the TFEU. Article 11 TFEU stipulates that environmental protection ‘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 implication of this environmental integration principle is that environmental considerations need to be mainstreamed into EU policies horizontally across all policy fields, including thus also trade policy. The integration principle is visible also in the area of the EU’s external competences in environmental issues. Article 191(4) TFEU envisages that both the EU as well as its Member States cooperate with third states and relevant international organisations in international issues.

#### 3.2 The European Green Deal

The European Green Deal covers diverse policy and it consists of legislative measures specifically on climate such as the Fit for 55 Package, the EU Strategy on Adaptation to Climate Change, and the European Climate Law. It also includes policy instruments in other areas. Figure 3 provides a more detailed overview on policy instruments of the European Green Deal.

Figure 2. Overview of European Green Deal

<p><b>Fit for 55 Package</b></p> <ul style="list-style-type: none"> <li>Reform of EU Emissions Trading System</li> <li>Directive establishing a system for greenhouse gas emission allowance trading (ETS 2)</li> <li>Revision of Effort Sharing Regulation</li> <li>Social Climate Fund</li> <li>Carbon Border Adjustment Mechanism</li> <li>Land Use, Land-use Change and Forestry Regulation</li> <li>Regulation on CO2 emissions for new cars and vans</li> <li>EU Methan Emissions reductions</li> <li>RefuelEU Aviation</li> <li>Fuel EU maritime Proposal</li> <li>Regulation on Alternative Fuels Infrastructure</li> <li>Revision of Renewable Energy Directive</li> <li>Revision of Directive Energy Efficiency</li> <li>Revision of the Energy Taxation Directive</li> <li>Revision of Energy Performance of Buildings Directive</li> <li>Regulation and Directive on Renewable and natural gases and hydrogen</li> <li>Proposal for Revision of Regulation on CO2 emission standards for heavy-duty vehicles</li> </ul>	<p><b>EU Biodiversity Strategy for 2030</b></p> <ul style="list-style-type: none"> <li>Nature Restoration Law</li> <li>EU Forest Strategy for 2030</li> <li>Revision EU Pollinators Initiative</li> <li>EU Action Plan on Organic Farming</li> <li>EU Soil Strategy</li> <li>Revised Environmental Crime Directive</li> <li>Revised Sustainable Finance Strategy</li> <li>Action plan against Wildlife Trafficking</li> <li>Proposal on tightening EU rules on ivory trade</li> </ul> <p><b>Farm to Fork Strategy</b></p> <ul style="list-style-type: none"> <li>Sustainable Use of Pesticides Directive</li> <li>Legislative Framework for Sustainable Food Systems</li> <li>Legislative Proposal on Plant Protection Products</li> <li>Legislation on EU animal welfare</li> <li>Sustainable Carbon Cycles</li> <li>Proposal for a Regulation on Farm Sustainability Data Network</li> <li>Regulation on EU geographical indications for wine, spirit drinks, and agricultural products</li> <li>Proposal for a Regulation Sustainability Labelling of Food Products</li> <li>Proposal for bindings food waste targets</li> </ul> <p><b>EU Zero Pollution Action Plan for Air, Water and Soil</b></p>	<p><b>Circular Economy Action Plan</b></p> <ul style="list-style-type: none"> <li>Regulation on Batteries and Waste Batteries</li> <li>Revision of Ecodesign Directive</li> <li>Proposal for a Directive on Green Claims</li> <li>Proposal on Rules promoting the repair of goods</li> <li>Proposal for a Regulation on Microplastics</li> <li>Revision of EU rules on Packaging and Packaging Waste</li> <li>Revision of Industrial Emissions Directive</li> <li>Proposal for Ecodesign for Sustainable Products Regulation</li> <li>EU Strategy for Sustainable and Circular Textiles</li> <li>Proposal to update rules on persistent organic pollutants in waste</li> </ul> <p><b>EU Sustainable Finance Framework</b></p> <ul style="list-style-type: none"> <li>Action plan on financing sustainable growth</li> <li>Regulation on sustainable investment</li> <li>Climate Delegated Act</li> <li>Disclosures Delegated Act</li> <li>Environmental Delegated Act</li> <li>RepowerEU</li> <li>NextGenEU</li> <li>Sustainable European Investment Plan</li> </ul>
<p><b>EU Strategy on Adaptation to Climate Change</b></p>		
<p><b>European Climate Law</b></p>		
<p><b>Just Transition Mechanism</b></p> <ul style="list-style-type: none"> <li>Regulation establishing the Just Transition Fund</li> <li>Proposal for a Regulation on Public Sector Loan Facility</li> <li>Invest EU Just Transition scheme</li> </ul>	<p><b>EU Chemicals Strategy for Sustainability</b></p> <ul style="list-style-type: none"> <li>Revision of Registration, Evaluation, Authorisation and Restriction of Chemicals</li> <li>Regulation on classification, labelling and packaging of chemicals</li> <li>Proposal to ban all remaining intentional uses of mercury</li> </ul>	<p><b>Renovation Wave Strategy</b></p> <ul style="list-style-type: none"> <li>Recommendation on Energy Poverty</li> <li>New European Bauhaus initiative</li> </ul>
		<p><b>European Industrial Strategy</b></p> <ul style="list-style-type: none"> <li>Net Zero Industry Act</li> <li>Critical Raw Materials Act</li> </ul>

Source: Own compilation

In order to obtain concrete insights on the coherence of the EU's trade agreements and of WTO law with the EGD, the Report adopted a case study approach as described more in detail below.

### 3.2.1 The EGD on the Circular Economy and Eco-Design

One of the key pillars of the EGD strategy is the EU's Circular Economy Action Plan (CEAP). The CEAP highlights the importance of more sustainable products in the EU's sustainability transitions. The CEAP consists of a set of initiatives aimed at creating a strong and coherent product policy framework that targets the environmental impacts of products across their entire life cycles. The Commission thus aims to improve the energy efficiency and eco-design of products, and to encourage the uptake of innovative technologies whilst promoting EU standards and technologies at a global level. Stricter climate and environmental sustainability standards and incentives such as eco-modulation are introduced for a wide range of products, but prioritizing those product groups that have significant impact on the environment and climate. The EGD also emphasizes the need for the EU to ensure access to sustainable resources and critical raw materials relevant for such clean technologies.

A sector where the consumer finds herself at the crossroads of the EU's climate, energy and circular economy policies is mobility. The transport sector represents around 25% of the EU's total greenhouse gas emissions (GHG)<sup>22</sup> and is therefore key to achieving the EGD's target of reducing GHGs by 55% by 2030 and climate neutrality by 2050. The Sustainable and Smart Mobility Strategy under the EGD highlights the need for consumers to shift away from fossil fuel-based modes of mobility to zero-emission vehicles, including battery-electric vehicles.<sup>23</sup>

The shift towards more sustainable mobility requires however a rapid development of supporting technologies, especially batteries. To achieve this objective, the EGD supports the implementation of the EU's Strategic Action Plan on Batteries,<sup>24</sup> which contains the imperative for the EU to diversify its sources of raw materials used in the battery value chain. The CEAP also highlights the leverage offered by EU trade policy 'to ensure sustainable and secure supply and deepen its shift towards a circular economy through recovery, re-use and recycling'.<sup>25</sup>

In this Report, we analyze the EU's new policy on electric vehicle batteries as outlined in the new EU Battery Regulation.<sup>26</sup> The focus is on how the EGD reconciles the objectives to reduce GHG emissions and protect the environment with the Battery Regulation's goals of also securing access to key resources and building a competitive and resilient European circular economy. The Report uses the issue of the batteries' recycled content requirements as a practical example to showcase how trade policies, in particular the rules of the WTO, may be incoherent with the EGD in this area of policy.

22 European Commission, 'Sustainable and Smart Mobility Strategy – putting European transport on track for the future, COM (2020) 789 final, para. 2.

23 Ibid, para. 11.

24 European Commission, 'Report on the Implementation of the Strategic Action Plan on Batteries: Building a Strategic Battery Value Chain in Europe', COM(2019) 176 final.

25 Ibid, at 6.

26 Regulation (EU) 2023/1542 of the European Parliament and of the Council of 12 July 2023 concerning batteries and waste batteries, amending Directive 2008/98/EC and Regulation (EU) 2019/1020 and repealing Directive 2006/66/EC [2023] OJ L 191 (the "Battery Regulation").

### 3.2.2 The EU's Farm to Fork (F2F) strategy

The EU's Farm to Fork (F2F) Strategy<sup>27</sup> for a fair, healthy and environmentally friendly food system is another cornerstone of the EGD. Its key objectives include reducing the environmental and climate footprint of the EU food system, strengthening its resilience, ensuring food security, nutrition, and public health, setting global standards for a transition of the food system, promoting animal welfare and tapping into new business opportunities. The European Commission seeks to adopt the proposal for a legislative framework for sustainable food systems (FSFS), which is a flagship proposal to accelerate the transition. The F2F Strategy is the first comprehensive set of proposals put forward by the European Commission to realise its ambitious goals. The proposals are an essential part of making the European consumers' diets healthier and more environmentally sustainable.

In a broader effort to reinforce public health, the F2F strategy commits to reducing overall EU sales of antimicrobials for farmed animals and aquaculture by 50% by 2030. Antimicrobial resistance (AMR) is estimated to result in 33,000 human deaths in the EU per year, as well as significant healthcare costs. Applicable as of 28 January 2022, the Veterinary Medicinal Products (VMP) Regulation<sup>28</sup> includes measures ensuring a responsible use of antimicrobials in animals. As part of the pharmaceutical package, on 26 April 2023 the Commission adopted also a proposal for a Council Recommendation on stepping up EU actions to combat antimicrobial resistance in a One Health approach: the Recommendation was adopted by the Council on 13 June 2023.

A global fair and sustainable transition envisaged in F2F strategy also includes measures to improve animal welfare that, in turn, protects animal health, food quality, and a preservation of biodiversity. European consumers increasingly show interest in whether animal welfare has been respected during the production process of the goods they purchase.<sup>29</sup> The Commission is expected to revise the animal welfare legislation (e.g. on animal transport and slaughter) to make it better aligned with the latest scientific evidence. The intention is to broaden the scope of the legislation and render it easier to enforce.

## 3.3 THE THREE CONSUMER CONCERNS

Within each of these three policy areas the Report focuses on a specific legal instrument. The instrument brings forth a range of topical environmental sustainability-related issues of coherence in the trade agreement and WTO law contexts. The issues are:

- **Sustainable use of natural resources:** reducing the environmental impacts of batteries through recycled-content requirements in the EU eco-design policy;
- **Public health:** combatting resistance to antimicrobials in EU food policy;
- **Animal welfare:** protecting the treatment of domestic animals in EU food policy.

<sup>27</sup> European Commission, 'A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system', COM(2020) 381 final.

<sup>28</sup> Regulation (EU) 2019/6 of the European Parliament and of the Council of 11 December 2018 on veterinary medicinal products and repealing Directive 2001/82/EC [2019] OJ L 4.

<sup>29</sup> European Commission, 'Attitudes of Europeans towards Animal Welfare' (2023) <<https://europa.eu/eurobarometer/surveys/detail/2996>> accessed 12 December 2023.

## 4 THE COHERENCE OF EU TRADE AGREEMENTS WITH THE EGD

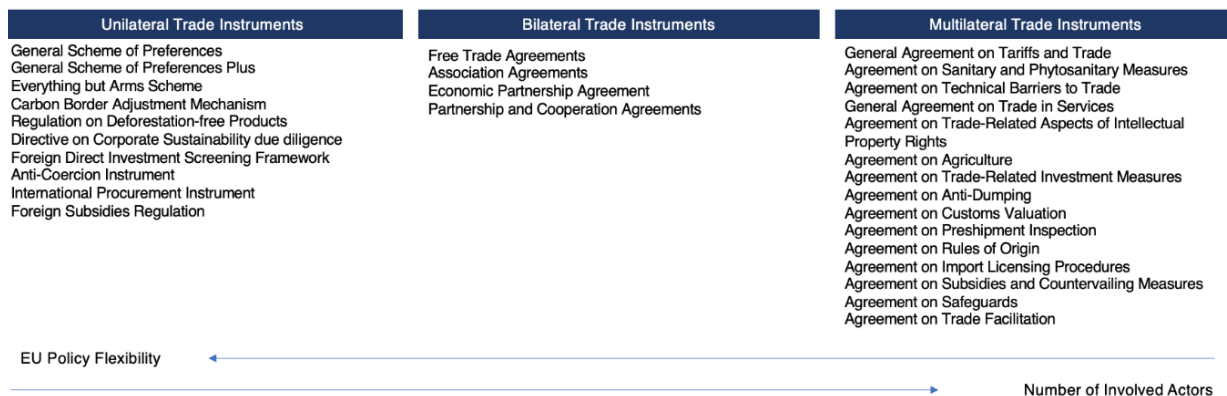
In this Section, the analysis is expanded to trade policies as introduced in Section 1.1. The focus of the analysis is on the horizontal coherence of EU trade agreements with the environmental objectives of the EGD. Environmental objectives are integrated in EU trade policy at different levels: the level of policy objectives, and policy instruments. As this report concentrates on the legal aspects of coherence, downstream levels such as policy implementation and policy effects are not analysed in detail.

At the level of policy objectives, there has been a discursive shift towards environmental sustainability in EU trade strategies from 1996 to the latest EU trade strategies in 2021. Whereas this shift is in principle in line with the objectives of the European Green Deal, the question is whether it is going far enough. At the level of policy instruments, the EU has been conducting Sustainability Impact Assessments since 1999 and integrating so-called ‘Trade and Sustainable Development (TSD) chapters in its bilateral trade agreements since its trade strategy in 2006. Sustainability is being mainstreamed as the TSD chapters cover an increasing range of issues while the most recent trade agreements, for example with EU-Chile TA (2022), introduce novel chapters on sustainable food systems (SFS). As regards policy implementation, the policy discussion revolves around whether sustainability provisions in EU trade agreements are implemented in an adequate manner. In the New Zealand-EU TA (2023), sustainability provisions, for example those concerning the ratification of the Paris Agreement, are for the first time in an EU trade agreement linked to trade sanctions similar to those that are applied to the rest of the trade agreement.

### 4.1 EU Trade Policy Instruments

EU trade policy contains a wide range of unilateral, bilateral, and multilateral instruments. The multilateral instruments that this Report was requested to focus on are the WTO Agreements. The EU and its Member States are parties to the WTO. With this membership, the EU has undertaken that its laws, including those on the environment such as the EGD, comply with the rules and regulations of the WTO. Because the WTO’s objective is to promote open trade, the Member States have agreed not to enact laws that would discriminate against imported products or prevent their access to the markets without a proper reason. Such proper reasons are defined in the WTO agreements and include the protection of public health or public morals, as well as the conservation of natural resources. The WTO’s rules on trade and their coherence with the EGD are analysed in Section 5 of this Report.

Figure 3. Overview of EU Trade Policy Instruments



Unilateral instruments are measures that are applied by the EU without the requirement of a consent from the other trading actors. They set requirements, which products manufactured in third countries must meet to enter the European market. They need to be coherent with international law, including the international trading system as codified under the agreements of the WTO. Traditionally, the EU has been using three types of unilateral trade instruments: the Generalised Scheme of Preferences, the Generalised Scheme of Preferences Plus and the Everything but Arms scheme. Since the European Green Deal in 2019, the EU Commission has been increasingly proposing unilateral instruments such as the CBAM<sup>30</sup>. The unilateral EU measures are in the hierarchy of law subordinate to the EU's commitments within the WTO. The steps in assessing the unilateral EU measures' WTO compliance would be similar to that performed for the EGD instruments in Section 5.

Bilateral instruments are agreements with another country or region. They require the consent of the partner country and must be compatible with the WTO agreements. The EU generally uses four types of bilateral trade instruments: Partnership and Cooperation Agreements, Economic Partnership Agreements, so-called 'Free Trade Agreements', and Association Agreements. This Report focuses on the EU 'free trade agreements', which are preferential trade agreements which have traditionally reduced tariffs and quotas, but include increasingly other areas relevant for trade between countries such as government procurement, and services. The EU is the actor with the most international trade agreements: it has in force or is provisionally applying trade agreements with 74 countries. Further 25 countries have negotiated agreements with the EU and other countries, but these agreements are not yet or might not be signed. 7 countries are currently in negotiations with the EU. Yet, the EU does not have trade agreements in place with some of its most important trading partners, such as the USA, China, India, or Brazil.

## 4.2 Environmental objectives in EU trade policy strategies

The European Commission regularly publishes new trade objectives in strategic documents. This usually happens after a new Commission and a new Trade Commissioner enter office. Table 1 provides an overview of key EU trade documents. We will next analyse how environmental objectives feature in these strategies.

Table 2. Strategic EU Trade Documents from 1996 to 2021

EU Trade Commissioner	EU Commission	Year	Trade Strategy
Leon Brittan	Santer	1996	The Global Challenge of International Trade. Market Access Strategy for the European Union
Pascal Lamy	Prodi	1999	The EU Approach to the Millennium Round
Peter Mandelson	Barroso I	2006	Global Europe. Competing in the World

30 CBAM (n 8).

Karel De Gucht	Barroso II	2010	Trade, Growth and World Affairs. Trade Policy as a core component of the EU's 2020 strategy
Cecilia Malmström	Juncker	2015	Trade for All. Towards a more responsible trade and investment policy
Valdis Dombrovskis	Von der Leyen	2021	An Open, Sustainable and Assertive Trade Policy

*Source: Own compilation*

EU trade strategies have evolved towards acknowledging environmental challenges and objectives over the past three decades. In the 1996 strategy 'The Global Challenge of International Trade', the main concern of the European Commission under Trade Commissioner Brittan regarding environmental-trade interactions were the effects of certain environment policy measures on trade.<sup>31</sup> The term 'environment' was used primarily in reference to the business sector and the competitive environment. This one-sided view which prioritized trade flows over environmental policy measures became more balanced in the 1999 'EU Approach to the Millennium Round' of trade negotiations in the WTO. It stated: 'The EU objectives for the new round must reflect this in terms of creating better conditions for the competitiveness of European business and industry, balanced with social progress and environment protection in Europe'.<sup>32</sup> The focus of the EU trade policy under Commissioner Lamy in the context of multilateral negotiations was on Europe both in terms of economic benefits but also environmental protection. This focus was widened by his successor, EU Trade Commissioner Mandelson. The 2006 strategy 'Global Europe: Competing in the World' repealed the 'moratorium', which the Commission had set itself on entering into bilateral trade agreements. As the focus of the EU thus shifted away from multilateral towards bilateral trade negotiations, the EU set the aim to spread environmental standards to other countries: 'As we pursue social justice and cohesion at home, we should also seek to promote our values, including social and environmental standards and cultural diversity, around the world'.<sup>33</sup> The term 'climate change' appeared first in the 2006 trade strategy as a phenomenon requiring further examination.

With the 2010 strategy 'Trade, Growth and World Affairs' under the term of the EU's Trade Commissioner de Gucht, the European Commission aimed at 'sustainable growth' in the EU and abroad. It asserted: 'Trade policy should continue to support green growth and climate change objectives, in particular reduced carbon emissions'.<sup>34</sup> The strategy mentioned energy, resource efficiency and biodiversity protection, but the focus was on the elimination of barriers to trade in environmental goods and services. The Commission, however, remained skeptical about the idea of border adjustment measures. The next EU trade Commissioner Malmström was in charge of the EU Commission's 2015 strategy 'Trade for All: Towards a more responsible trade and investment', which had the objective 'to ensure that economic growth goes hand in hand with social justice, respect for human rights, high labour and environmental standards and safety protection'.<sup>35</sup> Due to increased consumer concern on the environmental and social conditions of production, the attention was on not lowering

31 European Commission, 'The Global Challenge of International Trade: A Market Access Strategy for the European Union', COM(96) 53 final, at 17.

