IN-DEPTH ANALYSIS

Requested by the INTA committee

European Parliament

How can international trade contribute to sustainable forestry and the preservation of the world's forests through the Green Deal?

Policy Department for External Relations
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DIRECTORATE-GENERAL FOR EXTERNAL POLICIES
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ABSTRACT

High deforestation rates, particularly in tropical areas, remain a pressing concern for the international community, given their impacts on the global climate and the loss of biodiversity. The EU has committed to promoting sustainable forest management both domestically and internationally. However, efforts so far have concentrated on promoting the legality of trade in timber and timber products, via policy instruments such as FLEGT and the EU Timber Regulation. EU trade policy could be employed more systematically to promote sustainable forestry and deforestation-free value chains. The report proposes eleven measures to this end, both at the unilateral, bilateral and multilateral level, that *inter alia* combine market access incentives on the part of consumer markets such as the EU with obligations to promote principles of sustainable production on the part of producer countries.

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Executive Summary

Deforestation remains a pressing global concern. The FAO (Food and Agriculture Organisation) estimates that around 420 million hectares (ha), or **10 %, of global forested area has been lost** due to permanent conversion to other land uses. Considering forest expansion, the net loss of forest area amounts to 178 million ha **since 1990**. The annual rates of deforestation and net changes in forest areas have, however, declined over the last three decades. While 7.8 million ha were lost per year from 1990 to 2000 (net), it was 4.7 million ha annually between 2010 and 2020. The net changes vary from one region to another. The **loss of forests** has occurred **mainly in South America** with a decline of 129 million ha, or 13.3 %, since 1990. **Deforestation** rates are **increasing in Africa**, where forest areas have now been reduced by 106 million ha, or 14.3 %, since 1990. Data from alternative sources, in particular Global Forest Watch, confirm the concentration of deforestation in tropical areas in Africa, Asia and South America.

The **main factors driving deforestation vary** from region to region. In Latin America and South-East Asia, most tree cover loss is due to permanent conversion to commercial agriculture linked primarily to soybeans and cattle farming in Latin America and to palm-oil production in South-East Asia. Other agricultural products play an important role in specific regional contexts such as cocoa (West Africa), sugar and rubber (Latin America and Asia), cotton (India, West Africa) or tropical fruits (Central America). In African countries, small and medium-scale agriculture linked to urbanisation, infrastructure and mining is having an impact on changes to forest areas.

The recent academic literature identifies regional free trade agreements as an increasingly important factor for net deforestation and agricultural land expansion. According to one study, regional trade agreements increased bilateral agricultural trade by an average 30 % to 40 % in the 2000s. Increased agricultural trade leads to agricultural expansion and thereby often to deforestation. Therefore, a link between international trade and deforestation can be made. According to one study, the **EU accounts for 10 % of global embodied deforestation in consumption** and EU imports account for 36 % of global embodied deforestation in world trade.

The **international community,** as well as the EU, have confirmed the **objective of preserving the world's forests**. With the pace of deforestation increasing over recent years, delivering on the goals of the 2014 New York Declaration on Forests of halving deforestation by 2020 and halting deforestation by 2030 seems unrealistic without a significant increase in forest preservation efforts. The European Union has responded to these challenges with a variety of initiatives, both in its internal regulations and through trade policy and other external policy initiatives. Most recently, the new Commission headed by Ursula von der Leyen proposed a **European Green Deal (EGD)**. Amongst other things, the EDG **includes an EU forest strategy to be published in 2020**, aimed at encouraging forest preservation, restoration and afforestation.

The EU and its member states are active in a multitude of international policy frameworks and multilateral fora on forest policy. Over the last 30 years a **multilateral process** on advancing sustainable forest management has been institutionalised. It has achieved **progress on technical work relating to criteria & indicators for sustainable forest management**, although it has so far not been successful in setting up a binding international framework on sustainable forest governance. Similarities can be drawn with the discussion processes on forest-risk commodities (FRCs) and deforestation-free value chains for such products. While a myriad of public and private due diligence and certification processes has resulted in multiple initiatives, a harmonised and binding international framework for any of these commodities has yet to be adopted.

With respect to EU regulations, the forest governance approach of the EU is based on trade-related instruments that seek to combat the problems of illegal logging and deforestation. Of the trade-related measures, the **Forest Law Enforcement Governance and Trade (FLEGT) programme, the Voluntary Partnership Agreements (VPAs) under FLEGT, and the EU Timber Regulation (EUTR) are of particular**

importance. All major trade-related measures of the EU to combat illegal logging and deforestation have a **strong focus on the legality** of traded timber and timber products. Instruments that include **aspects of sustainable forestry remain underdeveloped**. There are, however, strong indications that policy instruments such as FLEGT could create an enabling environment for more sustainable practices. Calls for more measurable objectives and tools, including those with sustainability aspects, are reflected in the new FLEGT Work Plan 2018-2022. Such efforts, however, can only be successful when the implementation of schemes in third countries is guaranteed. Legal uncertainties, political conflicts and corruption hamper the implementation of VPAs in partner countries. A major issue is the **lack of capacities and sustainable finance in partner countries**, which is a key requisite for governance reform and implementation. It requires **continuous efforts in capacity-building, communication, and investments** (public and private) to reach sustainable outcomes.

Provisions relating to sustainable forestry have also been included in an **increasing number of EU bilateral free trade agreements** (FTA). Although these provisions have become more comprehensive over time, they are essentially **of a best endeavours nature**, that is, their actual implementation depends on the political will of the parties. Implementation is facilitated by consultations in the respective trade and development committees established under the agreements. Any disputes arising with regard to the provisions on trade and sustainable development of the FTAs — including sustainable forestry and trade in forest products — are to be dealt with by consultations, which in the case of the recent FTAs with Mercosur and Vietnam may involve the establishment of a panel of experts issuing a report with recommendations. Any recourse to trade sanctions in the event of a breach of commitments by a party under the regular state-to-state dispute settlement mechanism is, however, not possible. Arguably, this weakens the binding nature of these provisions.

EU trade policy could be employed to leverage the EU's efforts to promote sustainable forest management and deforestation-free value chains at three levels: (i) at the level of unilateral measures, (ii) via bilateral measures, and (iii) via multilateral initiatives. Measures at the three levels are of a complementary nature and could be employed individually or in specific combinations. At the **unilateral level**, three proposals are recommended: (1) **developing the EUTR into an instrument for sustainable forest management** by including sustainability criteria into its framework; (2) combining obligations for EU market access of FRCs with political dialogue and EU technical cooperation to enhance sustainable forest governance in producer countries in **a specific EU import regulation for FRCs**; and (3) introducing a **third special arrangement under the EU's Generalised System of Preferences (GSP)** focused on promoting sustainable forestry and deforestation-free value chains for FRCs.

At the **bilateral level**, seven proposals are recommended: (4) **granting preferential tariff rates** for sustainable timber & timber products and FRCs in bilateral EU FTAs; (5) **introducing import restrictions for non-sustainable timber & timber products and FRCs** into EU FTAs as an additional safeguarding measure; (6) including provisions into EU FTAs that offer tariff incentives conditional upon improvements in sustainable production; (7) **including investor obligations** in the EU's FTAs **with respect to sustainable development** and sustainable production of timber & timber products and FRCs; (8) further **employing the chapter on trade and sustainable development to promote deforestation-free value chains** and sustainable production and management of FRCs; (9) **strengthening enforcement and dispute settlement** with respect to the sustainable development provisions, in particular **via binding dispute settlements and an essential elements clause**; (10) **including** in EU FTAs **protocols on timber & timber products and FRCs** specifying sustainable management provisions and their implementation

Finally, at **the multilateral level**, it is recommended that the EU proposes to both major consumer and producer countries that they negotiate **a plurilateral or multilateral framework** for the promotion of trade in sustainable timber & timber products and FRCs via the establishment of **a mechanism that introduces tariff reduction commitments** by consumer countries **in exchange for pledges by producer countries to introduce sustainable production methods** for specific products.

1 Introduction

There has been an alarming increase in the rate of deforestation of tropical forests, particularly in the Amazon region, Africa and Asia. According to Global Forest Watch, since 2016 the loss of primary forests has been sharply rising again. Considering the critical threats posed by both the global climate crisis and the loss of biodiversity, the goal of preserving the world's forests has in recent years become increasingly important. However, delivering on the goals of the 2014 New York Declaration on Forests of halving deforestation by 2020 and halting deforestation entirely by 2030 seems unrealistic without a significant increase in forest preservation efforts.

The European Union has responded to these challenges over recent decades through a variety of initiatives, both in terms of its internal regulation and through trade policy and other external policy initiatives. Most recently, the new Commission headed by Ursula von der Leyen proposed a European Green Deal (EGD), which includes *inter alia* an EU Biodiversity Strategy, aimed at increasing the protection of biodiversity, as well as an EU forest strategy to be published in 2020, aimed at encouraging forest preservation, restoration and afforestation. However, the external dimension of the EGD and in particular its external policies to promote sustainable forestry in third countries, still require further elaboration.

Arguably, EU trade policy represents a key instrument in the EU's quest to contribute to global forest preservation and the promotion of sustainable forestry in partner countries. The EU is a major trading partner for practically all countries in Asia, Africa and Latin America, where there is a high concentration of tropical primary forest area. Interest in sustaining and deepening commercial relations with the EU should thus provide EU trade policy with some leverage in promoting sustainable forestry in these countries. Considering the urgent threat of deforestation and the climate change challenge, these opportunities should be swiftly exploited. In this context, the upcoming EU initiative for horizontal due diligence legislation as announced by Commissioner Didier Reynders on 29 April 2020 is of particular relevance.

Support for the idea that EU trade policy should be used to promote more vigorously ecological and social objectives has been growing in recent years. This is evident, for example, in the recent Franco-Dutch initiative calling for stronger Trade and Sustainable Development Chapters in bilateral EU Free Trade Agreements (FTAs) as well as for stricter enforcement [1]. Similarly, the Commission's plan to introduce a new Carbon Border Adjustment Mechanism within the framework of the EGD would contribute to the arsenal of unilateral trade instruments already in place, such as the EU Generalized System of Preferences Plus (GSP+) arrangement, which promotes enforcement of International Environmental Agreements. It is, therefore, both topical and of high societal relevance that the European Parliament should request an in-depth analysis on how trade policy contributes to sustainable forestry in third countries.

This in-depth analysis will, firstly, provide a short review of recent trends in deforestation and the trade in forest-risk products, in section 2. Secondly, we analyse the current state of play on forest governance at the multilateral level in section 3, and then present an overview of the current EU forestry regulation with a view to assessing its effectiveness in promoting sustainable forestry and deforestation-free value chains in third countries in section 4. This is followed by a discussion of current EU trade policies and their inclusion of sustainable forestry issues in section 5. Thirdly, we identify further trade-related measures for achieving sustainable forestry and deforestation-free value chains, in section 6. Finally, in section 7 we outline a set of eleven recommendations to the European Parliament for strengthening the use of EU trade policy to promote sustainable forestry in partner countries and to promote the trade of deforestation-free products.

[1] See Non-paper from the Netherlands and France authorities on trade, social economic effects and sustainable development, 21 April 2020, https://www.bilaterals.org/?non-paper-from-the-netherlands-and

2 Empirical overview of the state of the world's forest and the trade in forest/forest-risk products

2.1 Developments in forest cover and deforestation

According to the most recent FAO (Food and Agriculture Organisation) report, forest covers 31 % of total land area (FAO, 2020)[2]. The largest forest areas can be found in Europe (including Russia, 25 %), South America (21 %) and North and Central America (19 %), while Asian and African forests account for 15 % each. Almost half of all forests are located in tropical regions. Overall, forests in individual regions or countries have very different characteristics. They are affected by geological and climatic conditions, population growth, forestry and agricultural practices amongst other factors.

The FAO (2020) defines deforestation as the permanent conversion of forest area to other land uses. It estimates that around 420 million ha, or 10 %, of global forested area has, as of 2020, already been lost to deforestation and that, while some forest expansion has occurred as a result of planted forests, naturally regenerating forest areas and primary forests are shrinking, with the net loss of forest area amounting to 178 million ha since 1990. Annual deforestation rates and net changes in forest coverage have declined over the last three decades; 7.8 million ha (net) were lost per year from 1990 to 2000, compared to 4.7 million ha annually between 2010 and 2020. FAO data also indicate that net changes vary between regions. South America has experienced the greatest loss of forest area (129 million ha) since 1990, although there has been a declining trend in net losses. In Africa, on the other hand, deforestation rates are increasing, with forest areas having now been reduced by 106 million ha since 1990. All other regions report net gains.

Global Forest Watch (GFW) similarly defines deforestation as permanent change to tree cover (Curtis et al., 2018). Its estimates show a gross forest loss of 386 million ha, or 9.7 % between 2001 and 2019, with indications that this is part of an accelerating trend[3]. GFW data confirm the concentration of deforestation in tropical areas in Africa, Asia and South America (NYDF Assessment Partners, 2019). The inclusion in GFW data of temporary changes in natural and planted forests highlights the various factors for forest area change.

The primary contributing factor to deforestation is the expansion of commercial agriculture for exports and, to a lesser degree, for urbanisation, infrastructure and mining (Curtis et al., 2018; Hosonuma et al., 2012)[4]. This highlights the connection between deforestation on the one hand and international trade, as the main driver of agricultural expansion, on the other (DeFries et al., 2010; Leblois et al., 2017; Pendrill et al., 2019). In this context, Cuypers et al. (2013) use the concept of 'embodied deforestation' and show in a report for the European Commission that consumption within the EU accounts for 10 % of global embodied deforestation in consumption and that imports to the EU account for 36 % in global embodied deforestation in world trade. Abman and Lundberg (2020) identify regional FTAs recorded by the World Trade Organisation (WTO) as an increasingly important factor for net deforestation and agricultural land

[2] Estimations on forest areas can vary between different data sources depending on definitions and assessment methodologies. The FAO uses data from surveys among national authorities and defines forest areas according to tree cover and land use. This excludes tree stands in agricultural production systems (palm oil, rubber) and agroforestry systems (coffee), but includes temporarily removed forests (FAO, 2020, p.13). Other data sources, such as Global Forest Watch (Hansen et al., 2013), rely on satellite imagery and define forest according to tree cover. This includes forest plantations and agroforestry, but excludes (temporary) clear cuts in forest areas (Harris et al., 2016). These differences in definitions and assessment methods also affect the data on deforestation, forest degradation and underlying drivers.

[3] GFW data refer to a canopy density of >30 %.

