




## Article

# Free Trade, Environment, Agriculture, and Plurilateral Treaties: The Ambivalent Example of Mercosur, CETA, and the EU–Vietnam Free Trade Agreement

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**Abstract:** Transnational trade holds opportunities for prosperity and development if accompanied by a robust political and legal framework. Yet, where such a framework is missing, transnational trade is frequently associated with, among others, negative impacts on the environment. Applying a legal comparison, this article assesses if recent free trade agreements, i.e., the Mercosur Agreement, CETA and the EU–Vietnam Free Trade Agreement, negotiated by the European Union, have been underpinned with effective environmental standards so that they are in line with global environmental goals and avoid detrimental effects on climate and biodiversity. Besides that, we evaluate the extent to which these agreements at least enable and incentivise environmental pioneering policies in the trading Parties. In particular, we discuss the likely impacts of the agreements on the agricultural sector. The analysis finds that, while a few mandatory standards concerning, e.g., deforestation have been established, overall, the agreements lack a comprehensive legal framework to uphold/enhance environmental protection. Moreover, weak dispute settlement mechanisms to ensure compliance with sustainability measures limits their effectiveness. In addition, the provisions on regulatory cooperation and investor-state dispute settlement are likely to negatively affect the decision-making processes and (thus) discourage ecological pioneering policies in the trading Parties. Hence, there is a long way to go so that transnational trade is compatible with global environmental goals.

**Keywords:** trade; globalisation; Paris agreement; convention on biological diversity; agriculture; free trade agreements; CETA; Mercosur; EU–Vietnam free trade agreement; climate change



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## 1. Introduction: Free Trade and the Environment

Globalisation is a prevailing trend which encompasses worldwide trade as well as informational and cultural exchange [1–3]. Globalisation has not emerged ‘naturally’ but is the product of political decisions for free trade. Cross-border free trade, being one central element of globalisation, holds considerable opportunities for global prosperity. This is because capitalism requires legal certainty, free ideas and innovation, and thus connects well with liberal systems, just as markets and competition principally match well with liberal democratic basic principles [4–8].

Up to now, when considering social-economic aspects only, in sum, globalisation has benefited the people of Western countries. For example, many jobs have been created in the export sectors and even those who lose out to globalisation would be ‘financially compensated’ by basic manufacturing jobs or, as a last resort, through social benefits due to rising overall prosperity. However, today, more competitive nations challenge established social welfare systems by a potential race to the bottom in terms of social standards. This challenges environmental, climate, and resource politics, unless anchored at an international level. Lower (corporate) taxes and social and environmental standards

usually correspond with lower costs of production and henceforth competitive advantages. This hampers purely national social and environmental politics and therefore requires a global legal framework of free trade. The collateral damage is furthermore accompanied by shrinking profit margins of additional measures of liberalisation [9–11] (pp. 773 et seq.), [12] (pp. 20 et seq.), [13] (p. 61).

Before this background and much like in the history of the EU, environmental and social standards are useful measures, either directly incorporated into trade agreements or through an expanded international environmental and social law, [13] (pp. xiv et seq., 190 et seq.), [14–16]. Trade agreements in particular appear to be promising vehicles in counterbalancing the negative trends described above as their provisions frequently exceed those of the WTO and in some cases those of Multilateral Environmental Agreements [17]. Indeed, some kind of contribution of international trade towards transitioning to sustainability has been acknowledged [18–22] (para 271). For example, the 2030 Agenda for Sustainable Development recognises international trade as contributor for sustainable development [23] (para 68). Besides, studies have identified a link between regulatory change in domestic environmental policy making in response to environmental provisions of preferential trade agreements [24]. Others find that environmental provisions of trade agreements reduce air pollution in the trading Parties [25] while trade in low-carbon goods could be incentivised [19]. However, significant challenges regarding the environmental and social security systems remain. For example, multiple studies highlight the issue of deforestation in highly valuable forests as a result of trade, while others point towards the problems of income inequality [14] (pp. 138–144), [26–29]. Moreover, there is an ongoing discussion about carbon leakage and the shifting of emissions through international trade [30,31].

Still, many economists might be critical of an approach that focusses on climate and resource protection because they consider, generally speaking, any barrier to trade as negative [13] (pp. 45 et seq.), [32–34] (p. 101). The argument instead goes that unregulated trade causes greatest prosperity globally and is therefore the only (sensible) social-political way forward for OECD and developing countries alike. Where a need for regulation arises, e.g., where the general public calls for more climate protection or for (better) health insurance, nation states will have to provide the necessary regulatory tools [35,36] (pp. 105 et seq.), [37] (pp. 219 et seq.). Yet this argument, as well as the shrinking prosperity gains that have arisen from the division of labour in the past, do not oppose political measures as required by a global climate concept and its integrated social-political balancing. Furthermore, past experiences and the current dumping issue show that in order to work well, markets and free trade require a strong governmental framework, functional institutions, possibilities for social compensation measures, well-developed infrastructure, a well performing education systems, the absence of corruption, etc. [13,38–40] (pp. 135 et seq.). Besides that, many people on the globe (still) do not benefit from the established trade system.

Currently, doubts about the effects of globalisation, however do not increase the pressure to create global standards. Instead, they seem to push renationalisation processes everywhere [41–44]. At the same time, while national and European policymakers principally still have the legal authority to pursue environmental and social policy, they are hampered by the global economic constellation of globalisation introduced above, and ecological problems might simply shift to other countries [30,45]. Viewed from this angle, it seems reasonable that the EU Commission aims to further develop free trade and accompanying (in particular) ecological standards through plurilateral trade agreements.

It is before this background that the present article investigates (a) the extent to which free trade has recently been underpinned with transnational environmental standards—or whether, on the contrary, free trade agreements have been agreed at the price of common but less ambitious (environmental and social) standards. Besides that, where such standards are missing, (b) the article discusses to what extent at least environmental pioneering policies of the trading Parties are legally or factually enabled (or hampered) by plurilateral

treaties. Thus, rather than focussing our analysis to the effects of trade agreements onto domestic environmental and international trade law or why trading Parties chose to incorporate environmental provisions into the agreements [17], we investigate the robustness of environmental provisions within the agreements. By assessing the extent to which the provisions establish environmental standards and/or enable ambitious environmental policy making, we are able to understand the role that these agreements contribute to addressing environmental (and social) global challenges. To this end, the analysis builds on a legal comparison of three free trade agreements that have recently been negotiated by the EU or are currently in the negotiation and ratification process. The three agreements are the EU–Mercosur Agreement, the EU–Canada Comprehensive Economic and Trade Agreement (CETA), and EU–Vietnam Free Trade Agreement (EUVFTA).

The article precedes as follows: The section hereafter describes the methods adopted. Section 3 provides the results of the analysis, which includes the provisions on the precautionary principle, multilateral environmental agreements, regulatory cooperation, and in particular technical barriers to trade. We furthermore analyse the two dispute settlement mechanisms of the agreements and the measures on the right to regulate. A discussion and conclusion follow.

## 2. Materials and Methods

This article adopts a comparative legal analysis of three selected free trade agreements and combines it with a governance analysis. To this end, the discussion assesses the provisions of the Mercosur Agreement, CETA, and EUVFTA. These agreements have been selected due to their particular and current importance in the field of globalised trade and EU trade policy. Obviously, these agreements differ in their (asymmetric) trade relationships, structures, trade balances and volumes etc. As such, a comparison provides valuable insights how trade agreements negotiated by the EU implement (effective) measures to respond to urgent environmental challenges across these differences (or not).

The Mercosur Free Trade Agreement is an agreement between the EU and Argentina, Brazil, Paraguay, and Uruguay (forming the Mercosur bloc.) It is part of a three-pronged association agreement consisting of trade (discussed in this article), political dialogue, and cooperation. The negotiations of the three pillars have been concluded but have not been signed. While an Agreement in Principle has been published by the Commission, the latter two agreements are not in the public domain [46–49] (p. 12). Hence, the following elaborations build on the so-called Agreement in Principle. The Commission expects that the free trade agreement is going to be considered a mixed agreement, i.e., the subjects of the agreement do not fall exclusively under EU competency (Articles 3 and 4 TFEU). Therefore, in addition to the Council and the European Parliament, EU countries will also have to validate the agreement [46,50,51].

