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Comparative Analysis of Trade and Sustainable Development Provisions in Free Trade Agreements

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List of Cited Agreements and Protocols

Agreement	Year	Abbreviation
Australia-Korea Free Trade Agreement	2014	KAFTA
Australia-Malaysia Free Trade Agreement	2012	MAFTA
Australia-Peru Free Trade Agreement	2018	PAFTA
Australia-US Free Trade Agreement	2004	AUSFTA
Canada-Chile Free Trade Agreement	1996	
Canada-Colombia Free Trade Agreement	2008	
Canada-Costa Rica Free Trade Agreement	2001	
Canada-Honduras Free Trade Agreement	2013	
Canada-Jordan Free Trade Agreement	2012	
Canada-Korea Free Trade Agreement	2014	CKFTA
Canada-Panama Free Trade Agreement	2010	
Canada-Peru Free Trade Agreement	2008	
Canada-Ukraine Free Trade Agreement	2016	CUFTA
Chile-Argentina Free Trade Agreement	2017	

Chile-Colombia Free Trade Agreement	2006	
Chile-Uruguay Free Trade Agreement	2016	
Chile-US Free Trade Agreement	2003	
Comprehensive and Progressive Agreement for Transpacific Partnership	2018	CPTPP
EU-Canada Comprehensive Economic and Trade Agreement	2017	CETA
EU-Central America Association Agreement	2013	
EU-Colombia/Peru/Ecuador Trade Agreement	2013	
EU-Georgia Association Agreement	2016	
EU-Japan Economic Partnership Agreement (EPA)	2019	
EU-Moldova Association Agreement	2016	
EU-Singapore Free Trade Agreement	2019	
EU-South Korea Free Trade Agreement	2010	
EU-Ukraine Association Agreement	2017	
EU-United Kingdom Trade and Cooperation Agreement	2021	TCA
EU-Vietnam Free Trade Agreement	2020	
Japan-Chile Free Trade Agreement	2007	
Japan-Mongolia Free Trade Agreement	2015	
Japan-Peru Free Trade Agreement	2011	
Japan-Philippines Free Trade Agreement	2006	
Japan-Switzerland Free Trade Agreement	2009	
Japan-Thailand Free Trade Agreement	2007	
Japan-United Kingdom Free Trade Agreement	2020	
New Zealand-Hong Kong, China Closer Economic Partnership	2010	
New Zealand-Korea Free Trade Agreement	2015	
New Zealand-Malaysia Free Trade Agreement	2009	
New Zealand-Taiwan Free Trade Agreement	2013	
New Zealand-Thailand Closer Economic Partnership	2005	
North-American Free Trade Agreement	1994	NAFTA
Switzerland (European Free Trade Association-Central American states (Costa Rica, Guatemala and Panama)	2013	
Switzerland (European Free Trade Association)-Georgia FTA	2016	
Switzerland (European Free Trade Association)-Hong Kong FTA	2011	
Switzerland (European Free Trade Association)-Montenegro FTA	2011	
Switzerland (European Free Trade Association)-Philippines FTA	2016	
United States-Bahrain FTA	2005	

United States-Chile FTA	2003	
United States-Colombia FTA	2006	
United States-Dominican Republic Central America FTA	2004	CAFTA-DR
United States-Jordan FTA	2000	
United States-Korea FTA	2007	KORUS
United States-Mexico-Canada Agreement	2018	USMCA
United States-Morocco FTA	2004	
United States-Oman FTA	2006	
United States-Panama Trade Promotion Agreement	2007	
United States-Peru Trade Promotion Agreement	2006	

Protocols / Conventions

Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention)

Convention on Biological Diversity (CBD)

Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

ILO 1998 Declaration on Fundamental Principles and Rights at Work

ILO Decent Work Agenda

ILO Fundamental Conventions

ILO-International Program on the Elimination of Child Labour (ILO-IPEC)

International Convention for the Prevention of Pollution from Ships (MARPOL)

Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto Protocol)

Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol)

Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (Nagoya Protocol)

Paris Climate Accords (The Paris Agreement)

Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade

UN 2030 Agenda for Sustainable Development

United Nations Framework Convention on Climate Change (UNFCCC)

Vienna Convention on the Law of Treaties

Abbreviations

AA	Association Agreement
AFL-CIO	American Federation of Labour and Congress of Industrial Organizations
BIT	Bilateral Investment Treaty
CAFTA-DR	Dominican Republic-Central America FTA
CCAEC	Canada-Chile Agreement on Environmental Cooperation
CDE	Centre for Development and Environment
CPMRC	Comité Pro-Mejoras de la Ribera Cahuaré
CBD	Convention on Biological Diversity
CEPA	Comprehensive Economic Partnership Agreement
CETA	EU-Canada Comprehensive Economic and Trade Agreement
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
COMESA	Common Market for Eastern and Southern Africa
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CSR	Corporate Social Responsibility
DAG	Domestic Advisory Groups
DCFTA	Deep and Comprehensive Free Trade Agreement
DEE	Australian Department of the Environment and Energy
DESTA	Design of Trade Agreements
DFAT	Department of Foreign Affairs and Trade
DG	Directorate-General
DSM	Dispute Settlement Mechanism
EFTA	European Free Trade Association
EPA	Economic Partnership Agreement
EFL	Environmental Framework Law
EIA	Environmental Impact Assessment
EPI	Environmental Protection Index
EPZ	Export Processing Zone
ESA	Eastern and Southern Africa
EU	European Union
FAO	Food and Agriculture Organisation
FTAs	Free Trade Agreements
ICCPR	International Covenant on Civil and Political Rights
IEAs	International Environmental Agreements
ILC	Interagency Labour Committee

ILO	International Labour Organisation
ISDS	Investor-state Dispute Settlement
JPAC	Joint Public Advisory Committee
LABPTA	Labour Provisions in Trade Agreements
MEAs	Multilateral Environmental Agreements
MNCs	Multinational Corporations
CONAMA	National Commission on the Environment
NAAEC	North American Agreement on Environmental Cooperation
NACEC	North American Commission for Environmental Cooperation
NACLCLC	North American Commission on Labour Cooperation
NAFTA	North American Free Trade Agreement
NAO	National Administration Office
NGOs	Non-governmental organisations
NTB	Non-Tariff Barriers
NTPO	Non-trade Policy Objectives
ODA	Official Development Assistance
OECD	Organisation for Economic Cooperation and Development
PROFEPA	Office of the Federal Attorney for Environmental Protection (Procuraduría Federal de Protección del Ambiente)
OTLA	Office of Trade and Labour Affairs in the US
OHCHR	Office of the High Commissioner for Human Rights
OPC	Open Public Consultation
OSINFOR	Supervision of Forest Resources and Wildlife
PITAC	Public Interest Trade Advisory Committee in the US
PTA	Preferential Trade Agreement
PNA	Protected Natural Area
RANP	Protected Natural Areas Regulation
RBC	Responsible Business Conduct
RRM	Rapid Response Mechanism
RTAs	Regional Trade Agreements
SECO	State Secretariat for Economic Affairs
SEM	Submission of Enforcement Matter
SME	Small and Medium Enterprises
SPS	Sanitary and Phytosanitary
TBT	Technical Barriers to Trade
TCA	Trade and Cooperation Agreement
TEPAC	Trade and Environment Policy Advisory Committee in the US

TFAAB	Trade for all Advisory Board
TPP	Trans-Pacific Partnership
TREND	Trade and Environment Database
TSD	Trade and Sustainable Development
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCSD	United Nations Conference on Sustainable Development
UNCTAD	United Nations Conference for Trade and Development
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNGP	United Nations Guiding Principles
UNHCR	United Nations High Commissioner for Refugees
UNIDO	United Nations Industrial Development Organisation
UK	United Kingdom
US	United States
USAID	United States Agency for International Development
USCTTA	United States Cambodia Textile Trade Agreement
USMCA	United States Mexico Canada Agreement
USTR	United States Trade Representative
VCLT	Vienna Convention on the Law of Treaties

1 Executive Summary

1.1 Objectives and methods

In compliance with the terms of its 15-Point Action Plan on Trade and Sustainable Development (TSD), designed to improve the implementation and enforcement of environmental and labour provisions in the European Union's (EU) trade agreements, the European Commission is currently reviewing its TSD approach and reflecting on the need to take additional measures to ensure the full and effective implementation of TSD chapters in free trade agreements (FTAs). This study is designed to inform the Commission's TSD Review by undertaking a comparative analysis and identifying existing practices. Some of these FTA practices were born in different institutional or regional contexts with specific trading partners and as such, may not be directly transplanted to the EU TSD model.

This study provides a comprehensive and critical review of different approaches to TSD provisions in FTAs among a selection of non-EU countries. The study's objective is to compare the scope, modalities and effects of each country's TSD model. This required mapping out and assessing the social and environmental commitments that countries take when signing trade agreements; understanding the institutional mechanisms and stakeholders expected to promote sustainable development; and measuring the results accomplished by the inclusion of specific TSD provisions in FTAs.

This study dissects and compares a total of eight different approaches to TSD provisions in the EU, Australia, Canada, Chile, Japan, New Zealand, Switzerland and the US. It draws on a mix of quantitative and qualitative tools and methods to compare practices across FTAs and their effects on third countries, including FTA provision datasets, legal analysis of trade agreements, data collection from official sources (e.g., budget allocation), targeted interviews with state officials and trade policy stakeholders, official statistics measuring progress in social and environmental standards, and feedback from an international advisory board appointed for this study. This report is supplemented by an analysis of the findings of a wide-ranging open public consultation process coordinated by the European Commission, published separately to the study.

1.2 Comparative analysis of TSD provisions in third-country FTAs

This report provides an overview of each of the seven selected countries' approaches to TSD provisions.

1.2.1 *Australia*

Australia long separated trade from sustainability issues such as environment and social protection, and even today, does not systematically include TSD provisions in its FTAs. Australia first incorporated labour and environmental provisions in its FTA with the US (2005). **Australia's approach to implementation of TSD provisions can be described as cooperative.** It includes mostly consultation provisions for any matters relating to TSD. In its recently concluded agreements, including the Australia-Peru FTA and the Australia-Korea FTA, Australia included separate TSD chapters. However, these provisions exclude any recourse to legal arbitration or sanctions. The main implementation mechanisms are established through national focal contact points.

1.2.2 Canada

Partly as a result of its joint negotiations with the US under successive trade agreements (namely North American Free Trade Agreement (NAFTA), Trans-Pacific Partnership (TPP) and the US-Mexico-Canada Agreement (USMCA), partly under its own trade negotiating agenda, Canada has occupied a central role in the strengthening of trade linkages with labour rights and environmental protection. **The key features of Canada's approach to TSD implementation and enforcement include a public submission process for non-compliance and the potential use of trade sanctions for both environmental and labour provisions.** In effect, however, Canada has never had to resort to trade sanctions in the enforcement of labour and environmental provisions and largely relied on state-to-state cooperation. Its latest approach to implementation and enforcement mechanisms is included in the USMCA, which includes a Rapid Response Mechanism (RRM) on Freedom of Association. Over the past few years, the Canadian government has also developed a policy framework for an "*inclusive trade policy*," framed as a safeguard against the rise of populism to maintain a system of open trade while responding to calls for greater fairness and inclusiveness (women's rights, indigenous rights etc.) at home. The implementation of these provisions is not subject to the same enforcement mechanisms as labour and environmental provisions.

1.2.3 Chile

Chilean trade policy has **prioritised labour provisions over environmental issues**, while remaining flexible in the obligations contained. While it consistently recognises the importance of labour commitments, the country has **adopted several policy tools to overcome implementation challenges. These include dialogue, knowledge exchange, and dispute resolution.** Mechanisms to settle disputes differ across Chile's trade agreements, and while sanctions are not typically part of Chilean trade policy, the country has concluded some FTAs that include them as a negotiated outcome on the demand of its trading partners (e.g., the US and Canada).

1.2.4 Japan

Japan has included environmental and labour provisions in many of its FTAs. **Its approach can be described as cooperative. Even though most of its agreements do not contain specific implementation mechanisms, these can be interpreted from joint cooperation statements with third Parties.** These statements mostly indicate that the Parties will cooperate on issues of trade and sustainable development. As a result, most of the agreements concluded by Japan focus on the implementation of trade issues rather than TSD provisions. In recent agreements like the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) or the EU-Japan Economic Partnership Agreement (EPA), the strong influence exerted by other partners shaped the design of implementation mechanisms.