[4] Empirical analyses on the drivers of deforestation and connections to trade and consumption patterns are increasingly based on satellite imaginary data, in particular by Hansen et al. (2013).

expansion. More generally, Jean and Bureau (2016) show that regional trade agreements have increased bilateral agricultural and food exports by an average of 30 % to 40 % in the 2000s.

However, regional differences are prevailing. In Latin America and South-East Asia, most tree cover loss is due to permanent conversion to commercial agriculture (Harris et al., 2020), linked primarily to soybeans and cattle farming in Latin America and to palm-oil production in South-East Asia. Other agricultural products play an important role in specific regional contexts such as cocoa (West Africa), sugar and rubber (Latin America and Asia), cotton (India, West Africa) or tropical fruits (Central America). In African countries, small and medium-scale agriculture makes an important contribution to changes in forest areas and might lead to permanent conversions of forests (ibid.).

Forestry practices themselves contribute towards changes to forest areas and account for a quarter of tree cover loss in the GFW data (Curtis et al., 2018). This is linked to large-scale forestry operations in managed forests with subsequent forest regrowth and is common across the EU and North America, although tree plantations for paper pulp also play an increasing role (Harris et al., 2020). Further, selective timber logging affects temporary losses in forest areas as well as forest degradation, which brings about a reduction of biological and economic benefits from forests, including the complexity of forest ecosystems (FAO, 2020; Hosonuma et al., 2012). Fuelwood collection and charcoal are also drivers for forest degradation, particularly in Africa and Asia (ibid.).

2.2 Production of forest products (timber and non-timber products)

The global volume of roundwood as a raw material has increased from 2000 to 2018 by 0.7 % per year. Two categories — logs for industrial use and as a source of fuel — each represent an equal share in total roundwood. However, while wood fuels play a major role in Africa and Asia, roundwood production for industrial uses (sawlogs and veneer logs, pulpwood and other industrial wood) was still dominated by North America, EU-27 and other Europe (incl. Russia) in 2018. Production in Asia and South America has increased at the expense of the North American share of global production (FAO data).

Globally, the main timber products by volume are wood chips, sawnwood and wood-based panels. With the exception of wood charcoal, production in all timber-related products is largely concentrated in EU-27, Asia and North America. Since 2000, Asia has established itself as a dominant producer region, largely at the expense of North America, while the EU-27 share has remained stable.

There is an extensive group of forest-related products beside timber and timber products. This group includes maple products, cork, bamboo and rattan, gums and resins but could also be extended to incorporate mushrooms or wild meat. Sorrenti (2017) notes that there is currently no common definition for this product group and there is a significant gap in current global statistics as products are often not differentiated by the means of production. Thus, consistent data on both production and trade are difficult to collect even though these products contribute to food security, nutrition, community health, energy and employment.

2.3 Trade in forest products (timber, non-timber) and forest-risk commodities

Between 2000 and 2018, global trade in timber (wood raw materials and timber products) has exceeded the growth in total production. However, globally traded volumes are equivalent to just 11 % of total production volume, with roundwood, sawnwood, pulp for paper and paper being the most traded timber products globally (FAO, 2019).

Despite increasing production, Asia, and in particular China, is the major net importing region in all sub-categories, while trade patterns in all other regions are highly diverse (FAO forest trade data, (FAO, 2019)).

In products under the Harmonised System (HS) Codes 44, which includes the main wood raw materials and most timber products, global trade value has increased from USD 72 billion in 2000 to USD 153 billion in 2018. In addition, wood pulp (HS 47) is a major timber product in global trade with a value of USD 63 billion in 2018 (UN Comtrade data).

In the HS 44 and 47 categories, trade among the EU-27 accounts for an important share in global trade with 23 % in HS 44 and 15 % in HS 47. With regard to the extra-EU trade, the EU-27 is a net importer of wood pulp and a net exporter of timber products, with EU-27 export to non-EU countries capturing a share of 19 % in global trade.

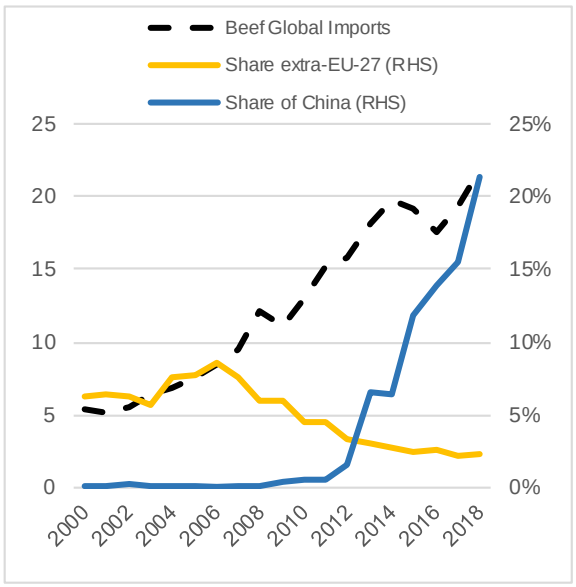
Extra-EU imports of timber products are dominated by wood pulp products from South America, and in particular Brazil, and timber products from Russia, Belarus and Ukraine, while exports go mainly to neighbouring countries, as well as to the US, Canada and Japan. The major sourcing countries for EU imports of all HS 44 and 47 products are Brazil, Russia, China, the United States, Uruguay, Ukraine and Belarus. These seven countries make up two-thirds of all extra-EU imports by the 27 EU member states, although the EU-27 takes in 70 % of all exports from Ukraine and Belarus and only 10 % from the United States and China. The EU-27 is also an important destination for timber products from major exporters in Africa such as Côte d'Ivoire (53 % in 2018), Cameroon (30 %), Gabon (31 %) and from Asia, for instance from Indonesia (9 %) or Malaysia (7 %) (UN Comtrade data). Thus, EU trade policy measures can have different effects on individual countries, depending on the importance of the EU as a trade partner (see discussion in sections 4 and 5 below).

As indicated above, deforestation in South America and Asia is mainly driven by the permanent expansion of commercial agriculture. In particular, products identified as forest-risk such as palm oil, cattle, soy, cocoa and coffee (NYDF Assessment Partners, 2019) are largely exported. However, pressures from agricultural expansion on forests differ from region to region due to specific product specialisations and the level of forest cover. In Latin America, deforestation is mainly related to the expansion of livestock pasture and to a smaller extent to that of farmland for soybeans. There are also important interrelations between these activities, as the conversion of pasture land to soy production has also led to pasture expansion in forest areas (Kuschnig et al., 2019; Seymour and Harris, 2019). In the case of South-East Asia, the expansion of palm oil plantations has contributed strongly to the permanent conversion of forest areas, although there has also been an increase in clearing for small-scale agriculture (ibid.).

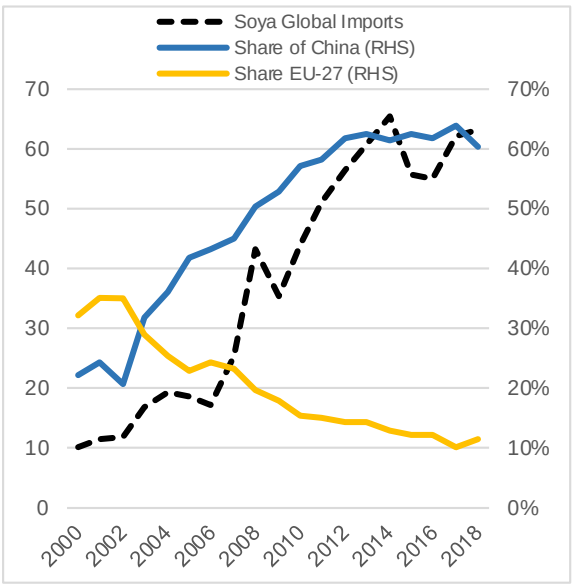
In African countries, and in particular in the Congo Basin and West Africa, there are three factors at play. The main driver has been the expansion of small and mid-scale agriculture (Seymour and Harris, 2019; Tyukavina et al., 2018). Alongside this, there have been expansions in areas for cocoa production (Kroeger et al., 2017; Ordway et al., 2017), as well as increases in selective logging, strongly related to increasing timber imports by China (Fuller et al., 2019). None of these factors necessarily lead to the permanent conversion of land, as consecutive small-scale clearings can allow secondary forests to regrow (NYDF Assessment Partners, 2019). However, increasing population pressure and the growth of agro-industrial crops (soybeans) and plantations (palm oil) do increase the strain on forest areas in Africa (ibid.; Ordway et al., 2017).

Figure 1: Trade patterns in main forest-risk commodities

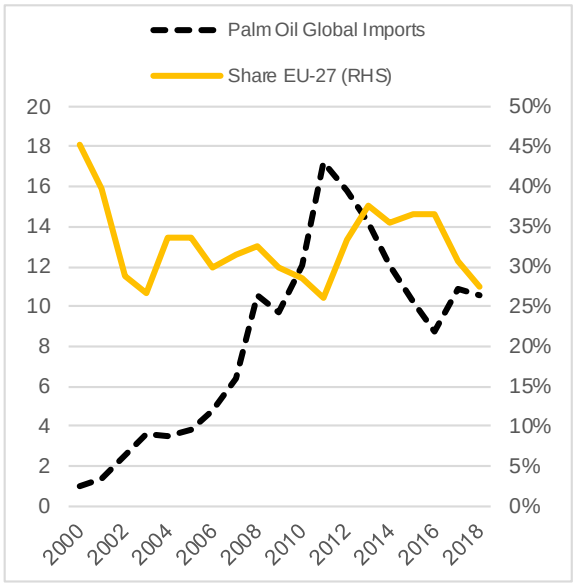
Beef (frozen) HS 0202 in billion USD



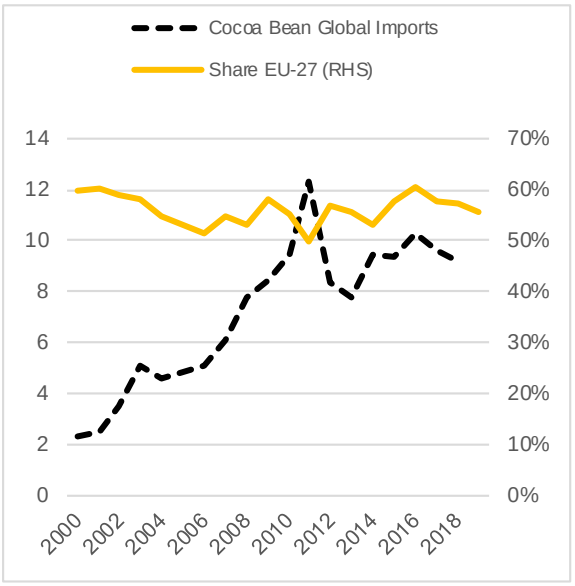
Soya beans HS 1201 in billion USD



Palm oil HS 151110 in billion USD



Cocoa beans HS1801 in billion USD



Source: UN Comtrade data

The regional specialisation on specific agricultural products generates individual trade patterns for the main FRCs, as shown in Figure 1. The global trade value of frozen beef (HS 0202), for instance, has more than quadrupled from USD 5.4 billion in 2000 to more than USD 20 billion. One-third of exported beef originated from South America in 2018, up from 14 % in 2000, primarily driven by demand from China. South America also produces 60 % of global trade in soybeans, most of which is, again, exported to China. As a result, the share of EU-27 imports is declining in relative terms, although the total volume of EU-27 imports remains on an upward trajectory in line with the overall growth in trade. The EU-27 has a large share (approximately 30 %) in the import of palm oil, of which 80 % comes from South-East Asia, and a dominant position in the import of cocoa beans, of which 80 % are produced in Africa.

2.4 EU tariffs on timber products and forest-risk commodities

EU tariffs are generally set at zero for most timber products (HS 44) and for all wood pulp (HS 47) and paper products (HS 48). Only processed timber products (Particle Boards, Fibreboards and Plywood) and products with tropical timber and bamboo are subject to Most-Favoured Nation (MFN) tariffs of up to 10 %. In the EU's FTAs and the GSP+, tariffs for all timber products are set to zero, while tariffs for processed timber products still exist in the standard GSP trade regime.

EU tariffs on FRCs are extremely divergent. The largest barriers in terms of tariffs (absolute and volume-related) and quotas exist for meat products. For this category, the EU also maintains tariffs and quotas in most FTAs as well as in GSP regimes. In other FRCs, less processed soy, palm oil and cocoa products face low to zero tariffs, while MFN tariffs are charged for processed products. In the simple GSP regime, these processed products benefit from reduced tariffs. In GSP+ and in FTAs, the tariffs are set to zero. Therefore, there is limited policy space for tariff reductions on timber products and forest-related products, although it could play a role for certain products and in combination with tariff changes for other products, as discussed in section 6.1.3 below.

3 Multilateral processes on sustainable forest governance

Work on sustainable forest management (SFM) at the international level gained momentum after the United Nations Conference on Environment and Development (Rio Earth Summit) in 1992. Although no convention on forests specifically emerged from Rio, the importance of forests across the economic, social and ecological landscape was clearly acknowledged. Recognising that forests are essential to economic development and the maintenance of all forms of life, the Conference adopted the **Rio Forest Principles**. A chapter of Agenda 21 was devoted to establishing a programme to enhance the scope and effectiveness of activities related to the management, conservation and sustainable development of forests and to effectively ensure the sustainable utilisation and production of forests' goods and services (chapter 11). Both the Forest Principles and **Chapter 11 of Agenda 21** expressed a broad suite of social, economic and environmental objectives around the concept of sustainability of forests. From this, the concept of SFM emerged. Although there was no universal international definition of SFM, it formed the basis of subsequent international policy on forests, especially the **United Nations Forum on Forests** (UNFF) founded in 2000 and its Non-Legally Binding Instrument on All Types of Forests, adopted in 2007.

Despite the absence of a global definition of SFM, there was an increasing recognition of the importance of monitoring, assessing and reporting progress in SFM at the global, national and regional levels. Work on developing criteria and indicators (C&I) as a tool to monitor, assess and report on trends in forest management was gaining ground at about the same time as the Rio Earth Summit. Important milestones included the 1992 **Guidelines for the sustainable management of natural tropical forests** of the **International Tropical Timber Organisation** (ITTO), developed as a tool to monitor, assess and report on progress in SFM for tropical forests. The need to develop similar principles and guidelines appropriate for temperate and boreal forests led to the agreements under the **Montreal Process** and Forests Europe process. Launched in 1994, the Montréal Process Working Group (MPWG) immediately set about the task of developing a set of C&Is to cover the temperate and boreal forests located within the territories its member countries. In February 1995, the MPWG agreed upon the '**Santiago Declaration**', a further milestone, covering seven criteria and 67 associated indicators, as guidelines for policy-makers to use in assessing national forest trends and progress toward SFM in temperate and boreal forests[5].

