

CAPÍTULO 6

GOVERNING SUSTAINABILITY THROUGH TRADE IN EU EXTERNAL RELATIONS: THE ‘NEW APPROACH’ AND ITS CHALLENGES

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INTRODUCTION

The Common Commercial Policy (CCP) has traditionally been the cornerstone of EU external relations law.² The reason is that the CCP is ‘not just a key external relations policy, but in substantive terms, it is at the heart of the European integration project and a logical consequence of the interaction between internal and external developments’.³ The renewed attention for sustainability questions (also driven by the United Nations Sustainability Development Goals⁴), has also entered the Free Trade Agreements (FTAs) that are the key instruments for the Union to regulate its trade relations with third states.⁵ The legal basis for EU FTAs is primarily derived from the European Union’s exclusive competence over trade policy, as outlined in the Treaty on

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² Many text books on EU external relations law, were largely devoted to this topic. See for instance P. Eeckhout, *EU External Relations Law*, 2nd edn (Oxford, Oxford University Press, 2011) 439; and P. Koutrakos, *EU International Relations Law*, 2nd edn (Oxford, Hart Publishing, 2015).

³ J. Larik, ‘Common Commercial Policy’, in J. Larik and R.A. Wessel (eds.), *EU External Relations Law: Text, Cases and Materials*, (Oxford, Hart Publishing, 2020).

⁴ See United Nations (UN) General Assembly, ‘Transforming Our World: The 2030 Agenda for Sustainable Development’, UN Doc/A/RES/70/1, 25 Sept. 2015.

⁵ See in general on FTAs, I. Bosse-Platière and C. Rapoport (ed.), *The Conclusion and Implementation of EU Free Trade Agreements: Constitutional Challenges* (Cheltenham, Edward Elgar Publishing, 2019); G. Kübek, ‘The European Union’s External Trade Agreements’ in C. Herrmann and J. Chaisse (eds.), *The International Law of Economic Integration* (Oxford, Oxford University Press, forthcoming).

the Functioning of the European Union (TFEU). Specifically, Articles 206 and 207 of the TFEU grant the EU the authority to negotiate and conclude trade agreements with third countries on behalf of its member states. These articles establish that the EU has the authority to define and implement a common commercial policy, which covers trade agreements, customs unions, and other trade-related matters. EU trade agreements are typically negotiated by the European Commission and require approval by the Council of the European Union and the European Parliament.

The Union's Common Commercial Policy is thus arguably the 'most exclusive' competence of the EU (see also Art 3(1) TFEU). Yet, for elements in these agreements for which the Union does not enjoy an exclusive competence, the Member States may have to step in as co-contracting parties, leading to 'mixed agreements'.⁶ While the need for Member States to join is based on an inclusion in the agreement of 'exclusive' Member State powers (such as for instance rules on indirect investments), the Union and its Member States may opt for EU-only agreements in the case of shared competences where no exclusive Member State powers are at stake.⁷ Obviously, bringing the Member States in through mixity may result in considerable delays, due to national ratifications and/or referendums. This may form a reason to 'split' comprehensive FTAs into two separate ones, one of which can be concluded as an EU-only agreement and one that deals with the areas that fall under Member State competences.⁸ While this goes against the comprehensive approach that is favoured by the EU, current treaty provisions seem to have been stretched as far as possible and after Opinion 2/15 in particular (see below) the Commission's approach seems to have become one of pragmatic acceptance.

Despite the still existing need to bring Member States in to include issues that are exclusively in the hands of the Member States, it is important to note that even EU-only FTAs can cover a range of issues as the '[t]he scope of the CCP has been drastically expanded over time through amendments to the EU Treaties as well as through interpretations of the Court of Justice'.⁹ Ar-

⁶ See for a recent analysis G. Kübek, *EU Trade and Investment Treaty-Making Post-Lisbon: Moving Beyond Mixity* (Oxford, Hart Publishing, 2024).

⁷ See extensively on this topic: M. Chamon and I. Govaere (Eds.), *The Law and Practice of Facultative Mixity* (Leiden, Martinus Nijhoff Brill, 2020).

⁸ This was done, for instance, in the case of the EU-Vietnam FTA and IPA. Originally designed as a comprehensive trade and investment agreement, the agreement was split in hindsight after the delivery of Opinion 2/15. See Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam [2020] OJ L 186/1. The text of the IPA has not yet been published in the OJ but see Council Decision (EU) 2019/1096 of 25 June 2019 on the signing, on behalf of the Union, of the Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part [2019] OJ L 175/1.

⁹ Larik (n. 2).

title 206 TFEU not only mentions international trade, but also foreign direct investment (FDI) as forming part of CCP, which indeed turns it into a more full-fledged ‘commercial policy’. The first part of Article 207(1) TFEU clearly reflects the core of CCP, as it refers to ‘to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.’ Yet, the CCP is not to be approached in isolation, as underlined by the final part of the same provision: ‘The common commercial policy shall be conducted in the context of the principles and objectives of the Union’s external action.’ This reveals that the CCP is part of the Union’s external action, which also encompasses its foreign policy. In short, the CCP more and more developed from an economic policy towards a foreign policy instrument. As argued by Dimopoulos after the entry into force of the Lisbon Treaty, that treaty, ‘signals the transformation of the CCP from an autonomous field of EU external action, subject to its own rules and objectives, into an integrated part of EU external relations, characterized by common values that guarantee unity and consistency in the exercise of Union powers. [...] In particular, the references to fair trade and integration to the world economy next to liberalization illustrate that trade liberalization should not be seen any longer as a self-determining objective, but it should be regarded within the broader context of economic and social development objectives.’¹⁰

These days, non-trade values seem to have become a standard element of FTAs concluded by the EU in the form of so-called ‘Trade and Sustainable Development’ (TSD) chapters.¹¹ The Court of Justice of the EU (CJEU) has in principle confirmed this broader scope. Thus, in relation to sustainability provisions in FTA’s, the CJEU in Opinion 2/15 concerning the EU’s FTA with Singapore, clearly held that ‘the objective of sustainable development [...] forms an integral part of the common commercial policy’.¹² As will be outlined in this contribution, sustainability as such also needs to be seen in broad terms. Thus, the new generation of FTAs may include provisions on environmental and labour standards, but the list seems to be getting longer and may also include issues such as climate change or gender equality.

