The Legal Significance of Trade and Sustainability Chapters in EU Free Trade Agreements

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Contents

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Abstract

The article recalls the evolution and content of Trade and Sustainable Development (TSD) Chapters in EU Free Trade Agreements. They usually contain commitments of both parties to exercise their domestic law without undermining labour and environmental standards. Moreover, parties commit to respect their international obligations in the field and create joint bodies with participation of civil society. Comparing the panel reports on South Korea (2021) and on Ukraine (2020), the authors argue that their practical effect does not depend so much on their legal status, but more on the political will to implement them. The article also tackles the question of whether a breach of TSD commitments by one party can justify trade sanctions by the other. While TSD dispute settlement provisions create a special mechanism for ordinary breaches, recourse to trade sanctions is possible under Article 60 of the Vienna Convention on the Law of Treaties in case of material breaches on core labour rights or important environmental obligations. Finally, the authors sketch the policy change of the European Commission of 2022, according to which the Paris Agreement on Climate Change should become an essential element of EU FTAs, so that also breaches of that instrument may be enforced by trade sanctions.

Keywords: EU Free Trade Agreements, Trade and Sustainability Chapters, Labour and Environmental Standards, EU-South Korea Panel Report, EU-Ukraine Panel Report, Enforcement, Vienna Convention on the Law of Treaties, State Responsibility, Trade Sanctions

A. Introduction

When the World Trade Organization was established in 1994, its members recalled in the first recital of the Marrakesh Agreement that their trade and economic relations should be conducted with a view of raising standards of living, ensuring full employment and increasing trade, "while allowing the optimal use of the world's resources in accordance with the objective of sustainable development" (…). Until now, however, the WTO has been unable to clarify how the liberalisation of trade could deliver also more sustainable development. Instead, a number of WTO States tackled the issue in their bilateral free trade agreements. In this respect, European practice deserves particular attention.

One of the Treaty of Lisbon's major innovations in 2009 was the proclamation of horizontal foreign policy objectives for the European Union (EU). According to Article 3(5) TEU, the Union shall contribute to (…) "the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights". Article 21(1) TEU enumerates the goals of fostering "the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty" (lit. d) and helping "develop international measures to preserve and improve the quality of the environment and the sustainable management of global resources, in order to ensure sustainable development (…)" (lit. f). Moreover, Article 207(1), second sentence, TFEU created a new link between these objectives and the EU's powerful trade policy by stating that "[t]he common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action".

One result of this linkage is the EU's practice of the last decade to include provisions on trade and sustainable development in its free trade agreements (TSD chapters). While the inclusion of such TSD chapters has been generally welcome as a useful policy contribution to balance economic interests with non-economic values, their precise legal significance remains controversial: do the TSD chapters contain legal commitments that are enforceable?

In this article, we will first briefly recall the historic evolution and major content of the TSD chapters until 2021 (B.) and the litigation practice to date (C.). In Section D., we will then examine the possibility to counter the breach of TSD commitments by one party with trade sanctions by the other party. A short presentation of the 2022 reform with the most recent practice up to 2024 follows in Section E. before concluding (F.).

B. Evolution and Content of TSD Chapters until 2021

I. Evolution of TSD Chapters

Already prior to the entry into force of the Lisbon Treaty, in 2008, the EU signed its first trade agreement with sustainable development aspects with the countries of the CARIFORUM.[1] However, the first trade agreement with a designated TSD chapter was the EU-Korea free trade agreement (EU-Korea FTA) of 2010.[2] Most of its provisions applied provisionally since July 2011 until it entered into force in December 2015. Serving as a model for future texts,[3] all EU trade agreements that followed the EU-Korea-FTA include TSD-related provisions.[4]

To date, this is true for the following agreements that have entered into force: Colombia/Peru/Ecuador,[5] Central America,[6] Ukraine,[7] Georgia,[8] Moldova,[9] Canada,[10] Japan,[11] Singapore,[12] Viet Nam[13] and the United Kingdom[14].

Moreover, we can find TSD chapters in a number of FTA agreements that have been signed and await ratification, namely the recent texts from 2020 with Mexico, from 2022 with Chile and 2023 with New Zealand. The Economic Partnership Agreement with Kenya from July 2023 contains similar commitments. The TSD chapter with Mercosur is subject to an ongoing debate between the partners, and the EU has proposed relevant texts in negotiations with Australia, Eastern and Southern Africa, India, Indonesia and Thailand.[15] In the following summary, we will focus on the most relevant provisions of the agreements that are already in force. In turn, TSD-related provisions in more restricted agreements, such as the Investment Agreement with China, will not be analysed.

1 Art. 3(1) and (2) EU-CARIFORUM agreement (OJ 2008, L 289/91).
2 OJ 2011, L 127/6.
3 *Hoffmeister*, in: Obwexer (ed.), p. 257.
4 *Velut et al.*, LSE 2022/2, p. 39.
5 OJ 2012, L 354/3 (Colombia/Peru), OJ 2016, L 356/3 (accession of Ecuador).
6 OJ 2012, L 346/3.
7 OJ 2014, L 161/3.
8 OJ 2014, L 261/4.
9 OJ 2014, L 260/4.
10 OJ 2017, L 11/1.
11 OJ 2018, L 330/3.
12 OJ 2019, L 294/3.
13 OJ 2020, L 186/3.
14 OJ 2021, L 149/10.
15 For a list of all the FTAs that are in force, are awaiting ratification or a being negotiated, see *European Commission*, Sustainable development in EU trade agreements, available at: https://policy.trade.ec.europa.eu/development-and-sustainability/sustainable-development/sustainable-development-eu-trade-agreements_en (17/2/2024).

II. Content of TSD-Chapters

Most EU FTAs cover TSD objectives (environment, labour, cross-cutting) in a dedicated single TSD chapter.[16] Only the agreement with Canada, where those issues are spread over chapters 22–24, and the agreement with the UK, whose Title IX on "level playing field for open and fair competition and sustainable development" contains several chapters touching upon SD matters, are structured differently. EU FTAs sometimes also venture into the territory of transparency, corporate social responsibility and gender issues, which will not be dealt with here.
The standard TSD chapters define the context or objectives of the chapter and usually include provisions relating to domestic law (1.), international standards and agreements (2.), the institutional set up (3.) and dispute settlement (4.).

1. Exercise of Domestic Law

A central provision of each TSD Chapter is the clause, according to which the parties recognise each other's *right to regulate* in the environmental and the labour field and/or the field of sustainable development. That right should be exercised in a manner that is consistent with their commitment to internationally recognised standards and agreements. According to the Commission, the protection of domestic regulatory space also reserves the right to be more ambitious.[17]

Moreover, the TSD chapters underline in varying ways that the parties shall strive to *improve* their law, policies and/or to ensure that they provide for and encourage high levels of protection.[18]

Finally, the chapters contain a "non-regression" and a "non-enforcement" clause.[19] The parties should not weaken/reduce/waive the environmental and labour protections in their domestic law, nor fail to enforce them effectively.[20] These clauses relate to the application of domestic law and are hence not dependent on a breach of the parties' international obligations.[21] However, they are contingent on a link to trade: either the clause contains the subjective condition that the parties cannot regress or non-enforce domestic law as an "encouragement for trade or

16 *Velut et al.*, LSE 2022/2, p. 44.
17 *European Commission*, Sutainable development, (fn. 15), second bullet point.
18 Compare Art. 13.3 EU-Korea FTA; Art. 268 EU-Colombia/Peru/Ecuador FTA; Art. 285(2) EU-Central America FTA; Art. 290(1) EU-Ukraine Association Agreement; Art. 228(2) EU-Georgia Association Agreement; Art. 364(2) EU-Moldova Association Agreement; Artt. 23.2, 24.3 CETA; Art. 16.2(1) EU-Japan EPA; Art. 12.2(2) EU-Singapore FTA; Art. 13.2(2) EVFTA, Artt. 387(4), 391(5) EU-UK-TCA.
19 *Bronckers/Gruni*, Journal of International Economic Law 2021, p. 30.
20 Compare Art. 13.7 EU-Korea FTA; Art. 277(1) and (2) EU-Colombia/Peru/Ecuador-FTA; Art. 291(2) and (3) EU-Central America FTA; Art. 296 EU-Ukraine Association Agreement; Art. 235(2) and (3) EU-Georgia Association Agreement; Art. 371(2) and (3) EU-Moldova Association Agreement; Artt. 23.4(2) and (3), 24.5(2) and (3) CETA; Art. 16.2(2) EU-Japan EPA; Art. 12.12 EU-Singapore-FTA; Art. 13.3(2) and (3) EVFTA; Artt. 387(2), 391(2) EU-UK-TCA.
21 *Bronckers/Gruni*, Journal of International Economic Law 2021, p. 30.

investment", or they lay down the objective condition that the parties cannot do so in a manner that is "affecting trade or investment between the parties". The wording and the practice is varied. Some agreements make both clauses dependent on a subjective trade condition.[22] The EU-Singapore-FTA and the EU-UK-TCA subject both clauses to the objective trade condition.[23] Other agreements use a mix of both techniques.[24]

In both alternatives (subjective or objective trade link), the question arises of how to substantiate such a link between the domestic measure and its (intended) impact on international trade. In the US-CAFTA-Dominican Republic FTA, the relevant article stipulates that a "Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement". In a dispute brought by the US government against Guatemala, the first TSD dispute under any FTA worldwide, the Panel established under the agreement found that Guatemala had failed to effectively enforce its labour laws at eight sites, affecting 74 workers.[25] Nevertheless, there was no breach of the relevant article. Even if the panel assumed *arguendo* that the eight failures of Guatemala fulfilled the "sustained or recurring course of action or inaction" condition, it found that only one of them met the trade condition. That one failure did not constitute a sustained or recurring course of inaction by itself.[26] For the panel, the trade condition is only fulfilled when the alleged failure "confers some competitive advantage on an employer or employers engaged in trade between the Parties".[27]

While this US-American case does not constitute a binding precedent for EU FTAs, the trade-effect condition in European non-regression clauses may nevertheless be interpreted as requiring a similarly high evidentiary standard.[28]

2. Compliance with International Standards and Agreements

EU FTA TSD chapters usually also contain clauses concerning international labour and environmental standards and agreements.