[5] For the history of sustainable forest governance at the international level, see https://www.montrealprocess.org/The_Montreal_Process/About_Us/history.shtml

With respect to Europe, the central forum for the promotion of forest governance and SFM is the Forest Europe process, assembling 46 European countries and the European Union. Founded in 1990, the process aims at developing common strategies on the sustainable management of forests in Europe. Perhaps most notably, the process has advanced the technical work on definitions and criteria for SFM *inter alia* by the **Pan-European Criteria and Indicators for sustainable forest management** and the Pan-European Operational Level Guidelines for sustainable forest management. As negotiations for a legally binding agreement on Forests in Europe, which began in 2011, are still pending, the resolutions, decisions and technical documents of the process are essentially of a soft law nature. Although the scope of activities has been focused on forest governance in Europe, the process serves as an important transmission mechanism to the international level. First, it aligns its working programme with relevant global initiatives, such as the 2030 Agenda for Sustainable Development and its Sustainable Development Goals (SDGs), the UNFF 11 Resolution and the Paris Climate Agreement. Secondly, it cooperates with international organisations and processes (part of which hold observer status with Forest Europe), for instance, UNECE, FAO, UNEP, UNFF, UNFCCC, or UNCCD (Forest Europe, 2015). The process has thus arguably contributed to mainstreaming SFM at the wider European level. Given that together with its member states it represents 28 of 47 members of Forest Europe and is the most important market for timber & timber products in Europe, it is fair to assume that the EU exerts considerable influence on the Forest Europe process.

A final multilateral forum that has become important over recent years with respect to advancing policy dialogue and technical work on SFM is **The Committee on Forestry (COFO)** of the FAO. As members of FAO, the EU and its member states also participate in the work of COFO.

With respect to deforestation-free value chains for FRCs, a multitude of public, private sector and civil society initiatives exists. Within the EU context, arguably the Amsterdam Declarations are particularly noteworthy. Launched in the context of Paris Climate Agreement and building on the New York Declaration on Forests, the **Amsterdam Declaration Partnership** is an informal cooperation focussed on promoting deforestation-free value, sustainable commodities. The focus is on cooperation with the private sector and producer country actors. Work relates in particular on palm oil, cocoa, and soya. The Amsterdam Declarations Partnership is based on the Amsterdam Declarations signed by Denmark, France, Germany, Italy the Netherlands, Norway and the United Kingdom[6].

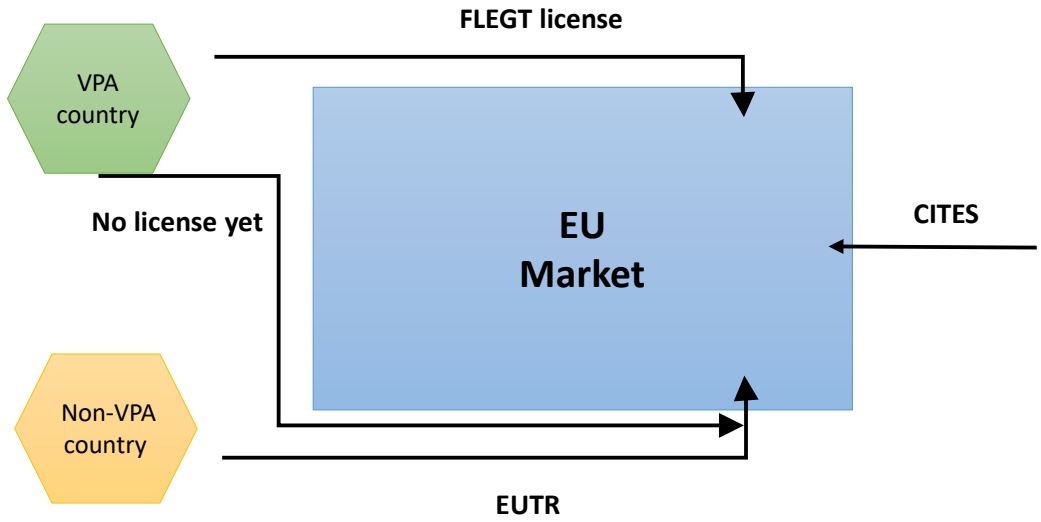
By way of conclusion, over the last 30 years and with the active participation of the EU, **a multilateral process** on advancing SFM has been institutionalised. It has achieved **progress on technical work** relating to C&Is for SFM, although it has so far not been successful in setting up a binding international framework on sustainable forest governance, be it at the multilateral or the European level. This is very similar to the related discussion processes on FRCs and deforestation-free value chains for such products. While a myriad of public and private due diligence and certification processes resulted in multiple initiatives, a **harmonised and binding international framework has not been adopted** so far for any of the FRCs.

[6] For more information see https://ad-partnership.org/implementation/

4 Review of existing EU policies to promote sustainable forestry in third countries

As outlined above, the EU and its member states are active in a multitude of international policy frameworks and multilateral fora on forest policy. The EU also follows the overarching framework set through the SDGs. While these initiatives are focused on global forest governance at the political level, implementation in the EU is based on trade-related instruments designed to address illegal logging and deforestation specifically. Figure 2 illustrates the import modalities for timber and timber products to enter the EU market under the most important EU systems, which are described in detail in the following sections.

Figure 2: Import modalities for timber and timber products to enter the EU market



4.1 Forest Law Enforcement, Governance and Trade

The Forest Law Enforcement, Governance and Trade (FLEGT) is the main trade-related EU policy instrument for combatting illegal logging and deforestation. The FLEGT Action Plan (AP) came into force in 2003, establishing measures to prevent imports of illegal timber into the EU. These measures provide technical and financial support to improve forest governance and facilitate policy reforms, improve transparency and traceability of timber trade, raise awareness of illegal logging, promote legal means for the production and trade of timber and to help build capacities of governments and administrations, business operators and civil societies in timber-producing countries.

The implementation of the FLEGT AP has been complex. An evaluation carried out for the period 2003-2014[7] concluded *inter alia* that (i) it has been effective in raising awareness of the problem of illegal logging at all levels, (ii) it has contributed significantly to improved forest governance globally and in targeted countries, and (iii) it has led to reduced demand for illegal timber in the EU, but that he support provided to producer countries should be more demand-driven, flexible and strengthened through the involvement of private sector stakeholders. Although improvements can be observed in forest governance, progress is slower than expected and requires further efforts. To render implementation more effective, additional political and financial support is required also within member states. In particular, stronger monitoring of management and outcomes is necessary, which places additional demands on capacity and resources.

[7] http://www.euflegt.efi.int/eu-flegt-evaluation

To this end, more explicit guidance on issues of process, implementation, strategic management and measurable objectives is necessary. The results of the evaluation are echoed by the report of the European Court of Auditors (2015), which concluded that the FLEGT AP is a powerful EU tool to support political dialogue on forest governance with developing countries, but requires concrete efforts on the planning and monitoring of activities.

The recent FLEGT Work Plan 2018-2022[8] is expected to address some of these weaknesses by dealing with the challenges of implementation and responding constructively to new developments on the global timber market. It offers guidance *inter alia* on new instruments for impact assessments, outlines more clearly the respective responsibilities and timelines and promotes more robust compliance with other instruments such as the EU Timber Regulation (EUTR) or the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) requirements on wildlife trade. It seeks to encourage collaboration in multilateral frameworks combining other international activities on combating illegal logging and to utilise synergies with instruments such as REDD+ (Reducing Emissions from Deforestation and Forest Degradation) to reduce forest loss. However, it does not introduce any new objectives or targets to the overall FLEGT AP and the actual means by which to promote SFM remain vague.

The new work plan raises two important points, firstly regarding cooperation with other consumer and processing countries and secondly regarding the question of financing FLEGT activities. Firstly, it is recognised that cooperation with big market players such as China, US, or Japan is key to avoiding leakage effects of the FLEGT system, i.e. EU efforts being undermined by illegal timber finding its way to other market players with weaker regulatory frameworks. Enhanced dialogue and exchange of experiences with the FLEGT system would help further to promote legality systems for timber and timber products worldwide. The Bilateral Coordination Mechanism (BCM) with China, for example, supports efforts towards legality verification and good governance with major trade partners of China in South-East Asia and Africa.

The issue of financing FLEGT activities in partner countries is also crucial. This refers to both the effective establishment of legality assurance systems and capacities for implementation and monitoring. The Work Plan refers to EU instruments such as the Global Public Goods and Challenges thematic programme (part of the Development Cooperation Instrument) and its FLEGT funding instrument, bilateral and regional cooperation, the European Neighbourhood Instrument (ENI), the Partnership Instrument, the Technical Assistance and Information Exchange instrument (TAIEX), the LIFE programme, as well as Member States' development cooperation financing and national budgets. There is also the need for private investment and public-private partnerships in partner countries. The EU External Investment Plan aims to increase investments in legal and sustainable timber supply chains and investment projects, e.g. for forests or forest plantations, for eco-businesses engaged in sustainable value chains for timber or for securing land tenure. This can be seen as an important step towards stronger sustainability of forest value chains although it would be pertinent to consider cross-sectoral coordination of development cooperation and financing in order to avoid fragmented, contradictory, or redundant funding across sectors (e.g. forestry with agriculture, climate change, etc.).

4.2 Voluntary Partnership Agreements

One major element of FLEGT implementation is the establishment of bilateral Voluntary Partnership Agreements (VPAs)[9]. A VPA is a bilateral trade agreement between the EU and a timber-exporting country outside the EU. In comparison to unilateral market regulations that demand legality proof, VPAs can be seen as bilateral partnerships that respect the territorial rights and legal frameworks of partner countries (Derous and Verhaeghe, 2019) and become legally binding only with the ratification of both sides.

[8] https://ec.europa.eu/environment/forests/pdf/FLEGT_Work_Plan_2018_2022.pdf
[9] http://www.vpaunpacked.org/

The main element is a timber legality assurance system that guarantees that all timber imports from a country into the EU are from legal sources. Legality is hereby defined according to national standards and the contents of the VPA, including any requirements for legal and governance reforms including national consultation processes in the partner country. Once all systems are in place, a country is allowed to issue FLEGT licenses, granting access to a country's timber and timber products to the EU market.

To date, seven countries have ratified a VPA with the EU: Ghana, Republic of the Congo, Cameroon, Indonesia, the Central African Republic, Liberia and Vietnam. Negotiations with Honduras and Guyana have been concluded and further negotiations are ongoing with Côte d'Ivoire, Democratic Republic of the Congo, Gabon, Laos, Malaysia and Thailand. So far, Indonesia is the only country to have implemented a legality verification system and, therefore, able to issue FLEGT licenses. From 2016 to mid-2019, it reported more than 104 000 FLEGT licenses worth USD 2.87 million[10]. Without the broader implementation of legality verification systems, the actual share of timber being traced under FLEGT licences globally remains small, although it is worth noting that VPA countries — while most of them have no licensing system yet — accounted for almost 80 % of EU tropical sawnwood imports in 2018[11].

Experiences from VPA countries show various effects of introducing the FLEGT system into timber exporting countries. Although not a system focusing on SFM, there are clear signals that FLEGT serves as an enabling factor for improving SFM in VPA countries by supporting forest governance reforms, sustainable harvesting practices and timber legality insurance systems. A better implementation of management plans, better development of the private sector and more transparent and participative forest governance are positive, tangible effects in VPA countries (Cerutti et al., 2020). In combination and synergy with REDD+ projects, this shall lead to strengthened institutions, policy reforms and new modes of mobilising financing resources (Neupane et al., 2019). If a legality assurance system is in place, as is the case in Indonesia, there is added value in improving public awareness of legality issues, reducing illegal logging, fostering sustainable practices and increasing legal certainty for business operators.

On the other hand, complex political and technical circumstances often hamper the progress and implementation of VPAs, as can be observed in the lack of legality assurance systems and, more concretely, in weak and inconsistent legal frameworks, insufficient financial resources and capacities and long-term conflicts. It has been observed that weak institutional arrangements and high levels of corruption may undermine the objectives of VPAs, especially in the absence of effective monitoring (Adams et al., 2020). In a consequence, limited compliance of local operators, higher costs of implementation, and lacking acceptance of the VPA regulations may encourage parties to circumvent legal requirements (Acheampong and Maryudi, 2020). Local communities may be cut off when their traditional forest activities are declared illegal, favouring international trade over local access (McDermott et al., 2020). Smallholders may be marginalised in the case that they cannot afford the compliance costs of the VPA arrangements (Derous and Verhaeghe, 2019).

4.3 EU Timber Regulation

The EUTR[12], adopted in 2010 and going into force in 2013, is a central instrument to prevent illegal timber and timber products from entering the EU market. It defines the obligations of operators importing timber from outside the EU by prescribing a set of rules for legality verification. This due diligence system obliges every operator to perform a risk management process to reduce the risk of importing timber from illegal sources by providing sufficient information (i.e. documents on the source, suppliers, legal compliance, etc.),

[10] http://www.euflegt.efi.int/publications/flegt-licensing-lessons-from-indonesia-s-experience
[11] https://www.flegtimm.eu/index.php/reports
[12] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32010R0995

a risk assessment and risk mitigation measures (e.g. additional documents for verification). This ensures proof of legality through the entire chain of custody from the source to the EU border.

While FLEGT deals with the country level (and the issuance of licences by respective government authorities), the EUTR requires all operators to declare legality. FLEGT and CITES licences are exempt from the EUTR since their verification systems are deemed sufficient for entry to the EU market. The EUTR is considered a significant instrument in combatting illegal logging and stopping deforestation on the global level because it provides a strong incentive to market players from outside the EU to bring timber legality issues on the market agenda. The first evaluation in 2016[13] showed that implementation had started according to plan but indicated considerable variation between EU member states. Operators have gradually taken steps towards due diligence, although evidence hints to smaller companies being burdened by high implementation costs and processes. Producer countries have been encouraged to develop systems to assess legal compliance with EUTR standards, the effect of which has still to be evaluated. The most recent information on EUTR implementation was presented in the Biannual Report from the Commission to the European Parliament and the Council in 2017[14], reporting on the state of implementation in the member states and on breaches of the EUTR and shortcomings in due diligence cases. Country reports from member states are requested every second year. In the recent Public Consultation[15], as part of a fitness check of FLEGT and EUTR, there was a general appreciation of the progress made through the EUTR. Two central points of criticism were raised; firstly, that there is significant variation in the definitions of due diligence on the national level, and secondly that the exclusion of certain products such as charcoal and printed paper may lead to market distortions, both within the EU and on the global level.

