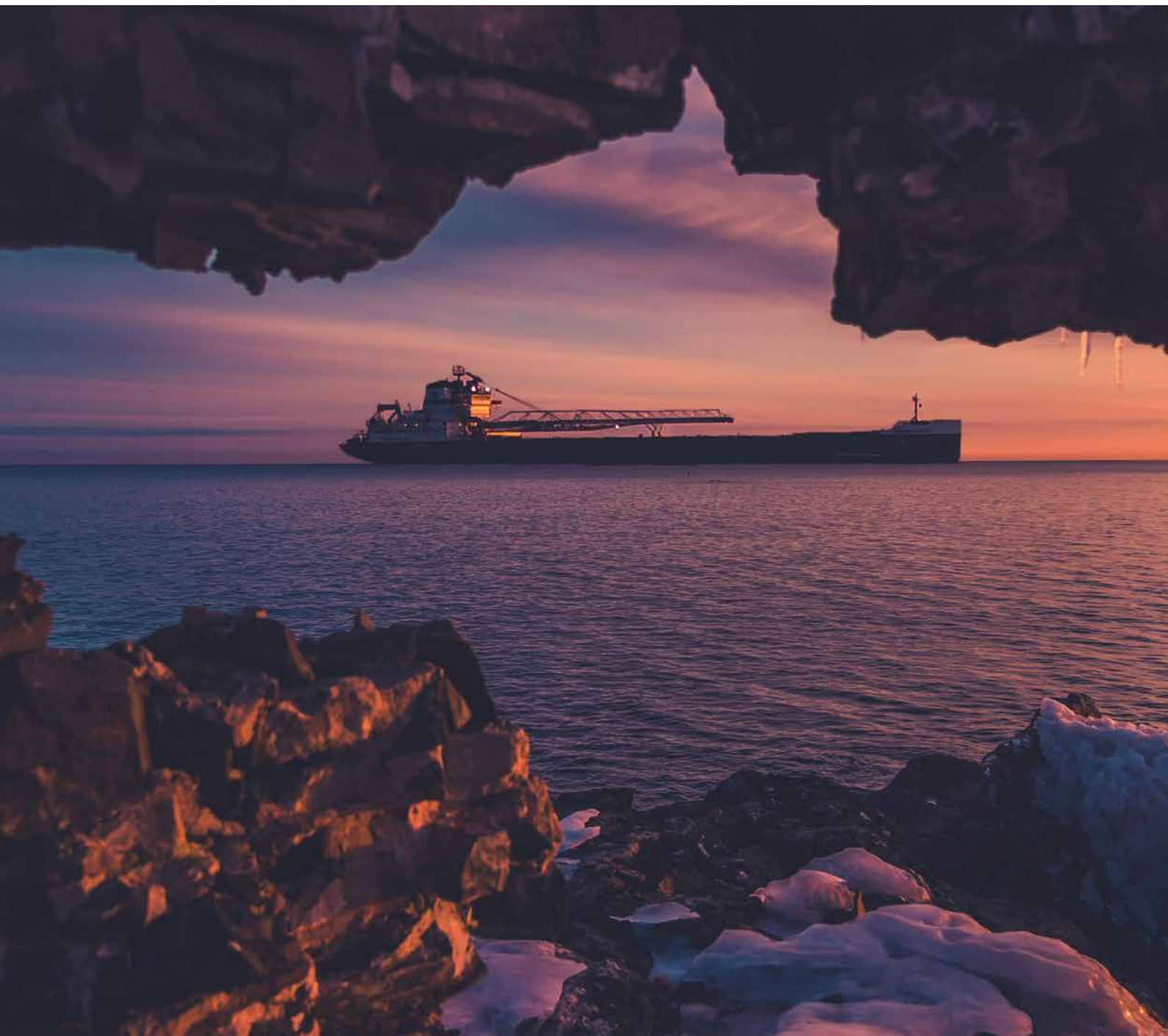


Anchoring climate and environmental protection in EU trade agreements

Exemplary elements



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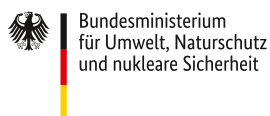
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The responsibility for the content of this publication lies with the author.

Contents

Abbreviations	7
Preface	8
Introduction	9
1. Environmental Obligations	12
1.1 Multilateral Environmental Agreements (MEAs)	12
1.2 Commitments beyond MEAs	14
1.3 Environmental Principles	15
2. Climate Change & the Paris Agreement	17
2.1 Climate Response Measures	19
2.2 “Embodied” Emissions	20
2.2.1 Process and Production Methods (PPMs)	20
2.2.2 Border carbon adjustments (BCAs)	22
2.3 Technology Transfer	24
2.4 Biodiversity, Food Security and Food Safety	26
2.4.1 Farmers’ Rights	26
2.4.2 Bio-piracy, Consent & Benefit Sharing	27
2.4.3 Food Safety and Health	28
2.5 Public Sector	28
2.5.1 Fossil Fuel Subsidies	29
2.5.2 Incentives for Renewable Energy	30
2.5.3 Trade Remedies	31
2.5.4 Public Services and Procurement	32
2.6 Carbon Offset Trading	34
3. Corporate Justice	36
3.1 Due Diligence & Corporate Accountability	36
3.2 Investment Protection	38
4. Compliance & Dispute Settlement	40
4.1 Monitoring	40
4.2 Enforcement	41
4.3 General Exceptions	44
4.4 Relationship to WTO Dispute Settlement	45
5. Feasibility and Process	46
5.1 Transparency and Impact Assessments	46
5.2 Pre-Ratification and Review	47
6. Conclusions	48
Endnotes	50

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Abbreviations

ADA	WTO Anti-Dumping Agreement
ASCM	WTO Agreement on Subsidies and Countervailing Measures
BAT	Best Available Technology
BCA	Border carbon adjustment
BIT	Bilateral Investment Treaty
CBD	Convention on Biological Diversity
CBDR	Common but differentiated responsibilities
CETA	Comprehensive Economic and Trade Agreement (EU-Canada)
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CJEU	Court of Justice of the European Union
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CSO	Civil society organisation
CSR	Corporate social responsibility
DAG	Domestic Advisory Group
DSB	WTO Dispute Settlement Bodies
ETS	Emissions trading scheme
EU	European Union
FAO	Food and Agriculture Organisation
FIT	Feed-in-Tariff
FTA	Free trade agreement
GATS	WTO General Agreement on Trade in Services
GATT	WTO General Agreement on Tariffs and Trade
GHG	Greenhouse gas
GPA	WTO Agreement on Government Procurement
HLCCP	High-Level Commission on Carbon Prices
IPR	Intellectual property rights
ISDS	Investor-state dispute settlement
ITPGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture
LCR	Local content requirement
MEA	Multilateral environmental agreement
NAAEC	North American Agreement On Environmental Cooperation
NAFTA	North American Free Trade Agreement
NDC	Nationally Determined Contributions
OECD	Organisation for Economic Co-operation and Development
PPM	Process and production methods
SIA	Sustainability Impact Assessment
SPS	WTO Agreement on the Application of Sanitary and Phytosanitary Measures
TBT	WTO Agreement on Technical Barriers to Trade
TRIMS	WTO Agreement on Trade-Related Investment Measures
TRIPS	WTO Agreement on Trade-Related Aspects of Intellectual Property Rights
UNFCCC	United Nations Framework Convention on Climate Change
UPOV	International Convention for the Protection of New Varieties of Plants
WTO	World Trade Organisation

Preface

After witnessing the largest global environmental protests in 2019, the new European Commission announced its European Green Deal. It is a set of policy ideas and proposals that is supposed to speed up Europe's climate change mitigation efforts and make Europe carbon neutral by 2050. However, of the 47 measures proposed, only one relates to international trade.¹ At the same time, the EU is finalising a trade agreement with the Mercosur bloc that is poised to increase deforestation and greenhouse gas emissions. Provisions that would help to effectively tackle climate change are conspicuously absent.

In this study, Ciaran Cross takes on the task of thinking through what it would mean to integrate effective climate and environmental provisions in a trade agreement. The starting point for this exercise are existing trade agreements and WTO rules, which has the advantage that the resulting recommendations are immediately applicable in today's circumstances. Yet, principles of global equity and ecological justice have guided the development of these proposals – as far as allowed by this framework – which thereby aim to provide pragmatic building blocks for a future trade system that is fair and sustainable.

The result is a comprehensive and detailed overview of how trade policy could contribute to climate change mitigation in a just and equitable way. It also makes a number of suggestions on corporate accountability, as well as how the architecture and mechanisms of these agreements could serve to regulate rather than liberalise international trade. These innovative proposals are a much needed contribution to the debate on how the international trading system could respond to a warming world. They go far beyond the limited debate about trading “environmentally friendly goods” and focus instead on a number of core problems of today's neoliberal trade regime.

The study is intended to be the start of a debate, not the end of it. Some of the proposals made here are intended to invite further discussion with activists and experts, in particular from the Global South. As the author himself notes, it is impossible to cover every environmental issue in a study of this scope. But it represents a big step forward in the debate around climate change and trade, tackles the issue head on and lays out clearly and comprehensively what could be done if climate change concerns – rather than vested economic interests – were central to trade policy making.



For the publishing organisations
Fabian Flues, PowerShift e.V.

Introduction

When the EU-Japan Free Trade Agreement (FTA)² entered into force in January 2019, the European Commission proudly announced that – for the first time ever – an FTA had ‘locked in’ Parties’ climate commitments under the Paris Agreement.³ To be more precise, the FTA’s short climate provision recognises ‘the urgent threat of climate change’, reaffirms Parties’ commitments to ‘effectively implement the UNFCCC [United Nations Framework Convention on Climate Change] and the Paris Agreement’, and vaguely commits them to cooperate on these matters.⁴

Despite the fanfare, this ‘milestone’ does not significantly improve on references to climate change in previous EU FTAs.⁵ Housed in the FTA’s ‘Trade and Sustainable Development’ (TSD) Chapter, the clause is subject to a largely toothless dispute settlement mechanism – aimed at promoting dialogue and cooperation, rather than guaranteeing effective monitoring and compliance. Moreover, the Commission still regards one of the EU-Japan FTA’s principle achievements to be its potential for increasing EU pork and beef exports to a market over 8,000 kilometres away.⁶ Precisely how this achievement can be credibly reconciled with ‘the urgent threat of climate change’ is unlikely to ever be addressed – least of all by the FTA’s negotiators.

How could the EU better integrate the objectives of the Paris Agreement into its FTAs? The answer is not simple. Negotiated under the auspices of the UNFCCC, the 2015 climate deal mandates Parties to set voluntary targets on reducing emissions in their ‘nationally determined contributions’ (NDCs) – which are self-determined and non-binding. Japan is in fact on track to fulfil its 2030 NDC target; the problem is that this target is ‘quite inconsistent with the Paris Agreement’s goals.’⁷ If the EU-Japan FTA is vague on what ‘effective implementation’ of the Paris Agreement looks like, so too is the Paris Agreement itself.

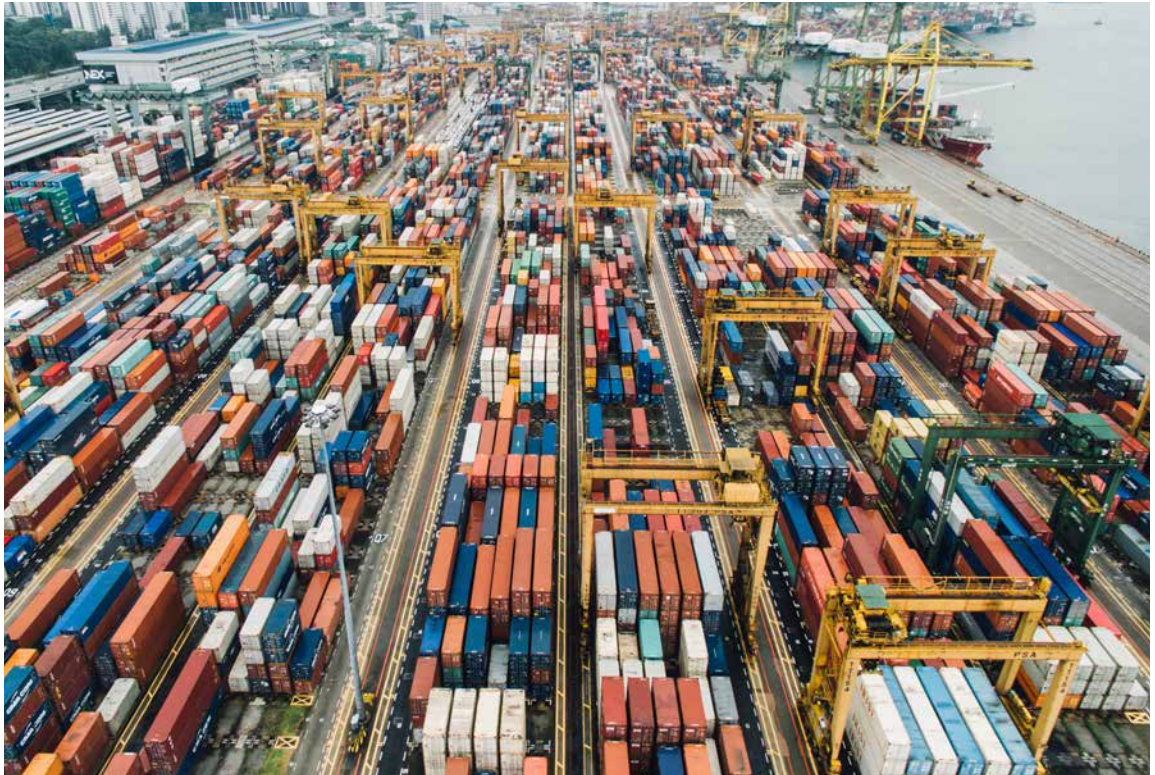
This study proposes that more ambitious and effective integration of environmental and climate protection in the EU’s FTAs is both possible and necessary. The imperative for a radical shift in the parameters of trade policy hardly needs repeating. While governments and policy-makers dither over questions of whether certain ‘trade-related’ climate measures comply with multilateral trade obligations, we are headed towards a global, trade-related catastrophe. Up to 33% of global



The recently concluded EU-Japan agreement contains weak environmental and climate rules.
Photo: European Council President on flickr

CO2 emissions, 30% of global greenhouse gas (GHG) emissions, 68% of global raw material extractions, and 30% of global biodiversity loss, are embodied in international trade.⁸ Put simply: if trade rules hinder the ability of states to address these environmental impacts, then those rules need to be reformed. The priority now must be to ensure that tariffs and ‘non-tariff barriers’ are assessed on the merits of their contribution to reducing trade’s environmental and climate footprint, rather than their impact on trade per se.

To that end, the content of Parties’ environmental commitments in the EU’s FTAs must be clarified and deepened, and the procedures for their enforcement opened up to facilitate greater civil society involvement. This necessarily entails a holistic approach to the linkage between trade commitments and sustainability concerns, which looks beyond FTAs’ TSD Chapters. On first glance, these TSD provisions do appear to address an impressive variety of environmental issues. But rather than substantive obligations, these contain mainly vague and unenforceable aspirations. In contrast, other parts of the EU’s FTAs include an array of stringent trade commitments, negotiated with scant consideration for environmental impacts or sustainable development objectives. By and large, these obligations reaffirm and deepen Parties’ World Trade Organisation (WTO)



How could international trade rules be reformed to support climate and environmental protection?

Photo: chuttersnap on Unsplash

10

commitments, and thus extend – in piecemeal fashion and with European business interests in the driving seat – a trade liberalisation agenda that has long lost its legitimacy, if not its strength. Meanwhile possibilities for reflection or innovation have been neglected.

The study is structured in five sections. Recommendations are detailed at the end of each.

Section 1 presents some general considerations for strengthening FTA Parties' environmental obligations, with particular reference to Parties' obligations under multilateral environmental agreements (MEAs). While obligations contained in an FTA can (and arguably should) go beyond those contained in MEAs, more detailed provisions are not advanced here for a simple reason: a universal approach is neither possible nor desirable, and FTAs must be properly tailored with regard to the respective needs of FTA Parties, levels of development, industries, resources, as well as the principle of 'common but differentiated responsibilities' (CBDR). As highlighted in the concluding part of this study, the inclusion of clearly defined, achievable and bespoke environmental obligations in FTAs is only likely when Parties conduct robust ex-ante Sustainability Impact Assessments and transparent, inclusive and effective public consultations in good faith, *prior* to negotiations.

Section 2 takes a more comprehensive look at how FTAs could strengthen states' action on climate change. The Paris Agreement provides a good example of why a 'supremacy clause' – which would aim to ensure that MEA obligations *prevail* over FTA obligations – is likely to prove insufficient. The manifold challenges of decarbonising trade, accelerating the global energy transition, and climate justice, involve a host of response measures – including intellectual property and subsidy reform, and the expansion of public investment and public services. Reference to the Paris Agreement alone cannot ensure that FTA obligations are supportive of these measures, for the simple reason that the Paris Agreement is itself *silent* on these issues. In light of that, there is a need to unpack existing trade obligations and explore possible alternatives.

Section 3 proposes ways in which FTAs could further contribute to efforts to strengthening the accountability of multinational corporations for their contributions to environmental damage. For this, the parallel reform of investment protection and dispute settlement is essential.

Section 4 considers non-compliance and options for FTA enforcement. In particular, it looks at how FTAs could grant civil society a greater role in the monitoring of environmental commitments, and in holding states to account for breaching them.

Section 5 addresses the political feasibility of the reforms outlined and proposes that democratisation of process – through increased transparency, accountability and public participation before, during and after FTAs are negotiated – is the single most important enabling factor in transforming the EU's current approach.

Section 6 concludes with the study's main recommendations.

Several limitations to the study should be noted from the outset – firstly with regard to *feasibility*. The vast majority of proposals contained here are not new, and neither is the challenge of making them heard. In its resolute determination to conclude new FTAs with Canada, Japan and the Mercosur bloc (Brazil, Argentina, Uruguay and Paraguay), the European Commission has proven consistently unable or unwilling to listen to opposition from critics in civil society, or even the European Parliament. Token attempts to establish consultative and participatory structures for the public to engage with EU institutions on trade and investment policy have produced much scepticism to date, and it remains to be seen whether they can produce anything else.

Secondly, it is obvious that ideal solutions to issues of transboundary environmental protection should be *multilateral*, not bilateral. FTAs may however provide a critical space for experimentation, and could be aimed at building consensus towards necessary WTO reforms. Indeed, the EU's FTAs constitute major building blocks in a nascent trade regime for the twenty-first century. Faced with rising protectionism, prolonged stalemate in negotiations, and the recent collapse of the WTO Appellate Body, the multilateral trade system is under considerable strain. Presently, the most vigorous interactions between WTO rules and climate mitigation policies are taking place not – as one might hope – in respect of fossil fuel consumption, technology transfer or biodiversity protection, but rather in tit-for-tat disputes over the renewable energy sector. With this in mind, possible approaches to making FTAs supportive of necessary reforms to baseline WTO commitments are highlighted where appropriate.

Finally, readers should be aware that this report focuses on *trade rules* rather than *trade per se*. In a study of this length, it is impossible to provide an *exhaustive* account of current FTAs or possible reforms. The following analysis is based on a selection of EU FTAs,⁹ and proposals are assembled from existing FTAs alongside other innovative approaches, many of which are yet to

be tested. As some of the issues raised are legally and technically complex, readers are encouraged to refer to the cited literature for more detail. This paper does not however address the specific impacts of trade on biodiversity or, for example, propose trade measures to curb deforestation. Rather, it is largely concerned with how trade rules aimed at eliminating 'non-tariff barriers' may curb environmental, sustainable development and climate change policies. The problems hinted at here undoubtedly extend beyond the scope of the study and there are many omissions: agricultural subsidies, animal welfare, regulatory cooperation, climate finance, aviation and shipping, etc. These proposals represent one assessment of the legal challenges ahead. But there is clearly much more to do.

1. Environmental Obligations

12



Environmental obligations included in EU trade agreements to date are too vague and weak.
Photo: Taneli Lahtinen on Unsplash

This Section aims to set out a general strategy for designing FTA environmental provisions so that they effectively contribute to environmental protection. Such provisions should serve at least two overarching objectives: i) encouraging Parties' compliance with their environmental obligations; ii) ensuring that Parties' environmental policies are not undermined by other commitments contained in the FTA.

To date, the provisions in TSD Chapters of EU FTAs arguably achieve neither of these objectives. They are consistently undermined both by *insufficient detail* on the Parties' commitments and a *lack of robust enforcement* mechanisms. While their scope and content varies, TSD Chapters include mainly aspirational or voluntary commitments that cannot lead to clear or measurable outcomes. Cooperation activities can be necessary and important, but can hardly be described as ambitious – since nothing would prevent FTA Parties from cooperating on environmental policies even in the absence of an FTA. It is doubtful that references to FTA Parties' 'right to regulate'¹⁰ serve as an effective safeguard of states' domestic policy space to regulate in the field of environmental protection, particularly if domestic policies come into conflict with other FTA commitments.

Whether located in a 'TSD Chapter' or any other part of the agreement, positive substantive obligations on environmental protection must be monitored and enforced if they are intended to be meaningful (see further below, Section 4). Monitoring and enforcement however depends on the relevant commitments also being drafted with sufficient clarity. Lastly, FTA provisions must also serve to manage potential conflicts between trade and environmental policies, and this may require corresponding adjustments to Parties' commitments under other sections of the FTA. This is illustrated in more detail in Section 2 below, in respect of the Paris Agreement.

Priority issues

- Strengthen Parties' domestic policy space to implement MEAs
- Ensure environmental protection commitments contained in the FTA are enforceable
- Incorporate principles of environmental protection applicable to the entire FTA

1.1 Multilateral Environmental Agreements (MEAs)

There are hundreds of Multilateral Environmental Agreements (MEAs) in force, covering a range of environmental concerns, including many transboundary issues. MEAs are diverse instruments, produced through extensive negotiations and political compromise, and their implementation is often subject to on-going multilateral discussion. Some twenty key MEAs contain trade-related provisions¹¹ that require, encourage or permit their signatories to adopt trade-restrictive measures on environmental grounds. However, many MEA provisions do not contain specific obligations or mandatory standards and therefore do not directly oblige Parties to take any specific action on trade at all. Several key MEAs duplicate terms from the WTO agreements ostensibly in order to manage concerns of 'green protectionism'.¹² Moreover, most MEAs do not have an effective enforcement mechanism and aim to rather promote dialogue and cooperation.

states can therefore struggle to defend their implementation of environmental measures that impact on trade – even if these measures are intended to implement MEAs. While effective implementation of MEAs *may* require

BOX I

When non-Parties to an MEA complain to the WTO

WTO members agreed back in 2001 to negotiate on the 'relationship between existing WTO rules and specific trade obligations set out in [MEAs]', but have made little progress.¹³ In the *EC-Biotech* dispute, the EU sought to justify a general de facto moratorium on the approval of genetically-modified products by relying on the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (CBD). The precautionary principle is an essential component of the Cartagena Protocol, the objective of which is to ensure 'an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms' such as those covered by the WTO Agreement on Sanitary and Phytosanitary (SPS) Measures. But, because the US (the complainant) was a signatory to neither the Cartagena Protocol nor the CBD, the Panel found it neither 'necessary' nor 'appropriate' to rely on these agreements,¹⁴ and concluded that the measures violated the SPS Agreement. It is unclear whether the Appellate Body would agree with the *EC-Biotech* panel in this respect.

It therefore remains uncertain whether a WTO member can invoke the provisions of an MEA to which it is signatory in order to justify an otherwise non-WTO compliant measure, if the *complaining* WTO members are *not signatories to the MEA*. It has even been suggested that unilateral measures taken to implement an MEA may violate WTO rules if the signatories to the relevant MEA do not include *all* WTO members.¹⁵ Since the constellation of Parties to MEAs varies considerably, this lack of legal clarity significantly weakens the implementation of MEAs vis-à-vis WTO rules.

trade-restrictive policies, generally their content is much less specific than that of trade agreements. This highlights an inherent risk involved in integrating *international environmental law* with *international economic law* – since the logic underpinning these regimes can sometimes seem at odds. In practice, disputes concerning trade and environmental policies tend to be settled in trade fora (usually at the WTO). But interpretative approaches based on so-called 'mutual supportiveness' can serve to downplay MEA implementation in order to



North American Free Trade Agreement Summit 2014 – The 1994 NAFTA agreement contained language designed to support Parties' implementation of some multilateral environmental agreements.

Photo: The Presidency of Mexico (2012-2018) on Wikimedia

ensure consistency with states' more stringent trade liberalisation commitments.

Carefully designed FTA provisions could help ensure the *supremacy of MEAs*, where these conflict with Parties' trade obligations. Simple reaffirmation of MEA commitments – which is how EU FTAs usually treat MEAs – is unlikely to achieve this. For example, a supremacy clause in the 1994 North American FTA (NAFTA) provided that specific trade obligations contained in a specific list of MEAs 'shall prevail' in the event of any inconsistency with NAFTA – with the proviso that 'where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement' (Art. 104.1). Parties had the option to agree to extend NAFTA's list of MEAs.

