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Law and Practice of the Common Commercial Policy

The First 10 years after the Treaty of Lisbon

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Trade and Sustainable Development Post-Lisbon

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1 Introduction

Trade and sustainable development have increasingly received attention, particularly following the debates on TTIP and CETA.¹ The core of the debate, however, is not new. Free trade can have detrimental consequences for labour and environmental conditions, often in developing countries. However, the general assumption is that trade also plays a positive role, contributing to enhanced protection of the environment and of labour conditions. Trade, it is argued, contributes positively to sustainable development by increasing real income and standards of living, allowing countries to allocate more resources to e.g. environmental protection. It is often heard that liberalisation can lead to a “race to the bottom” as countries and companies are tempted to engage in social and eco-dumping to become more attractive. Conversely, however, the global value chains resulting from trade may also lead to higher standards when powerful states promote a regulatory “race to the top”.²

Arguably the best option to achieve global environmental and social progress is to adopt appropriate corrective policies. Trade is neither the only nor the ideal tool to achieve environmental or social progress, but it can definitely serve as a tool in a larger toolkit that includes binding international environmental agreements and labour laws. Powerful markets, and hence powerful trading partners, such as the EU or the US have the capacity and arguably also the responsibility to use that power to encourage positive change. Complying with the rules of an attractive market is the price of trading with that market.³ Preferential access to such a market (positive approach) or restricted access (negative approach) can have a strong, at times even coercive, effect on producers and exporters. It is worth noting in this context that higher sustainability

- 1 Sustainable development under EU trade law comprises three pillars: economic, environmental and social – the latter including both labour standards and respect for human rights.
- 2 D. Vogel, *Trading up: Consumer and environmental regulation in a global economy* (Harvard University Press, 1997), 248 ff.
- 3 A. Bradford, ‘The Brussels Effect’, 107 *Northwestern University Law Review* 1 (2012); D. S. Grewal, *Network Power: The social dynamics of globalization* (Yale University Press, 2008).

standards do not only bring benefits to the local population in the developing country (such as better working conditions) or the global population (such as better environmental protection). They also create more of a level playing field with producers that already adhere to higher standards. Trade and Sustainable Development (TSD) standards viewed from this angle aim to abolish unfair or unethical competition from producers that employ for instance exploitative labour practices.

Since the Lisbon Treaty, the EU is formally committed to promoting environmental and social rights protection globally through Articles 3(5) and 21(2) TEU.⁴ Furthermore, Article 11 TFEU prescribes an environmental integration requirement in other EU policies with a view to promoting sustainable development. While this requirement is important with regard to internal policy, it is also being applied externally, such as in trade agreements with third countries.⁵ The EU has increasingly sought to assert itself as a prominent player in global environmental governance by gradually expanding its environmental policy from an internal policy to one with a marked external dimension. This is also an inevitable consequence of the aforementioned global value chains. If and when products and services exceed borders from the design to the final consumption stage, it is inevitable that their regulation implies external elements.

The increasingly elaborate and detailed TSD chapters in trade agreements are the flagship of the EU's commitments, as also emphasised in the 2015 "Trade for all" strategy.⁶ However, it is not because current trade agreements are more

4 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 the protection of its citizens. It shall contribute to peace, security, *the sustainable development of the Earth*, solidarity and mutual respect among peoples, *free and fair trade*, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter" (emphasis added). Article 21(2) TEU reads "The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty; (f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development".

5 See for a study on this, G. Marin Duran, E. Morgera, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions* (Hart Publishing, 2012).

6 Stating that "the EU has been leading in integrating sustainable development objectives into trade policy and making trade an effective tool to promote sustainable development worldwide" (European Commission, 'Trade for all: Towards a more responsible trade and investment policy', 2015, p. 22).

explicit in their sustainable development objectives, that pre-Lisbon trade agreements or trade relations did not include those. Equally, neither does it automatically mean that recent actions have become more effective. TSD chapters have been subject to much criticism because of their perceived lack of effectiveness, both among EU institutional players and civil society.

The current chapter will take a closer look at the evolution of sustainable development provisions/chapters in the recent history of EU trade agreements, both going back to the roots as looking at recent developments. After giving a factual overview, the challenges of effective trade and sustainable development policy will be addressed. The chapter will conclude with an outlook and possible policy recommendations for the next decade of the Common Commercial Policy.