Another point is the potential synergies of the EUTR and third-party certification schemes, which are not in themselves an EUTR proof, but can provide support for due diligence and documentation procedures. Forest certification is a market-based instrument to promote timber, timber products and value chains from sustainable sources. The two largest forest certification schemes, the Forest Stewardship Council (FSC) and the Programme for the Endorsement of Forest Certification Schemes (PEFC) claim that their systems have been aligned with the EUTR demands. As sustainability labels, PEFC reports 325 million ha of certified forests[16] while FSC reports 200 million ha (more than 20 % of the global industrial roundwood production)[17]. Given this magnitude, there should be exploration of further synergies with the EUTR, in particular with regard to sustainability verification, while taking into account that EUTR and private certification are of a different — albeit potentially complementary — nature (political vs market-based).

4.4 EU Wildlife Trade Regulations

CITES is implemented via the EU Wildlife Trade Regulations (EUWTR) in the EU. CITES and EUWTR focus on the sustainability and legality of international trade and regulate imports, exports, re-exports. The emphasis is on supply-side measures, in contrast to the EUTR, which maintains a strong focus on demand-side measures (UNEP-WCMC, 2019). The EUWTR has no particular focus on forestry or illegal logging but there is a list of tree species in the Annex that require specific protection and legality proof if traded. While FLEGT/EUTR and CITES have differing legality requirements, they share many synergies. A joint EUTR/CITES expert group is currently working on identifying action points for the continued harmonisation between the two systems.

[13] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016DC0074

[14] https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1538746572677&uri=COM:2018:668:FIN

[15] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/11630-Illegal-logging-evaluation-of-EU-rules-fitness-check-

[16] https://www.pefc.org/

[17] https://fsc.org/en/newsfeed/the-share-of-sustainable-wood-data-on-fscs-presence-in-global-wood-production

4.5 The EU Forest Strategy

The EU Forest Strategy is an instrument to coordinate forest-related activities within the EU. The EU Strategy 2013-2020 listed among its eight priority areas the issue of 'Forests from a global perspective', referencing the EU 2020 forest objective and referring *inter alia* to the goal to improve the EU's contribution to promoting SFM and reducing deforestation at a global level. The mid-term evaluation (European Commission, 2018) showed that the global dimension plays an important role in EU forest policymaking, in particular with respect to combatting illegal logging and deforestation. Also the idea of zero-deforestation commodity supply chains was added to the policy agenda, with the aim of achieving that by 2020.

A new forest strategy was announced for 2020 together with measures to support deforestation-free value chains, although this has been delayed due to the COVID pandemic. Its focus will lie on the protection of forests and forest restoration, looking in particular at the effects of land use, land-use change and forestry in a global context. Measures should be compliant with climate change and biodiversity regulations and look at the impact of dislocation effects of EU consumption patterns (e.g. agriculture, palm oil, timber). As a soft policy instrument, however, the EU Forest Strategy will require strong support from EU member states and a commitment to cooperation between member states and the Commission.

4.6 Synopsis

All major trade-related measures of the EU to combat illegal logging and deforestation have a strong focus on the legality of traded timber and timber products. Instruments to incorporate the promotion and monitoring of sustainable forestry remain underdeveloped. However, there are strong indications that FLEGT creates an enabling environment for more sustainable practices since it deals with forest governance reforms and participation of public and private stakeholders and it raises awareness of the need for legality of forestry, which to some extent implies certain elements of sustainability. Calls for more measurable objectives and tools, with the inclusion of sustainability criteria, are reflected in the new FLEGT Work Plan 2018-2022.

It is evident that greater synergies between different trade-related measures will strengthen any potential sustainability impacts. This includes synergies between EUTR/FLEGT and CITES, but also potentially between EUTR/FLEGT and private certification schemes as part of public-private partnerships or similar initiatives. Synergies may include shared costs for verification, comparability of systems and definitions, different levels of application and mutual accountability of documentation.

Such efforts, however, can only be successful when the implementation of schemes in third countries is guaranteed. Corruption, legal uncertainties, as well as political conflicts hamper the implementation of FLEGT in partner countries. A major issue is the lack of capacity and sustainable finance in partner countries, which is a key requisite for governance reform and implementation. It requires continuous efforts in capacity-building, communication and investments (public and private) to reach sustainable outcomes.

Since the share of timber and timber products traded through EUTR is only a fraction of the global market, e.g. ca. 10 % of HS 44 (see section 1), an ongoing exchange with major producer and consumer countries on the need for legal and sustainable timber is of great importance. It will arguably have the highest potential sustainability impact, should the underlying principles of FLEGT and EUTR have a trickle-down effect in those regions, countries and markets. Cross-sectoral activities (e.g. with agriculture, climate change, REDD+) will help generate more long-term sustainability effects when they are aligned and promote capacity-building as well as provide sufficient financing.

5 Review of EU Trade Policies

5.1 The role of sustainable forestry in the EU GSP arrangement

The EU's GSP arrangement removes import duties from products coming into the EU market from vulnerable developing countries. It is intended to help developing countries to alleviate poverty and create jobs based on international values and principles, including labour and human rights. The EU GSP arrangement consists of three pillars: (i) the Standard GSP with 15 countries as beneficiaries, (ii) the GSP+ arrangement with eight beneficiary countries and the Everything But Arms (EBA) special arrangement with 48 beneficiaries.

The EU's GSP+ arrangement promotes enforcement of International Environmental Agreements, the latter including *inter alia* the CITES and the Convention on Biological Diversity (CBD). The EU continuously monitors GSP+ beneficiary countries' effective implementation of the 27 international conventions on human rights, labour rights, environmental protection and good governance. This monitoring includes exchanges of information, dialogue, visits and involves various stakeholders, including civil society.

The total value of EU imports using the GSP arrangement increased to EUR 68.9 billion in 2018. The largest beneficiaries of the arrangement are Bangladesh (25 % of EU imports), India (24 %), Vietnam 14 %), Indonesia (10 %), Pakistan (9 %) and Cambodia (85 %). Roughly 74 % of products imported under the GSP arrangement are textile and apparel, footwear or machinery and mechanical equipment. FRCs such as rubber, furniture or cosmetics, oil and soap account for less than 10 % of imports under GSP (European Commission, 2020).

Not all imports from GSP countries benefit from EU trade preferences but only those included in a list of eligible products defined by the EU. The list is restricted to agricultural commodities and raw materials, light manufactured products such as textiles and apparel, leather goods and a selection of other manufactured products. It does, however, include soya, oils (including palm oil) and timber & timber products. Thus, only 73 % of EU imports from EBA countries are eligible for trade preferences, 59 % of EU imports from GSP+ countries and 35 % from Standard GSP countries. However, not all countries use the full range of tariff preferences that the GSP regulation offers to them. As a consequence, real rates of utilization are below maximum eligibilities.

As can be seen from the above figures, the GSP arrangement is of particular importance to EBA countries, including Sub-Saharan African countries, but nonetheless remains underexploited. The value of preferential imports from African GSP beneficiary countries to the EU increased by 17.2 % and reached EUR 3.3 billion in 2018. In the case of GSP+ countries, the percentage of actual imports covered by GSP trade preferences was already lower and stood at 49 % in 2018. For the beneficiaries of the Standard GSP, only some 26 % of their imports to the EU actually received trade preferences, though GSP eligible imports stood at 35 %.

From 1 January 2020, certain products including animal or vegetable oils, fats and waxes, as well as wood and articles of wood as well as wood charcoal graduated from the GSP arrangement in the case of Indonesia, meaning that for these products trade preferences are no longer granted.

With respect to the implementation and enforcement of international environmental agreements, the biannual report on the GSP for the period 2018-2019 notes that 'With regard to environment and climate change, countries have improved reporting (e.g. CITES)'.

Since the GSP system includes countries with important forest coverage, in particular Indonesia, Bolivia and the Democratic Republic of Congo, it could provide a powerful instrument to promote SFM through its trade preferences. To date, however, this is not listed as a specific objective under the GSP arrangement.

5.2 The role of sustainable forestry in EU bilateral trade policy

In its bilateral trade policy, the EU has included provisions on sustainable management of forest resources in the respective chapters on trade and sustainable development. This is true for the Association Agreements (AAs), the Economic Partnership Agreements (EPAs) and the bilateral trade agreements (FTAs).

5.2.1 The Association Agreements

Association agreements between the EU and third countries can cover a wide range of topics. Provisions with respect to forestry are included in a number of these. Article 294 of the **Association Agreement with Ukraine** deals with trade in forest products and commits parties to promote the sustainable management of forest resources, work together to improve forest law enforcement and governance and promote trade in legal and sustainable forest products. Forest management and trade in timber products is addressed regularly in the bilateral meetings of the trade and sustainable development sub-committee of the AAs, particularly in the case of Ukraine, given its large surface and forest area. The introduction by Ukraine in both 2005 and 2015 of export prohibitions for unprocessed timber has led to a request by the EU for bilateral dispute settlement consultations under the Association Agreement. The EU claims that the export prohibitions for unprocessed timber are neither necessary nor appropriate for pursuing the stated objective of the measures, namely the promotion of domestic wood processing and furniture production[18]. The consultations on the dispute are on-going.

Similar, though more extensive provisions have been incorporated into the **Association Agreements with Moldova and Georgia**. The respective provisions — Article 233 in the AA with Georgia, Article 369 in the AA with Moldova — also refer explicitly to the conservation of forests and stress the importance of information exchange and cooperation at the international level. In addition, the regulatory approximation agenda of the AAs extends to the domain of forestry, thus promoting a gradual alignment of forest regulations with EU standards.

5.2.2 Economic Partnership Agreements

Within the framework of the Cotonou Agreement, the EU has been negotiating EPAs with the African, Caribbean and Pacific (ACP) group of countries.

As the economic pillar of the Cotonou Agreement, EPAs are explicitly designed to promote the economic development of ACP countries, including a large group of mostly Sub-Saharan African countries with very low income. The sustainable management of these countries' natural resources is, therefore, of particular importance for their long-term economic development. While relevant to all regions, given the tropical forest areas within their territories, the agreements with the five African regional groupings are of high significance with respect to sustainable forestry[19].

All EPA agreements with the Africa regional groupings concluded as of now, contain provisions on sustainable forestry and trade of forest products, though with varying degrees of comprehensiveness and detail. Given its large forest area, the EPAs with Central Africa are most important with respect to sustainable forestry. The only interim or stepping-stone EPA (iEPA) in force to date with a country of this regional grouping has been concluded with Cameroon. The agreement was signed in 2009 and entered into provisional application in January 2014. It provides the template for agreements with other countries

[18] See Written Submission by the European Union – Ukraine Export prohibition on wood exports, Brussels 17 February 2020, https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158658.pdf

[19] These are the EPA with Eastern and Southern Africa (ESA), with the members of the South African Development Community (SADC), country-level agreements with Cameroon, Ghana and Côte d'Ivoire, the regional agreement with the East African Community (EAC) and the regional agreement with the ECOWAS countries. Negotiations on a regional agreement with Central Africa have all but stalled.

of Central Africa, though negotiations are stagnant for the time being. The iEPA contains a comprehensive chapter on forestry governance and trade in timber and forest products. The chapter describes a common working programme of the parties that is closely aligned with the agenda of the EU FLEGT action plan and explicitly refers to FLEGT and the VPAs in Article 53. With 18 million ha of tropical forests, Cameroon is the largest African exporter of tropical hardwood to the EU. The VPA with Cameroon entered into force on 1 December 2011.

The inclusion of a comprehensive chapter on forestry governance into the iEPA bears not only symbolic relevance, insofar as it lends additional weight to the significance attached by the EU to this topic it is subject to the dispute settlement mechanism of the agreement. Thus, trade sanctions might be invoked in the event of a breach of obligations by either party.

5.2.3 Bilateral free trade agreements

It has become common practice since the early 2000s that provisions on sustainable forestry are included in the bilateral trade agreements of the EU. Since their introduction, there has been a significant development in terms of the level of detail and comprehensiveness of the respective provisions. While in the **EU FTA with Colombia and Peru**, the wording remains at a rather general level, in the most recent **bilateral FTA with Vietnam**, the respective articles have become more specific and have been complemented by a very detailed list of cooperation areas including sustainable forestry. The provisions in the Vietnam agreement make explicit reference to the EU FLEGT action plan and are otherwise very similar to the respective provisions in the AA with Mercosur. Implementation is facilitated by regular consultations in the respective trade and development committee established under the agreement, where consultations and discussions on matters of sustainable forestry take place. Any disputes arising with regard to the provisions on trade and sustainable development — including sustainable forestry and trade in forest products — are to be dealt with via consultations, which in the case of the more recent EU Vietnam FTA may also involve the establishment of a panel of experts issuing a report with recommendations (Article 13.17). Any recourse to the regular dispute settlement process in the event of a breach of commitments under the trade and sustainable development provisions by a party is, however, excluded by Article 13.16., para 1. Therefore, current dispute settlement mechanisms are ineffective in this respect.

In the case of the **Association Agreement between the EU and Mercosur**, a political agreement was reached in June 2019 although approval by the Council and the European Parliament is still pending[20]. In its trade and sustainable development chapter, the agreement contains two articles dealing explicitly with sustainable forestry. Article 8 addresses SFM and commits the parties (i) to encourage trade in products from sustainably managed forests, (ii) to promote, as appropriate and with their prior informed consent, the inclusion of forest-based local communities and indigenous peoples in sustainable supply chains of timber and non-timber forest products and (iii) to combat illegal logging. In addition, the article commits parties to information exchange and cooperation on trade and forest conservation at the bilateral and international level. Article 13 contains a comprehensive list of areas of cooperation the parties may wish to engage in, including *inter alia* (j) corporate social responsibility, responsible business conduct, responsible management of global supply chains and accountability, (l) the conservation and sustainable use of biological diversity and (o) private and public initiatives contributing to the objective of halting deforestation, including those linking production and consumption through supply chains, consistent with SDGs 12 and 15.

By way of summary, it is important to note that although the articles cited in the above-mentioned FTAs have become more comprehensive over time, they are essentially of a best-endeavours nature, i.e. their

[20] Though the EU Mercosur Agreement is officially an Association Agreement, it is dealt with in the section on bilateral FTAs, as the character of the EU Mercosur Agreement is closer to bilateral FTAs than to AA like with Moldova, Georgia or Ukraine.

actual implementation depends on the political will of the parties. Implementation is facilitated by regular consultations in the respective trade and development committees established under the agreements, where consultations and discussions on matters of sustainable forestry take place. Any disputes arising with regard to the provisions on trade and sustainable development of the recent FTAs including sustainable forestry and trade in forest products, are initiated by consultations, which in the case of the EU Mercosur AA and the EU-Vietnam FTA (EVFTA) with Vietnam may involve the establishment of a panel of experts issuing a report with recommendations. Any recourse to trade sanctions in the event of a breach of commitments by a party under the regular dispute settlement procedure of the AA is, however, not possible.