Nearly thirty years after that agreement was drafted, the EU has failed to achieve such clarity regarding the supremacy of MEAs. Some EU FTA provisions refer to Parties' right to implement MEAs to which '*they are party*',¹⁶ a minor ambiguity that may have major consequences – as demonstrated in at least one WTO dispute to date (see Box I). Most EU FTAs provide that, 'Nothing in this Agreement shall be *construed to prevent*' Parties from implementing measures pursuant to MEAs.¹⁷ Such wording however constitutes mere interpretive guidance: arguably a state adopting a measure to implement an MEA is never prevented from maintaining such a measure, but merely obliged to face the consequences of any breach of its FTA commitments if

successfully challenged by another FTA Party. This may result in regulatory chill, but FTA provisions do not prevent Parties from adopting such measures per se.

Recommendations

- **Provide that each FTA Party 'shall ensure that its laws, policies and practices are in conformity' with select MEAs specified in the FTA**

► *Cited MEAs should include at least those identified as containing specific trade obligations, which includes the CBD and Cartagena Protocol, the United Nations Framework Convention on Climate Change (UNFCCC), Kyoto Protocol and Paris Agreement.¹⁸ Such a list need not necessarily be limited to MEAs that all FTA Parties have ratified. Ideally entry into force of the FTA should be conditioned on Parties' ratification of select MEAs (see below, Section 5.2). Provisions should permit Parties to add to the list of MEAs cited and for progressive extension of the clause to cover new MEAs. A transparent procedure should be established for civil society groups to propose and advocate the inclusion of additional MEAs.*

► *Such provisions could effectively make the MEAs cited binding on FTA Parties¹⁹ – but only if backed up with effective monitoring and enforcement mechanisms (see below, Section 4).*

- **Include a supremacy clause expressly stating that provisions of MEAs listed prevail over FTA provisions in the event of inconsistency**

► *Provisos referring to 'least inconsistent' measures (as in NAFTA Art. 104, see above) should be avoided. Parties should be expressly accorded a 'margin of appreciation' in determining the appropriate measures to achieve their policy objectives.*

► *FTA should include a definition of conflict or inconsistency as 'a situation in which a provision of one treaty poses an obstacle to the implementation of another treaty' including but not limited to situations in which a provision of one treaty enables or encourages a Party to undertake activities or adopt and implement measures which are prohibited by the other treaty.²⁰*

- **Clarify that each Party has the right to take measures to implement MEAs to which 'it is a Party', regardless of whether other FTA Parties are members of the MEA**

► *Such clauses should not be conditioned on fulfilment of the General Agreement on Tariffs and Trade (GATT) Art. XX 'Chapeau' (see below, Section 4.3).²¹*

1.2 Commitments beyond MEAs

EU FTAs usually commit Parties to strive towards 'high levels' of domestic environmental protection, and to neither 'waive', 'lower' nor 'derogate from' these standards. Such a waiver or derogation is however only proscribed when done with the *intention to encourage trade or investment*,²² or in a *manner affecting trade and investment*,²³ or both.²⁴ Establishing causality or intent in such cases would likely prove difficult in the event of any dispute, as demonstrated in the US-Guatemala labour arbitration under the Central America FTA (CAFTA, see below, Box V). As the above provisions concerning causality and intent in EU FTAs are not subject to any effective dispute settlement mechanism, they will likely never be subject to adjudication. Provisions of the 'new NAFTA' (the United States-Mexico-Canada Agreement, or USMCA) have attempted to clarify the meaning of 'in a manner affecting trade or investment',²⁵ but whether this is effective will only be tested in future disputes.

In addition to these provisions, EU FTAs could oblige Parties to develop, adopt and implement more clearly defined measures and policies for the objectives of environmental protection. Elements of individual MEAs can be strengthened through more specific FTA provisions, committing Parties to levels of protection that go beyond their MEA commitments. For example, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) commits each Party not only to 'adopt, maintain and implement laws, regulations and any other measures to fulfil its obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)', but also several measures which build on the commitments required by CITES itself.²⁶

The more detailed the provisions, the more effectively and promptly a Party's breach of a specific commitment can be addressed. For example, the US-Peru FTA includes extensive provisions aimed at tackling the illegal timber trade. In December 2018, Peru moved its forest inspection agency (Organismo de Supervisión de los Recursos Forestales y de Fauna Silvestre, OSINFOR) into the Ministry of Environment, in violation of the express obligation in the FTA that OSINFOR be independent.²⁷ OSINFOR has been instrumental in tackling rampant illegal logging in Peru

and helped reduce incidence of unauthorised logging from 90% to 67% of harvested timber (based on 2017 estimates). The US swiftly initiated government consultations – as a result of which, the decision to move OSINFOR was reversed in April 2019.²⁸

Even at their most specific – for example, in TSD Chapter provisions on timber or fisheries – EU FTAs routinely lack this level of precision. However such attention to detail is paying dividends with the EU's Voluntary Partnership Agreements (VPA) – a central component of the EU's Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan. This has been achieved largely due to the VPA's model of multi-stakeholder participation. In 2019, civil society organisations (CSOs) from forested tropical regions called on the EU to make similar consultative structures central to its FTA negotiations with Indonesia, Malaysia, the Philippines and MERCOSUR.²⁹

Recommendations

- **Prohibit FTA Parties from waiving, lowering or derogating from their level of environmental protection**

► *This should not include a requirement of intent to increase trade or investment, or of an effect on trade and investment. A rebuttable presumption could be included to the effect that trade or investment is deemed affected, whenever a Party does not comply with these provisions.*

- **Include specific, bespoke environmental commitments, addressed to particular trade or sectors of the economy**

► *Further concrete proposals are not advanced here. Rather specific commitments should be identified and developed through robust Sustainability Impact Assessments and transparent, inclusive public consultations conducted throughout the process of FTA formation (see below, Section 6).*

- **Ensure all positive environmental commitments are covered by meaningful and effective enforcement mechanisms (see below, Section 4)**

1.3 Environmental Principles

Principles of EU and international environmental law should be given greater weight, and serve to guide the implementation of all commitments contained in the FTA. These can also serve as interpretative guidance in the event of a dispute between FTA Parties, by



Clear path: The European treaties lay out the basic principles for environmental policy. Photo: Justin Kauffman on Unsplash

clearly establishing that all FTA provisions are to be read in light of them.

The Treaty on the Functioning of the European Union (TFEU) requires that EU environmental policy be guided by the following principles and objectives:

- the precautionary principle;
- the principles that 'preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay';³⁰
- the objectives of 'preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilisation of natural resources, promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change'.³¹

Several EU FTAs do refer to the *precautionary principle* in their TSD Chapters.³² However, the European Commission at present does not take a consistent position on *whether* the principle *should* be included.³³ These inconsistencies significantly weaken its application and limit the chances that Parties might successfully rely on it in any future dispute.³⁴ The absence of any reference to the precautionary principle *in the SPS Chapters* of the EU's FTAs to date is particularly perplexing given that the EU lost

two WTO disputes concerning regulations on food safety and animal and plant health, which were deemed to violate the WTO SPS Agreement.³⁵

The other principles and objectives from the TFEU cited above are not currently incorporated into the EU's FTAs.

Lastly, the principle of *common but differentiated responsibilities* (CBDR) is a fundamental tenet of international environmental law, a foundation of the UNFCCC and key to the implementation of the Paris Agreement, discussed below. Stricter environmental regulation of traded goods and services inevitably has market access and cost implications, and the principle of CBDR emphasises the development aspect of trade, by recognising states' respective historic *contributions* to environmental damage as well as their *resources* to address such harm. Despite its obvious relevance for trade policy, one review of 689 FTAs found explicit reference to CBDR in only two agreements.³⁶

Recommendations

16

- **Incorporate the above principles and objectives underpinning EU environmental policy, as well as the principle of CBDR, into the FTA's overarching Principles and Objectives (often included under General and Institutional Provisions)**
- **Include specific reference to Parties' right to invoke the precautionary principle with regard to SPS measures and provide that the provisions of the Cartagena Protocol prevail in the event of any inconsistency with Parties' SPS obligations**

2. Climate Change & the Paris Agreement



The Paris agreement was negotiated by 196 state parties in 2015 with the goal of limiting the average temperature rise to well below 2°C above pre-industrial levels and to pursue efforts to limit the increase to 1.5°C.

Photo: Presidencia de la República Mexicana on flickr

As with the obligations discussed in Section 1, designing FTA provisions to strengthen the effective implementation of the Paris Agreement should aim to serve two overarching objectives: i) encouraging Parties' compliance with their Paris Agreement commitments; and ii) ensuring that Parties' commitments under the Paris Agreement are not undermined by other FTA obligations. In this context however, several particular difficulties arise.

Firstly, drafting FTA provisions that make commitments undertaken in the Paris Agreement or individual states' nationally determined contributions (NDCs) 'binding' and 'enforceable' – as some have proposed³⁷ – is problematic. As noted above, emissions targets in the NDCs are voluntary and self-determined. No uniform template or harmonised system was created for NDC submissions, and many NDCs contain language so vague as to preclude meaningful enforcement.³⁸ Of the 189 NDCs submitted under the Paris Agreement, 152 states determined to reach their targets by 2030, mostly without any intermediary trajectory – making monitoring progress before 2030 inherently difficult. Therefore, punishing states through FTA dispute settlement mechanisms for failing to fulfil their NDC targets might mean simply penalising countries that formulated their NDCs with greater precision. Moreover, one cannot ignore that – currently – all NDCs taken collectively are still insufficient to meet the temperature target of the Paris Agreement.³⁹

Secondly, while FTAs might provide that Parties' obligations under the Paris Agreement

prevail over their trade commitments, the Paris Agreement includes no express reference to trade-related impacts or measures, and neither expressly mandates nor obliges Parties to take any specific action in respect of trade. NDCs on the other hand contain a wide variety of trade-related measures – including import bans⁴⁰ and subsidies, the promotion of technology transfer and trade in environmental goods, efficiency standards, eco-labelling requirements and border carbon adjustments.⁴¹ But as noted, Parties are not obliged to implement the measures indicated in their NDCs.

Conflicts between WTO disciplines and these climate change measures are already surfacing and it is widely acknowledged that the potential for future WTO challenges to the measures in states' NDCs is very high. For example, in 2016 the WTO Appellate Body ruled that 'local content requirements' imposed in India's renewable energy sector breached WTO rules, despite the fact the policy was aimed at ensuring India achieves its commitments under the UNFCCC, including the generation of 40% of total power capacity from renewable sources by 2030.⁴² India's failure to defend the measures ultimately rested on the WTO adjudicators' assessment that the UNFCCC was irrelevant to the case (see also Box IV).

Trade-related elements of NDCs need to be specifically protected from potential challenges as non-compliant with FTA or WTO rules. More comprehensively, trade

BOX II

The slim prospects of WTO reform

To an extent, WTO members may be already constrained from implementing trade-restrictive environmental policies by the baseline commitments contained in the WTO Agreements. Notwithstanding the persistent malaise in multilateral trade negotiations, the recent collapse of the WTO Appellate Body, and an increase in tit-for-tat protectionism, the WTO – its rules and its membership – remains highly influential and may prove critical for future international cooperation on transboundary environmental protection, and climate change mitigation in particular. Some dozen disputes concerning water, solar and wind energy have already fallen to the WTO's Dispute Settlement Bodies (DSB),⁴³ and future encounters with the climate regime seem inevitable.

The implementation of NDCs raises a number of questions with regard to WTO compliance, but credibly resolving these uncertainties depends on a multilateral consensus – either among WTO members or parties to the Paris Agreement. In the absence of a consensus, the job of navigating future conflicts is likely to fall to the WTO DSB on a case-by-case basis. In this respect, the record of the DSB is not reassuring: in each of the cases concerning renewable energy to date, WTO adjudicators found respondent states to have breached rules on non-discrimination.⁴⁴

Ideally, it has been proposed that WTO members adopt either i) a legally binding interpretation of the WTO Agreements; ii) a 'climate' waiver; or iii) a decision to amend certain WTO provisions.⁴⁵ Only the Ministerial Conference and the General Council have the authority to issue legally binding interpretations of the WTO Agreements.⁴⁶ In 'exceptional circumstances', the WTO Ministerial Conference may waive an obligation imposed on a member under any of the WTO agreements.⁴⁷ The Ministerial Conference may also decide to amend WTO provisions.⁴⁸ In all three cases, a majority of three fourths of the WTO membership is required.

Although there are a number of precedents, prospects for any of these options appear bleak.⁴⁹ FTA provisions could however contribute towards building wider support for these reforms amongst WTO members. Existing, vague FTA commitments to cooperate in WTO fora, such as the Committee on Trade and Environment (CTE), should be strengthened with more specific provisions committing FTA Parties to cooperate on and support concrete climate-related reforms of WTO Agreements. In the following sections, several FTA provisions are suggested which could support such reforms – although these alone would be insufficient without wider consensus among WTO members. A more comprehensive proposal for WTO reform is beyond the scope of this paper.

commitments must be designed to appropriately support the requisite economic and industrial transformations that the rapid adoption of low-carbon technologies and decarbonisation must entail. This will depend on trade rules that can facilitate economic diversification and the transfer of cleaner technologies, as well as limit protectionist battles over environmental goods and services. It will also require cooperation on methodologies to monitor and calculate GHG emissions embodied in international trade, and may necessitate a thorough reassessment of the potential benefits associated with the localisation of production and the relaxation of intellectual property disciplines. In particular, meeting the needs of developing countries will mean strengthening the EU's commitment to the principle of CBDR, and to mitigating the potentially adverse trade impacts of any climate response measures it adopts. Finally, it could mean adopting principles to guide

the development of controversial international carbon market mechanisms – a topic that dominated discussions at the COP 25 in Madrid (December, 2019).

Priority issues

- **Ensure Parties enjoy adequate policy space to implement climate response measures in fulfilment of current and future NDC commitments**
- **Protect the right of states to differentiate products and services with reference to their embodied carbon or GHG emissions and regulate trade accordingly**
- **Permit Parties to facilitate technology transfer in order to accelerate the energy transition – through performance requirements and/or relaxation of intellectual property rights**

- Regulate to ensure sustainable and equitable access to genetic resources in order to protect biodiversity and food security
- Guarantee the role of public investment (including subsidies and other incentive schemes) as well as of public services in the transition to a low-carbon economy

2.1 Climate Response Measures

A principle, overarching objective should be ensuring that states are able to adopt and implement 'climate response measures' – including those that are trade restrictive – without retaliation from trading partners. One can however anticipate that 'in the near term, most of the response measures containing trade restrictions will be applied by developed countries to imports from developing countries.'⁵⁰ The UNFCCC contains specific commitments in this respect to ensure that developed countries take into consideration the adverse impacts of climate response measures on developing countries and to take appropriate action – such as funding, insurance, technology transfer and capacity building – to mitigate these impacts (Art. 4.8 and 4.10, UNFCCC).

Recommendations

- **Affirm FTA Parties' right to adopt and implement unilateral climate response measures, including trade-restrictive measures**

► FTAs should clarify that Parties' fulfilment of their NDCs takes priority over any other commitments in the FTA.

► FTA provisions could set out a definition of 'climate response measures'. While an FTA definition might categorically identify and qualify particular measures for inclusion, it must not be exhaustive, or limited to measures taken to fulfil existing NDCs – since the NDCs are to be periodically reviewed and their ambition should be progressively enhanced.

► More effective than a definition would be to include a procedure for assessing such measures in the event of challenge by an FTA Party (below).

- **Require FTA disputes over climate response measures to be subject to a mandatory preliminary reference procedure⁵¹**

► This should involve a panel of climate experts who would determine whether a measure's trade impacts are justified by its climate objectives. This determination



Port of Lagos, Nigeria: The needs of developing countries must be respected when adopting climate response measures. Photo: dotun55 on flickr

should be guided first and foremost by a scientific evaluation of the measure's impact on emissions reduction.

► The fact that trade or investment flows between FTA Parties are impacted should not provide grounds for hindering the adoption of such measures. Local economies may accrue benefits from trade-restrictive policies – but these effects must not be deemed to indicate that the measures are 'merely' protectionist where they actually contribute to emissions reductions.

► If it is determined that the measure challenged is a legitimate 'climate response measure', retaliatory action from other FTA Parties should not be permitted.

- **Require Parties to fulfil commitments to mitigate adverse impacts of such policies on poorer states**

► If a trade-restrictive climate response measure contributes to emissions reductions, but also adversely affects trade or investment flows with a developing country partner, a mechanism should be established to review the EU's actions with reference to the principle of CBDR. This should ensure that the preliminary reference procedure above is attuned to issues of development and support the fulfilment of the EU's commitments under the UNFCCC.

► This procedure could mandate the panel of experts to order concrete actions on the part of the EU in respect of climate finance, technology transfer and capacity building, and should be directed at remedying adverse impacts by promoting low-carbon opportunities in the impacted regions or sectors.

2.2 “Embodied” Emissions

The Paris Agreement mandates signatories to take account only of their *territorial* emissions. Reading states’ accounts of *production-based* emissions in isolation can however create the misleading impression that countries with the highest levels of consumption have no responsibility for emissions resulting from the goods they *import*.⁵² Indeed, many developed countries’ have been achieving reductions of domestic emissions at the same time that their *consumption-based* emissions – embodied in imports from developing or emerging economies – continue to grow.⁵³ ‘Bringing back in’ these displaced emissions requires accounting for the carbon ‘embodied’ in imported goods and services.

This means inevitably differentiating between products and services based on respective levels of carbon emissions generated in production processes, as well as consumption and disposal. It is ultimately critical for climate change mitigation that states are permitted to distinguish (favourably or unfavourably) between goods and services on the basis of carbon footprints and other climate impacts. This objective goes hand in hand with promoting trade in environmental goods, often touted by free trade stalwarts as one of the most significant gains of trade liberalisation for the environment. EU FTAs generally contain merely promotional language in respect of environmental goods.⁵⁴ But not all ostensibly-“environmental” goods are equally environmentally sound, as amply demonstrated by the stalled WTO negotiations on a plurilateral Environmental Goods Agreement (EGA), which might have also covered – controversially – biodiesels. There is therefore clearly a

need for such differentiation *within* the class of goods categorised as ‘environmental’.

However, the issue of carbon or GHG emissions ‘embodied’ in trade raises complex technical, as well as legal, challenges.

2.2.1 Process and Production Methods (PPMs)

Whether WTO rules permit differentiation based on so-called ‘Process and Production Methods’ (PPMs) has long proved contentious, due to strict non-discrimination obligations contained in the General Agreement on Tariffs and Trade (in particular GATT Art. III:4 on National Treatment). Essentially, the GATT requirement not to discriminate between ‘like’ products means that such differentiation may hinge on a determination of ‘likeness’.⁵⁵ So-called ‘product-related’ PPMs that physically *alter the end product* – such as the use of pesticides that leave traces in agricultural goods – are accepted as a factor in the determination of ‘likeness’ under WTO rules. But differentiation of goods and services on the basis of PPMs that *do not alter the final product* – ‘non-product-related’ PPMs – are more contentious.⁵⁶ Embodied carbon falls into the latter category.

A recent Food and Agriculture Organisation (FAO) report identifies this issue as the ‘main challenge for climate-smart policies’;⁵⁷ even the WTO Secretariat acknowledges that determinations of ‘likeness’ in such cases is ‘particularly challenging’.⁵⁸ To date, EU FTAs routinely incorporate GATT National Treatment obligations by rote⁵⁹ – although at least one EU FTA already contains a minor limitation to its incorporation of GATT Art. III (albeit with no environmental purpose).⁶⁰ While technical regulations and conformity assessment procedures are regulated by the WTO Technical Barriers to Trade (TBT) Agreement, it remains somewhat uncertain to what extent measures based on ‘non-product related’ PPMs are covered by TBT provisions.⁶¹

It is worth recalling that – despite the ostensible reticence of the WTO to accept PPM-based measures – the TRIPS Agreement (WTO Agreement on Trade-Related Aspects of Intellectual Property Rights) already *requires* WTO members to discriminate between ‘like’ goods on the basis of non-product-related PPMs. TRIPS obliges members to ensure that intellectual property rights have been respected in the production process, but respect for intellectual property rights does not physically alter the final product.⁶²

A departure from the WTO-approach is arguably necessary to guarantee states the policy space to distinguish between products



Products produced with electricity from coal have higher embedded emissions than those manufactured with electricity from renewable energy sources.

Photo: Tony Webster on flickr

and services based on relative emissions. Designing measures that comply with WTO non-discrimination rules may be possible,⁶³ but – if challenged – the WTO-compliance of PPM-based measures is likely to hinge on whether they are justifiable under the GATT Art. XX Exceptions. Experiences to date of invoking Art. XX are not reassuring in this respect (see below, Section 4.3). Rather than relying on ‘exceptions’, determinations of ‘likeness’ under non-discrimination rules should take PPMs – and particularly embodied GHG emissions – into consideration; this would circumvent the need for Parties to *defend* such measures under Art. XX. in a dispute, and thus better serve to promote legal certainty in policy-making.

Finally, establishing a fair and reliable framework for such differentiation raises technical challenges. In practice, calculating a product’s embodied carbon raises complex questions concerning the methodologies used for quantification.⁶⁴ Indeed, calculating the carbon content (or footprints) of goods or services traded internationally has the potential to become a highly contested and politicised issue – in much the same way as ‘risk assessment’ has done in regard to food safety standards. While these global issues cannot be comprehensively dealt with under the auspices of *bilateral* FTA negotiations, the EU may be strategically well-placed to contribute to the evolution of multilateral standards and its FTAs could serve to pave the way for multilateral consensus on environmentally-based PPM distinctions, or an agreement among WTO members endorsing a methodology by which embodied carbon emissions should be calculated. Pilot initiatives on Product Environmental Footprint (PEF) and Organisation Environmental Footprint (OEF) methodologies for the EU single market have been underway for ten years, under the auspices of DG Environment.⁶⁵ An evolving body of international standards for the calculation and monitoring of GHG emissions produced by goods and services could also provide useful reference points – for example, the International Standards Organisation (ISO) 14060 ‘family’.⁶⁶ That said, the ISO is an industry-driven and producer-oriented body, with a ‘highly unbalanced’ membership skewed towards developed countries.⁶⁷ Reference to ISO standards in an FTA should be balanced by commitments on the part of the EU to provide technical assistance and capacity building to developing country partners to increase their engagement in international standard-setting organisations.

Ultimately, this issue of calculation may prove unavoidable for states intending to use a border carbon adjustment (BCA) mechanism, which could similarly require PPM-based

differentiation. Some of the issues unique to BCAs are discussed below.

Recommendations

- **Expressly permit FTA Parties to condition market access on PPM-based grounds, with reference to environmental sustainability and climate change**

- ▶ *This could be achieved by including a clarification to the National Treatment provisions concerning trade in goods and services, expressly referring to differentiation based on embodied carbon or GHG emissions.*

- **Establish a framework of cooperation to support Parties’ adoption of trade-restrictive measures guided by calculations of GHG emissions associated with the entire life cycle of products**

- ▶ *Whether by reference to ISO, other international instruments, or EU standards, this framework should permit Parties to take climate mitigation and adaptation actions, through the adoption of technical regulations and standards, as well as through public procurement and investment policies. FTAs should provide that climate-related labelling and similar technical regulations, conformity assessment procedures, including requirements for quantification and reporting of GHG emissions and reductions based on relevant ISO standards, are all assumed to fulfil a ‘legitimate objective’ in the sense of WTO TBT Agreement, Art. 2.2.*

- ▶ *Through public consultations (see below, Section 5), FTA negotiators should aim to identify specific cooperative activities to address emissions-intensive production and to design time-bound commitments to implement emissions-reducing initiatives in export-oriented sectors, in particular to ensure that developing country exporters are able to fulfil existing or future climate-related TBT requirements. To that end, and with reference to the principles of non-discrimination and CBDR, the EU should undertake concrete commitments to increasing its technical assistance and capacity building with developing country FTA partners, as well as addressing intellectual property barriers to the transfer of necessary technology.*

- ▶ *To further the effective implementation of such policies, more stringent due diligence obligations on businesses will be required to improve data collection and monitoring of supply chains, environmental assessments and traceability of raw materials (see below, Section 3.1).*



Even if “like” products or services differ in their embodied emissions (like the energy used to produce them), states might find themselves constrained to differentiate between them in trade policy.

Photo: Science in HD on Unsplash

- **Commit Parties to support in principle necessary WTO reforms including:**

- ▶ *A comprehensive and collective climate waiver ‘from WTO obligations for all trade-restrictive climate response measures that are based on the amount of carbon used or emitted in making a product, and that are taken in furtherance of and in compliance with the Paris Agreement and the UNFCCC’.*⁶⁸
- ▶ *A legally binding interpretation of relevant provisions of the GATT (Arts. I:1, III:2 and III:4), as well as all relevant provisions of the ASCM and TBT Agreement, to mandate the DSB to include ‘embodied carbon’ in the criteria used to determine ‘likeness’.*

2.2.2 Border carbon adjustments (BCAs)

Implementation of border carbon adjustments (BCAs) looks set to dominate much trade and climate change debate in coming years. The December 2019 roadmap for a European Green Deal includes a proposal for a BCA mechanism to be adopted for certain emissions-intensive sectors by 2021. Mexico’s NDC explicitly refers to BCAs, many other countries have expressed interest in using them, and there is widespread and growing support for them in the EU.⁶⁹ No country has to date adopted one.

