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RESEARCH DIVISION EU / EUROPE | WP NR. 02, JUNE 2022

Sustainable international value chains: The EU's new due diligence approach as part of a policy mix

Bettina Rudloff

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Introduction

A new family of regulatory approaches affecting international value chains has been initiated recently, mainly by developed countries, the Due Diligence Laws (DDLs). These new approaches are an addition to already existing (and partially) older trade measures that have already been adapted in the past to better incorporate sustainability goals. However, adding the DDLs on top of already existing other measures begs the question how all these measures fit together, how they interact and which areas would benefit from (improved) coordination.

The set of newly emerging DDLs includes for instance the US Dodd-Frank Act, Sec. 1502 for conflict minerals (2013), the French Due Diligence Law (2017), the German DDL followed suit (similar developments are pending in other European countries like Switzerland and the Netherlands). Additionally, some older acts exist for specific sectors like the Timber Regulation (2010) and there are additional acts on reporting like the UK Modern Slavery Act (2015) and certain EU-regulations in the financial sector e.g. on sustainability reporting.

The EU is currently working on additional legal acts, some of which are specifically relevant to agriculture: A first legal proposal for a directive on corporate sustainability due diligence was published in mid-February 2022 after several postponements (EU Commission 2022). Already at the end of 2021, the EU Commission had published another proposal for a regulation that applies to deforestation relevant supply chains – and is thus mainly relevant for agriculture (EU Commission 2021b). It envisages regulating six products on the EU market that have been identified as posing a particular high risk of deforestation and forest degradation (soy, beef, palm oil, cocoa, coffee, wood and derived products).

All these DDLs have in common that they hold individual corporate actors, especially those in the import market, responsible for ensuring human rights and social and environmental objectives along the value chain. This obligation of an entity along the chain mainly extends up to the primary (upstream) actors who, for example, provide raw material for further processing in the importing country. Violations of downstream actors – who, on the contrary, consume products – are less often covered.

In contrast to the already existing private and voluntary sustainability standards and the corresponding certification schemes (VSS), all of these new rules are legally binding and are using enforcement tools. However, the detailed elements of these DDLs can vary widely in terms of objectives, products and enforcement measures. Improved coordination could help avoid contradictory requirements and ineffectiveness, thereby reducing compliance costs for both directly obligated companies and the authorities entrusted with monitoring and sanctioning. At the same time, synergies for more indirectly affected actors along the value chains are important to minimise the burden, especially for small actors. Specifically in agriculture, very small actors can exist in developing countries and can bear the risk of not being able to meet the requirements – which is exacerbated as the number of different requirements increases.

Coordination across the various new initiatives should be based on identifying differences and the diverging effects that could emerge as a result, as well as on the challenges for actors and countries affected by the initiatives. The need to monitor such effects was raised at the latest G7 agriculture ministerial meeting under German presidency, which focused on the risks faced by small farmers. As a result, a study was commissioned by the OECD to monitor all the different initiatives, both new and existing private DDLs (G7 2022, para. 26).

1. An attempt at classification: Due diligence as part of a puzzle on sustainability in trade

The due diligence approach is part of a complex mix of different approaches that all aim to enforce human and labour rights and environmental objectives by different means in international value chains. These different approaches may have their origins in different policy areas that follow different logics and policy-making procedures. The different policy areas may lead to differently defined timeframes that limit flexibility. For example, policies that fall under the EU budget – such as the EU's Common Agricultural Policy (CAP) – are bound to a strict 7-year timeframe, which limits the possibility of short-term adjustments. Moreover, different policy frameworks address different actors with different vulnerabilities in terms of sustainability and interests – e.g. agricultural actors in the EU versus those in developing countries or farmers versus processors and retailers. Coordination that aims to achieve an overall balance of divergent interests across different policy areas increases complexity but also promotes synergies. It can also ensure package benefits across the different actors when deciding on new legal acts.

Trade Policy

A first policy sphere is *trade policy*, increasingly demanded – and partly used – to promote sustainability. Trade rules compromise different regulatory levels:

Multilateral rules of the World Trade Organization (WTO) serve as legal basis for enforcing rules by a dispute settlement mechanism. In addition, many countries, including the EU, have various uni-, bi and plurilateral agreements in place, which are based again on WTO rules. Trade rules mainly apply to the import side, using tariffs or import restrictions against an entire country or a product as an incentive to implement sustainability standards in third countries (Rudloff 2015). Only a few WTO disputes explicitly deal with sustainability – especially with reference to GATT Art. XX, which provides for exceptions to general GATT rules (such as the avoidance of quantitative trade restrictions) in order to pursue specific, well-defined policy objectives, such as protection of exhaustible resources or public morals. Rather than questioning whether the present sustainability goals fall under such legitimate policy objectives as defined in Art. XX, the corresponding disputes have focused on the modalities of the measures taken and particularly on the non-discrimination of countries. All responding countries that reacted to the undermining of their standards by import restrictions lost the cases.¹

As bilateral trade arrangements, all EU FTAs since the EU-South Korea FTA of 2010 include chapters on sustainable development and trade (TSD). They refer to international sustainability conventions such as those of the International Labour Organization (ILO). In principle, such agreements may affect a large volume of trade, as EU FTAs cover around 40% of EU's trade (IEEP 2022). However, the enforcement of these EU TSD chapters in terms of possible consequences for violations is limited compared to other FTA violations in other chapters, e.g. market access. These TSD chapters are exempt from the general dispute settlement and enforcement mechanisms of FTAs. However, they are subject to special dispute settlement rules (van t' Wout 2021, p. 2), which are more of a mediation type. A first case of this kind is the one against South Korea regarding a violation of ILO convention (on the freedom of association) (Han 2021).