1.2.5 New Zealand

New Zealand's approach to TSD provisions has become gradually institutionalised over the past decade. With the New Zealand-Korea FTA (2015), trade-sustainability linkages gained greater prominence. Instead of addressing environmental issues in a side agreement or on an *ad-hoc* basis in various provisions like sanitary and phytosanitary measures (SPS), technical barriers to trade (TBT) or investment, New Zealand committed to "*an integrated approach to sustainable development*" that dealt with TSD issues on par with other FTA chapters. New Zealand has shifted to more systematic stakeholder consultation and stricter commitment to seek external advice. In

short, **New Zealand favours a cooperative and consultative approach to sustainability issues, despite its strong attachment to the labour and environmental provisions of the CPTPP, whose TSD chapters are subject to trade sanctions.**

1.2.6 *Switzerland*

Switzerland has committed to including **specific provisions on social and environmental aspects of trade within new or updated FTAs since 2010**, when it drafted the first template TSD chapter with other members of the European Free Trade Association (EFTA). Thereafter, members updated the template between 2017 and 2020 to include additional provisions on various issues and further develop its dispute resolution mechanism. Switzerland has **established an FTA Joint Committee to monitor the country's implementation of sustainability regulations** by collecting information from federal offices as well as civil society. Most notably, Switzerland's **revised template TSD chapter includes a panel of experts as a new mechanism for dispute settlement**, which draws on recognised experts to draft, implement, and monitor recommendations.

1.2.7 *United States*

The US has prioritised trade linkages and TSD provisions since NAFTA raised the **prominence of both labour and environmental issues in trade policymaking**. Trade policymaking in the US is a process co-determined by the executive and legislative branches. The US TSD model has **three central features** related to the implementation and enforcement of labour and environmental provisions in FTAs: **1) its key focus on pre-ratification processes; 2) ability of civil society actors to file complaints for a country's failure to enforce its labour and environmental obligations under an FTA; 3) potential use of trade sanctions as an enforcement tool**. Despite its prominence in policy debates, the use of sanctions in the US model remains an exception to the rule. Its latest implementation and enforcement mechanisms are included in the USMCA, and more specifically its Rapid Response Mechanism (RRM) on Freedom of Association.

1.3 **Comparative analysis of the scope of environmental provisions in third-country FTAs**

The inclusion of environmental provisions in free trade agreements has developed considerably and become increasingly widespread over recent decades. While the US and EU have historically had a pioneering role in extending environmental provisions, similar models are now included in agreements involving neither of them. The range of specific environmental issues has increased over time, with more recent agreements including references to climate change, genetic resources and renewable energy as well as topics that have been present since NAFTA (1994) such as biodiversity or illegal trade in endangered species. Whilst the majority of the third countries studied include provisions on the right to determine the level of environmental protection and on non-derogation from domestic laws, as well as exceptions for the protection of natural resources and animal and plant life, Australia's and Japan's agreements tend to be less ambitious in scope and enforceability when not partnered with more ambitious countries such as Canada, the EU or the United States.

1.4 Comparative analysis of the scope of labour provisions in third-country FTAs

With the proliferation of trade agreements, labour provisions have become inextricably linked with trade provisions. Beyond the well-known cases of US and Canadian labour provisions, there is a **steady strengthening of labour provisions in almost all selected countries**, which can be seen in separate labour chapters or TSD chapters. This approach has been adopted in some of the agreements concluded by Chile, Australia and New Zealand. However, despite the widespread inclusion of labour provisions in FTAs, **significant variations with regards to scope and stringency remain**. As regards scope, the agreements concluded since the early 2000s by the US and Canada indicate that the 1998 Declaration on Fundamental Principles and Rights at Work of the International Labour Organisation (ILO) has been used as a baseline reference for labour standards. The same is applicable to agreements by Switzerland and Australia, while the New Zealand approach is less consistent. Japan's approach is different with no references to core labour standards in the agreements analysed. Thus, there is no uniform approach on the extent of incorporation and commitments undertaken. This can be partly attributed to the fact that not all the states have ratified the fundamental ILO conventions, hence the differences in the levels of commitments.

Furthermore, many third-country FTAs signed by Australia, Canada, New Zealand and the US go beyond core labour standards and include commitments to occupational safety and health, right to strike, wages, labour inspections, the protection of migrant workers, and/or access to justice, remedies and social guarantees. Finally, a notable policy development has been the broadening of social provisions beyond traditional TSD provisions under an "inclusive trade agenda" that includes, among others, gender and indigenous rights, as witnessed in Canada, Chile and New Zealand. These issues are not subject to the same implementation and enforcement rules but are already related to TSD provisions (e.g., ILO Conventions No. 100 on Equal Remuneration and No. 111 on Discrimination (Employment and Occupation)).

1.5 Comparative analysis of the scope of other social provisions¹ in third-country FTAs

The US and Canadian models reflect promotion of transparency, due process, and anti-corruption in trade agreements. While provisions have become increasingly robust with capacity building for compliance, monitoring, and enforcement in the US, language enabling public participation remains weaker than for other TSD issues – such as labour – in Canada. Meanwhile, Australia, Chile, and New Zealand lack common text across their trade agreements as emphasis tends to be dependent on the negotiating partner and on labour issues. All three reflect an overarching lack of focus on social commitments other than labour, prioritising cooperation and aspirational language. While the US likewise prioritises specific social commitments, a few of Canada's recent trade agreements cite the Universal Declaration of Human Rights of the United Nations (UN) and are explicit in naming particular human rights objectives.

¹ Other social provisions beyond labour include references to gender rights, indigenous rights, corporate social responsibility etc.

1.6 Comparative analysis of the scope of regulatory sovereignty and exceptions in third-country FTAs

The right to regulate effectively grants countries policy space with regard to the scope of labour and environmental provisions and their implementation. In addition, the non-derogation principle also ensures that Parties do not lower their standards to boost competitiveness. The analysis reflects that **there is a harmonised approach adopted by New Zealand, Switzerland, the US, Chile and Canada in incorporating the right to regulate and non-derogation provisions**. However, the approach by Australia is not consistent as the provision is not present in some agreements, while Japan maintains a consistent approach with no provisions on regulatory sovereignty.

1.7 Implementation provisions in third-country FTAs

The comparative analysis of TSD provisions across the seven selected countries sheds light on four important dimensions of implementation mechanisms:

First, **the most common institutional mechanism to deploy FTAs consists of joint committees and/or national contact points typically comprised of government officials at the cabinet or ministerial level**. These institutions often deal with labour and environmental issues jointly, although there are cases of specific subcommittees in charge of overseeing labour or environmental issues. The creation of independent governmental bodies to monitor TSD provisions as in the NAFTA case are an exception to the rule.

Second, **even for sanction-based enforcement models like in Canada and the US, cooperation remains the watchword for the implementation of TSD provisions**, as illustrated by the prevalence of cooperation provisions in the selected FTAs' labour and environmental provisions. **Explicit references to technical assistance and capacity-building programmes are much less common among the seven countries**. They primarily feature in Canadian and US FTAs, but are also included in some recent agreements signed by Australia, New Zealand and Switzerland. Unexpectedly, the economic development level of a trade partner country is not the only factor driving the inclusion of technical assistance and capacity-building provisions, to the extent that "North-North" FTAs can include such provisions, whereas "North-South" FTAs may not. Commitments to regulatory harmonisation is even less common outside US and Canadian FTAs.

Third, the comparative analysis of TSD provisions shows that **references to international treaties are common for labour, social and environmental standards in most selected FTAs, but that the most frequent international organisation referred to remains the ILO**. Many agreements contain provisions allowing for consultations with the ILO, whether for assistance with ILO conventions at the pre-ratification stage, or more marginally during labour disputes (see enforcement section). In practice and as Section 6.2 illustrates, ILO assistance has been particularly effective to drive developing countries to ratify ILO conventions at the pre-ratification stage. **The pre-eminence of the ILO for the implementation of labour standards contrasts with the environmental field, where no international organisation fulfils a comparable advisory function**.

Fourth, among the seven countries under study, **civil society participation is rarely institutionalised and harmonised across several FTAs**. Although many countries openly support the participation of non-state actors in trade policymaking, they tend to resort to *ad*

hoc consultations on the implementation of trade agreements instead of formal civil society committees like EU domestic advisory groups.

1.8 Enforcement provisions in third-country FTAs

Environmental and labour enforcement provisions in the FTAs of Australia, Canada, Chile, Japan, New Zealand, Switzerland, and the US generally include or choose from several broad categories of elements, which are examined hereafter:

- a) Obligations to implement international standards based on international commitments;
- b) Requirements to effectively enforce one's labour and environmental laws;
- c) A non-derogation clause;
- d) A public complaint or submission mechanism;
- e) A consultation process between the Parties;
- f) A dispute settlement; and
- g) A remedy.

Some countries include all elements in their agreements, while some selectively draw upon them. **International standards invariably rely on the 1998 ILO Declaration on Fundamental Principles and Rights at Work, and multilateral environmental agreements (MEAs).** In some agreements, the obligations are expanded to commitments to acceptable conditions of work. The obligation to enforce one's labour and environmental laws are also often included in TSD provisions. **The level of enforceability of those standards varies across third country FTAs, ranging from aspirational language** (e.g. "*strive to ensure*") in early US FTAs **to much more stringent and specific enforcement provisions** ("*shall promote compliance with and effectively enforce*") as found in Canadian agreements.

When TSD provisions are enforceable, violations of obligations are generally² required to have affected trade or investment between the Parties. This requirement can be a matter of contention in consultations and, potentially, dispute settlement as to what actions are in a manner affecting trade. **This can be minimised if the agreement is very specific in specifying how such a term is to be defined** by the Parties, or by a panel of experts.

Public complaint processes also vary in their availability and their procedures across third country FTAs. The provisions range from having no institutionalised public submission process at all, such as for agreements concluded by Switzerland for example, to having quite robust ones, such as in the cases of the US and Canada. Public submissions in the US and Canada can give rise to detailed reports that establish a factual record if the US or Canada receives a complaint from a national about another Party.³

Most agreements provide for a consultation process between the Parties. These consultations might form part of a dispute settlement process that leads to some form of arbitration or panel of experts (see e.g., US, Canada, Chile); or consultations might be the only recourse (see e.g.,

² The USMCA is an exception and analysed in greater details in Sections 7.1 and 8.1.

³ For a discussion of public submission processes, see case studies 2 and 3, respectively covered in sections 8.2 and 8.3.

Australia-Peru). Dispute settlement processes, when they exist, can include consultations, a panel of experts that produces a report and a plan of action, up to legal arbitration. Arbitration processes can be specifically tailored to the labour and environmental chapters, or can be the same processes as the regular dispute settlement procedures, albeit with panellists that are experts in the field. Recourse to arbitration is most prominent in US FTAs, but also exists in the CPTPP's labour and environmental chapters, which were highly influenced by the US model, even though the US is not a Party. **USMCA's Rapid Response Mechanism on Freedom of Association has been uniquely designed to address and remedy factory-level freedom of association violations in a more immediate manner than state-to-state arbitrations that address failure to enforce domestic laws by states.**

Finally, for those FTAs that include dispute settlement procedures, **remedies generally include either monetary assessments, or full recourse to dispute settlement procedures that will provide the remedy of suspension of benefits** in accordance with the dispute settlement rules.

1.9 Third-country TSD implementation practices

1.9.1 *Certification of compliance as ex-ante implementation*

The pre-ratification period can be used to press for domestic (legal) reforms, whether this relates to labour or environmental standards. The US certification of compliance that occurs after ratification but *before* entry into force is a **form of “ex-ante implementation” coordinated by the executive and legislative branches that has been particularly impactful**. Within the framework of FTA negotiations, the US has managed to obtain significant concessions before trade agreements went into effect, whether in the labour (domestic reforms, ratification of ILO conventions) or environmental field (domestic reforms and implementation of multilateral environmental agreements like the Convention on International Trade in Endangered Species (CITES)). This institutional mechanism is specific to the US.

1.9.2 *Role of international organisations*

Engaging with the ILO on labour issues at the negotiation stage has delivered tangible outcomes like the ratification of ILO conventions. Concretely, ILO interventions through capacity-building, technical assistance and an independent, neutral monitoring mechanism provide impetus for reform in both developed and developing countries as witnessed in Vietnam, Mexico, South Korea, and Canada, among others. In other words, international organisations can play an important role in improving compliance with international standards in both developing and developed countries, as witnessed by the ratification of ILO conventions by Canada and South Korea within the framework of their respective FTAs with the EU.

ILO technical assistance can also yield tangible results for monitoring processes. This includes targeted missions like scrutinising union-level elections, as witnessed in the implementation of the USMCA. Thus, given its widely acknowledged authority on labour standards, the ILO can play a valuable role in monitoring, in collaboration with two or several FTA Parties, but also between multinational firms, government officials, NGOs, and local workers.