BCAs could take the form of an internal tax or tariff – equivalent to the carbon costs imposed on domestic producers – applied to imports produced without comparable costs.⁷⁰ Their primary rationale is the wide disparity in climate policies in different jurisdictions. BCAs are usually discussed as a method to protect domestic producers from adverse competition due to imports from jurisdictions with a lower carbon price; they ostensibly prevent so-called ‘carbon leakage’ by reducing the benefits of relocating production outside of the regulating jurisdiction. Some also suggest that BCAs incentivise exporting states to adopt more ambitious climate targets.

Due to policy-makers’ interest, many experts have addressed whether BCAs can be designed so as to respect WTO rules.⁷¹ Importantly, to be WTO-compliant, BCAs may need to be applied to imports of covered goods *irrespective of origin*, meaning that French President Emmanuel Macron’s popular proposal to use BCAs to target countries that withdraw from the Paris Agreement would likely fall foul of multilateral trade rules. Arguably, such a sledgehammer approach might not even pass muster in terms of its environmental objectives – as the Paris Agreement is so compromised and NDCs are of questionable integrity, that a correlation between Paris membership and GHG emissions reduction *per se* cannot be assumed.⁷² On the other hand, *undifferentiated* application of BCAs on all imports would harm developing countries disproportionately, and disregard the principle of CBDR.

An additional challenge is the fact that, like PPMs, BCAs would require a determination of the carbon content of imports. The simplest method for such determination would be to rely on the ‘Best Available Technology’ (BAT) as a benchmark for estimating the emissions intensity of imports: this is widely deemed as the method least likely to violate WTO rules, but also the least effective at creating incentives for low-carbon production, as well as protecting against carbon leakage.⁷³ More effective and equitable, would be to design BCAs based on actual differences in embodied carbon: emissions from the production process, as well as energy inputs. But, as noted above, this is a type of ‘non-product related PPM’, the legality of such differentiation under WTO rules is uncertain,⁷⁴ and the methodologies for calculating carbon content should be based on a multilaterally agreed international standard – where to date none exists. For these reasons, the efficacy of BCAs as a method of addressing carbon embodied in trade is open to question: the least complicated and contentious variations may have limited coverage in practice;⁷⁵ while

BOX III

Carbon pricing: Making polluters pay?

Carbon pricing has been dubbed ‘the single most powerful and efficient tool to reduce domestic fossil fuel CO₂ emissions’.⁷⁶ Whether this claim is valid or not, putting a price on carbon can be seen as an important application of the ‘polluter pays’ principle. The High-Level Commission on Carbon Prices (HLCCP) has recommended that in order to deliver on the Paris Agreement, carbon prices need to be at least in the range of US\$40–80/Ton CO₂ by 2020 and US\$50–100/tCO₂ by 2030.⁷⁷

A *global carbon price* would render BCAs wholly unnecessary – but this is widely regarded as politically untenable.⁷⁸ In the absence of a multilaterally agreed price, domestic carbon prices vary widely. As of 2019, fifty-seven jurisdictions had either implemented carbon pricing initiatives or scheduled them for implementation; these initiatives raised US\$44 billion/year in revenues globally, and cover approximately 20 % of global GHG emissions.⁷⁹ Of the emissions covered, less than five per cent is priced at a level consistent with the HLCCP recommendations.⁸⁰

In short this means that existing carbon pricing initiatives *price carbon too low* to ensure the emissions reductions necessary to keep any increase in global average temperature well below 2°C above pre-industrial levels – the Paris Agreement target. The EU’s Emissions Trading System

(ETS) – the largest carbon pricing initiative to date – is a good example of under-pricing: in 2019 it priced carbon at \$25/Ton CO₂,⁸¹ and the free and over-allocation of carbon credits has enabled some companies to make windfall profits from trading credits they never needed. Despite a 2008 European Commission reform proposal planning to phase out free allocation entirely by 2020, the 2018 revision of the ETS Directive has extended the system of free allocation for another decade.⁸² Arguably the ETS is a subsidy to polluters.⁸³

Recent IMF estimates further suggest that several states’ have achieved an “effective” carbon price *higher* than the HLCCP target through “*implicit*” carbon pricing – that is compliance costs on activities that emit carbon, such as performance standards and other regulations, as well as subsidy reforms.⁸⁴ In relation to BCAs, it is therefore clear that in order to avoid ‘penalising countries implementing their mitigation pledges through non-pricing means’,⁸⁵ such measures must take account of both ‘explicit’ and ‘implicit’ costs – the sum of which is the *effective carbon price*. But calculating effective prices would significantly raise the administrative complexity of these measures. For that reason, the IMF proposes that the ‘*stick*’ of BCAs, is likely to be significantly less effective in building consensus on global carbon pricing, than the ‘*carrot*’ of *technology transfer*.⁸⁶

BCAs designed to be more environmentally effective could create a potentially impossible administrative burden, and are likely to invite allegations of green protectionism, as well as legal challenges and retaliation, ultimately creating more problems than they resolve.

EU FTAs might nevertheless be used to address some of the environmental, legal and technical challenges that these measures raise. To date, carbon pricing is a rather rare topic for inclusion in an FTA, but at least one EU FTA provision already aims to promote Parties’ exchange of information on these matters.⁸⁷ Arguably however, FTA provisions should first aim at fostering and expediting a multilateral consensus on carbon pricing (see Box III).



The introduction of Border Carbon Adjustments will be a controversial issue in the years to come, yet its effectiveness has been questioned. Photo: Mobil Kamera on flickr

Recommendations

- **Commit FTA Parties to raising domestic carbon prices in line with the HLCCP targets**

► *The HLCCP acknowledges a need for flexibility in price levels taking into account other factors including complementary environmental policies, development considerations and poverty-reductions strategies, as well as historical contributions to climate change, in line with the principle of CBDR.⁸⁸ FTA provisions should reflect these considerations.*

- **Include a declaration that FTA Parties regard BCAs as permissible under certain conditions**

► *FTAs could make Parties' adoption of BCAs conditional on:*

► *Mandatory exemptions for exports from Least Developed Countries or all developing countries, with express reference to the principle of CBDR.*

► *A requirement to redirect all revenue created towards climate mitigation and adaptation measures in developing countries, with LDCs and Small Island Developing States (SIDS) given priority. Revenue could be specifically earmarked for capacity building and technical assistance on measurement, reporting, and verification of emissions, or on carbon pricing.*

► *A requirement that Parties imposing BCAs first fulfil the HLCCP carbon price target in their territories, thereby encouraging Parties to increase the ambition of their domestic pricing initiatives as a pre-condition to deploying BCAs. Any ETS – such as the EU's – that permits free allocation would clearly fail to meet this criterion.*

► *Guarantees for foreign producers to access transparent procedures for demonstrating the actual climate performance of their products, through a process of third-party verification, or for documenting compliance costs comparable to those in the importing state. This process should offer importers the opportunity to claim deductions from BCAs on the basis of verified emissions or emissions costs in the exporting state.*

► *FTAs might further contain a declaration that Parties regard such BCAs as WTO-compliant.*

► *In view of the technical challenges these measures raise, FTAs could further address issues of methodology for calculating carbon content by committing Parties to cooperate on multilateral efforts towards establishing an international standard.*

2.3 Technology Transfer

The capacities of states to make a rapid transition away from a fossil-fuel based economy depends significantly on their ability to adopt, manufacture and maintain low-carbon technologies to achieve their climate mitigation efforts – as is reflected in the large number of NDCs referring to technology transfer.⁸⁹ The Paris Agreement aims to promote technology transfers by establishing a Technology Mechanism and accompanying framework (Arts. 10.1, 10.3 and 10.4), and the Katowice Climate Package includes obligations for developed countries to report on their financial support, technology transfer and capacity building activities with developing countries. Technology transfer can also be closely related to the principle of CBDR: UNCTAD's 2019 Trade and Development Report observes that, in particular, '[d]eveloping countries with abundant reserves of fossil fuel will continue to tap these if development priorities depend on their extraction and users are charged market prices (as per international trade agreements) for cleaner technologies'.⁹⁰

It is long apparent that intellectual property rights (IPR) protection may hinder transfer of cleaner technologies. The WTO TRIPS Agreement provides a baseline of IPR commitments for WTO members; whether it provides sufficient flexibility for rapid technology transfer is somewhat contested. Crucially, TRIPS permits – under exceptional circumstances – 'the use of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government' (Art. 31), otherwise known as *compulsory licencing*. Recent years have witnessed a significant surge in renewable energy related patents filed globally – with some 10,500 in 2016 and 14,800 in 2017.⁹¹ Patents in this sector are highly concentrated in a few leading countries, with Japan, the US, Germany and China accounting for over 60% of patents in green energy technologies worldwide.⁹²

In 2007, the European Parliament adopted a resolution recognising the imperative of transfer of technology to developing countries and urging for 'corresponding adjustments' to be made to international agreements concerning intellectual property in light of climate change; the resolution also refers to 'possible



The development of low-carbon technologies is key for states to be successful in their climate mitigation efforts.
Photo: Science in HD on Unsplash

amendments to the [TRIPS Agreement] in order to allow for the compulsory licensing of environmentally necessary technologies'.⁹³ No such action has been taken... In 2009, the WTO and UNEP acknowledged that IPR-holders market power allows them 'to limit the availability, use, and development of technologies, and this may result in higher costs for the acquisition of technologies'.⁹⁴ In 2012, the UNFCCC Technology Executive Committee invited submissions on 'ways to promote enabling environments and to address barriers to technology development and transfer, including on the role that the [TEC] could possibly play in this area of work'.⁹⁵ Several concrete proposals were made,⁹⁶ but the TEC merely served to identify IPRs as an area in which 'more clarity' is needed. The UNFCCC, Kyoto Protocol and Paris Agreement are all silent on the issue of IPR protection.

While many EU FTAs refer to striking a 'balance' between IPR and technology transfer, they contain little content that could serve to induce such transfers.⁹⁷ Several EU FTAs refer to the potential abuse of IPR by rights-holders.⁹⁸ Some FTAs include more extensive provisions on related cooperation and promotion activities.⁹⁹

Other policies that might promote technology transfer are expressly prohibited in EU FTAs. For instance, many EU FTAs agreements prohibit the use of "offsets" in public procurement.¹⁰⁰ Not to be confused with 'carbon offsetting', offset measures are associated with 'infant industry' strategies and refer to conditions or undertakings that encourage local development (or improve balance-of-payments accounts of a Party), such as the use of *local content requirements* (LCRs) or *licensing of technology*.¹⁰¹ Several studies suggest that the use of such requirements contributed

significantly to the rapid uptake of renewable energy technologies in China and Brazil (for further discussion on LCRs, see below, Section 2.5).¹⁰² Some EU FTAs further prohibit *both* technology transfer requirements *and* LCRs in their Investment Chapters.¹⁰³ By restricting FTA Parties' use of investment performance requirements or green procurement policies to foster technology transfer, the EU particularly risks locking developing countries into positions of 'mere passive recipients',¹⁰⁴ with little more to rely on than the largesse of the EU, its patent holders and investors. The Paris Agreement, the principle of CBDR, as well as relevant TRIPS provisions,¹⁰⁵ require much more than this.

Recommendations

- **No inclusion of provisions that limit Parties from promoting technology transfer through offsets, LCRs or other performance requirements in their public procurement and investment policies**
- **No extension of TRIPS' standard of patentability¹⁰⁶ nor its terms (duration) of protection**
- **Require the exclusion from patentability of certain 'inventions' in order to 'avoid serious prejudice to the environment' (pursuant to TRIPS Art. 27.2) and grant Parties broad discretion in applying this exclusion to climate-mitigation technologies**
- **Include a declaration to the effect that the climate emergency is deemed to fall within the definition of 'circumstances of extreme urgency' (TRIPS Art. 31(b)), and thus warrants compulsory licencing in order to overcome IPR barriers to the transfer of climate-related technology**

- ▶ FTAs should establish climate-related criteria for these and other measures, including flexibility on compulsory licencing for exports (not generally permitted under TRIPS).
- ▶ The provisions of the Paris Agreement on its Technology Mechanism and accompanying framework (Art. 10) should also be incorporated and Parties should commit to comply with and promote these mechanisms.
- **Include transparency commitments for Parties to legislate for disclosure and dissemination of existing climate-related IPRs**
- **Commit FTA Parties to cooperate on and support in principle an amendment to the WTO TRIPS Agreement – along the lines of the 2001 ‘public health’ Declaration – permitting the use of compulsory licensing for climate-mitigating technologies¹⁰⁷**
 - ▶ A further TRIPS Agreement amendment could be included, aimed at permitting WTO members to exclude key climate technologies from patent protection.
 - ▶ FTA Parties should include a declaration clarifying that all measures taken to implement the Technology Mechanism and other provisions of the Paris Agreement are deemed compatible with the WTO ASCM, the WTO Agreement on Trade-Related Investment Measures (TRIMS Agreement) and the TRIPS Agreement.



Many species are threatened by climate change: for example the bumblebee by its shrinking habitat.
Photo: Thomas David Cornwell on Unsplash

2.4 Biodiversity, Food Security and Food Safety

Although biodiversity is referred to only in the Preamble of the Paris Agreement, it is widely acknowledged that ‘climate change and biodiversity are interconnected’: ‘Biodiversity is affected by climate change, with negative consequences for human well-being, but biodiversity, through the ecosystem services it supports, also makes an important contribution to both climate-change mitigation and adaptation’.¹⁰⁸ Climate change thus threatens in particular the livelihoods of those ‘dependent on biodiversity and ecosystem biodiversity and ecosystem services such as access to food, water and shelter’,¹⁰⁹ and is anticipated to greatly increase the necessity of international exchange of genetic resources, as different regions and countries seek to realise their mitigation and adaptation policies.¹¹⁰ Temperature changes will also ultimately dramatically alter the global distribution of plants, animals and microorganisms, with implications for agriculture and livestock, incidences and susceptibility of pests and food-borne diseases.

As noted in the introduction, this study does not examine in further detail the issue of biodiversity loss per se, or the impacts of *increased trade* in specific products (biofuels, timber and other raw materials) on biodiversity loss. Rather, this section addresses biodiversity and trade law in respect of three specific issues: i) farmers’ rights to save, use, exchange and sell farm-saved seed; ii) access to, and sharing of benefits from, biological genetic resources; iii) phytosanitary security. These rules critically shape the management and exchange of genetic resources for food and agriculture, as well as on equitable access to those resources, with significant implications for food security and safety.

2.4.1 Farmers’ Rights

IPR regimes pose a potential threat to farmers’ rights to ‘adapt protected [plant] varieties to changing climatic and locally specific conditions (as well as to enjoy the economic benefits of producing their own seed)’.¹¹¹ It is estimated that farm-saved seeds account for over 80% of farmers’ total seed requirements in some African countries.¹¹² To this end, the FAO urges countries to sign and implement the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), which safeguards the rights of farmers to maintain genetic resources for purposes of food security and climate change adaptation. The TRIPS Agreement accords WTO members flexibility in this respect by permitting the

exclusion of plant varieties from patent protection, provided that these are protected by an alternative 'effective sui generis system', which could ensure farmers' rights are protected (Art. 27.3(b)).

Many EU FTAs however require Parties to ensure the protection of plant varieties in accordance with the (revised 1991) International Convention for the Protection of New Varieties of Plants (UPOV).¹¹³ This Convention favours *commercial plant breeders' rights* and is widely viewed as detrimental to farmers' rights.¹¹⁴ Several FTAs state that Parties should implement the 'optional exception to the right of the breeder' in UPOV Art. 15(2), but this exception 'would not allow national laws to permit small-scale farmers to freely exchange or sell farm-saved seed/propagating material even if the breeders' interests are not affected (e.g. small amounts or for rural trade)'.¹¹⁵ Though some EU FTAs also make reference to the ITPGRFA, this treaty is incompatible with the obligation imposed on FTA Parties to ensure plant variety protection in accordance with UPOV 1991.¹¹⁶

Recommendations

- **Require Parties to sign and implement the ITPGRFA**

- ▶ *Following the example of the EU-CARIFORUM FTA, agreements should expressly recognise that Parties 'have the right to provide for exceptions to exclusive rights granted to plant breeders to allow farmers to save, use and exchange protected farm-saved seed or propagating material'.*¹¹⁷

- *Further FTA provisions could be based on an existing model for a sui generis regime supportive of the objectives and the obligations under the CBD, the Nagoya Protocol and the ITPGRFA – as developed by the Association for Plant Breeding for the Benefit of Society.*¹¹⁸

2.4.2 Bio-piracy, Consent & Benefit Sharing

Multilateral efforts to address the misappropriation by corporations of genetic resources and traditional knowledge have long proven divisive. So-called 'bio-piracy' is facilitated by IPR protection and occurs when multinational corporations commercially exploit these resources without compensating the communities in which they originate. The Doha Declaration in 2001 mandated a review of the issue in relation to TRIPS Agreement and the Convention on Biological Diversity (CBD), but little progress has been made.¹¹⁹



The rights of farmers to save and reuse seeds and their ability to grow species adapted to local conditions are essential for climate change adaption and to achieve food sovereignty. Photo: © 2015 CIAT/Stephanie Malyon on flickr

The CBD promotes the conservation and sustainable use of biodiversity and emphasises the importance of traditional knowledge systems and practices to this end. Developing countries have long advocated that in order to deal with bio-piracy and ensure consent and benefit sharing, the international IPR regime should adopt *mandatory disclosure obligations* for genetic patent applications.¹²⁰ The 2014 Nagoya Protocol to the CBD aims to ensure biodiversity protection through the sharing of benefits derived from the use of biological genetic resources,¹²¹ but like the CBD does not require mandatory disclosure obligations.¹²² Several states submitted a draft text to the WTO in 2011 to reform the TRIPS Agreement in order to make such disclosures mandatory, though it was not adopted.¹²³

The EU has in principle expressed support for mandatory disclosure obligations.¹²⁴ However EU law only encourages patent applicants to voluntarily disclose the 'geographical origin' of 'biological material of plant or animal origin' where an invention is based on or uses such material,¹²⁵ and stipulates compliance measures derived from the Nagoya Protocol.¹²⁶ Several EU FTAs contain IPR provisions committing Parties to 'respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity'.¹²⁷ These provisions would *permit* FTA Parties to impose requirements for the disclosure of the origins of genetic resources and biological materials in the patenting process, and the sharing of benefits – but no FTAs to date *oblige* Parties to impose such requirements.



Greenflies: with rising temperatures incidences of pests and food-borne diseases are expected to rise.
Photo: horror by numbers on Unsplash

Recommendations

- Commit Parties to ensuring that their domestic patent laws require patent applicants to disclose the origins of genetic resources on which innovation is based where the subject matter of a patent application involves utilisation of genetic resources and/or associated traditional knowledge
 - ▶ FTA Parties could further commit to support in principle relevant amendments to the TRIPS agreement. The EU Parliament in 2013 resolved to support an amendment to this effect.¹²⁸ Provisions from the 2011 draft TRIPS amendment cited above could serve as a model.

2.4.3 Food Safety and Health

According to the FAO, changes in climatic conditions can be expected to produce significant shifts in the nature, geography and incidence of pests and food-borne diseases, as well as in human responses to protect food production and other plant and animal products.¹²⁹ Precise impacts can however be difficult to predict. With these changing conditions, a need for new trade measures related to food safety and animal and plant health can be anticipated in the near future.

The WTO SPS Agreement has proven highly contentious to date – in particular with regard to the precautionary principle and the issue of risk assessment. As discussed briefly above, the SPS Agreement permits only *provisional* measures in the absence of scientific certainty.

But new climate-related challenges clearly require proactive policies, which will inevitably be based on speculative models and predicted scenarios. Committing more resources to scientific research can however contribute to minimising the need for precautionary SPS measures and thus help mitigate the impacts of trade restrictive measures on developing countries.

Recommendations

- Affirm each FTA Party's right to invoke the precautionary principle in relation to the adoption and implementation of SPS measures
 - ▶ This should include provisions on risk assessment, which expressly refer to climate considerations and the principle of CBDR, and commit the EU to adopt in conjunction with any precautionary measures a strategy to mitigate impacts on developing countries.
- Commit the EU and developed country FTA Parties to dedicate greater resources to both scientific research on SPS-related issues and risk assessment activities at national, regional and international levels
 - ▶ To this end, FTAs should commit the EU to increasing its SPS technical assistance and capacity building with developing country partners, particularly in relation to research, risk assessment, surveillance and monitoring, in accordance with the principle of CBDR.
- Include a declaration that World Health Organisation recommendations for climate-smart health policies are considered SPS-compatible – as international standards within the meaning of SPS (Art. 3.4 and Annex A, para. 3) – and commit Parties to support a WTO declaration to this effect

2.5 Public Sector

The public sector will contribute significantly to driving global climate action, the energy transition and the development of renewable energy industries. Creating a stable and predictable environment for using public financing and incentives to promote the production and use of environmentally-sound energy requires careful consideration of subsidy reform, as well as the use of trade remedies against imports. Finally, the contribution of public services and government procurement – particularly in relation to energy, transport and environmental services – will be essential to climate change mitigation and adaptation.

2.5.1 Fossil Fuel Subsidies

The need for fossil fuel subsidy reform could hardly be more obvious or urgent, and several NDCs refer to their phase-out.¹³⁰ According to the WTO and UN Environment, '[r]emoving fossil fuel subsidies would raise government revenue by US\$ 2.9 trillion, while reducing global carbon emissions by more than 20 per cent and air pollution-related deaths by 55 per cent'.¹³¹ EU member states committed to phase out fossil fuel subsidies at the G20 ten years ago, but none has developed a comprehensive plan for doing so. Between 2014 and 2016, EU member states gave on average €55 billion per year in fossil fuel subsidies.¹³² The EU was conspicuously absent from the declaration on the phase-out of fossil fuel subsidies signed by twelve WTO members in the margins of the 2017 Ministerial Conference.¹³³

In 2019, five states (Fiji, Iceland, New Zealand, Norway, and Costa Rica) launched an initiative towards a plurilateral 'Agreement on Climate Change, Trade and Sustainability' (ACCTS) which includes the ambition to establish 'disciplines to eliminate harmful fossil fuel subsidies'.¹³⁴ Though still slim on detail, the ACCTS is intended to be 'open to all who can meet the established standard' with the objective of eventually becoming a multilateral agreement.

Detail will be much needed, as fossil fuel subsidy reform raises complex legal, economic, social *and* environmental issues. Some attempts to model fossil fuel subsidy elimination suggest that actions taken unilaterally or by certain states may have very different impacts when compared to concomitant elimination of subsidies globally – in terms of emissions, distributive impacts as well as carbon leakage.¹³⁵ To best serve emissions reduction, even coordinated global action might be ideally combined with an emissions cap in OECD countries.¹³⁶ Whatever the geographic scope, fossil fuel subsidy reform also needs to be accompanied by enhanced support for social protection and poverty reduction. In this respect, it is widely accepted that revenue savings from reform can be re-directed and would be sufficient to establish mitigation measures.¹³⁷ But experiences of subsidy reforms in Mexico, France and Ecuador in recent years illustrate that hasty reform can certainly 'go wrong'.¹³⁸ Approaches to reform must therefore be tailored to specific contexts: for instance, while it might seem prudent to distinguish between "consumer" subsidies and "producer" subsidies, even eliminating the latter may nonetheless impact vulnerable groups through indirect price effects.

