

Article**Sustainable Development and Trade Treaties****Xavier Fernández Pons**

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ABSTRACT:

Traditionally, international trade regulation has focused on the liberalization of exchanges and has paid little attention to labour and environmental aspects of production processes and methods in the countries of origin. Currently, there is evidence of the need to integrate sustainable development more intensively into trade agreements. This study examines various initiatives promoted in this regard in: the multilateral and plurilateral trade negotiations undertaken within the framework of the World Trade Organization, which have so far produced scant results; preferential trade agreements, which currently usually include chapters on sustainable development, including numerous provisions on labour and environment; and through unilateral measures that condition imports of products based on their processes and production methods at origin, whose compatibility with current international trade regulations sometimes raises much controversy

PALABRAS CLAVES:

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desarrollo sostenible,
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RESUMEN:

Tradicionalmente, la regulación internacional del comercio se ha focalizado en la liberación de los intercambios y ha prestado una escasa atención a los aspectos laborales y ambientales de los procesos y métodos de producción en los países de origen. Actualmente, se evidencia la necesidad de integrar más intensamente el desarrollo sostenible en los tratados comerciales. Este estudio examina diversas iniciativas impulsadas en tal sentido en: las negociaciones comerciales multilaterales y plurilaterales emprendidas en el marco de la Organización Mundial del Comercio, que hasta ahora han dado escasos resultados; acuerdos comerciales preferenciales, que actualmente suelen incorporar capítulos sobre desarrollo sostenible, incluyendo numerosas previsiones sobre cuestiones laborales y ambientales; y a través de medidas unilaterales que condicionan las importaciones de productos en función de sus procesos y métodos de producción en origen, cuya compatibilidad con las vigentes normas comerciales internacionales suscita, en ocasiones, mucha polémica.

MOTS CLES :

commerce
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durable, processus et
méthodes de
production,
Organisation mondiale
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RESUME :

Traditionnellement, la réglementation du commerce international s'est concentrée sur la libéralisation des échanges et a accordé peu d'attention aux aspects sociaux et environnementaux des processus et méthodes de production dans les pays d'origine. Actuellement, il existe des preuves de la nécessité d'intégrer plus intensément le développement durable dans les accords commerciaux. Cette étude examine diverses initiatives promues à cet égard dans : les négociations commerciales multilatérales et plurilatérales entreprises dans le cadre de l'Organisation mondiale du commerce, qui n'ont jusqu'ici produit que peu de résultats ; les accords commerciaux préférentiels, qui comprennent actuellement généralement des chapitres sur le développement durable, y compris de nombreuses dispositions sur les questions de travail et d'environnement ; et par des mesures unilatérales qui conditionnent les importations de produits en fonction de leurs procédés et modes de production, dont la compatibilité avec les réglementations commerciales internationales en vigueur suscite parfois de nombreuses controverses.

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1 INTRODUCTION: THE TRADITIONAL LEGAL BASES OF THE MULTILATERAL TRADING SYSTEM AND UNSUSTAINABLE ECONOMIC DEVELOPMENT

The relationships between international trade and sustainable development are complex. On the one hand, a well-regulated and managed international trade can contribute to a more efficient use of resources on a global scale, reduce the costs of cleaner technologies and encourage exports from developing and least developed countries, helping to reduce their levels of poverty. On the other hand, international trade can also go against sustainable development when, for example, social or environmental dumping is practiced, using the low labour or environmental standards of certain countries to minimize accounting costs.

In theory, as postulated by the Kantian approaches of Ernst-Ulrich Petersmann (2013: p. 90) in favour of a “cosmopolitan constitutionalism”, international trade and sustainable development could be reconciled under a well-structured institutional and regulatory framework, which would promote international trade and sustainable development on a global scale, taking due account of economic, social, and environmental aspects.

However, traditionally, international law has been characterized by a marked fragmentation and imbalance between its various specialized legal regimes. Thus, the international regulation of trade has tended to focus on the liberalization of cross-border exchanges (the *free trade*) and has paid insufficient attention to the socio-labour and environmental conditions of production in the countries of origin, leaving such issues for other regulatory areas, such as the International Labour Organization (ILO) or the United Nations Environment Programme (UNEP), characterized by their scarce coerciveness in practice.