2 Sustainable Development Provisions in FTAS

2.1 *The Roots of Sustainable Development Provisions*

The linking of trade and sustainable development is not new. International core labour standards were for the first time explicitly linked to international trade in the Havana Declaration of 1948. The trade-environment relationship has been embedded in the GATT 1947, the predecessor to the current WTO agreements in the post-war global trading system. Article XX GATT 1947 included exceptions to the substantive GATT obligations, allowing Members to adopt measures "necessary to protect human, animal or plant life"⁷ or "relating to the conservation of exhaustible natural resources".⁸ Trade concerns also found their way into multilateral environmental agreements (MEAs) starting from the mid '70s, such as the 1975 CITES⁹ (mandating a system of trade bans and restrictions on trade in endangered species), the 1987 Montreal Protocol¹⁰ (trade restrictions for ozone-depleting substances) and the 1989 Basel Convention¹¹ (on hazardous wastes).¹²

7 Article XX (b) of GATT.

8 Article XX (g) of GATT.

9 Convention on International Trade in Endangered Species of Wild Fauna and Flora, 993 UNTS 243, 1973.

10 Montreal Protocol on Substances that Deplete the Ozone Layer, 1522 UNTS 3, 1987.

11 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1673 UNTS 126; 28 ILM 657, 1989.

12 As different subsystems under international law, there is no hierarchy in norms between trade law and environmental law. Within the WTO dispute settlement, jurisdiction is limited to the WTO Agreements, but MEAs can serve as interpretative means to the

The beginning of the '90s was an important mark for the trade-environment debate. In 1992, the UN convened a landmark conference in Rio de Janeiro, the United Nations Conference on Environment and Development (UNCED, known as the '92 Rio Earth Summit), to set the tone and ambitions for global policy on development and environment. Leaders in Rio recognised the substantive links between international trade and environment by agreeing to strive for mutually supportive policies in favour of sustainable development.¹³ It was acknowledged that international trade is a key component of sustainable development, through a more efficient allocation of scarce resources and easier access for countries to, for instance, environmental goods and technologies.¹⁴ While Article XX GATT explicitly embedded an environmental element to trade policy, a similar social clause on human rights and labour rights was never introduced (apart from prison labour), despite regular calls for it and despite similar social clauses that can be found in regional, bilateral or unilateral initiatives such as the EU treaties, the EU Generalised System of Preferences, and EU trade agreements.

2.2 *Sustainable Development Conditionality in the EU GSP*

With regard to the EU's GSP, social and environmental clauses were added as a special incentive arrangement in 1998,¹⁵ and further defined in the 2002–2004 GSP.¹⁶ The aim of the clauses was to assist beneficiary countries in sustaining and improving their environmental and social standards, and to enable the EU to grant additional preferences to countries that respect minimum standards, such as the ILO labour conventions. In 2005, as a result of a dispute at the WTO brought by India concerning the EC's special arrangements to combat drug production and trafficking,¹⁷ GSP+ arrangements for sustainable development

Agreements (and in particular to Article XX GATT), as was held by the AB in *US-Gasoline*, referring to Article 3.2 DSU.

13 Rio Declaration on Environment and Development 1992, A/CONF.151/26 (Vol. I). See in particular principle 12 stating that "States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus".

14 WTO, *Harnessing Trade for Sustainable Development and a Green Economy* (2011), p. 1.

15 Council Regulation (EC) No 2820/98 of 21 December 1998.

16 Council Regulation (EC) No 2501/2001 of 10 December 2001.

17 Panel, *EC – Conditions for the Granting of Tariff Preferences to Developing Countries*, DS246.

and good governance were introduced, bringing under one heading the social and environmental clauses. In order to be eligible for GSP+, “vulnerable” countries must have ratified and implemented 16 UN/ILO core human and labour rights conventions, and at least 7 of 11 international conventions related to environmental and governance principles.¹⁸ As of 2014, developing countries need to have ratified all 27 listed conventions to qualify for GSP+.¹⁹ However, the 2005 GSP Regulation provided for a derogation in case of “specific constitutional constraints” where a “formal commitment to sign, ratify and implement any missing Convention” has been made. Only 14 developing countries applied for GSP+ treatment at the time, and currently there are 9 beneficiaries.²⁰ GSP+ status was lifted for Sri Lanka in 2010, but the country regained it in 2017.

In 2001, a third category of trade preferences for least-developed countries was introduced by the EU: the “Everything but Arms” status is being granted to countries when listed by the UN as LDC. While in principle unconditional, EBA preferences can be withdrawn in case of some exceptional circumstances, notably in case of serious and systematic violation of principles laid down in fundamental human rights and labour rights conventions.²¹ This happened to Myanmar in 1997 (reinstated in 2013), and in October 2018 the European Commission announced it would start withdrawal procedures for Cambodia and again for Myanmar.²² EBA status for Cambodia was withdrawn in August 2020, while formal procedures against Myanmar have yet to be started. The withdrawal procedure is a measure of last resort, when intensive dialogues fail to produce results.²³

In 2017, the Commission evaluated the functioning and the impact of the revised GSP. Whereas positive economic impact could already be witnessed, as well as an overall positive impact on social development and human rights, the Interim Report indicates only a limited impact on sustainable development and environmental protection. The latter is difficult to determine due to a lack

18 Council Regulation (EC) No 980/2005 of 27 June 2005.

19 Regulation (EU) No 978/2012 of the European Parliament and the European Council of 25 October 2012.

20 In 2018, the GSP+ beneficiaries are Cape Verde, Armenia, Kyrgyzstan, Mongolia, Pakistan, Philippines, Sri Lanka, Bolivia and Paraguay. Sri Lanka re-entered GSP+ in May 2017, after having been removed in 2010. Classified for three consecutive years by the World Bank as an upper middle income country, Paraguay left GSP+ on 1 January 2019. Countries lose their GSP status when entering an FTA with the EU.

