

A new blueprint for environmental provisions in EU trade agreements

ClientEarth contribution to DG Trade review
of Trade and Sustainable Development
chapters

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Introduction

The EU is stepping up its efforts to implement the European Green Deal, but more needs to be done to integrate environmental objectives into all areas of EU policy, including international trade. As the main instruments of EU external policy, free trade agreements (“FTAs”) should be utilised for building consensus on multilateral reforms and for the EU to promote and support the achievement of sustainability objectives at a global level.

Since 2010, provisions on trade and sustainable development have been included in EU trade agreements, in the so-called “Trade and Sustainable Development” (“TSD”) chapters. In 2017, the Commission launched a debate on how to better implement and enforce these chapters. It resulted in the Commission’s 2019 15-point action plan for TSD chapter implementation and enforcement. However, the recommendations set out therein have been criticised for not being sufficient to ensure full and effective implementation of the chapters. Indeed, there is a broad consensus among civil society and academics that there remains considerable scope for better incorporation of sustainability objectives and ambitious innovation - both in relation to the scope and nature of environmental commitments and to monitoring and enforcement mechanisms.¹

The Commission announced in its new trade policy strategy communication an early review of the 15-point action plan in 2021, “including the scope of commitments, monitoring mechanisms, the possibility of sanctions for non-compliance, the essential elements clause as well as the institutional set-up and resources required”.²

The EU is required to pursue an active environmental policy at international level. Article 191(1) of the Treaty on the Functioning of the European Union (“TFEU”) states that the EU environmental policy shall promote “measures at international level to deal with regional and worldwide environmental problems and in particular combating climate change”. Under Article 207 TFEU, the EU also places its trade policy into a larger framework of non-economic policy goals. The EU has in particular the obligation to foster sustainable economic, social and environmental development and contribute to the development of international measures to preserve and improve the quality of the environment.³ Furthermore, in accordance with the principle of environmental integration, environmental requirements must be integrated into the EU’s commercial policy.⁴

This briefing provides 13 concrete recommendations grouped under four focus areas to ensure the EU complies with EU Treaties. The first set of recommendations aims at effectively anchoring the EU’s sustainability and environmental objectives into EU trade agreements and ensuring sufficient policy space is preserved for environmental action (Section 1). The other recommendations respond to the remit of the review of the TSD chapters, including the nature and scope of TSD environmental obligations (Section 2)

¹ See for example IIEP, Environmental credentials of EU trade policy, March 2021, <https://ieep.eu/publications/environmental-credentials-of-eu-trade-policy> ; S; Lowe, The EU should reconsider its approach to trade and sustainable development, Centre for European Reform, October 2019, <https://www.cer.eu/insights/eu-should-reconsider-its-approach-trade-and-sustainable-development> ; M. Bronckers and G. Gruni, Retooling the Sustainability Standards in EU Free Trade Agreements, Journal of International Economic Law, Volume 24, Issue 1, March 2021, Pages 25–51, <https://doi.org/10.1093/jiel/jgab007>

² Communication from the European Commission, Trade Policy Review - An Open, Sustainable and Assertive Trade Policy, https://eur-lex.europa.eu/resource.html?uri=cellar:5bf4e9d0-71d2-11eb-9ac9-01aa75ed71a1.0001.02/DOC_1&format=PDF

³ Article 3(5) and Article 21(2) (d) and (f) TEU

⁴ Article 11 TFEU and Article 37 of the EU Charter of Fundamental Rights

and monitoring and enforcement mechanisms, including the establishment of a complaint mechanism by each Party and the possibility of sanctions for non-compliance with TSD obligations (Sections 3). The last set of recommendations aims at ensuring good governance and democratic decision-making processes (Section 4).

Summary of the recommendations

Recommendation 1: The ratification of EU FTAs should be conditional upon the ratification of certain multilateral environmental agreements (“MEAs”) and implementation of commitments aiming to tackle specific environmental issues

Recommendation 2: Preferential tariffs for certain products should be conditioned on the achievement of environmental objectives set out in the TSD chapters

Recommendation 3: Core environmental principles should be included in the general chapter to provide guiding principles to the overall agreement

Recommendation 4: A hierarchy clause in the general chapter should be introduced to resolve potential conflict between trade and environment related obligations

Recommendation 5: The general exceptions clause in EU FTAs should be revised to ensure that the necessary policy space for the adoption of environmental measures is preserved

Recommendation 6: Environmental provisions in TSD chapters should include obligations to undertake specific actions, building on MEAs, but also where no international environmental agreement exists or has not yet entered into force

Recommendation 7: A robust ex-post monitoring system and a ‘review and revision’ clause should be included to effectively assess the agreements impacts and review the implementation of the TSD chapters

Recommendation 8: Each Party should be obliged to establish a complaint mechanism, along with formal procedural guarantees, in order to allow holding the EU and its trade partners to account

Recommendation 9: The TSD dispute settlement process should be strengthened to make it as effective as the general dispute settlement mechanism

Recommendation 10: Penalties or sanctions should be available in case of violations of environmental obligations

Recommendation 11: The role and powers of Domestic Advisory Groups (“DAGs”) in the monitoring, enforcement and dispute settlement processes should be clarified and reinforced

Recommendation 12: Democratic participation should be ensured in FTAs negotiations and relevant environmental experts and decision-makers should be involved

Recommendation 13: EU FTAs negotiations should be based on sound ex-ante sustainability impact assessments

Section 1 - Structural provisions

Considering the broad scope of activities covered by trade agreements, they should be accordingly structured to ensure fundamental environmental considerations are built into and reflected in their design and implementation. Sustainability objectives should therefore be effectively anchored at the core of any trade agreement. To this end, they should feature a number of structural provisions which ensure that:

- (1) environmental and sustainability considerations are built into the fabric of every agreement, rather than being included as an afterthought (Recommendations 1 to 3); and
- (2) sufficient policy space for environmental and climate policies is safeguarded and any risks of *de facto* regulatory chill are avoided (Recommendations 3 to 5).

Recommendation 1: the ratification of EU FTAs should be conditional upon the ratification of certain multilateral environmental agreements and implementation of commitments aiming to tackle specific environmental issues

Both Parties should agree on pre-ratification commitments to a minimum level of environmental protection. These should include notably an obligation for the Parties to ratify a core list of multilateral environmental agreements (“MEAs”) before the parties are entitled to ratify the FTA.⁵

The Parties should also identify specific environmental issues to be tackled jointly and agree on specific and meaningful action as well as benchmarks to be achieved in this respect before the Parties can proceed to the ratification of the agreement.⁶

Recommendation 2: EU FTAs should set conditional preferential tariffs for certain products

In addition to pre-ratification commitments, trade agreements should also ensure continuous compliance with such commitments once the agreements enter into force. This can be done by linking tariff preferences to the achievement of commonly agreed environmental objectives. In other terms, the Parties should set reciprocal conditions for granting preferential tariffs for specific products with higher risks related to the environment and people.

As proposed in the French-Dutch non-paper on “trade, social economic effects and sustainable development”: “Parties should introduce, where relevant, staged implementation of tariff reduction linked to the effective implementation of TSD provisions and clarify what conditions countries are expected to

⁵ Indicative list: UN Framework Convention on Climate Change, the Paris Agreement, the Vienna Convention for the Protection of the Ozone Layer, the Montreal Protocol, the Convention on Biological Diversity, the Cartagena Protocol on Biosafety, the CITES Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Convention on the Conservation of Migratory Species of Wild Animals and the International Plant Protection Convention (IPPC).