Initially, the United Nations (UN) Conference on Trade and Employment, convened in 1946 by the Economic and Social Council, did foresee that the international regulation of trade would have to be explicitly linked to social and labour issues, which were reflected in the resulting Havana Charter (UN, 1948). This treaty, of Keynesian inspiration and which intended to create an International Trade Organization (ITO), included, for example, a relevant Art. 7 on “Fair Labour Standards”. However, as it is well known, the Havana Charter obtained very few ratifications and did not enter into force.

The General Agreement on Tariffs and Trade (GATT) of 1947 ended up operating as a partial substitute for the failed Havana Charter, losing the holistic approach of the latter and focusing on promoting a progressive liberalization of international trade in goods. The Preamble of the GATT of 1947 reflected a productivist conception of development, focused on economic growth, including as an objective “the full use of the resources of the world and expanding the production and exchange of goods”.

After the Rio de Janeiro Summit in 1992, the 1994 Marrakesh Agreement, establishing the World Trade Organization (WTO), incorporated a reference to sustainable development in its Preamble, alluding to “the optimal use of the world’s resources in accordance with the objective of sustainable development [...]”. However, the provisions introduced in the WTO Agreements on aspects related to sustainable development were few or very sparing in words. In 1995, the WTO created a Committee on Trade and Environment, but it has a merely consultative nature (Sinha, 2013).

In this way, the effective relevance of sustainable development within the multilateral trading system was, to a great extent, at the expense of future multilateral trade negotiations, which to date have produced very few results, and of the interpretations in the WTO dispute settlement system. Certainly, the panels and the Appellate Body of the WTO have made some valuable contributions in the search for a legal conciliation between trade and

environment, but this interpretive path has its limitations (Condon, 2009; Cosbey and Mavroidis, 2014; Trachtman, 2017).

Thus, multilateral trade rules have continued to focus on the elimination or reduction of barriers (tariffs and non-tariff barriers) and on non-discrimination between like products. The analysis of likeness has continued to focus mainly on the physical characteristics of the final products, drawing a veil over their various processes or production methods at origin that do not leave a physical trace in the final product (*non-product-related processes and production methods*, npr-PPMs), which have only been taken into account in some unique cases and, essentially, by way of exception, as in the emblematic case *United States – Import prohibition of certain shrimp and shrimp products*.¹ The possible justification for certain unilateral trade measures regarding npr-PPMs under current WTO rules continues to generate much debate (Fernández Egea, 2008; Conrad, 2011; Maggio, 2017; Sifonios, 2018; Calle Saldarriaga, 2018).

It must be recognized that developing countries have traditionally been opposed to the imposition of unilateral trade restrictions based on npr-PPMs, which they usually perceive as improper extraterritorial interferences, and that Principle 12 of the Rio Declaration on Environment and Development of 1992 provided that “unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided” and that “environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus” (UN, 1992).

In practice, trade liberalization on a global scale has been contributing for decades, along with other factors, to promoting an “unsustainable” economic development,² favouring the creation of complex global value chains and the relocation of industries to countries with lax regimes in labour and environment, seeking to maximize the benefits of transnational capital and forgetting negative externalities.

Certainly, the liberalization of the global trade has contributed, during the last decades, to the great growth experienced by China and other emerging countries and to the reduction of their poverty rates, but the growing discontent of those left behind from the benefits of such globalization, the worrying climate change and other serious environmental and health emergencies are showing, with increasing urgency, the need to thoroughly review the traditional design of the international trade regulation, requiring a determined integration of sustainable development within its rules (Rodrigo, 2015: 149).

In this aspiration to a more sustainable international trade, the SDGs, approved by resolution 70/1 of the General Assembly of 25 September 2015, with its holistic universal agenda that combines economic, social, and environmental objectives (UN, 2015). The SDGs try to promote prosperity conceived as inclusive human development, with an economic, social, and technological progress “in harmony with nature” (UN, 2015: 2).

The need for sustainable international trade, which takes into account the labour and environmental conditions of production, emerges, particularly, from SDG 8, on “inclusive and sustainable economic growth” and “decent work for all” (UN, 2015: 19 and 20), and SDG 12, on “sustainable consumption and production patterns”, which calls for reviewing

¹ Where the Appellate Body ended up concluding that the United States could, under certain conditions, prohibit the importation of shrimp from a country, such as Malaysia, that did not provide mechanisms to prevent the accidental death of sea turtles in shrimp fishing, as a measure related to the conservation of exhaustible natural resources justifiable under the general exceptions of Art. XX of the GATT of 1994, understanding that the highly migratory nature of sea turtles conferred a sufficient link to the United States authorities (WTO, 2001a). Other disputes in the WTO regarding the conservation and sustainable use of biodiversity abroad are analysed in Fernández Pons (2021a).