21 Regulation (EU) No 978/2012, Article 19.

22 Commission Implementing Decision of 11 February 2019, OJ [2019] C55/11 (Cambodia).

23 European Commission, ‘Report on the Generalised Scheme of Preferences covering the period 2016–2017’, COM (2018) 36 final, 16 January 2018.

of availability of environmental indicators and data over time. It is noted in the EC report that the "GSP should be considered as a facilitator, because the nature and the extent of the positive impact is critically co-determined by the domestic priorities of the beneficiary countries as reflected in the human rights, socio-economic and environmental policies adopted and implemented".²⁴

2.3 *Sustainable Development Chapters in FTAs*

With regard to its bilateral free trade agreements, the EU has included social clauses (human rights clauses) in all its agreements since 1995. All EU trade agreements since EU-CARIFORUM in 2008 contain provisions on trade and sustainable development, and the new generation of EU trade agreements, launched by the "Global Europe" Strategy,²⁵ of which EU-Korea was the first agreement in 2011, include a separate trade and sustainable development chapter with more legal detail concerning elements such as civil society involvement. In contrast to the earlier agreements that only contained an agreement on trade, the new generation of agreements (since the EU-Korea FTA) contain both a free trade agreement and a political framework agreement. The framework agreements reiterate the political objectives of sustainable development for both parties.²⁶ Post-Lisbon, TSD chapters are pursued next to the investment chapters, allowing the latter to be read in light of the former.²⁷ Since trade and investment are split into separate agreements following the ECJ's Opinion 2/15 in May 2017, the preamble to the investment agreements explicitly refer to the TSD provisions and commitments. In its Opinion 2/15, upon questions put forward by the European Commission on competence and legal basis, the ECJ found that the TSD provisions in the EU-Singapore agreement formed an essential part of the agreement, did not require a separate legal basis and thus fell within the competence of the EU under the CCP.²⁸ TSD clauses

24 European Commission, 'Mid-Term Evaluation of the EU's Generalised Scheme of Preferences (GSP): Final Interim Report', 21 September 2017.

25 Communication from the European Commission COM(2006) 567, 'Global Europe competing in the world': <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:r11022&from=EN>.

26 See e.g. Title V of the EU-Korea Framework Agreement.

27 See F. Hoffmeister, 'The Contribution of EU Trade Agreements to the Development of International Investment Law', in S. Hindelang, M. Krajewski (eds.), *Shifting Paradigms in International Investment Law* (OUP, 2016), p. 357-376.

28 For a discussion of competences for TSD chapters, see M. Cremona, 'Shaping EU Trade Policy post-Lisbon: Opinion 2/15 of 16 May 2017', *European Constitutional Law Review* 14:1 (2018), p. 231-259; See also the contributions of M. Cremona and A. Rosas in this volume on Opinion 2/15.

do preserve the right, however, of the parties to set their own standards in conformity with their international obligations and in accordance with their own internal legislative procedure.²⁹

By including TSD provisions in FTAs, the EU seeks to “maximise the leverage of increased trade and investment on issues like decent work, environmental protection, or the fight against climate change in order to achieve effective and sustainable policy change”.³⁰ Depending on the partner country, the objective of the TSD chapter may differ. With developed countries as trading partners that have similar levels of environmental protection and labour standards, the provisions serve to ensure that trade and investment liberalisation does not lead to a deterioration of environmental and labour conditions. In the case of developing countries the chapter may serve as an incentive to commit to and fully engage in the protection of environmental and labour standards.

TSD chapters have a common core, with possible additions that are specific to the partner country. In general, such a chapter contains provisions on core multilateral labour standards and ILO Conventions, common commitments to multilateral environmental conventions, climate change, and sustainable management of natural resources. The following example of the EU-Korea FTA may serve as an illustration:

... each Party shall seek to ensure that [...] laws and policies provide for and encourage high levels of environmental and labour protection, consistent with the internationally recognized standards or agreements referred to in Articles 13.4 and 13.5 [...].³¹

The Parties [...] commit to respecting, promoting and realising, in their laws and practices, the principles concerning the fundamental rights, namely: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation. The Parties reaffirm the commitment to effectively implementing the ILO Conventions that Korea and the Member States of the European Union have ratified respectively.³²

²⁹ ECJ, ‘Free Trade Agreement with Singapore’, Opinion 2/15 (2017), para. 165.

³⁰ 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’, 26 February 2018 (EC non-paper on trade and sustainable development), p. 1.

³¹ See Article 13.3 EU-Korea FTA.