The combination of cooperation and incentives can also be very effective as it allows partners to engage by increasing pressure and establishing clear timelines to achieve specific outcomes. This

is illustrated by the unique role the ILO played in the monitoring of the US-Cambodia Textile Trade Agreement.

While engagement with MEA Secretariats has been much less common than ILO technical assistance, connecting TSD implementation with capacity-building activities cosponsored by MEA Secretariats can help address the detrimental effects of illegal trade of preserved resources (e.g., US-Peru FTA and CITES).

Having an informed, enlightened and engaged civil society can provide considerable leverage in monitoring, encourage public submissions for non-compliance and add pressure on implementing the provisions. By engaging with each Party and multiple stakeholders, international organisations can help enhance civil society participation

1.9.3 Trade capacity-building and technical assistance

Leveraging institutional resources across government agencies allows supplementing the limited funding granted to trade agencies for implementation of labour and environmental provisions, in small and large countries alike. In all selected countries, labour and environmental ministries and agencies are engaged at both negotiating and implementing phases through various interagency processes. In some cases, **such decompartmentalised approach has allowed third countries to devote much larger amounts of resources to the implementation and enforcement of TSD provisions.** This “whole-of-government” approach should, however, not obscure the massive investment that some countries like the US have made, through both trade and other government agencies, to provide sustained engagement with local stakeholders to pursue TSD objectives.

1.9.4 Civil society inclusion

A multi-pronged approach to civil society participation can maximise stakeholders’ input at various stages of the trade policy process:

- **At the pre-negotiating and negotiating stages,** social and environmental **impact assessments** paired with civil society consultations have helped countries identify specific problems and anticipate key questions related to implementation. This was the case for the drafting of the US-Peru FTA’s Forest Annex, for which environmental NGOs provided significant input, or for the design of the US-Cambodia Textile Trade Agreement, partly shaped by the Union of Needletrades, Industrial and Textile Employees (UNITE). Labour unions were also involved in the negotiations of the USMCA’s RRM.
- **At the implementation stage, technical assistance and capacity building programmes with meaningful civil society engagement are more likely to bring tangible results than projects merely targeting government agencies,** as revealed by the analysis of multiple trade-and-labour capacity building programmes across different regions. Sustained collaboration with stakeholders requires commensurate funding, as illustrated by the Canada-Colombia FTA or the US-Peru FTA.

- **With regard to enforcement, public submissions for non-compliance can also play an important role to improve labour, environmental standards as well as human rights.** The case against Mexico on environmental degradation in the Sumidero Canyon, filed under the North American Agreement on Environmental Cooperation (NAAEC), shows that trade agreements can offer opportunities to make civil society voices heard when domestic channels are blocked.

1.10 Third-country TSD enforcement practices

Enforcement practices have varied across environmental and labour chapters. On the environmental front, the most developed set of practices have been the citizen submission processes of the NAAEC, now renewed under the USMCA. The lengthy record of reports by the North American Commission for Environmental Cooperation (NACEC) has provided important data and factual records. **Other than the extensive work of the CEC, there have not been any environmental disputes initiated in the countries studied.** However, the environmental agreements have provided the impetus to reform domestic environmental laws, as demonstrated in the case study on the US-Peru FTA. Further, while there has not been recourse to dispute settlement procedures, dispute settlement is an important element of an effective enforcement strategy that is supportive of cooperative approaches.

Labour enforcement practices centred on dispute settlement and state-to-state mechanisms, on the other hand, have been more extensive. In that regard, the US has the most extensive record with utilising labour enforcement mechanisms. To date, the US has accepted 13 petitions for review. As a result, 12 reports have been issued, and eight ministerial agreements entered into force. One proceeded all the way to dispute settlement. These petitions must meet specific criteria established in the labour chapters themselves, but that are also elaborated in administrative regulations promulgated by the relevant ministries. Because of the sensitivity of the matter, submitters have the right to keep the submission confidential. The in-depth reports by the Department of Labor have proved to be an important tool in labour chapter enforcement. This is because they serve much of the same purpose as human rights organisation reporting: generating a record around which governments base consultations and advocates can campaign. While they may draw from ILO reports, they also zoom in on specific sectors. The dispute settlement processes have also provided opportunities for cross-border organizing and cooperation, which has been a significant benefit for labour advocates and unions.

Nevertheless, a significant critique of labour enforcement practices, particularly in the US, has been the long process involved in instituting them, and the limitations of state-to-state processes with their focus on public law and enforcement. Because of the extensive efforts and resources often required to make changes to law, and particularly enforcement, advocates, political representatives, and government officials have advocated for firm-level response mechanisms that are time-sensitive. This has been realised in the inclusion of a facility-specific Rapid Response Mechanism that has on-site verification with specialised panels. The RRM has resulted in two successful on-site remediations. Its early success with regard to workers' rights will have to be weighed against some of its challenges and downsides, including its implementation costs, bureaucratic burdens, financial risks borne by private actors and concerns over due process.

1.11 Key takeaways from the case studies

1.11.1 *The US-Guatemala labour dispute*

In 2007, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and six Guatemalan unions collaborated to bring a complaint against the Guatemalan government for its failure to “effectively enforce” its labour laws, specifically with respect to freedom of association, rights to organise and bargain collectively, and acceptable conditions of work.⁷⁵ Ten years later, in a high-profile labour dispute under the Dominican Republic-Central America Free Trade Agreement (CAFTA-DR), an arbitral panel ruled in favour of the Guatemalan government, determining that the US was unable to show that the actions of Guatemala in question were both “*sustained or recurring*” and “*in a manner affecting trade*.” These were the legal standards agreed to by the Parties, with the burden of proof falling on the plaintiff to demonstrate that the violations of labour law met these standards. Perhaps the most pertinent interpretive decision by the Panel was its interpretation of “*In a manner affecting trade between the Parties*.” It is on these grounds that many of the claims, in the end, failed.

To address the panel’s interpretation of the language, and lower the burden of proof in future arbitrations, trading partners amended the USMCA’s Labour chapter to make it a rebuttable presumption that a measure in question affects trade and investment, unless it can be demonstrated otherwise by the respondent country. In addition, the USMCA included a novel special investigatory and dispute settlement process that specifically addresses freedom of association violations in specific workplaces. The development of this instrument is an attempt to overcome the weaknesses of the institutions in the US-Guatemala case.

1.11.2 *The NAAEC and the Sumidero Canyon II Case*

In 2011, the Comité Pro-Mejoras de la Ribera Cahuaré, a community organisation based in the Chiapas region in Mexico, filed a submission under NAFTA’s environmental side agreement (NAAEC) asserting that the Mexican government was failing to effectively enforce its environmental laws with regard to the extracting activities of a limestone quarry operating in the Sumidero Canyon National Park. The case of the Sumidero Canyon and its tangible impacts on environmental protection and local communities in Mexico show the empowering effects of the NAAEC’s citizen submission of enforcement matters (SEM) process and, more generally, of the participation of civil society in FTA enforcement mechanisms through public submission. Relative to the domestic and unilateral enforcement institutions existing in Mexico, the SEM process did not face the same kind of jurisdiction challenges reflected by Mexico’s Mining Act as well as the conflicts between municipal versus federal governance.

The USMCA builds upon this by incorporating administrative reforms directly into the text of the side agreement, imposing specific timelines, transparency, and disclosure requirements.

1.11.3 *The Canada-Colombia Agreement on Labour Cooperation*

On 20 May 2016, the Canadian Labour Congress⁴ and five Colombian labour organisations⁵ submitted a public communication to the Canadian National Administrative Office (NAO) pursuant to Article 10 and Annex 2 of the Canada-Colombia Labour Cooperation Agreement (LCA). The complainants alleged that the Government of Colombia failed to meet its obligations under the Canada-Colombia LCA, in particular as regards freedom of association, collective bargaining, derogation from labour laws to encourage trade and investment; enforcement of domestic labour laws; and timely access to labour justice.

This case study sheds light on the institutional mechanisms provided in Canadian labour cooperation agreements and in the labour chapters of Canada's free trade agreements. It reveals how the "public communication" process led to an investigation of allegations that Colombia had failed to meet its labour obligations in the agreements, including obligations to implement international standards, and to an accord between the Parties on an action plan to address the issue. The report from the Canadian NAO, while not legally binding, led to tangible change on the ground because both Parties were compelled to find a solution.

One of the practices of the Canadian public communication process pertains to the very clear guidelines offered for citizens' submissions, including a detailed step-by-step description of the process, clear time limits for every step, guidance on submission, criteria for acceptance and review of public communications and ambitious transparency requirements. In the present case, procedural certainty enabled close cooperation between the partner countries to address labour enforcement. The other advantage of this public submission mechanism is its openness: Article 10 of the Canada-Colombia LCA refers to "*any matters related to this Agreement*", and the range of stakeholders who can submit a public communication is very broad as it includes NGOs, businesses, and citizens in general. Another noteworthy development of the Canada-Colombia labour case was Canada's decision to cooperate with the US concerning its parallel case under the US-Colombia Agreement.

This case study also identifies a number of challenges related to the public communication/submission procedure. First, while time limits are an important component of procedural certainty, they can be rather short to collect information on the case and the alleged violations. Second, this process required significant resources for the National Administration Office to conduct interviews with stakeholders, organise staff missions to Colombia etc.

1.11.4 *The CPTPP and its labour consistency plans*

This case study analyses the CPTPP's "*labour consistency plans*" (LCPs) negotiated to address concerns over the violation of human rights and labour rights in Vietnam, Malaysia and Brunei. The LCPs are an important new development in explicitly requiring specific language of the law to be changed and in requiring mechanisms, including transparency, reporting, specific goals for the hiring of inspectors, and third-party review of progress to be implemented.

⁴ *The Canadian Labour Congress is the largest labour organisation in Canada. It brings together national and international unions, provincial and territorial federations of labour and community-based labour councils.*

⁵ *Central Unitaria de Trabajadores (CUT), Confederación de Trabajadores de Colombia (CTC), Corporación Colombiana para la Justicia y el Trabajo (COLJUSTICIA), Sindicato Nacional de Trabajadores de la Industria Agropecuaria (SINTRAINAGRO) et Unión Sindical Obrera (USO).*

This analysis examines the implementation of labour consistency plans in each of the three countries and reveals that many of the requirements of the LPCs that were a condition of US ratification have, to this day, not been met in the years subsequent to the ratification of CPTPP. The consequences of US withdrawal from CPTPP on the implementation and enforcement of the LCPs confirm the importance of the US certification of compliance mechanism as a lever for domestic reforms. It also confirms that great **potential for change lies at the pre-ratification or “pre-implementation” stage.**

1.11.5 *Environmental reforms in the US-Peru FTA*

The implementation of the 2009 US-Peru FTA and its Annex on Forest Sector Governance is an important case study illustrating the promises and the limitations of far-reaching environmental reforms negotiated during the pre-ratification phase. It sheds light on the distinction between output, outcome and impact, and on the challenges of monitoring the implementation of trade-induced domestic reforms over time. It highlights the potential impacts of a tailored and multi-stakeholder approach to TSD enforcement, supported by a number of institutional mechanisms involving both Parties, including both executive and legislative branches, international organisations (the CITES Secretariat), civil society actors and private actors.

The specific case of the Forest Annex shows that certification of compliance is a form of “ex-ante implementation” that leverages access to the US market to obtain reforms from trading partners after ratification but *before* the official entry into force of a trade agreement.

Finally, civil society participation at several stages of the trade policy process also contributed to making the US-Peru FTA a vehicle for domestic reforms and improved business practices. Conversely, the hasty pace of domestic reforms and the lack of consultation of indigenous communities in the pre-implementation had counterproductive effects on the protection for Peru’s forests. This case study also reveals the on-the-ground challenges of monitoring once the leverage of pre-ratification or *ex ante* implementation is gone.

2 Introduction

Ever since it began introducing TSD provisions in its trade agreements, the European Commission has favoured an evidence-based approach to sustainability issues that values consultation and input with Member States, the European Parliament and trade policy stakeholders. In July 2017, the Commission launched a debate on how to optimise the implementation and enforcement of TSD chapters in EU FTAs, which culminated in the publication of a 15-Point Action Plan in February 2018⁶. These fifteen recommendations, regrouped into four principles (Working Together, Enabling Civil Society including the Social Partners to play their role in implementation, Delivering, and Transparency and Communication) have influenced EU trade policy with regard to both processes and outcomes. In compliance with the terms of its 15-Point Action Plan, the Commission is currently reviewing its TSD approach and reflecting on the need to take additional measures to ensure the full and effective implementation of TSD chapters. This study is designed to inform the Commission's work by undertaking a comparative analysis and feeding best practices into the TSD review. Admittedly, some of these FTA practices were born in different institutional or regional contexts with specific trading partners and as such, may not be directly transplanted to the EU TSD model or any particular FTA.