² The expression “unsustainable” is taken from Pigrau i Solé (2017).

production methods and the consumption of resources and goods, taking into account their entire life cycle (UN, 2015: 22 and 23).

The EU, which was one of the main architects of the traditional multilateral trading system, today tends to present itself, with increasing determination, as one of the WTO members most in favour of a profound reform of this international institution, to update it taking into account the SDGs. The EU is now trying to promote, simultaneously and effectively, an open, fair, and sustainable international trade (Douma, 2017; Gruni, 2018; Fernández Pons, 2021b).

The Communication on “The European Green Deal”, presented in December 2019, insists that the EU must act as a “global leader” and its trade policy must serve to export its values to the world and promote sustainable development, committing third countries in labour and environmental issues (European Commission, 2019a: 2 and 20).³

In February 2021, the European Commission presented a Communication entitled “Trade Policy Review – An Open, Sustainable and Assertive Trade Policy”, emphasizing that the EU’s trade policy must promote, both inside and outside its territory, “greater sustainability in line with its commitment of fully implementing” the SDGs (European Commission, 2021a: 1). According to the European Commission, “global trade rules are in urgent need of being updated” to make “globalization more sustainable and fairer” and the EU trade policy “should use all the tools at its disposal to support social fairness and environmental sustainability”, including among its fundamental priorities “leading efforts to reform” the WTO (European Commission, 2021a: 10), which are specified in an annex entitled “Reforming the WTO: Towards a Sustainable and Effective Multilateral Trading System” (European Commission, 2021a: Annex).

In this context, this study aims to examine the extent to which proposals to integrate sustainable development into the regulation of international trade are taking shape (or not) in: the multilateral or plurilateral trade negotiations undertaken within the framework of the WTO; the conclusion of preferential trade agreements; or in unilateral trade measures, which are especially controversial when they penalize the import of certain products based on their processes and production methods in the countries of origin.

2 SUSTAINABLE DEVELOPMENT IN MULTILATERAL AND PLURILATERAL TRADE NEGOTIATIONS OF THE WTO

Various issues related to sustainable development have been raised in the trade negotiations sponsored by the WTO. In the agenda of the multilateral trade negotiations carried out under the Doha Round, which began in 2001 and has not yet been completed, social and labour issues have not been included, showing that, as the EU now critically observes, these issues continue to be a “taboo” in the WTO (European Commission, 2021a: Annex, 2), but various aspects related to the environment do appear, such as: the relationship between the current WTO rules and the specific trade obligations established in some multilateral environmental agreements; ecological labelling; and the elimination or reduction of tariff and non-tariff barriers to environmental services and goods, such as recycling machinery, solar panels or windmills (WTO, 2001b: paras. 31-33). However, these negotiations, like the Doha Round in general, have been yielding very few results to date, evidencing the difficulties in achieving major global consensus in a context of accentuated multipolar rivalry.

³ According to Sanahuja (2020-2021: 88), the European Green Deal supposes an approach to trade with environmental and geopolitical principles that is very different from the traditional liberal approach that the EU has championed for many years.

A specific case in which the negotiations in the WTO can be considered successful has been that of the revision of its Government Procurement Agreement (GPA). It shall be emphasized that it is a plurilateral agreement, whose parts are mainly advanced economies, and this fact facilitated the achievement of consensus. It is interesting to point out that the original GPA concluded in Marrakech in 1994 did not contain (surprisingly) explicit references to sustainability. In 2012, thanks to the impetus of the EU and the United States chaired by Barack Obama, it was possible to adopt a new version of the GPA, which entered into force on 6 April 2014 ([Anderson and Muller, 2017](#)). The new GPA of 2012 includes various provisions on environmental aspects in public procurement. It expressly contemplates, when defining the “technical specifications” that may appear in a public tender, those related to “processes and methods” for the “production and provision” of goods or services.⁴ Likewise, under the GPA of 2012, a work programme on sustainable public procurement has been created within the framework of the WTO.⁵