CETA is a comprehensive trade agreement between the EU and Canada which provisionally entered into force in 2014. The ratification in the Member States of the EU is pending (Article 30.7(3) TFEU). Finally, in August 2020, the free trade agreement between the EU and Vietnam entered into force while the Investment Protection Agreement is still in the process of ratification [52].

The basis for the comprehension of the texts are legal interpretation methods, focusing on the literal sense and systematics of legal norms [16] (pp. 53–58), [53–55] (pp. 472–475). A legal comparison is a method to gain and deepen scientific knowledge and provides insights into the correlations, dynamics, processes, causes, and recurring patterns of reality [54,56,57] (pp. 2–7), [58] (pp. 32 et seq.). Thus, a legal comparison contributes to understanding coherences and certain patterns in legal texts, based on which they can be critically analysed.

Given the twofold question of this paper on transnational environmental standards and the possibility of national pioneering roles, we assess the Mercosur Agreement in Principle, CETA, and the EUVFTA regarding their provisions on the precautionary principle and multilateral environmental agreements as well as the provisions on regulatory

cooperation and in particular technical barriers to trade. Besides that, we analyse the dispute settlement mechanism of the chapters on trade and sustainable development. These provisions could have the potential to both establish transnational standards and enable pioneering policies in the trading Parties. Thereafter, we assess the provisions on the right to regulate. At last, we introduce and discuss the investor-state dispute settlement mechanisms which are incorporated into CETA and the Investment Protection Agreement of the EUVFTA. Rather than establishing transnational standards, these provisions provide a frame to enable ambitious policy making in the Parties. An overview of the analysis can be found in Table 1 below. In particular, we assess the impacts of the Mercosur Agreement in Principle onto the agricultural sector and the associated environmental challenges. We frequently draw on examples in Brazil as the nation currently accounts for the highest trade flows between the EU and Mercosur [59]. The table below provides an overview of the analysis.

**Table 1.** Overview of the legal comparison (source: own table).

	Mercosur	CETA	EUVFTA
Precautionary principle	X	X	X
Multilateral environmental agreements & cooperation	X	X	X
Regulatory cooperation (technical barriers to trade)	X	X	
Dispute settlement—trade and sustainable development	X	X	
The right to regulate	X	X	X
Dispute settlement—investments		X	X

The present article measures the ecological effectiveness of the regulations—in terms of establishing transnational standards or at least enabling forerunner actions—towards the international binding climate and biodiversity targets (see in detail on governance analyses [16,60,61]). The ecological effectiveness of certain measures depends on, e.g., their design as well as their enforcement capacity which is why we make references to both dimensions.

An adequate level of protection is achieved when the goals of the Paris Agreement (PA) and the Convention of Biological Diversity can most likely be met globally. Article 2(1) PA aims at halting global warming well below 2 degree Celsius and to pursue efforts towards 1.5 degree Celsius. A number of arguments, inter alia based on Article 3 of the Paris Agreement, shows that the 1.5 degree target is legally binding to all nation states and prevails against Article 4(1) PA [62]. The target must not be exceeded in the remaining timeframe. Importantly, achieving the 1.5 degree target with reasonable certainty (rather than taking a 50–66% probability as basis as calculated by the IPCC), requires global zero emissions and zero fossil fuels in all sectors including, e.g., agriculture, mobility and construction in a maximum of two decades alongside a significantly reduced livestock sector [62]. More precisely, this is implied when presupposing that beyond rather unproblematic measures such as peatland management [60], forest management and restoration or enhancing the soil carbon content by climate-adapted agricultural practices (to compensate for remaining agricultural and process emissions), large-scale technical approaches like, e.g., atmospheric solar radiation management (SRM) in the field of geoengineering are not available in the short term. In contrast, it is highly uncertain that large-scale geoengineering and particularly SRM approaches can ever be implemented at all with a justifiable risk [63]. In sum, all of this also challenges agricultural production and the global trade system.

At the same time, the Convention on Biological Diversity aims at halting the loss of global biodiversity and instead to reverse the trend of biodiversity degradation/loss [64] (Strategic Goals B and C). Considering the rapidity in global biodiversity loss [65,66], these goals also significantly challenge the production of goods in the agricultural and all other economic sectors. In this respect, the three free trade agreements are examined in terms of whether they are in line with the objectives of the PA and the CBD. This means in particular that the agreements should not lead to a deterioration of climate and biodiversity protection policies in the trading Parties. Instead, the agreements have to introduce even

more stringent climate and biodiversity conservation standards in order to achieve the international binding goals.

### **3. Results: Legal Comparison between Mercosur, CETA, the EU–Vietnam Free Trade Agreement**

#### *3.1. The Precautionary Principle*

Precautionary measures are applied in the context of events where facts are uncertain. Uncertainty may entail that some future damage only occurs when cumulative factors come into play; that it may not even occur at all; or that it may not even be known whether it can/will occur at all, that certain ecosystem details and long-term processes are not known and that the effectiveness of policy instruments never implemented before remains unclear. Above all, uncertainty must not lead to (political) inaction. Instead, despite uncertainty, measures may or even need to be adopted to prevent potential dangers [16] (Chapter 3.6), [67–69] (p. 178). The precautionary principle is laid down in different international treaties, e.g., the United Nations Framework Convention on Climate Change (UNFCCC) (Article 3(3)) and the Rio Declaration (Principle 15). In the EU, Article 191(2) of the Treaty on the Functioning of the European Union provides that Union policy on the environment shall be based on the precautionary principle, alongside the polluter paying principle. The principle has also been incorporated into the three free trade agreements, which is a remarkable aspect of the agreements. In fact, it could establish transnational standards and enable ambitious policy making in the trading Parties. However, the legal measures are weak. Besides that, there is a more structural issue in that other provisions of CETA, such as those on regulatory cooperation, might undermine the precautionary principle established in EU primary law, as discussed in the following.

In all agreements, the precautionary principle is included in the Trade and Sustainable Development (TSD) Chapter, which is not subject to the general dispute settlement mechanism under Title VIII (Dispute Settlement) (Article 15(5) TSD Chapter) [70]. Hence, if one Party argues that the other Party breached the obligation of the precautionary principle, it has no recourse to the general dispute settlement mechanism. According to Article 10(1) Mercosur TSD Chapter, Parties shall ensure that, when establishing or implementing measures aimed at protecting the environment that affect trade or investment, relevant scientific and technical evidence on which they are based, is from recognised technical and scientific bodies. Where that evidence is insufficient and there is a risk of serious environmental degradation, a Party may adopt measures based on the precautionary principle (Article 10(2) TSD Chapter). Similarly, the CETA Agreement provides that Parties acknowledge that where there are threats of serious or irreversible damage, a lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation (Article 24.8(2) CETA). The EUVFTA lays down that Parties shall, among others, take into account the principle when preparing and implementing measures aimed at protecting the environment that may affect trade or investment (Article 13.11 EUVFTA).

Hence, applying the precautionary principle is not a mandatory requirement for the Parties to the Mercosur Agreement and CETA. Besides that, the provisions of the Mercosur Agreement in Principle and CETA require a risk of serious or irreversible environmental degradation whereby these terms have not been further specified and therefore leave a significant scope for interpretation. Above all, it is unclear why the precautionary principle should not be applied in case of any risk of environmental degradation as implied by the provisions on the EUVFTA. Thus, CETA and the Mercosur Agreement in Principle do not enshrine the precautionary principle as transnational environmental standard to which Parties have to comply. Yet, even where the principle is a mandatory requirement as in the EUVFTA, holding Parties accountable is likely to be challenging as the provisions of the Chapter on Trade and Sustainable Development are subject to a weak dispute settlement mechanism (Section 3.4). At the same time, the provisions of the precautionary principle in combination with Article XX GATT (might) enable a trading Party to implement and



enforce unilateral measures to protect the environment and fight climate change (on Article XX and environmental protection, see [16,71] (pp. 485–487)).