32 European Commission, 'The EU approach to the WTO Millennium Road', COM(1999) 331 final, at 5.

33 European Commission, 'Global Europe: Competing in the World', COM(2006) 567 final, at 5.

34 European Commission, 'Trade, Growth and World Affairs', COM(2010) 612 final, at 8.

35 European Commission, 'Trade for All: Towards a more responsible trade and investment policy', COM(2015) 497 final, at 15.

the level of consumer, environmental, social or labor protection, and on promoting European and international standards. The EU's current Trade Commissioner Dombrovskis has geared the EU in its 2021 trade policy review to 'An Open, Sustainable, and Assertive Trade Policy'. Environmental challenges figure prominently in the title of the current strategy. The role of trade policy in addressing the climate crisis is mentioned explicitly, as the document highlights 'the green transition as the defining objective of our time'.<sup>36</sup>

Throughout these six EU trade strategies, environmental challenges have been increasingly recognized. The 2022 Communication by the European Commission on 'The Power of Trade Partnerships' embraces the objective of 'mainstreaming sustainability throughout the entire trade agreement'.<sup>37</sup> At the same time, trade liberalization remains the Commission's primary focus in negotiating trade agreements. Bilateral and regional EU trade agreements are designed as 'free' trade agreements, not as 'sustainable' trade agreements, hybrid trade-and-environment-agreements let alone sustainability agreements.<sup>38</sup> The subtitle of the 2022 Communication is 'together for green and just economic growth', indicating the continuation of a paradigm in which the economic, the social and the environmental objectives create win-win-win situations. This describes the most recent phase of the Commission's strategies.<sup>39</sup> The increased integration of environmental objectives in trade agreements is a point of strong coherence with the EGD.

### 4.3 Environmental objectives in EU trade policy instruments

Against the backdrop of the EU's integration of environmental objectives in unilateral, bilateral, and multilateral trade policies, the following section focuses on the environmental elements of EU trade agreements. To account for environmental impacts, the EU is applying two types of tools: it conducts impact assessments and integrates environmental elements in the design of trade agreements.

#### 4.3.1 Impact Assessments of EU Trade Agreements

In the area of EU trade policy, impact assessments were first applied in 1999 to assess the sustainable development impacts of the WTO negotiations.<sup>40</sup> Currently, the EU carries out different types of impact assessments: in-house *ex ante* before negotiations, a SIA during the negotiations, and an *ex post* evaluation after the negotiations of a trade agreement. The Commission set in its 2006 trade strategy the aim to have environmental, labor, and developmental impacts 'as part of the overall impact assessment that will be conducted before deciding to launch FTA negotiations'.<sup>41</sup> The subsequent 2010 trade strategy promised to 'carry out impact assessments on all new trade initiatives with a potentially significant

36 European Commission, 'Trade Policy Review - An Open, Sustainable and Assertive Trade Policy', COM(2021) 66 final.

37 European Commission, 'The power of trade partnerships: together for green and just economic growth', COM(2022) 409 final, at 7.

38 The first instance of such a hybrid trade-and-environment-agreement can be seen in the Agreement on Climate Change, Trade and Sustainability, which Costa Rica, Fiji, Iceland, New Zealand, Norway and Switzerland are negotiating since 2019. Tancrede Voituriez, 'We need more hybrid trade and environment agreements' (IISD 2023) <<https://www.iisd.org/articles/policy-analysis/hybrid-trade-environment-agreements>> accessed 12 December 2023.

39 European Commission, 'The power of trade partnerships: together for green and just economic growth' COM(2022) 409 final.

40 European Commission (n 32), at 26.

41 European Commission (n 33), at 9.



economic, social or environmental impact on the EU and its trading partners, including developing countries'.<sup>42</sup> According to the 2015 trade strategy and in alignment with the EU Better Regulation agenda,<sup>43</sup> Sustainability Impact Assessments (SIA) are to be conducted '[d]uring the negotiation of major trade agreements [...] and *ex-post* evaluations after they have been implemented'.<sup>44</sup> The EU's current practice can be compared against these ambitions. In total, the EU has so far conducted 4 *ex ante* in-house impact assessments, 22 SIAs, and 7 *ex-post* evaluations of signed trade agreements. Table 2 provides an overview of the EU impact assessments for trade agreements that have been signed since 2008, conducted by the Directorate-General Trade of the European Commission. The assessments of environmental impacts are a procedural tool that can be used in trade agreements for increasing coherence with the EGD. However, they have not been consistently applied to all EU trade agreements: for example, *ex ante* in-house impact assessments are only publicly available for few trade agreements. In addition, SIAs are missing for certain trade agreements, for example with Albania, Serbia as well as Montenegro, and they are conducted at the level of the region rather than the specific country for others, as in the cases of Singapore or Kenya.

Table 3. European Commission DG Trade Impact Assessments

EU Trade Agreement	Signature	Ex-Ante Impact Assessment	Sustainability Impact Assessment	Ex-Post Evaluation
Free Trade Agreement New Zealand	2023	✓ IA 2017	✓ SIA 2020	(✗)***
Trade and Cooperation Agreement United Kingdom	2020	✗	✗	(✗)***
Free Trade Agreement Singapore	2019	✗	(✓) SIA 2009*	(✗)***
Free Trade Agreement Viet Nam	2019	✗	(✓) SIA 2009*	(✗)***
Association Agreement Mexico	2018	✓ IA 2015	✓ SIA 2019	(✗)***
Agreement for an Economic Partnership Japan	2018	✓ IA 2012	✓ SIA 2016	(✗)***
Comprehensive and Enhanced Partnership Agreement Armenia	2018	✗	✓ SIA 2013	(✗)***
Stabilisation and Association Agreement Kosovo	2016	✗	✗	✗
Economic Partnership Agreement SADC	2016	✗	(✓) SIA 2007*	(✓) EPE 2023**
Stepping Stone Economic Partnership Agreement Ghana	2016	✗	(✓) SIA 2007*	✗
Comprehensive Economic and Trade Agreement Canada	2016	✗	✓ SIA 2011	✗

42 European Commission (n 34), at 15.

43 European Commission, 'Better Regulation: Joining forces to make better laws', COM(2021) 219 final.

44 European Commission (n 35) at 12.

Stabilisation and Association Agreement Bosnia & Herzegovina	2015	×	×	×
Enhanced Partnership and Cooperation Agreement Kazakhstan	2015	×	×	×
Association Agreement Ukraine	2014	×	✓ SIA 2007	×
Association Agreement Georgia	2014	×	✓ SIA 2012	✓ EPE 2023
Association Agreement Moldova	2014	×	✓ SIA 2012	✓ EPE 2023
Economic Partnership Agreement ECOWAS	2014	×	(✓) SIA 2007*	×
Economic Partnership Agreement East African Community	2014	×	(✓) SIA 2007*	×
Stabilisation and Association Agreement Serbia	2013	×	×	×
Agreement establishing an Association Central America	2012	×	✓ SIA 2009	✓ EPE 2023
Interim Economic Partnership Agreement Eastern & Southern Africa	2012	×	(✓) SIA 2007*	×
Trade Agreement Colombia & Peru	2012	×	✓ SIA 2009	✓ EPE 2023
Free Trade Agreement South Korea	2011	×	✓ SIA 2009	✓ EPE 2019
Stabilisation and Association Agreement Montenegro	2010	×	×	×
Stabilisation and Association Agreement Albania	2009	×	×	×
Interim Economic Partnership Agreement Cameroon	2009	×	(✓) SIA 2007*	×
Interim Partnership Agreement Pacific States	2009	×	(✓) SIA 2007*	×
Stepping Stone Economic Partnership Agreement Cote Ivoire	2009	×	(✓) SIA 2007*	×
Economic Partnership Agreement Cariforum	2008	×	(✓) SIA 2007*	✓ EPE 2021

\* One macro-regional SIA conducted for ACP in 2007 and for ASEAN in 2009

\*\* Inception Report

\*\*\* Note: *Ex-post* Evaluations require some time since the entry into force to see potential impacts.

Source: Own Compilation

### *Ex Ante In-house Impact Assessments*

The European Commission has conducted four publicly available ex ante impact assessments with environmental dimensions before the opening of the negotiations with trading partners. These impact assessments as well as the *ex-post* evaluations are part of the 'Better regulation for better results – An EU Agenda'.<sup>45</sup> The goal of impact assessments is to inform political decision-making. Thus, ex ante in-house impact assessments accompany the Commission's recommendations to the Council for authorizing the opening of negotiations for trade agreements. Methodologically, impact assessments are based on Computable-General-Equilibrium models, which try to estimate how economies might react to policy interventions.<sup>46</sup>

Table 6 in Annex 2 summarizes key findings of DG Trade's ex ante in-house impact assessments conducted for the agreements with New Zealand and Australia, Chile, Mexico and Japan. The conducted assessments found in most of the cases negative, but negligible environmental impacts. The findings are similar for all agreements and across the three analysed dimensions: air pollution, biodiversity, and land-use change. The exceptions are air pollution in the case of Japan, which was estimated as not affected by the trade agreement, and biodiversity, which is a concern in the cases of Australia, New Zealand, and Chile. The overall environmental impact was estimated to be higher for the EU's trading partners than for the EU. A comparison of the language of the reports with global emissions (EU-Mexico 2015, 33) or total trade flows of the EU (EU-Japan-IA 2012, 42) leaves the impression that the environmental impacts are rather downplayed than overstated.

### *Sustainability Impact Assessments for EU Trade Agreements*

Sustainability Impact Assessments (SIAs) are meant to support the negotiations of trade agreements between the EU and its trading partners by providing an analysis of the potential economic, social, human rights and environmental impacts of the agreement. The SIA's analysis of the impacts on environmental sustainability and trade-offs of a trade agreement could be a source of evidence for assessing and improving the coherence of trade agreements with the EGD, for example by adjusting the design of the trade agreement.<sup>47</sup> However, it is not clear to what extent negotiators are actually taking the results of SIAs into consideration – in particular since the SIA is conducted during the negotiations.

SIAs are commissioned by the EU and prepared during the negotiation process by an independent external consultancy, usually based in Brussels. Assessments follow the Commission's handbook for SIAs<sup>48</sup> and are two-sided, analysing the impacts on the EU and the trading partner(s) in question, but not on third countries. As the trade actor with the most trade agreements to date, the EU has also conducted the most SIAs. In total, the EU has conducted 39 SIAs for bilateral and multilateral trade agreements since the Sustainability Impact Assessment Study of the WTO Seattle negotiation round in 1999.

The relevance of a SIA to the coherence of a specific trade agreement with the EGD depends on the characteristics of the EU's negotiating partner. Because a SIA targets the sectors and

45 European Commission, 'Better regulation for better results - An EU Agenda', COM(2015) 215 final.

46 For a critical analysis of ex-ante impact assessments, and CGE models in particular, see Mathilde Dupré and Thomas Dauphin, 'The European Commission's Trade Sustainability Impact Assessments: A Critical Review' (2022) Institut Veblen.

47 European Commission, 'Sustainability Impact Assessment', <[https://policy.trade.ec.europa.eu/analysis-and-assessment/sustainability-impact-assessments\\_en](https://policy.trade.ec.europa.eu/analysis-and-assessment/sustainability-impact-assessments_en)> accessed 22 October 2023.

48 European Commission, Directorate-General for Trade, 'Handbook for trade sustainability impact assessment' (2nd edition, 2016).

value chains with the most fundamental impacts of the agreement on the environment, SIAs vary, reflecting how the trading partner's economy is connected to the EU economy.

The SIA regarding the modernisation of the EU-Chile FTA for example offers concrete examples regarding the case studies of this Report. The SIA's analysis included the mining industry, specifically lithium. According to the SIA, lithium is in a short to medium term timeframe a key material of most used in electric vehicles. They thus relate directly to the EGD's objective to make mobility more sustainable. Chile is currently the second largest producer of lithium globally, with the largest reserves in the world. Chilean lithium is therefore vital for the EGD's electrification strategy. Yet, Lithium is also mined in the fragile Atacama Desert. The EU-Chile SIA brings forth the depletion of non-renewable resources, the lowering of groundwater levels and access to farming and drinking water as well as water contamination as the most severe environmental impacts of mining lithium. The SIA provides evidence for drafting the FTA such that it addresses the environmental impacts of batteries in a manner that is coherent with the EGDs objectives.

Thornier issues of coherence may also arise: what if a SIA points to an impact that cannot be mitigated, for example if the amount of lithium required increases massively? Will the trade-objective of the FTA - to increase trade - be coherent in the long term with the objective to protect the environment? The SIA's results seem coherent with the environmental objectives of the EU Battery Regulation's recycled content requirement on lithium in batteries, discussed in Section 5.2. The SIA is also weakly coherent in that it can contribute to life-cycle based assessments of lithium (batteries) that may take place under the Battery Regulation. The results of the SIA may at the same time contradict the FTA's objective of facilitating trade in lithium.

#### *Ex Post Evaluations of EU Trade Agreements*

*Ex post* evaluations were for the first time envisioned in the EU's 2010 Trade Strategy. To better monitoring the impacts of EU trade agreements, the strategy committed to 'carrying out *ex post* evaluations on a more systematic basis'.<sup>49</sup> The 2015 Trade Strategy in particular emphasized the need to enhance the assessments of impacts of trade policy on consumers both in impact assessments and *ex-post* evaluations.<sup>50</sup> The 2021 Trade Strategy repeated this commitment with a specific focus on 'key environmental aspects, including the climate' but also gender equality implications.<sup>51</sup>

The European Commission has published 10 *ex post* evaluations of bilateral or regional trade agreements, 7 of which were published after the European Green Deal strategy in 2019, 5 in 2023 alone. The increase of *ex post* evaluations of EU trade agreements could contribute to strengthening the coherence of EU trade instruments with the EGD, as they provide additional public information about the environmental consequences of EU trade agreements. It remains unclear though how specifically the generated insights from the *ex post* evaluations are utilized in designing future trade agreements. In addition, the legitimacy of the *ex post* evaluations has been questioned, particularly given that they are commissioned by the Commission and conducted frequently by Brussels-based consultancies. The criticism also relates to the lack of adequate specificity for assessed countries in particular in the case of regional assessments, as for example Costa Rica in the evaluation of the EU-Central America-trade agreement.

49 European Commission (n 34), at 15.

50 European Commission (n 35), at 14.

51 European Commission (n 36), at 22.

Table 4. *Ex post* Evaluations of EU Trade Agreements

Evaluations of Trade Agreement	Year	Status
Evaluation of EU-SADC-Economic Partnership Agreement	2023	Inception Report
Evaluation of EU-Georgia-Deep and Comprehensive Free Trade Area	2023	Final Report
Evaluation of EU-Moldova-Deep and Comprehensive Free Trade Area	2023	Final Report
Evaluation of EU-Colombia, Ecuador, and Peru-Trade Agreement	2023	Main Report
Evaluation of EU-Central America Association Agreement	2023	Main Report
Evaluation of six Euro-Med FTAs	2021	Final Report
Evaluation of CARIFORUM-Economic Partnership Agreement	2021	Final Report
Evaluation of EU-Korea-FTA	2019	Final Report
Evaluation of EU-Mexico-FTA	2017	Final Report
Evaluation of EU-Chile-Association Agreement, Trade Pillar	2012	Final Report

Source: Own Compilation

#### *From Impact Assessment to Impact Prevention?*

Environmental Impact Assessments, whether conducted before, during, or after the negotiations, can contribute to achieving coherence of EU trade law with the EGD. They provide public information about the environmental impacts of EU trade agreements at different stages. However, to date there has been no EU trade agreement for which all three types of impact assessments have been conducted and are publicly available. Furthermore, the European Commission has so far not met the ambition of conducting impact assessments for all EU trade agreements. It also remains unclear how the insights from impact assessments are concretely used in the policy process. The potential of impact assessments as tools to contribute to strengthening coherence of EU trade policy with the EGD depend thus on ensuring that impact assessments are followed by concrete actions. Weak or even strong coherence can thus be achieved if impact assessments are followed by measures of impact prevention. Coherence also depends on the accuracy of impact assessments, which in turn can be affected by how early or late they are conducted, or how specific they are to the country in question.

#### 4.3.2 Design of EU Trade Agreements

The EU integrates in its trade agreements specific design elements that have environmental objectives in line with the EGD. Traditionally, the trade agreements' sections on Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Measures (SPS) touch on environmental issues. Since the 2006 trade strategy, the EU has been incorporating new provisions related

to labour standards and environmental protection in the trade agreements.<sup>52</sup> The aim is to leverage the bilateral trade relation for strengthening sustainable development in particular in trading partner countries. Such provisions have since the 2010 EU-Korea Trade Agreement been included in specific chapters on Trade and Sustainable Development (TSD). In more recent trade negotiations, for example with India, Chile and Indonesia, the European Commission has in addition proposed specific chapters on Sustainable Food Systems (SFS).

Overall, there has been a trend towards mainstreaming environmental sustainability in the EU's trade agreements. The trend in principle supports the coherence of EU trade agreements with the EGD. However, the provisions remain in some cases unambitious and imprecise. In particular, the provisions tend not to go beyond what is already well-established practice in the EU. The protection of indigenous communities in the context of the EU-NZ TA is one of the few exceptions. On this issue, the EU adapted to the New Zealand's more advanced legal requirements.

Usually, the Commission does not approach trade negotiations as a forum for increasing its own environmental standards, as it considers EU rules to be the most stringent ones globally. The question arises to what extent the agreements under negotiation reflect the latest developments in measures proposed under the EGD. The following sub-sections illustrate through concrete examples from the three case studies (batteries; antimicrobials; welfare of farming animals) whether and how selected trade agreement chapters are (in) coherent with the objectives of the EGD. The analysed agreements have been concluded recently or are published EU proposals for trade agreements under negotiation. The EU's proposals are of interest for this Report as they reveal even more about the objectives of EU trade policy than the concluded agreements do. Concluded agreements are a compromise between the negotiating parties.

### *Chapters on Technical Barriers to Trade (TBT) in the EU Trade Agreements*

The aim of TBT chapters in EU trade agreements is to support trade in goods by preventing, identifying, and eliminating unnecessary technical barriers to trade. A TBT chapter applies to standards, technical regulations, and conformity assessments. The TBT chapters incorporate in EU trade agreements provisions that have generally already been agreed on in the WTO TBT Agreement.

A TBT chapter obliges the negotiating parties to conduct a regulatory impact assessment of the planned technical regulations.<sup>53</sup> This means that a sustainability requirement flowing from the EGD, for example a minimum recycled content requirement on certain materials in a battery (case study on the Battery Regulation), will need to undergo an analysis of the regulatory and non-regulatory alternatives for the requirement.<sup>54</sup> The procedure follows that of Article 2 of the WTO TBT Agreement. The requirement needs to be based on international standards, except when they would be ineffective or inappropriate.<sup>55</sup> In the case of the EU-New Zealand trade agreement, for example, trading partners also need to explain in case they did not use an international standard.<sup>56</sup> These articles of the TBT Chapter establish

52 European Commission (n 33), at 9.

53 Interim EU-Chile Trade Agreement, Article 9.5.1.

54 Ibid, Article 9.5.2.

55 Ibid, Article 9.5.3.

56 Ibid.

certain obligations for the EU that may promote, yet may also limit, the EU's ability to pursue stringent standards in the EGD. The Chapter thus seems weakly coherent, but may also be weakly incoherent, with the objectives of the EGD. If an international standard that would not reach the same recycled content-related level of protection as the EU rule would be considered 'ineffective or inappropriate', it would not prevent the EU from proceeding with the regulation of the batteries.