¹⁰ A. Dimopoulos, ‘The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy’ (2010) 15 *European Foreign Affairs Review* 153, 169.

¹¹ See G. Marín Durán, ‘Sustainable Development Chapters in EU Free Trade Agreements: Emerging Compliance Issues’ (2020) 57 *CMLR* 1031-1068. The 2008 EU-CARIFORUM Economic Partnership Agreement is often mentioned as the first FTA to include legally binding environmental and labour provisions (O.J. 2008, L 289/3, Arts. 183-196). The first FTA that included a full-fledged TSD Chapter was the 2010 FTA with Korea (O.J. 2011, L 127/6).

¹² Opinion 2/15 *EU-Singapore FTA*, EU:C:2017:376, para 147. See further Kübek (n 5) 64.

The impact of this normative role of the Union should not be underestimated,¹³ also given the large number of FTA's and the dependence of many countries around the world on access to the EU's internal market. FTA's have thus become part of the Union's extraterritorial regulatory reach, famously coined the 'Brussels Effect'.¹⁴ At this moment, the EU lists 76 FTAs in force, 25 FTAs adopted, 6 FTAs in the pipeline, and 22 FTAs on hold.¹⁵ Indeed, countries not affected by the EU's trade policy are hard to find. The normative, or standard-setting role flows from the Union's own Treaty brief to 'export' its own values (Articles 3(5) and 21 TEU in particular), and has now become part and parcel of the Commission's policies in this regard.¹⁶

Despite the clear Treaty obligations, the EU's global actions to enhance environmental, labour and social standards through trade have also been criticised. There are two main points of critique. First, TSD Chapters have been widely condemned for their lack of effectiveness on the ground. Against that background, secondly, critical questions about the extent to which the EU should (aim to) interfere in the internal affairs of third states through its external action emerged.

The first point of critique has *inter alia* been raised by several Member States,¹⁷ the EP,¹⁸ and some academics.¹⁹ They content, amongst others, that TSD Chapters do not go far enough, are not sufficiently tailored to the on-ground situation in partner countries, and lack effective enforce-

¹³ See in general on the EU as a global normative actor recently M. Neuman, R.A. Wessel and T. de Zee (eds.), *The EU in a Globalising World* (The Hague, T.M.C. Asser Press, 2024); as well as J. Odermatt and R.A. Wessel (eds.), *Research Handbook on EU Law and Global Challenges* (Cheltenham, Edward Elgar Publishing, 2025 (forthcoming)).

¹⁴ A. Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford, Oxford University Press, 2020); see also E. Fahey, *The Global Reach of EU Law* (London, Routledge, 2017).

¹⁵ See for an overview: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/negotiations-and-agreements_en.

¹⁶ See Commission Communication, 'Trade for all – Towards a more responsible trade and investment policy', COM(2015)497 final, at p. 15; Commission, 'Strategic Plan 2016–2020 – DG Trade', 22 Dec. 2017. Cf. also Y. Kaspirovich and R.A. Wessel, 'The Role of Values in EU External Relations: A Legal Assessment of the EU as a Good Global Actor', in E. Fahey and I. Mancini (eds.), *Understanding the EU as a Good Global Actor: Ambitions, Values and Metrics* (Cheltenham, Edward Elgar Publishing, 2022) 92–106. More specifically on the treaty brief the EU has in this regard: E. Kassoti and R.A. Wessel, 'The Normative Effect of Article 3(5) TEU: Observance and Development of International Law by the European Union', in P. García Andrade (ed.), *Interacciones entre el Derecho de la Unión Europea y el Derecho Internacional Público* (Tirant lo Blanch, 2023) 19–46.

¹⁷ See eg Non-paper from the Netherlands and France on trade, social economic effects and sustainable development (2020).

¹⁸ See eg, European Parliament resolution of 6 October 2022 on the outcome of the Commission's review of the 15-point action plan on trade and sustainable development (2022/2692(RSP)).

¹⁹ See eg, K. Hradilová and O. Svoboda, 'Sustainable development chapters in EU free trade agreements: Searching for effectiveness' (2018) 52 *JWT* 1019.

ment mechanisms. In 2022, the Commission unveiled a ‘new approach’ to trade and sustainability that responds to these concerns.²⁰ In particular, the Commission has broadened its ‘sustainability’ agenda and intends to tailor it more closely to the situation in partner countries. Moreover, the Commission seeks to improve the enforcement of TSD commitments, including by moving from a ‘cooperative’ (i.e. legally non-binding) to a ‘sanctions-based’ approach for individual commitments. At around the same time, the Commission furthermore proposed a series of unilateral trade instruments that essentially make access to the EU internal market conditional on compliance with environmental and/or human rights standards. Examples include the Deforestation Regulation,²¹ the proposed Corporate Due Diligence Directive,²² and the CBAM.²³ In view of the EU’s increased focus on the export and enforcement of global sustainability norms and the resulting (ambition of) the EU to exercise its jurisdiction extraterritorially, the above-mentioned second point of critique has re-gained prominence. In the words of Marín Durán, ‘[a]t the heart of this debate lies a disagreement over the extent to which the EU should govern through trade and use its trade-based market power to improve environmental and social conditions in partner countries.’²⁴

Against this background, the present contribution seeks to outline how the EU governs sustainability through trade, taking into account the changes made to the design of TSD Chapters since 2022 and the emergence of new unilateral instruments. It seeks to provide a concise overview of the current state of play of external and internal instruments deployed by the EU, as well as of the general direction the EU has taken, to export, promote, and enforce global sustainability norms. The relatively modest aim of this Chapter, therefore, is to assess recent and current developments in the EU’s choice to more closely link trade and sustainability on the basis of concrete examples and to look into a number of potential challenges related to this

²⁰ European Commission, ‘Commission unveils new approach to trade agreements to promote green and just growth’, Press Release, 22 June 2022. See, in more detail, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘The power of trade partnerships: together for green and just economic growth’, COM(2022) 409 final.

