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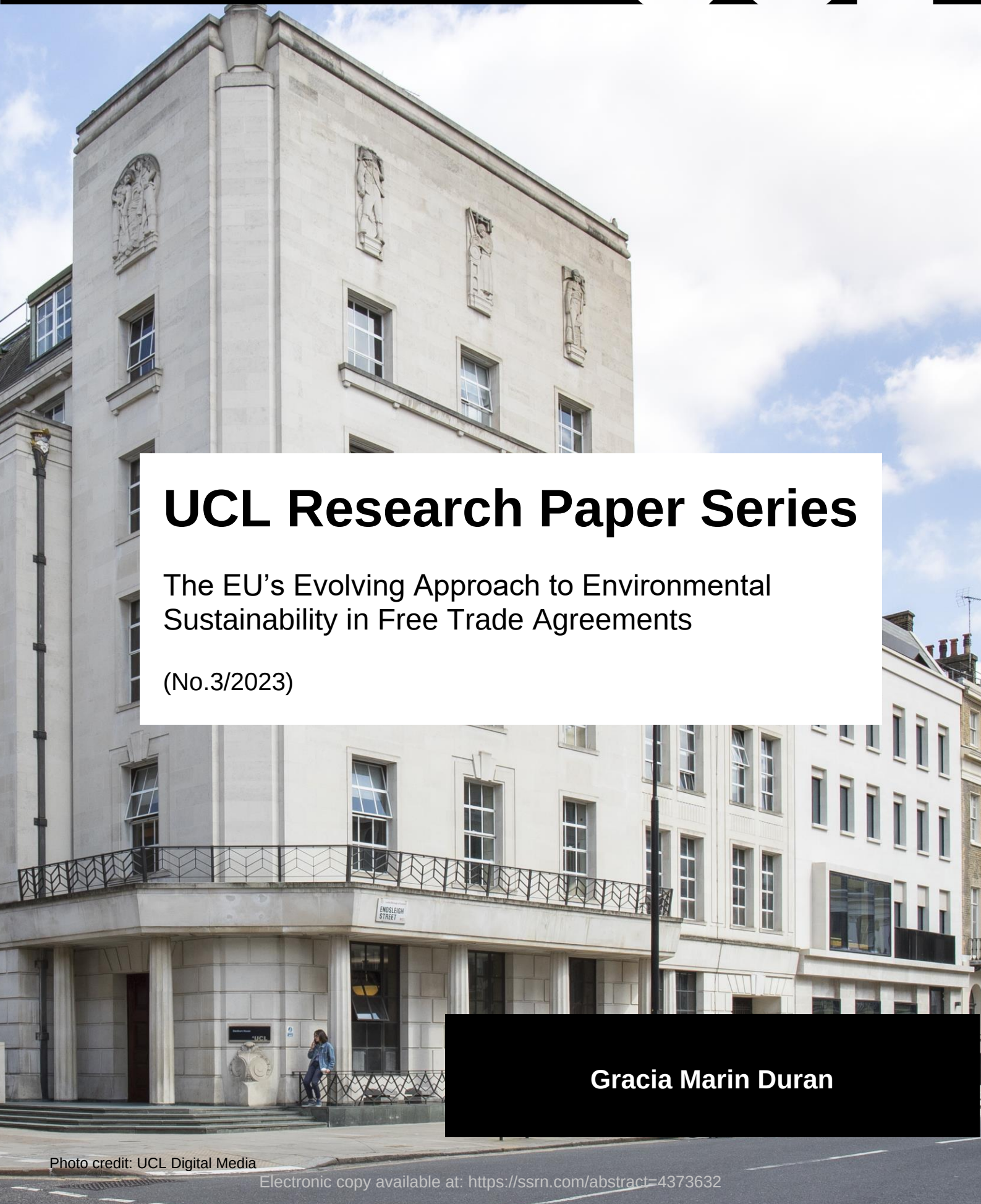

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The EU's Evolving Approach to Environmental Sustainability in Free Trade Agreements

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THE EU'S EVOLVING APPROACH TO ENVIRONMENTAL SUSTAINABILITY IN FREE TRADE AGREEMENTS

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Abstract: With the entry into force of the Lisbon Treaty, the promotion of sustainable development became a constitutional imperative for the EU in its relations with third countries. A practical manifestation of this has been the inclusion of environmental (and labour) provisions in the comprehensive free trade agreements (FTAs) concluded by the EU since 2010, which have sought to advance a distinct 'promotional' model for regulating trade-environment (and trade-labour) linkages in FTAs. However, the more recent agreements with the United Kingdom and New Zealand signal a paradigm shift in the EU's approach to promoting environmental sustainability in FTAs. This paper examines such an evolution in EU FTA practice with regards to both substantive environmental commitments and monitoring and enforcement mechanisms. In doing so, it discusses some of the key challenges that have emerged in terms of policy ambition and compliance.

Keywords: environmental sustainability; sustainable development; free trade agreements; sanction-based enforcement; level playing field; effectiveness; fairness

1. Introduction

While there is broad consensus that international trade should support sustainable development,[1] how exactly environmental (and social) concerns should be integrated into trade agreements has long been a matter of contention. For the European Union (EU), the promotion of sustainable development through its external trade policy became a constitutional imperative with the entry into force of the Lisbon Treaty.[2] A practical manifestation of this are the so-called 'Trade and Sustainable Development' (TSD) chapters, which have been a standard component of the comprehensive free trade agreements (FTAs) concluded by the EU with developed and developing countries since 2010. These TSD chapters are heralded as a central part of the EU's 'value-based' trade policy, where 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 itself. In doing so, the EU has sought to depart from the pre-existent policy practice by the United States (US) and Canada, and to develop a distinct model for regulating trade-environment linkages in FTAs. In essence, the EU's approach has been more ambitious in terms of substantive commitments on environmental sustainability but less coercive with regards to their enforcement, notably by excluding the use of economic sanctions as a remedy in cases of infringement. However, after defending this 'promotional' model for a

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[1] United Nations (UN) General Assembly, 'Transforming Our World: The 2030 Agenda for Sustainable Development' UN Doc/A/RES/70/1, 25 September 2015, paras 17.10–17.12. This paper focuses on environmental protection as an integral pillar of sustainable development. It does not deal with social protection due to space constraints.