To date, only the EU-Singapore FTA contains reference to the Parties' shared goal of

'progressively reducing subsidies for fossil fuels' (Art. 13.11.3). While welcome, this provision holds little promise without further elaboration. FTAs must contain more detailed commitments. Provisions on fishing subsidies in the CPTPP could provide further inspiration: these include a clear prohibition on subsidies 'for fishing that negatively affect fish stocks that are in an overfished condition', as well as a commitment to 'bring existing inconsistent subsidies into line with their CPTPP commitments within three years of the agreement's entry into force'.¹³⁹ These FTA provisions have even shaped subsequent proposals in WTO negotiations on fisheries subsidies, demonstrating that progressive FTA clauses can contribute to multilateral reform.¹⁴⁰

Transparency is likely to be critical to reform and notification requirements essential. The EU-South Korea FTA requires Parties to provide an annual report on the 'total amount, type and the sectorial distribution of subsidies which are specific and may affect international trade' (Art. 11.12.1). However, similar to existing notification provisions under the ASCM, these will likely fail to increase transparency of fossil fuel subsidies, which are neither necessarily 'specific' (in the meaning of the ASCM), nor do they necessarily adversely 'affect trade'. A much more comprehensive methodology for identifying and measuring fossil fuel subsidies was published in 2019 by experts from UN Environment – working with the OECD and the Global Subsidies Initiative (GSI) – for the purposes of fulfilling its mandate as custodian of the relevant indicator for achieving Sustainable Development Goal 12 (to 'ensure sustainable consumption and production patterns').¹⁴¹

Recommendations

- **Make FTA commitments on cooperation, notification and eventual phase-out of fossil fuel subsidies time-bound and subject to periodic assessment and review by institutional mechanisms established under the FTA**

- **Commit Parties to identifying and notifying their fossil fuel subsidies, and to cooperate on developing a common template for notification**

► *FTAs should stipulate a definition of fossil fuel subsidies and a methodology for measuring them. The UN Environment's methodology for fulfilling Sustainable Development Goal 12 (cited above) could be incorporated by reference into provisions on notification. The EU should combine these requirements with appropriate support for technical assistance and capacity building with developing country FTA partners.*

- ▶ *Parties should commit to harmonise FTA notification processes with any developed in WTO fora, or in the absence of multilateral action, to cooperate and support the adoption of notification obligations under the ASCM. The European Commission has already proposed such transparency reforms for the WTO.¹⁴²*
- **Include specific time-bound commitments on fossil-fuel subsidy phase-out, with such subsidies being prohibited after a period of flexibility**
 - ▶ *Any obligation to phase-out subsidies must be combined with specific obligations to mitigate impacts on vulnerable consumers, communities, workers and other groups, through social protection, public welfare and infrastructure programmes.*
 - ▶ *In line with the principle of CBDR, the EU should commit support to supplement the mitigation policies of developing countries, for example through technical assistance, capacity building and technology transfer. Fossil-fuel subsidy phase-out in developing countries could be further encouraged by expressly linking it to other trade commitments – for instance, permitting the use of local content requirements for development of infant industry in the renewables sector, or the use of compulsory licencing for technology that supports climate change mitigation and adaptation, while agreeing to abstain from using trade remedies against environmental goods.*

2.5.2 Incentives for Renewable Energy

While fossil fuel subsidies have never been subject to a WTO complaint, measures to support the renewable energy sector – cited in numerous NDCs – have increasingly faced challenges. As one scholar puts it, clean energy subsidies and incentives are ‘emerging as the most concrete testing ground for assessing the mutual supportiveness of WTO rules and climate change law’.¹⁴³ More frequently, ‘trade remedy’ measures are also being used to counteract support measures in this sector *unilaterally*, which can also significantly raise the costs of renewable energy goods.¹⁴⁴ This issue is addressed separately below.

Several WTO disputes have addressed the use of local content requirements (LCRs) to promote the renewable energy sector. Used in Feed-in-Tariff (FIT) incentive schemes, LCRs condition eligibility of renewable energy projects on their use of a minimum percentage of locally sourced goods. Several LCRs have been found to violate WTO rules (namely, GATT Art. III.4 and TRIMs Art. 2.1),¹⁴⁵ but in practice LCRs are widely used – including by EU member states – and the vast majority go unchallenged.¹⁴⁶

LCRs are somewhat controversial and as noted above, several recent EU FTAs extend the WTO prohibitions on LCRs in their procurement and investment chapters. OECD research suggests that LCRs create distortions detrimental to the renewable energy



Between 2014 and 2016, EU member states gave on average €55 billion per year in fossil fuel subsidies.
Photo: Grant Durr on Unsplash

sector and are therefore ineffective and increase costs; it recommends alternatively more targeted support to R&D, carbon pricing and non-discriminatory incentives.¹⁴⁷ However LCRs *can* be key drivers of infant industry development, as well as technology transfer; whether they *are* or not depends a good deal on their context and design.¹⁴⁸ Governments often argue that they are a ‘political necessity’ in building domestic support for environmental policies by creating local opportunities for businesses and workers. Whether such political expediency claims are legitimate is practically impossible to assess without counterfactual argumentation.

Rather than outright prohibition, the EU should incorporate into its FTAs some basic principles to guide the use of LCRs, based on sound empirical analysis of their benefits and pitfalls. Some experts specifically recommend that LCRs are effective when: i) time-bound and conditioned on periodic evaluation; ii) directed at select technologies; and iii) linked to training and integrated into a wider set of relevant policies.¹⁴⁹ The simplest proposition might therefore be to permit LCRs provided that they *contribute to sustainable development* and are *time-bound*; this would serve to fulfil the ‘political necessity’ of garnering domestic support for environmental policies, while ensuring that discrimination in favour of domestic industry does not become a permanent market distortion.

Recommendations

- **Permit Parties to use performance requirements – including LCRs – with reference to objectives of environmental protection and sustainable development, technology transfer and infant industry development in the renewable energy sector**
 - ▶ FTAs should expressly permit Parties to use LCRs in their green government procurement policies.
 - ▶ Provisions should commit Parties to using such measures on the condition that they are time-bound and periodically reviewed.
 - ▶ FTAs should neither ban such requirements in their Investment Chapters, nor provide any avenues for investors to challenge performance requirements or technology transfer requirements (for example by reference to TRIMS or TRIPS).
 - ▶ FTA Parties could make commitments on supporting bilateral or multilateral notification mechanisms for LCRs (to improve transparency and better inform industrial policy).



Under the WTO regime, support for the renewable energy sector faces more challenges than subsidies to the fossil fuel sector. Photo: Science in HD on Unsplash

- **Explicitly link commitments on fossil fuel subsidy reform and renewable incentives**
 - ▶ For example, FTAs could expressly accord Parties flexibility with regard to LCRs (and other incentives to the clean energy sector) on **condition** of fulfilling commitments to eliminate fossil fuel subsidies.
- **Commit Parties to support amendments to the WTO Agreements, for purposes of clean technology and energy transition, namely:**
 - ▶ to the TRIMS Agreement (Art. 2.1 and Annex) to permit developing countries a time-bound exception from the prohibition on domestic content requirements.
 - ▶ to the GATT (Art. XVIII Governmental Assistance to Economic Development) to expressly permit infant industry protection.

2.5.3 Trade Remedies

A related and often overlooked concern is the challenge that *unilateral trade remedies* pose for renewable energy incentives. Under WTO rules, states may unilaterally impose punitive ‘anti-dumping’ and ‘countervailing duties’ on imports in order to protect domestic industries against ostensibly anti-competitive and discriminatory practices.¹⁵⁰ These duties are imposed after an investigation prompted by complaints from domestic industries: countervailing duties are aimed at counter-acting subsidisation; anti-dumping duties are imposed in response to imports sold at below the ‘normal’ value. To be WTO-compliant, trade remedies must meet certain conditions, such

as proving injury and a causal relationship, but importing states may adopt them without consulting the WTO. Although exporting states can and sometimes do challenge the legality of unilateral trade remedies, the WTO dispute settlement bodies cannot order any compensation or reparation for damage already done. The administrative burden of investigating allegations of subsidisation or dumping also means these remedies are mostly a strategy of larger economies. Of forty-five trade remedy investigations initiated in the renewable energy sector from 2006 to 2015, the largest share was initiated by the EU (14 cases).¹⁵¹

One recent analysis concludes that trade remedies in this sector represent ‘de facto industrial policy tools’ which ultimately jeopardise green policies by increasing the costs of environmental goods and exacerbating trade tensions.¹⁵² Others have noted that unilateral retaliation in the renewables sector rarely targets ‘truly anti-competitive behaviour’, but rather ‘normal competition’.¹⁵³ Notably, the lapsed negotiations on a WTO Environmental Goods Agreement omitted any attempt to prevent members from frustrating trade in environmental goods through such unilateral retaliation.¹⁵⁴

The EU’s anti-dumping regulations currently permit for an exporting state’s ratification of and enforcement of MEAs (and international labour standards) to be taken into account when *calculating the price distortion* that has allegedly caused harm to domestic industry.¹⁵⁵ In CETA, each Party’s authorities may consider whether it is in the ‘public interest’ to apply less than ‘the full margin of dumping’ in calculating duties to be imposed on imports (Art. 3.3).

FTA provisions could go further by including commitments from FTA Parties to condition their use of trade remedies, or to refrain from their use entirely in relation to trade in clean energy and other environmental goods. These approaches should ultimately aim to prevent trade remedies from frustrating the rapid uptake of renewable energy goods by increasing costs, or (at least) to make trade remedies a more effective tool in addressing the relative environmental impacts of allegedly dumped or subsidised imports.

Recommendations

- **Three alternative approaches in EU FTAs might be possible:**

- ▶ *The most effective – and most contentious – would be to commit FTAs Parties to abstain entirely from imposing anti-dumping and countervailing measures on environmental goods.*¹⁵⁶ *This would likely be resisted by European industry.*

- ▶ *Alternatively, FTAs could stipulate that anti-dumping or countervailing duties be subject to a public interest test, which must include environmental – and in particular climate – concerns.*

- ▶ *A less radical approach would be to stipulate that Parties are obliged to condition their application of the ‘lesser duty rule’ on climate considerations. This could cut both ways, by **requiring** the application of the lesser duty rule in cases involving environmental goods (or the renewable energy sector), and **prohibiting** its application in cases involving goods with high GHG emissions.*¹⁵⁷ *This should ensure that the calculation of duties would be – to a degree – determined according to climate impacts.*

- **FTAs should also commit Parties to support in principle amendments to the WTO Agreements:**

- ▶ *Art. 8 of the Agreement on Subsidies and Countervailing Measures (ASCM) on non-actionable subsidies should be reinstated. This provision – which expired in 1999 – permitted certain types of ‘assistance to promote adaptation of existing facilities to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms’. Any amendment should clarify that subsidies directed at key climate-related research activities and industries are non-actionable under Art. 8. Such flexibility could be directly linked – even conditional upon – WTO members’ time-bound commitments to phase out of fossil fuel subsidies.*¹⁵⁸

- ▶ *The Anti-Dumping Agreement (ADA) should be amended to restrict WTO members’ use of anti-dumping measures for climate actions prescribed in NDCs, including subsidies or other incentives for climate-smart industries.*

2.5.4 Public Services and Procurement

Effective climate change mitigation and adaptation will depend on states’ ability to develop, expand and maintain public services, and to condition public procurement policies on environmental grounds. These public functions are not only critical for environmental policy, but also vital for healthy democratic societies, in which public ownership and control of essential services – transport, environmental services, energy – can ensure equitable access and provision, and helps to reflect public needs and preferences. Green government procurement policies may also serve as a vital

BOX IV

Local content requirements and trade remedies: Two sides of the same coin?

Under WTO rules, states enjoy wide discretion in adopting trade remedies, whereas local content requirements (LCRs) are basically prohibited. Experiences at the WTO highlight that these rules are being increasingly used to appease domestic industries through tit-for-tat retaliation.¹⁵⁹ In the renewable energy sector, industry interests have driven both the *adoption of punitive anti-dumping duties* and the *initiation of WTO challenges to LCRs*, with seemingly little regard for how these measures affect the energy transition.

The WTO dispute *India-Solar Cells* provides a useful illustration.¹⁶⁰ In 2014, Indian authorities imposed anti-dumping duties on solar cells and modules imported from China, the US and Malaysia following an investigation prompted by complaints from Indian manufacturers. These duties were imposed despite public concern that these could increase the cost of solar power projects in India. In retaliation, and at the behest of its own domestic manufacturers, the US initiated a WTO dispute challenging LCRs included in India's own 2010 flagship solar energy policy. At the time, the US itself had 'forty-four state renewable energy programs in twenty-three states' containing LCRs that potentially violated WTO rules.¹⁶¹ After the WTO Appellate Body ruled that India's LCRs violated WTO rules, India initiated a WTO dispute against the US' own LCRs. In 2019, a WTO Panel found in India's favour.

Notwithstanding whether the LCRs in these cases really were politically expedient for fostering domestic support for renewable energy, it is clear that international trade disputes will not provide an adequate forum for the development of renewable energy policies that balance the advantages of competition with the objectives of sustainable development and effective protection of the climate. Obviously, the criticism that *trade remedies* increase costs of renewables or other environmental goods can *also* be applied to *LCRs*. However, the argument that well-designed LCRs promote infant industry and technology transfer *does not apply* to trade remedies, *no matter their design*. Indeed, LCRs can hardly dodge allegations of discrimination, as they are *intended* to favour domestic producers. Unilateral trade remedies on the other hand purport to *remedy* anti-competitive practices, but often serve as proxies for protectionist tariffs.

Effective support for the renewable energy sector would be better served by ensuring that the *use of both LCRs and trade remedies be conditioned* on their contribution to climate change mitigation and sustainable development. Given the EU's current strong opposition to LCRs *per se*¹⁶² and its enthusiastic use of trade remedies to protect EU industry, prospects for reforming the EU's approach may be slim.

33



The use of trade remedies against renewable energy technologies hinders climate change mitigation.
Photo: Andreas Gücklhorn on Unsplash



Public services like mass transit are vital for a just transition to a low carbon society.

Photo: Madeleine Ragsdale on Unsplash

tool to stimulate demand for environmental goods and services, support local economies and infant industries, and even promote technology transfer.

While EU FTA Procurement Chapters contain much promotional language on green procurement, many clauses limit the capacity of Parties to adopt or maintain measures to protect the environment. For instance, some FTAs require that in respect of procurement obligations, any restrictive measures must be 'necessary' to achieve the policy objectives – an unnecessarily high threshold.¹⁶³ Moreover, as noted above, a number of EU FTAs prohibit 'offsets' in their Procurement Chapters. This blanket prohibition may hinder developing countries' attempts to promote the development of local 'infant' industries in environmentally-sound technologies, as well as the promotion of technology transfer, through performance requirements. Even the WTO Government Procurement Agreement (GPA), which also prohibits offsets, accords an exception to developing states, permitting them to negotiate upon accession 'conditions for the use of offsets, such as requirements for the incorporation of domestic content'.¹⁶⁴ Moreover, the GPA has limited coverage, due to its small membership of almost exclusively developed countries.

Increased trade in environmental services may similarly contribute to environmental protection, but FTAs sometimes curtail Parties' rights to regulate services by imposing strict conditions on any domestic licensing and qualification requirements, thus impairing states' ability to impose reasonable criteria on service providers (such as the conclusion of environmental impact assessments).¹⁶⁵

Prohibitions of performance requirements (including technology transfer) in investment provisions also limit states' ability to acquire the knowledge to develop domestic capacity for environmental services.

To this end, EU FTAs should ensure: i) that the provision of public services is excluded from liberalisation commitments; ii) that any liberalisation of environmental services serves environmental policy objectives; and iii) that FTA Parties retain the freedom to include sustainable development considerations in government procurement policies.

Recommendations

- **Include a strict carve-out of public services**

- *This could provide that the FTA 'does not apply to public services and to measures regulating, providing or financing public services'.*

- *Public services should be defined as 'activities which are subject to special regulatory regimes or special obligations imposed on services or service suppliers by the competent national, regional or local authority in the general interest'.¹⁶⁶*

- **Limit conditions on licensing and qualification requirements in Services Chapters to ensure Parties maintain regulatory space**

- *Requirements should make express reference to environmental criteria.¹⁶⁷*

- **Include clear provisions on government or public procurement that accord Parties the right to impose environmental and performance requirements**

- *These should include an unqualified right to 'prepare, adopt, or apply technical specifications to promote the conservation of natural resources or protect the environment' or to include environmental factors in the 'evaluation criteria' in tenders.¹⁶⁸*

- *Any offset provisions should expressly permit performance requirements in government procurement where these serve sustainable development goals.*

2.6 Carbon Offset Trading

The Paris Agreement lays the foundations for two market mechanisms to support Parties to achieve their NDC targets through trading in carbon offsets (Arts. 6.2 and 6.4). Such market mechanisms are a source of widespread controversy, in particular as they raise the risk of

richer countries (or high-emitting industries such as aviation) simply outsourcing their responsibilities, while maintaining or even increasing their own emissions. One 2015 study even found that offset trading under the Kyoto Protocol contributed to a significant increase in GHG emissions.¹⁶⁹

Precisely how the Article 6 provisions are to be operationalized is yet to be determined, and civil society groups have – by and large – opposed carbon offset markets *per se*. However, several states have expressed in their NDCs the intention to purchase offsets to achieve their reduction targets.¹⁷⁰ For example, New Zealand’s NDC calls for ‘unrestricted access to global carbon markets’ subject to traded units meeting reasonable standards of environmental integrity.¹⁷¹

To prevent global mitigation efforts being undermined by trade in units of dubious quality, as well as ensuring that countries fulfilment of NDCs are based on actual emissions reductions, the regulation of traded offsets may be ultimately unavoidable. If so, the critical factor will be how to ensure the ‘environmental integrity’ of units traded.¹⁷² Under the auspices of successive COPs, no consensus has been reached on such regulation, but initial independent assessments of NDC targets suggest that several problems with environmental integrity can be anticipated under the Article 6 mechanisms: some countries’ weak NDC targets could enable them to sell surplus units, without generating any actual emission reductions – a phenomenon dubbed ‘hot air’.¹⁷³ Moreover Australia, Canada, Japan, and the United States have expressly opposed establishing a single international body to oversee trading under the Paris agreement; and Brazil has been prominent in advocating for the carry-over of credits accumulated under the Kyoto Protocol’s Clean Development Mechanism, as well as for allowing countries to claim emissions reductions which they also sell to other countries (double-accounting).

Though controversial, the EU may be uniquely well-placed to promote international integrity of offset trading through its FTAs – at least with FTA partners that have *already expressed* their intention to use carbon markets to achieve NDC targets – and thereby strengthen the overall objectives of the Paris Agreement.

Recommendations

- **Include common principles on environmental integrity of units, committing Parties to adhere to them and to refrain from using mechanism types that involve high risks for environmental integrity**¹⁷⁴

► *Principles could address issues of double accounting and additionality,¹⁷⁵ as well as human rights impacts. Some proposals for ensuring the environmental integrity of carbon units have already been developed.*¹⁷⁶

- **Commit Parties to make any transfers subject to an automatic cancellation of 30%**

► *This would mean that transfers are more than “mere” offsets, and instead contribute to an **overall** mitigation in global emissions.¹⁷⁷ Under the Paris Agreement, ‘overall mitigation’ is an objective of Art. 6.4, but not Art. 6.2.*

- **Include a declaration that carbon units are not to be considered goods or services within the scope of the GATT or the General Agreement on Trade in Services (GATS)**

► *It is uncertain whether carbon units would be deemed goods or services under these agreements.¹⁷⁸ If a WTO dispute were to arise in the future concerning the differentiation of otherwise ‘like’ units on environmental integrity grounds (analogous to the PPM-debate, see above Section 2.2.1), the WTO Dispute Settlement Bodies would determine if the GATT or GATS apply. For the purposes of distinguishing units on environmental integrity grounds, it would therefore be essential that ‘environmental integrity’ be more clearly defined. Ideally such definition should be agreed by the COP, but prospects for a multilateral consensus on this matter seem slim. A definition included in a bilateral FTA might provide a reference point, but would be limited in effect to the FTA Parties and would not necessarily be taken into account in a WTO dispute (see below Section 4.4). An FTA declaration that the GATT or GATS do not cover carbon units may help to ensure at least that FTA Parties do not use WTO disciplines to undermine any agreement concerning these units’ environmental integrity.*

3. Corporate Justice



36

Trade agreements grant corporations extensive rights without any corresponding responsibilities for protecting people or the environment.

Photo: Ivan Bandura on Unsplash

It is no secret that the primary objective of the EU's FTAs is to promote the interests of businesses. In the European Commission's own bland terms: 'FTAs are major catalysts in opening markets and generating the framework conditions conducive to trade and investment'.¹⁷⁹ It is therefore little surprise that, to date, these agreements create practically no commensurate obligations for European companies or investors operating globally. The architects of these 'framework conditions' have paid scant attention to the widespread environmental damage (not to mention labour and human rights abuses) caused by European corporations and investors in their worldwide operations: the critical depletion of natural resources, deforestation and loss of biodiversity, degradation and pollution of land, river and marine resources, soil erosion and desertification, the production of hazardous waste and ultimately the climate catastrophe and all its attendant consequences...

Currently these agreements do little more than refer to voluntary business conduct; at the same time, the rights of investors are given priority over states' right to regulate.

Priority issues

- Commit Parties to impose mandatory due diligence obligations, and ensure the effective public oversight of business operations, as well as access to judicial remedies for victims of harm
- Remove investor-state dispute settlement and commit Parties to multilateral reforms of investment protection

3.1 Due Diligence & Corporate Accountability

A number of EU FTAs refer to issues of 'corporate social responsibility' (CSR) and 'responsible business conduct' in the context of cooperation activities and vague aspirational commitments to encourage the adoption of voluntary best practices.¹⁸⁰ Such provisions do little to further the implementation of robust human rights standards for corporations such as the UN Guiding Principles on Business and Human Rights (UNGPs) – a watershed in global efforts to address corporate justice and accountability, to which the EU and member states pledged full support in 2011¹⁸¹ – or the on-going negotiations towards a UN Binding Treaty on Business and Human Rights. The lack of implementation of the UNGPs in respect of EU trade policy is particularly lamentable, since these expressly outlined the threat that international trade and investment agreements pose to regulating business conduct, and recommended that states take care to 'retain adequate policy and regulatory ability'.¹⁸² Such caution has not been heeded: at best, the EU's FTAs cite a catalogue of soft-law instruments¹⁸³ that have long proven ineffective in preventing or remedying corporate misconduct.

In developing stricter provisions on corporate accountability, the EU's FTAs could take pointers from the evolving domestic legislation of EU member states. Seven EU member states have developed National Action Plans towards mandatory human rights due diligence for corporations.¹⁸⁴ The first such legislation in force – France's 'Duty of Vigilance' law – obliges companies to implement adequate and effective measures to identify risks within their supply chains, and to publically report these measures, as well as establishing judicial mechanisms to provide remedies to victims; the law also has its shortcomings, as there is no governmental authority monitoring compliance.¹⁸⁵

Such mandatory due diligence obligations could also be harnessed for improving traceability and transparency in supply chains, and FTAs may present particular opportunities in this regard. As noted above, differentiating products based on their PPMs – for example, on the basis of their relative ‘embodied carbon’ – raises not only legal, but also technical considerations. Improving the availability and quality of relevant data is essential to building the technical capacity to appropriately and equitably adopt PPM-based distinctions.

Recommendations

- **Oblige Parties to adopt and effectively implement domestic legislation aimed at promoting corporate justice objectives**

► At a minimum, these should include mandatory human rights due diligence laws, judicial mechanisms and monitoring institutions, drawing on the lessons of legislative developments in EU member states and other countries enacting National Action Plans to implement the UNGPs.

► FTAs should further specifically require domestic laws to impose supply chain traceability and transparency obligations on companies trading between FTA Parties, for example, to identify and report on the sources of raw material or components used in imported goods. The provisions of the EU’s Timber Regulation could provide some inspiration here: it requires traders to keep records of their suppliers and customers in order to facilitate the traceability of timber products.

► FTAs should also contain obligations for Parties to provide redress in cases of damage to the environment, which corporations have either caused or contributed to, with reference to the environmental obligations contained in the FTA. These provisions should emphasise the accessibility and efficacy of domestic legal systems,¹⁸⁶ and oblige Parties to provide domestic remedies.

► One additional, novel proposal would be to oblige FTA Parties to make companies’ obligations on CSR subject to competition law in domestic legislation.¹⁸⁷ This might be achieved by incorporating provisions of the Paris Convention for the Protection of Industrial Property, and could have the advantage of using existing trade law disciplines to establish a legally binding obligation on FTA Parties to ensure that the voluntary CSR promises of companies’ established in their jurisdictions are not mere lip service.¹⁸⁸ For example, over 9000 companies are



In March 2017 the French National Assembly adopted the world’s first law on mandatory due diligence obligations for corporations. Photo: Magali on flickr

signed up to the ‘world’s largest corporate sustainability initiative’ – the UN Global Compact – which includes several principles directly relevant to environmental protection.¹⁸⁹ FTAs could serve to make these commitments enforceable on competition law grounds, by requiring Parties’ relevant authorities to monitor whether businesses’ CSR commitments are liable to mislead consumers, and to take action when these voluntary commitments are not being fulfilled. This could however cause a backlash, resulting in corporate withdrawal from such voluntary initiatives.

► Given that the above proposals could create a high administrative burden, particularly for developing countries, special attention should be given to ensure appropriate technical assistance and capacity building commitments are included.

- **Ensure these obligations are subject to monitoring, compliance and dispute settlement procedures under the FTA (see below, Section 4.2)**

► Domestic judicial systems are likely to be more accessible to claimants, closer to the actual harm and able to respond more quickly than claims brought under an FTA mechanism. However, FTAs should provide an avenue for redress where Parties fail to implement relevant legislation or domestic courts fail to provide adequate access to remedy (see below, Section 4.2).