⁶ For example, see the proposals for pre-ratification commitments developed by a group of academics in the context of the EU-Mercosur trade agreements: Academic Statement: Proposals on the EU-Mercosur Association Agreement and the Environment, 8 February 2021, pages 2 and 3, <https://warwick.ac.uk/fac/soc/law/research/centres/chrp/governance/eumercosuraa/statement.pdf>

meet for these reductions, including the possibility of withdrawal of those specific tariff lines in the event of a breach of those provisions.”⁷

This list of products and conditions for liberalisation of tariffs would depend on each FTA and the exchange of goods between the Parties and would be compiled in consultation with relevant stakeholders and civil society organisations.

Recommendation 3: EU FTAs should include core environmental principles in the general chapter as guiding principles to the overall agreement

Fundamental environmental principles and objectives enshrined in the EU Treaties⁸ should be placed in the general, horizontal chapter of any FTA to guide the interpretation and the implementation of all commitments contained in the agreement. However, EU FTAs currently do not incorporate fundamental principles of EU and international environmental law. Only the precautionary principle - which requires that where there is uncertainty as to the extent of risk of environmental harm, protective measures may be taken without having to wait until the harm materialises - is referenced in several EU FTAs, but only in the TSD chapter, and the formulation often differs significantly.⁹

While consistent reference to the principle of preventive action, the combating of environmental impairment at source, and the polluter pays principle could be relevant in this international context, the precautionary principle, as a fundamental principle of EU health and environment protection policy, should be systematically anchored in the general chapter of any trade agreement concluded by the EU.

The precautionary principle is differently conceptualized under other legal systems, and is sometimes even absent. It is therefore crucial that the EU precautionary principle and its future application is clarified and sufficiently safeguarded in the text of FTAs. This would provide legal certainty and prevent EU environmental measures based on this principle from being challenged by other countries under WTO rules.¹⁰

As an example, the CETA Agreement mentions a form of this principle in Article 24.8(2), as part of its Trade and Environment Chapter.¹¹ However, the wording does not align with existing EU law as interpreted by the Court of Justice of the European Union (“CJEU”).¹² According to the CJEU’s jurisprudence: (i) EU law applies the precautionary principle in cases of both scientific and technical uncertainty; (ii) the application of the principle is not dependent on the presence of a threat of serious and irreversible damage; (iii) the measures which may be taken, are not limited to prevent environmental degradation, but, for example, also to protect human health; and (iv) the measures are not limited to cost-effective measures;

⁷ See the Non-paper from the Netherlands and France on trade, social economic effects and sustainable development, <https://nl.ambafrance.org/Non-paper-from-the-Netherlands-and-France-on-trade-social-economic-effects-and#t2-Social-economic-aspects-of-trade-agreements>

⁸ Article 191 (2) TFEU

⁹ For example CETA, Article 24.8; EU-Japan, Article 16.9; EU-Vietnam, Article 13.11

¹⁰ On this, see P-T. Stoll, W. Th. Douma, N. de Sadeleer and Patrick Abel, CETA, TTIP and the EU precautionary principle - Legal analysis of selected parts of the draft CETA agreement and the EU TTIP proposals, Foodwatch, 2016, https://www.foodwatch.org/fileadmin/Themen/TTIP_Freihandel/Dokumente/2016-0621_foodwatch-study_precautionary-principle.pdf

¹¹ CETA Agreement, Article 24.9(2): "Where there are threats of serious or irreversible damage, the lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures preventing environmental degradation".

¹² See notably Case T-13/99 [2002] Pfizer Animal Health v the Council of the European Union; Case C-127/02 [2002] Waddenzee v Vogels; Case T-74/00 [2002] Artego dan v European Commission.

rather, any sort of appropriate and proportionate measure may be taken. The definition of the precautionary principle in EU trade agreements should follow the interpretation given by the CJEU.

Recommendation 4: EU FTAs should include a hierarchy clause in the general chapter

There is a risk that bilateral trade agreements overrule provisions of an MEA which has been adopted prior to the trade agreement. This depends on the particular terms of each agreement. Such a conflict could create uncertainty as to the legal obligations of the Parties with respect to the application of relevant MEA and trade agreement. While trade agreements could be used as leverage for reinforcing global environmental protection, the potential conflict between trade and environment related obligations can result in a non-zero sum game. Without a provision to address such a conflict, trade rules can have a chilling effect on the adoption of domestic environmental laws that implement commitments under previously adopted MEAs.

The introduction of a hierarchy clause in the general chapter of trade agreements would reduce this chilling effect and litigation risks when creating environmental policies or implementing multilaterally negotiated environmental policies.¹³ This type of clause is found in various FTAs, including the United States-Mexico-Canada Agreement (USMCA), and should stipulate that in the event of any inconsistency between the trade agreement and a listed (or ratified) MEA, the latter shall prevail.

Recommendation 5: The general exceptions clause in EU FTAs should be revised

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 General Agreement on Tariffs and Trade ('GATT', Article XX) and the General Agreements on Trade in Services ('GATS', Article XIV). These provisions list a limited number of possible policy objectives that may justify derogations from FTA commitments, including several relevant to environmental protection.

The incorporation of general exceptions provisions into EU FTAs should be revised to ensure that the extent of the Parties' freedom to introduce domestic environmental protections is clarified in a way that is more progressive than certain interpretations of existing exception clauses. For example:

- FTAs should recognise a broad range of legitimate public policy objectives (such as key MEAs) that create exceptions and should expressly clarify that any written list is non-exhaustive;
- FTAs should clarify and confirm the scope of existing GATT exceptions: for example, by clearly setting out that they apply to environmental protection measures including measures that cover clean air and the atmosphere, and that 'exhaustible natural resources' (mentioned in Article XX(g) GATT) includes living resources;¹⁴ and
- FTA exceptions should confirm the adoption of measures affecting products made using certain Process and Production Methods (PPMs) is permissible (if well designed and non-discriminatory).¹⁵ FTAs should notably clarify that measures restricting a product's import based on PPMs can be justified with reference to a variety of reasons including consumer preference, different end uses,

¹³ For an example of hierarchy clause, see also L. Ankersmit and J. Lawrence, Making EU FTAs 'Paris Safe' Three Studies with Concrete Proposals, June 2019, <https://www.ssrn.com/abstract=3407949>

¹⁴ As an example, Article 28.3 of the EU-Canada Comprehensive Economic and Trade Agreement states that environmental measures are covered under Article XX(b) and that the reference to "exhaustible natural resources" in Article XX(g) covers living, as well as non-living, resources.

¹⁵ See ClientEarth, International trade rules and environmental protection measures, October 2020; See also L. Ankersmit and J. Lawrence, Making EU FTAs 'Paris Safe' Three Studies with Concrete Proposals, op. cit.

and according to other socio-political priorities such as environmental protection and the reduction of risk to human health.

A revised version of such clauses in should apply to all chapters including the one on Sanitary and Phytosanitary Measures (SPS) .¹⁶

Section 2 - Environmental obligations

Recommendation 6: EU FTAs should include specific environmental obligations in relation to the European Green Deal (“EDG”)

Most of the environmental provisions in EU TSD chapters recognize the Parties’ right to regulate on environmental matters and require high levels of environmental protection. TSD environmental provisions also reiterate the Parties commitment to effectively implement certain MEAs and reaffirm other existing commitments under these agreements. Other provisions with respect to specific environmental issues (climate change, biodiversity, forests, and marine resources) often contain vague “best endeavor” or promotional clauses, or are mere declarations of intent to exchange information on the ratification and implementation progress, provide technical assistance and capacity building, exchange of views and best practices, or to cooperate in future negotiations.

In order to effectively contribute to the achievement of EU’s climate and energy targets for 2030 and the objectives of the EGD, TSD chapters should go beyond such vague commitments and include substantive legal obligations to undertake specific actions which build on MEAs, but also where no international environmental agreement exists or has not yet entered into force.