[2] Treaty on the European Union, arts 3(5) and 21; Treaty on the Functioning of the European Union (TFEU), art 207(1).

decade, post-2020 FTAs concluded by the EU are gradually marking a paradigm shift in relation to the enforcement of sustainability commitments.

This article traces the evolution of environmental provisions in EU FTAs, from the earlier new-generation agreements (starting with the 2010 EU-Korea FTA),[3] to the 2020 EU-UK Trade and Cooperation Agreement (TCA)[4] and the most recent 2022 EU-New Zealand FTA.[5] This comparative analysis seeks to pinpoint the main innovations with respect to both substantive commitments on environmental sustainability (Section 2.1) and institutional mechanisms for their implementation and enforcement (Section 2.2). The paper also discusses the thorny issue of enforcing environmental provisions in EU FTAs through economic sanctions. It challenges the seemingly conventional wisdom that such a sanction-based enforcement is warranted from an effectiveness perspective, and argues that its implementation raises a number of legal challenges as well as serious equity concerns (Section 3).

2. Evolution of Environmental Provisions in EU FTAs

2.1 Substantive Commitments

2.1.1 TSD Chapters in New-Generation FTAs (2010 – 2020)

Beginning with the 2010 EU-Korea FTA,[6] EU free trade agreements[7] have recurrently included dedicated TSD chapters, which contain a number of substantive and institutional provisions in respect of environmental (and labour)[8] protection. While there is some variation across agreements, all TSD chapters share three main types of substantive commitments.[9]

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[3] Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, signed on 15 October 2011, O.J. 2011 L 127/6 [EU-Korea FTA].

[4] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, O.J. 2021 L149/10, signed on 30 December 2020 [EU-UK TCA].

[5] Free Trade Agreement between the European Union and New Zealand, signed on 30 June 2022 [EU-New Zealand FTA], https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/new-zealand/eu-new-zealand-agreement/text-agreement_en (accessed 8 February 2023).

[6] Technically, the 2008 EU-CARIFORUM Economic Partnership Agreement was the first to include legally-binding environmental provisions, but these differ in some respects from the dedicated TSD chapters in subsequent EU FTAs and will not be examined here.

[7] In this paper, the term 'free trade agreement' is used for simplicity, even though EU agreements have different terminology. Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, signed on 26 June 2012, O.J. 2012 L 354/21 [EU-COPE FTA]; Comprehensive Economic and Trade Agreement between Canada, of the one part, and the EU and its Member States, of the other part, signed on 30 October 2016, O.J. 2017 L 11/23 [EU-Canada FTA]; Agreement between the European Union and Japan for an Economic Partnership, signed on 6 July 2017, O.J. 2018 L330/3 [EU-Japan FTA]; Free Trade Agreement between the European Union and the Republic of Singapore, signed on 19 October 2018, O.J. 2019 L 294/3 [EU-Singapore FTA]; Free Trade Agreement between the European Union and the Socialist Republic of Vietnam, signed on 30 June 2019, O.J. 2020 L 63/3 [EU-Vietnam FTA]; Agreement amending the Association Agreement between the EU and its Member States, of the one part, and Mexico, of the other part, agreed in principle on 21April 2018 [EU-Mexico FTA], https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mexico/eu-mexico-agreement_en (accessed 8 February 2023); EU-Mercosur Trade Agreement, agreed in principle on 28 June 2019 [EU-Mercosur FTA], https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mercosur/eu-mercosur-agreement_en (accessed 8 February 2023).

[8] Due to space constraints, this paper only covers environmental provisions.

[9] In addition to these core commitments, TSD chapters include provisions on specific environmental issues (e.g., trade and climate change, biodiversity conservation and illegal trade in endangered species, sustainable forest management and trade in illegally harvested timber, sustainable fisheries management, fossil fuel subsidy reform).

The first category is based on international environmental standards and may be defined as 'minimum-level' clauses. These demand each FTA party to effectively implement in their domestic laws and practices the multilateral environmental agreements (MEAs) that they have each ratified.[10] These provisions add nothing substantively new, just incorporate pre-existing environmental commitments that are already binding on each FTA party under the relevant MEAs. Nonetheless, they are significant for promoting global environmental sustainability in a wide sense, even where bilateral trade and investment are not affected. In other words, they establish a minimum baseline of environmental protection that ought to be respected across each party's territory, irrespective of any trade (or investment) effects. However, the content of that minimum regulatory floor will vary from party to party, depending on the MEAs it has actually ratified. Unlike for social protection, there is no internally-agreed list of 'core' MEAs similar to the core labour standards enshrined in the International Labour Organisation (ILO)'s Declaration on Fundamental Principles and Rights at Work and associated ILO Conventions,[11] which all FTA parties are under an obligation to ratify and effectively implement.[12] Nonetheless, there are some global MEAs with quasi-universal acceptance that have been ratified -and hence, ought to be effectively implemented- by all FTA parties, including in the areas of climate change (1985 Vienna Convention for the Protection of the Ozone Layer[13] and its 1987 Montreal Protocol;[14] 1992 United Nations Framework Convention on Climate Change[15] and its 2015 Paris Agreement[16]), biodiversity conservation (1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora;[17] 1992 Convention on Biological Diversity[18]), and hazardous substances and waste (1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal;[19] 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade;[20] 2001 Stockholm Convention on Persistent Organic Pollutants[21]).

The second kind of commitments concerns existing domestic environmental legislation more broadly (i.e., above and beyond that implementing international standards) and take the form of 'non-derogation and effective enforcement' clauses. These provide that FTA parties

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There is disparity across EU FTAs on the content of these provisions and a detailed examination is outside the scope of this paper. For an overview, see Velut 2022, pp 48-50.

[10] E.g., EU-Korea FTA, art 13.5(2); EU-Singapore FTA, 12.6(2); EU-Canada FTA, art 24.4; EU-Japan FTA, art. 16.4(2); EU-Mercosur FTA, art. 14.5(3).

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

[12] E.g., EU-Singapore FTA, art 12.3(3); EU-Japan FTA, art 16.3(2); EU-COPE FTA, art 269(3).

