



# Highest Priority Trade Challenges Related to Climate Change:

EU and Americas Economic Law Relations

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## About the Project

CISDL undertook a multi-year program of work exploring EU-Latin America Free Trade Agreements (FTAs) and climate change in relation to leading trade and investment agreements and through creation of a regional community of practice to enhance legal capacity in both the EU and Latin American states, and more broadly. Expert workshops were conducted in September 2022 to discuss legal options in light of progressive practices found in regional and bilateral instruments.

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# HIGHEST PRIORITY TRADE CHALLENGES RELATED TO CLIMATE CHANGE: EU and Americas Economic Law Relations

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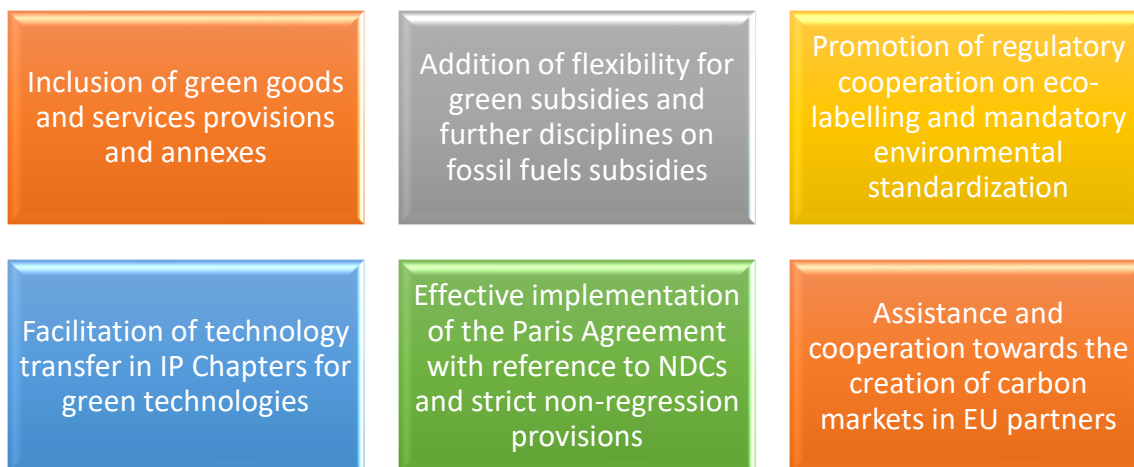
## **1. Executive Summary**

The report examines the existing EU-Americas Trade Relations and their linkages to climate change, through the lens of existing and under-negotiations Free Trade Agreements (FTAs). The assessment of these agreements shows that the parties should opt for more ambitious climate change provisions that further promote climate mitigation and adaptation policies, the provision of incentives to green goods and technologies, and the introduction of more enforceable climate change commitments linked to their respective Nationally Determined Contributions (NDCs) under the Paris Agreement. Based on this analysis and with a brief overview of other existing initiatives, the Report provides a lengthy proposal on more climate-ambitious text proposals in FTAs.

The idea behind the Report is that climate ambition should be present throughout a trade agreement and should not be limited to a single Environmental or Trade and Sustainability Chapter. Comprehensive approaches are required in order to provide the maximum incentives to promote trade in green goods and services and avoid indirect protection of harmful activities. Recently, the EU officially adopted this position in the 2022 FTA strategy Report and in the EU-New Zealand FTA.

The Report further examines in detail the different provisions in the environmental chapter with a view of providing substantive commitments to climate change, effective climate change governance, and efficient enforcement mechanisms aligned with partner countries' NDCs. Lastly, the Report briefly considers some provisions linked to the anticipated Carbon Border Tax Adjustment Mechanisms that the EU is currently proposing.

The Report strongly recommends the following:



## 2. Introduction

The 2022 Intergovernmental Panel on Climate Change (IPCC) Report reiterated that the present initiatives to combat climate change are inadequate. The Report highlighted that global greenhouse gas (GHG) emissions have been constantly rising over the past decade and reached their highest level in human history, despite the decline in the rate of growth.<sup>1</sup> The Report calls states and private actors for actions at the international, regional, national, and sub-national levels. Among its remarks, the Report reiterates FTAs' potential to diffuse climate mitigation standards, promote climate governance, and contribute, in general, to the fight against climate change.<sup>2</sup>

Despite these optimistic assertions, FTAs' effect on climate change is currently mixed.<sup>3</sup> FTAs between developed and developing countries (so-called North-South Agreements) are likely

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<sup>1</sup> Intergovernmental Panel on Climate Change, 'Climate Change 2022: Mitigation of Climate Change' (2022) IPCC WGII Sixth Assessment Report. p. 2-83.

<sup>2</sup> *ibid.*, Chapter 14: International cooperation, p. 74; Kateryna Holzer and Thomas Cottier, 'Addressing Climate Change under Preferential Trade Agreements: Towards Alignment of Carbon Standards under the Transatlantic Trade and Investment Partnership' (2015) 35 *Global Environmental Change* 514; Joshua P Meltzer, 'The Trans-Pacific Partnership Agreement, the Environment and Climate Change' in Tania Voon, *Trade Liberalisation and International Co-operation* (Edward Elgar Publishing 2013).

<sup>3</sup> Intergovernmental Panel on Climate Change (n 1), Chapter 14: International cooperation, p.71.

to increase emissions in the long run.<sup>4</sup> On the positive side, there is evidence suggesting that the incorporation of specific environmental or climate-related provisions could be highly beneficial to reducing GHG emissions.<sup>5</sup> The European Union (EU) has been highly active in this incorporation process by introducing environmental and climate change provisions in its extended network of FTAs.<sup>6</sup>

Although environmental rules have been formally introduced in regional trade agendas for over a decade,<sup>7</sup> no FTA in place can be considered the ‘gold standard’ for integrating climate change commitments.<sup>8</sup> According to an International Institute for European Environmental Policy (IEEP), climate change seems most appropriately addressed by the Draft EU-Australia FTA and the recently-concluded EU-New Zealand FTA.<sup>9</sup> Admittedly, the EU and UK Trade and Cooperation Agreement (TCA) also introduces many legal innovations in the field of climate change and trade.<sup>10</sup> Further, the UK-New Zealand FTA is also interesting and progressive.<sup>11</sup> However, this analysis should not lead to the conclusion of identifying one agreement as the standard against which other treaties will be negatively compared, especially when examining North-South FTAs. The specific economic and development conditions of the contracting parties should be taken into account in order to identify appropriate climate change commitments. For example, climate change ambitiousness can be found in North-South FTAs through positive commitments to cooperation, technology transfer and capacity building.

Overall, though, the EU’s general practice requires significant progress towards providing fully adequate environmental provisions that phase out the negative impact of trade in climate

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<sup>4</sup> Mehdi Nemati, Wuyang Hu and Michael Reed, ‘Are Free Trade Agreements Good for the Environment? A Panel Data Analysis’ (2019) 23 *Review of Development Economics* 435.

<sup>5</sup> Leila Baghdadi, Inmaculada Martinez-Zarzoso and Habib Zitouna, ‘Are RTA Agreements with Environmental Provisions Reducing Emissions?’ (2013) 90 *Journal of International Economics* 378 ; Zakaria Sorgho, Tharakan Joe. Do PTAs with environmental provisions reduce emissions? Assessing the effectiveness of climate-related provisions?. 2020. fhal-03004353f.

<sup>6</sup> Gracia Marín Durán, ‘Sustainable Development Chapters in EU Free Trade Agreements: Emerging Compliance Issues’ (2020) 57 *Common Market Law Review*.

<sup>7</sup> Indicatively, the EU ratified the first Free Trade Agreement with a sustainability chapter in July of 2011[ Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part 14.05.2011 (OJ L 127) 6].

<sup>8</sup> Phrasing has been taken from: Eline Blot and Marianne Kettunen, ‘Environmental Credentials of EU Trade Policy: A Comparative Analysis of EU Free Trade Agreements’ (05.2021) 22.

<sup>9</sup> *ibid*. The eventual agreement did fully reflect this optimistic view.

<sup>10</sup> 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 31.12.2020 (OJ L 444/14).

<sup>11</sup> EU-New Zealand Free Trade Agreement 30.06.2022.

change and utilize trade as a booster for environmental sustainability. The European Commission has corroborated this in its 2021 Trade Policy Review.<sup>12</sup>

Extensive comments and proposals regarding the EU treaty practice will be provided in Part 7 of the present Report; it is worth highlighting that this Report concludes that EU FTAs should become more climate change ambitious, both in their environmental chapters and overall. It has been evidenced by research that tariffs, subsidies, and technical barriers to trade and IP, among other regulations, are crucial to combatting climate change and improving the environmental performance of FTAs. The need for further climate ambition has been accepted by the European Green Deal,<sup>13</sup> while the European Commission promised in 2018 a 15-point action plan for a more effective implementation and enforcement of trade and sustainability chapter.<sup>14</sup> The results of which was published in its 2022 Action Plan.<sup>15</sup>

A global overview of EU FTA practice can be found below:

Source: European Council - Infographics trade maps.

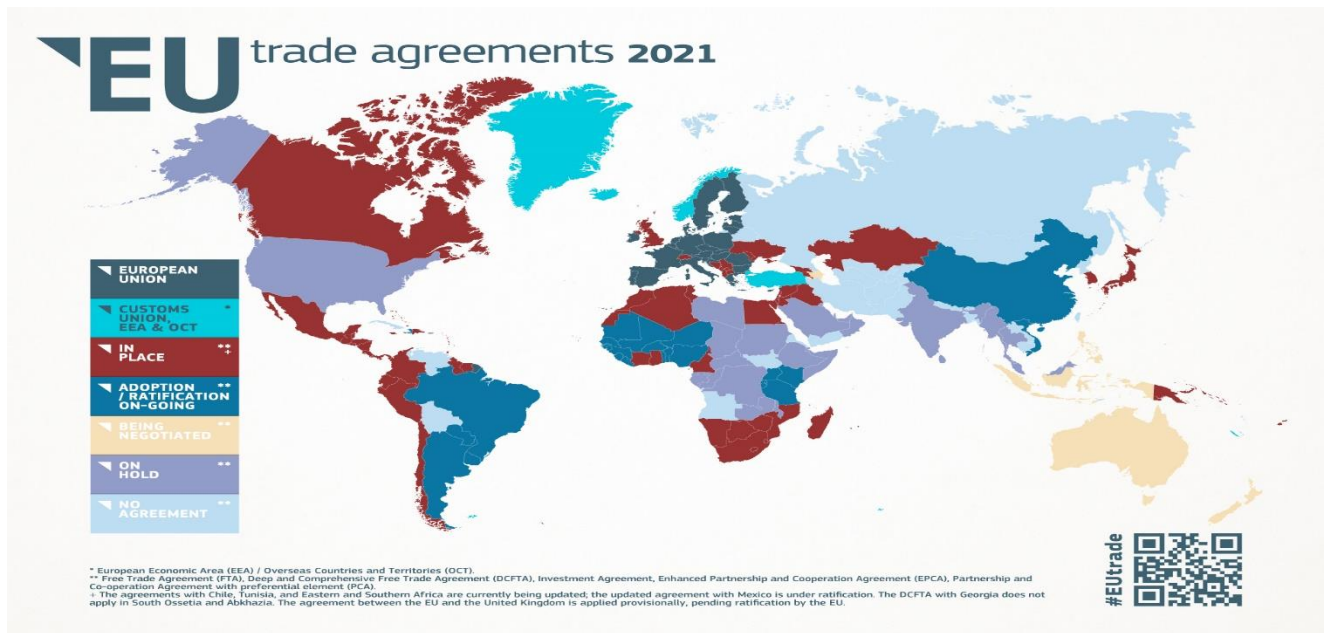
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<sup>12</sup> Blot, E. & Kettunen, M. (2021). Environmental credentials of EU trade policy – A comparative analysis of EU free trade agreements. Institute for European Environmental Policy; European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Trade Policy Review - An Open, Sustainable and Assertive Trade Policy’ (2021) COM(2021) 66 final.

<sup>13</sup> European Commission, ‘The European Green Deal’ (European Commission 11.12.2019) Communication from the Commission COM(2019) 640 final.

<sup>14</sup> European Commission, ‘Feedback and Way Forward on Improving the Implementation and Enforcement of Trade and Sustainable Development Chapters in EU Free Trade Agreements’ (26.02.2018) Non-paper.

<sup>15</sup> European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: The Power of Trade Partnerships: Together for Green and Just Economic Growth’ (22.06.2022) COM(2022) 409 final.



The Report starts its discussion from the EU side due to this side’s considerable impact on third countries on environmental and sustainability-related issues both in terms of hard law regulation and soft law power.<sup>16</sup>

The process of integration between the EU and Latin American countries started in 1999 and has rapidly ramped up in the last decade. Presently, the EU has signed agreements such as FTAs with almost all Latin American countries.<sup>17</sup> EU is Latin American countries’ third largest trade partner, while collectively, Latin American countries represent the EU’s fifth largest partner.<sup>18</sup> The overall amount of bilateral trade and investment has been constantly increasing.

Presently, the EU has a comprehensive agreement with Central American countries,<sup>19</sup> a plurilateral FTA with the Andean Community,<sup>20</sup> and two agreements with Mexico and Chile that are in the process of modernization. Further, the EU and Mercosur reached an agreement in principle as of June 2019, and an almost-finalized draft FTA is in place. Despite use of the

<sup>16</sup> So-called ‘Brussels effect’, Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (1st edn, Oxford University Press 2020). Here it is mainly the result of unilateral regulation of EU on environmental protection which is presently bound to increase with the new proposed regulations on anti-deforestation, CBAM etc.

<sup>17</sup> Except Bolivia and Venezuela.

<sup>18</sup> More: European Parliament. Directorate General for Parliamentary Research Services., *EU Trade with Latin America and the Caribbean: Overview and Figures: In Depth Analysis*. (Publications Office 2019) <<https://data.europa.eu/doi/10.2861/466762>> accessed 4 June 2022.

<sup>19</sup> Honduras, Nicaragua, Panama, Costa Rica, El Salvador and Guatemala.

<sup>20</sup> Colombia, Ecuador and Peru,

generic 'EU-Latin Americas trade relations' phrase, the relations between EU and the Latin American countries are highly complex and can only be examined on a country-by-country level (or agreement-by-agreement). For this reason, more specific analysis will be provided in the different Reports accompanying the present project.<sup>21</sup>

The present report will provide first a more detailed overview of EU-Americas trade relations while going agreement by agreement. Second, it will briefly assess the climate change ambition of each trade agreement, which will be linked to a mapping exercise of the main provisions of each agreement that will be found in Annex A. Third, it will introduce certain key innovative initiatives, proposals and developments outside of the EU trade relations with regard to trade and climate change. On this basis, the Report will move on to the best possible proposals. After a general overview of the Proposals, the Report will introduce key proposals Chapter by Chapter and provision by provision in the Environmental Chapter, which will stand as a guide for future policy makers and negotiators that seek to achieve the highest level of ambitiousness in climate change-related provisions in FTAs.

The Report is accompanied by 3 Annexes. The first will be the mapping of EU-Americas FTAs, which has mapped key environment-related provisions in EU-Americas FTAs. Annex B includes a summary of NDC Commitments by EU and Latin American countries and their relation to existing provisions. Annex C includes sample best possible proposals for climate change ambitious FTA provisions.

The Report has certain limitations with regards to its scope. It does not examine investment relations, i.e. investment protection and liberalisation provisions found either in the so-called mixed-agreements or in traditional bilateral investment treaties. Further, the Report does not examine in detail environmental issues indirectly related to climate change, such as biodiversity, deforestation and fisheries. The author reiterates that these issues are of utmost concern and importance in the fight against climate change; yet the present report has limitations in terms of its size. Hence, the Report focuses only on specifically climate change-related tools, provisions and instruments.

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<sup>21</sup> For more see: <https://www.cisd.org/about/engagement/high-climate-ambition-commitments-to-sustainability-in-regional-trade-and-investment-treaties/>

### 3. Overview of EU-South and Central Americas Trade Relations

The present part provides certain details concerning individual (or group-wise) trade relations between EU and Latin American countries.<sup>22</sup>

#### 3.1 EU-MERCOSUR Association Agreement Negotiations<sup>23</sup>

The EU and the Southern Common Market (MERCOSUR) – comprising Argentina, Brazil, Paraguay, and Uruguay, with Bolivia currently acceding – has not been concluded yet. The negotiation towards an EU-MERCOSUR Association Agreement started in 2000, with the objectives of boosting trade integration among MERCOSUR members and creating new opportunities for trade and investment with the EU. The negotiations reached an agreement in principle on 28 June 2019, following which a process of finalising the legal text of the draft Association Agreement commenced.<sup>24</sup> The eventual ratification of the agreement is uncertain after Austria, France, and Ireland criticised the insufficiency of the proposed environmental and labour commitments.<sup>25</sup> These considerations are still in place and are anticipated to remain until Brazilian elections, the outcome of which will be crucial moving forward.<sup>26</sup>

In 2021, the European Commission issued a Position Paper summarising the results of an independent sustainable impact assessment of the draft agreement: while ‘positive’ to ‘neutral’ welfare effects may be expected for the treaty parties, the assessment ‘highlight[ed] concerns in relation to the agreement’s potential impact on environment, in particular on deforestation’.<sup>27</sup> Given the experience with the Canada-EU Agreement CETA, it is expected that significant changes could still be integrated during the ‘legal scrubbing’ process. The 2021

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<sup>22</sup> For further details please see the specialized Reports of the Project (<https://www.cisd.org/about/engagement/high-climate-ambition-commitments-to-sustainability-in-regional-trade-and-investment-treaties/>)

<sup>23</sup> For more see the Reports by F. Andrade de Correa and A. Lehmen.

<sup>24</sup> Draft EU-Australia Free Trade Agreement 25.02.2019. Available at: [https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mercosur/eu-mercosur-agreement/agreement-principle\\_en](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mercosur/eu-mercosur-agreement/agreement-principle_en).

<sup>25</sup> Philip Blenkinsop, ‘Analysis: Twenty years on, EU turns cold on Mercosur trade deal’ (Reuters, 19 March 2021) <[www.reuters.com/article/us-eu-trade-latam-analysis-idUSKBN2BB0EU](https://www.reuters.com/article/us-eu-trade-latam-analysis-idUSKBN2BB0EU)> accessed 16 January 2022.

<sup>26</sup> See more: Markus Gehring and Marios Tokas ‘Effects of the Elections in Brazil on trade and climate policy and law and the Draft EU-Mercosur FTA’ (2022), CISDL, available at: <https://www.cisd.org/about/engagement/high-climate-ambition-commitments-to-sustainability-in-regional-trade-and-investment-treaties>.

<sup>27</sup> European Commission, ‘European Commission Services’ Position Paper on the Sustainability Impact Assessment in Support of Negotiations for the Trade Part of the European Union-Mercosur Association Agreement’ (24 March 2021), 21.

CISDL paper outlines several potential changes and proposals for legal scrubbing which legal experts from both sides of the Atlantic agree would be beneficial.<sup>28</sup>

From an overall analysis of the latest Draft texts (published in 2019), it can be argued that the agreement is far less progressive on environmental protection than other FTAs recently concluded by the EU. The long negotiations have made the environmental chapter (and other environmentally-related provisions throughout the Draft), a bit obsolete compared to recently negotiated or concluded EU FTAs.

### 3.2 EU-Mexico Global Agreement Renegotiations<sup>29</sup>

EU and Mexico signed an FTA in 1997, which entered into force in 2000.<sup>30</sup> After nearly two decades of operation, the parties negotiated an update to the terms of their bilateral trade and reached an Agreement in Principle on 21 April 2018. The final details of the text were concluded on 28 April 2020, and the Draft Agreement was published.<sup>31</sup> Presently, the Draft is being revised for the purposes of ratification. So far, no particular discussions have been had to determine whether the Draft may undergo significant changes given the enhanced understanding of trade and climate change issues, or whether it could eventually be put through legal scrubbing.

Presently, the Agreement in Principle and the present Draft seek to modernise the older agreement by introducing, among other things, a Trade and Sustainable Development chapter, which was inexistent before.<sup>32</sup> However, the Sustainability Impact Assessment (SIA)

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<sup>28</sup> J. Caceres et al, 'Environment and Climate Change in the Draft EU-Mercosur Trade Agreement' (2021) CISDL, (<<http://www.cisd.org/wp-content/uploads/2021/07/Environment-and-Climate-Change-in-the-Draft-EU-29.04.2021-Final.pdf>>)

<sup>29</sup> For more: Christian Delev, 'Trading Our Way Out of the Climate Crisis? Addressing Environmental Protection in the EU-Mexico Global Agreement Renegotiation Process' (2022), CISDL, <https://www.cisd.org/about/engagement/high-climate-ambition-commitments-to-sustainability-in-regional-trade-and-investment-treaties/>.

<sup>30</sup> Economic Partnership, Political Coordination and Cooperation Agreement between the European Community And its Member States, of the One Part, and the United Mexican States, of the Other Part 45.

<sup>31</sup> Draft EU-Australia Free Trade Agreement. Text available at: [https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mexico/eu-mexico-agreement/agreement-principle\\_en](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mexico/eu-mexico-agreement/agreement-principle_en).

<sup>32</sup> Secretaría de Economía, 'Visita del Secretario de Economía a Bruselas, Bélgica' [www.sice.oas.org/tpd/mex\\_eu/Modernization\\_process/MEX\\_EU\\_upgrade\\_s.pdf](http://www.sice.oas.org/tpd/mex_eu/Modernization_process/MEX_EU_upgrade_s.pdf); See also G Grieger, 'Modernisation of the trade pillar of the EU-Mexico Global Agreement' (European Parliamentary Research Service PE 608.680, October 2020) <[www.europarl.europa.eu/RegData/etudes/BRIE/2017/608680/EPRS\\_BRI\(2017\)608680\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608680/EPRS_BRI(2017)608680_EN.pdf)> accessed 28 March 2022; European Commission, 'Trade and Sustainable Development' <[trade.ec.europa.eu/doclib/docs/2018/april/tradoc\\_156822.pdf](http://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156822.pdf)>.

carried out for the Draft considers that the Agreement in Principle is expected to have ‘negative/minor’ impact on the enforcement of the United Nations Framework Convention on Climate Change (‘UNFCCC’) and Paris Agreement.<sup>33</sup> Hence, even though the Agreement in Principle introduces more ambitious climate change provisions, it still does not meet the standard developed by the IPCC, where FTAs constitute a positive instrument for achieving climate change mitigation. The concerns raised by the SIA have not been properly addressed by the Commission, which stated in a recent position paper that ‘the modernised Agreement’s provisions on TSD and on energy efficiency and sustainable energy could help mitigate any potential negative environmental effects’, without clarifying whether this could be achieved through legal scrubbing or substantial renegotiations of the Draft.<sup>34</sup>

### **3.3 EU-Chile Association Agreement Renegotiations<sup>35</sup>**

Chile was the first South American country to conclude an Association Agreement with the EU in 2003.<sup>36</sup> This agreement included trade, political and cooperation provisions. From here, during the 5<sup>th</sup> EU CELAC Summit in 2012, Chile and the EU agreed to analyse if the agreement could be modernised. After several meetings determining the scope and ambition of the possible modernisation, in 2016, the parties agreed to identify their levels of ambition for the modernisation of the agreement.<sup>37</sup> The EU began negotiations with Chile in 2017, with the progress report issued following the 10th round of negotiations, held between 19 April and 7 May, 2021.<sup>38</sup> While the negotiations are progressing, there are reports that the conclusion of the agreement has been postponed following pressure from France owing to ‘agricultural

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<sup>33</sup> *ibid*, 128.

<sup>34</sup> European Commission. Directorate General for Trade., *Sustainability Impact Assessment (SIA) in Support of the Negotiations for the Modernisation of the Trade Part of the Global Agreement with Mexico: Final Report*. (Publications Office 2020) 13 <<https://data.europa.eu/doi/10.2781/575630>> accessed 4 June 2022.

<sup>35</sup> For more: Javiera Cáceres Bustamante, ‘Brief on the Chile Inclusion of Environment Commitments in Trade Agreements and The Current EU-Chile Trade Agreement Negotiations’ (2022), CISDL, <https://www.cisd.org/about/engagement/high-climate-ambition-commitments-to-sustainability-in-regional-trade-and-investment-treaties/>.

<sup>36</sup> Agreement Establishing an Association between the European Community and Its Member States, of the One Part, and the Republic of Chile, of the Other Part 3.

<sup>37</sup> In parallel, in 2016, the EU conducted a public online consultation on a possible modernization of the trade part of the association agreement between the EU and Chile. For more information, see: [https://trade.ec.europa.eu/consultations/index.cfm?consul\\_id=209](https://trade.ec.europa.eu/consultations/index.cfm?consul_id=209)

<sup>38</sup> European Commission, ‘Report on the 10th Negotiating Round between the EU and Chile for the Modernisation of the Trade Part of the EU Chile Association Agreement’ (18 May 2021) <[trade.ec.europa.eu/doclib/docs/2021/may/tradoc\\_159588.pdf](https://trade.ec.europa.eu/doclib/docs/2021/may/tradoc_159588.pdf)>.

sensitivities' around the expected increase in Chilean poultry imports to the EU.<sup>39</sup> Further, the election of leftist candidate Gabriel Boric Font as the Chilean President is anticipated to have an impact on the negotiations due to his apparent pro-environment agenda.

With regards to climate change, the official text of the EU-Chile Agreement has not been publicly released yet but rather, only the EU Draft has been publicly disseminated.<sup>40</sup> The text proposal seems to introduce moderately ambitious climate change provisions such as specific commitments for the implementation of the Paris Agreement. The EU conducted both *ex-post* analysis of the association agreement, as well as an *ex-ante* SIA for the modernisation of the agreement.<sup>41</sup> The position paper of the European Commission following the SIAs<sup>42</sup> agrees that clear and effective commitments on climate change need to be made. Among other things, the Commission has implemented the recommendations by the SIAs by introducing innovative cooperation schemes.

### **3.4 EU Association Agreement with Colombia, Ecuador, and Peru<sup>43</sup>**

The EU-Andean Community (Colombia, Peru and Ecuador) Association Agreement has been provisionally applied to Colombia and Peru since 2013, and to Ecuador since 2017, following the signing of the Protocol of Accession for Ecuador in 2016. The Association Agreement is not presently being renegotiated; however, the regular meetings of the Trade Committee and the Trade and Sustainable Development Sub-Committee may create momentum for updating or amending the treaty.

Overall, the treaty cannot be considered highly ambitious on climate change. An *ex-ante* and *ex-post* SIA were issued<sup>44</sup> that were rather pessimistic about the impact of the Agreement on

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<sup>39</sup> Andy Bounds and Victor Mallet, 'France slows EU trade deals with New Zealand and Chile until after election' (*Financial Times*, 11 November 2021) <[www.ft.com/content/dd09b857-2d00-4ea3-ac86-0d15623fe3cd](http://www.ft.com/content/dd09b857-2d00-4ea3-ac86-0d15623fe3cd)> accessed 16 January 2022.

<sup>40</sup> *EU-Chile Agreement: European Union Draft Proposal* <[https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/chile/documents\\_en](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/chile/documents_en)>.

<sup>41</sup> European Commission. Directorate General for Trade. and BKP Development Research & Consulting., *Sustainability Impact Assessment in Support of the Negotiations for the Modernisation of the Trade Part of the Association Agreement with Chile: Final Report*. (Publications Office 2020) <<https://data.europa.eu/doi/10.2781/419678>> accessed 4 June 2022; European Commission, 'Evaluation of the Economic Impact of the Trade Pillar of the EU-Chile Association Agreement: Final Report' (23.03.2012) Final Report <[https://trade.ec.europa.eu/doclib/docs/2020/june/tradoc\\_158823.pdf](https://trade.ec.europa.eu/doclib/docs/2020/june/tradoc_158823.pdf)>.

<sup>42</sup> European Commission. Directorate General for Trade. and BKP Development Research & Consulting. (n 41).

<sup>43</sup> For more: Christian Delev, 'Ratcheting up Environmental Protection Standards: What are the Opportunities for Improving the EU-Andes Trade Agreement?' (2022), CISDL. Available at: <https://www.cisd.org/about/engagement/high-climate-ambition-commitments-to-sustainability-in-regional-trade-and-investment-treaties/>.