Acknowledging these institutional specificities, this study aims to provide a comprehensive and critical review of different approaches to TSD provisions in FTAs among a selection of non-EU countries. The study's objective is to compare the scope, modalities and effects of each country's TSD model. This requires mapping out and assessing the social and environmental commitments that countries take when signing trade agreements; understanding the institutional mechanisms and targeted actors expected to promote sustainable development; and measuring the results accomplished by the inclusion of specific TSD provisions in FTAs. Drawing from the expertise of the team and its international advisory committee, the study aims to inform the Commission's ongoing TSD review with an evidence-based outcome that would help the reader to assess the challenges and benefits of different provisions and enforcement practices. To determine the scope of this study, the team has collected data on third-country FTAs that include substantive TSD provisions and conducted a full literature review below.

⁶ *Non-paper of the European Commission services. Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements of 26 February 2018. Available at: http://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf*

3 Literature review

Since the North American Free Trade Agreement (NAFTA, entered into force in 1994) raised the prominence of labour and environmental issues in trade policy, TSD provisions have drawn considerable attention from scholars and policy analysts alike. What follows is a summary of the literature that aims first, to help define the objectives and structure of the TSD review and second, to discuss the methodological challenges inherent to this exercise, as well as the benefits and limits of different approaches.

For the most part, the analysis of TSD provisions in trade agreements is generally split between studies of labour or social clauses that have historically drawn greater scholarly attention, and the literature on environmental provisions, which after a burst of interest in the 1990s, have recently regained prominence. Another cleavage in the literature is the divide between North American trade scholars focusing primarily on the US and/or Canadian approaches to TSD provisions on the one hand, and European trade policy experts, despite some attempts to bridge this gap. A few studies have tried to bridge this Transatlantic divide, or compared the much-discussed US, Canadian and European models to other TSD approaches in Japan, Australia, Chile, EFTA countries and others.⁷ However, to this date, no publicly available study has sought to examine the implementation and enforcement of TSD provisions with such a wide comparative angle, covering both environmental and social standards with an in-depth analysis of institutional mechanisms and on-the-ground practices.

From a methodological standpoint, **studies of TSD provisions can be divided into three main categories:**

- 1) Legal analyses of the institutional design and the text of FTAs, with a focus on enforceability;
- 2) Large-n studies mapping out TSD provisions in FTAs with the aim of assessing the scope and impact on labour and environmental standards;
- 3) Case studies assessing the institutional mechanisms of specific FTAs, often relying on qualitative methods and interviews with state officials and trade policy stakeholders.

These different methods have been used and at times combined to better understand the nature, the evolution and the impact of trade agreements.

⁷ See e.g., Jonas Aissi, Rafael Peels and Daniel Samaan (2017). "Evaluating the effectiveness of labour provisions in trade agreements: an analytical framework", *International Labour Review*; Ida Bastiaens and Evgeny Postnikov (2017). "Greening Up: The Effects of Environmental Standards in EU and US Trade Agreements", *Environmental Politics*, vol. 26 (5): 847–869; Myriam Oehri (2015). "Comparing US and EU Labour Governance 'Near and Far'", *Journal of European Public Policy*, vol. 22(5), pp. 731–49; Jean-Baptiste Velut (2016). "What Role for Civil Society in Cross-Regional Mega-Deals? A Comparative Analysis of EU and US Trade Policies", *Revue Interventions économiques [Online]*, 55. Peter Draper, Nkululeko Khumalo and Faith Tigere (2017). *Sustainability Provisions in Regional Trade Agreements: Can they be Multilateralised?* RTA Exchange, International Centre for Trade and Sustainable Development (ICTSD) and Inter-American Development Bank (IDB); International Labour Organisation (2017), *Handbook on Assessment of Labour Provisions in Trade Arrangements*. Geneva: International Labour Office; International Labour Organisation (2019), *Labour Provisions in G7 Trade Agreements: A Comparative Perspective*. Geneva: International Labour Office.

The changing scope, diffusion and spill-over effects of TSD provisions in FTAs

Several studies have mapped out the rapid proliferation of TSD provisions in FTAs since the beginning of the twenty-first century and their increasing reference to international standards, with a focus on labour provisions,⁸ environmental provisions,⁹ or both.¹⁰ The enforceability of these trade agreements has evolved over “generations” or “models” of TSD provisions,¹¹ which means that different countries often have different approaches depending on the period and partner with whom they signed a trade agreement. These provisions are either included as integral chapters within the body of the agreement (e.g., US-Colombia FTA), dedicated TSD chapters (e.g., EU-Korea FTA) or contained in a side agreement (e.g., Canada-Honduras FTA). The diversity of implementation and enforcement approaches included in trade agreements ranges from no dispute settlement for these provisions to state-to-state dispute settlement (CPTPP, EU trade agreements) with some variations, including criminal and civil liability (US), use of dedicated expert panels and civil society monitoring (EU), committees and joint councils (Canada) and penalty fees or sanctions (US and Canada).

Through legal analysis and process tracing, trade policy scholars have tried to understand the evolution of environmental and labour provisions and examined the processes of path-dependence and policy diffusion of these clauses, trying to trace back the origins of social and environmental clauses or how they might influence future FTAs negotiated by the same trading partners or other countries adopting similar provisions. Using the TRend and ENvironment Dataset (TREND), a fine-grained dataset of environmental provisions in preferential trade agreements, Morin et al. (2017) show that the US has generated more new environmental standards (or legal innovations) in FTAs than any country, and contributed to the diffusion and expansion of the trade-environment nexus across the globe, as illustrated by the growing number of FTA partners adopting environmental standards as part of as well as outside the realm of US FTAs.¹² Using the same dataset, Morin and Rochette (2017) go further to highlight a convergence between two models: the American “competitive” approach to the trade-environment nexus and the European “cooperative” model. Thus, **the US favours a one-size-fits-all approach aimed primarily at levelling the playing field with US trade partners for fear that American environmental standards might put US economic interests at a competitive disadvantage. The EU, on the other hand, tends to adapt its environmental norms in FTAs to the economic, social and environmental context of its trading partner.** Analysing the evolution of FTA provisions, the authors posit a **gradual**

⁸ International Labour Organisation (2017). *Handbook on Assessment of Labour Provisions in Trade Arrangements*. Geneva: International Labour Office. International Labour Organisation (2019), *Labour Provisions in G7 Trade Agreements: A Comparative Perspective*. Geneva: International Labour Office.

⁹ Jean-Frédéric Morin and Myriam Rochette (2017). “Transatlantic Convergence of PTAs’ Environmental Clauses”, *Business and Politics*, vol. 19(4):621-658.

¹⁰ Peter Draper, Nkululeko Khumalo, and Faith Tigere (2017). *Sustainability Provisions in Regional Trade Agreements: Can they be Multilateralised?* RTA Exchange, International Centre for Trade and Sustainable Development (ICTSD) and Inter-American Development Bank (IDB).

¹¹ International Labour Organisation (2017). *Handbook on Assessment of Labour Provisions in Trade Arrangements*. Geneva: International Labour Office; Congressional Research Service (2020). *Labor Enforcement Issues in US FTAs*. <https://fas.org/sqp/crs/row/IF10972.pdf>; Jean-Frédéric Morin & Myriam Rochette (2017), “Transatlantic Convergence of PTAs’ Environmental Clauses”, *Business and Politics*, vol. 19(4):621-658; Axel Berger, Clara Brandi & Dominique Bruhn. *Environmental Provisions in Trade Agreements: Promises at the Trade and Environment Interface*. DIE, Briefing Paper, 16/2017.

¹² Jean-Frédéric Morin, Joost Pauwelyn, and James Hollway (2017). “The Trade Regime as a Complex Adaptive System: Exploration and Exploitation of Environmental Norms in Trade Agreements”, *Journal of International Economic Law*, vol. 20(2): 365–90. For a comprehensive analysis of the US approach to environmental provisions in FTAs, see Sikina Jinnah and Jean-Frédéric Morin, *Greening Through Trade*, Cambridge/London: MIT Press, 2020.

convergence of models over time, illustrated by the strengthening of European Union-inspired capacity-building programmes in recent US trade agreements or the proliferation of civil society participation clauses in EU FTAs, said to be partly inspired by the North American Agreement on Environmental Cooperation.¹³ Arguably, the characteristics of each trade-environment model as defined by Morin and Rochette are not always endemic to the EU or the US. For instance, the US has a long tradition in capacity-building programmes, while the EU also has had a long experience with civil society inclusion. Yet, their models contribute to the literature by showing that the US and EU approaches have much more common ground than is generally understood.

As far as Canada is concerned, Michéa (2018) sees the EU-Canada Comprehensive Economic and Trade Agreement's (CETA) TSD, labour and environment chapters as a logical convergence of the EU and Canadian TSD approaches; while Zini (2018) argues that Canada's labour provisions have shifted from a promotional to a more conditional model resembling the US approach to labour rights enforcement in trade agreements.¹⁴ The signature of the US-Mexico-Canada Agreement, which promises to offer stricter enforceability through a streamlined dispute settlement mechanism, confirms the latter point.

While the question of convergence remains to be settled, the literature on the scope of TSD provisions offers two important takeaways for the present study. First, **a country's approach to environmental and labour standards is hardly set in stone and, even in the case of the US, is strongly influenced by its trading partners**. Thus, countries have often used TSD provisions as policy experiments that may be refined in future FTAs (including in modernised versions of the same FTA). Second, **FTAs remain a powerful channel for the diffusion of social and environmental norms**.¹⁵ Bearing in mind the distinction between *de jure* and *de facto* standards, one must acknowledge the importance of policy diffusion as a positive impact of TSD provisions in trade agreements, with strong potential at both bilateral¹⁶ and multilateral levels.¹⁷

The impact of TSD provisions

The diffusion of TSD standards already provides evidence on the effects of TSD provisions at the level of global governance. This can take place both before and after ratification, inside and outside the trade sphere. In a large-n study crossing evidence between nearly 3,000 treaties (including 2,242 MEAs and 689 preferential trade agreements) and domestic environmental legislation across nearly 150 countries, Brandi, Blümer and Morin (2019) find that **FTAs are more likely to encourage domestic environmental reforms than MEAs before the ratification of trade deals**.¹⁸ Using a

¹³ Jean-Frédéric Morin and Myriam Rochette (2017). "Transatlantic Convergence of PTAs' Environmental Clauses", *Business and Politics*, vol. 19(4):621-658.

¹⁴ Frédérique Michéa (2018). "La modélisation des clauses sociales dans les accords commerciaux transatlantiques à la lumière de leur source", in Christian Deblock and Joël Lebullenger, *Génération TAFTA. Les nouveaux partenariats de la mondialisation*. Presses Universitaires de Rennes ; Sylvain Zini, "Les clauses sociales dans les partenariats intercontinentaux : la perspective nord-américaine", in Christian Deblock and Joël Lebullenger, *ibid*.

¹⁵ Ida Bastiaens and Evgeny Postnikov (2017); Jean-Frédéric Morin, Dominique Blümer, Clara Brandi and Axel Berger (2019). "Explaining the Varying Frequency of PTAs' Environmental Provisions", *World Economy*, vol. 42(9): 2602-2628.

¹⁶ Jean-Frédéric Morin, Dominique Blümer, Clara Brandi and Axel Berger (2019). "Explaining the Varying Frequency of PTAs' Environmental Provisions", *World Economy*, vol. 42(9): 2602-2628.

¹⁷ Horn, Henrik, Petros C. Mavroidis, and André Sapir (2010). "Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements", *World Economy*, vol.33 (11): 1565–88; Peter Draper, Nkululeko Khumalo, and Faith Tigere, *Sustainability Provisions in Regional Trade Agreements: Can they be Multilateralised? ICTSD 2017*.

¹⁸ Clara Brandi, Dominique Blümer and Jean-Frédéric Morin (2019). "When Do International Treaties Matter for Domestic Environmental Legislation?", *Global Environmental Politics*, vol.19(4): 14-44.

similar quantitative method to analyse the effects of 79 trade agreements on environmental reforms, Bastiaens and Postnikov (2017) go further to argue that **the design and enforcement mechanisms of TSD provisions play a key role in the timing of environmental reforms**.¹⁹ Their regression analysis reveals that countries that are in the process of negotiating a trade agreement with the US are more likely to improve their level of environmental protection (as measured by both Yale's Environmental Protection Index (EPI) and the total number of MEAs in force) over a three-year period. According to them, the threat of sanctions incentivises trading partners to reform environmental laws during the negotiating process. However, **little is said as to why the threat of sanctions operates less effectively once the agreement has been signed and the enforcement mechanisms are in place**, which would make the risk of being punished even more tangible.