[13] Vienna Convention for the Protection of the Ozone Layer, adopted 22 March 1985, 1513 UNTS 293.

[14] Montreal Protocol on Substances that Deplete the Ozone Layer, adopted 16 September 1987, 1522 UNTS 3.

[15] United Nations Framework Convention on Climate Change, adopted 4 June 1992, 1771 UNTS 107.

[16] Paris Agreement (PA), adopted 12 December 2015, 3156 UNTS.

[17] Convention on International Trade in Endangered Species of Wild Fauna and Flora, adopted 3 March 1973, 993 UNTS 243.

[18] Convention on Biological Diversity, adopted 5 June 1992, 1760 UNTS 79.

[19] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, adopted 22 March 1989, 1673 UNTS 57.

[20] Rotterdam Convention on Prior Informed Consent for Certain Hazardous Chemicals and Pesticides, adopted 10 September 1998, 2244 UNTS 337.

[21] Stockholm Convention on Persistent Organic Pollutants, adopted 22 May 2001, 2256 UNTS 119.

shall not waive or derogate, nor fail to effectively enforce, their environmental laws 'in a manner affecting [bilateral] trade or investment',[22] or in some agreements, 'to encourage [bilateral] trade or investment'.[23] Hence, these provisions do not prohibit any derogation or enforcement failure of domestic environmental standards, but only insofar as actual or intended effects on bilateral trade (or investment) can be shown, making a violation thereof harder to establish. In either case, the trade condition reflects the economically driven rationale behind these clauses. Their most immediate, direct goal is to avoid perceived 'unfair' competitive advantages that an FTA party could enjoy through undercutting its levels of environmental protection and thereby ensure a 'level playing field' in bilateral trade (and investment) relations – even if, *indirectly*, this may also preserve the global environment.

The third type of clauses relate to current and future levels of environmental protection in domestic laws but, unlike the other two sets of commitments, do not enshrine mandatory obligations. Each FTA party 'shall seek',[24] or 'shall strive',[25] to ensure that their laws and policies provide for 'high levels' of environmental protection and to continue to improve them over time. This aspirational and imprecise language allows for different levels of compliance and, arguably, renders these provisions difficult to implement and enforce in practice. However, they are not entirely meaningless: 'an overt weakening' of existing environmental laws 'could hardly be said to be consistent with striving to improve these standards'.[26]

2.1.2 Environment and Climate Chapter in EU-UK TAC (2020)

The TCA was bound to be different from all other EU FTAs since it governs the new relationship between the Union and a former Member State and, hence, was concluded in a very peculiar context of pre-existing deep levels of integration and regulatory convergence, including in the environmental field. Environmental provisions are mainly found in a novel title on 'Level Playing Field for Open and Fair Competition and Sustainable Development', which also includes rules on competition policy, subsidy control, taxation and social protection, and which proved particularly contentious to negotiate.[27] This seeks to address the EU's concerns over the UK's new 'freedom' to adopt divergent regulatory standards in the relevant areas and was set as a pre-condition for maintaining unfettered 'zero-tariff and zero-quota' UK access to the EU market.[28] As such, while the environmental commitments of the TCA are largely similar in some respects (e.g., the minimum-level clause requiring compliance with ratified MEAs)[29] when compared to regular EU FTAs, they are more ambitious in others.

First, the EU and UK are prohibited from 'weaken[ing] or reduc[ing], in a manner affecting [bilateral] trade or investment' their respective levels of climate/environmental protection 'below the levels that [were] in place at the end of the transition period', including by failing to effectively enforce their climate/environmental laws.[30] This key non-regression obligation is broader in scope than the 'non-derogation and effective enforcement' clauses previously examined, in that it covers *any* weakening or reduction of domestic levels of

[22] E.g., EU-Singapore FTA, art 12.12.
[23] EU-Canada FTA, arts 23.4-23.5; EU-Mexico FTA, art 27.2(3)-(5); EU-Mercosur FTA, art 14.2(3)-(5). Some FTAs combine both formulations, either making clear that 'encouragement' is dependent upon actual trade effects being shown (EU-Korea FTA, art. 13.7(2); EU-Japan FTA, art. 16.2(2)), or independently from each other (EU-COPE FTA, art 277(1)-(2)).
[24] E.g., EU-Korea FTA, art 13.13; EU-Canada FTA, art 24.3.
[25] E.g., EU-Singapore FTA, art. 12.2(2); EU Japan FTA, art 12.2(1); EU-COPE FTA, art 268.
[26] Bartels 2013, p 308.
[27] EU-UK TCA, Title XI, Chapters 2-6; and for an overview, Peers 2022, pp 62-66.
[28] Leonelli 2021, p 614.
[29] EU-UK TCA, art 400(2).
[30] EU-UK TCA, art 391(2).

environmental protection, and not just waivers or derogations from domestic environmental laws and sustained or recurring non-enforcement.[31] At the same time, a violation of the non-regression obligation in the TCA is similarly conditioned on demonstrating trade/investment effects. This means that a lowering from the common levels of climate/environmental protection that prevailed at the end of the transition period is permitted as long as it does not affect the economic level playing field between the EU and the UK.[32]

Second, the TCA provides for a 'rebalancing mechanism', which may be triggered in cases of divergence in future environmental (and other regulatory) standards between the EU and the UK, and which is unprecedented in EU FTAs. Either party may take rebalancing measures (including trade sanctions) if '*material impacts* on [bilateral] trade or investment … are arising as a result of *significant* divergences between the Parties'[33] in the areas of environmental and social protection, as well as subsidy control. Such measures 'shall be restricted with respect to their scope and duration to what is strictly necessary and proportionate in order to remedy the situation',[34] and their adoption is subject to specific procedural requirements.[35] While the TCA thus provides for economic remedies should 'significant' divergences in EU/UK levels of environmental protection arise in the future, it sets a higher trade-related threshold ('material impacts') than that enshrined in the non-regression clause. Hence, the burden of proof is likely to be even harder to discharge in practice for the party seeking to adopt such rebalancing measures.[36]