#### *Chapters on Sanitary and Phytosanitary (SPS) Measures in the EU Trade Agreements*

SPS Chapters aim at safeguarding public, animal and plant health from food-borne, disease or pest risks whilst facilitating trade in animals and animal products, plants, and plant products.<sup>57</sup> This is done for example by ensuring better communication, cooperation, and transparency on the sanitary and phytosanitary measures applicable in either country. The parties are also to introduce mechanisms for establishing equivalence between such national measures.<sup>58</sup> An SPS Chapter can oblige the importing Party to recognise the animal health status of the exporting Party with respect to diseases.<sup>59</sup> SPS Chapters can also contain rules for disputes that may eventually arise between the parties regarding their SPS measures.<sup>60</sup> From the viewpoint of coherence with the EGD, a provision in the EU-Chile FTA<sup>61</sup> confirming the EU's right as the importer to make the final decision regarding the equivalence of the exporter's measure is important. SPS Chapters thus can be coherent, potentially in a rather strong way, with the SPS measures of the EGD.

Of specific relevance to the coherence of the trade agreements with the EGD policies from the viewpoint of this Report's Case studies is the SPS Chapters' article on animal welfare. The language on animal welfare<sup>62</sup> however tends to create only an imprecise requirement to consult as soon as possible upon request by one of the Parties. Animal welfare is dealt with in a bit more detail in the chapter on sustainable food systems, discussed below. Meanwhile, measures aimed at addressing risks from antimicrobial resistance are likely to qualify as SPS measures. They are then subject to the horizontal requirements of the SPS Chapters on e.g. equivalence and on import conditions affecting trade. The coherence of the trade agreements' SPS Chapters with the EGD is mainly positive, but weak.

#### *Chapters on Trade and Sustainable Development (TSD) in the EU Trade Agreements*

The stated objective of TSD Chapters is 'to enhance the development of the Parties' trade and investment relationship in a way that contributes to sustainable development'.<sup>63</sup> As such, their objective is in principle coherent with the EGD. In line with this, the EU has in its FTA with New Zealand committed not to weaken its level of environmental protection for reasons related to promoting trade and investment.<sup>64</sup>

TSD chapters generally function through reinforcing existing commitments of the trading parties to multilateral environmental or labour agreements, contributing to the implementation of already existing environmental or labour laws, and involving civil society groups in sustainability discussions around the trade agreement.

57 SPS Chapter of Interim EU-Chile Trade Agreement, Article 6.1.

58 Ibid, Article 6.1.

59 Ibid, Article 6.6.

60 Ibid, Article 6.7.2.

61 Appendix V of the Annex to the SPS Chapter of the Interim EU-Chile Trade Agreement, para. 1 (d).

62 E.g., *ibid*, Article 6.13.4.

63 E.g., Interim EU-Chile Trade Agreement, Article 26.1 (3)

64 EU-New Zealand Trade Agreement, Article 19.2.4.

TSD Chapters set an obligation regarding a high level of environmental protection,<sup>65</sup> although the text is relatively soft. It only requires the Parties to ‘strive to ensure’ this objective. A characteristic of EU-FTAs is the emphasis on cooperation in the field of trade and environment, including on sustainable production and sustainable transport.<sup>66</sup> The topic of sustainable transport would allow covering questions related to the case study on electric vehicles’ lithium batteries and their recycling requirements.

While cooperation on environmental issues is coherent with the EGD, it does not reflect any firm, concrete commitments. The sparsity of firm commitments in FTAs is not surprising given that both parties need to agree on the text. In other words, even when the EU might be ready to make more firm commitments, the trading party may reject them. The EU-NZ FTA offers a positive example. It includes a commitment by the parties to ‘refrain from any action or omission that materially defeats the object and purpose of the Paris Agreement’.<sup>67</sup> This reflects strong coherence with the EGD and the EU is proposing similar provisions in the negotiations with e.g. Thailand and India.

A TSD Chapter is partly coherent and partly incoherent with the EGD in that it confirms each Party’s right to determine its sustainable development priorities, and to establish and to modify its environmental laws and policies. On the one hand, the TSD Chapter supports the objective of the EGD to overhaul many areas of environmental law in the EU. The TSD is in this respect strongly coherent with the EGD. The effect of these TSD Chapter provisions is however the reverse for the EU’s ambitions to address its environmental footprint outside of the EU’s borders. The protection of environment outside the regulating state’s own territory, in other words in the territory of other states, is a sensitive topic in the trade-environment debate. With the adoption of the EGD the EU appears to be expanding its approach in addressing environmental impacts globally, and perhaps even out-of-state environmental harms more unilaterally.<sup>68</sup> EU requirements with extraterritorial effects, such as those analysed in the Report’s case studies, would run counter the third countries’ right to environmental governance within their territories as endorsed by the TSD Chapter of e.g. the EU-NZ FTA and as negotiated in the EU-Thailand and EU-India Agreements. It is not evident whether the intention of the TSD text on the right to regulate the environment domestically is to restrict the extraterritorial regulation of the environment. If it is, the TSD Chapter would be incoherent with the objectives of the EGD. The TSD Chapters do however also contain more coherent language on the parties’ cooperation on the issue, including the economic and social impacts in the third country.<sup>69</sup>

A similar tension can be detected in other TSD Chapter provisions. The TSD Chapters for example confirm the Parties’ mutual commitment to follow and implement the international environmental law standards and requirements that the Parties have subscribed to.<sup>70</sup> The confirmation is coherent with the EGD, where the international standards are well aligned with the EGD. Yet, they also lead to a conflict, where a party’s level of ambition is higher than that of the international standard. This may well be the case for EGD policies. The TSD Chapter would be incoherent with the aspirations of the EU under the EGD.

On certain environmental issues the level of coherence offered by the TSD Chapters is higher.

65 See e.g. Proposed EU-Australia Trade Agreement, Article 2; Interim EU-Chile Trade Agreement, Article 26.2.3.

66 See e.g. EU-New Zealand Trade Agreement, Articles 19.5. and 19.6.

67 EU-New Zealand Trade Agreement, Article 19.6.3.

68 De Ville, Happersberger and Kalimo (n 2).

69 See e.g. EU-Kenya Economic Partner Agreement, Article 99.

70 Proposed EU-Australia Trade Agreement, Articles 2 and 4; Interim EU-Chile Trade Agreement, Articles 26.2 and 26.9. See also EU-New Zealand Trade Agreement, Article 19.2.2.



Such explicit language that is of relevance to the products of this report can be found in the Articles on the Trade and climate change, biodiversity and supply chain management.<sup>71</sup> The Articles on climate change in several TSD Chapters agreed to or proposed by the EU aim to facilitate the removal of obstacles on goods that mitigate climate change (e.g. energy efficient products), and the adoption of policies to deploy best available technologies. For example, in the EU-NZ FTA the parties agree to encourage trade in environmental goods and services as well as to facilitate trade that is relevant for addressing climate change. This includes the reduction or elimination of customs duties on environmentally more sustainable products as well as tackling tariff and non-tariff barriers<sup>72</sup> In the FTA between the EU and New Zealand the list of environmental goods includes, for example, geothermal heat pumps and various components for solar power. The provisions are coherent with the EGD and can be interpreted as an effort to solve at a bilateral level the failure at the multilateral level to agree on a comprehensive Environmental Goods Agreement. However, the EU's approach to address tariff barriers on environmental goods in its bilateral trade policy may not always be coherent with its internal actions. When suspending common customs tariffs duties on strategic goods for the EU industry through Regulation 2021/2278 (and subsequent amendments) for economic reasons, the EU appears not to have made a rigorous review of their sustainability implications.<sup>73</sup> In other words, raw materials and components not available in the EU and thus benefitting from tariff suspensions may be everything but environmentally friendly. In this respect, the EU's trade policy risks containing elements that are internally incoherent with the EGD.

In the EU's FTA with New Zealand, a new provision on promoting collaboration on resource-efficiency and circular economy has been adopted (Article 19.6). A similar provision has been proposed in the agreements with Australia, Thailand and India. Moreover, the proposed chapter on energy and raw materials in an agreement with India includes a commitment to cooperate in promoting the recycling of goods. The provision could be linked to, for example, case study on the use of recycled content in lithium batteries.

The TSD Chapter's Articles<sup>74</sup> highlight the importance of conserving biological diversity and using biological resources sustainably. While the provisions here focus on trade in endangered species and illegal wildlife trade,<sup>75</sup> the Article is coherent with the EGD's objective to protect ecosystems and their services. The conservation of biological diversity is fundamental in the extraction of raw materials, and thus highly relevant for e.g., the case study on batteries.

Provisions on responsible supply chain management encompass the Parties' efforts to promote trade in goods that contribute to a resource-efficient, low-carbon economy.<sup>76</sup> Furthermore, the Australia FTA-proposal for example specifically mentions the promotion of goods that are subject to ethical trade schemes and eco-labels. The latter TSD objective is coherent with the EGD objectives of promoting animal welfare.

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71        Respectively: Proposed EU-Australia Trade Agreement, Article 5, and Interim EU-Chile Trade Agreement, Article 26.10; Proposed EU-Australia Trade Agreement, Article 6, and Interim EU-Chile Trade Agreement, Article 26.13; Proposed EU-Australia Trade Agreement, Article 9, and Interim EU-Chile Trade Agreement, Article 26.3.

72        EU-Zealand Trade Agreement, Articles 19.5, 19.6, and 19.11. Somewhat similar provisions can be found in proposals for FTAs with Thailand and India. See also EU-China Investment Agreement in Principle, Article 2.5.

73        Interview with an expert from an EU Member State National Customs Administration.

74        See e.g. Proposed EU-Australia Trade Agreement, Article 6.2; Interim EU-Chile Trade Agreement, Article 26.13.6.

75        The Convention on the International Trade in Endangered Species (CITES) is the underlying international environmental Treaty in this issue area.

76        Proposed EU-Australia Trade Agreement, Article 9; Interim EU-Chile Trade Agreement, Article 26.3.4.

The FTAs recognize the need to restrict trade for environmental reasons. For example, in the TSD Chapter of the EU-Australia FTA-proposal, the Parties would expressly acknowledge that measures adopted pursuant to Multilateral Environmental Agreements (MEAs) may be justified as is provided for in Article XX of GATT. Moreover, it is common that FTAs include a chapter on exceptions, with reference to GATT XX and the right of the parties to justify trade restrictive measures on grounds related to e.g., the issue areas of the case studies, protection of public health, conservation of natural resources and public morals.<sup>77</sup> Interestingly the two first mentioned considerations have specifically been linked to environmental protection, while public morals have not. In EU FTAs, the potential link between public morals and environmental protection has in other words not been addressed. This topic is analysed further in Section 5.3 from the viewpoint of the coherence of WTO law with the EGD.

Finally, the TSD Chapters confirm the Parties' right to rely on the precautionary principle<sup>78</sup> and mandates the Parties to give due consideration to opinions of the public.<sup>79</sup> For example, under the EU FTA with New Zealand stakeholders should be given an opportunity to comment on trade measures that may affect the environment and vice versa.<sup>80</sup> This enables consumers to have a say, enhancing democratic legitimacy. This is further reinforced by the commitment to organize public consultations.<sup>81</sup> These process-oriented, cross-cutting provisions of the TSD Chapters are weakly coherent with the EGD.

Overall, the coherence of the TSD Chapters with the EGD varies. There are some aspects of strong coherence, such as the commitment to the Paris Agreement. In many cases, the language however offers merely principled endorsements and emphasises collaborative processes rather than establishing detailed commitments. The coherence is therefore mostly weak, while there are also important areas of obscurity and outright incoherence, such as the question on the extraterritorial scope of EGD.

### *Sustainable Food Systems (SFS) Chapters in EU Trade Agreements*

In the most recently started negotiations on FTAs with India and Indonesia, and the recently concluded agreements with Chile and New Zealand, the EU Commission has proposed new type of a Chapter on Sustainable Food Systems (SFS Chapter). An SFS Chapter aims at strengthening the policies of the negotiating Parties on more sustainable, healthy and resilient food systems.

The proposed SFS Chapters are in general terms coherent with the objectives of the EGD's Farm-to-Fork (F2F) strategy: included in the proposed SFS Chapters are specific articles on the F2F issue areas of animal welfare and the use of antimicrobials in food production. A closer examination of the Chapter's Articles brings forth different levels of coherence with the F2F strategy, from weak to strong. There in other words remains room for strengthening the coherence of this new element of trade agreements with the EGD.

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77 See e.g. EU-New Zealand Trade Agreement, Chapter 25.

78 Proposed EU-Australia Trade Agreement, Article 10.

79 E.g. Proposed EU-Australia Trade Agreement, Article 12.4; Interim EU-Chile Trade Agreement, Article 13.5.

80 See e.g. EU-New Zealand Trade Agreement, Article 19.14. A similar provision has been proposed to e.g. India.

81 See e.g. EU-New Zealand Trade Agreement, Article 22.7.

To start from the weaker end of the coherence spectrum, the SFS Chapters' general provisions are aligned with the spirit of the F2F but are not set in mandating or precise language. The Parties will exchange information, expertise and experiences relating to the food chain.<sup>82</sup> There is a general objective to jointly engage in the transition towards more sustainable food systems.<sup>83</sup> There also are carve-outs that weaken the coherence of the Chapters with the EGD. For example, the agreement's general objective to cooperate only applies to some existing food systems.<sup>84</sup> The EU-Chile FTA and the EU's proposal in the EU-India negotiations recognize the need for action beyond the direct bilateral level, where the parties undertake to 'cooperate to foster global transition towards more sustainable food systems.'<sup>85</sup>

Similarly, the SFS Chapters' provisions on animal welfare contain soft language: the 'Parties aim at reaching a common understanding' on animal welfare standards at the World Organisation for Animal Health (OIE)<sup>86</sup> and the parties 'will cooperate in the development and implementation of animal welfare standards.'<sup>87</sup> The animal welfare standards might follow the lowest common denominator, as they need to be based on 'the Parties' legislation - presumably meaning both Parties' legislation. The Parties either may<sup>88</sup> or shall<sup>89</sup> establish a technical working group on animal welfare. The commitments are in any event limited to cooperation in the field. The provisions on animal welfare are thus weakly coherent with the F2F strategy: their coherence could likely be strengthened though more precise language.

The EU's proposal for the Article on fighting antimicrobial resistance represents the stronger end of the coherence spectrum. According to this provision, the Parties to an FTA would need to recognise that antimicrobial resistance is a threat to human and animal health, and that the use of antimicrobials in animals contributes to such resistance, causing a major risk to public health.<sup>90</sup> The EU also proposes that the Parties recognise that the risk is transnational.<sup>91</sup> This can be important in reflecting on the competence of the EU or its partners to regulate the matter along the entire value chain, with effects that are potentially felt outside of their borders. The EU is also willing to commit to cooperate to foster a global transition towards sustainable food systems that contribute to internationally agreed objectives.<sup>92</sup>

There is mandating and precise language also to phase out the use of antimicrobials as growth promoters, although without a specific timeline.<sup>93</sup> The FTAs diverge, however, in terms of the use and implementation of international standards and action plans. The draft EU-India FTA proposes that Parties 'support the development of and to implement the agreed international action plans to fight against antimicrobial resistance'. The text also proposes a binding obligation regarding the use of internationally developed guidelines

82 See e.g. Proposed EU-India Trade Agreement, Article 4.3; Interim EU-Chile Trade Agreement, Article 7.4.4.

83 See e.g. Proposed EU-India Trade Agreement, Article 1; Interim EU-Chile Trade Agreement, Article 7.1.

84 See e.g. Proposed EU-India Trade Agreement, Article 4.1.

85 See e.g. Proposed EU-India Trade Agreement, Article 10; Interim EU-Chile Trade Agreement, Article 7.9.

86 See e.g. Proposed EU-India Trade Agreement, Article 6.2; Interim EU-Chile Trade Agreement, Article 7.6.2.

87 See e.g. Proposed EU-India Trade Agreement, Article 6.3; Interim EU-Chile Trade Agreement, Article 7.6.3.

88 See e.g. Proposed EU-India Trade Agreement, Article 6.7; Interim EU-Chile Trade Agreement, Article 7.6.8.

89 EU-New Zealand Trade Agreement, Article 8.3.

90 See e.g. Proposed EU-India Trade Agreement, Article 7.1; Interim EU-Chile Trade Agreement, Article 7.7.1.

91 See e.g. Proposed EU-India Trade Agreement, Article 7.1; Interim EU-Chile Trade Agreement, Article 7.1.1.

92 See e.g. Proposed EU-India Trade Agreement, Article 10; Interim EU-Chile Trade Agreement, Article 7.9.

93 See Proposed EU-India Trade Agreement, Article 7.1; EU-Chile Interim Trade Agreement, Article 7.2.2.

and practices. The provision suggests that the trade agreement limits the EU's freedom to push beyond international standards in its F2F strategy. This element of the SFS Chapter would be incoherent with the objectives of the EGD. In comparison, the EU-Chile FTA contains qualifications and is written in non-mandatory language regarding the use of such guidelines or recommendations. Under the EU-Chile FTA, the Parties are 'to consider existing and future guidelines, standards...' and they will support the 'development of international action plans... and their further implementation when both parties consider appropriate'.<sup>94</sup> Thus, EU-Chile FTA allows flexibility for the Parties in deciding how to deal with the risk of antimicrobial resistance. It is in that sense more coherent with the EGD. Both the EU and Chile have subsequently banned the use of antimicrobials.<sup>95</sup>

Unlike the case of animal welfare, the Parties under the EU-India FTA-proposal would *agree to establish* a technical working group on the use of antimicrobials. These are relevant legal thresholds from the perspective of the Parties' ability to regulate antimicrobials, including for the EU to increase the coherence of the SFS Chapters with its F2F strategy. The establishment of such a technical working group remains subject to further agreement by both parties under the EU-Chile FTA.

The SFS Chapters require the Parties to establish actions in pursuing the objectives and milestones on sustainable food systems.<sup>96</sup> A Sub-Committee established through an Agreement must annually assess the implementation of these actions.<sup>97</sup> These provisions would appear to constitute, like the Paris Agreement, mandatory procedural obligations that may be more demanding on the Parties than first appears. Framed differently, the SFS Chapters contain an interesting procedural element that may strengthen the coherence of the FTAs with the EGD dynamically, over a longer timeframe.

Finally, the end provisions of the SFS Chapters<sup>98</sup> assure the Parties' right to modify their import requirements and uphold regulatory measures to protect public policy objectives. The provision confirms at least weak coherence between the trade agreement and the EGD's current and future provisions. On the other hand, the same Article ensures that the (exporting) Party cannot be subjected to a 'particular regulatory outcome' – a topic that is likely important to the EU's trading partners that are facing the EU's globally speaking very stringent requirements on food and other products. Because the Article may limit the EU's regulatory options, it seems incoherent with the EGD. The Report reverts to this matter further below.

The SFS Chapters contain Articles of varying levels of coherence with the EGD. The coherence of the provisions on animal welfare with the EGD is positive but weak, those on antimicrobials stronger. Reference to international standards may lead to incoherence with the objectives of the EGD while the procedural rules may reach stronger coherence than is apparent at first sight.

94 Interim EU-Chile Trade Agreement, Article 7.7.3.

95 Regulation (EU) 2019/6, Article 107. For Chile, see: Chile. Servicio Agrícola y Ganadero. Resolución 6801. Establece Requisitos para el Registro, Comercialización y Uso de Antimicrobianos: Santiago. 2017 <<https://www.bcn.cl/leychile/navegar?idNorma=1111125&idParte=&idVersion=>> accessed on 4 March 2022); Rafael da Silva et al., 'Regulations on the use of Antibiotics in Livestock Production in South America: A Comparative Literature Analysis' (2023) 12 *Antibiotics* 1.