The design and language of these provisions is paramount to ensure their enforceability. The more detailed the provisions, the more effectively and promptly a Party’s breach of a specific commitment can be addressed. It is also important to draw lessons from the Panel of Experts’ ruling dealing with the dispute under the EU-Korea FTA,¹⁷ and ensure that the commitments listed in the TSD chapter stand on their own. These obligations should be directly enforceable without any requirement to demonstrate that non-compliance with TSD commitments has had an effect on trade flows (see below Section 3). Conditioning the enforcement of TSD commitments to such an obligation would constitute a significant and unreasonable limitation as, in practice, demonstrating such a direct link is almost always impossible.

In implementing this recommendation, there are two categories of environmental obligations that should be specifically addressed: (1) implement and fulfil existing international commitments and (2) close the gap where these do not yet exist (see below).

We have developed proposals of specific provisions that could be adopted in this regard. These are set out in the **Annex** to this briefing.

The environmental obligations included in EU FTAs will necessarily have to be different from one trading partner of the EU to the other. These obligations will depend on the context and specific situation in the

¹⁶ P-T. Stoll, W. Th. Douma, N. de Sadeleer and Patrick Abel, CETA, TTIP and the EU precautionary principle - Legal analysis of selected parts of the draft CETA agreement and the EU TTIP proposals, Foodwatch, 2016, https://www.foodwatch.org/fileadmin/Themen/TTIP_Freihandel/Dokumente/2016-0621_foodwatch-study_precautionary-principle.pdf

¹⁷ Report of the Panel of Experts in the EU-South Korea FTA dispute, 20 January 2021, https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159358.pdf

trading partner's country but also on the exchange of goods and services, in particular the adverse impacts that could arise from the trade flows of certain sensitive products and services between the Parties.

This is why it is of utmost importance that the negotiations of trade agreements, in particular of environmental obligations, are based on (1) comprehensive, independent and timely ex-ante sustainability impact assessments ("SIAs"), and (2) democratic participation and meaningful involvement of environmental experts and decision-makers (see Recommendations 12 and 13).

(1) Detailed implementation provisions of multilateral environmental and climate agreements

A first group of environmental obligations concerns areas where international environmental agreements exist and have been ratified by both the EU and its trading partner.

TSD provisions should include clear undertakings from each Party to the other to comply with their existing international commitments, which can be bilaterally enforced.

But TSD provisions should not be limited to repeating commitments made in international agreements. Negotiating FTAs should rather be an opportunity to build on provisions of multilateral environmental and climate agreements. Parties should develop and negotiate detailed and enforceable provisions that operationalize existing commitments deriving from those agreements. This should include the elaboration of specific measures in the context of national communications (such as the Paris Agreement's Nationally Determined Contributions, or 'NDCs'), as well as implementation instruments (such as the Convention on Biological Diversity's National Biodiversity Strategies and Action Plans, or 'CBD NBSAPs'). For instance, in the case of the Paris Agreement this would refer to the development of concrete measures to effectively reduce greenhouse gas emissions and achieve the Parties' respective NDCs.

(2) Closing the gap in the absence of international binding instruments

Another group of environmental obligations concerns areas where an international environmental agreement does not exist or has not yet been ratified or entered into force for one of the FTA partners.

In such a case, depending on the types of goods and services exchanged and their potential adverse impacts on specific environmental areas, Parties should develop specific and adequate provisions in the TSD chapter to enhance and ensure the best protection possible. Those areas can include, for example, circular economy, recycling and waste management, illegal fishing, deforestation, and the use of chemicals.

Where the EU has itself regulated or has proposed legislation on a particular matter (e.g. trade in commodities associated with deforestation and forest degradation¹⁸) or is about to (e.g. sustainable corporate governance), it should make use of its economic and diplomatic leverage to obtain the insertion of provisions ensuring an equivalent level of protection into an FTA that is being negotiated.

Even when the EU has not adopted environmental standards for the whole of the EU, the negotiation of FTAs with third countries and regions should constitute an incentive to try to develop such high standards in FTAs. However, this should not preclude the EU from continuing to encourage and develop environmental legal frameworks at international level / in international fora.

¹⁸ https://ec.europa.eu/environment/publications/proposal-regulation-deforestation-free-products_en

Section 3 - Monitoring and enforcement mechanisms

Further measures are necessary to ensure full and effective implementation of the commitments made within the TSD chapters so that those chapters are not mere window-dressing.

In order for any environment-related provisions in EU FTAs to have a meaningful impact and actually influence the Parties' behaviour, the provisions must be supported by well-designed oversight and enforcement mechanisms, including the possibility of sanctions in cases of non-compliance.

This requires mechanisms that enable transparent cooperation, involvement and engagement of civil society, comprehensive monitoring of compliance, and robust means of enforcement. These should bolster the achievement of environmental ambition and the rule of environmental law internationally and domestically.

Recommendation 7: EU FTAs should introduce an ex-post monitoring system and a 'review and revision' clause

First, EU FTAs should provide for a **rigorous and independent ex-post monitoring system** to (1) assess economic, environmental and social impacts *of the commercial provisions* of the FTA and (2) review the *effectiveness/implementation* of TSD provisions.

- This assessment and review should be conducted by independent external consultants with appropriate expertise and resources.
- A comprehensive ex-post assessment and review process should be carried out no later than 5 years after the date of signature/entry into force and on a regular basis every 5 years.
- They should be based on continuous information and reports/recommendations of Domestic Advisory Groups (DAGs). They should also be conducted on the basis of transparent information and procedures, taking into account all available and relevant evidence, and in widespread consultation with stakeholders, beyond DAGs, in particular individuals and groups affected by the implementation of the agreement.
- The impact assessment report and the outcome of the review process should be published.

Second, EU FTAs should include a **review and revision clause** providing that, where the ex-post monitoring process shows either (1) negative impacts of commercial provisions on the environment or (2) environmental provisions failing to be effective, action is then taken to address those issues by revising the agreement.

Recommendation 8: EU FTAs should introduce an obligation for each Party to establish a complaint mechanism along with formal procedural rules

Relying exclusively on a state-to-state dispute settlement mechanism will likely be ineffective as there is very little incentive for Parties to launch proceedings against agreement partners in relation to environmental failings.¹⁹ The availability of a third-party complaint mechanism that reduces state discretion on whether or not to activate the dispute-settlement for sustainability issues is thus paramount.

This is all the more necessary to ensure balanced accountability and equitable access to justice mechanisms given that companies can directly litigate against EU trade partners under agreements that

¹⁹ Dr Sabaa A. Khan, Environmental and Public Interest Considerations in NAFTA Renegotiation, International Institute for Sustainable Development, November 2017, <https://www.iisd.org/articles/environmental-and-public-interest-considerations-nafta-renegotiation>

contain an Investment Court System (revamped investor-state dispute settlement mechanism under new EU trade agreements). Civil society must be equally positioned, to hold the EU and its trade partners to account.

Civil society must be empowered to assess, review and improve the environmental implications of EU FTAs and the Parties' implementation of the environmental provisions. Civil society has a key role to play in raising concerns where a party is falling short of its obligations.

Together with the creation of the Chief Trade Enforcement Officer, the establishment of a Single Entry Point ("SEP") is a step in the right direction.²⁰ However, this mechanism is EU-centred and requires further improvement in order to provide a reliable system where civil society is effectively empowered to seek resolution to non-compliance (see box below).

