

SUSTAINABLE DEVELOPMENT CHAPTERS IN EU FREE TRADE AGREEMENTS: EMERGING COMPLIANCE ISSUES

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Abstract

In recent years we have seen an intensified interest in the ‘Trade and Sustainable’ (TSD) chapters, which represent the European Union (EU)’s effort to develop a distinct ‘promotional’ model for regulating trade-environment and trade-labour linkages in free trade agreements (FTAs). This article deals with the implementation and enforcement of TSD provisions and, in so doing, draws attention to compliance by the EU (and its Member States) which has been mostly neglected in previous academic discussions. It explores for the first time the question of who is responsible on the EU side for the due performance of TSD commitments, with the answer being even less clear following Opinion 2/15 on the EU-Singapore FTA. With this in mind, the article revisits the case for a harder sanction-based enforcement of TSD chapters and argues that this is not warranted from an effectiveness standpoint, and indeed unwanted for several legal and policy grounds.

1. Introduction

While there is broad consensus that international trade should support rather undermine sustainable development,¹ how exactly should environmental and social concerns be integrated in trade agreements is a far more complex and contentious question. With the prospects of tackling this issue within the World Trade Organization (WTO) being inherently limited,² emphasis has been increasingly placed on free trade agreements (FTAs) as an alternative governance framework for trade-environment and trade-labour linkages, starting with the North American Free Trade Agreement (NAFTA) and its Side Agreements on Environmental and Labour Cooperation.³ Compared to the WTO, FTAs offer greater opportunities to

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¹ See e.g., United Nations (UN) General Assembly, Transforming Our World: the 2030 Agenda for Sustainable Development, UN Doc/A/RES/70/1, 25 Sept. 2015, paras 17.10-17.12.

² With regards to social protection, the position taken since the 1996 Singapore Ministerial Conference is that labour standards ought to be kept out of the main agenda of the WTO and within the competence of the International Labour Organisation (ILO), with the caveat that such standards should not be used for “protectionist purposes” and “the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question”: WTO, Singapore Ministerial Declaration, WTO/MIN(96)/DEC, 18 Dec. 1996, para 4; re-affirmed in the Doha Ministerial Declaration, WTO/MIN(01)/DEC/1, 14 Nov. 2001 [Doha Declaration], para 8. With respect to environmental standards, the relationship between WTO rules and multilateral environmental agreements (MEAs) is part of the Doha agenda (Doha Declaration, para 31), but progress in the negotiations has been limited and, in any event, the mandate is limited to avoiding conflicts of norms between the two regimes rather than requiring WTO members to implement MEA commitments.

³ North American Agreement on Environmental Cooperation, signed on 14 Sept. 1993, available at:

incorporate sustainable development considerations, not only because of the smaller number of parties involved but also because of their typically broader regulatory breath.⁴ The European Union (EU) joined this trend shortly after the promotion of sustainable development through its external trade policy became a constitutional imperative with the Treaty of Lisbon,⁵ and since 2010 so-called ‘Trade and Sustainable Development’ (TSD) chapters have become a standard component of its new-generation comprehensive FTAs concluded with developed and developing countries alike. These TSD chapters are presented as a central part of the EU’s “value-based” trade policy, whereby the Union is determined to use trade as a vehicle for promoting “sustainable development worldwide” – that is, not only in third countries but presumably also in the EU.⁶ In doing so, the EU has sought to depart from the pre-existent US and Canadian policy practice and develop a distinct model for managing trade-environment and trade-labour linkages in FTAs, which is not only more ambitious in terms of substantive commitments but also less coercive with regards to their implementation and enforcement.

However, already within the first decade of their existence, TSD chapters have come under criticism particularly from the European Parliament (EP) and some scholars, with growing doubts as to whether they can effectively deliver on the promise to enhance global environmental and labour governance. At 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*. This article seeks to contribute to this discussion by drawing attention to a fundamental but largely overlooked aspect: compliance with these same sustainability requirements *within the EU* (including by its Member States) as the other evident side of the bilateral partnership. Part 2 provides a detailed examination of the main substantive and institutional provisions of TSD chapters, which is necessary to inform the subsequent analysis of compliance-related issues. It will be shown that the purpose of TSD is not confined to preventing retrogression in levels of environmental/labour protection for trade or competitive purposes, but is broader inasmuch as compliance with (minimum) standards of environmental/labour protection is required independently of any effect on bilateral trade (or investment). At the same time, TSD chapters favour a ‘promotional’⁷ approach to compliance, which essentially excludes the use of

<<http://www.cec.org/about-us/NAAEC>>; North American Agreement on Labour Cooperation, signed on 14 Sept. 1993, available at: <https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=fr&p_isn=35060&p_country=USA&p_count=2480&p_classification=23&p_classcount=111> (last visited 27 March. 2020).

⁴ That is, FTAs often contain *prescriptive* provisions, requiring trading partners to maintain certain standards of environmental and labour protection. In contrast, the WTO’s regulatory approach is largely *permissive*, whereby exception clauses establish the conditions under which WTO members may adopt trade-related measures for environmental and social protection purposes. On this point, see further: Marín Durán, “Innovations and Implications of the Trade and Sustainable Development Chapter in the EU-Korea Free Trade Agreement” in Harrison (Ed.), *The European Union and South Korea: The Legal Framework for Strengthening Trade, Economic and Political Relations* (Edinburgh University Press, 2013), at 127-129.

⁵ Arts. 3(5) and 21 Treaty on the European Union (consolidated version), O.J. 2012, C326/26 [TEU]; Art. 207(1) Treaty on the Functioning of the European Union, O.J. 2012, C326/47 [TFEU]. Before the Lisbon Treaty, environmental and social concerns were integrated in EU FTAs through hortatory and cooperative provisions scattered throughout the agreements: for an analysis in relation to environmental integration, see Marín Durán and Morgera, *Environmental Integration in the EU’s External Relations – Beyond Multilateral Dimensions* (Hart, 2012), at 56-144.

⁶ European Commission, Trade for All – Towards a More Responsible Trade and Investment Policy, COM(2015) 497final, 14 Oct. 2015, at 15; and Strategic Plan 2016-2020 – DG Trade, 22 Dec. 2017, at 14.

⁷ This partly follows the characterization of the ILO, distinguishing the ‘conditional’ approach (linking compliance to economic consequences in the form of sanctions or incentives) and the ‘promotional’ approach (not including economic sanctions or incentives as an enforcement mechanism) to labour provisions in FTAs: ILO, *Social Dimensions of Free Trade Agreements* (2015), at 20, available at:

economic sanctions in cases of non-compliance. Part 3 turns to the question of who on the EU side (i.e., the EU, its Member States or both) is responsible for ensuring compliance with TSD commitments. While the European Court of Justice (ECJ) took the view in *Opinion 2/15*⁸ that the Union is exclusively competent for entering into sustainability commitments, its reasoning was unconvincing and legally flawed. Moreover, it will be argued that *Opinion 2/15* has generated uncertainty in terms of implementation by the EU party and a certain imbalance in terms of its commitments vis-à-vis those of trading partners, particularly in the labour field. With this mind, Part 4 engages with the on-going debate over the suitability of the promotional approach to compliance adopted in TSD chapters, and in particular the suggestion that infringements of sustainability commitments should be subject to economic sanctions. It will be first highlighted that such a call for a harder enforcement mechanism seems premature at this early stages of implementation and, furthermore, rests on the (mis-)assumption that a compliance gap exists mainly in partner countries and hence such sanctions would be used primarily by (rather than against) the EU. In addition, it will be argued that moving towards a sanction-based enforcement model for TSD chapters is not warranted from an effectiveness standpoint, and indeed undesirable for several legal and policy reasons. Part 5 concludes.

2. Key elements of TSD chapters

Beginning with the 2010 EU – Korea FTA,⁹ EU free trade agreements¹⁰ have systematically included dedicated TSD chapters, which contain a number of substantive and institutional provisions in respect of environmental and labour protection. While there is some variation across agreements, all TSD chapters share three constitutive elements, which will be examined here using the EU – Singapore Free Trade Agreement¹¹ at issue in *Opinion 2/15* as a case-study and focusing on those provisions that are of most relevant to the analysis in subsequent sections.

2.1. Substantive provisions

The first element common to all TSD chapters are provisions defining the ‘Context and Objectives’ and placing them within the broader global agenda on sustainable development. Essentially, the parties “reaffirm their commitment to developing and promoting ... their bilateral trade and economic relationship in such a way as to contribute to sustainable development”¹² and explicit reference is made to relevant international instruments.¹³ In

<https://www.ilo.org/global/research/publications/WCMS_228965/lang--en/index.htm> (last visited 27 Mar. 2020). However, TSD chapters are still subject to binding dispute settlement mechanism.

⁸ *Opinion 2/15 (EU-Singapore Free Trade Agreement)*, EU:C:2017:376.

⁹ Technically, the 2008 EU – CARIFORUM Economic Partnership Agreement was the first to include legally-binding environmental and labour provisions, but these differ in some respects from the dedicated TSD chapters in subsequent EU FTAs and will not be examined in depth here: Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States [EU – CARIFORUM EPA], of the other part, O.J. 2008, L289/3, Arts 183-196.

¹⁰ In this article, the term ‘free trade agreement’ is used for simplicity, even though EU agreements have different terminology (see note 14 *infra*) and often go beyond establishing preferential trade relations.

¹¹ This section uses the 2018 version of the Free Trade Agreement between the European Union and the Republic of Singapore [EU-Singapore FTA], O.J. 2019, L294/3. This is now detached from the EU-Singapore Investment Protection Agreement, also signed on 19 Oct. 2018. In its 2015 version exhibited to the ECJ in *Opinion 2/15*, the single agreement contained instead seventeen chapters (and hence, the TSD chapter was Chapter 13): for a summary, see *Opinion 2/15*, para 10.

¹² EU – Singapore FTA, Art. 12.1(1).

¹³ These include: Agenda 21 of the United Nations Conference on Environment and Development, UN Doc A/CONF.151/26/Rev.1, 12 Aug. 1992, vol.1, Annex II; Johannesburg Plan of Implementation on Sustainable

addition, the parties recognize that “it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic labour and environment laws” and that “environmental and labour standards should not be used for protectionist trade purposes”.¹⁴ However, the legal value of this first set of provisions is somehow limited to providing interpretative context for the more substantive commitments in TSD chapters, which are of greater significance for present purposes.

With regards to this second element, all TSD chapters provide for three main substantive commitments laid out in the so-called ‘Right to Regulate and Levels of Protection’¹⁵ and ‘Upholding Levels of Protection’ provisions:¹⁶

Article 12.2 – Right to Regulate and Levels of Protection

1. The Parties recognise the right of each Party to establish its own levels of environmental and labour protection, and to adopt or modify accordingly its relevant laws and policies, consistent with the principles of internationally recognised standards or agreements, *to which it is a party*, referred to in Articles 12.3 (Multilateral Labour Standards and Agreements) and 12.6 (Multilateral Environmental Standards and Agreements).¹⁷
2. The Parties shall continue to improve those laws and policies, and shall strive towards providing and encouraging *high levels* of environmental and labour protection.¹⁸

Article 12.12 – Upholding Levels of Protection

1. A Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental and labour laws, *in a manner affecting trade or investment* between the Parties.

Development, UN Doc A/CONF.199/20, 4 Sept. 2002, Resolution 2 [JPOI]; Ministerial Declaration of the UN Economic and Social Council on Generating Full and Productive Employment and Decent Work for All, UN Doc A/61/3/Rev.1, 5 Jul. 2006.

¹⁴ EU – Singapore FTA, Art. 12.1(3). Similar contextual provisions are found in other EU FTAs: Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [EU-Korea FTA], signed on 15 Oct. 2011, O.J. 2011, L127/6, Art. 13.1; Trade Agreement between the European Union and its Member States of the one part, and Colombia and Peru, of the other part [EU-COPE FTA], signed on 26 Jun. 2012, O.J. 2012, L354/21, Art. 267; Comprehensive Economic and Trade Agreement between Canada, of the one part, and the EU and its Member States, of the other part [EU-Canada CETA], signed on 30 Oct. 2016, O.J. 2017, L11/23, Arts. 23.1 and 24.2; EU-Vietnam Free Trade Agreement [EU-Vietnam FTA], signed on 30 Jun. 2019, O.J. 2019 L294/3, Art. 12.1; Economic Partnership Agreement between the European Union and Japan [EU-Japan FTA], signed on 6 Jul. 2017, Art. 16.1, <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1684>> (last visited 27 Mar. 2020); Agreement amending the Association Agreement between the European Union and its Member States, of the one part, and Mexico, of the other part [EU-Mexico FTA], agreed in principle on 21 Apr. 2018, Art. 27.1, <<https://trade.ec.europa.eu/doclib/press/index.cfm?id=1833>> (last visited 27 Mar. 2019); EU-Mercosur Trade Agreement [EU-Mercosur FTA], agreed in principle on 28 Jun. 2019, Art. 14.1, <<https://trade.ec.europa.eu/doclib/press/index.cfm?id=2048>> (last visited 27 Mar. 2010)

¹⁵ See also: Art. 13.3 EU – Korea FTA; Art. 268 EU – COPE FTA; Arts 23.2 and 24.3 EU – Canada CETA; Art. 12.2 EU – Vietnam FTA; Art. 16.2(1)-(2) EU – Japan FTA; Art. 27.2 EU – Mexico FTA; Art. 14.2(1)-(2) EU – Mercosur FTA.