¹ DS 381 (Tuna-Dolphin II, Mexico against US), DS 58 (Turtle-Shrimps, India/Malaysia/Pakistan/Thailand against US), DS 400 and 401 (Seal ban, Canada and Norway against the EU).

There are major differences across EU FTAs in terms of the conventions referred to, especially in the area of environmental protection (IEEP 2022, p. 8). Overall, there are stricter and more enforceable rules in the area of human rights protection than for environmental objectives. The international consensus on human rights has a longer tradition and is more uniform and precise compared to environmental challenges, some of which depend on local conditions and are therefore inherently different. Some related ecologically aspects are not addressed in TSD chapters but are part of parallel dialogues in FTAs, e.g. often for timber and forests, sustainable fisheries, biodiversity or sustainable supply chain. Such bilateral dialogue formats aim to promote joint understanding and exchange of information (Hagemeier et al. 2021, page 82).

As hard enforcement of TSDs is limited, the EU is increasingly focusing on ways to support their implementation (EU Commission 2018). One new measure is the so-called »Handbook of implementation«, which aims to identify the challenges faced by local partners in complying with TSD requirements. A first one concerns the EU-Ecuador FTA (National Board of Trade Sweden 2019).

One new measure is a kind of tariff incentive for sustainability under the negotiated text of the EU-Mercosur FTA, which provides for a tariff rate quota for eggs conditional on the application of EU rules for laying hens (Hagemeier et al, 2021, p. 29). However, unlike with developing countries, such conditional preferences rarely exist with developed trading partners.

Unilateral trade approaches are common vis-a-vis developing countries, where tariff preferences are used as an incentive for implementing certain international agreements on human rights and environmental goals. For low and lower-middle income countries, the EU follows this approach by adhering to the General Scheme of Preferences (GSP). As a specific sustainability regime, the GSP+ additionally applies to selected countries that implement a set of defined conventions in addition to those of the basic GSP. Unlike the TSD chapters in FTAs with developed partners, these preferences are to be withdrawn in both regimes in case of violations. So far, however, such withdrawals have only been made in very few cases (European Parliamentary Research Service 2018) (Table 1).

Table 1: Withdrawal of preferences in EU's unilateral preference regimes

Country and Year	Area of Violation
Cambodia 2020	International Covenant on Civil and Political Rights (ICCPR)
Sri Lanka 2010	International Convention on Civil and Political Rights (ICCPR) Convention against Torture (CAT) Convention on the Rights of the Child (CRC)
Belarus 2007	ILO Convention on freedom of association and ILO Convention on collective bargaining
Myanmar/Burma 1997	Forced labour

Source: European Parliamentary Research Service 2018, p. 4; EU (2020), Factsheet.

In addition to these older regimes focussing on developing countries, the EU is developing several new unilateral or autonomously defined rules. A new proposal in the EU to ban imports on human rights grounds could follow the US import ban on products produced

by forced labour, which mainly addresses the Chinese region of Xinjiang and is thus a response to China's treatment of the Uyghur Muslim minority (Bill Signed: H.R. 6256).

In general, there is a long debate on how to strengthen trade rules for more sustainability, which are primarily set by the WTO and also serve as a basis for bilateral trade rules (Sifonios 2018). They aim to strike a balance between (as a more recent goal) sustainability, international competitiveness and open trade. For some issues, there is a linked scientific approach to justify certain measures. Some »Sanitary and Phytosanitary« (SPS) and other »Technical Barriers to Trade« (TBT) regulations are directly linked to product characteristics (product measures PMs) (Negi 2020). These can be physically identified, such as contamination with pesticides, contagious diseases or invasive species that pose a risk to humans, animals, plants or ecosystems. In some exceptional cases, however, these regulations also regulate processes that are not readily observable in the final products (process and production measures, PPMs), such as hygiene rules in slaughterhouses or animal welfare rules. In principle PMs and, to a limited extent, PPMs standards at the border are compatible with the WTO-system: Corresponding enforcement measures such as import bans can be justified if they follow a scientific consensus, expressed through a list of defined standards. These are defined by multilateral standardisation bodies named in the WTO agreements on SPS and TBT. For SPS, these are the Codex Alimentarius Commission, the World Organisation for Animal Health (OIE), and the International Plant Protection Convention (IPPC). For TBT, for instance, the International Standards Organisation (ISO) is mentioned. For standards stricter than those of the recognised organisations, individually offered risk assessments may also justify the need to enforce standards. There is some evidence from case law to support the interpretation that PPMs are generally not per se in conflict with the WTO. However, there is an ongoing debate on the conditions under which they are compatible (Sifonios 2018). As sustainability standards are often part of the PPM family, they are often at the centre of the relevant debates.