Climate related ISDS cases on the rise: The German company Uniper is threatening to bring an ISDS claim against the Netherlands for the shutdown of its coal powerplant in Maasvlakte by 2030. Photo: Zandcee on wikimedia

3.2 Investment Protection

Much debate around EU trade and investment policy has focused on the reform of investor-state dispute settlement (ISDS) mechanisms in the wake of a public backlash over their inclusion in the Transatlantic Trade and Investment Partnership (TTIP) and CETA proposals. ISDS clauses present a clear danger to environmental protection policies and risk undermining climate mitigation efforts. As one law firm recently put it: 'As more states enact legislation aimed at reducing reliance on fossil fuels and change incentive programs for renewable energy providers, we can expect to see more claims from energy companies in the coming months and years'.¹⁹⁰ The dangers posed by ISDS to policies related to 'environmental protection, socio-environmental impact assessment, renewable energy, taxation, corruption and human rights' are well known.¹⁹¹ Historically, investors based in the EU have been by far the most frequent litigants in ISDS claims worldwide,¹⁹² but claims against EU governments have been steadily increasing in recent years: the Canadian company Gabriel Resources is suing Romania for the government's refusal, on environmental grounds, to issue the company permits to establish Europe's largest open-pit gold mine;¹⁹³ German company Uniper has recently threatened to bring an ISDS claim against the Netherlands for its planned phase-out of coal-based power generation.¹⁹⁴

The European Commission has been rolling out an Investment Court System (ICS) for CETA and other FTAs, while simultaneously pushing forward on negotiations towards a Multilateral Investment Court (MIC), but these reforms fail to address many key concerns.¹⁹⁵ Internationally, alternative options are currently being explored under the auspices of the United Nations Commission on International

Trade Law (UNCITRAL, Working Group III). Amongst these is the proposal for a multilateral instrument providing for various options on reform and schedules for individual states commitments, which would override existing investment treaties once ratified and could include requirements for investors' to exhaust national remedies or provide for counterclaims by states against investors.¹⁹⁶ More effective still could be a multilateral declaration, which withdraws states' consent to arbitration (usually given unconditionally in investment agreements) with the effect that existing ISDS clauses are nullified; or an instrument for joint termination of existing agreements.¹⁹⁷

From an environmental perspective, little has so far changed. One significant development for EU FTA reform is that – following the CJEU ruling on the EU-Singapore FTA (Opinion 2/15),¹⁹⁸ which established that FTAs including ISDS are 'mixed agreements' and must be concluded together with the EU member states – it can be anticipated that provisions on investment protection are in future split into standalone agreements, to expedite the conclusion of FTAs. As a result, it may be unclear what relevance (if any) the provisions in an FTA's TSD provisions or its General Exceptions clauses should have for an investment agreement concluded in parallel. Such FTA clauses need to be clearly drafted to apply to investment provisions.

Moreover, the EU's investment policy needs to be completely re-oriented to support responsible investment for sustainable development. This includes obliging FTA Parties to ensure that their domestic legal systems are equipped to hold business entities to account for environmental harm (as well as labour and human rights violations) attributable to their operations. Investment agreements should also promote actively cross-border

investments that advance sustainable development and climate change mitigation and adaptation objectives.

Recommendations

- **No inclusion of ISDS or ICS mechanisms in any FTA or standalone investment protection agreement**
- **Ensure relevant commitments on environmental protection in FTAs also cover obligations contained in any parallel investment agreement**
 - ▶ *Due to the splitting of future EU FTAs and investment agreements, provisions should be carefully designed to ensure a legal link with relevant parts of the FTA – for example, Parties' commitments to neither waive nor derogate from levels of environmental protection in order to promote foreign investment (see above, Section 1.2), or General Exceptions provisions (see below, Section 4.3).*
- **Promote environmental protection and sustainable development in investment**
 - ▶ *Provisions should institutionalise cooperation activities on exchange of information and capacity building towards monitoring of investors' compliance with environmental laws and due diligence obligations, implementation of investment environmental impact assessments, as well as promotion of technology transfer.*
- **Include declaration of Parties' support in principle for wider reform of ISDS, such as a multilateral instrument withdrawing consent to ISDS**
 - ▶ *FTA negotiations could also be used to agree on the mutual termination of existing Bilateral Investment Treaties (BITs) between the negotiating partner country and EU member states. The process could assist in resolving the issue of 'sunset clauses' contained in most BITs.¹⁹⁹*

4. Compliance & Dispute Settlement

40

Questions of enforcement of EU FTAs' TSD Chapters have often overshadowed the various other elements discussed in this paper. In *all* EU FTAs to date, provisions in TSD Chapters are excluded from the agreements' main dispute settlement provisions, and are instead subject to a parallel process aimed at cooperation and dialogue, which appears to be more or less toothless – in both law and practice. In 2016, the European Parliament recommended the European Commission ensure that the enforcement of environmental and labour provisions in EU FTAs be finally made subject to FTAs' normal dispute resolution procedures, thereby putting breaches of these provisions on an equal footing to breaches of other FTA provisions, with any attendant consequences. In its Opinion of May 2017,²⁰⁰ the CJEU confirmed that – as a matter of international law and interpretation – the non-compliance of an FTA partner with these provisions would be sufficient grounds for the EU's suspension or termination of an agreement, regardless of whether the FTA itself provides for such action. For its part, the European Commission has committed to 'step up' enforcement, but steadfastly made the case for continuing its existing 'cooperative' approach with FTA partners.

The belief that FTAs *can* give 'teeth' to MEAs that seem otherwise unenforceable has frequently catalysed expectations of civil society actors to demand that the EU leverage its global market power for environmental purposes. Calls for trade sanctions directed at

coercing the EU's trading partners into taking action on the environment can however distract from the manifold complexities of this issue, as well as the manifest complicity of the EU and EU industries in environmental harm caused by business operations across the globe. One should be careful not to over-emphasise the capacity of FTAs to resolve deep and comprehensive failures to agree and implement urgently needed multilateral action on issues of international trade and the environment, or the regulation of transnational corporations.

Furthermore, the political will to enforce TSD provisions is not likely to simply materialise just because TSD provisions are made subject to an FTA's state-state dispute settlement mechanism – as was mandated by the European Parliament. Indeed, despite an array of FTA dispute settlement mechanisms in force internationally, FTA Parties barely ever invoke these mechanisms for violations of *any* FTA obligations. When states do litigate disputes over trade, they have historically shown a strong preference for the WTO Dispute Settlement Bodies (DSB) over alternative FTA dispute settlement mechanisms.²⁰¹ That trend may buckle with the present paralysis of the WTO Appellate Body, but FTAs should also prepare Parties for its potential revival by taking into consideration the relationship between FTA provisions and WTO obligations.

Priority issues

- Establish robust institutions for monitoring compliance, prioritising participation and ensuring transparency
- Include state-state dispute settlement, as well as a robust and independent third party complaint mechanism for breaches of environmental provisions
- Incorporate more comprehensive exceptions clauses to cover environmental and – in particular – climate change objectives
- Discourage Parties' recourse to the WTO DSB for matters dealt with in the FTA

4.1 Monitoring

Failures in the monitoring and enforcement of TSD provisions in EU FTAs has produced significant discontent, not least amongst the



Currently environmental provisions lack a clear enforcement mechanism in EU trade agreements.
Photo: Andy Li on Unsplash

CSOs that participate in the Domestic Advisory Groups (DAGs) ostensibly established to oversee them. While mechanisms vary slightly across FTAs, generally speaking TSD Chapters provide for DAGs to be established in each country party to the FTA, and for DAGs to meet at a Civil Society Forum once a year to discuss implementation of TSD provisions.²⁰² While most provisions refer to 'independence' and 'balanced representation', the constitution of DAGs is very vague. As CSO Fern recently noted, the very 'purpose of the DAGs is unclear', meetings are infrequent²⁰³ and attending participants from DG Trade sometimes lack the knowledge to engage with CSO input.²⁰⁴ Moreover, the inaction of the European Commission to take up violations identified by the DAGs and initiate enforcement proceedings fosters disengagement.

Ideally monitoring by CSOs should be operationalised before FTA negotiations have even begun – not after 'X' years of the FTAs coming into force (see below, Section 5.1). As noted above, the EU has already put in place robust mechanisms for CSO engagement in its 'FLEGT' VPAs, which could serve as a model.

Recommendations

- **Include detailed institutional provisions on DAGs, clarifying and deepening their monitoring functions, which:**
 - ▶ *Oblige Parties to hold DAGs meetings on a specified, regular periodic basis.*
 - ▶ *Provide for specific monitoring activities, such as the Parties' compliance with selected MEAs. The EU could adapt the approach used in respect of its GSP+ system: with an annual 'scorecard' and mandatory reporting obligations for all Parties' adherence to their MEA obligations.²⁰⁵*
 - ▶ *Provide clear rules on representation in DAGs, designed to optimise CSO independence, transparency and diversity.*
 - ▶ *Commit Parties to mobilise adequate financial and technical resources to support DAG activities – with attention to levels of economic development, and capacity building requirements – to ensure the effective participation of CSOs, as well as relevant experts at DAG meetings.*
 - ▶ *Mandate DAGs to participate in other institutional structures established by the FTA (Committees and Sub-committees established under other Chapters). CSOs would thereby be encouraged and empowered to actively promote the objectives*



Domestic advisory group meeting on workers rights in Korea. Photo: European Public Service Union

of environmental protections across the implementation of the entire FTA.

- ▶ *Empower DAGs to raise concrete violations of environmental commitments or negative environmental impacts of the FTA, and to demand inspections or audits in cases of suspected non-compliance.*
- **Strengthen monitoring environmental compliance by incorporating transparency and information access requirements**
 - ▶ *FTAs should commit Parties to adhering to rules and standards concerning access to environmental information and oblige Parties to collect and disseminate certain types of environmental information. These could be based on provisions of the Aarhus Convention²⁰⁶ or Escazú Agreement.²⁰⁷*
 - ▶ *FTAs should further oblige Parties to guarantee access to judicial review procedures for persons whose information requests are denied.²⁰⁸*

4.2 Enforcement

To date, 'enforcement' of TSD provisions in EU FTAs consists merely of the Parties' right to initiate government consultations in the event of a dispute over TSD issues, which can escalate to a referral to an independent Panel of Experts mandated to issue a report containing non-binding recommendations.²⁰⁹ There are no procedures in TSD Chapters to ensure that the Panel's recommendations are implemented, nor any other remedies of which to speak in respect of environmental (or labour) protection. As noted above, most of the provisions included in current TSD Chapters are in



An enforcement mechanism for environmental provisions needs to be carefully designed to be effective. Photo: Wesley Tingey on Unsplash

any case too vague to be enforceable. Others, such as the commitments not to waive, lower or derogate from levels of environmental protection, make little sense unless backed up by enforcement action and attendant consequences. However, experiences of these mechanisms illustrate that enforcement options that rely on FTA Parties to trigger them may end up not being used at all (see Box V).

Effective enforcement of environmental commitments could be strengthened by complementing state-state dispute procedures with a robust and independent complaints mechanism. The best precedent for this in an FTA to date is still the North American Agreement on Environmental Cooperation (NAAEC) – a side agreement to NAFTA – and its ‘Submissions of Enforcement Matters’ process (SEM – also known as the ‘citizen submission process’). Some ninety SEM complaints have been brought alleging NAFTA Parties’ failures to effectively enforce environmental laws. Overseen by a Secretariat within the Commission for Environmental Cooperation (CEC), these complaints only result in a ‘factual record’, which may be used to leverage compliance by naming and shaming, but cannot itself provide for sanctions or specific remedial action. Though sometimes criticised as ‘slow and opaque’, the SEM may benefit from provisions in NAFTA’s successor agreement (USMCA), which includes new obligations on Parties to comply with timeline, transparency and disclosure requirements and improves funding for the CEC.²¹⁰

BOX V

Can FTA Parties be trusted with environmental enforcement?

With the first ‘Panel of Experts’ under the EU-South Korea FTA recently established, and expected to deliver its report by March 2020, the enforcement mechanisms under TSD Chapters are facing their first real test. But expectations are low. The European Commission initiated government consultations with South Korea only after ignoring the requests of the agreement’s DAGs to do so for some five years.²¹¹

While it was ignoring the DAGs, the European Commission repeatedly sought to justify its ‘cooperative’ approach to enforcement by instrumentalising the only labour dispute under an FTA to ever reach arbitration. This case was brought by the US against Guatemala concerning the latter’s alleged violation of labour protection provisions in the Central America FTA and concluded in 2017, nearly a decade after the initial complaint, with arbitrators failing to find a breach of the agreement. The reasons for this outcome are simple enough: For one, CAFTA’s labour clause required that any violation be conducted in a ‘manner affecting trade’, which created an almost impossible evidentiary burden. Secondly, although Guatemala had witnessed endemic levels of violence against trade unionists, including over eighty murders since the FTA came into force, the US Trade Representative (bizarrely or strategically) omitted to mention these incidents in its submissions to the tribunal.²¹²

The European Commission has claimed that this case demonstrated why imposing sanctions for breach of TSD commitments might create additional legal hurdles, such as the burden of proving that an FTA breach had an economic impact (i.e. ‘in a manner affecting trade’).²¹³ But this reading of the US-Guatemala arbitration case is – frankly – disingenuous. *Nothing about a sanctions-based approach to enforcement requires that such provisos be built into the substantive commitments of FTA Parties.* More than anything else, two lessons might be gleaned from the US-Guatemala dispute: i) that vague, poorly-drafted FTA clauses which include such massive caveats will be difficult to enforce; and ii) that mechanisms which depend solely on FTA Parties for enforcement action will likely fail to provide access to justice.²¹⁴

Inspiration might also be drawn from a detailed 2017 Model Labour Chapter, which provides for collective complaints concerning the violation of any of the Chapters' obligations to be submitted to a Panel of Experts. The Panel should produce a final report ordering the cessation of any such violations, and may award compensation to injured parties. Each Party is obliged to make the final report binding within its territories 'as if it were a final judgment of a court in its domestic legal system'.²¹⁵ Both approaches illustrate that FTAs could include an independent complaints procedure accessible to third parties, to complement the FTA's state-state dispute settlement mechanism.

However, it is worth reiterating that expanding the scope of dispute settlement in this way is not a panacea. For example, the ability to impose monetary fines against a Party for failing to implement effective measures to combat illegal logging may seem a credible option. Fines so imposed could be allocated to a fund for addressing compliance. But reticent states might simply redirect other public resources that had formerly been dedicated to this area, so that the impact of the fine is effectively 'zero'. The 'idea' of enforcement might therefore prove more powerful than any actual implementation.

Violations of domestic environmental laws are also more effectively served by *domestic judicial mechanisms*, than by FTA dispute settlement procedures. The 'direct effect' of EU FTAs is usually excluded – meaning that FTA provisions cannot be invoked in domestic legal systems – but FTAs could provide impetus for strengthening domestic access to justice, if combined with precise and measurable commitments in the attendant substantive FTA provisions. The FTA could for example impose obligations on Parties to ensure in their domestic legal systems 'access to judicial and administrative mechanisms to challenge and appeal any decision, action or omission that affects or could affect the environment adversely or violate laws and regulations related to the environment'.²¹⁶ An FTA collective complaints mechanism could be designed to address situations where Parties have failed to fulfil this and similar obligations, and thus serve to improve domestic access to justice on environmental policy matters.²¹⁷

Recommendations

• Ensure breaches of environmental provisions are subject to the FTA's general dispute settlement mechanism

► *This would make violations of such provisions subject to the same procedures and penalties as violations of other commitments, including possible suspension or termination of the FTA. It would also improve legal certainty and policy coherence by ensuring that environmental provisions are given appropriate weight in disputes arising on other FTA matters.*

► *Panellists with requisite expertise in environmental law must be appointed to adjudicate any disputes concerning environmental policy.*²¹⁸

► *Fines imposed for breaches of the FTA should where appropriate be directed towards remedying violations and improving the conditions for compliance.*

► *FTA dispute settlement can be significantly delayed by administrative burden or lack of cooperation of FTA Parties. FTAs could therefore allow for automatic suspension of FTA obligations for blatant breaches of commitments – for instance, a Party's failure to ratify, or withdrawal from, an MEA.*

• Establish a supplementary civil society complaints procedure

► *This should be carefully designed with stakeholders through consultations during negotiations (see below, Section 5.1) in order to address any concerns regarding access or independence. It should ultimately allow for complaints concerning breaches of Parties' environmental commitments contained in the FTA to be initiated independently by civil society actors. It could be based on the NAAEC model – for example, by establishing a secretariat to handle complaints. Recent reforms to that model in the USMCA should also be taken into account.*

► *FTA Parties should be obliged to treat decisions resulting from the FTA complaints mechanism as binding and to implement their recommendations.*

► *FTA Parties should fund resources for this mechanism, but institutions must be robustly transparent and independent.*

► *The mechanism should be operational at the latest by the date of the FTA's entry into force.*

4.3 General Exceptions

General Exceptions clauses permit Parties to derogate from FTA commitments if justified by legitimate policy objectives. Clauses in current EU FTAs are modelled on the General Exceptions provisions of the GATT (Art. XX) and GATS (Art. XIV).²¹⁹ These provisions list a limited number of possible policy objectives in sub-paragraphs, including several relevant to environmental protection. Common to both the GATT and GATS are exceptions for measures *necessary* to ‘protect public morals’, or ‘to protect human, animal or plant life or health’ (sub-para. (a) and (b)); unique to the GATT is an exception for measures *relating* to ‘the conservation of exhaustible natural resources’ (sub-para. (g)).

The limitations of these clauses have long been obvious. For instance, a Party invoking Exceptions (a) and (b) above will have to show that a particular measure is *necessary* to achieve the policy objective, which can hardly be determined empirically. Moreover, these Exceptions clauses contain an *exhaustive* list of policy objectives. The GATT was drafted in 1947 and its Exceptions clause has remained unchanged since, despite some minor interpretive expansion. EU FTAs usually incorporate minor amendments to the GATT Art. XX sub-paragraphs reflecting this incremental evolution,²²⁰ but much more significant amendment is possible.²²¹

Worse still, WTO members must show that they have complied with the GATT Art. XX “Chapeau”: States may invoke the exceptions clause in relation to these policy objectives only ‘*subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade...*’

There has been labyrinthine interpretation of this single phrase in WTO case law and there remains some uncertainty as to how states can satisfy it in order to defend trade restrictive measures.²²² For example, does the prohibition on ‘disguised restrictions on international trade’ pertain only to measures with ‘a sole or primary illegitimate purpose’?²²³ Several WTO rulings illustrate that a trade-restrictive measure adopted for a legitimate policy purpose (i.e. environmental protection) may nonetheless be prohibited by the Chapeau if the implementing state has *exempted* certain trade from the scope of the challenged measure for *another* policy purpose (i.e. economic development, human rights).²²⁴ This approach fails to account for the fact that such measures are often

implemented in order to achieve multiple – and even competing – policy objectives.²²⁵

Remarkably, this phrase appears not only in FTAs’ General Exceptions, but has wormed its way in to a whole subset of FTA provisions: many FTAs include the Chapeau in corporate social responsibility clauses;²²⁶ the EU-Japan FTA even limits *the right to regulate* with the Chapeau.²²⁷ Given that it has proven an almost insurmountable hurdle in WTO disputes, it seems fair to conclude that the ‘Chapeau’ serves neither environmental policy, nor trade policy, particularly well. Rather it significantly contributes to legal uncertainty. General Exceptions provisions in FTAs should heed these experiences and ensure that as little discretion as possible is given to the adjudicators of disputes to interfere with Parties’ right to determine its own public policy objectives or to choose which measures best serve those objectives. Policy considerations such as these should ultimately be determined by governments – not through dispute settlement mechanisms.

Recommendations

- **Ensure Exceptions clauses refer to measures that are ‘related’ to achieve public policy objectives, or alternatively, to measures ‘justified’ on grounds of environmental (and other public) policies²²⁸**
 - ▶ *The term ‘necessary’ is to be consistently avoided, since this raises questions of whether alternative, less inconsistent or less-trade restrictive measures are available.*
- **Include a non-exhaustive list of possible policy objectives, allowing for Parties to invoke alternative objectives in the future²²⁹**
 - ▶ *A climate change exception should be expressly included, with reference to the objective of overall reduction in GHG emissions, as well as a human rights exception. Expanding on the existing ‘public morals’ exception could further ensure legal certainty with regard to its application – which to date has been largely only speculated upon – for instance to extra-territorial environmental harm. These three objectives (climate change, human rights and public morals) should all be formulated with regard to the issue of extra-territoriality, by explicitly referring to states’ domestic and international policies.²³⁰*
- **No incorporation of the Chapeau**
 - ▶ *FTA Parties invoking General Exceptions provisions should not be required to fulfil the Chapeau, nor should it be strewn throughout provisions of the FTA.*

- Ensure General Exceptions provisions apply to the entire FTA, including any Chapter on Investment or standalone investment agreement concluded in parallel
- Commit FTA Parties to support amendments to Art. XX of the WTO GATT

► These should broaden the scope of its legitimate public policy objectives – ideally to a non-exhaustive list –, replace the criteria that a measure be ‘necessary’ with a lower threshold (i.e. that measures be ‘related to’ or ‘justified by’ the policy objectives), and eliminate the requirement that Parties invoking the Exceptions fulfil the Chapeau. Measures implementing mandatory or voluntary commitments under MEAs should be expressly permitted (with regard for the points detailed above in Section 1.1).

4.4 Relationship to WTO Dispute Settlement

In the absence of the WTO reforms referenced in this paper, might future WTO challenges potentially undermine some of the alternative FTA provisions proposed above?

In the past, the WTO DSB has been reluctant to cede jurisdiction to FTA dispute settlement mechanisms, and WTO case law suggests that WTO judges may not apply FTA provisions when interpreting Parties’ commitments.²³¹ This is particularly significant for WTO-minus provisions in FTAs – since the WTO DSB is designed to enforce commitments undertaken in the WTO Agreements, and WTO members cannot simply opt-out of these by way of bilateral FTAs, nor waive their rights to recourse to the WTO DSB except under strict conditions (likely only on a case-by-case basis).²³² Therefore one FTA Party might still use the DSB to challenge another Party’s LCRs as prohibited under the TRIMS Agreement, regardless of whether their bilateral FTA expressly permits both Parties to adopt LCRs. Even if the FTA contained a supremacy clause, expressly providing that its provisions prevail over the WTO agreements,²³³ the WTO DSB is not bound to respect it, and may simply apply the TRIMS Agreement, Art. 2.1.

The upshot of this is that any flexibility or benefit an FTA terms proffer in terms of its Parties’ policy space to regulate trade on environmental grounds – vis-à-vis stricter WTO obligations – may be only as good as Parties’ mutual resolve not to fall back on the WTO DSB.



WTO rules represent a danger to environmentally friendly trade agreements

Photo: Enrique Mendizabal on flickr

FTA Parties’ recourse to the WTO DSB could however be discouraged, by penalising Parties that initiate WTO disputes challenging other Parties’ climate change and sustainable development policies.²³⁴ This might serve as a safeguard for WTO-minus provisions to evade WTO challenge, at least from other FTA Parties – though not from other WTO members. Given that the EU is the second most frequent WTO-litigator by a significant margin,²³⁵ commitments to refrain from WTO-litigation would likely constrain the EU more than other Parties to its FTAs. In the context of an FTA oriented towards climate change mitigation, trade in environmental goods, and deep commitments on reforms to promote technology transfer and food security, this could nonetheless send a strong signal to other WTO members that FTA Parties are serious about WTO reform.

Recommendations

- Include directly enforceable penalties against Parties that initiate WTO disputes to challenge other FTA Parties’ adoption or implementation of FTA-consistent climate response measures

► Penalties could be in the form of damages calculated on the basis of any benefit arising from the WTO complaint.

► Such a provision should be expressly framed to promote climate change mitigation and further emphasise FTA Parties’ commitments to necessary reform of multi-lateral trade rules to these ends.

5. Feasibility and Process



Opening FTAs to democratic participation is key for more environmentally friendly policy.
Photo: Edda Dietrich on flickr

46

The approach outlined above constitutes quite a radical departure from EU trade policy. In practice, these proposals have varying degrees of feasibility. FTAs contain *reciprocal* obligations and rights, and therefore impose obligations *on the EU and its member states – as well as FTA partners*. Matters on which the EU itself is making slow (or no) progress – such as enabling citizens to hold corporations to account or committing governments to phasing out fossil fuel subsidies – are a tall order. However desirable these objectives sound, one cannot realistically expect EU trade policy to be the vanguard of EU environmental protection; such an approach to FTAs will not likely materialise before internal advances on these issues are afoot, or such actions are *required by EU law*.

Such a shift is moreover contingent on the *democratisation* of how EU FTAs are designed, negotiated, concluded and implemented. A coalition of CSOs in 2018 developed a menu of reforms for EU Trade and Investment Policy highlighting the need for robust, inclusive and transparent participatory structures to inform FTA negotiations and ultimately the content of FTAs.²³⁶ The following seeks to emphasise some of these and additional concerns.

Priority issues

- Establish and institutionalise democratic participation throughout the entire process of FTA formation, from drafting mandates to assessing impacts
- Open existing FTAs for review and ensure future FTAs enter into force only when conditions are met

5.1 Transparency and Impact Assessments

At present, the deficits in process concerning environmental protection in FTAs can hardly be better illustrated than by examining the FTA Sustainability Impact Assessments (SIA). These SIAs appear entirely divorced from FTA negotiations. SIAs sometimes materialise long after FTA negotiations are concluded (as in the recent case of EU-Mercosur); sometimes not at all.²³⁷ There is also scarce evidence that negotiators take SIAs into account even when they are concluded in a timely fashion. For example, the Final Report of the SIA on the EU-Japan FTA painted a bleak picture of Japan's efforts to combat illegal international trade in timber. The SIA went as far as to suggest that Japan's inaction on illegal logging was counteracting the EU's own international strategy.²³⁸ Despite evidence that Japanese companies were sourcing illegally logged timber from an EU member state,²³⁹ the FTA's final provisions on timber contained little of a specific or binding nature.²⁴⁰

Stakeholder dialogue and consultation on EU FTAs is deeply flawed and transparency needs to be drastically improved.