Unfortunately, in other issues to be negotiated among all WTO Members, the fruits have so far been very few. The environmental issue already included in the original agenda of the Doha Round and in which more progress has been made is that related to fishing subsidies, which on many occasions can contribute to the overexploitation of fishing resources. The SDGs have helped drive these negotiations, which have been explicitly linked to SDG 14.6. This express connection between the SDGs and negotiations in the WTO is commendable, showing a way to overcome the traditional fragmentation between various sectors of the international legal order. The European Commission has strongly supported these negotiations, underlining that this example of synergy between the UN and the multilateral trading system should be taken as a model to specify other possible contributions of the WTO to the “sustainability objectives of the global community” ([European Commission, 2018a: 6](#)). In any case, these negotiations are proving to be complex, since fisheries subsidies are a particularly sensitive issue for many developing and least developed countries, which demand a marked special and differential treatment on this issue. In principle, it was planned to try to adopt said agreement at the twelfth WTO Ministerial Conference (MC12), to be held in Geneva from November 30 to December 3, 2021. On November 24, 2021, a draft agreement was presented, still with quite square brackets ([WTO, 2021a](#)). However, on 26 November 2021, the WTO General Council decided to postpone the MC12 indefinitely given the growing travel restrictions due to the new omicron variant of the virus that causes COVID-19 ([WTO, 2021b](#)). Therefore, it will be necessary to wait for a future appointment to complete these negotiations.

In addition to the issues that are already being negotiated in the strict sense, the EU and other Members are recently promoting new initiatives on environmental issues to be discussed (and eventually negotiated) in the framework of the WTO. For example, the EU presented on 30 October 2020 a “Non-paper on possible trade and climate initiative in WTO” ([European Commission, 2020](#)). On 17 November 2020, 50 WTO Members (including the EU and its Member States) distributed a “Communication on Trade and Environmental Sustainability” ([WTO, 2020](#)) and launched with it the so-called “Trade and Environmental Sustainability Structured Discussions” (TESSDs), which seek to complement the work of the Committee on Trade and Environment and other relevant committees and bodies of the WTO. The TESSDs, which are being coordinated by the Canadian and Costa Rican ambassadors to the WTO, are open to all WTO Members and to dialogue with external stakeholders, including the business community, civil society, international organizations and academic institutions ([WTO, 2020, paras. 2, 4 and 7](#)). It is noteworthy that, in November 2021, China and the United States have joined as new co-sponsors of the TESSDs ([WTO,](#)

⁴ Art. Iu:iii of the GPA of 2012.

⁵ Art. XXII:8(a) of the GPA of 2012 and WTO (2012).

2021c). However, it is still very uncertain the future of these recent initiatives, beyond generic communications or joint declarations, such as those sponsored by the EU and other WTO Members in December 2021 on trade and environment ([European Commission, 2021b](#)). On 7 February 2022, numerous WTO Members taking part in the TESSDs met to review a proposed 2022 work plan and exchange views on priorities for discussion ([WTO, 2022](#)).

3 PROVISIONS ON SUSTAINABLE DEVELOPMENT IN PREFERENTIAL TRADE AGREEMENTS

The WTO agreements have always coexisted with preferential trade agreements (PTAs), which have usually consisted of customs unions or free trade zones. However, the scant results obtained in the Doha Round trade negotiations seem to have led, in recent years, to a great proliferation of PTAs, which have been promoted, particularly, by the largest economies with countries particularly related. These recent PTAs are characterized by their extensive content (goods, services, intellectual property, investment, government procurement, etc.) and usually contain, particularly in those led by advanced economies, numerous labour and environmental provisions, which involve a change of model in the regulation of international trade ([Anuradha, 2017: 241](#)) and strengthen the regulatory interconnection between economic, social and environmental aspects within the international legal system ([Bonet Pérez, 2019: 163-165](#); [Huici Sancho, 2021: 277-283](#)).

A good example is the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). The origin of this agreement was the Trans-Pacific Partnership (TPP) promoted by the United States during the presidency of Barack Obama with eleven other countries of the Pacific rim (with the very significant exclusion of China). The TPP was done at Auckland (New Zealand) on 4 February 2016. But Donald Trump decided, on 23 January 2017, that the US would not ratify the TPP, and this agreement did not enter into force ([Ji and Rana, 2019](#)). The rest of the TPP negotiating countries decided to go ahead with this initiative, introducing certain changes. The formal signing ceremony of the CPTPP was held on 8 March 2018 in Santiago (Chile) and it entered into force on 30 December 2018. Currently, the CPTPP has eight States parties: Australia, Canada, Japan, Mexico, New Zealand, Peru, Singapore, and Viet Nam ([Australian Government, 2022](#)).