By contrast, **countries that have signed an FTA with the EU are more likely to enhance their environmental performance during the implementation phase**. This is because the EU's cooperative approach is conducive to a gradual learning process involving state officials and civil society organisations that can lead to domestic reforms in trading partners during the implementation phase. In short, the US sanction-based approach is more likely to have an impact *ex-ante* (before FTA ratification), while the EU's cooperative approach is said to yield greater results *ex-post* (after ratification).²⁰ These broader trends revealed by a robust statistical analysis do not mean, however, that EU pre-ratification negotiations cannot lead to social reforms (e.g., EU-Vietnam trade negotiations), nor that the US approach excludes dialogue and civil society participation after ratification – the latter being an important feature that is often neglected in comparative studies of EU and US TSD approaches.

Other studies have also shown that **pre-ratification processes have been effective in raising labour standards**. Harrison argues that pressure exerted by US authorities on trade partners has resulted in legislative changes to improve labour law protections and/or led to other actions already before US FTAs with Bahrain, Columbia, Morocco, Oman, and Panama came into force.²¹ Focusing on US trade agreements signed between 1982 and 2005, Kim (2012) also finds evidence that trade partners are more likely to adopt domestic labour reforms before ratification as opposed to after, confirming that pressure on third-party countries during the negotiating phase can lead to substantive reforms.²² The success of pre-ratification reforms explains why some scholars have argued that pre-ratification conditions should be employed to push for regulatory changes beyond existing labour standard commitments.²³

Relying on a mixed quantitative and qualitative approach to compare EU and US TSD provisions, Postnikov and Bastiaens conclude that labour provisions in FTAs can, indeed, have positive effects on workers' rights but, here again, stress the importance of "Preferential Trade Agreement (PTA)

¹⁹ Ida Bastiaens and Evgeny Postnikov (2017). "Greening Up: The Effects of Environmental Standards in EU and US Trade Agreements", *Environmental Politics*, vol. 26 (5): 847–869.

²⁰ *Ibid.*

²¹ James Harrison (2019). "The Labour Rights Agenda in Free Trade Agreements", *The Journal of World Investment & Trade*, vol.20. 705-725. 10.1163/22119000-12340153.

²² Moonhawk Kim (2012). "Ex Ante Due Diligence: Formation of Trade Agreements and Protection of Labor Rights", *International Studies Quarterly*, vol. 56 (4): 704–719.

²³ Madelaine Moore and Christoph Scherrer (2017). *Conditional or Promotional Trade Agreements - Is Enforcement Possible? How International Labour Standards Can Be Enforced through US and EU Social Chapters*, Friedrich Ebert Stiftung, Singapore: Available at: <https://library.fes.de/pdf-files/bueros/singapur/13446.pdf>.

design.”²⁴ While acknowledging the importance of institutional mechanisms, Van Den Putte (2016) argues that the impact of labour provisions seems to be more dependent on context and political will than on blanket design.²⁵ Moore and Scherrer (2017) go further to argue that **enforcement is contingent upon a broad range of factors at the macro and micro level including legislation, institutions, culture and politics.**²⁶

Other qualitative studies have highlighted the positive network effects inherent to dialogue and cooperation, and noted the importance of emerging transnational advocacy networks to promote and defend workers’ rights, whether in the context of EU trade policy,²⁷ US FTAs²⁸ or the Canada-Chile FTA.²⁹ **Some authors are at odds with the positive findings of these studies, criticising the limits of cooperative approaches to TSD enforcement.** Harrison et al. (2019) use a qualitative method relying on 121 interviews and find that the EU’s TSD provisions of three trade agreements, namely the EU-Cariforum Economic Partnership Agreement (EPA) (2008), the EU-Korea FTA (2011) and the EU-Moldova Association Agreement (2014) had no positive impact on labour standards.³⁰ In another analysis of labour provisions, Harrison (2019) finds that the EU’s cooperative approach has not been systematically implemented and that the ‘soft’ dispute resolution provisions are inadequate to resolve disputes in the event of a violation. They conclude that the absence of a threat of meaningful sanctions translates into a limited deterrent effect, against the European Commission’s reluctance to invoke the dispute resolution option. The study was published before the outcome of the EU-Korea FTA, which will likely renew the literature on the EU enforcement model.³¹

Despite its seemingly stricter enforcement rules, the US sanction-based model has also been criticised on various grounds. A 2014 report by the US Government Accountability Office identified three main problems to the US enforcement model that had long been raised by both scholars and policy experts of US trade policy: **an ineffective submission process for complaints of non-compliance; insufficient resources allocated to monitoring; inadequate accountability regarding the implementation of TSD provisions in FTAs.**³² Meanwhile the North American

²⁴ Evgeny Postnikov and Ida Bastiaens (2014). “Does dialogue work? The effectiveness of labor standards in EU preferential trade agreements”, *Journal of European Public Policy*, vol.21 (6), 923–940.

²⁵ Lore Van den Putte (2016). “The European Union’s Trade-Labour Linkage Beyond the “Soft” Approach”. Doctor of Philosophy, Netherlands: Ghent University.

²⁶ Moore and Scherrer (2017).

²⁷ Myriam Oehri (2015). “Comparing US and EU Labour Governance ‘Near and Far’”, *Journal of European Public Policy*, vol. 22(5), pp. 731–49; Postnikov and Bastiaens (2014); Lore Van den Putte & Jan Orbie (2015). “EU Bilateral Trade Agreements and the Surprising Rise of Labour Provisions”, *International Journal of Comparative Labour Law and Industrial Relations*, vol. 31(3), pp. 263–83.

²⁸ Joel Stillerman (2003). “Transnational Activist Networks and the Emergence of Labor Internationalism in the NAFTA Countries.” *Peer Reviewed Articles (Sociology Commons)*, 11, available at: http://scholarworks.gvsu.edu/soc_articles/11; Tamara Kay (2005). “Labor Transnationalism and Global Governance: The Impact of NAFTA on Transnational Labor Relationships in North America,” *American Journal of Sociology* 111, no. 3 (November): 715-756; Jean-Frédéric Morin and Sikina Jinnah (2018). “The untapped potential of preferential trade agreements for climate governance”, *Environmental Politics*, vol. 27 (3), 541-565, 2018.

²⁹ International Labour Organisation (2017). *Handbook on Assessment of Labour Provisions in Trade Arrangements*. Geneva: International Labour Office.

³⁰ James Harrison et al. (2019). “Governing Labour Standards through Free Trade Agreements: Limits of the European Union’s Trade and Sustainable Development Chapters”, *Journal of Common Market Studies*, vol. 57 (2), pp. 260–277.

³¹ James Harrison (2019). *The Labour Rights Agenda in Free Trade Agreements*. *The Journal of World Investment & Trade*. 20. 705-725. 10.1163/22119000-12340153. See Tonia Novitz (2021). “Enforceable Social Clauses in Trade Agreements with ‘Bite’? Implications of the EU–South Korea Panel of Experts Report of 20 January 2021 (May 31, 2021)”. *ETUI Research Paper - Policy Brief 2021.06*, Available at: <https://ssrn.com/abstract=3856982> or <http://dx.doi.org/10.2139/ssrn.3856982>

³² Government Accountability Office (2014). “Free Trade Agreements. U.S. Partners Are Addressing Labor Commitments, but More Monitoring and Enforcement Are Needed”, GAO-15-160, Washington, DC.

Agreement on Environmental Cooperation under NAFTA has received mixed appraisals, at times praised for its innovative citizens' submissions process³³ or criticised for its soft cooperative approach.³⁴

In addition to some of the above-mentioned studies, both the ILO (2017) and the Organisation for Economic Cooperation and Development (OECD)³⁵ **have underlined the importance of meaningful and inclusive dialogue among different policy stakeholders, effective monitoring, as well as strong public accountability mechanisms for the implementation of labour and environmental provisions in trade agreements.** Likewise, **most experts agree that technical assistance and capacity building are critical tools.**³⁶ This has led to suggestions that for labour provisions to be effective, they need to involve stakeholders, notably social partners, in the making and implementation of trade agreements.³⁷ This is also the case for environmental provisions. Yet, **to be fully effective in improving environmental conditions, trade agreements require strong civil societies.** In the previously cited study of environmental provisions in EU and US FTAs, Bastiaens and Postnikov (2017) show that a dense civil society is crucial for the effective implementation of EU FTAs, as they can help to promote environmental norms and counter the influence of organised businesses.

With regard to civil society participation, Martens, Potjomkina and Orbie (2020) rely on a mixed approach of surveys (134 surveys and 18 interviews with EU and non-EU Domestic Advisory Groups or DAGs)³⁸ and case studies to assess the role of domestic advisory groups (DAGs) in FTAs. They conclude that **DAGs' policy impact is constrained by a lack of genuine dialogue between both DAG members and DAGs and governments, which undermines civil society efforts to monitor FTAs adequately.**³⁹ At stake in these studies is the institutional design of civil society mechanisms and **DAGs that are allegedly ill-equipped to advance workers' rights for various reasons, including undefined purpose, inadequate resources for monitoring and/or lack of enforceability.**⁴⁰

³³ David Markell (2005). "Governance of International Institutions: A Review of the North American Commission for Environmental Cooperation's Citizen Submissions Process", 30 N.C. J. INT'L L. & COM. REG. 759, Available at: <https://ir.law.fsu.edu/articles/73>

³⁴ Pierre-Marc Johnson and Andre Beaulieu (1996). *The Environment and NAFTA: Understanding and Implementing The New Continental Law*, Island Press.

³⁵ Clive George and Shunta Yamaguchi (2018). "Assessing Implementation of Environmental Provisions in Regional Trade Agreements," OECD Trade and Environment Working Papers 2018/01, Available at: <https://doi.org/10.1787/18166881>

³⁶ Congressional Research Service (2020). *Labor Enforcement Issues in US FTAs*. Available at: <https://fas.org/sgp/crs/row/IF10972.pdf>

³⁷ Jordi Agustí-Panareda, Franz Christian Ebert and Desiree LeClercq (2014). *Labour Provisions in Free Trade Agreements: Fostering their Consistency with the ILO Standards System*. International Labour Office Background Paper, 2014. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3858496.

³⁸ Domestic Advisory Groups are composed of representatives of civil society organisations established in Member States' territories, which typically convene once a year and monitor the implementation of the sustainable development commitments.

³⁹ Deborah Martens, Diana Potjomkina, and Jan Orbie (2020). "Domestic Advisory Groups in EU Trade Agreements: Stuck at the Bottom or Moving up the Ladder?", Friedrich Ebert Stiftung, Available at: <http://library.fes.de/pdf-files/iez/17135.pdf>

⁴⁰ Liam Campling et al. (2016). "Can Labour Work Beyond the Border?" *International Labour Review*, vol. 155(3), pp. 357–82; James Harrison et al. (2019). "Governing Labour Standards through Free Trade Agreements: Limits of the European Union's Trade and Sustainable Development Chapters", *Journal of Common Market Studies*, vol. 57(2), pp. 260–277.

The **EU-wide RESPECT research project** also considers the role of civil society participation and **critically assesses the linkages between trade and non-trade policy objectives** (NTPOs), among which environmental and labour conditions.⁴¹ The project relies on a mixed methodology approach with the creation of a database of agreements with non-trade policy objectives as well as extensive engagement of stakeholders across all sectors.⁴² **The project finds that trade policy should be complemented by other instruments to pursue NTPOs and focus on the need of vertical policy coherence (EU Member States and Union-level policies) and horizontal coherence (across policy areas and instruments) as well as to bolster interactions with the private sector and civil society organisations in the EU and partner countries, both in the design of ex-ante impact assessments and ex-post monitoring and evaluation (RESPECT, 2021).** The authors find no causal relationship between inclusion of NTPO provisions in EU reciprocal trade agreements (conditioning access) and improvement in non-trade indicators, and highlight the **limited effect of trade sanctions to promote the enforcement of NTPOs**. The main reason is that trade preference margins are relative and depend on the value of affected trade (i.e. the share of the EU in total exports) and the ability of countries to find alternative markets. The research also suggests that **the capacity of domestic institutions in partner countries to implement provisions is a key determinant of non-trade outcomes**.