More recent FTAs typically also contain an **investment chapter**, in particular since investment has become an exclusive competence of the European Union with the Treaty of Lisbon[21]. Amongst others, the aim of such a chapter in an FTA is to facilitate market access for EU investors, restrict discriminatory treatment and protect their assets in partner countries from expropriation. To this end, investor-to-state dispute settlement provisions (ISDS) have traditionally been included. These enable investors to claim compensation for any alleged infringements on their property rights before an international investment tribunal, such as, e.g. International Centre for the Settlement of Investment Disputes (ICSID) tribunals[22]. ISDS has become particularly controversial in the recent trade policy debate due to concerns that it may impinge on countries' ability to regulate in the public interest, e.g. for social or environmental reasons.

The EU has responded to this debate by proposing to establish an Investment Court System (ICS). A bilateral ICS mechanism was included in the agreements between the EU and Canada (CETA) and between the EU and Vietnam, which are so far however neither provisionally applied nor in force. With the EU as a driving force, negotiations for the establishment of a Multilateral Investment Court (MIC) started in late 2017 under the auspices of the Working Group III of the United Nations Commission on International Trade Law (UNCITRAL), but are still pending. The focus of ICS is on improved procedural rules, the introduction of an effective appeal function and of binding rules for the interpretation of treaty provisions. The latter refers to the controversial discussion on the challenges posed by investment treaties to countries' right to regulate. Under ICS, parties to an agreement may in the future issue interpretations on specific treaty provisions, such as with respect to the right to regulate, which are binding for any tribunal established under the agreement. Investment chapters have thus become important elements in the EU FTAs because they both affirm the rights of investors and are potentially relevant for regulating investor obligations with respect to their business conduct in partner countries. This latter function is particularly relevant to the recent discussion on deforestation-free value chains and investor obligations for due diligence with respect to sustainable production[23].

[21] It should be noted that portfolio investments as well as investor protection and ISDS frameworks are excluded from the exclusive competence of the Union and thus remain in the shared competence between EU and its member states according to a recent decision of the CJEU (Opinion 2/15 of 16 May 2017).

[22] For more information see https://icsid.worldbank.org/

[23] For more information on ICS see e.g. https://trade.ec.europa.eu/doclib/press/index.cfm?id=2070

6 Identifying further possible trade-related EU measures for achieving sustainable forestry and deforestation-free value chains

6.1 Unilateral measures

6.1.1 Developing the EUTR into an instrument for forest sustainability

As mentioned in section 4.3., the focus of the EUTR is on the legality of timber and timber products. The sustainability of sources is not a primary concern of the EUTR, although it is addressed indirectly in the combatting of illegal logging and procedures.

With a view of combatting deforestation, a starting point for further development would be **to close loopholes that currently allow for the trade of non-sustainable timber products**. As highlighted in a recent public consultation on the fitness check of the EUTR, products such as charcoal are not yet subject to EUTR, despite more than 750 000 tons (UN Comtrade data) being imported into the EU in 2019.

Secondly, for a clearer assessment of the sustainability of timber and timber products, we can look to existing C&Is for SFM. Such tools have an established track record, both on the political and operational level, and are applied at global, regional, national/subnational and local levels to address the various dimensions of sustainability[24]. C&Is are used within both the FOREST EUROPE Process and the Montreal Process, they are applied by the ITTO and the FAO in their reporting procedures and they are used by certification instruments as a means of verifying SFM practices. All of these instruments share a common understanding of the principles of SFM including the importance of contributing to the maintenance of forest resources and carbon cycles, forest health and vitality, the economic functions of forests, forest biodiversity, forest soil and water, socio-economic and cultural benefits and an appreciation of aspects of governance (Linser et al., 2018). The variety of indicators is broad and reflect the very specific regional needs and socio-ecological circumstances. Such **sustainability indicators could serve as a complementary tool in** an **EU trade system** that aims at a higher level of compliance with internationally accepted sustainability criteria. In this regard, better documentation of measures that contribute towards achieving the UN SDGs may be helpful.

Such an approach clearly goes above and beyond the pursuit of legality of timber. C&I would enable regulatory authorities to look more carefully at sustainability, addressing more specifically those aspects of forest protection and deforestation as set out in the EU Green Deal. These benefits notwithstanding, the incorporation of C&I in the EUTR demands careful consideration. The regulatory burdens in the current EUTR implementation framework are already high, both for administrations and operators, and it is unclear whether the EU, with a stagnant timber market, can require global wood traders to comply with yet more demanding regulatory obligations. On the other hand, there may be strong potential synergies with certification activities already applied to the bulk of globally traded timber. Although different in nature (political vs market-based instruments), carefully crafted and implemented changes to the EUTR that allow for the incorporation of sustainability reporting may be worthwhile.

[24] http://www.fao.org/forestry/ci/88506/en/

6.1.2 Measures to support a deforestation-free EU import regime

Various measures can be designed to encourage or require that imports of timber and other FRCs be produced legally, sustainably and responsibly, in their countries of origin. Such measures can be voluntary, adopted by companies seeking to exclude undesirable products from their operations and supply chains. In 2010, the Consumer Goods Forum, a global industry network of retailers, manufacturers and service providers, adopted a target of achieving zero net deforestation throughout its membership's supply chains by 2020 and many individual companies have adopted purchasing policies aiming at sourcing legally — and, often, sustainably or responsibly — produced timber and timber products (see Brack, 2019). Demand-side measures can also be adopted by governments aiming to condition access to all or part of their country's markets on the imported products meeting specified standards.

The **EUTR** provides the legal basis for a customs procedure that makes the import of a particular commodity conditional on evidence of its legal origin through a due diligence procedure required from primary importers. As outlined in section 4 above, such a legality approach, as it is termed in the literature, is not equivalent to a comprehensive system promoting SFM in third countries but its principal objective is to assure that timber imported into the EU is harvested legally as defined under the legal prerogatives of third countries or international agreements. As argued above, this framework arguably contributes to the sustainable management of forest resources. Under the FLEGT initiative, the EUTR import regime is complemented by VPAs between the EU and timber-producing countries, which provide assistance to countries in improving their land-use governance and forest regulation, which as a consequence facilitates greater access to EU markets.

Similar approaches can be found in two other specific EU regulations. In 2008, the EU, as the world's largest importer of fishery products, adopted the **EU Regulation to end illegal, unreported and unregulated (IUU) fishing** to prevent illegal catch from entering the EU market[25]. In contrast to the EUTR, the IUU Regulation requires flag states of fishing vessels to certify the origin and legality of the fish by means of a catch certificate. Where a country's governance capacities and performance are deemed insufficient, the EU will engage with the country to help foster improvements, including through the provision of capacity-building resources. Where the country is found to be non-cooperative or otherwise fails to make sufficient improvements, the EU will first issue a warning (yellow card) formally setting out the improvements needed in order to maintain access to the EU market. In the most severe cases of non-performance, the EU will issue a red card, banning the import of fishery products from any of the flag state's vessels. The issuance of red cards consists of two steps. Firstly, the Commission proposes the red card, setting out the evidence on which its recommendation is based. Secondly, the Council of the EU adopts the decision to issue a red card and apply sanctions to the third country. On making required improvements, a country can be delisted through (re)issuance of a green card (Pritchard, 2016). Finally, EU importers found to be engaged in IUU fishing practices face financial penalties. To summarise, the three essential elements of the IUU Regulation are (i) a catch certification scheme operated by the competent flag state, (ii) a third country carding process combining political cooperation with sanctions and (iii) penalties for EU nationals.

The second regulation concerns the import of certain minerals and ores from third countries, where their extraction is related to the financing of armed conflicts or otherwise contributes towards serious human rights violations. Increasing evidence of illegal resource exploitation in financing armed groups involved in the conflict in the Democratic Republic of Congo in the early 2000s led to the emergence of various initiatives aimed at curbing the trade in 'conflict minerals'. At the core of these initiatives lies the establishment of due diligence requirements that companies must follow in order to prevent causing or

[25] Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing (IUU Regulation); and Commission Regulation (EC) No 1010/2009 of 22 October 2009 laying down detailed rules for the implementation of Council Regulation (EC) No 1005/2008.

promoting armed conflicts or human rights violations through their procurement of raw materials. Discussions in this area resulted in certain important outcomes including the **OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas**, adopted in 2016 at the multilateral level and **section 1502 of the Dodd-Frank Act**, which came into force in 2012 in the US. Both regulations oblige companies to perform due diligence with respect to certain conflict minerals in their supply chains, although both the coverage and the degree of legal obligation between the two regulations vary (Küblböck and Grohs, 2017).

The EU imports a significant quantity of mineral resources from regions affected by conflict, whether in raw or processed form or already incorporated into consumer products prior to import. Against this double background of international regulatory initiatives and respective EU imports, the **EU Regulation on Conflict Minerals** was adopted in July 2017[26]. The regulation introduces due diligence requirements for the upstream industry, i.e. importers of raw materials and smelter products but not for importers of semi-processed and finished products containing the respective minerals. Only importers of raw materials whose imports exceed a certain — still yet to be determined — annual threshold value will be bound by the regulation. For non-European smelters and refiners, the EU regulation will provide for a white list of global responsible smelters and refiners covered by supply chain due diligence schemes recognised by the Commission. European companies importing raw materials from listed smelters do not have to carry out further due diligence measures. However, it has not yet been specified which schemes will be classified as appropriate.

In accordance with US legislation, the EU regulation applies to the minerals tantalum, tungsten, tin and gold (3TGs). However, it applies not only to the Democratic Republic of Congo but to all 'conflict-affected and high-risk areas' to be specified by an indicative, non-exhaustive list. Implementation of the due diligence requirements will be legally binding and companies will have to carry out supply chain due diligence as of 1 January 2021.

Though the principal motivations of the three import regimes described above are different — combatting illegal logging in the case of the EUTR, prevention of illegal fishing in the case of IUU Regulation and preventing armed conflicts and related human rights violations in the case of the Conflict Minerals Regulation — the **underlying model** is quite similar in that it makes **market access to the EU conditional upon due diligence obligations for importers** and, in the case of the EUTR and IUU, combines this **with political dialogue and EU technical cooperation to enhance local governance** in producer countries so as to facilitate legal market access to the EU. Differences and variations exist in particular with respect to (i) product scope, with coverage focused on raw materials and to a lesser extent on intermediate goods and finished products, thus limiting the efficacy of the regulation in terms of imports covered, e.g. in the case of the Conflict Minerals Directive; (ii) certification and due diligence obligations, where coverage can be confined to legal origin, where requirements can include additional sustainability and human rights criteria and where the roles of public and private sector certification and due diligence schemes can be dealt with respectively; (iii) the specific mix of 'carrots' and 'sticks' extended under the political cooperation and sanctions mechanism vis-à-vis producing/exporting countries, which may range from sanctions administered through carding systems and financial penalties through to political dialogue and technical capacity-building support via VPAs.

[26] Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.

An import regime based on due diligence obligations for importers alongside technical cooperation and capacity-building for exporters could provide a model to build upon in the EU's efforts to promote sustainable management not only of forests but of FRCs in general. Following commitments under various international and national level initiatives such as the New York Declaration on Forests, the Amsterdam Declaration, or the French *Stratégie Nationale de Lutte contre la Déforestation importée* [27], and supported by recent research, e.g. the 2018 *Feasibility Study on options to step up EU action against deforestation* commissioned by the EC (COWI A/S, 2018), there are strong arguments for going beyond deforestation as enshrined in the EUTR so as to include a broader range of sustainability or deforestation-free criteria in any such new regulation. An EU import regime should thus not only include verification of legal production (both in relation to national laws and international agreements) but also criteria relating to direct and indirect impacts on forests and other ecosystems, the treatment of workers and the rights of forest communities and indigenous peoples, particularly in regard to land tenure and access. This would also fit with a comprehensive approach to meeting other EU commitments under the SDGs and the Paris climate agreement (Global Canopy and SEI, 2019).

The attractiveness of such a system for exporting countries does, of course, depend on the relative importance of the EU market in terms of global import share. Thus, it should be relatively attractive for commodities where the EU is a large global importer, such as palm oil, cocoa or soya and less attractive for commodities such as beef, where EU market share is comparatively small. In the latter case, exporters could prefer to redirect exports away from the EU in favour of importers with less stringent requirements, thus undermining the effectiveness of the EU regime. As a consequence, the scope of an import regime for FRCs in terms of commodities and products covered should be carefully assessed. The same applies to the mix of obligations and incentives. If comprehensive coverage is the preferred option, it will be particularly important to step up international dialogue and cooperation with other large importing countries such as China and India to harmonise import regulations for FRCs and thus impede trade diversion and regulatory arbitrage (Haupt et al., 2017).

6.1.3 Using the EU GSP system to promote sustainable forestry

As already indicated in section 5.1., the EU GSP system extends tariff preferences to low-income countries. With countries such as India, Indonesia, Republic of the Congo, Ghana, Côte d'Ivoire in the Standard GSP, Bolivia, Philippines and Sri Lanka in GSP+, as well as Democratic Republic of Congo, Cambodia and Myanmar in the EBA arrangement, most of the countries with tropical forest cover in Africa and South-East Asia are participants to the GSP arrangement.

Benefits under the GSP arrangement depend on the following parameters:

i. The magnitude of tariff preferences granted: under the Standard GSP (Regulation (EU) No 978/20212), tariff rates for eligible products designated as 'non-sensitive' are eliminated, with the exception of those for agricultural components. Tariffs for eligible products listed as 'sensitive' are reduced by 3.5 % points in the case of ad valorem duties and by 30 % for specific duties (Article 7). In the GSP+ arrangement, both ad valorem and specific tariffs for all eligible products are reduced to zero (Article 12). In the EBA arrangement, duties are suspended on all imported products with the exception of arms and ammunition (Article 18).