Third, the fight against climate change is elevated to constituting one of the 'essential elements' of the EU-UK partnership established by the TAC `and any supplementing agreements.[37] More specifically, each party is obliged to 'refrain from acts or omissions that would materially defeat the object and purpose of the Paris Agreement'.[38] A breach of this essential obligation is subject to a special procedure potentially leading to fast-track termination or suspension of the TCA (or any supplementing agreement), partly or wholly.[39] However, in practice, the EU has only triggered this type of 'essential elements' clauses (concerning respect for democratic principles and human rights) on limited occasions under regular FTAs.[40]

2.1.3 TSD Chapter in EU-New Zealand FTA (post-2022)

At the time of writing, the EU-New Zealand FTA is the most recently concluded agreement incorporating a TSD chapter, and followed the review process on the implementation and enforcement of these chapters launched by the Commission in June 2021.[41] As under previous FTAs, the parties 'shall effectively implement' those MEAs that they have each ratified (minimum-level clause).[42] Similarly, each party 'shall strive to ensure that its relevant law and policies provide for, and encourage, high levels of environmental [and labour] protection, and

[31] Bronckers and Gruni 2021, p 32.
[32] Leonelli 2021, p 625.
[33] EU-UK TCA, art 411(2) (emphasis added).
[34] Ibid.
[35] Ibid, art 411(3).
[36] Leonelli 2021, pp 632-633.
[37] EU-UK TCA, art 771.
[38] Ibid, art 764 (1).
[39] Ibid, art 772(1) and (4).
[40] Peers 2022, p 53-54; Bartels 2013, p 299-305.
[41] European Commission, 'Communication on the Power of Trade Partnerships: Together for Green and Just Economic Growth' COM(2022) 409 final, 29 June 2022 [Commission Communication 2022].
[42] EU-New Zealand FTA, art 19.5(2).

shall strive to improve such levels, law and policies'.[43] The aspirational wording of this clause makes it legally weaker and harder to enforce in practice. But compared to other regular FTAs, one change is noticeable in terms of ensuring no back-pedalling in existing levels of protection under domestic environmental laws. That is, the 'non-derogation and effective enforcement' clause[44] is reinforced by a broader and legally-biding non-regression obligation: '[a] Party shall not weaken or reduce the levels of protection afforded in its environmental law *in order to encourage* trade or investment'.[45] Here, a breach of the non-regression obligation is conditioned upon demonstrating an *intention* of encouraging trade (or investment), rather than an *actual* effect on trade (as under the EU-UK TCA), but it is unclear which one would be easier to establish in practice.

To recap, the evolution of substantive environmental provisions under EU FTAs since 2010 has mainly centred on strengthening the guarantees against a weakening of domestic environmental laws for competitive purposes, which is most evident in the TCA given the close economic interdependence and geographical proximity between the EU and the UK. As illustrated in Table 1 below, the broader reach of non-regression obligations under both the EU-UK TCA and EU-New Zealand FTA has been closely tied to proven impacts on bilateral trade or investment, reflecting the narrow focus of these clauses on safeguarding an economic level playing field.

Table 1 – Substantive Environmental Provisions in EU FTAs (2010-2022)

<table>
<tr><th>Agreement</th><th>Minimum-level clause</th><th>High-level Clause</th><th>Non-derogation/non-enforcement clause</th><th>Non-regression clause</th><th>Rebalancing clause</th></tr>
<tr><td rowspan="3">2010-2020 FTAs</td><td>Effective implementation of ratified MEAs</td><td>'High levels' of protection in domestic environmental laws</td><td>No derogation or lack of enforcement of domestic environmental laws</td><td rowspan="3">Not included, or legally weak[46]</td><td rowspan="3">Not included</td></tr>
<tr><td>Mandatory Obligation</td><td rowspan="2">Aspirational commitment, violation difficult to establish</td><td>Mandatory obligation</td></tr>
<tr><td>Not conditioned on trade/investment related effects</td><td>Violation conditioned on actual/intended effects on trade or investment</td></tr>
<tr><td rowspan="2">EU-UK TCA (2020)</td><td rowspan="2">Same as above</td><td rowspan="2">Same as above</td><td rowspan="2">Same as above</td><td>No weakening of domestic environmental laws</td><td>Rebalancing measures may be adopted if 'significant' divergences in domestic environmental laws</td></tr>
<tr><td>Mandatory obligation</td><td>Discretionary right</td></tr>
</table>

[43] Ibid, art 19.2(2).
[44] Ibid, arts 19.2(4)-(5).
[45] Ibid, art 19.2(3) (emphasis added).
[46] Where included in previous FTAs, non-regression clauses were significantly weaker, using aspirational rather than mandatory language: Leonelli 2021, pp 622-624.

				Violation conditioned on actual/intended effects on trade or investment	Adoption of rebalancing measures conditioned on 'material impacts' on trade/investment
EU-New Zealand FTA (2022)	Same as above	Same as above	Same as above	Same as EU-UK TCA	Not included

2.2 Implementation and Enforcement Provisions

2.2.1 New-Generation FTAs (2010 – 2020)

All EU FTAs concluded during the period 2010-2020 set up specific institutional mechanisms for the implementation and enforcement of TSD chapters. A specialised body, named Committee or Board on Trade and Sustainable Development and made up of senior representatives from each party, is assigned with the task of overseeing the implementation of the TSD chapter and guiding further bilateral cooperation in this area.[47] 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.[48] 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.[49] Despite this emphasis on stakeholder participation in the monitoring of TSD chapters, there is no formal requirement upon the parties to follow up on the submissions received, and the operation of these mechanisms has met considerable criticism for lack of accountability and transparency.[50]

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 FTAs[51] (with the exception of the EU-CARIFORUM EPA).[52] Pursuant to this self-contained system of dispute settlement, the parties