Given the sheer variety of implementation and enforcement mechanisms applied under different cultural-institutional contexts, the difficulty of isolating trade factors from other political and economic determinants, as well as the contested perspectives on the effects of trade agreements, **assessing the effectiveness of TSD provisions in FTAs remains a challenge for scholars and policymakers alike**.⁴³ This makes the present comparative study of TSD implementation and enforcement practices all the more important, as there is an urgent need for new evidence on best practices in this field. This literature review has shown that assessing the effectiveness of TSD provisions in FTAs requires a complex understanding of both causes and effects of social and environmental standards. With regard to the factors that can improve environmental and social standards, the design of trade agreements is of crucial importance to the effectiveness of TSD provisions.

As detailed in the subsequent section, this study builds upon the existing literature to examine in greater depth the intricacies of institutional mechanisms and civil society participation that are conducive to social and environmental reforms. As far as the effects of TSD provisions are concerned, **the literature reveals that FTAs can affect environmental and social standards in many different ways: before and after trade agreements are signed, through treaty ratification**

⁴¹ The RESPECT was undertaken by a consortium comprising the Robert Schuman Centre for Advanced Studies (European University Institute); the European Center for Advanced Research in Economics and Statistics (Université Libre de Bruxelles); the World Trade Institute (University of Bern); the University of Sussex; the Central European University; the Center for European Policy Studies; the European Centre for Development Policy Management; the Centre for Economic Policy Research; the University of International Business and Economics; and the School of International and Public Affairs (Columbia University). The findings of the project can be accessed here: http://respect.eui.eu/wp-content/uploads/sites/6/2021/09/RESPECT_Policy-brief.pdf.

⁴² The database codes non-trade issues (NTIs), such as civil and political rights (CPR), economic and social rights (ESR), environmental protection (EP), and security issues, in 665 preferential trade agreements (PTAs) signed between 1945 and 2018. See Lisa Lechner (2018). "The European Union's inclusion of Non-Trade Issues in Preferential Trade Agreements". Available at: http://respect.eui.eu/wp-content/uploads/sites/6/2019/05/eu_ntis_ptas.pdf.

⁴³ International Labour Organisation (2019). *Labour Provisions in G7 Trade Agreements. A Comparative Perspective*. Geneva: International Labour Office.

or legislative reforms, *de facto* standards, as well as less tangible effects such as bureaucratic socialization and standards visibility.

The study's contribution to the rich academic and policy literature on labour and environmental provisions in trade agreements is two-fold: First, the large selection of countries included in the comparative analysis makes it relevant not only to the EU, but also to many countries seeking to identify good practices in the implementation and enforcement of TSD provisions. Second, and in this spirit, it provides a fine-grained picture of the institutional mechanisms under EU and third countries' FTAs, thereby providing concrete takeaways on the minutiae of TSD governance, including FTA design, budget allocation and civil society membership. **This in-depth analysis goes beyond the common dichotomy between the EU cooperative approach and the US sanction-based model that has at times reduced policy debates on the potential benefits of TSD provisions.** The diverse set of sources used to inform this study is complemented with the perspectives of civil society organisations and individuals thanks to a wide-ranging consultation. The selection of FTAs in this study should not obscure the fact that some trade agreements like the Regional Comprehensive Economic Partnership (RCEP) do not include TSD provisions. **The objective of this analysis is to identify and assess new trends in TSD provisions.** The next section discusses how this study will build upon this literature to provide a comprehensive analysis of the implementation and enforcement of TSD provisions in FTAs with the aim of identifying best practices.

4 Methodology

Like the widely used concept of sustainable development, the notion of *trade and sustainable development* may encapsulate a wide-range of policy areas related to environmental, labour and human rights. The present study uses the EU's definition of TSD as a starting point for its comparative analysis. Thus, the notion of "TSD provisions" used throughout this report refers to environmental and social clauses included in the TSD, environmental and labour chapters of EU and third-country FTAs. Given all countries' efforts to make these issues cross-cutting, some additional language related to environmental and social issues can be found in other chapters (e.g., investment). Additionally, the list of social and environmental priorities varies from one country to another and is an ongoing policy debate. For methodological purposes, the present study prioritises the comparative analysis of environmental and labour chapters in third countries' FTAs, while providing scope to additional social and human rights provisions that may not be inherent to EU FTAs.

As illustrated in the literature review, the scope and effects of TSD provisions in trade agreements have drawn considerable attention in both academic and policy spheres and been under close scrutiny by trade policy stakeholders for more than three decades. A comprehensive comparative analysis of the enforcement of social and environmental provisions across different contexts requires overcoming methodological challenges related to both scope and effects of TSD provisions.

Implementation is defined as a set of processes underpinned by specific clauses and institutional mechanisms that allow to put an FTA into practice after its entry into force. **Enforcement** refers more specifically to the set of provisions and practices designed to prevent or settle disputes when conflicting interpretations over the terms of FTA arise. In practice, there is overlap between these two concepts.

The first set of challenges is linked to the fact that TSD provisions in third countries tend to be covered under different sections such as labour and environmental chapters and sometimes, additional social rights provisions like on trade and gender (e.g., modernised Canada-Chile trade agreement). **These chapters can be subject to different levels of enforceability** via different institutional mechanisms. For instance, Canada's environmental provisions are not subject to trade sanctions, while its labour provisions are. Hence, when relevant, this study dissociates the analysis of the scope and enforcement practices of labour provisions from those of environmental clauses and examines why countries might give greater prominence to certain issues over others.

The second set of challenges has to do with measuring the impacts of TSD provisions, and determining whether their effects should be assessed in the light of political reforms (domestic and/or ratification of ILO conventions or MEAs) or *de jure* labour rights, as opposed to socio-economic indicators or *de facto* labour rights or environmental standards. While the effects of trade on socio-economic variables can be notoriously difficult to isolate from other macroeconomic and political factors, the actual impact of labour and environmental provisions can be similarly difficult to disentangle from other factors. Not only do domestic politics play a central role in social and environmental reforms, but a variety of external factors can also lead to better social and environmental outcomes. These could come in the form of technical assistance from international organisations like the ILO or the World Bank, foreign aid programmes, diplomatic pressure unrelated

to trade policy or private initiatives undertaken by multinational corporations (MNCs) to make supply chains more socially and environmentally responsible.⁴⁴

To overcome these methodological issues, **this study dissects and compares a total of eight different approaches to TSD provisions in Australia, Canada, Chile, the European Union, Japan, New Zealand, Switzerland and the United States.** It draws on the following quantitative and qualitative tools and methods to compare practices across FTAs and their effects on third countries:

- **FTA provision datasets:** The present study provides a comparative analysis of TSD approaches using the criteria displayed in the TSD comparative tables. Data collection draws from two specific databases that are tailored to map out the scope, implementation and enforcement of TSD provisions: the Trade and Environment Database (TREND), a fine-grained database of environmental provisions in FTAs developed by Morin, Dür and Lechner (2018)⁴⁵, and the Labour Provisions in Trade Agreements (LABPTA) developed in Raess⁴⁶. These are cross-referenced with two comprehensive datasets: the DESTA (Design of Trade Agreements) database developed by Dür, Baccini and Elsig (2014)⁴⁷ and the World Trade Organisation's (WTO) Regional Trade Agreements (RTA) database.
- **Legal analysis:** Data collection is combined with a finer analysis of legal provisions to zoom in on specific clauses and enforcement mechanisms. This is particularly important to analyse not only the wording of TSD provisions, but also their interpretation under specific disputes, as revealed by public submissions, rulings or amici curiae.
- **Data collection from official sources:** This is used to measure resources allocated for the implementation and enforcement of TSD provisions in trade agreements, where such information is available. This is studied in conjunction with the budget allocated for official development assistance (ODA) at both bilateral and multilateral levels.
- **Targeted interviews** with state officials and leading experts: these include former and current officials from trade, labour and environmental ministries or agencies in the selected countries, civil society organisations, whether or not participating in the implementation and enforcement of TSD provisions in trade agreements, as well as policy experts from the academic and non-academic spheres.
- **Summary of the wide-ranging consultation process,** which ensures a high degree of transparency and the engagement of all relevant stakeholders in the conduct of the TSD review inside the EU. This has been led by the European Commission.
- **Official statistics measuring progress in social and environmental standards:** To the extent that causality can be notoriously hard to establish when it comes to the implementation

⁴⁴ Katrina Burgess (2010). "Global Pressures, National Policies, and Labor Rights in Latin America," *Studies in Comparative International Development*, vol. 45(2), pp. 198-224.

⁴⁵ Jean-Frédéric Morin, Andreas Dür and Lisa Lechner (2018). "Mapping the trade and environment nexus: Insights from a new dataset", *Global Environmental Politics*, vol. 18(1).

⁴⁶ Damian Raess and Dora Sari (2018), "Labour Provisions in Trade Agreements (LABPTA): Introducing a New Dataset", *Global Policy*, vol. 9, 451-466.

⁴⁷ Andreas Dür, Leonardo Baccini and Manfred Elsig (2014). "The design of international trade agreements: Introducing a new dataset". *The Review of International Organizations*, vol. 9 (3), 353-375.

and enforcement of specific provisions, and that tangible effects in environmental and labour standards may be rather visible in the medium to long term, statistics are used only in conjunction with other types of evidence (e.g., policy analysis, targeted interviews). Official sources include the World Bank, ILO, United Nations Conference on Trade and Development (UNCTAD), OECD, the Food and Agriculture Organisation (FAO), and national Institutes/Departments/Ministries of Statistics.

- **Feedback from the international advisory board of LSE Consulting's** Trade Policy Hub. Members of the advisory board include: Cecile Rapoport, Jan Orbie, Jean-Frédéric Morin, and Michèle Rioux.
- These methodological tools are used in accordance with the requirements and objectives of each phase of the study as detailed in the study logic (Table 1).

Table 1: Study logic

	Inception phase	Implementation phase	Concluding phase
Objectives	<ul style="list-style-type: none"> Fine-tuning of scope, methodology, and planning Fine-tuning of stakeholder consultation strategy Literature review Overview of TSD provisions and their implementation and enforcement in EU FTAs 	<ul style="list-style-type: none"> Overview of TSD provisions and their implementation and enforcement in EU FTAs In-depth understanding of the different scopes and institutional designs of TSD approaches in third-country FTAs Preparation of targeted interviews 	<ul style="list-style-type: none"> Assessment of the tangible impacts of TSD provisions on trade partners Analysis of third countries' practical experiences and results in TSD implementation and enforcement In-depth understanding of the institutional mechanisms and strategies to overcome the challenges of TSD implementation and enforcement
Tasks (ToR)	<ul style="list-style-type: none"> T1, T2, T3, T4, T5, T6, T7 	<ul style="list-style-type: none"> T4, T5, T6, T7 	<ul style="list-style-type: none"> T4, T5, T6 T7 – consultation activities Finalise all tasks (T 1-7)
Methodology and tools	<ul style="list-style-type: none"> Desk research Scoping interviews Legal analysis 	<ul style="list-style-type: none"> Feedback from international advisory committee Desk research Legal analysis Case studies Quantitative analysis of social and environmental indicators 	<ul style="list-style-type: none"> Feedback from international advisory committee Desk research Results from implementation phase (T4-7) Case studies Quantitative analysis Targeted interviews with experts Stakeholder consultation with EU survey Civil society dialogues
Deliverables	Inception report	Interim report	Final report

Note: Tasks (T1 to T7) are drawn from the Terms of References. T1 = Scoping; T2 = Literature review; T3 = Analysis of TSD provisions and their implementation and enforcement in EU FTAs; T4 = Analysis of TSD provisions in third-country FTAs; T5 = Analysis of implementation and enforcement provisions and practices in third-country FTAs; Task 6 = Case studies; Task 7 = Stakeholder consultation.

5 TSD provisions and their implementation and enforcement in EU FTAs

This section provides an overview of TSD provisions in recent EU agreements as well as their implementation and enforcement mechanisms.

5.1 Background

The first TSD provisions, which contain obligations to respect labour and environmental standards, were included in the 2008 EU-Cariforum Economic Partnership Agreement⁴⁸ and the 2011 EU-Korea Free Trade Agreement. Since then, TSD-related provisions have been included in all EU trade agreements, usually in the form of a dedicated chapter. **TSD chapters have become an integral component of the EU's 'new generation' trade agreements. Currently, the EU implements 11 trade agreements with TSD provisions or chapters with several countries and regions.**⁴⁹ These 11 agreements (see Table 2) are the ones covered in this analysis.