22 Art. 235 EU-Georgia Association Agreement; Art. 371(2) and (3) EU-Moldova Association Agreement; Artt. 23.4(2) and (3), 24.5(2) and (3) CETA.
23 Art. 12.12 EU-Singapore-FTA; Artt. 387(2), 391(2) EU-UK-TCA.
24 For the differing combinations (sometimes also splitting the links between trade and investment) compare: Art. 13.7 EU-Korea FTA; Art. 277(1) and (2) EU-Colombia/Peru/Ecuador-FTA; Art. 291(2) and (3) EU-Central America FTA; Art. 296 EU-Ukraine Association Agreement; Art. 16.2(2) EU-Japan EPA; Art. 13.3(2) and (3) EVFTA.
25 Final Report of the Panel, 14 June 2017, paras. 426 et seq., 594, available at: https://www.trade.gov/sites/default/files/2020-09/Guatemala%20%E2%80%93%20Obligations%20Under%20Article%2016-2-1%28a%29%20of%20the%20CAFTA-DR%20%20June%2014%202017_1_0.pdf (17/2/2024).
26 Ibid., paras. 444 et seq., 491, 497 et seq., 594.
27 Ibid., para. 190.
28 *Marín Durán*, CMLR 2020/4, p. 25 of the open access version.

a) Labour Standards and ILO Conventions

Referring to labour norms, one can distinguish between the references to core labour standards and specific ILO Conventions.

The notion of core labour standards can be traced back to the 1996 Declaration of the WTO Ministerial Conference in Singapore. While rejecting the insertion of a "social clause" in the rulebook of the WTO, Ministers renewed their commitment to "the observance of internationally recognized core labour standards".[29] Seizing on this recognition, the ILO adopted the "Declaration on Fundamental Principles and Rights at Work" (the 1998 ILO Declaration) two years later. It recognizes four principles:

1. The freedom of association and the right to collective bargaining;
2. The elimination of all forms of forced or compulsory labour;
3. The effective abolition of child labour; and
4. The elimination of discrimination in respect of employment and occupation.

The 1998 ILO Declaration rapidly became a reference across a range of FTAs among ILO members.[30] Although not being a formal member of the ILO, the EU prominently figures among the supporters of these standards in its FTAs. While the precise wording of the duty to promote and implement the principles may differ,[31] it is clear that they are binding on the parties even if they have not ratified relevant ILO Conventions in the field.[32] Moreover, unlike US agreements, EU TSD chapters do not require a trade link. Rather the obligation to comply with the core labour standards is self-standing.

The TSD chapters also include commitments regarding specific ILO Conventions. Their levels may vary: some provide for an exchange of information regarding the ratification of certain conventions, some regulate that parties cooperate in promoting ratification, some regulate that the parties "consider" ratification, and in some cases the parties commit to make "continued and sustained efforts" towards ratifying certain conventions. Most TSD chapters also include commitments of the States to implement certain ILO Conventions effectively.[33]

While the EU-Korea FTA only refers to the international labour standards mentioned above, all of the subsequent trade agreements except the EU-Japan EPA refer to other standards, sometimes inside and sometimes outside of the TSD chapters. CETA and the EU-UK TCA refer additionally to minimum wage, occupational

29 Singapore Ministerial Declaration, 13 December 1996, para. 4, available at: https://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm (16/6/2024).
30 *Gustafsson/Bahri*, in: Bethlehem (ed.), p. 630.
31 Art. 13.4(3) EU-Korea FTA; Art. 269(3) EU-Colombia/Peru/Ecuador-FTA; Art. 286(1) EU-Central America FTA; Art. 291(2) EU-Ukraine Association Agreement; Art. 229(2) EU-Georgia Association Agreement; Art. 365(2) EU-Moldova Association Agreement; Art. 23.3(1) CETA; Art. 16.3(2) EU-Japan EPA; Art. 12.3(3) EU-Singapore FTA; Art. 13.4(2) EVFTA; Art. 399(2) EU-UK-TCA.
32 *Bronckers/Gruni*, Journal of International Economic Law 2021, p. 28.
33 For a comparative list see *Velut et al.*, LSE 2022/2, pp. 228 et seq., Annex 1, Table 1a.

health and safety, labour inspection and the rights of migrant workers, while most of the other agreements only refer to one additional standard (mainly occupational health and safety).[34]

Another important difference to US FTAs, which may contain a pre- and/or post-ratification conditionality on improving labour standards, is the fact that the EU usually does not ask a trade partner to ratify new ILO Conventions as a condition for signing or ratifying the FTA. Instead, the EU may include best-efforts clauses, which allows it to monitor the efforts (or absence thereof) of the trading partner to advance with the ratification of certain ILO Conventions. For example, such clause played a role in the EU-Korea dispute with respect to Conventions No. 87, 98, 29 and 105 (see Section C.I.2).

In the case of the EU-Viet Nam FTA, an exception to the EU practice of including "only" best-efforts clauses post-ratification occurred in 2020. Here, the Vietnamese government made changes to domestic labour laws described as "path-breaking reforms"[35] even before ratification of the free trade agreement. In November 2019, Viet Nam revised its labour code with four significant improvements according to the ILO. From 2021 onwards, the Code is applicable to 55 million workers (instead of 20 million before), increases protection against gender discrimination and sexual harassment at work, allows for negotiations on wages and grants workers a right to establish and join a workers representation of their own will.[36] Viet Nam also ratified two out of three outstanding ILO core conventions (No. 98, 105) in 2019 and 2020. However, Convention 87 on Freedom of Association and Protection of the Right to Organize is still not ratified as of early 2024.

According to *Marslev* and *Staritz*, the EVFTA played "a crucial role as an external reform catalyst".[37] They argue that the Commission's position was unusually strong against the background of the US leaving the Trans Pacific Partnership Agreement. Inside the Union the Commission was forced to take a tough negotiation stance in order to reflect wishes of the European Parliament and some Member States. Moreover, the reformists inside the country (a minority) used the agreement strategically to make progress on the internal reform process and actors in Viet Nam itself with connections to both sides were also important. They conclude there was a specific historical context for the Viet Nam example, which will not be easy to replicate.[38]

34 Ibid., pp. 46, 52 et seq., Table 5.
35 *Marslev/Staritz*, Review of International Political Economy 3/2023, p. 1126.
36 https://www.ilo.org/hanoi/Informationresources/Publicinformation/Pressreleases/WCMS_765310/lang--en/index.htm (18/5/2024).
37 *Marslev/Staritz*, Review of International Political Economy 2023/3, p. 1144.
38 Ibid.

b) Green Standards and Multilateral Environmental Agreements

In the environmental field, the parties reaffirm their commitment to effectively implement multilateral environmental agreements (MEAs) to which they are a party.[39] An important detail concerns the question of whether this reference is static (only MEAs to which a State is party at the time of signature?) or dynamic (also MEAs, which a State may sign up in the future?). In this respect, only Article 270(2) of the EU-Colombia/Peru/Ecuador-FTA contains a closed list of MEAs covered by the commitment.

Normally, there is no commitment to ratify new MEAs but only to exchange information concerning ratification and/or to cooperate in promoting ratification.[40] Art. 287(3) and (4) EU-Central America FTA is special in this regard, because the parties undertake (if they have not done so) to ratify the Amendment to Article XXI of CITES and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade.

An important evolution concerns the Paris Agreement on Climate Change, adopted in December 2015 and entered into force in November 2016. The Commission observed in 2018:

> Whereas all TSD chapters in recent EU trade agreements include provisions on trade and climate change; those negotiated after the Paris Agreement (including the EU's agreements with Singapore, Vietnam, and Japan) will contain stronger and more detailed provisions to this end. These will (i) reaffirm a shared commitment to the effective implementation of the Paris Agreement, (ii) commit the parties to close cooperation in the fight against climate change, (iii) and commit the parties to agree on and carry out joint actions.[41]

Accordingly, the EU-Japan EPA, the EU-Singapore FTA, the EVFTA, and the EU-UK TCA contain such a new obligation to implement the Paris Agreement effectively.[42]

This clause triggers three legal consequences: First, it reinforces the weight of the nationally determined contributions (NDCs) by making them also an obligation between the parties of the FTA. Second, the obligation can be enforced under the dispute settlement mechanism included in the TSD chapters. Third, there is no trade

39 Art. 13.5(2) EU-Korea FTA; Art. 287(2) EU-Central America FTA; Art. 292(2) EU-Ukraine Association Agreement; Art. 230(2) EU-Georgia Association Agreement; Art. 366(2) EU- Moldova Association Agreement; Art. 24.4(2) CETA; Art. 16.4(2) EU-Japan EPA; Art. 12.6(2) EU-Singapore FTA; Art. 13.5(2) EVFTA; Art. 400(2) EU-UK-TCA; For a comparative list see *Velut et al*., LSE 2022/2, pp. 228 et seq., Annex 1, Table 1a.

40 *Velut et al*., LSE 2022/2, pp. 60, 228 et seq., Annex 1, Table 1a.

41 Non paper of the Commission services, Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements, 26/2/2018, p. 10.

42 See *Velut et al*., LSE 2022/2, pp. 61, 231 et seq., Annex 1, Table 1a.

condition for this commitment, which means that possible breaches do not need to have an effect on trade with the EU.[43]

For the EU FTAs signed prior to 2015, all EU trading parties (except Colombia/Peru/Ecuador, due to the mentioned closed list) will have to implement the Paris Agreement effectively anyway, due to the general clause to implement all MEAs binding on them.

CETA was signed on 30 October 2016, i.e. after the signing of the Paris Agreement, but before its entry into force. Therefore, it does not contain a reference to the Paris Agreement. However, CETAs' Joint Committee adopted a recommendation on 26 September 2018, in which it affirmed "the Parties' commitment to effectively implement the Paris Agreement, as a multilateral environmental agreement within the meaning of Article 24.4 of CETA(…)".[44]

Importantly, the last FTA in the decade under consideration (2010-2020), namely the EU-UK TCA, upgraded the significance of the Paris Agreement. According to Article 771 thereof, the obligation under Article 764(1) to "respect the Paris Agreement" and to "refrain from acts or omissions that would materially defeat" its object and purpose, is declared an "essential element" of the partnership. This foreshadows already the reform of 2022, after which the EU sought to establish the Paris Agreement as an essential element of all FTAs (see below Chapter E.).

