
The EU Approach to Regulating Global Value Chains

1. Introduction

The European Union (EU; Union) is deeply integrated into global markets. As the world's largest trader of manufactured goods and services and ranking first in both inbound and outbound international investments, the EU is able, through its policies and legal instruments, to influence global trading patterns.¹ Moreover, the EU has a vested interest in shaping the rules that govern the international trading system to protect the integrity of its internal market and promote its values.

Over the past 30 years, the proliferation of global value chains (GVCs) has radically altered the global economy, fragmenting production processes, diversifying sources of supply and thereby transforming trading patterns across the world.² These changes have inevitably had an impact on the EU and its internal market, just as they have shaped international relations and trade policy in other jurisdictions.

This economic shift has not taken place in isolation from other socio-economic trends. Globalisation and the liberalisation of markets has been accompanied by an increase in societal awareness of the negative externalities associated with economic development, including the risks of environmental harm and the exacerbation of social inequalities. The need to address these externalities concurrently is reflected in the United Nations 2030 Agenda for the Sustainable Development and the United Nations Sustainable Development Goals (SDGs), both adopted in 2015.

The past two decades have also been characterised by the acceptance by the international community that climate change is a matter of common concern to humankind.³ As a result, the relationship between the emergence of GVCs and their impacts on 'environmental sustainability' has attracted increased policy attention within the EU, in other jurisdictions and at the multilateral level.

¹ See statistics published by the Directorate-General for Trade, European Commission.

² According to data published by the OECD, by 2020 70% of international trade was for production in GVCs. See OECD (2021), 'Trade Policy Implications of Global Value Chains: Preliminary Observations from the 2021 TIVA Database', No. 2021/01, OECD Publishing, Paris, <https://doi.org/10.1787/a0331ce4-en>. Even though recent data suggests that there has been a de-fragmentation of global markets, overall, the proportion of trade in intermediate goods and services remains significant. See Jaax, A., S. Miroudot and E van Lieshout (2023), 'Deglobalisation? The reorganisation of GVCs in a changing world', OECD Publishing, [https://one.oecd.org/officialdocument/TAD/TC/WP\(2021\)17/en](https://one.oecd.org/officialdocument/TAD/TC/WP(2021)17/en).

³ This is reflected in the Preamble to the United Nations Framework Convention on Climate Change (adopted on 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC). The UNFCCC is the umbrella treaty on climate change, which entered into force in 1994, and has near-universal membership of 198 parties.

Within the EU, the adoption of the Lisbon Treaty in 2007 provided a legal foundation for a more intensive and structured pursuit of non-economic objectives through the Union's internal and external policies.⁴ Article 21 of the Treaty on European Union (TEU) requires all relevant EU policies, including trade policy, to promote sustainable development and Article 11 of the Treaty on the Functioning of the European Union (TFEU) mainstreams the Union's environmental objectives.⁵

The launch of the 'Green Deal' in 2019 together with associated policy initiatives such as the new Circular Economy Action Plan, exemplify a shift in political focus towards embedding core 'Union values' across a broad spectrum of regulatory domains, taking into account the internal and external dimension of those policy objectives.⁶ Similarly, the European Commission's 2021 Trade Policy Review, reiterated that EU trade policy should 'use all the tools at its disposal to support social fairness and environmental sustainability'.⁷

Building on these political orientations, since 2019 the EU has adopted a growing body of domestic regulatory instruments designed to further integrate social and environmental objectives along value chains connected to its internal market. Those instruments do so by addressing the behaviours of different market participants, from manufacturers designing products, to operators placing goods on or exporting goods from the internal market, to end consumers. All of these economic actors are incentivised to adopt more sustainable practices and/or consumption patterns. Some rules address specific products such as batteries, others a specific concern such as deforestation, and others seek to ensure that the efficacy of internal regulatory requirements is not undermined by market forces and regulatory 'leakage', for instance the Carbon Border Adjustment Mechanism (CBAM).

Whilst each of the regulatory frameworks differ in some respects, they share important commonalities. In particular, they all aim to promote non-economic values whether environmental (emissions-reductions and the prevention of biodiversity loss), or social (respect for human rights and the prevention of forced labour) and they use similar regulatory tools such as 'due diligence' frameworks and reporting requirements to secure that end. Given the fragmented structure of the world economy, these regulations have, inevitably and by design, implications for participants along the GVCs connected to the internal market, irrespective of where those participants are located.

Viewed holistically, this growing body of legislation can be conceptualised as a distinct field of regulation at the EU level: 'EU GVC regulation'.

This chapter examines the foundations of EU GVC regulation including its conceptual origins and purpose. Section 2 two examines the definition of GVCs and section 3 addresses their basic attributes. Section 4 considers the relationship between GVCs, international trade and sustainable development. Since regulating GVCs presents conceptual challenges

⁴Consolidated Version of the Treaty on European Union [2008] OJ C115/13 which entered into force on 1 December 2009 (TEU).

⁵Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/13 (TFEU).

⁶Commission, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'The European Green Deal', COM/2019/640 final; and Commission, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A new Circular Economy Action Plan for a cleaner and more competitive Europe', COM/2020/98 final.

⁷Commission, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Trade Policy Review – An Open, Sustainable and Assertive Trade Policy', COM/2021/66 final.

their inherent characteristics, these are explained in section 5. Sections 6 and 7 examine the drivers for, as well as the origins and objectives, of the EU's regulatory efforts. Section 8 examines the core elements of the EU's regulatory approach from a comparative perspective. Finally, section 9 contextualises and introduces the overarching concerns that the regulatory approach has elicited.

2. Defining 'Global Value Chains'

This section explains the conceptual origins of a 'global value chain' (GVC) and sets out the structure of a GVC relied on throughout this book.⁸

The globalisation of the world economy prompted businesses to specialise and outsource production processes. This has generated an increase in the trade in 'components', 'intermediate goods' or 'value-added', all of which can be described more holistically as 'inputs'. In response to a shift in trading patterns, when describing and analysing trade flows, economists and business writers increasingly refer to 'value chains' rather than 'supply chains'.

The concept of a 'value chain' is related to that of a 'supply chain', but is broader in scope. Traditional definitions of a 'supply chain' focus on the sequence of suppliers along which the relevant finished product or raw material moves to reach the end customer, a 'value chain' encompasses the different processes which occur throughout the whole life-cycle of a product. This includes the design, marketing, production and disposal phase. These processes may itself be broken down into different constituent 'inputs', each of which may be delivered by different participants. Whether it is a physical input or a service, each 'input' adds 'value' to the product as it moves along the chain and before it reaches the consumer as a finished product.

Businesses optimise their production processes by unbundling and localising these constituent 'inputs' across different sites and with different actors, based on factors such as the availability of skills, technology and raw materials at a competitive cost.⁹ This optimisation, which is often driven by comparative advantage, has (at least) two implications. First, production processes are increasingly fragmented. Second, the inputs required to create a product are no longer concentrated in a single location or jurisdiction. Hence, the concept of a 'global value chain', implies a cross-border provision of services, raw materials, components, or parts.¹⁰

The use of the term 'GVC' in this book refers to the totality of the inputs that 'add value' which are involved in the life-cycle of a product or service, where at least two such

⁸ The 'value chain' concept was described by Michael Porter as a series of activities undertaken by a company to generate and add value to products. See M Porter, *Competitive Advantage: Creating and Sustaining Superior Advantage* (Free Press 1980).

⁹ For an analysis of the drivers of participation in GVCs, see World Bank. 2020. *World Development Report 2020: Trading for Development in the Age of Global Value Chains*. Washington, DC: World Bank. ISBN: 978-1-4648-1457-0. License: Creative Commons Attribution CC BY 3.0 IGO.

¹⁰ For a broad definition, see P Antràs, 'Conceptual Aspects of Global Value Chains' Background Paper (World Development Report 2020): 'A global value chain or GVC consists of a series of stages involved in producing a product or service that is sold to consumers, with each stage adding value, and with at least two stages being located in different countries. A firm participates in a GVC if it produces at least one stage in a GVC.'

inputs occur in two different jurisdictions. Since the EU is only regulating along GVCs to the extent that they are connected to the internal market, references to GVC Regulation and to GVC regulation should also be understood on that basis.

3. Basic Attributes of Global Value Chains

Any analysis of the EU's regulatory approach needs to take into account the basic attributes of GVCs which have informed the design of the EU's legislation.

The first of these attributes is that they are an economic construct. In particular, the structures and identity of the participants in any given GVC are largely driven by economic considerations, most notably the competitive advantage and degree of 'value added' that is offered or can be offered at each production stage. For this reason, GVCs do not lend themselves to exhaustive characterisation precisely because each GVC is unique.

Studies have identified multiple drivers for GVC participation (and hence their structures). Cost is one obvious driver with cheap labour and workforce availability featuring prominently among the factors that drive GVC participation. Other drivers may be linked to the nature of the product, for instance higher technological know-how and a better educated workforce are associated with trade in more complex products. They may also be linked to the availability of essential 'inputs', for instance access to raw materials or energy sources.

The identity and distribution of GVC participants has also changed over time. Between 1990 and 2015, GVC participation worldwide grew by about seven percentage points. This has been attributed to at least two factors. First, production processes in some countries and sectors have become more fragmented – an intensification effect. Second, certain countries and sectors that were already GVC intensive have boosted their share of world trade – a concentration effect.¹¹

A second and closely related attribute of GVCs is that they are dynamic, both in terms of their geographic distribution and in terms of their composition. They are prone to modulation in response to changes that impact their efficacy, one of which can be increased regulatory intervention impacting one or more of the 'inputs' to the chain. Studies have shown, for instance that factors such as the institutional quality of contracting and property rights, labour market regulations and the development of and access to financial markets have industry-specific effects on productivity and lead to comparative advantages which in turn influence GVC participation.¹² Multinational enterprises (MNEs) increasingly base their decisions about where to do business on the ability to ensure that they can meet regulatory obligations. For example, studies have shown that sustainability criteria are playing an increasing role for MNEs in the choice of their suppliers.¹³

¹¹ World Bank. 2020. *World Development Report 2020: Trading for Development in the Age of Global Value Chains*. Washington, DC: World Bank. doi:10.1596/978-1-4648-1457-0. License: Creative Commons Attribution CC BY 3.0 IGO.

¹² N Nunn and D Trefler 'Domestic institutions as a source of comparative advantage' in G Gopinath, E Helpman and K Rogoff (eds), *Handbook of International Economics*, Vol 4 (Elsevier 2014).

¹³ Tagliani, D. and D. Winkler (2014), *Making global value chains work for development*. Economic Premise, No. 143, The World Bank, Washington, DC, <http://documents.worldbank.org/curated/en/2014/05/19517206/making-globalvalue-chains-workdevelopment>; OECD (2014), *Development Co-operation Report 2014: Mobilising*

Third, many GVCs have vulnerabilities. This is a factor that increasingly weighs in the balance of where large companies, particularly MNEs, choose to do business. Whilst GVCs should be understood to be idiosyncratic, they nonetheless share dimensions which can provide a framework for comparing their level of vulnerability.

A first such dimension is their structure. Unsurprisingly, this is not uniform. Some GVCs are hierarchical, some are concentrated on a limited number of suppliers whilst others rely on diversified supplier networks. These different structures have been described as 'spiders', where multiple points converge at a central assembly point, and 'snakes', where the respective stages are sequential.¹⁴ In general terms, the number of inputs and actors increases the overall complexity of any given GVC, irrespective of its overall structure. Conversely, this does not automatically mean that the GVC is more vulnerable.

A second dimension of GVCs is their geographic spread. The scope of that geographic spread increases the exposure of the GVC to cross-jurisdictional effects, including the adverse impacts of trade barriers. Regulatory differences raise the cost for foreign suppliers wishing to export to other (differently) regulated markets.¹⁵ Those differences may result from diverse public policy objectives or be due to regulators from different countries pursuing the same public policy objectives with different regulatory approaches.

A third dimension is dependency. Dependencies on specific sources of supply influence the degree of vulnerability of a GVC to 'choke points' which may occur upstream or downstream. For instance in some industries, including the mining, ICT and automotive industries, a high concentration of suppliers and/or buyers has been identified as increasing the exposure to global value chain risk.¹⁶ Dependencies also increase susceptibility to 'shocks'. The vulnerability of GVCs has been highlighted in recent years by several so-called 'shocks', notably the Covid-19 pandemic and the impact of armed conflicts.¹⁷ The idea that climate change can impact the resilience of GVCs has also gained traction in the policy sphere.¹⁸

4. Global Value Chains, International Trade and Sustainable Development

The EU's policy choice to integrate non-economic objectives along value chains connected to its internal market is to be understood as part of broader discussions concerning the dominance of value chains, the impacts this has had on international trade and the linkage to sustainable development. This section sets out an overview of that wider context,

Resources for Sustainable Development, OECD Publishing, Paris, <http://dx.doi.org/10.1787/dcr-2014-en>; Bonini S. and Swartz S. (2014) Profits with purpose. How organizing for sustainability can benefit the bottom line (McKinsey & Company, McKinsey on Sustainability & Resource Productivity July 2014).

¹⁴ R. Baldwin and A. Venables, 'Spiders and Snakes: Offshoring and Agglomeration in the Global Economy' (2013) 90 *Journal of International Economics* 245.

¹⁵ OECD, OECD Regulatory Policy Outlook 2015, OECD Publishing, 2015.

¹⁶ C. Schwellnus et al., 'Global value chain dependencies under the magnifying glass' (2023) OECD Science, Technology and Industry Policy Papers, No. 142, OECD Publishing, Paris, <https://doi.org/10.1787/b2489065-en>.

¹⁷ S. Cigna, V. Gunnella and L. Quaglietti, 'Global Value Chains: Measurement, Trends and Drivers' (2022) ECB Occasional Paper No 2022/289, available at SSRN: <https://ssrn.com/abstract=4007756> or <http://dx.doi.org/10.2139/ssrn.4007756>.

¹⁸ See, C. Bellmann, 'Trade and climate change in the World Trade Organization', (2022) *Forum on Trade, Environment & the SDGs* (TESS).

including the positive and negative facets of the relationship between GVCs and sustainable development.

4.1. Trade and Sustainable Development

Today, the link between global trade and sustainable development is taken as a given.¹⁹

Economists have long made the case that the capacity of trade to promote income growth, can in turn drive economic and social development. By 1964, at the establishment of the United Nations Conference on Trade and Development (UNCTAD), the international community was willing to acknowledge that '[e]conomic and social progress throughout the world depends in large measure on a steady expansion in international trade.'²⁰ Therefore, whilst the term 'sustainable development' was first coined in the 1980s, the foundations for linking economic development to broader social progress were already laid.²¹

The Preamble to the Marrakesh Agreement establishing the World Trade Organization (WTO) in 1995 explicitly refers to the parties recognition that

relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development.²²

Viewed in context, the adoption of the United Nations 2030 Agenda for Sustainable Development and the United Nations Sustainable Development Goals (SDGs) in 2015 represents, therefore, the outcome of decades of efforts at the multilateral level to ensure that economic growth is addressed in parallel with other objectives such as social inclusion and environmental protection.

Both the 2030 Agenda and the SDGs are underpinned by the notion that countries should simultaneously seek to achieve sustainable development in three dimensions: economic, social and environmental. By acknowledging the interconnections between these domains, countries are encouraged to develop policies which address global issues from a multidisciplinary perspective rather than in silos.