The EU Single Entry Point – key shortcomings

- It is an entirely EU-centred mechanism. Complaints can only be launched by EU Member States, businesses, civil society organisations, trade unions and citizens, against EU's trading partners – not against the EU itself or its Member States.
- The Operating guidelines do not contain sufficient procedural guarantees on how complaints related to sustainability violations and trade barriers should be handled. It is up to the European Commission to decide which complaints it will take forward. There are no obligation to disclose how complaints related to sustainability violations and trade barriers will be prioritised; No indication on how decisions (not) to take forward a complaint or to adopt an enforcement plan must be justified and communicated/publicised; No specific timelines within which the European Commission must provide a reply ; and how a complaint should be investigated.
- The Operating Guidelines require the complainant to provide substantiated information on the economic impact for EU operators trading with or investing in the trading partner (page 4). However, TSD violations should not be conditioned upon an impact on trade.

To address the key shortcomings of the SEP and ensure reciprocity among the Parties:

- Any EU FTA should include an obligation on each Party to establish or designate a competent and independent authority/body in charge of dealing with complaints from individuals and civil society organisations ("CSOs").related to non-compliance with the TSD chapters.
- The complaint mechanism should be easily accessible and there should be no significant restrictions in allowing, receiving and accepting submissions.
- The complaint mechanism should be reciprocal, i.e. opened to complaints from stakeholders from and against both Parties.
- EU FTAs should also require the establishment of rigorous procedural requirements that give complainants the guarantees that a substantiated complaint will be properly examined in a timely fashion.²¹ A provision should specify that when a complaint is substantiated, the competent authority/body is required to conduct a full examination, respect certain time limits, allow for a

²⁰ DG Trade, Operating Guidelines for the Single Entry Point and complaints mechanism for the enforcement of EU trade agreements and arrangements, June 2021, https://trade.ec.europa.eu/access-to-markets/en/form-assets/operational_guidelines.pdf

²¹ From an EU perspective, the establishment of the SEP should be complemented by the establishment of strong, clear and formal procedural guarantees similar to the ones under the Trade Barrier Regulation. The adoption of an internal piece of legislation (by means of an autonomous TSD Regulation or an amendment to the EU's Trade Barrier Regulation) via the ordinary legislative procedure would ensure the full involvement of the European Parliament.

hearing, and take a formal decision as to whether or not the complaint requires action on the basis of the provisions of the FTA in question. A pre-notification system should be available in order to determine, amongst other things, the precise nature of the information required to substantiate the complaint and ensure it is manageable for complainants. In case a complaint is deemed not sufficiently substantiated, the complaint authority should provide written reasons for not accepting or investigating the complaint. The complaint mechanism should be required to automatically investigate cases that are submitted by a DAG. In accordance with the Aarhus Convention, this provision should also ensure transparency of the process, notably by providing a public record of complaints. The way the complaints are prioritised should be clearly set-out and made transparent, regular reports to relevant DAGs and Civil Society Dialogues should also be provided by the complaint mechanism.

- The complaint mechanism should not simply be a post-box: it must be connected to a powerful enforcement mechanism. EU FTAs should empower the complaint authority, on the basis of its findings, to either adopt an enforcement action plan or a decision to trigger the state-to-state consultation provided in TSD chapters. In case a Party does not comply with the enforcement action plan, this should automatically trigger the establishment of a Panel of Experts. This will avoid relying exclusively on the Parties' will to launch proceedings against their partners in relation to TSD chapter failings. The complaint mechanism should also be empowered, where explicitly provided by the text of the agreement, to trigger the suspension of certain trade preferences.
- As mentioned above, the violation of the TSD chapters should not be conditioned upon the existence of an impact on trade nor should it have to be demonstrated in the complaints.

Recommendation 9: EU FTAs should reinforce the TSD dispute settlement process to make it as effective as the general dispute settlement mechanism

The type of dispute settlement and enforcement chosen reflects the importance attached to the norms subjected to them. EU trade agreements tend to adopt a soft approach to the enforcement of sustainability provisions, contrary to trade provisions that benefit from a strong enforcement mechanism. However, sustainability provisions deserve an equally effective and robust dispute settlement mechanism.

In order to be on par with commercial provisions, the EU should reinforce its TSD-specific dispute settlement procedure by providing more transparent, detailed and institutionalised procedures. This is not only crucial to address the imbalance with the powerful enforcement mechanisms from which trade and investment rules benefit, but also to ensure effective compliance with TSD chapters.

Existing TSD chapter dispute settlement procedure entails two main steps; state-to-state consultation and a Panel of Experts, both of which require improvements to maximise their effectiveness.

As for the first step, the **state-to-state consultation procedure needs to be strengthened** to make it more effective. EU FTAs should:

- Include clear timelines for starting the consultations after a Party's request;
- Require transparency of the proceedings and of the decisions (including the publication of documents considered, decisions and reasons provided, and reports to the Domestic Advisory Groups);
- Include an obligation to involve and seek advice from relevant MEA bodies; and
- Include automatic consultation with DAGs during the state-to-state consultation process and the decision to request or not the establishment of a Panel of Experts to examine the matter.

The second step of the procedure also needs to be reinforced. The report of the Panel of Experts has no teeth. The report is binding, but it cannot be enforced in the absence of political willingness. Contrary to

the mechanism available to enforce trade provisions, no sanctions or penalties can be imposed in case of non-compliance with TSD chapters.

It is therefore key to **reinforce the powers of the Panel of Experts and ensure they have the relevant expertise on sustainability issues**. The Panel of Experts should thus have:

- Demonstrable environmental expertise;
- An obligation to consult and seek opinions of external experts and relevant MEA bodies with regard to matters related to compliance;
- An obligation to make its reports publicly available and provide civil society with a reasonable opportunity to respond to these reports;
- An obligation to determine a reasonable period of implementation of their recommendations;
- The capacity to impose sanctions, in case of non-compliance with the Panel of Experts' recommendations after the period of implementation. (see recommendation 10)

It is important that any resolution reached by the Parties shall be made publicly available in all circumstances with no exception.

Recommendation 10: EU FTAs should include the possibility of penalties/sanctions in case of violations of environmental obligations

The EU's existing TSD enforcement model of dialogue and consultation can improve conditions in partner countries and should remain the primary tool to engage with its trade partner on TSD issues. But that does not mean that the EU cannot move towards enforcement procedures that effectively discourage non-compliance with the agreement's provisions and secure compliance if a partner country refuses to comply with the Panel of Experts' recommendations. For example, the US has shifted from a cooperative to a sanction-based approach. There is no evidence so far that the US sanction-based approach is less effective than the EU approach.

The establishment of additional mechanisms sanctioning the behaviour of trading partners in terms of respect for the environment and the fight against climate change is necessary to bolster the environmental impact of European trade policy. It is not always necessary for Parties to arrive at the stage of actually imposing sanctions for these mechanisms to be effective. Simply the existence of a robust penalty regime as a last resort would help to give the environmental provisions of the future trade relationship real bite. The threat of meaningful sanctions via a hard-edged approach to enforcement and fines is a driver for compelling compliance with environmental law.

The type and nature of sanctions that would come as a last resort in the case of a violation of TSD commitments should depend on the type of violation and be proportionate to its seriousness. The potential socio-economic impacts of the sanction should also be carefully assessed.²² These sanctions could take the shape of:

- The payment of monetary compensation into a fund established for supporting appropriate environmental or social initiatives;
- The imposition of targeted trade sanctions (including suspension of tariff liberalisation or other import restriction) on goods that are implicated in the sustainability violation; or

²² For a critical assessment of the different types of sanctions the EU could include, see M. Bronckers and G. Gruni, Retooling the Sustainability Standards in EU Free Trade Agreements, *Journal of International Economic Law*, Volume 24, Issue 1, March 2021, Pages 25–51, <https://doi.org/10.1093/jiel/jgab007>

- The termination or (partial) suspension of tariffs liberalisation under the agreement in response to a serious and substantial violation (such as of the 'essential elements') (see also above Section 1, Recommendation 2).