Recommendations

- **Ensure fully transparent and open-ended public consultations are conducted before any mandate for negotiation is finalised, and throughout the negotiations**
 - ▶ *Civil society participation and consultations should be formally institutionalised and prioritised from the earliest stages (i.e. pre-negotiation) of FTAs.*
 - ▶ *The European Parliament should be involved in the drafting and approval of all FTA negotiating mandates, and there should be a requirement for European and member state parliaments to approve*

the mandate. EU institutions, Directorate Generals (DGs) and ministries with a public interest objective should also play a more prominent role in FTA negotiations.

- ▶ *All mandates, negotiating proposals, draft textual proposals and consolidated texts must be made public.*
- ▶ *Adequate resources need to be committed to these participatory processes. The EU should require that equivalent level of consultation is conducted in FTA partner countries, and where necessary provide technical assistance and capacity building to that end.*
- **Ensure monitoring mechanisms are operational prior to negotiations**
 - ▶ *These mechanisms – including the involvement of civil society organisations – should be established to assess FTA Parties' compliance with any pre-ratification conditions (such as ratification and implementation of MEAs).*
- **Subject all FTAs to ex ante and ex post Sustainability Impact Assessments (SIAs)**
 - ▶ *In 2016, the European Parliament resolved that the European Commission should 'ensure the timely publication of SIAs in order to inform negotiating positions before they are formulated, to inform the public and to enable elected representatives to properly assess any proposed agreement'; and 'to take the findings of such (SIAs) assessments fully into account during negotiations'.²⁴¹*
 - ▶ *No FTA negotiations should begin prior to the relevant SIA's publication.*
 - ▶ *The scope of SIAs should also be amended to better ensure that sustainability impacts are identified during the assessment.*
 - ▶ *Failure to take findings of the SIA into account during FTA negotiations should provide grounds for the negotiation's suspension.*
- **Abolish the provisional application of mixed trade agreements**

5.2 Pre-Ratification and Review

The EU's record of successfully encouraging ratification of MEAs after an FTA's entry into force, as provided for in some agreements, is poor.²⁴² This failed strategy should be abandoned.

Robust and transparent procedures for reviewing FTAs in force should be established, with a view to amending or reforming them. This would be helpful in particular with regard to introducing new issues into existing FTAs.

Recommendations

- **Require Parties to ratify and implement priority MEAs (and ILO Conventions) before an FTA's entry into force**
 - ▶ *This would effectively leverage the FTA negotiations to have maximum impact on MEA ratification.*
- **Conduct evaluations of FTA partners' NDCs**
 - ▶ *This could be used in order to identify potential weaknesses, trade-related measures on which the Parties might cooperate, and to agree a methodology for interim annual targets for emissions reductions, thereby making NDC outcomes more measurable.*
- **Open up existing EU FTAs for review to bring them in line with environmental policy objectives and promote trade policy consistency.**
 - ▶ *The European Commission could also conduct a systematic evaluation of NDCs with all FTA partners, in light of the relevant FTA provisions, in order to identify potential conflicts and make amendments that support FTA Parties' mitigation efforts.*
- **Conduct SIAs periodically after the FTA's entry into force**
 - ▶ *This would enable the identification of FTA impacts on environmental protection, and the Parties' fulfilment of their NDCs. Ex post monitoring for impacts of trade liberalisation on GHG emissions could identify emissions increases caused by expansion in trade and give grounds for the agreement's suspension, or for duties to be imposed on GHG-intensive products.²⁴³ Ex post SIAs could also provide grounds for other FTA amendments to address unforeseen environmental impacts.*

6. Conclusions

48



Reform of trade agreements and multilateral rules could help fight climate change and foster social and ecological development. Photo: DFID - UK Department for International Development on flickr

Many environmental advocates rightly regard the prospects of reforming existing trade rules to support effective action on the environment with some suspicion. To date, the EU's "attempts" to integrate the objectives of sustainable development into its FTAs have been disappointing at best. These token gestures have demonstrated neither the creativity nor the political will to meaningfully address how trade rules shape governments' policy space to take action to protect the environment. They rather lay bare the fact that EU trade policy continues to be dominated by the interests of powerful economic actors – with scant regard for our present ecological crisis.

Can FTAs be better designed to give appropriate primacy to the huge task of climate change mitigation and adaptation, as well as other essential aspects of environmental protection? The premise of this study is that they not only *can*, they *must* be. International trade will continue – with or without FTAs. The challenge of regulating transboundary economic activity is intrinsically tied up with reining in precisely those activities that are causing the most damage to our planet. Opposing FTAs on the basis that they contribute to – rather than counter – this environmental harm is a strategy that can only go so far, before one is

tasked with the question of what an alternative FTA might actually look like. While "free trade" may sound like a misnomer for any agreement that seeks to *better regulate* trade, as many critics of the trade regime are aware, "free trade" was *always* a misnomer. Put simply: the challenges of environmental – and particularly climate – protection will not be solved by trade rules alone, but *not* regulating trade is *not an option*.

This study has presented a spectrum of possible elements to anchor these objectives in the EU's FTAs. Sixteen priority issues are presented below, with appropriate precedence given to the urgent threat of climate change and potential impacts on mitigation and adaptation.²⁴⁴ These are not intended as a "shopping list", from which negotiators are to cherry-pick novel ways to sell FTAs to otherwise sceptical citizens or environmental activists. Arguably these are a bare minimum of necessary reforms – and clearly much more work needs to be done.

While reforms to WTO Agreements are not repeated here, as noted at the outset, addressing transboundary environmental issues on a piecemeal bilateral level cannot be expected to yield results more favourable

than multilateral solutions. Although essential, prospects for WTO reform look bleak. But consistent adoption of these FTA reforms, combined with FTA Parties' support for reforms in multilateral fora, might contribute to producing multilateral rules that foster a more rapid decarbonisation of the global economy.

The following action points are recommended as a priority:

- 1. Establish robust democratic participation throughout the entire FTA formation, from drafting mandates to assessing impacts, and open existing FTAs for review.**
- 2. Incorporate the principles and objectives underpinning EU environmental policy, as well as the principle of Common But Differentiated Responsibilities (CBDR), to guide the implementation and interpretation of the FTA.**
- 3. Ensure environmental protection provisions are enforceable – by including more specific commitments (designed following consultations and Sustainability Impact Assessments) and making them subject to the FTA's general dispute settlement mechanism.**
- 4. Include detailed institutional provisions on Domestic Advisory Groups, clarifying their monitoring functions, commit Parties to comply with transparency and information access requirements, and establish a supplementary civil society complaints procedure for breaches of environmental commitments.**
- 5. Strengthen Parties' domestic policy space to implement Multilateral Environmental Agreements (MEAs) – through a supremacy clause for MEAs, and a procedure to handle disputes over climate response measures.**
- 6. Require Parties to fulfil commitments to mitigate adverse impacts of climate response measures on poorer states in accordance with the principle of CBDR, and ensure appropriate technical assistance and capacity building commitments are included.**
- 7. Protect the right of states to differentiate products and services with reference to their embodied carbon or Greenhouse Gas (GHG) emissions, and commit Parties to support methodologies of calculating GHG emissions associated with the entire life cycle of products.**
- 8. Commit FTA Parties to first raising domestic carbon prices in line with the High Level Commission on Carbon Prices' recommendations before imposing Border Carbon Adjustments (BCAs) and to adopt procedures and exemptions to ensure that BCAs are applied equitably and in accordance with the principle of CBDR.**
- 9. Permit Parties to use compulsory licencing and local content requirements to promote rapid transfer of cleaner technologies.**
- 10. Require Parties to notify fossil fuel subsidies and establish time-bound phase-out, combined with social policies to mitigate impacts on the poor.**
- 11. Make Parties' use of anti-dumping or countervailing duties subject to a public interest test, including environmental – and in particular climate – considerations.**
- 12. Include a strict carve-out of public services and ensure Parties maintain space to regulate services and public procurement by using environmental requirements.**
- 13. Require Parties to sign and implement the International Treaty on Plant Genetic Resources for Food and Agriculture, and to legislate to protect farmers' rights, as well as to require patent applicants to disclose the origins of genetic resources.**
- 14. Oblige Parties to adopt and effectively implement domestic legislation imposing mandatory human rights due diligence obligations on businesses – including on supply chain traceability and transparency.**
- 15. Exclude investor-state dispute settlement (ISDS) and commit Parties to support reform of investment protection such as a multilateral instrument withdrawing consent to ISDS.**
- 16. Ensure General Exceptions provisions apply to the entire FTA, include a non-exhaustive list of policy objectives, and protect Parties' right to determine both public policy objectives and measures implementing these objectives.**

- 1 The introduction of Border Carbon Adjustments that would enable the EU to put a levy on imports according to their carbon content.
- 2 "FTA" is used in this paper as a generic, umbrella term for bilateral, regional or preferential free trade agreements (RTAs/PTAs), as well as the Economic Partnership Agreements (EPAs) and Association Agreements (AA).
- 3 European Commission, Press release: 'EU-Japan trade agreement enters into force', 31 January 2019: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_785 [Accessed 27 February 2020].
- 4 EU-Japan, Art. 16.4.4.
- 5 E.g. EU-Colombia-Peru, Art. 275; EU-Ukraine, Arts. 361(a), 374, 376(h).
- 6 Indeed, meat and dairy exporters have been among the primary beneficiaries of the agreement since it entered into force. See European Commission, Press release: 'Trade: First year of the EU-Japan Economic Partnership Agreement shows growth in EU exports': https://ec.europa.eu/commission/presscorner/detail/en/ip_20_161 [Accessed 27 February 2020].
- 7 Climate Action Tracker, 'Country Summary: Japan', 2 December 2019: <https://climateactiontracker.org/countries/japan/> [Accessed 27 February 2020].
- 8 See Fig. 1 'Burden shifting', in Thomas Wiedmann & Manfred Lenzen, 'Environmental and social footprints of international trade', *Nature Geoscience*, Vol. 11 | May 2018, p.314-5. The authors further note that 35–60% of 'domestic species threats are linked to production for export' and that over 50% of the biodiversity footprint of developed economies 'is exerted outside of their territorial boundaries'.
- 9 Namely: the Comprehensive Economic and Trade Agreement (EU-Canada, CETA), EU-CARIFORUM, EU-Central America, EU-Chile, EU-Colombia-Peru, EU-Japan, EU-Mercosur (text published on 28 June 2019), EU-Singapore, EU-South Korea, EU-Ukraine and EU-Vietnam.
- 10 E.g. CETA, Art. 24.3; EU-CARIFORUM, Art. 192; EU-Ukraine, Art. 290.
- 11 A useful overview is available in: WTO Committee on Trade and Environment (CTE), *Matrix on Trade-Related Measures Pursuant to Selected Multilateral Environmental Agreements*. CTE in Special Session - WT/CTE/W/160/Rev.8; TN/TE/S/5/Rev.6 (October 2017).
- 12 For instance, Art. 3.5 UNFCCC includes the GATT Art. XX Chapeau. See discussion below, Section 4.3.
- 13 DOHA WTO MINISTERIAL 2001: MINISTERIAL DECLARATION. WT/MIN(01)/DEC/1. 20 November 2001, para. 31(i).
- 14 EC-Biotech DS291. Panel Report, 29 September 2006, para. 7.71, 7.95.
- 15 WTO, 'The environment: a specific concern': https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey2_e.htm [Accessed 27 February 2020].
- 16 E.g. CETA, Art. 24.4.
- 17 EU – Central America, Art. 287.5; EU-Colombia-Peru, Art. 270.4.
- 18 See WTO CTE, *Matrix on Trade-Related Measures Pursuant to Selected MEAs*.
- 19 See model provisions in Markus Krajewski & Rhea Tamara Hoffmann, 'Alternative Model for a Sustainable Development Chapter and related provisions in the Transatlantic Trade and Investment Partnership (TTIP)'. (Commissioned by The Greens / European Free Alliance in the European Parliament) p.19-21. Available: <https://reinhardt-buettikofer.eu/wp-content/uploads/2016/08/Model-SD-Chapter-TTIP-Second-Draft-July-final.pdf> [Accessed 27 February 2020].
- 20 Adapted from proposal in Markus Krajewski, *Ensuring the Primacy of human rights in trade and investment policies: Model clauses for a UN Treaty on transnational corporations, other businesses and human rights* (CIDSE Private Sector Group, March 2017) p.26.
- 21 E.g. EU-Central America, Art. 287; EU-Colombia-Peru, Art. 270; EU-Japan, Art. 16.4.5; EU-Ukraine, Art. 292.3; EU-Vietnam, Art. 13.5.4.
- 22 E.g. CETA, Art. 24.5; EU-CARIFORUM, Art. 193.
- 23 E.g. EU-Central America, Art. 291.2-3; EU-Japan, Art. 16.2.2; EU-South Korea, Art. 13.7; EU-Ukraine, Art. 296.
- 24 E.g. EU-Colombia-Peru, Art. 277; EU-Vietnam, Art. 13.3.
- 25 These specify that a waiver or derogation is 'in a manner affecting trade or investment between the Parties' where it involves persons or industries that produce goods or provide services traded between the Parties, or that invest in the territory of the Party that has failed to comply with the obligation. See USMCA, footnotes accompanying Arts. 24.4.1, 24.9.1, 24.10.1, 24.22.2.
- 26 See CPTPP, Article 20.17.2, 20.17.4(a), Art. 20.17.5 and fn. 26.
- 27 US-Peru FTA, Annex 18.3.4, Art. 3(h)(iii).
- 28 David Hill, '10 reasons U.S. must hold Peru to trade deal and protect Amazon', *Mongabay News*, 15 February 2019. Available: <https://news.mongabay.com/2019/02/10-reasons-u-s-must-hold-peru-to-trade-deal-and-protect-amazon-commentary/> [Accessed 27 February 2020]; also 'U.S. concludes environmental spat with Peru using trade treaty', *Reuters*, 9 April 2019. Available: <https://www.reuters.com/article/us-usa-peru-trade/u-s-concludes-environmental-spat-with-peru-using-trade-treaty-idUSKCN1RL2RG> [Accessed 27 February 2020].
- 29 Fern, 'LOGGING OFF – Deepening and expanding multi-stakeholder participation in VPAs to achieve greater impact'. *Forest Watch Special: FLEGT VPA Update* (June 2019); see also Fern et al, Press release: 'Declaration of Civil Society Organisations from Forested Tropical Countries' (October 2019) p.3. Available: <https://www.fern.org/news-resources/declaration-of-civil-society-organisations-from-forested-tropical-countries-2037/> [Accessed 27 February 2020].
- 30 Treaty on the Functioning of the European Union (TFEU), Art. 191.2. At least one TSD Chapter already incorporates these principles: EU-Ukraine, Art. 292.4.
- 31 TFEU, Art. 191.1.
- 32 These provisions vary significantly in their formulation (some use the wording of the 1992 Rio Declaration on Environment and Development, Principle 15 – without actually naming the principle). E.g. CETA, Art. 24.8; EU-Central America, Art. 292; EU-Colombia-Peru, Art. 278; EU-Japan, Art. 16.9; EU-Vietnam, Art. 13.11.
- 33 Cf. the Commission's comments on the EU-Mercosur FTA: 'The agreement also explicitly upholds the 'precautionary principle', meaning that public authorities have a legal right to act to protect human, animal or plant health, or the environment, in the face of a perceived risk even when scientific analysis is not conclusive.' (see: https://ec.europa.eu/rapid/press-release_QANDA-19-3375_en.htm, [Accessed 27 February 2020]) And on JEFTA: 'Does the agreement contain a reference to the precautionary principle? No – but it does not need to because the precautionary principle is already enshrined in the EU treaties and EU trade agreements must respect those treaties.' (See: <https://ec.europa.eu/trade/policy/in-focus/eu-japan-economic-partnership-agreement-explained/>, [Accessed 27 February 2020]).
- 34 After negotiations on the EU-Mercosur FTA concluded in 2019, one of Uruguay's top trade officials boasted to the media that by successfully isolating any reference to the precautionary principle to the TSD Chapter – excluded from the FTA's main dispute settlement mechanism – Mercosur had prevented the EU from relying on it in future disputes concerning pesticides. Whether this interpretation is correct is debatable. Nevertheless it highlights that EU FTAs leave considerable legal uncertainty as to the application of fundamental principles of EU and international environmental law. See comments of Valeria Csukasi, Director-General for Health Affairs, Integration and Mercosur in Uruguay, in Mariana Simões, 'Acordo com Mercosul enfraquece poder da União Europeia de barrar alimentos com agrotóxicos', *Agência Pública / Repórter Brasil*, 19 August 2019.

- 35 The WTO SPS Agreement requires WTO Members to only adopt measures based on scientific principles and not to maintain measures without adequate scientific evidence. Measures must be based on a risk assessment, and 'provisional' measures may be adopted only where no sufficient scientific evidence is available, meaning that any precautionary measures must be temporary (Art. 5.7). The EC-Biotech Panel concluded that – even if the precautionary principle were relevant – its application would be limited to the interpretation of 'particular treaty terms' and could not 'override any part of the SPS agreement'. As one study notes, the simple reinstatement of WTO rules on SPS measures in EU FTAs 'must appear as full EU endorsement of affairs as they stand' – that is the position maintained by the WTO DSB in these two cases (Peter-Tobias Stoll et al. *CETA, TTIP and the EU Precautionary Principle: Legal Analysis of selected parts of the draft CETA agreement and the EU TTIP proposals* (Foodwatch, June 2016), p.12). See Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R. 16 January 1998; Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS29/R. 29 September 2006. para. 4.540.
- 36 Namely the EU-Central America, Art. 50.2, 20.1; and EU-Colombia-Peru, Arts. 267.4, 275.2. See Jean-Frédéric Morin and Rosalie Gauthier Nadeau, 'Environmental Gems in Trade Agreements Little-known Clauses for Progressive Trade Agreements', *CIGI Papers No. 148* (Centre for International Governance Innovation, October 2017) p.4.
- 37 Transport & Environment, 'Can trade and investment policy support ambitious climate action?' (Transport & Environment / Trade Justice Movement, November 2017) p.11.
- 38 For example, Japan commits itself to the 'expansion of renewable energy introduction to the maximum extent possible'... (INDC of Japan, p. 15, cited in Rana Elkahwagy et al. *UNFCCC Nationally Determined Contributions: Climate Change and Trade*. CTEI Working Papers, CTEI 2017-02 (Centre for Trade and Economic Integration, January 2017), *UNFCCC Nationally Determined Contributions*, p.10.
- 39 While some 108 countries have so far committed to update their NDCs in 2020 with more ambitious commitments, only two states have submitted updated NDCs at the time of writing. The EU is one of 37 parties that have committed to merely updating its NDC – to 'increase clarity, transparency and understanding', but not ambition. See: <https://www.climatewatchdata.org/2020-ndc-tracker> [Accessed 27 February 2020].
- 40 For example, import bans are proposed 'on vehicles older than 3 years (Gabonese republic), on incandescent bulbs and inefficient devices (Venezuela), on old cars (Djibouti), on hardware or equipment that does not match domestic standards (Kuwait)'. Elkahwagy et al. *NDCs*, p.12 and 25.
- 41 Clara Brandi. *Trade Elements in Countries' Climate Contributions under the Paris Agreement* (International Centre for Trade and Sustainable Development, 2017) p.39.
- 42 Appellate Body Report, *India—Certain Measures Relating to Solar Cells and Solar Modules*. WT/DS456/AB/R, 16 September 2016.
- 43 Some of these cases are still at consultation stages: *People's Republic of China—Measures concerning wind power equipment* (DS 419); *Canada—Renewable Energy* (DS 412); *Canada—Feed-In Tariff Program* (DS 426); *Republic of Moldova—Environmental Charge* (DS 421); *United States of America—Countervailing Measures (China)* (DS 437); *European Union and a member state—Certain Measures Concerning the Importation of Biodiesels* (DS 443); *United States of America—Countervailing and Anti-Dumping Measures (China)* (DS 449); *European Union and certain member states—Certain Measures on the Importation and Marketing of Biodiesel and Measures Supporting the Biodiesel Industry* (DS 459); *European Union—Anti-Dumping Measures on Biodiesel from Argentina* (DS 473); *European Union and certain member states—Certain Measures Affecting the Renewable Energy Generation Sector* (DS 452); *European Union—Biodiesel* (DS 480); *Republic of India—Solar Cells* (DS 456); *United States of America—Renewable Energy* (DS 510).
- 44 See comments of Christian Häberli, *Potential conflicts between agricultural trade rules and climate change treaty commitments - Background paper for The State of Agricultural Commodity Markets (SOCO)* (Food and Agriculture Organization of the United Nations Rome, 2018), p.13 and 16.
- 45 For an assessment of various avenues for WTO reform and their political feasibility, see Kasturi Das et al, *Making the International Trade System Work for Climate Change: Assessing the Options* (Climate Strategies, 2018).
- 46 WTO Agreement, Art. IX:2.
- 47 WTO Agreement, Article IX:3.
- 48 WTO Agreement, Art. X.
- 49 Precedents include the 2001 Doha Declaration on the TRIPS Agreement and Public Health, and the Kimberley Waiver –adopted in 2003 – concerning conflict diamonds and GATT commitments. A legal interpretation has never been adopted.
- 50 James Bacchus, *What Is a Climate Response Measure? Breaking the Trade Taboo in Confronting Climate Change*. CIGI Papers No. 220 (July 2019) p.14.
- 51 This proposal is adapted from Jessica Lawrence & Laurens Ankersmit, *Making EU FTAs 'Paris Safe': Three studies with concrete proposals* (The Greens/EFA, Amsterdam Centre for European Law and Governance, Central European University; 8 March 2019) p.7.
- 52 See Etem Karakaya et al, 'How Production Based and Consumption Based Emissions Accounting Systems Change Climate Policy Analysis: The Case of CO2 Convergence', *Munich Personal RePEc Archive, MPRA Paper No. 88781* (2018); also Juudit Ottelin et al, 'What can we learn from consumption-based carbon footprints at different spatial scales? Review of policy implications', *Environ. Res. Lett.* 14 2019.
- 53 Glen Peters et al, 'Growth in emission transfers via international trade from 1990 to 2008', *Proceedings of the National Academy of Sciences*, 108 (21) May 24, 2011. pp.8903-8908; Glen Peters et al, 'Guest post: How China has reduced the carbon footprint of developed countries'. *Carbon Brief*, 8 November 2017: <https://www.carbonbrief.org/guest-post-how-china-has-reduced-carbon-footprint-developed-countries> [Accessed 27 February 2020]; see also infographics on 'Sources of the UK's carbon footprint', available at: <http://www.emissions.leeds.ac.uk/chart2.html> [Accessed 27 February 2020].
- 54 E.g. CETA Arts. 24.9.1 and 24.12.1(f); EU-Georgia, Art. 231; EU-Singapore, Art. 12.11, EU-Vietnam, Art. 13.10.
- 55 Although the WTO DSB makes the assessment of 'likeness' on a case-by-case basis, determination is guided by four criteria recommended by the 1970 GATT Working Party on Border Tax Adjustments, namely: i) the product's end-uses; ii) consumers' tastes and habits; iii) the product's properties, nature and quality; and iv) its tariff classification.
- 56 See discussion in Susanne Droege et al, *The trade system and climate action: ways forward under the Paris Agreement*. Working Paper (Climate Strategies, October 2016), p.14.
- 57 Häberli, *Potential conflicts*, p.7.
- 58 WTO, 'WTO rules and environmental policies: key GATT disciplines', Available: https://www.wto.org/english/tratop_e/envir_e/envt_rules_gatt_e.htm [Accessed 27 February 2020].
- 59 E.g. CETA, Art. 2.3; EU-Central America, Art. 85; EU-Japan, Art. 2.7; EU-Singapore, Art. 2.3; EU-South Korea, Art. 2.8; EU-Ukraine, Art. 34.
- 60 EU-Colombia-Peru, Art. 21.1, 21.2 and fn. 6, in respect of Colombian liquor monopolies.
- 61 Labelling measures related to 'non-product-related' PPMs are within the scope of the TBT Agreement, but other types of measure may not be (see Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R. 16 May 2012; and Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS401/AB/R. 22 May 2014). If a measure were deemed covered by the TBT, provisions of the TBT would prevail over the provisions of the GATT in cases of any inconsistency between the two agreements.
- 62 Konrad von Moltke, 'Reassessing "Like Products"', Paper presented at the Chatham House Conference Trade, Investment and the Environment, 29 & 30 October 1998.

63 It is recommended that in designing WTO-compliant carbon footprint measures, states should in particular: i) use general regulations (rather than quotas or import bans) and not single out particular countries or products in ways that could be deemed arbitrary or disproportionate; ii) foster dialogue and cooperation in good faith, with the aim of reaching an international agreement; and iii) ensure measures are not more trade restrictive than necessary or disproportionately impact certain countries. See Lawrence & Ankersmit, 'Making EU FTAs 'Paris Safe''; also Timo Gerres et al. *Can Government Ban Materials with Large Carbon Footprint? Legal and Administrative Assessment of Product Carbon Requirements* (German Institute for Economic Research - DIW, 2019).