¹⁶ See also: Art. 13.7 EU – Korea FTA; Art. 277 EU – COPE FTA; Arts 23.4 and 24.5 EU – Canada CETA; Art. 12.2 EU – Vietnam FTA; Art. 16.2(2) EU – Japan FTA; Art. 27.2(3)-(5) EU – Mexico FTA; Art. 14.2(3)-(5) EU – Mercosur FTA.

¹⁷ Emphasis added.

¹⁸ Emphasis added.

2. A Party shall not fail to effectively enforce its environmental and labour laws, through a sustained or recurring course of action or inaction, *in a manner affecting trade or investment* between the Parties.¹⁹

The relationship between these provisions is not straightforward, but it becomes easier to understand if each clause is viewed as imposing a distinct limitation on the sovereign right to regulate in environmental and labour matters. The first of such limitations is the obligation to respect the ‘internationally recognised standards or agreements to which it is a party’, which establishes the minimum level of environmental and labour protection to be observed by each of the FTA parties (hereinafter, ‘minimum-level’ clause). This needs, in turn, to be read in conjunction with another set of provisions (Articles 12.3 and 12.6) that provide some guidance as to the international standards and agreements at issue. In respect of social protection, the parties undertake to ratify and effectively implement the four core labour standards that are enshrined in the ILO Declaration on Fundamental Principles and Rights at Work (and its follow-up),²⁰ namely: freedom of association and the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour, and the elimination of discrimination in respect to employment and occupation.²¹ In addition, the parties further reaffirm their commitment to effectively implement the ILO Conventions that they have each ratified and to make efforts towards ratifying other ILO Conventions.²² As to environmental standards, the parties simply reaffirm their commitment to the effective implementation in their domestic laws and practices of the multilateral environmental agreements (MEAs) that they have each ratified, without, however, specifying the agreements in question.²³ The only exception in this regard is the agreement with Colombia and Peru, which does provide for a closed list of relevant MEAs.²⁴

¹⁹ Emphasis added.

²⁰ International Labour Conference (86th Session), Declaration on Fundamental Principles and Rights at Work, 18 Jun. 1998 [1998 ILO Declaration], available at <<https://www.ilo.org/declaration/lang--en/index.htm>> (last accessed 27 Mar. 2020). Note that these core labour standards are to be observed by all ILO members, regardless of whether or not they have ratified the relevant ILO Conventions (para. 2(a)). For a critical assessment, see Alston, “Core Labour Standards and the Transformation of the International Labour Rights Regime”, 15 EJIL (2004), 457-521.

²¹ Art. 12.3(3) EU – Singapore FTA. The relevant eight ILO Conventions are: Convention C87 on Freedom of Association and Protection of the Right to Organize, 9 Jul. 1948; Convention C98 on the Right to Organize and Collective Bargaining, 1 July 1949; Convention C29 on Forced Labour, 28 Jun. 1930; Convention C105 on the Abolition of Forced Labour, 25 Jun. 1957; Convention C138 on Minimum Age for Admission to Employment, 26 Jun. 1973; Convention C182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 17 Jun. 1999; Convention C100 on Equal Remuneration, 29 Jun. 1951; Convention C111 on Discrimination (Employment and Occupation), 25 Jun. 1958.

²² Art. 12.3(4) EU – Singapore FTA. See also: Art. 13.4(3) EU – Korea FTA; Art. 269(3)-(4) EU – COPE FTA; Art. 23.3 EU – Canada CETA; Art. 12.3(3)-(4) EU – Vietnam FTA; Art. 16.3(2)-(5) EU – Japan FTA; Art. 27.3(2)-(4) EU – Mexico FTA; Art. 14.4(4)-(5) EU – Mercosur FTA. For a critique of these labour provisions, see Gruni, “Towards a Sustainable World Trade Law? The Commercial Policy of the European Union After Opinion 2/15 CJEU”, 13(1) *Global Trade and Customs Journal* (2018), 4-12, at 6-7.

²³ Art. 12.6(2) EU – Singapore FTA. See also: Art. 13.5(2) EU – Korea FTA; Art. 24.4 EU – Canada CETA; Art. 12.6(2) EU – Vietnam FTA; Art. 16.4(2) EU – Japan FTA; Art. 27.4(2) EU – Mexico FTA; Art. 14.5(3) EU – Mercosur FTA.

²⁴ Art. 270(2) EU – COPE FTA. These core MEAs are: Montreal Protocol on Substances that Deplete the Ozone Layer, 16 Sept. 1987, 1522 UNTS 3; Basel Convention on the Transboundary Movements of Hazardous Wastes and their Disposal, 22 Mar. 1989, 1673 UNTS 57; Stockholm Convention on Persistent Organic Pollutants, 22 May 2001, 2256 UNTS 119; Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 3 Mar. 1973, 993 UNTS 243; Convention on Biological Diversity, 5 Jun. 1992, 1760 UNTS 79 and its Cartagena Protocol on Biosafety, 29 Jan. 2000, 2226 UNTS 208; Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 Dec. 1997, 2303 UNTS 148; Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 10 Sept. 1998, 2244

To large extent, this first limitation to the right to regulate adds nothing substantively new since it merely incorporates into a bilateral/regional context international environmental and labour standards that are already binding on the FTA parties under the relevant multilateral agreements.²⁵ Otherwise said, this ‘minimum-level’ provision in TSD chapters seeks to further the take-up and effective implementation of existing international environmental and labour regimes, rather than creating a system of parallel normative standards.²⁶ And yet, three points are worth highlighting for the purpose of the subsequent discussion of *Opinion 2/15*. First, the minimum-level clause is not entirely meaningless, since its effect is to make pre-existing multilateral commitments applicable between the EU and the third country concerned on the basis of the FTA itself and, hence, enforceable in accordance with the FTA dispute settlement procedures in addition to multilateral compliance mechanisms. Second, the operation of this minimum-level clause at the bilateral/regional level necessarily requires the identification of the ‘EU party’ in order to be able to determine which are the applicable ILO Conventions and MEAs. That is, are we referring to agreements to which the EU, or the Member States, or both, are a party? Third, this minimum-level clause is not expressly linked to trade (or investment) as per the text of Article 12.2(1) EU – Singapore FTA (or of equivalent provisions in other FTAs), and hence a violation thereof can be established even when there are *no* direct effects on bilateral trade (or investment).²⁷

The second limitation to the right regulate is that parties ‘strive to’ ensure that their laws and policies provide for and encourage ‘high levels’ of environmental and labour protection. This is potentially broader in scope than the first limitation, in that it is not confined to domestic legislation implementing international standards and still applies even when bilateral trade (or investment) is not affected. However, it is legally weaker, being couched in best-endeavours and imprecise terms,²⁸ which allow for different levels of compliance. For this reason, it is arguably difficult to implement and enforce in practice, although “an overt weakening” of existing environmental or labour laws “could hardly be said to be consistent with striving to improve these standards.”²⁹

The third, and more important, constraint on the right to regulate is the prohibition on parties to derogate, or fail to effectively enforce, their domestic environmental and labour laws ‘in a manner affecting trade or investment’ between them. This provision is framed in clearly mandatory terms, and hence provides an effective guarantee against retrogression in existing legislative protections in the environmental and social fields (hereinafter, ‘non-regression’ clause).³⁰ However, and unlike the minimum-level clause, this non-regression obligation is explicitly linked to bilateral trade (and investment), as per the text of Article 12.12 EU – Singapore FTA (and of equivalent provisions in other FTAs). That is, a violation is made conditional upon demonstrating that the derogation or non-enforcement of domestic environmental or labour laws has a direct effect on bilateral trade (or investment). This trade

UNTS 337. Note that this closed list is somehow selective and does not cover all core MEAs highlighted in the JPOI.

²⁵ Bartels, “Human Rights and Sustainable Development Obligations in EU Free Trade Agreements”, 40(4) *LIEI* (2013), 297-313, at 308-9.

²⁶ Editorial Comments, 55 *CML Rev.* (2018), 373-386, at 385.

²⁷ On this point, see further sections 3.1 and 4.2 *infra*.

²⁸ This expression may have been borrowed from Art. 191(2) TFEU, where a ‘high level’ of protection is one of the substantive principles of EU environmental policy and seems to reflect a moving-target of a continuous improvement of environmental (and in the TSD chapter context, also social) protection. See Case C-284/95, *Safety High-Tech v S. & T. Srl*, EU:C:1998:352, para 49, clarifying that such a level of protection does not necessarily have to be the highest that is technically possible; and for a discussion, see Misonne, “The Importance of Setting a Target: the EU Ambition of a High Level of Protection”, 4(1) *Transnational Environmental Law* (2015), 11-36, at 19-20.

²⁹ Bartels, *op.cit. supra* note 25, at 308.

³⁰ *Ibid.*, at 307.

condition makes it more difficult to establish when the non-regression obligation has been violated.³¹ Admittedly, its formulation is softer in the EU – Canada CETA, EU – Mexico FTA and EU – Mercosur FTA (‘to encourage trade or investment’),³² arguably entailing a more intent-based rather than effect-based test.³³ But in either case, the specific link to trade sheds light on the purpose of the non-regression obligation. It is primarily aimed at preventing that competitive pressures arising from greater economic liberalisation lead to a ‘race-to-the-bottom’ in environmental and labour regulations, and thereby preserve a ‘level-playing field’ in bilateral trade (and investment) relations.³⁴

In comparison to the minimum-level clause, the scope of application of the non-regression obligation is broader since it extends to all domestic environmental and labour laws, and not only those that implement international environmental and labour standards (as it the case of the minimum-level obligation). Despite this apparent overlap, the trade-effect condition in the non-regression clause is likely to help delimiting the respective scope of application of these two obligations in practice. Due to its higher trade-related evidentiary burden, the non-regression obligation seems mostly relevant for domestic environmental and labour laws that go *above* and *beyond* international standards, and which are thus not covered by the minimum-level clause. Otherwise this provision, which requires compliance with those international standards but lacks a trade-effect condition, would be rendered largely redundant and this would be contrary to the principle of effectiveness in treaty interpretation. As reference to the other sections in the article, Table 1 below summarizes the comparison between these three main substantive provisions found in all TSD chapters.³⁵

Table 1 – Main Substantive Provisions in TSD Chapters

Provision	Normative Standard	Legal Nature	Specific Trade Link
<i>Minimum-level</i>	Eight fundamental ILO conventions + other ratified ILO conventions/	Mandatory	No, violation may be established without any effect on trade/investment

³¹ Similarly, see Art. 12.12 EU – Vietnam FTA.

³² Arts. 23.4 and 24.5 EU – Canada CETA; Art. 27.2(3)-(5) EU – Mexico FTA; Art. 14.2(3)-(5) EU – Mercosur FTA. Some FTAs combine both formulations, either making clear that ‘encouragement’ is dependent upon actual trade effects being shown (Art. 13.7(2) EU – Korea FTA; Art. 16.2(2) EU – Japan FTA), or independently from each other (Art. 277(1)-(2) EU – COPE FTA).

³³ Bronckers and Gruni, “Taking Enforcement of Labour Standards in the EU Free Trade Agreements Seriously”, 56(6) CML Rev. (2019), 1591-1622, at 1596-1597.

³⁴ On this rationale behind environmental and labour provisions in FTAs, see Hradilová and Svoboda, “Sustainable Development Chapters in EU Free Trade Agreements: Searching for Effectiveness”, 52(6) JWT (2018), 1019-1042, at 1021-1022. Questioning its validity, see Araujo, “Labour Provisions in EU and US Mega-Regional Trade Agreements: Rhetoric and Reality”, 67 ICLQ (2018), 233-253, at 234-236.

³⁵ In addition, TSD chapters have often included an indicative list of cooperative activities concerning trade-related aspects of labour and environmental policies (e.g., Arts. 12.4 and 12.10 EU – Singapore FTA; Arts. 23.7 and 24.12 EU – Canada CETA), a best-effort commitment to promote trade and investment practices that support sustainable development, such as eco-labelling or fair trade assurance schemes and corporate social responsibility (e.g., Art. 12.11 EU – Singapore FTA; Art. 16.5 EU – Japan FTA), as well as more specific provisions dealing with trade and the sustainable management of natural resources, notably fighting illegal logging and unsustainable fishing and related trade in these products (e.g., Arts. 273-274 EU – COPE FTA; Arts. 24.10-24.11 EU – Canada CETA; Arts. 16.7-16.8 EU – Japan FTA; Arts 12.7-12.8 EU – Vietnam FTA), as well as conservation of biological diversity (e.g., Art. 272 EU – COPE FTA; Art. 27.6 EU – Mexico FTA; Art. 14.7 EU – Mercosur FTA). However, there is some disparity across agreements and a more detailed examination of these provisions is outside the scope of this article. It suffices to note that these provisions are often of a soft-law nature, formulated in hortatory and cooperative language, and hence their legal enforceability is questionable.