Most trade measures relate to the import side (Table 2, p.9) which uses the incentive of market strength, i.e. they make access to an economically interesting market, such as the EU, dependent on compliance with certain rules or standards. Few trade approaches restrict the other side of trade, i.e. exports. An example of this are restrictions aiming at food security by preventing food outflows (Rudloff 2015). Compared to import-linked rules, this opposite direction is seen as particularly sensible with regard to the sovereignty of foreign countries. Export restrictions potentially limit their scope of decision-making to a greater extent, as they cannot buy according to their domestic decisions (Ankersmit et al, 2012, Cooreman 2017).

The basis for export restrictions is again determined by the WTO: GATT Article XI generally prohibits quantitative restrictions, including export-related restrictions, but provides for an exception for food shortages under certain conditions (»temporarily« applied, »critical« shortage, »essential« to the exporting country). Despite of the exemption provided for food, there are several initiatives to restrict its application due to the counterproductive price-pushing effects. On humanitarian goods, several WTO member states have signed declaration to this effect (WTO 2020). At the EU level, there have been only few export-related approaches so far – traditionally on military-products and those used for torture (Peterson 2021; Kanetake 2018). They are mostly operationalised through authorizing exports. France has initiated a new export ban on certain pesticides (Euractiv 2020; Bladon, Braoudakis 2021, Matthews 2022). A very recent report covering this issue by the Commission highlights the relevance of assessing specifically trade rules on PPMs on a »case-by case«- basis (EU Commission report 2022).

Foreign Policy

Another policy area besides trade policy where similar measures are used is *foreign policy*. Economic sanctions are used mainly to enforce human rights objectives. Such sanctions comprise very different trade measures, the either restrict the import originating in a certain region or country or, on the contrary, limit exports to certain regions. They may also target individual persons or entities by restricting banking transactions or travel (Lopez 2013). On food products – as with medical products – the humanitarian consensus excludes essential products (not luxury goods) from explicit sanctions (EU Council 2018, see for different links the San Remo Manual on naval blockades Segall 1999). This is intended to protect the population of the originally sanctioned country – and possibly also of third countries affected by side effects of restricted exports, leading to higher world market prices – from humanitarian burdens.

Foreign Investment policy

Another policy area regulates *investment measures* that can also influence sustainability of international value chains. Like due diligence approaches, they address private actors. Corresponding rules influence, for example, the establishment of multinational enterprises with locations in other countries in order to gain direct access to foreign markets instead of exporting there. Unlike in trade policy, the multilateral basis for investments is weaker. Major rules are therefore part of what are now thousands of bilateral investment treaties (BITs) between countries. These rules can influence (re)allocation of investor activities, e.g. possible ownership of or access to foreign resources. This may have an impact on sustainability in terms of exploiting resources or extracting property and associated rents, as is debated regarding the phenomenon of »land grabbing«. However, access to certain resources such as land and water can be limited or prohibited for foreigners. New domestic sustainability requirements in the target country for investments entering into force *after* foreign investments took place may be interpreted as and claimed to be indirect expropriation. This may result in compensation claims by foreign investors against the accused country. This risk for an accused country can cause »regulatory chill«, i.e. countries refrain from introducing new and stricter sustainability regulation to avoid corresponding claims and potentially high amounts of compensation payments (Berge & Berger 2021).

Domestic requirements in agricultural policies

The policy framework of originally *domestic-focused agricultural policies*, such as the European Agricultural policy (CAP), has also increasingly integrated certain types of, mainly environmental, requirements for farmers. Corresponding measures can be part of regulatory law and thus binding, they can be a prerequisite for receiving general agricultural subsidies or they can qualify for additional possible subsidies under various ecological programmes. The latter are offered at regional level and their application is decided on an individual basis at farm level. Thus, there are both mandatory and voluntary elements of agricultural policies aiming at sustainability. These requirements and possibly linked subsidies can influence international value chains through comparative cost effects and can thus indirectly influence trade patterns. These effects strongly depend on the specific design of the corresponding subsidies (Rudloff, Brüntrup 2018; Baylis et al 2021).

The aforementioned measures related to trade, investment or agricultural subsidies are set by state actors, but can also include voluntary elements by providing a margin of compliance (such as following the GSP+ trade regime or applying for certain CAP ecological agricultural programmes). This differs from foreign policy sanctions, which are mandatory to be applied by business actors involved in sanctioned activities like trade. At the same

time, there are a number of self-defined and voluntary regulations especially in agriculture: voluntary sustainability standards and accompanying certification schemes (VSS) on human rights and ecological rules (Baylis et al 2021). They respond to the aforementioned failure of international regulations, as these are often limited, especially when enforcing PPMs, which are often relevant for sustainability (UNFSS 2018, Lee et al., 2012). However, VSS usually cover only a small part of trade volume as they apply to very specific, high-end niche products, which limits their scope of effects.

New due diligence approaches

The newly developed *due diligence initiatives* all explicitly address businesses as responsible for sustainability, as do the private VSS, but define requirements as binding obligations. The EU proposal on preventing deforestation combines classic entity-related due diligence rules with a country-benchmark system. The proposed text thus follows option 2 of the Commission's own impact assessment without the original approach of listing and disclosing the companies in breach of their obligations («naming and shaming») (EU Commission 2021a).