<sup>44</sup> European Commission and Development Solutions, 'EU-Andean Trade Sustainability Impact Assessment' (10.2009); European Commission. Directorate General for Trade. and BKP Economic Advisors., *Ex Post Evaluation*

climate change. The *ex-ante* Report found out that the FTA was drafted in way that caused greater degrees of trade liberalisation to increase negative effects on climate (i.e. through CO2 emissions) over time.<sup>45</sup> The *ex-post* Report pointed out that the agreement does not influence the Parties' ambitions with regards to further commitments under their NDCs.<sup>46</sup> However, the Report clarifies that the FTA may have still positively influence further NDC commitments due to the active engagement of civil society. The Report notes in this regard the need to introduce further disciplines and mechanisms for cooperation within the sustainable development chapter.

### **3.5 EU Association Agreement with Central America<sup>47</sup>**

The EU concluded an Association Agreement with Central America – comprising Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama – on 29 June 2012.<sup>48</sup> The agreement is not presently being reviewed, nor has a modernisation process been discussed.<sup>49</sup> Regular discussions on the implementation of the agreement are organised at least annually within the Association Committee. Presently, though, it seems that there is not enough political movement towards a renegotiation process.

## **4. Assessment of EU-South and Central Americas Practice**

Most of EU-Americas FTAs can be considered moderately ambitious with regards to climate change. Most of the existing FTAs are rather old and do not reflect the latest developments in FTA treaty making practices that more adequately and ambitiously incorporate climate change provisions. Further, most of the FTAs lack references to climate change (or sustainable development in general) outside of the Trade and Sustainability Chapter. Such references may constitute valuable synergies by promoting positive climate change regulation and trade in green goods and services, and incentivizing financing climate-friendly technologies.

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*of the Implementation of the Trade Agreement between the EU and Its Member States and Colombia, Peru and Ecuador: Final Report. Vol. I, Main Report.* (Publications Office 2022) <<https://data.europa.eu/doi/10.2781/9164>> accessed 5 June 2022.

<sup>45</sup> European Commission and Development Solutions (n 44) 68.

<sup>46</sup> European Commission. Directorate General for Trade. and BKP Economic Advisors. (n 44) 156–157.

<sup>47</sup> For more on the Report by J. Cabrera and Y Grenados Torres.

<sup>48</sup> Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other 15.12.2012 (OJ L 346) 3.

<sup>49</sup> European Commission, 'Joint Communiqué - 7th CA-EU Association Committee Meeting' (17 June 2021) <[trade.ec.europa.eu/doclib/docs/2021/july/tradoc\\_159688.pdf](https://trade.ec.europa.eu/doclib/docs/2021/july/tradoc_159688.pdf)>.

In the various SIAs, it is evident that the FTAs have been drafted, structured, and, so far, implemented in a way that negatively affects the environment.<sup>50</sup> For example, the *ex-ante* SIA for EU-Andean Community FTA considered that both the EU and Colombia would experience the highest absolute increase in emission with the implementation of the agreement, which would be at least a 0,01% increase in global emissions.<sup>51</sup> Further, the SIAs also reiterate the pressure that the FTAs would put on natural resources such as land, water, biodiversity, and forestry.<sup>52</sup>

However, there are certain positive aspects. For example, services liberalisation is considered to have a positive environmental impact since it *“increase[s] the utilisation of environmentally efficient technologies and management techniques”* and *“reduce[s] pressures on consumption of water and other resources”*.<sup>53</sup> Further, the most recent initiatives such as the EU-Chile negotiations were found to be having a positive effect on climate change policies in Chile, as the FTA would constitute an additional commitment to the UNFCCC and the Paris Agreement.<sup>54</sup> For example, the cooperation initiatives could increase opportunities for exchange of technical solutions fostering renewable energy.<sup>55</sup>

Hence, indeed, some positive conclusions can be drawn. In the example of EU-Chile, the Chilean officials consider that the agreement reached constitutes the greenest agreement signed by Chile, especially since it incorporates provisions on the effective implementation of commitments under the Paris Agreement, cooperation between the EU Green Deal and the Chilean National Green Hydrogen Strategy, and the ‘alleged’ compatibility with the 2030 Sustainable Development Agenda.<sup>56</sup>

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<sup>50</sup> European Commission. Directorate General for Trade. and BKP Development Research & Consulting. (n 41); ECORYS, ‘Trade Sustainability Impact Assessment of the Association Agreement to Be Negotiated between the EU and Central America’ (18.09.2009) TRADE08/C1/C14 & C15-Lot 2; European Commission and Development Solutions (n 44).

<sup>51</sup> European Commission and Development Solutions (n 44) 68.

<sup>52</sup> *ibid* 84–69, 119, 158.

<sup>53</sup> *ibid* 104.

<sup>54</sup> European Commission. Directorate General for Trade. and BKP Development Research & Consulting. (n 41).

<sup>55</sup> *ibid*; European Commission, ‘European Commission Services’ Position Paper on The Sustainability Impact Assessment In Support Of Negotiations For The Modernisation Of The Trade Part Of The Eu – Chile Association Agreement’ (06.2020).

<sup>56</sup> SUBREI. Finalizan negociaciones de la modernización del Acuerdo de Asociación entre Chile y la Unión Europea (2021), online <https://www.subrei.gob.cl/sala-de-prensa/noticias/detalle-noticias/2021/11/15/finalizan-negociaciones-de-la-modernización-del-acuerdo-de-asociación-entre-chile-y-la-unióon-europea>.

This conclusion, however, cannot be reached on the rest of EU-Americas Trade Relations. As shown previously, the rest of EU trade agreements with Latin American countries cannot be considered truly ambitious with regards to climate change, at least by the standard set by the IPCC. The fact that many of those treaties have less ambitious text may be detrimental to achieving a higher level of environmental protection since it disincentivizes governments from introducing additional climate change measures, due to fear of possible conflicts with trade agreements. This issue started with discussions and criticisms within the World Trade Organization<sup>57</sup> but it extends further. Without ambitious provisions such as non-regression obligations, FTAs may have a chilling effect on the adoption of new domestic environmental laws.<sup>58</sup> In contrast, provisions which prioritize climate change obligations over trade liberalization or impose positive obligations on implementing environmental commitments may constitute positive leverage for enforcing global environmental protection rules.<sup>59</sup>

## 5. New EU Trade Policy Review

The European Commission issued its long-awaited new Action Plan on Trade and Sustainable Development Chapters in FTAs on 22 June 2022.<sup>60</sup> The Action Plan focuses on effective implementation of Trade and Sustainable Development (TSD) chapters and commitments in FTAs by setting out 20 action points over 6 Policy Priorities. The Action Plan was accompanied by revised operating guidelines for the Single-Entry Points and complaints mechanisms for enforcement of EU FTAs. Overall, the European Commission has pursued a more holistic approach to effective implementation of TSD Chapters than previously.

Indeed, the European Commission shapes its Action Plan around Six Policy Priorities:

### **(1) the need to be more proactive in cooperation with partners**

The first action plan has three action points:

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<sup>57</sup> Elena Cima, *Can Trade Work for the Environment?: The Promotion-Based Model* (Brill Nijhoff 2021); Joel Trachtman, 'WTO Trade and Environment Jurisprudence: Avoiding Environmental Catastrophe' (2017) 58 Harvard International Law Journal 273.

<sup>58</sup> L. Ankersmit and J. Lawrence, Making EU FTAs 'Paris Safe' Three Studies with Concrete Proposals, June 2019, <https://www.ssrn.com/abstract=3407949>

<sup>59</sup> Clotilde Henriot and Amandine Van de Berghe, 'A New Blueprint for Environmental Provisions in EU Trade Agreements: ClientEarth Contribution to DG Trade Review of Trade and Sustainable Development Chapters' (12.2021); Axel Berger, Clara Brandi and Dominique Bruhn, 'Environmental Provisions in Trade Agreements: Promises at the Trade and Environment Interface' (Deutsches Institut für Entwicklungspolitik (DIE) 2017) Briefing Paper 16/2017.

<sup>60</sup>

- **Step up engagement with** trade partners in a **cooperative process** to foster **compliance with international labour and environmental standards**.
- When needed, provide **incentives and support** to trade partners for **reform processes** and **capacity building** through **technical and financial assistance**. Where appropriate, the EU should also develop a Team Europe approach in support of jointly agreed sustainable development priorities with partner countries.
- Use trade agreements to facilitate dialogue with partner countries and, as appropriate, assist these partners to **meet the sustainability requirements** of the **EU trade-related autonomous instruments**.

It is very important here that the Commission recognises the need for further capacity building through technical and financial assistance. The Commission re-affirms that capacity building is a requirement to foster compliance with existing levels of protection and to raise levels of protection. This particular policy priority does not constitute a novelty in EU FTA policy; however, its importance cannot be undervalued.

## **(2) stepping up the country-specific approach**

The second action plan focuses on country-specific approaches in TSD policy and sets up two action points:

- Pursue a **tailored approach** and conduct **better targeted impact assessments on TSD**, with a view to **identifying country-specific sustainability priorities** and **providing detailed analyses of impacts early on**.
- Negotiate, where appropriate in light of specifically identified priorities in partner countries and on a case-by-case basis, **detailed and time-bound roadmaps** with **milestones**. Roadmaps should **recognise a role for civil society** to monitor their implementation.

The Commission signals that TSD chapters will be tailored to trade partners. Implementation priorities and roadmaps shall be agreed to with specific timelines and milestones. The latter are indeed innovative for EU trade policy and this process will be fostered by sustainability impact assessments (*ex-ante* and *ex-post*). This is the first time the European Commission sets out an agenda of timelines and milestones in TSD chapters as existing FTAs rarely had such

specificities, even when commitments on effective implementation of Multilateral Environmental Agreements (MEAs) and the ILO Convention were in place.

### **(3) mainstreaming sustainability beyond the TSD chapter of trade agreements**

The third policy priority introduces two action points:

- Prioritise **market access** to **environmental goods** and **services**, in particular in the area of renewable energy and energy efficiency, for instance by addressing tariff and non-tariff barriers, as well as access to and investment in raw materials and goods needed for the green transition.
- Ensure that **impact assessments** and **sustainability impact assessments** analyse all **relevant chapters** of trade agreements to identify which provisions and commitments are most likely to have an **impact on sustainability issues** as well as where the agreement opens up **opportunities for achieving sustainability objectives beyond the TSD chapter**.

These are two extremely influential and important innovations in EU FTA policy. Indeed, sustainability considerations outside of TSD chapters constitute a notable absence in existing EU FTAs and many stakeholders (NGOs, civil society and think tanks) have called for such inclusions. What should be noted here is that these references will be tied to sustainability impact assessments, since so far, such assessments have not analysed how non-TSD chapters could promote (or obstruct less) sustainable development targets and commitments. This is very promising development.

### **(4) increasing the monitoring of the implementation of TSD commitments**

The fourth policy priority introduces 4 action points which focus on continuous monitoring of the implementation of TSD commitments, through continuous engagement with partners:

- Develop a **comprehensive EU approach across services**, using all available instruments to monitor the implementation of TSD commitments, and involving EU Delegations, as well as actively cooperating with Member States' capitals, embassies, and field offices.
- Work together with **EU Delegations** in their support and definition of best practices as trade partners set and start working with their local Domestic Advisory Groups (DAGs).

- Support continuous **involvement of the European Parliament** in TSD implementation within the framework of its inter-parliamentary contacts, and stand ready to assist it in its efforts to generate regular country-specific discussions on trade and sustainable development.
- In parallel to the TSD review, **revise the Operating Guidelines for the Single-Entry Point** to increase transparency and predictability for stakeholders, while clarifying who can bring complaints, how they will be handled, and what timeframes are applicable. The Guidelines will also make clear that DAGs **can file collective complaints** on violations of TSD commitments and represent the interests of parties located in partner countries.

In essence, it calls for streamlining the process of various EU Bodies (EU Delegations, European Parliament, the Single-Entry Point) in order to increase the cooperation among them and develop a comprehensive approach to effective implementation of TSD. A notable issue here that has been noticed in practice is the lack of cooperation among EU mechanisms and bodies, which heavily reduces the efficiency of the system. This process being fully internal to the EU, we anticipate that it will start soon. Already, the revision of the Operating Guidelines of the Single-Entry Point is attached in the Review.<sup>61</sup> The new Guidelines set out the main rules on standing for complaint, procedure, governing rules and principles (e.g. confidentiality), and they provide practical guides on how to fill out complaints. In sum, the Commission sets out in this policy priority a comprehensive re-examination of EU-level administration of TSD chapters and commitments.

#### **(5) reinforcing the role of civil society**

The fifth policy priority focuses on how civil society may have a more active and effective role in TSD governance and implementation. It calls for 7 action points:

- Ensure an **inclusive consultation process** with civil society throughout **all stages** of the lifecycle of trade agreements, from gap-analysis to implementation, including priority identification.

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<sup>61</sup> “The Single Entry Point is the centralised contact point for all EU-based stakeholders who want to lodge a complaint on market access issues or about non-compliance with commitments taken by other countries under the Trade and Sustainable Development (‘TSD’) provisions of EU trade agreements or under the EU’s Generalised System of Preferences (‘GSP’)”

- Further strengthen the role of EU **DAGs** by providing resources for their logistical support, capacity building and functioning.
- Invite **EU DAG's representatives** to **TSD Member States' Expert Groups** led by the Commission, where they will be able to contribute specific expertise, and **closely associate DAGs** in preparing the **TSD Committee meetings**, in particular on the identification and the monitoring of implementation priorities.
- Promote and facilitate the **interaction between EU and partner countries' DAGs**.
- Foster **transparency on the composition of DAGs**.
- **Exchange views with EU DAGs** on EU TSD-related **technical assistance projects**.
- Ensure that the **remit of the DAGs extends beyond TSD** in order to cover the entirety of trade agreements.

The action points here include recognition of certain procedural rights of civil society in participation in the consultation process through all stages of FTAs. Further, it is a very important recognition that EU should provide the means to civil society (here EU DAGs) in order to ensure their more effective involvement in the process. There is, further, a commitment to invite DAGs to TSD Expert Groups to exchange views on technical assistance projects. The follow-up actions will be very interesting to those wishing to see whether the Commission is truly committed to increasing the involvement of civil society in EU trade policy.

#### **(6) enhancing enforcement by means of trade sanctions as a measure of last resort**

The last policy priority, and the most anticipated and proclaimed one related to the introduction of trade sanctions, is remedies to breaches of TSD commitments. The Review provides the following:

The Commission will:

- 19. Further strengthen the enforcement of TSD commitments in future agreements by proposing to EU trading partners to:
  - a. **Extend the general state-to-state dispute settlement compliance stage to the TSD chapter.**
  - b. Involve the **DAGs** in **monitoring the compliance stage**.
  - c. **Extend the possibility of applying trade sanctions** to cases of failure to comply with obligations that materially defeats the object and purpose of the **Paris Agreement on**

**Climate Change**, or in serious instances of non-compliance with the **ILO fundamental principles and rights at work**.

The application of trade sanctions will follow the general state-to-state dispute settlement rules.

- 20. Prioritise **the enforcement of TSD cases** based on the importance of the nature of the commitments at issue, the **seriousness of their violation**, and the **impact on the environment or workers**.

In essence, after a ruling of the Panel of experts, the implementation of the ruling is subject to review by a Panel. In instances of core TSD commitments, including ILO fundamental principles and the Paris Agreement, trade sanctions may be authorized following the general dispute settlement rules. The sanctions will be temporary and proportionate, and they will probably take the form of a suspension of concessions similar to WTO dispute settlement. This practice has been noted in many US FTAs and its practical effectiveness has been met with some scepticism. Overall, normal dispute settlement rules will generally apply to the TSD.

### Summary

It is an ambitious plan that includes developments within the EU and in its relations with trade partners. Within the EU, the goals are to increase transparency, facilitate internal monitoring to TSD commitments, and reinforce the involvement of civil society. In its FTAs, the Commission commits to adopt a tailor-made implementation roadmap with trade partners, increase cooperation by putting, among other things, more emphasis on capacity building, include sustainability standards throughout an FTA, and finally, fully introduce the TSD chapter to dispute settlement (with the possibility of trade sanctions).

Generally, this is a step in the right direction with some question marks regarding the effectiveness of trade sanctions in TSD violations, the reaction of FTA partners to implementation guidelines (need to see how committed the Commission is to much-required capacity building) and the administration of existing FTAs (or those nearly adopted). The present negotiations of the EU with countries from Latin America, India, and Indonesia will constitute the first canvas upon which the proclamations of the Commission shall be witnessed.

## 6. Initiatives outside of the EU

EU has admittedly been the most ambitious trade partner in terms of introducing environmental protection clauses, and in particular climate change, in FTAs.<sup>62</sup> Still, other trading partners have followed a similar path of climate ambitiousness with innovative provisions in FTAs or plurilateral initiatives in the field of international trade and climate change. The potential positive impact of FTAs in fostering trade in green goods and services, incentivizing further climate change commitments, for example in the form of NDCs, and promoting institutional cooperation on better implementation of such commitments, has long been advocated by academia and was recently further endorsed by the IPCC.<sup>63</sup>

The general tendency in FTAs is to start including references to climate change by strengthening climate governance,<sup>64</sup> or by introducing climate-related provisions that go beyond the Kyoto Protocol and the Paris Agreement such as cooperation or electric vehicles or carbon markets.<sup>65</sup> However, the largest GHG emitters (excluding the EU) do not have extensively ambitious climate change provisions or environmental chapters in their FTAs.<sup>66</sup>

Starting with the US, the amended NAFTA (the USMCA) constitutes a rather unambitious initiative.<sup>67</sup> One interesting feature is the express conflict clause it has introduced that

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<sup>62</sup> Blot and Kettunen (n 8); Delphine Misonne, 'The Importance of Setting a Target: The EU Ambition of a High Level of Protection' (2015) 4 *Transnational Environmental Law* 11.

<sup>63</sup> William Nordhaus, 'Climate Clubs: Overcoming Free-Riding in International Climate Policy' (2015) 105 *American Economic Review* 1339; Thomas L Brewer and others, 'Carbon Market Clubs and the New Paris Regime. Networked Carbon Markets' (07.2016) <<http://hdl.handle.net/10986/25768>>; N Keohane, A Petsonk and A Hanafi, 'Toward a Club of Carbon Markets' (2017) 144 *Climatic Change* 81; Michele Stua, 'A Single Mechanism for the Certification of Mitigation Outcomes', *From the Paris Agreement to a Low-Carbon Bretton Woods* (Springer International Publishing 2017) <<http://link.springer.com/10.1007/978-3-319-54699-5>> accessed 5 June 2022; George David Banks and Timothy Fitzgerald, 'A Sectoral Approach Allows an Artful Merger of Climate and Trade Policy' (2020) 162 *Climatic Change* 165.

<sup>64</sup> Shunta Yamaguchi, 'Greening Regional Trade Agreements: Subsidies Related to Energy and Environmental Goods', vol 2020/01 (2020) *OECD Trade and Environment Working Papers 2020/01*; Jean-Frédéric Morin and Sikina Jinnah, 'The Untapped Potential of Preferential Trade Agreements for Climate Governance' (2018) 27 *Environmental Politics* 541.

<sup>65</sup> Harro van Asselt, 'Climate Change and Trade Policy Interactions: Implications of Regionalism', vol 2017/03 (2017) *OECD Trade and Environment Working Papers 2017/03* <[https://www.oecd-ilibrary.org/environment/climate-change-and-trade-policy-interactions\\_c1bb521e-en](https://www.oecd-ilibrary.org/environment/climate-change-and-trade-policy-interactions_c1bb521e-en)> accessed 5 June 2022; Markus Gehring, Sean Stephenson and Marie-Claire Cordonier Segger, 'Sustainability Impact Assessments as Inputs and as Interpretative Aids in International Investment Law' (2017) 18 *The Journal of World Investment & Trade* 163; Morin and Jinnah (n 64); Markus Gehring and Emily Morison, 'Climate and Energy Provisions in Trade Agreements with Relevance to the Commonwealth', vol 2020/11 (2020) *International Trade Working Paper 2020/11* <[https://www.thecommonwealth-ilibrary.org/commonwealth/trade/climate-and-energy-provisions-in-trade-agreements-with-relevance-to-the-commonwealth\\_f8ebf31e-en](https://www.thecommonwealth-ilibrary.org/commonwealth/trade/climate-and-energy-provisions-in-trade-agreements-with-relevance-to-the-commonwealth_f8ebf31e-en)> accessed 5 June 2022.

<sup>66</sup> Intergovernmental Panel on Climate Change (n 1), Ch.14, p. 73.

<sup>67</sup> United States - Mexico - Canada Agreement (USMCA) 30.11.2018.

requires that in the case of an inconsistency between the trade agreement and a listed (or ratified) MEA, the latter shall prevail.<sup>68</sup> However, the Paris Agreement and the UNFCCC are neither listed nor ratified (by the US); hence they are presently excluded from the scope of USMCA. In general, the agreement does not introduce any specific provision on climate change, even though there is a possibility for cooperative mitigation plans through the Commission for Environmental Cooperation established by the Agreement.<sup>69</sup>

Moving forward, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which includes some of the world's largest emitters, such as Canada, Japan and Australia, while China and Taiwan have applied for membership and the United Kingdom is also considering joining, is silent on climate change.<sup>70</sup> The Environmental Chapter does not refer to climate change. For example, Article 20.1 introduces the definition of an 'environmental law' by stating the following:

For the purposes of this Chapter: environmental law means a statute or regulation of a Party, or provision thereof, including any that implements the Party's obligations under a multilateral environmental agreement, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through:

- (a) the prevention, abatement or control of the release, discharge or emission of pollutants or environmental contaminants;
- (b) the control of environmentally hazardous or toxic chemicals, substances, materials or wastes, and the dissemination of information related thereto; or
- (c) the protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas [...]

It is evident that climate change is not primarily part of this definition, at least not as an end in itself. Putting combatting climate change aside, the Chapter does not provide for positive obligations of result (e.g. effective implementation of MEAs) but introduces certain mild

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<sup>68</sup> Article 1.3.

<sup>69</sup> Noemie Laurens and others, 'NAFTA 2.0: The Greenest Trade Agreement Ever?' (2019) 18 *World Trade Review* 659.

<sup>70</sup> Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) 08.03.2018; Christopher O'Toole, 'TPP Trade and Environment Chapter' in David A Gantz and Jorge A Huerta-Goldman (eds), *The Comprehensive and Progressive Trans-Pacific Partnership: Analysis and Commentary* (Cambridge University Press 2021) <<https://www.cambridge.org/core/books/comprehensive-and-progressive-transpacific-partnership/tpp-trade-and-environment-chapter/C865FC608A1FE5D246BB71FC2208688B>> accessed 26 November 2021.

(best-efforts) obligations, without particular references to increased levels of protection, non-regression obligations, and obligations undertaken by other international agreements.

For instance, Article 20.2 provides in provision:

2. Taking account of their respective national priorities and circumstances, the Parties recognise that enhanced cooperation to protect and conserve the environment and sustainably manage their natural resources brings benefits that can contribute to sustainable development, strengthen their environmental governance and complement the objectives of this Agreement.

3. The Parties further recognise that it is inappropriate to establish or use their environmental laws or other measures in a manner which would constitute a disguised restriction on trade or investment between the Parties.

One rather promising initiative exists in the negotiations started between Costa Rica, Fiji, Iceland, New Zealand, Norway, and Switzerland on a new Agreement on Climate Change, Trade and Sustainability (ACCTS).<sup>71</sup> The goals of this negotiated agreement are to liberalise trade in environmental goods and services, and to introduce new disciplines of fossil fuel subsidies and guidelines on voluntary eco-labels.<sup>72</sup> According to the Statement of the negotiating parties on 11 November 2021, “[t]he aim of the ACCTS initiative is to demonstrate that trade rules and policies can be mutually-supportive of trade, sustainable development and climate objectives.”<sup>73</sup>

In addition, the UK-New Zealand FTA constitutes a very positive development,<sup>74</sup> especially in light of the initially not-very-ambitious UK climate change and trade policy, demonstrated by the UK’s willingness to join CPTPP. Indeed, the FTA has an extensive TSD chapter, with significant commitments on climate change, promotion of green goods and services, and reduction of fossil fuels subsidies. Many of its provisions will be included in our subsequent analysis as model provisions.

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<sup>71</sup> For more see website: <https://www.mfat.govt.nz/en/trade/free-trade-agreements/trade-and-climate/agreement-on-climate-change-trade-and-sustainability-accts-negotiations/#:~:text=The%20launch%20of%20the%20initiative,Prime%20Minister%20of%20Iceland%20H.E.>

<sup>72</sup> Carolyn Deere Birkbeck, ‘Greening International Trade: Pathways Forward’ (2021) 41.

<sup>73</sup> <https://www.mfat.govt.nz/en/media-and-resources/climate-ministers-on-the-role-of-trade-policy-in-accelerating-climate-action/>

<sup>74</sup> New Zealand—United Kingdom of Great Britain and Northern Ireland Free Trade Agreement 28.02.2022.

A final development that occurred during the review process of this Report is the Singapore-Australia Green Economy Agreement.<sup>75</sup> It builds on the bilateral trade, investment, and environmental relations between the parties. It establishes the foundation for facilitating the flow of environmental goods and services, green and transition finance and clean energy. It presently spans 7 key areas: (i) trade and investment; (ii) standards and conformance assessments; (iii) green and transition finance; (iv) carbon markets; (v) clean energy, decarbonisation, and technology; (vi) skills and capabilities; and (vii) engagements and partnerships. Presently, the Agreement does not set out binding obligations but rather creates the framework to collaborate on the key green economy areas. Its implementation and future negotiations among the parties should be examined closely.

## **7. Highest Priorities for Climate-Ambitious FTAs**

The present part provides a theoretical overview of the particular best proposals that are introduced in the next part. Certain aspects have already been introduced when assessing the EU-Americas practice and non-EU initiatives. Presently, though, it is important to introduce certain theoretical aspects on FTA environmental commitments.

The first issue to introduce is the nature of the commitment entailed in FTAs, which can be divided into negative and positive integration commitments. Negative integration obligations are those that do not necessitate any domestic regulation but rather, simply bound domestic regulations or administrative practices from protectionist or discriminatory measures that distort the trade concessions reached.<sup>76</sup> This includes restrictions on subsidies, discriminatory domestic taxation, discriminatory domestic regulations, etc.<sup>77</sup> By contrast, positive integration obligations entail regulatory harmonization processes and a minimum standard of regulatory treatment. Positive integration also entails the creation of common institutions that may intervene for the welfare optimum, such as common regulations for unstable markets, shared regulatory bodies and intervention in favour of economically disadvantaged

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<sup>75</sup> Singapore-Australia Green Economy Agreement <<https://www.dfat.gov.au/geo/singapore/singapore-australia-green-economy-agreement>>.

<sup>76</sup>John Ruggie, 'Embedded Liberalism and Postwar Economic Regimes', *Constructing the World Polity: Essays on International Institutionalization* (Routledge 1998); Anne-Marie Burley, 'Regulating the World: Multilateralism, International Law, and the Projection of the New Deal Regulatory State', *Multilateralism Matters: The Theory and Praxis of an Institutional Form* (Columbia University Press 1993) 125–152.

<sup>77</sup>Jürgen Kurtz, Jorge E Viñuales and Michael Waibel, 'Principles Governing the Global Economy' in Jorge E Viñuales (ed), *The UN Friendly Relations Declaration at 50* (1st edn, Cambridge University Press 2020).

regions.<sup>78</sup>

For instance, positive integration commitments can be found in the EU-Ukraine Association Agreement. The Agreement obliges Ukraine in Annex XXXI to Chapter 6 to implement the Kyoto Protocol including all eligibility criteria for fully using the Kyoto mechanisms, develop a long-term action plan for mitigation and adaptation to climate change, and develop and implement long-term measure to reduce greenhouse gases emissions, in order to harmonize with EU environmental law.<sup>79</sup> In contrast, an example of negative integration commitments can be found in the CPTPP, which does not introduce positive integration obligations on climate change but rather allows Members to take certain measures in favour of environmental protection (not climate change in particular) if certain requirements are met.

Climate change requires positive commitments and actions; hence, positive integration provisions can be associated with effective implementation of more ambitious NDCs and other commitments related to MEAs. For this reason, the next section proposes a lengthy and specific obligation to ratify and effectively implement MEAs by the parties to the FTA. This does not mean that negative integration obligations are meaningless. Indeed, non-regression obligations constitute an important example of negative integration; their impact on climate change cannot be doubted.

