Trade and Sustainable Development chapters in EU Free Trade Agreements:

Challenging the exclusion of sanctions as a tool of inducing compliance with environmental standards in the context of international trade

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"I didn't want to suggest that humanity was in some way separate from the rest of the animal kingdom. We do not have a special place. We are not the preordained and final pinnacle of evolution. We are just another species on the tree of life."

A Life on Our Planet: My Witness Statement and a Vision for the Future, Sir David Attenborough

Abstract

This thesis strives to answer the research question of whether sanctions should be excluded as a compliance inducing mechanism towards an effective environmental protection in the context of Trade and Sustainable Development (TSD) chapters of Free Trade Agreements (FTAs) concluded between the EU and third countries, given the negative impacts international trade has on the environment and the position of the EU in global trade as one of the biggest drivers of pollution and environmental destruction beyond its borders. The EU has opted for a policy dialogue-based model of enforcement to its TSD chapters that has been called toothless and is under scrutiny. One option would be to introduce the possibility of recourse to sanctions in case of (protracted) non-compliance with environmental obligations contained in FTA's by either party, drawing upon a sanctions-based model similar to the approach the USA and Canada adopt in their FTAs, as it is unknown how an EU sanctions-based model would look like in practice, as it has not yet been attempted and provisions could vary in content and formulation.

This thesis concludes that the Commission appears to no longer exclude the possibility of considering sanctions. Moreover, trade sanctions are not considered a good option to pursue sustainable development ends, but financial sanctions in the case of (protracted) non-compliance of a partner country with the SD clauses of an FTA could function as an incentive to implement environmental reform. The fact remains, however, that for both trade and financial sanctions, there is so far no experience as to their effectiveness in practice. In terms of the compatibility of a mechanism of imposing sanctions by way of countermeasures in retort to violations of a TSD chapter, it is inconclusive whether such a measure would be in conformity with WTO law, but there is no indication to suggest that it would be illegal – especially in the case of financial penalties-, as it already exists within the scope of many other FTAs.

Introduction

Sustainable development can be defined as an approach to economic planning that endeavours to promote economic growth while preserving the quality of the environment for future generations[1]. This ever more popular concept has largely been difficult to apply due to many factors. One of them is that sustainable development is still a developing legal principle or branch of law[2], and given the lack of a fixed and universally accepted operational definition, its implementation – and, therefore, enforceability - becomes an issue in and of itself. I.e., its undefined legal status and its vague and ambiguous terminology makes a straightforward legal implementation or application of the principle of sustainable development in legal practice very difficult. The EU has been regarded as a frontrunner on global environmental protection[3] and is committed to promoting sustainable development. As defined by the European Commission[4], which is the operational definition for this paper, sustainable development is to be understood as "*meeting the needs of the present whilst ensuring future generations can meet their own needs*" and is made of three pillars[5], them being economic[6], environmental[7], and social[8]. The pursuit of sustainable development in EU trade policy – and, indeed, all relevant EU policies - is required by Treaty law, namely Article 11 TFEU[9] and the overarching principles of Article 3(5) of the TEU, which introduce fundamental concepts such as "*sustainable development of the Earth*" and "*free and fair trade*" to mandate the EU's "*relations with the wider world*". [10] These constitutional concepts have guided EU external action since their introduction by the Lisbon Treaty.

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[1] Federico Cheever and Celia I. Campbell-Mohn, 'Sustainable development' (*Encyclopedia Britannica*, 28 February 2019) <https://www.britannica.com/topic/environmental-law/Sustainable-development> accessed 2 July 2021.

[2] Virginie Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm' (2012) 23(2) European Journal of International Law 377–400. The author explores how the concept of sustainable development has been (creatively) considered by international legal scholars not only as an evolutive norm but as a new branch of international law in itself.; Jonathan Verschuuren, 'The growing significance of the principle of sustainable development as a legal norm' (2016), Research Handbook on Fundamental Concepts of Environmental Law, 276-305, 1-5. This work explains how many scholars consider sustainable development as not having the status of a legal principle, but remains rather an objective or duty in law, a goal or a policy goal.

[3] This is mainly due to the EU's contribution to the emergence and development of both internal and external environmental laws and regulatory regimes. Mar Campins Eritja, 'The European Union and Global Environmental Protection: Transforming Influence into Action' (2020) Routledge, Chapter two.

[4] European Commission, 'Sustainable development', <https://ec.europa.eu/trade/policy/policy-making/sustainable-development/> accessed 2 July 2021

[5] This definition of sustainable development and the three-pillar (social, economic and environmental) design of sustainability is globally accepted and endorsed by the UN General Assembly since the Rio + 5 Conference of 1997, and more recently it can be found in the UN 2030 Agenda for Sustainable Development, UN General Assembly, *Transforming our world : the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1, available at: https://www.refworld.org/docid/57b6e3e44.html (accessed 9 August 2021).

[6] Economic sustainability means that businesses or countries use their resources efficiently and responsibly so that they can operate in a sustainable manner to consistently produce an operational profit.

[7] Environmental sustainability requires living within the means of the natural resources available, namely by ensuring that consumption of natural resources is done at a sustainable rate and applying Circular Economy principles.

[8] Social sustainability is the ability a social system to persistently achieve social wellbeing, namely by ensuring this social wellbeing can be maintained in the long term.

[9] *"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."*

[10] Article 3(5) TEU reads: *"In its relations with the wider world, the Union shall uphold and promote its values and interests and […] contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect*

One way by which the EU pursues these goals is by the integration of sustainability language in its trade agreements via Trade and Sustainable Development (TSD) chapters[11]. To this end, all EU FTAs since the 2009 FTA with South Korea[12] include a Trade and Sustainable Development chapter, which mainly seeks to ensure that the EU, as well as its trading partners, follow international requirements in the pillars that compose sustainable development, mainly labour and environmental standards. The environmental protection targets are not uniform throughout all Agreements, but they primarily comprise climate change mitigation[13], biodiversity preservation[14], sustainable energy management[15] and the sustainable management of natural resources[16]. Thus, the European Union attempts to reconcile its position of power and influence as the world's largest trading bloc with an ever-growing aspiration to exercise environmental policy leadership on a global scale[17]. These chapters aim to commit both contracting parties to uphold standards contained in multilateral environmental agreements (MEAs) such as the Paris Agreement on Climate Change and the Convention on Biological Diversity (CBD) of 1992, as well International Labour Organisation (ILO) conventions, but sanctions are purposely excluded as a compliance inducing mechanism. My research question is whether sanctions as a compliance inducing mechanism should be excluded as a tool for a more effective environmental protection in the context of TSD chapters of EU FTA's. In this context, sanctions are to be understood as a coercive international law tool, i.e., as pressure imposed through measures, which is usually in the form of economic, financial, or trade costs, through the dispute settlement procedure of each FTA.

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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"[…]."

[11] European Commission, 'Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs)' COM (2017) 0654 final.

[12] Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part (2011/265/EU).

[13] Climate change mitigation refers to tackling the causes and minimising the possible impacts of climate change, by, namely, reducing greenhouse gas emissions. Levels of emissions are regulated by MEAs such as the Paris Agreement, and FTAs contain provisions that oblige parties to comply with such agreements: CETA Article 24.4(2): "*Each Party reaffirms its commitment to effectively implement in its law and practices, in its whole territory, the multilateral environmental agreements to which it is party"*.

[14] EU-Mercosur FTA TSD Chapter, Article 7: "*1. The Parties recognise the importance of the conservation and sustainable use of biological diversity consistent with the Convention on Biological Diversity (CBD), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the International Treaty on Plant Genetic Resources for Food and Agriculture, and the decisions adopted thereunder and the role that trade can play in contributing to the objectives of these agreements*". Climate change mitigation is also specifically mentioned as a goal in provisions such as EU-JEEPA FTA, Article 16.5(c).

[15] EU-JEEPA FTA, Article 16.5(c): *"The Parties recognise the importance of enhancing the contribution of trade and investment to the goal of sustainable development in its economic, social and environmental dimensions. Accordingly, the Parties: (…)shall strive to facilitate trade and investment in goods and services of particular relevance to climate change mitigation, such as those related to sustainable renewable energy and energy efficient goods and services, in a manner consistent with this Agreement"*.

[16] CETA Article Article 24.10(1): "*The Parties recognise the importance of the conservation and sustainable management of forests for providing environmental functions and economic and social opportunities for present and future generations, and of market access for forest products harvested in accordance with the law of the country of harvest and from sustainably managed forests*."; JEEPA ARTICLE 16.8(1): "*The Parties recognise the importance and the role of trade and investment in ensuring the conservation and sustainable use and management of fisheries resources, safeguarding marine ecosystems, and promoting responsible and sustainable aquaculture"*.

[17] Charlotte Bretherton and John Vogler, 'The European Union as Trade Actor and Environmental Activist: Contradictory Roles?', (2000) 15(2) Journal of Economic Integration, 163-194.

At this point, it is pertinent to explain why trade should be used as a vehicle for sustainability in the first place. The answer is that it is partly due to the driving negative impacts global trade has on the environment. Indeed, Europe was found to be one of the biggest consumer blocs connected to tropical deforestation emissions, and emissions linked to international trade-related transport are increasing, in the current growth model based on the exploitation of natural resources and mass consumption [18]. Against this backdrop, the EU is making more efforts to harness trade for sustainability than other major trading partners. However, there is scant evidence to show that the EU's FTAs, with their TSD chapter, are realizing their potential to reduce trade expansions' negative impacts on the environment[19]. Indeed, the conflict between FTAs and their adverse impact on sustainable development, on one side, and using the Agreements' mechanisms for the purpose of advancing sustainable development (or at least preventing or mitigating harmful outcomes), on the other, has not gone unnoticed[20]. Furthermore, it is important to stress that trade policy alone cannot – and must not be expected to - solve all global problems in environmental matters. That being said, the potential of a sustainable trade policy focused on specific trade-related challenges must not be disregarded. Such is the position of the EU, as seen for instance in then Trade Commissioner Phil Hogan's hearing as Commissioner-designate, where it become clear that he appreciates the need to "*ensure that trade is sustainable*", and that "*trade policy must contribute to addressing global challenges such as climate change and protecting the environment*"[21].