[27] See *Stratégie Nationale de Lutte contre la Déforestation importée 2018-2030,* https://www.ecologique-solidaire.gouv.fr/sites/default/files/2018.11.14_SNDI_0.pdf; '"Amsterdam Declaration" Towards Eliminating Deforestation from Agricultural Commodity Chains with European Countries', https://ad-partnership.org/about/; The New York Declaration on Forests, https://www.nydfglobalplatform.org/wp-content/uploads/2017/10/NYDF_Declaration.pdf;

ii. The scope of the list of eligible products: Currently, approximately 66 % of tariff lines for the Standard GSP and GSP+ are covered by the list of eligible products pursuant to Annex V and Annex IX of Regulation (EU) No 978/2012[28]. For EBA countries, almost 100 % of their exports to the EU are covered, with the exception of arms and ammunitions (section 93 of the Combined Nomenclature).

iii. The rules of origin: all imports under the GSP arrangement have to comply with the EU regulations on rules of origin. However, providing the documentation required under EU customs regulations can be onerous, which explains to a large extent why utilisation rates under the three GSP arrangements stand at less than 100 % of eligible products, e.g. 73.7 % for Standard GSP, 83.1 % for GSP+ and 93.4 % for EBA beneficiary countries in 2018.

Thus, in principle, the **GSP arrangement could be used to promote sustainable forestry**. As utilisation rates, as well as tariff preferences, are already high for GSP+ and EBA countries, the incentivisation potential is **the greatest** for countries in the Standard GSP, where eligible products still face preferential tariffs larger than zero and both utilisation rates and total import coverage are still comparatively low.

To this end, a possible option would be to introduce **a third special arrangement under GSP focused on promoting sustainable forestry and deforestation-free value chains.** Countries qualifying for the Standard GSP arrangement could thus become eligible for (i) additional tariff preferences, (ii) an expanded list of eligible products and (iii) less restrictive rules of origin, or a combination thereof, if they agree to comply with defined standards on sustainable forestry and deforestation-free value chains under a VPA with the EU. These VPAs should create a legally binding obligation for the partner country to implement a licensing scheme for defined FRCs and to regulate trade in these products in accordance with the national law of the producing country and the environmental and human rights criteria laid out in the VPA. The latter should be based on the respective provisions in the EUTR and other due diligence-based legislation for deforestation-free products on the EU market, as described in section 3 and as currently being discussed by European policymakers[29]. FRCs originating in partner countries with VPAs should be considered of negligible risk under EU due diligence requirements. Trade preferences under the special arrangement could be phased-in over several steps. For instance, 50 % of the full trade preferences under the special arrangement could be granted upon ratification of the VPA by the partner country, with a further 50 % granted upon the start of operation of the licencing scheme operated by the partner country, or something similar.

Linking an import regime for FRCs based on the principles of the EUTR and similar legislation to the GSP arrangement along the lines proposed above would provide an **incentive mechanism for FRC producer countries to comply with the standards required by the EU**. It would thus offer some compensation for the administrative burden demanded from economic operators and public administrations in partner countries in complying with EU standards. Arguably, the economic benefits from enhanced trade preferences under such a special arrangement are limited, as EU tariffs are, on average, already at low levels and typical imports from low and lower-middle-income countries already profit from low and zero tariffs. The exception to this is agricultural products, where EU simple MFN tariffs averaging 14.2 % in 2019 are three times higher than tariffs on industrial goods (WTO, 2019), resulting in a reduction of agricultural imports to the EU by an estimated EUR 19 billion (Matthews, 2020; Cipollina and Salvatici, 2020). EU agricultural tariffs are also extremely variable, ranging from zero tariffs to tariff peaks of up to 171.6 %. Almost all tariffs above 20 % relate to agricultural products. Approximately 19 % of agricultural tariff lines

[28] See European Commission: The EU's Generalised Scheme of Preferences (GSP), August 2015, https://trade.ec.europa.eu/doclib/docs/2015/august/tradoc_153732.pdf

[29] See e.g. the Draft Report with recommendations to the Commission on an EU legal framework to halt and reverse EU-driven global deforestation, (2020/2006(INL)), Rapporteur: Delara Burkhardt. https://www.delara-burkhardt.eu/wp-content/uploads/sites/872/2020/06/Burkhardt_Draft_Report_Deforestation._15_June_2020_.pdf

were duty-free in 2016, of which the sectors with the highest percentages of duty-free lines were cotton, wood and paper, minerals and metals and other agricultural products (WTO, 2017).

Extending the list of eligible products to product groups in agriculture such as fruits, vegetable and plants, coffee, tea and cocoa or sugar, which are still subject to higher tariff protection, would thus confer the highest benefits for countries under the new special GSP arrangement (see Table 1).

Table 1: Applied MFN Tariffs for EU agricultural trade, 2019

	Number of lines	Simple average (%)	Tariff range (%)	Standard deviation	Share of duty-free lines (%)	Share of non-*ad valorem* tariffs (%)
Total	**9,533**	**6.3**	**0-171.6**	**10.0**	**27.0**	**10.7**
HS 01-24	**2,505**	**14.1**	**0-171.6**	**16.7**	**14.9**	**38.4**
HS 25-97	**7,028**	**3.7**	**0-70**	**3.8**	**31.3**	**0.8**
By WTO category						
WTO agricultural products	**2,099**	**14.2**	**0-171.6**	**18.3**	**18.9**	**47.0**
Animals and products thereof	351	19.0	0-116.6	21.0	15.1	68.7
Dairy products	151	32.3	0.9-160.3	25.9	0.0	100.0
Fruits, vegetables, and plants	509	13.0	0-162.9	13.5	11.8	17.1
Coffee, tea, and cocoa and cocoa preparations	47	11.5	0-18.7	6.7	14.9	51.1
Cereals and preparations	226	17.2	0-99.6	14.8	8.8	79.6
Oil Seed, fats, oils and their products	175	6.3	0-94.3	10.6	35.4	7.4
Sugar and confectionary	44	27.0	0-148.2	33.4	4.5	88.6
Beverages, spirits and tobacco	331	12.9	0-118.5	18.3	16.6	58.6
Cotton	6	0.0	0	0.0	100.0	0.0
Other agricultural products, n.e.s.	259	5.9	0-171.6	14.7	51.0	22.0

Source: WTO, 2019, p. 63

While across the board reduction of agricultural tariffs will certainly be difficult to achieve in political terms, upholding existing tariff escalation in particular for tropical commodities such as coffee, tea, cocoa and other similar products, which the EU does not produce itself, is arguably difficult to justify, especially if produced sustainably. Here current protection is designed to shield processing activities in the EU, operated typically by large and competitive multinational companies (MNCs). Offering tariff preferences for these products for producers in a special GSP arrangement would thus make a difference. Besides this, it would provide **an incentive for these countries to upgrade into higher-value production processes**, all the more so if upgrading is supported by EU development cooperation programmes.

6.2 Bilateral measures

6.2.1 Tariff preferences for sustainable products in a trade in goods chapter

While the majority of global production of timber products as well as other FRCs is based on conventional production techniques, a growing fraction of production is based on sustainable development standards as evidenced by the multitude of private certification schemes that have emerged in recent decades. Thus, in the context of bilateral FTAs, the EU could **create incentives for the import of sustainable products by offering preferential tariff treatment** such as a zero tariff for sustainable products while maintaining the MFN tariff for non-sustainable products. In practice, the preferential tariff could be linked to those imported products that do have a sustainability certification.

Linking tariff preferences such as a zero tariff to certified sustainable products while maintaining the MFN tariff for conventional products would raise a number of technical and legal questions. First, the actual application of the tariff would require recognised and recognisable certification schemes, which would allow the customs administrations to identify clearly the different products. As the difference between the two types of products cannot be seen or otherwise determined physically, the application of the tariff preference would necessarily rely on the certificate. This could create incentives for fraudulent declarations or false certifications. Secondly, sustainable and non-sustainable products could not be mixed in one batch because this would make the application of the tariff preference impossible unless an appropriate accounting mechanism is in place that would ensure preferential duties are only applied to the 'sustainable' part of a shipment. Thirdly, the application of the tariff would depend on an agreed system of certification of sustainable production. The conditions of such a system and the recognition of certification schemes for selected products could be determined by a special treaty body set up by the EU and partner country.

While these technical difficulties could be addressed in the trade agreement itself, it should be noted that providing tariff preferences based on sustainability criteria would constitute a deviation from existing practices. So far, neither the EU nor other states have widely adopted any process and production methods (PPMs) as criteria for distinguishing imports with regard to tariff classifications. In principle, PPMs are not allowed under WTO rules (Article I GATT)[30]. In this context, the opinions in the legal literature on the determination of the 'likeness' of a product based on PPMs remain controversial (Howse and Regan, 2000; Charnovitz, 2002; Potts, 2008). Recent attempts to question this doctrine in the context of the WTO negotiations on an Environmental Goods Agreement (EGA) have been rejected. However, this would not prevent the partners of a bilateral trade agreement from deviating from the WTO approach.

With respect to the application in practice of such an arrangement by the partner country and its exporters, a critical factor will be the preference margin between the MFN tariff for the conventional product and the preference rate for the sustainable products. To the extent that existing tariffs applicable to timber and timber products as well as to FRCs are already relatively low, tariff preferences would have to be granted specifically for those products that are still exposed to significant MFN tariffs. Within timber products, this would include particle boards, fibreboard, plywood and furniture articles. With respect to FRCs, meat products, palm oil (not crude) and cocoa preparations would be cases in point.

[30] See e.g. United States – Restrictions on Imports of Tuna, No. DS21/R, 30 ILM 1594 (1991) at 1618; Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WT/DS161/AB/R, WT DS169/AB/R, para 135 et seq.

6.2.2 Import restrictions for non-sustainable products

An alternative to linking tariff preferences to certified sustainable products could be import restrictions, such as an import ban for non-sustainable products. This approach would be similar to the model employed by the EU's FLEGT AP (see section 4.1). According to this model, VPAs are signed with trade partners exporting forest products. Once such an agreement is in place, only licensed timber can be exported to the EU. The FLEGT model, therefore, is based on the EUTR, which prohibits placing illegally harvested timber or timber products on the EU market. It is, therefore, not an import ban as such but a measure aimed at prohibition of the sale of illegally harvested timber on the EU market. A prohibition of the importation of non-sustainable FRCs would, however, only be aimed at imports and not at domestic production and distribution.

Import restrictions for non-sustainable products would also rely on certification schemes, which would need to be established by a competent treaty body. More importantly, such import bans would constitute a deviation from the WTO principle of the elimination of quantitative restrictions as enshrined in Article XI GATT. This principle is usually repeated and incorporated in bilateral trade agreements of the EU. Consequently, import bans for non-sustainable products would require a specific derogation from this principle in the bilateral trade agreement.

While the parties to the FTA can exempt import restrictions for non-sustainable products from the principle of the elimination of quantitative restrictions as established in the FTA, such exemptions would also be a deviation from Art. XI GATT[31]. It is questionable how this could be justified. The general exemption clause for customs unions or FTAs enshrined in Article XXIV:4-8 GATT may not be sufficient because deviation from Article XI GATT would not be necessary to establish a customs union or FTA[32]. However, it could be possible to justify this deviation on the basis of Article XX (b) or Article XX (g) GATT. This would require that the deviation is necessary to protect human, animal or plant health or that it relates to the conservation of exhaustible natural resources taking the relevant jurisprudence on Article XX GATT into account[33].

If the EU and a partner country agree on an import ban, it is unlikely that the latter would challenge this import ban based on Art. XI GATT through WTO dispute settlement. To avoid ambiguity, the parties could also agree to refrain from taking recourse to WTO dispute settlement with regards to such a measure. While other WTO Members could raise such a claim, since WTO Members do not need to demonstrate a substantial trade interest if they challenge measures of other WTO Members as violations of WTO law[34], it does not seem likely that other Members would actually resort to such a measure if it is clear that the affected party agreed with the policy. To avoid legal ambiguity or to guide a hypothetical WTO panel on the issue, the EU and the partner country could add a footnote to the relevant text of their agreement, indicating that they deem the import ban a justified restriction. This would only be of indicative value for the panel but it would reflect the view of the WTO members most closely connected with the issue.

Finally, the commercial effects of such an import ban need to be carefully assessed. It is possible that sustainable products currently imported into other states would be diverted to the EU, while non-sustainable products currently imported into the EU would be diverted to other markets. Assuming the scale of production of both the sustainable product and the non-sustainable product is sufficiently large, trade diversion would, therefore, not lead to a change in the prevailing production patterns on the ground

[31] Article XI:1 GATT reads: 'No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.'

[32] See Turkey – Textiles, WT/DS34/AB/R, paras. 58–59.

[33] See for a similar analysis Geraets and Natens (2014) who argue that the EUTR can be justified on the basis of Article XX(b) and Article XX(g) GATT.

[34] EC – Bananas, WT/DS27/AB/R, para 132.

in the partner country but only to a shift in export destinations. If on the contrary, production has so far been largely based on non-sustainable production methods, the introduction of the import ban under the agreement would arguably trigger an economic shock both for the consumer market, i.e. the EU and the producer country. The EU might experience a supply shortage, particularly if the producer country has been an important supplier of the product and the producer country itself would be confronted with the loss of an important export market and a commensurate loss of export revenue, at least in the short term, before exports to alternative markets have been established or sustainable production has expanded to meet EU import demand with sustainable products. Cases in point for such a scenario would be palm oil imports from Indonesia, or soy imports from Mercosur countries, both of which are primarily produced with non-sustainable standards and imported to the EU in large quantities. A possible remedy for such a scenario would involve the inclusion of a sufficiently timed transition period during which the import ban would not apply. The partner country would thus have time to convert its production, which could be facilitated by EU capacity-building programmes and financial support.

6.2.3 Tariff incentives conditional upon improvements in sustainable production

A third **model linking tariff incentives to sustainable production** could be based on improvements in sustainable production methods for timber and FRCs. The United States and Vietnam agreement on the improvement of labour rights in Vietnam adopted in the context of the Transpacific Partnership (TPP) applies this approach[35].

The EU and the partner country would need to agree on concrete measures that the partner country should undertake or goals it should achieve within a specified time period, e.g. within five years after a specified date. Should the partner fail to implement these measures or to reach these goals, the EU could withhold tariff concessions foreseen for a later stage of the operation of the agreement or suspend already existing tariff preferences and reapply the MFN tariff. Alternatively, the EU could also make the granting of tariff preferences subject to the condition that the partner country meets the agreed steps in a certain time period. While the former model would operate with the threat of disincentives in the event of non-fulfilment but would make tariff preferences applicable immediately after the entry into force of the agreement, the latter model would operate with incentives at a later stage but would not apply any tariff preferences immediately.