A further issue to consider is the level playing field concept introduced in many EU FTAs. In its 2021 Trade Policy Review, the European Commission introduced its agenda for an open, sustainable, and assertive trade policy.<sup>80</sup> Amongst the policy goals outlined, the Commission emphasized the need for trade policy to support an open, strategic autonomy and ensure a level playing field. Without getting further into the details of the concept, the level playing field is primarily a trade objective, which recognizes that the present state of globalization requires governmental intervention in order to disrupt the positive benefits of liberalization and avoid negative externalities. This is not strictly limited to a trade policy analysis, since the

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<sup>78</sup> Federico Ortino, *Basic Legal Instruments for the Liberalisation of Trade: A Comparative Analysis of EC and WTO Law* (Hart Pub 2004) 17; Jan Tinbergen, *International Economic Integration* (Elsevier 1954) 76,78-79; John Pinder, 'Positive Integration and Negative Integration: Some Problems of Economic Union in the EEC' (1968) 24 *The World Today* 88.

<sup>79</sup> Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part 29.05.2014 (OJ L161).

<sup>80</sup> European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Trade Policy Review - An Open, Sustainable and Assertive Trade Policy' (n 12).

EU has started to recognize that other major policy areas are encompassed in their pursuit of level playing field. This is more than true on climate change.

This is exemplified by the EU proposal for its post Brexit relations with UK (Draft text of the Agreement on the New Partnership with the United Kingdom 18.03.2020).<sup>81</sup> The proposal provides for a whole Title on Level Playing Field and Sustainability (Title III). Specifically, Article LPFS 1.1, which encompasses the objectives of the level playing field, provides:

1. The Parties recognise that the establishment of conditions that ensure a level playing field between the Parties is necessary for trade and investment between the Union and the United Kingdom to be conducted within an environment of open and fair competition and in a manner that is conducive to sustainable development.

...

3. The Parties affirm their common understanding that their economic partnership can only deliver benefits in a mutually satisfactory way if it prevents distortions of trade and unfair competitive advantages and contributes to sustainable development. To that end, the Parties are determined to maintain high standards in the areas of state aid, competition, state-owned enterprises, taxation, social and labour protection, environmental protection and the fight against climate change.<sup>82</sup>

EU proposed that the level playing field should not be limited to trade and investment relations. Rather, it seeks to enrich the idea of level playing field with obligations towards sustainable development.<sup>83</sup> In the case of climate change and trade, level playing field entails the following general categories of provisions:

- reaffirmation of State's right to regulate;
- obligations to comply with and implement climate change treaties;
- commitments to encourage and promote green trade and domestic production processes, and green government procurement.

Many of the best possible proposals follow the most ambitious level playing field commitments that are found primarily in EU FTAs.

Moving forward, one fundamental issue that 'haunts' many Trade and Sustainability Chapters

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<sup>81</sup> Draft text of the Agreement on the New Partnership with the United Kingdom 2020.

<sup>82</sup> *ibid* LPFS 1.1.

<sup>83</sup> For a review of level-playing-field obligations within international trade agreements concluded by the EU, see Matilda Gillis, 'Let's Play?: An Examination of the "Level Playing Field" in EU Free Trade Agreements' (2021) 55 *Journal of World Trade*..

in FTAs is non-committal language.<sup>84</sup> The text used in provisions on environmental cooperation, non-regression obligations, and implementation of MEAs, in many instances, introduces ‘soft’ obligations. In particular, the provisions either do not introduce mandatory language, or simply introduce best-efforts obligations, or do not stipulate any consequence of a failure to implement or abide by the provision. The latter may also be associated with the exception from dispute settlement provisions of the whole TSD Chapters, or the lack of any implementation or non-conformity procedure such as a Panel of Experts review. The obvious solution to these considerations is the introduction of more mandatory language in substantive provisions and the introduction of non-conformity procedures or formal dispute resolution.<sup>85</sup> Such non-conformity procedures may be tied to particular indicators, targets or timelines agreed to by the parties, which may constitute trigger points for review of the particular commitments.

Lastly, the Report is not limited to the TSD Chapters; rather, it is important to integrate climate change ambitious provisions throughout the FTA. For example, the promotion of green goods and services requires that the tariff schedules and the services schedules of commitment are tailored to this need by providing more favourable market access and tariff treatment to such goods, over CO2 intense products.<sup>86</sup> Similar considerations apply to technical barriers to trade, IP regulations and government procurement, among other things.

## **8. Best Possible Textual Proposals for Climate Ambitious FTAs**

In the present part, the Report goes through the main elements of an FTA and discusses best possible proposals making FTAs ambitious on climate change. Annex B includes the particular provisions.

### **8.1 Proposals outside of Trade and Sustainability Chapter**

As previously discussed, climate change ambition should not be limited to the trade and sustainability chapter. In the present sub-part, the discussion will focus on the different chapters and provisions traditionally found in FTAs.

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<sup>84</sup> Marco Bronckers and Giovanni Gruni, ‘Retooling the Sustainability Standards in EU Free Trade Agreements’ (2021) 24 *Journal of International Economic Law* 25.

<sup>85</sup> Eline Blot, Antoine Oger and James Harrison, ‘Enhancing Sustainability in EU Free Trade Agreements: The Case for a Holistic Approach’ (05.2022) Policy Report.

<sup>86</sup> Joseph S Shapiro, ‘The Environmental Bias of Trade Policy’ (2021) 136 *The Quarterly Journal of Economics* 831.

### 8.1.1 *Chapeau of the Treaty: Setting the pace from the outset*

The importance of the *chapeau* of the treaty cannot be understated. It provides the texture and colour of the treaty,<sup>87</sup> and it constitutes a primary source for identifying the object and purpose of the treaty, which is relevant in the interpretation process.<sup>88</sup>

The parties here should be bold and explicitly recognise that the fight against climate change constitutes a fundamental part of the agreement, and the parties commit to effectively implementing their climate change commitments in MEAs.

For example, the EU-UK TCA starts:

1. REAFFIRMING their commitment to democratic principles, to the rule of law, to human rights, to countering proliferation of weapons of mass destruction and to the fight against climate change, which constitute essential elements of this and supplementing agreements,

2. RECOGNISING the importance of global cooperation to address issues of shared interest,

[...]

7. RECOGNISING the Parties' respective autonomy and rights to regulate within their territories in order to achieve legitimate public policy objectives such as the protection and promotion of public health, social services, public education, safety, the environment including climate change, public morals, social or consumer protection, animal welfare, privacy and data protection and the promotion and protection of cultural diversity, while striving to improve their respective high levels of protection,

9. RECOGNISING the need for an ambitious, wide-ranging and balanced economic partnership to be underpinned by a level playing field for open and fair competition and sustainable development, through effective and robust frameworks for subsidies and competition and a commitment to uphold their respective high levels of protection in the areas of labour and social standards, environment, the fight against climate change, and taxation,

The EU-Andean Communities FTA provides the following:

COMMITTED to implementing this Agreement in accordance with the objective of sustainable development, including, the promotion of

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<sup>87</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products* [1998] Appellate Body Report WT/DS58/AB/R, 1998:VII, p. 2755 DSR [152–153].

<sup>88</sup> Oliver Dörr and Kirsten Schmalenbach, 'Article 31. General Rule of Interpretation' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012) 585; Richard Gardiner, *Treaty Interpretation* (Oxford University Press 2015) 213.

economic progress, the respect for labour rights and the protection of the environment, in accordance with the international commitments adopted by the Parties;

The *chapeau* could go further and fully confirm the parties' commitment to implementing the Paris Agreement, cooperating on promoting green technologies, and progressively adopting more ambitious NDCs. No specific example exists presently. However, the parties could imitate the aforementioned instance of EU-Andean Communities and include a reference to implement their NDCs. This should also entail a reference on need to cooperate for future more ambitious NDCs.

### Proposal

- **Include references on effective implementation of MEAs**
- **Include references on implementation of NDCs and cooperation for further climate ambitiousness**

#### 8.1.2 *Subsidies Disciplines: More space for green subsidies and less for fossil fuels*

The discussion over subsidy disciplines and climate change has been an extensive one. The debate revolves mainly around two prongs: new disciplines to restrict or eliminate subsidies on fossil fuels and new disciplines to increase the regulatory space to provide subsidies to renewable energy producers or green goods.<sup>89</sup>

In general, EU FTAs do not usually contain particular provisions on renewable energy production or fossil fuels, since the rules largely examine fairness of competition.<sup>90</sup> In the EU-Singapore FTA, the parties introduce public policy objectives in subsidy control. In particular, Article 10.4, Section II, provides:

(1) The Parties agree that subsidies can be granted by a Party when they are necessary to achieve a public policy objective. The Parties acknowledge, however, that certain subsidies have the potential to distort the proper functioning of markets and undermine the benefits of trade liberalisation. In principle, subsidies granted to enterprises providing goods or services should not be granted by a Party when they negatively affect, or are likely to affect, competition and trade.

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<sup>89</sup> Ilaria Espa and Gracia Marín Durán, 'Renewable Energy Subsidies and WTO Law: Time to Rethink the Case for Reform Beyond Canada – Renewable Energy/Fit Program' (2018) 21 *Journal of International Economic Law* 621; Aaron Cosbey and Petros C Mavroidis, 'A Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy: The Case for Redrafting the Subsidies Agreement of the WTO' (2014) 17 *Journal of International Economic Law* 11.

<sup>90</sup> Luca Rubini, 'Good, the Bad, and the Ugly - Lessons on Methodology in Legal Analysis from the Recent WTO Litigation on Renewable Energy Subsidies, The' (2014) 48 *Journal of World Trade* 895.

(2) An illustrative list of public policy objectives for which subsidies could be granted by a Party, subject to the conditions set out in this Section,<sup>71</sup> includes the following: ...

(d) facilitating the development of certain economic activities or of certain economic areas, including but not limited to, subsidies for clearly defined research, development and innovation purposes, subsidies for training or for the creation of employment, subsidies for environmental purposes, subsidies in favour of small and medium-sized enterprises as defined in the Parties' respective legislations; and

[...]

(3) Each Party shall ensure that enterprises use the specific subsidies provided by a Party only for the policy objective for which the specific subsidies have been granted.

A similar option was adopted by the EU-Vietnam FTA, which not only recognizes that 'subsidies may contribute to achieve public policy objectives', but also presents an *"illustrative list of public policy objectives for which a Party may grant subsidies"*, in which *"subsidies for environmental purposes are explicitly allowed subjected to the conditions within this section"*.<sup>91</sup>

Presently, the most ambitious phrasing on climate change and subsidies is to be found in the EU-UK TCA, which provides extensive rules on subsidy control on energy and environment.

Article 367 reads:

Energy and environment

14. The Parties recognise the importance of a secure, affordable and sustainable energy system and environmental sustainability, notably in relation to the fight against climate change which represents an existential threat to humanity. Therefore, without prejudice to Article 366, subsidies in relation to energy and environment shall be aimed at, and incentivise the beneficiary in, delivering a secure, affordable and sustainable energy system and a well-functioning and competitive energy market or increasing the level of environmental protection compared to the level that would be achieved in absence of the subsidy. Such subsidies shall not relieve the beneficiary from liabilities arising from its responsibilities as a polluter under the law of the relevant Party.

On the other side of the spectrum, the UK-New Zealand FTA (as well as EU-New Zealand but with less strict language) takes a significant step forward with express words limiting fossil

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<sup>91</sup> Article 10.4.2, Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam 12.06.2020 (OJ L 186) 3.

fuels subsidies. It provides in Article 22.8, called 'Fossil Fuels Subsidy Reform and Transition to Clean Energy',

1. The Parties recognise the need to reduce the use of fossil fuels and to support the global transition to clean energy in order to further the implementation of the Sustainable Development Goals of the 2030 Agenda and the objectives of the UNFCCC and Paris Agreement. The Parties further recognise that fossil fuel subsidies can distort trade and investment, disadvantage renewable and clean energy, encourage wasteful consumption, and contribute significantly to global greenhouse gas emissions.

2. Accordingly, each Party shall:

(a) take steps to eliminate harmful fossil fuel subsidies where they exist, with limited exceptions in support of legitimate public policy objectives;

(b) as fellow members of the Powering Past Coal Alliance, end unabated coal-fired electricity generation in their territories as part of a clean energy transition aligned with the goals of the Paris Agreement;

(c) encourage the transition to clean energy for electricity, heat, and transport;

(d) ensure that information on fossil fuel support measures, including any subsidies, is published;

(e) end new direct financial support, such as officially supported export credits, for fossil fuel energy in non-parties, except in limited circumstances where it:

(i) meets a legitimate policy goal, such as improved safety or environmental standards; or

(ii) supports a clean energy transition aligned with the goals of the Paris Agreement;

(f) end international aid funding for fossil fuel energy except in limited circumstances where it is not feasible to provide access to energy solely from renewable sources and the aid:

(i) is essential as part of a humanitarian response;

(ii) is to meet a legitimate policy goal such as improved safety or environmental standards; or

(iii) supports a clean energy transition aligned with the goals of the Paris Agreement; and

(g) encourage non-parties to develop and undertake best practice approaches to fossil fuel subsidy reform.

In sum, the subsidies chapter should lay down the principles and the areas for which the parties consider that subsidies should be maintained or granted. There, the inclusion of an illustrative list of public policy objectives constitutes an additional commitment to using subsidies for promoting climate change mitigation and adaptation.

One additional crucial issue should be the introduction of extensive cooperation mechanisms between the parties in order to most efficiently use subsidy resources and avoid inefficient ‘subsidy-wars’, even for subsidies used for developing green technologies. The inherent inefficiencies of an uncooperative approach would greatly impede the level of ambitiousness set.<sup>92</sup>

One way of achieving this is through the imposition of transparency obligations on subsidy provisions, since lack of transparency has been one of the biggest issues contributing to inefficient subsidy control,<sup>93</sup> consultation mechanisms and specialised committees that discuss issues related to climate change and subsidies.<sup>94</sup> This is recognized in the Subsidies Chapter of the EU-New Zealand FTA, which provides “[t]he Parties acknowledge, however, that certain subsidies have the potential to distort the proper functioning of markets, undermine the benefits of trade liberalisation and harm the environment. In principle, subsidies should not be granted by a Party when they negatively affect, or are likely to affect, competition or trade or significantly harm the environment.”

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<sup>92</sup> Similar considerations for anti-trust: Andrew T Guzman (ed), *Cooperation, Comity, and Competition Policy* (Oxford University Press 2010); Andrew T Guzman, ‘The Case for International Antitrust’, *Competition Laws in Conflict, Antitrust Jurisdiction in The Global Economy* (AEI Press 2004).

<sup>93</sup> Subsidies as untransparent instruments in Petros Mavroidis, Patrick Messerlin and Jasper Wauters, *The Law and Economics of Contingent Protection in the WTO* (Edward Elgar Publishing 2008) 296 <<http://www.elgaronline.com/view/9781847202765.xml>> accessed 11 July 2021; United Kingdom, Department for Business, Energy and and Industrial Strategy, ‘Subsidy Control: Designing a New Approach for the UK Consultation Impact Assessment’ Impact Assessment BEIS006(C)-21-MF.

<sup>94</sup> See for example Article 369 and 370 EU-UK TCA.

## Proposals

Disciplines on Green Subsidies	Disciplines on Fossil Fuels	Cooperation and Transparency
<ul style="list-style-type: none"><li>• More Regulatory Space</li><li>• Example of Article 367 EU-UK TCA</li></ul>	<ul style="list-style-type: none"><li>• More stringent disciplines</li><li>• Example of Article 22.8 UK-New Zealand FTA</li></ul>	<ul style="list-style-type: none"><li>• Consultation Mechanisms and specialised committees on green subsidies</li><li>• Example of Article 369-370 EU-UK TCA</li></ul>

### 8.1.3 Trade in Goods: Tariff Concessions and Favourable Treatment to Green Goods

The traditional core of FTAs is the chapter on trade in goods, which is usually the more liberalized one, and provides rules on reciprocal trade preference, market access conditions, and zero tariff schemes. Climate change comes into play when examining whether climate-friendly products should receive more favourable tariff, tax, or regulatory treatment than carbon-intensive products. These issues have been extensively discussed within the context of the WTO, and the solutions adopted within FTAs is to explicitly provide states the capacity to differentiate between such products, either by allowing the so-called regulatory distinctions,<sup>95</sup> or by introducing environmental considerations in the concept of 'likeness',<sup>96</sup> or by including differential tariff treatment in the schedules of concessions.<sup>97</sup>

Import tariffs and non-tariff barriers tend to be higher in clean industries and products than in carbon intense ones, which amounts to an implicit subsidy to carbon emissions.<sup>98</sup> For this reason, the provision of more favourable tariff and domestic regulatory treatment is crucial,

<sup>95</sup> For more on the issue: Jason Houston-McMillan, 'The Legitimate Regulatory Distinction Test: Incomplete and Inadequate for the Particular Purposes of the TBT Agreement' (2016) 15 World Trade Review 543.

<sup>96</sup> For more see: Cottier, Thomas. Renewable Energy and Process and Production Methods. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 2015. [www.e15initiative.org/](http://www.e15initiative.org/)

<sup>97</sup> Petros C Mavroidis and Damien J Neven, 'Greening the WTO Environmental Goods Agreement, Tariff Concessions, and Policy Likeness' (2019) 22 Journal of International Economic Law 373.

<sup>98</sup> Shapiro (n 87).

since any positive or ambitious positive measure in favour of climate change will still be negated by the more preferential tariff status-quo of ‘dirty’ industries.<sup>99</sup> Thus, FTA should explicitly allow the introduction of measures affecting (positively or negatively) products that were produced only by using certain processes and production methods.

The EFTA-Indonesia CEPA provides tariff preferences to imports from Indonesia if the imports comply with “*laws, policies and practices aiming at protecting primary forests, peatlands, and related ecosystems, halting deforestation, peat drainage and fire clearing in land preparation, reducing air and water pollution, and respecting rights of local and indigenous communities and workers.*”<sup>100</sup> This has been applied to palm oil imports, where EFTA states will further establish domestic control systems on the compatibility of such imports with sustainability standards. Similar choices have been made by the EU in the Mercosur Draft with regards to animal welfare, where animal welfare standards must be applied by Mercosur producers in order to gain preferential status for exports of shelled eggs.<sup>101</sup> The effectiveness of such measures is closely related to the tariff treatment of non-environmentally friendly products, as well as the general market conditions. In the EFTA-Indonesia CEPA, for instance, a predominant portion of the imports of palm oil is not environmentally friendly and, since it is used for animal feed, receives low tariff treatment, this renders the tariff preference for sustainable palm oil seemingly ineffective.<sup>102</sup>

An additional example is the introduction of separate chapters or provisions specifically dedicated to the promotion of environmental goods and services, which include energy-saving products, electric cars, environmental monitoring products and renewable energy

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<sup>99</sup> Hatti Owens and Tom West, ‘International Trade Rules and Environmental Protection Measures: Import Restrictions and Process and Production Methods (PPMs) under the General Agreement on Tariffs and Trade’ (10.2020) <<https://www.clientearth.org/media/axymwawk/2020-10-15-international-trade-rules-and-environmental-protection-measures-ce-en.pdf>>; Jessica C Lawrence and Laurens Ankersmit, ‘Making EU FTAs “Paris Safe” Three Studies with Concrete Proposals’ <<http://rgdoi.net/10.13140/RG.2.2.20930.43203>> accessed 5 June 2022.

<sup>100</sup> Article 8.10(2):a; Article 8.10(2):e, *Comprehensive Economic Partnership Agreement between the Republic of Indonesia and the EFTA States*.

<sup>101</sup> ‘The EU Sets Precedent with the First Animal Welfare-Based Condition in a Trade Agreement’ <<https://www.eurogroupforanimals.org/news/eu-sets-precedent-first-animal-welfare-based-condition-trade-agreement>> accessed 5 June 2022.

<sup>102</sup> Charlotte Sieber-Gasser, *The EFTA-Indonesia Template for Sustainable Palm-Oil – and for Human Rights?*, Blog, Human Rights In Context, April 29 2021 [Online]: <https://www.humanrightsincontext.be/post/the-efta-indonesia-template-for-sustainable-palm-oil-and-for-human-rights>.

goods.<sup>103</sup> The EU-Andean Community in Article 271.2 stipulates that the parties agree to promote environmental goods and services, while the CPTPP explicitly promotes cooperation on motor vehicles using alternative fuels.<sup>104</sup> The EU-UK TCA provides, among other things, for cooperation on “initiatives to promote environmental goods and services, including by addressing related tariff and non-tariff barriers”.<sup>105</sup> The EU-CARIFORUM FTA provides that “[t]he Parties agree to cooperate, including by facilitating support in the following areas: [...] assistance to producers to develop and/or improve production of goods and services, which the Parties consider to be beneficial to the environment”.<sup>106</sup>

In the EFTA-Philippines CEPA, the trade and sustainability chapter provides:

The Parties *shall strive to facilitate and promote* investment, trade in and dissemination of goods and services that contribute to sustainable development, such as environmental technologies, sustainable renewable energy, as well as goods and services that are energy efficient, eco-labelled or subject to schemes such as fair and ethical trade. Related non-tariff barriers will be addressed as part of these efforts

This issue, as seen previously, is indeed addressed in the provisions of favourable tariff treatment.

After many non-conclusive examples (i.e. without a specific list), the EU-New Zealand introduces an extensive list of green goods and services in its Annex to the TSD Chapter. The same option was taken in the Agreement between New Zealand and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu on Economic Cooperation (ANZTEC),<sup>107</sup> and the more recent UK-New Zealand FTA.<sup>108</sup> The latter includes a very comprehensive list of HS subheadings on environmental goods. Article 22.7 of Chapter 22 eliminates all import tariffs at the 6-digit level of 293 HS subheadings containing environmental goods listed in Annex 22A. The Environment and Climate Change Sub-Committee established by the Agreement is

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<sup>103</sup> Fabiano de Andrade Correa, ‘The Role of Law in the Green Economy: Challenges and Opportunities for the Liberalization of Environmental Goods and Services’ in Hassane Cisse and others (eds), *The World Bank Legal Review, Volume 5:Fostering Development through Opportunity, Inclusion, and Equity* (The World Bank 2013) <[http://elibrary.worldbank.org/doi/abs/10.1596/978-1-4648-0037-5\\_ch7](http://elibrary.worldbank.org/doi/abs/10.1596/978-1-4648-0037-5_ch7)> accessed 5 June 2022.

<sup>104</sup> Article 5.1(c) of the Appendix between Japan and Canada.

<sup>105</sup> Article 400.

<sup>106</sup> Article 190 2(e).

<sup>107</sup> Over 132 environmental goods are identified to be liberalized immediately upon entry into force of the agreement.

<sup>108</sup> New Zealand—United Kingdom of Great Britain and Northern Ireland Free Trade Agreement.

requested to keep the list under review and make recommendations to the Joint Committee for modifications.<sup>109</sup>

The UK-New Zealand FTA constitutes an illustrative example of a treaty that directly liberalizes a list of environmental goods, with a detailed HS description, additional product specifications, and remarks. The following ‘screenshot’ taken from the Annex could be used as a benchmark for future FTAs, since it constitutes an ambitious but remarkably thorough example of green goods and services liberalization.

**ANNEX 22A**  
**ENVIRONMENTAL GOODS LIST**

<b>HS 2017</b>	<b>HS Description</b>	<b>Additional Product Specification</b>	<b>Remarks/Environmental Benefit</b>
060290	Live plants, incl. their roots and mushroom spawn (excl. bulbs, tubers, tuberous roots, corms, crowns and rhizomes, incl. chicory plants and roots, unrooted cuttings and slips, fruit and nut trees, rhododendrons, azaleas and roses)		Promote regrowth and biodiversity of plant life for local agriculture.
261800	Granulated slag "slag sand" from the manufacture of iron or steel		Waste material that can be further utilised or recycled.
280461	Silicon; containing by weight not less than 99.99% of silicon		Polysilicon is a key raw material for the production of photovoltaic panels.
280469	Silicon; containing by weight less than 99.99% of silicon		Polysilicon is a key raw material for the production of photovoltaic panels.

Further, Article 22.7 provides extensive rules and principles on this liberalization, as well as additional principles on future negotiations and cooperation on promotion of goods and services.

Article 22.7

Environmental Goods and Services

1. The Parties recognise the importance of facilitating trade and investment in environmental goods and services, including clean technology, as a means of improving environmental and economic performance, contributing to clean growth and jobs, and encouraging sustainable development while addressing global environmental challenges including climate change.

<sup>109</sup> Article 22.7, Agreement between New Zealand and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu on Economic Cooperation (ANZTEC) 1.12.2013 (B2013-12).

2. Accordingly, each Party shall: (a) eliminate customs duties on originating goods of the other Party upon entry into force of this Agreement on HS six-digit subheadings containing the environmental goods listed in Annex 22A (Environmental Goods List), 3 in accordance with Chapter 2 (National Treatment and Market Access for Goods) and Annex 2A (Schedule of Tariff Commitments for Goods). The Environment and Climate Change Sub-Committee established under Article 30.9 (Sub-Committees – Institutional Provisions) shall keep this list under review, in conjunction with other relevant committees established under this Agreement, as appropriate, and may make recommendations to the Joint Committee for modifications to Annex 22A (Environmental Goods List). In keeping this list under review, the Environment and Climate Change Sub-Committee may consider factors such as the extent to which a good contributes to the clean growth and sustainable development objectives of the Parties, advances in available technologies, any potential dual-use of proposed environmental goods, relevant multilateral or plurilateral developments, and other environmental and climate factors; and

(b) facilitate and promote trade and investment in environmental goods and services, and endeavour to address any potential tariff and nontariff barriers to such trade and investment that may be identified by a Party, including by working through the Environment and Climate Change Sub-Committee and in conjunction with other relevant committees established under this Agreement, as appropriate.

3. In accordance with Article 22.19 (Cooperation) the Parties shall cooperate on ways to enhance trade in environmental goods and services. Areas of cooperation may include:

(a) renewable and low carbon energy;

(b) energy efficient products and services;

(c) clean transport including uptake of electric vehicles;

(d) energy storage technologies;

(e) sustainable financial services;

(f) clean heat;

(g) carbon capture, utilisation, and storage;

(h) climate change adaptation and resilience technologies and services;

(i) conservation of biological diversity, pollution abatement, and water conservation; and

(j) identification of, and further liberalisation of trade in, environmental services.

4. The Parties acknowledge that achieving the objectives of the UNFCCC and the Paris Agreement requires collective action. Accordingly, the Parties shall also cooperate in international fora, including at the WTO and under the UN Environment Programme, on ways to further facilitate and liberalise global trade in environmental goods and services.

Overall, the examples of EU-New Zealand and, most notably, UK-New Zealand should be followed in future negotiations by the EU. They represent least intrusive ways to promote green production and trade, by providing direct incentives for green goods and services.

## Proposals

### Green Goods and Services

- Tariff preferences with a list of green goods and services based on the EU-New Zealand and UK-New Zealand FTA

### Cooperation Mechanisms

- Update of green goods and services list
- Clarify the requirements for being considered an eligible good/service, and
- technical assistance to producers to satisfy the requirements

#### 8.1.4 General Exceptions

Following the trade in goods and trade in services part, it is imperative that the general exceptions are examined. Such clauses allow Parties to derogate from FTA commitments if justified by legitimate policy objectives. Many FTAs mimic the model of the General Exceptions provisions of the General Agreement on Tariffs and Trade (GATT, Article XX) and the General Agreements on Trade in Services (Article XIV).

For instance, Article 13 of the EU-Mercosur Draft provides:

##### Article 13 General exceptions

1. Article XX of the GATT 1994, including its Notes and Supplementary Provisions, is incorporated into and made part of Chapter (XXX – “Market Access/NTM”) and Chapter (XXX – Customs and Trade Facilitation).
2. In this context, the Parties understand that (a) the measures referred to in Article XX(b) of the GATT 1994 include environmental measures, such as measures taken to implement multilateral environmental agreements, which are necessary to protect human, animal or plant life or health; and (b) Article XX(g) of the GATT 1994 applies to measures for the conservation of living and non-living exhaustible natural resources.

General exceptions, overall, do not constitute an example of climate ambitious treaties. As it has been aptly demonstrated in WTO case law, general exceptions impose a heavy evidentiary burden on the invoking country, and they are limited in their application to the limited and

exhaustive range of policy objectives. The necessity requirement that is usually present in many exceptions makes any successful invocation of the provisions even harder.<sup>110</sup> Still, general exceptions could be revised with a view of recognising climate change as a policy objective, or by linking exceptions to commitment made under MEAs.<sup>111</sup>

One last remark on general exceptions concerns their unilateral nature. Unilateral measures tend to be inefficient since they are prone to biases and increased transactional costs due to regulatory divergences and clashes in cross-border settings.<sup>112</sup> Hence, where an innovative measure for combatting climate change is introduced, there is a possibility that the lack of synergy with the measures taken by a trade partner may seriously hamper the measure's trajectory. For this reason, it is advisable that general exceptions be tied to a notification or consultation obligation with a view of achieving a bilateral approach before introducing any measure. This is for example the path taken by the EU-Mercosur Draft that introduces after the General Exception the following:

3. Before a Party takes any measures provided for in subparagraphs (i) and (j) of Article XX of the GATT 1994, it shall provide the other Party with all relevant information, with a view to seeking a solution acceptable to the Parties. If no agreement is reached within 30 days of providing the information, the Party may apply the relevant measures. Whenever exceptional and critical circumstances require immediate action, the Party intending to take the measures may apply the necessary measure without prior notification. The Party shall inform the other Party immediately thereof.