3. Institutional Set Up

The institutional set-up under the TSD chapters is straightforward. On the governmental level, a committee, board or sub-committee is established, which *inter alia* oversees the implementation of the provisions and is usually comprised of senior/high-level representatives of the parties.[45]

An important innovative feature is the participation of civil society. Each party shall make use of existing/create new domestic consultative mechanisms (e.g. Do-

43 *Bronckers/Gruni*, Journal of International Economic Law 2021, pp. 28 et seq.

44 CETA Joint Committee Recommendation 001/2018, 26/9/2018, para. 2, available at: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/rec-001.aspx?lang=eng (17/2/2024); see also Joint Activity Report to the CETA Joint Committee, First 18 Months of the CETA Joint Committee Recommendation on Trade, Climate Action and the Paris Agreement, available at: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/2020-report-activ-rapport.aspx?lang=eng (17/2/2024).

45 Art. 13.12(2) and (3) EU-Korea FTA; Art. 280(2)-(7) EU-Colombia/Peru/Ecuador FTA; Art. 294(2) and (3) EU-Central America FTA; Art. 300(1) EU-Ukraine Association Agreement; Art. 240(2) and (3) EU-Georgia Association Agreement; Art. 376(2) and (3) EU-Moldova Association Agreement; Artt. 22.4(1), 23.8(3), 24.13(3) CETA; Artt. 16.13, 22.3 EU-Japan EPA; Art. 12.15(2) and (3) EU-Singapore FTA; Art. 13.15(2) and (3) EVFTA; Art. 8(1j), (2) and (5) EU-UK-TCA.

mestic Advisory Groups (DAGs)).[46] Often they are supposed to meet together as a Civil Society Forum,[47] but sometimes the parties just agree to organise a public session of the committee/board/sub-Committee with stakeholders to exchange views on issues related to the implementation of the Chapter.[48] Such dialogues are usually held once a year.

4. Dispute Settlement

Each TSD chapter operates its own dispute settlement mechanism (TSD DSM). Most of them contain a provision, according to which the parties can explicitly "only" use the special mechanism of the TSD chapter.[49] As summarized by the Commission, they usually contain the following features:

- government-to-government consultations,
- setting up a panel consisting of independent experts on trade, labour and environment,
- drafting a panel report that is public and that neither party can block,
- monitoring of the implementation of the panel report.[50]

In contrast to the general dispute settlement chapter, where binding arbitration reports must be complied with under the threat of trade sanctions, the TSD panel reports in the FTAs until 2021 are non-binding and not beefed up with the possibility to enact sanctions in case of non-compliance.[51]

Again, a significant exception occurred in the EU-UK TCA of 2020, which contains an Article on "rebalancing measures". According to Art. 411 TCA, they can be taken, if material impacts on trade or investment between the Parties are arising as a result of significant divergences between the Parties in the areas of labour, social, en-

46 Art. 13.12(4) EU-Korea FTA; Art. 281 EU-Colombia/Peru/Ecuador FTA; Art. 294(4) and (5) EU-Central America FTA; Art. 299(1) EU-Ukraine Association Agreement; Art. 240(4) EU-Georgia Association Agreement; Art. 376(4) EU-Moldova Association Agreement; Artt. 23.8(4), 24.13(5) CETA; Art. 16.15(1) EU-Japan EPA; Art. 12.15(5) EU-Singapore FTA; Art. 13.15(4) EVFTA; Artt. 12, 13(1) EU-UK-TCA.

47 Art. 13.13(1) EU-Korea FTA; Art. 295(1) EU-Central America FTA; Art. 299(3) EU-Ukraine Association Agreement; Art. 241(1) EU-Georgia Association Agreement; Art. 377(1) EU-Moldova Association Agreement; Art. 22.5(1) CETA; Art. 16.16(1) EU-Japan EPA; Art. 13.15(5) EVFTA,

48 Art. 282(1) EU-Colombia/Peru/Ecuador FTA; Art. 12.15(4) EU-Singapore FTA.

49 Art. 13.16 EU-Korea FTA; Art. 300(7) EU-Ukraine Association Agreement; Art. 242(1) EU-Georgia Association Agreement; Art. 378(1) EU-Moldova Association Agreement; Article 23.11(1) and Article 24.16(1) CETA; Art. 16.17(1) EU-Japan EPA; Art. 12.16(1) EU-Singapore FTA; Art. 13.16(1) EVFTA. A different wording is used in Art. 285(5) EU-Colombia/Peru/Ecuador FTA; Art. 284(4) EU-Central America FTA; Artt. 357, 389(2), 396(2), 407(2) EU-UK-TCA.

50 Non-paper of the Commission services, Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs), 11/7/2017, pp. 3 et seq., Art. 12.17(8) sentence 8 leaves the option for the parties to decide against the report being made publicly available.

51 *Bronckers/Gruni*, Journal of International Economic Law 2021, p. 37.

vironmental or climate protection, or with respect to subsidy control. *Bronckers* and *Gruni* describe the possibility to adopt rebalancing measures as a "fundamental break with the EUs traditional softer approach".[52] However, this overlooks that the EU had an interest to deter against the risk of unfair regulatory competition of a highly competitive neighbour and former Member State by deliberately lowering such standards as a policy premium for leaving the Union. The changes are hence the result of specific exigencies and negotiations in the context of Brexit.[53] In our view, the EU-UK TCA provision on "rebalancing" is thus not setting a new trend for dispute settlement provisions in the EU's TSD chapters in general. Rather, it opens two possible enforcement mechanisms for labour, social and environmental issues: either a Party triggers a case for a Panel of Experts, or it goes through rebalancing measures. It appears that the first avenue is mainly designed to hear complaints about the (alleged) violation of commitments (including on non-regression), while the second avenue envisages more disagreements about future divergences which might infringe the level playing provisions (Article 355–357 TCA),[54] which are not present in a usual TSD chapter of an EU FTA.

III. Interim Conclusion

By now, TSD chapters are an established feature of any EU FTA. Their substance has grown over time, both in the labour and the environmental field. Importantly, the EU demands compliance with core labour norms irrespective of any trade link. At the same time, the EU remains cautious not to demand the ratification of Conventions that a country has not yet signed. Moreover, the dispute settlement system works on the basis of cooperation and contracts out from the general dispute settlement mechanism in FTAs, which are modelled along the binding WTO system with a possibility to impose trade sanctions in case of non-implementation of a Panel report. Compared to the US and Canada, this approach may be characterized as being "more ambitious in terms of substantive commitments but also less coercive with regards to their implementation and enforcement".[55]

C. Dispute Settlement Practice

In order to ascertain the legal significance of the EU's TSD chapters more closely, we will now look at the FTA dispute settlement practice. So far, the EU has activated the dispute settlement mechanism that is included in the TSD chapters only once: in a dispute with South Korea over trade union rights (1). In a second case, TSD obligations played a role in a dispute run under the general dispute settlement mechanism against Ukraine relating to certain export bans (2).

52 Ibid., p. 32.
53 *Gustafsson/Bahri*, in: Bethlehem (ed.), p. 635.
54 *Hoffmeister*, in: Heger/Gourdet (eds.), p. 141.
55 *Marín Durán*, CMLR 2020/4, p. 2; supported by *Kübek*, in: Fahey (ed.), p. 287.

I. South Korea

1. Consultations and Panel Request

The case has its origins in political calls from the Korean Domestic Advisory Group and the EU-Korea FTA Civil Society Forum. The European Parliament supported their cause in 2017,[56] and only after having made a promise in the 2018 non-paper to become more "assertive",[57] the Commission requested consultations in December 2018.[58] Failing a satisfactory resolution in the government consultations of January 2019, Commissioner *Malmström* sent a letter in March 2019 to the Korean government announcing the next step, if Korea were to fail addressing the EU's concerns shortly.[59] The latter reacted by initiating the formal process to ratify three of four ILO Conventions referred to the FTA.[60]

In July 2019, the Commission requested the establishment of an Expert Panel pursuant to Art. 13.15(1) EU-Korea FTA, making two requests: First, it argued that Art. 2(1), (4d)), Art. 23(1), Art. 12(1-3) of the Trade Union and Labour Relations Adjustment Act (TULRAA) were inconsistent with Art. 13.4(3) first sentence lit (a) EU-Korea FTA. It provides that

> [t]he Parties in accordance with the obligations deriving from membership of the ILO and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its 86th Session in 1998, commit to respecting, promoting and realising, in their laws and practices, the principles concerning the fundamental rights.

Lit. (a) refers to the right to "freedom of association and the effective recognition of the right to collective bargaining". Second, the EU argued that the efforts Korea made towards the ratification of ILO Conventions No. 87, 98, 29 and 105 were "inadequate" considering Korea's commitment to "make continued and sustained efforts towards ratifying the fundamental ILO Conventions" pursuant to Art. 13.4(3) last sentence of the agreement.[61]

56 European Parliament resolution of 18 May 2017 on the implementation of the Free Trade Agreement between the European Union and the Republic of Korea (2015/2059(INI)), P8_TA(2017)0225, para. 5, available at: https://www.europarl.europa.eu/doceo/document/TA-8-2017-0225_EN.pdf (18/2/2024).

57 For details see below Section E.II.1.

58 *Nissen*, EJIL 2022/2, p. 609.

59 Letter of Commissioner Malmström to Minister of Trade Yoo and Minister of Employment and Labour Lee, 4/3/2019, available at: https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/7416e6ad-a6c3-449b-9f9a-c4841f591902/details (18/6/2024).

60 *Han*, European Foreign Affairs Review 2021/4, p. 537.

61 Request for the establishment of a Panel of Experts by the EU, 4/7/2019, available at: https://circabc.europa.eu/rest/download/dfc6a2fa-eb47-4f37-85d0-c8d6cbb266c7?ticket (18/2/2024).