Since sustainable development was embraced as a concept, a number of international organisations have actively engaged in identifying indicators for measuring progress and the implementation of the SDGs.²³

¹⁹ There is no specific SDG for 'trade'. However, there is broad consensus that trade as a policy plays a significant role in the implementation of many of the SDGs including by contributing to poverty reduction. For an overview, see 'Trading into Sustainable Development: Trade, Market Access, and the Sustainable Development Goals, in the SDGs and the Addis Ababa Action Agenda (AAAA), UNCTAD/DITC/TAB/2015/3 UNITED NATIONS PUBLICATION ISSN 1817-1214.

²⁰ UNCTAD, UNCTAD I Final Act and Report. Proceeding of the United Nations Conference on Trade Policymaking and the Sustainable Development Goals (23 March-16 June 1964).

²¹ World Commission on Environment and Development, Brundtland Report (United Nations 1987).

²² Marrakesh Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1867, 1868 and 1869 UNTS.

²³ This includes the United Nations Environmental Programme, the World Trade Organization, the Organisation for Economic Co-operation and Development and the World Bank.

4.2. GVCs and Sustainable Development

The emergence of GVCs as an economic phenomenon has created new opportunities for participation in the global economy. Low-income and middle-income countries have been able to benefit from these opportunities, as have a broader spectrum of enterprises including SMEs and small, local producers.²⁴ In particular, since the barriers to participating in a GVC are far lower than the investment required to build a whole industry from scratch, enterprises in developing countries can, through participation in a GVC, contribute to boosting economic growth, even in the absence of broader domestic industry for the end product. According to the World Bank, this possibility for 'hyper-specialisation' has increased productivity and income growth in developing countries to a greater extent than could have been achieved through an equivalent increase in trade in finished goods.²⁵ As a result, GVCs have had effects on the patterns of international trade, boosting trade flows from regions and countries which were previously largely excluded from global markets. Indeed, the expansion of GVCs has since been described as 'revolutionary' for many poorer countries.²⁶

Despite these benefits, the impacts of GVCs have not been exclusively positive from a broader sustainability perspective.

One reason for this is that the nature of the competitive advantages which have driven the inclusion of market participants located in developing countries in GVCs are in tension with the achievement of other dimensions of the SDGs. This is exemplified by the relationship between the availability of workers and the achievement of social rights.

Multiple studies have identified that the availability of cheap, low-skilled labour is an important driver of GVC participation.²⁷ Within the EU, Eurostat data indicates a primary reason why EU-based enterprise, engaged in international outsourcing in the period from 2015 to 2020, was to cut labour (66%) and other costs (54%).²⁸ In some cases, a comparative advantage that is built on the availability of cheap labour has allowed individual countries to become significant players in a specific industry. For example, the availability of low-skilled labour is a key factor which explains Vietnam's significance in GVCs linked to the mobile phone industry.²⁹

However, the demand for cheap, low-skilled labour is also a factor known to exacerbate the exploitation of workers and to incentivise poor labour standards. In certain jurisdictions which rely on this comparative advantage as a basis to secure participation in GVCs, the pressure on enterprises to keep their 'input' competitively attractive can, particularly in the absence of rigorous governance structures, adversely impact wider societal progression as regards reinforcing social and human rights and impede social upgrading.

²⁴ The WTO measures GVC participation by the use of foreign inputs in exports (referred to as backward participation in GVCs) and the use of domestic inputs in third-country exports (referred to as forward participation). Both can stimulate economic growth.

²⁵ See, World Bank, 2020. World Development Report 2020: Trading for Development in the Age of Global Value Chains. Washington, DC: World Bank. doi:10.1596/978-1-4648-1457-0. License: Creative Commons Attribution CC BY 3.0 IGO.

²⁶ See, World Bank, World Development Report 2020.

²⁷ See, for instance, 'The Participation of Developing Countries in Global Value Chains: Implications for Trade and Trade-Related Policies' (OECD Trade Policy Paper No. 179, 2015).

²⁸ See N Sunjka and G Papadopoulos, 'International sourcing, business functions and global value chains' based on the Eurostat Global Value Chain survey (data extracted in 2022), available at: www.ec.europa.eu/eurostat.

²⁹ World Bank, World Development Report 2020.

The availability of natural resources is another driver of GVC participation where similar tensions manifest. In recent decades, climate change linked to anthropogenic greenhouse gas emissions has been recognised as an issue of global concern demanding a global response.³⁰ Climate change mitigation policies, including those adopted under the auspices of the 2015 Paris Agreement, have spillover effects. The demand for technologies and raw materials necessary for a clean energy transition has increased exponentially. Certain minerals, notably rare earths, which are necessary for 'clean' technologies are highly concentrated in a limited number of countries including China, the Democratic Republic of the Congo (DRC), South Africa, Australia, Chile, Indonesia and Argentina.³¹

The limited availability of these resources presents economic opportunities for the countries where they are situated, particularly in Africa where there is currently limited connectivity and potential to integrate further in GVCs.³² However, the extraction of minerals is also associated with significant adverse environmental effects. Therefore, given sustainability risks are known to be high, particularly at extraction sites, mineral governance is of critical importance.³³

Moreover, according to the International Resource Panel (2019), the extraction and processing of materials, fuels and food account for about half of the total global greenhouse gases (excluding climate impacts associated with land use) and more than 90 per cent of biodiversity loss.³⁴ Whilst many studies have focused on carbon emissions caused by manufacturing processes, other impacts include land-use change driven by consumer demand for certain commodities. These environmental 'downsides' have attracted increased attention, including in the EU, as environmental protection and climate change mitigation has moved up the policy agenda, both domestically and at the international level.

Addressing these tensions is not straightforward. Neither the benefits of GVC participation nor the potential adverse impacts are distributed evenly within and across countries.³⁵ Nor is it obvious how to fully evaluate the risks and address them. Taking the example of environmental impacts of GVC participation, these can be measured both in terms of aggregate impacts and as the place-specific effects of the concentration of GVC activities in a country or region. This means it is possible for a GVC to have a low overall environmental impact, but for one of the 'inputs' to cause significant localised adverse environmental effects.

In sum, there is broad consensus that GVC participation is a net positive in terms of economic benefits for many low-income and middle-income economies, but the broader 'sustainability' implications of GVCs are considerably more nuanced. Striking that balance has informed the EU's efforts to regulate GVCs.

³⁰ See the Preamble to the UNFCCC.

³¹ A further increase in demand for certain of these minerals was predicted by the International Energy Agency in 2021. See International Energy Agency, 'The Role of Critical Minerals in Clean Energy Transitions, flagship report' (Paris: IEA, 2021), <https://www.iea.org/reports/the-role-of-critical-minerals-in-clean-energy-transitions>.

³² M Müller, 'The 'new geopolitics' of mineral supply chains: A window of opportunity for African countries' (2023) 30 *South African Journal of International Affairs* 177, DOI: 10.1080/10220461.2023.2226108.

³³ See K Sturman, J Loginova, S Worden, J Matanzima and A Arratia-Solar, 'Mission critical: strengthening governance of mineral value chains for the energy transition' (2022) Extractive Industries Transparency Initiative (EITI).

³⁴ A Beckers, M Kühliert, C Liedtke and HW Micklitz, 'A Legal Framework for Global Value Chains' (Wuppertal Institute 2021).

³⁵ World Bank. 2020. World Development Report 2020.

5. Conceptual Challenges for the Governance and Regulation of Global Value Chains

Despite their economic significance, GVCs have largely eluded legal conceptualisation. GVCs are, in essence, a cross-border economic process or a network. They have been described in legal terms as representing a mixture of structurally separate entities that are constituted through equity ownership (eg, corporate groups) or contractual relationships (supply chains).³⁶ This description is not, however, exhaustive. Whilst there is necessarily a degree of coordination between different 'inputs' along the chain to ensure the output of the 'finished good', the extent to which there is a 'lead' entity with a governance role over the GVC as a whole is a variable parameter.

It is widely recognised that GVCs can give rise to negative socio and environmental externalities. How these issues can best be addressed through law, and under which normative framework, is still a topic of debate. As they may imply interactions between multiple private entities and sometimes states, in legal terms GVCs bridge the realms of private and international law.³⁷ However, whilst both private law concepts and norms of international law can inform efforts to regulate GVCs, neither provides a complete normative framework to address their complexities.

The challenges of addressing the negative externalities of GVCs through law has been identified as both a source of the adverse social and environmental impacts in GVCs and, paradoxically, one reason for the efficiency gains they represent. This tension arises because the existence or absence of regulatory frameworks can itself be a driver of GVC participation. The more that companies are confronted with legal liabilities or regulatory obligations linked to sustainability concerns, the greater the role of regulatory arbitrage in determining where 'inputs' are sourced.

Due to their typology, complexity and multinational character, efforts to apply transnational rules to GVCs have, until recently, been largely directed towards promoting the use of voluntary soft law standards.³⁸ Hence, 'regulation' has primarily been channelled through private initiatives linked to corporate governance rather than through 'public' or 'governmental' rule-setting.

Against this backdrop, the EU's efforts to regulate along value chains connected to its internal market should be understood to represent a fundamental change of legal approach, both in terms of upgrading from 'soft' law to 'hard' law norms, and in terms of the depth and breadth of the control that is being exercised by a 'public' regulator.

This section examines some of the difficulties that arise in relation to the regulation of GVCs due to their basic attributes.³⁹

³⁶ J Salminen and M Rajavuori, 'Private International Law, Global Value Chains and the Externalities of Transnational Production: Towards Alignment?' (2021) 12 *Transnational Legal Theory* 230, DOI: 10.1080/20414005.2021.1970470.

³⁷ See also, IGLP Law and Global Production Working Group, 'The Role of Law in Global Value Chains: A Research Manifesto' (2016) 4 *London Review of International Law* 79, <https://doi.org/10.1093/lril/rw003>.

³⁸ See also, ch 10.

³⁹ These basic attributes have been described in section 3.

5.1. Issues of Jurisdiction

GVCs consist, by definition, of participants situated in different locations. Most definitions of a GVC (including the one used in this book) refer to inputs being sourced from at least two 'jurisdictions'.⁴⁰

The term 'jurisdiction' has different functions in law. In this context, it should be understood to refer to the reach of a state's law and hence the permissive scope of its exercise of regulatory authority. In public international law, 'jurisdiction' in this sense has traditionally had a strong link with the notion of sovereignty and hence when delimiting competences between sovereign actors, the approach has been primarily to focus on concepts of 'territoriality'.⁴¹

Since GVC participants are not in the same location, they will, almost inevitably, be subject to different regulatory norms determined by the rules that apply to them in the jurisdiction in which they are situated.⁴² As a result, a first conceptual question is how to define the jurisdictional reach of a regulatory framework that aims to address the negative externalities of a value chain that has, by definition, a transnational character.

One solution is to set requirements, particularly on goods, in the form of market access conditions. In other words, to avoid regulating 'extraterritorially', norms are only applicable to the extent that a market participant seeks to access the market in the regulating jurisdiction.

This approach has been applied by the EU in its GVC Regulations. For example, both the Regulation on Deforestation Free Products (EUDR)⁴³ and the Forced Labour Regulation (FLR)⁴⁴ condition the export of goods from the Union or the placing of goods on the internal market on their meeting requirements linked to the non-economic value pursued. In both cases, this has been expressed as a total prohibition. A similar approach has also been applied by other states, when addressing the objective of securing the eradication of forced labour.⁴⁵

Questions over jurisdiction also arise when enforcing regulatory norms. 'Jurisdiction' in this context should be understood to refer to 'adjudicatory' jurisdiction, ie, the circumstances in which a court or administration can submit natural or legal persons to its processes. The reference point for 'adjudicatory jurisdiction' varies, but in Europe, in civil and commercial matters, is mainly linked to the place of domicile or residence of the defendant. 'Adjudicatory jurisdiction' is closely related to identifying responsibility for legal harm.

⁴⁰ See section 3. In practice, many GVCs involve participants situated in far more than two different jurisdictions.

⁴¹ FA Mann, 'The Doctrine of Jurisdiction in International Law' (1964) 111 *Recueil des cours de l'Académie de droit international de La Haye* 15.

⁴² It is possible to have a 'value chain' that is composed of 'inputs' sourced in one jurisdiction. The regulatory challenges described below would not manifest in that context since a single regulatory authority could set norms on all participants within such a 'value chain'.

⁴³ Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 [2023] OJ L150/206 (EUDR).

⁴⁴ Regulation (EU) 2024/3015 of the European Parliament and of the Council of 27 November 2024 on prohibiting products made with forced labour on the Union market and amending Directive (EU) 2019/1937 [2024] OJ L, 2024/3015 (FLR).

⁴⁵ In the US, rules addressing forced labour are set down in section 307 of the Tariff Act of 1930 (19 USC §1307), the Uyghur Forced Labor Prevention Act (UFLPA) and Countering America's Adversaries Through Sanctions Act (CAATSA). These rules are enforced by the US Customs and Border patrol and are designed to prevent merchandise produced in whole or in part in a foreign country using forced labour from being imported into the US.

Regulatory frameworks without adequate means of enforcement lack efficacy. But within GVCs, determining causation and attributing of responsibility for harm are not straightforward. This is because GVCs consist of a collective of entities. Moreover, many GVCs are defined by a high level of fragmentation. Whilst some coordination between the links in the chain is necessary to ensure that each input 'adds value' to the 'end product', the legal nature of that coordination is highly variable and certainly not systematically contractual. Attributing legal responsibility for adverse externalities occurring along the chain can, therefore, be complex. When harm manifests, it could either be argued that such 'harm' is attributable exclusively to the individual actor in the chain that caused it, or that it is attributable to the GVC as a whole.

To avoid the legal and practical difficulties associated with attributing responsibility, one potential solution is to identify a 'lead firm' and hold that firm accountable for the actions of other entities within their control or with whom they have a certain type of relationship.⁴⁶ MNEs are often cited as good candidates for this task. However, even though MNEs are recognised as playing a significant role in GVCs, identifying a 'lead firm' in a GVC is not always self-evident. Moreover, it is arguable that the problems of global production cannot be reduced to the responsibility (and liability) of individual 'lead companies' or MNEs.

In practice, where rules are not respected and harm does manifest, this may not occur in the same place as the destination market.⁴⁷ Individuals with grievances may encounter significant difficulties in obtaining judicial redress. The degree of judicial enforcement may also impact the perceived comparative advantage that GVC participants can offer. For example, non-compliant entities may seek to evade liability by shifting the location of their 'inputs' to jurisdictions with less robust liability regimes.

Within the EU, certain Member States have shown themselves to be more open than others to so-called 'transnational claims' including where those claims are related to 'sustainability' issues. For instance, the Netherlands,⁴⁸ France⁴⁹ and Germany⁵⁰ have legal regimes which recognise responsibility for enterprises for the actions of certain suppliers, including where those actions occur in another country.

This too has potential consequences in terms of the organisation of GVCs. One concern that has been expressed is that this openness can give rise to forum shopping by prospective claimants who may simply choose to sue an entity in the most claim-friendly jurisdiction.

⁴⁶ Salminen and Rajavuori (n 36).