In the Preamble of the CPTPP, the parties reaffirm the importance of promoting “environmental protection and conservation, gender equality, indigenous rights, labour rights, inclusive trade, sustainable development and traditional knowledge...”. The CPTPP includes numerous labour provisions in its Chapter 19 on “Labour”, which repeatedly refers to the ILO Declaration on Fundamental Principles and Rights at Work of 1998 and its follow-up and alludes to the concept of “decent work” as defined by the ILO. The CPTPP also contains numerous environmental provisions, particularly in its Chapter 20 on “Environment”, which covers, in addition to general commitments, specific precepts on, for instance: “Multilateral Environmental Agreements” (Art. 20.4); “Trade and Biodiversity” (Art. 20.13); “Invasive Alien Species” (Art. 20.14); “Transition to a Low Emissions and Resilient Economy” (Art. 20.15); “Marine Capture Fisheries” (Art. 20.16), which includes a specific regulation on fisheries subsidies and demonstrates the ability of the PTAs to deal with stuck issues within the multilateral trading system; and “Conservation and Trade” (Art. 20.17). The CPTPP provides that its general mechanism for dispute settlement, regulated in its Chapter 28 (“Dispute Settlement”) and which includes the establishment of a panel of experts, also applies to possible disputes over the two aforementioned chapters on labour and environment.

The CPTPP can be considered one of the most ambitious PTAs in labour and environmental matters ([Chen, 2019: 22](#)) and provides a regulatory model that could inspire

other international trade agreements and future reforms of the multilateral trading system. However, some authors observe that the true effectiveness of this labour and environmental provisions must be verified in practice, because the main purpose of these provisions could be providing a patina of sustainability concern in treaties aimed primarily at expanding trade and investment (Meidinger, 2019: 195).

The EU has also launched an ambitious agenda of commercial negotiations with third countries, among which it is worth mentioning, for example, those carried out with: South Korea, Colombia-Peru-Ecuador, Central America, Canada, Singapore, Japan, Vietnam, and Mercosur (European Commission, 2021c). All these negotiations are characterized by their great breadth (including provisions on trade in goods, services, intellectual property, foreign investment, government procurement, competition and other issues that go beyond the provisions of the multilateral trading system) and usually include a chapter entitled “Trade and Sustainable Development” (TSD), with numerous socio-labour and environmental provisions.

Taking as an example the TSD chapter of the EU-Mercosur agreement in principle announced on 28 June 2019 (European Commission, 2019b), it comprises 18 articles, which include substantive provisions on: objectives and scope (with explicit allusions to the SDGs); right to regulate and levels of protection; transparency; multilateral labour agreements and standards (with various references to decent work); multilateral environmental agreements; trade and climate change (with specific references to the 2015 Paris Agreement); trade and biodiversity; trade and sustainable forest management; trade and sustainable management of fisheries and aquaculture; trade and responsible management of supply chains, etc... From an institutional point of view, it includes the creation of a Sub-Committee on Trade and Sustainable Development (TSD Sub-Committee) and a specific mechanism for dispute settlement.

This systematic inclusion of TSD chapters in the PTAs negotiated by the EU is laudable and is a clear way to assert the regulatory influence of the EU at an international level, as some authors have already analysed (Raess, Schmieg and Voituriez, 2018). In contrast with the traditional focus of the multilateral trading system on *free trade* and its scant references to social and environmental issues, the new PTAs promoted by the EU have a holistic vision.

In any case, the TSD chapters should not remain in generic provisions, being necessary to specify them and guarantee their effective application in practice. Some analysts have observed that there are provisions in TSD chapters, such as those relating to the sustainable management of forests in the aforementioned EU-Mercosur agreement, which could have very little practical relevance in the face of productivist policies such as those of President Jair Bolsonaro in Brazil (Ghiotto and Echaide, 2019) and the EU is currently trying to negotiate, to this end, a more demanding regime on this issue (European Commission, 2021c: 4). Some Mercosur authors have criticized the TSD chapter and the growing environmental requirements of the EU, which they see as signs of a new “regulatory protectionism” of the EU, which would like to “dye everything green” (Raboi, 2020). On the other hand, it is disturbing that these TSD chapters include their own dispute settlement mechanism, which is softer than the mechanisms established to guarantee other chapters of PTAs.

To evaluate the effectiveness of the TSD chapters, the EU has been including, within the regular monitoring of the implementation of its PTAs, a specific monitoring of such chapters. In February 2018, the European Commission already identified “15 concrete and practicable actions” trying to make the TSD chapters more effective (European Commission, 2018b).