The first-best method to deal with environmental distortions – according to standard economic theory[22] – would be to adopt corrective environmental policies, namely in the form of enforceable international treaties, and not trade policies which dedicate a mere chapter to sustainable development. However, uniquely environmental policies are scarce and generally considered toothless[23], as exemplified by the Rio Declaration and Paris Agreement[24], since they are commitments with very little or no enforcement, with no required penalties or criminal sanctions. Their formulation is often rendered weaker by factors such as corporate influence in their negotiations[25]. Hence, we

[18] Caspar Trimmer, 'How trade helps drive tropical deforestation' (Stockholm Environment Institute, 8 April) <https://www.sei.org/featured/trade-helps-drive-deforestation/> accessed 1 July 2021.
[19] Céline Charveriat and Marianne Kettunen, 'Time to get real about sustainability and trade within the European Green Deal' (Institute for European Environmental Policy, 19 November 2019) <https://ieep.eu/news/time-to-get-real-about-sustainability-and-trade-within-the-european-green-deal> accessed 1 July 2021.
[20] Jan Orbie, Deborah Martens, Myriam Oehri & Lore Van den Putte, 'Promoting sustainable development or legitimising free trade? Civil society mechanisms in EU trade agreements' (2016) 1:4 Third World Thematics: A TWQ Journal, 526-546.
[21] European Parliament, 'Committee on International Trade: Hearing of Phil Hogan Verbatim Report' (2019).
[22] C.S. Pearson, 'Economics and the Global Environment' (2000) Cambridge University Press.
[23] International Treaties such as the Paris Agreement are considered lacking in enforcement machinery and as not being sufficiently (or at all) justiciable. Daniel Bodansky 'The Legal Character of the Paris Agreement' (2016) 25:2 RECIEL, 142-150, 145 to 147.
[24] The Paris Agreement contains many contains very few direct requirements and many unenforceable commitments, for example, Article 12: "*Parties shall cooperate in taking measures, as appropriate, to enhance climate change education, training, public awareness, public participation and public access to information, recognizing the importance of these steps with respect to enhancing actions under this Agreement*."
[25] Kenny Bruno, 'The Corporate Capture of the Earth Summit' in 'The Corporate Takeover of Sustainable Development' (Food First Books 2002) 22.

are left with a second-best[26] method in the form of trade agreements that include a few provisions that address environmental matters. It should not be forgotten, nonetheless, that this inevitably leads to efficiency losses in the strive for environmental protection, as it is not the main focus of the policy. Furthermore, the EU must ensure that its international trade legislation is compliant with WTO rules, i.e., non-discriminatory in relation to the origin of like goods and the least trade restrictive possible to achieve desired environmental objectives, which also constrains the potential of environmental measures.[27]

The EU has until now opted for a policy dialogue-based approach or model of enforcement to its TSD chapters that has been called toothless. While the way forward to ensure compliance and enforcement in future EU FTAs is not clear, it is evident that the concerns about the EU's existing approach to TSD chapters in FTAs will need to be addressed (especially if the EU is to ratify agreements with big new parties such as Mercosur and Australia in the future). This could be done by introducing the possibility of recourse to sanctions in case of non-compliance with environmental obligations contained in FTA's by either party (drawing upon a sanctions-based approach or model, similar to the USA and Canadian approach), cumulatively to existing approaches, which have been found to be meritorious in many ways.

To address the exclusion of sanctions as an environmental protection tool in the context of TSD chapters of EU FTA's, this thesis is divided into three chapters. Chapter 1 will provide the broader framework of TSD chapter in FTAs concluded by the EU with trade partners. For this, an analysis of the current implementation and enforcement approaches to environmental standards in FTAs adopted by the EU and its partners is conducted. Chapter 2 delves into the possibility of improving enforceability of environmental standards in FTAs by exploring the hypothesis of introducing sanctions to the EU FTA model. This legal exercise is done by comparing the sanctions-based approach to enforcement in its current manifestations to the dialogue-based approach favoured by the EU, and by addressing practical and procedural obstacles to the introduction of a sanctions' mechanism, specifically its compatibility with WTO law. Finally, Chapter 3 will take note of two case studies. The first one, the text of the EU-Mercosur Trade Agreement, strives to show a very recent example of how the exclusion of recourse to sanctions, and indeed of access to dispute resolution in case of a non-compliance with environmental standards manifests in practice. The second case-study, the US-Guatemala case, is added to explore the shortcomings of the existing sanctions'

[26] UNU-CRIS Working Papers, 'The Sustainable Development Clauses in Free Trade Agreements: An EU Perspective for ASEAN?' W-2013/10, 5.

[27] Legal provisions adopted to achieve environmental protection goals, by their very nature, may restrict trade and therefore have an impact on WTO rules. They may be in conflict with basic trade rules, such as the principle of non-discrimination (Articles I and III of the General Agreement on Tariffs and Trade (GATT)) and the prohibition of quantitative restrictions (Article XI GATT). In the trade and environment context, therefore, Article XX GATT - an exception clause – often comes into play.

mechanisms in ratified FTAs when triggered to address SD (labour or environmental) standards, in comparison with trade rules.

This discussion aims to contribute to the broader context of the international environmental academic debate.

Methodology

In the FTAs concluded so far, there is an effort from the EU to reconcile economic and non-economic principles – namely environmental. The provisions contained in the TSD chapters are legally binding[28], but there is no recourse to sanctions in case they are not effectively implemented and complied with, and no real redress. This paper hopes to, through a method of desk research and legal comparative research, shine a light on the dialogue-based mechanisms through which the EU implements and enforces environmental protection in FTAs and explore the introduction of sanctions as a potential policy option for improvement of this pursuit. Comparisons will be drawn between the EU system and the one in place in North America, and between different chapters of EU FTAs, to try to attain the best knowledge for improvement of environmental protection beyond the EU's borders going forward. The FTAs that will be touched upon will all belong to the so-called 'second generation' of agreements[29], as these are the ones that include a TSD chapter.

Importantly, it must be said that it is hard to find ways to measure the effects legal policies have on environmental protection, or account for the precise practical impact that compliance or non-compliance with TSD provisions have on the environment, and this will not be attempted. Rather, assessing the effectiveness of enforcement and compliance mechanism of TSD chapters will be done from a legal perspective. Legal effectiveness can be defined in different ways with the aid of legal sociology and legal philosophy[30], but for the purpose of this thesis it shall be defined and measured as enforceability of the legal provisions in question, i.e., the provisions that contain environmental commitments and obligations.

[28] In EU-Japan Economic Partnership Agreement (JEFTA), European Union-Japan, December 27, 2018, 61, L 330, Chapter 16 (16.4 – 16.10), the wording "shall" is present in each provision to bind both parties to, respectively, commit to MEAs, promote sustainability through trade, conserve biological diversity, sustainably manage forests and fisheries resources and take into account scientific environmental information, and do so transparently. In Comprehensive Economic and Trade Agreement (CETA) (2017) Canada-European Union, January 14, 60, L 11, Chapter 24 (24.4 – 24.16) contains the same provisions, and adds new ones, such as a duty of public information awareness of its environmental law and enforcement.

[29] "Second generation" agreements are the agreements concluded after 2006, like those with South Korea, Colombia, Peru and Ecuador, Central America, Canada and Japan, which extend to new areas, including sustainable development.

[30] Jan Torpman and Fredrik Jörgensen, 'Legal Effectiveness' (2005), (4) Archiv Für Rechts und Sozialphilosophie.

Chapter 1: Trade and Sustainable Development Chapters in EU FTAs

1.1. Introduction

To challenge the exclusion of introducing the recourse to sanctions to EU FTA's sustainable development provisions as a compliance inducing mechanism, to provide for a more effective environmental protection in the context of international trade, it is relevant to analyse the current formulation of TSD chapters. This chapter will analyse the implementation of environmental protection by breaking it down into the two main types of mechanisms contained in Agreements (monitoring and advisory, and enforcement).

1.2. The implementation of environmental standards in FTAs

EU TSD chapters create a monitoring committee and a consultative domestic advisory group (DAG)[31]. If either contracting party suspects the other of breaching its TSD commitments[32], that party can initiate government-to-government consultations with a view to resolving the issue and, if this fails, a panel of independent experts can be convened to determine whether a party is in breach of its obligations and suggest resolutions. Some environmental chapters of FTAs like CETA expressly provide for the receipt of submissions by civil society actors, including regarding alleged failure to

[31] CETA Article 24.13(5): "*Each Party shall make use of existing, or establish new, consultative mechanisms, such as domestic advisory groups, to seek views and advice on issues relating to this Chapter. These consultative mechanisms shall comprise independent representative organisations of civil society in a balanced representation of environmental groups, business organisations, as well as other relevant stakeholders as appropriate. Through such consultative mechanisms, stakeholders may submit opinions and make recommendations on any matter related to this Chapter on their own initiative*"; JEEPA Article 16.15(1): "*Each Party shall convene meetings of its own new or existing domestic advisory group or groups on economic, social and environmental issues related to this Chapter and consult with the group or groups in accordance with its laws, regulations and practices*.". A Domestic Advisory Group is "*a balanced representation of business organisations, trade unions and environmental / other organisations. To become member of an EU DAG, an EU organisation needs to be: Independent not-for-profit organization; Represent and promote EU interests; Have specific expertise or competence on areas covered by the trade and sustainable development chapter; Registered in both the transparency Register of the European Commission/European Parliament and in the civil society dialogue database of DG Trade; Some members are designated by the European Economic and Social Committee (EESC)*" in European Commission, 'Implementation of the Trade and sustainable development (TSD) chapter in trade agreements – TSD committees and civil society meetings' (2020).

[32] EU FTAs do embody comprehensive, substantive obligations relating to environmental standards, but the attainment of these commitments rests typically on dialogue and cooperation mechanisms and non sanction-based procedures for the resolution of disputes. For example, Article 2(1) of the EU–Mercosur TSD chapter: "*Each Party shall strive to improve its relevant laws and policies so as to ensure high and effective levels of environmental and labour protection*". Also, obligations not to lower the level of domestic labour and environmental protection, for example CETA Article 24.5(2): "*A Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental law, to encourage trade or the establishment, acquisition, expansion or retention of an investment in its territory*." and (3): "*A Party shall not, through a sustained or recurring course of action or inaction, fail to effectively enforce its environmental law to encourage trade or investment*."

implement the relevant provisions[33]. Envisaged dispute settlement procedures mostly provide for amicable consultations and review by an expert body without access to regular, enforceable dispute settlement or the possibility of applying trade or other economic sanctions in the event of non-compliance, or protracted non-compliance[34].