The social dimension of DDLs is based on the UN guiding principle of «respect, protect and remedy» by the corresponding UN framework of 2008: According to this, the state has the duty to protect against human rights violations by third parties, including businesses, through appropriate measures (UN 2011). An important milestone was the Ruggie Commission and the report under the UN Secretary, which clearly stated that not only states but also private enterprises bear responsibilities for human rights (Ruggie et al 2009, Ruggie et al. 2011, compare e.g. Wettstein 2015).

The environmental dimensions in these approaches are mainly based on the growing and increasingly strict number of Multinational Environmental Agreements (MEAs), notably the Convention on Biological Diversity (CBD) and the UN Framework Convention on Climate Change (UNFCCC). Another important step was the global Sustainable Development Agenda 2030 agreed upon in 2015 under the UN which encourages governments to take such measures to enforce «global public goods» (UN 2015, compare e.g. King 2016).

Table 2: (Smart) mix for sustainable development in international value chains (tendency, major focus marked in grey)

Criteria		Basic Frames		Implementing Policies					Due diligence
		HR Con-ventions	MEAs	Trade (WTO, FTAs, Unilateral)	Foreign policy/ Sanctions	Investments	Agricultural Policy	Voluntary VSS	
Objective	Human and social rights								
	Environmental aims								
Liable Actor	State								
	Business								
Target level	Country/Region							some	some
	Product								
	Process								
International enforceability	Low								
	High			at WTO level					
Entry point of trade flow	Domestic					in target country			
	International	Import				n.a.		market access via VC	
		Export					n.a.		some
	Other (resources' access)								
Coverage	Horizontal								
	Specific sectors				excl. humanitarian goods				

Source: Own compilation.

The new due diligence initiatives are part of the overall catalogue of different measures, originating from different policy areas. They contribute to an overall mix of measures (Ertl, Schebesta 2020) and combine the advantages of other measures from other policy areas:

- they are more enforceable compared to trade rules, as they can directly legally bind entities in the territory of the regulatory actor,
- they can also address sustainability more systematically, as they are linked to value chains rather than aggregated countries or sectors, as is usually the case with trade measures,
- they can also cover PPMS such as VSS for which the WTO-compatibility remains ambiguous,
- their WTO-compatibility is often defended by arguing that DDLs are aimed at market placing and not at prohibiting imports, and can therefore be considered non-discriminatory. However, a final judgement remains contentious and may be ruled in a dispute referring to GATT Article XX or XI (Felbermayr et al 2021).

Additionally, they can address violations more specifically than, for example, sanctions, as they do not restrict products per se or burden entire countries, but only affect individual production lines along the supply chains of specific companies.

2. A specification for due diligence: Comparing the recent German and EU approaches

Although all due diligence approaches aim to address private actors and to ensure enforcement via specific legally binding obligations– which can trickle up the whole VC to the primary supplying actors – there are differences in the specific mechanisms (Table 3, p. 12). These differences influence the impact on actors within the value chain:

A first difference relates to the main sustainability objective. These can include human rights such as the right to food or labour rights, land right violations, products from endangered animals and plants. Existing DDLs often refer to a defined set of international conventions, e.g. the German Act referring to 11 human rights (HR) and labour rights conventions, but only to three environment-related conventions (Minamata 2013 on mercury, Stockholm 2001 on persisting toxic substances and Basel 1989 on dangerous waste).

Table 3: Comparison of major elements in the German and the EU due diligence approaches

Elements	Horizontal due diligence		Sectoral due diligence +: avoid deforestation
	D (Dtsch. BGBl., July 2021)	EU (Com directive proposal 2022/0051 COD)	EU (Com regulation proposal 2021/0366 COD)
Sustainability focus (number of acts)	<ul style="list-style-type: none"> ■ Human and labour rights (11) ■ Environmental aspects (3) (Annex) 	<ul style="list-style-type: none"> ■ Human and labour rights (German act +11) ■ Environmental aims including climate strategy (German Act + 4) (Annex) 	<ul style="list-style-type: none"> ■ Avoid deforestation after cut-off date 31 Dec 2020 ■ Land use rights, environmental protection (Art. 1,2,3)
Companies	<ul style="list-style-type: none"> ■ Employers: 3000 - 1000 (in 2024) ■ Sectors: products and services (§ 1) 	<ul style="list-style-type: none"> Application to EU and third countries' entities (EU turnovers relevant) (Art. 2) ■ Group 1: 500 employees + 150 Mio. EUR global net turnover with climate contribution plan ■ Group 2: For risk sectors including agriculture: 250 employees + 40Mio. EUR global turnover of which 50% in risk sectors ■ Risk sectors defined (Art. 2.1, b) 	<ul style="list-style-type: none"> ■ All, but different duties for non-SME traders/ operators and SME- traders ■ 6 pilot products, potentially to be extended (Art. 4,6)
Extent of value chain	<ul style="list-style-type: none"> ■ Own business area (§ 2) ■ Upstream: Direct tier (§ 3.5) and ■ indirect tier, risk-based (§ 3.8) 	Complete value chain, up- and downstream (direct and indirect, if long-term relations) (Art. 6)	<ul style="list-style-type: none"> ■ Upstream: »raw products« , traders and operators (Art. 4,6) ■ Geo-location, traceability down to plot (Art. 9)
Obligations on due diligence	Risk management, regular risk analysis including prioritisation, prevention, mitigation, complaint mechanisms, documentation (§ 3)	Due diligence policy, identify actual and potential risk, preventing and mitigating, complaints procedure, monitoring effectiveness, public communication (Art. 4,5)	<ul style="list-style-type: none"> ■ Non-SME traders (Art. 6) and operators (Art. 4): (1) Information/documents (only one for SME-traders) (2) Risk assessment to prove that non-compliance is negligible (3) Risk mitigation ■ Simplified due diligence if low country- risk: no risk assessment and mitigation unless concern (Art. 12) ■ Country benchmarking 3-tier risks (Art. 27) (low, standard, high) with criteria like deforestation rate, extension of production, laws for Paris agreement, partnership agreements (Art. 28)