It will be crucial to ensure sanctions can be designed in a way that “avoids harm against vulnerable parts of the population or sanctions which would be disproportionate. Or which would result in trade diversion, i.e. countries redirecting its trade flows towards other countries”.²³ To assess and mitigate harms against vulnerable parts of the population, it will also be key to consult DAGs and seek their opinion on the types of sanctions to be applied by the Panel of Experts in case of non-compliance with their report and recommendations (see Recommendation 11).

From an EU perspective, this would notably require the CTEO to be empowered to adopt sanctions in case of non-compliance with the Panel of Experts' recommendations or serious violations.

As mentioned above under Section 2, the imposition of fines must not be contingent on a Party having to demonstrate 'nullification and impairment' of the agreement's economic benefits for that Party. Environmental protection and avoidance of environmental harms should be an objective in and of itself. Additionally, it is paramount that any sanctioning system be reciprocal: EU Member States may not always be in compliance themselves.

Recommendation 11: EU FTAs should clarify and reinforce the role and powers of Domestic Advisory Groups in the monitoring, enforcement and dispute settlement processes

Domestic Advisory Groups provide civil society with an institutionalised basis to monitor the implementation and enforcement of TSD chapters. However, their effectiveness has shown to be limited.²⁴ EU FTAs should clarify and reinforce their roles and powers as follows:

- EU FTAs should include binding, clear and precise rules on establishment, composition, and functions of the DAGs to ensure representativeness, independence and balance (this is key for trading partners where civil society may not enjoy the same political space or do not have an equally established architecture for appointing members and running the DAG);
- EU FTAs should prescribe for DAGs to be set up as of the entry into force, even if provisional, of the trade agreement;
- The mandate of the DAG should not be limited to the TSD chapters alone, but should cover all provisions of the agreement that have an impact on the environment, animals, or the respect of social and human rights;
- DAGs should have the power to commission independent assessments of (A) whether the Parties are complying with their social and environmental commitments in practice and (B) whether the trade agreement itself is having detrimental environmental and social outcomes;
- EU FTAs should ensure DAGs have the right to present their views in meetings of the TSD Committee and other meetings between the Parties;
- EU FTAs should clarify that DAGs have the right to submit recommendations to the TSD Committee, to which the TSD Committee is required to respond and motivate any decision not to act upon a recommendation;

²³ A. Marx, et al., Dispute Settlement in the Trade and Sustainable Development Chapters of EU Trade Agreements, Leuven Centre for Global Governance Studies, p. 91, <https://ghum.kuleuven.be/ggs/publications/books/final-report-9-february-def.pdf>

²⁴ EU DAGs, Non-paper : Strengthening and Improving the Functioning of EU Trade Domestic Advisory Groups October, October 2021, https://www.cnvinternationaal.nl/Resources/Persistent/b18f21c2f3007be3974e41d8fec1594f72e20af6/CNVI-0311%20-%20Non-paper%20Strengthening%20Domestic%20Advisory%20Groups_FINAL.pdf

- DAGs should be automatically informed and consulted on:
 - the overall priorities of the Parties for the implementation of the TSD chapter (the Parties should justify their decision not to include priorities suggested by the DAG);
 - the preparation of annual FTA implementation reports (including its dedicated chapter on TSD implementation);
 - ex-post assessments;
 - complaints prioritisation and investigations;
 - the state-to-state consultation process and the decision to request (or not) the establishment of a Panel of Experts to examine the matter;
 - the decision on the measures taken to comply with the Panel of Experts' reports and on the decision on the types of remedies in case of non-compliance;
 - determining a period for implementation of the Panel of Experts' recommendations and verifying compliance;
 - the types of sanctions to be applied by the Panel of Experts in case of non-compliance with the report and recommendations.
- DAGs should have sufficient funding and technical support.

Section 4 – Good governance and democratic decision making

Designing ambitious environmental commitments requires two prerequisites. In order to effectively balance non-economic interests during the negotiations, the European Commission must ensure policy choices are based on evidence, expertise (including available science on environmental effects) and follow an informed and participatory approach.

The European Commission should set up an effective environmental governance structure and mechanisms to ensure democratic participation throughout the entire process of FTA negotiations, from drafting mandates to assessing impacts.

Recommendation 12: EU FTA negotiations should ensure democratic participation and involve relevant environmental experts and decision-makers

In order for EU trade agreements to contain meaningful environmental provisions and commitments, the EU needs to rely on the relevant expertise and know-how of environmental and other non-trade department or ministries to negotiate these provisions. This requires that:

- relevant departments of EU institutions are sufficiently resourced and are given a leading role in the negotiations of environmental provisions (e.g. DG ENV, DG CLIMA, etc.);
- relevant environmental departments of EU Member States can make their voice heard during the national and international discussions on the FTA;
- relevant committees of the European Parliament (in particular the ENVI committee) can participate in the FTA negotiations and discussions on the same footing as the lead committee of the Parliament, the Committee on Trade;
- greater transparency and access to documents: after each round of negotiation, the EU should strive to ensure that the consolidated texts (i.e. integrating the various options considered) are published to allow civil society and elected officials to react and give their opinion; and
- meaningful opportunities for CSOs to engage and be heard during all stages of the negotiations.

Recommendation 13: EU FTA negotiations should be based on sound ex-ante sustainability impact assessments

EU trade negotiations are supposed to be informed by a ‘sustainability impact assessment’ (SIA) to ensure the European Commission’s policy choices are based on sound (scientific) evidence and that the resulting agreements respect human rights and high economic, social and environmental standards. SIAs are the main instruments to ensure environmental considerations are effectively integrated in the negotiations of trade agreements in accordance with Article 11 TFEU. SIAs are also key to ensuring transparency and appropriate involvement of all stakeholders in the decision making process.

It is therefore crucial that SIAs are finalised before the end of the negotiations at the very least, and that the SIA findings and any recommendations are taken into account during the negotiations.

The failure to complete the SIA in time and thus integrate these concerns in the European Commission’s negotiation position not only undermines any notion that public input was valued in the negotiation process but also erodes confidence that environmental and social concerns have been sufficiently reflected and addressed in the text of the agreement, notably within TSD chapters.

To avoid the SIA process being reduced to a box-ticking exercise, the EU must ensure in-depth ex-ante SIAs are conducted:

- in a multi-disciplinary approach (involving economists but also lawyers, agronomists, veterinarians, climate and biodiversity experts, etc.);
- on the basis of a comprehensive and balanced involvement of stakeholders; and
- in a timely and appropriate manner so that the findings and recommendations can guide/support negotiating positions.²⁵

²⁵ See notably the European Ombudsman Decision in case 1026/2020/MAS concerning the failure by the European Commission to finalise an updated ‘sustainability impact assessment’ before concluding the EU-Mercosur trade negotiations, 19 March 2021, <https://www.ombudsman.europa.eu/en/press-release/en/139425>

ANNEX - EXAMPLES OF LEGAL OBLIGATIONS THAT EU FTA'S PARTNERS COULD AGREE TO WITH RESPECT TO THE EU GREEN DEAL

The negotiations of FTAs give an opportunity to the Parties to agree on the inclusion of provisions that build on and operationalise existing international commitments set in multilateral environmental agreements (MEAs). In areas not covered by any international environmental agreements or standards, or regulated by only one of the Parties, the EU should leverage trade negotiations to build consensus between States Parties, civil society and experts on the kind of measures that need to be adopted and include specific provisions to enhance and ensure the best protection possible – while ensuring there remains sufficient space to develop specific international regimes in the future.

This annex aims at offering some proposals with respect to the inclusion of more detailed and enforceable obligations to foster sustainable development worldwide (Article 21 TEU). The purpose is by no means to provide a comprehensive and exhaustive list of provisions that can be included in FTAs.