Sustainable development chapters, although differing slightly[35] (JEEPA comprises commitments to ratify and implement the Paris Agreement[36],[37] while CETA includes three separate chapters which cover sustainable development[38], labour[39] and environment[40]), are usually structured in three pillars. These are the binding commitments by the contracting Parties to some MEAs, mechanisms to involve civil society organizations in the implementation of said commitments and a specific dispute settlement mechanism driven by independent arbitrators, who divulge findings regarding compliance. Current TSD chapters in EU trade agreements include a broad set of binding provisions, which are moored in multilateral standards (such as MEAs), in an approach that, apparently, treats the environment on an equivalent position in the agreements' framework as other areas. In terms of scope, EU TSD provisions consequently seek to promote the effective implementation of MEAs[41], a level playing field achieved by not lowering environmental and labour standards with the aim of improving trade or appealing to investment and sustainable management of natural resources, as well as encouraging corporate social responsibility and fair and ethical trade initiatives and guaranteeing effective implementation.

[33] CETA Articles 23.8(5) and 24.7(3).
[34] CETA Articles 23.10, 23.11, 24.15 and 24.16.
[35] Eurogroup for Animals, Transport & Environment, Fern and CONCORD 'From Ceta To Jeepa – The Variations In The "Trade & Sustainable Development" Provisions In Eu Free Trade Agreements' (2018), 3.
[36] JEEPA Article 16.4 on MEAs states on paragrpah (4): "*(…) The Parties reaffirm their commitments to effectively implement the UNFCCC and the Paris Agreement,(…). The Parties shall cooperate to promote the positive contribution of trade to the transition to low greenhouse gas emissions and climate-resilient development. The Parties commit to working together to take actions to address climate change towards achieving the ultimate objective of the UNFCCC and the purpose of the Paris Agreement*.".
[37] Ibid. JEEPA Article 16(4)(4).
[38] CETA Chapter 22 on "*Trade and Sustainable Development*".
[39] Ibid. Chapter 23 on "*Trade and Labour*".
[40] Ibid. Chapter 24 on "*Trade and Environment*".
[41] These are, *inter alia*: Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES Convention); Minamata Convention on Mercury (Minamata Convention); Convention on Persistent Organic Pollutants (Stockholm Convention); Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention); Convention on the Control of Transboundary Movements of Hazardous Wastes and their disposal (Basel Convention); Framework Convention on Climate Change (UNFCCC); Kyoto Protocol, The Paris Agreement; Convention on Biological Diversity (UN) (CBD) and its Protocol on Biosafety to the Biodiversity Convention (The Cartagena Protocol), Protocol on Liability and Redress to the Cartagena Protocol on Biosafety (The Nagoya – Kuala Lumpur Supplementary Protocol) and Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of the Benefits Arising from their Utilization to the Convention on Biological Diversity (The Nagoya Protocol); Protocol to the Convention for the Protection of the Ozone Layer on Substances that deplete the Ozone Layer (Montreal Protocol).

1.2.1. Monitoring and advisory mechanisms

The positive aspects of the existing EU model are that the institutional structure of EU TSD chapters, through platforms where civil society can play an advisory role, is devised to be inclusive. Civil society actors can participate in the monitoring of the FTA implementation through direct discussions with governments. These platforms include the previously explained DAGs and Joint Platforms from each FTA partners, bringing civil society organisations from both sides together.

During a first stage, EU efforts concentrate on incentivising the partner country to work with the Union, through dialogue, joint projects, interaction with international bodies and the setting-up of dedicated institutional and civil society structures[42]. TSD provisions in FTAs are binding and therefore subject to a dispute settlement mechanism[43], by a procedure that consists of government-to-government consultations, the setting up a panel consisting of independent experts - on trade, labour, and environment –, the drafting of a public panel report, and, finally, the monitoring of the implementation of said panel report[44]. At every stage, the involvement of civil society and international organisations is possible.

1.2.2. Enforcement mechanisms

As we have seen, the common approach to enforcement mechanisms in TSD chapters includes the establishment of a Parties' committee in charge of monitoring the implementation of the TSD chapter, a mechanism allowing advice from civil society, government-to-government consultations, and, as a last resort option, the establishment of a panel in charge of producing a report on the matter at stake.[45] JEEPA differentiates itself with the inclusion of a provision that tasks the Parties' TSD committee with interacting with civil society[46]. CETA contains two mechanisms that have not been

[42] EU-Mercosur FTA Article 15(1): "*The Parties shall make all efforts through dialogue, consultation, exchange of information and cooperation to address any disagreement on the interpretation or application of this Chapter*.".
[43] CETA Article 24.16: "*1. For any dispute that arises under this Chapter, the Parties shall only have recourse to the rules and procedures provided for in this Chapter.2. The Parties shall make every attempt to arrive at a mutually satisfactory resolution of a dispute. At any time, the Parties may have recourse to good offices, conciliation, or mediation to resolve that dispute.".*
[44] CETA Article 24.15(10): "*The Panel of Experts shall issue to the Parties an interim report and a final report setting out the findings of fact, its determinations on the matter, including as to whether the responding Party has conformed with its obligations under this Chapter and the rationale behind any findings, determinations and recommendations that it makes*. (…)" and (11): "*If the final report of the Panel of Experts determines that a Party has not conformed with its obligations under this Chapter, the Parties shall engage in discussions and shall endeavour, within three months of the delivery of the final report, to identify an appropriate measure or, if appropriate, to decide upon a mutually satisfactory action plan (…)*".
[45] Eurogroup for Animals, Transport & Environment, Fern and CONCORD 'From Ceta To Jeepa – The Variations In The "Trade & Sustainable Development" Provisions In Eu Free Trade Agreements' (2018).
[46] JEEPA Article 16,13(2)(c).

reproduced in other agreements, namely, a complaint mechanism for the general public[47], as well as an article on access to justice in environmental matters[48].

However, this enforceability mechanism, as it stands, is considered to be significantly limited[49], namely, because only the parties to the agreement may trigger it. It is therefore unavailable to NGOs or trade unions that may be conscious of practices that contradict commitments under the FTA, and moreover, while the party concerned must provide information on the measures taken to comply with the report, there is no possibility of "condemnation", much less of any kind of sanctions' mechanism as a follow-up for protracted non-compliance. In fact, the safeguard of sustainable development rules continues to be merely political, and incentive based, which nevertheless does not prevent the EU from resorting to this mechanism, as attested by the complaint against South Korea for failure to respect freedom of association[50], notwithstanding the unsatisfactory result. By way of example, in the EU-Japan FTA, parties pledge to "*cooperate to promote the positive contribution of trade*" to the low-carbon transition and "*commit to work together in climate action to achieve the objectives of the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement*"[51]. However, the Agreement does not place the TSD chapter under the jurisdiction of the dispute settlement mechanism between the parties of the Agreement, as the goal is to promote cooperation and settlement through dialogue, while excluding the use of a formal settlement if one of the parties violates its sustainable development obligations in the event of failure of conciliation.

1.3. Conclusion

The Commission's 2017 report on FTA implementation[52] claims that TSD chapters of EU FTAs have, broadly speaking, been successful. Nevertheless, it is apparent that enforceability is lacking and that there is ample room (and need) for improvement, if these TSD chapters are to provide for effective environmental protection. However, opinions on how to do so vary widely, from the Commission and its refusal of considering

[47] CETA Article 24.7.
[48] CETA Article 24.6.
[49] Alan Hervé 'The European Union and its model to regulate international trade relations' (2020) European Issue n°554, Fondation Robert Schuman.
[50] According to the EU, the Korean Act on Freedom of Association (1998) excludes certain categories of workers from the right to organize and South Korea was in breach of Article 13(4) 3 of the EU-South-Korea FTA, according to which the parties shall make continuous and sustained efforts to ratify the fundamental ILO conventions. Consultations were considered unsuccessful in 2019, but the EU requested the establishment of an expert panel. This will be developed upon on Chapter 2 (2.4.).
[51] JEEPA Article 16(4)(4).
[52] Report from The Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Implementation of Free Trade Agreements, 1 January 2016 - 31 December 2016, COM/2017/0654 FINAL.

sanctions[53], to some authors who go as far as expressing regret that the suspension of the trade agreement in the event of withdrawal from the Paris Agreement or insufficient efforts is absent[54]. The following Chapter will explore legal barriers to a more stringent enforcement approach, crystallized by international law, specifically WTO law, and whether they preclude the adoption of sanctions-based approach or if they could be compatible.

[53] European Commission Services 'Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements' (2018)
[54] Tancrède Voituriez, 'Leveraging trade for the environment: inadequacies in the European approach and possible options' (IDDRI, November 19th 2019) <https://www.iddri.org/en/publications-and-events/blog-post/leveraging-trade-environment-inadequacies-european-approach-and> accessed 1 July 2021

Chapter 2. Improving enforceability of environmental standards in FTAs

2.1. Introduction

Following the adoption of the UN Agenda 2030 in 2015, which sets Sustainable Development Goals and targets, and of the 2015 Paris Agreement on Climate Change, the European Commission reviewed and evaluated its TSD chapters. This review resulted in new proposals, after debate with Member States and stakeholders[55], but no change has taken place as of yet. There is hope the environmental performance of the EU trade policy will be improved under the new EU Green Deal[56] and the Institute for European Environmental Policy has issued a paper containing policy recommendations to this end[57]. In its non-paper on the *Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements*[58], the Commission services acknowledged the general view that the implementation of TSD chapters should be stepped-up and improved, namely by highlighting the need for more transparency of enforcement actions, while maintaining their broad scope. The possibility of introducing sanctions as a compliance inducing mechanism in any form was excluded. However, the document focused on whether infringements of the sustainability chapters in the FTAs should be subject to trade sanctions, disregarding financial penalties or other more targeted sanctions in lieu of trade restrictions. This chapter will strive to analyse and challenge that choice, within the scope of legality of WTO rules[59], which requires that any sanctions adopted are not trade-restrictive, i.e., applied in a manner that constitutes arbitrary and unjustified discrimination or a disguised restriction on trade. As will be expanded on later, sanctions could be inconsistent with the GATT[60], and therefore compliance with the General Exceptions of Article XX's chapeau clause should be analysed.