With regard to CETA, there has been a discussion on the impact of the provisions on regulatory cooperation on the precautionary principle established in EU primary law (Article 191(2) TFEU). On the one hand, the German government argues that the provisions of the free trade agreement do not affect the precautionary principle in the Treaty on the Functioning of the EU. Instead, according to the German government, Article 24.8(2) CETA reaffirms the precautionary principle as laid down in EU primary law [72]. On the other hand, critics have pointed out that the precautionary principle in primary law of the European Union is indeed going to be undermined by these provisions on regulatory cooperation. These provisions require that Parties have to consider the effects on trade and investment alongside impacts on environmental protection when implementing measures (Section 3.3) [73]. Related to that, others have argued that the precautionary principle is undermined by Article 2(3) of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures which has been incorporated into the provisions on regulatory cooperation of CETA (e.g., Article 21.2) and the Chapter on Sanitary and Phytosanitary Measures of the Agreement in Principle of Mercosur (Article 4) [74].

Thus, there is considerable uncertainty about the scope and applicability of the precautionary principle established in the agreements as well as the effect of CETA on EU primary law. This means that the precautionary principle is not established as a transnational environmental standard in all agreements—or at least not in a reliable way (EUVFTA). If at all, states are allowed to justify unilateral pioneering measures by invoking the principle. However, even this can be difficult, as the vagueness presented above demonstrates.

### 3.2. Multilateral Environmental Agreements

The following section discusses the provisions of the three free trade agreements on Multilateral Environmental Agreements (MEAs). These provisions are, like the precautionary principle, incorporated into the Trade and Sustainable Development Chapters. We will discuss if they can serve as transnational standard and if they can justify unilateral environmental measures. Thereafter, we will assess the free trade agreements in the context of Article 31 of the Vienna Convention on the Law of Treaties.

Article 5 TSD Chapter of the Mercosur Agreement in Principle contains provisions on MEAs. Mandatory provisions include the regular exchange of information regarding the ratification of MEAs (Article 5(4) TSD Chapter) and the consultation and cooperation, as appropriate, on trade-related environmental matters related to MEAs (Article 5(5) TSD Chapter). Parallel to these provisions, Parties shall cooperate, as appropriate, on trade-related climate change issues (Article 6(3) TSD Chapter). Besides that, according to Article 6(2)(a) TSD Chapter, the Parties shall effectively implement the UNFCCC and the Paris Agreement. Consistent with Article 2 PA, Parties shall promote the positive contribution of trade towards low greenhouse gas emissions and climate-resilient development and to increase the ability to adapt to the adverse impacts of climate change in a manner that does not threaten food production (Article 6(2)(b) TSD Chapter). Thus, a direct link to the agricultural sector is established.

In addition to conserving biodiversity in line with the CBD (Article 7(1) CBD), the Mercosur Agreement in Principle contains provisions on trade and sustainable management of forests. Parties shall implement measures to combat illegal logging and related trade (Article (8)(2)(c) TSD Chapter) and, among others, promote, as appropriate, the inclusion of forest-based local communities (Article 8(2)(b) TSD Chapter). Article 13 TSD Chapter furthermore contains voluntary provisions on working together on trade and sustainable development. The Article provides a non-conclusive (inter alia) list that includes, e.g., trade-related aspects of the climate change regime and in particular the implementation of the Paris Agreement (Article 13(h) TSD Chapter). While most provisions on MEAs are voluntary for the Parties, making the implementation of measures to combat illegal logging mandatory is a positive aspect of the Agreement in Principle. The agricultural

sector in particular is likely to be affected by this provision as agriculture is the largest driver of deforestation in Latin America [75–77]. However, a policy analysis requested by the Committee on the Environment, Public Health and Food Safety of the European Parliament finds that traded products between the EU and Mercosur are instead highly likely to promote deforestation in the Brazilian and Argentinian forests [78]. Besides that, recent announcements of the Brazilian government seem to contradict with the country's commitments under various MEAs [79,80] such as the Paris Agreement. Yet, critique has also been voiced over deforestation (policies) in the European Union—which has significantly increased in recent years [81]. For example, in 2015, the European Court of Auditors found that the European Union's initiative to tackle illegal logging and related trade lacks clear goals and that the overall impact was diluted [82]. More recently, the Commission urged Romania to stop illegal logging by effectively implementing the EU Timber Regulation [83,84].

Like the Mercosur Agreement in Principle, CETA contains provisions on MEAs (Article 24.4 CETA). Again, Parties commit to consult and cooperate as appropriate with respect to environmental issues of mutual interest related to MEAs, which includes the exchange of information (Article 24.4(3) CETA). Yet, in contrast to the Mercosur Agreement in Principle (Articles 6 and 7), CETA does not contain specific references to the Paris Agreement and the CBD. Instead, Parties agree to cooperate on trade-related sustainable development (Article 22.3(1)) and environmental issues of common interest (Article 24.12 CETA) such as trade-related aspects of the current and future international climate change regime (Article 24.12(1)(e) CETA). In fact, this is the only time the CETA-Agreement establishes a reference to global climate change policy. Parties will consider views and input from stakeholders on their cooperation activities, again, as appropriate (Article 24.12.(3) CETA). In turn, the EUVFTA contains provisions on climate change (Article 13.6 EUVFTA) and biological diversity (Article 13.7 EUVFTA). In line, albeit weaker than the Mercosur Agreement in Principle, Parties to the EUVFTA are required to cooperate on the implementation of the Paris Agreement (Article 13.6(1) EUVFTA) and consult and share information (Article 13.6(2) EUVFTA). Other provisions of the article, such as enhancing capacities to move towards climate resilient economies, are voluntary. Article 13.7(1) EUVFTA establishes a reference to the CBD and incorporates Article 15 of the Convention ('Access to Genetic Resources') (Article 13.7(2) S.1-2 EUVFTA). The Article lists actions that Parties shall perform, such as encouraging trade in products which contribute to the sustainable use and conservation of biological diversity (Article 13.7(3)(a)–(f) EUVFTA).

Overall, the provisions on MEAs in the agreements primarily contain 'soft measures' which leaves their effectiveness up to the discretion of the Parties. Thus, rather than creating common and ambitious transnational standards, the agreements fall short on creating an adequate level of protection with regard to MEAs. The soft and vague character in combination with lacking ambitious domestic environmental protection measures [80,85,86] makes it very unlikely that they will be utilised to create ambitious unilateral protection measures. At the same time, by requiring the Parties to the Mercosur Agreement to effectively implement the Paris Agreement, this trade agreement incorporates at least one important transnational standard in terms of combating climate change. Yet again, because no enforceable awards can be issued under the dispute settlement mechanism of the TSD Chapter of the three free trade agreements (Section 3.4), ensuring Parties' compliance with these provisions will be challenging [87].

Nevertheless, the following aspect is to be pointed out. Beyond the provisions of the free trade agreements, Article 31 of the Vienna Convention on the Law of Treaties establishes that all international treaties must be interpreted in light of the whole body of international law [16], (p. 264), [88] (pp. 521–570). As such, international environmental law such as the Paris Agreement are to be taken into consideration when interpreting the provisions of free trade agreements. For this reason, the Parties to the free trade agreements are committed to the content of those environmental treaties as a transnational environmental standard, irrespective of the content of the trade agreements. Unilateral

measures can also invoke those treaties. However, it is questionable if jurisdiction will consequently refer to Article 31, as earlier experiences with WTO jurisdiction demonstrate (see e.g., Panel Report of U.S. vs. EC Biotech Products Case Articles 7.49–7.75). Besides, as is the case with the provisions on the precautionary principle (Section 3.1), taking reference to the provisions on MEAs in combination with Article XX GATT (might) enable Parties to implement unilateral measures for environmental protection and climate change.