²¹ Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 [2023] OJ L 150/206.

²² Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM/2022/71 final.

²³ Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism [2023] OJ L 130/52.

²⁴ Marín Durán (n 10) at 1033.

choice. While this is certainly not the first contribution to this topic,²⁵ it seems one of the first addressing these issues in a more comprehensive manner on the basis of recent developments.

The Chapter is structured as followed: Section 2 explains ‘standard’ design features of EU TSD Chapters. Although the ‘new approach’ to TSD has introduced some ‘twists’, these standard features are still common to TSD Chapters in EU FTAs, including more recent ones. Section 3 highlights some novelties brought about by the ‘new approach’, focusing particular on the scope and enforcement of these Chapters. Section 4 then turns to unilateral instruments that promote sustainability through trade, highlighting in particular the CBAM, the Deforestation Regulations, and the proposed Corporate Due Diligence Directive.

1. TSD CHAPTERS IN EU FTAS: ‘STANDARD’ DESIGN FEATURES

In addition to a more general ‘mainstreaming’ of sustainability issues throughout FTAs, the TSD Chapters have since become a standard element in the design of EU FTAs and the issues governed by these chapters, as well as the way there are enforced, has continuously evolved over the years. Nonetheless, the TSD Chapters in EU FTAs share a number of ‘standard’ features, such as their overarching objectives (section 2.1), key substantive clauses (section 2.2), and, generally, a ‘cooperative’ enforcement model (section 2.3).

1.1. Overarching Objectives

While there are some differences, TSD chapters usually share a number of common elements. One common feature is that the sustainability in general, and the protection of the environment and labour rights more specifically, are explicitly framed as objectives of EU FTAs – both in the preamble as well as in the specific chapter on TSD.

The preamble of EU FTAs typically includes an important starting point, which may be illustrated by a relatively recent example, the 2020 EU-Viet Nam FTA²⁶:

‘DETERMINED to strengthen their economic, trade and investment relationship *in accordance with the objective of sustainable development, in its economic, social and environmental dimensions*, and to promote trade and investment

²⁵ Ibid, but also other publications referred to in e.g. (n. 15, 18, 39, 42 and 47).

²⁶ Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam, OJ L 186/1, 12.06.2020.

under this Agreement in a manner *mindful of high levels of environmental and labour protection* and relevant *internationally recognised standards and agreements*.²⁷

By emphasising that trade and investment shall be strengthened only in accordance with broader sustainability goals, the parties underline that the objective of sustainable development in general, and environmental and labour protection specifically, form an inherent part of trade as conceived by the parties. Article 13.1 of the EU-Viet Nam FTA, which recalls the objectives of the agreement's TSD Chapter, further underlines that the promotion of sustainable is a self-standing end of the trade relationship between the EU and Viet Nam. Accordingly, '(t)he *objective of this Chapter is to promote sustainable development*, notably by fostering the contribution of trade and investment related aspects of labour and environmental issues'.²⁸ By framing sustainability as an objective of the FTA in and of itself, the parties underline their intention to create a strong connection between the environmental and labour rights protection and trade.²⁹

1.2. Key Substantive Rights

TSD Chapters in EU FTAs also share a number of common substantive clauses and/or regulatory techniques. Perhaps the most well-known feature is the so-called 'right to regulate', which forms the premise of the relationship between trade and non-trade values in TSD Chapters. Accordingly,

'The Parties recognise their respective right to:

- (a) determine its sustainable development objectives, strategies, policies and priorities;
- (b) establish its own levels of domestic protection in the environmental and social areas as it deems appropriate; and
- (c) adopt or modify accordingly its relevant laws and policies in a manner consistent with the internationally recognised standards [...].³⁰

The right to regulate underlines that EU FTAs do not intend to harmonise domestic environmental and social standards. In principle, the parties remain free to determine their own level of protection. However, the final sentence of the provision underlines that the parties' freedom to establish their own level of protection is limited by the obligation to uphold international (minimum) standards. In addition, the parties 'right to regulate' may

²⁷ Indent 4 of the Preamble of the EU-Vietnam FTA (n 25), emphasis added.

²⁸ Emphasis added.

²⁹ See also *Panel of Expert Proceedings Constituted under Art. 13.5 of the EU-Korea Free Trade Agreement*, 20 January 2021, p. 27 (hereinafter: *Korea-Labour Rights*).

³⁰ Art. 13.2(1) EU-Viet Nam FTA.

be confined by the terms of the FTA itself. TSD Chapters in EU FTAs commonly include three different types of clauses that limit the parties' sovereign right to regulate.³¹ First, there are so-called 'high level clauses', on the basis of which the parties need to aim for high environmental, social, and labour rights protection. Second, there are clauses establishing a minimum level of environmental, social, and labour rights protection by incorporating internationally recognised standards into the FTA. Third, TSD Chapters in EU FTAs commonly include so-called 'non-regression' clauses, which seek to prevent competitive pressure arising from greater economic liberalization leading to a 'race-to-the-bottom' in environmental and labour regulations. The following will briefly explain them in turn.

High level clauses are perhaps the most ambitious substantive feature of TSD Chapters. As a result, their wording is very ambitious and vague. They commonly stipulate that '(e)ach Party shall endeavour to ensure that its laws and policies provide for and encourage high levels of domestic protection in the environmental and social areas and shall continuously endeavour to improve those laws and policies.'³² Despite merely connotating 'soft' endeavours to achieve high levels of protection without setting out any 'hard' legal obligations, the Panel in *Ukraine-Wood Products* highlighted that high level clauses may serve as relevant context for justifying an otherwise FTA-incompatible measure under Article XX GATT.³³ Similarly, in *Korea-Labour Rights*, the Panel of Expert concluded that a TSD clause connotating the parties best endeavours to ratify fundamental ILO Conventions³⁴ 'creates a legally binding obligation'.³⁵

Aside from including high level ambitions, TSD Chapters in EU FTAs stipulate a minimum level of environmental, social, and labour rights protection. To do so, EU FTAs commonly incorporate multilateral labour, environmental, and social rights conventions that both parties have ratified or agreed to ratify. In doing so, the parties make these international standards a binding component of their trade relationship.³⁶ In respect to environmental rights, each FTA party 'reaffirms its commitment to effectively implement

³¹ As categorised by Marín Durán (n. 10).