	Ratified MEAs		
<i>Non-regression</i>	Existing national laws (including above/beyond international standards)	Mandatory	Yes, violation conditional upon direct effect on trade/investment
<i>High-levels</i>	Imprecise	Aspirational	No, but violation difficult to establish

2.2. Institutional provisions

The third and final element common to all TSD chapters are the specific institutional mechanisms set up therein, which are the essence of the EU's promotional approach to the implementation and enforcement of environmental and labour provisions. A specialized body (Committee or Board on Trade and Sustainable Development) is assigned with the task of overseeing the implementation of the TSD chapter and to guide further bilateral cooperation in this area.³⁶ In addition to this joint inter-governmental body, each party is also required to have in place domestic consultative mechanisms (e.g., Domestic Advisory Groups), comprising a balanced representation of business, environmental and labour stakeholders, with a view to seeking their input on matters under the TSD chapter.³⁷ Bilateral consultative mechanisms are also foreseen in various forms (e.g., Civil Society Forums) for the parties to conduct regular dialogue with these stakeholders on the implementation of the TSD chapter.³⁸ Despite this emphasis on public participation in the monitoring of TSD chapters, there is no formal requirement upon the parties to follow-up on the submissions received from stakeholders.³⁹

Disputes concerning any matter arising under the TSD chapter may only be resolved through its specific dispute settlement procedures, and recourse to the general dispute settlement mechanism is explicitly excluded in most EU FTAs⁴⁰ (with the exception of the EU-CARIFORUM EPA).⁴¹ Pursuant to this self-contained system of dispute settlement, the parties are first required to seek a mutually satisfactory resolution of the matter through governmental consultations. In this process, the parties may request the advice of the ILO, relevant multilateral environmental organizations and stakeholders.⁴² Where these initial consultations

³⁶ Art. 12.15(2)-(3) EU – Singapore FTA. See also: Art. 13.12(2)-(3) EU – Korea FTA; Art. 280 EU – COPE FTA; Arts. 23.8(3) and 24.13(3) EU – Canada CETA; Art. 12.15(2)-(3) EU – Vietnam FTA; Art. 16.13 EU – Japan FTA; Art. 27.14 EU – Mexico FTA; Art. 14.14 EU – Mercosur FTA.

³⁷ Article 12.15(5) EU – Singapore FTA. See also: Art. 13.12 (3)-(4) EU – Korea FTA; Art. 281 EU – COPE FTA; Arts 23.8(4) and 24.13(5) EU – Canada CETA; Art. 12.15(5) EU – Vietnam FTA; Art. 16.15 EU – Japan FTA.

³⁸ Article 12.15(4) EU – Singapore FTA. See also: Art. 13.13 EU – Korea FTA; Art. 282 EU – COPE FTA; Art. 12.5(4) EU – Vietnam FTA; Art. 16.16 EU – Japan FTA.

³⁹ Marx et al., *Dispute Settlement in the Trade and Sustainable Development Chapters of EU Trade Agreements* (Leuven Centre for Global Governance Studies, 2017), at 26, available at: <<https://ghum.kuleuven.be/ggs/publications/books/final-report-9-february-def.pdf>> (last visited 27 Mar. 2020).

⁴⁰ Article 12.16(1) EU – Singapore FTA. See also: Art. 13.16 EU – Korea FTA; Art. 285(5) EU – COPE FTA; Arts 23.11 and 24.16 EU – Canada CETA; Art. 12.16(1) EU – Vietnam FTA; Art. 16.17(1) EU – Japan FTA; Art. 27.15 EU – Mexico FTA; Art. 14.15(5) EU – Mercosur FTA.

⁴¹ The EU-CARIFORUM EPA differs from other EU FTAs in that the regular dispute settlement procedure does apply to matters arising out of the T&SD chapter, although trade sanctions are ruled out for breaches of trade/environment and trade/labour provisions (Art. 213(2)). However, this remedy carve-out does not apply to violations of environmental and labour standards set out in the investment chapter of the agreement, which may thus be subject to trade sanctions (Arts. 72 and 73). For a more detailed account, see Marx, op. cit. *supra* note 39, at 24-25.

⁴² Art. 12.6(2)-(5) EU – Singapore FTA.

do not lead to a satisfactory resolution of the dispute, any party may refer the matter to a Panel of Experts (comprising members with expertise in trade, environmental and labour issues),⁴³ which is to issue a report with recommendations for the resolution of the matter within the established timeframe, to be made public unless the parties agree otherwise.⁴⁴ In its deliberations, the Panel may seek advice from competent international organisations and stakeholders.⁴⁵ The implementation of the Panel's recommendations is to be monitored by the joint Board or Committee on Trade and Sustainable Development, and stakeholders may submit observations in this regard.⁴⁶ While stakeholder involvement is thus favoured in the dispute settlement process, there is no formal requirement to follow-up on any such submission and no effective private complaint procedure.⁴⁷

These institutional provisions, therefore, reflect the EU's collaborative and non-confrontational approach to the implementation and enforcement of the TSD chapters, relying on inter-party dialogue and third-party adjudication but excluding the possibility of imposing sanctions (in the form of fines or withdrawal of trade concessions) in cases of non-compliance with the recommendations of the Experts Panel. In doing so, the EU has distanced itself from US practice, under the NAFTA Side Agreements and other FTAs concluded thereafter,⁴⁸ where infringements of environmental and labour clauses may be subject to monetary or trade sanctions as a remedy of last resort.⁴⁹ In this sense, TSD chapters can be understood as an example of 'Normative Power Europe' coined by Manners,⁵⁰ whereby "persuasion, argumentation and the conferral of shame and prestige" rather than "coercion or solely material motivations" may effect more sustained long-term change in environmental and social norms in third countries.⁵¹ However, as discussed below,⁵² the lack of a 'stick' to enforce (at least, legally-binding) obligations in TSD chapters, alongside the limited involvement of stakeholders in monitoring and dispute settlement mechanisms, have triggered an on-going debate on the suitability of the EU's promotional approach to compliance. But before engaging with this discussion, the next section considers the Court's (mis-)interpretation of TSD chapters in *Opinion 2/15* and its broader implications for implementation on the EU side.

3. Who is responsible on the EU side for TSD chapters?

3.1. ECJ (mis-)interpretation of TSD chapters in *Opinion 2/15*

In the eagerly awaited *Opinion 2/15*, delivered on 16 May 2017 in response to a request by the

⁴³ Art. 12.7(1)-(5) EU – Singapore FTA.

⁴⁴ Art. 12.7(6) and (8) EU – Singapore FTA.

⁴⁵ Art. 12.7(7) EU – Singapore FTA.

⁴⁶ Art. 12.7(9) EU – Singapore FTA. See also: Art. 13.15(2) EU – Korea FTA; Art. 285(4) EU – COPE FTA; Arts 23.10(12) and 24.15.12 EU – Canada CETA; Art. 12.17(9) EU – Vietnam FTA; Art. 16.18(5)-(6) EU – Japan FTA; Art. 27.17(8)-(9) EU – Mexico FTA; Art. 14.17(11) EU – Mercosur FTA.

⁴⁷ For a more in-depth examination of institutional mechanisms under TSD chapters, with an emphasis on civil society involvement, see Prévost and Alexovičová, "Mind the Compliance Gap: Managing Trustworthy Partnerships for Sustainable Development in the EU Free Trade Agreements' 6(3) *International Journal of Public Law and Policy* (2019), 236-269, at 244-251.

⁴⁸ For a comparative study of EU and US approaches, see Scherrer, Greven, Leopold and Molinari, *An Analysis of the Relative Effectiveness of Social and Environmental Norms in Free Trade Agreements* (2009), available at: <[https://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO-INTA_ET\(2009\)406996](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO-INTA_ET(2009)406996)> (last visited 27 Mar. 2020).

⁴⁹ For an overview with regards to labour provisions, see ILO (2015), op. cit. *supra* note 7, at 33-35 (Table 2.1).

⁵⁰ Manners, "Normative Power Europe: A Contradiction in Terms?", 40(2) *JCMS* (2002), 235-258.

⁵¹ Manners, "The Social Dimension of EU Trade Policies: Reflections from a Normative Power Perspective", 14 *EFA Rev.* (2009), 785-803, at 793.

⁵² See further section 4 *infra*.

European Commission,⁵³ the Court addressed the question of whether the Union had the requisite external competence to sign and conclude alone the EU-Singapore FTA.⁵⁴ As such, this is an important decision beyond the specific EU-Singapore relationship in determining how far the EU's exclusive competence over the Common Commercial Policy (CCP) stretches post-Lisbon.⁵⁵ This is so not only with regards to subject matters (notably, foreign direct investment)⁵⁶ explicitly brought within the CCP legal basis (Article 207(1) TFEU) by the Lisbon Treaty,⁵⁷ but also the extent to which CCP-based agreements may encompass provisions designed to achieve non-trade objectives (notably, TSD chapters). In addressing this constitutional question under EU law, the Court implicitly determined who (i.e., the EU, the Member States or both) will bear responsibility under public international law for the performance of obligations under the FTA with Singapore. This is because, pursuant to the general rules of international responsibility as codified by the International Law Commission (ILC), the existence of an internationally wrongful act entailing international responsibility depends on the twin conditions of breach of an international obligation that is binding upon a State or international organization (IO) and attribution of the infringing conduct to that State or IO.⁵⁸ Hence, the first of these two conditions can only be met by the entity that becomes a contracting party to the FTA with Singapore, as international treaties do not generally create rights or obligations for third parties.⁵⁹

Essentially, the Court ruled that all aspects of the EU-Singapore FTA came within exclusive EU competence, with the exception of provisions relating to non-direct investment and provisions on Investor-State dispute settlement that fell instead within competence shared between the EU and the Member States.⁶⁰ Building on its earlier case law for delimiting the material scope of the CCP, the Court held that only components of the EU-Singapore FTA that display a 'specific link' with international trade could fall within that policy:

"It is settled case-law that the mere fact that an EU act, such as an agreement concluded by it, is *liable to have implications for trade* with one or more third States is *not enough* for it to be concluded that the act must be classified as falling within the common commercial policy. On the other hand, an EU act falls within that policy if it *relates specifically to such trade* in that it is essentially *intended to promote, facilitate or govern such trade* and has *direct and immediate effects* on it ..."⁶¹

Applying this test, the Court found that the TSD chapter could be entirely subsumed under the CCP for two main reasons that are far from persuasive, and indeed partly inaccurate from a legal standpoint. The first part of the Court's reasoning concerns whether the different substantive provisions of the TSD chapter display a 'specific link' with international trade in

⁵³ Pursuant to Art. 218(11) TFEU.

⁵⁴ *Opinion 2/15*, para 1.

⁵⁵ Art. 3(1)(e) TFEU.

⁵⁶ On this aspect of *Opinion 2/15*, see Hainbach, "The CJEU's *Opinion 2/15* and the Future of EU Investment Policy and Law-Marking", 45(2) LIEI (2018), 199-209.

⁵⁷ Trade in services and the commercial aspects of intellectual property (IP) have formed part of the CCP since the Nice Treaty, but they were largely excluded from exclusive competence. In judgements preceding *Opinion 2/15*, the Court had interpreted the scope of the CCP post-Lisbon in relation to these matters: for trade in services, Case C-137/12, *Commission v Council*, EU:C:2013:675; for commercial aspects of IP, Case C-414/11, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, EU:C:2013:520; and *Opinion 3/15 (Marrakesh Treaty on Access to Published Works)*, EU:C:2017:114.

⁵⁸ ILC, Articles on Responsibility of States for Internationally Wrongful Acts (ARS), UN Doc. A/RES/56/83, 12 Dec. 2001, Art. 2; Draft Articles on the Responsibility of International Organizations (ARIO), UN Doc. A/Res/66/100, 27 Feb. 2012, Art. 4.

⁵⁹ Art. 34 Vienna Convention on the Law of Treaties (VCLT), signed on 23 May 1969, 1155 UNTS 331.

⁶⁰ *Opinion 2/15*, para 305. For a detailed commentary, see Cremona, "Shaping EU Trade Policy post-Lisbon: *Opinion 2/15* of 16 May 2017", 14 EuConst (2018), 231-259.