96 See e.g. Proposed EU-India Trade Agreement, Articles 8.1 and 8.2; Interim EU-Chile Trade Agreement, Article 7.8.3.

97 See e.g. Proposed EU-India Trade Agreement, Article 9; Interim EU-Chile Trade Agreement, Article 7.8.1.

98 See e.g. Proposed EU-India Trade Agreement, Article 11; Interim EU-Chile Trade Agreement, Article 7.10.

### Tariffs in EU Trade Agreements – the Example of Meat

Most EU trade agreements reduce the tariffs between the EU and its trading partners for a large amount of goods. Tariffs are taxes charged on goods as they cross borders between customs areas.<sup>99</sup> Tariffs raise the price of imported goods on the domestic market, protect domestic producers who compete with the imported goods, and generate revenue for the state. At the same time, tariffs make goods more expensive for the consumer and protect also inefficient producers. In principle, tariff reductions are coherent with the environmental objectives of the EGD if they reduce trade barriers for environmental goods and are incoherent with the EGD if they reduce trade barriers for environmentally harmful goods.<sup>100</sup> The overall coherence of the tariffs of EU trade agreements with the EGD is the sum of the tariff reductions for all goods covered by a specific trade agreement. We illustrate the coherence of tariffs with the EGD with the example of meat, as meat is directly related to all three focus areas of this report: natural resources, public health, and animal welfare.

Meat consumption is rising globally due to population growth, higher income and dietary shifts towards meat-heavy diets.<sup>101</sup> According to the Food and Agriculture Organization (FAO) of the United Nations, the global meat production amounted to 364.2 million tonnes (mt) in 2022 and is expected to further grow 10-15% by 2032.<sup>102</sup> Most meat is poultry meat (141.0 mt), before pork meat (122.3 mt), bovine meat (76.1 mt), and ovine meat (16.7 mt).<sup>103</sup> Meat production contributes to protein supply but increases environmental, health, and animal welfare issues. The FAO estimates that 12 - 14.5 % of anthropogenic greenhouse gas emissions are caused by the livestock sector.<sup>104</sup> Meat production plays accordingly a critical role in the adaptation of food systems necessary to achieve the 1.5-2 degree climate change target of the Paris Agreement<sup>105</sup> but also the land restoration target of the Kunming-Montreal Global Biodiversity Framework.<sup>106</sup> Due to the perishability of meat, trade in meat and meat products is a relatively recent phenomenon, promoted by technological innovation in refrigerated transport and trade liberalization. 11.5% of global meat production was traded (41.8 mt) in 2022 and meat exports are projected to rise a further 3% by 2032.<sup>107</sup>

The EU plays a triple role in the meat value chain. It is a major importer of feed, a major consumer of meat, and a major producer and exporter of meat. In 2022, the EU produced a total of 42.2 mt of meat – 22.1 mt pork, 13 mt poultry, 6.6 mt beef and 0.5 mt sheep and goat meat from 134 million pigs, 400 million hens, 75 million cattle and 70 million sheep and

99 The EU is a customs union since 1968. Members of a custom union do not apply tariffs or non-tariffs measures hindering the movement of goods between members of the customs union and apply a common external tariff from goods coming from third countries.

100 There is no international consensus which goods are environmental goods and which goods are environmentally harmful goods. 46 members of the World Trade Organization launched in July 2014 negotiations for the establishment of an environmental goods agreement. The Asia-Pacific Economic Cooperation and the Organisation for Economic Co-Operation and Developments proposed two different lists of environmental goods.

101 H. Charles J. et al., 'Meat consumption, health, and the environment' (2018) 361 *Science*; David Tilman and Michael Clark, 'Global diets link environmental sustainability and human health' (2014) 515 *Nature* 518.

102 OECD and FAO, 'Agricultural Outlook 2023-2032' (2023).

103 FAO, 'Food Outlook – Biannual report on global food markets' (2023).

104 OECD and FAO (n 103); <https://www.fao.org/newsroom/detail/new-fao-report-maps-pathways-towards-lower-livestock-emissions/en>. This is 6.2 billion tons of CO2 equivalent (GtCO2eq).

105 Michael A. Clark et al., 'Global food system emissions could preclude achieving the 1.5 and 2 C climate change targets' (2020) 370 *Science* 705.

106 Marta Kozicka et al., 'Feeding climate and biodiversity goals with novel plant-based meat and milk alternatives' (2023) 14 *Nature Communications*.

107 OECD and FAO (n 103).

goats.<sup>108</sup> This makes the EU one of the four main meat producers next to the USA, Brazil and China. Each European consumed in average 69.5 kilograms of meat per year in 2020, which is projected to drop to 67 kg per year by 2031.<sup>109</sup> This is significantly over the global average consumption of meat which stands at 42.8 kg per year, and 2 to 4 times higher than the recommended intake. EU production in meat satisfies EU demand with regard to poultry, pork and beef. Only sheep and goat meat is largely imported from New Zealand and Australia.<sup>110</sup> The EU exported 5.6 mt pork (2019), 1.78 mt poultry (2019), and 1 mt beef (2021).<sup>111</sup> The EU's triple role has environmental implications. European livestock was estimated to produce 81-86 % of the total EU agricultural greenhouse gas emissions in 2020.<sup>112</sup> Changes in European nutrition towards more plant-based diets has potential to mitigate climate change, and to reduce nitrogen emissions and land requirements.<sup>113</sup> It would also lower the environmental footprint of imported feed for European livestock.<sup>114</sup>

Tariff reductions in EU trade agreements are expected to further increase meat exports. Table 5 provides an overview of the tariff schedules of recent EU trade agreements. The Directorate-General for Agriculture and Rural Development of the European Commission commissioned in 2016 a study, which indicated that 90 per cent of the new demand for agri-food products over the next 10-15 years will be outside of Europe and that income and employment in the EU agri-food sector are dependent on access to export markets, as the European market for agricultural products is relatively saturated. 'The ambitious bilateral trade agenda pursued by the EU over the last 10-15 years is therefore set to continue'.<sup>115</sup> Two additional studies conclude that EU trade agreements overall benefit the EU agri-food sector, if defensive and offensive negotiations are mixed, as some European sectors such as beef, sheep meat and poultry may be vulnerable to imports.<sup>116</sup>

Overall, the tariff schedules in the EU's recent trade agreements further reduce tariffs on meat. This liberalization of meat trade leads to increased availability, lower prices, and more consumer choice in meat products. Tariff reductions on meat products that *increase* the GHG emissions are strongly incoherent with the environmental objectives of the EGD. Tariffs on meat that *hinder decreases* in the GHG emissions are also incoherent with the EGD. However, for a comprehensive assessment tariffs on meat should not be assessed in isolation: the GHG

108 Eurostat, 'Agricultural production - livestock and meat' (2023).

109 European Commission, Directorate-General for Agriculture and Rural Development, 'EU Agricultural Outlook 2021-2031' (2023); [https://commission.europa.eu/system/files/2023-01/SWD\\_2023\\_4\\_1\\_EN\\_document\\_travail\\_service\\_part1\\_v2.pdf](https://commission.europa.eu/system/files/2023-01/SWD_2023_4_1_EN_document_travail_service_part1_v2.pdf); The European Green Deal (n 5), p. 12.

110 Rachele Rossi, 'The sheep and goat sector in the EU Main features, challenges and prospects' (2017) European Parliamentary Research Service.

111 Marie-Laure Augère-Granier, 'The EU poultry meat and egg sector' (2019) European Parliamentary Research Service; Marie-Laure Augère-Granier, 'The EU pig meat sector' (2020) European Parliamentary Research Service; Claudia Vinci, 'European Union beef sector' (2022) European Parliamentary Research Service.

112 In 2023, agriculture produced 14.3 % of the EU's total greenhouse gas emissions. See Eurostat, 'Quarterly greenhouse gas emissions in the EU' (2023); European Commission, Directorate-General for Agriculture and Rural Development, Jean-Louis Peyraud and Michael MacLeod, 'Future of EU livestock – How to contribute to a sustainable agricultural sector? - Final Report' (2020) Publications Office.

113 Vilma Sandström et al., 'The role of trade in the greenhouse gas footprints of EU diets' (2018) 19 *Global Food Security* 48; Henk Westhoek et al., 'Food choices, health and environment: Effects of cutting Europe's meat and dairy intake' (2014) 26 *Global Environmental Change* 196.

114 Fabio Sporchia et al., 'The environmental footprints of the feeds used by the EU chicken meat industry' (2023) 886 *Science of The Total Environment*; Fabio Sporchia, Ermias Kebreab, and Dario Caro, 'Assessing the multiple resource use associated with pig feed consumption in the European Union' (2021) 759 *Science of The Total Environment*; Johan O. Karlsson, 'Halting European Union soybean feed imports favours ruminants over pigs and poultry' (2021) 2 *Nature Food* 38.

115 European Commission, Directorate-General for Agriculture and Rural Development, Copenhagen Economics, 'Impacts of EU trade agreements on the agricultural sector' (2016) Publications Office.

116 Pierre Boulanger et al., 'Cumulative economic impact of future trade agreements on EU agriculture' (2016) JRC Science for Policy Report, EUR 28206 EN; Emanuele Ferrari et al., 'Cumulative economic impact of trade agreements on EU agriculture' (2021) JRC Science for Policy Report, EUR 30496 EN.

emissions and other life-cycle based environmental impacts, similar impacts of alternatives to meat, as well as preferential tariffs on alternative substitutes to meat such as plant-based meat should be taken into account. From a global perspective, further research is needed to evaluate whether indirect consequences such as the relocation of meat production, and a shift in market shares from the EU to other countries with potentially more or less efficient production methods, have beneficial or detrimental consequences for the environment in the broader sense.<sup>117</sup>

Table 5. Tariff Reductions on Meat in Recent EU Trade Agreements

EU Trade Agreement	Tariffs on EU Imports	Tariffs on EU Exports
EU-Chile FTA	The EU provides additional market access in the form of duty-free quotas to Chile, including an additional import quota for 9 000 tonnes of poultry meat with provisions to increase the quota by another 9 000 tonnes after three years. It will also add duty-free quotas for 2 000 tonnes of bovine meat, 4 000 tonnes of sheep meat and 9 000 tonnes of pork for import into the European Union.	99.9% of EU exports will be tariff-free (all products except sugar). Despite Chile's low import tariffs, market access for some EU products such as beef, fresh fruits and vegetables has been denied due to SPS issues.
EU-New Zealand FTA	Beef meat: Reduced duty of 7.5 % for tariff quota of 10,000 tonnes, gradually applied over 7 years.  Sheep meat: Duty free import of tariff rate quota of 38,000 tonnes, will be gradually applied over 7 years	Trade Agreement removes all tariffs on EU agri-food exports upon entry into force
EU-Japan-EPA	Custom duties for almost all products including Japan's export priority products such as beef will be eliminated at the date of entry into force of the EPA	Japan will phase out ad valorem duties on pork cuts and pork meat over 11 years. Ad valorem duties on beef will be reduced from 38.5% to 26.7% in April 2019, and gradually fall to 9% over 15 years. Base rate tariffs on poultry meat will be phased out after 5-10 years. MFN duties on sheep and goat meat are already at zero.
EU-Vietnam FTA	For certain agricultural products such as poultry meat, the EU will eliminate tariffs over a transitional period of up to 7 years.	Tariffs on poultry meat will be progressively removed in 10 years, fresh pork after 9 years, frozen pork after 7 years, beef after 3 years
EU-Singapore FTA	Tariff elimination for 84% of all tariff lines for Singapore's originating exports to the EU upon entry into force. Customs duties will be removed within 5 years for meat and meat products.	Singapore has zero duties on imports of agri-food products and committed itself to keep zero duties on EU exports.
EU-Canada-CETA	The EU will grant Canada tariff rate quotas (TRQs) over six years for almost 50 000 metric tonnes (MT) for beef, 3 000 MT for bison, and 75 000 MT for pork. For Canadian beef exported to the EU within the existing high-quality beef quota, the duty will drop from 20 percent to zero. All beef imports into the EU will continue to be subject to EU requirements regarding growth promoters, antimicrobial treatments and sanitary inspections.	On the entry into force, Canada eliminated duties for 90.9% of all its agricultural tariff lines. By 2023, this will increase to 91.7%. Poultry remains excluded.

Source: Own compilation<sup>118</sup>

117 We do not take into consideration here indirect consequences such as, for example, the potential relocation of EU market shares of meat production from the EU to other countries, with potentially less efficient production methods, or potential detrimental effects on the conclusion of trade agreements as such.

118 There is no international consensus which goods are environmental goods and which goods are

In sum, trade liberalization remains the Commission's primary focus in negotiating trade agreements. While there has been a trend towards mainstreaming environmental sustainability in the EU's trade agreements, which in principle supports their coherence with the EGD, the provisions remain in some cases unambitious. As regards the Environmental Impact Assessments, they can contribute to achieving coherence of EU trade law with the EGD irrespective of whether they are conducted before, during, or after negotiations. Yet thus far there has been no EU trade agreement for which all three types of impact assessments were conducted and are publicly available, and the European Commission has not conducted impact assessments for all EU trade agreements. It is unclear also how the insights derived from impact assessments have been used in the policy process. To ensure that environmental impact assessments result in weak and even strong coherence, such assessments should thus be followed by measures of impact prevention. In essence, while impact assessments are crucial tools for identifying potential environmental impacts of trade agreements, their effectiveness in ensuring coherence with the EGD objectives relies heavily on their comprehensive application, utilization in policy-making, and subsequent actions taken to prevent adverse effects.

The design of specific chapters of the Trade Agreements shows varying degrees of coherence. The TSD Chapters are mostly weakly coherent with the EGD. While the TSD's objectives are aligned with the EGD, in many cases, the language offers merely principled endorsements and emphasises collaborative processes rather than establishing detailed commitments. The SFS Chapters contain provisions of varying levels of coherence with the EGD as well. The provisions on animal welfare with the EGD are weakly coherent, while those on antimicrobials stronger. Reference to international standards may lead to incoherence with the objectives of the EGD while the procedural rules may reach stronger coherence than is apparent at first sight. Finally, tariff reductions on meat products that *increase* the GHG emissions or other environmental impacts, or harm public health are strongly incoherent with the environmental objectives of the EGD.

## **5 THE COHERENCE OF WTO LAW WITH THE EGD**

This Section provides first (Section 5.1) an overview of the rules of WTO Agreements that are relevant for assessing the coherence of WTO law with the EGD. The Report then assesses (Section 5.2) how coherent the identified WTO rules are with the selected EGD measures in the three EGD case studies introduced in Section 2.2.2.

### **5.1 Trade law disciplines of the WTO**

Many of the environmental laws and policies developed in the EGD, such as the case studies of this Report, focus on the environmental qualities and characteristics of specific products. These measures may affect international trade, because their requirements usually apply also to imported products and the processes used for manufacturing the products. The measures thus come into contact with the WTO law, the primary objective of which is to

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environmentally harmful goods. 46 members of the World Trade Organization launched in July 2014 negotiations for the establishment of an environmental goods agreement. The Asia-Pacific Economic Cooperation and the Organisation for Economic Co-Operation and Developments proposed two different lists of environmental goods.



maintain global trade open and non-discriminatory, and in some areas also to promote better access to markets. The international obligations that the EU has undertaken within the WTO require the EU to ensure that the EGD measures comply with the disciplines of the relevant WTO Agreements. An exporting Party that feels that an importing Party's regulatory measure, such a requirement adopted by the EU under the EGD, does not respect the rules of the WTO can challenge the measure in the WTO's dispute settlement system. If the importing Party is considered not to comply with its WTO commitments, it is obliged either to adjust the measure or to face legitimate (retaliatory) trade sanctions of proportionate effect by the exporting Party.

Two WTO Agreements are of particular importance for the case studies of the Report: the Agreements on the Technical Barriers to Trade (TBT) and on Sanitary and Phytosanitary Measures (SPS). The TBT and SPS Agreements apply to most environmental technical regulations and food-safety measures. The TBT Agreement applies to technical regulations that set mandatory (e.g. environmental) requirements applicable to an identifiable group of products, and which set out product characteristics or their related processes and production methods. Meanwhile, the SPS Agreement applies exclusively to measures that have the specific objectives of protecting human, animal and plant life or health from food-borne risks within the territory of an importing state.

The main objectives of the TBT and SPS Agreements are to guard against trade protectionism *and* to promote market access. As regards the first objective, the TBT and SPS Agreements aim to discipline measures that are discriminatory or aimed at awarding a competitive advantage to local producers (SPS Art. 2.3 and 5.5 as well as TBT Art. 2.1). However, the TBT and SPS Agreements allow WTO members to take measures even though they may have a detrimental impact on imported products, if the measures aim to promote environmental protection or other legitimate public policy objectives.<sup>119</sup>

Discrimination based on the country of origin, unless indispensable for reasons of essential societal objectives such as environmental protection, are thus prohibited as detrimental to open trade. Such rules may also be incoherent with achieving environmentally optimal outcomes. Trade in environmentally more sustainable (i.e. 'greener') products enables access to and creates competition for products that may under appropriate circumstances support the environment, for example.

The second objective of the TBT and the SPS Agreements is to promote market access, also in certain cases where there is no discrimination. Article 2.2 of the TBT Agreement would thus not be coherent with technical regulations that have a limiting effect on international trade, if the limiting effect is more than what is necessary to fulfil a legitimate objective. In assessing whether a technical regulation is more trade restrictive than necessary (the 'necessity test'), the WTO adjudicating bodies will consider and weigh the following elements: (1) the degree to which a measure contributes towards achieving a legitimate objective; (2) the trade-restrictiveness of the measure; and (3) the nature of the risks involved and the gravity of the consequences that will arise as a result of non-fulfilment of the set objective. The WTO adjudicating bodies will also assess whether there is an alternative measure that is less trade

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119 Denise Prévost, 'The role of science in mediating the conflict between free trade and health regulation at the WTO' in Marjolein van Asselt, Michelle Everson, and Ellen Vos, *Trade, Health and the Environment. The European Union Put to the Test* (Routledge 2014), at 131-133.

restrictive, but which would make an equivalent contribution to a legitimate objective, taking account of the risks that non-fulfilment would create, and which is reasonably available to the regulating state.

A similar requirement is imposed in the SPS Agreement, which stipulates that Member States may apply SPS measures only to the extent necessary to protect human, animal, or plant life or health (Art. 2.2). The measure may not be more trade-restrictive than required to achieve the desired level of protection, taking into account technical and economic feasibility (Art. 5.6). In other words, WTO law would be incoherent with an EGD measure to protect the environment, if there exists an alternative way to reach the same environmental objective that is less limiting on the imports. The latter, alternative measure should be chosen instead.

Overall, the TBT and SPS Agreements include specific rules that delimit the EU's ability to adopt measures to protect the environment. This Report examines instances where the WTO rules are incoherent with the objectives of the EGD.

The three case studies of the Report highlight important and topical issues where WTO law is incoherent with the EGD. This Report was commissioned so as not to focus on the reverse angle, i.e. on aspects of the EGD that could be adjusted for improving their coherence with the WTO law, sometimes for further environmental benefits.