³² Art. 13.2(2) EU-Viet Nam FTA.

³³ Article XX GATT has been incorporated into EU FTAs. See, in casu, Article 35 EU-Ukraine Association Agreement. See further *Restrictions applied by Ukraine on exports of certain wood products to the European Union*, Final Report of the Panel established pursuant to Article 308 of the EU-Ukraine Association Agreement, 11 December 2020, para 245.

³⁴ Article 13.4.3 EU-Korea FTA. The provision stipulates that the parties 'will' (and notably not shall) 'make continued and sustained efforts towards ratifying fundamental ILO Conventions (...)'.
³⁵ *Korea Labour Rights* (n 28) paras 265, 271.

³⁶ See similarly the Opinion of Advocate General Sharpston, Opinion 2/15, *FTA with Singapore*, ECLI:EU:C:2016:992, para 498.

in its domestic law and practice the multilateral environmental agreements to which it is a party.³⁷ With the exception of the FTAs with Colombia and Peru,³⁸ no specific list of multilateral environmental agreements (MEAs) is mentioned, which allows for a dynamic interpretation. In respect to labour rights, the FTA parties typically confirm their commitment to the 'ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its 86th Session in 1998, to respect, promote and effectively implement the principles concerning the fundamental rights at work'.³⁹ The Panel in *Korea-Labour Rights* confirmed that the obligation to respect, promote, and effectively implement the principles concerning the fundamental rights at work is 'established by its own terms'.⁴⁰ In order to establish a breach, it therefore suffices that one party failed its obligation to respect, promote and effectively implement key ILO principles. The other party does not have to prove that this failure affected trade between the parties.

However, some TSD provisions expressly require a linkage to trade. A common example is the 'non-regression' clause. This clause typically stipulates that a party 'shall not waive or derogate from, or offer to waive or derogate from, its environmental or labour laws, *in a manner affecting trade*'.⁴¹ A dispute between the USA and Guatemala under the Dominican Republic-Central America-United States FTA (CAFTA-DR) illustrated that the 'non-regression' clause may not bite in situations where a party (here: Guatemala) failed to effectively enforce its domestic (here: labour) laws because it is difficult to demonstrate that such a failure has demonstrable effects on trade between the parties.⁴² In the literature, the burden of proof for the 'effects on trade' criterion established in the *CAFTA-DR* case has been described as being very difficult, if not impossible, to meet.⁴³ Yet, in *Korea-Labour Rights*, the panel noted that there are important differences between the text of EU FTAs (here:

³⁷ See e.g. Article 13.5(2) EU-Vietnam FTA.

³⁸ See Marín Durán (n 10) 1037.

³⁹ See e.g. Art. 13.4(2) EU-Vietnam FTA. On the link between trade and core international labour rights in EU FTAs see T. A. Novitz, 'The role of the EU in making 'sustainable' labour linkages in contemporary trade: is being 'assertive' also 'good'?' in Fahey and Mancini (n. 15) 124.

⁴⁰ *Korea-Labour Rights* (n 28) para 68. See further T. A. Novitz, 'Sustainable Labour Conditionality in EU Free Trade Agreements? Implications of the EU-Korea Expert Panel Report' (2022) 47 *European Law Review* 3.

⁴¹ See e.g. Art. 13.3(2) EU-Vietnam FTA. Emphasis added.

⁴² *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, Final Report of the Panel, 14 June 2017.

⁴³ See e.g. K. Claussen, 'Reimagining Trade-Plus Compliance: The Labor Story' (2020) 25 *Journal of International Economic Law* 34; or A. Alvarez-Jimenez, 'The International Law Gaze: The Protection of Labour Rights in Free Trade Agreements: Mission Impossible?' (2018) 287 *New Zealand Law Journal* 291. In the EU context see M. Brockers and G. Gruni, 'Taking the enforcement of labour standards in the EU's free trade agreements seriously' (2019) 6 *CMLR* 1591, 1604.

the FTA with Korea) and the CAFTA-DR.⁴⁴ As a result, it is not clear whether the standard of demonstrating ‘in a manner affecting trade’ established in the *CAFTA-DR* case could be applied in the same way for enforcing non-regression clauses under EU FTAs.

1.3. Cooperative Enforcement Mechanisms

EU FTAs contain special procedural rules for settling disputes on sustainability rules. In many EU FTAs (e.g. the FTAs with Korea, Canada, Singapore, Vietnam, or Japan), TSD Chapters contain their own dispute settlement procedure. Under this special TSD dispute settlement procedure, alleged breaches of TSD Chapter provisions can be brought before a Panel of Experts which ‘shall issue an interim and a final report to the Parties’.⁴⁵ The reports of the Panel of Experts ‘shall set out the findings of facts, the applicability of the relevant provisions and the basic rationale behind any findings and recommendations’.⁴⁶ The parties must subsequently ‘discuss appropriate actions or measures to be implemented taking into account the final report of the Panel of Experts and the recommendations therein’.⁴⁷ The parties’ domestic advisory groups, which are composed of economic, social and environmental stakeholders, oversee the implementation of the report by the parties and may issue observations.⁴⁸ In contrast to the FTA’s horizontal dispute settlement mechanism, trade sanctions are generally not foreseen to enforce compliance with the report of the Panel of Experts. According to the Commission, such a ‘cooperative’ approach to TSD enforcement enables a broader scope for TSD Chapters, as the EU’s negotiating partners have ‘been clear that they would not accept a broad scope combined with trade sanctions’.⁴⁹ The *Korea-Labour Rights* case has shown that a report by a Panel of Experts can yield practical change. Korea ratified three fundamental ILO Conventions in response to the report⁵⁰, even though the Panel of Experts concluded that Korea had not acted in breach of its obligation to ‘make continued and sustained efforts towards ratifying’ these ILO Conventions.⁵¹ Yet, the changes made by Korea to its ‘Trade Union

⁴⁴ *Korea-Labour Rights* (n 28) para 93.