Indeed, the environmental obligations included in EU FTAs will necessarily have to be different from one trading partner of the EU to the other. These obligations will depend on the context and specific situation in the trading partner's country but also on the exchange of goods and services, in particular the adverse impacts that could arise from the trade flows of certain sensitive products and services between the Parties.

This is why it is of utmost importance that the negotiations of trade agreements, in particular of environmental obligations, are based on (1) comprehensive, independent and timely ex-ante sustainability impact assessments, (2) democratic participation and meaningful involvement of, civil society interest groups, environmental experts and decision makers.

1. Climate

The science couldn't be clearer: we are facing a climate crisis that threatens the future of life on our planet. An increase in average global temperatures above 1.5C risks catastrophic sea level rise, extreme weather and the loss of species and habitats, as well as food scarcity and increasing poverty for millions of people worldwide. The devastating intensity of recent fires, droughts and floods across the world has only emphasised the need for greater urgency.

The 2015 Paris Agreement was a landmark moment in the global response to combat climate change, with countries agreeing to take action reflecting their "highest possible ambition". But many countries and companies still aren't doing enough.

Despite the continuing shortfall in countries' commitments, there were several significant outcomes from COP26, with countries recognising the need to:

- (i) reduce global carbon dioxide emissions by 45 per cent by 2030 and to net zero around mid-century to limit warming to 1.5°C (in line with the IPCC science);
- (ii) accelerate emissions reductions in the "critical decade" up to 2030;
- (iii) encourage sectoral action to contribute to national emissions targets, particularly in emissions-intensive sectors;
- (iv) accelerate technology and policies to transition towards low-emission energy systems;
- (v) rapidly scale up the deployment of clean power generation and energy efficiency;
- (vi) take action on coal power and fossil fuel subsidies; and
- (vii) provide support to the poorest and most vulnerable, including through the provision of adequate climate finance, and towards achieving a just transition.

The Green Deal's overarching objective is to transition towards a climate neutral, environmentally sustainable, resource efficient and resilient economy by 2050. In September 2020, the Commission

proposed to raise the 2030 greenhouse gas emission reduction target to at least 55% compared to 1990 levels. This announcement was followed by the presentation in July 2021 of the 'Fit for 55' package. The Commission also announced a new target of 40% for the share of renewable energy in the EU's energy mix.

While the targets themselves are key, it is also critical that the measures for meeting those targets are clear and that progress against the targets is closely and regularly monitored.

Aligning trade and climate policies was described as a priority in the EU's Trade policy review issued in February 2021. The implementation of the Paris Agreements (and the Convention on Biological Diversity – see below) is a key priority for the EU. The EU has recognised in this context the need to use its leverage and engage its partners, notably the biggest emitters and polluters, so that they contribute their fair share to climate change mitigation (likewise to the preservation of biodiversity – see below).

Examples of concrete measures

The Parties shall:

i. Domestic action on emissions

- Effectively implement the UNFCCC and the Paris Agreement including by submitting regularly updated Nationally Determined Contributions in line with their "*highest possible ambition*", and delivering fully on those commitments while ensuring a just transition.
- Eliminate fossil fuel subsidies while protecting against any impacts on the poor and vulnerable communities.
- Ensure the rapid deployment of clean power generation and energy efficiency measures while working towards the elimination of unabated fossil fuel generation.
- Ensure companies (including state-owned enterprises) set science-based plans to ensure that their business model and strategy is compatible with the just transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement, consistent with the corporate responsibility to respect human rights.

ii. Climate finance

- Support the development and implementation of initiatives, including under the UNFCCC, providing financial support, technology transfer and capacity-building to assist developing countries with respect to climate mitigation and adaptation.

iii. Loss and damage

- Support the development and implementation of initiatives, including under the UNFCCC, addressing loss and damage associated with the adverse effects of climate change.

2. Biodiversity

Whilst recognising states' sovereign rights over their biological diversity, the impacts of biodiversity loss transcend national boundaries. Biological diversity constitutes the foundation of life on earth as well as humanity's economies, food systems, livelihoods and health, and the ever-accelerating rate of extinction

of species²⁶ and degradation of habitats²⁷ are jeopardizing the survival of numerous species, as well as vital, present and future services to people. To halt the ongoing crisis, coordinated policy responses among different sectors are needed. These should necessarily prioritize: conserving and restoring the planet's key ecosystems and species, addressing the main drivers of biodiversity loss (land/sea use change, climate change, unsustainable exploitation of resources and organisms and pollution) and closing the biodiversity financing gap. Learning from mistakes of the previous decade (particularly the global failure to meet any of the Aichi Targets included in the Strategic Plan for Biodiversity 2011-2020), biodiversity governance should be transparent and participatory, promoting rights-based approaches and including indigenous peoples, local communities and civil society.

In its Biodiversity Strategy to 2030, the EU assumes the role of a global leader in the post-2020 negotiations on biodiversity governance (both marine and terrestrial), a commitment it should translate into action through the improvement of the biodiversity clauses of the "Trade and Sustainable Development Chapters" of existing and future Free Trade Agreements. After all, "trade policy will actively support and be part of the ecological transition" as the Commission very aptly states in the EU Biodiversity Strategy to 2030. The EU should lead by example in its implementation of the post-2020 Global Biodiversity Framework, simultaneously ensuring that its trade partners take sufficient actions domestically in order to meet the global Goals and Targets to be set during the 15th Conference of the Parties of the Convention on Biological Diversity.

Examples of concrete measures

The Parties shall:

i. International Law & Policy

- Fully comply with their international obligations deriving from the CBD, in line with its three objectives, by taking concrete measures for the conservation and sustainable use of biological diversity and for the equitable access to and sharing of benefits deriving from the utilization of genetic resources.
- *[If adopted after May 2022]* meet the 2030 Goals and Targets of the post-2020 Global Biodiversity Framework, as well as its 2050 Vision.
- Assist the CBD Secretariat and the CBD's Subsidiary Bodies on the optimization of implementation of the Convention and the post-2020 Global Biodiversity Framework, during their intersessional work and at all subsequent CoPs.
- Acknowledge the growing international consensus on the emergence of a human right to a healthy environment, currently recognized in more than 150 national jurisdictions²⁸ and through UN Human Rights Council's Resolution 48/13, and strive for its international recognition through a UN General Assembly Resolution.

ii. Protected Areas

- Protect and conserve their biological diversity through –among others- area-based conservation, namely by designating a system of effectively managed and equitably governed protected areas, and by recognizing OECMs (and ICCAs, where applicable), for 30% of their land and freshwater

²⁶ According to the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES), currently 1 million species of plants and animals are threatened with extinction, while abundance of terrestrial native species has fallen by at least 20% since 1900 (*Global Assessment Report on Biodiversity and Ecosystem Services*)

²⁷ In another publication (*Assessment Report on Land Degradation and Restoration*), IPBES reports that more than 75% of the total land's area has been degraded

²⁸ UN Human Rights Council, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, A/HRC/43/53 (2019), Annex II

resources and 30% of their marine and coastal areas. National legislation will prioritize areas of particular importance to biodiversity, as well as the ecological representativity of the chosen areas.