⁴⁷ As has been cogently argued: 'If ever it was possible to allocate jurisdiction on the basis of the ordinary concept of national sovereignty alone, the globalisation of national economies and developments such as the internet have led to a situation where this is no longer possible'. See A Johnston and E Powles, 'The Kings of the World and their Duke's Dilemma: Globalisation, Jurisdiction and the Rules of Law' in PJ Slot and MK Bulterman, *Globalisation and Jurisdiction* (Kluwer Law International 2004).

⁴⁸ In the Netherlands, the Child Labor Due Diligence Act imposes obligations in relation to contractors, subcontractors or other legal entities in the value chain, including state entities, which are in any way linked to the undertaking's activities. See Wet van 24 oktober 2019 houdende de invoering van een zorgplicht ter voorkoming van de levering van goederen en diensten die met behulp van kinderarbeid tot stand zijn gekomen (Wet zorgplicht kinderarbeid), Stb.2019, 401.

⁴⁹ French law imposes obligations in relation to subsidiaries, subcontractors and suppliers with whom companies have an established relationship. See Loi no 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (1), NOR: ECFX1509096L.

⁵⁰ The German Supply Chain Law imposes liability for the actions of direct suppliers. See Lieferkettensorgfaltspflichtengesetz vom 16. Juli 2021 (BGBl. I S. 2959).

The EU has sought, through its GVC Regulations to address some these challenges. In particular, the Corporate Sustainability Due Diligence Directive (CS3D) establishes a basis for the civil liability of the large companies that are in scope.⁵¹

5.2. Norm-Setting

Most regulatory frameworks set norms which are defined as the benchmark against which compliance falls to be assessed. Whilst many jurisdictions promote non-economic values such as environmental protection and ensuring the respect for core labour standards in their laws, there is less consensus over what, in normative terms, such protection should require from states and other economic operators in a GVC. In short, there is no shared value-scale.⁵² This raises the question of how a common standard for all GVC participants can be defined as well as by whom.

One solution, which has been advocated by certain third countries, is to resolve this at the multilateral level as opposed to encouraging a proliferation in autonomous instruments such as those introduced by the EU.

Fora such as the United Nations (UN) and the Organisation for Economic Co-operation and Development (OECD) were early movers in the field of GVC governance and have accumulated expertise, primarily through developing strategies around corporate responsibility and private sector governance. Equally, the WTO represents the vast majority of states active in the multilateral trading system and is arguably well placed to address issues of global concern with transnational implications, particularly where they intersect with international trade.

However, a common critique of international or transnational regulatory frameworks developed at the multilateral level is that the resulting norms reflect the lowest common denominator and 'lack teeth'. For those jurisdictions with progressively higher levels of social and environmental ambition, it is increasingly unacceptable from a policy perspective to settle for a lower standard than that which it aspires to domestically, even where that standard has been determined by common accord.

The concept that states should be free to determine their respective regulatory ambition has gained traction under international law. For example, the commitments under the Paris Agreement on Climate Change are structured precisely such that each party may develop a nationally determined contribution (NDC) that reflects its highest level of ambition. Whilst those NDCs must be progressive, the terms of the Paris Agreement do not set an upper limit on the regulatory ambition that a given party may seek to achieve in reaching the collective temperature goals.⁵³

There are other difficulties in relying on multilateral norms. Fora such as the WTO have struggled with norm creation, blocked by consensus-based decision-making processes and

⁵¹ See further, ch 3 and ch 10. In February 2025, the Commission adopted a proposal for an amending Directive which, if adopted, would substantially modify this civil liability mechanism.

⁵² See A Gonzalez and Y Bourgeois, *The Trade Handbook: Making Trade Work for Prosperity, People and Planet* (FEPS 2023).

⁵³ Paris Agreement on Climate Change (adopted 12 December 2015, entered into force 4 December 2016) 3156 UNTS 79, art 4(2) which requires parties to 'prepare, communicate and maintain successive nationally determined contributions that it intends to achieve'.

highly polarised positions within the membership. In the WTO, for instance, this has been exemplified by the inability to reach agreements on agricultural subsidies despite years of negotiations.⁵⁴ Some WTO Members have questioned whether it is the role of the WTO to seek to do more than regulate international trade. Moreover, the two-tier dispute settlement system remains incapacitated due to an inability to reach an agreement on reform. More generally, the duration of multilateral negotiations and absence of sufficiently concrete outcomes also explain the emergence of norms at a regional or national level, particularly in a context where addressing fundamental issues such as climate change through environmental regulation is perceived to be urgent.

5.3. Regulatory Burden Sharing

Regulatory requirements almost always cause economic operators to incur compliance costs. Compliance costs are not distributed evenly along a GVC. First, operators established in jurisdictions with a high level of regulation have higher operating costs than those operators in jurisdictions where there are lower levels of regulation. On the other hand, when a given destination market sets new and more stringent regulatory standards, the burden of bringing activities into regulatory compliance is greater for those entities active in jurisdictions where the existing standards are lower than those applicable in that end market.

Statistics suggest that the impacts of this regulatory gap and the resulting compliance burden generally affects economic operators located in lower-income and middle-income countries more than those active in higher-income countries.

This is not the only factor that leads to difference in the compliance burden. Some stages of a production process may be inherently more polluting or simply more prone to give rise to risks of other forms of social harm. This means that GVC participants active at a certain point in the chain may bear a comparatively higher compliance burden without necessarily having greater financial resources available to allocate towards meeting the requirements. Regulatory norms tend to focus on the end product rather than distribution of the costs of compliance. How this is managed within a given GVC may, therefore, depend on the structure of that chain.⁵⁵

6. The Drivers and Origins of EU GVC Regulation

Efforts to govern GVCs have to date had two core features. First, they have been led by multi-lateral fora such as the UN and the OECD. Second, they have relied on soft law initiatives to which enterprises are encouraged to adhere as opposed to binding 'hard law' frameworks.

⁵⁴ See J Norris and F Marisi, 'The European Union and the Reform of the World Trade Organization' in C Kaddous and F Hoffmeister (eds), *EU Diplomacy in Multilateral Fora* (Hart Publishing 2025).

⁵⁵ Certain of the EU's regulatory measures try to incentivise larger market participants to provide structured support to SMEs and other GVC participants to facilitate the mitigation of environmental or human rights risks. See, for instance, Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 [2024] OJ L, 2024/1760 (CS3D).

The focus has therefore, been on encouraging uptake of responsible business conduct (RBC) and many of these initiatives have focused on larger market participants such as MNEs.⁵⁶

The EU has supported these soft law instruments and the initiatives at the multilateral level to reinforce GVC governance. Nevertheless, the EU now is beating its own regulatory path.⁵⁷ This section examines two interrelated questions: (1) Why does the EU want to regulate along the 'GVCs' connected to its internal market? (2) How have these instruments developed?

6.1. Drivers for EU GVC Regulation

It is generally accepted that the governance along value chains needs to be improved. However, given the conceptual challenges of regulating a transnational economic construct, there has been no real consensus as to how this should be done or by whom. The EU has stepped in to a regulatory space that was previously occupied by soft law. There are at least four, closely interrelated, drivers for its decision to do so. The first is a 'participation imperative', the second a 'values imperative', the third a 'harmonisation imperative' and finally, there is an 'externalisation imperative'.

6.1.1. The 'Participation Imperative'

Perhaps the most straightforward explanation for the EU's underlying interest in using domestic legislation to embed non-economic objectives along value chains that are connected to its internal market is precisely that connection.

The EU is deeply integrated in international trade flows and is an important destination market. EU consumers demand products and commodities that are derived from or move along complex GVCs. EU-based enterprises participate in these GVCs. For instance, MNEs who play a central role in some GVCs, have integrated themselves into European production chains and are particularly present in those Member States with favourable corporate tax regimes. The most recently available Eurostat data⁵⁸ examining international sourcing patterns shows that more than 75 per cent of EU enterprises sourced goods or services abroad in the period from 2018 to 2020.⁵⁹

⁵⁶ See, for instance, OECD (2023), OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, OECD Publishing, Paris, <https://doi.org/10.1787/81f92357-en>. See also, Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations' "Protect, Respect and Remedy"

⁵⁷ See J Norris, 'The EU approach to 'Global Value Chain Regulation': a seismic shift in how EU trade policy interacts with the United Nations Sustainable Development Goals?' in *Sustainable Development as Fundamental Pillar of Economic Governance and Public Affairs* (Bologna University Press 2024).

⁵⁸ Eurostat has been measuring the impacts of GVC participation by EU-based enterprises since 2007. See Eurostat international sourcing survey, which has since renamed as the 'GVC survey'. With the adoption of the European Business Statistics Regulation, there is now a legal basis for additional statistical research on GVCs and their impact in the EU. See Regulation (EU) 2019/2152 of the European Parliament and of the Council of 27 November 2019 on European business statistics, repealing 10 legal acts in the field of business statistics [2019] OJ L327/1.

⁵⁹ International sourcing is defined by Eurostat as 'the total or partial movement of business functions (core or support business functions) currently performed in house or domestically sourced by the resident enterprise to either non-affiliated (external) suppliers or affiliated enterprises located abroad'. Eurostat's statistics also show that

At the same time, EU consumers increasingly demand that the goods they consume are consistent with contemporary societal values, for instance that they are 'eco-friendly' or 'sustainable'. To meet these demands, the EU needs to adopt rules that have the objective of ensuring EU 'values' are respected by companies during production processes. To be fully effective, those rules need to apply along any value chain linked to the internal market.

6.1.2. *The 'Values Imperative'*

The modern EU is a values-based legal order that combines market integration with the pursuit of non-economic objectives. Applying rules along GVCs furthers the EU's overarching objectives to promote sustainable development, high levels of environmental protection and human rights. This is consistent with the values set down in the EU Treaties and EU policies designed to implement those provisions.⁶⁰ It is also in line with international commitments to which the Union has adhered and, in some instances, spearheaded.⁶¹

The promotion of economic and social development and high employment levels has been a treaty-based objective for the EU since the adoption of the Treaty of Amsterdam in 1997. Sustainable development as such was defined as a core objective of the EU by the 2007 Lisbon Treaty. Article 3 of the TEU confirms that sustainable development has both an internal dimension⁶² and an external dimension.⁶³ The Lisbon Treaty also added language relating to sustainable development to the Preamble, reflecting its overarching importance within the Union's legal order.

Respect for human rights and achieving a high level of environmental protection are also objectives which have a constitutional status within the EU's legal order.

Article 2 TEU defines the respect of human rights as a founding value for the EU legal order. The EU Charter of Fundamental Rights guarantees EU citizens' rights.

Article 11 of the TFEU provides that 'environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development'. Article 37 of the European Charter on Human Rights similarly provides that a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

the degree of participation in GVCs by enterprises varies as between the Member States, as does the type of goods and services that are outsourced and insourced.

⁶⁰ In 2021 the EU published its Trade Policy Review – 'An Open, Sustainable and Assertive Trade Policy' – a strategy that specifically relates trade policy to sustainable growth, including as reflected in the Green Deal and the EU Digital Strategy with an internal and external dimension. See COM/2021/66 final.

⁶¹ Commission and High Representative, Joint Communication to the European Parliament and the Council on strengthening the EU's contribution to rules-based multilateralism JOIN/2021/3 final.

⁶² TEU, art 3(3): 'The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.'

⁶³ TEU, art 3(5): 'In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.'

At the international level, the EU is generally acknowledged to have played a significant role in helping develop the UN's 2030 Agenda and is party to a large number of other international agreements including the Paris Agreement on Climate Change (2015) and the International Labour Organization (ILO) Core Conventions. In the trade arena, the EU joined the WTO on its foundation in 1995 and has influenced the interpretation of international trade law in such a way as to balance free trade with environmental protection. The EU has, therefore, consistently embraced multilateralism as a means to further both its trade policy and environmental and social objectives.

Given this backdrop, it is unsurprising that the EU's GVC Regulations reference international legal principles and norms. For instance, the Explanatory Memorandum accompanying the Commission proposal for a ban on products made from forced labour identifies that combating forced labour and promoting corporate sustainability due diligence standards are priorities of the EU's agenda on human rights and links this objective explicitly both to SDG 8.7 and also to the EU strategy on promoting decent work worldwide.⁶⁴

EU policies should also be understood to reflect the concerns and preoccupations of EU citizens. The European Parliament has raised the profile of non-economic values and called on the Commission to propose many of the legislative instruments covered in this book. For example, the EUDR followed from a Parliamentary Resolution calling on the Commission to take reinforced action to address deforestation.⁶⁵ The FLR likewise builds on a Resolution of the European Parliament.⁶⁶

6.1.3. The 'Harmonisation Imperative'

As a response to socio-political priorities, a number of Member States have adopted legislation that target supply chains. This includes, France, Germany and the Netherlands, all of which have chosen to address core societal values using different legislative approaches.

In France, the 'loi de vigilance' was adopted in 2017.⁶⁷ It establishes a civil duty of vigilance, aimed at the prevention of risks and serious abuses to fundamental rights, health, safety of persons and the environment, related to business activities. It also establishes a reparation and liability mechanism for breaches of that obligation by companies. Under the loi de vigilance, companies of more than 5,000 employees in France or 10,000 in France or abroad are required to establish, implement and publish a Vigilance Plan covering its own activities and those of its controlled subsidiaries, subcontractors and suppliers. When a company fails to respect its Vigilance obligation, affected persons, as well as non-governmental organisations, trade unions or public municipalities – can formally notify (*mise en demeure*) the company to comply with its obligation.

⁶⁴ Commission, Proposal for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market, COM/2022/453 final; and Commission, Communication to the European Parliament, the Council and the European Economic and Social Committee on decent work worldwide for a global just transition and a sustainable recovery, COM/2022/66 final.

⁶⁵ European Parliament, Resolution of 22 October 2020 with recommendations to the Commission on an EU legal framework to halt and reverse EU-driven global deforestation (2020/2006(INL)).

⁶⁶ European Parliament, Resolution of 9 June 2022 on a new trade instrument to ban products made by forced labour (2022/2611(RSP)).

⁶⁷ See La loi française n°2017-399 relative au devoir de vigilance des sociétés mères et entreprises donneuses d'ordre (1) NOR: ECFX1509096L.

In 2021 the German Parliament passed the Act on Corporate Due Diligence Obligations in Supply Chains (Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten, LkSG). The Act requires companies that have their central administration, principal place of business, administrative headquarters, statutory seat, or branch office in Germany to ensure the respect of human rights in their activities by implementing due diligence obligations. The Act initially applied to companies in Germany with at least 3,000 employees and was extended to those with at least 1,000 employees from 2024. The core elements of the due diligence obligations include the establishment of a risk management system to 'identify, prevent or minimise' the risks of human rights violations and damage to the environment. The due diligence obligations apply to a company's own business area, to the actions of a contractual partner and to the actions of other (indirect) suppliers. The obligations are linked to the rights protected in 11 international conventions listed in an Annex.

In the Netherlands, the Child Labour Due Diligence Act (Wet Zorgplicht Kinderarbeid), was adopted by the Dutch Senate (Eerste Kamer der Staten-Generaal) and published in the Dutch State Gazette (*Staatsblad*) in 2019. Its entry into force was subsequently delayed pending the outcome of the negotiations for the EU's corporate sustainability due diligence rules.

Intra-EU regulatory differences present an additional impetus to legislate at the EU-level. When Member States apply different norms and standards to address shared values such as environmental protection or human rights, this can give rise to distortions within the internal market and create regulatory loopholes. This creates pressure to ensure a 'level playing field' between the Member States. In this respect, the EU arguably has a systemic need to regulate to maintain the coherence of its single market and to ensure the efficacy of measures which seek to reinforce its overarching policy objectives.