⁴⁵ See, eg, Art. 13.17(8) EU-Vietnam FTA.

⁴⁶ *Ibid.*

⁴⁷ See, eg, Art. 13.17(9) EU-Vietnam FTA.

⁴⁸ *Ibid.*, in conjunction with Art. 13.15(4) EU-Vietnam FTA. See more generally V. Kube, *EU Human Rights, International Investment Law and Participation* (Berlin, Springer, 2019) 289.

⁴⁹ Non paper of the Commission services, ‘Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements’ (2018) p. 3.

⁵⁰ See International Labour Organisation, ‘Korea recognizing respect for fundamental labour standards as the foundation for tackling the challenges of the future of work’, Press Release, 29 April 2021.

⁵¹ *Korea-Labour Rights* (n 28) para 293.

and Labour Relations Adjustment Act' have widely been deemed insufficient to fully comply with the Panel of Expert's report, including by the EU.⁵² Overall, the implementation of TSD Chapters through cooperative enforcement mechanisms has hence yielded mixed results in practice.

2. THE EU'S 'NEW APPROACH' TO TRADE AND SUSTAINABILITY

As above mentioned, the Commission proposed a 'new approach' for governing sustainability through trade in 2022, which a view to making FTAs 'an even bigger driver of positive change'.⁵³ Since then, aspects of the 'new approach' have been implemented in the latest EU FTAs, most notably the ones with Chile and New Zealand. It is beyond the scope of this chapter to discuss all elements of the 'new approach'. Looking at the FTAs with Chile and New Zealand in some detail, this section instead seeks to highlight to elements of it: first, the broadened understanding of 'sustainability' as reflected in the scope of FTAs, and secondly the changes made to the enforcement of TSD clauses.

2.1. Towards a Broader Notion of Sustainability in EU FTAs: The Case of Trade and Gender

One of the more recent changes to TSD Chapters is that they increasingly deploy a broader definition of 'sustainability'. In view of the division of competence between the EU and its Member States, a broadened definition of sustainability is not without risk, as it may raise new questions of mixity. As has been argued elsewhere, the 'absorption capacity' of the CCP in relation to sustainability matters is not endless.⁵⁴

Newer items on the Commission's TSD agenda include inter alia ocean governance, the promotion of responsible business conduct, the shift towards a circular economy, deforestation-free supply chains, or gender equality. Out of these examples, the latter has recently gained considerable traction, amongst others with the EU finalizing its first FTA with a self-standing chapter on trade and gender equality (i.e. the 2022 Interim Trade Agreement with Chile). The case of trade and gender thus serves as a case in point to illustrate why and how the EU broadens its sustainability agenda in FTAs.

The fact that the first EU FTA with a self-standing Chapter on trade and gender is the one with Chile is not a coincidence. The development of

⁵² See, eg, EU-Korea Free Trade Agreement, 9th session of the Committee on Trade and Sustainable Development, Joint Minutes, 6 and 7 September 2023.

⁵³ European Commission (n 19).

⁵⁴ Kübek (n 5) 64 et seq.

including chapters on women's empowerment and gender equality in FTAs can largely be attributed to the former Chilean President Michelle Bachelet, who had also served as the executive director of the UN Entity for Gender Equality and the Empowerment of Women.⁵⁵ In fact, the first FTA to include a designated chapter on trade and gender equality was the 2016 Chile-Uruguay FTA. Until very recently, EU FTAs did not address gender equality, aside from a couple of minuscular provisions.⁵⁶ From that perspective, the 2022 Interim Trade Agreement marks a directional change in EU trade practice. As commitments on gender equality and women's empowerment were explicitly highlighted by the Commission as new elements of the EU's latest FTAs,⁵⁷ future FTAs may follow the blueprint of the EU-Chile FTA. This was at least the case for the 2023 EU-New Zealand FTA, which includes a provision that mimics, albeit in short, the trade and gender equality chapter of the EU-Chile FTA.⁵⁸

When looking at how the EU governs gender equality through trade in its recent FTAs with Chile and New Zealand, it become apparent that it essentially applies the 'standard' regulatory TSD techniques that were described above to a new issue area. As a baseline, the parties recognize their respective right 'to establish its own scope and guarantees of equal opportunities for men and women (...)' (*right to regulate*).⁵⁹ The parties must however exercise their right to regulate in conformity with international agreements addressing gender equality to which they are a party (*minimum level of protection*) and strive to improve relevant laws and policies promoting gender equality (*high level clause*).⁶⁰ Moreover, the parties 'shall not, in order to encourage trade or investment, weaken or reduce the protection granted under their respective laws aimed at ensuring gender equality or equal opportunities for women and men' (*non-regression clause*).⁶¹

Overall, the commitments made by the parties are rather weak. They connote a 'best effort' endeavour, rather than a legal obligation. This is also due to the scarcity of multilateral conventions setting minimum standards on gender equality⁶² and the parties lack of political willingness to

⁵⁵ On link between trade and gender equality and the recent development to integrate gender equality chapters into FTAs see esp. R. Klimke, 'Ist das EU-Außenwirtschaftsrecht gender-blind?' (2023) 61(1) *Archiv des Völkerrechts* 27.

⁵⁶ See Art. 13.14(1)(e) EU-Vietnam FTA; and Art. 2.5(2)(d) EU-Vietnam IPA.

⁵⁷ See European Commission (n 19) 3. The EP has long been pushing for the integration of clauses on gender equality in EU FTAs. See European Parliament, 'Gender equality and trade' (2018).

⁵⁸ Art. 19.4 EU-New Zealand FTA.

⁵⁹ Art. 27.3 EU-Chile Interim Trade Agreement.

⁶⁰ Art. 27.2 EU-Chile Interim Trade Agreement.

⁶¹ Art. 27.3(7) EU-Chile Interim Trade Agreement.