³² See Article 13.4 EU-Korea FTA.

The chapter then proceeds with respect to multilateral environmental agreements as follows:

2. [...] The Parties reaffirm their commitments to the effective implementation in their laws and practices of the multilateral environmental agreements to which they are party.
3. The Parties reaffirm their commitment to reaching the ultimate objective of the United Nations Framework Convention on Climate Change and its Kyoto Protocol. They commit to cooperating on the development of the future international climate change framework in accordance with the Bali Action Plan.³³

The EU-Korea FTA also states the parties' intention to facilitate and promote trade in environmental goods and services:

The Parties shall strive to facilitate and promote trade and foreign direct investment in environmental goods and services, including environmental technologies, sustainable renewable energy, energy efficient products and services and eco-labelled goods, including through addressing related non-tariff barriers. The Parties shall strive to facilitate and promote trade in goods that contribute to sustainable development, including goods that are the subject of schemes such as fair and ethical trade and those involving corporate social responsibility and accountability.³⁴

TSD chapters can include provisions on specific local challenges, such as for instance biodiversity loss caused by deforestation and intensification of agriculture. A typical example would be a provision on palm oil production in countries such as Malaysia or Indonesia. The EU-Singapore FTA has been branded as the EU's first "green" FTA, containing specific terms on the liberalisation of environmental services such as waste removal and rules on illegal fishing and logging.³⁵

TSD chapters also contain provisions on upholding levels of domestic legislation and establish a monitoring mechanism, building on public scrutiny through involvement of civil society. While the objectives are set out, the parties to FTAs are free to regulate according to their own collective preferences. Harmonisation of social and environmental provisions with parties to trade agreements is not the aim, rather progressing through dialogue and

33 See Article 13.5 EU-Korea FTA.

34 See Article 13.6 EU-Korea FTA.

35 See Article 12.7, 12.8 EU-Singapore FTA. See also the draft Articles 15.7 and 15.8 in the EU-Vietnam FTA.

cooperation to make economic and trade-related endeavours sustainable in the long term:

The Parties recognise that it is not their intention in this Chapter to harmonise the labour or environment standards of the Parties, but to strengthen their trade relations and cooperation in ways that promote sustainable development [...].³⁶

TSD chapters are often associated with developing countries. However, as the above examples of Korea and Singapore have shown, these chapters are equally relevant to developed countries with regard to upholding high standards, both in the partner country and in the EU. The strong protests against the EU-US Transatlantic Trade and Investment Partnership (TTIP) and the "Wallonia-debacle" with the Canada-EU Comprehensive Economic and Trade Agreement (CETA) have shown growing concerns about the policy space for sustainability standards within the EU and the fear that such trade agreements may lead to lower standards. CETA contains three chapters (22–24) on trade-related sustainability provisions, including labour and environmental considerations. Chapter 22 of CETA concerns trade and sustainable development and serves as a framework chapter establishing institutional rules for the subsequent two chapters dealing with trade and labour (Chapter 23) and trade and environment (Chapter 24). The objective of the chapter is stated in Article 22.1, which stipulates:

The Parties recognise that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development, and reaffirm their commitment to promoting the development of international trade in such a way as to contribute to the objective of sustainable development, for the welfare of present and future generations.

The parties make the commitment "to review, monitor and assess the impact of the implementation of this Agreement on sustainable development" in their territories, and additionally they may carry out joint assessments (Article 22.3(3)). Furthermore, the agreement establishes the Committee on Trade and Sustainable Development (CTSD), an intergovernmental body made up of high level officials of the parties. The CTSD is to meet on an *ad hoc* basis and

³⁶ See e.g. Article 13.1(3) EU-Korea FTA.

monitor the implementation of Chapters 22 to 24 and the review of the impact of the agreement on sustainable development (Article 22.4). Chapters 23 and 24 furthermore contain provisions on regulatory dialogue and on the parties' rights to regulate.³⁷

The right to regulate includes the right of the parties to set their own priorities and modify and adapt their legislation. With regard to the potential lowering of standards, the right to regulate is limited in a twofold fashion: First, parties must not modify their laws in ways inconsistent with their international commitments including those of CETA. Second, CETA incorporates two articles (Article 23.4 for labour and Article 24.5 for environment) on 'Upholding levels of protection' that introduce an obligation

not [to] waive or otherwise derogate from, or offer to waive or otherwise derogate from, its labour law and standards [environmental law], to encourage trade or the establishment, acquisition, expansion or retention of an investment in its territory.

In previous agreements, such as the EU-Cariforum EPA, the obligation to uphold the level of protection was put forward as a recommendation and not as an obligation.³⁸ The "level of protection" referred to in these titles are the levels as set by the respective parties to the agreement. In other words there is no ambition to agree to a common level.