Table 3: continued

Elements	Horizontal due diligence		Sectoral due diligence +: Avoid Deforestation
	D (Dtsch. BGBl., July 2021)	EU (Com directive proposal 2022/0051 COD)	EU (Com regulation proposal 2021/0366 COD)
Enforcement/ Civil liability	<ul style="list-style-type: none"> ■ No specific civil liability ■ Exclusion public procurement (§ 22), penalty and fine (§ 23,24) 	<ul style="list-style-type: none"> ■ Civil liability to be ensured by MS laws under certain conditions (Art. 22) ■ MS ensure regimes: effective, proportionate, dissuasive penalties (Art. 20) 	<ul style="list-style-type: none"> ■ No specific civil liability ■ Fines, confiscation of product and revenue, exclusion of public procurement (Art. 23)
Remedy and compensation	<ul style="list-style-type: none"> ■ Effective remedy, taking precedence over termination of business relationship (§ 7) ■ Taken into account in fines (§ 24.13/7) 	MS ensure that companies take measure against adverse impacts »where relevant«, including payments to persons and communities (Art. 8)	No remedy, only at benchmark-level on deforestation risk (Art. 27)
Complaints procedure	Complaints procedure (§ 8)	Complaints procedure by company, MS shall ensure access for all actors including civil society along value chain (Art. 9)	<ul style="list-style-type: none"> ■ No explicit requirement for complaints procedure at company level ■ Ensure option to raise substantiated concerns and access to justice (Art. 29, 30)
Accompanying measures/support	General guidelines for implementation by competent authority (Art. 20)	Support to company by MS, support possible by Commission, explicitly for excluded but possibly indirectly affected SMEs (Art. 14)	<ul style="list-style-type: none"> ■ Benefit of existing Partnership Agreements like on timber by integrative approach (including specifically small farmers, indigenous) (Art. 28) ■ Decide on support after review especially for small famers, indigenous (Art. 32)
Review	None	Open deadline to evaluate effectiveness, sector size, relevant sectors and conventions and relevance of climate strategy (Art. 29)	<ul style="list-style-type: none"> ■ No later than 2 years: extending to other ecosystems and further commodities ■ No later than 5 years (a) additional trade facilitation tools, (b) impact on farmers and support (Art. 32)

Source: Own compilation based on legal acts and Holly, G.; Lysgaard, A. (2022), own translation of German Act.

In addition, there are differences especially in the following aspects of due diligence initiatives, bearing in mind the diverging types of legal acts at EU level. As the horizontal due diligence proposal is a directive, this leads to a wider scope and responsibility at MS level.

Specific risk coverage: A general principle is proportionality to tie the strength of duties to severity and likelihood of a certain negative impact. This general principle can be specified by defining certain sectors or certain upstream regions as of particularly high risk. The process of defining the degree of risks is crucial and is often left to the entity itself, without further external definitions, basing the definition on own historic empiric evidence of observed risks in the chain. The German Act states that different sources may be used for this evidence (local information, past risks, public controls). In contrast, the EU's proposed regulation to prevent deforestation undertakes first a pre-selection of six products assumed to be of particularly high risk and then secondly combines them with a benchmark system for upstream countries according to their level of current deforestation. The EU's horizontal proposal defines certain high-impact sectors (e.g. minerals, textiles, agriculture and forestry) for which stricter obligations are set.

Obligations follow a common general pattern that includes elements such as risk assessments, types of risk mitigation, documentation, remediation and the establishment of a complaints procedure. Often these obligations differ between the explicitly obligated company (more or stronger obligations) and other actors along the value chain who are mainly obligated to document. Small and medium-sized enterprises are also often subject to weaker obligations. The proposal on deforestation provides for a simplified procedure based on the classified risk of deforestation in a country (»benchmarking«).

Addressed scope of undertakings, extent of value chains and covered sectors: Often obligations differ between directly and indirectly affected actors, i.e. for their own business environment and for the rest of the value chain. The latter often concern weaker duties such as limited documentation requirements. The German Act commits large companies as directly responsible actors, whereas the EU proposed regulation to avoid deforestation directly addresses all actors (including those who first place the product on the market) in the value chain, but differentiates between companies according to their size in terms of the number and type of obligations. The scope of the value chain covered is first defined by whether both, upstream (e.g. the supply of raw materials) and downstream (e.g. the distribution or use of certain products) activities are part of the explicit responsibility of the obliged entity. The EU horizontal proposal is the most ambitious one in this regard, as it covers both down- and upstream activities, whereas the other initiatives only cover downstream activities. However, the forestry proposal also includes actors that place products on the market first. A second parameter potentially diverging is the integration of products and sectors. The proposed EU regulation to prevent deforestation starts with six defined pilot products considered of particular high risk (beef, palm oil, soy, cocoa, coffee, wood and derived products). This list can be extended to other products and other ecosystems after an intended review. The EU's horizontal initiative addresses all sectors, but some sectors, such as agriculture, are assumed to be of particular high risk.