## **Proposal**

**The general exception should not be the focus of the FTA.**

**Invocation of general exception should be tied to a notification or consultation procedure.**

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<sup>110</sup> Peter van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (Cambridge University Press 2017); Andrew Mitchell and Caroline Henckels, 'Variations on a Theme: Comparing the Concept of "Necessity" in International Investment Law and WTO Law' (2013) 14 *Chicago Journal of International Law*.

<sup>111</sup> Owens and West (n 100); Lawrence and Ankersmit (n 100).

<sup>112</sup> Steve Charnovitz, 'Environmental Trade Measures: Multilateral or Unilateral Other International Developments' (1993) 23 *Environmental Policy and Law* 154.

### 8.1.5 *Technical Barriers to Trade Provisions*

Technical Barriers to Trade (TBT) include technical regulations and non-mandatory standards.<sup>113</sup> Their relevance and impact on combatting climate change is immense, since compulsory technical specifications or voluntary standardization may constitute a prerequisite to enter the market, or benefit from favourable treatment, or be considered a green good or service.<sup>114</sup> In recent years, FTAs tend to introduce environment-related provisions in their TBT provisions in order to ensure further cooperation and transparency on the introduction and development of technical regulation and conformity assessment related to the protection of the environment. At the same time, the parties recognise that certain urgent matters may require expediated procedures and they are excluded from this normal process of notification.

For example, the CETA provides in Article 4.6:

1. Each Party shall ensure that transparency procedures regarding the development of technical regulations and conformity assessment procedures allow interested persons of the Parties to participate at an early appropriate stage when amendments can still be introduced and comments taken into account, except where urgent problems of safety, health, environmental protection or national security arise or threaten to arise. Where a consultation process regarding the development of technical regulations or conformity assessment procedures is open to the public, each Party shall permit persons of the other Party to participate on terms no less favourable than those accorded to its own persons.
2. The Parties shall promote closer cooperation between the standardisation bodies located within their respective territories with a view to facilitating, among other things, the exchange of information about their respective activities, as well as the harmonisation of standards based on mutual interest and reciprocity, according to modalities to be agreed by the standardisation bodies concerned.
3. Each Party shall endeavour to allow a period of at least 60 days following its transmission to the WTO Central Registry of Notifications of proposed technical regulations and conformity assessment procedures for the other Party to provide written comments, except where urgent problems of safety, health, environmental protection or national security arise or threaten to arise. A Party shall give positive consideration to a reasonable request to extend the comment period

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<sup>113</sup> Bossche and Zdouc (n 111) ch 13.

<sup>114</sup> Rex J Zedalis, 'The Environment and the Technical Barriers to Trade Agreement: Did the Reformulated Gasoline Panel Miss a Golden Opportunity?' (1997) 44 *Netherlands International Law Review* 186.

Further, a significant encumbrance in the effective introduction of TBT measures by developing countries is their lack of expertise, especially when the EU has a predominant role in international standard-setting. For this reason, many EU treaties introduce commitments on cooperation, trade facilitation, and technical assistance.

An extensive and illustrative example is Article 5.10 of the EU-Vietnam FTA, which introduces obligations on cooperation and trade facilitation in the field of standards, technical regulation, and conformity assessment. It reads:

#### Article 5.10 Cooperation and Trade Facilitation

1. The Parties shall strengthen their cooperation in the field of standards, technical regulations and conformity assessment procedures with a view to increasing the mutual understanding of their respective systems and to facilitating trade between them. To that end, they may establish regulatory dialogues at both horizontal and sectoral levels.
2. The Parties shall aim to identify, develop and promote bilateral initiatives regarding standards, technical regulations and conformity assessment procedures that are appropriate for particular issues or sectors and which facilitate trade. Those initiatives may include:
  - (a) promoting good regulatory practices through regulatory cooperation, including the exchange of information, experiences and data, with a view to improving the quality and effectiveness of their standards, technical regulations and conformity assessment procedures and making efficient use of regulatory resources;
  - (b) using a risk-based approach to conformity assessment such as relying on a supplier's declaration of conformity for low-risk products and, where appropriate, reducing the complexity of technical regulations, standards and conformity assessment procedures;
  - (c) increasing the convergence of their standards, technical regulations and conformity assessment procedures with relevant international standards, guides or recommendations;
  - (d) avoiding unnecessary divergence of approach in standards, technical regulations and conformity assessment procedures where no international standards, guides or recommendations exist;
  - (e) promoting or enhancing cooperation between the Parties' respective organisations, public or private, responsible for standardisation, conformity assessment and metrology;
  - (f) ensuring efficient interaction and cooperation between regulatory authorities at regional or international level; and

(g) exchanging information, to the extent possible, about agreements and arrangements related to technical barriers to trade subscribed to at international level

3. Upon request, a Party shall give due consideration to proposals for cooperation from the other Party under this Chapter. This cooperation shall be undertaken, inter alia, through dialogue in appropriate fora, joint projects, technical assistance and capacity-building programmes on standards, technical regulations and conformity assessment procedures in selected industrial areas, as mutually agreed.

The EU-Singapore FTA includes a separate chapter on non-tariff barriers to trade in renewable energy generation. The objectives of the chapter are set out in Article 7.1: *“In line with global efforts to reduce greenhouse gas emissions, the Parties share the objective of promoting, developing and increasing the generation of energy from renewable and sustainable non-fossil sources, particularly through facilitating trade and investment. To this effect, the Parties shall cooperate towards removing or reducing tariffs as well as nontariff barriers, and shall cooperate on fostering regulatory convergence with or towards regional and international standards.”*

The chapter has an extensive article on TBT measures with regards to renewable energy and allows the introduction of environmental considerations (in the form of environmental performance) when adopting technical regulations, instead of design or descriptive characteristics.<sup>115</sup>

The overall approach of the EU-Singapore FTA should be extended to most TBT chapters, especially as eco-labelling and mandatory environmental standardization becomes more and more the norm. Further, EU should prioritize offering technical expertise and trade facilitation commitments in adopting climate-friendly technical regulations.

The EU-Singapore FTA has further relevant provisions on TBT measures in the environmental chapter where it recognises the *“usefulness of efforts to promote trade in goods that are the subject of voluntary or private sustainable development assurance schemes, such as eco-labelling, or fair and ethical trade”*.<sup>116</sup> It continues to provide a commitment that the parties will seek to cooperate and promote *“climate-friendly goods and services, such as sustainable*

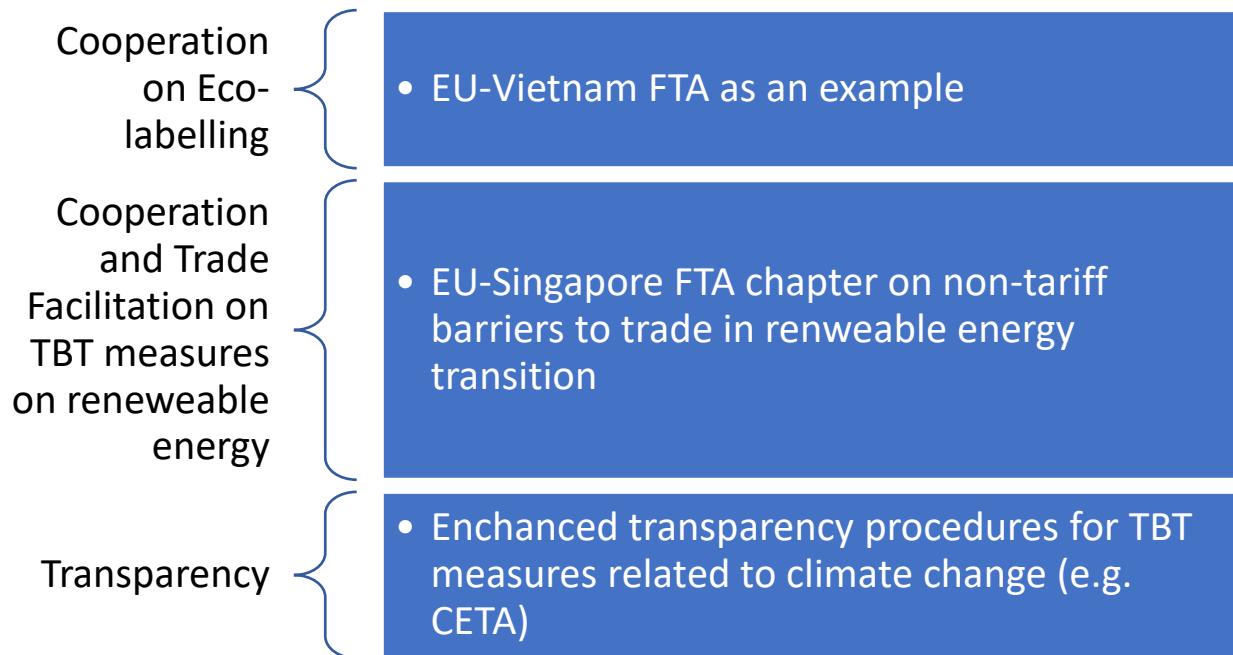
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<sup>115</sup> 2. Where appropriate, the Parties shall specify technical regulations based on product requirements in terms of performance, including environmental performance, rather than in terms of design or descriptive characteristics.

<sup>116</sup> Article 12.11.1

*renewable energy goods and related services and energy efficient products and services, including through the adoption of policy frameworks conducive to the deployment of best available technologies and through the promotion of standards that respond to environmental and economic needs and minimise technical obstacles to trade”.*<sup>117</sup>

## Proposals



### 8.1.6 Sanitary and Phytosanitary Measures Chapter

The chapters on sanitary and phytosanitary (SPS) measures are closely related to TBT Chapters, since most SPS measures constitute technical regulations dedicated to the protection of human, animal and plant life or health.<sup>118</sup> Overall, climate change has an increasing impact on human health, animal diseases and plant pests.<sup>119</sup> FTAs primarily incorporate the WTO SPS Agreement by supplementing it with trade facilitation measures,

<sup>117</sup> Article 12.11.2

<sup>118</sup> Bossche and Zdouc (n 111) 14; Joost Pauwelyn, ‘The WTO Agreement on Sanitary and Phytosanitary (SPS) Measures as Applied in the First Three SPS Disputes. EC - Hormones, Australia - Salmon and Japan - Varietals’ (1999) 2 Journal of International Economic Law 641.

<sup>119</sup> Standards and Trade Development Facility and World Bank, ‘Climate Change and Trade: The Link to Sanitary and Phytosanitary Standards’ (09.2011).

equivalence and mutual recognition conditions, and institutional and implementation provisions.<sup>120</sup>

An emerging issue is the application of the precautionary approach. The WTO SPS Agreement adopts a rather restrictive instance of the precautionary approach, which has been criticised for its capacity to properly address the increasing threats of climate change to plant, animal and human life or health.<sup>121</sup> There is a need to include an express reference to the precautionary approach in the SPS Agreement.<sup>122</sup>

The practice, though, is to incorporate the precautionary approach in the Environmental chapter. For example, the EU-UK TCA has the following procedure on the precautionary approach:

Article 356: Right to regulate, precautionary approach [original footnote 1] and scientific and technical information

2. The Parties acknowledge that, in accordance with the precautionary approach, where there are reasonable grounds for concern that there are potential threats of serious or irreversible damage to the environment or human health, the lack of full scientific certainty shall not be used as a reason for preventing a Party from adopting appropriate measures to prevent such damage.

3. When preparing or implementing measures aimed at protecting the environment or labour conditions that may affect trade or investment, each Party shall take into account relevant, available scientific and technical information, international standards, guidelines and recommendations.

However, a particular application of the precautionary approach is the recognition of the capacity of states to introduce provisional SPS measures when the relevant scientific evidence

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<sup>120</sup> Look for instance the EU-Mercosur Draft Agreement: risk-based approach to regulations (article 4). The chapter identifies competent authorities (article 5), general obligations (article 6), trade facilitation measures (article 7), alternative measures (article 8), equivalence (article 9), and recognition of animal health and plant pest status and regional conditions (article 10), transparency (article 11), notifications (article 12), consultations (article 13), emergency measures (article 14), and verification of the official control system (article 15).

<sup>121</sup> Muhammad Islam, 'The Sanitary and Phytosanitary Agreement of the World Trade Organization: Debunking Its Reliance on Scientific Evidence and Reluctance to Endorse Potential Biotechnology Risks' (2021) 12 *European Journal of Risk Regulation* 547; Henriot and Van de Berghe (n 59).

<sup>122</sup> The SPS Agreement and the SPS Chapters in FTA follow mainly the prevention principle. The precautionary approach should be distinguished from the prevention principle. The precautionary approach allows the introduction of measures to mitigate possible risks despite the lack of conclusive scientific evidence on the calculation of risk. In contrast, the preventive principles obliges the introduction of measures to prevent damage from risks for which we have scientific certainty. The occurrence of damage is probable in the prevention principle in case no measure is taken, while in the precautionary approach the occurrence of damage cannot be predicted clearly. For more: Pierre-Marie Dupuy and Jorge E Viñuales, *International Environmental Law* (Second edition, Cambridge University Press 2018).

is insufficient.<sup>123</sup> It is not a very ambitious example since provisional measures are exceptional and temporary, and the implementing authority has the burden of proof to provide scientific evidence and information in order to fully implement the measures. Still, it allows the imposition of sanitary or phytosanitary measures based on the precautionary principle.<sup>124</sup>

A further important element is the provision of special and differential treatment (SDT). For example, EU-Andean Community FTA and the EU-Vietnam FTA provide extensive SDT provisions including technical assistance, transitional period for implementation of measures, and alternative import conditions for certain SPS Measures.

For example, the EU-Vietnam provides:

#### Article 6.15 Technical Assistance and Special and Differential Treatment

1. The Union should provide technical assistance to address specific needs of Viet Nam to comply with the Union's SPS measures, including food safety, animal and plant health, and the use of international standards.
2. In accordance with Article 10 of the SPS Agreement, in the case of new SPS measures, the Union shall take into account the special needs of Viet Nam so as to maintain the export opportunities of Viet Nam while continuing to achieve the Union's level of protection. The SPS Committee shall be consulted upon request by either Party to reflect on and decide about:
  - (a) longer timeframes for compliance;
  - (b) alternative import conditions in the context of equivalence; and
  - (c) technical assistance activities.

An interesting development in the EU-Mercosur Draft is a separate chapter on 'Dialogues' with the following objective:

[...] to strengthen their mutual confidence and agree to establish dialogues and exchange information to improve their common understanding on the following subjects:

1. Animal welfare matters.

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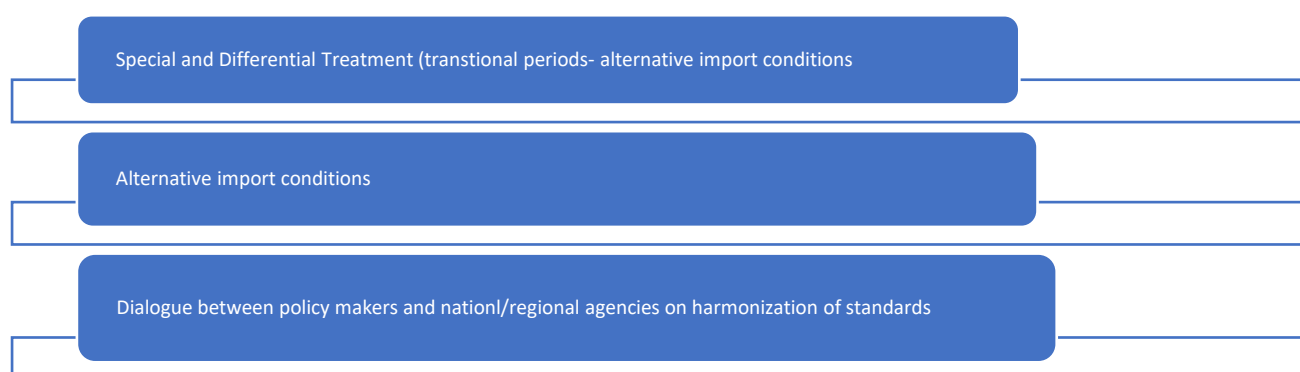
<sup>123</sup> Article 11(f) EU-Mercosur Draft FTA

<sup>124</sup> Stoll, W. Th. Douma, N. de Sadeleer and Patrick Abel, CETA, TTIP and the EU precautionary principle - Legal analysis of selected parts of the draft CETA agreement and the EU TTIP proposals, Foodwatch, 2016, [https://www.foodwatch.org/fileadmin/Themen/TTIP\\_Freihandel/Dokumente/20160621\\_foodwatchstudy\\_precautionary-principle.pdf](https://www.foodwatch.org/fileadmin/Themen/TTIP_Freihandel/Dokumente/20160621_foodwatchstudy_precautionary-principle.pdf)

2. Issues related to the application of agricultural biotechnology.
3. Combating antimicrobial resistance (AMR).
4. Scientific matters related to food safety, animal and plant health.

The chapter introduces a sub-committee that will work permanently on the issues with a view of augmenting the dialogue between the policy makers and the national or regional agencies. This cooperation scheme may provide an interesting initiative to foster information exchange and regulatory cooperation with a view of creating common rules on certifications and accreditation, including the harmonization of standards for different products (e.g., the capacity pesticides).

### Proposals



#### 8.1.7 Government Procurement Chapter

In the field of government procurement, more FTAs allow the introduction of environmental technical specifications to be introduced as a requirement to participate in a tender process.

For example, Article 19.9 of the CETA stipulates:

1. A procuring entity shall not prepare, adopt or apply any technical specification or prescribe any conformity assessment procedure with the purpose or the effect of creating unnecessary obstacles to international trade.

Yet:

9. The evaluation criteria set out in the notice of intended procurement or tender documentation may include, among others, price and other cost factors, quality, technical merit, environmental characteristics and terms of delivery.

The EU-Japan FTA is even more direct by providing:

#### ARTICLE 10.10 Environmental conditions

Procuring entities may lay down environmental conditions relating to the performance of a procurement, provided that those conditions are compatible with the rules established by this Chapter and are indicated in the notice of intended procurement or in another notice used as a notice of intended procurement or tender documentation

The EU-Mercosur Draft allows that *“the evaluation criteria [...] of tender documentation may include, among others, [...] technical merit environmental characteristics.”*<sup>125</sup> Similarly, the EU-Vietnam FTA provides further specifications on the operation of such environmental considerations:

7. Where procuring entities lay down environmental characteristics in terms of performance or functional requirement, as referred to in paragraph 2(a), they may consider using the detailed specification or, if necessary, parts thereof, as defined by eco-labels existing within the Union and green labels existing in Singapore, provided that:

- (a) those specifications are appropriate to define the characteristics of the supplies or services that are the object of the contract;
- (b) the requirements of the label are drawn up on the basis of scientific information; and
- (c) those specifications are accessible to all interested parties

Further, it is quite frequent that a General Exceptions clause is introduced in the Government procurement chapter. For example, the EU-Mercosur Draft allows the adoption of measures *“necessary to protect human, animal, or plant life or health including environmental measures.”*<sup>126</sup>

One crucial aspect in this process is the provision of capacity building and assistance to government procurement authorities in developing countries. The goal is to increase the expertise and the capacity of procuring entities, so that they are able to include

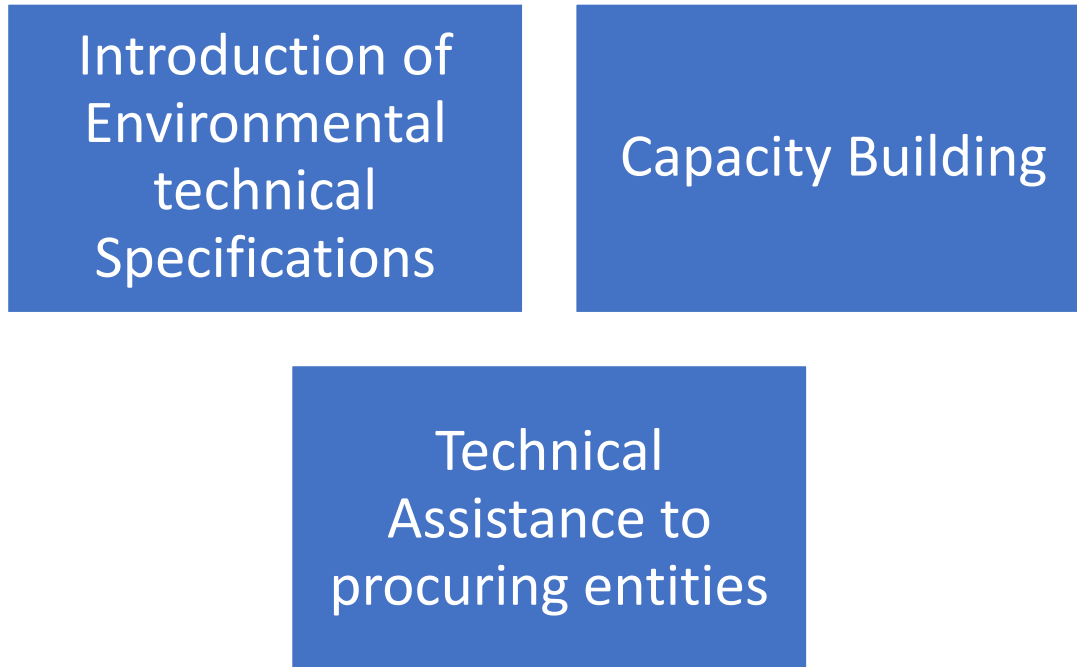
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<sup>125</sup> Article 17.3

<sup>126</sup> Article 5.2(c); Similar in EU-Central America FTA, Article 210.6.

environmental specifications in their tendering process. So far, no specific provision has been found in FTAs on this issue.

### Proposals



#### 8.1.8 Intellectual Property

Intellectual Property chapters are crucial to combatting climate change, as green goods and services rely primarily on newer technological developments that are either carbon neutral or more energy efficient.<sup>127</sup> Further, IP protection constitutes a powerful incentive for a company to invest in new technologies as well as a source of monopoly power over a particular invention, business secret or trademark etc. One important element in this regard is the inclusion of a provision that excludes from patentability or general IP protection of environmentally harmful inventions. Hence, there will be no incentive for developing inventions that have an environmental harmful effect.

Further, trade partners should foster innovation on climate friendly technologies by facilitating cooperation between the different stakeholders. Article 138 of the EU-

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<sup>127</sup> Abbe EL Brown, *Intellectual Property and Climate Change*, vol 1 (Rochelle Dreyfuss and Justine Pila eds, Oxford University Press 2017); Abbe EL Brown, *Intellectual Property, Climate Change and Technology* (Edward Elgar Publishing 2019).

CARIFORUM FTA stipulates a lengthy cooperation on eco-innovation and renewable energy provisions that sets out general principle and examples of cooperative schemes:

#### Article 138 Cooperation on eco-innovation and renewable energy

1. With a view to achieving sustainable development and in order to help maximise any positive and prevent any negative environmental impacts resulting from this Agreement, the Parties recognise the importance of fostering forms of innovation that benefit the environment in all sectors of their economy. Such forms of eco-innovation include energy efficiency and renewable sources of energy.
2. Subject to the provisions of Article 7 and 134, the Parties agree to cooperate, including by facilitating support, in the following areas:
  - (a) projects related to environmentally-friendly products, technologies, production processes, services, management and business methods, including those related to appropriate water-saving and Clean Development Mechanism applications;
  - (b) projects related to energy efficiency and renewable energy;
  - (c) promotion of eco-innovation networks and clusters, including through public-private partnerships;
  - (d) exchanges of information, know-how and experts;
  - (e) awareness-raising and training activities;
  - (f) preparation of studies and provision of technical assistance;
  - (g) collaboration in research and development; and
  - (h) pilot and demonstration projects.

Moving on to particular aspects of IP protection, there is extensive practice on the relation between biodiversity and traditional knowledge. Presently, this Report will not focus on the specific issue of biodiversity, but it is interesting to see from a legal drafting standpoint how extensive references to biodiversity and protection of traditional knowledge can get, as similar options could be developed with regards to combatting climate change. Further, it is crucial to recognize the importance of traditional or indigenous knowledge in understanding ecological impacts of climate change on cultural and social aspects.

## CHAPTER 2 PROTECTION OF BIODIVERSITY AND TRADITIONAL KNOWLEDGE

### ARTICLE 201

1. The Parties recognise the importance and value of biological diversity and its components and of the associated traditional knowledge, innovations and practices of indigenous and local communities [original footnote 62]. The Parties furthermore reaffirm their sovereign rights over their natural resources and recognise their rights and obligations as established by the CBD with respect to access to genetic resources, and to the fair and

equitable sharing of benefits arising out of the utilization of these genetic resources.

2. The Parties recognise the past, present and future contribution of indigenous and local communities to the conservation and sustainable use of biological diversity and all of its components and, in general, the contribution of the traditional knowledge [original footnote 63] of their indigenous and local communities to the culture and to the economic and social development of nations.

3. Subject to their domestic legislation, the Parties shall, in accordance with Article 8(j) of the CBD respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity, and promote their wider application conditioned to the prior informed consent of the holders of such knowledge, innovations and practices, and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

4. In accordance with Article 15 paragraph 7 of the CBD, the Parties reaffirm their obligation to take measures with the aim of sharing in a fair and equitable way the benefits arising from the utilization of genetic resources. The Parties also recognise that mutually agreed terms may include benefit-sharing obligations in relation to intellectual property rights arising from the use of genetic resources and associated traditional knowledge.

5. Colombia and the EU Party will collaborate in further clarifying the issue and concept of misappropriation of genetic resources and associated traditional knowledge, innovation and practices so as to find, as appropriate and in accordance with the provisions of international and domestic law, measures to address this issue

6. The Parties shall cooperate, subject to domestic legislation and international law, to ensure that intellectual property rights are supportive of, and do not run counter to, their rights and obligations under the CBD, in so far as genetic resources and associated traditional knowledge of the indigenous and local communities located in their respective territories are concerned. The Parties reaffirm their rights and obligations under Article 16 paragraph 3 of the CBD in relation to countries providing genetic resources, to take measures with the aim to provide access to and transfer of technology which makes use of such resources, upon mutually agreed terms. This provision shall apply without prejudice to the rights and obligations under Article 31 of the TRIPS Agreement.

7. The Parties acknowledge the usefulness of requiring the disclosure of the origin or source of genetic resources and associated traditional knowledge in patent applications, considering that this contributes to the transparency about the uses of genetic resources and associated traditional knowledge.

8. The Parties will provide, in accordance with their domestic law, for applicable effects of any such requirement so as to support compliance with the provisions regulating access to genetic resources and associated traditional knowledge, innovations and practices.

9. The Parties will endeavour to facilitate the exchange of information about patent applications and granted patents related to genetic resources and associated traditional knowledge, with the aim that in the substantive examination, particularly in determining prior art, such information can be considered.

10. Subject to the provisions of Chapter 6 (Cooperation) of this Title, the Parties will cooperate on mutually agreed terms in the training of patent examiners in reviewing patent applications related to genetic resources and associated traditional knowledge.

11. The Parties recognise that data bases or digital libraries which contain relevant information constitute useful tools for patentability examination of inventions related to genetic resources and associated traditional knowledge.

12. In accordance with applicable international and domestic law, the Parties agree to collaborate in the application of domestic frameworks on access to genetic resources and associated traditional knowledge, innovations and practices.

13. The Parties may, by mutual agreement, review this Chapter subject to the results and conclusions of multilateral discussions.