Other trade agreements with TSD provisions that are beyond the scope of this study include two agreements for which ratification is pending (EU-Mercosur Association Agreement and new EU-Mexico Trade Agreement to replace the existing EU-Mexico Global Agreement) and six agreements that are currently under negotiation (EU-Australia Free Trade Agreement, modernised EU-Chile Association Agreement, deepening of the EU-Eastern and Southern Africa Economic Partnership Agreement, EU-Indonesia Free Trade Agreement, EU-New Zealand Free Trade Agreement, and EU-Philippines Free Trade Agreement). Moreover, the EU-China Comprehensive Agreement on Investment (CAI) does not fall within the scope of this study.

Following the adoption of the global 2030 Agenda for Sustainable Development of the United Nations, the European Commission began revising its TSD approach.⁵⁰ In its 2015 Communication "*Trade for All: Towards a more responsible trade and investment policy*",⁵¹ it outlined a trade agenda that promotes sustainable development, human rights, and good governance in the European Union and third countries. It acknowledged that, while recent EU FTAs systematically included TSD provisions, the EU would have to ensure that TSD provisions were implemented and used effectively as those FTAs entered into force. In order to achieve this goal, the European Commission committed to focus on the implementation of FTAs' sustainable development dimensions. In 2017, the Commission launched a public debate on how to better implement and enforce TSD chapters in EU FTAs,⁵² which culminated in the **release of the Commission's 2018 TSD 15-Point Action Plan.**⁵³ This Action Plan is **organised into four categories of actions:**

⁴⁸ The EU-CARIFORUM FTA does not include a fully-fledged TSD chapter of the type that the EU started including from the EU-South Korea FTA onwards.

⁴⁹ For further information, see: <https://ec.europa.eu/trade/policy/policy-making/sustainable-development/>

⁵⁰ Mattia Colli Vignarelli (2021). "The European Commission Trade Policy Review: The Effectiveness of Sustainable Development Chapters in EU FTAs", *European Papers*, vol. 6(1), pp. 1-5.

⁵¹ European Commission (2015). "*Trade for All: Towards a more responsible trade and investment policy*". Available at: https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf

⁵² Non-paper of the Commission services (2017). "*Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs)*", 11 July 2017. Available at: https://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf

⁵³ Non-paper of the Commission services (2018). "*Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements*", 26 February 2018. Available at: https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf

- 1) **Working together**, including with Member States and the European Parliament, and international organisations;
- 2) **Enabling civil society to play a role in implementation**, most notably by facilitating civil society's monitoring role, expanding civil society structures beyond TSD chapters, and promoting responsible business conduct;
- 3) **Delivering results under the TSD chapters**. This category includes assertive enforcement; commitments on climate change and labour; encouraging early ratification of core international agreements, reviewing the TSD implementation effectiveness, and making resources available to support TSD chapters implementation; and
- 4) **More transparency and better communication**.

Following the introduction of this Action Plan, there have been examples of EU action on sustainability issues in the context of trade agreements. During the pre-implementation phase of the EU-Vietnam trade agreement, Vietnam implemented substantive labour reforms, such as the ratification of certain ILO conventions and the adoption of a new Labour Code, which is more in line with some fundamental labour rights,⁵⁴ though actual implementing regulations are still pending. Another outcome of the European Commission's actions on assertive enforcement was the ratification by South Korea of three fundamental ILO conventions following the activation by the EU of the dedicated dispute settlement mechanism under the EU-South Korea FTA.⁵⁵ Furthermore, the TSD provisions of recent FTAs have been strengthened, as evidenced, by the binding commitment in the FTA with Japan to ratify and effectively implement the Paris Agreement on Climate Change.

Despite these outcomes, a number of stakeholders have raised questions about the lack of effectiveness of EU TSD chapters and called for EU TSD chapters to be strengthened and enforced more effectively.⁵⁶ In this context, and in anticipation of the Trade Policy Review Communication from the Commission,⁵⁷ in October 2020, Executive Vice-President and Commissioner for Trade Valdis Dombrovskis announced that the Commission would bring forward the review of the 15-Point Action Plan to 2021 (initially planned by 2023). This review intends to delve deeper into how to improve the implementation and enforcement of TSD provisions in EU FTAs.

⁵⁴ *International Labour Organisation (2019). Revised Vietnamese Labour Code to help everyone gain fair shares of economic growth (2019)*, available at

https://www.ilo.org/hanoi/Informationresources/Publicinformation/newsitems/WCMS_729339/lang--en/index.htm

⁵⁵ See <https://ec.europa.eu/trade/policy/accessing-markets/dispute-settlement/bilateral-disputes/>

⁵⁶ *European Parliament (2016). "TTIP and Labour Standards"; EESC, "Next Generation Trade and Sustainable Development – Reviewing the 15-point action plan (own-initiative opinion)"*, Available at

<https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/next-generation-trade-and-sustainable-development-reviewing-15-point-action-plan-own-initiative-opinion>; Mattia Colli Vignarelli (2021). "The European Commission Trade Policy Review: The Effectiveness of Sustainable Development Chapters in EU FTAs", *European Papers*, vol. 6(1), pp. 1-5; Demy van't Wout (2021). "The enforceability of the trade and sustainable development chapters of the European Union's free trade agreements", *Asia Europe Journal*, 1-18; Marco Bronckers and Giovanni Gruni (2021). "Retooling the Sustainability Standards in EU Free Trade Agreements", *Journal of International Economic Law*, vol. 24(1), 25-51.

⁵⁷ *Communication from the European Commission: Trade Policy Review – An Open, Sustainable and Assertive Trade Policy of 18.2.2021*: Available at: https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc_159438.pdf

5.2 Methodological approach

Using specifically developed TSD comparative tables, this study analyses the main TSD provisions of a sample of EU trade agreements. In particular, the comparative tables consider the *scope* of TSD provisions (specific issues addressed), as well as *implementation* and *enforcement* provisions. Whenever necessary, the analysis distinguishes between TSD provisions pertaining to the environment (including climate change) and the TSD provisions pertaining to labour and social issues. In general, the analysis provides an overview of TSD provisions and looks for any convergences and differences between EU FTAs. When relevant, the analysis distinguishes between TSD provisions in trade agreements with developed countries and those in trade agreements with developing countries. The analysis is based on textual examinations of EU trade agreements. It is focused on TSD chapters, and also includes some sustainability-related provisions in other parts of the agreements, as indicated in Table 2.

Eleven EU trade agreements were selected for this study. The main selection criteria were that the EU trade agreements include TSD chapters and that they are currently in force, whether provisionally or not.

Table 2: List of EU trade agreements selected for the comparative study

Trade agreement	Date of signature ⁵⁸	Entry into force ⁵⁹	Location of TSD chapters and relevant labour, environmental, and cooperation provisions ⁶⁰
EU-South Korea Free Trade Agreement (FTA)	6 October 2010	<ul style="list-style-type: none"> 1 July 2011 (provisionally) 13 December 2015 (full) 	<ul style="list-style-type: none"> Chapter 13 on TSD (Articles 13.1-13.15). It includes provisions on labour and environmental aspects. Annex 13 deals with Cooperation on TSD.
EU-Colombia / Peru / Ecuador Trade Agreement	26 June 2012	<ul style="list-style-type: none"> 1 March 2013 (provisionally – with Peru) 1 August 2013 (provisionally – with Colombia) 1 January 2017 (provisionally – with Ecuador) 	Title IX governs TSD (Articles 267-86). It includes provisions on labour and environmental aspects.
EU-Central America Association Agreement	29 June 2012	<ul style="list-style-type: none"> 1 August 2013 (provisionally – Honduras, Nicaragua; Panama) 1 October 2013 (provisionally – 	<p>Under Part IV on Trade:</p> <ul style="list-style-type: none"> Title VIII on TSD (Articles 284-302). It includes provisions on labour and environmental aspects. <p>Under Part III on Cooperation:</p> <ul style="list-style-type: none"> Title III on Social Development and Social Cohesion (Articles 41-48). It includes provisions on

⁵⁸ Information found on EUR-Lex.

⁵⁹ Information found on EUR-Lex.

⁶⁰ This table shows where the TSD chapters are located and, where necessary, the relevant labour, environmental, and cooperation provisions.

Trade agreement	Date of signature ⁵⁸	Entry into force ⁵⁹	Location of TSD chapters and relevant labour, environmental, and cooperation provisions ⁶⁰
		Costa Rica, El Salvador <ul style="list-style-type: none"> 1 December 2013 (provisionally – Guatemala) 	employment and social protection, indigenous peoples and other ethnic groups, vulnerable groups, gender. <ul style="list-style-type: none"> Title V on Environment, Natural Disasters and Climate Change (Articles 50-51). Title VI on Economic and Trade Development includes Article 63 on Cooperation and Technical Assistance on TSD.
EU-Ukraine Association Agreement	21 March 2014	<ul style="list-style-type: none"> 1 November 2014 (provisionally) 1 September 2017 (full) 	Under Title IV on trade and trade-related matters: <ul style="list-style-type: none"> Chapter 13 on TSD (Articles 289-302). Under Title V on Economic and Sector Co-operation: <ul style="list-style-type: none"> Chapter 6 on Environment (Articles 360-366; Annexes XXX & XXXI). Chapter 21 on Cooperation on employment, social policy and equal opportunities (Articles 419-425; Annex XL).
EU-Georgia Association Agreement	27 June 2014	<ul style="list-style-type: none"> 1 September 2014 (provisionally) 1 July 2016 (full) 	Under Title IV on Trade and Trade-Related Matters: <ul style="list-style-type: none"> Chapter 13 on TSD (Articles 227-243). It includes provisions on labour and environmental aspects. Under Title VI on Other Cooperation Policies: <ul style="list-style-type: none"> Chapter 3 on Environment (Articles 301-306). Chapter 4 on Climate action (Articles 307-312). Chapter 14 on Employment, social policy and equal opportunities (Articles 348-354).
EU-Moldova Association Agreement	27 June 2014	<ul style="list-style-type: none"> 1 September 2014 (provisionally) 1 July 2016 (full) 	Under Title V on Trade and Trade-Related Matters: <ul style="list-style-type: none"> Chapter 13 on TSD (Articles 363-379). Under Title IV on Economic and other sectoral cooperation:

Trade agreement	Date of signature ⁵⁸	Entry into force ⁵⁹	Location of TSD chapters and relevant labour, environmental, and cooperation provisions ⁶⁰
			<ul style="list-style-type: none"> Chapter 4 on Employment, social policy and equal opportunities (Articles 31-37; Annex III). Chapter 16 on Environment (Articles 86-91; Annex XI). Chapter 17 on Climate action (Articles 92-97; Annex XII).
EU-Canada Comprehensive Economic and Trade Agreement (CETA)	30 October 2016	21 September 2017 (provisionally)	<p>TSD provisions are found in several chapters. The main ones are:</p> <ul style="list-style-type: none"> Chapter 22 on TSD (Articles 22.1-22.5). Chapter 23 on Trade and Labour (Articles 23.1-23.11). Chapter 24 on Trade and Environment (Articles 24.1-24.16).
EU-Japan Economic Partnership Agreement (EPA)	17 July 2018	1 February 2019 (full)	Chapter 16 governs TSD (Articles 16.1 – 16.19). It includes provisions on labour and environmental aspects.
EU-Singapore Free Trade Agreement (FTA)	19 October 2018	21 November 2019 (full)	<p>Chapter 12 governs TSD (Articles 12.1-12.17).</p> <p>It includes specific sections on:</p> <ul style="list-style-type: none"> Labour aspects (Section B, Articles 12.3-12.5). Environmental aspects (Section C, Articles 12.6-12.10).
EU-Vietnam Free Trade Agreement (FTA)	30 June 2019	1 August 2020 (full)	<ul style="list-style-type: none"> Chapter 13 governs TSD (Articles 13.1-13.17). It includes provisions on labour and environmental aspects. Chapter 16 on Cooperation and capacity building includes provisions on cooperation in TSD (Article 16.2(e)).
EU-United Kingdom Trade and Cooperation Agreement (TCA)	30 December 2020	1 May 2021 (full)	<p>Under Part 2, Title XI is dedicated to Level playing field for open and fair competition and sustainable development. In particular, it has the following chapters:</p> <ul style="list-style-type: none"> Chapter 6 governs Labour and social standards (Articles 386-389). Chapter 7 governs Environment and climate (Articles 390-396).

Trade agreement	Date of signature ⁵⁸	Entry into force ⁵⁹	Location of TSD chapters and relevant labour, environmental, and cooperation provisions ⁶⁰
			<ul style="list-style-type: none"> Chapter 8 governs Other instruments for TSD (Articles 397-407). Chapter 9 includes Horizontal and institutional provisions (Articles 408- 411).