2. Findings

In its report of 20 January 2021, the Expert Panel first affirmed its jurisdiction.[62] It rejected the South Korean objection[63] that the EU had not raised issues arising under the chapter as required in Artt. 13.14, 13.15 EU-Korea-FTA, because Art. 13.2(1) on the scope ("Except as otherwise provided in this Chapter, this Chapter applies to measures adopted or maintained by the Parties affecting trade-related aspects of labour and environmental issues in the context of Articles 13.1.1 and 13.1.2.") required a general trade link for all disputes under the chapter. Rather, it found that "the proper scope of Article 13.4.3 is established by its own terms, and thus falls within the 'except as otherwise provided' clause of Article 13.2.1. It is not appropriate, or even possible, to apply the limited scope bounded by 'trade-related labour' to the terms of Article 13.4.3, as proposed by Korea".[64] In its reasoning, the panel *inter alia* refers to other parts of the TSD chapter, where provisions explicitly limit the scope and finds a lack of limitation to be significant.[65] This reasoning allows the conclusion that TSD provisions without an express trade-link can be enforced even in a purely domestic situation.[66]

With respect to the first EU claim, the Expert Panel rejected the claim concerning Art. 12(1–3) TULRAA but found that Art. 2(1), (4 d)), Art. 23(1) TULRAA did not conform to the "principles concerning freedom of association, which Korea is obliged to respect, promote and realise by Article 13.4.3 of the EU-Korea FTA".[67] Importantly, it held that the commitment regarding the principles concerning the fundamental rights included in that Article was legally binding.[68]

In contrast, the Panel rejected the second EU claim. While the obligation of the parties to "make continued and sustained efforts towards ratifying the fundamental ILO Conventions" was also legally binding,[69] without "explicit targets or at least any informal understanding on expected milestones towards ratification", it contained only "an on-going obligation (…) affording leeway for the Parties to select specific ways to make continued and sustained efforts".[70] In the Panel's view, Korea's efforts since 2017 concerning ILO Convention Nos. 87, 98, 29 satisfied the requirements of the provision.[71] It did express some criticism concerning Korea's lack of progress with respect to Convention 105.[72]

62 Report of the Panel of Experts, 20/1/2021, p. 27, para. 96 et seq., available at: https://circabc.europa.eu/sd/a/d4276b0f-4ba5-4aac-b86a-d8f65157c38e/Report%20of%20the%20panel%20of%20experts.pdf (18/2/2024).
63 Ibid., p. 16, paras. 54 et seq.
64 Ibid., p. 19, para. 68.
65 Ibid., pp. 20 et seq., paras. 71 et seq.
66 *Kübek*, in: Fahey (ed.), p. 292.
67 Report of the Panel of Experts, (fn. 62), p. 70, para. 257; p. 53, para. 196; p. 56 para. 208; p. 61, para. 227; pp. 78 et seq.
68 Ibid., p. 30, para. 107; p. 36, para. 127.
69 Ibid., p. 74, para. 277.
70 Ibid., p. 74, para. 278.
71 Ibid., p. 76, para. 288.
72 Ibid., p. 77, para. 290.

3. Implementation

Although the Expert Panel did not find an infringement, the EU was able to congratulate Korea on the ratification of ILO Convention Nos. 87, 98 and 29 in the 7th session of the TSD Committee in March 2021.[73]

In the 8th session of the TSD Committee in September 2022, Korea also announced the full implementation of the Panel's recommendations by amending the law.[74] Concerning the full implementation of the recommendations, the EU still saw space for improvement in the 9th session of the TSD Committee in September 2023. With regard to the ratification of Convention 105, Korea announced that it had started the review for the procedure to amend two national laws that include provisions on imprisonment with work. The EU invited Korea to accelerate its actions and criticised the lack of ratification of the mentioned Convention. In particular, it referred to the fact that the EU-Korea FTA had entered into force more than 12 years ago and that the Expert Panels Report had been issued more than two years before the meeting.[75]

4. Assessment

Not surprisingly, the Commission gave a positive assessment of the exercise. Already after the adoption of the Panel report, Commissioner Dombrovskis argued that the case had shown the effectiveness of the Commission's "cooperation-based approach".[76] Later on, in its 2021 Report on the Implementation and Enforcement of EU Trade Agreements, the Commission referred to the case to underline "the importance of the assertive use of the enforcement tools foreseen in TSD Chapters, when needed".[77]

However, with hindsight, a more careful assessment seems in place. In fact, with respect to the first claim, the Expert Panel made clear that ILO standards, which might "have previously been assumed to be soft persuasive provisions without 'bite', can be regarded as legally binding".[78] On the second claim, although South Korea finally ratified three additional ILO conventions, the relative weakness of the

73 Joint Minutes, 7th Committee on Trade and Sustainable Development, 13–14 April 2021, p. 2, available at: https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/2e6ac3df-18ba-4328-9571-4225c7f86468/details (18/2/2024).

74 Joint Minutes, 8th session of the Committee on Trade and Sustainable Development, 15–16 September 2022, p. 2, available at: https://circabc.europa.eu/rest/download/3d1d9557-4318-45b1-b277-77da4eaba260?ticket (18/2/2024).

75 Joint Minutes, 9th session of the Committee on Trade and Sustainable Development, 6-7 September 2023, p. 3, available at: https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/26cdef87-a20b-4b85-9062-d5201aa1df70/details (18/2/2024).

76 Press Release, 25 January 2021, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_203 (18/2/2024).

77 Report on the Implementation and Enforcement of EU Trade Agreements, 27.10.2021, COM(2021) 654 final, p. 17, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0654 (18/2/2024).

78 *Novitz*, European Law Review, 2022/1, pp. 37 et seq.

"best efforts" clauses was exposed.[79] At the time of completing the manuscript in June 2024, South Korea has still not ratified ILO Convention No. 105.

II. Ukraine

The Ukraine case was the first dispute resolved under the general dispute settlement mechanism of an EU FTA. It focused on Art. 35 EU-Ukraine Association Agreement ("the AA"), which forbids "any prohibition or restriction or any measure having an equivalent effect on the import of any good of the other Party or on the export or sale for export of any good destined for the territory of the other Party".

1. Consultations and Panel Request

After unsuccessful consultations in February 2019, the EU requested the establishment of an Arbitration Panel under Art. 306 AA in June of that year. It claimed that a permanent export ban of 2005 and a temporary export ban of 2015 on certain wood products by Ukraine would be inconsistent with Art. 35 AA.[80] In its defence, Ukraine stated that they would be justified under Articles 36 AA, XX(b) and XX(g) of the GATT. Moreover, it would make use of its right to regulate its own level of environmental protection, laid down in Art. 290 EU-Ukraine AA. In its view, the measures have to be read together with Articles 294 and 296(2) AA, which are included in the TSD chapter (chapter 13).[81] These provisions regulate the cooperation concerning trade in forest products and contain the non-regression and non-enforcement clauses. Moreover, for the first time during the oral hearing of October 2020, Ukraine made the procedural point that the entire dispute should have been brought under Chapter 13 and not under Chapter 14.[82]

2. Findings

In its decision of 11 December 2020, the Arbitration Panel first assessed Ukraine's procedural objection as a "preliminary issue".[83] Since Ukraine had accepted to run the dispute under Chapter 14, it was precluded from raising a jurisdictional objection as late as during the oral hearing, which was in any case "untimely".[84] Moreover, the subject matter of the dispute was the compatibility of the two export bans

79 Ibid., p. 37; *Bronckers/Gruni*, Journal of International Economic Law 2021, p. 27.
80 Position of the EU, referred to in the Final Report of the Arbitration Panel, 11/12/2020, p. 31, paras. 73–77, available at: https://policy.trade.ec.europa.eu/enforcement-and-protection/dispute-settlement/bilateral-disputes/ukraine-wood-export-ban_en (18/2/2024).
81 Ibid., p. 32, paras. 79 et seq.
82 Ibid., p. 18, para. 25 and pp. 32 et seq., paras 81–85.
83 Final Report of the Arbitration Panel, (fn. 80), pp. 34–44, paras. 91–138.
84 Ibid., p. 39, paras. 117; pp. 39–41, paras. 118–125.

with Art. 35 AA, which falls under Chapter 14, even if the forestry products at issue are also regulated under Chapter 13.[85]

On substance, the Panel affirmed that the two measures were incompatible with Article 35 AA, which incorporated in substance Article IX GATT (and hence not requiring an "actual effect test").[86] It then turned to the legal significance of the TSD chapter and found that "the provisions of Chapter 13 are not self-standing or unqualified exceptions that could justify measures that are *per se* in breach of Article 35 of the AA".[87] However, it also acknowledged that they could "serve as relevant 'context' for the interpretation of other provisions of Title IV, which allow the Parties to introduce or maintain measures in derogation to Article 35 of the AA, including for environmental reasons based on Article 36 of the AA in conjunction with Article XX of the GATT 1994".[88] The relevant analysis of the 2015 temporary ban under Articles XX(g) GATT showed, however, that the ban was not made effective in conjunction with restrictive measures on domestic production and hence not justified.[89] For that very reason, the invocation by Ukraine of Chapter 13 was also deemed irrelevant.[90] In turn, Ukraine was able to defend the 2005 export ban as a necessary measure to protect public health under Article XX(b) GATT.[91] In its conclusion, the Panel hence concentrated only on the 2015 temporary ban and recommended that

> Ukraine takes any measure necessary to comply in good faith with the above Arbitration Panel's ruling, as prescribed by Article 311 of the AA ('Compliance with the arbitration panel ruling') in respect of the 2015 temporary export ban found in paragraph (3) above to be in breach of its obligations pursuant to Article 35 of the AA, taking into due account all relevant provisions of the Association Agreement, including those of Chapter 13 on 'Trade and sustainable development', specifically Article 293 of the AA on 'Trade in forest products', which commits the Parties to 'improve forest law enforcement and governance and promote trade in legal and sustainable forest products'.[92]

3. Implementation

Although the Panel report is binding on Ukraine, it was not implemented to date. While the government had introduced a draft amendment to the Parliament during the course of the proceedings, the latter was never adopted. Moreover, since the full-scale invasion of the country by Russia in February 2022, attention has shifted

85 Ibid., p. 43, paras. 135 et seq.
86 Ibid., p. 60, paras. 215–218.
87 Ibid., p. 66, para. 244.
88 Ibid., p. 67, para. 251.
89 Ibid., pp. 115–117, paras. 458–465.
90 Ibid., p. 118, paras. 466 et seq.
91 Ibid., pp. 69–96, paras. 264–376.
92 Ibid., p. 126, para. 508.

away from this file and the Commission refrained from taking trade countermeasures for non-implementation.