Moving on, an important element in Intellectual Property Chapters is the provisions dedicated to technology transfer, which constitutes a powerful tool to disseminate climate-friendly technologies from developed to developing countries.<sup>128</sup> In the EU-Central America FTA, Article 228(b) explicitly promotes technology transfer between both regions for the creation of a viable technological base in the Central America Party, while at the same time a Sub-Committee on Intellectual Property rights is created which, among other things, defines the priority areas for technology transfer.<sup>129</sup> Here, an express recognition of climate change as an area for technology transfer would further prioritize the field within the works of a sub-Committee on Intellectual property rights. Hence, the IP treaties should have a provision that explicitly encourages transfer of technology to help in the adoption of new technologies that

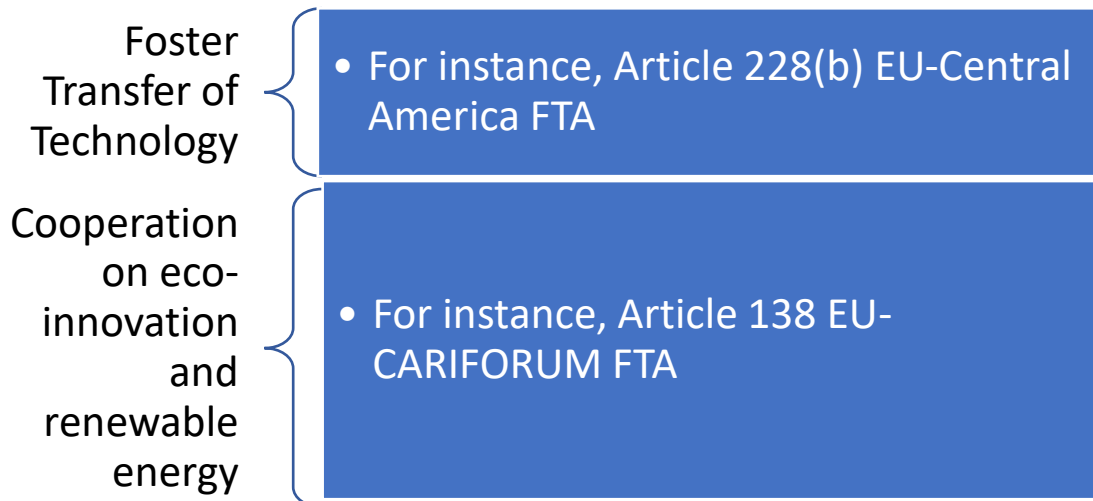
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<sup>128</sup> Inmaculada Martínez-Zarzoso and Santiago Chelala, 'Trade Agreements and International Technology Transfer' (2021) 157 *Review of World Economics* 631.

<sup>129</sup> Article 274.1

may contribute to the mitigation of climate change and aid in energy transition, among other elements.

## Proposals



## 8.2 Proposals within the Environmental Chapter

In the present part, the Report examines certain key provisions that can be found either in an Environmental Chapter or in a Trade and Sustainability Chapter. The main theme that will run through this part is the need to introduce binding language, positive obligations, and specific commitments for combatting climate change.

### 8.2.1 Introductory provisions

The starting point of the analysis is the introductory provisions of the environmental chapters. Here, similarly to the *chapeau* of a treaty, the pace of the chapter is set. For example, the EFTA-Philippines EPA started with the following:

#### ARTICLE 11.1 Context and Objectives

1. The Parties recall the Declaration of the United Nations Conference on the Human Environment of 1972, the Rio Declaration on Environment and Development of 1992, Agenda 21 on Environment and Development of 1992, the Johannesburg Plan of Implementation on Sustainable Development of 2002, the Rio+20 Outcome Document “The Future We Want” of 2012, the UN Sustainable Development Summit Outcome Document “Transforming Our World: the 2030 Agenda for Sustainable

Development” of 2015, the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up of 1998, the Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work of 2006 and the ILO Declaration on Social Justice for a Fair Globalization of 2008.

2. The Parties recognise that economic development, social development and environmental protection are interdependent and mutually supportive pillars of sustainable development. They recognise the benefits of cooperation on trade-related labour and environmental issues as part of a global approach to trade and sustainable development.

3. The Parties reaffirm their commitment to the promotion of international trade with the aim to contribute to the objective of sustainable development and to integrate and reflect this objective in the Parties’ trade relations.

4. The Parties agree that the provisions of this Chapter shall not be used for protectionist trade purposes.

There is a great variety in such introductory clauses, which, however, serve their purpose, especially when referring directly to climate change instruments, policies, and goals. This is clear from the example of EU-Andean Communities FTA, where Article 275 constitutes an introductory provision regarding the commitments of the parties to combatting climate change:

#### ARTICLE 275 Climate Change

1. Bearing in mind the United Nations Framework Convention on Climate Change (hereinafter referred to as "UNFCCC") and the Kyoto Protocol, the Parties recognise that climate change is an issue of common and global concern that calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, for the benefit of present and future generations of mankind.

2. The Parties are resolved to enhance their efforts regarding climate change, which are led by developed countries, including through the promotion of domestic policies and suitable international initiatives to mitigate and to adapt to climate change, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions, and taking particularly into account the needs, circumstances, and high vulnerability to the adverse effects of climate change of those Parties which are developing countries.

3. The Parties also recognise that the effect of climate change can affect their current and further development, and therefore highlight the

importance of increasing and supporting adaptation efforts, especially in those Parties which are developing countries.

4. Considering the global objective of a rapid transition to low-carbon economies, the Parties will promote the sustainable use of natural resources and will promote trade and investment measures that promote and facilitate access, dissemination and use of best available technologies for clean energy production and use, and for mitigation of and adaptation to climate change.

5. The Parties agree to consider actions to contribute to achieving climate change mitigation and adaptation objectives through their trade and investment policies, inter alia by:

(a) facilitating the removal of trade and investment barriers to access to, innovation, development, and deployment of goods, services and technologies that can contribute to mitigation or adaptation, taking into account the circumstances of developing countries;

(b) promoting measures for energy efficiency and renewable energy that respond to environmental and economic needs and minimise technical obstacles to trade.

In the EU-UK, the relevant chapter is named 'Level Playing Field'; hence, the introductory provision introduces the concept.

#### ARTICLE 355 Principles and objectives

1. The Parties recognise that trade and investment between the Union and the United Kingdom under the terms set out in this Agreement, require conditions that ensure a level playing field for open and fair competition between the Parties and that ensure that trade and investment take place in a manner conducive to sustainable development.

2. The Parties recognise that sustainable development encompasses economic development, social development and environmental protection, all three being interdependent and mutually reinforcing, and affirm their commitment to promoting the development of international trade and investment in a way that contributes to the objective of sustainable development.

3. Each Party reaffirms its ambition of achieving economy-wide climate neutrality by 2050.

4. The Parties affirm their common understanding that their economic relationship can only deliver benefits in a mutually satisfactory way if the commitments relating to a level playing field for open and fair competition stand the test of time, by preventing distortions of trade or investment, and by contributing to sustainable development. However, the Parties recognise that the purpose of this Title is not to harmonise the standards of the

Parties. The Parties are determined to maintain and improve their respective high standards in the areas covered by this Title

It is really interesting here that the parties explicitly reaffirm their ambition of achieving climate neutrality by 2050. Further, it is imperative that they introduce their commitment to climate change regulation from the very beginning.

In the UK-New Zealand, the introductory provision (Article 22.3), specifies that “[t]he objectives of this Chapter[trade and environment] are to promote mutually supportive trade and environmental policies; promote high levels of environmental protection and effective enforcement of environmental laws; encourage the Parties to address the urgent threat of climate change; and enhance the capacities of the Parties to address trade or investment-related environmental issues, including through cooperation”. Further, the parties recognize “the urgent need to address climate change, as outlined in the Intergovernmental Panel on Climate Change Special Report on Global Warming of 1.5°C, is a contribution to the economic, social, and environmental objectives of sustainable development”.<sup>130</sup>

After the introductory provisions, many FTAs include provisions related to the recognition of state’s right to regulate. This right to regulate is highly related to provisions on non-regression obligations and on levels of protection that will be examined in part 7.2.3.

A traditional example of the right to regulate provision is Article 12.2 of the EU-Singapore FTA:

#### 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 its relevant laws and policies accordingly, consistent with the principles of the internationally recognised standards or agreements to which it is party, referred to in Articles 12.3 (Multilateral Labour Standards and Agreements) and 12.6 (Multilateral Environmental Standards and Agreements).
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

In the EU-UK TCA, the Rights to regulate is introduced alongside the capacity to utilise the precautionary approach and the principles related to the use of scientific and technical information when regulating:

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<sup>130</sup> Article 22.3(c), New Zealand—United Kingdom of Great Britain and Northern Ireland Free Trade Agreement.

ARTICLE 356 Right to regulate, precautionary approach [original footnote 1] and scientific and technical information

1. The Parties affirm the right of each Party to set its policies and priorities in the areas covered by this Title, to determine the levels of protection it deems appropriate and to adopt or modify its law and policies in a manner consistent with each Party's international commitments, including its commitments under this Title.

2. The Parties acknowledge that, in accordance with the precautionary approach, where there are reasonable grounds for concern that there are potential threats of serious or irreversible damage to the environment or human health, the lack of full scientific certainty shall not be used as a reason for preventing a Party from adopting appropriate measures to prevent such damage.

3. When preparing or implementing measures aimed at protecting the environment or labour conditions that may affect trade or investment, each Party shall take into account relevant and available scientific and technical information, international standards, guidelines and recommendations.

Additionally, in the introductory provisions, the parties should introduce a conflict clause that provides that any trade commitment should not be introduced at the expense of climate change or environmental obligations generally. For instance, Article 22.1(2) CETA strikes a distinct balance favouring domestic environmental protection:

The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded by their domestic labour and environment law. At the same time, the Parties stress that environmental and labour standards should not be used for protectionist trade purposes.

These clauses will be further examined in the non-regression provisions of the present paper (8.2.3).

The EU-Andean Communities FTA has an extensive provision on trade favouring sustainable development, which sets out the ambitions of the parties and their recognition that trade should primarily promote sustainability.

ARTICLE 271 Trade Favouring Sustainable Development

1. The Parties reaffirm that trade should promote sustainable development. The Parties also recognise the beneficial role that core labour standards and decent work can have on economic efficiency, innovation and productivity, as well as the value of greater coherence between trade policies, on the one hand, and labour policies on the other.

2. The Parties shall strive to facilitate and promote trade and foreign direct investment in environmental goods and services.
3. The Parties agree to promote best business practices related to corporate social responsibility.
4. The Parties recognise that flexible, voluntary, and incentive-based mechanisms can contribute to coherence between trade practices and the objectives of sustainable development. In this regard, and in accordance with its respective laws and policies, each Party will encourage the development and use of such mechanisms.

One final element presented in introductory provisions is an adapted approach to the common but differentiated responsibility principle. EU treaties with many developing countries (but also CETA) clearly stipulate that there is no objective of harmonisation of environmental laws. For example, the EU-Singapore FTA provides in Article 12.1(4) that “*in light of the specific circumstances of each Party, it is not their intention to harmonise the labour or environment standards of the Parties*”. Hence, different levels of development allow for the introduction of different environmental policies. Still, even if such provisions existed, they should be limited through a commitment not to regress and to increase levels of environmental protection in the future.

As a final thought, the parties should explicitly provide for timeframes, goals, and targets in their introductory provisions of the Environmental Chapter. This is illustrated by the example of EU-UK TCA with the goal of climate neutrality by 2050. The EU-New Zealand focuses on limiting global warming to 1.5°C. The EU Action Plan explicitly acknowledges the need for goals and targets.

## Proposals

Combatting Climate Change as main objective	Recognize targets and objectives	Right to Regulate and Precautionary Approach
<ul style="list-style-type: none"><li>• EU-Andean Communities FTA Article 275</li><li>• EU-UK TCA 355</li></ul>	<ul style="list-style-type: none"><li>• 1.5°C Global Warming</li><li>• Climate neutrality</li></ul>	<ul style="list-style-type: none"><li>• Article 356 EU-UK TCA</li><li>• Trade Favoring Sustainable Development (Article 271 EU-Andean Communities FTA)</li></ul>

### 8.2.2 *Effective Implementation of Multilateral Environmental Agreements*

At this stage, EU FTAs progressively make reference to environmental treaties, instruments, and principles.<sup>131</sup> Similar options have been taken also by other trade partners such as the United States. In most US environmental chapters, the parties commit to effectively enforce domestic environmental laws and the MEAs that they have joined.<sup>132</sup> Indicatively, EU FTAs refer, among other things, to:

- The UN Framework Convention on Climate Change;
- the Paris Agreement;
- the Vienna Convention for the Protection of the Ozone Layer;
- the Montreal Protocol;
- the Convention on Biological Diversity;
- the Cartagena Protocol on Biosafety;
- the CITES Convention on International Trade in Endangered Species of Wild Fauna and Flora;

<sup>131</sup> Blot, Oger and Harrisson (n 85).

<sup>132</sup> Edward Gresser, 'Labor and Environment in Trade since NAFTA: Activists Have Achieved Less and More than They Realised' (2010) 45 Wake Forest Law Review 508.

- the Convention on the Conservation of Migratory Species of Wild Animals and the International Plant Protection Convention (IPPC).

For example, Article 393 of the EU-UK TCA provides:

#### ARTICLE 393

##### Environmental and climate principles

1. Taking into account the fact that the Union and the United Kingdom share a common biosphere in respect of cross-border pollution, each Party commits to respecting the internationally recognised environmental principles to which it has committed, such as in the Rio Declaration on Environment and Development, adopted at Rio de Janeiro on 14 June 1992 (the "1992 Rio Declaration on Environment and Development") and in multilateral environmental agreements, including in the United Nations Framework Convention on Climate Change, done at New York on 9 May 1992 ("UNFCCC") and the Convention on Biological Diversity, done at Rio de Janeiro on 5 June 1992 (the "Convention on Biological Diversity"), in particular:

- (a) the principle that environmental protection should be integrated into the making of policies, including through impact assessments;
- (b) the principle of preventative action to avert environmental damage;
- (c) the precautionary approach referred to in Article 356(2);
- (d) the principle that environmental damage should as a priority be rectified at source; and
- (e) the polluter pays principle.

2. The Parties reaffirm their respective commitments to procedures for evaluating the likely impact of a proposed activity on the environment, and where specified projects, plans and programmes are likely to have significant environmental, including health, effects, this includes an environmental impact assessment or a strategic environmental assessment, as appropriate.

3. These procedures shall comprise, where appropriate and in accordance with a Party's laws, the determination of the scope of an environmental report and its preparation, the carrying out of public participation and consultations and the taking into account of the environmental report and the results of the public participation and consultations in the consented project, or adopted plan or programme.

For the purposes of climate change, it is imperative that the treaties not only refer to the climate change MEAs but also require that parties effectively implement them. This is the option taken by the EU-UK TCA that introduces the following:

## ARTICLE 401 Trade and climate change

1. The Parties recognise the importance of taking urgent action to combat climate change and its impacts, and the role of trade and investment in pursuing that objective, in line with the UNFCCC, with the purpose and goals of the Paris Agreement adopted at Paris on 12 December 2015 by the Conference of the Parties to the United Nations Framework Convention on Climate Change at its 21st session (the "Paris Agreement"), and with other multilateral environmental agreements and multilateral instruments in the area of climate change.

2. In light of paragraph 1, each Party:

(a) commits to effectively implementing the UNFCCC, and the Paris Agreement of which one principal aim is strengthening the global response to climate change and holding the increase in the global average 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;

(b) shall promote the mutual supportiveness of trade and climate policies and measures thereby contributing to the transition to a low greenhouse gas emission, resource-efficient economy and to climate-resilient development; and

(c) shall facilitate the removal of obstacles to trade and investment in goods and services of particular relevance for climate change mitigation and adaptation, such as renewable energy, energy efficient products and services, for instance through addressing tariff and non-tariff barriers or through the adoption of policy frameworks conducive to the deployment of the best available solutions.

The EU-South Korea FTA clearly confirms the obligations of the parties under UNFCCC and the Kyoto Protocol.<sup>133</sup> An important element that appears in the EU-UK TCA is the introduction of targets and goals regarding climate change. It is not certain that goals such as the 2050 economy-wide climate neutrality found in the EU-UK TCA can be extended on trade deals with less integrated partners; yet the parties should provide a benchmark around which their climate change MEAs implementation measures are to be introduced. The need for deadlines and target dates was reiterated by the European Commission in its 2022 FTA Action Plan. Thus, the planning of implementation should include pre-defined steps, dates, and indicators.

**A missing piece that needs to be introduced is the linkage between effective implementation of climate change agreement and NDCs.** Our research project has shown

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<sup>133</sup> Article 13.5.3 EU-South Korea FTA.

that the EU-Americas FTAs have significant gaps on operationalizing NDCs through trade. The European Commission should come up with a wording that includes NDCs in the climate change provisions.

Generally speaking, parties have the liberty to introduce any measures to implement MEAs. However, FTAs should introduce an outer limit in the implementation flexibility of states by prohibiting the introduction of measures that “*constitute a means of arbitrary or unjustifiable discrimination between the Parties or a disguised restriction on trade*”.<sup>134</sup>

However, the treaties should go further and introduce specific climate change implementation measures that can serve either as examples, or specific commitments.<sup>135</sup> For instance, such language can be found in the EU-Ukraine Association Agreement, which obliges Ukraine in Annex XXXI to Chapter 6 to implement the Kyoto Protocol including all eligibility criteria for fully using the Kyoto mechanisms, develop a long-term action plan for mitigation and adaptation to climate change, and develop and implement long-term measures to reduce GHG emissions, in order to harmonize with EU environmental law.<sup>136</sup>

In the EU-UK TCA, the parties had committed to introduce an effective carbon pricing mechanism that covers all GHG emissions from electricity generation, heat generation, industry, and aviation.

#### ARTICLE 392 Carbon pricing

1. Each Party shall have in place an effective system of carbon pricing as of 1 January 2021.
2. Each system shall cover greenhouse gas emissions from electricity generation, heat generation, industry and aviation.
3. The effectiveness of the Parties' respective carbon pricing systems shall uphold the level of protection provided for by Article 391.
4. By way of derogation from paragraph 2, aviation shall be included within two years at the latest, if not included already. The scope of the Union system of carbon pricing shall cover departing flights from the European Economic Area to the United Kingdom.

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<sup>134</sup> E.g. 12.6 EU-Singapore FTA ; Article 13.5 EU-Vietnam FTA ; 16.4.5 EU-Japan FTA

<sup>135</sup> Bronckers and Gruni (n 84) 28.

<sup>136</sup> Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part.

5. Each Party shall maintain its system of carbon pricing insofar as it is an effective tool for each Party in the fight against climate change and shall in any event uphold the level of protection provided for by Article 391.

In a nutshell, FTAs should include enforceable provisions that operationalize existing international commitments from MEAs and introduce concrete measures on key policy areas such as carbon pricing.

## Proposals

Effective Implementation of MEAs	Operationalize NDCs	Specific Implementation Tools
<ul style="list-style-type: none"> <li>• Include climate change treaties in the list</li> <li>• Use strong language</li> <li>• Add deadlines, steps and targets for effective implementation</li> </ul>	<ul style="list-style-type: none"> <li>• Include references to NDCs</li> <li>• Introduce action plan on effective implementation of NDCs through trade tools</li> </ul>	<ul style="list-style-type: none"> <li>• Carbon Pricing</li> <li>• Implementation of Kyoto Mechanisms</li> </ul>

### 8.2.3 Non-regression obligations from levels of protection

As previously examined, FTAs recognise the right of parties to introduce their own levels of environmental protections and adopt or modify their environmental laws and policies, as long as these are consistent with the principles set out in MEAs or international standards. This right to regulate is effectively limited by the non-regression obligations that prohibit parties from derogating from, or failing to properly enforce, their domestic environmental laws, in a manner affecting trade or investment among the parties. For example, Article 12.12 of the EU-Singapore FTA provides:

#### 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.
2. A Party shall not fail to effectively enforce its environmental and labour laws, through a sustained or recurring course of action or inaction, where

such failure to effectively enforce would affect trade or investment between the Parties.

This mandatory clause links a possible violation to a direct effect on bilateral trade. Hence, there is an effect-based conditionality in the non-regression obligation.<sup>137</sup> Following the recent EU-Korea FTA arbitration panel, this requirement is not really high.<sup>138</sup> The Panel essentially considered that the deep integration of sustainable development aspirations in the FTA means that any national measure that implements such commitments (i.e. effective implementation of ILO Conventions) is inherently related to trade.<sup>139</sup> Still, there are certain instances where this link has been lower by requiring a more intent-based approach. This approach was followed by the CETA:

#### Article 23.4

##### Upholding levels of protection

1. The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in their labour law and standards.
2. A Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its labour law and standards, to encourage trade or the establishment, acquisition, expansion or retention of an investment in its territory.
3. A Party shall not, through a sustained or recurring course of action or inaction, fail to effectively enforce its labour law and standards to encourage trade or investment.

Still, this link with trade, even if lower, reiterates that FTAs primarily aim at ensuring fair competitive conditions by avoiding a ‘race to the bottom’ in environmental regulation.<sup>140</sup> Therefore, non-regression obligations, unfortunately, are only seen in light of their effect (or intended effect) on trade relations.<sup>141</sup> This becomes more evident in Article 11.4 of the EFTA-Philippines CEPA:

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<sup>137</sup> Giovanni Gruni and Marco Bronckers, ‘Taking the Enforcement of Labour Standards in the EU’s Free Trade Agreements Seriously’ (2019) 56 *Common Market Law Review* 1596–1597 <<https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/56.6/COLA2019126>> accessed 5 June 2022.

<sup>138</sup> *Panel of Expert Proceedings constituted under Article 1315 of the EU-Korea Free Trade Agreement (Report)* (Panel of Experts).

<sup>139</sup> *Ibid.* para. 98.

<sup>140</sup> Durán (n 6) 1039.

<sup>141</sup> For EU there is a possibility that this link exists for complying with the considerations of the CJEU that an act should relate specifically to trade by intending to promote, facilitate or govern such trade and has direct and immediate effects on it, is within the competences of the EU, *Opinion 2/15 of the Court: Free Trade Agreement between the European Union and the Republic of Singapore (Full Court)* [16.06.2017] ECJ 2/15, ECLI:EU:C:2017:376 [36].

## ARTICLE 11.4

### Upholding Levels of Protection in the Application and Enforcement of Laws, Rules, Regulations or Standards

1. A Party shall not fail to effectively enforce its labour and environmental laws, rules, regulations or standards in a manner affecting trade or investment between the Parties.
2. Subject to Article 11.3 (Right to Regulate and Levels of Protection), a Party shall not:
  - (a) weaken or reduce the level of environmental or labour protection provided by its laws, rules, regulations or standards with the sole intention to encourage investment from another Party or to seek or to enhance a competitive trade advantage of producers or service providers operating in its territory; or
  - (b) waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws, rules, regulations or standards in order to encourage investment from another Party or to seek or to enhance a competitive trade advantage of producers or service providers operating in its territory.

In contrast, FTA partners should include a non-conditional non-regression obligation such as the one found in the EU Draft Proposal for the EU-UK FTA, which incorporated a strong operational obligation of non-regression at the level of climate protection:

A Party shall not adopt or maintain any measure that weakens or reduces the level of climate protection provided by the Party's law and practices, and by the enforcement thereof, below the level provided by the common commitments and targets applicable in the Union and the United Kingdom at the end of the transition period, and by their enforcement.<sup>142</sup>

Still, the phrasing of most non-regression provisions provides an additional layer to climate change ambition, since it is not required that an action is breaching international commitments. Indeed, failure to effectively implement international environmental commitment does breach an FTA as discussed in 7.2.2, but still a country may breach the FTA rules by simply not properly applying domestic environmental laws in order to attract

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<sup>142</sup> Article 2.34.

investments. This may be extended to NDCs and provide a further safeguard in their effective implementation.

The non-regression obligations are tied to commitments on high level of environmental protection. In other words, the parties need to ensure that their domestic laws and policies encourage high levels of climate change ambitiousness and strive to further improve them. This minimum standard can be linked to international standards, principles and agreements as seen in the previous chapter. For example, Article 16.2.1 of the EU-Japan FTA provides:

Recognising the right of each Party to determine its sustainable development policies and priorities, to establish its own levels of domestic environmental and labour protection, and to adopt or modify accordingly its relevant laws and regulations, consistently with its commitments to the internationally recognised standards and international agreements to which the Party is party, each Party shall strive to ensure that its laws, regulations and related policies provide high levels of environmental and labour protection and shall strive to continue to improve those laws and regulations and their underlying levels of protection

Finally, the common but differentiated responsibilities principle may come into play here by recognising that the parties may be at different stages of development or that they have different needs. Hence, each party may retain the right *“a reasonable exercise of discretion with regard to decisions on resource allocation relating to investigation, control and enforcement of domestic environmental and labour regulations and standards, while not undermining the fulfilment of the obligations undertaken.”*<sup>143</sup>

## Proposal

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<sup>143</sup> Article 277.3 EU-Andean Community FTA.

Strong and  
Enforceable  
Language

Non-regression  
should be unlinked  
from possible  
trade effects

Effective  
application of  
domestic  
environmental law

Provision of special  
and differential  
treatment

#### 8.2.4 Future Levels of Protection provisions

One development that has been noted in the EU-UK negotiations is the commitment for higher future levels of protection. These provisions are key to climate ambitiousness as the parties need to strive to ensure that their laws and policies are becoming steadily and increasingly more ambitious by offering a higher level of environmental protection.

The commitment is found, among else, in the EU-UK TCA in Article 391 that provides the “[t]he Parties shall continue to strive to increase their respective environmental levels of protection or their respective climate level of protection referred to in this Chapter”. This is the most explicit reference to future levels of protection as usually FTAs tend to include such provisions within the provisions on existing levels of protections. For example, Article 22.3 of the Draft Australia-UK FTA provides:

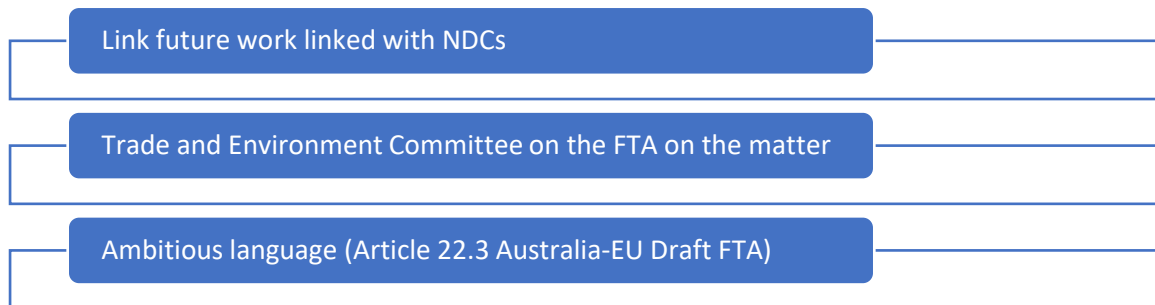
3. Each Party shall strive to ensure that its environmental laws and policies provide for, and encourage, high levels of environmental protection and to continue to improve its respective levels of environmental protection.<sup>144</sup>

It is not really politically anticipated that any party will introduce a legally binding commitment to increase its level of environmental protection or climate change ambition. Still, a link to a future goal or commitment such as an NDC, a goal under a MEA, or a mutually agreed goal could be an impactful incentive, as we have seen in the 2050 EU-UK TCA

<sup>144</sup> Text available: <https://www.dfat.gov.au/trade/agreements/not-yet-in-force/aukfta/official-text>.

commitment on climate neutrality. Additionally, the parties should have references to future work to be done on the chapter. A strong and ambitious Trade and Environment/Climate Change FTA committee would be beneficial to this process.

### Proposals



#### 8.2.5 Transparency and Cooperation Mechanisms

At this point, the question is not whether the parties have committed to combat climate change but rather how to effectively do so. The element that is examined are the transparency mechanisms set by FTAs in order to foster cooperation among the parties and to facilitate the implementation of climate change schemes. A second element is the various cooperation mechanisms established by the parties to an FTA.

Transparency is also linked to effective participation of stakeholders at the domestic level in the development of national initiatives. Hence, it should be required that any domestic consultative mechanism should be comprised of both business and environmental stakeholders.<sup>145</sup> This has been widely applied in the US environmental chapters, where each party is required to established national advisory committee made by experts in business or environmental matters.<sup>146</sup> These committees consult the FTA bodies on the implementation of the environmental commitments found in the relevant chapter.

<sup>145</sup> Axel Marx and others, 'Dispute Settlement in the Trade and Sustainable Development Chapters of EU Trade Agreements' (01.2017) 27.

<sup>146</sup> E.g United States- Republic of Korea Free Trade Agreement 30.06.2007, Ch. 22, Art. 22.2.

Further, the parties should agree that the relevant committee or sub-committee should be responsible for conducting an *ex-post* sustainability impact assessment on the effect on climate change from the application of the treaty. The parties should introduce more ambitious initiatives based on the outcome of the impact assessment. Negative assessment should be the basis, even for instigating treaty reform processes.<sup>147</sup> So far, no initiatives have been instigated following the pessimistic impact assessments.