3 Impact, Effective Implementation and Enforcement

Sustainability provisions do not have as their primary objective the liberalisation of trade, and do not follow the same logic as the pertinent core provisions. The provisions are not written in the same strict, detailed and binding manner as economic provisions, and monitoring their implementation and compliance is not as straight-forward and requires a different approach.³⁹ Also, one needs to be aware that trade policy is not and cannot be the best method to deal with labour market imperfections (such as child labour or discrimination of workers) or environmental distortions (such as polluting production or illegal logging) – the best method is to adopt appropriate corrective labour market

³⁷ See Article 23.3 and 24.3 CETA.

³⁸ See Article 193 EU-Cariforum EPA.

³⁹ Kommerskollegium, 'Implementation and Enforcement of sustainable development provision in free trade agreements – options for improvement', 2016 (Kommerskollegium), p. 3.

or environmental policies.⁴⁰ However, trade policy can be a second-best where the first option is not available, in particular when higher standards are set than would otherwise be applicable. The bigger the market, the more powerful that standard-setting will be.⁴¹ It has been suggested that the effects of sustainability provisions depend on a variety of factors, such as presence of strong domestic social partners, economic dependence of the trade partner on market access, and domestic technical capacity for the remediation of problems.⁴² The EU undertakes Sustainability Impact Assessments (SIA) to assess the potential economic, social, human rights and environmental impact of ongoing trade negotiations, both in the EU and the partner countries.⁴³ They allow stakeholders to give input, and should help the negotiators to identify possible trade-offs and optimise the policy choices. The SIA is available to the public and includes policy recommendations, to which the European Commission answers in a position paper. The Commission also undertakes ex-post evaluations (implementation assessments), but they are more *ad hoc* and without a clear timeline. A systematic exercise would give great insights, also with a view to later agreements; beyond the impact assessment and the stakeholder views, little research has been undertaken into the actual negotiations of the sustainability provisions and the main challenges and hurdles during the negotiations of these chapters, which may in itself be telling.⁴⁴ Our assumption would be that due to the soft nature of the chapters combined with the *sine qua non* approach of the EU (the agreement needs to be taken – or not, as a whole), trading partners agree with the terms without extensive discussions.

The TSD provisions/chapters in EU trade agreements can be criticised for not going far enough, being too vague in their wording and too soft in the way violations are dealt with. As they strive for a balance between “imposing” norms on trade partners (often developing countries, such as the African, Caribbean and Pacific countries, as well as a number of Asian and Latin-American countries) and leaving sufficient policy space and ownership, they inevitably lead the EU to meet its partners “somewhere in the middle” (assuming that the

40 L. Cuyvers, ‘The sustainable development clauses in recent free trade agreements of the EU: perspectives for ASEAN’, *Journal of Contemporary European Studies* 22:4 (2014), p. 430.

41 A. Bradford, ‘The Brussels Effect’, 107 *Northwestern University Law Review* 1 (2012); D. S. Grewal, *Network Power: The social dynamics of globalization* (Yale University Press, 2008).

42 Kommerskollegium (n. 39), p. 15.

43 For the updated SIA methodology, see European Commission, ‘Handbook for Trade Sustainability Impact Assessment’, 2nd edition, 2016.

44 On labour rights provisions see J. Harrison et al., ‘Governing Labour Standards through FTAs’, *Journal of Common Market Studies* 57:2 (2018), p. 1–18.

EU starts from the higher ground – which may not be the case with some of its FTA partners). The TSD chapters do not contain specific requirements for modifications to domestic law as they leave discretion to governments as to how to implement the relevant standards and how to enforce them. The EU has traditionally based its enforcement system on a cooperative, managerial model, focusing on “managing” causes of non-compliance through positive means. The US for instance, applies a more sanctions-based model, in which cooperation is ensured through sanctions which create costs and remove benefits.⁴⁵ Interestingly the EU’s cooperative approach has been suggested as a serious downside to TSDs, even though the sanctions based approach is not widely carried either.⁴⁶

Trade sanctions can be justified when others are not “playing by the rules” of the international trading system, such as countervailing measures against foreign subsidies or to impose anti-dumping duties. It is attractive to suggest that this logic may be applied to social and environmental dumping, too. When countries gain their market advantage by not respecting labour or environmental standards, trading partners should not enable these practices. Nonetheless, there is little evidence that imposing sanctions will lead to a long-term strategy with permanent improvement.⁴⁷ Sanctions could trigger unwanted effects, especially in developing countries or least developed countries. A decrease of exports could lead to a reduction of investments and consequently jobs, hitting the very workers which are meant to be protected. Moreover, poverty reduction may (understandably) trump environmental or labour protection in terms of policy priorities in developing countries. Furthermore, the loss of market share of one country is likely to be filled by competitors from other countries which may not have similar, let alone higher sustainability standards.