64 Brandi, *Trade Elements*, p.5-6. See also discussion of GHG emissions footprints, as well as land, water and material footprints, in Wiedmann & Lenzen, 'Environmental and social footprints'.

65 See DG Environment, Single Market for Green Products Initiative: <https://ec.europa.eu/environment/eussd/smgp/index.htm> [Accessed 27 February 2020].

66 'The ISO 14060 family provides clarity and consistency for quantifying, monitoring, reporting and validating or verifying GHG emissions and removals to support sustainable development through a low-carbon economy'. In particular, ISO 14067:2018 'defines the principles, requirements and guidelines for the quantification of the carbon footprint of products. The aim of this document is to quantify GHG emissions associated with the life cycle stages of a product, beginning with resource extraction and raw material sourcing and extending through the production, use and end-of-life stages of the product.'

67 For example, 'some ISO members (ABENOR of Benin) only participate in one technical committee (TC), while other ISO members such as France, Germany or the United Kingdom participate in over 700 technical bodies, including TCs, subcommittees and working or ad hoc study groups.' See Panagiotis Delimatsis, 'Global Standard-Setting 2.0: How The WTO Spotlights ISO And Impacts The Transnational Standard-Setting Process'. *Duke Journal Of Comparative & International Law*, Vol 28:273 (2018) p.290-3.

68 See James Bacchus, *Special Report - The Case for a WTO Climate Waiver* (Centre for International Governance Innovation, 2017).

69 See for example, *For The Many, Not The Few: Towards a Progressive Model for International Trade and Investment*. (Progressive Alliance of Socialists and Democrats, December 2018) p.24. Available: <https://www.socialistsand-democrats.eu/publications/many-not-few-towards-progressive-model-international-trade-and-investment> [Accessed 27 February 2020]; *Green Trade For All: A Greens/EFA paper adopted on 12 June 2018* (The Greens / European Free Alliance) p.9. Available: <https://www.greens-efa.eu/en/article/document/green-trade-for-all/> [Accessed 27 February 2020]; and *Towards a Progressive Trade Politics in the European Union* (European United Left/Nordic Green Left, April 2019). p.23. Available: <https://www.quengl.eu/issues/publications/report-towards-a-progressive-trade-politics-for-the-european-union/> [Accessed 27 February 2020].

70 While BCAs might in principle be applied to exports (as rebates) these risk being challenged as a subsidy, and such application is generally discouraged. See literature cited in footnote 71.

71 E.g. Michael A. Mehling et al, 'Designing Border Carbon Adjustments For Enhanced Climate Action', *American Journal Of International Law*, Vol. 113:3 (2019); M.C. Porterfield, 'Border Adjustments for Carbon Taxes, PPMs, and the WTO'. *U. Pa. J. Int'l L.* Vol. 41:1 (2019); John S. Odell, *Our Alarming Crisis Demands Border Adjustments Now* (International Centre for Trade and Sustainable Development, 2018); Marco Sakai & John Barrett, 'Border carbon adjustments: Addressing emissions embodied in trade' *Energy Policy* 92 (2016) 102-110.

72 Macron's proposal to single out the US – as punishment for withdrawing from the Paris Agreement – might thus be difficult to justify. Some Paris signatories may take less action than the US on reducing emissions and the US could – in theory – meet its targets even if it withdraws from the Agreement. See Simon Lester, 'What if the U.S. Complies with the Paris Accord Obligations?' *International Economic Law and Policy Blog*, 4 June 2017. Available: <http://worldtradelaw.typepad.com/ielpblog/2017/06/what-if-the-us-complies-with-the-paris-accord-obligations.html> [Accessed 27 February 2020].

73 The viability of using a BAT-benchmark has been widely discussed. Many have noted that, while it may be the most 'WTO-safe' variation of a BCA, applying an undifferentiated BAT-benchmark could significantly reduce the scope and effectiveness of BCAs, and therefore would not succeed in 'levelling the playing field'. Das (2011) argues that a BAT-approach would likely be opposed by domestic industries and suggests this is the reason why free allocation of allowances emerged as the preferred alternative under the EU's ETS. A BAT-benchmark approach would also fail to differentiate between energy inputs, which would be especially problematic for BCAs applied to electricity-intensive sectors, such as aluminium production. On the other hand, Ismer et al (2016) suggest that BAT-benchmarking would create 'incentives for carbon efficiency improvements', but the authors do not mention energy inputs. See Kasturi Das, *Can Border Carbon Adjustments Be WTO-Legal?* 8 *Manchester J. Int'l Econ. L.* 65 (2011), p.77-81; Aaron Cosbey et al, *A Guide for the Concerned: Guidance on the elaboration and implementation of border carbon adjustment* (ENTWINED – Environment and Trade in a World of Interdependence, 2012) p.15-16; Ryan Rafaty, *How can consumption-based carbon pricing address carbon leakage and competitiveness concerns?* (Carbon Pricing Leadership Coalition / Climate Strategies, 2018), p.5-6; Sakai & Barrett, 'Border carbon adjustments', p.108; and Roland Ismer et al, *Inclusion into Emissions Trading Systems: Legal Design and Practical Administration* (German Institute for Economic Research - DIW, 2016) p. 8.

74 Porterfield suggests that only border adjustments of non-product related PPM regulatory standards are prohibited under the GATT, but *adjustments of indirect taxes* are permitted; therefore a 'border tax adjustment' (BTA) would not need to satisfy a test of 'likeness' of the manufactured products. He thus argues that the only challenge is ensuring BTAs are 'assessed at a level that does not exceed the tax on the domestic product'. However, on the question of benchmarking that assessment, Porterfield recommends using 'domestic average emissions for a product' while permitting importers to 'petition for a lower BTA based on lower CO₂e emissions.' He does not refer to BAT-benchmarking, but the same shortcomings would apply (see footnote 73) (Porterfield, 'Border Adjustments', p.38, 40).

75 Sakai & Barrett conclude that 'BCAs could prove to be complex, costly and ineffectual policy tools'. See Sakai & Barrett, 'Border carbon adjustments', p. 108.

76 Carbon pricing can take the form of a 'cap-and-trade' regime or a 'carbon tax'. The IMF strongly advocates for the latter, since it involves less administrative burden, while offering both price predictability and revenue generation. See International Monetary Fund, *Fiscal Monitor: How to Mitigate Climate Change* (IMF, Washington DC, October 2019) p.3-5.

77 High-Level Commission on Carbon Prices (HLCCP), *Report of the High-Level Commission on Carbon Prices* (Washington, DC: World Bank, 2017).

78 See the work of economist and 2018 Nobel Prize winner William Nordhaus on how a global carbon price could be effective: <http://carbon-price.com/> [Accessed 27 February 2020].

79 'This consists of 28 emission trading systems (ETSS) in regional, national and subnational jurisdictions, and 29 carbon taxes, primarily applied on a national level'. World Bank, *State and Trends of Carbon Pricing 2019* (World Bank Group, Washington DC. June 2019), p.9.

80 Namely initiatives in Sweden, Switzerland, Liechtenstein, Finland, Norway, France. See World Bank, *State and Trends*, p.10, 15, 27

81 See Table 1.1. Selected Carbon Pricing Arrangements, 2019 in IMF, *Fiscal Monitor*, p.3.

82 See Directive (EU) 2018/410; and Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading system of the Community COM/2008/0016 final - COD 2008/0013. Para. (17).

83 Even the Commission's own 2008 proposal to amend the ETS Directive noted in its Explanatory Memorandum, (para. 6) that 'from 2013 onwards, the current Directive allows all allowances to be auctioned' and 'Allocation for free would constitute state aid which must be justified under Article 87 and 88 of the EC Treaty'. Also on ETS and the ASCM, see J. Windon, 'The allocation of free emissions units and the WTO subsidies agreement', 41 *Georgetown Journal of International Law* (2009).

- 84 For example, 'Benin (US\$96.7/tCO₂), Democratic Republic of the Congo (US\$148.5/tCO₂), Paraguay (US\$180.5/tCO₂), Togo (US\$100/tCO₂), and Uruguay, (US\$98.8/tCO₂). Note that none of these countries have an explicit carbon pricing instrument in place'. See World Bank, *State and Trends*, p.69.
- 85 IMF, *Fiscal Monitor*, p.12, 19, 25.
- 86 IMF, *Fiscal Monitor*, p.12, 25.
- 87 EU-Vietnam, Art. 13.6.2(a-b).
- 88 See generally HLCCP, *Report on Carbon Prices*.
- 89 Mexico's NDC for example, includes the conditional target of an additional 15% reduction 'subject to a global agreement addressing important topics such as carbon pricing, technical cooperation and access to financial resources and technology'. See Elkahwagy et al, *NDCs*, p.19.
- 90 United Nations Conference on Trade and Development Secretariat, *Trade and Development Report 2019: Financing a Global Green New Deal*. UNCTAD/TDR/2019 (UNCTAD, 2019) p.46.
- 91 'Green patents 'surge 43%', *Renews*, 1 October 2018: <https://renews.biz/48257/green-patents-surge-43/> [Accessed 27 February 2020].
- 92 Rivera León et al, *Measuring innovation in energy technologies: green patents as captured by WIPO's IPC green inventory*, *Economic Research Working Paper No. 44* (World Intellectual Property Organization, September 2018).
- 93 European Parliament resolution of 29 November 2007 on trade and climate change (2007/2003(INI)). Paras. 1, 9 and 16.
- 94 Ludvine Tamiotti et al. *Trade and Climate Change: A report by the United Nations Environment Programme and the World Trade Organization* (WTO/UNEP, 2009) p.44.
- 95 IPR issues are listed under the 'enabling environments and barriers' policy theme of the TEC website (<https://unfccc.int/ttclear/policies> [Accessed 27 February 2020]). Since 2012, no action appears to have been taken.
- 96 Submissions available on the TEC website. Of particular note are those from the Climate Action Network International, International Centre for Trade and Sustainable Development (ICTSD) and the Third World Network. For instance, the ICTSD states (p.5): 'It is difficult to envisage a credible approach to work on technology development and transfer without considering the role of intellectual property rights.'
- 97 E.g. EU-Vietnam, Art. 12.1.2; EU-Colombia-Peru, Art. 196; EU-Central America, Art. 78(g). Other agreements rather push IPR-holders' concerns: EU-CARIFORUM provides that technology transfer should occur on a 'commercial basis' (Art. 112); EU-Ukraine commits Parties to respect IPR-holders' 'legitimate expectations' (Art. 159.2).
- 98 E.g. EU-CARIFORUM, Art. 142.2; EU-Ukraine, Art. 10.3.
- 99 E.g. EU-Central America, Arts. 50.4(b), 55, 228, 231 and 274(c).
- 100 E.g. CETA, Art. 19.4.6; EU-Central America, Arts. 209.2(j), 211; EU-Chile, Art. 140; EU-Colombia-Peru, Art. 175.5; EU-Singapore, Art. 9.4.6; EU-Vietnam, Art. 9.4.9.
- 101 E.g. EU-Singapore FTA includes the prohibition in a dedicated Chapter on 'Non-Tariff Barriers to Trade and Investment in Renewable Energy Generation', expressly banning LCRs and the 'unjustified licensing of technology'. The term 'unjustified' is not defined and no criteria for justifying such measures are included (Art. 7.2(d) and Art. 7.4).
- 102 See Carsten Gandenberger et al. 'The International Transfer of Wind Power Technology to Brazil and China'. *Working Paper Sustainability and Innovation No. 5 07/2015* (Fraunhofer Institute for Systems and Innovation Research ISI, 2015) p.43. China was host to the largest proportion of projects initiated under the Kyoto Protocol's Clean Development Mechanism (CDM), but by many accounts the CDM was not itself a particularly effective promoter of technology transfer. A 2011 study of 1000 CDM projects found that only 265 involve technology transfer (K. Das, *Technology Transfer under the Clean Development Mechanism: an empirical study of 1000 CDM projects*. Working Paper 014, Governance of Clean Development Working Paper Series (School of International Development, University of East Anglia UK, 2011) p.28-9). A later study, estimated that tech transfer occurs in less than half of CDM projects. At that time, China accounted for 48% of all 7,520 CDM projects globally. (L. Xie, et al. 'Technology transfer in Clean Development Mechanism (CDM) projects: lessons from China', *Technological and Economic Development of Economy* 19 (Supplement 1, 2013) p.472-3).
- 103 E.g. EU-Japan, Art. 8.11; CETA, Art. 8.5.1(f). In CETA, Canada scheduled three reservations in relation to performance requirements, including technology transfer (Reservations I-C-1, I-C-16, and I-C-17). A 2017 EU-commissioned analysis of the potential for modernisation of the 2002 EC-Chile FTA proposes that the FTA should follow the CETA model and expressly prohibit performance requirements and thereby hinder tech transfer in favour of investment protection, despite its assessment that the existing agreement's provisions on technology transfer (Art. 24(2a)) had been relatively successful. (See *Ex-ante Study of a Possible Modernisation of the EU-Chile Association Agreements: Final Report*, Prepared by ECORYS - CASE, February 2017, p114, 121, 261).
- 104 Lise Johnson, *Space for Local Content Policies and Strategies: A crucial time to revisit an old debate*. (Deutsche Gesellschaft für Internationale Zusammenarbeit, July 2016) p.34
- 105 Namely, TRIPS Art. 7 ('The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations') and Art. 66.2 ('Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base'). Additionally TRIPS Art. 40 addresses competition policy, and licensing practices that restrain competition and may impede the transfer of technology.
- 106 Under TRIPS, criteria for patentability require a product to be new; involve a non-obvious inventive step; and be capable of industrial application.
- 107 This was proposed to the TRIPS Council by Ecuador in 2013. See Third World Network, 'TWN Info Service on Climate Change (Jun13/02)'. 10 June 2013: <https://www.twn.my/title2/climate/info.service/2013/climate130602.htm> [Accessed 27 February 2020].
- 108 'Climate Change and Biodiversity', Convention on Biological Diversity, 19 Dec. 19: <https://www.cbd.int/climate/> [Accessed 27 February 2020].
- 109 *Connecting Biodiversity and Climate Change Mitigation and Adaptation – Key Messages from the Report of the Second Ad Hoc Technical Expert Group on Biodiversity and Climate Change* (Secretariat of the Convention on Biological Diversity, 2009).
- 110 FAO, *Coping with climate change – the roles of genetic resources for food and agriculture* (FAO, 2015) p. 18, 105.
- 111 International Institute for Sustainable Development, *Sustainability Toolkit for Trade Negotiators* (4.1.1 Fostering Green Innovation). Available: <https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators> [Accessed 27 February 2020].
- 112 Carlos M. Correa et al., *Plant Variety Protection in Developing Countries: A Tool for Designing a Sui Generis Plant Variety Protection System: An Alternative to UPOV 1991* (APBREBES, 2015) p.35.
- 113 E.g. EU-Japan, Art. 14.3.2(h); EU-Ukraine, Art. 228; EU-Chile, Art. 170(a)(v); EU-Vietnam, Art. 12.42; EU-Colombia-Peru, Art. 232; EU-South Korea 10.39.
- 114 Both Ends, 'UPOV 91 and trade agreements: Compromising farmers' right to save and sell seeds'. *Both Ends Discussion Paper* (October 2018) p.3.
- 115 Correa et al., *Plant Variety Protection*, p.35.
- 116 See Both Ends, 'UPOV', p.5. It is notable in this respect that the newly negotiated EU-Mercosur FTA provides in its IPR Chapter that 'access to genetic resources for food and agriculture shall be subject to specific treatment in accordance with [ITPGRFA]', and simultaneously requires that FTA Parties 'protect plant varieties rights, in accordance with [UPOV]'. (Cf. Art. X.6.2 (Protection of Biodiversity and Traditional knowledge) and Art. X.41 (International Agreements), Texts published following the agreement in principle announced on 28 June 2019).
- 117 EU-CARIFORUM FTA, Art. 149. The provision only requires Parties to 'consider acceding to [UPOV]'.
118 See Chapter 4, Correa et al., *Plant Variety Protection*.

- 119** See Doha WTO Ministerial Declaration 2001. WT/MIN(01)/DEC/1. Adopted 14 November 2001, para. 19. Under the auspices of the World Intellectual Property Organization (WIPO), an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) has been trying since then to resolve the issue. See World Intellectual Property Organization, *Key Questions on Patent Disclosure Requirements for Genetic Resources and Traditional Knowledge* (WIPO, 2017).
- 120** Chiefly Brazil, China, Colombia, Ecuador, India, Indonesia, Peru, Thailand, the ACP Group, and the African Group.
- 121** Art. 6 of the Nagoya Protocol requires that the user of biological resources obtain 'prior informed consent of the Party providing such resources...' See also F. Rabitz, 'Biopiracy after the Nagoya Protocol: Problem Structure, Regime Design and Implementation Challenges', *Brazilian Political Science Review* Vol. 9 No. 2, Sao Paulo, May/Aug 2015.
- 122** Disclosure obligations were mooted by Parties to the CBD in 2002, but the resulting Guidelines only encourage disclosure. See Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of Benefits Arising out of their Utilisation (6th Conference of Parties to the Convention on Biological Diversity) para. 16(d).
- 123** "Draft Decision to Enhance Mutual Supportiveness between the TRIPS Agreement and the Convention on Biological Diversity", (TN/C/W/59) June 2011.
- 124** See IGC Report of the Twenty-Eighth Session Geneva, July 7 to 9, 2014 (WIPO/GRTKF/IC/28/11, 15 Feb 2016), para 55: '[The EU delegation] had proposed a mechanism under which it could contemplate agreeing to a requirement to disclose the origin, or source, of GRs in patent applications... To be acceptable, the disclosure requirement would have to contain safeguards as part of an overall agreement to ensure legal certainty, clarity and appropriate flexibility.'
- 125** European Union Directive 98/44/EC on the Legal Protection of Biotechnological Inventions of July 6, 1998, paras 26 and 27. See WIPO, *Key Questions*, 'Annex: Disclosure Requirements Table' (updated May 2017).
- 126** These are basically due diligence obligations. See EU Regulation 511/2014 on compliance measures for users from the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization in the Union, 16 April 2014.
- 127** E.g. EU-CARIFORUM, Art. 150; EU-Central America, Art. 229.4-5; EU-Colombia-Peru, Art. 201; EU-Ukraine, Art. 229.
- 128** European Parliament resolution of 15 January 2013 on development aspects of intellectual property rights on genetic resources: the impact on poverty reduction in developing countries (2012/2135(INI)). (2015/C 440/07) paras. 32-36.
- 129** See discussion in R. Lopian, *Climate change, sanitary and phytosanitary measures and agricultural trade. The State of Agricultural Commodity Markets (SOCO) 2018: Background paper* (Food and Agriculture Organization of the United Nations, 2018) pp. 24, 30-33. The following proposals are based on Lopian's recommendations; also Häberli, *Potential conflicts*, p.36-38.
- 130** E.g. Ethiopia, Ghana, India, Nigeria, Sierra Leone. Elkahwagy et al. *NDCs*, p.12.
- 131** WTO Secretariat and UN Environment, *Making Trade Work for the Environment, Prosperity and Resilience* (WTO/ UNE, 2018), p25
- 132** Frédéric Simon, 'EU countries have 'no concrete plans' to phase out fossil fuel subsidies', *Euractiv*. 9 September 2019. Available: <https://www.euractiv.com/section/climate-environment/news/eu-countries-have-no-concrete-plans-to-phase-out-fossil-fuel-subsidies-report/> [Accessed 27 February 2020].
- 133** WTO members who signed onto the statement include Chile; Costa Rica; Iceland; Liechtenstein; Mexico; the Republic of Moldova; New Zealand; Norway; Samoa; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Uruguay.
- 134** See Joint Leaders' statement on the launch of the 'Agreement on Climate Change, Trade and Sustainability' initiative (New York, 25 September 2019).
- 135** J. Monkelbaan, *Transport, Trade and Climate Change: Carbon Footprints, Fuel Subsidies and Market-based Measures*. ICTSD Global Platform on Climate Change, Trade and Sustainable Energy (International Centre for Trade and Sustainable Development, 2011) p. 18-19.
- 136** J. Monkelbaan, *Transport, Trade and Climate Change*, p.22.
- 137** Ivetta Gerasimchuk et al. *A Guidebook to Reviews of Fossil Fuel Subsidies: From self-reports to peer learning* (IISD Global Subsidies Initiative, 2017) p.23.
- 138** Franziska Funke, Laura Merrill, 'How Reforming Fossil Fuel Subsidies Can Go Wrong: A lesson from Ecuador'. *Global Subsidies Initiative*, October 24, 2019: <https://www.iisd.org/gsi/subsidy-watch-blog/how-reforming-fossil-fuel-subsidies-can-go-wrong-lesson-ecuador> [Accessed 27 February 2020].
- 139** CPTPP, Art. 20.16.5.
- 140** Margaret A. Young, 'Energy transitions and trade law: lessons from the reform of fisheries subsidies' in *International Environmental Agreements* 17(1), March 2017, p.381 (NB. Young refers to the Trans-Pacific Partnership, which was superseded by the CPTTP. These provisions however remained unchanged in the CPTTP).
- 141** SDG indicator 12.c.1 is the 'Amount of fossil fuel subsidies per unit of GDP (production and consumption)', as per the Resolution adopted by the General Assembly on Work of the Statistical Commission pertaining to the 2030 Agenda for Sustainable Development (A/RES/71/313). See *Measuring Fossil Fuel Subsidies in the Context of the Sustainable Development Goals*, United Nations Environment Programme (UN Environment), International Institute for Sustainable Development (IISD) (2019).
- 142** See European Commission, '2018 Concept paper on WTO modernisation', p.4 Available: <http://trade.ec.europa.eu/doclib/html/157331.htm> [Accessed 27 February 2020]. Even the US supports enhanced notification obligations – see WTO, *Procedures to Enhance Transparency and Strengthen Notification Requirements Under WTO Agreements*. Communication from the United States. JOB/GC/148, JOB/CTG/10 (2017). For further detail on WTO reform see ICTSD, *Reforming Fossil Fuel Subsidies through the Trade System. WTO: Paths Forward*. (International Centre for Trade and Sustainable Development, 2018).
- 143** Kati Kulovesi, 'International Trade Disputes on Renewable Energy: Testing Ground for the Mutual Supportiveness of WTO Law and Climate Change Law', 23(3) *REV. EUR. CMTY. & INT'L ENVIR. L.* 342-553 (2014).
- 144** Strictly speaking, trade remedies are not only directed at counteracting state support (such as subsidisation), but also dumping caused by private entities. For purposes of brevity, the issue is nevertheless addressed below in this context in order to highlight that public incentives to the renewable energy sector are vulnerable to this type of retaliation.
- 145** LCRs may also violate the ASCM or – conversely – be justifiable under GATT Art. III:8 (government procurement) or GATT Art. XX (environmental exceptions). None of these have yet been tested in WTO case law.
- 146** For example, LCRs were adopted in the renewable energy sector between 1997 and 2012 in Argentina, Brazil, Canada (Quebec & Ontario), China, Croatia, France, India, Italy, Malaysia, Spain, South Africa, Turkey, Ukraine and USA (See Vyoma Jha, 'Political Economy of Climate, Trade and Solar Energy in India', 9(2) *Trade L. & Dev.* 255 (2017) p.272). Hufbauer et al additionally list the following countries as having adopted LCRs (not necessarily for renewable energy) between 2008 and 2013: Australia, Azerbaijan, Botswana, Egypt, Greece, Indonesia, Kazakhstan, Kenya, Mexico, Mongolia, Nigeria, Paraguay, Russia, Saudi Arabia, South Korea, Switzerland, Tanzania and Uganda (See *Local Content Requirements: A Global Problem* (Peterson Institute for International Economics, September 2013) p5-6).
- 147** Geraldine Ang, 'Overcoming barriers to international investment in clean energy'. *OECD Investment Insights*, June 2015.
- 148** See J.C. Kuntze & Tom Moerenhout, *Local Content Requirements and the Renewable Energy industry - A Good Match?* (International Centre for Trade and Sustainable Development, 2013); Suzy H. Nikièma, *Performance Requirements in Investment Treaties Best Practices Series* (International Institute for Sustainable Development, December 2014) p.16; Johnson, *Space for Local Content Policies* (GIZ, 2016); Aaron Cosbey, 'Everyone's Doing It: The Acceptance, Effectiveness and Legality of Performance Requirements'. *Investment Treaty News*, 19 February 2015 (International Institute for Sustainable Development).

Available: <https://www.iisd.org/itn/2015/02/19/everyones-doing-it-the-acceptance-effectiveness-and-legality-of-performance-requirements/> [Accessed 27 February 2020].

149 Oliver Johnson, 'Promoting green industrial development through local content requirements: India's National Solar Mission', *Climate Policy*, Vol. 16, Iss. 2 (2016).