In this regard, Article 282 of the EU-Andean Community FTA expressly requires the Sub-committee on Trade and Sustainable Development to hold “*a session with civil society organisations and the public at large, in order to carry out a dialogue on matters related to the implementation*” of the Sustainability Chapter.<sup>148</sup> This is in addition to the duty of individual Parties to ‘consult domestic labour and environment or sustainable development committees or groups, or create such committees or groups when they do not exist’ under Article 281, and “*to review, monitor and assess the impact of the implementation of this Agreement on [...] environment [...] through its respective domestic and participative processes*” under Article 276.<sup>149</sup>

An interesting model is Article 398 EU-UK TCA that reads:

#### Article 398 Transparency

1. The Parties stress the importance of ensuring transparency as a necessary element to promote public participation and of making information public within the context of this Chapter. In accordance with their laws and regulations, the provisions of this Chapter, of Title IX and of Title X, each Party shall:
  - (a) ensure that any measure of general application pursuing the objectives of this Chapter is administered in a transparent manner, including by providing the public with reasonable opportunities and sufficient time to comment, and by publishing such measures;
  - (b) ensure that the general public is given access to relevant environmental information held by or for public authorities, as well as ensuring the active dissemination of that information to the general public by electronic means;
  - (c) encourage public debate with and among non-state actors as regards the development and definition of policies that may lead to the adoption of law relevant to this Chapter by its public authorities; this includes, in relation to

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<sup>147</sup> Henriot and Van de Berghe (n 59) 9; Marios Tokas, ‘Rebalancing Trade and Sustainability Scales Via FTA Reviews’ (*IISD:SDG Knowledge Hub*, 20.06.2022) <<https://sdg.iisd.org/commentary/generation-2030/rebalancing-trade-and-sustainability-scales-via-fta-reviews/>>.

<sup>148</sup> Article 282 EU-Andean Community Agreement.

<sup>149</sup> Article 281, *ibid*.

the environment, public participation in projects, plans and programmes;  
and

(d) promote public awareness of its laws and standards relevant to this Chapter, as well as enforcement and compliance procedures, by taking steps to further the knowledge and understanding of the public; in relation to labour laws and standards, this includes workers, employers and their representatives.

It is important that the treaty text allows for future developments in the long run through institutional settings created by the FTA. Many disciplines and targets may not be politically, financially, or practically achievable at the time of the conclusion of the treaty but may become so in the future. The Australia-Singapore Green Economy Agreement is an example, where the parties have agreed on a gradual introduction of new disciplines through collaboration and negotiations.

Primarily, cooperation takes place at an intergovernmental level with the introduction of Joint Commissions, Sub-Committees on Environment, or other FTA level institutions. Indeed, the parties may agree to cooperate on shaping their energy policy by promoting cooperation between institutions responsible for energy issues. This is the example followed in the Guatemala-Taiwan FTA, where in Article 20.13 agree on the following:

#### Artículo 20.13 Cooperation in the Energy Sector

1. The objective of the cooperation between the Parties shall be to develop their respective energy sectors, focusing on promoting the transfer of technology and information exchange regarding their respective legislations.
2. The cooperation in this sector will be carried out, fundamentally, by means of information exchange, training of human resources, technology transfer and joint technological, development and infrastructure projects agreed upon by the Parties, as well as the design of more efficient energy generation processes, the rational use of energy, support for the use of alternative and renewable energy sources that protect the environment, and promotion of recycling projects and waste management for energy use.
3. To promote cooperation with the institutions in charge of energy issues and formulation of energy policies

Cooperation may include capacity building on environmental governance. For example, Annex 19.3, Article 1(g) of the US-Chile FTA provides that the parties will cooperation on *“developing a pollutant release and transfer register in Chile, reducing mining pollution, improving environmental enforcement and compliance assurance, sharing private sector expertise, improving agricultural practices, reducing methyl bromide emissions, and increasing the use of cleaner fuels.”*

The Japan-Mexico EPA constitutes an interesting non-EU or US example of an FTA where the parties introduce specific cooperation mechanisms regarding climate change. In particular, Article 147 stipulates:

1. The Parties, recognizing the need for environmental preservation and improvement to promote sound and sustainable development, shall cooperate in the field of environment. Cooperative activities under this Article may include:
  - (a) exchange of information on policies, laws, regulations and technology related to the preservation and improvement of the environment, and the implementation of sustainable development;
  - (b) promotion of capacity and institutional building to foster activities related with the Clean Development Mechanism under the Kyoto Protocol to the United Nations Framework Convention on Climate Change, as may be amended, by means of workshops and dispatch of experts, and exploration of appropriate ways to encourage the implementation of the Clean Development Mechanism projects;
  - (c) encouragement of trade and dissemination of environmentally sound goods and services; and
  - (d) encouraging the exchange of information for the identification of investment opportunities and the promotion and development of business alliances in the field of environment.
2. Implementing arrangements setting forth the details and procedures of cooperative activities under this Article may be made between the government agencies of the Parties.

Similar cooperation initiatives on climate change can be found in the EU-Central America FTA, where Article 50 introduces a commitment by the parties to cooperate on climate mitigation and adaptation, by developing, among other things, domestic carbon markets. Additionally, the parties should continue to support collaborations on clean technology initiatives, such as the one introduced in the EU-South Korea FTA and Mexico-EU Agreement in Principle.<sup>150</sup>

In a nutshell, cooperation mechanisms dedicated to climate change can be found in the following areas:

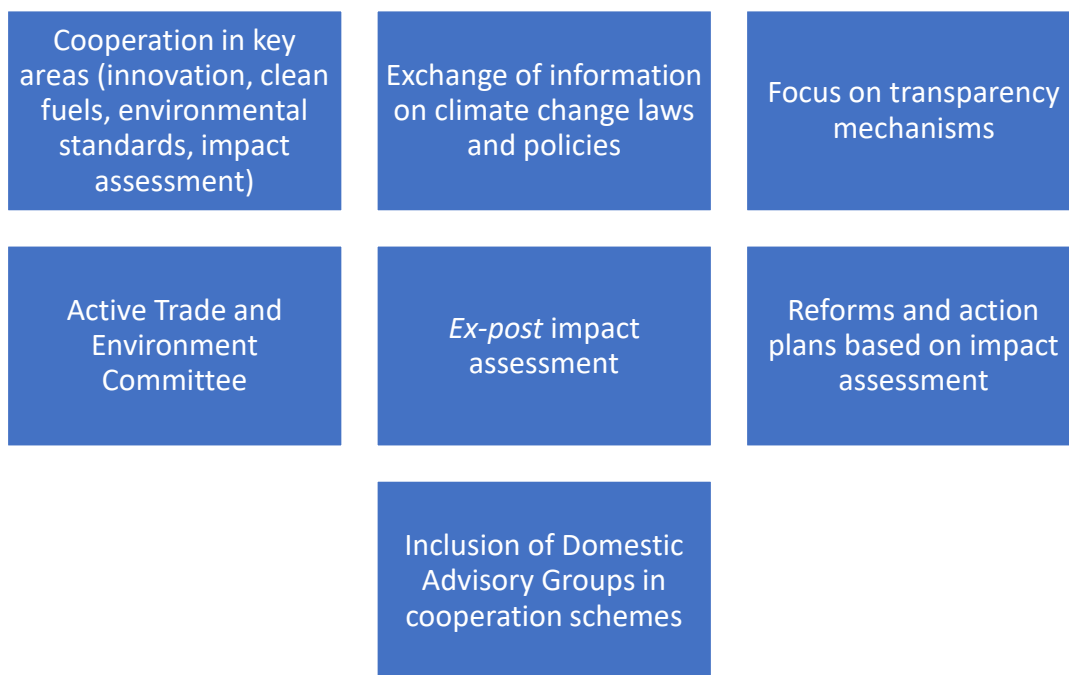
- Exchange of information on eco-labels, and cooperation in their certification process;
- Promotion and harmonization of voluntary schemes for green goods and services;
- Promotion of low-carbon technologies;
- Promotion of other climate-friendly and energy efficient technologies;

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<sup>150</sup> Annex 13, Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part; Trade and Sustainable Development Chapter, Article 13 'Working Together on Trade and Sustainable Development' Draft EU-Mexico Agreement-Agreement in principle 21.04.2018.

- Development, establishment, improvement and maintenance of climate change performance goals and standards;
- Exchange of information on life-cycle management of goods, including carbon accounting and end-of-life management;
- Cooperation on conducting environmental impact assessment procedures.

The effectiveness of these cooperation mechanisms remains to be seen since many of those provisions have been introduced in FTAs that very recently entered into force. Still, given the fact that the cooperation mechanisms cannot be tied to ‘hard law’ obligations, a significant part of their effectiveness remains at the hands of the stakeholders. Thus, there needs to be significant political commitment to bring together the different stakeholders.



### 8.2.6 Enforcement Mechanisms

At this point, the question that arises is what happens if one of the parties do not meet their commitments found in climate change provisions. Usually, the climate change obligations are not subject to normal dispute settlement proceedings, but rather, they are subject to a specialized dispute settlement mechanism.<sup>151</sup> Indeed, disputes, especially under the EU FTAs,

<sup>151</sup> Denise Prévost and Iveta Alexovičová, ‘Mind the Compliance Gap: Managing Trustworthy Partnerships for Sustainable Development in the European Union’s Free Trade Agreements’ (2019) 6 International Journal of Public Law and Policy 236.

are usually referred to a Panel of (Independent) Experts who may assess the compatibility of the measure (or the lack of a measure) with a treaty standard. Their decisions are not binding, at least in the same way as for trade-related disputes subject to ordinary dispute settlement.

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Indeed, the EU-Japan FTA stipulates in Article 16.17.6 that:

the Parties shall discuss actions or measures to resolve the matter in question, *taking into account the panel's final report and its suggestions*. Each Party shall inform the other Party and its own domestic advisory group or groups of any follow-up actions or measures no later than three months after the date of issuance of the final report.

Similarly, the CETA provides in Article 24.14.11 that:

If the final report of the Panel of Experts determines that a Party has not conformed with its obligations under this Chapter, the Parties shall engage in discussions and shall endeavour, within three months of the delivery of the final report, to identify an appropriate measure or, if appropriate, to decide upon a mutually satisfactory action plan. In these discussions, *the Parties shall take into account the final report*. The responding Party shall inform, in a timely manner, its civil society organisations, through the consultative mechanisms referred to in Article 24.13.5, and the requesting Party of its decision on any action or measure to be implemented.

The Panel of Experts is comprised of experts in trade, labour and environmental issues.<sup>153</sup> During its proceedings, the Panel may seek advice from competent international organizations and stakeholders, including NGOs.<sup>154</sup> The implementation of the recommendations is monitored either by the relevant Committee on Trade and Sustainable Development or a joint Board, and stakeholders may submit observations.<sup>155</sup> The EU-Central America Agreement states that “[t]he Parties to the procedure shall, taking into account the report and recommendations of the Panel of Experts, endeavour to discuss appropriate

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<sup>152</sup> Katerina Hradilová and Ondrej Svoboda, ‘Sustainable Development Chapters in the EU Free Trade Agreements: Searching for Effectiveness’ (2018) 52 *Journal of World Trade*; Karsten Nowrot, ‘Environmental Dispute Settlement Mechanisms in EU Free Trade Agreements’ (2017) 20 *ZEuS Zeitschrift für Europarechtliche Studien* 493.

<sup>153</sup> Art. 12.17(1)–(5) EU-Singapore FTA.

<sup>154</sup> Art. 12.17(7) EU-Singapore FTA.

<sup>155</sup> Art. 12.17(9) EU-Singapore FTA. See also Art. 13.15(2) EU-Korea FTA; Art. 285(4) EU-COPE FTA; Arts. 23.10(12) & 24.15(11) 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) Draft EU-Mercosur FTA.

*measures to be implemented including, where appropriate, possible cooperation to support implementation of such measures”*.<sup>156</sup> The EU-Singapore FTA provides in Article 12.17.9:

The Parties shall discuss the appropriate measures to be implemented, taking into account the report and recommendations of the Panel of Experts. The Party concerned shall inform its stakeholders, through the consultative mechanisms referred to in paragraph 5 of Article 12.15 and the other Party, of its decisions on any actions or measures to be implemented, no later than three months after the report has been submitted to the Parties.

The increasingly important position of civil society in dispute settlement proceedings has been recently noticed in their involvement in the EU-South Korea dispute regarding certain labour provisions.<sup>157</sup>

In the *South Korea* dispute, the decision of the Panel of Experts was agreed to be implemented by the Committee on TSD and the Trade Committee in April 2021. The Committee agreed on the monitoring process regarding the implementation of the recommendations by the experts, which will include a joint examination of the changes made to the trade union law and of moves towards the ratification of the one outstanding fundamental ILO Convention.<sup>158</sup> The European Commission as examined previously has called for a more active role to be taken by NGOs and DAGs in the implementation of such recommendations.

In contrast, in US FTAs, environmental obligations are subject to the same remedies, procedures and sanctions as any other trade provision. The effectiveness of this option is empirically questionable, as demonstrated by the *Guatemala—Issues Relating the Obligations Under Article 16.2.1* dispute, where decision of the arbitration Panel under CAFTA-DR allowed the US to introduce sanctions against Guatemala for a violation of its labour obligations.<sup>159</sup> However, sanctions cannot be considered an effective tool against

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<sup>156</sup> Article 301.3

<sup>157</sup> Hradilová and Svoboda (n 153) 1028.

<sup>158</sup> ‘Communication From the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions on Implementation and Enforcement of EU Trade Agreements’ (27.10.2021) COM(2021) 654 final.

<sup>159</sup> *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 1621(a) of the CAFTA-DR (Report)* (Panel).

breach of sustainability provisions that require positive actions on behalf of states. Still, sanctions have been accepted as a complement to other enforcement mechanisms.<sup>160</sup>

Still, moving on from the question of more formal dispute settlement procedures, climate change provisions should primarily supplement cooperation mechanisms with monitoring and non-compliance mechanisms such as dialogue, capacity building and, finally, shaming.<sup>161</sup>

The CPTPP has opted for a monetary penalty instead of trade sanctions.<sup>162</sup> The monetary penalties should be gathered and directed into a fund dedicated to supporting climate change initiatives.<sup>163</sup> This has recently been endorsed by the European Commission, which seeks to utilize any possible compliance mechanisms in its environmental chapters.<sup>164</sup>

Following the 2022 Action Plan, the EU-New Zealand FTA constitutes the primary example of this new approach. The Dispute Settlement provisions allow the examination of a climate change claim under the ordinary dispute settlement procedure while providing the capacity for possible sanctions in case of non-compliance. The standard set by the Agreement is “*any action or omission which materially defeats the object and purpose of the Paris Agreement*”. This is a rather high bar and most probably will never be met. Still, it shows first steps towards operationalizing climate change commitments in FTA dispute settlement.

Further, an important element, although not related to dispute settlement, is the consideration of climate change to be an essential element of an FTA. In other words, the climate change obligations included in the Agreement would consider the essential basis for the accomplishment of the object and purpose of the FTA, within the meaning of Article 60 of the Vienna Convention of the Law of Treaties.<sup>165</sup> This idea was adopted by the EU-UK TCA

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<sup>160</sup> Bronckers and Gruni (n 84) 42; Henriot and Van de Berghe (n 59); Yilly Vanessa Pacheco Restrepo, ‘Enforcement Practice Under Preferential Trade Agreements: Environmental Consultations and Submissions on Environmental Enforcement Matters in the US-Peru TPA’ (2019) 46 *Legal Issues of Economic Integration*.

<sup>161</sup> Bronckers and Gruni (n 84) 42.

<sup>162</sup> Article 28.20(7) of the CPTPP.

<sup>163</sup> Marx and others (n 146) 91.

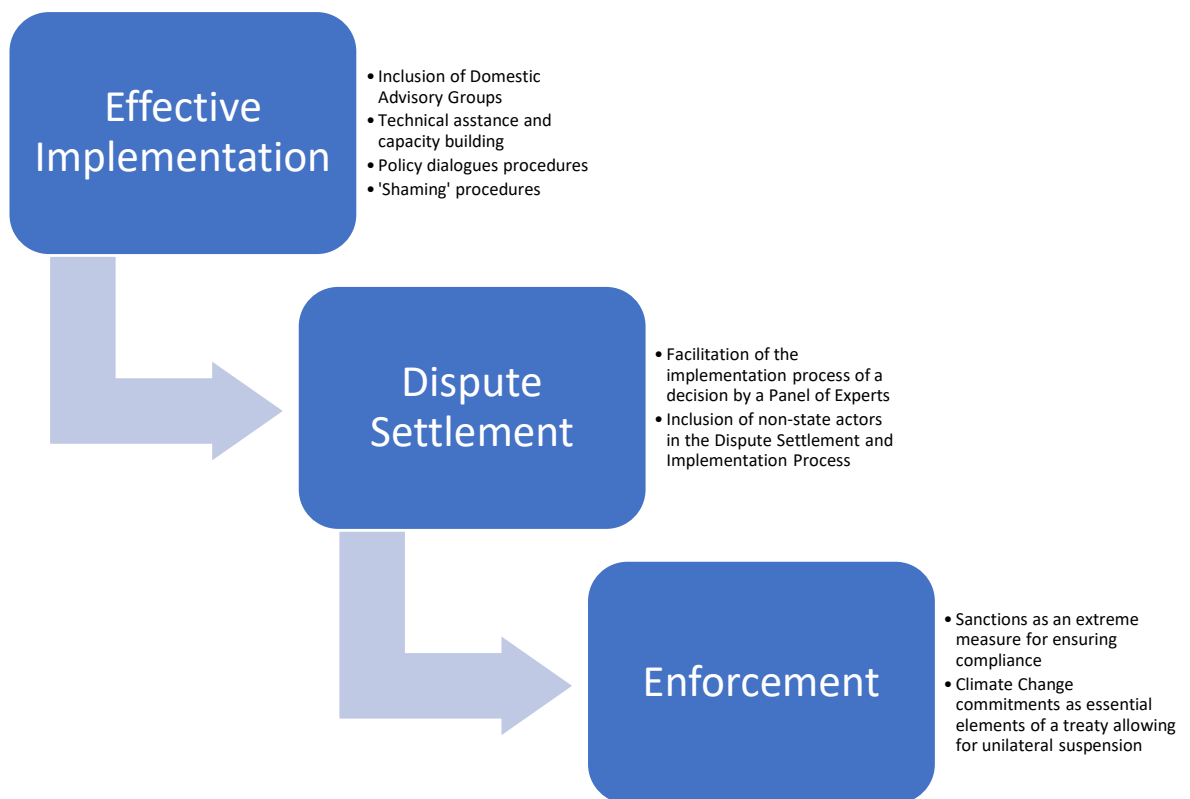
<sup>164</sup> ‘Communication From the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions on Implementation and Enforcement of EU Trade Agreements’ (n 159).

<sup>165</sup> Vienna Convention on the Law of Treaties 23.05.1969 (1155 UNTS 331); Thomas Giegerich, ‘Article 60’ in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018) <[https://doi.org/10.1007/978-3-662-55160-8\\_63](https://doi.org/10.1007/978-3-662-55160-8_63)> accessed 17 October 2022.

where serious and substantial failure of either Parties would give a conditional right to terminate or suspend the operation of the treaty.<sup>166</sup>

Overall, formal dispute settlement constitutes an *ultimum refugium* for effective implementation of climate change commitments. Still, the most important element is the provision of effective cooperation mechanisms and the facilitation of implementing the recommendations of the Panel of Experts.

## Proposals



### 8.2.7 Provisions related to Carbon Border Adjustment Mechanisms

The recent proposal of the European Commission for introducing a Carbon Border Adjustment Mechanism ('CBAM') has caused significant discussion both within the EU<sup>167</sup> and outside,<sup>168</sup>

<sup>166</sup> Article 772. See further: Tokas (n 148).

<sup>167</sup> Anne Gläser and Oldag Caspar, 'Less Confrontation, More Cooperation Increasing Acceptability of the EU Carbon Border Adjustment in Key Trade Partners' (06.2021) Policy Brief <[https://germanwatch.org/sites/default/files/2021-06-15\\_Less%20confrontation%2C%20more%20cooperation\\_Increasing%20acceptability%20of%20the%20EU%20Carbon%20Border%20Adjustment%20in%20key%20trade%20partners\\_0.pdf](https://germanwatch.org/sites/default/files/2021-06-15_Less%20confrontation%2C%20more%20cooperation_Increasing%20acceptability%20of%20the%20EU%20Carbon%20Border%20Adjustment%20in%20key%20trade%20partners_0.pdf)>.

<sup>168</sup> South African Government 2021: Joint Statement issued at the conclusion of the 30th BASIC Ministerial Meeting on Climate Change hosted by India on 8th April 2021. <https://www.gov.za/nr/speeches/joint-statement-issued-conclusion30th-basic-ministerial-meeting-climate-change-hosted>. Last retrieved: 2021-06-16.

while other countries such as Canada have been actively considering introducing a similar mechanism.<sup>169</sup> One of the key issues of CBAM is the possible discriminatory differential treatment between trade partners.<sup>170</sup> Indeed, one of the core issues of WTO compatibility is how the European Commission will differentiate between products of different origins in the implementation of the CBAM.<sup>171</sup>

Without getting into the details of this labyrinthine and complex legal analysis, the following stipulations of the CBAM are interesting for our FTA analysis. The CBAM in essence will require from companies that export goods in EU (and produced abroad) to purchase CBAM certificates that correspond to the number of emissions generated in the production process of those goods. However, the Proposal allows importers to gain preferential treatment (such as a reduced number of CBAM certificates), if the importers have already paid a duty similar to CBAM, such as a carbon tax, in their country of origin.<sup>172</sup> This means that the European Commission will assess the quality of the carbon pricing policies in third countries in order to ensure they are of equal quality compared to the EU's policy. Here, the important part is the compatibility of these policies with the EU Emissions Trading System ('ETS'), which constitutes the basis for the CBAM. Countries that have linked their carbon pricing systems with the EU ETS, such as Switzerland, will be fully exempted from the scheme.<sup>173</sup>

This 'carrot and stick' approach primarily has the goal of incentivizing countries to further commit to measures combating climate change, introducing domestic ETS, and developing

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<sup>169</sup> Department of Finance Canada, 'Exploring Border Carbon Adjustments for Canada' (8 May 2021) <<https://www.canada.ca/en/department-finance/programs/consultations/2021/border-carbon-adjustments/exploring-border-carbon-adjustments-canada.html>> accessed 5 June 2022.

<sup>170</sup> Ingo Venzke and Geraldo Vidigal, 'Are Trade Measures to Tackle the Climate Crisis the End of Differentiated Responsibilities? The Case of the EU Carbon Border Adjustment Mechanism (CBAM)' (2022) Research Paper 2022/02 <<https://papers.ssrn.com/abstract=4013767>>.

<sup>171</sup> Cecilia Bellora and Lionel Fontagné, 'EU in Search of a WTO-Compatible Carbon Border Adjustment Mechanism' (CEPII research center 2022) 2022-01 <<https://ideas.repec.org/p/cii/cepiddt/2022-01.html>> accessed 5 June 2022; Gracia Marín Durán, 'EU Carbon Border Adjustment Mechanism: Key Issues Going Forward' (2021) 26 European Foreign Affairs Review; Edouard Gergondet, 'The European Union's Proposed Carbon-Border Adjustment and Its Impact on Trade With Africa' (2021) 16 Global Trade and Customs Journal; Timothy Meyer and Todd N Tucker, 'A Pragmatic Approach to Carbon Border Measures' (2022) 21 World Trade Review 109.

<sup>172</sup> Articles 3.23, Proposal for a Regulation of the European Parliament and of the Council establishing a carbon border adjustment mechanism 14.07.2021.

<sup>173</sup> Articles 2.3; 2.5; Annex IIA. For electricity, see Articles 2.7-2.9.

their national carbon markets.<sup>174</sup> It is interesting though how FTAs may contribute to this process, especially since they may reduce the possible negative trade implications of the CBAM as a barrier to trade and minimize possible carbon leakage caused by unilateral mitigation in a fragmented climate,<sup>175</sup> while further increasing consensus and standardize carbon certification practices, which could help to avoid issues of WTO incompatibility.<sup>176</sup>

In some FTAs, such as the EU-Central America Agreement, the parties commit to provide assistance to the development of domestic carbon markets. Article 50 of the Agreement stipulates:

3. Cooperation shall in particular address:

(a) the protection and sustainable management of natural resources and ecosystems, including forests and fisheries;

(b) the fight against pollution of fresh and marine waters, air and soil, including through the sound management of waste, sewage waters, chemicals and other dangerous substances and materials;

(c) global issues such as climate change, depletion of the ozone layer, desertification, deforestation, conservation of biodiversity and biosafety;

(d) in this context, cooperation shall seek to facilitate joint initiatives in the area of climate change mitigation and adaptation to its adverse effects, including the strengthening of carbon market mechanisms.

The EU-UK TCA is more precise and direct in this matter, which can be explained by the UK's previous participation in the EU ETS. Here, Article 392 actively obliges both parties to have an effective system of carbon pricing which covers "*greenhouse gas emissions from electricity generation, heat generation, industry and aviation*". More extensively, the provisions introduce the following obligations: introduction of carbon pricing with a specific date, coverage of carbon pricing, non-regression obligations, effective implementation, and cooperation.

#### ARTICLE 392 Carbon pricing

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<sup>174</sup> Pieter Pauw, Louise Van Schaik and Giulia Cretti, 'The CBAM Effect: How the World Is Responding to the EU's New Climate Stick' (05.2022) Clingendael Alert <[https://www.clingendael.org/sites/default/files/2022-05/Alert\\_CBAM\\_effect.pdf](https://www.clingendael.org/sites/default/files/2022-05/Alert_CBAM_effect.pdf)>.

<sup>175</sup> Helene Naegele and Aleksandar Zaklan, 'Does the EU ETS Cause Carbon Leakage in European Manufacturing?' (2019) 93 *Journal of Environmental Economics and Management* 125; Jared C Carbone and Nicholas Rivers, 'The Impacts of Unilateral Climate Policy on Competitiveness: Evidence From Computable General Equilibrium Models' (2017) 11 *Review of Environmental Economics and Policy* 24.

<sup>176</sup> Kateryna Holzer, *Carbon-Related Border Adjustment and WTO Law* (Edward Elgar 2014) 352.

1. Each Party shall have in place an effective system of carbon pricing as of 1 January 2021.
2. Each system shall cover greenhouse gas emissions from electricity generation, heat generation, industry and aviation.
3. The effectiveness of the Parties' respective carbon pricing systems shall uphold the level of protection provided for by Article 391.
4. By way of derogation from paragraph 2, aviation shall be included within two years at the latest, if not included already. The scope of the Union system of carbon pricing shall cover departing flights from the European Economic Area to the United Kingdom.
5. Each Party shall maintain its system of carbon pricing insofar as it is an effective tool for each Party in the fight against climate change and shall in any event uphold the level of protection provided for by Article 391.
6. The Parties shall cooperate on carbon pricing. They shall give serious consideration to linking their respective carbon pricing systems in a way that preserves the integrity of these systems and provides for the possibility to increase their effectiveness.

Of course, it is not practically possible to extend this example to trade partners other than the UK, even developed ones. However, an approach slightly softer on deadline and more focused on cooperation and capacity building could be pivotal to promoting climate change ambitiousness since it would, among other things, provide additional incentives to properly implement a carbon pricing policy in order to import into the EU market without causing disruptions.

## Proposals

Cooperation  
mechanisms in  
carbon markets

Technical  
assistance

Equivalence  
procedures

Carbon  
certification  
schemes

## 9. Conclusion

The present Report sought to provide an overview of EU's trade relations with Latin and Central American Countries. Further, it provided a detailed analysis over the different provisions that can be introduced either in the EU-Americas relations, or in general, in order to achieve maximum level of climate ambitiousness. The specific sample provisions can be found in Annex B.

The main thesis of the Report is that climate ambitiousness should not be limited to the Trade and Sustainability or Environmental chapters in FTAs. The parties should carefully craft their treaties by introducing climate favourite provisions throughout the FTA, such tariff preferences, subsidy provisions, government procurement and intellectual property.

As a final note, the 2022 IPCC Report made it even more clear that the climate crisis is no longer imminent but rather it is present. Any discussion on future trade relations should be tied to the discussion of using trade flows to combat climate change. As such, countries should be ambitious and innovative in their approach to FTA and abandon traditional views that dichotomize trade from environmental protection. The agreements should allow, incentivize, and oblige countries to introduce new and more ambitious climate change policies that

ensure that the targets set either under the relevant FTAs, or under the Paris Agreement and the UNFCCC are met.