III. Interim Conclusions

In view of the above, we draw two important lessons from the dispute settlement practice so far. First, the TSD chapters may contain binding obligations of a different degree: strict standards or best efforts clauses. Both of them are enforceable. Moreover, they may also become relevant as context when interpreting the exceptions for trade-restrictive measures elsewhere in the FTA. All this speaks in favour of a high degree of legal relevance. At the same time, the fact that the Panel report under a TSD chapter is only exhortatory does not seem to be decisive, as even binding Panel reports risk non-implementation as the EU-Ukraine case shows. Hence, the level of compliance may more depend on other factors, such as the persuasiveness of the report and the domestic political willingness of the losing party to eradicate the trade irritant with the European Union.

D. Trade Sanctions for TSD Breaches

The latter observation also leads to our final analysis about the possibility to impose trade sanctions in case of TSD breaches. While the FTA chapters on general dispute settlement expressly foresee such a possibility in a case of non-compliance with a Panel report, such powers are not included in the TSD dispute settlement chapters. This raises the question whether trade sanctions are excluded in reaction to a breach of a TSD provision. For that purpose, we will examine two potential legal bases, namely Art. 60 of the Vienna Convention on the Law of Treaties (VCLT) and the law of State responsibility, as codified in the International Law Commission (ILC) Articles on Internationally Wrongful Acts (ARSIWA).

I. Art. 60 VCLT

According to Article 60(1) VCLT, a party can invoke a material breach of a bilateral treaty "as a ground for terminating the treaty or suspending its operation in whole or in part". As a norm codifying customary international law, it also applies to EU FTAs with third states.[93] Two points merit particular attention: Does the breach of a TSD provision amount to a "material breach" under Article 60(3) VCLT? And does the TSD dispute settlement mechanism under the TSD chapter not constitute a *lex specialis* under Article 60(4) VCLT?

93 ECJ, Opinion 2/15, ECLI:EU :C:2017:376, para. 161.

1. Material Breach

Under Article 60(3)(b) VCLT a material breach consists in "the violation of a provision essential to the accomplishment of the object or purpose of the treaty". Whether or not a TSD provision satisfies this criterion will rely on a case-by-case analysis.

a) Core Labour Rights

A clear indicator to affirm the essential nature of a treaty provision is the fact that the parties jointly regard it as such. In this respect, the EU uses standard "essential elements" clauses since 1995. They may be laid down either in the FTA itself, or in the corresponding political agreement. When the clause is only found in the political agreement, the FTA will usually contain a "bridging clause". A typical example thereof is Art. 15.14(2) of the EU-Korea FTA stating that "[t]he present Agreement shall be an integral part of the overall bilateral relations as governed by the Framework Agreement". The latter then contains the following general clause in Article 1(1):[94]

> 1. The Parties confirm their attachment to democratic principles and human rights and fundamental freedoms, and the rule of law. Respect for democratic principles and *human rights and fundamental freedoms as laid down in the Universal Declaration of Human Rights and other relevant international human rights instruments*, which reflect the principle of the rule of law, underpins the internal and international policies of both Parties and *constitutes an essential element of this Agreement*.

It follows that a breach of human rights, as laid down in the Universal Declaration of Human Rights and the corresponding provisions of the two UN Covenants, by one side may be sanctioned by suspending or terminating the treaty by the other side. This is true not only of the EU-Korea Framework Agreement, but also of the free trade agreement by way of incorporation under Art. 15.14(2) FTA. Sometimes, this cross-retaliation possibility is even expressly laid down in the political agreement. For example, the non-fulfilment clause under Article 28(7) of the Strategic Partnership Agreement with Canada of 2016[95] says:

> In addition, the Parties recognise that a particularly serious and substantial violation of human rights or non-proliferation, as defined in paragraph 3, could also serve as grounds for the termination of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) in accordance with Article 30.9 of that Agreement."

This analysis leads to the question of which precise labour rights are covered by the essential elements clause. Art. 20 (freedom of association and assembly) UDHR, Art. 23 UDHR (right to work, equal pay, just remuneration, join trade unions), Art. 24 UDHR (right to rest and leasure, including reasonable limitation of working

94 EU-Korea Framework Agreement, OJ 2013, L 20/2.
95 EU-Canada Strategic Partnership Agreement, OJ 2016, L 329/45.

hours and periodic holidays with pay), all form part of the Universal Declaration, which is referenced *en bloc*. However, not all of them are essential. For *Velut* and others the essential elements clauses in EU FTAs are "covering human rights *and thus core* labour standards".[96] This restrictive reading is justified by the fact that realization of economic, social and cultural rights usually depends on "national effort … in accordance with the organization and resources of each State", as stated by Art. 22 UDHR. Consequently, such economic, social or cultural rights are generally not directly enforceable against the State.[97] Nevertheless, certain rights within this group of economic, social and cultural rights form an exception, as they are of fundamental importance, formulated in a sufficiently precise manner and enforceable irrespective of the economic resources of a State. In our view, this selective list of UDHR rights coincides with the four components of the regular TSD provision on fundamental principles and rights at work. Accordingly, any breach of such a TSD core labour right provision would amount to a "material" breach of the political agreement within the meaning of Article 60(3) VCLT and thus also of the FTA containing a bridging clause.

b) Other TSD Provisions

In addition, it may be possible to identify other TSD provisions as "essential" to accomplish "the object or purpose of the treaty" even if they are not expressly qualified as such. For that, it must be shown that a provision was a key element for the conclusion of the treaty.

In its commentary on the Draft Articles, the ILC explained that the choice of the wording "material" instead of "fundamental" breach allows the inclusion of ancillary provisions that one party found "essential to the effective execution of the treaty" and that "may have been very material in inducing it to enter into the treaty at all".[98] Whether such a material breach exists, must be determined objectively.[99]

With regard to the EU, it can be argued that TSD chapters are material for the EU to enter a FTA.[100] As observed in the introduction, Art. 207(1) second sentence TFEU obliges the Union to include sustainable economic, social and environmental development (Art. 21(2) lit.(d) TEU) in its commercial policy. Consequently, primary law directs the Commission to pursue trade and sustainability goals together.

Moreover, the European Parliament established a clear conditionality. According to its resolution of 6 October 2022, "the conditions in which goods and services are produced in terms of human rights, the environment, labour and social develop-

96 *Velut et al*., LSE 2022/2, p. 61 (emphasis added).
97 *Hoffmeister*, p. 322.
98 ILC, Draft articles on the law of treaties with commentaries, Yearbook of the International Law Commission 1966, Vol. 2, p. 255, Art. 57, para. 9.
99 *Giegerich*, in: Dörr/Schmalenbach (eds.), Article 60 VCLT, para. 20.
100 *Hoffmeister*, Archiv des Völkerrechts 2015, pp. 35, 63 et seq.

ment are of the same relevance as the trade of those goods and services itself".[101] In many cases, MEPs indicated that they would only support the ratification of a FTA if it contained a solid TSD chapter. Furthermore, public opinion in some Member States is very critical towards FTAs, and thus, the inclusion of TSD chapters is one way to gain public support for FTAs as a TSD chapter can mitigate the fears of opponents that FTAs could lead to lower social and environmental standards.

Finally, against the contrary position of Advocate-General *Sharpston* (who argued that a breach of TSD provisions in the EU-Singapore Agreement would not empower the parties to suspend the treaty),[102] the ECJ concluded in its Opinion 2/15 that the TSD chapter of the Draft EU-Singapore Agreement "plays an essential role in the envisaged agreement".[103] Therefore, it held that the other party can "terminate or suspend the liberalisation, provided for in the other provisions of the envisaged agreement, of that trade" following customary law as enshrined in Art. 60(1) VCLT.[104]

It follows that also other TSD provisions beyond the duty to comply with core labour rights might qualify as essential elements of an EU FTA. However, suspension would only become available if also the breach itself is "of serious character".[105] For that, a case-by-case analysis of the alleged facts is warranted. Typical examples may be national decisions of a certain scale, which clearly infringe the environmental commitments of a partner country flowing from ratified MEAs. Moreover, any suspension would have to be proportionate to the breach in question.

2. TSD Dispute Settlement Chapters as lex specialis

The application of Art. 60 VCLT could, however, be excluded under Art. 60(4) VCLT, which reads: "The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach".

This paragraph is an expression of the *lex specialis* rule. It applies, for example, when the treaty "establishes a self-contained regime, exhaustively regulating the permissible responses to a material breach and thereby prohibiting others, including those in Art. 60 paras. 1–3".[106] It must, therefore, be examined whether the dispute settlement mechanism included in the TSD chapters represents such a specific regime. For *Bronckers* and *Gruni* that is not the case. For them, the TSD dispute settlement chapters only constitute a *lex specialis* over the general dispute mecha-

101 European Parliament resolution of 6 October 2022 on the outcome of the Commission's review of the 15-point action plan on trade and sustainable development (2022/2692(RSP)), P9 TA(2022)0354, available at: https://www.europarl.europa.eu/doceo/document/TA-9-2022-0354_EN.html (18/2/2024).

102 Opinion of Advocate General Sharpston, Opinion 2/15, 21/12/2016, paras. 490 et seq.

103 ECJ, Opinion 2/15, ECLI:EU:C:2017:376, para. 162.

104 Ibid., paras. 161 et seq.

105 ILC, Draft articles on the law of treaties with commentaries, Yearbook of the International Law Commission 1966, Vol. 2, p. 255, Art. 57, para. 9.