[55] Directorate-General for External Policies Policy Department, 'The future of sustainable development chapters in EU free trade agreements' (2018) PE 603.877

[56] European Parliament 'The European Green Deal' (2020) https://www.europarl.europa.eu/doceo/document/TA-9-2020-0005_EN.pdf Accessed 3 July 2021

[57] Kettunen et al., 'An EU Green Deal for trade policy and the environment: Aligning trade with climate and sustainable development objectives' (2020) IEEP Brussels / London.

[58] European Commission Services 'Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements' (2018)

[59] *Prima facie*, economic/trade sanctions have the potential to be inconsistent with several provisions of the GATT, including Article I (Most Favored Nation Status), Article XI (General Elimination of Quantitative Restrictions), and Article 11(4) (National Treatment).

[60] GATT 1994: General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).

2.2. The hypothesis of introducing sanctions to the EU FTA model

The EU deliberately opts for a policy dialogue-based instead of a sanctions-based implementation and enforcement mechanisms. There is ample discussion pondering whether it would be desirable in the EU context to add sanctions to its toolbox in order to achieve an effective protection of the environment in third countries, and whether they are feasible from a legal perspective.[61] In its 2018 non-paper, the Commission services concluded that moving towards a sanctions-based model was impossible due to the absence of consensus, and that such an approach would not fit easily with the EU's model.[62]

How an EU sanctions-based model would look like in practice is unknown, as it has not yet been attempted and provisions could vary in content and formulation. Most conjectures hypothesize, however, that this option would be based on adopting certain aspects and features of FTA implementation and enforcement that are currently in existence in the sanctions-based model we do know, the USA and Canadian one[63]. In this model, TSD chapters are covered by the FTAs' dispute settlement mechanisms and usually provide for the possibility of trade concessions to be withdrawn or economic sanctions to be imposed as a measure of last resort, if a dispute settlement panel finds that there was a failure to meet environmental standards and this final report is not implemented in a timely manner, providing for a more vigorous follow-up of the environmental provisions[64]. Such a move would involve the adoption of new structures and procedures, in addition to the dispute settlement mechanism including government-to-government consultations, a panel procedure, the publication of public reports, and then, finally, there would be added the possibility to apply sanctions in case of non-compliance (or protracted non-compliance), with or without a link to trade or investment between the parties (which will be discussed later on) – so, not necessarily an abandonment of the current model, but rather an upgrade, or a 'gearing up', as it would improve enforceability.

[61] European Commission, 'Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs)' COM (2017) 0654 final.
[62] European Commission Services 'Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements' (2018) 3.
[63] Axel Marx, Franz Ebert, Nicolas Hachez and Jan Wouters, 'Dispute Settlement in the Trade and Sustainable Development Chapters of EU Trade Agreements' (2017), Leuven Centre for Global Governance Studies, 79.
[64] CAFTA–Dominican Republic FTA with the USA, Article 16.2.1(a) and 20.16 (on suspension of benefits following the non-implementation of final report by arbitral Panel); Yillt Vanessa Pacheco Restrepo, 'Enforcement Practice Under Preferential Trade Agreements: Environmental Consultations and Submissions on Environmental Enforcement Matters in the US-Peru TPA' (2019), 46 Legal Issues of Economic Integration, 247 – 262, 255; US-Peru TPA Article 18.12 (on the request of environmental consultations) and Chapter 21 on Dispute Settlement, Articles 21.6 to 21.16 (which configure payments of annual monetary assessment); Article 21.16(9): "*Compensation, the payment of monetary assessments, and the suspension of benefits are intended as temporary measures pending the elimination of any non-conformity or nullification or impairment that the panel has found*.".

As previously mentioned, the Commission has been opposed to this approach, arguing it would not fit in the EU's model[65]. Its arguments rest on the fact that trade sanctions are, usually, a means to compensate parties for quantifiable economic damages resulting for failures in compliance under the agreement at stake and hence, in the case of a breach of TSD commitments, this compensation to the other party (they specify the EU, even though the mechanism would go both ways) would not necessarily result in "*effective, sustainable and lasting improvement of key social and environmental standards on the ground*"[66]. The Commission further argues that a sanctions-based approach would narrow the scope of TSD chapters by translating breaches of environmental standards into economic compensation, and due to the fact that negotiating partners would not accept trade sanctions combined with a broad scope of sustainable development measures – and this may indeed be incompatible with WTO law. Not to mention that proving the economic injury necessary to enable sanctions in the first place might be too challenging, as exemplified by the US- Guatemala dispute which will be explored in Chapter 2.4. This is indeed a legally sound argument, but the configuration of a sanctions' mechanism can be informed by these observations and by this case, i.e., the mechanism can be drafted in such a way as to not be objectionable under WTO law or contain an impossible burden of proof in the form of a link to economic injury. In this way, sustainable development provisions can be less broad and more focused, and do not need to be linked to economic injury. Additionally, these considerations were made with regards to trade sanctions, and other more targeted sanctions were unfortunately not explored, just like the effectiveness of the broad obligations contained in current EU FTAs which preclude hard enforcement.[67]

Furthermore, there is the question as to what extent a sanctions-based approach would allow the EU to maintain its current strategy of reinforcing the MEAs dealing with sustainable development, taking into account ongoing processes and efforts within the multilateral system. On the other hand, as mentioned before, EU TSD chapters are not subject to enforceable dispute settlement procedures and there are also no financial penalties for non-compliance and this lack of sanctions has been criticized by MEPs and civil society groups, who claim that EU TSD chapters are toothless in practice[68]. European civil society groups have indeed called attention to an imbalance in the treatment of their concerns *vis-a-vis* those of investors, given that, under the investment protection mechanisms contained in multiple EU FTAs, foreign investors are able to sue for financial compensation in the event that government action is adjudicated to have harmed their investment, while, on the other hand groups concerned about environmental

[65] European Commission, 'Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements' (2018) 3.
[66] Ibid. European Commission (2018) 3.
[67] Marco Bronckers and Giovanni Gruni, 'Taking the Enforcement of Labour Standards in the EU's Free Trade Agreements Seriously' (2019), Common Market Law Review 57(6), 1591–1622, 4-8.
[68] Sam Lowe, 'The EU Should Reconsider Its Approach To Trade And Sustainable Development' (Centre for European Reform, 31 October 2020) <https://www.cer.eu/insights/eu-should-reconsider-its-approach-trade-and-sustainable-development> accessed 3 July 2021.

damage and degradation have very limited recourse. As we have seen, the Commission has responded to these claims by the publication of a non-paper in 2017 seeking feedback on its approach to TSD and asking whether the EU ought to continue with the existing approach, improving it, or whether it should move to a more sanctions-style enforcement regime. The response to this consultation was then published in its second non-paper on the subject in 2018, where it concluded that pursuing a sanctions-based approach to enforcing EU TSD chapters was not sensible, and rather recommended improving the existing model by increasing transparency and implementing a more assertive approach to enforcement under the existing mechanisms.

However, as pointed out by some academics[69], this discourse creates a false sense of dilemma – between abandoning altogether a cooperation and dialogue model in favour of sanctions or maintaining cooperation with no possibility for sanctions whatsoever -, since rather than abandoning its existing model entirely and replacing it with a sanctions-based one, the EU could instead build upon existing approaches and add needed improvements for efficacy. This would mean that dialogue and consultation would remain the primary tool for engaging with FTA partners on TSD issues, but supplemental unilateral removal of trade preferences or economic sanctions could be associated to specific areas of concern. In this hypothesis, dispute settlement could exist only as a fall back, which would allow the partner country to contest the EU's decision if it does not agree to it, or vice versa. Such an upgrade of the EU's approach to TSD enforcement would result in more MEP support for the backing of new FTAs, and it could also provide an effective means of ensuring that partner countries and the EU itself continue to abide by their international environmental obligations, when faced with extra teeth.

The EU's FTAs include a range of hazier provisions to raise the standards of labour and environmental protection[70]. According to the Commission, the lack of sanctions has allowed the EU to incorporate more aspirational language in its FTAs[71]. However, there has been no materializing of evidence that this broader set of aspirations in the EU's FTAs has produced better, more consequential results than the narrower set of enforceable norms in the Trade Agreements concluded by the USA and Canada[72]. Additionally, it should also be noted that it has been argued that, because the sustainability obligations in the EU's FTAs are often less clear and more aspirational, compliance is more difficult, and that this would justify their lack of enforceability, arguably rendering the more aspirational language pointless, if not counterproductive.[73]

[69] Ibid. Sam Lowe (2020).
[70] For example, Article 22.3 CETA *('…strive to promote trade and economic flows and practices that contribute to enhancing decent work and environmental protection, including by encouraging…*').
[71] European Commission, (2018), 3.
[72] European Commission annual reports on the implementation of EU free trade agreements (FTAs) 2017-2019.
[73] Denise Prévost and Iveta Alexovicov´a 'Mind the Compliance Gap: Managing Trustworthy Partnerships for Sustainable Development in the European Union's Free Trade Agreements' (2019) 6 International Journal of Public Law and Policy 236, 249; Swedish National Board of Trade 'Implementation and Enforcement of Sustainable Development Provisions in Free Trade Agreements—Options for Improvement' (2016) 13.

When reflecting on the introduction of trade sanctions, some open questions float through the considerations made, such as the quantification of the damage caused by the breach of environmental provisions and possibilities to avoid the risk that trade sanctions unintentionally affect the parts of the population or environment which they are supposed to benefit. In some contexts, the imposition of fines may be more appropriate to induce compliance[74]. Such fines could also be used to address the violations subject to the dispute or be awarded to the people or preservation efforts concerned. Importantly, evidence suggests that, to have some positive effects, sanction regimes do not necessarily need to be applied, but rather it is often already the threat of trade sanctions that can induce compliance[75].