⁶¹ *Opinion 2/15*, para 36.

that they have ‘direct and immediate effects’ on it –as opposed to these merely having ‘implications for trade’. As shown in the previous section, and as equally opined by Advocate General (AG) Sharpston, *some* provisions in the TSD chapter are clearly and explicitly linked to trade. This is notably the case of the non-regression clause, whose key purpose is to ensure a level-playing field between FTA parties and only applies insofar as there is a direct effect on bilateral trade (or investment).⁶² Conversely, other provisions in the TSD chapter regulate levels of environmental and social protection irrespective of any direct effect on bilateral trade (or investment), and in particular the minimum-level clause. As rightly pointed out by AG Sharpston, this provision essentially seeks “to achieve in the European Union and Singapore minimum standards of [...] labour protection and environmental protection, *in isolation* from their possible effects on trade.”⁶³ Otherwise said, the minimum-level clause is primarily aimed at ensuring respect for international environmental and labour standards *per se* and across each party’s territory, even where no trade occurs between them in the good or service concerned. This interpretation is seemingly that endorsed by the Commission in the on-going labour dispute under the EU-Korea FTA, where the EU makes a claim under the minimum-level clause of that agreement (Article 13.4(3)), without any reference to trade (or investment) effects.⁶⁴

The Court, however, (mis-)read the minimum-level provision as an undertaking by FTA parties “to ensure that *trade* between them takes place in compliance with the obligations that stem from the international agreements concerning social protection of workers and environmental protection to which they are party.”⁶⁵ It further maintained that “[h]aving regard to the difficulty in distinguishing, for the purpose of compliance with those commitments, between products and services which are traded between the European Union and [Singapore] and those that are not, the need to ensure in an effective manner that those commitments are complied with in the course of such trade justifies them covering all the activities in the sectors concerned.”⁶⁶ While there may be some truth in this statement, it also reveals how flexible the ‘specific link’ standard can be and how much discretion it leaves the Court in delineating the substantive scope of the CCP on a case-by-case basis.⁶⁷ In fact, the Court did not distinguish between its self-made ‘direct and immediate trade effects’ criterion (within CCP) and ‘mere implications for trade’ criterion (outside CCP) when examining the various substantive provisions of the TSD chapter. Instead, it seemed satisfied that a notional trade link of some sort could be established, equally bringing within the CCP provisions of the TSD chapter with a discernible effect on bilateral trade (e.g., non-regression clause) and those with, at best, an implied effect on such trade (e.g., minimum-level clause).

The second reason why, according to the Court, the TSD chapter met the specific trade link relates to the procedural provisions and is even less convincing from a legal viewpoint. While recognizing that the regular dispute settlement mechanism under the EU-Singapore FTA (providing for trade sanctions as a possible remedy) is not applicable to the TSD chapter,⁶⁸ the Court found somewhat surprisingly that “a breach of the provisions concerning social

⁶² A.G. Sharpston, *Opinion 2/15*, para 489. Other examples include: Art. 12.7 (‘Trade in Timber Products’), Article 12.8 (‘Trade in Fish Products’) and Art. 12.11 (‘Trade and Investment Promoting Sustainable Development’).

⁶³ *Ibid.*, para 491 (emphasis in original).

⁶⁴ *Republic of Korea – Compliance with Obligations under Chapter 13 of the EU – Korea Free Trade Agreement (Request for Consultations by the European Union)*, 17 Dec. 2018; see further discussion in section 4.1 *infra*.

⁶⁵ *Opinion 2/15*, para 152 (emphasis added).

⁶⁶ *Ibid.*, para 153.

⁶⁷ On this point, see Kleimann, “Reading Opinion 2/15: Standards of Analysis, the Court’s Discretion, and the Legal View of the Advocate General”, *EUI Working Papers RSCAS 2017/23*, available at: <<https://cadmus.eui.eu/handle/1814/46104>> (last visited 27 Mar. 2020).

⁶⁸ *Opinion 2/15*, para 154.

protection of workers and environmental protection, set out in that chapter, authorises the other Party — in accordance with the rule of customary international law codified in Article 60(1) of the [1969 Vienna] Convention on the Law of Treaties [VCLT] ... — to terminate or suspend the liberalization, provided for in the other provisions of the envisaged agreement, of that trade.”⁶⁹ This proposition is simply wrong from a public international law perspective for a number of reasons. First, technically speaking, the 1969 VCLT referred to by the Court only applies to treaties concluded between States, and not between States and other subjects of international law as in the case at hand.⁷⁰ Second, the customary international law rule reflected in Article 60(1) VCLT is a default clause, which is only applicable in the absence of a specific treaty provision regulating the consequences of a breach of its norms.⁷¹ Whereas it is correct that Article 60(1) VCLT generally enables a party to invoke a *material*⁷² —and not just any— breach of a bilateral treaty as a ground for terminating or suspending (in whole or in part) that treaty vis-à-vis the defaulting party, Article 60(4) VCLT clearly stipulates that this is “without prejudice to any provision in the treaty [*in casu*, EU-Singapore FTA] applicable in the event of a breach.”⁷³ In other words, with regards to the termination or suspension of treaties, the VCLT gives primacy to the more specific provisions in a given treaty in line with the *lex specialis* principle under public international law.⁷⁴ As previously seen, Article 12.16(1) of the EU-Singapore FTA leaves no doubt that any breach of the TSD chapter can only be resolved through the specialized dispute settlement mechanism, which does *not* authorize a party to suspend trade (or other) concessions under any circumstance and this prevails over the general provisions of the VCLT.

Put differently, TSD chapters do not impose any form of ‘trade conditionality’ in a proper legal sense:⁷⁵ neither does it give the other party the right to adopt trade sanctions in cases of non-compliance, nor does it make a specific trade benefit dependent upon compliance with environmental and labour standards.⁷⁶ As will be seen, shortly after *Opinion 2/15* was issued, the Commission consulted stakeholders on (*inter alia*) the possibility of moving towards a sanction-based enforcement model for TSD chapters.⁷⁷ This further corroborates that

⁶⁹ *Opinion 2/15*, para 161.

⁷⁰ Art. 3 VCLT. Instead, the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLTIO), signed on 21 March 1986, 25 ILM 543 (1986), would be applicable to the EU – Singapore FTA. The VCLTIO is not yet in force, but considered to partly reflect customary international law.

⁷¹ This follows the residual character of the VCLT: see Bartels, *op.cit. supra* note 25, at 300 (note 20).

⁷² As per Article 60(3) VCLT, this refers to a “violation of a provision essential to the accomplishment of the object and purpose of the treaty”. On this high threshold, see *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgement, (1997) ICJ Reports, p. 7.

⁷³ Art. 60(4) VCLT.

⁷⁴ Namely, *lex specialis derogat legi generali*, meaning that, in the event of a conflict, the more special norm prevails over the general norm: see Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (CUP, 2003), at 385-418.

⁷⁵ Nonetheless, if light of post-2008 practice, one could argue that TSD chapters are becoming a ‘political’ condition on the part of the EU for entering into negotiations of, and concluding, FTAs.

⁷⁶ A.G. Sharpston, *Opinion 2/15*, paras 490-491, where she distinguished the TSD chapter from the ‘essential elements’ clauses found in EU FTAs (which impose an obligation to respect democratic principles and human rights and the other party may suspend trade concessions in cases of material breach pursuant to the ‘non-execution’ clause) and the GSP-plus scheme (which makes the granting of additional trade preferences conditional upon compliance with a number ILO/human rights conventions and MEAs). On the former, see Bartels, *op. cit. supra* note 25, at 299-304. On the latter, see Orbie and Tortell, “The New GSP+ Beneficiaries: Ticking the Box or Truly Consistent with ILO Findings?”, 14(3) EFA Rev. (2009), 663-681; Switzer, “Environmental Protection and the Generalised System of Preferences: A Legal and Appropriate Linkage?”, 57(1) ICLQ (2008), 113-147.

⁷⁷ See section 4.1 *infra*.

such an option is not, unlike the Court and some scholars have suggested,⁷⁸ currently available under public international law.⁷⁹ Moreover, as Cremona rightly notes, if the Court's proposition of resorting to trade sanctions on the basis of Article 60(1) VCLT was accepted, its contention that the TSD chapter in the EU – Singapore FTA “does not affect the scope of the obligations under the international agreements it refers to, and therefore does not impose new obligations on the parties, becomes harder to maintain.”⁸⁰ This is because the imposition of trade sanctions is not generally available as a penalty for non-compliance under ILO Conventions,⁸¹ nor under MEAs,⁸² but it would become so on the basis of the EU-Singapore FTA if the ECJ's (erroneous) reasoning was followed.

In sum, the Court's conclusion that the TSD chapter of the EU – Singapore FTA came within the EU's exclusive powers under the CCP was flawed given that it was based on key misperceptions highlighted in the following passage:

“It follows from all of those factors that the provisions of [TSD chapter] of the envisaged agreement are intended not to regulate the levels of social and environmental protection in the Parties' respective territory [*wrong, the 'minimum-level' clause does precisely this irrespective of any trade effect*] but to govern trade between the European Union and the Republic of Singapore by making liberalisation of that trade subject to the condition that the Parties comply with their international obligations concerning social protection of workers and environmental protection [*wrong, there is no such trade conditionality insofar as trade benefits cannot be suspended for non-compliance*].”⁸³

Nonetheless, the Court also justified its extensive approach to the scope of the CCP by reference to the post-Lisbon overarching set of objectives for the Union's external action found in Article 21 TEU (including ‘sustainable development’ among those objectives)⁸⁴ and Article 3(5) TEU (obligation to contribute to ‘free and fair trade’ in external relations),⁸⁵ as well as Articles 9 and 11 TFEU which, respectively, require the integration of social and environmental protection requirements into all EU policies and activities with a view to promoting sustainable development.⁸⁶ On this point, the Court markedly departed from the position of AG Sharpston, who had insisted that these Treaty provisions “are not relevant to resolving the issue of competence” and “cannot affect the scope of the [CCP] laid down in Article 207 TFEU.”⁸⁷ By contrast, the Court attributed an important role to these provisions, and Article 21 TEU in particular, in delimiting the boundaries of EU (exclusive) trade powers from other (non-exclusive) competence areas (in this case, environmental and social policy).

⁷⁸ E.g., Bronckers and Gruni, op. cit., *supra* note 33, at 1613, referring to this possibility as a “nuclear option under public international law”, albeit a rather remote one.

⁷⁹ This remains true irrespective of the effects of *Opinion 2/15* within the EU legal order, which is binding only insofar as the compatibility of an international agreement with the EU treaties is concerned (Art. 218(11) TFEU).

⁸⁰ Cremona, op. cit. *supra* note 60, at 245.

⁸¹ ILO Constitution, Art. 22 (reporting procedure) and Arts. 24-34 (representation and complaints procedures). For an examination of these ILO supervisory mechanisms, see Marx, op. cit. *supra* note 39, at 48-59.

⁸² UN Environment Programme, *Compliance Mechanisms under Selected Multilateral Environmental Agreements* (2007), at 118-9, Table 3.5, showing that (limited) trade sanctions are available as non-compliance measures only under 4/19 of the surveyed MEAs (CITES, Montreal Protocol, Kyoto Protocol and Whaling Convention), available at: <<http://wedocs.unep.org/handle/20.500.11822/7507>> (last visited 27 Mar. 2020).

⁸³ *Opinion 2/15*, para 166.

⁸⁴ *Ibid.*, para 142, referring specifically to Art. 21(2)(f) TEU linking sustainable development to the preservation and improvement of the quality of the environment and the sustainable management of global natural resources.

⁸⁵ *Ibid.*, para 146.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*, para 495.

Emphasizing that Article 207(1) TFEU explicit links the CCP to the overall objectives and principles of EU external action, it held that “sustainable development henceforth forms an integral part of the common commercial policy.”⁸⁸ By bringing (non-economic) sustainable development objectives within the breath of the CCP, the Court avoided having to categorize the TSD provisions as merely ancillary or incidental to the predominant trade aims of the EU-Singapore FTA,⁸⁹ which had been its classical approach to determine whether the CCP legal basis could be used for EU acts pursuing (also) non-economic objectives.⁹⁰ This is a significant move and signals the Court’s willingness to enable the development of a ‘value-based’ external trade policy through exclusive EU powers.⁹¹ At the same time, it raises questions as to where exactly does the CCP end given the evolving and contested meaning of ‘sustainable development’⁹² and the equally very broad nature of other objectives enshrined in Article 21 TEU.⁹³ But leaving aside this constitutional issue, the next section turns to the implications of *Opinion 2/15* for the operation of TSD chapters on the EU side.

3.2. *Implications of Opinion 2/15 for TSD chapters*

Following *Opinion 2/15*, the EU – Singapore FTA was signed at the Asia-Europe Summit Meeting in Brussels on 19 October 2018, with the Union only becoming a contracting party and hence assuming exclusive responsibility under public international law for the performance of all obligations contained therein.⁹⁴ In formal terms, this settles the question of responsibility in the event of a future dispute under the EU – Singapore FTA, with the EU being the sole respondent and responsible party for any alleged breach of the TSD chapter. However, in practical terms, it raises new puzzles as to how the core sustainability commitments will operate for the EU side, which are also relevant in the context of the more cooperative monitoring mechanisms under the TSD chapter.⁹⁵

The first difficulty arises in the context of the minimum-level clause which, as we have seen, requires compliance with existing international environmental and labour standards. The EU is a party (alongside its Member States) to most key MEAs,⁹⁶ whereas it is not a member of the ILO (only an observer) and, as international law currently stands,⁹⁷ cannot itself conclude any of the eight fundamental ILO Conventions referred to in the TSD chapter.⁹⁸ This means

⁸⁸ *Ibid.*, paras 147 and 163.

⁸⁹ *Ibid.*, para 32.