Recently, following the aforementioned Communication to review the EU's common commercial policy ([European Commission, 2021a](#)), the European Commission is trying to promote possible improvements in the design and monitoring of TSD chapters. To that end, the European Commission launched open public consultations on 23 July 2021, which concluded on 5 November 2021 ([European Commission, 2021d](#)). In May 2021, the European Commission requested an independent study, which was commissioned to the London School of Economics and Political Science (LSE Consulting), to compare the provisions on trade and sustainable development included in various PTAs promoted by the EU and by other advanced economies (such as Australia, Canada, the United States, Japan, New Zealand, or Switzerland) in order to identify best practices. The final version of this report has been published in February 2022 ([LSE Consulting, 2022](#)).

4 UNILATERAL TRADE MEASURES BASED ON THE SUSTAINABILITY OF PROCESSES AND PRODUCTION METHODS

As noted above, under current WTO rules it is difficult to justify the unilateral imposition of restrictions on imports of certain products based on processes or production methods that do not leave a physical trace in the final product, but this is not impossible. With this in mind, some WTO Members, particularly advanced economies, have already imposed for a long time import restrictions on some products, such as fish and timber, if sustainable management of fisheries and forests is not ensured by the countries of origin ([Marquès i Banqué, 2019](#); [Pons Ràfols, 2021](#)).

Currently, the EU is, with the encouragement of the European Green Deal, the WTO Member that is most vigorously promoting the imposition of restrictions or “penalties” on imports of very diverse types of products based on their carbon footprint or deforestation linked to its production, which are of special relevance for the fight against climate change and the preservation of biodiversity. Some of the measures or proposals that the EU has launched in this regard are highly controversial, particularly from the perspective of developing or emerging countries, which often question their compatibility with current WTO rules.

Next, some of these measures promoted by the EU will be referred to, beginning with an example of a measure that is already in force and has been challenged before the WTO dispute settlement system. Thus, in December 2019 and January 2021, claims were filed against the EU for certain measures relating to palm oil and biofuels based on palm crops by Indonesia ([WTO, 2019](#)) and Malaysia ([WTO, 2021](#)).

Both countries are the largest producers of palm oil in the world (used, among other purposes, to produce biofuels) and some studies indicate that the expansion of palm cultivation in Southeast Asia (and other tropical countries) has been doing, to a large extent, through the deforestation of primary forests, destroying important carbon sinks ([EU External Action Service, 2019](#)).

Indonesia and Malaysia note that the EU's classification of biofuels as sustainable had initially focused on emissions from direct land use, but more recently the EU has also wanted to take into account the effects of the so-called indirect land use change (ILUC) and this would be penalizing the biofuel obtained from palm oil. Indonesia and Malaysia note that this biofuel had traditionally been considered in the EU as a sustainable biofuel, but that this situation has changed with Directive (EU) 2018/2001 (EU, 2018), known as Renewable Energy Directive (RED) II, the Commission Delegated Regulation (EU) 2019/807 (EU, 2019) and other complementary rules.

According to this new EU regulation, palm cultivation is considered to present, in general, a high risk of ILUC. The carbon no longer absorbed after the deforestation

determines that this biofuel cannot generally be considered as sustainable. Indonesia and Malaysia argue that these EU measures generally penalizing biofuel derived from palm oil are, for various reasons, inconsistent with WTO rules. Both claims have considerable economic and legal interest, which some authors, anticipating what the WTO adjudicative bodies may end up determining, have already addressed from different positions ([Mitchell and Merriman, 2020](#); [Mayr, Hollaus, Madner, 2021](#)).

It is also necessary to refer to one of the most prominent (and controversial) proposals of the European Green Deal, consisting in the establishment of a carbon border adjustment mechanism (CBAM). The European Commission has presented a regulation proposal on 14 July 2021, which will be designated as the CBAM Regulation Proposal ([European Commission, 2021e](#)). Pending the approval of this initiative by the European Parliament and the Council, the CBAM is proposed as part of the “Fit for 55 Package” and is considered “as an essential element of the EU toolbox to meet the objective of a climate-neutral Union by 2050 in line with the Paris Agreement” ([European Commission, 2021e: p. 16, para. 9](#)).