2.3. The sanctions-based approach to enforcement in comparison to the dialogue-based approach

When it comes to the impact of environmental provisions in FTAs on environmental policy reform, the sanctions-based approach typified by the US approach has been found[76] to incentivize partner states to reform during the negotiation phase, having an *ex ante* effect, whereas the policy dialogue-based approach adopted by the EU is predicted to have an *ex post* effect, leading to reform in the implementation phase.[77] Overall, studies suggest[78] that sustainability provisions, particularly in the dialogue-based approach, at best contribute to achieve a few (moderate) positive outcomes and at worst do not harm socio-economic development. Any evidence concerning the *ex-post* effectiveness of strongly enforceable provisions through third party adjudication and unilateral sanctions, however, has not been produced as of yet, much less analysed.[79]

In a European Parliament's Directorate-General for External Policies Workshop[80], it was discussed that trade sanctions are not a good option to pursue sustainable

[74] W . Davey 'Compliance Problems in WTO Dispute Settlement' (2009) , 42:1 Cornell International Law Journal, 119-128, 125.
[75] S. Charnovitz 'Rethinking WTO Trade Sanctions' (2001) 95:4 American Journal of International Law, 792-831, 809; D. Lacy and M. S. Niou 'A Theory of Economic Sanctions and Issue Linkage: The Roles of Preferences, Information, and Threats' (2004) 66:1 The Journal of Politics, 25–42.
[76] Ida Bastiaens I. & Evgeny Postnikov. 'Greening Up: The Effects of Environmental Standards in EU And US Trade Agreements' (2017) 26:5 Environmental Politics 847-869.
[77] The authors base their findings on USA and EU FTAs with environmental provisions on developing countries' environmental policy reform by applying the Environmental Performance Index, which is comprised of indicators such as climate and energy, air quality, water resources, health, agriculture, forests, fisheries and biodiversity and habitat.
[78] European Parliament, Directorate General for External Policies of the Union, Policy Department for External Relations, Workshop on 'The future of sustainable development chapters in EU free trade agreements' (2018), PE 603.877, 14.
[79] Conclusion reinforced by the ruling in the US-Guatemala case (Section IV), where the arbitration panel determined that the litigants could not prove that the labour rights violations were trade-related and therefore prosecutable under the agreement.
[80] Evita Schmieg, German institute for International and Security Affairs (SWP) 'Innovation in the social pillars of sustainable development', European Parliament Workshop (2018) PE 603.877, 23.

development ends[81], but financial sanctions in the case of (protracted) non-compliance of a partner country, with the labour clauses of an FTA, could help to achieve various objectives, one being that the funds could be directly applied for the improvement the situation of the environment, working on the premise that financial sanctions could function as an incentive to implement reform. This would be done through the creation of a mechanism to improve the labour and environmental situation in contracting parties – 'financial sanctions', in this envisioning of the measure, is not to be understood as the imposition of fines or fees, but rather the creation of a mechanism that would lead automatically to improving the environmental situation in partner countries.[82]This option is appealing as, since it doesn't configure trade sanctions or measures that could be considered trade-restrictive, it would, in principle, not be WTO-incompatible[83]. This configuration of financial sanctions where the fines are used for projects addressing SD circumstances are a feature of the Canada-Colombia FTA, in the case of labour obligations[84], and can be an inspiration for a future EU model.

Another objective is, that such a mechanism would force partner governments to deal with sustainable development issues in their budgetary processes, which could strengthen ownership. In this logic, some advise that employing another technical expression might improve acceptance by negotiating partners. The fact remains, however, that for both trade and financial sanctions, there is so far no experience as to their effectiveness, so many simply work on the hypothesis that sanctions might work as an incentive to implement reform in the field of sustainable development.

Features under the USA's and Canada's agreements that may be of particular interest to the debate on how to improve the TSD chapters under EU trade agreements concern, in particular, the complaint and the sanction mechanisms. Specifically, the USA trade agreements usually provide for mechanisms through which stakeholders can formally allege breaches of labour provisions and environmental provisions, albeit to a lesser extent when it comes to the latter. Furthermore, USA trade agreements as well as partly Canada's agreements and the EU-Cariforum Agreement foresee arbitral dispute

[81] In the case of the labour situation, rather than improve it, they were found to worsen the situation of workers in partner countries.

[82] This hypothesis attempts to address the fact that non-compliance with environmental standards is often rooted in basic development problems, such as limited administrative capacities, inadequate enforcement of legislation and weak institutional infrastructure and it is therefore not enough to demand third parties to change this situation without financial and technical support to conduct reform processes, and trade policy should contribute to development that informs and influences internal policies.

[83] Not being trade-restrictive, they would not be GATT incompatible and Article XX exceptions would not be required. This mechanism would not be likely to be a violation of Articles I, lII, and XI, of the GATT, as it would not configure trade measures.

[84] Canada-Colombia FTA Article 1604: "*In order to further the foregoing objectives, the Parties' mutual obligations are set out in the Labour Cooperation Agreement between Canada and the Republic of Colombia (LCA) (…)*" whose Article 20(5) sets out that: "*Monetary assessments shall be paid into an interest-bearing fund designated by the Council and expended at the direction of the Council for appropriate labour initiatives in the territory of the Party that was the object of the review. In deciding how to expend monies paid into the fund, the Council may consider the views of interested persons in the Parties' territories*.".

settlement and economic sanctions as a measure of last resort[85]. This provides the environmental and labour provisions with a more vigorous follow-up than many other international arrangements in these areas and could be considered also for other EU trade agreements[86].

2.4. Practical and procedural obstacles to the introduction of sanctions

The Commission notes that when other countries coupled sustainability obligations with sanctions in their FTAs, these obligations were narrower in scope than the norms that the EU managed to include in its FTAs[87], meaning they were more focused and lacked a range of vaguer obligations and declarations of intent that have questionable legal significance, such as provisions where the parties "*reconfirm that trade should promote sustainable development*"[88] and commit to "*promote awareness*"[89]. Indeed, the Commission is criticized for making no attempt to analyse whether its broader provisions on environmental protection or labour rights have been able to achieve more[90]. There is no evidence to support this.[91] As discussed above, some of these provisions are so weak that they would seem to be virtually meaningless.[92]

The proposals of the European Parliament in the sense that FTA panels should be able to oblige a non-complying party to make financial payments as a temporary compliance inducement mechanism has been endorsed by some in academia.[93]

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[85] EU-CARIFORUM Economic Partnership Agreement (EPA) between the EU and 14 Caribbean countries, (2008) Articles 189, 195, 203(1), Article 213(1) and (2). the adoption of trade sanctions under this agreement is possible for disputes regarding the labour and environmental provisions included in the investment chapter, See Article 213(2) as read in conjunction with Articles 72(b) and 73 of the EU-Cariforum Agreement.

[86] Axel Marx, Franz Ebert, Nicolas Hachez and Jan Wouters, 'Dispute Settlement in the Trade and Sustainable Development Chapters of EU Trade Agreements' (2017), Leuven Centre for Global Governance Studies, 79.

[87] European Commission Non-paper (2018) 3.

[88] EU-South Korea FTA Article 13.6.

[89] CETA Article 23.6.

[90] Marco Bronckers and Giovanni Gruni 'Retooling the Sustainability Standards in EU Free Trade Agreements' (2021) 24:1 Journal of International Economic Law, 25–51.

[91] Marco Bronckers and Giovanni Gruni 'Improving the Enforcement of Labour Standards in the EU's Free Trade Agreements' (2018) in 'Restoring Trust in Trade: Liber Amicorum in Honour of Peter Van den Bossche', D Prévost, I Alexovičová & J Hillebrand Pohl (eds) (2018) Hart Publishing.

[92] European Commission 'Report on Implementation of EU Free Trade Agreements in 2017' (2018) and Commission Staff Working Document SWD(2018)454 final.

[93] Marco Bronckers and Giovanni Gruni 'Improving the Enforcement of Labour Standards in the EU's Free Trade Agreements' (2018), 22. The authors recognise that the chapter on sustainable development in the bilateral agreements is binding but could be strengthened by providing for: "(*a) a complaints procedure open to the social partners, (b) appeals to an independent body to settle disputes relating to social and environmental problems speedily and effectively, such as panels of experts selected by both parties on the basis of their expertise in human rights, labour law and environmental law, and whose recommendations would have to form part of a well-defined process, with implementing provisions, (c) recourse to a dispute settlement mechanism on an equal footing with the other parts of the agreement, with provision for fines to improve the situation in the sectors concerned, or at least a temporary suspension of certain trade benefits -provided for under the agreement, in the event of an aggravated breach of these standards".*

2.4.1. Compatibility of a sanctions-based approach to enforcement with WTO law

A big objection[94] to introducing a mechanism of imposing trade sanctions by way of countermeasures in retort to violations of a TSD chapter is that such sanctions could violate WTO law. As for financial sanctions, the Commission did not address this possibility in its non-paper of 2018.[95] In response, there are those who entertain the question of whether any particular justification under WTO law is even necessary[96], due to the tense relationship between WTO and non-WTO law, which makes some scholar submit the assessment that the countermeasures under discussion in this case are removed from the WTO, since they concern a violation of an international agreement made separate to the WTO, and in respect of obligations - i.e., environmental standards - that are outside of the scope of WTO law. Indeed, while the objectives of raising standards of living and sustainable development are included in the Preamble to the Agreement establishing the WTO, human rights, labour rights and environmental protection do not feature explicitly in the WTO mandate.

Nonetheless, a brief and generic assessment of the compatibility of the sanctions option with WTO law is in order. A truly valuable assessment falls outside the scope of this thesis, since such an assessment will depend on how exactly these provisions would be formulated, what sort of measures they would incorporate – i.e., trade sanctions by way of trade restrictions, financial sanctions, or other form or compliance-inducing mechanism. Assuming they might infringe GATT rules, it is important to stress that otherwise GATT-illegal measures can be allowed under the chapeau clause of Article XX GATT if they fall under one of the exceptions and if "*applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevai*l," and if they are not "*a disguised restriction on international trade*." Two of the exceptions laid out in Article XX on General Exceptions are of particular relevance to the protection of the environment, them being paragraphs (b), which allows measures "*necessary to protect human, animal or plant life or health*", and (g), "*relating to the conservation of exhaustible natural resources (…)*". Therefore, WTO members can adopt measures which meet these two cumulative requirements of GATT Article XX on General Exceptions[97]. To introduce any potential measures envisioned under a sanctions-based model, the EU and its trade partners, would need to perform this two-tier analysis.

[94] European Commission Non-Paper (2018).
[95] Bronckers and Gruni, 1614 and 1616–17.
[96] Marco Bronckers and Giovanni Gruni 'Retooling the Sustainability Standards in EU Free Trade Agreements' (2021).
[97] First, that measures fall under one of the exceptions under Article XX and that the measure satisfies the requirements of the introductory paragraph, i.e. that it is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, and is not a disguised restriction on international trade; GATT Article XX.