- Adopt long-term conservation and restoration measures in order to achieve the desired objectives and ensure the permanence of measures through appropriate legislative, administrative, contractual and other means.
- Prioritise support for the full and effective participation of indigenous peoples and the implementation of all protection, conservation and restoration activities with the free, prior, and informed consent of indigenous peoples, and with appropriate recognition of the rights of indigenous peoples to their lands, territories and resources, as set out under the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and full respect for their diverse knowledge systems and decision-making systems.²⁹

iii. Drivers of Biodiversity Loss and other Pressures

- Undertake environmental and socioeconomic impact assessments for all projects, plans and activities that may have negative impacts on biodiversity, particularly for projects inside of or adjacent to protected areas [In case, the counterpart has ratified the Espoo Convention, this paragraph can make direct reference to it].

iv. GBF Implementation

- Update and publish their NBSAPs in line with the GBF, so that national priorities and planned actions correspond to the GBF's components and contribute towards meeting its targets.
- Work collaboratively on the exchange of best practices and sharing of knowledge in order to optimize implementation of the different elements of the GBF

v. Enabling Conditions

- Put their land and sea areas under integrated, biodiversity-inclusive spatial planning, with the full and effective participation of IPLCS and pursuant to the provision of free, prior, informed consent.

3. Forests

In its 2019 Communication on Stepping up EU Action to Protect and Restore the World's Forests, the European Commission stated that it will promote trade agreements that include provisions on the conservation and sustainable management of forests and further encourage trade of agricultural and forest-based products not causing deforestation or forest degradation. The Communication added that it will also explore possibilities to provide incentives to trade partners to address deforestation and will engage with trading countries to step-up implementation and enforcement of relevant provisions in the EU trade agreements and will draw lessons from these experiences.

On the 2nd of November 2021, at least 110 countries representing 85 per cent of the planet's forests had signed the COP26 Glasgow Leaders Declaration on Forests and Land Use, committing to halt and reverse deforestation by 2030. This commitment needs to be translated into actions and measures and the EU Free Trade Agreements can be used as one of the instruments to do so.

The EU is already taking a step forward with the Commission's proposal for a new regulation on deforestation-free products.³⁰

²⁹ In line with the IUCN-adopted Motion 101 "Setting area-based conservation targets based on evidence of what nature and people need to thrive" (September, 2021)

³⁰ https://ec.europa.eu/environment/publications/proposal-regulation-deforestation-free-products_en

While EU TSD chapters contain some dedicated provisions on 'Trade and Sustainable Management of Forests', these are not sufficient and should be strengthened. In order to have FTAs that aim to avoid further pressure on forests and avoid negatively impacting forest ecosystems and the livelihoods of forest communities, it is key that those provisions do not solely address the question of sustainable management of forests and associated trade but also address the essential question of trade of agricultural commodities associated with deforestation and forest degradation and the question of the recognition and protection of legitimate land tenure rights.

Examples of concrete measures

The Parties shall:

i. International Law & Policy

- Strengthen cooperation on policies and actions to halt deforestation, forest degradation and restore forests in key international fora, including the Food and Agriculture Organization (FAO), G7/G20, the UN Framework Convention on Climate Change (UNFCCC), the UN Forum on Forests (UNFF), the Convention on Biological Diversity (CBD), the United Nations Convention to Combat Desertification (UNCCD), the UN Environment Assembly (UNEA), the Organisation for Economic Co-operation and Development (OECD) and the World Trade Organization (WTO), for instance by promoting best practices and a common understanding of sustainable supply chains, and advocating for the adoption and implementation of strong commitments and provisions.³¹

ii. Local communities and Indigenous Peoples

- Prioritise support for the full and effective participation of local communities and Indigenous peoples with respect to the allocation and management of forested land and forest resources with their free, prior, and informed consent, and with appropriate recognition of the rights of indigenous peoples to their lands, territories and resources, as set out under the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and full respect for their diverse knowledge and decision-making systems.

iii. Trade and commodities associated with deforestation and forest degradation

- Support the adoption, implementation and enforcement of domestic legislation that counters the trade in commodities associated with deforestation and forest degradation.

[Where trade flows are important between the Parties, more specific obligations could be included in the TSD chapter. Below are some examples:]

- Increase the number of officials who are in charge of the implementation and enforcement of domestic laws related to trade and commodities associated with deforestation and forest degradation;
- Provide trainings or technical assistance in order to increase the operational capacity of officials in charge of the implementation and enforcement of domestic laws related to trade and commodities associated with deforestation and forest degradation, ensure that Parties devote the necessary financial resources in order to increase the proper implementation and enforcement of their domestic legislation;

³¹ It reflects one of the key action that is mentioned in the 2019 EU Communication on Stepping up EU Action to Protect and Restore the World's Forests

- Exchange information on the number of investigations, checks and enforcement actions taken by the Parties with respect to the implementation and enforcement of their domestic legislation; and
- Adopt clear and credible enforcement policies related to the penalties for breach of domestic legislation related to trade and commodities associated with deforestation and forest degradation.

iv. Exchange of information and transparency

- Exchange information and promote transparency on trade-related initiatives with respect to the use of forested land, forest resources, forest governance and on the conservation of forest cover and cooperate to maximise the impact and ensure the mutual supportiveness of their respective policies.

4. Fisheries and oceans

An estimated 20% of seafood on the global market is the result of illegal, unreported, or unregulated (IUU) fishing. Some 60% of seafood consumed in the EU is imported and 15% of EU seafood production is exported. The EU's trade policy therefore plays a significant role in regulating the human activity that has the single greatest impact on marine biodiversity: fishing.

The EU should only sign trade agreements with third countries covering fisheries products if those third countries have in place laws and policies effectively combatting IUU fishing and allowing sustainable fishing to take place.

The EU should also press third countries, especially major importers of seafood, to align their import control measures with the EU's. This will reduce opportunities for illegally caught seafood to enter the global marketplace altogether and eventually onto the EU market in particular.

The EU should not expand market access to countries that have been pre-identified (i.e. yellow-carded) under the EU Regulation on IUU Fishing or that are subject to measures under the Non-Sustainable Fishing Regulation.

Likewise, the EU should agree at WTO level to end harmful fisheries subsidies (i.e. subsidies that contribute to increasing fishing capacity) and ensure that the 2021-2027 European Maritime and Fisheries Fund is spent accordingly. This is the most concrete action the EU can take in the short-term to give effect to President von der Leyen's ambition for EU leadership in global ocean governance.

In addition, the EU has some of the largest seafood companies in the world. Fish that has been caught illegally, unsustainably or in violation of human rights should not find its way to European consumers. Future EU trade policy must encourage corporate governance frameworks that promote the implementation of processes to reduce these risks in supply chains.

EU TSD chapters do not contain obligations to limit or ban harmful fisheries subsidies; the updated US-Mexico-Canada trade agreement (USMCA) demonstrates that this can be done.

Examples of concrete measures

The parties shall:

i. Fisheries management - principles of good governance³²:

- Systematically apply the precautionary approach to fisheries management in order to ensure that the exploitation of living marine biological resources restores and maintain populations of harvested species above levels which can produce the maximum sustainable yield;
- Systematically implement the ecosystem-based approach to fisheries management so as to ensure that the negative impacts of fishing activities on marine ecosystems are minimised, and ensure that aquaculture and fisheries activities avoid the degradation of the marine environment;
- Systematically base fisheries management decisions on the best available scientific advice, and on complete, accurate and reliable data and ensuring that all fishing activities are fully documented;
- Cooperate to actively support the development of appropriate and transparent mechanisms for the allocation of fishing opportunities, fishing licences and authorisations at the international level.

ii. International rules

- Actively support and contribute to the activities of international organisations dealing with fisheries, including Regional Fisheries Management Organisations (RFMOs);
- Effectively cooperate with, and where appropriate in, regional fisheries management organisations in which the Parties are either members, observers, or cooperating non-contracting parties, with the aim of achieving good governance and sustainable fisheries, including by promoting scientific research and advocating for science-based decisions;
- Systematically promote the strengthening of effective compliance mechanisms, and, where applicable, the adoption and effective implementation of catch documentation or certification schemes and of port State measures;
- Ensure the full compliance with those decisions by the implementation of effective monitoring, control and enforcement of the RFMOs' fisheries management measures and by the review of periodical performance.

iii. Fight against IUU

- Adopt and implement an adequate legal framework to effectively prevent, deter and eliminate illegal, unreported and unregulated (IUU) fishing on a case by case basis, and cooperate to combat IUU fishing, including, where appropriate:
 - the effective exchange of information on IUU activities in their waters;
 - the effective implementation of policies and measures to exclude IUU products from trade flows and fish farming operations, such as the adoption of commonly agreed administrative rules to facilitate the implementation of catch certification schemes, in order to streamline effective checks and verifications of catch certificates for imported, exported and re-exported fishery products;
 - the effective implementation of the obligatory Port State Measures arising from their responsibilities and duties as coastal states, flag states, port states and market states.