⁹⁰ A.G. Sharpston, *Opinion 2/15*, paras 481-482. In the trade-environment context, see e.g., *Opinion 2/00 (Cartagena Protocol)*, EU:C:2001:664, paras 22-23; and Case C-94/03, *Commission v Council (Rotterdam Convention)*, EU:C:2006:2, paras 34-36. For a discussion of this case law, see Eeckhout, *EU External Relations Law* (OUP, 2011), at 39-57; and in the context of *Opinion 2/15*, Kleimann, *op. cit. supra* note 67, at 11-20.

⁹¹ Cremona, *op. cit. supra* note 60, at 259. Welcoming this jurisprudential approach, see Gruni, *op. cit. supra* note 22.

⁹² See *inter alia*, Barral, “Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm”, 23(2) EJIL (2012), 377-400.

⁹³ On this point see further, Larik, “Trade and Sustainable Development: Opinion 2/15 and the EU’s Foreign Policy Objectives”, *The EU and the World: A Law Review Blog* (1 Jun. 2017), available at: <<https://blogs.ucl.ac.uk/europe-and-the-world-journal/2017/opinion215-trade-sustainable-development>> (last visited 27 Mar. 2020).

⁹⁴ Arts. 26 and 34 VCLT.

⁹⁵ See section 2.2 *supra*.

⁹⁶ European Commission, Multilateral Environmental Agreement to which the EU is a Contracting Party (Aug. 2017), available at: <http://ec.europa.eu/environment/international_issues/agreements_en.htm> (last visited 27 Mar. 2020).

⁹⁷ This is because, under the ILO Constitution, membership of the organization is only open to States (Art. 1(2)) and only ‘Members’ can conclude ILO Conventions (Art. 19(5)). On this point, see *Opinion 2/91 (ILO Convention C170)*, ECLI:EU:C:1993:106, paras 37-38.

⁹⁸ See note 21 *supra*.

that the minimum-level clause would be void of content for the EU as far as international labour standards are concerned. Such a shortcoming has been partly addressed in the EU – Singapore FTA, by clarifying that it is the ILO Conventions which “the Member States of the Union have ratified”⁹⁹ that are the object of the effective implementation commitment under the minimum-level clause. And yet, what may the EU do if Singapore alleged a violation of this clause because one (or more) of its EU Member State(s) has failed to effectively implement a given ILO Convention?¹⁰⁰ In principle, pursuant to Article 216(2) TFEU, international agreements concluded by the Union (such as the EU – Singapore FTA or MEAs) are binding upon the Member States as a matter of EU law,¹⁰¹ and thus the Commission may initiate infringement proceedings before the ECJ against recalcitrant Member States to ensure their compliance with such agreements.¹⁰² In *Commission v Ireland*, the Court accepted this applies to a commitment in an EU-concluded agreement (*in casu*, the European Economic Area (EEA) Agreement) to adhere to another international agreement to which the EU is *not* a party (*in casu*, the Berne Convention for the Protection of Literary and Artistic Works),¹⁰³ provided that the subject-matter of that agreement (*in casu*, the Berne Convention) is in large measure covered by EU law.¹⁰⁴ It is unclear whether this criterion developed in the context of a mixed agreement (i.e., EEA Agreement) would apply to our EU-Singapore FTA and ILO Conventions scenario, the former being an EU-only agreement. In this case, would the Commission be able to effectively police Member States’ compliance with the relevant ILO Conventions through infringement action before the ECJ, even where there is *no* EU law on the subject-matter? Assurance on this question seems critical from a partner-country standpoint, because what is clear is that the EU itself cannot perform core labour commitments under the minimum-level clause: it has no legislative competence in the areas of freedom of association and collective bargaining (ILO Conventions C87 and C98),¹⁰⁵ nor legislation in place with regards to forced or child labour (ILO Conventions C29, C105, C138 and C182).

The second trouble concerns the scope of application of the non-regression clause: it only refers to each party’s environmental and labour laws and, hence, only EU (not Member States)¹⁰⁶ legislation in these fields is seemingly caught by the prohibition laid down in this provision. While the EU has actively used its shared competence over environmental matters

⁹⁹ Art. 12.3(3) EU – Singapore FTA. Similarly see, Art. 12.3(3) EU – Vietnam FTA. The EU – Japan FTA instead clarifies, in Art. 16.3(2), footnote 1, that “[f]or the European Union, ‘ILO membership’ means the ILO membership of the Member States of the European Union.”

¹⁰⁰ This question is far from theoretical: for an overview of finalized and pending representation and complaints cases involving EU Member States at the ILO, see Marx, *op. cit. supra* note 39, at 54-57, Tables 3-5.

¹⁰¹ In the context of EU-only agreements, see Case C-104/81, *Hauptzollamt Mainz v Kupferberg*, EU:C:1982:362, para 13. Similarly, in the context of mixed agreements, see Case C-13/00, *Commission v. Ireland (Berne Convention)*, EU:C:2002:184, paras 14-15 and Case C-239/03, *Commission v France (État de Berre)*, EU:C:2004:598, paras 25-26. This is reinforced by the duty of sincere cooperation in Art. 4(3) TEU requiring, *inter alia*, a “close association between the [EU] institutions and the Member States both in the process of negotiation and conclusion [of an international agreement] and in the fulfilment of the obligations entered into.” (*Opinion 2/91*, para 36). On this duty and relevant case law, see Delgado Casteleiro and Larik, “The Duty to Remain Silent: Limitless Loyalty in EU External Relations?”, 36(4) *EL Rev.* (2011) 524-541.

¹⁰² See generally, Mendez, “The Enforcement of EU Agreements: Bolstering the Effectiveness of Treaty Law?”, 47(6) *CML Rev.* (2010) 1719-1756, at 1737-1741.

¹⁰³ Case C-13/00, *Commission v. Ireland*, para 1.

¹⁰⁴ *Ibid.*, paras 16-19: “The Berne Convention thus creates rights and obligations in areas covered by Community law. That being so, there is a Community interest in ensuring that all Contracting Parties to the EEA Agreement adhere to that Convention.”

¹⁰⁵ Art. 153(5) TFEU, whereby EU legislative measures may not be adopted with regards to: “pay, the right of association, the right to strike or the right to impose lock-outs.”

¹⁰⁶ The term ‘Party’ in Article 12.12 EU – Singapore FTA (see section 2.1 *supra*) cannot be read as including the EU Member States since they are not contracting parties to the agreement (Preamble, para. 1), and there is no textual basis to indicate that their environmental and labour laws are otherwise covered.

and there is EU legislation in almost every conceivable field of environmental policy,¹⁰⁷ the same cannot be said for labour matters. In fact, EU legislative competence for social policy is limited to a (closed) list of labour issues¹⁰⁸ and to support and complement Member States' law-making activities in these fields by means of minimum-standard Directives, with Member States being able to maintain more stringent protective measures.¹⁰⁹ Furthermore, as already noted, the EU has no competence to legislate over certain key labour issues (e.g., pay and collective bargaining), which are predominantly regulated at national level.¹¹⁰

Presumably then, if a Member State lowers or fails to enforce its domestic labour laws in a manner affecting EU-Singapore bilateral trade, Singapore may not claim a breach of the non-regression clause. In other words, the scope for applying this obligation against the EU side is significantly reduced in an EU-only agreement scenario vis-à-vis the mixed-agreement scenario (where Member States' laws would also come into play), in particular for labour matters. This may have well been an unintended consequence of *Opinion 2/15*, but it appears at odds with the proclaimed partnership spirit of TSD chapters, insofar as the EU cannot be held accountable under the non-regression clause for all environmental and labour laws within its territory that may impact on bilateral trade (or investment), unlike its partner countries. To redress this imbalance, an explicit clarification would be needed in the EU – Singapore FTA to the effect that Member States' environmental and labour laws are also subject to the non-regression obligation.

In fact, the situation looks quite different for the TSD chapters in FTAs that were concluded jointly by the EU and Member States prior to *Opinion 2/15*,¹¹¹ such as the EU – Korea FTA (2011), the EU – COPE FTA (2012) and the EU – Canada CETA (2016). As a matter of public international law, *Opinion 2/15* and the Court's determination of EU exclusive competence over the TSD chapter of the EU-Singapore FTA, has no bearing for these other agreements. So long as both the EU and its Member States are contracting parties to these FTAs, the presumption under public international law is that they are each bound by all obligations contained therein (including under the TSD chapter)¹¹² and may not invoke internal rules as justification for non-performance,¹¹³ unless it is otherwise agreed in the FTAs or in situations covered by Article 46 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLTIO).¹¹⁴ However, there is no 'Declaration of Competence',¹¹⁵ nor any other clear basis in these FTAs

¹⁰⁷ Jans and Vedder, *European Environmental Law*, 3rd ed. (Europa Law Publishing, 2012), at 253.

¹⁰⁸ Arts. 4(2) and 153(1)(a)-(k) TFEU. See also, Art. 19 TFEU, empowering the Union to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. In practice, EU labour law has mainly focused on health and safety at work, non-discrimination, workers' information and consultation, cross-border employment relationships and free movement of workers.

¹⁰⁹ Arts. 153(2)(b) and 4. The latter is also true for environmental legislation: Art. 193 TFEU.

¹¹⁰ For an overview, see Lhernould et al., *Analytical Report 2017 – The Interrelation between Social Security Coordination Law and Labour Law* (Dec. 2017), at 9-10, available at: <http://englishbulletin.adapt.it/analytical-report-2017-the-interrelation-between-social-security-coordination-law-and-labour-law/> (last visited 27 Mar. 2020).

¹¹¹ The EU – Japan FTA (2017) and EU – Vietnam FTA (2019) have been concluded as EU-only agreements. It remains to be seen how the EU – Mercosur FTA and EU – Mercosur FTA would be concluded, since only an 'agreement in principle' has been reached at the time of writing (see note 15 *supra*).

¹¹² This flows from the principle of *pacta sunt servanda* in Art. 26 VCLTIO.

¹¹³ *Ibid.*, Arts. 27(1)-(2).

¹¹⁴ *Ibid.*, Art. 27(3).

¹¹⁵ This is a tool used in the context of multilateral mixed agreements aimed at clarifying which parts of the agreement bind the EU, which parts bind the Member States, and which parts are binding on both, thereby delimiting their respective responsibility for the performance of obligations. For a critical review, see Delgado Casteleiro, "EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?", 17(4) EFA Rev. (2012), 491-510.

for apportioning obligations and responsibility between the EU and its Member States.¹¹⁶ In addition, it is doubtful that Article 46 of the VCLTIO could be invoked in this case. Given the signature of these FTAs predates *Opinion 2/15*,¹¹⁷ and hence the division of treaty-making powers between the EU and the Member States in relation to TSD chapters was far from settled at that time, a violation of EU competence rules could not have been ‘manifest’ (that is, objectively evident) to the third parties concerned.¹¹⁸

Consequently, unlike in the case of the EU – Singapore FTA, the EU and the Member States are jointly bound by all provisions of the TSD chapters in the EU – Korea FTA, the EU – COPE FTA and the EU – Canada CETA.¹¹⁹ Importantly, this mixed EU party does away with most of the concerns arising in the post-*Opinion 2/15* EU-only agreement scenario discussed above. First, in the event of a dispute under the relevant FTA, EU Member States can be held directly responsible for duly performing their sustainability commitments. This is particularly significant for the labour aspects of the minimum-level clause, given that the Member States (and not the EU itself) are the party with the actual power to effectively implement core ILO Conventions. Second, and more generally, the reach of the non-regression obligation is clearly broader in mixed FTAs, since Member States’ environmental and labour laws (and not only EU legislation) are *de jure* covered and cannot be weakened for competitive purposes. Ironically perhaps, when it comes to the implementation and of TSD chapters, it seems that the EU-only agreement scenario does not offer greater legal clarity, nor is it necessarily better, than the mixed-agreement scenario from a third-party perspective.

4. A promotional, or a more coercive, approach to compliance?

4.1. Commission’s stakeholder consultation on TSD chapters

Since the conclusion of the EU – Korea FTA in 2010, the suitability of the EU’s promotional approach to compliance with TSD provisions has been increasingly questioned by the European Parliament,¹²⁰ some Member States¹²¹ and scholars. In particular, a perceived

¹¹⁶ These agreements leave the definition of the ‘EU party’ ambiguous: “the European Union or its Member States or the European Union and its Member States within their respective areas of competence as derived from the Treaty on European Union and the Treaty on the Functioning of the European Union” (Art. 1.2 EU – Korea FTA; Art. 1.1 EU – Canada CETA).

¹¹⁷ See note 14 *supra*.

¹¹⁸ VCLTIO, Art. 46(2) provides: “An international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was *manifest* and concerned a rule of fundamental importance.” Art. 46(3) further states: “A violation is manifest if it would be *objectively evident* to any State or any international organization ...” (emphasis added).