The examples in the Report concern specifically situations where the WTO law may affect the ways in which the EGD addresses environmental impacts outside of the EU's boundaries. The examples thus analyse the difficult issue of the EU's extraterritorial responsibility for and ability to govern the phase of product life cycles that takes place in third countries – the EU's environmental footprint outside of the Union's jurisdiction. The case studies and the related issues of coherence are, as explained in Section 2.3.3, the following:

- Sustainable mobility – how to draft measures at the nexus of environmental protection and industrial policy?
- Animal welfare – what role for consumer preferences and public morals?
- Public health – how to combat resistant bacteria in the global food chain?

In each of the cases, the analysis zooms closely on specific questions to showcase the diversity and complexity of the issues at stake.

## **5.2 Recycled-content requirements in batteries – defining the objectives of legislation**

In order to determine the coherence of the WTO law with the recycled content requirement of the EU Battery Regulation, it is necessary to establish what legitimate regulatory objectives are supported by the TBT Agreement.

### 5.2.1 Legitimate regulatory objective(s) of recycled content requirements

The Battery Regulation's recycled content requirement<sup>120</sup> qualifies as a technical regulation under the TBT Agreement, because it sets a mandatory production method to an identifiable group of products. Hence, the disciplines of the TBT Agreement apply to this measure. Article 2.1 of the TBT Agreement prohibits WTO members from setting technical regulations that accord less favourable treatment on imported products than on like domestic products or products of other origin. Less favourable treatment can occur either as *de jure* discrimination or as *de facto* discrimination. There is *de jure* discrimination if the technical regulation makes explicit distinctions between products based on their country of origin. There is *de facto* discrimination when a technical regulation modifies the conditions of competition to the detriment of imported products, even though there is no express reference to their origin in the measure. The burden of a *de facto* discriminatory policy falls disproportionately on imported products compared to the burden on like domestic products.

However, not all measures resulting in a detrimental impact on imports are incoherent with the TBT Agreement. The TBT Agreement allows in cases of *de facto* discrimination a detrimental impact on imports, if the impact stems exclusively from a legitimate regulatory objective, not from reflecting discrimination on a group of imported products. The TBT Agreement includes an illustrative, non-exhaustive list of legitimate objectives. These objectives include the protection of human health or safety, animal or plant life or health, and the protection of the environment. By contrast, economic objectives including objectives to promote or protect local industries are not considered legitimate under the WTO law. They cannot justify discriminatory impacts on imported products.

To know whether the TBT Agreement supports the objectives behind the recycled content requirement of the EU Battery Regulation, it is necessary to establish the precise regulatory objectives behind it. A recycled content requirement can be motivated by an environmental objective. The EU Batteries Regulation has the general objective of 'preventing and reducing the adverse impacts of batteries on the environment, protecting the environment and human health by preventing and reducing the adverse impacts of the generation and management of waste batteries'.<sup>121</sup> The Regulation mentions also the aim of reducing the use of resources and favouring the application of the waste hierarchy.<sup>122</sup> The Regulation highlights the broader context of the carbon footprint and the environmental impacts arising across the life-cycle of batteries from the extraction of cobalt, nickel and lithium to their refining operations.<sup>123</sup> The Regulation also acknowledges the environmental impacts resulting from waste batteries that are not separately collected and not treated in an environmentally friendly way.<sup>124</sup>

Even though the Regulation contains a multitude of references to various environmental objectives regarding batteries, it does not expressly link the adoption of the recycled content requirement itself to any specific environmental goal. Rather, the rationale given for the mandatory recycled content requirement in the Battery Regulation is to 'support the development of the circular economy and allow a more resource-efficient use of raw materials, while reducing the EU's dependency on raw materials from third countries' by promoting the recovery of these metals from waste.<sup>125</sup> The aim of contributing to a circular economy is,

120 Battery Regulation (n 26), at Art. 8.

121 Battery Regulation (n 26), at Art. 2.

122 Battery Regulation (n 26), at Recital 12.

123 Battery Regulation (n 26), at Recital 77-78.

124 Battery Regulation (n 26), at Recital 108.

125 Battery Regulation (n 26), at Recital 30.

however, ambiguous. A circular economy is a means that can be used for achieving different environmental ends, not an end in itself.<sup>126</sup> A circular economy can foster different aspects of environmental sustainability. It is not clear whether the recycled content requirement is aimed at, for example, the GHG emission or loss of biodiversity during the extraction of the resource, or pollution during the end-of-life management of the resource. Because the TBT requires national measures to pursue a legitimate objective, it would be strongly coherent with a Battery Regulation requirement on minimum recycled content that is clear about its environmental objective. It would be weakly coherent with a recycled content requirement that is not clear about its environmental objective.

Moreover, the Battery Regulation explicitly cites as one of its objectives the need to reduce the EU's dependency on raw materials from third countries.<sup>127</sup> Reducing resource use may be advanced for reasons other than to promote environmental objectives. Increasing recycled content with the view of reducing raw material dependency to create or to maintain EU's competitive advantage in battery manufacturing is an industrial policy objective. Reducing dependency on raw materials to ensure security of supply for key industries may be considered as promoting EU's national security interest – 'strategic autonomy' and 'resilience'. Because industrial policy objectives are not legitimate under the TBT Agreement, the recycled content requirement framed against that objective risks being considered protectionist.<sup>128</sup> The TBT Agreement would be incoherent with a EGD measure that pursues an industrial policy objective.

The recycled content requirement of the EU Battery Regulation may also be underpinned by multiple objectives in parallel. The pursuit of many policy objectives may be expected in eco-design rules and circular economy policies in other EGD measures as the EU strives to achieve internal policy coherence and applies the principle of environmental integration (Art. 11 TEU). The WTO recognizes that national regulators may accommodate within a single measure several policy interests.<sup>129</sup> The WTO law is in this respect coherent with how the EGD pursues multiple objectives through its Circular Economy policies. Incoherence with EGD may however arise when a measure simultaneously pursues a legitimate regulatory objective, such as the protection of the environment, and an illegitimate objective such as the promotion of industrial policy. These cases are likely to be scrutinized strictly in the WTO dispute settlement system, if an exporting country raises a complaint against the EGD measure. While the exporting country, as the complainant, has under the WTO rules the burden of demonstrating the existence of a detrimental impact on its products, it is for the EU as the defendant importing country to provide evidence that such detrimental impacts derive from a legitimate regulatory objective and to provide evidence on the environmental benefits of the recycled content requirement. The burden of providing evidence would be incoherent with an EGD measure that is not based on robust scientific evidence.

The TBT Agreement may also be coherent, with the recycled content requirement, and with circular economy strategies more broadly speaking, if they are aimed at resource conservation. Art. XX of the GATT lists the conservation of exhaustible natural resources as a legitimate objective in itself, without linking it expressly to environmental protection.<sup>130</sup> Thus, the WTO law seems in the end coherent with a recycled content requirement that aims to conserve exhaustible natural resources.

126 Harri Kalimo and Eleanor Mateo, 'Circular Economy as a Means, not an End: The Case of Sustainable Carsharing' (2022) 52 *The Environmental Law Reporter* 10922.

127 Battery Regulation (n 26), at Recital 30.

128 Panel Report, *China - Rare Earths* (2014), para. 7.400.

129 Appellate Body Report, *US - Clove Cigarettes* (2012), paras. 113, 115.

130 The key metals in batteries would likely be considered exhaustible natural resources. See Panel Report, *China - Raw Materials*, para. 7.369; Panel Report, *China - Rare Earths*, para. 7.365.

## 5.2.2 Even-handedness of requirements that pursue legitimate objectives

The right of the WTO member states to promote legitimate objectives under Article 2.1 TBT is, however, subject to meeting certain conditions. It must be shown that the technical regulation is designed and applied in an even-handed manner.<sup>131</sup> The requirement must be fair and reasonable in addressing the environmental risk(s). The fairness and reasonableness of the requirement will need to be assessed against the legitimate regulatory objective(s) that it is trying to resolve. We identified above multiple possible objectives for the Battery Regulation's recycled content requirement.

As regards the objective to conserve exhaustible resources, the recycled content requirement must have a close and genuine relationship to reducing the pace of extraction or consumption of the key metals. To be even-handed towards imports, the WTO requires that there are also restrictions to limit domestic production or consumption. The limitation on imports must thus be internally coherent with domestic policy measures. It would be difficult for the EU to argue that there will be an absolute reduction in the extraction of key metals because battery use in cars is exploding. A very strict interpretation of even-handedness would thus lead to an incoherence between the TBT and the EGD measure. It seems however that it is sufficient according to the WTO law that the EU has policies to restrict domestic production and consumption, even if the amount of resource use were increasing at the same time as long as it is lower than expected demand.

Another type of even-handedness issue would arise if the objective of the recycled material requirement were to address the environmental impacts of the extraction and refining of the metals. Such adverse impacts will vary depending on the region where the extraction takes place and the environmental protection programmes to manage the impacts. The application of the recycled content requirement on imported batteries may also well concern batteries where the material extraction and production process has not had any adverse impact within the EU. The tests on the legitimate objective and the even-handedness of the measure thus bring forth the extraterritorial effect of the EGD measure on third countries. We revert to extraterritoriality in Section 5.5.

In summary, an assessment of the coherence of the WTO law with the recycled content requirement illustrates that at the level of the environmental objectives, the WTO is coherent with the EGD. The allocation of the burden of proof on the EU to demonstrate a legitimate objective creates procedural weak incoherence with the EGD measures. The assessment also shows how the WTO law may be incoherent with measures that are aimed at achieving a more 'circular economy' without being specific about the contents of that objective. Trade law seems to function here as a lens that brings forth the importance of regulatory precision in defining the environmental objectives of the EGD measure. An assessment of the coherence of trade law with the EGD also reveals challenges related to extraterritoriality. The EU can help ensure coherence with the WTO by providing clarity and textual evidence on the sought legitimate objectives.

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131 Appellate Body Report, *US – Clove Cigarettes* (2012), para. 182.

## 5.3 Consumer perceptions of animal welfare as a basis for distinguishing products

### 5.3.1 Animal welfare in the EU

The second case study on the coherence of the EGD and trade law concerns the EU's F2F strategy, specifically the issue of animal welfare. The F2F strategy aims to ensure a higher level of animal welfare, which the strategy links to improving animal health and food quality, reducing the need for medication (and thus the susceptibility for development of antimicrobial resistance) and preserving biodiversity.<sup>132</sup> Besides contributing to these policy objectives, animal welfare also reflects citizen concerns.<sup>133</sup> There is a growing number of EU consumers that demand more welfare-friendly farming methods and information to help them identify products produced in welfare-friendly conditions.<sup>134</sup>

The Commission has committed to revising the existing EU animal welfare legislation to align it with the latest scientific evidence, broaden its scope, and ultimately ensure a higher level of animal welfare.<sup>135</sup> The Commission has intended to put forward a legislative proposal in the last quarter of 2023 to phase out and prohibit the use of cages for specific animal species covered in the initiative.<sup>136</sup> A citizens' initiative requested the Commission to issue a legislative proposal to prohibit: (i) cages for laying hens, rabbits, pullets, broiler breeders, layer breeders, quail, ducks and geese; (ii) farrowing crates for sows; (iii) sow stalls, where not already prohibited; and (iv) individual calf pens, where not already prohibited. The exact conditions for the prohibition of cage systems will be determined on the basis of impact assessments that will consider four issues: (i) animal welfare benefits, (ii) social and economic needs of the farming sector in the EU, (iii) the international trade dimension, and (iv) environmental aspects. While the current Commission will not keep to the original timeline, the issue will not disappear, and it will be there for the next Commission to address.

Most EU animal welfare rules are currently limited to EU production. Only a few animal species and products are subject to animal welfare import requirements. The latter can only be found for example in marketing standards for eggs<sup>137</sup> and slaughter requirements on stunning procedures.<sup>138</sup> Moving forward, the Commission is considering the option of translating the EU requirements on cages into import requirements on production methods to achieve policy coherence between domestic and imported products.<sup>139</sup> This would preclude access to the EU market of animals or products of animal origin that do not comply with EU requirements on caging conditions. Hence, the caging requirements could be challenged as incompatible with WTO law by the country of an exporting producer that does not fulfil the requirements. The EU may then demonstrate that its treatment of products of caged and free animals

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132 Farm to Fork (n 27), at 10.

133 Ibid.

134 On attitudes of Europeans towards animal welfare, see European Commission, Special Eurobarometer 442 (March 2016).

135 European Commission, 'Revision of the animal welfare legislation' <[https://food.ec.europa.eu/animals/animal-welfare/evaluations-and-impact-assessment/revision-animal-welfare-legislation\\_en](https://food.ec.europa.eu/animals/animal-welfare/evaluations-and-impact-assessment/revision-animal-welfare-legislation_en)> accessed 10 December 2023.

136 European Commission, Communication from the Commission on the European Citizens' Initiative (ECI) "End the Cage Age", C(2021) 4747 final.

137 Commission Regulation (EC) No 589/2008 of 23 June 2008 laying down detailed rules for implementing Council Regulation (EC) No 1234/2007 as regards marketing standards for eggs [2008] OJ L 163, Article 30.

138 Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing [2009] OJ L 303, Article 12.

139 The other non-exclusive options also include enhancing cooperation with trade partners and animal welfare labelling that are applicable to imports.

differently is based on legitimate public moral concerns related to animal welfare. WTO law is strongly coherent with the EGD objective of protecting public moral concerns.

Despite the growing prominence of regulation on animal welfare standards, it remains uncertain whether requirements relating to caging conditions are considered 'technical regulations' under WTO law. The classification determines if it is the disciplines of the TBT Agreement or the GATT that apply. Nevertheless, in both cases, the first step is to determine whether the imported product is in fact subject to treatment less favourable than a domestic product. For discrimination to exist, the imported and domestic products need to be considered 'like'. Products that are not like can also be treated differently. If products are like, a difference in their treatment may still be permissible if this is the outcome of pursuing a legitimate regulatory objective related to that product. We therefore need to address the question of whether products of free and caged animals are to be considered like products.

### 5.3.2 Consumer perceptions of animal welfare as a basis for distinguishing products

Assuming that the caging requirement on imports is classified as a technical regulation under the TBT Agreement, the likeness between domestic and imported products is determined based on whether they are in a competitive relationship with each other.<sup>140</sup> The nature and extent of the competitive relationship, then, bring into discussion the perspective of the consumer. To what extent will it matter how the increasingly sustainability-conscious consumers perceive the differences between products that do or do not meet certain animal welfare requirements? Framed differently, consumer preferences or demand for food products that emphasize animal welfare could potentially have an important role in determining the compatibility of animal welfare standards, including caging requirements, with WTO rules.

One of the four criteria<sup>141</sup> in determining likeness between products in WTO decision-making practice is 'the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand'. The assessment of consumer perceptions of products that do or do not follow certain animal welfare requirements would be combined with an analysis of the other three criteria of likeness: the physical properties, the ability of products to serve the same end-uses, and the international tariff classification. Evidence on the criteria would be weighed together to make an overall assessment on the existence of a competitive relationship. For example, it might need to be investigated whether the caging conditions affect the physical qualities or have physically detectable results in the concerned animals or animal products,<sup>142</sup> and whether the resulting differences in product qualities were sufficient to influence consumer preferences.<sup>143</sup> If there is substantial similarity related to the physical characteristics and end uses of a product, the distinction will rely heavily on consumer preferences, taste, and habits. For consumers with strong preferences for ethically grown animals, products produced with lower welfare standards might not be an alternative or substitute to those produced with

140 Appellate Body Report, *US – Clove Cigarettes* (2012), para. 116.

141 The WTO uses in its assessment of likeness the following criteria: '(i) the physical properties of the products; (ii) the extent to which the products are capable of serving the same or similar end-uses; (iii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and (iv) the international classification of the products for tariff purposes.'

142 E.g. reduced occurrence of tough or watery meat, bruising. See e.g. Harry J. Blokhuis et. al., 'Animal Welfare Impact on the Food Chain' (2008) 19 *Trends in Food Science & Technology* S79.

143 Emily Barrett Lydgate, 'Consumer preferences and the National Treatment Principle: emerging environmental regulations prompt a new look at an old problem' (2011) 10 *World Trade Review* 165, at 180.

higher welfare standards. The difference in consumer perceptions would imply an absence of a competitive relationship between the products, which means the products can be treated differently. The application of WTO law would be coherent with the EGD.

The problem with relying on consumer perceptions in analysing the likeness of products is that it is not easy for a consumer to distinguish animals or animal products based solely on how they were produced or raised, such as through restricted use of cages. Behavioural economics also advise that consumers are not necessarily rational actors.<sup>144</sup> It has thus been argued that regulation is required precisely to help consumers distinguish and decide between the products.<sup>145</sup> Yet, current consumer preferences are already influenced by existing domestic regulation, which in turn may be structurally favourable towards protecting the *status quo*, including the incumbent market actors. The counterargument would be that it is precisely consumer preferences – such as a preference for animal welfare – that underpin regulation in a democratic system. Thus, the relationship between consumer preferences and regulation in caging is, so to say, a chicken-and-egg problem.

In WTO dispute settlement cases, it has been stated on likeness that ‘it is not necessary to demonstrate that the products are substitutable for all consumers...; ‘if the products are highly substitutable for some consumers but not for others, this may also support a finding that the products are like’.<sup>146</sup> The WTO panels would also consider market-based data and surveys on purchasing behaviour, assessing substitutability and cross-price elasticity. The application of the cross-price elasticity test means that the consumer concern on animal welfare would need to be compelling enough to actually influence purchasing behaviour.<sup>147</sup>

The foregoing illustrates that the WTO law is as such coherent with policies that consider the issue of animal welfare. The role of consumers hinges on their behaviour on the market: as regards likeness, the threshold is set at the level where animal welfare affects purchasing decisions. The threshold is not set with reference to the consumer’s role as a citizen in democratic policy-making. Considering the challenges relating to the latter standard, this seems coherent. All criteria of likeness considered, the EU’s caging requirements on imported products would today likely result in a finding of likeness of products of high animal welfare standards with imported products from caged animals. This does not mean that the TBT Agreement is systemically incoherent with the EGD. It does however impose the burden on the EU to demonstrate that any detrimental impact on imports stems from a legitimate regulatory objective. Is the TBT Agreement thus at least weakly coherent with EGD in considering the protection of animal welfare such a legitimate objective?

### 5.3.3 Public Moral Concern as a Legitimate Regulatory Distinction

In order to rely on the public moral concern under Article 2.1 of the TBT Agreement, the EU needs to establish (i) the existence of the EU’s public concern about animal welfare related to caging conditions and (ii) that such concern for public morals is within the EU’s own

144 See e.g. Graham Mallard, *Bounded Rationality and Behavioural Economics* (Routledge 2016); Lucia A. Reisch and Min Zhao, ‘Behavioural economics, consumer behaviour and consumer policy: state of the art’ (2017) 1 *Behavioural Public Policy* 190.

145 Gabrielle Marceau and Joel P. Trachtman, ‘A Map of the World Trade Organization Law of Domestic Regulation of Goods: The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade’ (2014) 48 *Journal of World Trade* 351.

146 Appellate Body Report, *US – Clove Cigarettes* (2012), para. 142.

147 Lydgate (n 143).



systems and scales of values'.<sup>148</sup> The existence of public concern about caging conditions can be inferred from the fact that the proposed EU legislation banning cages originated from a European Citizens' Initiative'.<sup>149</sup>

Moreover, under the WTO rules, the EU has wide discretion in determining what public morals entail. The WTO Panel has broadly defined public morals as constituting 'standards of right or wrong conduct maintained by or on behalf of a community or nation'.<sup>150</sup> While coherent with the EGD, this approach has raised a concern for potential overreach. Regulations based on public morals can have impacts beyond the EU's borders, whilst no broad international consensus on what constitutes public morals is required.<sup>151</sup> Even a limited international recognition of animal welfare as a moral issue suffices.<sup>152</sup> The exporting country where the measure has an effect does not need to share the view that animal caging is a moral question or its moral value.