Encouraging measures, fines and specific civil liability. All approaches provide for different types of penalizing violations. These measures can include fines, exclusion from public procurement, or even confiscation of affected products or related revenues. A particularly sensitive issue during the decision-making process for all initiatives were specific and new civil liability rules. The German Act and the EU's forestry proposal rely on existing general

civil liability rules rather than establishing new ones. The EU's horizontal approach explicitly emphasises the need for relevant regulations in place at Member State level to be applied under certain violation conditions.

The UN defines *complaints procedures, remedies and compensation for damages* as most relevant elements for a fair treatment of actors affected negatively by rights violations (Ertl, Schebesta, p. 2). Existing approaches differ according to a general mechanism in place and the mean of compensation or reparation. The latter may be the termination of adverse effects or an actual payment. A complaint system can be designed as a mediation process in round tables. The new initiatives often require the directly addressed companies to offer such procedures. The strictness of this duty is in some initiatives not finally clear: The EU's horizontal initiative defines the MS as responsible to oblige companies »where relevant«. On the other hand, financial payments and indirect burdens are also mentioned for actors not explicitly covered, which can play a large role in developing countries. The German Act defines a mechanism and refers to compensation as being considered for defining fines. The EU's proposal to prevent deforestation does not provide for complaint procedures for companies, but emphasises that Member States must ensure access to the general legal system. Compensation for damages are only included as a vague general option in the EU's horizontal approach.

Support for implementation. While the German Act only provides administrative guidelines as support for implementation, the EU approaches are more specific and offer options to support implementation through financial aid: The horizontal proposal defines that Member States – possibly as well jointly with the Commission - should support companies in implementing the rules . It even at least acknowledges possible indirect effects for actors along the value chain who are not explicitly liable. In principle, this can cover the risk of being forced out of the chain if this actor is perceived as too risky by the obliged entity. The proposal to prevent deforestation goes furthest by suggesting joint partnership agreements as in the timber sector, which can mandate implementation through support. Additionally, a planned review mechanism should identify specific challenges faced by small farmers and indigenous communities, as well as appropriate support.

3. Conclusions for coordination: Governance tools to support coherent sustainable value chains

Better coordination of the different approaches for sustainability at the different regulatory levels is highlighted as an important issue in the European Sustainable Development Report 2021. This report particularly emphasises linking domestic and external measures, i.e. to »align Europe’s domestic transformations with its external relationships and cooperative endeavours« (European Sustainable Development Report 2021, p. xi).

Due to the differences identified between the different approaches, the following general recommendations can support better interlinkage and avoid contradictions between regimes:

Better coherence through cross-regime governance. Different policy areas are often subject to different political responsibilities and face different decision-making procedures and timing. Stronger inter-linking of these areas can be supported by the EU’s general approach of better regulation. Specific regulatory impact assessments (RIAs) are obliged to assess potential effects of envisaged new legal acts (EU Commission 2021c). Evaluation criteria are general EU principles such as subsidiarity or the SDGs. These RIAs can be explicitly used to raise awareness of cross policy effects by referring to assessments undertaken in other policy areas, e.g. the obliged Sustainable Impact Assessments (SIAs) for new trade agreements. Relevant impacts identified in these SIAs could be covered by trade-relevant RIAs (so called policy specific toolbox #29 on guidelines for assessing trade effects) and vice versa. In addition, the degree of cross-policy effects of certain new initiatives could be assessed as explicit criterion for assessments, as well as impacts on third countries or vulnerable actors.

Better monitoring and more flexibility. So far, there only exist limited review mechanisms in in the form of systematic and regular reviews of the actual effects once a trade-related initiative has entered into force: Within FTAs, the EU-UK FTA is considered the most advanced, as it provides for continuous review every five years (IEEP 2022, p. 35). In addition, some of the new EU due diligence approaches provide for a review process:

- The proposal on preventing deforestation is the most ambitious in this respect and *provides for specific review periods* (2 and 5 years) and specific options for a possible extension of the overall objective and product coverage. However, earlier monitoring prior to entry into force could be useful. Some risks, such as being pushed out of a value chain, may occur already very early on while anticipating the initiatives entering into force (Akam et al. 2022).
- *Ex-post sustainability assessments (SIAs)* of trade agreements are another source of assessing actual impacts. They complement the traditionally required ex-ante assessments of FTAs, i.e. before negotiations are concluded, at a stage when actual outcomes of the agreements – and thus possible effects – are still unknown. So far, only few ex-post SIAs have been started but not yet been finally published, e.g. on Andean countries and Central-America (Bkp 2022). These SIAs are conducted by external research institutes selected by the Commission in an open tender procedure. Therefore, they differ in terms of methodology and issues covered, which limits their comparability across different FTAs. Especially in the case of qualitative effects, which dominate sustainability issues, local expertise is needed for a sound evaluation. In most cases, this is hardly covered by more aggregated SIAs. They often use classical econometric modelling more appropriate for economic

dimensions than for most social and environmental aspects of sustainability (Rudloff et al, 2022). Therefore, more qualitative expertise and knowledge of local conditions should be considered both in ex-ante and ex-post SIAs (Rojas-Rogeros 2018).