From a trade policy perspective, however, it would seem difficult to withhold all tariff concessions for a number of years after the entry into force of the agreement. As a matter of fact, the partners of a FTA are usually keen on applying the reduced tariffs provisionally even before the entry into force of the agreement. Depending on the scope of the withheld tariff concessions it may even be difficult to qualify such an arrangement as FTA in order to justify it under Article XXIV: 4-8 GATT. It seems more realistic to allow the EU to suspend its tariff preferences if the partner country has not met the agreed standards or has failed to take concrete steps towards sustainable palm oil production within the agreed time period.

A temporary suspension of tariff preferences subject to certain conditions would not be a violation of WTO provisions. It would be a derogation of the tariff reductions agreed in the trade agreement. As this would be part of that agreement, it would not be a problem from a legal perspective. In particular, it avoids the potential technical and legal problems with respect to making a distinction between 'sustainable' and 'non-sustainable' products as discussed above. Rather than making tariff preferences subject to conditions applicable to individual shipments, all shipments from the partner country would be treated equally at any given time.

[35] It should be noted that the agreement is not in force due to the fact that the US withdrew from the TPP negotiations in early 2017. The agreement can be found at: https://ustr.gov/sites/default/files/TPP-Final-Text-Labour-US-VN-Plan-for-Enhancement-of-Trade-and-Labour-Relations.pdf

The key challenge of such a system would be the specification of the concrete measures and steps the partner country needs to undertake to avoid the suspension of the tariff preferences. These steps could either be agreed by the parties already in the agreement or could be adopted by a special treaty body. While the former would allow the scheme to be applicable immediately after the entry into force of the agreement, the latter approach would make the application of the scheme dependent upon a decision of the competent treaty body, thus postponing the application of the scheme until a decision between the parties to the agreement has been reached.

Furthermore, a mechanism would need to be designed that would solve disputes between the parties if they disagree on the question of whether obligations have been met or not.

6.2.4 Provisions related to Investment

If a FTA contains a chapter on the protection and promotion of investments, it would be important to seriously consider the inclusion of provisions that support sustainable development and sustainable production of timber and FRCs.

Specifically, the investment chapter could be complemented by a **clause on investor obligations** and **a denial of benefits clause**. With respect to investor obligations, foreign investors should be obliged to comply with internationally agreed corporate governance standards and practices such as, for instance, the OECD Guidelines for Multinational Enterprises[36]. Alternatively, due diligence requirements as stipulated by EU laws and regulations, e.g. a potential EU legal framework to halt and reverse global deforestation, might be included. In the event of a breach of these standards and due diligence requirements, the denial of benefits clause prohibits the investor from making use of any of the rights conferred to the investor through the investment chapter in investor-state dispute settlement.

It should be noted that such provisions would not only apply to European foreign direct investors with stakes in the respective FRCs sectors in the partner country but also to portfolio investors and EU financial institutions providing finance to foreign investors with interests in the respective FRC sectors in the partner country.

The agreement could include the requirement to extend the obligations imposed on investors to other business entities in an article in the sustainable development chapter in order **to include domestic investors or investors from any third country**. Such a provision should aim at creating equal obligations for all business entities based on the above-mentioned investor obligations.

In addition to investor obligations and a so-called denial of benefits clause, the investment chapter should also contain **substantive protection standards,** which do not negatively affect the ability of governments to regulate economic activities in a sustainable manner. Furthermore, the agreement's dispute settlement system should not rely on traditional investment arbitration but establish a system based on principles of judicial independence, transparency and the rule of law[37].

6.2.5 Provisions in the chapter on trade and sustainable development

The chapter on trade and sustainable development (sustainable development chapter, TSD) should cover sustainable development clauses which are relevant for all chapters of the FTA. The chapter should cover environmental, labour and human rights issues. It should entail the binding obligation to ensure that the

[36] The OECD Guidelines for Multinational Enterprises provide the most comprehensive current guidance for responsible business conduct, including in the areas of labour rights, human rights, environment, information disclosure, combating bribery, consumer interests, competition, taxation, and intellectual property rights. For further information see: https://www.oecd.org/corporate/mne/

[37] Relevant examples can be found in Krajewski and Hoffmann (2016) and Krajewski (2016) or IISD, *Model International Agreement on Investment*, https://www.iisd.org/investment/capacity/model.aspx.

domestic laws and policies are in conformity with fundamental labour, environment and human rights agreements. It is suggested that such a chapter should also include provisions specifically to address sustainable production and management of FRCs, including provisions on investor obligations, both for domestic and third-country investors.

Institutional provisions

The Sustainable Development Chapter should establish the competent treaty body for adopting the standards of sustainable production and management, including international agreements, due diligence standards, EU regulations and private sector certification schemes.

Technical and financial assistance

Going beyond the current provisions on political cooperation included in the EU's FTAs, the sustainable development chapter could contain obligations of the EU to provide the partner country with technical and financial assistance to improve sustainable production and management of FRC. While provisions on technical assistance and capacity-building are usually not part of traditional trade and investment agreements, the inclusion of articles on capacity building and technical assistance into future EU FTAs would contribute to a more balanced agreement by making the obligations on assistance and cooperation binding.

Obligations to regulate other business entities

As mentioned above, EU investors are often not the most important investors in the production of FRC in partner countries. Domestic and third-country investors also play a significant role in the sector. Investor obligations established in an investment protection chapter would, however, only address foreign investors, i.e. investors of the other party. This could lead to an unfair disadvantage for EU investors vis-à-vis domestic and third-country investors. To establish a level playing field between foreign investors covered by the investment chapter, domestic investors and third-country foreign investors, the parties should be obliged to extend the obligations established in the investment chapter of the FTA to all business entities operating on their territories. This could be achieved through an obligation to adopt the relevant regulation and legislation domestically.

Rights of affected local communities and indigenous peoples

As many FRC production projects may have negative effects on local peoples and communities, it is important to strengthen the application of the right to free, prior and informed consent (FPIC). This right was first developed in the context of the rights of indigenous peoples[38] and is increasingly accepted as part of international human rights law[39]. It requires states to consult and cooperate in good faith with the indigenous peoples concerned, engaging with their representative institutions in order to obtain FPIC before adopting and implementing any measures that may affect them. FPIC has been of specific importance in the context of projects involving the use of and access to land. Many commentators agree that FPIC should not be limited to indigenous peoples but should be enjoyed by local communities with special relations to land in general (Manirakiza, 2013; Rösch, 2016). In recent EU FTAs, e.g. with the Mercosur countries, FPIC is referred to in the respective provision on trade and sustainable management of forests

[38] See Art. 10, 11(2), 19, 28(1), 29(2) and 32(2) United Nations Declaration on the. Rights of Indigenous Peoples; Art. 16(2) Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169) and Art. 12 Indigenous and Tribal Populations Convention (ILO Convention 107).

[39] Mary and Carrie Dann v. United States, IACHR, Report Nº 75/02, Case 11.141; Maya Communities of the Toledo District v. Belize, IACHR Report Nº 40/04, Case 12.053; Saramaka People v. Suriname, IACtHR Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007 Series C No. 172. See also Human Rights Committee, General Comment 23, Article 27 (Fiftieth session, 1994), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 38 (1994).

(Article 8), although the wording of the provisions remains hortatory ('shall promote') and does not oblige the parties to adopt, strictly implement nor enforce respective international agreements on the rights of indigenous peoples. A reaffirmation of FPIC as enshrined in international agreements combined with an obligation for effective implementation could be a beneficial addition to the sustainable development chapter.

6.2.6 Enforcement and dispute settlement

The standard practice under EU FTAs so far has been to exempt the obligations laid down in the sustainable development chapter from binding dispute settlement. Instead, dispute settlement has been relegated to consultations in bodies established by the treaty, or more recently, by including the option of setting up a panel of experts tasked with issuing a report and making recommendations for the solution of the matter, for instance in the EU-Mercosur agreement and the FTA with Vietnam.

Thus, the EU has continued with its 'promotional' strategy with respect to sustainable development by strengthening frameworks for dialogue, cooperation and monitoring of implementation. Ideally, this leads to self-regulatory measures adopted by private actors and requires a high level of civil society engagement to ensure implementation of the labour and environmental clauses and remedies for violations (Posthuma and Ebert, 2010; Campling et al. 2015). This approach can be contrasted to a 'conditional' strategy, as for instance pursued by the US in the TPP negotiations with Vietnam. Within TPP, the bilateral labour chapter negotiated with Vietnam obliged the parties to meet certain labour standards before the agreement could come into effect. Vogt (2015) argues that the conditional approach of the US has been more effective in driving regulatory change on labour standards in Vietnam. While the 'conditional' approach potentially strengthens domestic regulations in developing countries, implementation and enforcement of those laws may remain weak in practice. Thus, trade unions and civil society actors become significant players in putting pressure on governments to uphold the enforcement of reforms.

Other recent research has also concluded that implementation of the EU's sustainable development chapters suffers from shortcomings, particularly from a lack of political commitment and financial resources, especially with respect to more comprehensive public and civil society consultations (see Harrison et al., 2016(a), 2016(b); Barbu et al., 2017). Partially in response to these criticisms, which were largely shared by civil society and the NGO community, the Commission published a non-paper in July 2017 on how to improve implementation of trade and sustainable development chapters and initiated a stakeholder consultation process. In a second non-paper of 26 February 2018[40], the Commission sums up the results of the stakeholder consultation and outlines '15 concrete and practicable actions' for improving the implementation and enforcement of TSD chapters. Measures proposed refer to four areas: (i) working together, i.e. closer cooperation with member states, the European Parliament and international organisations; (ii) enabling civil society, including social partners, to play a greater role in implementation, in particular by extending the substantive scope of competence of the respective TSD committee's advice to cover the implementation of the whole agreement in future FTAs; (iii) delivering, e.g. by developing country priorities for implementation and ensuring more assertive monitoring and enforcement and the provision of more financial resources to this end; and (iv) transparency and communication. With respect to the issue of trade sanctions, i.e. the inclusion of the TSD chapter in the state-to-state dispute settlement mechanism, given the lack of political consensus, the Commission considered it impossible to include it on the agenda. On a technical level, the Commission argued that besides quantification issues related to establishing the economic damage of a breach of TSD commitments, sanctions would not guarantee sustainable and lasting improvements of social and environmental standards on the ground. While this is,

[40] Non paper of the Commission services 'Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements', https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf

of course, true, it is in the very nature of every model based on monetary sanctions (including conventional trade sanctions) or incentives that while changes in behaviour can be encouraged, they cannot be guaranteed.

From a legal perspective, the **application of the state-to-state dispute settlement to the TSD chapter would establish a level playing** field between all obligations of the parties in the FTA — whether they relate to trade, investment or sustainable development. The state-to-state dispute settlement mechanism ensures that either party can suspend concessions or obligations in the event of non-compliance with a ruling of the dispute settlement panel.

In the event that the inclusion of all provisions seems infeasible, the core provisions to be covered could be referred to within an **essential elements clause** in the sustainable development chapter. If a treaty party breaches one of the articles mentioned in the essential elements clause, the other treaty party may undertake appropriate extraordinary, unilateral measures. Typically, this would allow a temporary partial or full suspension of the trade agreement. Such clauses have been proposed in the context of human rights clauses in trade agreements (Bartels, 2014). It should be noted, however, that such extraordinary measures may constitute a heavy burden on the other trading partner.

6.2.7 Protocols on specific forest-risk commodities

In light of the special relevance that the EU attaches to promoting deforestation-free value chains and sustainable management of FRCs, it might be worth highlighting the importance of sustainable production and management of one or more FRCs, as is the case, in a special protocol. The EU and its trading partners have sometimes adopted such protocols to FTAs if they wanted to address specifically issues relating to an important sector or topic and to include provisions that would not normally be part of the chapters of a regular trade and investment agreement. Examples include the Protocols on Cultural Cooperation with South Korea and the EU-CARIFORUM-States.

Such **a protocol could refer to the importance of sustainable production**, management and governance, relevant international documents and existing inter-governmental and multi-stakeholder initiatives, which are specific to respective FRCs. Furthermore, it could include provisions guiding the work of the competent treaty bodies and on the standards of defining and certifying sustainable products. In addition, it could also include the mechanism set up for the withdrawal or suspension of tariff concessions should such measures be included in the agreement. Furthermore, the Protocol could include provisions on regulating other business entities and on FPIC as mentioned above.

The legal nature of the Protocol would be equivalent to clauses within the chapters of the FTA. Therefore, the provisions within the Protocol are legally binding. The preamble of the Protocol with references to UN and other global strategies on sustainable forestry, however, would provide interpretive guidance, as does a preamble of a FTA. The advantage of a Protocol on a particular FRC would be to gather all relevant provisions in one section of the FTA instead of separating the provisions according to different chapter topics. Moreover, the Protocol would deal with very specific sustainable development problems in the respective sector, highlighting specific developmental needs. The Protocol would therefore highlight the importance the two parties attach to the deforestation and the sustainable management of FRCs.

6.3 Multilateral measures

Although the discussion on the current state of affairs with respect to multilateral initiatives for SFM and deforestation-free value chains for FRCs in section 3 has highlighted limited achievements, a broad consensus exists in the economics and political science literature on the superior merits of multilateral solutions to collective action problems (see, e.g. Ruggie, 1992; Keohane, 1990), although it is also recognised that they are difficult to achieve and to maintain (see, e.g. Olson, 1965). This holds true for global environmental problems as well. Comprehensive and effective international arrangements hold the

highest prospects of promoting sustainable solutions and avoid the typical drawbacks of bilateral arrangements.

Against the background of the recent crisis of the WTO in general, and the deadlock of the negotiations for an EGA in particular, the search for identifying more promising multilateral avenues towards the promotion of trade in sustainable products has assumed particular importance. In our view, **two approaches** merit closer attention: (i) a **detailed assessment of the reasons for the deadlock of the EGA negotiations with the aim of identifying critical factors** that might facilitate more successful negotiations; (ii) **identifying alternative approaches to multilateral negotiations** in the light of strong conflicts of interests and high uncertainty with respect to outcomes.

Ad (i): amongst other issues, for instance, definitional problems of what constitutes an environmental good, in their analysis of the reasons for the stalemate of the EGA negotiations since 2017, De Melo and Solleder (2018) highlight (i) the asymmetry in the comparative advantage between developed and developing countries in the production of environmental goods and (ii) the respective tariff protection levels — low in the case of developed countries and high in the case of developing countries — as the major explanatory factors. The higher comparative advantage for developed countries is also due to the existence of environmental regulations, the latter being a typical precondition for developing technological capabilities in the environmental industries in the first place. Trade in environmental goods thus increases with regulatory overlap, i.e. to the extent that countries have similar levels of environmental regulations. The authors conclude that trade in environmental goods will benefit from an increase in regulatory convergence and call for a 'greening of the GATT', whereby countries take measures that protect the environment to entice developing-country participation (see also Mavroidis and de Melo, 2015).