### Annex A: Mapping of EU-Americas FTAs

The Table below shows the climate change provisions and commitments in EU-Americas FTAs. Overall, it is evident that the parties should have been and should strive towards more ambitious commitments and references to climate change (or environmental protection in general) in the provisions of the FTAs outside of the specific environmental chapter.

**Table 1:** Climate change provisions and commitments in environmental or trade and sustainability chapters

Name of FTA	Reference to Climate Change MEAs	Trade for sustainable development	Non-Regression	Future Levels of Protection	Effective Implementation of MEAs	Panel of Experts	CBAM related provisions (e.g. carbon pricing, carbon markets)	Specific Provisions Climate Change
EU-Andean Communities	+	+	+		+	+	+	+
EU-Mercosur Draft	+	+	+	+	+	+		+
EU-Mexico (existing Economic Partnership, Political Coordination and Cooperation Agreement )								
EU-Mexico (under negotiations)	+	+	+		+	+		+
EU-Central America Association Agreement	+	+	+		+	+	+	+

EU-Chile (existing)							
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Table 2: Climate Change and environmental related provisions outside of the environmental or trade and sustainability chapters

Name of FTA	Reference in Subsidies	Reference in TBT and SPS chapters	Reference in IP chapter	Reference in Government Procurement	Chapeau of the Treaty	Differential treatment in favour of green goods, services etc.	Application of Dispute Settlement
EU-Andean Communities			+				
EU-Mercosur Draft			+	+		+	
EU-Mexico (existing Economic Partnership, Political Coordination and Cooperation Agreement )							
EU-Mexico (under negotiations)							
EU-Central America Association Agreement			+				
EU-Chile (existing)							

## **ANNEX B: Best Possible Proposals**

### **9.1 Preamble**

[...]

COMMITTED to implementing this Agreement in accordance with the objective of sustainable development, including, the promotion of economic progress, the respect for labour rights and the protection of the environment, in accordance with the international commitments adopted by the Parties;

[...]

REAFFIRMING their commitment to promote sustainable development and the development of international trade in such a way as to contribute to sustainable development in its economic, social and environmental dimensions;

### **9.2 Trade in Goods**

*Article X*

#### **Regional Integration**

1. The Parties recognise the importance of regional integration in furthering the social, economic and sustainable development of the signatory and of the European Union, enabling to strengthen the relations between the Parties, acknowledging the relevance these processes may have in promoting regional sustainable development and to contribute to the objectives of this Agreement.
2. While recognising the differences in their respective regional integration processes, and without prejudice to the commitments undertaken under this Agreement, the Parties shall foster conditions which facilitate the movement of goods and services between and within the two regions.
3. With respect to movement of goods, pursuant to paragraph 1:
  - a. goods originating in a signatory [...] of that are released for free circulation in the European Union [EU Party] shall benefit from free movement of goods within the territory of the European Union [EU Party] under the conditions established by the Treaty on the Functioning of the European Union;
  - b. the signatory Member States of shall apply to goods originating in the European Union [EU Party] that are imported in its territory from another signatory [...], customs procedures that are no less favourable than those applicable to goods originating in that signatory [...].

The treatment referred to under points (a) and (b) of this paragraph does not include tariff treatment for goods, which is governed by Chapter X [Trade in Goods].

- c. the signatory [...] shall periodically review their customs procedures with a view to facilitating the movement of goods of the European Union [EU Party] between their territories and to avoiding duplication of procedures and controls when practicable and in accordance with the evolution of their integration process.
  - d. benefits of [...] harmonisation of technical regulations and conformity assessment procedures, SPS requirements and approval procedures (including import certificates, controls) shall be extended under non-discriminatory conditions to goods originating in the EU if they have been imported in compliance with the importing Member State of [...] laws and regulations.
4. With respect to trade of services, pursuant to paragraph 2:
- a. Member States of the European Union shall endeavour to facilitate, as appropriate, the freedom to provide services between their territories to enterprises owned or controlled by natural or juridical persons of a signatory [...] and established in a Member State of the European Union;
  - b. signatory [...] shall endeavour to facilitate, as appropriate, the freedom to provide services between their territories to enterprises owned or controlled by natural or juridical persons of a Member State of the European Union and established in a signatory [...].

## **CHAPTER X CUSTOM DUTIES**

1. For purposes of this Chapter, "originating" means qualifying under the rules of origin set out in Annex [X] (Rules of Origin).
2. Except as otherwise provided for in this Agreement, each Party shall reduce and/or eliminate its customs duties on originating goods in accordance with the Schedules set out in Annex 1 (hereinafter referred to as "Schedules").
3. A customs duty includes any duty or charge of any kind imposed on or in connection with the importation of a good, including any form of surtax or surcharge imposed on or in connection with such importation,<sup>1</sup> but does not include any:
  - (a) internal taxes or other internal charges imposed consistently with Article III of GATT 1994, including carbon-adjustment taxes.
  - (b) Antidumping or countervailing duties applied in accordance with Articles VI and XVI of GATT 1994 and the WTO Agreement on the Implementation of Article VI of

GATT 1994 and the WTO Agreement on Subsidies and Countervailing Measures in conformity with the Chapter (Trade Remedies).

(c) measures applied in accordance with Article XIX of GATT 1994 and with the WTO agreement on Safeguards, or with other safeguard measures of the Agreement.

(d) measures authorised by the WTO Dispute Settlement Body or under the Dispute Settlement provisions of this Agreement.

(e) fee or other charge, imposed consistently with Article VIII of GATT 1994.

(f) measures adopted to safeguard a Party's external financial position and its balance of payments, in conformity with Article XII of GATT 1994 and the Understanding on Balance of Payments Provisions of GATT 1994.

## **Article X**

### **Environmental Goods and Services**

1. The Parties recognise the importance of facilitating trade and investment in environmental goods and services, including clean technology, as a means of improving environmental and economic performance, contributing to clean growth and jobs, and encouraging sustainable development while addressing global environmental challenges including climate change.

2. Accordingly, each Party shall:

(a) eliminate customs duties on originating goods of the other Party upon entry into force of this Agreement on HS six-digit subheadings containing the environmental goods listed in Annex XA (Environmental Goods List), 3 in accordance with Chapter X (National Treatment and Market Access for Goods) and Annex 2X (Schedule of Tariff Commitments for Goods). The Environment and Climate Change Sub-Committee established under Article X (SubCommittees – Institutional Provisions) shall keep this list under review, in conjunction with other relevant committees established under this Agreement, as appropriate, and may make recommendations to the Joint Committee for modifications to Annex X (Environmental Goods List). In keeping this list under review, the Environment and Climate Change Sub-Committee may consider factors such as the extent to which a good contributes to the clean growth and sustainable development objectives of the Parties, advances in available technologies, any potential dual-use of proposed environmental goods, relevant multilateral or plurilateral developments, and other environmental and climate factors; and

(b) facilitate and promote trade and investment in environmental goods and services, and endeavour to address any potential tariff and nontariff barriers to such trade and investment that may be identified by a Party, including by working through the Environment and Climate Change Sub-Committee and in conjunction with other relevant committees established under this Agreement, as appropriate.

3. In accordance with Article X (Cooperation) the Parties shall cooperate on ways to enhance trade in environmental goods and services. Areas of cooperation may include:

(a) renewable and low carbon energy;

(b) energy efficient products and services;

- (c) clean transport including uptake of electric vehicles;
- (d) energy storage technologies;
- (e) sustainable financial services;
- (f) clean heat;
- (g) carbon capture, utilisation, and storage;
- (h) climate change adaptation and resilience technologies and services;
- (i) conservation of biological diversity, pollution abatement, and water conservation;  
and
- (j) identification of, and further liberalisation of trade in, environmental services.

4. The Parties acknowledge that achieving the objectives of the UNFCCC and the Paris Agreement requires collective action. Accordingly, the Parties shall also cooperate in international fora, including at the WTO and under the UN Environment Programme, on ways to further facilitate and liberalise global trade in environmental goods and services.

### 9.3 Technical Barriers to Trade

#### *Article X*

#### **Cooperation and technical assistance**

1. To contribute to fulfilling the objectives of this Chapter, the Parties agree to, inter alia:
  - a) Promote cooperation and joint activities and projects between their respective organizations, public and/or private, national and/or regional, in the fields of technical regulations, standardization, eco-labelling, conformity assessment, metrology and accreditation;
  - b) Promote good regulatory practices through the exchange of information, experiences and best practices about, inter alia, regulatory impact assessment, regulatory stock management and risk assessment and public consultation;
  - c) Exchange views on market surveillance;
  - d) Strengthen the technical and institutional capacity of the national regulatory, metrology, standardization, conformity assessment and accreditation bodies, supporting the development of their technical infrastructure, including labs and testing equipment, and sustaining the continuous training of human resources;
  - e) Promote, facilitate and, whenever possible, coordinate their participation in international organizations and other fora related to technical regulations, conformity assessment, standards, accreditation and metrology;
  - f) Support technical assistance activities by national, regional and international organizations in the areas of technical regulations, standardization, conformity assessment, metrology and accreditation;

g) endeavour to share available scientific evidences and technical information among regulatory authorities of the Parties, to the extent necessary to cooperate or pursue technical discussions under this Chapter, with the exception of confidential or other sensitive information.

2. A Party shall give appropriate consideration to proposals of the other Party for cooperation under this Chapter.

## *Article X*

### **Technical regulations**

1. The Parties agree to make best use of good regulatory practices with regard to the preparation, adoption and application of technical regulations, as provided for in the TBT Agreement, including, for example, preference for performance-based technical regulations, use of impact assessments or stakeholder consultation. In particular, the Parties agree to:

- a) use relevant international standards as a basis for their technical regulations including any conformity assessment elements therein, except when such international standards would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued. Where international standards have not been used as a basis for a technical regulation, which may have a significant effect on trade, a Party shall, upon request of the other Party, explain the reasons why such standards have been judged inappropriate or ineffective for the aim pursued.
- b) when reviewing their technical regulations, in addition to the Article 2.3 and without prejudice to the Articles 2.4 and 12.4 of the TBT Agreement, to increase their alignment with relevant international standards. The Parties shall consider, inter alia, any new development in the relevant international standards and whether the circumstances that have given rise to any divergence from any relevant international standard continue to exist.
- c) promote the development of regional technical regulations and that these are adopted at national level and/or replace existing ones, in order to facilitate trade between the Parties; and
- d) allow a reasonable interval between the publication of technical regulations and their entry into force for economic operators of the other Party to adapt. The phrase “reasonable interval” shall be understood to mean normally a period of not less than 6 months, except when this would be ineffective in fulfilling the legitimate objectives pursued.
- e) to carry out the impact analysis of planned technical regulations in accordance with its respective rules and procedures.
- f) when preparing technical regulations, to take due account of the characteristics and special needs of micro, small and medium-sized enterprises.
- g) Where appropriate, the Parties shall specify technical regulations based on product requirements in terms of performance, including environmental performance, rather than design or descriptive characteristics.

## 9.4 Sanitary And Phytosanitary Measures

### Article X Transparency and exchange of information

1. Upon request of a Party and within 15 working days following the date of such request, the Parties shall exchange information on:

- a) SPS procedures for the import approval of a product, including, if possible, expected timelines;
- b) The requirements that apply for the import of specific products, including as appropriate the model of certificate;
- c) Information on the pest status, including surveillance, eradication and containment programs and their results in order to support such pest status and import phytosanitary measures;
- d) The state of play of the procedure for import approval of specific products;
- e) The relation of the SPS measure to the international standards, guidelines and recommendations and, in case that a measure is not based on international standard, the scientific information on which the SPS measure is not in conformity with and an explanation of the reasons of such measure.
- f) In cases where relevant scientific evidence is insufficient, a Party adopting a provisional measure shall provide the available pertinent information on which the measure is based and, when available the additional information for a more objective assessment of the risk and will review the SPS measure accordingly in a reasonable period of time.
- f) In cases where relevant scientific evidence or information is insufficient or inconclusive and there is a risk on human, animal or plant life or safety in its territory, a Party [may adopt sanitary or phytosanitary measures based on the precautionary principle. Such measures shall be based upon available pertinent information and subject to periodic review. The Party adopting the measure shall seek to obtain new or additional scientific information necessary for a more conclusive assessment and shall review the measure as appropriate.

2. The Parties shall make publicly available, by the means they decide, updated information of their:

- a) SPS import requirements and authorisation procedures for the products covered by this chapter.
- b) List of regulated pests.

3. The Parties shall inform each other of:

- a) Any change in the sanitary and phytosanitary status that may affect trade between the Parties.

- b) Matters related to the development and application of SPS measures that may affect trade between the Parties.
- c) Any pertinent information for the adequate implementation of this Chapter.

4. Without prejudice of paragraph 1 when the information referred has been made available by notification to the WTO or to the International Standard Setting Body, in accordance with the relevant rules, or on publicly accessible and fee free web-sites of the Parties, the information shall be considered communicated to the other Party.

5. Each Party shall designate a contact point and inform the other Party no later than one month after the entry into force of this Agreement.

## *Article X*

### **Special and Differentiated Treatment**

1. The European Union should provide technical assistance to address specific needs of [...] to comply with the Union's SPS measures, including food safety, animal and plant health, and the use of international standards.

2. In application of article 10 of the SPS Agreement, when [...] has identified difficulties with a proposed measure notified by the EU Party, [...] may request, in its comments submitted to the EU, pursuant to Annex B to the SPS Agreement referred to in Article 7 of the SPS Trade part of the Agreement, an opportunity to discuss the issue. The EU Party and Paraguay shall enter into consultation in order to agree on:

- a) alternative import conditions to be applied by the importing Party according to Article 7 (alternative measures); or
- b) technical assistance according to Article 18 cooperation and technical assistance; or
- c) a transitional period of 6 months for proposed measures to apply to goods from [...], which could be exceptionally extended for another period of no longer than 6 months.

## **9.5 Subsidies**

### SUBSIDIES

#### **Principles**

1. The Parties agree that subsidies can be granted by a Party when they are necessary to achieve a public policy objective.

2. With a view to ensuring that subsidies are not granted where they have or could have a material effect on trade or investment between the Parties, each Party shall have in place and maintain an effective system of subsidy control that ensures that the granting of a subsidy respects the following principles:

- a) subsidies pursue a specific public policy objective to remedy an identified market failure or to address an equity rationale such as social difficulties or distributional concerns (“the objective”);
- b) subsidies are proportionate and limited to what is necessary to achieve the objective;
- c) subsidies are designed to bring about a change of economic behaviour of the beneficiary that is conducive to achieving the objective and that would not be achieved in the absence of subsidies being provided;
- d) subsidies should not normally compensate for the costs the beneficiary would have funded in the absence of any subsidy;
- e) subsidies are an appropriate policy instrument to achieve a public policy objective and that objective cannot be achieved through other less distortive means;
- f) subsidies’ positive contributions to achieving the objective outweigh any negative effects, in particular the negative effects on trade or investment between the Parties.

2. An illustrative list of public policy objectives for which a Party may grant subsidies, subject to not undermine the proper functioning of markets and the benefits of trade liberalisation, includes the following:

- (a) making good the damage caused by natural disasters or exceptional occurrences;
- (b) promoting the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;
- (c) remedying a serious disturbance in the economy of one of the Parties;
- (d) facilitating the development of certain economic activities or of certain economic areas, including but not limited to, subsidies for clearly defined research, development and innovation purposes, subsidies for training or for the creation of employment, subsidies for environmental purposes, subsidies in favour of small and medium-sized enterprises as defined in the Parties' respective legislations;
- (e) promoting, developing and increasing the generation of energy from renewable and sustainable non-fossil sources; and
- (f) promoting culture and heritage conservation.

3. The Parties acknowledge the relevance of achieving multilateral regulations regarding the use of subsidies for environmental purposes, for which they commit to cooperate within the framework of the WTO.

4. The Parties recognise the importance of a secure, affordable and sustainable energy system and environmental sustainability, notably in relation to the fight against climate change which represent an existential threat to humanity. Therefore, without prejudice to Article 1.1 [Principles], the subsidies in relation to energy and environment shall be aimed at, and incentivise the beneficiary in, delivering a secure, affordable and sustainable energy system and a well-functioning and competitive energy market or increasing the level of environmental protection compared to the level that would be achieved in absence of the

subsidy. Such subsidies shall not relieve the beneficiary from liabilities arising from its responsibilities as a polluter under the law of the relevant Party.

## **9.6 Transparency and Cooperation Mechanisms**

### Article X

#### Energy (Including Renewable Energy)

1. The Parties agree that their joint objective shall be to foster cooperation in the field of energy, in particular sustainable clean and renewable energy sources, energy efficiency, energy saving technology, rural electrification and regional integration of energy markets, among others as identified by the Parties, and in compliance with domestic legislation.

2. Cooperation may include, among others, the following:

(a) formulation and planning of energy policy, including interconnected infrastructures of regional importance, improvement and diversification of energy supply and improvement of energy markets, including facilitation of transit, transmission and distribution within the Republics of the CA Party;

(b) management and training for the energy sector and transfer of technology and know-how, including ongoing work on standards relating to energy generating emissions and energy efficiency;

(c) promotion of energy saving, energy efficiency, renewable energy and studying of the environmental impact of energy production and consumption, in particular, its effects on biodiversity, forestry and land use change;

(d) promotion of the application of clean development mechanisms to support the climate change initiatives and its variability

## **Political Dialogues**

### Article X

#### Environment

1. The Parties shall promote a dialogue in the areas of environment and sustainable development by exchanging information and encouraging initiatives on local and global environmental issues, recognising the principle of shared but differentiated responsibilities, as set forth in the 1992 Rio Declaration on Environment and Development.

2. This dialogue shall be aimed, inter alia, at fighting the threat of climate change, biodiversity conservation, the protection and sustainable management of forests to, inter alia, reduce emissions from deforestation and forest degradation, the protection of hydro and marine resources, basins and wetlands, the research and development of alternative fuels and

renewable energy technologies and the reform of environmental governance in view of increasing its efficiency

#### *Article X*

##### **The subcommittee**

1. The Parties hereby establish a Subcommittee on Dialogues in animal welfare, in agricultural, biotechnology, in combating antimicrobial resistance and in food safety, plant and animal health, hereinafter referred as the Subcommittee.
2. The Subcommittee shall be comprised of representatives of the Parties with responsibility on matters covered by this Chapter.
3. The Subcommittee will appoint ad-hoc working groups to conduct the Dialogues. It will also establish the scope, mandate and agendas of these working groups.
4. The working groups will be composed of representatives of the Parties with technical expertise on the matters subjected to dialogue. They will be co-chaired by the representatives of the Parties.
5. The Subcommittee and the working groups may meet by video or audio-conference and may also address issues electronically.
6. The co-chairs of the working groups shall report to the Subcommittee on the work of the group.
7. The Subcommittee may review the task assigned to a working group.
8. The Subcommittee will be responsible to promote and disseminate information on its work of competence, inter alia, to business circles and civil society. When appropriate, relevant stakeholders shall be invited to participate in the discussions of issues of their expertise.

#### *Article X*

##### **Cooperation and Technical Assistance on Trade and Sustainable Development**

1. The Parties recognise the importance of cooperation and technical assistance in the fields of trade and labour, and trade and environment for achieving the objectives of Title VIII (Trade and Sustainable Development) of Part IV of this Agreement.
2. To complement the activities set out in Title X (Social Development and Social Cohesion) and X (Environment, Natural Disasters and Climate Change) of Part X of this Agreement, the Parties agree to cooperate, including by supporting technical assistance, training and capacity building actions in, inter alia, the following areas:

(a) supporting the development of incentives to foster environmental protection and decent work conditions, especially through the promotion of legal and sustainable trade, for instance through fair and ethical trade schemes, including those involving corporate social responsibility and accountability, as well as related labelling and marketing initiatives;

(b) promoting trade related cooperation mechanisms as agreed by the Parties to help implement the current and future international climate change regime;

(c) promoting trade in products derived from sustainably managed natural resources, including through effective measures regarding wildlife, fisheries and certification of legally and sustainably produced timber. Particular attention shall be paid to voluntary and flexible mechanisms and marketing initiatives aimed to promote environmentally sustainable productive systems;

(d) strengthening institutional frameworks, development and implementation of policies and programs regarding the implementation and enforcement of multilateral environmental agreements and environmental laws, as agreed by the Parties, and developing measures to combat illegal trade with environmental relevance, including through enforcement activities and customs cooperation;

(e) strengthening institutional frameworks, development and implementation of policies and programs regarding Fundamental Principles and Rights at Work (freedom of association and collective bargaining, forced labour, child labour, no employment discrimination) and the implementation and enforcement of International Labour Organization (hereinafter referred to as "ILO") conventions and labour laws, as agreed by the Parties;

(f) facilitating exchange of views on the development of methodologies and indicators for sustainability review and supporting initiatives to jointly review, monitor and assess the contribution to sustainable development of Part X of this Agreement;

(g) strengthening the institutional capacity on trade and sustainable development issues and supporting the organisation and facilitation of the agreed frameworks for dialogue with civil society on such matters.

## 9.7 Government Procurement

### General Principles

1. With respect to any measure related to covered procurement:

a. the EU Party, including its procuring entities, shall accord immediately and unconditionally to the goods and services of the [...] and to the suppliers of the [...] offering such goods and services, treatment no less favourable than the treatment accorded to its own goods, services and suppliers;

b. [...], including its procuring entities, shall accord immediately and unconditionally to the goods and services of the EU Party and to the suppliers of the EU Party offering

such goods and services, treatment no less favourable than the treatment accorded to its own goods, services and suppliers.

2. With respect to any measure concerning covered procurement, the EU and [...], including their respective procuring entities, shall not:

- a. treat a locally established supplier less favourably than another locally established supplier on the basis of degree of foreign affiliation to, or ownership by, juridical or natural persons of the other Party; nor
- b. discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of the other Party.

3. The provisions of this Article do not apply to custom duties or any other measure of an equivalent nature, which have an impact on foreign trade, or to other import regulations and measures which affect the trade in services, different to the ones which specifically regulate public procurement covered under this agreement.

4. Each Party shall ensure that its procuring entities may take into account environmental, labour and social considerations throughout the procurement procedure, provided that those considerations are compatible with the rules established this Chapter and are indicated in the notice of intended procurement or in another notice used as a notice of intended procurement or tender documentation.

#### *Article X*

### **Cooperation in Government procurement**

The Parties commit to cooperate to ensure the effective implementation of this chapter. The Parties shall use the available and existing instruments, resources and mechanisms. In particular, cooperation activities in this area shall be carried out, inter alia, through:

- i) exchange of information, good practices, statistical data, experts, experiences and policies in areas of mutual interest;
- ii) exchange of good practices regarding the use of sustainable procurement practices and other areas of mutual interest;
- iii) promoting networks, seminars and workshops in topics of mutual interest;
- iv) transfer of knowledge, including, inter alia, contacts between experts from the EU and MCS countries;
- v) sharing of information between the EU and MCS countries, with a view to facilitate access to the government procurement markets of each other Parties', in particular for micro, small and medium size enterprises.
- vi) exchange of information and cooperation on fair and ethical trade, private and public certification and labelling schemes including eco-labelling and green public procurement;

## 9.8 Intellectual Property

### Section A – General Provisions and Principles

#### Protection of Biodiversity and Traditional knowledge

1. The Parties recognise the past, present and future contribution of indigenous and local communities to the conservation and sustainable use of biological diversity and all of its components and, in general, the contribution of the traditional knowledge of their indigenous and local communities to the culture and to the economic and social development of nations].
2. Subject to their domestic legislation the EU and [...] respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the involvement and approval of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices.
3. The Parties recognise the importance of taking appropriate measures, subject to national legislation, to preserve traditional knowledge.
4. The Parties furthermore reaffirm their sovereign rights over their natural resources and recognise their rights and obligations as established by the Convention of Biological Diversity of 1992 (henceforth referred to as CBD) and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the CBD with respect to access to genetic resources, and to the fair and equitable sharing of benefits arising out of the utilisation of these genetic resources.
5. The Parties shall cooperate, subject to domestic legislation and international law, to ensure that intellectual property rights are supportive of, and do not run counter to, their rights and obligations under the CBD, in so far as genetic resources and associated traditional knowledge of the indigenous and local communities located in their respective territories are concerned
6. Recognising the special nature of agricultural biodiversity, its distinctive features and problems needing distinctive solutions, the parties agree that access to genetic resources for food and agriculture shall be subject to specific treatment in accordance with the International Treaty on Plant Genetic Resources for Food and Agriculture (2001).
7. The Parties may, by mutual agreement, review this Article subject to the results and conclusions of multilateral discussions.

#### Article X

#### Transfer of technology

1. The Parties agree to exchange views and information on their practices and policies affecting transfer of technology, both within their respective regions and with third countries. This shall in particular include measures to facilitate information flows, business

partnerships, licensing and subcontracting. Particular attention shall be paid to the conditions necessary to create an adequate enabling environment for technology transfer in the host countries, including issues such as development of human capital and legal framework.

2. The Parties shall take measures to prevent or control licensing practices or conditions pertaining to intellectual property rights which may adversely affect the international transfer of technology and that constitute an abuse of intellectual property rights by right holders or an abuse of obvious information asymmetries in the negotiation of licences.
3. The EU Party shall facilitate and promote the use of incentives granted to institutions and enterprises in its territory for the transfer of technology to institutions and enterprises of the MCS States in order to enable the MCS States to establish a viable technological base.
4. The Parties encourage transfer of technology to help in the adoption of new technologies that may contribute to the mitigation of climate change and aid in energy transition.

## **Article X Cooperation**

1. The Parties agree to cooperate with a view to supporting implementation of the commitments and obligations undertaken under this Chapter in view of Objectives set out in Article X.2 and Principles set out in Article X.4 of this Chapter.
2. The areas of cooperation include, but are not limited to, the following activities:
  - a) The exchange of information on the legal framework concerning intellectual property rights and relevant rules of protection and enforcement;
  - b) The exchange of experience between the Parties on legislative progress;
  - c) The exchange of experience between the Parties on the enforcement of intellectual property rights;
  - d) The exchange of experience between the Parties on enforcement at central and sub-central level by customs, police, administrative and judiciary bodies;
  - e) Coordination to prevent exports of counterfeit goods, including with other countries;
  - f) Technical assistance, capacity-building; exchange and training of personnel;
  - g) The protection and defence of intellectual property rights and the dissemination of information in this regard in, inter alia, business circles and civil society;
  - h) Public awareness of consumers and right holders; enhancement of institutional cooperation, particularly between the intellectual property offices;
  - i) Actively promoting awareness and education of the general public on policies concerning intellectual property rights;

- j) Engaging with SMEs, including at SME-focused events or gatherings, regarding using, protecting and enforcing intellectual property rights;
- k) The application of the CBD and related instruments, and the domestic frameworks on access to genetic resources and associated traditional knowledge, innovations and practices;
- l) The promotion of the convergence of green patent programs, with the objective of creating a space for the exchange of experiences in green technologies.
- m) Facilitation of voluntary stakeholder initiatives to reduce intellectual property rights infringement, including over the internet and in other marketplaces;
- n) The exchange of information related to public domain in their territories.

3. Without prejudice to paragraph 1 and 2 and to supplement them if necessary, the Parties agree to establish a Sub-Committee on Intellectual Property to follow up on the implementation of the provisions of this Chapter and any other relevant issue. This Sub-Committee shall be co-chaired by officials of both Parties and will meet at least once per year, except if the Parties agree otherwise. These meetings shall be carried out through any agreed means, including by video conference. The Sub-Committee on Intellectual Property will adopt its decisions by consensus. It may also adopt specific rules of procedure, by consensus.

## *Article X*

### **Cooperation and transparency**

1. The Sub Committee on Intellectual Property established in accordance with Article X.59 shall see to the proper functioning of this Sub-Section and may consider any matter related to its implementation and operation. In particular, it shall be responsible for:

- (a) taking decisions amending Annex I as regards the references to the law applicable in the Parties,
- (b) taking decisions modifying Annex II as regard to geographical indications and exchanging information for that purpose,
- (c) exchanging information on legislative and policy developments on geographical indications and any other matter of mutual interest in the area of geographical indications,
- (d) cooperating on the development of alternative names for products that were once marketed by producers of a Party with terms corresponding to geographical indications of the other Party, especially in cases subject to a phasing out. Parties shall notify each other if a geographical indication listed in Annex II ceases to be protected in the territory of the Party concerned. Following such notification, the Sub Committee shall modify Annex II in accordance with Article X.39.3 (b) to end the protection under this Agreement. Only the Party in which the product originates is entitled to

request the end of the protection under this Sub-Section of a geographical indication listed in Annex II.