106 *Giegerich*, in: Dörr/Schmalenbach (eds.), Article 60 VCLT, paras. 68 et seq., direct quote in para. 69.

nism in the very same FTA.[107] *Marín Durán* comes to the opposite conclusion. For her, the dispute settlement mechanism for breaches of TSD-provisions under the EU-Singapore FTA has primacy over Art. 60 VCLT and represents a *lex specialis*. More generally, she concludes that TSD DSMs

> do not impose any form of 'trade conditionality' in a proper legal sense: neither does it give the other party the right to adopt trade sanctions in cases of non-compliance, nor does it make a specific trade benefit dependent upon compliance with environmental and labour standards.[108]

She also argues that the fact that the Commission carried out a consultation in 2018 on whether to move to the sanctions based model supports the reading that the imposition of trade sanctions for breaches of the TSD chapter is currently not possible.[109] Similarly, *Kübek* finds for the EU-Korea FTA, that "[t]his specific TSD dispute settlement system is self-contained",[110] and *Gustafsson* and *Bahri* state that the TSD dispute settlement chapter "preclude any suspension of trade benefits in response to violations".[111]

Applying the rules of interpretation under Article 31 VCLT, we plead in favour of a differentiated approach. Clearly, the wording of the TSD DSM speak in favour of a *lex specialis*. For example, Art. 13.16 EU-Korea FTA (under the heading "Dispute settlement") reads: "For any matter arising under this Chapter, the Parties shall only have recourse to the procedures provided for in Articles 13.14 [government consultations] and 13.15 [Panel of Experts]." Both the use of "only" and "any matter" indicate that the TSD DSM trumps other dispute settlement mechanisms. All but the EU-Colombia/Peru/Ecuador FTA[112] and the EU-Central America FTA[113] include very similar language.[114] The most recent agreements (Japan, Singapore, Viet Nam) even include two sentences: one that is very similar to Art. 13.16 EU-Korea FTA and one that explicitly regulates the relationship to the other DSMs included in the FTAs.[115] Finally, various provisions in Title IX of the EU-UK TCA contain

107 *Bronckers/Gruni*, Journal of International Economic Law 2021, p. 41.
108 *Marín Durán*, CMLR 4/2020, p. 12.
109 Ibid., pp. 12 et seq.
110 *Kübek*, in: Fahey (ed.), p. 290.
111 *Gustafsson/Bahri*, in: Bethlehem (ed.), p. 633.
112 Art. 285(5) EU-Colombia/Peru/Ecuador FTA: "This Title is not subject to Title XII (Dispute Settlement)".
113 Art. 284(4) EU-Central America FTA: "The Parties shall not have recourse to dispute settlement procedures under Title X (Dispute Settlement) of Part IV of this Agreement and to the Mediation Mechanism for Non-Tariff Measures under Title XI (Mediation Mechanism for Non-Tariff Measures) of Part IV of this Agreement for matters arising under this Title".
114 Art. 13.16 EU-Korea FTA; Art. 300(7) EU-Ukraine Association Agreement; Art. 242(1) EU-Georgia Association Agreement; Art. 378(1) EU-Moldova Association Agreement; Article 23.11(1) and Article 24.16(1) CETA; Art. 16.17(1) EU-Japan EPA; Art. 12.16(1) EU-Singapore FTA; Art. 13.16(1) EVFTA.
115 Art. 16.17(1) EU-Japan EPA; Art. 12.16(1) EU-Singapore FTA; 13.16(1) EVFTA.

specific rules how the TSD-related dispute settlement provisions relate to the general dispute settlement provisions in Title I of Part Six.[116]

This leads to the systemic part of the interpretation. As in particular the latest examples make clear, the TSD DSMs operate as *lex specialis* with respect to the general DSMs of the FTAs. The EU-Ukraine Panel also inquired whether the subject matter of the dispute before it fell either under Chapter 14 (general trade disputes) or Chapter 13 (disputes under the SD chapter).[117] However, none of the clauses explicitly excludes a recourse to general international law.

In this situation, recourse to the object and purpose of the TSD DSM is of particular importance. On the one hand, subjecting the TSD chapter to a special DSM shows the willingness of the parties to avoid ordinary DSM, which could lead to binding Panel reports with trade sanctions in case of non-implementation. That seems to carry a joint will, to avoid trade sanctions for ordinary TSD breaches. In line with the "cooperative" approach, disputes about the proper implementation of TSD obligations are generally subject to the TSD DSM only. On the other hand, a few TSD obligations are much more fundamental than others. In particular those TSD provisions, which we identified in the previous section as "essential elements" (core labour standards and important environmental standards), cannot be regarded as being "downgraded". It would be exactly contrary the object and purpose of the EU's insistence to *add* a TSD chapter to the usual "essential elements" clause on human rights (either in the FTA or the political agreement), if that had the effect of excluding core labour rights from the enforcement mechanism. Therefore, a nuanced view comes to the conclusion that all TSD provisions, which cannot be qualified as "essential" fall exclusively under the TSD DSM, whereas the exceptionally important TSD provisions, whose breach would be "material" can also be enforced by recourse to Article 60 VCLT.

This conclusion is even more compelling, if the material breach concerns an *erga omnes* obligation,[118] to which compliance is owed to the international community as a whole (and the EU as part thereof) independently of the FTA concerned. In this case, compliance by the treaty partner is already owed to the EU based on customary international law before entering into the FTA. Thus, the recommitment in the FTA cannot limit the EU's enforcement possibilities that existed before. If so, this would need to be explicitly determined in the FTA, which is not the case. In addition, it is contrary to the aim of TSD chapters, namely to strengthen the relevant provisions, not to derive thereof new limits to their enforcement. Examples for such *erga omnes* obligations include all *ius cogens* norms.[119] Among them figure

116 Artt. 357, 389 (2), 396(2), 407(2) EU-UK-TCA.

117 Final Report of the Arbitration Panel, (fn. 80), p. 42, para. 132.

118 ICJ, *Barcelona Traction, Light and Power Company, Limited*, Judgement, I.C.J. Reports 1970, pp. 3, 33, paras. 33 et seq.

119 ILC, Draft conclusions on identification and legal consequences of peremptory norms of general international law (*ius cogens*), with commentaries (2022), A/77/10, p. 64, Conclusion 17.

the prohibition of slavery[120] and the prohibition of child labour.[121] Furthermore, there are *erga omnes* obligations that do not have *ius cogens* character,[122] like the prohibition on forced labour in its blatant forms[123] and perhaps the joint commitments to save the world's climate under the Paris Agreement.[124]

In such a situation, the procedure agreed by the Parties under the non-fulfilment clause for essential elements in the political agreement would have to be observed, or in the absence thereof, customary international law on the suspension of treaty obligations.[125]

II. The Law of State Responsibility

The second legal basis for trade sanctions in reaction to a breach of the TSD chapter could be the law of state responsibility. More specifically, it needs to be verified whether such a reaction could qualify as a countermeasure regulated under Artt. 49 et seq. of the 2001 ILC Draft Articles. While the EU is not a State, it may have recourse to these rules as a subject of international law, which may have been injured by a wrongful act of its treaty partner.

1. Proportionate Reaction to a Wrongful Act

The starting point of the analysis is the affirmation, as confirmed by the EU-Korea Panel, that the TSD provisions are legally binding. Hence, their breach would constitute an internationally wrongful act committed by the EU's trading partner. Official conduct by the legislature, the executive or even the judiciary could be attributed to the State in question and trigger its international liability. As the obligation is owed to the EU, the latter could therefore take countermeasures as injured party under Artt. 42 and 49(1) ARSIWA, as long as they are proportionate according to Art. 51 ARSIWA.

On that point, the ILC explained in its commentary that not only "quantitative" but also "'qualitative' factors such as the importance of the interest protected by the rule infringed and the seriousness of the breach" need to be taken into account[126]. While it may be difficult to quantify the injury of the EU because of a TSD breach in another country, the qualitative assessment may help in the analysis. As *Bronckers* and *Gruni* point out, the ECJ faced similar problems when assessing the

120 Ibid., p. 88, Conclusion 23, para. 12.
121 *Humbert*, p. 119.
122 *Martin*, Saskatchewan Law Review 2002, p. 353.
123 *Von Unger,* Kritische Justiz, 2004/1, pp. 44 et seq.
124 For an overview of the discussion see *Jean*, New York University Journal of International Law & Politics 2022, pp. 94–96.
125 *Hoffmeister,* pp. 452–470.
126 ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission 2001, Vol. II, Part 2, p. 135, Art. 51, para. 6.

proportionality of financial penalties in response to persistent obligations of an environmental obligation by an EU Member State.[127] Therefore, it seems theoretically possible to construe countermeasures commensurate to the TSD breach occurred in the partner country.

2. Relationship to Article 60 VCLT

More problematic could be the relationship between the Law of State responsibility and Art. 60 VCLT. This time, Art. 60(1) VCLT could be a *lex specialis* vis-à-vis the general rules on countermeasures in the area of treaty law within the meaning of Art. 55 ARSIWA, reading:

> These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

At first sight, there are good reasons to see Art. 60 VCLT as such a special rule. It was construed to balance the different interests of the treaty parties, which could be circumvented if the Law of State Responsibility was applicable.[128] At second sight, however, one can also discover important differences between the two regimes with respect to their aim and effect. While Art. 60 VCLT "aims at restoring the balance of performances within the treaty",[129] the rules on state responsibility "aim to compel the defaulting State to cease its violation of international law and/or restore the situation that would have existed had there been no such violation".[130] Their effect is also different: if a State suspends or terminates a treaty on the basis of Art. 60 VCLT, this results in a "temporary or permanent extinction of the norm".[131]If the State takes a countermeasure the affected norm remains binding and is being violated by the state that takes the countermeasure.[132] Against that background, the ILC emphasises in its ARSIWA commentary that "[c]ountermeasures are to be clearly distinguished from the termination or suspension of treaty relations (…), as provided for in Article 60 of the 1969 Vienna Convention".[133] Moreover, Art. 73 VCLT contains the disclaimer that "[t]he provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty (…) from the international responsibility of a State (…)". In its commentary, the ILC explains that

> [i]t decided that an express reservation in regard to the possible impact (…) of the international responsibility of a State on the application of the present articles was

127 *Bronckers/Gruni*, Journal of International Economic Law 2021, p. 42.
128 *Giegerich*, in: Dörr/Schmalenbach (eds.), Art. 60 VCLT, para. 75.
129 Ibid., para. 74.
130 *Simma/Tams*, in: The Oxford Guide to Treaties, pp. 581 et seq.
131 Ibid., p. 582.
132 Ibid.
133 ICL, Draft articles on Responsibility, (fn. 126), p. 128, Introduction of Chapter 2 of Part 3 ASR, para. 4.

> desirable in order to prevent any misconceptions from arising as to the interrelation between the rules governing those matters and the law of treaties.[134]

Against that background, the VCLT rules do not generally supersede the law of State responsibility when a party reacts to treaty breaches of the other side.