### 3.3. Regulatory Cooperation and Technical Barriers to Trade

The present section discusses regulatory cooperation. Regulatory cooperation can contribute to the creation of transnational standards and impact ambitious policy making in the trading Parties. According to the WTO, regulatory cooperation ‘contributes to the reduction of unnecessary barriers to trade and associated negative economic impacts’ by reducing ‘unnecessary’ regulatory diversity and by limiting the costs associated with ‘necessary’ regulatory diversity among WTO Members [89]. Hence, it is argued that regulatory cooperation reduces the costs of traders [90] (pp. 185–188), [91] (p. 8). At the same time, the quantification of these effects is subject to substantial methodical challenges [92] (p. 18), [93] (p. 25). And in fact, the recent social impact assessment (SIA) to the Mercosur Agreement in Principle does not quantify the economic effects in the agricultural sector due to missing data. Instead, the SIA qualitatively reviews, e.g., the differing sanitary measures in the beef sector in the Mercosur countries [92] (p. 18). Still, the assumed profits resulting from the measures to reduce and/or eliminate the non-tariff barriers—which include technical barriers—between the EU and Mercosur to trade are expected to be significant [93] (pp. 25–27), [94] (p. 48). In fact, for the agricultural sector, the cost-saving effects are expected to be more important than the reduction of tariffs [93] (pp. 25–27). Before this background and due to the limited scope of this Article, the following section focusses on the provisions of technical barriers to trade and regulatory cooperation of the Mercosur Agreement in Principle and CETA.

The Mercosur Agreement in Principle does not contain a designated chapter on regulatory cooperation. Instead, in addition to the provisions on trade and sustainable development introduced above (Section 3.2), elements of regulatory cooperation are incorporated into different chapters including the chapter on Technical Barriers to Trade (TBT), Customs and Trade Facilitation, Sanitary and Phytosanitary Measures and Dialogue. In contrast, the CETA Agreement contains a designated Chapter on regulatory cooperation and a separate Chapter on TBT. Therefore, the following section discusses the provisions of the TBT Chapter of the Mercosur Agreement in Principle and thereafter compares them with the provisions on regulatory cooperation and TBT of the CETA Agreement.

The objective of the TBT Chapter of the Mercosur Agreement in Principle is to facilitate trade in goods by identifying, preventing and eliminating unnecessary technical barriers to trade and to enhance cooperation (Article 1 TBT Chapter). This includes all products—including agricultural products (Article 2 TBT Chapter in conjunction with Article 1.13 TBT Agreement). Relevant TBT include technical regulations, standards and conformity assessment procedures (Article 3(1) TBT Chapter). Conformity assessment procedures are the procedures used to determine that the relevant requirements in technical regulations or standards are fulfilled (Article 3(2) TBT Chapter in conjunction with Annex 1 TBT Agreement). This can include the testing of products and/or certification procedures [94] (p. 15). Above all, the Parties recognise the importance to intensify cooperation (Article 4(1) TBT Chapter) and, to this end, shall encourage trade facilitating initiatives which may include, among others, mutual or unilateral recognition of conformity assessment results (Article 4(2)(e)). Parties may, as appropriate, consult with stakeholders to gain non-governmental perspectives (Article 4(4)). A standard is a provision of a recognised body, i.e., governmental or non-governmental institution, that establishes, e.g., rules, guidelines or characteristics for products with which compliance *is not* mandatory (Article 3(2) TBT Chapter in conjunction with Annex 1 TBT Agreement). This includes for example standards developed by the International Organization for Standardization (ISO). To harmonise



standards on as wide a basis as possible (Article 6(4) TBT Chapter), the Parties to the Mercosur Agreement shall encourage the standardising bodies within their territory, among others, to foster bilateral cooperation with the standardisation bodies of the other Party (Article 6(4)(g) TBT Chapter).

At last, a technical regulation is a provision that establishes, e.g., product characteristics or production methods with which compliance *is* mandatory (Article 3(2) TBT Chapter in conjunction with Annex 1 TBT Agreement). Article 5(1)(a) requires that the Parties use relevant international standards as a basis for their technical regulations. When preparing, adopting and applying technical regulations, the Parties agree to make best use of good regulatory practices including, e.g., stakeholder consultations (Article 5(1) TBT Chapter). Market access is conditional on compliance with these regulations [94] (p. 14)—for example, statutory hygiene requirements for food products. In spite of that, an audit of the Directorate-General for Health and Food Safety of the European Commission (DG SANTE) in 2017 found that the competent authorities in Brazil in different occasions could not guarantee that meat products complied with the import requirements of the EU [95] (pp. 9, 19). Besides that, in a resolution in 2011, the European Parliament has pointed out that Mercosur producers have to comply with less stringent standards on the environment, animal welfare, food safety and phytosanitary measures than EU producers [70]. In line with the Parliament, the results of the SIA show that environmental policies in Mercosur are less stringent and that the overall environmental performance is lower than in the EU. In fact, Brazil ranks lowest in the sub-category agriculture [92] (p. 66 and Chapter 5.2.2).

The provisions on transparency of the TBT Chapter provide that, where a Party develops a ‘major’ technical regulation or conformity assessment procedure which may have a significant impact on trade, it shall allow persons of the other Party to provide input through a formal consultation process (Article 8(1)(b) TBT Chapter). While the European Commission assures that ‘cooperation will only apply to EU laws that affect trade or investment. It will not include EU Member States’ laws’ [46] (p. 15), [96]. Others caution that, as a consequence of these provisions, the governments of Mercosur would be allowed to intervene in the decision-making process of the EU—and vice versa—and thus impact upon the democratic process [94] (pp. 50, 53). Another issue is that the rules on transparency do not contain a mechanism where non-government actors can submit inputs.

Above all, differing levels of standards can trigger shifting effects and provide incentives to (re)locate the production to the location with the lower standards to enable cheaper and easier production. For example, agricultural production in Brazil and Argentina heavily relies on mineral fertilisers as well as highly hazardous pesticides that are forbidden in the EU [97]. In fact, input of agrochemicals in Brazil and Argentina is among the highest in the world [98]. Apart from that, scarce resources like mineral P based on phosphate rock, increasingly contaminated with heavy metals, next to the energy-intensive produced nitrogen fertilisers are applied, threatening natural resources like soil and water and contributing to global warming [99–101]. Nutrient cycles therefore remain widely open [54,102]. The mainly export-oriented, industrialised and monocultural agricultural production, e.g., of soy as feedstuff additionally fosters land-use changes at the expense of forests [103]. Here, the necessity to create robust transnational environmental (and social) standards becomes-again-apparent.

In contrast to the Mercosur Agreement in Principle, CETA contains a designated chapter on regulatory cooperation. The reason for this difference, according to the WTO, could be that, where a free trade agreement is signed between two Parties with strong economic ties, these Parties may aim for comprehensive convergence-potentially resulting in harmonisation. In turn, where an agreement is signed between Parties with less strong ties and limited trade flows and/or different ‘levels of development’, Parties may instead aim to achieve better understanding and confidence to facilitate trade [89] (p. 32).

Chapter 21 of the CETA Agreement establishes the provisions on regulatory cooperation. These provisions apply, among others, to the development, review and methodological aspects of regulatory measures covered by the TBT Agreement of the WTO and

the Chapter on TBT in the Agreement itself (Article 21.1 CETA). Overall, regulatory cooperation is undertaken on a voluntary basis. Yet, when refusing or withdrawing from cooperation, Parties should be prepared to explain the reasons for the decision to withdraw to the other Party (Article 21.2(6) CETA) which potentially creates political pressure. Regulatory cooperation between the EU and Canada shall aim to contribute to environmental protection (Article 21.3(a) CETA). Besides that, it aims to contribute to the improvement of competitiveness and efficiency of industry by, e.g., pursuing compatible regulatory approaches including the recognition of equivalence or the promotion of convergence (Article 21.3(d)(iii)(B) CETA). Thus, while environmental concerns have been put on to the agenda, above all, Parties commit themselves to the principle of trade and investment facilitation (enshrined in Article 21.2(4) CETA). Besides that, rather than effectively protecting the environment through improved standards and regulations, instruments cover (only) research and risk management (Article 21.3(a)(i)(ii) CETA) [104] (pp. 12–13).