The article contained in FTAs on MEAs typically concludes with a reference to the right of the parties to adopt measures to implement such agreements, which is subject to the chapeau sentence from GATT Article XX.[98] When the countries have set their own level of protection and adopted environmental legislation, they must not fail to effectively enforce that legislation, affecting trade and investment between parties. In the case of current EU FTAs which provide for commitments relating to labour rights and environmental obligations that are binding to varying degrees and not subject to the regular dispute settlement mechanism, the WTO legality of potential trade measures adopted under these provisions has not been tested in practice, but theoretically, they could be the subject of a dispute in the WTO.[99] In addition, the countries should not lower the levels of protection afforded in their environmental laws, or otherwise derogate from their environmental legislation in order to attract trade and investment[100]. These kinds of stipulations are included in a third key provision on '*upholding levels of protection*'[101] . They aim to legally commit parties to effectively enforce their environmental laws and address concerns related to '*pollution havens'*,[102] in which countries may strategically lower their standards or under-enforce their laws in order to attract trade and investment.

In the case of trade sanctions such as raising preferential tariffs in respect of a non-complying FTA partner, they are normally WTO legal[103], but a link with trade or investment is required. Such tariff increases might rebalance the trade effects caused by the lowering of domestic levels of environmental protection. On the other hand, raising tariffs above bound levels, or imposing an import ban, in order to induce an FTA partner to comply with its international labour or environmental commitments, would infringe WTO law[104] and might not be covered by the exception for FTAs.[105] WTO precedent suggests that such a trade restriction enforcing an FTA's bilateral standards could not be justified under the GATT's public policy exception for enforcement measures either.[106]

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[98] EU-Central America FTA, Article 287(5); EU-Colombia and Peru FTA, Article 270(4).

[99] European Union 'WTO rules: Compatibility with human and labour rights' (2021) 6; Lorand Bartels 'The Application of Human Rights Conditionality in the EU's Bilateral Trade Agreements and other Trade Arrangements with Third Countries', European Parliament (2008) 19.

[100] Article 13.3(2) of the EU–Vietnam FTA (non-regression); Article 13.7(1) of the EU–Korea FTA (non-enforcement); Article 13.12 of the EU–Singapore FTA (non-regression and non-enforcement).

[101] Eu-Korea FTA, Article 13.7 ; EU-Central America FTA, Article 291; EU- Colombia and Peru FTA, Article 277.

[102] Tomasz Koźluk and Christina Timiliotis, 'Do Environmental Policies Affect Global Value Chains? A New Perspective On The Pollution Haven Hypothesis' OECD Economics Department Working Papers No. 1282, 110-111.

[103] The EU EU does envisage trade sanctions in the event certain developing countries, to which it has granted unilateral trade preferences, violate multilateral human rights, labour, or environmental standards. In such cases, the EU reserves the right to withdraw benefits under the so-called Generalised System of Preferences (GSP) Article 19(1)(a) Regulation (EU) No 978/2012 (the 'GSP Regulation'), OJ 2012 L 303/1. Article XXIV(8)(b) GATT.

[104] Articles I, II or XI, XIII GATT.

[105] Article XXIV GATT, as interpreted by WTO Appellate Body Report, Turkey—Restrictions on Imports of Textile and Clothing Products, WT/DS34/AB/R, adopted 22 October 1999, paras. 57-58, and in WTO Appellate Body Report, Peru–Additional Duty on Imports of Certain Agricultural Products, WT/DS457/R, adopted 27 November 2014, paras. 5.114-116; Gregory Shaffer and Alan Winters, 'FTA Law in WTO Dispute Settlement: Peru–Additional Duty and the Fragmentation of Trade Law', 16 World Trade Review 303 (2017), at 320–22.

[106] Article XX(d) GATT, as interpreted by WTO Appellate Body Report, Mexico—Tax Measures on Soft Drinks and Other Beverages, WT/DS308/AB/R, adopted 6 March 2006, para 77–79; Article XX(a) GATT, as recently interpreted by WTO Panel Report,United States—Tariff Measures on Certain Goods from China, WT/DS543/R, adopted 15

However, alternatives to avoid the disadvantages of trade sanctions - like financial penalties - have become more prominent as a compliance inducement mechanism[107]. This alternative would leave trade concessions granted to the EU's FTA partner in place, therefore not being objectionable under WTO law. The European Parliament has been endorsing the possibility of including financial penalties as an inducement mechanism in the EU's FTAs since 2010[108]. Canada proposed to include them as a sanction in CETA, but this was rejected by the EU[109] and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which includes many of the EU's preferential trading partners, also provides for the payment of a monetary penalty in lieu of trade sanctions in its dispute settlement mechanism[110] and has not been found to be in noncompliance with WTO rules[111].

2.5. Conclusion

For the mechanisms contained in TSD chapters to be effective, building compliance incentives, including, as a last resort, sanctions, into the institutional and procedural framework of environmental (and labour) provisions seems highly desirable. Gearing up the non-trade policy pursuits of FTAs appears also important in order not to give the impression that issues relating to sustainable development rank lower on the priority of the parties than other issues dealt with by the agreement.

In the analyses of the various ways in which such measures could crystalize, trade sanctions (such as trade retaliation) were found to not be ideal as a compliance inducing measure and raise issues in terms of compatibility with WTO rules. Sanctions in the form of financial penalties as compliance inducement mechanism, however, leave the trade concessions granted to FTA partners in place and do not configure trade-restrictive measures, therefore not raising objections under WTO law.

September 2020, para 7.178ff (US tariffs on wide range of goods faulted for not having sufficient nexus with the public morals invoked by the USA).

[107] Marco Bronckers and Giovanni Gruni, 'Taking The Enforcement of Labour Standards in the EU's Free Trade Agreements Seriously' (2019), Common Market Law Review 57(6), 1591–1622, 4-8.

[108] Resolution on human rights and social and environmental standards in international trade agreements of 25 November 2010 (2009/2219(INI)) para 22(a); See Resolution on implementation of the 2010 recommendations of Parliament on social and environmental standards, human rights and corporate responsibility of 5 July 2016 (2015/2038(INI)) paras 22(c) and (d).

[109] Billy Melo Araujo, 'Labour Provisions in EU and US Mega-regional Trade Agreements: Rhetoric and Reality', 67 International and Comparative Law Quarterly 233 (2018), at 242; Thomas Fritz, 'Analysis and Evaluation of the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada' (Hans-B¨ockler-Foundation Project Number 2014-779-1, 26 January 2015), at 29.

[110] Article 28.20(7) of the CPTPP. This trade agreement includes a large number of countries with which the EU already has FTAs in place (Canada, Chile, Japan, Peru, and Singapore), or is still negotiating or finalizing FTAs (Australia, Mexico, New Zealand, and Vietnam).

[111] World Trade Organization, 'WTO members review CPTPP at 100th session of Committee on Regional Trade Agreements' (22 June 2021) https://www.wto.org/english/news_e/news21_e/rta_22jun21_e.htm acessed on the 3 of August 2021.

Chapter 3. Illustrative Case studies

3.1. Introduction

Chapter 3 will take note of two case studies: the first one, the text of the EU-Mercosur Trade Agreement, strives to analyse and challenge a very recent example of how the exclusion of recourse to sanctions, and indeed of access to dispute resolution in case of a non-compliance with environmental standards, manifests; the second case-study, the US-Guatemala case, is added to explore the shortcomings of the existing sanctions' mechanisms in an FTA when triggered to address SD (labour or environmental) standards, in comparison with trade rules, and what conclusions can be drawn from it in regards to the sanctions-bases model of enforcement in general.

3.2. Case Study I: EU-Mercosur Trade Agreement

The EU-Mercosur[112] Trade Agreement is chosen as a case-study as it is the most recent Agreement that has been agreed on in principle[113], in 2019, which includes a TSD chapter containing obligations to respect or uphold a set of environmental standards derived from other international treaties. This agreement manifestly does not ascribe the same legal prescriptiveness and enforcement to environmental obligations as to the economic obligations of the same FTA[114], and such obligations on environmental standards, when compared to the agreement's intellectual property obligations, remain more general and less prescriptive.

The agreement does contain clear obligations to promote, and effectively implement, multilateral environmental agreements[115] to implement the Paris Agreement[116]. It also incorporates references to multiple international instruments on sustainable development and conservation[117] where some more prescriptive language can

[112] Brazil, Argentina, Paraguay, Uruguay.
[113] Trade negotiations have been concluded, but it has not yet been ratified.
[114] For example, liberalisation of goods and services or intellectual property rights.
[115] EU-Mercosur Article 5.3.
[116] EU-Mercosur Article 6.2a.
[117] Such as the Convention on Biological Diversity (CBD), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the United Nations Sustainable Development goals (SDGs), amongst others.

be detected, namely, regarding fighting illegal trade in wildlife[118], illegal logging[119], and protection of the marine environment[120].

The added value of such obligations on an FTA as to their realization - since most of the binding obligations included in the EU-Mercosur FTA reference international treaties that the Mercosur countries, the EU, and its Member States already have to respect under international law - might be questioned[121]. Some authors put forward[122] that the main contribution of the EU-Mercosur FTA to compliance with MEAs could precisely be supporting the implementation of such international obligations through an enforcement mechanism based on hard measures, since most of the MEAs, including the Paris Agreement on Climate Change, lack procedures to enforce their obligations in case of non-compliance or protracted non-compliance.

The EU-Mercosur FTA does contain a developed enforcement system for economic obligations and intellectual property rights, but this mechanism cannot, however, be used to ensure the respect of environmental obligations contained in the TSD chapter, firstly, because it lacks obligations on how such environmental standards should be enforced at the domestic level. In contrast, the section on intellectual property of the same FTA contains a very extensive section[123] on enforcement requiring the parties to the FTA to ensure multiple procedural guarantees whenever intellectual property rights are litigated via domestic courts[124]. While it is true that legal standing in cases of breaches of environmental commitments is different than in intellectual property litigation, obligations on environmental standards are also excluded from the standard state-to-state dispute settlement[125] of the EU-Mercosur FTA, and neither economic nor trade sanctions cannot be utilised to persuade the parties to respect such obligations but rather, as in other FTAs, environmental obligations employ a separate, softer mechanism which allows for consultations and the creation of a panel of experts, but no sanctions in case of (protracted) non-compliance.