There is not enough evidence to comment on the effectiveness of EU TSD chapters in comparison with U.S. and Canadian models which involve sanctions, and there are certainly pros and cons to every system.⁴⁸ However, following a public stakeholder consultation launched by the European Commission on the matter in 2017, it can be concluded that there is no consensus among European policy makers and stakeholders on the use of sanctions, while there

45 Kommerskollegium (n. 39), p. 5.

46 EC non-paper on trade and sustainable development (n. 30).

47 Kommerskollegium (n. 39).

48 Kommerskollegium (n. 39). For an interesting comparison between the EU and US approach, see J. L. Mortensen, ‘Towards more effective sustainability provisions in future European trade agreements: can Europe learn from the US?’, Discussion paper for the Danish Confederation of Trade Unions (2017).

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is consensus on enhancing engagement and making more effective use of the toolbox already available under TSD chapters to increase effectiveness.⁴⁹ That toolbox contains structures to involve civil society organisations in the implementation of those commitments, as well as a dedicated dispute settlement mechanism through which the findings of independent arbitrators may highlight issues of compliance. Engagement and compliance can also be required before the actual conclusion of the agreement (pre-ratification conditionality): for instance in the case of the EU agreement with Peru and Colombia, the European Parliament in 2012 demanded the adoption by the Colombian governments of a Roadmap to protect trade unionists, human rights and environmental protection before giving its consent⁵⁰; in 2016, the Parliament insisted on a human rights conditionality clause in CETA.⁵¹

3.1 *Monitoring and Civil Society Mechanisms*

Under EU FTAs, the implementation of commitments is ensured through the monitoring roles of the dedicated government bodies (TSD Committee, Trade Committee, Joint Committee) and the civil society structures (domestic advisory groups and civil society forums). The Committee is established to oversee the implementation of the chapter.⁵² Within that committee, domestic advisory groups comprising of civil society organisations can be set up:

Each Party shall convene new or consult existing domestic advisory group(s) on sustainable development with the task of advising on the implementation of this Chapter. Each Party shall decide on its domestic procedures for the establishment of its domestic advisory group(s) and appoint its (their) members. Such domestic advisory group(s) shall comprise independent representative organisations, ensuring a balanced representation of economic, social and environmental stakeholders, including among others employers' and workers' organizations, business groups, and environmental organizations. Each domestic advisory group may, on its own initiative, submit views or recommendations to its respective Party on the implementation of this Chapter.⁵³

49 EC non-paper on trade and sustainable development (n. 30).

50 European Parliament Resolution of 13 June 2012 on the EU Trade Agreement with Colombia and Peru (2012/2628(RSP)).

51 CETA, Article 28(7).

52 Such committees have been set up in EU-Korea, Article 44; EU-Colombia/Peru (2014), EU-Central America (2014), as well as in the current draft FTAs.

53 Draft EU-Vietnam FTA, Article 15.4.

Civil society mechanisms are characterised by the participation of a group of domestic representatives of labour, environment and business constituencies in both trading partners (called the *Domestic Advisory Group* (DAG)); by a transnational forum where the members of the domestic groups meet; and by interaction between the civil society groups and government officials of both trading partners discuss the implementation of the TSD chapter. However, little is known about the functioning of these groups and they have been subject to criticism.⁵⁴ For instance, they are viewed as too improvised, lacking frequency and continuity.⁵⁵ The selection procedures are criticised for being not transparent, which may lead to representatives clearly not always being independent from the government.⁵⁶ Furthermore, it is often unclear whether and how governments follow up on the outcomes of these mechanisms, undermining their credibility and effectiveness.⁵⁷ Notwithstanding its flaws, in 2017 the Europe-Peru Platform (a network of 16 European NGOs created in 2005 to increase coordination of advocacy toward European institutions and the European public on the topic of human rights situation in Peru) as well as members of the EU DAG, filed a "complaint against the Peruvian Government for failing to fulfil its labour and environmental commitments under the Trade Agreement between Peru and the EU".⁵⁸ The European Commission has since been following up with the relevant authorities in Peru, as well as the ILO and civil society.⁵⁹

Even if the mechanisms and the trade agreements as a whole may have obvious shortcomings, participation is an opportunity to highlight those

- 54 See among others J. Orbie, D. Martens, M. Oehri, L. Van den Putte, 'Promoting Sustainable Development of Legitimising Free Trade? Civil Society Mechanisms in EU Trade Agreements', *Third World Thematics: A TWQ Journal* 1:4 (2017) (Orbie et al.), p. 526–546.
- 55 J. Orbie, D. Martens, L. Van den Putte, *Civil Society meetings in European Union Trade Agreements: Features, Purposes and Evaluation* (CLEER papers, 2016/3); L. Van den Putte, J. Orbie, F. Bossuyt, D. Martens, F. de Ville, *What social face of the new EU Trade Agreements? Beyond the 'soft' approach* (ETUI Policy Brief, 13/2015).
- 56 Y. Altintzis, 'Civil society engagement and linkages in EU trade policy', in T. Takacs, A. Ott, A. Dimopoulos (eds.), *Linking Trade and non-commercial interests: The EU as a global role model?* (CLEER papers, 2013/4).
- 57 M. Muguzura, *Civil society and trade diplomacy in the 'Global Age': The European case: trade policy dialogue between civil society and the European Commission* (WWF European Policy Office, 2002).
- 58 'Complaint against the Peruvian Government for failing to fulfil its labour and environmental commitments under the Trade Agreement between Peru and the EU': <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupMeetingDoc&docid=12295>.
- 59 Commission Staff Working Document, 'Individual reports and info sheets on implementation of EU Free Trade Agreements', SWD (2018) 454 final, 31 October 2018, p. 49.