This regulatory aim is explicitly reflected in Commission's legislative proposals which resulted in GVC Regulations. For instance, in its proposal for a Directive on Corporate Sustainability Due Diligence,⁶⁸ the Commission identifies two important factors prompting its proposed regulatory intervention. First, that the increasing complexity and global nature of supply chains presents challenges for companies to get reliable information on suppliers' operations. Second, that the fragmentation of national rules on corporate, sustainability-related due diligence obligations slows down the take-up of good practices.

The 'harmonisation imperative' also explains the shift to hard law. Soft law initiatives such as the RBC initiatives spearheaded by the OECD and the UN which rely on enterprises to opt-in do not afford the same degree of homogeneity within the Union, and in particular, among entities active on the internal market as legislation at the EU level.

Related to this, the 'harmonisation imperative' is also reflected in the choice of legal instrument. Whereas EU law has primacy over the domestic law of the Member States, the extent to which Member States have flexibility as to how to integrate new rules into their own legal systems depends on whether the legal rules are defined in regulations or directives. 'Regulations' within the meaning of EU law require no further implementing measures to take binding effect in the legal orders of the 27 Member States.⁶⁹ This guarantees a high level

⁶⁸ Commission, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM/2022/71 final.

⁶⁹ See TFEU, art 288. This is discussed further in ch 10.

of consistency across the EU internal market. In contrast, as a Directive, the CS3D accords a greater degree of flexibility for Member States to give effect to its provisions.

6.1.4. The 'Externalisation Imperative'

The EU has invested heavily in promoting multilateralism and has expressed a commitment to continue to do so. A fourth driver for the EU's regulatory intervention is that GVC regulation represents a logical extension of the EU's broader efforts to assert unilateral regulatory power with global effects.

The concept of the 'Brussels effect', a term coined by Bradford,⁷⁰ has been used to describe the regulatory influence that the EU aspires to, and in fact asserts on a global scale through norm-setting. Whilst this is particularly relevant to standard-setting, the EU has a stated (and often repeated) objective to be a 'first mover' or 'world-leader' on issues of global concern including addressing and mitigating climate change. Going one step further, the EU has expressed an explicit objective to encourage broader global buy-in to its chosen regulatory approach, for instance as regards its Carbon Border Adjustment Mechanism.⁷¹ In other words, by setting rules that could then become a benchmark for global norms, the EU hopes to maintain significant influence in shaping the rules that govern the broader system of international trade.

There are other reasons for the EU seeking to export its regulatory models. First, there are value-driven motives. Where the EU sets high levels of regulatory protection, this incentivises a broader rise in ambition – a so-called global raising of the bar.⁷² But securing a generalised acceptance of norms defined at the EU level as market practice also has clear advantages for EU domestic industry, lowering the compliance costs they might encounter to meet equivalent requirements in other markets and regions. This benefit of exporting a regulatory model has been identified as key to ensuring the competitiveness of EU industry.⁷³

Finally, given the structure of the economy of the internal market, the external dimension is intended to prevent 'regulatory leakage' from the EU as a consequence of a high divergence in regulatory requirements across the globe and amongst the EU's trading partners. This refers to the risk that increasing regulatory protection domestically within the Union will prompt operators to evade the additional compliance burden and costs by relocating certain or all of their production outside the EU. Should this arise, an unintended side-effect of the regulations is that the EU in fact contributes further to the social harm it is seeking to avoid and protect against. Whilst the term 'carbon leakage' has been widely discussed in the context of the Carbon Border Adjustment Mechanism, this is not the only GVC Regulation which has examined the impacts of legislative intervention on the basis of this parameter. The impacts of regulatory leakage have been considered in the framework of setting due diligence obligations

⁷⁰ A Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020).

⁷¹ Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism [2023] OJ L130/52 (CBAM Regulation or CBAM).

⁷² See section 7.1.1.

⁷³ See Commission, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'An EU Strategy on Standardisation Setting global standards in support of a resilient, green and digital EU single market', COM/2022/31 final.

on companies in relation to their supply chains. It has also been evaluated in other transnational frameworks such as anti-bribery and anti-corruption legislation.

6.2. Existing and Complementary Legal Tools

The pursuit of non-economic values in conjunction with economic integration is not a new endeavour for the EU. The EU has built and reinforced its internal market and customs union – both of which are acknowledged to be ‘flagship achievements’ of the European integration process – whilst seeking to establish high levels of environmental protection and respect for human rights in parallel.⁷⁴ These regulatory efforts have also been complemented by an external policy dimension. For instance, the EU’s trade policy has coupled an economic outlook focused on trade liberalisation with the promotion and reinforcement of ‘non-economic’ objectives including environmental protection, respect for human rights and labour standards. Similarly, the EU’s common foreign and security policy has pursued objectives linked to these Union values.

The EU, similar to certain other jurisdictions, has relied on legal tools to define the parameters of the relationship between its economic and non-economic objectives in this context.⁷⁵ This legal toolkit includes multilateral agreements, bilateral agreements and specific instruments such as the Generalised System of Preferences (GSP) and restrictive measures.⁷⁶ This section describes these instruments.

6.2.1. Multilateral Relations

Multilateral relations have been an important vehicle through which the Union has sought to promote its values across the globe. The EU is an observer to the UN an active member of the WTO, and a participant and/or financial contributor to many other international organisations.⁷⁷ This includes organisations such as the OECD which have developed soft law initiatives intended to address the negative externalities associated with certain GVCs and encourage more responsible corporate behaviour.

The EU has also acceded to binding commitments under international law. A party to the core ILO Conventions, and other key multilateral treaties, the EU has sought to steer efforts to adopt commitments relating to labour and social rights as well as to environmental objectives and climate change mitigation. It is acknowledged to have played a prominent role in key international negotiations including those giving rise to the United Nations 2030 Agenda and the Sustainable Development Goals (UN SDGs),⁷⁸ the Paris Agreement

⁷⁴ See M Egan and MH Guimarães, ‘The Single Market: Trade Barriers and Trade Remedies’ (2017) 55 *Journal of Common Market Studies* 294; and T Lyons, *EU Customs Law*, 3rd edn (Oxford University Press 2018) ch 1.

⁷⁵ See, for instance, Canada, Australia, the UK, the US and New Zealand.

⁷⁶ See Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 [2012] OJ L303/1 (GSP Regulation). The GSP Regulation has reinforced sustainable development goals with specific developing countries through conditionality clauses.

⁷⁷ The precise status that the EU enjoys in these international organisations depends on their legal frameworks and, in particular, on whether ‘membership’ is reserved to states.

⁷⁸ United Nations, *Transforming Our World: The 2030 Agenda for Sustainable Development A/RES/70/1*.

on Climate Change⁷⁹ and more recently, the discussions within the Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction.⁸⁰

Increasingly the EU is also participating in legal proceedings before international jurisdictions where issues such as the extent of state obligations in respect of climate change are under consideration.⁸¹ This is separate and additional to the very proactive role that the Union has played in WTO dispute settlement through which it has contributed to influencing the interpretation of the rules of international trade, including with regard to the balancing between trade and environmental considerations.⁸²

The multilateral level has not however transitioned from soft law guidance to binding rules addressing the sustainability concerns that can arise along GVCs.

This is, at least partly, linked to the challenges that organisations such as the WTO have encountered in building consensus. Whilst there is no shortage of opponents of the EU's decision to adopt autonomous rules, there is limited consensus as to who precisely could take on the task of addressing the thornier aspects of the relationship between trade, climate change and sustainable development.

The WTO Committee on Trade and Environment is a forum in which issues such as trade and the climate have been discussed, but concrete proposals have not emerged.⁸³ In July 2024, Costa Rica, Iceland, New Zealand and Switzerland, completed negotiations on a plurilateral agreement on climate change, trade and environmental sustainability. Whilst welcoming this initiative, this prompted the Deputy Director-General to raise his doubts as to how trade negotiators at the WTO will address the 'daunting issues' linked to trade sustainability and climate change.⁸⁴

6.2.2. *Bilateral Trade and Cooperation Agreements*

The EU has an extensive network of free trade and other partnership agreements which have been deployed as a primary tool to link economic development to the sustainable development goals.⁸⁵ Cooperation on sustainable development, environmental protection and

⁷⁹ The Paris Agreement on Climate Change (n 53) adopted by 196 Parties at the UN Climate Change Conference (COP21) in Paris, France, on 12 December 2015.

⁸⁰ See United Nations, International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national

⁸¹ The EU submitted observations in the Advisory Opinion proceedings on climate change before the International Tribunal on the Law of the Sea (ITLOS) and in those pending before the International Court of Justice.

⁸² The EU has been a party to certain disputes in which this relationship has been considered: see WTO, *European Union and certain Member States – Certain Measures concerning Palm Oil and Oil Palm Crop-Based Biofuels*, Report of the Panel (5 March 2024) WT/DS600/R; WTO, *Brazil – Measures Affecting Imports of Retreaded Tyres*, Report of the Appellate Body (29 August 2008) WT/DS332. See also WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (12 October 1998) WT/DS58 in which the EU participated as a third party.

⁸³ For the impasse that can arise when multilateral frameworks fail to deliver, see D Bodansky, 'What's So Bad about Unilateral Action to Protect the Environment?' (2000) 11 *European Journal of International Law* 339.

⁸⁴ See WTO, Speech Deputy Director-General Paugam, 4 July 2024: 'There is no shortage of substantive issues, as you could hear: green tariffs, export restrictions, green subsidies, fossil fuel subsidies, border adjustments, standards and regulations, ecolabels, public procurements ... Where I still have doubts is in how our trade negotiators will address these daunting issues within the WTO' WTO | 2024 News items – DDG Paugam – WTO at a 'cross-

⁸⁵ These include Free Trade Agreements, Trade & Investment Agreements, Economic Partnership Agreements (EPAs), Association Agreements and other Political and Cooperation Agreements. As discussed in ch 11, the EU

human rights is integrated into almost all of the EU's modern partnership and cooperation agreements.

In the EU's Free Trade Agreements (FTAs), since 2010 provisions addressing trade and sustainable development (TSD) have been set down in dedicated chapters.⁸⁶ Most of the EU's trade and cooperation agreements provide that respect for human rights is an essential element of the Agreement. In the recent FTA concluded between the EU and New Zealand, compliance with the Paris Agreement was accorded the same status.⁸⁷

Modern FTAs have also been preceded by Sustainability Impact Assessments which are intended to evaluate the potential social, environmental and economic impacts of proposed trade agreements and ex post evaluations are being conducted in accordance with the European Commission's 'Better Regulation' framework.

The legal efficacy of these provisions has, however, come under scrutiny.⁸⁸ In particular, the outcome of a dispute brought within the framework of the EU–Korea FTA concerning the implementation of the obligations relating to the protection of labour rights, increased the perception that the TSD provisions lack sufficient teeth. One, but not the only basis of this critique, was the absence of binding dispute settlement as regards TSD obligations.⁸⁹

In 2021, the EU reviewed the efficacy of its TSD chapters and proposed a reform.⁹⁰ The communication resulting from that process identified that revised TSD chapters should be more country specific and more 'assertively' enforced. This implies, in particular, that future TSD chapters should be subject to binding dispute settlement as applied to other provisions in the agreement. In addition, the communication proposes greater mainstreaming of the sustainable development objectives across FTAs, for instance through provisions on the trade of environmental goods and services. Modernised TSD provisions have since been negotiated into the recent FTA concluded with New Zealand and form the starting point for negotiations with other third countries.⁹¹

These instruments, necessarily, imply a mutually agreed approach to sustainable development between the negotiating partners. This has meant, in some instances, that ambition has been constrained by the need to build consensus around the 'lowest common denominator'. The existence of an 'ambition gap' is one of the reasons that the EU has progressively sought to develop autonomous instruments.

also enters into non-binding bilateral arrangements with a view to increasing cooperation on, for instance, critical raw materials.

⁸⁶ The first FTA to include a TSD Chapter was the EU–Korea Free Trade Agreement. See Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [2011] OJ L127/6.

⁸⁷ Free Trade Agreement between the European Union and New Zealand [2024] OJ L2024/866.

⁸⁸ See F Hoffmeister and A Siemer, 'The Legal Significance of Trade and Sustainability Chapters in EU Free Trade Agreements' (2024) 3 *Zeitschrift für Europarechtliche Studien* 269, 269.

⁸⁹ M Bronckers and G Giovanni, 'Retooling the Sustainability Standards in EU Free Trade Agreement' (2021) 24 *Journal of International Economic Law* 25.

⁹⁰ Commission, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'The power of trade partnerships: together for green and just economic growth, COM/2022/409 final.

⁹¹ The EU is currently negotiating FTAs with India, Indonesia, Mercosur, Eastern and Southern Africa and Thailand. The launch of negotiations with Mercosur significantly predates the reform of the TSD chapters. The text on which political agreement has been reached includes an Annex to the TSD Chapter.

6.2.3. *The Generalised System of Preferences*

The Generalised System of Preferences (GSP) is a trade policy instrument which grants developing countries tariff preferences, ie, tariff reductions up to complete exemption from customs duties.⁹² These preferences apply to the import of finished industrial products as well as to processed agricultural products originating in the respective developing country. They are offered on a unilateral basis and only apply to those countries listed in the Annexes to the Regulation.⁹³

The EU's scheme has three arrangements in place. One of these, the GSP + is a special incentive arrangement for sustainable development and good governance.⁹⁴ GSP+ reduces the same tariffs as those that fall within the scope of the standard arrangement to 0 per cent for vulnerable low and lower-middle income countries that implement 27 international conventions relating to labour and human rights, environmental and climate protection, and good governance. This is, therefore, a means to incentivise third countries to implement these norms since tariff preferences should be temporarily withdrawn

if the beneficiary country does not respect its binding undertaking to maintain the ratification and effective implementation of those conventions or to comply with the reporting requirements imposed by the respective conventions, or if the beneficiary country does not cooperate with the Union's monitoring procedures as set out in this Regulation.⁹⁵

In 2010, the EU withdrew Sri Lanka from its GSP+ programme due to shortcomings in Sri Lanka's implementation of three UN human rights conventions: the International Covenant on Civil and Political Rights, the Convention Against Torture, and the Convention on the Rights of the Child. Preferences have also been withdrawn from Myanmar and Belarus.

The EU's current GSP has been applied since 1 January 2014. In November 2023 the application of this GSP regulation was extended until December 2027, pending the approval of a reviewed GSP regulation by the European Parliament and the Council of the European Union. Before adopting its proposal for a revised GSP, the Commission carried out an impact assessment of the existing scheme. This found that whilst overall the GSP has incentivised implementing of the listed human rights and labour conventions, it is undermined by the fact that it does not currently address environmental governance.⁹⁶

Since the GSP seeks to incentivise changes in the way third countries implement their international commitments, it is a different mechanism from autonomous regulation which seeks to embed sustainability into products made available in or exported from the internal market. The similarity is that both the GSP+ and the EU's GVC Regulations are built around 'conditionality' mechanisms.

⁹² GSP Regulation. The GSP is adopted in line with the enabling clause in the General Agreement on Tariffs and Trade (GATT) 1994. About a dozen countries have GSP schemes in place.

⁹³ See GSP Regulation, Annex II, Annex III and Annex IV.