(e) cooperating on the identification of products that could benefit from protection as geographical indications and any other action aimed at achieving protection as geographical indications for these products. In so doing, the European Union and MCS shall pay particular attention to promoting and preserving local traditional knowledge and biodiversity through the establishment of geographical indications.

4. Parties shall, either directly or through the Sub Committee, remain in contact directly on all matters relating to the implementation and the functioning of this Sub-Section. In particular, a Party may request from the other Party information relating to product specifications and their amendments, as well as contact points for control provisions.

5. A product specification referred to in this agreement shall be the one approved, including any amendments also approved, by the authorities of the Party in the territory from which the product originates.

6. Parties may make publicly available the product specifications or a summary thereof corresponding to the geographical indications of the other Party protected pursuant to this Subsection, in Portuguese, Spanish or English.

## **9.9 Dispute Settlement and Enforcement Mechanisms**

### *ARTICLE X* **Consultations**

[...]

X. In disputes concerning the TSD Chapter as regards matters related to the multilateral agreements or instruments referred to in TSD Chapter, the Parties shall take into account information from the ILO or relevant bodies or organisations established under Multilateral Environmental Agreements (MEAs) in order to promote coherence between the work of the Parties and these organisations. Where relevant, the Parties shall seek advice from such organisations or their bodies, or any other expert or body they deem appropriate. Each Party may seek, if appropriate, the views of the ... [domestic civil society bodies set up under the Agreement] referred to in Article X of Chapter X [Institutional Chapter] or other expert advice.

### *Article X* **Panel of Experts**

1. If, within 120 days of a request for consultations under Article X no mutually satisfactory resolution has been reached, a Party may request the establishment of a Panel of Experts to examine the matter. Any such request shall be made in writing to the contact point of the other Party established in accordance with Article X and shall identify the reasons for requesting the establishment of a Panel of Experts, including a description of the measure(s) at issue and indicating the relevant provision(s) of this Chapter that it considers applicable.

2. Except as otherwise provided for in this Article, the provisions set out in Articles X (Composition of arbitration panel), X (Hearings) and X (Information and technical advice) of Chapter X (Dispute Settlement Procedures), Articles X (Confidentiality) and X (Costs) of Chapter X (General Provisions) of Title X (Dispute Settlement), as well as the Rules of Procedure in Annex X and the Code of Conduct in Annex X to Title X (Dispute Settlement) shall apply.

3. The Trade and Sustainable Development (TSD) Sub-Committee shall, at its first meeting after the entry into force of this Agreement, establish a list of at least 15 individuals who are willing and able to serve on the Panel of Experts. The list shall be composed of three sub-lists: one sub-list proposed by the EU, one sub-list proposed by [X] and one sub-list of individuals that are not nationals of either Party. Each Party shall propose at least five individuals for its sub-list. The Parties shall also select at least five individuals for the list of individuals that are not nationals of either Party. The TSD Sub-Committee shall ensure that the list is kept up to date and that the number of experts is maintained at least at 15 individuals.

4. The individuals referred to in paragraph 3 shall have specialised knowledge of, or expertise in issues addressed in this Chapter including labour, environmental or trade law, or in the resolution of disputes arising under international agreements. They shall be independent, serve in their individual capacities and shall not take instructions from any organisation or government with regard to issues related to the disagreement, or be affiliated with the government of any Party, and shall comply with Annex X (Code of Conduct) to Title X (Dispute Settlement).

5. A Panel of Experts shall be composed of three members, unless the Parties agree otherwise. The Chairperson shall be from the sub-list of individuals that are not nationals of either Party. A Panel of Experts shall be established according to the procedures set out in paragraphs 1 and 4 of Article X (Composition of arbitration panel) of Chapter X (Dispute Settlement Procedures) of Title X (Dispute Settlement). The experts shall be selected from the relevant individuals on the sub-lists referred to in paragraph 3 of this Article, in accordance with the relevant provisions of paras 2, 3 or 5 (Composition of arbitration panel) of Chapter X (Dispute Settlement Procedures) of Title X (Dispute Settlement).

6. Unless the Parties agree otherwise within seven days from the date of establishment of the Panel of Experts, as defined in paragraph 6 of Article 8 (Composition of arbitration panel) of Chapter 3 (Dispute Settlement Procedures), Title VIII (Dispute Settlement), the terms of reference shall be: "to examine, in the light of the relevant provisions of Chapter X [Trade and Sustainable Development] of the EU-[X] Free Trade Agreement, the matter referred to in the request for the establishment of the Panel of Experts, and to issue a report, in accordance with Article 17 of that Chapter, making recommendations for the resolution of the matter".

7. With regard to matters related to the respect of multilateral agreements referred to in this Chapter, the opinions of experts or information requested by the Panel of Experts in accordance with Article X (Information and Technical Advice) of Chapter X (Dispute Settlement Procedures) of Title X (Dispute Settlement) should include information and advice from the relevant ILO or MEA bodies. Any information obtained under this paragraph shall be provided to both Parties for their comments.

8. The Panel of Experts shall interpret the provisions of this Chapter in accordance with the customary rules of interpretation of public international law.

9. The Panel of Experts shall issue to the Parties an interim report within 90 days of the establishment of the Panel, and a final report no later than 60 days after issuing the interim report. These reports shall set out the findings of facts, the applicability of the relevant provisions and the basic rationale behind any findings and recommendations. Either of the involved Parties may submit written comments on the interim report to the Panel of Experts within 45 days of the date of issue of the interim report. After considering any such written comments, the Panel of Experts may modify the report and make any further examination it considers appropriate. Where it considers that the deadlines set in this paragraph cannot be met, the chairperson of the Panel of Experts shall notify the Parties in writing, stating the reasons for the delay and the date on which the panel plans to issue its interim or final report.

10. The Parties shall make the final report publicly available within 15 days of its submission by the Panel of Experts

11. If the final report of the Panel of Experts determines that a Party has not conformed with its obligations under this Chapter, the Parties shall engage in discussions and shall endeavour, within three months of the delivery of the final report, to identify an appropriate measure or, if appropriate, to decide upon a mutually satisfactory action plan. In these discussions, the Parties shall take into account the final report. The Party complained against shall inform its... [civil society domestic advisory group] referred to in Article ... of Chapter ... and the other Party of its decisions on any actions or measures to be implemented no later than 90 days after the report has been made publicly available. The Sub-Committee on Trade and Sustainable Development shall monitor the follow-up to the report of the Panel of Experts and its recommendations. The ... [civil society domestic advisory groups set up under the Agreement] referred to in Article(s) ... of Chapter... may submit observations to the Trade and Sustainable Development Sub-Committee in this regard.

## ARTICLE X

### **Compliance measures**

1. The Party complained against shall take any measure necessary to comply promptly with the findings and recommendations in the final report in order to bring itself in compliance with the covered provisions.

2. The Party complained against shall, no later than 30 days after delivery of the final report, deliver a notification to the complaining Party of the measures which it has taken or which it envisages to take to comply.

3. In addition, as regards disputes under the [TSD Chapter]:

(a) The Party complained against shall inform its domestic civil society mechanism established pursuant to Article XX of this Agreement and the contact point of the other Party established pursuant to Article XX of this Agreement of the measures which it has taken or which it envisages to take to comply no later than 30 days after delivery of the final report.

(b) The [body] shall monitor the implementation of the compliance measures. The ... [civil society mechanisms established pursuant to Article(s) X of Chapter X may submit observations to the [body] in this regard.

*Article X*

**Dispute Resolution**

1. The Parties shall make all efforts through dialogue, consultation, exchange of information and cooperation to address any disagreement on the interpretation or application of this Chapter.
2. Any time period mentioned in Articles [X] and [X] may be extended by mutual agreement of the Parties.
3. All time periods established under this Chapter shall be counted in calendar days from the day following the act or fact to which they refer.
4. For the purpose of this Chapter, parties to a dispute under this chapter shall be as set out in Article 2 (Parties) of Chapter 1 (Objective and Scope) of Title VIII (Dispute Settlement).
5. If the consulting Parties have failed to resolve the matter under the framework proposed in the Trade and Sustainable Development chapter, the requesting Party may recourse to dispute settlement under Title X Dispute Settlement.

ARTICLE X

**Temporary remedies**

2. As regards disputes under [TSD Chapter] this article applies if:

(a) a situation set out in points (a), (b) or (c) of paragraph 1 arises and the final report pursuant to Article X.12 found a violation of Article X (non-respect of core labour rights) or of the obligation referred to in Article X, [TSD Chapter] (Trade and Climate Change), i.e. to refrain from any action or omission which materially defeats the object and purpose of the Paris Agreement ; or

(b) a situation set out in point (d) of paragraph 1 arises and the decision of the compliance panel pursuant to Article X found a violation of Article X (non-respect of core labour rights) or of the obligation referred to in Article X [TSD Chapter] (Trade and Climate Change) i.e. to refrain from any action or omission which materially defeats the object and purpose of the Paris Agreement

ARTICLE X

**Fight against climate change**

1. The Parties consider that climate change represents an existential threat to humanity and reiterate their commitment to strengthening the global response to this threat. The fight against human-caused climate change as elaborated in the United Nations Framework Convention on Climate Change ("UNFCCC") process, and in particular in the Paris Agreement adopted by the Conference of the Parties to the

United Nations Framework Convention on Climate Change at its 21st session (the "Paris Agreement"), inspires the domestic and external policies of the Union and the United Kingdom. Accordingly, each Party shall respect the Paris Agreement and the process set up by the UNFCCC and refrain from acts or omissions that would materially defeat the object and purpose of the Paris Agreement.

2. The Parties shall advocate the fight against climate change in international forums, including by engaging with other countries and regions to increase their level of ambition in the reduction of greenhouse emissions

## **Article X**

### **Fulfilment of obligations described as essential elements**

1. If either Party considers that there has been a serious and substantial failure by the other Party to fulfil any of the obligations that are described as essential elements in Article 771, it may decide to terminate or suspend the operation of this Agreement or any supplementing agreement in whole or in part.

2. Before doing so, the Party invoking the application of this Article shall request that the Partnership Council meet immediately with a view to seeking a timely and mutually agreeable solution. If no mutually agreeable solution is found within 30 days from the date of the request to the Partnership Council, the Party may take the measures referred to in paragraph 1.

3. The measures referred to in paragraph 1 shall be in full respect of international law and shall be proportionate. Priority shall be given to the measures which least disturb the functioning of this Agreement and of any supplementing agreements.

## **9.10 Trade And Sustainable Development**

### *Article X*

#### **Objectives and Scope**

1. The objective of this Chapter is to enhance the integration of sustainable development in the Parties' trade and investment relationship, notably by establishing principles and actions concerning labour<sup>1</sup> and environmental aspects of sustainable development of specific relevance in a trade and investment context.

2. The Parties recall the Agenda 21 and the Rio Declaration on Environment and Development of 1992, the Johannesburg Declaration on Sustainable Development and the Johannesburg Plan of Implementation on Sustainable Development of 2002, the Ministerial Declaration of

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<sup>1</sup> For the purposes of this chapter, the term "labour" means the strategic objectives of the ILO under the Decent Work Agenda, which is expressed in the ILO 2008 Declaration on Social Justice for a Fair Globalisation

the United Nations Economic and Social Council on Creating an environment at the national and international levels conducive to generating full and productive employment and decent work for all, and its impact on sustainable development of 2006, the Declaration on Social Justice for a Fair Globalisation of 2008 of the International Labour Organisation (ILO), and the Outcome Document of the UN Conference on Sustainable Development of 2012 entitled "The Future We Want" and the document "Transforming our World: the 2030 Agenda for Sustainable Development", adopted in 2015.

3. The Parties recognize that the economic, social and environmental dimensions are interdependent and mutually reinforcing dimensions of sustainable development and reaffirm their commitment to promoting the development of international trade in such a way as to contribute to the objective of sustainable development, for the welfare of present and future generations. They underline the benefit of cooperation on trade-related social and environmental issues as part of a global approach to trade and sustainable development.

4. Consistent with the instruments referred to in paragraph 2, the Parties shall promote sustainable development through:

(a) the development of trade and economic relations in a manner that contributes to the objective of achieving the Sustainable Development Goals and supports their respective labour and environmental standards and objectives in a context of trade relations that are free, open, transparent, and respectful of multilateral agreements to which they are Party.

(b) the respect of their multilateral commitments in the fields of labour and of the environment.

(c) enhanced cooperation and understanding of their respective labour and environmental trade-related policies and measures, taking into account the different national realities, capacities, needs and levels of development and respecting national policies and priorities.

(d) joint cooperation in relevant trade and environment forums, including the WTO Committee on Trade and Environment.

5. Recognizing the differences in their levels of development, the Parties agree that this Chapter embodies a cooperative approach based on common values and interests.

## *Article 2*

### **Right to regulate and levels of protection**

1. The Parties recognise the right of each Party to determine its sustainable development policies and priorities, to establish the levels of domestic environmental and labour protection it deems appropriate and to adopt or modify its law and policies. Such levels, law and policies shall be consistent with each Party's commitment to the international agreements and labour standards referred to in Articles 4 and 5.

2. Each Party shall strive to improve its relevant laws and policies so as to ensure high and effective levels of environmental and labour protection.

3. A Party should not weaken the levels of protection afforded in domestic environmental or labour law with the intention of encouraging trade or investment.

4. A Party shall not waive or derogate from, or offer to waive or derogate from, its environmental or labour laws in order to encourage trade or investment.
5. A Party shall not, through a sustained or recurring course of action or inaction, fail to effectively enforce its environmental or labour laws in order to encourage trade or investment.
6. A Party shall not apply environmental and labour laws in a manner that would constitute a disguised restriction on trade or an unjustifiable or arbitrary discrimination.
7. The Parties commit to not adopting or applying regional or national trade or investment-related legislation or other related administrative measures as the case may be in a way which has the effect of frustrating measures intended to benefit, protect or conserve the environment or natural resources or to protect public health.

## Article X

### **Sub-Committee on Trade and Sustainable Development and Contact Points**

1. The Parties hereby establish a Sub-Committee on Trade and Sustainable Development (hereafter "TSD Sub-Committee"). It shall comprise senior officials, or their delegates, from each Party.
2. The TSD Sub-Committee shall meet within a year of the date of entry into force of this Agreement, unless otherwise agreed by the Parties, and thereafter as necessary in accordance with Article ... of Chapter ... [*Institutional provisions on meetings of Sub-Committees of the Trade Committee*]. [This TSD Sub-Committee shall establish its own rules of procedures and adopt its decisions by consensus.]
3. The functions of the TSD Sub-Committee are to:
  - (a) facilitate and monitor the effective implementation of this Chapter, including cooperation activities undertaken under this Chapter,
  - (b) carry out *ex post* analysis of the environmental impact of trade provisions and make recommendations to the Trade Committee with respect to negative outcomes of the agreement,
  - (c) carry out the tasks referred to in Articles 16 and 17,
  - (d) make recommendations to the Trade Committee, including with regard to topics for discussion with the [*civil society mechanism*], referred to in Article ... of Chapter ... [*general institutional provisions*],
  - (e) consider any other matter related to this Chapter as the Parties may agree.

4. The TSD Sub-Committee shall publish a report after each of its meetings.
5. Each Party shall designate a Contact Point within its administration to facilitate communication and coordination between the Parties on any matter relating to the implementation of this Chapter.

## **Article X**

### **Trade Favouring Sustainable Development**

1. The Parties shall strive to facilitate and promote trade and foreign direct investment in environmental goods and services, including through addressing the reduction of non-tariff barriers related to these goods and services.
2. The parties shall facilitate increased cooperation with respect to the manufacture, importation, sale and operation of motor vehicles using alternative fuels.
3. The Parties recognise the need to ensure that, when developing public support systems for fossil fuels, proper account is taken of the need to reduce greenhouse gas emissions and of the need to limit distortions of trade as much as possible. The Parties share the goal of progressively reducing subsidies for fossil fuels. Such reductions may be accompanied by measures to alleviate the social consequences associated with the transition to low carbon fuels. In addition, both Parties will actively promote the development of a sustainable and safe low-carbon economy, such as through investment in renewable energies and energy efficient solutions, and promote the use of nature based solutions.

## CHAPTER

### TRADE AND SUSTAINABLE DEVELOPMENT

#### *Article 1*

#### **Objectives and Scope**

1. The objective of this Chapter is to enhance the integration of sustainable development in the Parties' trade and investment relationship, notably by establishing principles and actions concerning labour<sup>1</sup> and environmental aspects of sustainable development of specific relevance in a trade and investment context.
2. The Parties recall the Agenda 21 and the Rio Declaration on Environment and Development of 1992, the Johannesburg Declaration on Sustainable Development and the Johannesburg Plan of Implementation on Sustainable Development of 2002, the Ministerial Declaration of

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<sup>1</sup> For the purposes of this chapter, the term "labour" means the strategic objectives of the ILO under the Decent Work Agenda, which is expressed in the ILO 2008 Declaration on Social Justice for a Fair Globalisation

the United Nations Economic and Social Council on Creating an environment at the national and international levels conducive to generating full and productive employment and decent work for all, and its impact on sustainable development of 2006, the Declaration on Social Justice for a Fair Globalisation of 2008 of the International Labour Organisation (ILO), and the Outcome Document of the UN Conference on Sustainable Development of 2012 entitled "The Future We Want" and the document "Transforming our World: the 2030 Agenda for Sustainable Development", adopted in 2015.

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

4. Consistent with the instruments referred to in paragraph 2, the Parties shall promote sustainable development through:

(a) the development of trade and economic relations in a manner that contributes to the objective of achieving the Sustainable Development Goals and supports their respective labour and environmental standards and objectives in a context of trade relations that are free, open, transparent, and respectful of multilateral agreements to which they are Party.

(b) the respect of their multilateral commitments in the fields of labour and of the environment.

(c) enhanced cooperation and understanding of their respective labour and environmental trade-related policies and measures, taking into account the different national realities, capacities, needs and levels of development and respecting national policies and priorities.

5. Recognizing the differences in their levels of development, the Parties agree that this Chapter embodies a cooperative approach based on common values and interests.

6. The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded by their domestic labour and environment law. At the same time, the Parties stress that environmental and labour standards should not be used for protectionist trade purposes.

## *Article X*

### **Multilateral Environmental Agreements**

1. The Parties recognize that the environment is one of the three dimensions of sustainable development and that its three dimensions -economic, social and environmental- should be addressed in a balanced and integrated manner. Additionally, the Parties recognize the contribution that trade could make to sustainable development.

2. The Parties recognise the importance of the United Nations Environment Assembly (UNEA) of the United Nations Environment Programme (UNEP) and multilateral environment agreements as a response of the international community to global or regional environmental challenges and stress the need to enhance the mutual supportiveness between trade and environment policies.

3. Recalling the above paragraphs, each Party reaffirms its commitments to promote and effectively implement, multilateral environmental agreements (MEAs), protocols ~~and~~, their amendments and specific programmes, decisions and recommendations to which it is a party.
4. The Parties reaffirm their commitment to effectively implement in their laws and practice the multilateral environmental agreements to which they are parties including:
  - a) United Nations Framework Convention on Climate Change (UNFCCC);
  - b) Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal;
  - c) The Stockholm Convention on Persistent Organic Pollutants;
  - d) Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade;
  - e) Convention on Biological Diversity (CBD);
  - f) Cartagena Protocol on Biosafety to the CBD;
5. The Parties shall regularly exchange information on their respective progress as regards the ratifications of MEAs, including their protocols and amendments.
7. The Parties shall consult and cooperate, as appropriate, on trade-related environmental matters of mutual interest in the context of multilateral environmental agreements.
8. The Parties acknowledge their right to invoke Article X (General Exception) in relation to environmental measures.
9. Nothing in this agreement shall prevent Parties from adopting or maintaining measures to implement the MEAs to which they are party provided that such measures are consistent with Article (X).6.

#### *Article X*

#### **Sustainable Agriculture**

1. The Parties recognize the increasing impact that global changes, such as climate change, biodiversity loss, land degradation, droughts and the emergence of new pests and diseases have on the development of productive sectors such as agriculture, livestock and the forestry sector.
2. The Parties recognize the importance of strengthening policies and developing programs that contribute to the development of more productive, sustainable, inclusive and resilient agricultural systems.
3. The Parties will share information and experiences in the development and implementation of integrated policies that promote the incorporation of the pillars of agricultural sustainable development. In this sense, the Parties will seek to improve agricultural productivity considering the protection and sustainable use of ecosystems and natural resources, including water, soil and air, biodiversity and ecosystem services, as well as reinforcing the social dimension, in addition to contributing to the adaptation and effective mitigation of the agricultural, forestry and food sectors to global changes.

## Article X

### Trade and Climate Change

#### 1.

1. The Parties recognise the importance of taking urgent action to combat climate change and its impacts, and the role of trade in pursuing this objective, consistent with the UN Framework Convention on Climate Change (UNFCCC), the purpose and goals of the Paris Agreement adopted by the Conference of the Parties to the UNFCCC at its 21st session, and with other MEAs and multilateral instruments in the area of climate change.

2. In light of paragraph 1, each Party shall effectively implement the UNFCCC and the Paris Agreement, including commitments with regard to Nationally Determined Contributions.

3. The commitment to effectively implement the Paris Agreement under paragraph 2 includes the obligation to refrain from any action or omission which materially defeats the object and purpose of the Paris Agreement.

4. In light of paragraph 1, each Party shall:

(a) Promote the mutual supportiveness of trade and climate policies and measures thereby contributing to the transition to a low greenhouse gas emission, resource-efficient and circular economy and to climate-resilient development;

(b) Facilitate the removal of obstacles to trade and investment in goods and services of particular relevance for climate change mitigation and adaptation, such as renewable energy and energy efficient products and services, for instance through addressing tariff and non-tariff barriers or through the adoption of policy frameworks conducive to the deployment of best available technologies;

(c) Promote emissions trading as an effective policy tool for reducing greenhouse gas emissions efficiently and promote environmental integrity in the development of international carbon markets.

5. The Parties shall work together to strengthen their cooperation on trade-related aspects of climate change policies and measures bilaterally, regionally including with third countries and in international fora, as appropriate, including in the UNFCCC, the Paris Agreement, the WTO, the Montreal Protocol on Substances that Deplete the Ozone Layer, the International Civil Aviation Organisation (ICAO) and the International Maritime Organisation (IMO). Such cooperation may cover inter alia:

(a) Policy dialogue and cooperation regarding the implementation of the Paris Agreement, such as on means to promote climate resilience, renewable energy, low-carbon technologies, energy efficiency, sustainable transport, sustainable and climate-resilient infrastructure development, emissions monitoring, emissions action in relation to third countries as appropriate;

(b) Policy and technical exchanges regarding the development and implementation of domestic and international carbon pricing including emissions trading, and the promotion of effective standards of environmental integrity in their implementation;

(c) Supporting the development and adoption of ambitious and effective greenhouse gas emissions reduction measures by the IMO to be implemented by and for ships engaged in international trade;

(d) Supporting an ambitious phase-out of ozone depleting substances and phase-down of hydrofluorocarbons under the Montreal Protocol on Substances that Deplete the Ozone Layer through measures to control their production, consumption and trade; the introduction of environmentally friendly alternatives to them; the updating of safety and other relevant standards as well as by combating the illegal trade of substances regulated by the Montreal Protocol.

## Article X

### **Trade and Fossil Fuel Subsidy Reform**

1. The Parties recall the Sustainable Development Goal target 12.C to rationalise inefficient fossil fuel subsidies that encourage wasteful consumption, including by phasing out harmful fossil fuel subsidies; and the Glasgow Climate Pact and the WTO Ministerial Statement on Fossil Fuel Subsidies adopted on 15 December 2021 that encourage efforts towards meeting this target. The Parties recognise that fossil fuel subsidies can distort markets, disadvantage renewable and clean energy, and be inconsistent with the goals of the Paris Agreement.
2. Accordingly, the Parties share the goal of reforming and progressively reducing fossil fuel subsidies and reaffirm their commitment to work to meet this objective in accordance with national circumstances, while taking fully into account the specific needs of populations affected.
3. The Parties shall strengthen their cooperation on trade-related aspects of fossil fuel subsidy policies and measures bilaterally and in international fora. Recognising that the World Trade Organization can play a central role in the fossil fuel reform agenda, the Parties shall work together and encourage the other WTO members to advance the reform and pursue new fossil fuel subsidy disciplines in the WTO, including through enhanced WTO transparency and reporting that will enable the evaluation of the trade, economic, and environment effects of fossil fuel subsidy programmes. A

## Article X

### **Public Information and Civil Society Dialogue Forum**

1. Each Party shall encourage public debate with and among non-state actors as regards the development and definition of policies that may lead to the adoption of environmental law by its public authorities.
2. Each Party shall promote public awareness of its environmental law, as well as enforcement and compliance procedures, by ensuring the availability of information to stakeholders.
3. The Parties agree to organise and facilitate a bi-regional Civil Society Dialogue Forum for open dialogue, with a balanced representation of environmental, economic and social stakeholders. The Civil Society Dialogue Forum shall conduct dialogue encompassing sustainable development aspects of trade relations between the Parties, as well as how cooperation may contribute to achieve the objectives of this Title. The Civil Society Dialogue Forum will meet once a year, unless otherwise agreed by the Parties.
4. Unless the Parties agree otherwise, each meeting of the Board will include a session in which its members shall report on the implementation of this Title to the Civil Society

Dialogue Forum. In turn, the Civil Society Dialogue Forum may express its views and opinions in order to promote dialogue on how to better achieve the objectives of this Title.

### *Article 13*

#### **Working together on trade and sustainable development**

The Parties recognise the importance of working together in order to achieve the objectives of this Chapter. They may work together on inter alia:

- (a) labour and environmental aspects of trade and sustainable development in international fora, including in particular the WTO, the ILO, UNEP, UNCTAD, High-level Political Forum for Sustainable Development and multilateral environmental agreements (MEAs)
- (b) the impact of labour and environmental law and standards on trade and investment;
- (c) the impact of trade and investment law on labour and the environment;
- (d) voluntary sustainability assurance schemes such as fair and ethical trade schemes and eco-labels through the sharing of experience and information on such schemes;

as well as trade-related aspects of:

- (e) the implementation of fundamental, priority and other up-to-date ILO Conventions;
- (f) the ILO Decent Work Agenda, including on the inter-linkages between trade and full and productive employment, labour market adjustment, core labour standards, decent work in global supply chains, social protection and social inclusion, social dialogue, skills development and gender equality;
- (g) the implementation of MEAs and support for each other's participation in such MEAs;
- (h) the dynamic international climate change regime under the UNFCCC, in particular the implementation of the Paris Agreement;
- (e) trade-related aspects of the current and future international climate change regime, as well as domestic climate policies and programmes relating to mitigation and adaptation, including issues relating to carbon markets, ways to address adverse effects of trade on climate, as well as means to promote energy efficiency and a clean energy matrix, and the development and deployment of low-carbon and other climate-friendly technologies;
- (i) the Montreal Protocol and any amendments to it ratified by the Parties, in particular measures to control the production and consumption of and trade in Ozone Depleting Substances (ODS) and Hydrofluorocarbons (HFCs), and the promotion of environmentally friendly alternatives to them, and measures to address illegal trade of substances regulated by the Protocol;

- (j) corporate social responsibility, responsible business conduct, responsible management of global supply chains and accountability, including with regard to implementation, follow-up, and dissemination of relevant international instruments;
- (k) the sound management of chemicals and waste;
- (l) the conservation and sustainable use of biological diversity, and the fair and equitable sharing of the benefits arising from the utilization of genetic resources, including by appropriate access to such resources, as referred to in Article 7;
- (m) combatting wildlife trafficking, as referred to in Article 7;
- (n) the promotion of the conservation and sustainable management of forests with a view to reducing deforestation and illegal logging, as referred to in Article 8;
- (o) private and public initiatives contributing to the objective of halting deforestation, including those linking production and consumption through vertical productivity and supply chains, consistent with SDGs 12 and 15;
- (p) the promotion of sustainable fishing practices and trade in sustainably managed fish products, as referred to in Article 9;
- (q) sustainable consumption and production initiatives consistent with SDG 12, including, but not limited to, circular economy and other sustainable economic models aimed at increasing resource efficiency and reducing waste generation.
- (r) the conservation of biomes considering its relevance to global climate and environment.
- (s) In the light of the environmental challenges facing their respective regions, and in order to promote the development of international trade in such a way as to ensure sustainable and sound management of the environment, the Parties recognise the importance of establishing effective strategies and measures at the regional level. The Parties agree that in the absence of relevant environmental standards in national or regional legislation, they shall seek to adopt and implement the relevant international standards, guidelines or recommendations, where practical and appropriate.

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