⁶² Aside from a generic reference to the ILO, Art. 27.2 EU-Chile Agreement mentions only one multilateral agreement, namely the 1979 UN Convention on the Elimination of all Forms of Discrimination Against Women.

integrate some of the more recent and/or ambitious international instruments, such as the Istanbul Convention or the WTO Buenos Aires Declaration on Trade and Women's Economic Empowerment,⁶³ into the scope of the FTA. Clauses that stipulate a binding commitment, such as the non-regression clause, require a direct link to trade between the parties and are therefore difficult to enforce in practice. Whether the simple 'export' of standard regulatory TSD techniques is the best way to govern new, and internationally less regulated, aspects of sustainability may therefore be questioned. One may wonder whether the Commission's approach to 'transfer' its standard TSD techniques to new issue areas such as trade and gender equality may be in part be due to competence concerns: by deploying TSD techniques that were excluded by the CJEU as triggers of mixity in Opinion 2/15⁶⁴, the Commission may seek to ensure that FTAs with a broadened TSD agenda can nonetheless be concluded by the EU without its Member States. Irrespective of this potential rationale, questions about the suitability of the Commission's approach of course pertain. At the very least, the agreements with Chile and New Zealand, and – in hindsight, by means of a committee decision,⁶⁵ – CETA, include a commitment to engage in cooperation activities 'designed to improve the capacity and conditions for women' to access and fully benefit from the opportunities created by the respective FTA.⁶⁶ In practice, these cooperation activities could provide an opportunity to better understand the effects of trade liberalisation on gender equality, to strengthen the existing rules⁶⁷ and to improve future practice.

2.2. Towards a Sanctions-Based Enforcement

With its 'new approach' to TSD, the Commission sought to increase the assertiveness of the enforcement of TSD Chapters. In particular, the Commission announced that it will 'extend the standard state-to-state dispute settlement compliance phase to the TSD chapter of our trade agreements' and

⁶³ The Declaration has been adopted by 127 WTO members to date, including all EU member states and Chile. There is a generic reference to acknowledging the work of and cooperating in multilateral fora, such as the WTO and OECD, on trade and gender issues (eg, Art. 19.4(9) EU-New Zealand FTA).

⁶⁴ In Opinion 2/15, the CJEU *inter alia* argued that TSD Chapter fall within the scope of the CCP because they merely refer to existing multilateral agreements the parties had already signed up to and are not enforceable through the agreement's main dispute settlement procedure. See further Opinion 2/15, paras 152, 154-155. See further Kübek (n 5) 66-67.

⁶⁵ Recommendation 002/2018 of 26 September 2018 of the CETA Joint Committee on Trade and Gender.

⁶⁶ See eg, Art. 27.4 EU-Chile Interim Trade Agreement.

⁶⁷ Notably, Art. 27(2) of the EU-Chile Interim Trade Agreement contains a 'rendre-vous clause', which allows reviewing the trade and gender equality chapter 'in light of experience gained in their implementation'. If necessary, the parties may 'suggest how the [relevant provisions] may be strengthened.'

‘include the possibility to apply, as a last resort, trade sanctions for material breaches of the Paris Climate Agreement and the ILO fundamental labour principles’.⁶⁸ The EU-New Zealand FTA is the first agreement that follows the Commission’s new approach.⁶⁹ It aligns dispute settlement procedures on sustainability and trade issues under a single horizontal mechanism.⁷⁰ That said, the horizontal dispute settlement mechanism included in the EU-New Zealand FTA largely incorporates the ‘specific’ procedural rules for settling TSD disputes that were previously set out in the TSD Chapter itself.⁷¹ As a result, dispute settlement procedures on sustainability issues remain ‘specific’ to those on pure ‘trade’ issues. In particular, the enforcement of panel reports remains largely ‘cooperative’. While the extension of the horizontal dispute settlement procedure to sustainability implies that a party found in violation of a TSD commitment is obliged to ‘deliver a notification to the complaining Party of any measure that it has taken to comply with the final report’⁷², the complaining party can generally not adopt temporary remedies if the party complained against does not comply with the final report.⁷³ By way of exception, temporary remedies are possible if the report of the panel finds that the complaining party either violated the ILO fundamental labour principles or defeated the material object and purpose of the Paris Agreement, and did not sufficiently remedy its behaviour.⁷⁴ A similar sentence can be found in Article 27.4(3) of the EU-New Zealand FTA, which concerns compliance with the agreement’s ‘essential elements’. Accordingly, a party may take any ‘appropriate measures relating to this Agreement in the event of an act or omission that materially defeats the object and purpose of the Paris Agreement.’ In both instances, it remains unclear, however, how a party, through its individual conduct, can ‘materially defeat’ the object and purpose of the Paris Agreement. It therefore remains to be seen if these provisions will stand the test of practice.

⁶⁸ Commission Press Release (n 19).

⁶⁹ See previously however Art. 411(2) TCA, which introduces a novel rebalancing procedure. Commentators have criticised the high burden of proof for the complaining party posed by Article 411(2) TCA. Indeed, it would be very difficult to prove that ‘material impacts on trade and investment’ between the EU and the UK actually results from a lowering of TSD standards. See further eg J. Bäumlér, ‘Level Playing Field and Sustainable Development’, in G. Kübek, C. J. Tams and J. P. Terhechte (eds.) *EU-UK Trade and Cooperation Agreement: A Handbook* (Baden-Baden/Oxford/Munich, Nomos, Hart, Beck, 2024).

⁷⁰ Art. 26.2 EU-New Zealand FTA.

⁷¹ See, eg, Art. 26.5(3)(b) and 26.6(1)(b) (composition of the panel); or Art. 26.13(3) (compliance monitoring) of the EU-New Zealand FTA.

⁷² Art. 26.15(1) EU-New Zealand FTA.

⁷³ Art. 26.16 EU-New Zealand FTA has limited application for disputes based on the TSD Chapter (see second paragraph).

⁷⁴ Art. 26.16(2) EU-New Zealand FTA.