⁹⁴ Everything But Arms is an arrangement for least developed countries providing them with duty-free, quota-free access to the EU market for all products except arms and ammunition. The standard GSP applies for low and lower middle-income countries. This means a partial or full removal of customs duties on two-thirds of tariff lines.

⁹⁵ See GSP Regulation, art 15.

⁹⁶ Commission, Staff Working Document Impact Assessment Report Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on applying a generalised scheme of tariff preferences and repealing Regulation (EU) No 978/2012 of the European Parliament and of the Council, SWD/2021/266 final.

6.2.4. Restrictive Measures

The EU has used other instruments to reinforce its position that human rights abuses should not be tolerated. In particular, it has imposed restrictive measures or 'sanctions' on countries that violate human rights and democratic principles. In 2020, the EU adopted a global sanctions regime for serious human rights violations and abuses.⁹⁷

Restrictive measures have not been adopted on the basis of the common commercial policy (Article 207 TFEU) but have been considered to be part of the Common Foreign and Security Policy.⁹⁸ Whilst sanctions are a means to economically disincentivise egregious violations of human rights, they do not afford the same possibilities to positively incentivise a shift in market behaviour. They are, therefore, an important part of the EU's external relations toolkit, but serve a different function from the EU's autonomous GVC Regulations.

6.3. The Genesis of EU GVC Regulations

The shift towards GVC regulation as an EU regulatory model has been progressive. This section looks at earlier examples of autonomous rules intended to address behaviour along value chains linked to the EU market.

6.3.1. Illegal, Unreported and Unregulated Fishing

Arguably, the first example of an autonomous 'value chain' regulation within the EU legal order is the legal framework governing illegal, unreported and unregulated fishing (IUU). IUU is an international phenomenon but one of strategic relevance to the EU given the size of the EU's fishing fleet, the fact that fisheries policy is an exclusive Union competence and the commercial value of the interests at stake to Union operators.

IUU has been associated with adverse economic and social effects, notably forced labour practices and poor safety standards on board vessels.⁹⁹ As a result, at the EU level, anti-IUU fishing policy interacts with other policy spheres including labour, customs, trade and transport policies, sanitary requirements, as well as the repression of fraud and criminal acts like tax evasion or money laundering.¹⁰⁰

The EU Regulation to prevent, deter and eliminate illegal, unreported and unregulated fishing (IUU Regulation) entered into force on 1 January 2010.¹⁰¹ This Regulation applies

⁹⁷ Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses [2020] OJ L4101/13. See also Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses [2020] OJ L4101/1.

⁹⁸ See TEU, art 29 and TFEU, art 215.

⁹⁹ The issue of labour standards and IUU fishing has also been raised before the WTO. During the negotiation of the WTO Agreement on Fisheries Subsidies, the US tabled a proposal to include rules to address this concern. These were not, however, retained.

¹⁰⁰ Commission, Report to the European Parliament and the Council on the application of Council Regulation (EC) No 1005/2008 establishing a community system to prevent, deter and eliminate illegal, unreported and unregulated (IUU) fishing (IUU Regulation), COM/2020/772 final.

¹⁰¹ Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing amending Regulations (EEC) No 2847/93, (EC)

to all vessels engaged in the commercial exploitation of fishery resources, and seeks to prevent, deter and eliminate all trade of fishery products into the EU deriving from IUU fishing in all waters, and the involvement of EU nationals in IUU activities conducted under any flag.

Whilst the IUU Regulation integrates elements that had been developed at the multi-lateral level, for instance the definition of IUU fishing in the Regulation is inspired by the definition introduced by the 2001 Food and Agriculture Organization (FAO) International Plan of Action to prevent, deter and eliminate IUU fishing – it sets regulatory norms in line with the EU's level of ambition.

The substantive obligations introduced by the IUU Regulation include bans on the import, export and re-import of products from IUU fishing, prohibitions on access to EU ports and a scheme for the inspection of third-country vessels. To ensure the effectiveness of this prohibition, fishery products must be accompanied by a catch certificate. Transshipments and processing operations of fishery products are also included in the scope of that certification scheme.

The Regulation also provides a legal basis for establishing a list of non-cooperating third states.¹⁰² The basis for inclusion on that list is broad encompassing any state that 'fails to discharge the duties incumbent upon it under international law as flag, port, coastal or market State, to take action to prevent, deter and eliminate IUU fishing'.¹⁰³ This is not assessed on a wholly unilateral basis since this is ascertained by reference to the quotas set down by regional fisheries organisations. Inclusion on that list is, however, in essence, a unilateral decision taken by the EU.

The EU has itself described the IUU Regulation as 'unique'.¹⁰⁴ Whilst far-reaching, it is generally acknowledged to have contributed substantially to improving ocean governance and to addressing the phenomenon of IUU at an international level. The multilateral legal framework has also evolved since the IUU Regulation was adopted. Notably in 2016, the Port State Measure Agreement was adopted as the first international legally binding agreement tackling IUU and the EU participated actively in the negotiations of the technical aspects of that agreement.¹⁰⁵

6.3.2. *Illegal Timber Trade and Biofuels*

The field of environmental law is also one which has proved to be a testing ground for autonomous measures and some of the regulatory devices used in the EU's GVC Regulations. In 2010, the EU introduced measures intended to address the illegal trade in timber.¹⁰⁶

No 1936/2001 and (EC) No 601/2004 and repealing Regulations (EC) No 1093/94 and (EC) No 1447/1999 [2008] OJ L286/1 (IUU Regulation).

¹⁰² A non-cooperating third state is registered as such by a Council Decision.

¹⁰³ See IUU Regulation, art 31(3).

¹⁰⁴ COM/2020/772 final.

¹⁰⁵ Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (14 June 2010) UNTS 2988, No 52047.

¹⁰⁶ Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market [2010] OJ L295/23 (Timber Regulation); and Council Regulation (EC) No 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community [2005] OJ L347/1.

This regime established a risk-based due diligence requirement on importers to prevent illegally harvested timber or timber products entering the EU market. This legislation will be replaced by the EUDR.

In 2018, the EU adopted the recast Renewable Energy Directive (RED II).¹⁰⁷ Like its predecessor, RED II provides that biofuels will only be eligible to be counted towards Union renewable energy targets if that biofuel can be shown to meet sustainability criteria.¹⁰⁸

In addition, RED II introduced rules limiting the eligibility of certain biofuel to be counted towards the Union's renewable energy targets, including the sectoral target for the transport sector. Those rules were based on the overall emissions savings represented by a biofuel over a fossil fuel comparator.

Certain biofuels are produced from food and feedstock and hence depend on the cultivation of crops. This is associated with land use change, which can include deforestation and hence gives rise to emissions. The legislation calculates emissions associated with direct land use change linked to the production of those crops on the basis of a life-cycle's analysis.¹⁰⁹ It also accounts for the risk of emissions associated with indirect land use change (ILUC). Since ILUC emissions cannot be calculated using the same methodology as that used for direct land use change, the EU applied a formula that used crop expansion as a proxy. It followed the logic that if crops were expanding, any further stimulation of demand for that crop for biofuels in the EU market would exacerbate indirect land use change and cause further emissions.

Given the risk of emissions associated with land use change (direct and indirect), RED II capped the contribution of all biofuels made from food and feedstock to a maximum share of 7 per cent of the renewable energy targets. In addition, it introduced a phase-out of the eligibility of those biofuels associated with a high risk of creating indirect land use change emissions based on the formula. By way of exemption, if a specific batch of biofuel could be demonstrated to have been produced from feedstock cultivated in a way that did not increase emissions, it could be exempted from that cap. The Delegated Regulation adopted in 2019 identifies palm oil as a high-ILUC risk feedstock.¹¹⁰

This legislation has been cited as an example of the EU seeking to regulate production processes, including those that take place in third countries. These rules were challenged before the WTO by Indonesia and Malaysia on the grounds that they discriminated against palm oil and palm oil-based biofuels. In DS600, the Panel ruled that the EU measures regulate product characteristics and link this to market access.¹¹¹ The Panel accepted that the EU could legitimately regulate to address demand in its own market but found that the measures, as applied, are discriminatory.

¹⁰⁷ Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast) (RED II) [2018] OJ L328/82.

¹⁰⁸ See RED II, art 29.

¹⁰⁹ Default GHG emission values and calculation rules are provided in Annex V (for liquid biofuels) and Annex VI (for solid and gaseous biomass for power and heat production) of the RED II.

¹¹⁰ Commission Delegated Regulation (EU) 2019/807 of 13 March 2019 supplementing Directive (EU) 2018/2001 of the European Parliament and of the Council as regards the determination of high indirect land-use change-risk feedstock for which a significant expansion of the production area into land with high carbon stock is observed and the certification of low indirect land-use change-risk biofuels, bioliquids and biomass fuels [2019] OJ L133/1.

¹¹¹ WTO, *European Union and certain Member States – Certain Measures concerning Palm Oil*, Report of the Panel (n 82).

6.3.3. Conflict Minerals

The EU has also adopted autonomous rules to address factors that contribute to human rights abuses in relation to the extraction of certain minerals. The EU identified as a policy concern that in politically unstable areas, the minerals trade can be used to finance armed groups, fuel forced labour and other human rights abuses, and support corruption and money laundering.

As a response, in 2017, the EU adopted the Conflict Minerals Regulation (CMR) which entered into application in 2021.¹¹² The CMR applies to four minerals – tin, tantalum, tungsten and gold and aims to ensure that importers of those minerals to the EU have conducted due diligence in line with existing international (soft law) standards, namely the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.¹¹³

Whilst the CMR has a narrowly circumscribed purpose and limited product scope, since it requires importers to conduct due diligence along supply chains using a risk-based approach, it nonetheless provides a model from which the more recent GVC Regulations have evolved. It has also been complemented by structures and support measures intended to help secure compliance. This includes the European Partnership for Responsible Minerals. Nevertheless, a review of the efficacy of the CMR two years after its entry into application revealed mixed results. In particular, awareness of the EU requirements remains low, notably in third countries.¹¹⁴

Other jurisdictions have also sought to address the problems associated with conflict minerals using different regulatory structures. For instance, in 2010 the United States (US) passed legislation, known as the Dodd-Frank Act Section 1502.¹¹⁵ This requires US listed companies to carry out due diligence on minerals sourced from the Democratic Republic of Congo and neighbouring countries. In contrast, the EU's Conflict Minerals Regulation applies to imports of the minerals in scope irrespective of their country of origin. Equally, other regional organisations have sought to develop standards. For instance, the Pan African Resource Reporting Code (PARC) has been established under the auspices of the African Union.

7. GVC Regulatory Objectives: Present and Future?

Most EU legislation can be classified as falling within a specific domain. For instance, the environmental law *acquis* can be readily identified, including by reference to the legal basis in the EU Treaties on the basis of which it has been adopted.¹¹⁶ The EU's GVC Regulations

¹¹² Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas [2017] OJ L130/1 (Conflict Minerals Regulation).

¹¹³ OECD, *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (OECD 2013).

¹¹⁴ Commission, Report to the European Parliament and the Council, 'Review of the functioning and effectiveness of Regulation (EU) 2017/821 (Conflict Minerals Regulation) pursuant to Article 17(2) of Regulation (EU) 2017/821', COM/2024/415 final.

¹¹⁵ Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 US Code § 1502 (2010).

¹¹⁶ Much of the EU's environmental legislation has been adopted on the basis of TFEU, art 192.

are different. These instruments share common and interrelated objectives but have different 'policy' homes and pursue these objectives through different legal prisms.¹¹⁷ This is also one of the reasons why navigating the growing body of GVC regulation is complex for market participants who may find themselves subject to multiple sets of rules depending on the value chains in which they are active.¹¹⁸

The GVC Regulations covered in this book all pursue regulatory objectives that have a nexus to 'sustainability' in the broader sense of that term. These objectives have been framed in numerous domestic policies including the Commission's Communication on the Green Deal, the Communication on Decent Work Worldwide, the Circular Economy Action Plan and the post Covid-19 resilience plan.¹¹⁹ They encompass, therefore, both environmental and social concerns. Within those broad spheres, they tackle a range of issues from greenhouse gas emissions to biodiversity loss to child labour. They also are built around a principle of transparency.

GVC Regulations may pursue multiple regulatory objectives simultaneously precisely because they address an economic construct (the 'value chain') from the perspective of sustainability, which is itself multidimensional. For example, the CS3D seeks to change corporate behaviour towards environmental and human rights concerns and imposes due diligence obligations in respect of both. It also sets new obligations with regard to climate change mitigation.¹²⁰

Equally, GVC Regulations may seek to achieve an objective such as environmental protection notwithstanding that the legal basis for that act is not necessarily Article 192 TFEU or exclusively so. For example, both the EUDR and the CS3D have among their objectives, environmental protection. Whilst the EUDR is an 'environmental' regulatory act adopted on the basis on Article 192 TFEU, the CS3D is adopted on the basis of Article 50 TFEU and is considered to be an extension of the company law *acquis*. In other words, whilst both instruments are intended to ensure that the same core Union value is protected – they use different means – one set of rules ensures products entering or leaving the internal market have been produced in conformity with environmental norms set by the EU and the other seeks to shift responsibility to (very) large market participants to verify their business operations are not associated with environmental harm.

A further example is the Batteries Regulation, which also sets rules intended to improve among other things the environmental performance of batteries on the Union market. This Regulation sets requirements aimed at securing a high level of environmental protection but does so through the prism of product regulation. Unlike the predecessor legislation which it replaces, the Batteries Regulation has been adopted on a dual legal basis of Article 192 TFEU and the single market provision, Article 114 TFEU.

¹¹⁷ For a discussion of the conceptualisation of GVC regulation, see A Beckers, 'Global Value Chains in EU Law' (2023) 42 *Yearbook of European Law* 322; <https://doi.org/10.1093/yel/yead010>.

¹¹⁸ For a discussion of these issues, see section 9.

¹¹⁹ See 'The European Green Deal' (n 6); Commission, Communication to the European Parliament, the Council and the European Economic and Social Committee on decent work worldwide for a global just transition and a sustainable recovery, COM/2022/66 final; the 'Circular Economy Action Plan' (n 6); and Commission, Communication to the European Parliament, the Council and the European Economic and Social Committee and the Committee of the Regions, Europe's moment: Repair and Prepare for the Next Generation, COM/2020/456 final.

¹²⁰ See CS3D, art 22.

The values that the EU is seeking to protect by regulating along value chains have evolved and diversified. This is reflected in how a specific value is protected. For example, the level of ambition reflected in the EUDR exceeds that in the predecessor legislation, the EU Timber Regulation.¹²¹ Equally, it is reflected in an extension of the values that are protected. For instance, the EU Conflict Minerals Regulation,¹²² which is one of the first pieces of EU legislation to impose specific obligations on importers to monitor and report on sources of supply, seeks to address comparatively narrow issues relating to potential human rights abuses associated with the mining of so-called conflict minerals. The ban on products made from forced labour illustrates precisely that the issues of labour rights is now being regulated on a far broader scale, across a wide spectrum of product categories. The CS3D requires companies in scope to conduct due diligence in respect of human rights harm referred to against a list of legal norms set down in existing international frameworks.¹²³

The objectives of GVC regulation in the EU are still evolving. This regulatory model may be extended in the future to protect other 'core' Union values. Sustainability has become a political priority and hence is a logical starting point. Nevertheless, as a regulatory objective, sustainability is also under pressure.