150 Namely, the WTO Anti-Dumping Agreement (ADA) and Agreement on Subsidies and Countervailing Measures (ASCM).

151 Followed by the US (9), India (6), China (5), Australia (5), Peru (4) and Canada (2). These cases concerned solar technology (21), biofuels (15) and wind technology (9). Data from Ilaria Espa, 'New Features of Green Industrial Policy and the Limits of WTO Rules: What Options for the Twenty-first Century?' *Journal of World Trade*, 53, no. 6 (2019).

152 Espa, 'New Features', p.987.

153 Jonas Kasteng, *Trade Remedies on Clean Energy: A New Trend in Need of Multilateral Initiatives*, E15 Expert Group on Clean Energy Technologies and the Trade System - Think Piece (International Centre for Trade and Sustainable Development / World Economic Forum, December 2013) p.1.

154 Robert Howse, 'Obama's free-trade green plan has a chance of breaking WTO inertia', *Globe and Mail*, 27 June 2013: <https://www.theglobeandmail.com/report-on-business/economy/economy-lab/obamas-free-trade-green-plan-has-a-chance-of-breaking-wto-inertia/article12870243/> [Accessed 27 February 2020].

155 Regulation (EU) 2017/2321.

156 Kasteng, *Trade Remedies*, p.7.

157 As proposed in Transport & Environment, 'Trade and Sustainable Development: A chance for innovative thinking' (Transport & Environment, October 2017), p.8-9.

158 See ICTSD, 'Reforming Fossil Fuel Subsidies', p.6.

159 Espa suggests that one of the principle reasons WTO members turn to the DSB to challenge LCRs – rather than using unilateral measures – is simply that LCRs are not easily counteracted by trade remedies. Espa, 'New Features', p.987, fn. 48.

160 This following account is based on Jha, 'Political Economy'.

161 Jha, 'Political Economy', p.273.

162 This is further evidenced by EU proposals for future rulemaking activities in the WTO, in which it is suggested that new WTO rules should target 'performance requirements (such as the sourcing or production of goods or services locally) in a more comprehensive manner'. See European Commission 2018 'Concept paper on WTO modernisation', p.5 Available: <http://trade.ec.europa.eu/doclib/htm/157331.htm> [Accessed 27 February 2020].

163 E.g. EU-Colombia-Peru, Art. 174(b).

164 See Art. XVI(2) in the 1994 GPA; Art. V(3)(b) in the revised 2014 GPA.

165 E.g. EU – Singapore FTA, Art. 8.20.

166 Model provisions can be found in Markus Krajewski, *Model Clauses for the Exclusion of Public Services from Trade and Investment Agreements* (Chamber of Labour Vienna and the European Federation of Public Service Unions, February 2016).

167 E.g. EU – Singapore FTA, Art. 8.17. See further commentary in *IISD Sustainability Toolkit: 4.2 Services*.

168 E.g. EU Singapore, Art. 10.9(6, 7, 11).

169 Anja Kollmuss et al, 'Has Joint Implementation reduced GHG emissions? Lessons learned for the design of carbon market mechanisms', *Stockholm Environment Institute, Working Paper No. 2015-07*.

170 Namely: Canada, Japan, Liechtenstein, Monaco, New Zealand, Norway, South Korea and Switzerland. Additionally Sweden NDC indicates that 'international credits could be used to meet these more ambitious targets.' World Bank, *State and Trends*, p.55 & 62

171 World Bank, *State and Trends*, p.56.

172 Dennis Tänzler et al. *Analysing the interactions between new market mechanisms and emissions trading schemes: Opportunities and prospects for countries to use Article 6 of the Paris Agreement: Final Report*. CLIMATE CHANGE 02/2019. Report No. (UBA-FB) 002696/ENG (Umweltbundesamt, June 2018), p.70-71.

173 This is made possible by overestimation of 'business as usual' scenarios and attendant lack of ambition reflected in the NDC targets. One assessment has found that Indonesia, India and China's NDCs have significant potential to transfer 'hot air' through the international carbon market. See Stephanie La Hoz Theuer, et al. 'When less is more: limits to international transfers under Article 6 of the Paris Agreement', *Climate Policy*, 19:4, 401-413 (2019) p.402, 409; also Tänzler et al. *Analysing the interactions*, p.73; Axel Michaelowa, et al. 'Additionality revisited: guarding the integrity of market mechanisms under the Paris Agreement', *Climate Policy*, 19:10, 1211-1224 (2019) p.1215.

174 Under the Kyoto Protocol, some states made unilateral commitments in this respect, but later reneged on their promises and purchased 'hot air'. La Hoz Theuer, 'When less is more', p.411; also Lambert Schneider, 'Environmental Integrity under Article 6 of the Paris Agreement: Discussion Paper' (Umweltbundesamt, March 2017) p.7.

175 Additionality 'requires any mitigation activity that is considered for a market-based mechanism to demonstrate that the corresponding emission reductions would not have happened in the absence of the support from the market-based mechanism. Additionality is key to ensuring that no fictitious carbon units, i.e. units that do not represent real emission reductions, compromise global carbon markets'. Michaelowa, 'Additionality revisited', p.1212.

176 For example, Moritz von Unger & Dennis Tänzler, 'A Proposal on Principles: Governance considerations and legal language for the Art. 6 mechanisms', *Carbon Mechanisms Review 1* | 2018 March-April, p.16.

177 This proposal follows that of the Alliance of Small Island States for all transfers under Art. 6. It is opposed by Australia, Japan, Norway and the US. The function of automatic cancellation is similar to the new market stability reserve (MSR) of the EU's own ETS – which permits both automatic deletion of surplus allowances and member states' active removal of emission permits. See Frank Jotzo et al. 'Double counting of emissions cuts may undermine Paris climate deal'. *The Conversation*, 15 October 2019. Available: <https://theconversation.com/double-counting-of-emissions-cuts-may-undermine-paris-climate-deal-125019> [Accessed 27 February 2020]. Also Steve Zwick, 'Will Double-Counting Dust-Up Crush Katowice Climate Conference?', *Ecosystem Marketplace*, 14 December 2018. Available: <https://www.ecosystemmarketplace.com/articles/old-hang-up-over-double-counting-just-one-wrench-in-katowice-climate-talks/> [Accessed 27 February 2020]; Natalie Sauer, 'Wealthy countries resist global tax on carbon offsets', *Climate Change News*, 26 June 2019. Available: <https://www.climatechangenews.com/2019/06/25/wealthy-countries-resist-global-tax-carbon-offsets/> [Accessed 27 February 2020].

178 Droege et al, *The trade system and climate action*, p.27 & 40.

179 European Commission, *Report on Implementation of EU Free Trade Agreements: 1 January 2017 - 31 December 2017* (2018), p.8.

180 Sometimes these commitments are further watered down by the inclusion of the Chapeau: e.g. EU-Vietnam, Art. 13.10.2(e); CETA, Art. 23.3.2(b); EU-South Korea, Art. 13.6; EU-Ukraine, Art. 293.3.

181 *Communication from the Commission: A renewed EU strategy 2011-14 for Corporate Social Responsibility* (COM/2011/0681 final).

182 Guiding Principle 9 states: 'States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other states or business enterprises, for instance through investment treaties or contracts.' The UNGP's commentary clarifies that Principle 9 also applies to free trade agreements. OHCHR, *Guiding Principles on Business and Human Rights, Implementing the United Nations "Protect, Respect and Remedy" Framework*, 2011, p. 11.

183 United Nations global compact; UN 2030 agenda for sustainable development; ISO 26000 guidance standard on social responsibility; OECD guidelines for multinational enterprises; OECD due diligence guidance for responsible business conduct.

184 The UK, the Netherlands, Italy, Denmark, Finland, Lithuania, Sweden.

185 Sandra Cossart, 'What lessons does France's Duty of Vigilance law have for other national initiatives?' *Business & Human Rights Resource Centre*, 27 June 19 Available: <https://www.business-humanrights.org/en/what-lessons-does-frances-duty-of-vigilance-law-have-for-other-national-initiatives> [Accessed 27 February 2020].

186 The concluded EU-Mercosur FTA, for example, provides that Parties are to 'ensure that judicial and administrative proceedings are available and accessible in order to permit effective action to be taken', but this provision applies only to 'infringements of labour rights referred to in [the TSD Chapter]', not its environmental provisions (Art. 4.11). The entire Chapter is also excluded from the FTA's main dispute settlement mechanism. (TSD Chapter published following the agreement in principle announced on 28 June 2019).

187 This proposal is adapted from the IISD's *Sustainability Toolkit for Trade Negotiators* (Section 3.7 Other Environmental Commitments: CSR).

188 Art. 10*bis* para. (3)(iii) prohibits 'indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.' (Paris Convention for the Protection of Industrial Property (as amended on September 28, 1979)). The Convention is incorporated into the TRIPs Agreement (Art. 2.1) and this Article is already cited in several IPR provisions (EU-Colombia-Peru, Art. 233; EU-Japan (Art. 14.1.3); CETA (Art. 20.19.2(c))).

189 UN Global Compact Principles 7, 8 and 9, see: <https://www.unglobalcompact.org> [Accessed 27 February 2020].

190 Katie Sara Hyman & Justin Williams, 'Recent ECT Claims - Impact for Investors and Governments', *JD Supra*, October 21, 2019: <https://www.jdsupra.com/legalnews/recent-ect-claims-impact-for-energy-59188/> [Accessed 27 February 2020].

191 Stefanie Schacherer, *International Investment Law and Sustainable Development: Key cases from the 2010s* (International Institute for Sustainable Development, October 2018).

192 UNCTAD data shows that claims brought by investors from the Netherlands, UK, Germany, Spain, France, Luxembourg and Italy accounted for 424 of all 942 known ISDS cases between 1987-2018. See *Fact Sheet on investor-state dispute settlement cases in 2018*, IIA Issues Note, May 2019 Issue 2 (UNCTAD).

193 'Suing to force through a toxic goldmine: Gabriel Resources vs Romania', *Red Carpet Courts* (Friends of the Earth, Transnational Institute, Corporate Europe Observatory, 2019). See: <http://10isdsstories.org/cases/case1/> [Accessed 27 February 2020].

194 Marie-Amélie Brun, 'Sued for acting on climate breakdown?', *European Environmental Bureau*, 7 November 2019: <https://meta.eeb.org/2019/11/07/sued-for-acting-on-climate-breakdown/> [Accessed 27 February 2020].

195 Encounters between ISDS clauses and EU law are at the same time slowly creating a legal quagmire. The CJEU has ruled that ISDS claims brought under *intra-EU* BITs are inconsistent with EU law (C-284/16, Judgment (OJ), 20/04/2018, *Achmea v Slovak Republic*), but EU member states are split on whether the judgement applies to ISDS cases brought under the Energy Charter Treaty (ECT) – the ISDS clause of which has been invoked in more cases than any other international investment agreement. In any case, the CJEU Opinion has not stopped ISDS tribunals themselves from exercising jurisdiction over intra-EU ISDS disputes... Finally, the ICS clause in CETA was deemed consistent with EU law in a highly dubious CJEU judgement (Opinion 1/17 of the Court of 30 April 2019), which risks placing 'member states in a situation of impossible conflicting duties, whereby the CJEU could even (*ad absurdum*) sanction the member state for having changed its legislation to comply with rulings by the ICS triggered by Canadian investors' (see comments in Francisco de Abreu Duarte, 'Autonomy and Opinion 1/17 – a matter of coherence?' *European Law Blog*, 31 May 2019: <https://europeanlawblog.eu/2019/05/31/autonomy-and-opinion-1-17-a-matter-of-coherence/> [Accessed 27 February 2020]).

196 International Trade Union Confederation, *Summary of the proceedings and trade union advocacy to the 38th session of UNCITRAL's Working Group III on ISDS Reform*, October 14-18, 2019, UN Headquarters, Vienna.

197 See proposals in Lise Johnson et al, *Clearing the Path: Withdrawal of Consent and Termination as Next Steps for Reforming International Investment Law*. CCSI Policy Paper, April 2018 (Columbia Center on Sustainable Investment).

198 Opinion 2/15 of the Court of 16 May 2017, paras. 225-256, 285-293, 294-304.

199 The process for terminating intra-EU BITs after the CJEU *Achmea* ruling might serve as a model for terminating extra-EU BITs. See 'Declaration of the Representatives of the Governments of the member states of 15 January 2019 on the legal consequences of the judgement of the Court of Justice in *Achmea* and on investment protection in the European Union': https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf [Accessed 27 February 2020].

200 Opinion 2/15 of the Court of 16 May 2017, para. 161.

201 Geraldo Vidigal, 'Why is there so little litigation under free trade agreements? Retaliation and adjudication in international dispute settlement', Centre for Trade and Economic Integration Working Papers - CTEI-2017-14 (2017).

202 E.g. CETA, Art. 23.13.4, 22.5; EU-Central America, Art. 294, 295; EU-Chile, Art. 11, 48; EU-Colombia-Peru, Art. 281, 282; EU-Singapore, Art. 12.15.5; EU-South Korea, Art. 13.12, 13.13; EU-Ukraine, Art. 299; EU-Vietnam, Art. 13.15.4.

203 The EU-Japan FTA provides for meetings to be 'convened regularly', unless the Parties decide otherwise (Art. 16.16.3). Postnikov notes that although annual meetings are foreseen under the EU-Chile agreement, 'the Civil Society Dialogue has convened only twice, in 2006 and 2011'. Evgeny Postnikov, 'Environmental Instruments in Trade Agreements: Pushing the Limits of the Dialogue Approach' in *European Union External Environmental Policy: Rules, Regulation and Governance Beyond Borders*. Eds. Camilla Adelle et al. (Palgrave Macmillan, 2018) p.70.

204 Perrine Fournier & Saskia Ozinga, *Forests and forest people in EU Free Trade Agreements* (Fern, October 2018), p.23. Several of the following recommendations are based on Fern's assessment.

205 As proposed in Transport & Environment, 'Trade and Sustainable Development: A chance for innovative thinking' (Transport & Environment, October 2017), p.7.

206 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Arts. 4 & 5.

207 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, Arts. 5 & 6.

208 As per the Aarhus Convention, Art. 9(1). It is however worth recalling that the Aarhus Convention Compliance Committee (ACCC) – which monitors its implementation – found in 2017 that the EU had breached several of these provisions (Arts. 9(3) and (4)) (Case No. ACCC/2008/32). A 2019 Commission Services report on the ACCC decision considered the allegations that the case-law of the CJEU and EU Aarhus Regulation fail to provide adequate administrative or judicial review of non-legislative environmental acts, and noted 'difficulties' and 'significant hurdles' in these respects. See 'Report on European Union implementation of the Aarhus Convention in the area of access to justice in environmental matters', COMMISSION STAFF WORKING DOCUMENT. Brussels, 10.10.2019 SWD(2019) 378 final. p.28.

209 E.g. CETA, Art. 23.9, 23.10; EU-Central America, Art. 296, 297; EU-Colombia-Peru, Art. 283, 284; EU-Japan, Art. 16.17, 16.18; EU-Singapore, Art. 12.16, 12.17; EU-South Korea, Art. 13.5, 13.14; EU-Ukraine, Art. 301; EU-Vietnam, Art. 13.16, 13.17.

210 See Tracy Hester, 'Still standing: The New U.S.-Mexico-Canada Agreement and the fate of the Commission for Environmental Cooperation', *American Bar Association*, 10 May 2019: https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2018-2019/may-june-2019/still-standing/ [Accessed 27 February 2020]; also Scott Vaughan, 'NAFTA's Environmental Record: History, outcomes, impacts and options' (International Institute for Sustainable Development, June 2017), p.8.

- 211** The Commission finally initiated government consultations in January 2019. See European Public Service Union (EPSU), 'EU Domestic Advisory Group (DAG) calls on European Commission to open labour consultations on trade union rights pursuant to the EU-Korea FTA', 21 December 2016: <https://www.epsu.org/article/eu-domestic-advisory-group-dag-calls-european-commission-open-labour-consultations-trade-0> [Accessed 27 February 2020].
- 212** See C.Cross, 'Failure by design: did the US choose to lose the Guatemala labour dispute?' Vol. 24 / 3 *International Union Rights* (London: ICTUR, 2017).
- 213** See the 'Non paper of the Commission services', p. 8. Of course, the Commission is itself responsible for the drafting of TSD Chapters that contain *precisely these provisos – absent any sanctions-mechanism*.
- 214** Ciaran Cross, 'Legitimising an Unsustainable Approach to Trade: A discussion paper on sustainable development provisions in EU Free Trade Agreements' (Powershift, December 2017).
- 215** Peter-Tobias Stoll et al, 'Model Labour Chapter for EU Trade Agreements - In cooperation with Bernd Lange MEP, Chairman of the Committee on International Trade and commissioned by Friedrich-Ebert-Stiftung' (FES, 2017). p.5 & 39-41, Art. X.37. Available at: https://www.fes-asia.org/file-admin/user_upload/documents/2017-06-Model_Labour_Chapter_DRAFT.pdf [Accessed 27 February 2020].
- 216** As in the Escazú Agreement, Art. 8.2(c); similar provisions are contained in the Aarhus Convention, Art. 9.2.
- 217** Ankersmit proposes an alternative method to establish a complaints procedure for FTA enforcement *within the EU* – which would entail only the adoption of an EU instrument akin to the existing EU Trade Barriers Regulation. See Laurens Ankersmit, 'A Formal Complaint Procedure for a More Assertive Approach towards TSD Commitments' (ClientEarth, 27 October 2017).
- 218** E.g. CPTTP, Art. 28.9.5(b).
- 219** E.g. EU-Chile, Art. 191; EU-Singapore, Art. 2.14; EU-South Korea, Art. 2.15.1; EU-Ukraine, Art. 36.
- 220** E.g. CETA, Art. 28.3.1: 'The Parties understand that the measures referred to in Article XX (b) of the GATT 1994 include environmental measures necessary to protect human, animal or plant life or health. The Parties understand that Article XX(g) of the GATT 1994 applies to measures for the conservation of living and non-living exhaustible natural resources.'
- 221** Some Canadian FTAs exclude the requirement that measures for the conservation of exhaustible natural resources be adopted 'in conjunction with restrictions on domestic production or consumption, or the protection of natural resources': See Canada–Panama FTA, Art 23.02(3); Canadian model BIT, Art 10.
- 222** For example: Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R. 20 May 1996; Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R. 6 November 1998; Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R. 17 December 2007; Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R. 18 June 2014.
- 223** Bartels concludes that 'it is still not clear what [the Chapeau] requires'. L. Bartels, 'The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction', *American Journal of International Law*, Vol. 109:95, p.96, 123.
- 224** For instance, in *EC – Seal Products* the Appellate Body found that a ban on imports of seal products was legitimate under GATT Art. XX (a) ('public morals'), but that an exemption from the ban for the products of traditional indigenous hunting constituted arbitrary and unjustifiable discrimination. See also *Brazil – Retreaded Tyres*, para 227.
- 225** See further discussion in Gracia Marín Durán, 'Measures with Multiple Competing Purposes after *EC – Seal Products*: Avoiding a Conflict between GATT Article XX-Chapeau and Article 2.1 TBT Agreement' *Journal of International Economic Law*, Volume 19, Issue 2, June 2016, pp. 467–495.
- 226** EU-Vietnam, Art. 13.10.2(e). See also CETA, Art. 23.3.2(b); EU-South Korea, Art. 13.6; EU-Ukraine, Art. 293.3.
- 227** Art. 16.2.3. Notably, Art. 3.5 UNFCCC also incorporates the GATT Art. XX Chapeau, but whether this particular Article also applies to the Paris Agreement is contested. See Bacchus, *What Is a Climate Response Measure?* p.9.
- 228** The latter approach ('relating') is used in Art. 36 TFEU – which, it should be added, also contains the 'Chapeau'!...
- 229** A more detailed 'model' Exceptions clause is developed in Lawrence & Ankersmit, 'Making EU FTAs 'Paris Safe'', p. 14.
- 230** Krajewski, *Ensuring the Primacy of human rights*, p.19.
- 231** See especially: Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, 6 March 2006; Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, 22 October 1999; Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products* WT/DS457/AB/R, 20 July 2015.
- 232** In *Peru – Agricultural Products*, the Appellate Body held that a relinquishment of these rights and obligations cannot go 'beyond the settlement of specific disputes'. WT/DS457/AB/R, fn. 106. Some scholars suggest an FTA waiver might nevertheless meet this criterion. Cornelia Furculiță, 'Fork-in-the-Road Clauses in the New EU FTAs: Addressing Conflicts of Jurisdictions with the WTO Dispute Settlement Mechanism' *CLEER PAPERS 2019/1* (Centre for the Law of EU External Relations, 2019) p.37 See also discussion in Geraldo Vidigal, 'The Return of Voluntary Export Restraints? How WTO Law Regulates (and Doesn't Regulate) Bilateral Trade-Restrictive Agreements' (2018), p.8: 'The fact that WTO law establishes some conditions for Members to agree on WTO-plus arrangements cannot mean that they are automatically prohibited from agreeing to WTO-minus rules. Pursuant to Article 41.1(b) [Vienna Convention on the Law of Treaties], this would only occur if the modification: (a) is prohibited by WTO rules; (b) affects the rights and obligations of other WTO Members; or (c) creates a derogation incompatible with the effective execution of the object and purpose of the WTO Agreements as a whole.'
- 233** Plenty of FTAs already in force contain interpretive provisions stating that the FTA should prevail over WTO rules in the event of any inconsistency: E.g. Canada-Colombia, Art. 102; Canada-Jordan, Arts. 1-2; Canada-Panama; Art. 1.04; Canada-Peru, Art. 102; Chile-Central America, Art. 1.04; Chile-Mexico, Art. 1-03; Costa Rica-Singapore, Art. 1.3; Israel-Mexico, Art. 1-04; Nicaragua-Chinese Taipei, Art. 1.03; NAFTA, Art. 103; Panama-Chinese Taipei, Art. 1.03; Panama-Central America, Art. 1.04. See 'ANNEX: MAPPING INTERPRETATIVE PROCESSES IN REGIONAL INTEGRATION AGREEMENTS' in Asif H. Qureshi, *Interpreting WTO Agreements: Problems and Perspectives*, 2nd edition (Cambridge University Press, 2015).
- 234** This proposal is based on that of Gabrielle Marceau and Julian Wyatt, who suggest that 'specific [FTA] provisions could be adopted with a view to discouraging the parallel use of the WTO dispute settlement system'; namely, a 'directly enforceable penalty' against an FTA Party, which could 'require the payment of damages equivalent to disgorging, say, 300% of any benefit gained at the WTO'. While their proposal concerns 'fork-in-the-road' clauses in FTAs and is limited to cases when FTA Parties initiate parallel proceedings (under the FTA and WTO), it could nevertheless be adapted to these ends. See Gabrielle Marceau & Julian Wyatt, 'Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO' *Journal of International Dispute Settlement*, Vol. 1, No. 1 (2010), p.72.
- 235** Of 590 disputes referred to the DSB since 1995, the EU has initiated 102 of them (only the US has brought more, with 124; the next closest is Canada, with 40). See WTO, 'Disputes by member', Available: https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm [Accessed 27 February 2020].
- 236** See 'Civil Society Statement – EU Trade and Investment Policy must be democratised', *Seattle To Brussels Network*, 1 February 2018. <http://s2bnetwork.org/civil-society-statement-eu-trade-investment-policy-democracy/> [Accessed 27 February 2020].
- 237** See Draft recommendation of the European Ombudsman in the inquiry into complaint 1409/2014/JN against the European Commission, 26 March 2015. Available: <https://www.ombudsman.europa.eu/en/recommendation/en/59398> [Accessed 27 February 2020].

238 European Union Directorate-General for Trade, *Trade Sustainability Impact Assessment of the Free Trade Agreement between the European Union and Japan: Final Report*. May 2016. Final Report, p 234.

239 Environmental Investigation Agency, *Built on Lies: New Homes in Japan Destroy Old Forests in Europe* (EIA, 2016).

240 During negotiations, Japan did enact a new law, which failed to address many deficits of the former regulations. See M. Momii. 'Japan's New Timber Law', *Forest Legality Initiative*, 12 May 2016. Available: www.forestlegality.org [Accessed 27 February 2020].

241 European Parliament resolution of 5 July 2016 on implementation of the 2010 recommendations of Parliament on social and environmental standards, human rights and corporate responsibility 2015/2038(INI) para. 17 (e) and (f).

242 As evidenced by the fact that some nine years after the entry into force of the EU-Korea FTA, Korea has still not ratified four fundamental ILO Conventions. See Mikyung Ryu, 'Ratification of C87 and C98: A means of regression?' *International Union Rights*, Vol. 26, No. 3 (ICTUR, 2019).

243 As proposed in Greens/EFA, *Green Trade For All*, p10.

244 A final point to emphasise is the necessity or possible benefit of combining the proposed actions that have logical policy connections. For example, the issues of 'emissions embodied in imports' (7) and states' right to adopt climate response measures (5) must be combined with actions fulfilling the principle of CBDR (6). This should serve to minimise the incidence of trade restrictions based on 'embodied emissions' being abused for protectionist purposes. Additionally, combining the commitment to notify fossil fuel subsidies and their time-bound phase-out (10) with the offer of greater flexibility to use compulsory licencing and local content requirements (9) would serve to accelerate the energy transition if it helps ensure the availability of alternative clean energy production.

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