As is the case in the Mercosur Agreement in Principle, the Parties to the CETA Agreement can influence the policy making process of the other Party—yet to an extent that likely exceeds the provisions of the Mercosur measures. Regulatory cooperation activities may include, among others:

- (1) consultations and exchanges of information throughout the regulatory development process—as early as possible (Article 21.4(b) CETA),
- (2) sharing proposed technical or sanitary and phytosanitary regulations with the other Party at the earliest stage possible so that comments and proposals for amendments may be taken into account (Article 21.4(d) CETA) and
- (3) exchanging information about contemplated regulatory actions, measures or amendments under consideration, at the earliest stage possible in order to examine the possibilities for greater convergence between the Parties on how to state the objectives of regulations and how to define their scope (Article 21.4(f)(i) CETA).

With regard to (3), the phrase ‘contemplated regulatory actions, measures or amendments’ indicates that an exchange of information on policy making is not limited to specific areas and instead could provide a window to the trading Parties to influence policy making in any policy area of the other Party. At the same time, given regulatory cooperation is voluntary and no specific cooperation activities are mandatory, there is large uncertainty about the actual implementation and impact of these provisions [104] (pp. 15–16). In contrast, cooperation on TBT including technical regulations, standards and conformity assessment procedures to facilitate trade is mandatory (Article 4.3 CETA). Among others, Parties may request that the other Party recognises a technical regulation as equivalent (Article 4.4(2) CETA). While an OECD study found that regulatory cooperation can indeed strengthen environmental provisions [105] (pp. 20–22), the level of environmental protection is lowered where one Party develops weaker environmental provisions, yet these would, under this provision considered to be equal.

To sum up, regulatory cooperation builds on the premise that it facilitates trade and investment by reducing barriers to trade and costs for trading companies. The scope of regulatory cooperation is more comprehensive in the CETA Agreement than in the Mercosur Agreement in Principle. Above all, the emphasis of regulatory cooperation is on trade and investment facilitation without ensuring necessary safeguard mechanisms are in place to uphold and enhance levels of environmental protection when, e.g., recognising a technical regulation as equivalent. Besides that, some mandatory, albeit weak, provisions on cooperation with regard to MEAs established in the TSD Chapter are subject to the separate dispute mechanism which hinders holding Parties effectively accountable (Section 3.2). Before this background, with regard to the differing levels of technical standards in e.g., Mercosur and the EU, harmonised provisions-oriented towards global environmental goals—may be useful under certain circumstances, e.g., where safeguard mechanisms are in place to avoid a lowering of environmental protection. Still, typical governance problems (e.g., enforcement issues) are likely to hamper the overall effectiveness of these provisions (Section 4). Thus, rather than utilising the provisions on regulatory cooperation to create ambitious en-

vironmental (and social) standards, they cannot ensure that they might in fact lead towards a reduction of the level of protection. Moreover, even though there is uncertainty about the actual effects of regulatory cooperation on the trading Parties, these provisions—depending on their application by the Parties—might impact the domestic policy and could hamper ambitious and democratic policy making. Henceforth, if adopted at all, these provisions will require ongoing public scrutiny, monitoring and transparency.

#### 3.4. *Dispute Settlement: Trade and Sustainable Development*

This section deals with provisions that can influence the enforcement of transnational environmental standards in an indirect way. Where Parties do not comply with the provisions of the Trade and Sustainable Development Chapters, the other Party can utilise a dispute settlement mechanism. In fact, the provisions on trade and sustainable development of the three free trade agreements are subject to a specific dispute settlement procedure. The general dispute mechanism of the Mercosur Agreement in Principle contains provisions where the complaining Party may temporarily suspend concessions or other obligations equivalent to the nullification or impairment of benefits accruing to the Party under this Agreement suffered as a result of the violation (Article 18(2) Title XXX Dispute Settlement). Here, we will discuss the provisions of the separate mechanism of the Mercosur Agreement in Principle and CETA and show that it is significantly weaker than the general dispute mechanism.

The Mercosur Agreement in Principle establishes that Parties shall—with regard to trade and sustainable development issues—have no recourse to the general dispute settlement mechanism under Title VIII (Dispute Settlement) (Article 15(5) TSD Chapter). Instead, Articles 15–17 TSD Chapter contain the provisions of the dispute resolution mechanism applicable to the TSD Chapter. Parties create a Sub-Committee on Trade and Sustainable Development (TSD Subcommittee) consisting of senior officials or their delegates from each Party (Article 14(1) TSD Chapter), which, among others, facilitates the dispute resolution mechanism (Articles 16 and 17 TSD Chapter). The individuals of the TSD Subcommittee shall, among others, have specialised knowledge of issues of the TSD Chapter incl. labour, environmental or trade law, be independent and shall not take any instruction from any organisation or government with regard to the dispute issue (Article 17(4) TSD Chapter). Parties to the dispute resolution shall be the EU, Mercosur or one or more of its signatory Member States (Article 15(4) TSD Chapter in accordance with Article 2 (Parties) of Chapter 1 (Objective and Scope) of Title VIII (Dispute Settlement)). If in disagreement regarding the interpretation or application of the Chapter, a Party may request consultations with the other Party (Article 16(1) TSD Chapter). In case an issue cannot be solved, in a second step, a Party may request that the TSD Subcommittee be convened which shall then aim to reach an agreement (Article 16(5) TSD Chapter). Any resolution reached shall be made publicly available (Article 16(7) TSD Chapter). However, if within 120 days of a requested consultation, no resolution has been reached, a Party may request the establishment of a Panel of Experts to examine the matter (Article 17(1) TSD Chapter). The Panel of Experts shall be composed of three members (Article 17(5) TSD Chapter) and examine the matter of dispute and issue a report with recommendations for the solution of the matter (Article 17(6) TSD Chapter). The report shall be made publicly available as well (Article 17(10) TSD Chapter). The Parties shall discuss appropriate measures to be implemented. The Party complained against is required to inform its civil society domestic advisory group and the other Party of its decisions no later than 90 days after the report has been made publicly available. At last, the TSD Subcommittee shall monitor the follow-up to the report and civil society domestic advisory groups may submit observations to the TSD Sub-Committee (Article 17(11) TSD Chapter). Hence, there is no effective enforcement of the provisions of the TSD Chapter [106].

Like the TSD Chapter of the Mercosur Agreement in Principle, Chapter 24 on Trade and Environment of the CETA Agreement is subject to its own dispute resolution mechanism (Article 24.16(1) CETA). This mechanism also comprises (1) consultations between

the Parties, (2) the establishment of a Committee on Trade and Sustainable Development and (3) the possibility to request a panel of experts to examine the matter (Articles 24.14 and 24.15 CETA). Members of the public such as NGOs can make submissions on matters of environment and trade (Chapter 24). Each Party shall give ‘due consideration’ to these submissions (Article 24.7(3) CETA). Yet, no further steps are included.

Thus, in both agreements, rather than applying ‘hard’ measures as under the general dispute mechanism, the dispute settlement mechanisms on matters of trade and sustainable development only contain ‘soft measures’ and which limit its effectiveness significantly [87] (pp. 552–553), [94] (p. 77). In particular, holding Parties accountable to the few mandatory transnational standards for environmental protection (e.g., illegal logging, effective implementation of the Paris Agreement) is difficult as no enforceable awards can be issued. These issues furthermore potentially undermine unilateral pioneering measures. This is because the asymmetric judicial review for economic and ecological interests may at least implicitly lead to the conclusion that environmental issues are less important under the trade agreements. Thus, Parties that try to push forward environmental protection on national level may feel legally uncertain about whether such national regulations are allowed or not.