GVCs are extremely vulnerable to geopolitics and other global shocks such as pandemics and conflict. The regulatory objectives and priorities for GVCs, both in general terms and at the EU level, have shown themselves to be susceptible to adaptation to address prevailing market conditions. Increasingly, GVC regulation, therefore, also reflects 'reactive' policy concerns such as security of supply and supply chain resilience. This phenomenon has occurred on a global scale. For instance, following the Covid-19 pandemic, a significant number of countries introduced export restrictions, particularly relating to food and medical supplies. This highlighted the risks of dependencies, both to developed country markets and to low-income and middle-income countries reliant on those export markets.¹²⁴ Within the EU, a number of recent policy strategies likewise reflect a prevailing preoccupation with ensuring security of supply, including with regard to the raw materials necessary to achieve a clean transition to renewable energy.¹²⁵

8. The 'EU Approach' to GVC Regulation

A growing number of countries are considering or have already adopted legislation that regulates supply chains. The stated policy objectives are similar (environmental protection, social rights, labour standards etc), but the legal mechanisms that are being deployed vary

¹²¹ Regulation (EU) No 995/2010.

¹²² Regulation (EU) 2017/821.

¹²³ The CS3D is discussed in ch 3. In essence, 'human rights due diligence' under this Directive requires companies to verify along their 'chain of activities' to ascertain and if necessary, prevent, mitigate and redress abuses of human rights to be determined by reference to the obligations set down in a list of International Conventions annexed to the Directive itself. This is, therefore, a far broader exercise than the targeted due diligence requirements under the Conflict Minerals Regulation.

¹²⁴ See Brenton, Paul; Ferrantino, Michael J.; Maliszewska, Maryla. 2022. Reshaping Global Value Chains in Light of COVID-19: Implications for Trade and Poverty Reduction in Developing Countries. © Washington, DC: World Bank. <http://hdl.handle.net/10986/37032> License: CC BY 3.0 IGO.

¹²⁵ See further, ch 12.

as between jurisdictions.¹²⁶ This section describes the 'EU approach' to GVC regulation by reference to five core components: (1) market conditionality; (2) commodity-centricity; (3) risk-based due diligence; (4) support for implementation; and (5) shared enforcement.

8.1. Element One: Market Conditionality

The GVC Regulations examined in this book are all domestic, regulatory instruments which apply rules to operators seeking to import or export products to the EU's internal market. Therefore, they rely on 'market conditionality'.

One implication of this regulatory structure is that whilst these rules only impose conditions on the permissibility of marketing in the Union on those operators seeking to place products on or export them from the EU market, if that condition is satisfied, they apply irrespective of where that operator is located geographically. Therefore, as soon as there is a link to the EU internal market, the legislation has effects on operators located in third countries. Conversely, in the absence of any intention to sell or otherwise access the EU internal market, a producer or operator in a third country has no need to adhere to the EU rules.

Whilst many EU GVC Regulations draw on guidance that has been established at the multilateral level, the level of ambition and the level of protection for the 'value' is determined by the EU. Therefore, it is not constrained to a 'lowest' global common denominator. It is for this reason that these can also be described as 'autonomous' instruments. The incentives for third-country operators to apply EU standards as regards environmental protection or social rights rely, therefore, on the attractiveness and degree of dependency on the EU internal market as a destination for a finished product or as a source of an 'input'.

8.2. Element Two: Product or Commodity-Centricity

Another feature of the EU approach to GVC regulation is that the factor determining the applicability of the legal requirements is the products or commodities.¹²⁷ In other words, the rules are product driven and not applied only to specific geographic regions. This differs from the regulatory approach that has been applied in other jurisdictions, including the US. For example, the Uyghur Forced Labor Prevention Act applies restrictions to products originating in an identified region on the basis of a rebuttable presumption that their production will have entailed forced labour.¹²⁸ Canada has also applied measures, including enhanced due diligence, to the same specific region to address concerns over human rights violations.¹²⁹

¹²⁶ For example, the US has introduced measures to address forced labour including the Uyghur Forced Labor Prevention Act, to address the risks associated with conflict minerals including the Dodd-Frank Act section 1502 and measures to address illegal timber including the Lacey Act. In Canada, the Fighting Against Forced Labour and Child Labour in Supply Chains Act entered into force on 1 January 2024. In Norway, the 'Transparency Act', which entered into force in 2022, requires larger companies to carry due diligence in accordance with the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (but on topics of reduced scope).

¹²⁷ The exception is the CS3D which addresses the behaviour of very large companies.

¹²⁸ Uyghur Forced Labor Prevention Act, Pub L No 117-78, 135 Stat 319 (2021).

¹²⁹ Global Affairs Canada and the Canadian Trade Commissioner Service issued an advisory to bring attention to human rights violations in China affecting Uyghurs. Canadian companies that are (1) sourcing directly or indirectly from Xinjiang or from entities relying on Uyghur labour, (2) established in Xinjiang, or (3) seeking to engage

This regulatory choice has legal and political implications.

In legal terms, this approach allows the EU to 'phase-in' its regulations by selecting specific products, sectors, or commodities which it considers present the greatest risks or in relation to which it considers that the objectives can best be achieved. This was, for example, the reason for selecting the sectors that would be within the initial scope of the CBAM. At the same time, this type of product-oriented phase-in leaves flexibility to determine which additional products may be brought in scope subsequently. That is referenced to the level of environmental/social ambition.

On the other hand, because the selection of products, sectors or commodities has central importance in delimiting the scope of application of any given regulation, the choice of what is 'in' and what is 'out' has not only legal, but also political significance. Some of these choices generated significant policy debate during the inter-institutional legislative process. This was particularly evident during the discussions leading to the adoption of the EUDR and the CBAM.

Finally, whilst the regulatory model is product centric, the geographic origin of a product is not completely irrelevant. It is a factor that may be part of a risk assessment that operators must carry out in the framework of due diligence obligations. For example, the EUDR introduces a system of country benchmarking. The risk associated with a specific country will impact the extent of the due diligence obligations, but not the existence of the obligations as such.¹³⁰

8.3. Element Three: A 'Risk-Based' Due Diligence Model

The EU's regulatory model relies on risk-based due diligence mechanisms as well as product tracking and reporting requirements.

For example, the CS3D requires Member States to ensure the integrations of risk-based due diligence in the corporate governance carried out by large corporate entities active or established in their territories. Risk-based due diligence is also a core design component of the EUDR, the FLR and is integrated in product legislation such as the Batteries Regulation and the Ecodesign for Sustainable Products Regulation (ESPR). This is, therefore, one of the principal regulatory tools relied on to give effect to the market conditionality rule.

8.3.1. *Defining Risk-Based Due Diligence*

The emphasis on risk-based due diligence is not a regulatory novelty. Soft law instruments such as OECD Guidance (both for specific sectors,¹³¹ and for Responsible Business Conduct)¹³² is built on a due diligence framework. The EU has largely adopted these definitions and does not provide a legislative definition of 'due diligence' as such. The EU has,

in the Xinjiang market, will be required to sign this Integrity Declaration on Doing Business with Xinjiang Entities prior to receiving services and support from the Trade Commissioner Service.

¹³⁰ This is one aspect of the EUDR which has been criticised. See section 9 and ch 5, for instance, the OECD/FAO (2023), OECD-FAO Business Handbook on Deforestation and Due Diligence in Agricultural Supply Chains, OECD Publishing, Paris, <https://doi.org/10.1787/c0d4bca7-en>.

¹³² OECD (2018), OECD Due Diligence Guidance for Responsible Business Conduct.

however, by reference to the OECD Multinational Enterprises Guidelines, described due diligence as 'the processes through which enterprises can identify, prevent, mitigate, and account for how they address their actual and potential adverse impacts'.¹³³

Risk-based due diligence implies that companies should prioritise and focus their efforts. For example, the OECD Guidelines state 'Where enterprises have large numbers of suppliers, they are encouraged to identify general areas where the risk of adverse impacts is most significant and, based on this risk assessment, prioritise suppliers for due diligence'.¹³⁴ In addition, it implies that measures taken should be commensurate with the level of risk.

The CS3D integrates this structure with a requirement on companies to identify risks followed by a separate obligation to prioritise the adverse impacts identified from this exercise.¹³⁵ Thereafter, companies must bring harm to an end or otherwise take steps to mitigate that harm.

The EUDR establishes a tiered due diligence process and identifies factors which should inform the risk assessment that operators carry out.¹³⁶ Risk-based due diligence is not, therefore, framed identically across all EU GVC Regulations but is modelled on the framework established by the OECD.¹³⁷

8.3.2. *The Advantages of Due Diligence for the Regulator*

The EU is neither the first nor the only jurisdiction to seek to apply rules to GVCs through due diligence. Studies have shown that incorporating a thorough due diligence process into their management systems helps enterprises detect risks and gain improved knowledge of their operations. Prevention and mitigation of sustainability risks also reduces the company's exposure to potentially large remediation costs it might incur if the risk were not addressed.

There are different reasons which explain the EU's choice to rely on due diligence.

First, due diligence offers a built-in level of flexibility. It is a standard which is necessarily ancillary to a legal obligation. It is shaped by other non-legal considerations (business practice/consumer concerns) and has been described as a 'bridge principle between law and other spheres of normativity'.¹³⁸

Given the complexities of legislating at the EU level, the flexibility that is inherent to reliance on a standard represents a structural advantage for the legislator. Framework legislation can impose a duty of due diligence and leave the contours of what precisely compliance with that obligation will entail to be refined and defined in implementing acts. Many of the EU's GVC measures use this approach.¹³⁹

¹³³ OECD (2023), OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, OECD Publishing, Paris, <https://doi.org/10.1787/81f92357-en>, chapter II – general policies, para 10.

¹³⁴ OECD Guidelines for Multinational Enterprises, Chapter II, Commentary, para 16.

¹³⁵ See CS3D, art 9. See also, ch 3.

¹³⁶ See EUDR, art 8. See also, ch 5.

¹³⁷ See also, OECD (2022), Translating a risk-based due diligence approach into law: Background note on Regulatory Developments concerning Due Diligence for Responsible Business Conduct, <https://mneguidelines.oecd.org/translating-a-risk-based-due-diligence-approach-into-law.pdf>.

¹³⁸ A Peters, H Krieger and L Kreuzer, 'Due Diligence: The Risky Risk Management Tool in International Law' (2020) 9 *Cambridge International Law Journal* 121.

¹³⁹ This is a feature of EU GVC Regulations which has been criticised. See section 9.

Importantly, this flexibility also allows for the integration of existing soft law standards and principles to inform the substantive behaviour required to meet the due diligence standard. The EU has explicitly referred to soft law instruments such as OECD Guidance in its regulations, for example in the Conflict Minerals Regulation and the EUDR. This facilitates the transition for the market operators who need to implement the rules.

Second, due diligence is essentially a risk-management tool. Companies are required to carry out a legal, environmental and/or social assessment of their activities to avoid not only breaches of the 'law' but broader 'negative' outcomes. Risks related to GVCs sometimes emanate from private actors, but they may also be influenced by extraneous factors, for instance pandemics and conflicts or regional instability. The potential source of risks along GVCs are uncertain, both in the sense that they could emanate from any one of the actors along the chain or from extraneous factors arising in any one of the jurisdictions through which the GVC passes. Due diligence as a mechanism facilitates dealing with this precise type of uncertainty.¹⁴⁰

Third, a due diligence model places the compliance burden on companies to monitor the environmental and social impacts of their own practices. In this sense, it dilutes the regulatory burden on the states through which GVCs pass and avoids regulatory dependency on the existence of consistent 'domestic' legislation in each relevant jurisdiction. Related to this, due diligence centres accountability on the actors in the GVC who are the most proximate to the EU market, ie, the importers and exporters.

Fourth, given due diligence was deployed in earlier regulatory initiatives there is acquired experience and systems already in place which have been evaluated. Policymakers have concluded that these mechanisms can be improved on, but refining an existing model is seen as preferable to starting from scratch. The EUDR is a clear example of this approach in action. The constituent elements of the EUDR draw on the lessons learned from the Timber Regulation and FLEGT, retain parts of those structures, and supplement the approach in other respects.¹⁴¹

Finally, other jurisdictions have also embraced due diligence in their efforts to 'regulate' supply chains linked to their territories. Within the EU, France and Germany both use due diligence as a central component of their 'supply chain' laws.¹⁴² Canada's Fighting Against Forced Labour and Child Labour in Supply Chains Act, which was passed by the Parliament in May 2023 and which entered into effect on 1 January 2024, imposes an obligation on certain government institutions and private-sector entities to report on the measures taken to prevent and reduce the risk that forced labour or child labour is used by them or in their supply chains.¹⁴³ Those reports must include details of the reporting entity's due diligence processes in relation to those risks.

8.3.3. *Risk-Based Due Diligence in Second-Generation GVC Regulations*

Due diligence as a regulatory model was introduced in the first generation of EU efforts to regulate supply chains including the EU Timber Regulation¹⁴⁴ and the Conflict Minerals Regulation.¹⁴⁵ However, the structure of due diligence requirements has evolved.

¹⁴⁰ Peters, Krieger and Kreuzer (n 138).

¹⁴¹ See further, ch 10.

¹⁴² See section 6.1.3.

¹⁴³ Bill S2-111 was approved by the Senate on 28 April 2022.

¹⁴⁴ See Regulation (EU) No 995/2010.

¹⁴⁵ See Regulation (EU) 2017/821.

In the first place, greater precision has been introduced in the regulatory frameworks. This is a direct response to criticisms of the EU Timber Regulation for lacking clarity as to the precise nature of the obligations with which importers were expected to comply.

In the second place, whilst the majority of the regulations refer or integrate guidance that has been prepared by the UN, the OECD and other international organisations, the EU rules do not necessarily apply these due diligence standards verbatim. The reasons for this are in some cases linked to the type of legal norm. For instance, the CS3D departs from the OECD framework on due diligence reporting where it considers that those rules do not lend themselves to direct integration in a legally binding instrument. This is to be contrasted with the CMR which essentially integrates the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas into Union law.

8.4. Element Four: Implementation Support and Private Sector Onboarding

Regulations which are intended to have effects along value chains present specific challenges for implementation. These arise both at the institutional level and on the ground for economic operators. Implementation is particularly challenging for certain types of market participant such as SMEs and those economic operators who are situated in low-income and middle-income countries.

GVC Regulations do not just impose top-down requirements but seek to shift behaviours – whether those of corporate entities or of end consumers. This implies that implementation requires a high degree of collaboration.

This has been reflected within the structure of the EU's new rules. For instance, the EUDR and the FLR both provide for the establishment of multi-stakeholder platforms. This is intended to facilitate the integration of the private sector in the implementation process, itself a broader recognition of the role that the private sector has played in this field. This includes civil society but also organisations which have already worked to develop certification and standards in the framework of supply chains.

8.5. Element Five: Shared Enforcement

A fifth feature of the EU approach to GVC regulation is the nature of the enforcement structures. Member States and their enforcement authorities have a central role. However, the European Commission, as the 'enforcer' institution of the EU also has a strategic oversight function. The degree of centralised oversight at the level of the European Commission is variable but, during the inter-institutional legislative process, the European Parliament and Council consistently argued to keep a more prominent institutional role.¹⁴⁶ This reflects a trend towards centralising the enforcement task.

This regulatory choice can be explained, at least partly, by the relationship between the EU and its Member States.