The proposed CBAM tries to address the problem of so-called carbon leakage, which occurs when industries intensive in greenhouse gas (GHG) emissions tend to relocate from countries that impose higher demands on their domestic producers (as is the case of the EU with the cap and trade system established in its Emissions Trading System, EU ETS) towards more permissive countries or when, although such relocations do not take place, there is an increase in imports of goods with high embedded emissions from more permissive countries. Carbon leakage implies that GHG emissions are not reduced on a global scale, but simply change their country of origin or may even increase globally, by concentrating the production of certain goods whose production usually releases high emissions (such as steel, aluminium, cement...) in less demanding countries. Although the risk of carbon leakage is not new, it is understandable that the ambition of the objectives set out in the European Green Deal and the so-called European Climate Law (EU, 2021) increase this risk and the concern of the EU.

The CBAM Regulation Proposal is technically complex. Initially, various alternatives were considered for its design, such as the creation of a border tax adjustment (inspired by the specific provision of Art. II:2(a) of the GATT of 1994) or the inclusion of importers of certain goods in the EU under the EU ETS ([Fernández Pons, 2020](#)). The European Commission has finally opted for a third way, which can be described as an original border regulatory adjustment mechanism. Its logic, succinctly described, is that EU importers of certain products originating in third countries (in principle, fertilizers, aluminium, cement, electricity, iron and steel) will have to acquire public certificates (CBAM certificates) for carbon emissions embedded in imported goods, based on the real emissions released during the production process in the country of origin. The amount of such CBAM certificates will be determined by the European Commission according to the weekly average price of emission rights auctioned within the framework of the EU ETS. In this way, importers of the aforementioned goods in the EU will be subject to regulations and pecuniary charges equivalent (although not identical) to those of domestic producers of such goods subject to the EU ETS. If the production of the goods in the countries of origin is already subject to an emissions trading system or some type of payment for the GHG emissions released there, the importer in the EU may apply the corresponding discounts and acquire less CBAM certificates. The mechanism therefore tends to equate the price of the carbon released in installations located in the EU and that of the embedded emissions in the aforementioned imported goods, preserving the competitiveness of the industries located in the EU and promoting greater efforts in third countries to reduce emissions and to implement more decarbonised production processes.

The CBAM Regulation Proposal is a good example of the international leadership that the EU wants to exercise in the fight against climate change and the energy transition. The

European Commission always insists that its proposal has been designed to be fully compatible with WTO and other international rules. Some scholars observe that, being the CBAM a case of unilateral measure with an extraterritorial projection, based on processes and production methods in third countries that do not leave a physical trace in the final product, its justification under the current rules of the WTO is still a legally complicated issue open to discussion ([Markkanen, Viñuales, Pollitt, Lee-Makiyama, Kiss-Dobronyi, Vaishnav, et al., 2021: 37-44](#)).

Several countries, including China, Russia and India, have been expressing their concern about this EU proposal, considering that it is incompatible with WTO rules and even with basic principles of the international regime against climate change itself, as the principle of common but differentiated responsibilities, alleging that the CBAM Regulation Proposal imposes on the import of goods from any third country (regardless of its degree of development and its level of national commitments) a price for embedded emissions equivalent to that paid within the EU ETS ([Markkanen, Viñuales, Pollitt, Lee-Makiyama, Kiss-Dobronyi, Vaishnav, et al., 2021: 50-54](#)). Russia concludes, for example, that the EU proposal is an example of disguised trade protectionism ([Markkanen, Viñuales, Pollitt, Lee-Makiyama, Kiss-Dobronyi, Vaishnav, et al., 2021: 51](#)). The concerns and criticisms of various WTO Members about the CBAM proposed by the EU have been expressed in the regular meetings of various WTO bodies.⁶ Therefore, it is likely that, once this proposal is approved in the EU, claims will be raised before the WTO dispute settlement system or that some powers will even be tempted to use other pressure measures. Therefore, the EU should persevere in the soft power of dialogue and “climate diplomacy” ([Fajardo del Castillo, 2021](#)), without prejudice to the assertiveness that the current complex geopolitical context also requires.

The set of measures promoted by the European Green Deal that affect international trade has been expanded with other initiatives presented by the European Commission on 17 November 2021, such as a proposed regulation to stop the marketing of certain products associated with deforestation ([European Commission, 2021f](#)). This proposal contemplates prohibiting the commercialization of certain raw materials (specifically, palm oil, cocoa, coffee, beef, and soybeans) and products derived from them when their production is linked to deforestation or forest degradation, including the prohibition of the importation of such products into the EU based on the deforestation carried out in their respective countries of origin. In this way, it is intended to put pressure on third countries to stop deforestation on a global scale, which in large part is usually associated with the expansion of the production of the aforementioned selected raw materials. It should be noted that the prohibition does not refer only to illegal deforestation, but also to those deforestations authorized by internal legislations after 31 December 2020, explicitly alluding to the provisions of SDG 15.2, on sustainable forest management ([European Commission, 2021f: 24, para. 15](#)). A complex regulation is included to guarantee the traceability of the selected goods.