Giovanni Gruni suggested that, in order to improve sustainability chapters in EU's FTAs, the EU should avoid 'unprescriptive' or dubious legal language and refer to

[118] EU-Mercosur Article 7.2c.
[119] EU-Mercosur Article 8.2.
[120] EU-Mercosur Article 9.2.
[121] Giovanni Gruni, 'The unsustainable lightness of enforcement procedures: environmental standards in the EU-Mercosur FTA' (Blogdroiteuropéen, 13 May 2020) <https://blogdroiteuropeen.com/2020/05/13/the-unsustainable-lightness-of-enforcement-procedures-environmental-standards-in-the-eu-mercosur-fta-by-giovanni-gruni/> accessed 1 July 2021.
[122] Giovanni Gruni, 'The unsustainable lightness of enforcement procedures: environmental standards in the EU-Mercosur FTA'.

[123] EU-Mercosur FTA Chapter [XX] Intellectual Property https://trade.ec.europa.eu/doclib/docs/2019/september/tradoc_158329.pdf.
[124] EU-Mercosur FTA Article X.44.
[125] EU-Mercosur FTA Article 15 on Dispute Resolution: *« 1. The Parties shall make all efforts through dialogue, consultation, exchange of information and cooperation to address any disagreement on the interpretation or application of this Chapter.(…) 5. No Party shall have recourse to dispute settlement under Title VIII (Dispute Settlement) for any matter arising under this Chapter."*

environmental obligations clearly, precisely, and unconditionally. He suggests that this could be done, at the very least, by asserting that the parties to the agreement have obligations to ratify, implement via domestic legislation, and enforce via domestic courts the referred environmental standard without additional conditions.

In addition, he proposes that the EU should approximate the very large difference in quality of enforcement of environmental obligations, when compared to the other economic obligations and rights of its FTAs, namely, by including precise procedural obligations on how environmental standards shall be enforced via domestic courts, as it is done with intellectual property rights[126]. Furthermore, in his view, environmental standards should be permitted to be enforced by means of the standard dispute settlement mechanism of the agreement, which incorporates sanctions. It is well observed that environmental standards should not be excluded from the dispute settlement mechanism of the Agreement, as this results in – apart from the absence of real redress – the impression that sustainable development provisions do not have the same importance as the remainder of the Agreements. In the previously mentioned[127] option of financial sanctions with no trade-restrictive impact, they would be legally feasible under WTO rules. While it is unknown how this would look like in practice, in the EU model, it is not unheard of since it already happens in FTAs concluded by other countries. By way of example, the CPTPP, a trade agreement between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore and Vietnam[128], foresees that environmental commitments can be litigated by way of the standard dispute settlement mechanism of the FTA, via a panel that involves environmental law experts[129]. All the commitments in CPTPP's Environment chapter are subject to dispute settlement which can result in trade disciplines, fines, and trade sanctions[130]. There is no availability of comprehensive research covering every trade agreement in existence. However, the effectiveness of this mechanism is unclear, since existing research has uncovered no instance of the dispute settlement procedure actually being used to enforce environmental obligations in any trade agreement which provides for that possibility[131].

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[126] EU-Mercosur, Article X.44.
[127] Chapter 2.3.1.
[128] The CPTPP is a FTA between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore and Vietnam, which was signed by these 11 countries on 2018.
[129] CPTPP Article 28.9(5) on Dispute Settlement: "*For a dispute arising under Chapter 19 (Labour), Chapter 20 (Environment) or Chapter 26 (Transparency and Anti-corruption), each disputing Party shall select panellists in accordance with the following requirements, in addition to those set out in Article 28.10.1 (Qualifications of Panellists): (b) in any dispute arising under Chapter 20 (Environment), panellists other than the chair shall have expertise or experience in environmental law or practice*".
[130] World Economic Forum White Paper, 'Will the Trans-Pacific Partnership Agreement Reshape the Global Trade and Investment System? What's In and What's New: Issues and Options' (2016) REF 190716, 19-21; CPTPP Article 20.17.5: "*In a further effort to address the illegal take of, and illegal trade in, wild fauna and flora, including parts and products thereof, each Party shall take measures to combat, and cooperate to prevent, the trade of wild fauna and flora(…). Such measures shall include sanctions, penalties, or other effective measures, including administrative measures, that can act as a deterrent to such trade. (…)*".
[131] Errol Meidinger, 'TPP and Environmental Regulation in Megaregulation Contested: Global Economic Ordering After TPP (Benedict Kingsbury, et al., eds., Oxford University Press 2019), 181; Chris Wold, "Empty Promises and Missed Opportunities: an Assessment of the Environment Chapter of the Trans-Pacific Partnership" (2016).

While the EU-Mercosur FTA is acknowledged as a breakthrough on environmental protection, when compared to the WTO, which practically does not contain any obligations on environmental standards, it contains issues that could need addressing. The European Parliament has before now presented proposals suggesting that an FTA panel should have the means to compel a non-complying party to make financial payments as a temporary incentive to bring itself into compliance with labour standards until the date when it does so. There seems to be a consensus among scholars that trade sanctions should be left out or as a last resort option, only in case the third party does not comply with the sustainable development standard or refuses to pay the financial penalty required in the FTA.[132]

3.3. Case-study II: US-Guatemala case

The US-Guatemala case was filed by the United States through the Central America-Dominican Republic-United States Free Trade Agreement (CAFTA-DR),[133] and was the first time labour complaints were contested under the CAFTA-DR mechanisms[134]. To this date, there were no disputes on environmental complaints, but labour rights are also part of TSD chapters of Trade Agreements and are usually subject to the same mechanisms. This case was within the jurisdiction of the Arbitral Panel established pursuant to Chapter 20 of the Dominican Republic-Central America-United States FTA[135], and informed the discussion on the merit of a sanctions-based approach to enforcement of SD obligations internationally. Importantly for this thesis, it was cited by the Commission in its 2018 non-paper[136] as one of the arguments to justify that a sanctions-based approach was not a suitable option and sanctions were therefore excluded.

Academic research suggesting the ineffectiveness of the USA enforcement of labour obligations[137] references, as the main case-law, the US-Guatemala case. In this case, the arbitration panel found that Guatemala was failing to enforce its labour obligations under Chapter 16 of CAFTA-DR[138], but as the USA did not prove that

[132] Resolution on implementation of the 2010 recommendations of Parliament on social and environmental standards, human rights and corporate responsibility of 5 July 2016 (2015/2038(INI)) paragraphs 22(c) and (d).
[133] CAFTA-DR Panel Report, 'In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR' (2017) US v Guatemala.
[134] P. Paiement, 'Leveraging Trade Agreements for Labor Law Enforcement: Drawing Lessons From The US-Guatemala CAFTA Dispute' (2018) Georgetown Journal of International Law 765.
[135] Arbitral Panel Established Pursuant to Chapter Twenty of the Dominican Republic – Central America – United States Free Trade Agreement, 14 June 2017, *International Labor Rights Case Law*, *4*(1), 29-44.
[136] European Commission Non-paper (2018).
[137] D. Raess, E. Schmieg and T. Voituriez, 'The future of sustainable development chapters in EU free trade agreements' (Workshop, Directorate-General for External Policies of the European Parliament, 23 July 2018).
[138] TJ Brooks, 'U.S.-Guatemala Arbitration Panel Clarifies Effective Enforcement Under Labor Provisions of Free Trade Agreement' (2018) International Labor Rights Case Law 45.

Guatemala's failure had the consequence of affecting trade between the Parties,[139] the conclusion was that it was not relevant under the Agreement. Observers argue that the US v Guatemala case may not so much have demonstrated the disadvantages of a sanction-based model, but rather the ineffective construct of the obligations in the CAFTA-DR Agreement itself.[140]

Drawing the US-Guatemala case, in the report of the Panel of Experts established under the EU-Korea FTA,[141] South Korea argued that the Panel did not have jurisdiction to assess the concerns brought by the EU.[142] The Panel, however, verified its jurisdiction and stated that the CAFTA-DR Panel Report was not of assistance in interpreting and applying TSD Chapter of the EU-Korea FTA,[143] namely because "*CAFTA-DR Agreement's Chapter 16, which contains the provision upon which the United States of America made its complaint against Guatemala, does not have the same contextual setting of sustainable development as the EU-Korea FTA, nor does it refer to the range of multilateral and international agreements and declarations which the Parties have included in the EU-Korea FTA*".[144] In the same *ratio*, it seems unfeasible to deduce the effects of a potential future sanctions-based model applied to the TSD Chapters of EU FTAs from an arbitration Panel decision established under the CAFTA-DR Agreement. Instead, the findings of the Panel suggest that the TSD design of obligations may not be sufficiently effective, regardless of the enforcement model, as can serve as inspiration for a better future design.[145]

3.4. Conclusion

The 2017 Commission services non-paper took notice of the current debate about the effectiveness of the soft approach of TSD Chapters, and acknowledged the option of shifting to a different approach, such as a tougher and sanction-based enforcement model.[146] After one year of debates, the 2018 non-paper proposed "*a set of 15 concrete and practicable actions to be taken to revamp the TSD chapters*"[147], which did not envisage sanctions in any way, shape or form. This is observable in the 2019 EU-Mercosur FTA, whose enforcement mechanism regarding obligations on environmental

[139] Central America-Dominican Republic-United States Free Trade Agreement (CAFTA-DR), 43 ILM 514 (2004), Article 16(2)(1)(a).
[140] European Economic and Social Committee, own-initiative opinion REX/500-EESC-2017 on Trade and sustainable development chapters (TSD) in EU Free Trade agreements (FTA), 14 February 2018.
[141] Report of the Panel of Experts Proceeding Constituted Under Article 13(15) of the EU-Korea Free Trade Agreement of 20 January 2021, EU v Korea.
[142] Ibid., paragraph 58.
[143] Ibid., para. 90
[144] Ibid., para. 93.
[145] Article 13(4)(3) of the EU-Korea FTA appears to have little prescriptive force, as the Panel found that Korea had not acted inconsistently with the Agreement's TSD commitments, because it had not failed to "*make continued and sustained efforts*" in the direction of the ratification of core ILO Conventions.
[146] European Commission Non-paper (2017).
[147] European Commission Non-paper (2018).

protection remains considerably weak, specially when compared to other clauses and rights of the same text. The US-Guatemala case, upon examination, does not demonstrate that dispute settlement or sanctions work less well in respect of environmental or labour standards compared to trade rules, but rather that the trade effects test as part of a sustainability standard may be difficult to meet in practice.