¹⁴⁶ See, for inst

On a doctrinal level, this relationship is governed by a principle of sincere cooperation, by the rule of primacy of EU law over domestic law, and by subsidiarity which requires the EU to intervene (in regulatory terms) only to the extent that this can be better achieved at Union level than by the Member States.

On a structural level, the EU has a vast border with entry points to its market located in all 27 Member States. Reliance on national enforcement authorities is therefore, both a legal and practical necessity. Many of the measures rely on customs authorities to conduct verifications and controls at the border. Indeed, it is a specific feature of the measures that the legal obligations they contain only apply to the extent that the products will be placed on or be exported from the Union market.

However, this enforcement structure means that enforcement has to be accompanied by central reporting obligations to ensure that the Commission is able to monitor the implementation of the new rules and that they are applied consistently. The need for greater convergence in the enforcement activity is reflected in the EU's GVC Regulations, many of which set detailed requirements on the Member State authorities to ensure a more harmonised approach.¹⁴⁷

9. Criticisms of the EU's Regulatory Approach

The EU's GVC Regulations have been met with criticism from market operators and from third countries.

It has been argued that certain requirements introduced by these rules are inconsistent with the EU's obligations under international law, including the core disciplines of international trade law set down in the WTO Agreements. For instance, following the notification of the EUDR to the WTO, an open letter signed by 14 other WTO Members raised concerns over the consistency of that Regulation with the General Agreement on Tariffs and Trade (GATT) 1994, and eventually with the Agreement on Technical Barriers to Trade (TBT Agreement).¹⁴⁸ This was followed by a letter in September 2023 with 17 signatories,¹⁴⁹ and WTO Members have continued to raise their concerns before different WTO committees¹⁵⁰ and before the WTO Council for Trade in Goods.¹⁵¹ The adoption of the CBAM similarly triggered complaints that this Regulation is not consistent with the Union's international commitments. These have been expressed both before the WTO¹⁵² as well as in other

¹⁴⁷ Implementation and enforcement of the EU's GVC Regulations is addressed in greater detail in ch 10.

¹⁴⁸ Agreement on Technical Barriers to Trade which is annexed to the Agreement Establishing the World Trade Organization (entered into force 1 January 1995) 1867 UNTS 154 (TBT Agreement). The EUDR was not notified to the TBT Committee since the EU does not consider that it falls within the scope of the TBT Agreement.

¹⁴⁹ See *Trading partners joint letter on EUDR 7 September 2023.pdf*.

¹⁵⁰ See WTO, *Minutes of the Meeting of the Committee on Technical Barriers to Trade*, 13–15 March 2024, G/TBT/M/92 – published May 2024.

¹⁵¹ See Council for Trade in Goods, 2 July 2024, Proposed Agenda, G/C/W/847, item 25.

¹⁵² China's Ministry of Commerce and climate envoy have openly criticised the EU's CBAM as a unilateral measure and a trade barrier. In May 2023, India threatened to initiate a dispute challenging the CBAM before the WTO. India plans to challenge EU carbon tax at WTO | Reuters.

multilateral settings such as the Conference of the Parties (COP) of the Paris Agreement¹⁵³ and bilaterally.¹⁵⁴

This section contextualises these criticisms by reference to relevant aspects of international law. It then provides an overview of the overarching and recurrent criticisms which have been voiced.

9.1. GVC Regulation and International Law

9.1.1. WTO Law and Unjustifiable Discrimination

Many of the criticisms that have been raised against the EU's new regulatory approach have invoked rules of international trade. Not all members of the WTO consider that GVC regulation in general, or the EU's autonomous rules in particular, can be accommodated within the disciplines of set down in the WTO Agreements. Others have questioned whether the WTO Agreements can provide a normative framework to meaningfully evaluate measures which have impacts along value chains criss-crossing multiple jurisdictional boundaries. This section contextualises those arguments by providing a brief overview of the rules and principles referred to.

In the first place, it is useful to bear in mind that the rules governing international trade as set down in the WTO Agreements explicitly refer to and acknowledge the connection between economic growth and sustainable development. This is set out in the Preamble to the Marrakesh Agreement establishing the WTO. In addition, the notion that environmental considerations may feature in the context of trade relations finds repeated expression in the texts of the covered Agreements. This is important precisely because it demonstrates that the parties to the WTO Agreements have recognised, from the inception of the WTO and during the negotiations of the covered Agreements, that there may be situations in which members find it necessary to compromise, intentionally or otherwise, principles of liberalised trade in pursuit of other objectives including environmental protection. In other words, the norms of international trade law reflect that a balance may be required to reconcile different regulatory imperatives – economic and non-economic – precisely because trade liberalisation can be associated with negative environmental and labour externalities.¹⁵⁵

The WTO Agreements preclude discrimination. This is reflected in two broad principles – the 'Most Favoured Nation' principle (MFN) and the 'National Treatment' principle

¹⁵³ Certain states sought to have an item on the CBAM added to the agenda of the twenty-eighth Conference of the Parties to the Paris Agreement. Certain states submitting written observations to the International Court of Justice in the framework of the Advisory Opinion on the obligations of states in relation to climate change criticised the EU for environmental measures which they consider will significantly affect producers in their territories and which they assert are not consistent with the Paris Agreement.

¹⁵⁴ India and the EU continue to discuss the CBAM bilaterally. See, for instance, the press release following the meetings held in July 2024. EU-India advance cooperation on CBAM, European Commission (europa.eu).

¹⁵⁵ For instance, studies examining the impacts of trade on employment have shown that trade liberalisation can imply both job creation and job destruction. See Trade and Employment Challenges for Policy Research (2007). A joint study of the International Labour Office and the Secretariat of the World Trade Organization, ISBC: 978-92-2-119551-1.

(NT). The MFN principle implies that a WTO Member may not discriminate between and among countries and hence must immediately and unconditionally accord any 'advantage' to the like product originating in or destined for another member.¹⁵⁶ The NT principle precludes WTO Members from discriminating against another WTO Member and thus requires that like products must be subject to no less favourable treatment.¹⁵⁷ These foundational principles are complemented by rules prohibiting export and import restrictions, requiring members to ensure that technical requirements do not impose an unnecessary barrier to trade and circumscribing the conditions under which subsidies may be granted.¹⁵⁸

At the same time, the WTO Agreements reflect that members have the right to regulate in their territories in pursuit of 'legitimate objectives.' This regulatory autonomy has, therefore, to be balanced against the constraints implied by the MFN and NT rules. The most classic expression of this balancing exercise is found in the General Exceptions set down in Article XX of the GATT 1994. However, analogous principles are found in the rules set down in the TBT Agreement, which also mandate that legitimate regulatory objectives are to be weighed against the distortive effects of measures on conditions of competition.¹⁵⁹

Therefore, when the consistency of any given measure with WTO law is raised and to the extent that it is necessary to balance the rights and obligations of members,¹⁶⁰ under both the GATT 1994 and the TBT Agreement, the questions that arise may be distilled down to the following:

- i. What is the (true) objective pursued by the measure?
- ii. Is the objective within the substantive scope of what can be understood to be 'legitimate objectives'?
- iii. Does the measure nonetheless give rise to unjustifiable discrimination?

This staged analysis has been tested and applied in a growing number of WTO disputes. What emerges from this jurisprudence is the following.

In the first place, the material scope of 'legitimate objectives' under the WTO Agreements should be understood as sufficiently broad and mutable to encompass different facets of environmental protection including climate change mitigation.¹⁶¹ The battlegrounds lie, therefore, rather in the identification of the 'true' objective of a measure and, importantly, in whether that measure has been designed such as to avoid any form of arbitrary discrimination or disguised protectionism.¹⁶²

¹⁵⁶ See GATT 1994, art I:1.

¹⁵⁷ See GATT 1994, arts III.2 and III.4.

¹⁵⁸ A detailed analysis of these rules is outside the scope of this book.

¹⁵⁹ See TBT Agreement, art 2.2.

¹⁶⁰ In other words, assuming that there is some form of regulatory differentiation that requires justification.

¹⁶¹ See, for instance, WTO, *Brazil - Measures Affecting Imports of Retreaded Tyres*, Report of the Appellate Body (n 82). The logic of the Appellate Body in *Brazil Retreaded Tyres* was adopted by the Panel in *DS 600 - EU - Certain Measures concerning palm oil - Malaysia*. In that dispute, measures which sought to reduce the risk of emissions associated with indirect land use change were accepted to pursue a legitimate objective and hence to be within the substantive scope of regulatory objectives that could be considered legitimated under art 2.2 of the TBT Agreement and under art XX(g) of the GATT 1994. For a summary, see J Norris, 'Trade and Environment Back in the Spotlight: Measuring-up the EU's Rules on Biofuels - WTO Panel Report in EU - Palm Oil/DS600' (2024) 51 *Legal Issues of Economic Integration* 195.

¹⁶² In WTO, *European Union and certain Member States - Certain Measures concerning Palm Oil*, Report of the Panel (n 82) the Panel was required to consider claims that these measures amounted, in reality, to green protectionism. The Panel assessed the objective of the measure on a granular basis, declining to follow an approach of

In the second place, the identification of the objective is a thorny issue precisely because of concerns over 'green protectionism' in disguise. Therefore, the stated objective might be a starting point, but analytically it is not the only relevant consideration.

In the third place, it is the last requirement which has consistently presented the greatest hurdle for regulating members. The chapeau of Article XX of the GATT 1994 which finds its analogue in Article 2.1 of the TBT Agreement is the metaphorical graveyard for many of the measures that have been subjected to scrutiny through dispute settlement.

The chapeau provides that WTO Members may adopt otherwise GATT-inconsistent measures which are provisionally justified under one of the subparagraphs of Article XX '[s]ubject to the requirement that such measures are not applied in a way which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade'.

In interpreting this provision the Appellate Body has notably held that a WTO Member may not use an 'economic embargo to require other Members to adopt essentially the same comprehensive regulatory programme, to achieve a certain policy goal, as that in force within that Member's territory without taking into consideration different conditions which may occur in the territories of those other Members'.¹⁶³ The extent of the inquiry which should be conducted into the 'appropriateness of the regulatory programme for the conditions prevailing in those exporting countries' is a core issue in determining the existence of discrimination. Excessive rigidity in the application of rules has also been considered to satisfy the requirement of 'arbitrary discrimination'.¹⁶⁴

Whilst meeting the requirement of the chapeau may be challenging for regulating members, these previous disputes demonstrate that tensions between legitimate regulatory objectives and the impacts these may have in third countries can and repeatedly have been assessed within the framework of the existing WTO Agreements.

9.1.2. *The Paris Agreement and CBDR-RC*

A second strand of international law which has been invoked in the context of criticisms of the EU's GVC Regulations is the principle of 'CBDR-RC' as reflected in the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement.

Recital (3) to the Preamble of the Paris Agreement refers to the objectives of the UNFCCC and to its principles. It states that the Paris Agreement is to be 'guided by [the Convention's] principles, including the principle of equity and common but differentiated responsibilities and respective capabilities, in the light of different national circumstances'.

The principle of CBDR-RC concerns differentiation. Under the Paris Agreement, CBDR-RC is a principle which is operationalised through Articles 2(2) and 2(4) which set obligations concerning the preparation and communication of nationally determined

accepting that because the Directive pursued the stated objective of environmental protection and is based on art 193 TFEU (the environmental legal basis), the analysis could stop there.

¹⁶³ WTO, United States – *Import Prohibition of Certain Shrimp and Shrimp Products* (n 82) para 164.

¹⁶⁴ WTO, European Communities – *Measures Prohibiting the Importation and Marketing of Seal Products* (EC – *Seals*), Report of the Appellate Body (22 May 2014) WT/AB-2014-1-AB-2014-2, para 5.305.

contributions.¹⁶⁵ Those provisions reflect that parties do not currently enjoy the same technical or economic capacity to address climate change with the same measures, and hence, whilst all parties are required to adopt NDCs that reflect their highest level of ambition, there may be differentiation as between the measures taken.

In the context of measures that are intended to address climate change, it has been argued that this principle applies more generally and hence requires regulating parties to allow for differentiation as between implementing parties.¹⁶⁶

9.2. Overarching and Recurrent Concerns

Regulating to embed non-economic values along production processes presents challenges, some of which are inherent to the characteristics of the global economy, and in particular the dominance of GVCs. The criticisms levied against the EU's regulatory approach relate both to the solutions the EU has found to address certain of those difficulties and, in some cases, to the concept of regulating along a value chain per se. This section sets out a non-exhaustive overview of the overarching and recurrent concerns that have been invoked by different stakeholders in relation to the EU's GVC Regulations.¹⁶⁷

9.2.1. *Unilateral Approach and Jurisdiction*

Perhaps the most fundamental of the recurrent criticisms of the EU's new instruments is that it has decided to regulate along GVCs at all. At the highest level, this reflects a view that to the extent that GVCs should be subject to any form of regulation, the task of defining those rules would best be left to multilateral fora, or should, as a minimum, imply common accord. In normative terms, this has been linked to the position that there exists a duty to cooperate under international law and that this duty should be interpreted so as to require states, when addressing 'global concerns', to ensure that the international community agrees with regulatory measures that may impact them.¹⁶⁸

This reasoning derives from for at least two perspectives.

First, it has been linked to the transboundary nature of GVCs, an attribute which means that any domestic regulation designed to have effects along value chains inevitably has

¹⁶⁵ The Paris Agreement on Climate Change (n 53) art 2(2) provides that '[t]his Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances'.

¹⁶⁶ The EU's position is that the CBRD-RC principle as reflected in the Paris Agreement is not a general principle of international law, and thus must be interpreted in its normative context. See Written Statements of the European Union in the Advisory Proceedings on the Obligations of States in respect of Climate Change, available at: <https://www.icj-cij.org/case/187/written-proceedings>.

¹⁶⁷ The author takes no position as to the validity of any one of these criticisms. The EU maintains that its GVC Regulations respect the balance of rights and obligations under the WTO Agreements and are consistent with its obligations under public international law. For criticism levied against specific instruments, see also the relevant chapters in this book.

¹⁶⁸ The existence of a duty to cooperate in the specific context of addressing climate change in the framework of UNCLOS was recently affirmed by ITLOS in its Advisory Opinion. However, this duty to cooperate has not been interpreted as requiring the ex ante or ex post agreement of the international community before adopting measures. Rather it has been linked to the obligation to prevent transboundary harm which has itself been recognised as a general principle under customary international law.

implications for operators in other jurisdictions, and to the extent that this regulatory activity prompts changes in trade flows, for the states themselves.

Second, it has been argued that since the non-economic values that the EU is seeking to protect have been characterised as issues of 'global concern', they require a multilateralised solution. This latter point has been raised repeatedly as regards the CBAM and the EUDR, which both seek to give effect to the EU's broader climate change mitigation objectives.¹⁶⁹

In short, the EU stands accused, through its GVC Regulations, of effectively seeking to impose a set of values and a level of protection on third countries.¹⁷⁰ This critique is linked to the perception that by regulating as a 'first mover' the EU is seeking to impose rather than ensure a buy-in to its chosen regulatory model.¹⁷¹

Another closely related criticism is that the EU's new measures, in particular those which set market access conditions, seek to regulate production processes in third countries by applying EU standards on producers in those countries. This, it has been argued, amounts to an exercise of extraterritorial jurisdiction by the EU.¹⁷² It has also been argued that the EU fails to sufficiently account for approaches applied in other jurisdictions and instead relies on 'contingent unilateralism' to ensure that its methodology is applied.¹⁷³

9.2.2. Divergence from International Standards and Definitions

Criticisms have been directed against divergences between the normative content in the EU's new instruments and existing soft law standards as reflected in the UN Guiding Principles and/or OECD Guidance.¹⁷⁴ This too is underpinned by a more fundamental concern that the EU's approach is leading to regulatory heterogeneity, which itself increases burdens, particularly on SMEs.