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shortcomings and to try to make a change from within. Public protesting may be easier, but progress can only be made if all stakeholders engage to work together towards a better-functioning system – even if some civil society groups participate to oppose the very trade agreement.⁶⁰ Engaging private actors in the implementation of labour and environmental provisions may also be essential for compliance, in particular with regard to countries with limited engagement capacity.⁶¹

The European Commission has proposed to take further steps to support DAGs in the EU and in the partner countries: a project under the EU's Partnership Instrument has been launched to support trade unions and business in their roles. Also, an exchange of best practices between DAGs of different partner countries is set up in order to create rules and recommendations for establishment and functioning of DAGs and CSFs, and stimulate creation of guidelines for DAGs based on existing experience and practices in this context.⁶² Furthermore, it is proposed to extend the scope of the civil society structure to cover the entire FTA instead of only the TSD chapter (DAGs are currently only allowed to discuss and advise on the implementation of the TSD chapters only). This legal limitation has constrained the ability of the groups to provide advice on the sustainability implications of other parts of agreements – e.g. technical barriers to trade, or sanitary and phytosanitary measures, etc.⁶³

3.2 *Dispute Settlement Mechanisms*

Based on the example of the WTO dispute settlement system that has, despite the recent challenges and need for reform, mostly worked very well since its inception in 1995, the EU has included state-to-state dispute settlement mechanisms in its FTAs since 2000. Since 2009, the EU has also included investor-state dispute settlement mechanisms in trade and investment agreements. Disputes settlement mechanisms are set up to ensure that agreements are enforced and that disputes can be settled: it provides an effective means to establish whether a country has acted in conformity with its obligations and aims to avoid trade damaging unilateral action by having an independent body applying and interpreting the agreement. Where a party fails to comply with a commitment, the other party can resort to the dispute settlement mechanism,

60 Orbie et al. (n. 54), p. 535.

61 Kommerskollegium (n. 39), p. 26.

62 EC non-paper on trade and sustainable development (n. 30), p. 5.

63 EC non-paper on trade and sustainable development (n. 30), p. 6.

including recourse to the independent panel procedure leading to a public report with recommendations. Despite their potential, dispute settlement mechanisms in EU FTAs have not been triggered until very recently indeed.⁶⁴ Before these recent developments, the only known example of a “sustainability dispute” under a bilateral trade agreement was a dispute brought by US and Guatemalan labour unions on failure by Guatemala to implement labour rights provisions of the US-DR-CAFTA agreement.⁶⁵ The reason for the rare occurrence of relevant dispute settlement provisions being triggered, are most likely diverse. One reason is that in order to trigger dispute settlement, it must be demonstrated that the failure is due to a sustained or recurring course of action, and that the violation occurs in a manner affecting trade or investment between the parties.⁶⁶ Another reason could relate to the limited standing in the dispute settlement provisions: in addition to current state-to-state model, it is suggested to add a third-party-state dimension and a third party-third party component.⁶⁷

Dispute settlement for TSD chapters differs from the general dispute settlement procedure established for the remainder of the FTA, which does provide an explicit role for civil society and international organisations. Under the TSD dispute settlement, civil society and international organisation can be involved at every stage. The outcome of the proceedings are a public report that can be monitored for implementation, but does not include sanctions. Rather, it focuses on mutually agreed solutions to problems. The European Commission has recently stepped up the monitoring and analysis of compliance with TSD commitments by a number of FTA partner countries: letters setting out compliance concerns and actions to be taken in the absence of which dispute settlement would need to be launched have been sent to a number of partner countries. Should the results of these actions not

64 EC non-paper on trade and sustainable development (n. 30), p. 7. For recent triggers see request for consultations under the EU-Korea FTA's sustainable development chapter: 17 December 2018. See 'EU steps up engagement with Republic of Korea over labour commitments under the trade agreement': <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1961>. Labour rights are at the heart of the request. Subsequently see consultations with Ukraine over the country's ban on the export of unprocessed woods: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1968>.

65 Panel Report, *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR* (adopted 14 June 2017), <https://bit.ly/2tiQos4>.