Conclusion

This thesis set out to scrutinize the current policy option of excluding sanctions as a compliance inducing mechanism in TSD chapters of EU FTAs. To address the lack of effectiveness of TSD Chapters, the European Commission announced, in 2021, a review of its previous action plan, which will contemplate further actions on the effective implementation and enforcement of TSD Chapters including *inter alia* "*the possibility of sanctions for non-compliance*", which is a positive development since the 2018 stance.[148] Negotiating FTAs not only to protect private interests, but to promote global values is crucial to building "*a more sustainable and fairer globalization*"[149], and every step in the direction of an effective enforcement of TSD Chapters would be very welcome by scholars, stakeholders, and the EP[150]. Therefore, even though discussions are still ongoing, it can be said sanctions are no longer resolutely excluded, which is an interesting recent development that may affect future FTAs.

The inquiry into the adequacy of the policy dialogue-based approach showed, amongst other things, that even though sustainable development forms an integral part of the EU's commercial policy, it has not been prioritized over commercial interests in FTAs, which indicates that the thinking on TSD chapters should shift to recognise the need to harness trade for sustainability, and not the other way round[151]. This view is supported by many academics, stakeholders, and the European Parliament, who have suggested that linking the TSD chapters to a binding dispute settlement mechanism and potential sanctions might be the advisable approach. Some studies in this same line of thought theorize that the shadow of disputes, complaints and possible sanctions might provide additional incentives to comply with the requirements of the TSD chapters by itself.[152]

Another takeaway of this research was that the literature does not explore in depth the consequences of bringing MEAs into enforcement mechanisms of TSD chapter of FTAs, which is partly explained by the difficulty of doing so without the knowledge of how such measures would exactly look like and entail. This difficulty is also patent in the attempted evaluation of the compatibility of a potential EU sanctions-based approach with WTO law.

[148] European Commission, Communication COM(2021) 497 final of 18 February 2021 on 'Trade Policy Review – An Open, Sustainable and Assertive Trade Policy'.
[149] Ibid., 22.
[150] M. Colli Vignarelli 'The European Commission Trade Policy Review: The Effectiveness of Sustainable Development Chapters in EU FTAs' (2021) 6:1 European Papers - A Journal on Law and Integration, 1–5.
[151] Demy van 't Wout, 'The enforceability of the trade and sustainable development chapters of the European Union's free trade agreements', Asia Europe Journal (16 June 2021) 16.
[152] Axel Marx, Franz Ebert, Nicolas Hachez and Jan Wouters, 'Dispute Settlement in the Trade and Sustainable Development Chapters of EU Trade Agreements' (2017), Leuven Centre for Global Governance Studies, 91.

In terms of the practical effectiveness of a sanctions-based approach in the promotion of environmental protection, even with such a model currently in existence in other international trade agreements, the imposition of sanctions following a breach of sustainability standards was only attempted once, with no promising outcome or concrete answers for the future. The predominant view amongst researchers, however, is that in future EU FTAs should include financial sanctions for violations of environmental and labour standards in the dispute settlement mechanism, but not trade sanctions, as these may raise compatibility issues with WTO rules, and they may not be suited to improving the situation of the environment and labour in the partner countries[153].

Challenging the exclusion of sanctions in EU FTAs as a compliance inducing mechanism with SD commitments is a topic that needs further research, as it is a step in improving a trade regime that defectively deals with sustainability issues, particularly with the environment, despite being inextricably linked to it. Many authors share the expectation and hope that, alongside trade agreements, international environmental treaties and agreements will grow in importance and enforceability, but while they do not, it is vital to emphasise the need to harness trade for sustainability, and not the opposite. There is very limited time to prevent environmental and climate catastrophe[154], and the clock is ticking fast.

[153] Evita Schmieg 'Labour Clauses for Sustainability?' SWP Comment 2018/C 15 (2018) 6.
[154] There are many sources that attest to this, namely the United Nations Intergovernmental Panel on Climate Change (IPCC) Special Report: Global Warming of 1.5°C (2018), which was also converted into a summary for policymakers.

Table of Instruments

International Treaties and Conventions

CAFTA–DR	Dominican Repulic-Central America Free Trade Agreement (CAFTA-DR) (2002)
Canada-Colombia FTA	Canada-Colombia Free Trade Agreement (2008)
CETA	Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part, *OJ L 11, 14.1.2017*
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore and Vietnam (2018)
EU-CARIFORUM Agreement	EU-CARIFORUM Economic Partnership Agreement (EPA) between the EU and 14 Caribbean countries
EU-Central America FTA	Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other. *OJ L 346, 15.12.2012*
EU-Colombia and Peru FTA	Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, EU/CO/PE/en
EU-Korea FTA	Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part (2011/265/EU)
EU-Mercosur FTA	European Commission, EU-Mercosur trade agreement in principle Brussels, 1 July 2019
US-Peru TPA	United States-Peru Free Trade Agreement (PTPA) (2009)

EU–Singapore FTA	Free trade Agreement between the European Union and the Republic of Singapore, ST/7972/2018/ADD/5, *OJ L 294, 14.11.2019*
EU–Vietnam FTA	Proposal for a COUNCIL DECISION on the conclusion of the Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam, COM/2018/691 final
General Agreement on Tariffs and Trade (GATT)	General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994)
JEEPA	Agreement between the European Union and Japan for an Economic Partnership, *OJ L 330, 27.12.2018*
Paris Agreement	Paris Agreement to the United Nations Framework Convention on Climate Change (2015) T.I.A.S. No. 16-1104
TEU	European Union, Treaty on European Union (Consolidated Version), Treaty of Maastricht, 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002 <https://www.refworld.org/docid/3ae6b39218.html> (accessed 23 August 2021)
TFEU	European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01 <https://www.refworld.org/docid/4b17a07e2.html> (accessed 23 August 2021)

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CAFTA-DR Arbitral Panel	Arbitral Panel Established Pursuant to Chapter Twenty of the Dominican Republic – Central America – United States Free Trade

	Agreement, 14 June 2017, 4(1) *International Labor Rights Case Law*
CAFTA-DR Arbitral Panel Report	CAFTA-DR Panel Report, 'In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR' (2017) US v Guatemala.
COM/2017/0654	Report from The Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Implementation of Free Trade Agreements, 1 January 2016 - 31 December 2016, COM/2017/0654 FINAL
Commission 2017 non-paper	European Commission Services, *Non-Paper on Trade and Sustainable Development (TSD) Chapters in EU Free Trade Agreements (FTAs)*, 11.07.2017
Commission 2018 non-paper	European Commission Services, *Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements*, 26.02.2018
European Commission	European Commission, 'Implementation of the Trade and sustainable development (TSD) chapter in trade agreements – TSD committees and civil society meetings' (2020) < https://trade.ec.europa.eu/doclib/press/index.cfm?id=1870> (accessed August 2021)
European Parliament Resolution 2010	European Parliament, Resolution on human rights and social and environmental standards in international trade agreements of 25 November 2010 (2009/2219(INI)) Resolution on implementation of the 2010 recommendations of Parliament on social and environmental standards, human rights and corporate responsibility of 5 July 2016 (2015/2038(INI)) paras 22(c) and (d).

European Parliament Resolution 2016	European Parliament, Resolution on implementation of the 2010 recommendations of Parliament on social and environmental standards, human rights and corporate responsibility of 5 July 2016 (2015/2038(INI))
EU-Korea FTA Pamel Report	Report of the Panel of Experts Proceeding Constituted Under Article 13(15) of the EU-Korea Free Trade Agreement of 20 January 2021, EU v Korea
Hearing of Phil Hogan	European Parliament, 'Committee on International Trade: Hearing of Phil Hogan Verbatim Report' (2019)
Institute for European Environmental Policy (IEEP) report	Kettunen et al., *An EU Green Deal for trade policy and the environment: Aligning trade with climate and sustainable development objectives* (2020) IEEP Brussels / London.
IPCC Report	United Nations Intergovernmental Panel on Climate Change (IPCC) Special Report: Global Warming of 1.5°C (2018)
PE 603.877	European Parliament, Directorate General for External Policies of the Union, Policy Department for External Relations, Workshop on 'The future of sustainable development chapters in EU free trade agreements' (2018), PE 603.877
PE 689.359	European Parliament 'WTO rules: Compatibility with human and labour rights' (2021) PE 689.359
REX/500-EESC-2017	European Economic and Social Committee, own-initiative opinion on Trade and sustainable development chapters (TSD) in EU Free Trade agreements (FTA) (2018) REX/500-EESC-2017

SWD(2018)454	European Commission 'Report on Implementation of EU Free Trade Agreements in 2017' (2018) and Commission Staff Working Document SWD(2018)454 final.
The European Green Deal	European Parliament 'The European Green Deal' (2020) <https://www.europarl.europa.eu/doceo/document/TA-9-2020-0005_EN.pdf> (accessed 3 July 2021)
UN 2030 Agenda for Sustainable Development	UN General Assembly, *Transforming our world : the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1 <https://www.refworld.org/docid/57b6e3e44.html> (accessed 9 August 2021)
W-2013/10	UNU-CRIS Working Papers, *The Sustainable Development Clauses in Free Trade Agreements: An EU Perspective for ASEAN?*, W-2013/10
WT/DS308/AB/R	WTO Appellate Body Report, Mexico—Tax Measures on Soft Drinks and Other Beverages, WT/DS308/AB/R, adopted 6 March 2006
WT/DS34/AB/R	WTO Appellate Body Report, Turkey—Restrictions on Imports of Textile and Clothing Products, WT/DS34/AB/R, adopted 22 October 1999
WT/DS457/R	WTO Appellate Body Report, Peru–Additional Duty on Imports of Certain Agricultural Products, WT/DS457/R, adopted 27 November 2014, paras. 5.114-116
WT/DS543/R	WTO Panel Report, United States—Tariff Measures on Certain Goods from China, WT/DS543/R, adopted 15 September 2020
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