[47] E.g., EU-Korea FTA, art 13.12(2)–(3); EU-Singapore FTA, art 12.15(2)–(3); EU-COPE FTA, art 280; EU-Canada FTA, art 22.4.
[48] E.g., EU-Korea FTA, art 13.12(4)–(5); EU-Singapore FTA, art 12.15(5); EU-COPE FTA; art 281; EU-Canada FTA, art 24.13(5); EU-Japan FTA, art 16.15.
[49] E.g., EU-Korea FTA, art 13.13; EU-Singapore FTA, art 12.15(4); EU-COPE FTA, art 282; EU-Canada FTA, art 22.5; EU-Japan FTA, art 16.16.
[50] For a careful analysis, see Prévost and Alexovicova 2019, pp 244-48.
[51] E.g., EU-Korea FTA, art 13.16; EU-Singapore FTA, art 12.16(1); EU-COPE FTA, art 285(5); EU-Canada FTA, art 24.16; EU-Japan FTA, art 16.17(1); EU-Mexico FTA, art 27.15; EU-Mercosur FTA, art 14.15(5).
[52] The EU-CARIFORUM EPA differs from other EU FTAs in that the regular dispute settlement procedure applies to matters arising out of the TSD chapter, although trade sanctions are ruled out for breaches of trade/environment

are first required to seek a mutually satisfactory resolution of the matter through governmental consultations.[53] Where these initial consultations 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. The Panel is to issue a final report within the established timeframe, with findings as to whether there has a failure to comply with the relevant obligations and (non-binding) recommendations for the resolution of the matter, which is to be made public unless the parties agree otherwise. In its deliberations, the Panel may seek information and advice from (*inter alia*) multilateral environmental organisations and private stakeholders. The follow-up to the Panel's report is to be monitored by the joint Board or Committee on Trade and Sustainable Development, and private stakeholders may submit observations in this regard.[54]

While stakeholder involvement is thus favoured in the dispute settlement process, there is no formal requirement to act upon any such submission. At the domestic level, the EU has taken some steps to improve stakeholder involvement in the enforcement of TSD chapters, including the creation of a 'Single Entry Point' (SEP) in November 2020 under the remit of the Chief Trade Enforcement Officer (CTEO) in the Commission's Directorate General for Trade. The SEP provides a centralised contact point for EU-based stakeholders (e.g., industry associations, trade unions or non-governmental organisations) to lodge individual or collective complaints (including through Domestic Advisory Groups) on violations of TSD commitments, which are handled by the CTEO. However, stakeholder use of this new system to raise TSD-related concerns has been limited to date.[55]

These institutional provisions reflect the EU's promotional approach towards compliance with environmental sustainability commitments in 2010-2020 FTAs, relying on inter-party dialogue and third-party adjudication, but ruling out the possibility of imposing economic sanctions (in the form of fines or withdrawal of trade concessions) in cases of non-compliance with the report of the Panel of Experts. Against this backdrop, the EU-UK TCA and the EU-New Zealand FTA signal a shift in the EU's approach to the enforcement of environmental sustainability commitments.

2.2.2 EU-UK TAC (2020)

The EU-UK TCA largely retains the model of providing for dedicated institutional mechanisms with regards to both the implementation of environmental sustainability provisions (overseen by the joint Trade Specialised Committee on Level Playing Field for Open and Fair Competition and Sustainable Development)[56] and dispute settlement (involving inter-governmental consultations and independent review by a Panel of Experts),[57] but introduces two main innovations. First, it provides more detailed rules on the compliance stage following the issuance of the Panel report, including possible review by the Panel of any measures taken

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).

[53] E.g., EU-Korea FTA, art 13.14; EU-Singapore FTA, art 12.16(2)-(6); EU-COPE FTA, art 283; EU-Canada FTA, art 24.14; EU-Japan FTA, art 16.17(2)-(5); EU-Mexico FTA, art 27.16; EU-Mercosur FTA, art 14.16

[54] E.g., EU-Korea FTA, art 13.15; EU-Singapore FTA, art 12.17; EU-COPE FTA, arts 284-285; EU-Canada FTA, art 24.15; EU-Japan FTA, art. 16.18; EU-Mexico FTA, art 27.17; EU-Mercosur FTA, art 14.17.

[55] Commission Communication 2022, p 9. See also the amendments to the EU Trade Enforcement Regulation: Regulation (EU) 2021/167 of the European Parliament and of the Council of 10 February 2021concerning the exercise of the Union's rights for the application and enforcement of international trade rules, O.J. 2021 L49/2, para 10.

[56] EU-UK TCA, art 8(j).

[57] EU-UK TCA, arts 408-409.

by the defaulting party to address non-conformity with the agreement.[58] Second, temporary remedies for breach under the general dispute settlement rules are available in disputes concerning the non-regression clause[59] – but *not* other environmental provisions of the TCA.[60] In cases where the Panel finds a violation of the non-regression obligation, the disputing parties may agree on compensation.[61] Failing this, and where no measure is taken to comply with the Panel report, the winning party may retaliate against the losing party through the suspension of trade concessions.[62] There are, however, limits to such trade retaliation which are similar to those found under the dispute settlement rules of the World Trade Organisation (WTO), including that it shall be proportionate.[63]

It is important to note that this trade retaliation as means of inducing compliance with the non-regression obligation is distinct from the trade measures that may be adopted under the rebalancing mechanism of the TCA discussed earlier. The latter are not temporary remedies (or countermeasures) for a prior breach of TCA environmental obligations, but just rebalancing measures to offset the (material) impacts on bilateral trade/investment that may result from future (significant) divergences in EU/UK levels of environmental protection.[64] Notably, such regulatory divergence may take the form of one party raising its level of environmental protection vis-à-vis that existing at the end of the transition period, while the other does not. Yet, none of these actions would itself be inconsistent with the TCA.

2.2.3 EU-New Zealand FTA (post-2022)

The EU-New Zealand FTA is broadly similar to other regular FTAs when it comes to monitoring the implementation of TSD commitments (by a joint specialised Committee on Trade and Sustainable Development)[65] and stakeholder involvement mechanisms at the domestic and transnational levels.[66] However, it is the first agreement to incorporate the 'more assertive' approach to enforcement proposed by the Commission following the 2021 review process of TSD chapters. Breaking with previous practice, the EU-New Zealand FTA brings disputes arising under the TSD chapter into the general dispute settlement mechanism established the agreement.[67] This sets out the two-stage process of inter-governmental consultations and Panel review procedures in substantially more detail when compared to the dedicated method for settling TSD disputes under previous FTAs. But the key difference between the two mechanisms lies in what happens at the compliance stage, after infringement findings have been made in the Panel's final report. Under the EU-New Zealand FTA, there is no ambiguity that the Panel's findings and recommendations in relation to TSD provisions are legally binding, and the defaulting party shall promptly take the necessary measures to comply with them.[68] The specialised Committee on Trade and Sustainable Development is responsible for monitoring the implementation of such compliance measures.[69] If the parties disagree over