- *Local expertise and involvement of local partners* could be strengthened by using already existing networks that carry out their own assessments, such as private certification schemes.
- *Substantial flexibility* requires the ability to change rules once challenges are identified within the review process. The proposal to prevent deforestation provides for such adjustments by potentially expanding the products and ecosystems covered. However, the opposite, namely the exclusion of products, is not mentioned. More open flexibility should be the goal here.

Define joint vulnerabilities and helpful support for SMEs. There are several approaches to integrate actors at the partner side. These approaches should firstly be better interlinked and secondly evaluated in terms of their success: In the area of FTAs, the new idea of a handbook of implementation – a first one concluded for EU-Ecuador (National Board of Trade Sweden 2019) – provides for a joint process via workshops to identify problems on the partner side to implement necessary sustainability aspects. Knowledge about corresponding approaches, e.g. by private actors, should be shared.

Follow the future relationship between voluntary private approaches and public initiatives. Despite the new and binding approaches, private actors will probably continue to develop voluntary – and possibly stricter – standards in parallel. In the area of private standards for product quality and safety, it has long been observed that private standards develop faster and more dynamically than publicly defined standards. These private standards can be a de facto marketing barrier for farmers in developing countries, for example. Even if they meet the public standards, their products may not be promoted and sold by relevant retailers in the import market due to their own higher standards. On the other hand, private standards can provide important impetus to better address other dimensions of sustainability. This potential impact of continuous development of private standards in the area of due diligence should also be monitored.

Abbreviations

BIT	Bilateral Investment Treaty
CAP	Common Agricultural Policy
CAT	Convention against Torture
CRC	Convention on the Rights of the Child
DDL	Due diligence laws
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
HR	Human rights
ICCPR	International Convention on Civil and Political Rights
IPPC	International Plant Protection Convention
ISO	International Standards Organization
MEA	Multilateral Environmental Agreement
MS	Member State(s)
OIE	International Office of Epizootics (new name: World Organization for Animal Health)
PM	Product measure
PPM	Processes and production measure
RIAs	Regulatory Impact Assessment
SIAs	Sustainability Impact Assessment
SPS	Sanitary and Phytosanitary
TBT	Technical Barriers to Trade
TSD	Trade and Sustainable Development
UN	United Nations
UNFCCC	United Nations Framework Convention on Climate Change
VC	Value chain

References

- Akman, M. S., Botti, F., Brandi, C., Brüntrup, M., Dietrich, M., Espa, I., Freytag, A., Koopman, R., Mildner, S., Rudloff, B., (2022): Sustainable and Resilient Agricultural Value Chains: Addressing Multiple Vulnerabilities with a new Partnership Approach, T7 Task Force Sustainable Economic Recovery Policy Brief, March 2022, available at: <https://www.think7.org/publication/sustainable-and-resilient-agricultural-value-chains-addressing-multiple-vulnerabilities-with-a-new-partnership-approach/>
- Ankersmit, L., Lawrence, J. C., and Davies, G. T., (2012): Diverging EU and WTO perspectives on extraterritorial process regulation, WTO Perspectives on Extraterritorial Process Regulation (February 17, 2012). Minnesota Journal of International Law Online.
- Baldon, C.; Braoudakis, N. (2021): 'Imported Products, Pesticides, and the Environment: The Compatibility of 'Mirror Measures' with WTO Rules, 16, Global Trade and Customs Journal, Issue 9, pp. 459-466.
- Baylis, K., Heckeley, Th., Hertel, Th. (2021): Agricultural Trade and Environmental Sustainability, Annual Review of Resource Economics 2021 13:1, 379-401.
- Bkp (2022): Ex-post evaluations, at: Ex post evaluations of two EU trade agreements (bkd-development.com).
- Cooreman, B. (2017): Global environmental protection through trade: a systematic approach to extraterritoriality. Edward Elgar Publishing.
- EP (2020): Factsheet: withdrawal of Cambodia's preferential access to the EU market, available at: https://trade.ec.europa.eu/doclib/docs/2020/february/tradoc_158631.pdf.
- EP (2022): Trade aspects of the EU-Mercosur Association Agreement. Study requested by the INTA committee, in: Think Tank, European Parliament, November 2021.
- Ertl, V., Schebesta, M. (2020): Sustainability in Global Supply Chains Arguments for and Against a Legal Obligation for Compliance with Human Rights and Environmental Standards, Konrad Adenauer Stiftung.
- EU Commission (2018): 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 Agreement.
- EU Commission (2021a): Commission Staff Working Document Impact Assessment minimising the risk of deforestation and forest degradation associated with products placed on the EU market, 17.11.2021.
- EU Commission (2021b): Proposal for a regulation of the European Parliament and of the Council on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010.
- EU Commission (2021c): Better regulation: Joining forces to make better laws, Communication. COM/2021/219 final.