¹¹⁹ This does not mean, however, that there will be joint responsibility of the EU and its Member States for breaches of the TSD chapter in each and every case. In the logic of the general rules of international responsibility, a breach of an international obligation needs to be supplemented by attribution, and, therefore, the key question is whether the infringing conduct is attributable to the EU and/or its Member States. For further discussion in the WTO context, see Marín Durán, “Untangling the International Responsibility of the European Union and Its Member States in the World Trade Organization Post-Lisbon: A Competence/ Remedy Model”, 28(3) EJIL (2017), 697-729, at 704-708.

¹²⁰ European Parliament, Resolution on Human Rights and Social and Environmental Standards in International Trade Agreements of 25 November 2010, 2009/2219(INI), para 22(a); and Resolution on Implementation of the 2010 Recommendations of Parliament on Social and Environmental Standards, Human Rights and Corporate Responsibility of 5 July 2016, 2015/2038(INI) [2016 EP Resolution], paras 21-22.

¹²¹ See letter to EU Trade Commissioner Cecilia Malmström by Ministers of five Member States (Belgium, Finland, Luxembourg, Sweden and the Netherlands), putting forward several suggestions for improving the implementation of T&SD chapters but no mention of trade sanctions, 11 May 2017, available at: <<http://www.politico.eu/wp->

‘compliance gap’ between TSD commitments and their implementation in the EU’s trading partners has come to the forefront of the debate, with some tendency to fault the EU’s promotional approach as being less effective than the sanction-based approach to compliance with environmental and labour commitments followed in US and Canadian FTAs.¹²² In response to these growing pressures, the European Commission issued a non-paper in July 2017 with a view to assessing current EU practice and encouraging discussion with the various stakeholders on suggestions for improvements around two main options: (i) strengthening the current model and (ii) moving to a sanctions-based model.¹²³

At the outset, two points ought to be made on this consultation process and on-going academic debate. First, the timing of such a stocktaking exercise seems rather premature given that the first TSD chapter to have been included in an EU FTA (that with Korea) was just completing its sixth year of implementation in July 2017. In fact, as the Commission acknowledges, no comprehensive empirical analysis exists that would enable a full evaluation of the implementation (or lack thereof) of TSD chapters.¹²⁴ The Commission’s 2017 and 2018 FTA Implementation Reports pointed to a “gradual progress” in the implementation of TSD chapters, even though challenges do evidently remain at this early stage.¹²⁵ Some academic studies have established the existence of a compliance gap with TSD commitments in selected EU’s trading partners, but this has been mainly in the area of core labour standards.¹²⁶ Furthermore, in December 2018, the EU triggered for the first time the dispute settlement procedures under the TSD chapter of the EU – Korea FTA and has more recently requested the establishment of a Panel of Experts.¹²⁷ The EU claims a violation of the minimum-level clause on two grounds: (i) Korea has failed to make “sustained and continuous efforts” in the eight years following the provisional application of the FTA to ratify 4/8 fundamental ILO Conventions;¹²⁸ and (ii) Korea has failed to comply with its obligations arising from ILO membership and the 1998 ILO Declaration to respect and promote the principles concerning the freedom of association and the effective recognition of the right to collective bargaining.¹²⁹ Ahead of this first Panel report being issued, it is too early to determine whether or not the

content/uploads/2017/06/20170511155157994.pdf?utm_source=POLITICO.EU&utm_campaign=e95ace0190-EMAIL_CAMPAIGN_2017_06_27&utm_medium=email&utm_term=0_10959edeb5-e95ace0190-189774485> (last visited 27 Mar. 2020).

¹²² See, *inter alia*, Bronckers and Gruni, op. cit. *supra* note 34; Marx, op. cit. *supra* note 39. This view is not unanimously shared in the literature: for a contrary view, see amongst others, Prévost and Alexovičová, op. cit. *supra* note 47; Hradilová and Svoboda, op. cit. *supra* note 34.

¹²³ European Commission, Non-Paper on Trade and Sustainable Development Chapters (TSD) in EU Free Trade Agreements (FTAs), 11 Jul. 2017 [2017 Commission Non-Paper], at 5-9.

¹²⁴ *Ibid.*, at 5.

¹²⁵ European Commission, Report on the Implementation of Free Trade Agreements: 1 January 2016 – 31 December 2016, COM(2017) 654 final, 9 Nov. 2017, at 27-29; and Report on the Implementation of Free Trade Agreements: 1 January 2017 – 31 December 2017, COM(2018) 728 final, at 38-39.

¹²⁶ See e.g., Ebert, “Labour Provisions in EU Trade Agreements: What Potential for Challenging Labour Standards-related Capacity Building”, 155(3) *International Labour Review* (2016), 407-433; Harrison et al., “Governing Labour Standards Through Free Trade Agreements: the Limits of the European Union’s Trade and Sustainable Development Chapters”, 57(2) *JCMS* (2019), 260-277; Max, Lein and Brando, “The Protection of Labour Rights in Trade Agreements: the Case of the EU – Colombia Agreement”, 50(4) *JWT* (2016), 587-610; Vogt, “The Evolution of Labor Rights and Trade—A Transatlantic Comparison and Lessons for the Transatlantic Trade and Investment Partnership”, 18(4) *Journal of International Economic Law* (2015), 827-860.

¹²⁷ See note 64 *supra*; and *Republic of Korea – Compliance with Obligations under Chapter 13 of the EU – Korea Free Trade Agreement (Request for the Establishment of a Panel of Experts by the European Union)*, 4 Jul. 2019. For a background to the dispute, see Hradilová and Svoboda, op. cit. *supra* note 34, at 1026-1027.

¹²⁸ These are: C87 Freedom of Association and Protection of the Right to Organize Convention; C98 Right to Organize and Collective Bargaining Convention; C29 Forced Labour Convention, 1930; C105 Abolition of Forced Labour Convention.

¹²⁹ 1998 ILO Declaration, para 2(a); see note 20 *supra*.

existing mechanisms under the EU – Korea FTA are effective in ensuring compliance with the Panel’s recommendations on the matter.

Second, much of the emphasis in both the Commission’s non-paper and scholarship has been on the lack of implementation of TSD chapters *in partner countries*, with no attention given to compliance *within the EU*.¹³⁰ This one-directional assessment is in clear tension with the idea of a bilateral partnership and, moreover, its underlying assumption is not supported by empirical data. Taking the minimum-level clause as an example, it is true that all EU Member States have ratified the eight fundamental ILO Conventions¹³¹ but complaints have been raised as to their effective implementation by some Member States before the ILO, including with regards to freedom of association.¹³² In fact, in the FTA context, Korea requested at the meeting of the TSD Committee in April 2018 information on the pending cases at the ILO Committee of Freedom of Association and the Commission admitted that “some of the Member States are also facing challenges implementing ILO Conventions as seen in the cases of violations of [such conventions]”.¹³³ Similarly, with regards to MEAs, the EU’s Seventh Environmental Action Programme (2014-2020) recognizes that, while the EU has a good track-record when it comes to membership of MEAs, “a number of Member States have still not ratified key agreements [which] compromises the Union’s credibility in related negotiations.”¹³⁴

Following the input received from civil society organisations and other stakeholders, the Commission published a follow-up paper in February 2018, in which it reports “a clear consensus that the implementation of TSD chapters should be stepped-up and improved”, while maintaining their current broad scope in terms of commitments.¹³⁵ Based on this, the Commission outlined fifteen “concrete and practicable actions” to revamp the implementation and enforcement of TSD chapters, including: (i) greater coordination with Member States and the EP, as well as the ILO and MEA bodies;¹³⁶ (ii) facilitate the monitoring and advisory role of civil society through additional funding;¹³⁷ (iii) make more assertive use of existing dispute settlement procedures;¹³⁸ (iv) conduct regular reviews on functioning and impact;¹³⁹ (v) step-up financial resources to support implementation in partner countries;¹⁴⁰ (vi) more transparency and better communication, including a commitment to provide time-bound and reasoned responses to submissions filed by stakeholders.¹⁴¹ These reform proposals have already

¹³⁰ See Harrison et al., “Labour Standards Provisions in EU Free Trade Agreements: Reflections on the European Commission’s Reform Agenda”, *World Trade Review* (2018), 1-23, at 12, also noting that: “despite the formally reciprocal nature of the provisions, there is scant evidence that they have been operationalized in a way that considers labour issues within the EU.”

¹³¹ This is not the case, however, of the conventions classified as ‘priority’ by the ILO, with ratification rates varying across EU Member States: <<https://www.ilo.org/dyn/normlex/en/f?p=1000:12001::NO>> (last visited 27 Mar. 2020).

¹³² See note 100 *supra*.

¹³³ European Commission, Summary of Discussion of the 6th Committee on Trade and Sustainable Development under the EU – Korea FTA, 13 Apr. 2018, at 3, where Korea also raised under the minimum-level clause (Art. 13.4) a case of alleged force labour of North Korean workers in Poland, but the EU only address claims directly related to the ILO Conventions.

¹³⁴ Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020, O.J. 2013, L354/171, para 101.

¹³⁵ European Commission, Non-Paper on Feedback and Way Forward on Improving Implementation and Enforcement of Trade and Sustainable Development Chapters in EU Free Trade Agreements, 18 Feb. 2018 [2018 Commission Non-Paper].

¹³⁶ *Ibid.*, at 4.

¹³⁷ *Ibid.*, at 5.

¹³⁸ *Ibid.*, at 7-8.

¹³⁹ *Ibid.*, at 9.

¹⁴⁰ *Ibid.*, at 9-10.

¹⁴¹ *Ibid.*, at 10-11.

undergone academic scrutiny,¹⁴² mainly with regards to the role of civil society and other stakeholders in compliance mechanisms. For instance, Alexovičová and Prévost aptly assess the Commission’s proposals against the ‘managerial approach’ to compliance and make further recommendations in terms of transparency, institutionalization and accountability.¹⁴³ Bronckers and Gruni see the continued absence of an effective private complaint procedure as the main problem in the enforcement of TSD chapters and put forward a detailed proposal in this regard modelled on the EU’s Trade Barriers Regulation.¹⁴⁴ Leaving aside this valuable contributions, the remainder of this article will focus on what has been the sticky point in the whole debate: namely, whether or not infringements of TSD commitments should be subject to economic sanctions as an extreme remedy.

4.2. *Moving towards sanction-based enforcement?*

In its 2018 Non-Paper, the European Commission dismissed the option of imposing trade sanctions in cases of non-compliance with TSD commitments, noting that the “absence of consensus on a sanctions-based model makes it impossible to move to such an approach” which, furthermore, “would not fit easily with the EU’s model.”¹⁴⁵ However, this contentious issue is likely to resurface in the near future in light of ongoing pressures from the EP and other stakeholders, as well as the recent creation of a Chief Trade Enforcement Officer in the Commission.¹⁴⁶ Ultimately, the suitability of a cooperative or more coercive approach to effecting compliance with TSD commitments depends on the perspective one takes. But if we seriously approach compliance as reciprocal matter between the EU and its trading partners, it becomes evident that a sanction-based enforcement model for TSD chapters would be undesirable from an equity standpoint and also unwarranted for other legal and policy grounds.

From an effectiveness perspective, proponents of a sanction-based enforcement model seemingly assume that such retaliatory economic measures are necessary and effective in inducing compliance with TSD commitments when other cooperative mechanisms have failed.¹⁴⁷ However, the empirical evidence on this presumed compliance-inducing effect of economic sanctions is scant and at best mixed, as observed by the ILO amongst others.¹⁴⁸ At the outset, the availability of trade (or monetary) sanctions does not guarantee that environmental and labour complaints will be pursued more actively to the phase of dispute settlement. In fact, FTA practice thus far suggests otherwise. The EU has comparatively made a more assertive use of dispute settlement procedures (with no economic sanctions) under TSD chapters in 10 years of practice (i.e., the aforementioned labour dispute under the EU – Korea FTA), than the US and Canada in enforcing environmental and labour commitments through the dispute settlement mechanisms (with economic sanctions) under their respective FTAs in over 20 years of practice since NAFTA (i.e., only one labour arbitration so far under the US –

¹⁴² See e.g., Harrison et al., op. cit. *supra* note 130, at 13-23.

¹⁴³ Prévost and Alexovičová, op. cit. *supra* note 47, at 251-255.

¹⁴⁴ Regulation (EU) 2015/1843 of the European Parliament and of the Council of 6 October 2015, O.J. 2015, L272/1; see Bronckers and Gruni, op. cit. *supra* note 34, at 1598-1609, albeit this proposal is largely limited to labour standards and it is unclear whether or not the authors consider it should be followed for environmental standards in TSD chapters.

¹⁴⁵ 2018 Commission Non-Paper, op. cit. *supra* note 135, at 3.

¹⁴⁶ See Bronckers and Gruni, op. cit. *supra* note 34, at 1594.

¹⁴⁷ See e.g., Bronckers and Gruni, op. cit. *supra* note 34, at 1616 and 1619; 2016 EP Resolution (2016), op. cit. *supra* note 120, para 21(d).

¹⁴⁸ ILO (2015), op. cit. *supra* note 7, at 57; see also Swedish National Board of Trade, *Implementation and Enforcement of Sustainable Development Provisions in Free Trade Agreements – Options for Improvement* (27 May 2016), at 14, available at: <<https://www.kommerskollegium.se/globalassets/publikationer/rapporter/2016-och-aldre/publ-implementation-and-enforcement-of-sustainability-provisions-in-ftas.pdf>> (last visited 27 Mar. 2020).