³² in line with EU Regulation 1380/2013

- Provide support to third countries to prevent, deter and eliminate IUU fishing.

iv. Control and enforcement:

- Adopt, implement and maintain effective monitoring, control and surveillance measures aimed at the conservation of sustainable fish stocks and the prevention of overfishing, including, inter alia, observer schemes, vessel monitoring schemes including licencing schemes, localisation schemes, transshipment control, inspections at sea, port state control of arrivals and landing operations;
- Ensure the full traceability of the catches of fishery products from the point of harvest to the point of last sale point through the recording and reporting of complete, accurate and reliable electronic fisheries data;
- Use all available tools in accordance with international law, including port State measures, coastal State measures, market-related measures and measures to ensure that nationals and vessels under their jurisdiction do not support or engage in IUU fishing, or fishing related activities in support of such fishing;
- Adopt and effectively apply non-discriminatory, dissuasive and proportionate sanctions against operators and fishing vessels committing violations of the rules established under their fisheries management policy.

v. Livelihood of coastal communities

- Implement effective measures to support the livelihoods of coastal communities, including with regard to the objectives and principles of the FAO Voluntary Guideline for Securing Small-Scale Fisheries.

vi. Harmful subsidies

- Limit or ban harmful fisheries subsidies, that is, any subsidies that increase fishing capacity, such as the acquisition of a first fishing vessel, vessel upgrades, fuel-tax exemptions, port renovations, and other measures that enable fishers to travel further and longer than they would otherwise.

5. Transparency and access to justice

Principle 10 of the Rio Declaration on Environment and Development recognises that “environmental issues are best handled with the participation of all concerned citizens”, laying the foundations of the public’s right to access information, public participation and access to justice in environmental matters. Adherence to this principle entails promoting it in all international agreements, including FTAs. The EU’s commitment to doing so was reinforced when it, along with all of its Member States, became party to the UNECE Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters.

The Aarhus Convention contains specific and enforceable access rights that have been implemented into EU law through legislation and the case law of the Court of Justice of the EU. Therefore, FTAs concluded between the EU and other parties to the Aarhus Convention should make specific reference to those obligations enshrined in the Aarhus Convention.

FTAs that are concluded with countries that are not parties to the Aarhus Convention should also contain strong obligations to ensure adequate access rights for members of the public, in the spirit of Article 3(7)

of the Convention, which obliges the EU institutions to promote the application of the principles of this Convention in international environmental decision-making processes.

Examples of concrete measures

Parties shall:

- Adhere to and introduce where necessary rules and standards concerning access to environmental information and the collection and dissemination of environmental information. These should be based on provisions of the Aarhus Convention.
- Adhere to and introduce where necessary rules to ensure the consultation and full and effective participation of the public in decision-making that has an effect on the environment. These should be based on the provisions of the Aarhus Convention.
- Guarantee access to judicial review procedures for persons whose information requests are denied and whose public participation rights have been infringed;
- Ensure that administrative or judicial proceedings are available to citizens, communities and public interest groups having sufficient interest in a particular matter or who maintain that a right is infringed under its law, in order to challenge acts and omissions of public authorities and private persons which contravene provisions of its environmental, labour, and human rights law, including appropriate remedies for violations of such law.
- Ensure that these proceedings provide adequate and effective remedies, including injunctive relief as appropriate, and are fair, equitable, timely and not prohibitively expensive.

6. Other environmental areas which should deserve specific commitments in TSD chapters

6.1. Chemicals

The Rotterdam Convention provides for a procedure on the prior informed consent of countries to which chemicals are exported that are severely restricted or banned within the EU. The EU transposed the provisions of the Convention into EU law by Regulation 649/2012. The Regulation provides that an importing country must be informed by the EU exporting country of the dangerous characteristics of a chemical substance or product which is listed in the Regulation and is to be exported, and must have agreed to the import (prior informed consent - PIC-procedure). Yet this does not prevent the EU from exporting banned or severely restricted substances to these countries. The inclusion of such commitments would ensure the EU delivers the objectives set in the European Green Deal and the Chemicals Strategy for Sustainability to prevent the export of hazardous chemicals, including pesticides, banned in the EU. This would not prevent the Commission to consider other options for implementing this objective, notably by revising its legislation.

Therefore, negotiations for a FTA could usefully provide that for a specific chemical - for example asbestos or atrazine, a pesticide - the Parties of the FTA commit that no trade of this specific chemical between the two trading partners should take place.

The Parties should also commit, when one of the party has banned or severely restricted the use of a (group of) chemical, that these substances cannot be exported to the partner.

6.2. Plastics

Negotiations for an FTA are an opportunity to include provisions ensuring that Parties will only trade goods in packaging for which there is a system in the country receiving the goods with sufficient capacity to return said packaging for reuse or refill by a producer. In the absence of a return for reuse system, ensuring that recycling facilities are sufficient to process the waste created by the packaging of the imported goods, taking into account the existing demands and cumulative pressures on the system. The packaging must be designed to make recycling such packaging possible and highly likely in the waste management system of the receiving country.

6.3. Trade and Responsible Management of Supply Chains

The European Commission stated in its Communication 'Trade Policy Review - An Open, Sustainable and Assertive Trade Policy' that *"Strengthening the resilience and sustainability of the EU economy, and its supply chains is a pillar of the European Union's drive towards open strategic autonomy"*.

This ambition was reinforced in the Communication where it is said *"Enhancing the resilience of supply chains also goes hand-in-hand with the EU's objective of making supply chains more sustainable, in particular by promoting sustainability standards across global value chains. More sustainable supply chains have generally proven to also be more resilient. Trade policy can also contribute to this objective by promoting responsible business conduct and greater transparency and traceability in supply chains. The forthcoming legislation on sustainable corporate governance as well as deforestation will be important milestones in this regard."*

The latest FTAs reflect similar languages when it comes to the sustainability of supply chain. The commitments so far refer to Parties recognising the importance of responsible management of supply chains through responsible business conduct and corporate social responsibility practices. It also mentions the exchange of information and cooperation on the matter.

However, on sustainable corporate governance, the EU will very soon be in possession of a legislative framework that should notably, in theory, oblige companies to conduct due diligence to identify, assess and mitigate adverse environmental and human rights impact throughout their supply chain.

To put sustainable global value chains governance at the centre of EU trade policy, the new EU regulatory framework should be reflected in upcoming EU trade agreements. The Parties should commit to support the implementation and enforcement of domestic legislation on corporate due diligence and corporate accountability.

In particular, in light of the findings and recommendations of the sustainable impact assessment, the Parties should agree to commit on more specific obligations.

Examples of concrete measure

Parties shall:

- Provide trainings or technical assistance in order to increase the awareness of companies and civil society on Parties policies and regulatory frameworks on corporate due diligence and corporate accountability;
- Exchange information on the number of investigations, checks and enforcement actions taken by the Parties with respect to the implementation and enforcement of their domestic legislation on corporate due diligence and corporate accountability.

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