At the same time, the ILC wrote that Art. 60 VCLT only applies to material breaches, "whereas in the context of State responsibility any breach of a treaty gives rise to responsibility irrespective of its gravity".[135] This seems to indicate that the specific Article 60 VCLT would supersede the law of state responsibility when the internationally wrongful act constitutes a material breach of treaty, but the rules of ARISWA would remain available for reacting to all other international wrongful acts, including non-material treaty breaches.

This is a plausible position, as Article 60 VCLT would be useless if a State could ignore its conditions by resorting to countermeasures instead when facing a material breach of the other side. Therefore, the Law of State responsibility may only provide a basis for countermeasures in reaction to a breach of a TSD provision, which can be considered non-material. However, when introducing the specific TSD DSM into the FTA, the EU and its FTA partners agreed to hold dialogues for such non-material breaches. Therefore, we come to the conclusion that, by virtue of Article 55 ARSIWA, the possibility of taking countermeasures is excluded in such scenarios.

III. Interim Conclusion

Seen as a whole, we maintain that TSD dispute settlement provisions are the main avenue to settle disputes relating to potential breaches of labour or environmental obligations in TSD chapters. When a case relates to a non-material breach within the meaning of Article 60 VCLT, they are *lex specialis* and exclude the possibility to resort to countermeasures under the law of State responsibility. They also do not allow for the suspension of trade commitments under Article 60 VCLT, because they do not reach the threshold of a material breach.

When a TSD violation can qualify as material breach of the FTA, though, such as disregarding core labour rights under the human rights clause or serious infringements of fundamental environmental commitments under a ratified MEA, the EU may either activate the TSD dispute settlement procedure or resort to unilateral trade sanctions under Article 60 VCLT.

E. The 2022 Reform

Since the beginning, the effectiveness of TSD chapters was subject to heavy political debate between the EU institutions. As their positions have evolved over time and

134 ILC, Draft articles on the law of treaties with commentaries, Yearbook of the International Law Commission 1966, Vol. 2, p. 267, Art. 69, para. 1.

135 ILC, Draft articles on Responsibility, (fn. 126), p. 117, Art. 42, para. 4.

led to a reform in 2022, the chapter would be incomplete without capturing these newer developments.

I. The Position of the European Parliament in 2010

Already back in 2010, the EP asked to introduce a TSD dispute settlement mechanism, which would be equivalent to other parts of the agreement. It found it important that the chapter would provide for a power to impose fines "or at least a temporary suspension of certain trade benefits provided for under the agreement, in the event of an aggravated breach of these standards".[136] In July 2016, the Parliament elaborated on the theme:[137]

> 18. Stresses that provisions on human rights, social and environmental standards, commitments on labour rights based on the ILO's core conventions and principles of corporate social responsibility (CSR), including the OECD principles for multinational companies and the UN Principles on Business and Human rights, should be binding and must form a substantial part of EU trade agreements through enforceable commitments;
>
> calls on the Commission to include sustainable development chapters in all EU trade and investment agreements;
>
> considers that, in order to make these sustainable development provisions binding, a 'three-step approach' needs to be implemented, with government consultations, domestic advisory groups and expert panels involving the ILO, and with, as a last resort, the general dispute settlement provision of the agreement used to address disputes with the possibility of financial sanctions;
>
> points out that labour and environmental standards are not limited to Trade and Sustainable Development Chapters, but must be effective throughout all areas of trade agreements.

II. The Position of the European Commission

1. The two non-Papers of the Commission Services of 2017 and 2018

In May 2017, the Swedish Trade Commissioner *Malmström* received a letter from five trade Ministers (Belgium, Finland, Luxemburg, the Netherlands and Sweden) calling for "improving the implementation of TSD provisions". Responding to

136 European Parliament resolution of 25 November 2010 on human rights and social and environmental standards in international trade agreements, (2009/2219(INI)), P7_TA(2010)0434, para. 22, available at: https://www.europarl.europa.eu/doceo/document/TA-7-2010-0434_EN.html?redirect (19/2/2024) .

137 European Parliament resolution of 5 July 2016 on a forward-looking and innovative future trade and investment, (2015/2105/INI), available at: https://www.europarl.europa.eu/doceo/document/TA-8-2016-0299_EN.html (9/6/2024).

these and other calls,[138] the Commission services released a non-paper in July 2017.[139] It outlined two options as a basis for the discussions: First, the EU could continue "with its broad TSD scope", but strengthen its policy.[140] Second, certain aspects of the US and Canadian system for implementation and enforcement, *inter alia* sanctions, could be included in the EU model.[141] After consultations of the institutions and civil society, the Commission published a second non-paper in February 2018.[142] It concluded that there was "a clear consensus that the implementation of TSD chapters should be stepped-up and improved".[143] The participants wanted to keep the broad scope of the chapters, but saw the need for more effective means to achieve more effective implementation. The non-paper then laid out a 15-point action plan with seven commitments concerning a more assertive enforcement.[144]

Among them was the promise to step up the efforts to ensure early ratification of certain labour Conventions,[145] which can be read as a "recognition of pre-ratification conditionality".[146] According to the Commission, participants had differing views on trade sanctions, though. While a minority wished to move into that direction, a majority supported the EU's enforcement model at the time.[147] Due to the lack of consensus, the Commission found it "impossible to move to" a sanctions-based approach.[148] It saw two main difficulties in combining such an approach with the EU's model: first, trade sanctions would compensate the EU for a breach of labour and environmental norms, but would not guarantee that there was "effective, sustainable and lasting improvement of key social and environmental standards on the ground".[149] Second, if sanctions were introduced, a way to translate the breaches into economic compensation would need to be found. The Commission services, come to the conclusion that this would narrow the scope of the chapters, referring to the scope of the relevant norms in treaties of countries that follow the sanctions-based approach and to an unwillingness of negotiating partners to accept a broad scope combined with trade sanctions.[150]

138 *Hradilová/Svoboda*, Journal of World Trade 6/2018, pp. 1030 et seq., available at: https://www.researchgate.net/publication/330352591_Sustainable_Development_Chapters_in_the_EU_Free_Trade_Agreements_Searching_for_Effectiveness (19/2/2024).
139 Non-paper of the Commission services, Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs), 11/7/2017, p. 2.
140 Ibid., pp. 5 et seq.
141 Ibid., pp. 7 et seq.
142 Non paper of the Commission services, Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements, 26/2/2018, pp. 1 et seq., available at: https://www.politico.eu/wp-content/uploads/2018/02/TSD-Non-Paper.pdf (19/2/2024).
143 Ibid., p. 2.
144 Ibid., pp. 2 et seq.
145 Ibid., pp. 8 et seq.
146 *Marslev/Staritz*, Review of International Political Economy 2021, p. 1129.
147 2018 Non paper of the Commission services, (fn. 142), p. 2.
148 Ibid., p. 3.
149 Ibid.
150 Ibid.

2. The Trade Strategy of 2021

The situation further evolved in the aftermath of the EU-MERCOSUR draft FTA. After having reached a political agreement in June 2019, the text came under fire, *inter alia* for environmental concerns relating to the rain forests in Brazil and the weak enforcement mechanisms of the TSD chapter. In October 2020, the EP found that "the EU-Mercosur agreement cannot be ratified as it stands".[151] France also held this position.[152] Parliaments in Austria, Wallonia (Belgium), Ireland and the Netherlands opposed the agreement.[153] The then chancellor of Germany, *Angela Merkel*, representing a country that previously supported the agreement, expressed in August 2020 "considerable doubts" about whether to support the agreement due to environmental concerns.[154] In March 2021, the European Ombudsman found that the Commission's failure to finalise the sustainability impact assessment "in good time, notably before the end of the EU-Mercosur Trade negotiations (…) constitutes maladministration".[155]

In addition, the Dutch and French Trade Ministers released a non-paper in May 2020. They called for "the EU to (…) increase its ambition regarding the nexus between trade and sustainable development in all its dimensions, consistent with the implementation of the European Green New Deal".[156] They proposed, *inter alia*, the introduction of "staged implementation of tariff reduction linked to the effective implementation of TSD provisions" and wished to have the power to withdraw specific tariff lines for TSD breaches.[157]

Against the background of the Mercosur controversy and increasing calls to strengthen the TSD chapters, the Strategy of the new Trade Commission Dom-

151 European Parliament resolution of 7 October 2020 on the implementation of the common commercial policy – annual report 2018, (2019/2197(INI)), P9_TA(2020)0252, para. 36, available at: https://www.europarl.europa.eu/doceo/document/TA-9-2020-0252_EN.html (19/2/2024).

152 *EPC*, Mixed feelings about the EU–Mercosur deal: How to leverage it for sustainable development", 14/4/2021, available at: https://www.epc.eu/en/Publications/Mixed-feelings-about-the-EUMercosur-deal-How-to-leverage-it-for-su~3dad10 (19/2/2024).

153 Austria: https://www.reuters.com/article/idUSL5N26A11K/; Wallonia: https://www.brusselstimes.com/93770/wallonia-votes-against-eu-trade-pact-with-mercosur-countries-brazil-argentina-uruguay-paraguay-agriculture-environment; Ireland: https://www.politico.eu/article/irish-parliament-rejects-eu-mercosur-deal-in-symbolic-vote/; Netherlands: https://iede.news/en/european-union/dutch-parliament-votes-against-eu-mercosur-free-trade-treaty/ (all of them: 12/6/2024).

154 https://www.dw.com/en/merkel-amazon-deforestation-threatens-eu-mercosur-deal/a-54651194 (19/2/2024).

155 Decision in case 1026/2020/MAS concerning the failure by the European Commission to finalise an updated "sustainability impact assessment" before concluding the EU-Mercosur trade negotiations, p. 7, Conclusion, available at: https://www.ombudsman.europa.eu/export-pdf/en/139418 (19/2/2024).

156 Non-paper from the Netherlands and France on trade, social economic effects and sustainable development, 8/5/2020, p. 1, available at: https://www.tresor.economie.gouv.fr/Articles/73ce0c5c-11ab-402d-95b1-5dbb8759d699/files/6b6ff3bf-e8fb-4de2-94f8-922eddd81d08 (12/6/2024).