CADR FTA,¹⁴⁹ to be discussed below). In addition, if one looks at the practice in the WTO dispute settlement system, the compliance-inducing effect of trade sanctions is questionable. As of December 2019, trade retaliation has been requested and authorized¹⁵⁰ only in a handful of WTO cases (10 disputes),¹⁵¹ actually implemented in an even smaller number of cases,¹⁵² and led to a certain degree of compliance with the condemnatory WTO ruling in some (e.g., *US – FSC*) but not all (e.g., *EC – Hormones*) instances.¹⁵³

Most importantly, bearing in mind that compliance with TSD chapters is a reciprocal matter, trade sanctions will often be an ineffective means to enforce compliance by the EU side for the majority of its FTA partners. As has been well documented in the WTO context,¹⁵⁴ trade sanctions are inherently inequitable as an enforcement tool where significant disparities in market size and economic power exist between the disputing parties, as it is undoubtedly the case of most FTAs concluded by the EU(28) being the world's second-largest economy. The reason for this lies, essentially, in the asymmetric capacity to actually use trade retaliation. Typically, for a small-market country seeking to retaliate against an economically powerful country, trade sanctions often result in 'shooting oneself in the foot' (i.e., in the form of increased import prices) while inflicting little economic harm –and hence, retaliatory pressure– on the offending party.¹⁵⁵ Retaliation in the area of trade-related intellectual property rights (TRIPS), as opposed to goods and services, may help mitigating the first of these shortcomings,¹⁵⁶ but its potential in exerting pressure on the defaulting party will ultimately depend on the market size of the retaliating country. In WTO practice, this has been illustrated by the relatively successful experience of a large developing country (i.e., Brazil in *US –*

¹⁴⁹ United States – Central America-Dominican Republic Free Trade Agreement (2006), available at: <<https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text>> (last visited 27 Mar. 2020).

¹⁵⁰ WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), signed on 15 Apr. 1994, 1869 UNTS 401, Art. 22.6. Given the WTO Dispute Settlement Body decides on requests for authorization to retaliate by reverse (or negative) consensus, such an authorization is for all practical purposes automatic.

¹⁵¹ See in this regard Vidigal, "Why Is There So Little Litigation under Free Trade Agreements? Adjudication and Retaliation in International Dispute Settlement", 20(4) *Journal of International Economic Law* (2017), 927-950, arguing that WTO members prefer adjudication to retaliation because of the added value provided by the reputational damage and collective pressure for compliance that a condemnatory WTO ruling generates.

¹⁵² Namely: *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Recourse to Article 22.6 Arbitration Report, WT/DS27/ARB, 9 Apr. 1999 [*EC – Bananas III*]; *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, Recourse to Article 22.6 Arbitration Report, WT/DS26/ARB, 12 Jul. 1999 [*EC – Hormones*]; *United States – Tax Treatment for Foreign Sales Corporations*, Recourse to Article 22.6 Arbitration Report, WT/DS108/ARB, 30 Aug. 2002 [*US – FSC*]; *United States – Continued Dumping and Subsidy Offset Act of 2000*, Recourse to Article 22.6 Arbitration Report, WT/DS217/ARB, 31 Aug. 2004.

¹⁵³ In other instances, the mere *threat* of trade retaliation may have been enough to induce the withdrawal of the WTO-inconsistent measure: e.g., *United States – Certain Country of Origin Labelling Requirements*, Recourse to Article 22.6 Arbitration Report, WT/DS384/DS386/ARB, 7 Dec. 2015, where the US Congress repealed the country-of-origin labelling scheme at issue a few weeks after Canada and Mexico were granted authorization to retaliate. See further, Limenta, *WTO Retaliation – Effectiveness and Purpose* (Hart, 2017), particularly at 49-69.

¹⁵⁴ See e.g., Cai, "Making WTO Remedies Work for Developing Nations: The Need for Class Actions", 25(1) *Emory International Law Review* (2011), 151-196; Nottage, "Evaluating the Criticism that WTO Retaliation Rules Undermine the Utility of WTO Dispute Settlement for Developing Countries" in Bown and Pauwelyn (Eds.), *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement* (CUP, 2010); Shaffer and Meléndez-Ortiz (Eds.), *Dispute Settlement at the WTO – The Developing Country Experience* (CUP, 2010).

¹⁵⁵ This has been even acknowledged by WTO arbitrators: see e.g., *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Recourse to Article 22.6 Arbitration Report, WT/DS27/ARB/ECU, 24 Mar. 2000, paras 73 and 86.

¹⁵⁶ See Spadano, "Cross-Agreement Retaliation in the WTO Dispute Settlement System: An Important Enforcement Mechanism for Developing Countries?", 7(3) *World Trade Review* (2008), 511-545; Subramanian and Watal, "Can TRIPS Serve as an Enforcement Device for Developing Countries in the WTO?", 3(3) *Journal of International Economic Law* (2000), 403-416.

Upland Cotton) and the unsuccessful attempt of a small developing country (i.e., Antigua in *US – Gambling*) in cross-retaliating under the TRIPS Agreement against the United States.¹⁵⁷ Overall, there is yet to be one example of ‘David v Goliath’ compliance-inducing retaliation in the WTO. For our purposes, this means that introducing trade sanctions under TSD chapters would, in practice, translate into an imbalanced one-way enforcement mechanism in favour of the EU in most FTAs –and not one that is “reciprocal in nature” as it is sometimes claimed.¹⁵⁸

These equity concerns would equally arise in the case of monetary sanctions, which have been suggested by Bronckers and Gruni as the primary remedy for breaches of TSD chapters,¹⁵⁹ unless the capacity to pay of the offending party is accounted for in the calculation of financial penalties (e.g., through a GDP factor). That is, the EU would agree to pay proportionally higher fines for the same violation of TSD chapters than its less economically developed partners.¹⁶⁰ This possibility seems unlikely, and in fact, has no precedent in FTA practice. Some Canadian and US FTAs do provide for financial remedies for breaches of environmental and labour provisions, but the amount of monetary penalties is not usually adjusted on basis of the offending party’s level of economic development and ability to pay.¹⁶¹ But even if differentiated monetary sanctions were acceptable to the EU, it is far from clear how such financial payments would be made. For instance, to retake our earlier example under the EU – Singapore FTA:¹⁶² should a fine for failure to effectively implement ILO Conventions (minimum-level clause) by one Member States come out of the collective EU budget?¹⁶³

Furthermore, an additional equity issue in EU FTAs involving developing-country partners is that “low levels of compliance [with TSD chapters] may result from capacity constraints [in these countries] and sanctions may be counterproductive and exacerbate the conditions that led to non-compliance.”¹⁶⁴ The European Commission also shares this view, noting that trade sanctions could serve to “compensate” the EU for breaches of TSD commitments (if quantifiable in economic terms), but “would not guarantee that this will result in effective, sustainable and lasting improvement of key social and environmental standards on

¹⁵⁷ See further Mitchell and Salonidis, “David’s Sling: Cross-Agreement Retaliation in International Trade Disputes”, 45(2) *JWT* (2011), 457-488, at 474-479. Essentially, in *US – Upland Cotton*, Brazil’s threat of cross-retaliation under the TRIPS Agreement led a negotiated settlement of the dispute, whereas in *US – Gambling*, Antigua was not capable of actually implementing TRIPS cross-retaliation given the prevailing economic imbalance.

¹⁵⁸ See *inter alia*, Bronckers and Gruni, *op. cit. supra* note 34, at 1618, even though the authors early state (at 1592): “[n]o sanctions are envisaged in the event the *EU’s trading partners* flout these standards” (emphasis added).

¹⁵⁹ *Ibid.*, at 1618, suggesting that trade sanctions would be available *extrema ratio* where the defaulting party refuses to pay the financial penalties.

¹⁶⁰ *Ibid.*, at 1616-1617, hinting that financial penalties (and on this basis, trade sanctions) could be calculated following the example of EU law infringements by Member States. For further development of this argument in the WTO context, see: Bronckers and Baetens, “Reconsidering Financial Remedies in the WTO Dispute Settlement System”, 16(2) *Journal of International Economic Law* (2013), 281-311.

¹⁶¹ On the Canadian side, see most recently: Arts 19.15(12), 20.23(1) and 28.20(7)-(8) Comprehensive and Progressive Agreement for Trans-Pacific Partnership, signed on 8 Mar. 2018, available at: <<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=eng>> (last visited 27 Mar 2020). On the US side, see *inter alia*: Art 20.17 US – CADR FTA; Arts. 17.7(6), 18(12)(6) and 21.16(6)-(7) US – Colombia Trade Promotion Agreement, signed on 22 Nov. 2006, available at: <<https://ustr.gov/trade-agreements/free-trade-agreements>> (last visited 27 Mar 2020).

¹⁶² See section 3.2 *supra*.

¹⁶³ A similar difficulty has arisen in the context of investor-State dispute settlement: see Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party, O.J. 2014 OJ, L257/121; and for a discussion, Dimopoulos, “The Involvement of the EU in Investor-State Dispute Settlement: A Question of Responsibilities”, 51(6) *CML Rev* (2014), 1671-1720.

¹⁶⁴ Prévost and Alexovičová, *op. cit supra* note 47, at 241.

the ground.”¹⁶⁵ This stance may be informed by the EU’s experience under its unilateral General System of Preferences (GSP),¹⁶⁶ where the effectiveness of sanctioning non-compliance by withdrawing trade preferences has been shown to be rather limited in making targeted developing countries redress violations of core labour standards.¹⁶⁷

Besides their uncertain compliance-inducing effect and inequitable character, another policy consideration weakening the case for trade sanctions is that they risk compromising the current value-based purpose and comprehensive scope of TSD chapters. As previously examined, TSD commitments are not confined to levelling the playing field between trading partners (i.e., non-regression obligation), but address more broadly the regulation of environmental and labour standards independently from any trade effect, both by establishing a minimum regulatory floor (i.e., relevant ILO Conventions/MEAs) and by encouraging a progressive improvement in levels of protection (i.e., high-levels clause).¹⁶⁸ However, as the Commission has warned, “negotiating partners have been clear that they would not accept a broad scope [of TSD chapters] combined with trade sanctions.”¹⁶⁹ This is quite plausible in light of US FTA practice, which has involved similar trading partners to that of the EU, and where the scope of environmental and labour provisions is typically narrower than that of TSD chapters. For instance, in the case of the social protection, US FTAs are usually limited to requiring compliance with the core labour standards set out in the ILO Declaration, without providing for ratification and effective implementation of any ILO Convention.¹⁷⁰ Furthermore, in most of these US FTAs, economic sanctions are only available as a remedy for breaches of a narrow set of obligations pertaining to the non-derogation and effective enforcement of domestic laws on these core labour rights, which are subject to a trade-effect condition.¹⁷¹ In other words, a shift towards a sanction-based enforcement approach is unlikely to escape a policy trade-off –namely, a TSD chapter with ‘greater teeth’ but focused on its competitiveness dimension of levelling the playing field for EU industries in international trade, rather than on its normative dimension of enhancing global environmental and labour governance more broadly and irrespective of trade effects. This is regrettable since, according to Commission, “the majority of complaints about TSD implementation concern violations that ... have not had a measurable direct impact on bilateral [trade] exchanges.”¹⁷²

In fact, the case for economic sanctions is often made in generic terms, without due regard for the different nature of TSD provisions. However, from a legal perspective, economic sanctions appear ill-suited for securing compliance with most of these provisions. This is clearly the case of soft-law aspirational commitments, such as the high-levels clause, but also

¹⁶⁵ 2018 Commission Non-Paper, op. cit. *supra* note 135, at 3.

¹⁶⁶ Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalized tariff preferences, O.J. 2012, L303/1, Arts 15 and 19.

¹⁶⁷ See Zhou and Cuyvers, “Linking International Trade and Labour Standards: the Effectiveness of Sanctions under the European Union’s GSP”, 45(1) *JWT* (2011) 63-85, at 76-77, based on the cases of Myanmar/Burma (EBA preferences withdrawn in 1997, reinstated in 2013) and Belarus (GSP preferences withdrawn in 2006).

¹⁶⁸ See section 2.1 *supra*.

¹⁶⁹ 2018 Commission Non-Paper, op. cit. *supra* note 135, at 3.

¹⁷⁰ See e.g., Art. 16.1 US – CADR FTA; and further Araujo, op. cit. *supra* note 34, at 239-240; Vogt, op. cit. *supra* note 126, at 849-851. For a similar finding in the environmental context, see Jinnah and Morgera, “Environmental Provisions in American and EU Free Trade Agreements: A Preliminary Comparison and Research Agenda”, 22(3) *Review of European, Comparative and International Environmental Law* (2013), 324-339, at 334-335.