[58] Ibid., art 409(18). See, however, art 409(9) suggesting that, if the Panel makes specific recommendations for the resolution of the matter, these are non-binding on the defaulting party: '[f]or greater certainty, the Parties share the understanding that if the Panel makes recommendations in its report, the respondent Party does not need to follow these recommendations in ensuring conformity with this Agreement.'
[59] Ibid, arts 410(2).
[60] Ibid, art 409(19).
[61] Ibid, art 749(1)
[62] Ibid, art 749 (2)-(3).
[63] Ibid, art 749(5); and for discussion, Peers 2022, p 73-78.
[64] EU-New Zealand FTA, art 411.
[65] Ibid, arts 24.4.1(e) and 24.4.6.
[66] Ibid, arts 24.6 (on Domestic Advisory Groups) and 24.7 (on Civil Society Forum).
[67] Ibid, art 26.2.
[68] Ibid, art 26.13.1.
[69] Ibid, art 26.13.3(b).

the existence or consistency of these measures with the relevant provisions of the agreement, independent review by the Panel is available.[70] In cases of non-compliance within the arranged period of time,[71] the general temporary remedies (i.e., compensation and trade retaliation) are only applicable to one specific breach of environmental provisions -namely, 'the Party complained against failed to refrain from any action or omission that *materially defeats the object and purpose* of the Paris Agreement' (PA clause).[72]

This provision is puzzling for a number of reasons. First, the Commission fails to explain why it considers that the use of trade sanctions is appropriate as a remedy of last resort to foster compliance with the Paris Agreement, but presumably not for other MEAs.[73] This is surprising because the imposition of trade sanctions is not available as a penalty for non-compliance under the Paris Agreement itself, nor more generally under MEAs with few exceptions (e.g., CITES and Montreal Protocol).[74]

Second, it is unclear what the terms 'materially defeats the object and purpose' of the Paris Agreement actually imply. The central purpose of the Paris Agreement is stipulated in Article 2 as 'strengthen[ing] the global response to the threat of climate change', and further defined in more specific aims for mitigation ('holding the increase in the global temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels'),[75] adaptation ('increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development')[76] and finance ('making finance flows consistent with a pathway towards low greenhouse emissions and climate-resilient development').[77] However, which individual actions (or omissions) would materially defeat such an object and purpose is far less clear. For instance, in relation to mitigation, each party is under an obligation (of conduct) to 'prepare, communicate and maintain' nationally determined contributions (NDCs) 'with a view to achieving' the long-term temperature goal of the agreement.[78] Yet, there are no mandatory obligations on the substance or stringency of such NDCs – just a normative expectation that each successive NDC represents a 'progression' and reflects the 'highest possible ambition', which each party is left to determine 'in light of different national circumstances'.[79] Arguably, a party's complete failure to submit an NDC, or to comply with its self-determined mitigation commitments therein, would likely meet the threshold of materially defeating the object and purpose of the Paris Agreement. But the key question is which other actions (or omissions) may also meet that standard.[80] The term '*materially* defeating' sets a high bar,[81] and is likely

[70] Ibid, art 26.15.2.
[71] Ibid, art 26.14.
[72] Ibid, art 26.16.2 (emphasis added).
[73] Commission Communication 2022, p 11.
[74] UN Environment Programme, Compliance Mechanisms under Selected Multilateral Environmental Agreements, 2007, pp 118–9 (Table 3.5).
[75] Art 2.1(a) PA.
[76] Art 2.1(b) PA.
[77] Art 2.1(c) PA.
[78] Arts 3 and 4(2) PA.
[79] Art4(3) PA; and for discussion, Rajamani 2016, pp 500-501; Voigt and Ferreira 2016, pp 295-297.
[80] A combined reading of Articles 19.6.2 and 19.6.3 of the EU-New Zealand FTA suggests it goes beyond effective implementation of NDCs.
[81] Arguably higher than the obligation in Article 18 of the Vienna Convention on the Law of Treaties (VCLT), adopted on 23 May 1969, 1155 UNTS 331, not to defeat the object and purpose of a treaty prior to its entry into force.

to be confined to serious violations of provisions that are essential to the accomplishment of the object and purpose of the Paris Agreement.[82]

Third, from a global governance standpoint, a question arises as to whether it would be appropriate for an FTA Panel to determine when a party's action (or inaction) materially frustrates the object and purpose of the Paris Agreement, without any guidance from the multilateral climate regime on the matter. In principle, it is true that an FTA Panel may request information from the relevant MEAs when deciding bilateral disputes concerning compliance with multilateral agreements.[83] But in practice, such an advice is likely to be quite limited in the context of the Paris Agreement. This is because the key oversight mechanism established under this agreement (the so-called 'Global Stocktake') is only authorised to assess collective progress towards meeting the global warming targets, thereby insulating individual parties from any assessment as to the adequacy of their mitigation action under NDCs.[84] In this regard, climate-related commitments are in a distinct position when compared to core labour standards included in TSD chapters, where an FTA Panel may rely on the fact that the ILO supervisory system does monitor the application of ratified conventions in individual members.[85]

3. Towards a Harder Sanction-based Enforcement?

As exposed in the previous section, recent EU FTAs have marked a significant shift in the approach towards the enforcement of environmental sustainability commitments at two levels. First, in institutional terms, the EU-New Zealand FTA abandons the separate procedures for settling disputes concerning the TSD chapter and fully integrates them into the general dispute mechanism applicable to whole agreement. This alignment of dispute settlement arrangements is a welcome step, as it remedies the fact that the earlier TSD-dedicated dispute settlement procedures lacked detailed rules on the compliance stage. However, it is important that the specificities raised by trade-and-environment disputes continue to be duly accounted for in the general dispute settlement procedures -e.g., in terms of ensuring subject-matter expertise in the Panel's composition and consultation with competent monitoring bodies under relevant MEAs.[86]