Introducing this initiative, Frans Timmermans, Executive Vice President responsible for the European Green Deal, stated that “to succeed in the global fight against the climate and biodiversity crises we must take the responsibility to act at home as well as abroad” ([European Commission, 2021g](#)). However, there are many criticisms that are already being expressed from some of the countries that could be most affected by these measures, such as Brazil, Indonesia, Colombia... Thus, for example, a Brazilian association of soybean producers considers that this is a proposal with “protectionism disguised as environmental conservation” and it is “an affront to national sovereignty” of the countries of origin, by also penalizing deforestation carried out in accordance with the internal legislation of the country of production ([Agence France Press News, 2021](#)). It is therefore likely that the approval of

⁶ See, for example, WTO Committee on Trade and Environment (2021: 18-23).

this measure by the EU will also end up giving rise to claims before the WTO dispute settlement system.

In addition, it is pending that the European Commission presents a relevant proposal for a directive aimed at promoting more sustainable corporate governance, specifying due diligence throughout the entire global supply chain and taking into account social and environmental conditions of production in the countries of origin. On the course of such an initiative see European Commission (2021h).

The ideal that seems to inspire this battery of measures promoted by the EU consists of moving from the traditional general principle of non-discrimination between physically similar products (with exceptions) to a new regulatory paradigm, which would start, as a basic principle, from the need to distinguish between products (and services) based on their sustainability, taking into account the environmental and labour conditions of the processes and production methods in the countries of origin. Synthetically and paraphrasing Hamlet: to be a sustainable product or not to be a sustainable product, this is (now) the question.

But such a distinction is technically complex (requiring careful traceability of products and their raw materials from their origins) and it is also complex from different points of view (legal, political, economic...). Note, for example, within the EU itself, the current debate on whether nuclear power or natural gas should be considered as sustainable or not.

5 FINAL REMARKS: TOWARDS A MORE SUSTAINABLE INTERNATIONAL TRADE?

The relevance of sustainable development in the multilateral trading system and other international trade agreements has been following a complex and still incomplete path from fragmentation to normative interconnection.

In any case, this transition from the traditional international trade regulation model (very focused on free trade) to a new regulatory model that emphasizes promoting sustainable international trade, taking the SDGs as a reference, will not be easy.

Certainly, the EU is trying to lead an in-depth reform of the WTO rules and can find allies in other advanced economies (including Biden's United States) and certain developing countries. But there are still many disagreements with China, Russia, India, Indonesia, and other emerging economies.

Faced with the difficulties in achieving new major consensuses in the WTO, advanced economies are promoting the inclusion of numerous socio-labour and environmental provisions in PTAs. This is, in principle, positive, since it corrects the traditional fragmentation of international law. But these are not times for complacency. It must be underlined that the main objectives of international trade agreements continue to be the promotion of trade and investment between the parties and it is necessary to ensure that this multiplication of provisions on sustainability is not a mere 'decoration' and that these provisions are subject to controls and dispute settlement mechanisms equal (or, at least, equivalent) to those of the rest of the provisions of the treaties.

The new regulatory paradigm that the EU and other advanced economies are trying to promote, lifting the veil that has generally been covering the conditions of production at origin, generates resistance, especially when it takes the form of unilateral trade restrictions or penalties with an extraterritorial scope, such as those measures intended to put charges on imported products based on the carbon emissions released in the country of origin.

It remains to be seen how various measures of this type that the European Commission is currently promoting, such as the CBAM Regulation Proposal, will end up being specified and applied in practice. And it also remains to be seen how other countries,

particularly emerging and developing countries, will end up reacting in front of those measures, because these countries tend to see them as forms of disguised and extraterritorial protectionism, and they look at the SDGs through their own prisms, focusing on special and differentiated trade treatment, development aid or the principle of common but differentiated responsibilities.

It is also still legally uncertain whether the adjudicative bodies of the WTO will consider such unilateral measures compatible with multilateral trade rules, accepting an evolutionary interpretation of the criteria to determine the analysis of the likeness between products (including their respective npr-PPMs) or, at least, a broader view of the exceptions and their possible extraterritorial reach.

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