66 Kommerskollegium (n. 39), p. 14.

67 A. Marx, F. Ebert, N. Hachez, 'Dispute settlement for labour provisions in EU Free Trade Agreements: Rethinking current approaches', *Politics and Governance* 5:4 (2017), p. 49–59.

be satisfactory and compliance concerns persist, the Commission services take the view that dispute settlement proceedings should be launched "without hesitation".⁶⁸

3.3 *Enhanced Engagement*

Another "soft" means of increasing the effectiveness and the impact of the trade preferences and relations, mostly applicable to GSP and EBA beneficiaries, is intensifying the dialogue through enhanced engagement. In the event of failure of the dialogue the EU may still withdraw the status and (part of) the preferential access. Dialogue rather than ready triggering of the dispute settlement provisions is the preferred option for the EU's approach towards FTA partner countries, too, as illustrated by its talks with South Korea on the ratification of outstanding ILO Conventions.

Examples of formalised enhanced engagement with EBA beneficiaries can be found in the Special Partnership for Democracy, Peace and Prosperity with Myanmar, a strategy laid down by the European Commission in May 2016,⁶⁹ or the 2013 Bangladesh Sustainability Compact for the clothing industry.⁷⁰ In the Myanmar Special Partnership, possible EU initiatives were proposed to improve democracy, the rule of law, the peace process, human rights, and sustainable development. The Bangladesh Sustainability Compact is a sectoral initiative, aimed at the promotion of labour rights and factory safety. In a coordinated effort by the EU, Bangladesh, the US, Canada and the ILO short and long-term commitments have been set. They bring together employers, trade unions and other key stakeholders to promote labour rights and factory safety. The Compact is underpinned by the possible action of withdrawing trade preferences should results not show – a threat which was narrowly averted by the Bangladeshi government through sufficient progress made on its labour laws.

68 European Commission, 'Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements', non-paper of the Commission services, 26 February 2018, p. 8.

69 European Commission, 'Elements for an EU strategy vis-à-vis Myanmar and Burma: A Special Partnership for Democracy, Peace and Prosperity', (JOIN (2016) 24 final), 1 June 2016.

70 Joint Statement, 'Staying engaged: a Sustainability Compact for continuous improvements in labour rights and factory safety in the Ready-Made Garment and Knitwear Industry in Bangladesh', 8 July 2013 https://trade.ec.europa.eu/doclib/docs/2014/october/tradoc_152853.pdf.

4 Outlook

One can only truly measure performance and success when clear performance indicators are set. What are the objectives, what are the aims to be achieved? Without such objectives, one is left to judge based on differing expectations and ideals. It is not difficult to criticise trade and sustainable development chapters in FTAs if the expectation is that these will lead to a green and fair planet for all. A TSD chapter in a trade agreement has its obvious limits. Firstly, they exist within the context of a trade agreement, and any action must thus somehow be related to that. Secondly, the levels of development between the EU and its trading partners may differ considerably, which often has an impact on the institutional set-up, legal framework and rule of law of the trading partner. The EU can assist developing countries because of the hard lessons it learnt itself in the past and continues to learn. Thirdly, the EU cannot just impose its (relatively recent) "superior" norms on trade partners: local circumstances, cultural differences and geographical aspects may require a different approach. Effective long-term policy depends on the engagement and ownership of local partners. Fourthly, sanctions run the risk of being counter-productive, harming those who are in most need of help due to loss of jobs and increased poverty. Any type of sanction needs to contain strong incentives and cooperation mechanisms to have a positive effect. However, as noted above, there is no consensus among EU stakeholders on the use of sanctions. The jury is still out on what is empirically the most effective measure available pursuant to the EU's recent FTAs.

One could argue that TSD chapters are only included in free trade agreements to mobilise sufficient public and political support for those trade agreements in times where globalisation and free trade are increasingly contested in developed countries.⁷¹ It could also be argued that (some) civil society support in developed countries is related to the extent that they are exposed to unfair or unethical competition from producers that employ exploitative labour practices. There may even be true believers in the idea of using trade policy as a means to incentivise better global labour and environmental protection. However, whatever the rationale, it is in everyone's best interest to ensure that the TSD chapters are as impactful and effective as possible. Any criticism should thus be framed constructively, and all stakeholders need to cooperate to the extent possible to ensure the success. This requires efforts from different

71 J. Orbie et al. (n. 54), p. 530; K. Ulmer 'Trade embedded development models', *The International Journal of Comparative Labour Law and Industrial Relations* 31:3 (2015), p. 303–326.

stakeholders to engage partners in their "field of expertise": amongst industry, amongst social partners – especially if the institutional set-up in either country is not yet what it should be. As has been shown above, the larger the group that implements high TSD standards, the stronger those standards become, which may then have an impact on regional trade in other regions of the world and may eventually result in a general uptake of the higher standard. Trade can in that regard serve as leverage and a positive incentive for more ambitious norms.

The link between trade and sustainable development is not new as has been demonstrated in this chapter. However, the TSD provisions and chapters have become the subject of scrutiny and debate, which can only be seen as a positive development. The current challenge is to increase their effectiveness and maximise results, whether through dispute settlement or otherwise.

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