More problematic is the second innovation, which concerns the use of economic sanctions as a temporary remedy in cases of non-compliance with *selected* (not all) environmental sustainability commitments -i.e., the non-regression obligation in the EU-UK TCA and the PA clause in the EU-New Zealand FTA. The Commission justifies this move as a response to the open public consultation (OPC) it conducted,[87] as well as the independent comparative study on TSD provisions in FTAs it requested,[88] as part of the 2021 review of TSD chapters.[89] Yet, a closer look at these two documents does not reveal a clear-cut case in favour of introducing economic sanctions as an enforcement tool for environmental sustainability commitments. Notably, among the 71 total stakeholders (largely EU-based) participating in the OPC, the majority of trade unions (11 respondents in total) and non-

[82] A parallel may be drawn with 'material break' under the VCLT as a ground for terminating (in whole or in part) a treaty and its definition in Article 60(3)(b). On this high threshold, see *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, [1997] ICJ Reports, p 7.
[83] EU-New Zealand FTA, art 26.21(3).
[84] Art 14 PA. This is complemented by a transparency framework (art 13) and a compliance mechanism that is facilitative, non-adversarial and non-punitive in character (art 15). For an overview of this oversight system, see Rajamani 2016, pp 502-505.
[85] ILO Constitution, art 22 (reporting procedure) and arts 24–34 (representation and complaints procedures).
[86] This has been the case in the EU-New Zealand FTA, arts 26.7(3) and 26.21(3).
[87] LSE Consulting 2021.
[88] Velut JB et al 2022.
[89] Commission Communication 2022, p 1.

governmental organisations (20 respondents in total) were in favour of sanctions, whereas most business associations (26 respondents in total) were against them and public authorities (4 respondents in total) were split on the question.[90] These responses reflect a continued absence of consensus on a sanction-based enforcement model for TSD chapters, just in the previous OPC run by the Commission in 2017, which had then led it to conclude that a move towards such an approach was 'impossible'.[91] Similarly, the independent comparative study does not take a clear position on the suitability of compliance approaches, and notes that 'even for sanction-based enforcement models like in Canada and the US, cooperation remains the watchword for the implementation of TSD provisions'.[92] Therefore, the real motivations behind the Commission's change of perspective on the issue of sanctions remain obscure.

Nonetheless, it is true that the suitability of the EU's traditional cooperative approach to compliance with TSD provisions in earlier FTAs has attracted criticism in academic and institutional circles for being too 'soft' and ineffective in enhancing global environmental governance. In particular, the European Parliament[93] and some scholars have argued in favour of a 'harder' enforcement of TSD commitments, including by adding economic sanctions as a remedy of last resort in far-reaching cases of non-compliance.[94] The underlying assumption behind these calls seems to be that such retaliatory economic measures can be more effective at inducing compliance with TSD commitments by recalcitrant trade partners where dialogue and cooperation have failed to do so. Such an assumption, however, is questionable on several grounds. First, the availability of sanctions as a remedy does not necessarily mean that environmental (or labour) complaints will be pursued more frequently to the phase of dispute settlement under FTAs. In fact, FTA practice thus far suggests otherwise. The EU has made more assertive use of dispute settlement procedures (with no economic sanctions) under TSD chapters in 12 years of practice (i.e. the 2018 labour dispute under the EU-Korea FTA),[95] than the US and Canada did to enforce environmental and labour commitments through the dispute settlement mechanisms (with economic sanctions) under their respective FTAs in over 20 years of practice since North American Free Trade Agreement was concluded (i.e. equally one labour arbitration so far under the US-CADR FTA).[96] Second, empirical evidence on the presumed compliance-inducing effect of economic sanctions is scant and at best mixed. Even if one looks at the WTO system where practice has been more extensive when compared to FTAs, trade retaliation has been requested and authorised only in a handful of WTO cases (12 disputes as of December 2020), actually implemented in an even smaller number of cases, 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.[97] Conversely, the EU's traditional cooperative approach

[90] LSE Consulting, pp 4 and 10.
[91] 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 February 2018 [Commission Non-Paper 2018], p 3.
[92] Velut JB et al 2022, p 18.
[93] See e.g., 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), paras 21–22.
[94] See notably, Bronckers and Gruni 2021; Mazzotti 2021. This view is not unanimously shared in the literature. For a contrary view, see e.g. Prévost D and Alexovicova 2019; Hradilovà and Svoboda 2018.
[95] *Panel of Experts Proceedings Constituted under Article 13.15 of the EU-Korea Free Trade Agreement – Report of the Panel*, 20 January 2021.
[96] *In the matter of Guatemala – Issues relating to the Obligations under Article 16.2.1(a) of the CAFTA-DR – Final Report of the Panel*, 14 June 2017.
[97] In other cases, 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 December 2015.

turned out be successful in the 2018 EU-Korea labour dispute. As showcased in the Commission's 2021 FTA Implementation Report, within one month of the issuance of the Panel of Experts' final report in January 2021, Korea took concrete steps to address infringement findings through amendments to its domestic labour legislation and the ratification of 3 of the 4 pending fundamental ILO Conventions.[98]

But leaving aside the issue of effectiveness, enforcing environmental sustainability commitments through economic sanctions raises a number of legal and policy challenges. First, as the Commission has itself recognised, most EU negotiating partners 'would not accept a broad scope [of TSD chapters] combined with trade sanctions.'[99] Hence, there seems to be an unavoidable trade-off between the breadth of environmental obligations and their enforceability through economic sanctions. Looking at EU and US FTA practice, trade retaliation is only available as a remedy for breaches of a narrow set of environmental obligations, and subject to high thresholds.[100] As seen above, a violation of the non-regression clause in the EU-UK TCA is conditioned on demonstrating trade/investment effects, whereas the PA clause in the EU-New Zealand FTA is confined to actions or inactions that materially defeat the purpose of the Paris Agreement. In both cases, the burden of proof will be hard for a complaining party to discharge and may render these clauses very difficult to enforce in practice.[101]