There is also a relatively low evidentiary threshold for establishing the existence of public moral concerns on the caging of animals. The text of the any forthcoming measure, its legislative history, and other evidence regarding the structure and operation of the measure will suffice, no submission of survey evidence being required.<sup>153</sup> This approach has been criticized as creating uncertainty and inviting abuse as a protectionist measure.<sup>154</sup> The main delimiting factor is merely the requirement of even-handedness of the regulatory objective, i.e. that the caging conditions apply equally to domestic and imported products.<sup>155</sup> Overall, the coherence of the WTO law is strong with regulation of caging conditions under the EGD, provided that the latter is designed and applied even-handedly.

#### 5.3.4 Alternative, more coherent ways to govern public moral concerns?

The wide reach of measures that states may attempt to justify with reference to moral concerns could be delimited in an assessment of their coherence with the TBT Agreement. Article 2.2 of the TBT Agreement requires the EU to ensure that its technical regulations are not more trade restrictive than necessary to fulfil a legitimate objective. An analysis of the coherence of the caging measure against the necessity requirement could help identify which elements contribute and how to the public moral objective advanced by the EGD. A measure is more trade restrictive than necessary – so inconsistent with trade law – if there is an alternative less trade-restrictive way of making an equivalent contribution to the public moral objective. Such measure must be reasonably available to the regulating state.

<sup>148</sup> Panel Report, *US-Gambling* (2004), para. 6.461.

<sup>149</sup> See European Commission, 'End the Cage Initiative' C(2021) 4747 final.

<sup>150</sup> Panel Report, *US-Gambling* (2004), paras. 6.461 and 6.465.

<sup>151</sup> Ibid.

<sup>152</sup> Max Jansson, *Value Reconciliation in Trade Law in Light of Criteria on Process and Production Methods – A comparative study of the E.U., U.S., and the WTO* (PhD Thesis 2019), at 467-468.

<sup>153</sup> Paola Conconi and Tania Voon, 'EC-Seal Products: The Tension between Public Morals and International Trade Agreements' (2016) 15 *World Trade Review* 211, at 232.

<sup>154</sup> Ibid, citing Roger Alford, 'Morality Play at the WTO' (*Opinio Juris*, 5 December 2013) <<http://opiniojuris.org/2013/12/05/morality-play-wto/>> last accessed 11 December 2023; Joost Pauwelyn, 'The Public Morals Exception After Seals: How to Keep It in Check' (*International Economic Law and Policy Blog*, 27 May 2014) <<https://worldtradelaw.typepad.com/ielpblog/2014/05/the-public-morals-exception-after-seals-how-to-keep-it-in-check.html>> last accessed 12 December 2023.

<sup>155</sup> See e.g., Steve Charnovitz, 'The moral Exception in Trade Policy' (1998) 38 *Virginia Journal of International Law* 689.

A classic alternative to a complete ban on imports of animals not meeting the caging requirements is labelling and the Commission has been reported to consider improving animal welfare labelling schemes.<sup>156</sup> A mandatory label distinguishing the ‘cage-free’ animal products from those grown in cages would arguably be a less trade-restrictive alternative than a market access ban. The label would give producers the choice of whether to raise the animals while respecting the requirements, while labelling their products accordingly on the EU market. However, the question with labels is whether the information they contain is sufficient to influence consumer purchasing decisions to achieve the EU’s level of protection. A caging requirement as a precondition for market access would ensure that only compliant products enter the EU market. It would prevent consumption of non-compliant products throughout the EU market. This could have a larger impact in reducing the inappropriate use of caging abroad, as the consumers are left with no choice regardless of their moral beliefs. A mandatory label would reduce consumption of unethical products only by those consumers who notice and understand the label and are compelled to act in accordance with it.

From the viewpoint of consumers, a label would be a more targeted and empowering way of protecting morality. Relying on informed decisions, it would better respect the diversity of values and choices within the society. Yet, it may also be argued that the EU legislature, by choosing a market access requirement, has exercised its institutional powers to determine the level of protection desirable for the society at large. Market access rules express citizen empowerment if they are underpinned by a democratic process. The latter would be more consistent with how the WTO identifies the existence of public moral concern.

It would also be important to extend the analysis to how the different measures achieve the level of protection in terms of the ultimate objective of preventing unethical food production. The promotion of the public moral concern aims not only to reduce the level of consumption of unethically produced products by EU consumers, but also to reduce the incidence of practices considered as morally offensive.

Given the foregoing, the TBT Agreement would likely be coherent with an import-prohibiting requirement on animal caging, despite the less trade-restrictive option of labelling.

#### **5.4 Mirror Measures to protect public health – design matters**

The third case study of the report extends the analysis of the EGD’s policies to the area of public health. In the cases, and indeed also in the field of the previous case study on animal welfare, the EU appears to apply the exact same regulatory standards or policies to both domestic and imported products. These so called ‘mirror measures’ raise specific issues of coherence with WTO law. The analysed mirror measures concern the rules on combatting antimicrobial resistance.

Under WTO law, subjecting domestic and imported products to the same level of standards, and thus requiring foreign producers to adjust their production processes, is not unlawful per se. However, to be coherent with WTO law, these types of measures should not be economically motivated or aimed at preventing imported products from gaining competitive advantage.<sup>157</sup> Furthermore, because of their unilateral character and impact on foreign production processes, particularly in developing countries, the WTO law stipulates that mirror

<sup>156</sup> European Commission, ‘Application of EU health and environmental standards to imported agricultural and agri-food products’, COM/2022/226 final, at 20.

<sup>157</sup> Charnovitz (n 155).

measures should be designed so that trade effects are minimized, whilst still achieving the level of protection desired by the regulating state. Simply complying with different regulations, even if they are non-discriminatory, will usually increase the costs for exporters and thereby hinder the imported products' access to the market. The TBT and the SPS Agreements thus tread this delicate balance as they seek to discipline measures that constitute unnecessary obstacles to international trade. We analyse the coherence of the Agreements' requirements on the design of the mirror clause relating to the restriction on antimicrobial use on animals.

Regulation (EU) 2019/6 on Veterinary Medicinal Products (VMP Regulation) implements the F2F strategy on antimicrobial resistance. Antimicrobial resistance may arise from the improper administration and use of antimicrobials in animals as it accelerates the emergence and spread of resistant micro-organisms. The loss of resistance to antimicrobials poses serious risks to human health. To minimize the exposure to antimicrobial agents, the VMP Regulation (a) prohibits the use of antimicrobial medicinal products on animals for the purposes of promoting growth or increasing yield, and (b) reserves the use of certain antimicrobial medicines solely for the treatment of human infection. The regulation contains a 'mirror clause', which applies these requirements to operators in third countries who wish to export to the EU live animals or products of animal origin which are intended for consumption.-

#### 5.4.1 Country-Based versus Producer-Based Restrictions

The VMP Regulation seeks to regulate the use of antimicrobials on animals. In order to gain access to the EU market, the consignment of animals and animal food products need to meet two cumulative conditions: (1) it must originate from a list of approved *countries* to be developed according to certain criteria, and (2) it must be accompanied by a *certification* attesting that the animal products have complied with the requirements on the restricted administration of antimicrobials.<sup>158</sup> In determining the list of approved countries, the Commission needs to consider the general criteria set out under Article 127 of the Official Controls Regulation<sup>159</sup> including the relevant legislation in the exporting country, information regarding the application and enforcement of such legislation, and other important data. The latter includes data on the capability of the third country to ensure that only animals or goods which provide the same or an equivalent level of protection enter the EU. This last part may be crucial, as it seems to confirm that the intention of the EU is not to require that exporting countries to adopt similar bans or measures, but merely to require that the exporting country has legislation or other systems in place to differentiate those products that comply with the EU's requirements from those that do not.

To be clear, the SPS Agreement respects WTO member states' prerogative to determine the level of sanitary protection that they deem acceptable. The EU has the right to prevent the spread of antimicrobial resistance through the food chain and to determine the level of protection it considers acceptable. However, the EU is also obliged under the SPS Agreement to ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, and to minimize the negative trade effects in doing so. In case of a complaint, the WTO dispute settlement body will require the complainant

<sup>158</sup> Commission Delegated Regulation (EU) 2023/905, Article 4. The provision introduces detailed rules for imports in accordance with Article 118 of the VMP Regulation.

<sup>159</sup> Regulation (EU) 2017/625 of the European Parliament and of the Council of 15 March 2017 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection [2017] OJ L 95.

to demonstrate that there is an alternative measure, which (1) is reasonably available taking into account technical and economic feasibility, 2) achieves the EU's appropriate level of protection, and 3) is significantly less trade restrictive than the existing measure.<sup>160</sup>

#### 5.4.2 Trade-Restrictiveness of the VMP's Import Requirement

The first prong of assessing imports under the VMP Regulation – that imports of animal products originate from a country that meets specific requirements – may at a first glance seem problematic in the light of the SPS Agreement. The VMP Regulation restricts access to the market for products that do not originate from the list of approved countries, or in other words, imposes a country-based restriction. Generally, measures of this type are seen under the WTO law as very restrictive.<sup>161</sup> They force the exporting state to apply a policy equivalent to that of the importing state to all in-state production instead of requiring compliance only from those companies that wish to gain access to the market. At the same time, a country-list based requirement restricts access of products from producers that are compliant, if they operate in a country which has not adopted an equivalent regulatory scheme.<sup>162</sup> Against this background, the EU needs to pay particular attention to how it applies the Official Accords Regulation. Designing criteria that would have the effect of restricting access even of compliant producers would have a high risk that the measure is challenged as more trade-restrictive than necessary. The SPS would however be coherent with the contested measure, in case there does not exist an alternative measure that would be technically and economically feasible and allow the EU to achieve the same level of protection.

The risk of transmitting AMR organisms to humans includes routes and pathways beyond contact via the food chain. Transmission of AMR organisms from animals to humans is also possible through the contamination of the environment with antibiotic-resistant bacteria resulting from the 'concentration of antibiotic residues in farm waste', which eventually finds its ways into e.g. drinking or coastal water.<sup>163</sup> This contamination may also be caused by producers that do not export. Could the EU then for this reason refuse importation of products that are certified as compliant with EU's rules on antimicrobials when those products originate from countries that have not banned the use of antimicrobials similarly to the EU?

Producers from countries that have not banned antimicrobials to the same degree as the EU may have an interest in exporting to the EU and may well be able to comply with the EU's restriction on antimicrobial use. A prohibition on the importation of products from such producers simply due to their country of origin would raise questions of compatibility with WTO law. The exporting country would likely argue that the EU should accept any product certified as compliant with standards equivalent to the EU's antimicrobial requirements regardless of its origin. This alternative measure would be less trade restrictive as well as technologically and economically feasible for the EU. The EU might argue that it would not achieve the same level of protection against AMR as the use of antimicrobials would not be

<sup>160</sup> Appellate Body Report, *Australia-Salmon* (1998), para. 194.

<sup>161</sup> Barbara Cooreman, *Global Environmental Protection through Trade. A Systemic Approach to Extraterritoriality* (Edward Elgar 2017) 165; Steve Charnovitz 'The Law of Environmental "PPMs" in the WTO: Debunking the Myth of Illegality' (2002) 27 *Yale Journal of International Law* 68-69.

<sup>162</sup> See Charnovitz 2002 (n 161), at 68-69.

<sup>163</sup> Iqbal Ahmad Samreen, Hesham A. Malak, and Hussein H. Abulreesh, 'Environmental antimicrobial resistance and its drivers: a potential threat to public health' (2021) 27 *Journal of Global Antimicrobial Resistance* 101, at 103-106.

restricted to the same extent in the exporting state, provided the EU is able to demonstrate this based on sufficient evidence. Overall, WTO law would likely be incoherent with a requirement that the exporting country has implemented similar standards. It would likely be coherent with a requirement that products of exporting countries can be verified as either complying or not complying with the standards of the importing country.

In broader terms, a country-based measure has for the importing country the advantage of being administratively light. An important argument behind mirror measures is that administrative efficiency is a legitimate part of a country's regulatory sovereignty. Administration and costs arising from regulatory compliance are in this view an equally natural part of the exporter's duties. If checking the compliance of a state instead of individual producers is simpler and cheaper, it is for the importing country to follow such an approach. These considerations have, however, important counter-arguments. The importer's duty of collaboration does not extend beyond feasible alternatives. A country-based approach shifts much of the burden of enforcing the importer's regulations to the exporting state. What is an advantage for the importer becomes the reverse from the exporter's perspective; a further embodiment of extraterritoriality of the mirror measures.

The SPS Agreement imposes certain limitations on how the EU is able to address AMR risks. Generally, the SPS Agreement is coherent with the level of protection chosen by the EU. However, the EU needs to base its measure on sufficient evidence. The SPS Agreement is strongly coherent with EGD measures that focus on the characteristics of how individual products are produced as a condition for access to EU market. There is a risk of incoherence when the measure shifts emphasis from the product characteristics to assessing whether the country where the product originates from has adopted a national policy similar to the EU. Further, the SPS Agreement limits the EU's ability to choose the cheapest and most administratively feasible measure, if that measure is highly trade restrictive and there exists a less trade restrictive way to achieve the EU's desired level of protection.

## **5.5 Extraterritoriality as an issue of coherence**

For the EGD to succeed in transitioning the EU to a more environmentally sustainable economy, its actions cannot be confined to impacts that the EU causes within its borders. Global value chains link European consumption to production abroad. In case the country of production does not address the EU's environmental impacts, and a multilateral or a bilateral solution to the issue is not available, the difficult question on the EU's right and ability to do so arises. Under what conditions and to what extent, if at all, is the EU entitled to take unilateral measures to manage the impacts? Extraterritorial policies that reach beyond their domestic jurisdictions impinge on the right of other states to regulate activities within their own territories. In this final section of the report, we focus on the coherence of the WTO law with EGD measures from the specific viewpoint of extraterritoriality.

### **5.5.1 Locus of environment and health concern and extraterritoriality**

Neither the WTO Agreements nor its dispute settlement cases contain clear rules on the member states' ability to enact environmental measures that have impacts abroad. The locus of the regulated environmental concern has been advanced as an indicator of whether

such an extraterritorial measure is coherent with WTO rules. Measures have on this basis been grouped into inward-looking, outward-looking, and both inward- and outward-looking measures.<sup>164</sup> This systematization helps to identify the primary legitimate objective as well as the state that has the responsibility for addressing it.<sup>165</sup> Inward-looking measures regulate production activities abroad in order to address a concern within the domestic territory of the regulating state. Inward-looking measures that have extra-territorial effects are in principle coherent with WTO law. An outward-looking measure aims to protect a concern that is located entirely outside the regulating state, such as pollution from the production facility into a lake in the country of production. Outward-looking measures that have no effects or territorial links with the regulating state are in the typology considered incoherent under WTO law. A measure may also be both outward-looking and inward-looking, such as measures addressing transboundary or global problems such as pollution that spills directly into the regulating state or protects migratory animal species that cross the borders between the states, or address a global issue that affects every state, such as climate change.

The WTO Appellate Body has so far not taken a definite stance on whether there are territorial limitations to legitimate objectives. It has noted that at least when there is a sufficient nexus between a regulating state and the object of the regulatory concern, the importing state is entitled to regulate the object. The WTO dispute settlement body has, however, not clarified what this sufficient nexus entails. It has allowed for example parties to protect sea turtles as they were considered migratory and traversing the waters of the regulating state.<sup>166</sup> Establishing a clear causal link between an activity abroad and a local harm might be challenging where there are different interacting factors involved, or a local harm is difficult to pinpoint or observe.<sup>167</sup> In such cases a direct, substantial, and foreseeable effect on the environment of the regulating state can be decisive. The same applies for the level of international recognition and support for the environmental concern. A public moral concern may also fall within this last category of measures: it aims to protect an external situation because of a domestic public moral interest.

### 5.5.2 Extraterritoriality in the three case studies

#### *VMP Regulation*

The requirements of the VMP Regulation on imported food products address husbandry activities abroad in order to protect EU consumers from the risk of AMR. This mirror measure can be considered an inward-looking measure. It affects the product characteristics (i.e. presence of antimicrobial resistant organisms) in order to protect EU consumers from the risk of spreading AMR organisms through the food chain. The import requirement also protects the EU consumers' health from the potential transboundary harm resulting from the imprudent use of antimicrobials in the exporting country. The release of antimicrobials into the environment increases the risk of developing antimicrobials resistance and its transmission through the environment.<sup>168</sup> The WTO law is strongly coherent with the inward-

164 Charnovitz 2002 (n 161); Carlos Manuel Vázquez, 'Trade Sanctions and Human Rights - Past, Present, and Future' (2003) 6 *Journal of International Economic Law* 797; Cooreman 2017 (n 161).

165 Ming Du, 'Permitting Moral Imperialism? The Public Morals Exception to Free Trade at the Bar of the World Trade Organization' (2016) 50 *Journal of World Trade* 675, at 700.

166 Cooreman (n 161).

167 *Ibid.*, at 134.

168 Samreen (n 163).

looking aspects of the import requirement in the VMP, while coherence is of weak type for the outward-looking elements of the extraterritorial measure.

### *Animal Welfare*

The WTO Appellate Body has recognized the ‘systemic importance’ of setting jurisdictional limits on WTO member states when they invoke public morals as a legitimate regulatory objective. The Appellate Body has nonetheless not had the opportunity to provide full clarity on the issue.<sup>169</sup> In the typology on the locus of the concern, public moral uniquely appears inward- and outward-looking at the same time. The outward objective may refer to an environmental concern abroad (i.e. welfare of animals due to caging) but are simultaneously inward-looking because of the domestic public moral interest on the external situation. The possibility of characterizing any external environmental issue as a public moral concern thus poses the risk of expanding the ‘sufficient nexus’ in a manner that can allow the regulating state to engage in disguised protectionism. Besides the legitimacy of the local public moral concern (animal welfare), the trade measure (a ban on the imports of the animal product) needs be ‘reasonably related’ to the (public moral) concern in the importing country (not following the requirements on the caging of animals) for the outward-looking measure to have a sufficient nexus.<sup>170</sup> In terms of the WTO law, there would exist a ‘sufficient nexus’ to the extraterritorial import requirement that is based on the caging conditions. The WTO law would be coherent with the EGD’s plans for animal welfare standard.

### *Recycled Content Requirement*

Earlier, the Report described the challenges of identifying the precise environmental objective(s) of the recycled content requirement under the Battery Regulation. These challenges have implications on locating the nexus of the concern to assess the extraterritorial reach of the measure. Whether there is weak or strong coherence with the WTO’s sufficient nexus requirement depends on the specific objective sought. Regulating the production of batteries to reduce waste may be considered as having both inward-and outward-looking objectives. If the effects of the EU’s recycled content requirement when applied abroad are merely incidental for waste reduction within the EU, the measure is inward-looking in a weak manner, only. The locus of the environmental effect would be in waste reduction in the exporting country, making the measure outward-looking. WTO law would with greater probability be incoherent with it.

If the objective of the recycled content requirement is to conserve natural resources, the locus will depend on where the resources are extracted. This will for some materials be predominantly if not exclusively abroad. Thus, from the viewpoint of the objective of conserving natural resources, the recycled content requirement could be considered outward-looking. WTO law would risk being incoherent with such approach. If the ultimate objective of limiting resource use was in fact to reduce the environmental impacts arising from the extraction and processing of the resource, the situation would be different. The assessment would then concern the type of environmental impact that is caused: the reduction of greenhouse gas emissions due to avoided extraction would for example be a global concern with a direct effect on the EU. Similarly, if the goal were to minimize the impacts of mining on destructing ecosystems, contribution to biodiversity loss could be seen as a global concern. The latter interpretation would add an inward-looking aspect to an outward-looking measure. This would increase the likelihood that WTO law is coherent with the measure.