It is before this background that the Committee on Agriculture and Rural Development of the European Parliament, in a draft opinion, called for binding and enforceable environmental and social standards to be included in free trade agreements and to reopen the negotiations on the Mercosur Agreement to include such measures [106]. Furthermore, in 2019, scientists and NGOs argued for making trade with Brazil conditional upon upholding environmental protection and the rights of indigenous communities [107,108]. The Commission in turn launched a Trade Policy Review in June 2020 which, among others, aims to assess how to pursue sustainability objectives in trade policy and the role of ‘due diligence schemes’ [109,110]. Thus, the necessity to (at least) renegotiate the trade agreements becomes apparent.

### 3.5. *The Right to Regulate*

This section deals with the right to regulate of the single states (and the EU, respectively). Measures on the right to regulate do not lay down common environmental standards. Instead, they might enable ecological pioneering activities of the trading Parties which could in turn restrict free trade. The general WTO law establishes a legal frame for this aspect. In principle, free trade restrictions can be justified via Article 31 of the Vienna Convention and via Article XX GATT using international environmental law such as the Paris Agreement or human rights [111–114]. Yet, details are frequently subject to disputes. The following section discusses the provisions of the Mercosur Agreement in Principle and CETA on the right to regulate which are incorporated into the Chapters on Trade and Sustainable Development.

Parties of the trade agree that the agreements shall not limit their ability to regulate on environmental matters [91] (p. 14). Instead, the Parties to the Mercosur Agreement recognise the right of each Party to determine its sustainable development policies and environmental and labour protection (Article 2(1) TSD Chapter). Parties shall strive to improve the relevant policies (Article 2(2) TSD Chapter) and simultaneously should not weaken the level of environmental and labour protection to encourage trade or investment (Article 2(3) TSD Chapter). Besides that, a Party shall not waive or derogate from its environmental and labour policies to encourage trade or investment (Article 2(4) TSD Chapter). Yet, overall, the weak language on upholding environmental protection provisions (‘shall strive’; ‘should not’) in combination with the policy trends observed in Brazil, i.e., increasing deforestation rates (spiking in 2019) and the dismantling of measures to protect the environment and the rights of indigenous people [80,85,103], puts these provisions indeed at risk over trade facilitation and investment.

In CETA, Article 24.3 and the preamble (p. 2) of the agreement establish that Parties recognise the right to regulate on environmental matters. Again, Parties shall strive to

continue to improve environmental laws and policies and shall seek to ensure high levels of environmental protection. Besides that, Article 24.5 CETA establishes provisions on upholding levels of protection in environmental law. Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in their environmental law. Again, the phrases used in this chapter are weak—especially the provision to not lower environmental measure to facilitate trade (“recognise that it is inappropriate”). In fact, these provisions do not guarantee that protection levels are not lowered [104] and we find a similar result with regard to a provision on the right to regulate in the context of the investment dispute settlement mechanism (Section 3.6). Hence, the Mercosur Agreement in Principle and CETA do not provide sufficient instruments to prevent the dismantling of environmental protection standards and regulations. Instead, they are likely to create economic constraints which put ambitious environmental policies at risk (Section 1). Even more so, it seems unlikely that they would incentivise unilateral ecological pioneering policies in the trading Parties.

### 3.6. Investor-State Dispute Settlement

Like the provisions on the right to regulate, rather than creating environmental standards, the provisions on investor-state dispute settlement mechanisms might impact pioneering policies in the trading Parties. The following section introduces the provisions for the resolution of investment disputes between investors and states of CETA (Chapter 8 Section F) and compares them with the EU-Vietnam Investment Protection Agreement (IPA) which has been negotiated alongside the EUVFTA. Both agreements, IPA and CETA, lend themselves for comparison because they contain a ‘modern and reformed investment dispute resolution mechanism’ [115] (p. 8) and incorporate references to the establishment of a multilateral investment court (Article 8.29 CETA and Article 3.41 EUVFTA) [116] (pp. 646–647). In contrast, the Mercosur Agreement in Principle does not provide measures on dispute settlement on investment protection because the negotiation mandate of the European Commission dates back to 1999 and has not been updated to the increasing competencies of the Commission under the Lisbon Treaty [49] (p. 5).

Yet, importantly, the provisions on the resolution of investment disputes between investors and states of both, CETA and IPA, are currently not in force. This is because the CETA Agreement on the one hand is only applied provisionally because the ratification in the Member States of the EU is pending (Article 30.7(3)). As a consequence, among others, the provisions of the investor-state dispute settlement mechanism are excluded from application because they do not fall under exclusive competency of the EU (Article 207 TFEU) [117]. Similarly, on the other hand, the adoption of the IPA is pending on the ratification in the Member States of the EU [118].

According to the provisions of CETA, first and foremost, a dispute shall be settled as far as possible amicably (Article 8.19(1) CETA). To this end, the agreement contains provisions on consultations (Article 8.19 CETA) and mediation (Article 8.20 CETA). Where consultations have not led to a resolution, a claim may be submitted to the tribunal (Article 8.23 CETA) which then decides on these claims (Article 8.27(1) CETA). The members of the tribunal are appointed by the CETA Joint Committee. The CETA Joint Committee comprises representatives of both Parties (Articles 26.1(1) and 8.27(1) CETA). Tribunal members shall be independent and not affiliated with any government (Article 8.30(1) CETA). They shall furthermore have juridical competencies (Article 8.27(4) CETA) and comply with a code of conduct which is yet to be drawn up (Article 8.44(2) CETA). The agreement furthermore contains provisions on transparency. The Parties to the agreement are required to make the documents by the investors publicly available (Article 8.23(8)) as well as other procedural documents (Article 8.36(2) CETA). Besides that, hearings should be open to the public (Article 8.36(5) CETA).

Like CETA, the EU-Vietnam IPA contains an ‘amicable resolution clause’ (Article 3.29 IPA) upon which the submission of a claim to the tribunal is conditional (Article 3.30(1) IPA). An investment tribunal system is created with members, albeit less than in



CETA, appointed by a committee that also comprises representatives of both Parties (Article 4.1 in conjunction with Article 3.38(2) IPA). Hence, under both agreements, tribunal members cannot be appointed by the disputing Parties but are appointed by the respective committees [116] (pp. 632–634). The EU-Vietnam IPA furthermore contains provisions on ethics and an already developed code of conduct (Article 3.40 and Annex 11 IPA) as well as rules on transparency (Article 3.46 IPA). Yet, no explicit requirement for public hearings as in CETA is established.

According to Article 8.31(1) CETA, the tribunal shall apply the agreement when generating its decision. It does not have the jurisdiction to determine the legality of a measure under the domestic law of the Parties. Yet, it may consider, as appropriate, the domestic law of a Party ‘as a matter of fact’. In turn, any meaning given to domestic law by the tribunal shall not be binding upon the courts or the authorities of that Party (Article 8.31(2) CETA). Yet, critics have pointed out, that despite these safeguard mechanisms, tribunals may nevertheless interpret the domestic (EU) law of the Parties and thus challenge the autonomy of EU law [119] (pp. 130–132). In contrast, the EU-Vietnam IPA establishes that the tribunal (and appeal tribunal) shall take into consideration, as matter of fact, any relevant domestic law of the disputing Party (Article 3.42(2) IPA) and hence contains, in contrast to CETA, a binding requirement to apply domestic law. An award issued, both in CETA and the EU-Vietnam IPA, may only be monetary damages and/or restitution of property (Article 8.39(1) CETA; Article 3.53(1) IPA) and shall be binding between the disputing Parties (Article 8.41 CETA; Article 3.55 IPA). No punitive damages shall be awarded (Article 8.39(4) CETA; Article 3.53(3) IPA) which has led the European Commission to reason that an award cannot lead to the repeal of a measure [120] (p. 6), [96] (p. 88). Nevertheless, the Parties might still be obligated to pay large sums in monetary damages.

CETA furthermore establishes an appellate tribunal which reviews awards of the tribunal (Article 8.28 CETA). For example, where the appellate tribunal identifies errors in the application or interpretation of applicable law, it may modify or reverse the award (Article 8.28(2)(a) CETA). Members of the appellate tribunal shall fulfil the same requirements as tribunal members (Article 8.28(4) CETA). The award by the appellate tribunal shall be considered as a final award of the procedure (Article 8.28(9)8d CETA). Like CETA, the EU-Vietnam IPA contains a two-tiered mechanism which includes an appellate mechanism (Article 3.54 IPA). Again, the appeal tribunal has the power to modify or reverse the awards issued by the first tribunal (Article 3.54(3) IPA).