Second, and in line with customary international law,[102] FTAs will often require that economic sanctions (or countermeasures) be proportionate – that is, they 'shall not exceed the level equivalent to the nullification or impairment caused by the violation'.[103] This proportionality requirement thus limits the degree of intensity of the retaliatory response, and demands that the level of injury caused by the violation be determined in order to calculate the appropriate amount of trade retaliation that may be applied by the offended treaty partner. This determination, however, can be particularly complex in the case of the PA clause: how should we measure injury suffered by an *individual* State resulting from interference by another State with *global* commons (i.e., the Earth's climate)? Bronckers and Gruni suggest that it is not necessary to assess proportionality in this context in purely quantitative terms, and that qualitative factors may be also be considered (e.g., importance of the interest protected by the rule infringed or the seriousness of the breach).[104] While this is certainly true under customary rules of State responsibility,[105] this may not be allowed under EU FTAs which explicitly require the level of trade retaliation to be equivalent to the 'nullification and impairment caused by the violation'. This follows closely the language used in the WTO Dispute Settlement Understanding and has been more narrowly interpreted as involving economic harm.[106] Hence, assuming an action (or inaction) by party A is found to materially defeat the object and purpose of the Paris Agreement, how may we determine the level of economic injury suffered by party B?

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[98] European Commission, 'Report on the Implementation and Enforcement of EU Free Trade Agreements' COM(2021) 654 final, 27 October 2021, p 18. See also follow-up in TSD Committee: https://trade.ec.europa.eu/doclib/docs/2021/may/tradoc_159567.pdf.

[99] Commission Non-Paper 2018, p 3.

[100] An exception here is Article 26.16.2 EU-New Zealand FTA, which makes trade retaliation available as a temporary remedy for breaches of the minimum-level clause in respect of core labour standards (not subject to a trade/investment condition).

[101] On the trade-effects condition in the non-regression clause in the US-Guatemala labour dispute, see Marín Durán 2020, pp 1064-1065.

[102] International Law Commission (ILC), Articles on State Responsibility with Commentaries 2001, art 51.

[103] See e.g., EU-UK FTA, art 749(5); EU-New Zealand FTA, art 26.16.5.

[104] Bronckers and Gruni 2021, p 42.

[105] ILC 2001, p 135, noting that Article 51 explicitly refers to 'taking into account the gravity of the internationally wrongful act and the rights in question'.

[106] WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, 14 April 1994, art 22.4.

Third, and perhaps most importantly, a shift towards a sanction-based enforcement of environmental obligations raises fundamental questions of equity between FTA partners. As has been well documented in the WTO context, trade sanctions are inherently inequitable as an enforcement tool where significant disparities in market size and economic power exist between the disputing parties. This is undoubtedly the case with most FTAs concluded by the EU(27), being the world's third-largest economy. The reason for this lies, essentially, in the asymmetric capacity to actually use trade retaliation as means to induce compliance with treaty commitments. Typically, for a small-market country seeking to retaliate against an economically powerful country, trade sanctions often result in 'shooting oneself in the foot' (due to increased import prices) while inflicting little economic harm – and hence, retaliatory pressure – on the offending party.[107] Overall, there is yet to be one example of 'David vs. Goliath' compliance-inducing retaliation in the WTO. For our purposes, this means that introducing trade sanctions to enforce TSD commitments would, in practice, translate into an imbalanced one-way enforcement mechanism in favour of the EU in most FTAs. Regrettably, these equity concerns have been largely ignored by the Commission in its 2021 TSD review process, as well as in most scholarly debates on the issue of enforceability. Proponents of sanction-based enforcement are yet to explain how it can be reconciled, in practice, with their formal acceptance that compliance with environmental sustainability provisions in EU FTAs is a reciprocal matter and should go in both directions (i.e., not only by third countries, but equally by the EU and its Member States).

4. Conclusions

This paper has examined the evolution in the EU's approach to environmental sustainability provisions in FTAs, at both substantive and institutional levels. Two main trends have emerged from this analysis. First, with regards to the substance of these provisions, we have witnessed a firming up of non-regression clauses, which prohibit the lowering of environmental protection levels under domestic laws for competitive purposes. This has been most noticeable in the EU-UK TCA, which is hardly surprising in light of the pre-existing high degree of economic interdependence and geographical proximity between the EU and its former Member State. However, the formulation of this non-regression obligation has not consistent across EU FTAs, raising important questions of interpretation and application. Notably, what is the difference, if any, between *actual* and *intended* effects on bilateral trade/investment as a threshold condition for establishing a breach of these clauses? Similarly, the PA clause which has been included in more recent FTAs (either as an 'essential element' of the EU-UK TCA, or as an obligation in the climate provisions of the EU-New Zealand FTA, both enforceable through trade sanctions) leaves ambiguous which actions (or inactions) by may *materially defeat* the object and purpose of the Paris Agreement. FTA parties should use the joint institutional mechanisms to provide further guidance on these standards.

Second, the EU seems now ready to embrace the idea that trade retaliation should be available as a remedy to counter far-reaching violations of selected environmental obligations. While this move towards more coercive means of enforcement may be welcome in some quarters, it was argued that the case for trade sanctions is at best dubious from an effectiveness perspective, while such retaliatory measures raise a number of legal and policy concerns. Most significant among them are issues of equity, which have been largely neglected in the scholarly and institutional debates in EU circles. Trade sanctions are clearly inequitable as an enforcement tool where economic imbalances exist between trading partners, with the 'stick' being a real option only for the economic powerful side – in most instances, the EU – regardless

[107] See further Marín Durán 2020, pp 1059-1062 and references to WTO case law therein.

of its own compliance record. As such, a sanction-based enforcement mechanism is at odds with the proclaimed 'partnership' spirit of TSD chapters, whereby compliance with sustainability commitments should not be one-directional but genuinely a two-way street (i.e., by EU/Members States as much as by third countries). Against this background, it is not surprising that the more assertive approach to enforcement proposed by the Commission in the 2021 TSD review and first implemented in the EU-New Zealand FTA has not been followed in the EU-Chile FTA, which was concluded in December 2022.[108] This raises questions as to whether there a 'one-size-fits all' approach to enforcing environmental sustainability obligations is suitable –and will be acceptable– to all EU FTA partners.

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[108] EU-Chile Advanced Framework Agreement, signed 9 December 2022, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/chile/eu-chile-agreement_en (accessed 8 February 2023). This follows the 'promotional' approach similar to that in earlier 2010-2020 FTAs, discussed in section 2.2.1.

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