3. UNILATERAL ‘TRADE AND SUSTAINABILITY’ INSTRUMENTS

Around the same time when the Commission announced its ‘new approach’ to sustainable development in its external trade agenda, it also proposed a number of internal measures that link sustainability and trade. These measures are however not legally based on the CCP (Art. 207 TFEU) but on the EU’s internal competence for environment (Art. 192 TFEU) and/or the internal market (Art. 50, 114 TFEU). Yet, these measures have apparent effects on external because they use access to the EU internal market as a ‘leverage’ to demand compliance with sustainability standards by (economic operators from) third states. This section will briefly introduce three of these instruments: the Corporate Sustainability Due Diligence Directive (CSDD Directive), the Deforestation Regulation, and the Carbon Border Adjustment Mechanism (CBAM).

The proposed CSDD Directive seeks to incentivise companies to internalize negative externalities in their global corporate conduct. To do so, it introduces mandatory human rights and environmental due diligence obligations on the parent company.⁷⁵ Prior to the design of the CSDD, various Member States had taken similar legislative initiatives (eg the French Vigilance law, the German Sorgfaltspflichtengesetz, the Norwegian Transparency Act or the Dutch Child Labour Due Diligence Act).⁷⁶ The CSDD Directive thus also aims to approximate national sustainability due diligence requirements. At the time of writing, it remains unclear whether the Member States in the Council can agree on a common approach and how that common approach precisely looks like.⁷⁷ The proposed version sets out that the Directive will apply to EU companies that have more than 500 employees and an annual net worldwide turnover of more than EUR 150 million.⁷⁸ It will also apply to EU companies with more than 250 employees and a net worldwide turnover of more than EUR 40 million if these companies operate in high-risk sectors (e.g. the textiles, agriculture, or extraction of mineral resources).⁷⁹ Moreover, it will apply to third state companies that generate a net annual turnover of more than EUR 150 million within the EU, or of more than EUR 40 million, if that turnover is largely generated in risk sectors.⁸⁰ Companies that fall within the

⁷⁵ Article 1 of the Proposal for a Directive (n 21).

⁷⁶ See further eg C. Patz, ‘The EU’s Draft Corporate Sustainability Due Diligence Directive: A First Assessment’ (2022) 7 *Business and Human Rights Journal* 291; or A. Schilling-Vacaflor and A. Lenschow, ‘Hardening foreign corporate accountability through mandatory due diligence in the European Union? New trends and persisting challenges’ (2021) 17 *Regulation & Governance* 677.

⁷⁷ Support for the proposed Directive, in its current form, could not be found in the Council on 28 February 2024.

⁷⁸ Article 2(1)(a) of the proposed Directive (n 21).

⁷⁹ Article 2(1)(b) of the proposed Directive (n 21)

⁸⁰ Article 2(2) of the proposed Directive (n 21).

scope of the directive must inter alia (1) identify actual or potential adverse impacts arising from their activities along the supply chain; (2) bring actual adverse impacts to an end and prevent and mitigate potential adverse impacts; (3) establish a complaints procedure; and (4) monitor the effectiveness of their due diligence policies annually.⁸¹ The Member States must ensure that their national implementation act of the CSDD Directive includes sanctions for non-compliance.⁸² Moreover, the CSDD Directive stipulates that companies incur civil liabilities if they do not comply with the due diligence requirements and damage has been suffered as a result.⁸³

The Deforestation Regulation seeks to ‘minimi[se] the Union’s contribution to deforestation and forest degradation worldwide’ and, in so doing, its ‘contribution to greenhouse gas emissions and global biodiversity loss’.⁸⁴ As the second largest importer of goods linked to global deforestation, the EU indeed ‘bears significant responsibility for the dangerous trend of global deforestation and forest degradation’.⁸⁵ The Deforestation Regulation concerns six main ‘forest risk commodities’: cocoa, coffee, oil palm, rubber, soya and wood.⁸⁶ In accordance with Article 3 of the Regulation, products may no longer be made available on the EU internal market or exported, unless they (a) are deforestation-free; (b) have been produced in accordance with the relevant legislation of the country of production; and (c) are covered by a due diligence statement. Operators and traders of the six covered commodities must exercise due diligence to ensure that their products comply with Article 3.⁸⁷ They must, inter alia, collect information and data about the commodity, make a risk assessment and adopt risk-mitigation measures.⁸⁸ The regulation provides for control procedures and penalties for non-compliance.⁸⁹

The CBAM seeks to align the carbon price of imported goods with the price that EU producers pay for carbon emissions under the Emissions Trading System (ETS). By levying a ‘carbon tax’ on imported goods, the EU addresses the risk of ‘carbon leakage’ that may be caused by the relocation of EU producers to countries with less stringent climate standards.⁹⁰ The CBAM

⁸¹ Article 4; 6-8 of the proposed Directive (n 21).

⁸² Article 20 of the proposed Directive (n 21).

⁸³ Article 22 of the proposed Directive (n 21).

⁸⁴ Article 1(1)(a) and (b) of the Deforestation Regulation (n 20). For these products, the Deforestation Regulation is *lex specialis* to the CSDD.

⁸⁵ G Marín Durán and J Scott, ‘Regulating Trade in Forest-Risk Commodities: Two Cheers for the European Union’ (2022) 34 *Journal of Environmental Law* 245.

⁸⁶ Article 2(1) Deforestation Regulation (n 20).

⁸⁷ Article 4(1) of the Deforestation Regulation (n 20).

⁸⁸ Articles 5, 8, 9-11 of the Deforestation Regulation (n 20).

⁸⁹ Articles 25-26 of the Deforestation Regulation.