If an investor claims to have suffered a loss or damage because the other Party has violated the provisions on non-discriminatory treatment (Section C) or investment protection (Section D), the investor may make use of the resolution mechanism of CETA (Article 8.18(1) CETA). Section C contains provisions on national treatment (Article 8.6 CETA) and most-favoured-nation treatment (Article 8.7 CETA). Section D at first lays down the right to regulate to Parties to achieve, among others, environmental protection (Article 8.9(1) CETA) and secondly provides that there is no breach of obligation where a Party regulates in a manner that negatively affects an investment or interferes with an investor’s expectations (Article 8.9(2) CETA). Section D furthermore contains provisions on direct and indirect expropriation (Article 8.12 CETA) as well as on fair and equitable treatment (Article 8.10 CETA). Article 8.12 establishes six breaches of the obligation to fair and equitable treatment including, e.g., targeted discrimination on manifestly wrongful grounds (Article 8.10(2)(d) CETA). The European Commission argues that this list is a closed list which thus avoids abusive interpretations and instead gives clear guidance to the tribunal when rendering its decision [121] (p. 11), [122] (p. 191). However, the last point in the list in conjunction with Paragraph 3 of the Article provides the Parties with a review clause for the list. If the Parties in fact adopted any further details to the fair and equitable treatment obligations (Article 8.10(2)(f) CETA), an investor could make a claim on this ground. Like CETA, the EU-Vietnam IPA limits the scope for disputes to investment protection and non-discriminatory treatment (Article 3.27(1) IPA) including, among others,

fair and equitable treatment (Article 2.5). These provisions also contain a reference to the right to regulate with regard to environmental protection (Article 2.2 IPA).

Besides that, in both agreements, where a claim is submitted to the tribunal, the tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied, but that the Party subsequently frustrated (Article 8.10(4) CETA and Article 2.5(4) IPA). While on the one hand, there is uncertainty about the phrase 'legitimate expectation' [123] (pp. 37–39), [124] (pp. 168–172), on the other hand these provisions could furthermore undermine the rule which provides that a Party does not breach an obligation where it regulates contrary to investor expectations (see above) (Article 8.9(2) CETA and Article 2.2(2) IPA). This might ultimately hamper unilateral policy initiatives which for example aim to implement climate protection measures (see Section 4) as well as the right to regulate (Section 3.5).

The EU and both, Canada and Vietnam, furthermore commit themselves to subsequently develop a permanent multilateral investment court to decide on investment disputes (Article 8.29 CETA and Article 3.41 IPA). If created, the multilateral investment court would thus replace the bilateral mechanisms such as the mechanisms introduced in CETA and IPA [125] (p. 6). With regard to its investment policy and for the multilateral investment court, the European Commission pursues five objectives. Three of these objectives concern the facilitation of investments to encourage economic growth while only one objective requires the promotion of investment that supports sustainable development and respect for environmental standard through, e.g., corporate social responsibility and responsible business practices [126,127]. Hence, above all, in the long-run, a focus is set on economic aspects while efforts to ensure environmental protection in trade remain limited.

Overall, scholars highlight that the provisions on fair and equitable treatment and expropriation have become more precise compared to previous agreements [123], [96] (p. 63), [128] (p. 43). Some argue that they are in fact less comprehensive than provisions under the constitutional law of Member States of the European Union [96] (pp. 62–63). Others argue that the provisions are still not precise enough to protect the Parties from liability [123] when, e.g., introducing measures on environmental protection. Moreover, the legal insecurity might put economic constraints onto the trading Parties and thus facilitate a race to the bottom with regard to environmental and climate protection measures or shift environmental harmful production to the country with lower standards (Section 1). This would furthermore factually (once again) hamper ecological pioneering activities of individual or several states (such as the EU). Concerns have also been voiced over whether the investor-state dispute settlement mechanism of CETA is compatible with EU primary law. Among others, Belgium has queried if the tribunal and appellate tribunal may strip the European Court of Justice off its exclusive jurisdiction over the definitive interpretation of EU law [129] (para 50). The court in turn found that these provisions are compatible with EU primary law (ibid para 245). The view of the Court has in turn been questioned by academics which point out that the investor-state dispute settlement mechanism indeed negatively affects the legal order of the EU [119] and therefore environmental pioneering actions on national (or EU) level. Hence, like the provisions on regulatory cooperation (Section 3.3), these measures, if adopted at all, demand ongoing public scrutiny, monitoring and transparency (see below).

#### 4. Discussion: Trade, Environment and Agriculture

Transnational trade, being one element of globalisation and facilitated by the free trade agreements, can only have beneficial impacts in a broad sense if accompanied by a robust political and legal framework [16] (pp. 261–262). In fact, the preamble of the Marrakesh Agreement provides that, above all, trade should be conducted with, among others, a view to raising the standard of living while optimally utilising resources in accordance with sustainable development and seeking to protect the environment (recital 1). To this end, Parties to the WTO may enter into agreements which reduce tariffs and

other barriers to trade (recital 3) (ibid) (different in e.g., [74] (p. 252)). Indeed, some studies find that the EU shows leadership in promoting climate measures in trade agreements [87] (pp. 557–560) while others highlight the pivotal role of the US in greening trade [17]. Besides, studies confirm that trade agreements can indeed diffuse environmental measures. For example, Peru has adopted new environmental provisions in response to the US-Peru trade agreement. Yet, importantly, this trade agreement differs from the agreements of this article in that trading Parties have recourse to an effective dispute settlement mechanism (Article 18.12.(6) US-Peru PTA). As such, trading Parties can (more) effectively require the other Party to comply with the environmental protection provisions. Still, despite the adoption of new domestic policies in Peru, compliance remains a significant issue [17] (pp. 103–128). The potential to ‘export’ environmental standards and human rights of free trade agreements has also been acknowledged in the context of the Mercosur Agreement [10] (p. 14), [92] (p. 68). However, the analysis of this article paints a different picture. While some positive elements have been incorporated into the three agreements, overall, the provisions do not create a robust legal framework for effective environmental protection. At times they do not even ensure that environmental protection standards are not lowered over trade facilitation. This stands in sharp contrast to the global environmental goals enshrined in the Paris Agreement and the CBD (Section 2).

The liberalisation of the agricultural sectors of the EU and the Mercosur countries exemplifies the significant implications that transnational trade is likely to have on climate and biodiversity unless accompanied by a robust legal frame. This becomes particularly clear, when shedding light onto the livestock sector because meat and livestock products, both in the EU and Mercosur, are associated with high resource consumption and are a major driver of multiple environmental issues including biodiversity loss and open nutrient cycles [130–133].

In general, the welfare gains the Mercosur agreement are expected to be small [9,10] and these gains can be unevenly distributed across sectors and regions (see for a comprehensive critique on the modelling techniques and underlying assumptions [134], [13] (pp. 55–61)). Nevertheless, it is worth noting that the import quota for beef from Mercosur to the EU increases. Currently, Mercosur countries are allowed to export approximately 67,000 t of high-quality beef under the preferential ‘Hilton Quota’ at a 20% tariff rate (Article 1(1)(a)(c) and (3) Regulation (EU) No 593/2013). Under the Mercosur Agreement, this quota is replaced by an in-quota rate of 7.5% of 99,000 t of beef—55% fresh and 45% frozen. The European Commission argues that because the 99,000 t beef with preferential treatment represent only 1.2% of the European beef consumption, the new quota will replace some of the current imports and will not lead to a production increase in Mercosur countries [135] (p. 3). The opposite, i.e., the provisions of the free trade agreement will serve as an incentive to increase production and export to Mercosur producers, has been argued by others [94] and has recently been found by the SIA in support of the agreement. Results of the SIA show that, applying the conservative scenario, bovine meat imports of the EU (9.3%) as well as output (0.2–2.1%) and export (0.7–10.1%) of bovine meat in all Mercosur countries are expected to increase (relative to the baseline scenario) [92] (pp. 30–34). The report furthermore assumes that additional land that is required for cattle production in Mercosur countries will likely come from the conversion of idle lands (ibid, p. 113). Besides that, the Mercosur Agreement in Principle contains provisions on the access to raw materials. It provides that duties that are currently imposed by Mercosur on products such as soybean products which are used for EU feedstock will be reduced or eliminated [91] (p. 3) which has led the Commission to reason that the agreement will improve the access to these raw materials [46] (p. 6). Yet, soybean exports, next to beef exports, from Latin America to Europe are a major driver of deforestation in Latin American countries [26,27] and thus contribute to the environmental issues discussed above.