¹⁷¹ See e.g., Arts. 16.2(1)(a) and 16.6(6)-(7) US – CADR FTA; and for an overview ILO (2015), op. cit. *supra* note 7, at 33-35 (Table 2.1) and Marx, op. cit. *supra* note 39, at 35 (Table 1). Only some US FTAs make economic sanctions available for all labour provisions: US – Jordan FTA (2001), US – Peru FTA (2009), US – Colombia FTA (2012), US – Panama FTA (2012) and US – Korea FTA (2012). For an evolution of US practice in this regard, see Vogt, op. cit. *supra* note 126, at 829-835.

¹⁷² 2017 Commission Non-Paper, op. cit. *supra* 123, at 8.

of hard-law commitments that have not, or not primarily, been included for economic considerations, such as the minimum-level clause. The on-going EU – Korea labour dispute mentioned earlier is helpful to illustrate this point. It is useful to recall that the EU’s complaint is based solely on the minimum-level clause that is not subject to a trade-effect test, and hence the EU is not required to demonstrate that Korea’s alleged breaches of labour commitments has negatively affected bilateral trade. Let’s assume that the expert panel was to find in favour of the EU and economic sanctions were available as a remedy: how can non-compliance with labour (or environmental) standards be quantified and translated into compensatory trade (or monetary) measures when no harmful impact on trade is shown and, indeed, may not even exist? In the case of breaches of trade and trade-related obligations, proving economic injury is necessary to calculate the amount of trade retaliation,¹⁷³ since the retaliatory response may not usually go beyond the level of economic harm caused by the other party’s offending measure.¹⁷⁴

But even if sanction-based enforcement was confined to breaches of hard-law obligations with a trade-effect condition in TSD chapters (i.e., non-regression clause), as it is the case in most US FTAs, this would not be free of legal hurdles. This is because the requirement under the non-regression clause that the derogation or failure to enforce domestic environmental or labour laws occurs in ‘a manner affecting [bilateral] trade or investment’ is ambiguous. The interpretation of these terms was the crux of the matter in the first-ever labour dispute under an FTA dispute settlement mechanism,¹⁷⁵ and the panel report issued in July 2017 may be influential for similar disputes under other free trade agreements, including those concluded by the EU. The complaint concerned Guatemala’s alleged failure to effectively enforce its domestic labour laws,¹⁷⁶ which the US claimed was in violation of the so-called effective enforcement clause (Article 16.2(1)(a) of the US – CADR FTA) – a provision similar to the non-regression clause in TSD chapters.¹⁷⁷

Unsurprisingly, Guatemala favoured a narrow interpretation of the terms ‘in a manner affecting trade’ as requiring an unambiguous showing of actual trade effects (i.e., measurable changes in prices of, or trade flows in, goods or services),¹⁷⁸ whereas the US argued for a looser

¹⁷³ In the WTO dispute settlement system, Art. 22.4 DSU provides that trade retaliation must be equivalent to the level of nullification or impairment. Similarly in the FTA context, see e.g., Art. 14.12(2) EU – Singapore FTA; Art. 20.16.2 US – CADR FTA.

¹⁷⁴ See Bronckers and Gruni, *op. cit. supra* note 34, at 1607, suggesting that Canadian practice under some FTA-related Labour Cooperation Agreements could be followed, whereby fines for violations of labour provisions (not subject to a trade-effect condition, but a softer ‘to encourage trade and investment’) are calculated on the basis of the following factors: (i) pervasiveness and duration of the infringement; (ii) reasons for the infringement; (iii) level of compliance that could be reasonably expected, given the Party’s resource constraints; (iv) efforts made to remedying non-compliance after the panel’s final report; (v) any other relevant factors. See e.g., Art 20.(2)(b) and Annex 4 Canada – Peru Agreement on Labour Cooperation, signed 29 May 2008; Art 14.6 and Annex 3 Canada – Honduras Agreement on Labour Cooperation, signed 5 November 2014, available at: <<https://www.canada.ca/en/employment-social-development/services/labour-relations/international/agreements.html>> (last accessed 27 Mar. 2020).

¹⁷⁵ Panel Report, *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, dated 14 June 2017 [US – Guatemala Panel Report], available at: <<https://www.trade.gov/industry/tas/>> (last visited 27 Mar. 2020).

¹⁷⁶ *Ibid.*, paras 60 and 106. Two claims were considered by the Panel in this regard: (i) failure to secure compliance with court orders requiring employers to reinstate and compensate workers wrongfully dismissed for union activities and to pay a fine for their retaliatory action; (ii) failure to properly conduct investigations under the Guatemalan Labor Code and to impose the requisite penalties when Ministry of Labor inspectors identified employer violations.

¹⁷⁷ Article 16.2.1(a) US – CADR FTA reads: “A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a *manner affecting trade* between the Parties, after the date of entry into force of this Agreement.” (emphasis added).

¹⁷⁸ US – Guatemala Panel Report, paras 157-160, which was rejected by the Panel (paras. 176-180).

standard (i.e., affecting the conditions of competition in traded sectors) without need to prove observable effects on bilateral trade.¹⁷⁹ The arbitral panel adopted a middle-ground approach, ruling that disputed actions must confer “some competitive advantage on the employer or employers engaged in [bilateral] trade”, which needs to be demonstrated by factual evidence and be more than *de minimis*.¹⁸⁰ Even so, the US only met this evidentiary burden in one out of the eight instances in which it was found that Guatemala had not effectively enforced its labour legislation.¹⁸¹ By analogy, non-regression clauses in TSD chapters can be expected to implicate a high evidentiary threshold with regards to the trade-effect condition, making a violation thereof difficult to establish. Conscious of this problem, Bronckers and Gruni suggest that the trade-effect condition should be removed from non-regression clauses in TSD chapters, while introducing monetary and (as last resort) trade sanctions for non-compliance.¹⁸² However, for the reasons already mentioned, this suggestion raises practical challenges in terms of calculating the level of compensatory economic sanctions for infringements of environmental and labour commitments.¹⁸³ Furthermore, it is unlikely to be acceptable to most of the EU’s FTA partners, taking into account prevailing FTA practice¹⁸⁴ and also the broader scope of non-regression clauses in TSD chapters which go beyond internationally-recognized labour and environmental standards.¹⁸⁵

5. Conclusions

TSD chapters have been heralded by the EU as an alternative value-based model for managing trade-environment and trade-labour linkages in FTAs, which purposely seeks to depart from the established US and Canadian policy practice. And yet, the promotional approach to implementation and enforcement endorsed in TSD chapters has been increasingly questioned in academic and other circles as to whether it can effectively deliver on the promise to enhance global environmental and social governance. While most of this debate has so far been focused on the use of the EU’s trade-based market power to effect compliance with TSD commitments in third countries, this article has placed more emphasis on compliance by the EU (and its Member States) as the other obvious but largely overlooked side of the bilateral partnership.

In this regard, it was argued that the ECJ’s bringing of TSD chapters within the EU’s exclusive (CCP) powers in *Opinion 2/15* was based on shaky legal arguments. In particular, and contrary to the Court’s position, the EU is not entitled under public international law to adopt trade sanctions in response to breaches of sustainability commitments, as TSD chapters currently stand. Moreover, *Opinion 2/15* has, intentionally or not, led to imbalance and

¹⁷⁹ Ibid., paras 154-156 and 161. In essence, the US interpretation would imply that any failure to enforce labour laws that affects in any way labor costs of an employer engaged in trade will necessarily modify the conditions of competition and thereby deemed to be ‘in a manner affecting trade’, which was rejected by the Panel (paras 478-480).

¹⁸⁰ Ibid., paras 190-192 and 196, establishing a three-prong test: (1) whether the enterprise or enterprises in question export to FTA parties in competitive markets or compete with imports from FTA parties; (2) the effects of a failure to enforce; and (3) whether these effects are sufficient to confer some competitive advantage on such an enterprise or such enterprises.

¹⁸¹ Ibid., paras 435-507 (for the court orders claim), where no breach of Art. 16.2(1)(a) was ultimately found since this instance alone did not amount to a ‘sustained or recurring course of inaction’. For further discussion, see Paiement, “Leveraging Trade Agreements for Labour Law Enforcement: Drawing Lessons from the US – Guatemala CAFTA Dispute”, 49(2) GJIL (2018), 675-692.

¹⁸² Bronckers and Gruni, op. cit. *supra* note 34, at 1604-1606 and 1621.

¹⁸³ See *supra* notes 173-174 and accompanying text.

¹⁸⁴ See *supra* notes 169-172 and accompanying text.

¹⁸⁵ See Table 1 *supra*, and also Bronckers and Gruni, op. cit. *supra* note 34, at 1605, where this key point is overshadowed with references to “fundamental rights” and “shared values”.

uncertainty in terms of implementation of core sustainability commitments by the EU side, particularly in the labour field. On the one hand, the scope of the non-regression clause has been narrowed for the EU party, since it is not made applicable to the domestic laws of the Member States which is the vast part of social regulation in the EU territory. On the other hand, under the minimum-level clause, it is not entirely clear what the EU can effectively do within its internal institutional structures to ensure compliance by its Member States with the relevant ILO Conventions. Thus, when it comes to the implementation of TSD chapters, it seems that the EU-only agreement scenario does not offer greater legal clarity, nor is it necessarily better, than the mixed-agreement scenario from a third-party viewpoint. In a true spirit of partnership, it is paramount for the EU to address these issues in future FTA negotiations, particularly given the growing trend post *Opinion 2/15* to split the erstwhile comprehensive FTAs into separate trade and investment agreements so as to avoid mixity.¹⁸⁶

These difficulties in securing performance by its own Member States with core labour provisions in the TSD chapters may partly explain the EU's (and more specifically, the Commission's) opposition to a sanction-based enforcement of sustainability commitments, even with countries such as Canada that already includes economic sanctions for breaches of environmental and labour provisions in its own FTAs.¹⁸⁷ However, a second argument made in this article is that the EU should continue to reject such a sanction-based approach to compliance for a variety of legal and policy reasons, which are equally relevant to the labour and environmental components of TSD chapters. In essence, the case for trade (or monetary) sanctions as an enforcement tool is at best dubious from an effectiveness perspective, while such measures are legally ill-suited to secure compliance with most TSD commitments that are either aspirational (e.g., high-levels clause) or lack a trade-effect condition (e.g., minimum-level clause). In practice, only the non-regression obligation seems amenable to enforceability through economic sanctions, but even here it would be challenging to demonstrate a trade impact of the alleged environmental or labour violation. Most importantly, economic sanctions raise important equity concerns where economic imbalances exist between trading partners, with the stick being actually an option only for the economic powerful side – in most instances, the EU – regardless of its own compliance record.

In closing, it is important to recall that most TSD chapters have been in place for less than four years¹⁸⁸ and it is simply too early to make a conclusive assessment as to whether their promotional approach, or a harder sanctioning approach, is the best way forward towards ensuring compliance with environmental and labour provisions in FTAs.¹⁸⁹ The outcome and follow-up of the on-going EU – Korea labour dispute, against the backdrop of the US – Guatemala labour dispute, will no doubt shed light on this question. But the success of TSD chapters does not solely depend on how far the EU manages to police and enforce compliance in partner countries within a formally reciprocal structure. Equally pertinent is the extent to which monitoring and enforcement mechanisms under TSD chapters will be successfully used

¹⁸⁶ In addition to the EU – Singapore FTA (note 11 *supra*) and the EU – Japan FTA and EU – Vietnam FTA (note 111 *supra*), this approach of decoupling investment protection provisions from FTAs is also being followed in the on-going negotiations with Australia and New Zealand: see Geraerts, “Changes in EU Trade Policy After Opinion 2/15”, 13(1) *Global Trade and Customs Journal* (2018), 13-18, at 17-18.

¹⁸⁷ Araujo, *op. cit. supra* note 34, at 242; see also European Parliament, Briefing – Trade and Sustainable Development Chapters in CETA (Jan. 2017), at 10, available: <<https://www.europarl.europa.eu/EPRS/EPRS-Briefing-595894-Trade-sustainable-development-chapters-CETA-FINAL-old.pdf>> (last visited 27 Mar. 2020).

¹⁸⁸ See note 14 *supra*.

¹⁸⁹ See latest European Commission, Report on the Implementation of Free Trade Agreements 1 January 2018 – 31 December 2018, COM(2019) 455 final, 14 Oct. 2019, at 26-28 pointing to varying degrees of progress in the implementation of TSD chapters depending on the partner country.

by FTA partners to raise and tackle compliance issues within the EU.¹⁹⁰ It is hoped that future evaluations can be more balanced in considering compliance with TSD commitments as a genuinely two-way street.

¹⁹⁰ At the time of writing, a reliable assessment cannot be made. First, bilateral inter-governmental bodies in charge of monitoring the implementation of TSD chapters (see section 2.2 *supra*) are yet to meet for the first time under several agreements (i.e., EU – Singapore FTA, EU – Vietnam FTA, EU – Mexico – FTA; EU – Mercosur FTA), or have only met 1-2 times under others (i.e., EU – Japan FTA and EU –Canada CETA). Second, while the situation is different for agreements that have been in force for a longer period of time (i.e., EU – Korea FTA and EU – COPE FTA, meeting minutes are not systematically published by the Commission (i.e., only available for 3/6 meetings).