⁹⁰ See indents 9-15 of the CBAM regulation.

regulation applies to products in six different sectors (cement, electricity, fertilisers, iron and steel, aluminium, and chemicals (specifically hydrogen)) imported into the EU from all third countries⁹¹, with the exception of Iceland, Lichtenstein, Norway and Switzerland⁹². During a transition period that lasts until 2026, importers of these products are obliged to report the total actual direct emissions. From 2026 onwards, they must pay sufficient CBAM certificates to cover these emissions.⁹³ The price of the CBAM certificate will mirror the weekly price of carbon under the ETS with a view to ensuring that importers and EU producers pay the same price for carbon emissions. Yet, importers can apply for a reduction to take account of the price for carbon paid in the country of production.⁹⁴

With the proposed CSDD Directive, the Deforestation Regulation, and the CBAM, the EU is certainly testing the boundaries of international law. Doubts have in particular been raised with regard to the compatibility of these unilateral measures with WTO law, as they are likely to be inconsistent with the non-discrimination rules of the GATT.⁹⁵ WTO members are required not to discriminate between ‘like product’ imported from third countries (most-favourite nation principle, Art. I:1 GATT) and not to discriminate between foreign and domestic ‘like’ products (national treatment obligation, Art. III:4 GATT). There are exceptions to this. WTO-inconsistent measures can *inter alia* be justified on ground of conserving exhaustible natural resources (Art. XX(g) GATT). Whether the EU’s new unilateral measures comply with the conditions for invoking such an exception, and in particular the ‘chapeau’ of Art. XX GATT, remains unclear. In case of the CBAM, further concerns have been raised with regard to the instrument’s compliance with the Common but Differentiated Responsibilities and Respective Capabilities (CBDRRC).⁹⁶ More broadly, scholars have also criticised the extent of the EU’s new unilateral turn, which stand in contrast with EU constitutional objectives pro-

⁹¹ Article 2(1) in conjunction with Annex 1 of the CBAM Regulation (n 20).

⁹² Annex III of the CBAM regulation. These countries are either part of the EU ETS or have an emission trading system that is linked to the ETS.

⁹³ Article 4 read in conjunction with Article 6 of the CBAM Regulation (n 22).

⁹⁴ Article 9 CBAM Regulation (n 22).

⁹⁵ See eg A. Dias, A. Nosowicz and S. Seeuws, ‘EU Border Carbon Adjustment and the WTO: Hand in Hand Towards Tackling Climate Change’ (2020) 15 *Global Trade and Customs Journal* 15; S. Sato, ‘EU’s Carbon Adjustment Mechanism: Will It Achieve Its Objective(s)?’ (2022) 56 *Journal of World Trade* 383; Marín Durán and Scott (n 84) 261; or J. Bäuml, ‘Germany’s Supply Chain Due Diligence Act: Is It Compatible with WTO Obligations?’ (2022) 25 *Zeitschrift für europarechtliche Studien* 265 (similar concerns arise for the CSDD Directive).

⁹⁶ See, eg, Art. 2(2) Paris Agreement. See further G. Marín Durán, ‘Carbon Border Adjustments: Ensuring Compatibility with the International Climate and Trade Regimes’ (2023) 72 *International & Comparative Law Quarterly* 73.

moting openness towards international law.⁹⁷ This brings us back to one of the main critiques against the promotion of sustainability norms by the EU, including through unilateral measures, in third states, which the conclusion will further engage with.

CONCLUDING OBSERVATIONS

The Union's 'new approach' for governing sustainability through trade, launched in 2022, can be seen as a new step in using FTAs to live up to its treaty brief to 'uphold and promote its values and interests' (Art. 3(5) TEU) and to 'ensure consistency between the different areas of its external action and between these and its other policies' (Art. 21(3) TEU). Indeed, as we have seen, the goal was to make FTAs 'an even bigger driver of positive change'. Since then, aspects of the 'new approach' have been implemented in the latest EU FTAs, most notably the ones with Chile and New Zealand. At the same time, the more recent TSD Chapters deploy a broader definition of 'sustainability' and may include ocean governance, the promotion of responsible business conduct, the shift towards a circular economy, deforestation-free supply chains, or gender equality. The importance of this development is not to be underestimated. By emphasising that trade and investment shall be strengthened only in accordance with broader sustainability goals, the parties underline that the objective of sustainable development in general, and environmental and labour protection specifically, form an inherent part of trade as conceived by the parties.

The need to ensure consistency between different policy areas forms a large part of the explanation to not only link sustainability and trade, but also to more clearly link internal developments to external action. In a way this is nothing new. The CCP as such developed out of the need to develop a trade policy as a result of the coming of age of the internal market. The 'new approach' to sustainable development in the external trade agenda, not only aimed to connect to the increasing role of sustainability issues in internal policies, but also went hand in hand with a number of new internal measures, such as the proposed Corporate Sustainability Due Diligence Directive (CSDD Directive), the Deforestation Regulation, and the Carbon Border Adjustment Mechanism (CBAM).

While no one could deny the importance of a link between trade and sustainability – also given the Sustainable Development Goals (SDGs) agreed upon in the UN framework⁹⁸ – the debate continues on the extent to which

⁹⁷ G. Kübek and I. Mancini, 'EU Trade Policy between Constitutional Openness and Strategic Autonomy' (2023) *European Constitutional Law Review* 518.

⁹⁸ Available at: <https://sdgs.un.org/goals>.

the EU should use its trade power in an extraterritorial manner by imposing 'its' values on other states.⁹⁹ While for the EU itself it has become virtually impossible to agree on a trade agreement that would not take sustainability issues into account, the reluctance of some third states to 'swallow' values that the EU had a long time to develop itself under far better economic conditions, remains an issue. Some situations may seem close to a violation of the principle of non-intervention under international law, and it is clear that this principle may set limits to the extent to which the EU wishes to push the export of its values.

This implies that the EU has to find a balance between the fulfilment of its mandate regarding the promotion of its values in its relations with the world and respect for one of the fundamental principles of international law.¹⁰⁰ While sustainable trade may indeed have become a universal value, the relationship between the EU and certain third countries is not always an equal one and taking differences between trading partners into account will lead to a more sustainable trade relationship.

⁹⁹ Marín Durán (n 10) at 1033.

¹⁰⁰ Cf. G. Fernández Arribas and R.A. Wessel, 'Promoting the Rule of Law through EU External Relations and the Principle of Non-Intervention under International Law', in L. Hinojosa and C. Pérez-Bernárdez (ed.), *Enhancing the Rule of Law in the EU's External Action* (Cheltenham, Edward Elgar Publishing, 2023) 41-62.