Concerns over regulatory divergence are also behind criticisms of specific definitions and terms which the EU has adopted in some of its instruments. For instance, one issue that has been identified with the EUDR is that the EU has established its own definitions of key terms such as 'deforestation'.¹⁷⁵

¹⁶⁹ See, for instance, the Statement of the delegate of Colombia to the WTO TBT Committee, 12–15 March 2024: 'While it is true that countries can take environmental measures, deforestation is a global issue that requires cooperative approaches rather than unilateral actions that could become trade restrictions' G/TBT/M/92. See also China's 2024 Trade Policy Review in which it states that 'China pushes for multilateral discussions on trade-related climate measures of great concerns to Members, such as CBAM under the framework of CTE'. See WT/TPR/G/458.

¹⁷⁰ The concerns expressed by the majority of third countries are related to the choice of model more than to the underlying value itself. For instance, there is near global consensus that climate change mitigation is a legitimate value. It is, therefore, the means more than the end that is subject to debate.

¹⁷¹ According to the WTO, more than 70 WTO Members have notified that they are considering a carbon pricing mechanism similar to the CBAM.

¹⁷² JB Mata Diz and HE de Paiva Araújo, 'Extraterritoriality and the Impact of EU Regulatory Authority: Environmental Protection as Soft Power' in N Cunha Rodrigues (ed), *Extraterritoriality of EU Economic Law: European Union and its Neighbours in a Globalized World*, vol 4 (Springer 2021): https://doi.org/10.1007/978-3-030-82291-0_15.

¹⁷³ For a discussion of 'contingent unilateralism', see J Scott and L Rajamani, 'EU Climate Change Unilateralism' (2012) 23 *European Journal of International Law* 469.

¹⁷⁴ The OECD Guidelines for MNEs were updated in 2023 and were endorsed by the OECD Council. See OECD/Decision of the Council on the Guidelines for Multinational Enterprises on Responsible Business Conduct, OECD/LEGAL/0307.

¹⁷⁵ The definition of 'deforestation' draws on the definition by the FAO.

In some instances, the EU has been criticised for failing to adopt a definition, for example, the EU has not defined 'global value chains' or 'value chains' as terms in the CS3D although that legislation is designed to establish a horizontal framework. The retained term in the CS3D is a 'chain of activities'.¹⁷⁶

9.2.3. *Effectiveness of the Measures*

It has been argued that the EU's new tools will not actually be capable of achieving their stated regulatory objectives (whether environmental or social protection) because they capture only the first tiers of a GVC and have difficulty accommodating their complexity.¹⁷⁷ This criticism is levied against risk-based due diligence in general as well as against the EU's instruments in particular.

The need to take into account different tiers within a GVC is reflected in some of the EU instruments. For instance, the CS3D indicates that companies should, when appropriate and feasible, use contractual cascading to ensure that their due diligence policies are adhered to along their 'chain of activities'. However, contractual cascading has been highlighted as an ineffectual means of targeting labour issues in supply chains. This point was raised by a number of stakeholders in relation to this specific instrument.¹⁷⁸

Linked to the efficacy of the measures have been criticisms of the scope and notably what has been left out of reach. This applies not only to the CS3D which excludes SMEs,¹⁷⁹ financial services and limits the due diligence obligations for regulated financial entities, but also to the EUDR and CBAM which only apply to certain commodities. Most of the instruments include review clauses. However, more recent Commission proposals have sought to reduce rather than expand the scope of these instruments.¹⁸⁰

9.2.4. *Discrimination*

A number of WTO Members have argued that the EU's measures discriminate against producers in third countries in contravention of the MFN and NT rules set down in the WTO Agreements.¹⁸¹

¹⁷⁶ Among the responses to the public consultation on the proposal for the CS3D, concerns over insufficient alignment with the OECD MNE Guidelines and the UNGPs were raised by multiple stakeholders. This included the Norwegian Consumer Authority, which pointed out that the Norwegian Transparency Act is based on those standards and companies have been aware of these guidelines for several years.

¹⁷⁷ See K. Eller, "Is 'Global Value Chain' a Legal Concept? Situating Contract Law in Discourses Around Global Production" (2020) 16 *European Review of Contract Law* 3: <https://doi.org/10.1515/ercl-2020-0002>.

¹⁷⁸ In responding to the public consultation on the proposal for the CS3D, concerns over over-reliance on contractual cascading were raised, inter alia, by amfori, Sweden, Ikea, Netherlands. For an overview, see Selected responses to EU Commission's proposal for a directive on Corporate Sustainability Due Diligence - Business & Human Rights Resource Centre (business-humanrights.org).

¹⁷⁹ A number of stakeholders contributing to the consultation process on the CS3D expressed the view that SMEs should be within scope as many of the risks that the due diligence obligations are seeking to identify occur at that level of a 'value chain'. This point was raised by civil society, for instance, the International Cocoa Initiative (ICI), Switzerland, as well as by industry associations including the Finnish Commerce Federation, the Norwegian Consumer Authority, and the Kammer der Steuerberater und Wirtschaftsprüfer, Germany.

¹⁸⁰ In February 2025, the Commission proposed to revise the CBAM and the CS3D as part of an 'omnibus' simplification package.

¹⁸¹ It has not been specified whether such claims would ultimately be articulated under art I:1 and III.4 of the GATT 1994 or one of the other covered agreements such as the Agreement on Technical Barriers to Trade, art 2.1

This issue has been raised as regards the scheme for country benchmarking that is due to be introduced under Article 29 of the EUDR.¹⁸² Country benchmarking is a process in which the Commission will assign countries or parts thereof a level of risk – standard, high or low – based on a methodology which is to be adopted by way of an implementing act. This has implications for the level of due diligence obligations on market operators. It also has implications for the level of enforcement activity that must be carried out by Member State authorities.¹⁸³

Third countries have expressed concerns that the methodology for country benchmarking will not be applied on the basis of sufficiently objective or transparent criteria. Civil society has also flagged the imperative of applying objective and transparent criteria for the country benchmarking exercise, notably in the light of pressure from certain states to attenuate the obligations in the context of negotiations for a free trade agreement.¹⁸⁴

The EUDR is not the only GVC regulation which has prompted WTO Members to identify a risk of discrimination. Following the notification of the Batteries Regulation to the WTO TBT Committee, certain other Members raised concerns that some of the obligations in that Regulation could be inconsistent with the non-discrimination disciplines in Article 2.1 of the TBT Agreement.¹⁸⁵ Those concerns related in particular to the introduction of a requirement to conduct a carbon footprint calculation and the future methodology that would be developed for that purpose.¹⁸⁶ Equally, several WTO Members have argued that the CBAM is also discriminatory or is otherwise WTO-inconsistent.¹⁸⁷

Excluding certain types of entity or commodities is a further ground on which it has also been suggested that EU rules might give to discrimination. During the consultation process for the EUDR, it was flagged that by selecting a limited number of commodities this can risk 'demonising' them.¹⁸⁸ Indeed, one of the grounds on which both Indonesia and Malaysia challenged the EU before the WTO for its rules under RED II addressing the risk of

of which also prohibits discrimination. Indeed, the question of the applicability of the TBT Agreement to certain of the EU's regulations has also been raised by third countries. See, for instance, the comments of the delegate for Australia, Meeting of the WTO TBT Committee, 13–15 March 2024.

¹⁸² Ambassadors from 17 countries described the EU Regulation on deforestation-free products (EUDR) as an 'inherently discriminatory and punitive unilateral benchmarking system that is potentially inconsistent with WTO obligations' in a letter sent to EU Commission and Parliament officials in September 2023. See *Why the Global South is against the EU's anti-deforestation law* | Euronews.

¹⁸³ For a fuller analysis, see ch 5 on the EUDR.

¹⁸⁴ See Open Letter on the procedure and criteria for 'country benchmarking' under art 29 of the EU Deforestation Regulation and the role of trade agreements, 14 November 2023: 'we are deeply concerned that the classification under the country benchmarking may be used as a bargaining tool in order to facilitate the conclusion of trade agreements. We are aware, in this regard, that representatives of the Brazilian and Argentinian governments have asked, in the context of the negotiations of the EU–Mercosur trade deal, that Mercosur countries be assigned to the "low risk" category as a condition for their approval of the agreement.'

¹⁸⁵ See WTO, Notification G/TBT/N/EU/775; Japan's Comments on the WTO/TBT Notification of EU (G/TBT/EU/775); and Reply from the European Union to the Comments received from Japan regarding Notification G/TBT/N/EU/775.

¹⁸⁶ The EU notified the draft implementing act setting the methodology for a carbon footprint calculation to the WTO TBT Committee in May 2024. This requirement is discussed in greater detail in ch 8.

¹⁸⁷ See, for instance, the statements of India, South Africa, China and Brazil at the 28th Meeting of the Conference of the Parties of the United Nations Climate Change Convention (COP28) and the Communication from Argentina, Bangladesh, Barbados, Plurinational State of Bolivia, Brazil, Cabo Verde, Colombia, Ecuador, Egypt, Honduras, Indonesia, Kazakhstan, Panama, Paraguay, Peru, South Africa, Uruguay, Bolivarian Republic of Venezuela, and the African Group at the 13th Ministerial Conference of the World Trade Organization on 29 February 2024.

¹⁸⁸ See Commission, Synopsis Report of Stakeholder Consultation (2021), Task 3 – Impact assessment on demand-side measures to address deforestation.

indirect land use change associated with the production of conventional biofuels, was that the full extent of the measures only impacted one feedstock: palm oil. An argument advanced (but ultimately rejected), was that, had the EU been truly intent on addressing the environmental risks associated with biofuel production from feed and feedstocks, they would have applied equivalent restrictions on the eligibility of soya bean-based biofuels.¹⁸⁹ The dispute nonetheless highlights that there is a balance to be struck between framing an obligation narrowly and ensuring that the measures can contribute to their objectives.

9.2.5. *Regulator Hyperactivity and Excessive Compliance Burdens*

It has been argued that the EU has embarked in an exercise of regulatory hyperactivity, rolling out multiple new regulatory instruments all of which address value chains but without sufficiently accounting for the overlaps and synergies between them. This is also a concern that has been flagged by companies subject to Economic and Social Governance (ESG) reporting obligations which currently exist under multiple frameworks, and which are linked to the CS3D.¹⁹⁰

In terms of implementation, concerns have been raised that companies and smallholders will simply be unable to comply with the normative requirements in the EU's expanded regulatory toolkit.

These concerns are multifaceted.

First, there is the cost burden associated with compliance which will not be distributed equally along value chains. It is well known that certain stages of production are more likely to be associated with environmental risks. The EU rules do not specify how such costs should be allocated, a factor which has raised concerns amongst operators in low-income and middle-income countries.

Second, there are logistical concerns. For instance, it has been pointed out that uploading the data required for economic operators placing products on the EU market to be able to show compliance requires infrastructure. IT equipment and information management platforms are less likely to be available to operators in certain jurisdictions. National regulatory requirements concerning privacy and access to data have also been cited as potential impediments to compliance.

Third, it has been argued that the rules are unworkable given the specific characteristics of certain value chains. For example, under the EUDR there is an obligation to trace a commodity back to the level of the GPS coordinates where it was sourced. Market participants have pointed out that when commodities are mixed or cumulated in bulk shipments

¹⁸⁹ See WTO, *European Union and certain Member States – Certain Measures concerning Palm Oil*, Report of the Panel (n 82) WT/DS600/R and WTO DS593. Indonesia and Malaysia challenged certain aspects of RED II and its delegated regulation on the grounds that the cap and phase-out of the eligibility of certain conventional biofuels to be counted towards the Union's renewable energy targets were discriminatory. In DS600, the Panel partially upheld Malaysia's claims finding that as applied, the measures did treat palm oil-based biofuel less favourably than other like biofuels. This finding was linked to the sufficiency of the data relied on as the basis for the regulatory distinction as well as a failure to sufficiently consider the life-cycle of palm trees.

¹⁹⁰ This includes the reporting obligations set down in the Corporate Sustainability Reporting Directive (CSRD). The relationship between the CSRD and the CS3D is discussed in ch 3. In February 2025, the Commission proposed an omnibus package which would substantially revise the CS3D and the CSRD to attenuate the requirements on market operators. See Proposal for a Directive amending the Directives: Accounting, Audit, CSRD and CSDDD – Omnibus I – COM/2025/81.

this becomes a very challenging task.¹⁹¹ Equally, another requirement under the EUDR is that the covered and derived products should have been produced in accordance with the relevant legislation of the country of production. It has been argued that this has been defined so broadly (it covers eight different legal areas), that the compliance burden is excessive for the producers of those products. Stakeholders have repeatedly called on the EU to identify practical solutions to these issues.

As to the synergies between the EU's different autonomous instruments, concerns have been raised precisely because the multiplication of reporting standards creates confusion and thereby increases 'information costs' as well as the risk of duplication in regulatory efforts.

Finally, concerns have been raised over the 'complex' structure of many GVCs, including extensive reliance on future delegated acts. Complexity is also an issue raised in relation to the human rights' due diligence obligation under the CS3D which defines human rights by reference to enumerated Conventions in the Annex.¹⁹²

10. Conclusion

Stepping into a regulatory space that has hitherto been occupied by private soft law initiatives is a bold move. In doing so the EU has openly signalled an intention to shift the behaviours of market participants, including EU consumers, so as to ensure alignment with its non-economic objectives. That these domestic measures have an effect outside the borders of the EU is the inevitable consequence of the structure of the global economy, the EU's role within international markets, and the prevalence of GVCs.

Although the EU has and is maintaining a high level of engagement with stakeholders, it is fair to say that the EU's GVC Regulations have been far from universally welcomed. Since these new rules are in their infancy, it remains to be seen whether the full panoply of implementation challenges that have been raised manifests itself, or whether the efforts to provide support for implementation will sufficiently attenuate the projected burden on market operators.

It is, however, evident that through this body of autonomous instruments the EU is going further and faster than other jurisdictions in seeking to reinforce its 'sustainability' objectives along the value chains connected to its internal market. Irrespective of the conceptual and practical complexities this entails, it represents the emergence of a new legal domain – EU GVC regulation.

¹⁹¹ The FAQs on the EUDR indicate that for products traded in bulk, such as soy or palm oil, this means that the operator (or traders that are not SMEs) needs to ensure that all plots of land involved in a shipment are identified and that the commodities are not mixed at any step of the process with commodities of unknown origin or from areas deforested or degraded after the cut-off date of 31 December 2020. For relevant composite products, such as, for example, furniture with a wood component (the operator needs to geolocate all the plots of land where relevant commodities (wood for example) used for the manufacturing process has been produced. The relevant commodities components cannot be of unknown origin or/and from areas deforested or degraded after the cut-off date. See further, ch 5.

¹⁹² See OECD Watch, June 2024, Alignment within Reach: Remaining opportunities to align the EU CS3D with the OECD Guidelines.