157 Ibid., p. 1.

brovskis of 2021, entitled "Trade Policy Review – An Open, Sustainable and Assertive Trade Policy",[158] marks another important evolution in the Commission position. He announced that "[t]he EU will propose that the respect of the Paris Agreement be considered an essential element in future trade and investment agreements".[159] Moreover, the Commission would "strengthen the enforcement of trade and sustainable development commitments on the basis of complaints made to the Chief Trade Enforcement Officer (CTEO)".[160] The strategy also announced an early review of the 15-point action plan in 2021 that would encompass all relevant aspects of TSD implementation and enforcement.[161] In order to unblock the Mercosur agreement, the Trade Commissioner promised "assertive enforcement of both its market access and sustainable development commitments" and referred an ongoing dialogue "on enhancing cooperation on the sustainable development dimension of the Agreement, addressing the implementation of the Paris Agreement and deforestation in particular".[162]

3. The Communication of June 2022

In February 2022, the Commission published an independent comparative study[163] and conducted an open public consultation[164]. This laid the ground for the new Communication in June 2022 dedicated to TSD.[165] On the enforcement side, the Commission proposed to align TSD enforcement with the general state-to-state dispute settlement (SSDS). If a party does not comply within the named period, trade sanctions should be possible as a matter of last resort in instances of serious violations of core TSD commitments. There would be a breach of environmental provisions if a party fails to comply with its obligations under the Paris Agreement in a way that "materially defeats the object and purpose of the agreement".[166] When it comes to labour rights "serious instances of non-compliance" with the ILO fundamental principles and rights at work would constitute such a violation.[167]

158 *European Commission*, Trade Policy Review – An Open, Sustainable and Assertive Trade Policy, COM(2021) 66 final, pp. 12 et seq.
159 Ibid., p. 12.
160 Ibid., p. 13.
161 Ibid., pp. 13 et seq.
162 Ibid., p. 19.
163 *Velut et al.*, LSE 2022/2.
164 Open public consultation on the Trade and Sustainable Development (TSD) Review, available at: https://policy.trade.ec.europa.eu/consultations/open-public-consultation-trade-and-sustainable-development-tsd-review_en (19/2/2024).
165 Communication of the Commission of 22 June 2022, The power of trade partnerships: together for green and just economic growth, COM(2022) 409 final, p. 1.
166 Ibid., p. 11 (the direct quote is also included on p. 11).
167 Ibid., p. 11.

A few days later, on 30th of June 2022, the negotiations for a trade agreement between the EU and New Zealand were concluded.[168] Signed on 9th of July 2023, it "is the first one to integrate the EU's new approach" according to the Commission.[169] Indeed, under Article 26.2 its TSD commitments are enforceable through the general dispute settlement mechanism. Moreover, the fulfilment of obligations clause (Article 27.4) contains in its paragraph 3 the following new language:

> (3) This Agreement forms part of the common institutional framework referred to in Article 52(1) of the Partnership Agreement. A Party may take appropriate measures relating to this Agreement in the event of a particularly serious and substantial violation of any of the obligations described in Article 2(1) or Article 8(1) of the Partnership Agreement as essential elements, which threatens international peace and security so as to require an immediate reaction. A Party may also take such appropriate measures relating to this Agreement in the event of an act or omission that materially defeats the object and purpose of the Paris Agreement. Those appropriate measures shall be taken in accordance with the procedure set out in Article 54 of the Partnership Agreement.

The clause hereby amends the "essential elements clause" of the Partnership Agreement. Seen together, Articles 26.2 and 27.4(3) of the EU-NZ Trade Agreement create "the possibility of trade sanctions as a matter of last resort, in instances of serious violations of core TSD commitments, namely the ILO fundamental principles and rights at work, and of the Paris Agreement on Climate Change".[170]

III. The Council Position of October 2022

In response to the June 2022 Communication, the Council followed suit. In its conclusions of October 2022 relating to the Trade and Sustainability Review, the Council made the following points on enforcement:

> 8. The Council supports the Commission's commitment to strengthen further the implementation and enforcement of TSD provisions in all future negotiations of trade agreements and to reflect it in the ongoing negotiations as appropriate, including by proposing to apply the compliance stage of the general state-to-state dispute settlement to the TSD chapter of such agreements. The Council invites the Commission to use review clauses and, where relevant, joint committees to align existing trade agreements with the new TSD approach, as appropriate. Moreover, the involvement of DAGs in monitoring the compliance stage must also be strengthened in line with the Communication. Furthermore, trade sanctions, which may take the form of suspension of trade concessions, could be applied, as a matter of last resort, after exhausting possibilities

168 Key elements of the EU-New Zealand trade agreement, available at: https://policy.trade.ec.europa.eu/news/key-elements-eu-new-zealand-trade-agreement-2022-06-30_en (19/2/2024).

169 Press release, EU and New Zealand sign ambitious free trade agreement, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3715 (19/2/2024).

170 Key elements of the EU-New Zealand trade agreement, available at: https://policy.trade.ec.europa.eu/news/key-elements-eu-new-zealand-trade-agreement-2022-06-30_en (19/2/2024).

for an amicable settlement. They can be applied for serious violations of agreed commitments concerning ILO fundamental principles and rights at work as well as cases of failure to comply with obligations that materially defeat the object and purpose of the Paris Agreement on Climate Change. Any such trade sanctions should be temporary, targeted and proportionate. In addition, the respect of the Paris Agreement on Climate Change will be proposed by the EU to be an essential element in future trade agreements".[171]

IV. Subsequent Practice with Chile and Mercosur

In view of these clear demands, the Commission then approached its treaty partners in ongoing negotiations. However, the December 2022 text of the EU-Chile Interim Trade Agreement (ITA) follows the established practice with a specialised TSD DSM. A joint statement commits both sides to conclude a review process under Article 26.23 within twelve months upon the entry into force of the ITA, which could introduce stronger enforcement of the TSD chapter. Moreover, and regardless of the outcome of this review, the Parties will also consider the possibility of including the Paris Agreement as an essential element of the ITA and the modernized EU-Chile Agreement.[172]

For the stalled EU-Mercosur FTA, the Commission proposed in March 2023 a Joint Instrument within the meaning of Art. 31 VCLT for the interpretation of the FTA. The proposal includes specifications for the TSD chapter as well as a Joint Declaration to review it. The review may relate to the inclusion of a compliance phase and countermeasures as last resort in the dispute settlement mechanism of the TSD chapter and the designation of the Paris Agreement as an essential element of the agreement.[173] However, Mercosur has ruled out to accept the admissibility of sanctions. In addition, Mercosur demands a new compensation mechanism for EU regulations that reduce market access, which is targeted against the EU Deforesta-

171 Council Conclusions of the Trade and Sustainability Review, 21/10/2022, para. 8, https://www.consilium.europa.eu/en/press/press-releases/2022/10/17/council-conclusions-on-the-trade-and-sustainability-review/ (9/7/2024).

172 See The EU-Chile agreement explained, available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/chile/eu-chile-agreement/agreement-explained_en#TSD (19/2/2024) and Joint Statement on Trade and Sustainable Development by the European Union and Chile, 2 December 2022, p. 2, available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/chile/eu-chile-agreement/text-agreement_en (15/6/2024).

173 EU proposal for a Joint instrument, available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mercosur/eu-mercosur-agreement/documents_en (15/6/2024).

tion Regulation[174] and the Carbon Border Adjustment Mechanism[175] (CBAM).[176] By the end of 2023, the text was still not agreed.

V. Interim Conclusion

Five years after the start of the review process in 2017, the institutions have agreed to change the practice from 2010–2022 on TSD chapters on two main points. First, it should be made clear that the breach of certain TSD commitments may lead to trade sanctions as a matter of last resort. Second, the Paris Agreement will be elevated to an essential elements clause. However, in our view, the first point is in reality not so new, but rather a confirmation of the legal possibilities that already exist under the existing TSD chapters. In return, declaring the Paris Agreement as an essential element removes any doubt that the breach of a Paris commitment will constitute a material breach, which could lead to sanctions according to Article 60 VCLT.

F. Overall Conclusion

In sum, we conclude that the TSD chapters in EU FTAs are legally significant in various ways.

First, their substantive scope covers both labour and environmental measures in the partner country, which are subject to a non-regression obligation. Moreover, labour-related domestic measures must comply with core international labour standards and relevant ILO Conventions, referred to in the FTA, whereas domestic measures affecting the environment need to be in line with multilateral environmental agreements identified in the FTA and the Paris Agreement. Depending on the wording used in any given precise clause, violations thereof may become a legitimate concern of the EU even if the breach does not affect the trade between the parties.

Second, the TSD clauses contain legally binding commitments, which can be enforced via the special TSD Dispute Settlement Mechanisms. The EU-Korea Panel report is a good example that enforcement may lead to results, even if the report as such is not binding and its non-implementation could not be followed-up by trade retaliation. Moreover, the case of the EU-Viet Nam FTA shows how effective pre-ratification conditionality can be.

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

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

176 *Kafsack*, Endlich ist die Antwort der Mercosur-Staaten da, Frankfurter Allgemeine Zeitung, 15/9/2023, available at: https://www.faz.net/aktuell/wirtschaft/mercosur-staaten-erklaeren-bedingungen-fuer-handelsabkommen-mit-eu-19178118.html (20/11/2023).

Third, in case of material breaches of a TSD commitment on core labour rights or important environmental obligations, recourse to trade sanctions is already possible under Article 60 VCLT, as the TSD dispute settlement chapter does not exclude such possibility. In turn, non-material breaches of a TSD commitment may only be dealt with under the TSD dispute settlement mechanism. The law of State responsibility cannot be invoked according to the *lex specialis* rule in Article 55 ARSIWA.

Fourth, the 2022 reform further broadens the possibility of trade sanctions. The EU-New Zealand FTA of 2023 did so by making the general dispute settlement system applicable to the TSD chapter. The reform also broadens the scope of future TSD provisions, whose breach may be considered material. It added the Paris Agreement (which the EU considered as an essential element of the partnership only in its TCA with the United Kingdom of 2020, a rather special agreement with a former EU Member State) to the arsenal of the essential elements clause, which the EU wishes to include from now on with each of its trading partners. At the same time, the reluctance of Chile and Mercosur to subscribe to these new elements serves as a stark reminder that the EU cannot unilaterally impose its TSD policy on a trading partner, but that TSD chapters in EU FTAs need to be consented by both sides.

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