The prevalence of a mercantilist mind-set favouring export gains over environmental benefits, applying both to developed as well as developing countries, and the lack of environmental regulations in developing countries are thus two key factors to bear in mind when discussing options for multilateral approaches to sustainable forest governance and the promotion of deforestation-free value chains. Multilateral initiatives with the objective of facilitating trade in sustainably produced timber & timber products as well as FRCs should thus pay particular attention to three issues: (i) designing the list of products covered by the agreement by taking into account the comparative advantages of all partners, but particularly of developing countries, (ii) providing for an asymmetric approach with respect to tariff reductions with rather generous exemptions for sensitive products from developing countries and (iii) committing to comprehensive technical and financial support for regulatory alignment between partners.

With respect to the product coverage, we would argue that in contrast to the EGA negotiations, where the list of eligible products was essentially constrained to industrial goods with comparative advantages on the side of developed countries, the reverse would be true with respect to timber & timber products and FRCs, where comparative advantage would rest with developing countries. Thus, an **extended EPA negotiation approach** including as an additional category a list of sustainably produced timber & timber products and FRCs or, alternatively, new multilateral negotiations on an agreement for sustainable products, would potentially benefit from a more balanced distribution of comparative advantages between developed and developing countries. As indicated already in section 6.2.1., a challenge for such an extended approach consists in securing compatibility with WTO law, as PPMs are in principle not allowed under WTO rules (Article I GATT) and the opinions in the legal literature on the determination of the 'likeness' of a product based on PPMs remain controversial. Crucially, determination of sustainability would have to operationalised in the agreement and appropriate monitoring mechanisms established. To this end, cooperation with multilateral processes on SFM and sustainable production of FRC, as described in section 5, could be useful.

Ad (ii): given the current crisis of multilateralism, which spans many international policy fields including trade policy, it is important to think about how more experimentalist, 'bottom-up' arrangements might work. The literature on experimental governance provides some suggestions to this end (see, e.g. De Burca, Keohane and Sabel, 2014). Global environmental problems such as climate change are marked by two intertwined sets of characteristics that make integrated, top-down bargaining extremely challenging. The first set is political and relates to the fragmentation of power and authority in the international system, in particular the absence — or better, unwillingness — of the hegemonic power to impose order on actors with sharply divergent interests. The second is cognitive and relates to the uncertainty about the feasibility of achieving policy outcomes, such as lower emissions, reductions in deforestation or more sustainable production methods at acceptable costs. Under such circumstances, for countries or companies assuming strong commitments, it will be extremely difficult to determine *ex ante* those technological and regulatory measures that will actually prove most effective. The uncertainty about the actual burdens of various commitments exacerbates the bargaining problems. If it is unknown at the time of bargaining which commitments really can be fulfilled and how others will respond if some are not, bargaining among parties with sharply divergent interests will be highly complex and cautious to the point of paralysis. Risk-averse players will prefer deadlock to codifying ambitions that may prove too costly or simply unattainable (Keohane and Victor, 2015; Young 1989(a), 1989(b)). Against such a background, more 'bottom-up' negotiating approaches might be more promising, particularly if they accomplish three critical tasks: (1) participants need to articulate their shared goals; (2) there must be significant costs to participants of inaction — a 'penalty default' that can induce cooperation where it is not spontaneously forthcoming; and (3) institutions to assess national pledges and help stitch them together must be developed. Besides, the recently concluded multi-party interim appeal arrangement (MPIA) overcoming partly the WTO Appellate Body crisis, which includes the EU and 22 WTO Members, suggests that plurilateral approaches remain possible even within the wider WTO framework.

Applying this to the case of a **plurilateral** or ideally **multilateral framework for the promotion of trade in sustainable timber & timber products and FRCs**, a mechanism could be envisaged that combines tariff reduction commitments by consumer countries in exchange for pledges by producer countries to introduce sustainable production methods for specific products. The pledges would determine implementation targets and periods and be based on agreed-upon definitions and criteria for sustainable production. Similar to the bilateral mechanism described in section 6.2.3, tariff reductions could be granted upfront with the threat of suspension if pledges are not implemented as stipulated in the agreement. With respect to establishing institutions to assess national pledges and progress towards achieving commitments, co-operations could be set up with the multilateral processes described in section 5, for instance, ITTO, COFO (FAO) and the Montreal process, as well as with international research organisations such as CIFOR and European Forest Institute (EFI). This should be complemented by stakeholder consultation with private certification organisations, NGOs and civil society.

7 Recommendations

7.1 Unilateral measures

R1: Develop the EUTR into an instrument for sustainable forest management

The EUTR already deals implicitly with questions of sustainability as these prominently comprise the legality of timber & timber products. In order to advance SFM and to combat deforestation with respect to EU imports of timber and timber products, the inclusion of sustainability criteria into the EUTR framework should be seriously considered. In this respect, we recommend referring to internationally accepted criteria for SFM, as stipulated by the respective international fora such as FOREST EUROP. Respective indicators can be established to serve specific purposes relating to SFM objectives. This would specifically entail the inclusion of a precise definition of SFM practices together with specific criteria in a revised EUTR legal framework, instead of relying on a plethora of different legal acts from diverse exporting countries. To exploit synergies and reduce the administrative burden on businesses, this should be accompanied by the initiation of a cooperative process between EU regulators and private forest certification schemes with the objective of aligning the sustainability criteria and reporting standards demanded from economic operators.

R2: Combine obligations for EU market access of FRCs with political dialogue and EU technical cooperation to enhance sustainable forest governance in producer countries in an EU FRC import regulation

Though differences for individual products do exist, the EU is, in general, one of the largest importers of FRCs. This market power should be leveraged to promote SFM and prevent illegal deforestation. The model underlying the three special import regimes for timber & timber products (EUTR), for fish (IUU Regulation) and for conflict minerals could be used as the reference for an import regulation for FRCs. The regulation should combine due diligence requirements for importers with respect to the economic, social and ecological sustainability of production of FRCs with political dialogue and technical capacity building in producer countries, if necessary. The 'carrot' of access to the large EU market should be complemented by technical capacity building implemented by specific country programmes under EU international development cooperation, or special cross-country programmes dedicated to specific FRCs. A nuanced system of 'sticks' should also be set up, starting with monitoring instruments and civil society consultations and extending to economic and regulatory sanctions. The latter could be modelled on the carding system applied in the IUU regulation.

R3: Consider introducing a third special arrangement under GSP focused on promoting sustainable forestry and deforestation-free value chains for FRCs

A large number of countries with tropical forest cover are party to the EU's GSP arrangements. With the exception of the GSP+ special arrangement, which requires the effective implementation of 27 international conventions on human rights, labour rights, environmental protection and good governance, including CITES, the system has so far not been used for promoting SFM and deforestation-free value chains.

A possible option, therefore, would be to introduce **a third special arrangement under GSP focused on promoting sustainable forestry and deforestation-free value chains.** Countries qualifying for the Standard GSP arrangement could thus become eligible for (i) additional tariff preferences, (ii) an expanded list of eligible products and (iii) less restrictive rules of origin, or a combination thereof, if they agree to comply with defined standards on sustainable forestry and deforestation-free value chains under a VPA with the EU. These VPAs should create a legally binding obligation for the partner country to implement a licensing scheme for defined FRCs and to regulate trade in these products in accordance with the national law of the producing country and the environmental and human rights criteria laid out in the VPA. Trade

preferences under the special arrangement could be phased in over one or more steps, depending on the degree of implementation of obligations under the VPA.

Linking an import regime for FRCs based on the principles of the EUTR and similar legislation to the GSP arrangement along the lines proposed above would provide an additional **incentive mechanism for FRC producer countries to comply with the standards required by the EU**, at least for those that qualify for the EU's GSP arrangement.

7.2 Bilateral measures

R4: Examine possibilities for granting preferential tariff rates for sustainable timber & timber products and FRCs in bilateral EU FTAs

Increasingly, the production of timber, and timber products and FRCs is based on sustainable development standards as evidenced by the multitude of private certification schemes that have emerged in recent decades. Thus, in the context of bilateral FTAs, the **EU could create incentives for the import of sustainable products by offering preferential tariff treatment** such as a zero tariff for sustainable products while maintaining the MFN tariff for non-sustainable products. In practice, the preferential tariff could be linked to those imported products that do have a sustainability certification.

To the extent that existing tariffs applicable to timber and timber products as well as FRCs are already relatively low, tariff preferences would have to be granted particularly for those products that still are exposed to significant MFN tariffs. With respect to timber products, this would include particle boards, fibreboard, plywood and furniture articles. With respect to FRCs, meat products, palm oil (not crude) and cocoa preparations would be cases in point. It should, however, be noted that a challenge to such tariff preferences before WTO dispute settlement proceedings cannot be completely ruled out, although we think that such new provisions could be justified with reference to Article XX (g) GATT.

R5: Examine the introduction of import restrictions for non-sustainable timber & timber products and FRCs into EU FTAs as an additional safeguarding measure

An alternative to linking tariff preferences to certified sustainable products could be import restrictions, such as an import ban for non-sustainable products. This approach would be similar to the models employed by the EU's FLEGT Action Plan and EUTR. However, the WTO compatibility of such a measure could be challenged and needs careful consideration. Thus, the introduction of import restrictions, such as an import ban, should be explicitly restricted to cases that fall under the scope of Article XX (g) GATT, that is, those necessary to protect human, animal and plant health or that relate to the conservation of exhaustible natural resources.

R6: Examine the inclusion of provisions into EU FTAs that offer tariff incentives conditional upon improvements in sustainable production

A third model linking tariff incentives to sustainable production could be based on improvements in sustainable production methods for timber and FRCs. The EU and the partner country would need to agree on concrete measures that the partner country should undertake or goals it should achieve within a specified time period. Should the partner fail to implement these measures or fail to reach these goals, the EU could withhold tariff concessions foreseen for a later stage of the operation of the agreement or suspend already existing tariff preferences and reapply the MFN tariff. Such a temporary suspension of tariff preferences subject to certain conditions would not be a violation of WTO provisions.

R7: Examine the inclusion of investor obligations in the EU's FTAs with respect to sustainable development and sustainable production of timber & timber products and FRCs

If an EU FTA contains a chapter on the protection and promotion of investments, it would be important to seriously consider the inclusion of specific clauses regarding sustainable development and sustainable production of timber and FRCs. Specifically, the investment chapter could be complemented by a **clause on investor obligations** and **a denial of benefits clause**. With respect to investor obligations, foreign investors should be obliged to comply with internationally agreed corporate governance standards and practices such as, for instance, the OECD Guidelines for Multinational Enterprises. Alternatively, due diligence requirements as stipulated by EU laws and regulations, e.g. a potential EU legal framework to halt and reverse global deforestation, might be included. In the event of a breach of these standards and due diligence requirements, the denial of benefits clause prohibits the investor from making use of any of the rights conferred to the investor through the investment chapter in investor-state dispute settlement. The investment chapter should also contain **substantive protection standards,** which do not negatively affect the ability of governments to regulate economic activities in a sustainable manner.

R8: Use the chapter on trade and sustainable development to promote deforestation-free value chains and sustainable production and management of FRCs

The chapter on trade and sustainable development included in all recent EU FTAs covers sustainable development clauses, which are relevant to all chapters of the FTA. Recent FTAs with Mercosur and Vietnam also contain specific provisions on the promotion of sustainable forestry. The sustainable development chapter could include additional provisions specifically addressing sustainable production and management of FRCs. Such provisions should in particular cover (i) the relevant standards of sustainable production and management of FRCs, including international agreements, due diligence standards, EU regulations and private sector certification schemes; (ii) technical and financial assistance provided by the EU to the partner country to improve sustainable production and management of FRCs; (iii) obligations to regulate third-country business entities operating in FRC sectors extending the investor obligations of the FTA's investment chapter to all business entities operating on the parties' territories so as to establish a level-playing field; and (iv) a specific provision reaffirming the rights of affected local peoples and communities to FPIC with an obligation for effective implementation.

R9: Strengthen enforcement and dispute settlement with respect to sustainable development

The EU has so far applied a 'promotional' strategy with respect to sustainable development by strengthening frameworks for dialogue, cooperation and monitoring of implementation. This does not rectify the basic asymmetry that the TSD chapter remains exempt from binding state-to-state dispute settlement in contrast to all the trade and investment provisions of the FTA. Against the background of the United States shifting to a conditional approach, which makes trade concessions conditional on the parties obligations to meet sustainable development standards, trade partners might interpret the EU's continued attachment to a promotional strategy for sustainable development as an indication of low priority. Subjecting the TSD chapter to binding dispute settlement or at least introducing an essential elements clause in the TSD chapter, which would provide for the possibility of undertaking appropriate measures in the case of a breach of provisions covered the clause, should be seriously contemplated. As a minimum, the essential elements clause should cover provisions on illegal deforestation and the rights of local communities and indigenous peoples.

R10: Include a protocol on timber & timber products as well as on FRCs

In light of the special relevance the EU attaches to promoting deforestation-free value chains and sustainable management of timber and timber products and FRCs, it might be worth highlighting the importance of this in a special protocol. Such a protocol could include provisions on guiding the work of the competent treaty bodies and on the standards of defining and certifying sustainable products. It could also include the mechanism set up for the withdrawal or suspension of tariff concessions should such measures be included in the agreement. Furthermore, the protocol could include the provisions on regulating third country business entities and on FPIC. The protocol could also set up an agenda and the organisational modalities for the technical and financial assistance provided under the agreement.

7.3 Multilateral measures

R11: Examine possibilities to propose a plurilateral or multilateral framework for the promotion of trade in sustainable timber & timber products as well as FRCs

The crisis of multilateral trade policy notwithstanding, the case for international cooperation on sustainable forest governance and deforestation-free value chains of FRCs is straightforward. To this end, a mechanism could be envisaged that combines tariff reduction commitments by consumer countries in exchange for pledges by producer countries to introduce sustainable production methods for specific products. The pledges would determine implementation targets and periods and be based upon agreed-upon definitions and criteria for sustainable production. Tariff reductions could be granted upfront, with the threat of suspension if pledges are not implemented by producer countries as stipulated in the agreement. With respect to establishing institutions to define C&I for sustainability and to assess national pledges and progress towards achieving commitments, co-operations could be set up with existing multilateral processes on SFM and sustainable production of FRCs. This should be complemented by stakeholder consultations with private certification organisations, NGOs and civil society.

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