169 Appellate Body Report, *EC – Seal Products* (2014), para. 5.173.

170 *Du* (n 165), at 701-702.

The increasingly complex and global nature of environmental impacts and problems today demands greater clarity on what is a sufficient nexus from the viewpoint of the WTO when regulating extraterritorial concerns. An assessment of the locus of the objective of the three EGD measures illustrates differences in inward-looking, outward-looking, or both inward- and outward-looking measures on the processes and production methods. There is a risk of WTO law being incoherent with EGD measures if they are unilateral and predominantly outward-looking. Conversely, an analysis of the inward- or outward-looking nature of the measure helps perceive the differences in the choice and design of the instrument to regulate the extraterritorial objective. The WTO law is coherent with extraterritorial EGD measures at least as long as they define a nexus between the EU and the environmental concern in a precise manner.

## **6 CONCLUSIONS**

The objective of this Report was to analyse the coherence of the EU's trade agreements and of the WTO law with the European Green Deal (EGD). The conclusions of the analysis on the coherence of trade agreements with the EGD is below presented first, followed by those on the coherence of WTO law with the EGD. The Report found commonalities in the coherence between the two groups: first and foremost, there are many points where the EU trade agreements and WTO law are coherent with the EGD. The coherence is however mostly weak, and important cases of incoherence were also identified. The issue-specific findings on coherence are summarised in Annex 3. In Section 7 of the Report, we provide Recommendations on how to strengthen the coherence. The Report was commissioned to focus exclusively on the coherence of trade law and policy with the EGD, not on coherence in the reverse direction. This Report also did not investigate the actual impacts of coherence from the viewpoints of the environment and trade; the analysis took place at the level of the policies.

### **6.1 Coherence as the angle of observation**

The Treaty on the Functioning of the EU states that the EU is to ensure coherence<sup>171</sup> between all its policies and activities, including those on the environment and trade. In addition to the horizontal (i.e. external) coherence between these two fields of law and policy, the Report analysed the vertical coherence between the EU-level and the international level of trade agreements and WTO law. Coherence was measured on a continuum from strong incoherence to strong coherence.

### **6.2 Coherence of the EU trade agreements with the EGD**

Over the past two decades, there has been an increase in the environmental considerations in EU trade strategies and in the sustainability instruments in EU trade agreements. The EU has been conducting Sustainability Impact Assessments since 1999, and the EU trade agreements include since 2006 a specific Chapter on Trade and Sustainable Development (TSD) and most recently on Sustainable Food Systems. The evolution of these trade policy

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171 See footnote 14 on the different language versions of the term.



instruments supports in principle the achievement of the goals set by the EGD. The EU trade agreements are therefore coherent with the EGD. Four key shortcomings related to coherence can be identified, however.

First, coherence is mostly weak. Different types of impact assessments are conducted, but inconsistently. Their results are not considered systematically nor transparently, so the effectiveness and legitimacy of the assessments remain low. There is also much room for improvement in the trade agreements' design. The EU trade agreements in the case studies or more generally speaking do not replicate the EGD's level of ambition -- they may not even reach it. The level of ambition is often determined externally in other instruments. The analysed trade agreements, including their specific Chapters on TSD and SFS, support the EGD mostly in rather imprecise and non-mandating terms. They contain provisions on the enforcement of the environmental measures in some cases only. In areas where the agreements require the ratification and enforcement of international environmental agreements, coherence is stronger. Yet trade agreements requiring the parties to use international standards can also lead to incoherence on the EU side, because they can prevent the EU from following a more ambitious EGD requirement. The more ambitious the international environmental agreements that the EU requires in the agreement, the stronger is the EU's extraterritorial effect on the third country. The reasons for the weak coherence lie partly in the sheer size and slowness of agreements as trade policy instruments. The results may also be strategic: agreeing to a precise requirement with one country would reduce negotiation leverage in later negotiations with other countries. The low level of ambition on the EU side and the lack of mandating language may be political and obviously depends also on the negotiating partner.

Second, because the EU is a net importer of environmental impacts, its footprint must be addressed beyond the EU's borders. The challenge is how to do this without the burden falling on the EU's trading partners to bear, and without engaging in unfair extraterritorial policies towards them. When high-income countries like the EU and New Zealand agree in a trade agreement to merely follow their pre-existing environmental standards, the impact of the FTA may be mostly felt in countries like Indonesia or Malaysia that are negotiating a trade agreement with the EU. The EU-New Zealand trade agreement can create a benchmark for prospective agreements, where it is then only the other trading partners, that will need to raise their level of protection. The coherence of this trade policy approach with the ambitions of the EGD seems wanting.

Third, increasing the coherence of trade agreements with the EGD by strengthening their legal effects, in particular their enforceability and sanctions, may lead to a false illusion of effectiveness. The negotiations that will be concluded are with high-income country partners who already fulfil the TSD requirements to a great extent, while mandatory TSD provisions may decrease the legitimacy, lead to an unequal distribution of adaptation costs and slow down the conclusion of agreements with low-income country partners, in particular the former colonies. This may lead to instances of incoherence.

Fourth, trade agreements with sustainability chapters may be structurally ill-suited for governing environmentally damaging products. If trade agreements are considered narrowly only from the viewpoint of increasing trade, they could not include provisions that actually decrease or even ban the trade of certain goods. The challenge was illustrated by the Report's example of tariff schedules on meat. On the positive side, the adding of environmental considerations into trade agreements may shift the supply and demand towards more environmental products. This would make the agreements more coherent with the EGD. Bilateral agreements have however been weak in achieving this target in the absence of

an Environmental Goods Agreement. Moreover, most of 'more sustainable' products still do cause some environmental impacts. TSD Chapters that allow the trade agreement partner countries to maintain their chosen level of environmental protection are coherent with the aim of the EU prohibiting non-compliant imports. They are however incoherent from an extraterritorial viewpoint, because they create a tension with a lower protection level in the partner country. The rule offers nevertheless protection in case the trading partner considered to challenge the EGD measure in the WTO dispute settlement system. Putting trade chapters and environmental and sustainability chapters on an equal stance would address the current limitations.

To summarise: the evolution towards mainstreaming environmental considerations and environmental impact assessments are in principle coherent with the European Green Deal. After the adoption of the EGD, further changes in the EU's approach to trade agreements can be detected. Recently negotiated agreements and proposals thereof have included, for example, binding commitments to the Paris Agreement as well as provisions on reducing tariffs for environmental goods. Still, the observed coherence is mostly weak and there are also cases of incoherence. The coherence of trade agreements still leaves considerable room for improvement.

### **6.3 The coherence of WTO law with the EGD**

The analysis in the case studies did not observe examples of the WTO law curtailing the EU's ability to adopt a legitimate environmental objective of the EGD. WTO law grants the EU wide discretion in setting its environmental objectives as well as in determining its level of protection. Similar to the situation in the trade agreements, in most of the instances analysed in the Report's case studies the WTO law was coherent with the EGD. There were nonetheless also instances of limited coherence or of incoherence. This was so in each of the three case studies.

First, the case study on the recycled content requirements on batteries presented issues of incoherence typical to circular economy policies. Circular economy policies may combine legitimate regulatory objectives of environmental protection with illegitimate objectives, especially those on the promotion of industrial policy. The WTO law would require the EU to distinguish and to substantiate the claimed environmental objectives. WTO law would thus be likely incoherent with measures that are aimed at achieving a more 'circular economy' without being specific about the contents of that objective. The EU would also have the burden of providing the evidence that the proposed measure achieves its intended environmental objective. Furthermore, the WTO law requires the EU to adopt measures that are the least trade restrictive alternative that is feasible and achieves the EU's level of protection. The latter aspects are nonetheless not incoherent with the EGD.

Second, the WTO law offers various opportunities for engaging consumers. The incorporation of consumer perspectives in a WTO analysis may hinder or strengthen coherence with EGD objectives. This will depend on whether consumer choices are coherent with the EGD's objectives; consumer choices may not always be rational nor environmentally sustainable. In the animal welfare example, it was visible how regulation and consumer preferences are interdependent. Awareness about animal welfare and the environment among consumers is nonetheless increasing, as is the availability of more reliable environmental information on products. It would be incoherent not to give consumer perceptions appropriate weight in the WTO law's 'likeness' and 'necessity' tests.

Third, the sensitive issue of extraterritorial environmental regulation was analysed in all three case studies. The locus of the environmental impacts varied from inward looking and outward looking to combinations of both. The WTO law as it stands does not clearly define whether and to what extent it delimits the extraterritoriality of EGD. There is a strong case of WTO coherence with inward looking measures in the EGD. WTO law is potentially incoherent with outward-looking measures that do not have any effect on the local environment of the EU as the regulating state, such as conserving resources situated outside the EU. This poses a challenge for regulating the environmental footprint abroad of the EU's consumption. As discussed in the case of antimicrobials, there is a particular risk of incoherence if a measure does not focus on the characteristics of the imported product but rather on whether a trading partner has adopted the same policies. The argument for 'consumer jurisdiction'<sup>172</sup> supports the view that in the absence of multilateral consensus, it is for the importing country and its consumers to define the level of environmental protection that their actions should be related with, even if there is no impact on the state consumption. However, stringent EU requirements affect especially the smaller, low-income countries, charging them with the burden of compliance. The EU may thus be susceptible to being attacked as violating the principle of 'common but differentiated responsibilities and respective capacities'.

Fourth, the WTO law may create a chilling effect on the EGD in areas where the law's contents and interpretation remain uncertain. The uncertainty is mainly an issue of the very slow and piecemeal way that the WTO's decision-making practice develops. Examples in the analysis included the uncertainties in defining a 'sufficient nexus' to the regulated environmental issue (such as conserving resources abroad), the scope of 'public morals' (such as sentiments about the caging of animals in the importing country), the notion of 'conservation of natural resources' (as a self-standing objective or as a proxy for an environmental or some other policy objective).

To summarize, the WTO law is in most respects coherent with the EGD. There are elements of strong coherence amongst the mostly weak instances of coherence, but also points of incoherence. The latter deserve to be addressed further. In comparative terms it is logical that trade agreements display stronger coherence with EGD than does WTO dispute settlement law. The latter is by nature reactive and focuses on issues of alleged *incoherence*.

## 7 RECOMMENDATIONS

This final section of the Report outlines the recommendations. The recommendations to increase coherence are first presented on the trade agreements, then on WTO law and finally on the structural and institutional aspects of them both.

### 7.1 Recommendations on the coherence of trade agreements with the EGD

The EU should consider improving the environmental sustainability of trade agreements on three accounts:

(i) **Impact assessments (IAs)**

IAs should be continuously up-to-date to keep them abreast with the EGD. A

<sup>172</sup> Timothy Meyer, 'Consumption Governance: The Role of Production and Consumption in International Economic Law' (forthcoming) *Brigham Young University Law Review*.

mechanism to conduct IAs prior, during and/or after all EU trade negotiations and to integrate their insights into future trade negotiations is called for. The EU should identify mitigating measures and make their results publicly available to prevent and address environmental risks identified under the conducted IAs. A body responsible for periodically monitoring the progress of mitigating measures on IAs should also be designated. Further, the EU should consider requiring both trading partners to conduct impact assessments prior to implementing any project that the trade agreement is contributing towards and that may have significant environmental impacts.

(ii) **The design of environmental provisions in trade agreements**

The improvements include increased ambition and precision, as well as a commitment of compliance with major International Environmental Agreements (such as Paris; Kunming-Montreal). An assessment in terms of the principles of 'Do No Significant Harm' and 'Common But Differentiated Responsibilities and Respective Capabilities', as well as the adaptation costs of the low-income country partners, are also to be considered. The agreements should use international standards as a premise, but establish in the agreement the right to surpass them on science-based, non-discriminatory environmental grounds.

(iii) **The environmental impacts of bilateral trade**

A process for taking into account the sustainability and unsustainability of the traded products when establishing or updating their tariff rates and quotas should be in place. Having in the agreement a mechanism for regularly updating a list of environmental goods that benefit from preferential tariffs.

## **7.2 Recommendations on the coherence of the WTO law with the EGD**

In three issue areas – legitimate regulatory objective, consumer preferences, and extraterritoriality – a clarification of WTO law would be particularly helpful for improving its coherence with environmental considerations. The clarification can take place through an interpretative note or protocol in the WTO Agreements, as part of the WTO revisions, or as interpretations by the current WTO dispute settlement body, including the 'Multiparty Interim Appeal Arbitration Arrangement' (MPIA).

The European Commission should pursue a bold and active litigation strategy and negotiation agenda in the WTO revisions to clarify the below interpretative questions for coherence with the EGD. The opportunities for such an approach have increased in the light of the first experiences from the MPIA.

The MPIA proposed in the WTO Frozen Fries case a standard of review that gives more discretion to the environmentally progressive state: any outcome that could be reached while following the rules of interpretation of the Vienna Convention on the Law of the Treaties would be acceptable to the arbitrator. The application and implications of this doctrine deserve further research and should be put again to test in the MPIA.

Developing the WTO decision-making practice further such that it is environmentally progressive while rigorous on protectionism would be coherent with the EGD.

(i) **Legitimate regulatory objective**

Many EGD policies, and in particular those addressing Circular Economy as a cross-cutting policy strategy, address simultaneously multiple environmental and non-environmental objectives. The WTO should clarify how it addresses the pursuit of legitimate objectives that may also promote non-legitimate objectives.

Circular Economy is a resource efficiency strategy. To develop circular economy policies within the EGD, the notion of 'conservation of natural resources' in WTO should be clarified: is it an objective in itself, or does it presume a separate showing of environmental benefits.

(ii) **Consumer preferences**

Consumers are increasingly aware of questions of environmental sustainability. Further studies on consumer preferences for more sustainable products should be conducted. Such scientific studies should be considered as part of the WTO tests on '(un)like' products and 'necessity'. The appropriate consideration of consumer preferences would make WTO decision-making procedures more coherent with the EGD.

The scope of 'public morality' as a ground of justification deserves clarification. The EGD would benefit from a lenient interpretation of public morality in the context of environmental protection. An overly extensive interpretation would however risk opening possibilities for discrimination and protectionism.

The EU is in the process of strictly regulating green claims. Access to verified environmental information is important for consumers to purchase more sustainably. WTO practice that supports a wide use of such modern information-based instruments, including labels, is coherent with the EGD.

(iii) **Extraterritoriality**

The EGD underlines the EU's responsibility for the environmental impacts of its activities outside of EU borders. Products' environmental impacts are to be considered over their entire life cycles, including thus also the production processes. The current WTO law interpretation of extraterritoriality covers inward measures and inward-outward measures, as they both have a sufficient nexus to European domestic concerns. The WTO should clarify which types of outward extraterritorial impacts on the environment a country can legitimately address, and with what kinds of policy instruments, while remaining compliant with WTO law.

The political processes of reconciliation and Technical Assistance address the EU's external environmental footprint, on the one hand, and not intruding other countries' sovereignty in how to protect or utilise their environment, on the other. Legal tests can then be constructed to *enforce* the political outcomes. International cooperation thus increases coherence.

### 7.3 Structural recommendations for coherence

The findings on the coherence of the EU trade agreements and of the WTO law with the EGD lead also to structural recommendations about the institutional frameworks of trade policy.

(i) **Consider Sustainability and Trade Agreements (STAs)**

The current EU trade agreements are agreements focused predominantly on the promotion of open trade. Environmental considerations advocated by the EGD are increasingly included but have a secondary role and have led only to weak coherence with environmental objectives. The EU should review the structural limitations of its trade agreements in promoting a sustainability agenda. The EU should assess the option of shifting the design of its trade agreements towards STAs, in alignment with the Sustainable Development Goals. In STAs sustainability is the rationale underlying the liberalization of trade. STAs would help find international consensus on reducing trade in unsustainable products and in promoting environmentally more sustainable products. They would promote the spirit of international collaboration and offer an alternative to unilateral (EU) measures in promoting stringent environmental requirements. STAs should not lead to discriminatory or protectionist measures.

(ii) **Persistent efforts for a multilateral dispute settlement**

The ability of the WTO to function effectively as a source and interpreter of international rules on trade and environment remains severely constrained. The EU should continue to support and to work towards solutions that allow for a balanced, legitimate and timely international resolution of disputes based on the rule of law. Inclusive research projects and experiments such as the MPIA in the context of the WTO should be further explored alongside persistent efforts to revamp the WTO.

(iii) **Collection and utilisation of comprehensive, up-to-date data on environmental impacts**

Comprehensive and up-to-date data on the environmental impacts of the EU's actions is important for all three fields – the trade agreements, WTO law and the EGD. In particular *ex post* analyses of the effectiveness of policies in addressing environmental impacts has potential for increasing coherence between the three fields. It allows addressing key environmental concerns with the most effective tools while facilitating the identification of the least trade-restrictive policy instruments. To have an impact, the collected data must however also be actively integrated in decision-making within trade agreements, the WTO decision-making, and the EGD policies.

### ***Annex 1. A summary on the methodology.***

The research was conducted in four steps in June 2023-October 2023. First, a bibliometric analysis paved the way for a political science and legal literature review. The review focused on EGD, in particular the selected substantive areas of policy (e.g., food, eco-design, animal welfare); EU trade agreements; the WTO dispute settlement; as well as political and legal approaches on 'coherence'. The literature review was combined early on with a policy and legal analysis in the same fields, with Section 4 on trade agreements emphasising a policy analysis and Section 5 on the compatibility of EGD measures with WTO law a legal analysis. The work was guided by 10 semi-structured expert interviews from five constituencies (national ministries (environment; trade) (3); European Commission civil servants (legal service; trade; environment (2); NGO (2); practicing lawyer (1); academics (2)). The experts were interviewed in their personal capacity; the aim was not to establish the positions of their respective institutions but to identify the most pertinent questions of coherence from the perspectives of practice (e.g., which product groups and issues face challenging issues of (in)coherence? Which provisions in the trade agreements or Articles in WTO law are the most contested (i.e., potentially the most incoherent) today?). The literature review, policy analysis and expert interviews were not sequential. Together they formed the second phase of the analysis that proceeded in iterative rounds, in particular with the aim of focusing the analysis. The third step was to conduct a more detailed legal and policy analysis focusing on the identified consumer concerns as Case studies. Fourth, the draft Report was presented to the above-mentioned experts and other internal reviewers for comments, leading as the fifth step to a final round of edits and publication in December 2023.

Annex 2.