- EU Commission Report (2022): Application of EU health and environmental standards to imported agricultural and agri-food products, 3 June 2022.
- EU Commission (2022): Proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937.
- EU Council (2018): Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy, 4 Mai 2018, 5664/18, available at <https://data.consilium.europa.eu/doc/document/ST-5664-2018-INIT/en/pdf>.
- Euractiv (2020): Commission to consider halting export of banned pesticides, EU source says, by Natasha Foote, November 9, 2020.
- Europe Sustainable Development Report 2021: Transforming the European Union to achieve the Sustainable Development Goals.
- Felbermayr, G., Langhammer, R.; Sandkamp, A.; Herrmann, Ch., Trapp, P: (2021): Study on behalf of Gesamtmetall Economic Evaluation of a Due Diligence Law, Final Report.
- G 7 (2022): Wege zu nachhaltigen Ernährungssystemen in Krisenzeiten Kommuniqué der G7-Agrarministerinnen und Agrarminister, 14 Mai 2022 Berlin.
- García, B., Grüning, C., Weiss, D., Kriege, K. (2022): Strengthening The 'E' In HREDD. Why the environmental dimension of sustainable supply chains matters. Berlin: adelphi research GmbH.
- Hagemeyer, J., Maurer, A., Rudloff, B., Stoll, P. T., Woolcock, S., Coste Viera, A., Mensah, K. and Sidlo, K. (2021): Trade aspects of the EU-Mercosur Association Agreement, Study for the European Parliament, available at [https://www.europarl.europa.eu/thinktank/de/document/EXPO_STU\(2021\)653650](https://www.europarl.europa.eu/thinktank/de/document/EXPO_STU(2021)653650).
- Han, J. S. (2021): The EU-Korea Labour Dispute: A Critical Analysis of the EU's Approach', 26, *European Foreign Affairs Review*, Issue 4, pp. 531-552.
- Holly, G.; Lysgaard, A. (2022): How do the pieces fit in the puzzle? Making sense of EU regulatory initiatives related to business and human right, The Danish Institute for Human Rights.
- IEEP (2022): Enhancing sustainability in EU Free Trade Agreements. The case for a holistic approach, Policy reports April 2022.
- Kanetake, M. (2018): »Balancing innovation, development, and security: dual-use concepts in export control laws« *Global Environmental Change and Innovation in International Law* (Cambridge University Press, 2018 Forthcoming)
- Kirkpatrick, C. and Parker, D. (2004), Regulatory impact assessment and regulatory governance in developing countries. *Public Admin. Dev.*, 24: 333-344. <https://doi.org/10.1002/pad.310>.

- Lee, J., Gereffi, G., & Beauvais, J. (2012). Global value chains and agrifood standards: Challenges and possibilities for SHFs in developing countries. *Proceedings of the National Academy of Sciences*, 109(31), 12326-12331.
- Matthews, A. (2022): Implications of the European Green Deal for agri-food trade with developing countries, Brussels, European Landowners' Organization.
- National Board of Trade Sweden (2019): TSD Handbook. Implementation of the chapter on trade and sustainable development in the Trade Agreement between EU and Ecuador.
- Negi, A. (2020). The World Trade Organization and Sustainability Standards. In: Negi, A., Pérez-Pineda, J., Blankenbach, J. (eds) *Sustainability Standards and Global Governance*. Springer, Singapore.
- Peterson, T. M., »Sanctions and third-party compliance with us foreign policy preferences: An analysis of dual-use trade.« *Journal of Conflict Resolution* 65.10 (2021): 1820-1846.
- Rojas-Romagose, H. (2018): Overview of the evolution of the methodology and coverage of EU ex-ante trade sustainability impact assessments over time, World Trade Institute 28 December 2018.
- Rudloff, B. (2015): Trade rules and food security, Scope for domestic support and food stocks, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), September 2015.
- Rudloff, B.; Brüntrup, M. (2018): Fair Play: The Recent Common Agricultural Policy and Its Limited Effect on Development, SWP Comment 2018/C 21, 17.05.2018.
- Rudloff, B.; Wieck, C. (2020): Sustainable Supply Chains in the Agricultural Sector: Adding Value Instead of Just Exporting Raw Materials – Corporate Due Diligence within a Coherent, Overarching and Partnership-based EU Strategy, SWP Comment 2020/C 43, 21.09.2020.
- Schaus, M. (2022): Reviving the WTO and rules-based trading, The EU's role, CEPS Policy Insights No 2022-01.
- Segall, A. (1999): Economic sanctions: legal and policy constraints, *International Review of the Red Cross*, No. 836, 31-12-1999.
- Sifonios, D. (2018): *Environmental Process and Production Methods (PPMs) in WTO Law*, Volume 3, Springer.
- van 't Wout, D. (2021): The enforceability of the trade and sustainable development chapters of the European Union's free trade agreements. *Asia Eur J* (2021), available at <https://doi.org/10.1007/s10308-021-00627-1>.
- WTO (2020): Export prohibitions and restrictions, information note 23 April 2020 Page: 1/17, available at https://www.wto.org/english/tratop_e/covid19_e/export_prohibitions_report_e.pdf.

Bettina Rudloff is Senior Associate and Expert on Trade, Agriculture and Development Policy at the EU/Europe Division of the German Institute for International and Security Affairs (SWP)

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SWP

Stiftung Wissenschaft und Politik
German Institute for International and Security Affairs

Ludwigkirchplatz 3–4
10719 Berlin
Telephone +49 30 880 07-0
Fax +49 30 880 07-100
www.swp-berlin.org
swp@swp-berlin.org

doi: 10.18449/2022WP05