Moreover, in its recent communication of the Farm to Fork Strategy, the Commission states that it will ‘examine EU rules to reduce the dependency on critical feed materials (e.g., soya grown on deforested land)’ [136] (p. 8) which clearly contradicts with the

provisions of the Agreement in Principle. Overall, the expected increase in traded meat and feedstuff will (most likely) increase the pressure on climate and biodiversity. In turn, the few mandatory environmental standards which are established in the Trade and Sustainable Development Chapter are unlikely to prevent environmental degradation due to the weak dispute settlement mechanism. Parties will not be able to hold each other accountable and enforce the provisions of the agreement. Thus, agreeing with others [17] (pp. 175–176), environmental provisions have to become subject to the general dispute settlement mechanism of trade agreements. In the meantime, the provisions of MEAs such as the Paris Agreement and the CBD could be enforced by invoking Article 31 of the Vienna Convention on the Law of Treaties. Yet, past experiences have shown that this is unlikely to happen.

The potential to export environmental standards might also seem feasible because environmental protection standards in the EU frequently appear to be more ambitious than, e.g., in the Mercosur countries and Vietnam [137]. Yet, lifting these lower standards to the EU level is far from sufficient to effectively tackle the various intertwined global environmental issues. At present, even if ongoing EU legislative procedures try to strengthen EU climate and land-use policy, they are still frequently not in line with the goals of the Paris Agreement and the CBD [62,86,138].

All of these issues feed into longstanding critique of NGOs and recently reached the political arena when e.g., the Cypriot parliament voted against CETA [139] while the German chancellor [140], the French President Emmanuel Macron [141] and the Austrian Parliament [142] voiced concerns or announced to not ratify the Mercosur Agreement. Thus, before Mercosur is adopted, the agreement requires comprehensive renegotiations aiming at the establishment of robust environmental standards in line with global environmental goals.

Moving beyond Mercosur, the provisions on regulatory cooperation and the investor-state dispute settlement mechanism (CETA and EUVFTA) in the agreements might negatively affect the policy making process (e.g., when aiming to adopt strict(er) environmental protection requirements). For example, uncertainty about liability regarding the legitimate expectation of investors (Section 3.4) might lead to a ‘regulatory chill’, i.e., political inaction in the face of (presumed) liability pressures [143], [144] (pp. 115–116). While this would contradict with the precautionary principle established in the agreements and in EU primary law, the actual effects of the provisions are hard to predict.

Besides that, CETA and the EU-Vietnam IPA, if ratified, would grant investors with the right to make use of a mechanism to settle investment disputes which is not accessible to natural persons or non-governmental institutions. Thus, these agreements would create significant inequalities [74] (p. 262), [128] (p. 52), [145] (pp. 78–79), [146] (pp. 766–767), which would continue to exist for 20 years even if CETA was terminated by one Party (Article 30.9(2) CETA).

Addressing the inequality imbedded in the investment dispute mechanisms and emphasising that businesses have a responsibility to respect human rights and that civil society actors have an important and legitimate role in seeking remedy for the adverse human rights impacts, the UN Human Rights Council decided to create an intergovernmental working group. The working group shall elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises [147]. Among others, under the envisaged instrument, victims of human rights violations shall have access to justice and adequate remedies and be guaranteed the right to submit claims to the courts of the state Parties [148] (Article 4(2)(c) and (d)). While this approach appears to be a promising step to counterbalance the one-sided rights of investors, it is noteworthy that the establishment of the working group and the efforts to develop such a mechanism have initially been met with reluctance by the EU, its Member States and many other industrialised countries [147] (p. 3), [149] (pp. 4, 10).

Instead, the European Commission, rather than being a forerunner in the intergovernmental working group, aims to introduce mandatory human rights and environmental due diligence legislation in 2021 which would apply to companies and investors [150]. It is certainly an important step to hold companies and investors—such as agricultural businesses—accountable by introducing mandatory rather than voluntary instruments. Yet, at the same time, implementing and enforcing these provisions will be challenging [151] (pp. 557–562). Besides that, the envisaged legislation does not resolve the issues of the imbalanced privileges of natural persons and civil society actors to courts. Lastly, command-and-control instruments frequently face typical governance problems including shifting and rebound effects as well as enforcement issues. It is before this background that geographically and sectoral broad quantity control instruments have been proposed to effectively limit global warming and to stop/ reverse the loss of biodiversity [60,133], i.e., a cap-and-trade system to phase out fossil fuels within maximum two decades and a cap-and-trade system for livestock products. As global measures, these instruments would directly and indirectly push global trade towards sustainability. Yet, even if for example the European Union would push for such a policy, it seems (highly) unlikely that the policy would be implemented on a global scale. Therefore, border adjustments for imports and exports will have to accompany this approach. Border adjustments would, e.g., impose a fee on imported products which have been produced under less stringent environmental protection requirements [152–154], [16] (pp. 243–246). And in fact, the implementation of carbon border adjustments has recently again [155,156] been put on the political agenda as part of the Green Deal of the European Commission [157] (p. 5). Besides that, linking global environmental standards to financial transfers to developing countries could create the global conditions (welfare state, rising education) that nation states require to profitably participate in global free trade—including the establishment of democratic institutions. At the same time, further efforts should be undertaken to develop structures/institutions which provide natural persons and civil society actors with access to a court system and the ratification of the provisions on investor-state dispute settlement should be blocked.

## 5. Conclusions

This article analysed three free trade agreements with regard to their contribution towards transitioning to sustainability. In particular, the analysis assessed the extent to which the agreements create transnational standards and the extent to which they legally and/or factually hamper or enable ecological pioneering activities of the trading Parties. To this end, we compared the provisions on the precautionary principle, multilateral environmental agreements, regulatory cooperation as well as the dispute settlement mechanisms and the measures on the right to regulate. The analysis has shown that while it is positive to see that trade and sustainable development has become part of all three agreements including direct references to global environmental goals and a few mandatory standards on, e.g., deforestation (Mercosur Agreement), overall, effective measures to ensure environmental protection as required by the goals of the Paris Agreement and the CBD are missing. Besides that, it appears that the provisions of the free trade agreements frequently favour trade facilitation over environmental protection. Hence, these agreements to a very limited extent only establish transnational standards which would ensure the positive contribution of trade to sustainability and/or enable ambitious policy making in the Parties. At the same time, because many provisions on, e.g., regulatory cooperation and trade and sustainable development are voluntary and the outline of the investor-state dispute settlement mechanisms has been reformed, their actual effects are hard to predict. Yet, all of this does not limit the urgency to implement effective (trade) policies and global standards to combat global environmental challenges such as climate change and biodiversity loss including, e.g., ongoing deforestation due to agricultural expansion in Latin America. However, because it seems unlikely that global political agreement will be reached any time soon, for the meantime, quantity control instruments in line with environmental agreements accompanied by border adjustments have been proposed for the EU. With regard to



the analysed free trade agreements, it became clear that the provisions of CETA and the EUVFTA which already entered into force require amendments to make them compatible with global environmental goals, that the Mercosur Agreement requires renegotiations and that the ratification of the provisions on investor–state dispute settlement mechanisms should be blocked.

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