Table 6. Ex-Ante Inhouse Impact Assessments DG Trade

PTA	Year	Air Pollution & CO2 Emissions	Biodiversity	Land-Use Change	Overall impact
EU-New Zealand & Australia-FTAs	2017	<p>—</p> <p>“CO2 emissions will increase in all three trading partners in both C1 and C2 scenarios. New Zealand increases its CO2 emissions the most, ranging between 0.29% and 0.64% respectively in the conservative and increased liberalisation scenarios. The figures for Australia are 0.12% and 0.38% in the two scenarios, while in the EU the increases in CO2 emissions are negligible and 0.03% and 0.04% [...]overall; the FTAs are expected to have only a negligible, though negative, impact on CO2 emissions globally over the long term.” (p.33)</p> <p>“In the EU and New Zealand the major sources of NOX are transport, while in Australia, the largest source of NOX is industrial combustion. Although the sectors that are expected to benefit most from the FTAs in the EU involve combustion processes, the impact is very small and therefore does not pose particular concern “(p.33)</p>	<p>—</p> <p>“The expansion of the agricultural sector in Australia (to a small extent the rice, sugar and cereals sectors) and New Zealand (in the animal and the fruit and vegetables sectors) could pose some potential threat to biodiversity. The long term increase in land use and intensity in New Zealand and the inefficient use of nitrogen fertilisers pose some limited concerns about the potential negative implications for ecosystems.” (p.33)</p> <p>“In the EU there could be potential negative impact on biodiversity in the case of reduction of sheep farming, as a part of such farming takes place in high nature value land” (p.34)</p>	<p>—</p> <p>“Land intensity is expected to experience a negligible increase (0.55%) in the EU. This is largely due to the expected increase in some agricultural sectors such as animal farming. Australia is expected to experience a moderate increase (0.98%) on land use intensity most likely due the expansion of the ruminant meat and some agricultural sectors. A similar moderate increase (0.99%) is,expected in New Zealand, most likely due the expansion of the ruminant meat and the vegetable and fruit sectors. This suggests that land use would increase by about 1%” (p.34)</p>	<p>—</p> <p>Overall, the findings of the analysis point to a minor impact of both FTAs on the environment. The expected impact on global emissions is negligible as it is mitigated by the fact that the FTA favours relatively less energy- and emission-intensive sectors [...] some of the sectors that could benefit most from the FTA in Australia and New Zealand are environmentally sensitive, such as oil and coal and some agricultural production [...] The only area of limited concern is a potential pressure on biodiversity by the expected expansion of some of the agricultural sub-sectors in New Zealand and Australia. (p.34)</p>
EU-Chile-Agreement	2017	<p>—</p> <p>“Without mitigating measures, CO2 emissions are likely to increase slightly in both regions because of the scale and technique effects, and by the projected increase in transportation” (p.29)</p>	<p>—</p> <p>“Other environmental issues that may require attention due 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.” (p.29)</p>		<p>—</p> <p>“The study concludes that the environmental effects of both the conservative and the ambitious scenarios are likely to be limited in Chile, and almost negligible in the EU.” (p.29)</p>



EU-Mexico-Agreement	2015	<p style="text-align: center;">-</p> <p>“Additional production in these economies will therefore need to take place within the existing ceilings commitments, through a combination of increased emissions efficiency (energy- saving investments), increased use of low-emission technologies and potentially, re-allocation of production from more to less emission-intensive sectors. Therefore, the new agreement should contain specific provisions to promote trade and investment in low-emission infrastructure and technologies (such as energy efficiency and renewable energies). [...] Overall, the impact on global emissions is close to zero.” (p.33)</p>	<p style="text-align: center;">- +</p> <p>“The comprehensive modernisation option increases trade and thus the need for resources for production. This may increase waste and might threaten both natural resources and the preservation of biodiversity.”</p> <p>“On the other hand, an ambitious reduction of NTBs is expected to have a positive effect on trade in environmental goods and services. Increased levels of trade in environmental goods and services, such as in the area of renewable energy, should lead to innovation and greater efficiency and provide environmental benefits” (p.33)</p>	<p style="text-align: center;">0</p> <p>“the dairy products sector in Mexico would face increased competition from the EU under a modernised FTA. The environmental impact of any decline in milk production in Mexico is likely to be limited as the most likely outcome would be a shift to other forms of livestock production. The environmental impact in the EU of a (modest) increase in exports of dairy products to Mexico would be mitigated by environmental regulations in force in the EU.” (p.33)</p>	<p style="text-align: center;">-</p> <p>“As a consequence, any positive or negative environmental effects resulting from an ambitious modernisation of the EU-Mexico FTA are likely to be very small. Impacts may be somewhat greater in Mexico, given that the EU represented 8.2% of its exports in 2014.” (p.33)</p>
EU-Japan-Agreement	2012	<p style="text-align: center;">0</p> <p>“Within the energy intensive sectors covered by the EU ETS these re-allocations are driven by the emission price mechanism. For sectors outside the EU ETS, this may require strengthening of climate change regulatory policy measures. In Japan, it is assumed that the government will put in place the necessary measures to respect the emission ceiling commitments. As such, any scale effect (i.e. as a result of an increase in production) in the EU or Japan brought about by trade opening is compensated by composition and technique effects, or changes in production patterns and production techniques” (p. 43)</p>	<p style="text-align: center;">-</p> <p>“Every scenario under the FTA policy option increases trade and thus the need for resources for production. This may increase waste and may pose dangers for both natural resources and the preservation of biodiversity. It is expected that the negative impact of the different policy options on waste, biodiversity and natural resources would be mitigated to some extent by benefits flowing from increased trade in environmentally sustainable goods and services, and increased cooperation between the two partners. An ambitious reduction of NTMs is expected to significantly improve trade in environmental goods &amp; services” (p.43)</p>	NA	<p style="text-align: center;">-</p> <p>“It is also important to recognise that Japan accounted for only 3.3% of the EU’s exports and 4.7% of its imports in 2009. In consequence, any negative environmental effects resulting from even an ambitious FTA with Japan would be associated with what is in reality only a small part of the EU’s overall trade flows. The current EU and Japanese commitments to increase the share of renewable energy and to decrease overall energy consumption are ambitious.” (p.42)</p>

Source: Own compilation

### *Annex 3. A summary of issue-specific findings on coherence*

Annex 3 summarizes the findings of coherence in each of the sections discussed in the Report.

As regards the coherence of the EU FTAs with the EGD, there is a trend towards the integration of more environmental objectives in EU trade strategies and EU trade instruments. However, points of incoherence remain. The strongest point of incoherence is the strategies' and instruments' structural design, which is principally aimed at liberalizing trade. This is weakly (or in some cases strongly) coherent with EGD objectives with respect to environmental goods and services. It is however incoherent with respect to environmentally harmful goods and services. Environmental impact assessments contribute in principle to EGD objectives by providing information on the environmental effects of trade agreements. Nevertheless, the lack of systematic integration of the results to address the environmental risks associated with the conclusion of the trade agreements, or in order to improve the design of future trade agreements, is a source of incoherence. The design elements of the different chapters (TSD, TBT, SPS, and SFS) show varying degrees of coherence with the EGD. The TSD Chapter is mostly coherent with the EGD, but only weakly as it emphasises collaborative processes and lack firm commitments. The SFS Chapter appears to incorporate elements that exhibit stronger coherence with the EGD – this can be attributed to provisions that improve the mutual advancing of sustainable food systems in the trading partners, as well as to firm commitments to phase out antimicrobials. A potential source of incoherence across the different chapters relates to the use of international standards. Commitment to implement existing international standards could be incoherent with the EGD objectives if the EU's level of ambition is higher.

From the perspective of the WTO, a strong point of coherence is that the WTO grants the EU wide discretion in determining its sustainability objectives and in setting the appropriate level of protection. Potential sources of incoherence relate to how the WTO rules limit the EU's choice in the design of policy instruments. The WTO rules also require EU measures to have a sufficient nexus to environmental impacts taking place outside its borders. The incorporation of consumer perspectives in the WTO analysis is a potential source of coherence or incoherence with EGD objectives, depending on the alignment of consumer interest with the EGD objectives. Lack of legal certainty on important doctrines which would impact the autonomy and ambition of the EU in adopting environmental regulations may contribute to a regulatory chilling effect and is thus a point of incoherence with the EGD. These points are further elaborated below.

Sections	Conclusions on Coherence	Incoherent		Neutral	Coherent	
		Strong	Weak		Weak	Strong
<b>4.2. Environmental Objectives in EU Trade Policy Strategies</b>						
Environmental Objectives	There is a trend towards the integration of more environmental objectives in EU trade strategies.					X
Structure / Overall Objective	Promoting open trade remains the Commission's primary focus in negotiating trade agreements. Environmental sustainability is a secondary rather than an overarching goal.		X			
Environmental Goods	The EU FTAs have promoted trade in environmentally sustainable products only to a limited degree, while they have liberalised trade also for products that under EGD are considered problematic. There is a challenge in including provisions that actually <i>decrease</i> or even <i>ban</i> the trade of the most environmentally damaging goods.		X			
<b>4.3 Environmental Objectives in EU Trade Policy Instruments</b>						
<b>4.3.1. Impact Assessments</b>						
<i>Ex-Ante</i> IA and SIAs	The assessments of environmental impacts have not been consistently applied to all EU trade agreements: for example, <i>ex ante</i> in-house impact assessments are only available for a few trade agreements. In addition, SIAs are missing for certain trade agreements.		X			
<i>Ex-post</i> IA	The use of <i>ex post</i> evaluations of EU trade agreements provides data on how to strengthen the coherence of EU trade instruments with the EGD, but their use has been deficient in multiple respects.				X	
Impact Assessments	There is no clear process how the generated insights from <i>ex-ante</i> IAs, SIAs, and <i>ex-post</i> evaluations are utilized in designing more environmental trade agreements.		X			

4.3.2. The Design of EU Trade Agreements						
Mainstreaming of Environmental Sustainability	The EU increasingly mainstreams environmental sustainability in its FTAs. However, the provisions remain in some cases unambitious: they do not set environmental ambitions beyond what is already well-established practice in the EU.				X	
TBT Chapter (Regulatory Impact Assessment)	The requirement to base technical regulations on international standards, except when these would be ineffective or inappropriate, and the need to consider less trade-restrictive alternatives create obligations that could weaken the coherence with the EGD where EGD objectives afford higher level of protection than international standards. The coherence thus varies.		X		X	
SPS Chapter (Decision on Equivalence)	The provision in the EU-Chile FTA confirming the EU's right to make the final decision on whether an exporter's measure could be considered equivalent to an EU's SPS measure provides strong coherence with the EGD.					X
SPS Chapter (Animal Welfare)	There is an imprecise requirement to consult regarding animal welfare as soon as possible upon request by one of the Parties. This provides weak coherence with the EGD.				X	
TSD Chapter (General Objective)	The overall objective of the TSD Chapters "to enhance the development of the Parties' trade and investment relationship in a way that contributes to sustainable development" is coherent with the EGD.				X	
TSD Chapter (Ambition)	TSD Chapters set an obligation regarding a high level of environmental protection, but only requires the Parties to 'strive to ensure' this objective.				X	
TSD Chapter Cooperation	The provisions promote cooperation on environmental issues but do not reflect any firm, concrete commitments.				X	
TSD Chapter (Paris Agreement)	The EU-New Zealand FTA includes a commitment by the parties to "refrain from any action or omission that materially defeats the object and purpose of the Paris Agreement". This reflects strong coherence with the EGD.					X

TSD Chapter (Sustainable Development)	The provision in the TSD Chapters confirming each Party's right to determine their respective sustainable development priorities and environmental laws and policies are strongly coherent with the EGD objective of regulating environmental concerns situated within the EU.					X
	However, the same provisions could limit the EU's ability to regulate its environmental footprint abroad.		X			
TSD Chapter (International Law and Standards)	The TSD Chapters confirm the Parties' mutual commitment to follow and implement the international environmental law standards and requirements that the Parties have subscribed to. The confirmation is coherent with the EGD where the international standards are well aligned with the EGD. A conflict may arise when the EU's level of ambition is higher than that of the international standard.		X		X	
TSD Chapter (Environmental Goods & Services)	The TSD Chapters include articles that aim to <i>facilitate</i> (but do not mandate) the removal of obstacles on goods that mitigate climate change (e.g., energy efficient products), and the adoption of policies to deploy the best available technologies. The Parties are to cooperate on initiatives such as addressing tariffs and non-tariff barriers on environmental goods and services.				X	
TSD Chapter (Tariffs for Environmental Goods)	The EU appears to not have rigorously considered the environmental impacts of decisions to suspend common customs tariffs duties on strategic goods through Regulation 2021/2278 (and subsequent amendments).		X			
TSD Chapter (Circular Economy)	The EU's-New Zealand FTA adopted a new provision on promoting collaboration on resource-efficiency and circular economy, with other FTAs adopting a similar provision. The proposed chapter on energy and raw materials with India also includes a commitment to cooperate in promoting the recycling of goods. The provisions are not set in mandating or precise language.				X	
TSD Chapter (Circular Economy) -	The provisions on responsible supply chain management include an imprecise and non-binding requirement to promote trade in goods that contribute to a resource-efficient and low-carbon economy.				X	

TSD Chapter (Biodiversity)	The TSD Chapters recognize the importance of conserving biological diversity and using biological resources sustainably. However, the provisions do not explicitly address the link between trade activities' impact on ecosystems beyond use of biological resources.				X	
TSD Chapter (Animal Welfare)	The EU-Australia FTA-proposal specifically promotes goods that are subject to ethical trade schemes and eco-labels. The latter is coherent with the EGD objective of promoting animal welfare.				X	
TSD Chapter (Public Morals)	The EU FTAs have not addressed the potential link between public morals and environmental protection.			X		
TSD Chapter Environmental Exceptions	The FTAs recognize the need to restrict trade for environmental reasons. E.g., measures adopted pursuant to Multilateral Environmental Agreements (MEAs) may be justified as is provided for in Article XX of the GATT.				X	
TSD Chapter (Procedural)	The TSD Chapters confirm the Parties' right to rely on the precautionary principle and mandate the Parties to give due consideration to opinions of the public.				X	
Sustainable Food Systems (SFS) Chapters in EU Trade Agreements						
SFS Chapter (Objectives)	There is a general objective to jointly engage in the transition towards more sustainable food systems. The proposed SFS Chapters include specific articles on the F2F issue areas of animal welfare and the use of antimicrobials in food production. However, the provisions are not set in mandating or precise language.				X	
SFS Chapter	In the EU-India FTA the Parties are to cooperate in reducing the environmental and climate change effects, but the text contains a carve out: it applies to only "some existing food systems".				X	

SFS Chapter (Global Cooperation)	The EU-Chile FTA and the EU's proposal in the EU-India negotiations recognize the need to act beyond the bilateral level by requiring the parties to "cooperate in multilateral fora to foster global transition towards more sustainable food systems".				X	
SFS Chapter (Animal Welfare)	The SFS Chapters recognize the promotion of animal well-being as an objective on its own. However, the SFS Chapters' provisions on animal welfare contain non-binding language.				X	
SFS Chapter (Animal Welfare)	The animal welfare standards might follow the lowest common denominator because the Parties have to cooperate in developing and implementing these standards based on "the Parties' legislation" – presumably meaning both Parties' legislation.				X	
SFS Chapter (Animal Welfare)	The Parties either may or shall establish a technical working group on animal welfare. The commitments are limited to cooperation in the field.				X	
SFS Chapter (Antimicrobial Resistance)	The EU proposes for the Parties to recognise the risk of antimicrobial resistance as transnational.					X
SFS Chapter (Antimicrobial Resistance)	There is mandating and precise language to phase out the use of antimicrobials as growth promoters, but without a specific timeline.				X	
SFS Chapter (International Standards)	The draft EU-India FTA includes an obligation to follow internationally developed guidelines and practices, which could limit the EU's ability to push beyond such international standards in its F2F strategy.		X			
SFS Chapter (Procedural Requirements)	The SFS Chapters require the Parties to establish actions in pursuing the objectives and milestones on sustainable food systems. A Sub-Committee established through an Agreement must annually assess the implementation of these actions. Such requirements may strengthen the coherence of the FTAs with the EGD over time.					X

SFS Chapter (Level of Protection)	The SFS Chapters assure the Parties' right to modify their import requirements and to uphold regulatory measures to protect public policy objectives.				X	
	The same provision also indicates that the (exporting) Party cannot be subjected to a "particular regulatory outcome".		X			
Tariffs in Trade Agreements	The tariff reductions in the EU trade agreements are expected to further increase meat exports.	X				
WTO and EGD						
5.2. Batteries Regulation - Recycled Content Requirement						
Recycled Content Requirement (Legitimate Objectives)	At the level of the environmental objectives, the WTO is coherent with the EGD. Because the TBT requires national measures to pursue a legitimate objective, it would be strongly coherent with a Battery Regulation requirement on minimum recycled content that is clear about its environmental objective. It would be incoherent with a recycled content requirement that is not clear about its environmental objective.		X			X
Multiple Objectives of Recycled Content Requirement	The WTO law is in principle coherent with the fact that the EGD pursues multiple objectives through its Circular Economy policies. WTO would however be incoherent with certain parallel objectives of circular economy, such as industrial policy.	X			X	
Recycled Content Requirement Conservation Objective	The WTO law seems in the end coherent with a recycled content requirement that aims to conserve exhaustible natural resources.				X	
Burden of Proving actual Objective	The allocation of the burden of proof on the EU to demonstrate that any discriminatory impact on imported products can be explained by a legitimate objective creates procedural burden, which can be considered as weak incoherence with the EGD measures.		X			
Interpretation	Strict interpretation of the requirement that a measure must be even-handed may lead to findings of incoherence.		X			



5.3. Consumer perceptions of animal welfare as a basis for distinguishing products						
Objectives	WTO law is strongly coherent with the EGD objective of protecting public moral concerns.					X
Interpretation	Under WTO law, the difference in consumer preferences e.g., between high-welfare and low-welfare products, seems to enable the EU to treat these products differently even if this would disproportionately impact imported products.					X
Interpretation	All criteria of likeness considered, the EU's caging requirements on imported products would today likely result in a finding of likeness of products of high animal welfare standards with imported products from caged animals.		X			
Necessity Test	The TBT Agreement would likely be coherent with an import ban on animal caging, despite the less trade-restrictive option of labelling.				X	
5. 4. Mirror Measures to Protect Public Health						
Objectives	Generally, the SPS Agreement is coherent with the level of protection chosen by the EU.					X
Design: Country-Based Measure	The SPS Agreement is strongly coherent with measures that focus on the characteristics of how individual products are produced as a condition for access to EU market.					X
	Those criteria that would have the effect of restricting access even of compliant producers would risk being challenged as more trade-restrictive than necessary.		X			
Less Trade-Restrictive than Necessary	The SPS Agreement limits, and is thus incoherent, with the EU's ability to choose the cheapest and most administratively feasible measure that is highly trade restrictive, if there is a less trade restrictive measure that achieves the EU's level of protection.		X			
5.5. Extra-Territoriality						
VMP Regulation	The WTO law is strongly coherent with the inward-looking aspects of the import requirement in the VMP, while coherence is of the weak type for the outward-looking elements of the measure.				X	X

Animal Welfare	The WTO law would be coherent with the EGD's plans for animal welfare standard. EU's public moral concern creates 'sufficient nexus' to the extraterritorial import requirement on caging conditions.					X
Recycled Content Requirement	If the objective of the requirements is to reduce waste, the locus of the environmental effect would be in the exporting country, making the measure outward-looking. WTO law would with greater probability be incoherent with it.		X			
	If the goal were to minimize the impacts of mining on destructing ecosystems, contribution to biodiversity loss could be seen as a global concern. The latter interpretation would add an inward-looking aspect to an outward-looking measure. This would increase the likelihood that WTO law is coherent with the measure.				X	
	From the viewpoint of the objective of conserving natural resources, the recycled content requirement could be considered outward-looking insofar as the resources to be conserved are situated outside the EU, leaning towards the finding of incoherence with the WTO law.		X			
	WTO law is coherent with extraterritorial EGD measures at least as long as they define a nexus between the EU and the environmental concern in a precise manner				X	
Horizontal Issue	Lack of legal certainty on important doctrines could impact the autonomy and ambition of the EU in adopting environmental regulations and may contribute to regulatory chilling effect.		X			

## ABOUT THE AUTHORS

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The Centre for Environment, Economy and Energy analyses and develops innovative legal and policy instruments that can be used to govern the turbulent transitions in these areas, within the EU and in its external relations. Positioning ourselves at the interface of academia with political, legal and other societal decision-making, we focus in particular on the international and European governance of the environmental, economic and energy transitions and their interactions.

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