The agreements thus cover OECD countries (Canada, Japan, South Korea, Singapore and the United Kingdom); developing countries (Central America, Colombia/Peru/Ecuador, and Vietnam); and countries that are part of the EU Eastern Partnership⁶¹ and implement the Deep and Comprehensive Free Trade Areas under their Association Agreements with the EU (Georgia, Moldova and Ukraine).

In the great majority of agreements, the TSD objectives (labour, environment and cross-cutting) are covered by a dedicated single TSD chapter. Only the EU-Canada CETA (with three chapters: TSD, labour and environment) and the EU-UK Trade and Cooperation Agreement (TCA) have a different structure (the TCA has a *sui-generis* structure because of the unprecedented nature of the relationship). While environmental and social provisions are typically included in the TSD Chapter, many agreements, especially with developing countries, also include additional provisions on cooperation on the environment and social matters. In general, the analysis focused on the provisions in the TSD chapters and, where applicable, the labour and environmental chapters. Any deviation from this approach, in particular to include relevant provisions with TSD objectives from other chapters of EU trade agreements, is explicitly indicated in the discussion of the results (Section 5.3).

An overview of the relevant tables and the results are presented in Section 5.3.1. The tables should be interpreted as follows: a checkbox indicates that an EU trade agreement contains relevant TSD provision(s) that cover(s) the category at stake; a blank cell indicates that no relevant TSD provisions were identified for the category.⁶²

5.2.1 Scope of TSD provisions

The analysis breaks down the scope of TSD provisions between labour and environmental provisions in terms of the following categories:

Specific environmental issues covered by EU FTAs: The overview of the specific environmental issues in the TSD provisions, including environmental provisions outside the TSD chapter of the 11 EU Agreements under review, covered climate change, renewable energy, air pollution, ozone layer, biodiversity, sustainable management of fisheries, forests conservation and management, illegal

⁶¹ These Agreements call for the approximation of the Partnership countries' legislation with specific EU legal instruments. See: https://ec.europa.eu/neighbourhood-enlargement/neighbourhood/eastern-partnership_en.

⁶² It should be noted, however, that further to references to specific MEAs and ILO conventions, the majority of EU TSD chapters commit the Parties to the effective implementation of MEAs and ILO conventions, which either Party has ratified. For example: EU-Vietnam Free Trade Agreement, Chapter 13, Article 4(4) and Chapter 13, Article 5(2); EU-Singapore Free Trade Agreement Chapter 12, Section B, Article 12.3(3) and Chapter 12, Section C, Article 12.6(2); EU-Japan Economic Partnership Agreement, Chapter 16, Article 16.3(3) and Chapter 16, Article 16.4(2).

trade in endangered species, genetic resources, including traditional knowledge, pesticides and/or chemicals. As part of the overview, environmental issues outside the TSD chapters of the 11 EU Agreements have also been examined.

Explicit reference to multilateral environmental agreements (MEAs): The overview examined whether the TSD provisions, including environmental provisions outside the TSD chapter, of the 11 EU Agreements under review explicitly mention certain MEAs. This analysis looked at explicit mentions of specific agreements, but not at obligations on the Parties to uphold all MEAs that the Parties have committed to, without explicitly mentioning them. The following MEAs were selected based on the topic they cover and whether the EU is a Party to them:

Climate change and ozone layer protection:

- United Nations Framework Convention on Climate Change (UNFCCC);⁶³
- Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto Protocol);⁶⁴
- Paris Agreement;⁶⁵
- Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol).⁶⁶

Biological Diversity:

- Convention on Biological Diversity (CBD);⁶⁷
- Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (Nagoya Protocol);⁶⁸
- Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES);⁶⁹
- Waste management;
- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention).⁷⁰

⁶³ *United Nations Framework Convention on Climate Change, adopted on 9 May 1992, entered into force on 21 March 1994.*

⁶⁴ *Kyoto Protocol to the United Nations Framework Convention on Climate Change, adopted on 11 December 1997, entered into force on 16 February 2005.*

⁶⁵ *Paris Agreement, adopted on 12 December 2015, entered into force on 4 November 2016.*

⁶⁶ *Montreal Protocol on Substances that Deplete the Ozone Layer, adopted on 16 September 1987, entered into force on 1 January 1989.*

⁶⁷ *Convention on Biological Diversity, adopted on 22 May 1992, entered into force 29 December 1993.*

⁶⁸ *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, adopted on 29 October 2010, entered into force on 12 October 2014.*

⁶⁹ *Convention on International Trade in Endangered Species of Wild Fauna and Flora, adopted on 3 March 1973, entered into force on 1 July 1975.*

⁷⁰ *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, adopted on 22 March 1989, entered into force on 5 May 1992.*

Environmental regulatory sovereignty and exceptions⁷¹: An overview is provided of provisions on environmental regulatory sovereignty and exceptions on trade-related measures for the conservation of natural resources and for plant and animal life in the 11 EU Agreements examined. The category of environmental regulatory sovereignty can include sovereignty in determining its own environmental policies based on State priorities, e.g. right to regulate provisions. Exceptions refer to restrictions on trade-related measures. Non-regression clauses are another way to ensure no back-peddalling on existing commitments (e.g., the EU-UK TCA contains provisions on enforcement of non-regression from levels of protection (or non-derogation) in its labour and environment chapters).

Reference to international labour standards: The analysis provides an overview of the specific international labour standards explicitly referred to in the TSD provisions, including labour provisions outside the TSD chapter, of the 11 EU Agreements under review. These include internationally recognised labour standards, such as the right to organise and collective bargaining, the elimination of forced labour, the abolition of child labour, non-discrimination in employment and occupation, minimum wage, occupational health and safety, labour inspection, and the rights of migrant workers.

Explicit reference to international labour instruments: It was examined whether the TSD provisions, including labour provisions outside the TSD chapter, of the 11 EU agreements under review explicitly mention specific international labour instruments, namely the 1998 ILO Declaration on Fundamental Principles and Rights at Work (1998 ILO Declaration), the ILO fundamental conventions, and ILO Decent Work Agenda.

Other social commitments: The review looked for explicit references to other social commitments, namely gender equality/women's rights and corporate social responsibility (CSR)/responsible business conduct (RBC), in the TSD provisions, as well as in labour and social provisions outside the TSD chapter. References to specific CSR/RBC instruments were identified, such as the OECD Guidelines on Multinational Enterprises and the UN Guiding Principles on Business and Human Rights.

Labour regulatory sovereignty: The review examined whether the TSD provisions refer to the Parties' right to regulate in the public interest, particularly in labour or social matters.

An overview of the relevant tables and the results are presented in Section 5.3.1.

TSD provisions on implementation: The study collects and analyses the main EU FTAs provisions on implementation. Generally speaking, this step aims to understand whether and how EU trade agreements establish legal, institutional, and policy mechanisms and procedures to ensure the implementation of environmental, labour, and social commitments under TSD provisions. To the extent that environmental and labour provisions in EU FTAs are subject to similar implementation procedures, they were treated as TSD provisions under the same table, unlike for other countries that often apply different institutional mechanisms to labour and environmental linkages.

More specifically, the analysis of TSD provisions in EU trade agreements focuses on the following three categories:

Intergovernmental mechanisms: This category looked for TSD provisions on intergovernmental mechanisms. In particular, the focus was on provisions calling for regulatory cooperation (including

⁷¹ The category of environmental regulatory sovereignty entails a declaration on sovereignty over environmental regulation. This can include sovereignty in determining its own environmental policies based on State priorities, e.g. right to regulate provisions. Exceptions refer to exceptional restrictions on trade-related measures.

information exchange), harmonisation and/or approximation of domestic measures, technical assistance and capacity building, and joint scientific cooperation. Provisions establishing intergovernmental committees to work on TSD chapters' implementation were also covered.

Role of international organisations: This category looked at whether the TSD provisions of EU FTAs call for international organisations, such as the ILO, multilateral environmental organisations or MEAs bodies, to assist in the implementation of environmental, labour, and social provisions, as well as the type of assistance required (i.e., collaboration; guidance; advice).

Civil society participation: The study examines whether the TSD provisions call for civil society participation at the level of each Party (e.g., via DAGs) and/or transnational level (e.g., transnational civil society meetings; civil society dialogues). The analysis also determined whether EU FTAs require civil society participation in consultation processes organised in the context of impact assessments, as well as whether public submissions on TSD matters or TSD provisions implementation are permitted.

The relevant tables and results are presented in Section 5.3.2.

5.2.2 TSD provisions on enforcement

Similarly, the review collected and analysed the main EU FTAs provisions on the enforcement of TSD provisions. This step aimed to understand which enforcement mechanisms EU FTAs use to fulfil their environmental, labour, and social goals under TSD provisions. As in the previous section, environmental and labour issues were treated as TSD provisions under the same table where relevant. Here again, the TSD tables were populated with the identified TSD provisions on enforcement, and this was used for a thematic analysis of enforcement provisions and practices, focusing on the following three categories:

Nature of commitments: This category explored whether EU FTAs include commitments such as provisions on non-derogation from domestic labour and environmental laws, as well as commitments to ratify and effectively implement ILO conventions and MEAs. Where necessary, TSD provisions that impose binding commitments were distinguished from those that encourage best-endeavour or cooperation.

Dispute settlement mechanisms (DSMs): This category investigated how EU trade agreements attempt to resolve disputes arising from the implementation of TSD provisions (and/or environmental, labour, or social provisions). First, the study explores whether the EU trade agreements establish specific DSMs for non-compliance with TSD provisions. Second, when EU trade agreements establish specific DSMs, the study identified the key features of those DSMs, namely government consultation and panels of experts. Government consultation refers to the process by which Parties consult each other to resolve disputes arising from the application of TSD provisions. Panel of experts refers to the process in which a panel is appointed whereby experts are to settle a dispute involving the respect/enforcement of TSD provisions.

Remedies: This category examined whether the selected EU trade agreements included potential remedies if a Party fails to comply with TSD provisions (and/or environmental, labour, and social provisions) or with the decision taken under the DSM procedures.

The results are presented in Section 5.3.3.

5.2.3 Implementation of TSD provisions

In addition to the overview of the TSD provisions in the eleven EU FTAs, Section 5.3.4 provides an overview of their implementation in practice, drawing on published Commission documents. This examination of implementation and enforcement provisions helps inform the comparative analysis conducted in the following sections.

5.3 Results

Section 5.3 presents the review of TSD provisions in the 11 EU FTAs agreed for analysis: Section 5.3.1 covers the scope of the provisions; Section 5.3.2 then reviews provisions on implementation; finally, Section 5.3.3 addresses provisions for enforcement. These three sections provide overview tables for the 11 EU agreements, together with summary text⁷². Subsequently, Section 5.3.4 presents an overview of information on the implementation and enforcement of TSD chapters.

5.3.1 Scope of TSD provisions

Specific environmental issues covered by EU FTAs

All of the analysed EU FTAs include a provision that each Party shall effectively implement MEAs, protocols and amendments that it has ratified and/or specific MEAs listed in the TSD provisions. It can be noted that the recent EU TSD chapter template contains an article on Trade and Climate Change which specifies that each Party shall effectively implement the UNFCCC and the Paris Agreement, including its commitments with regards to its Nationally Determined Contributions. This is reflected in the agreements with the UK, Japan, Singapore and Vietnam.

Climate change is addressed in all of the selected EU trade agreements, whether in the TSD chapter or an environmental chapter. Some trade agreements may have a chapter dedicated to climate action (e.g., EU-Moldova Association Agreement).⁷³ Renewable energy is also covered in all of the selected EU trade agreements, whether in the TSD or Energy and Raw Materials (ERM). Some provisions on renewable energy, for example, refer to the Parties' commitment to facilitate the removal of obstacles to trade or investment in goods and services of particular relevance to climate change mitigation, such as sustainable renewable energy such as sustainable renewable energy (e.g., EU-Georgia Association Agreement; EU-Singapore FTA). Similarly, all eleven EU FTAs cover fisheries and forest conservation.

Ten EU FTAs address the issue of biodiversity protection, and nine EU FTAs cover illegal trade in endangered species. Nine agreements include provisions on genetic resources, including traditional knowledge. It should be noted that three of those nine agreements include genetic resources provisions in their intellectual property chapter rather than the TSD chapter. Provisions on genetic resources sometimes refer to the knowledge and practices of indigenous and local communities (e.g., EU-Colombia/Peru/Ecuador Trade Agreement; EU-Central America Association Agreement).

⁷² In all the tables, the agreements are listed chronologically by date of signature.

⁷³ The EU-UK TCA includes also a dedicated commitment related to the application of a system of carbon pricing covering greenhouse gas emissions from electricity generation, heat generation, industry and aviation. There is also a confirmation of Parties' ambition to achieve economy-wide climate neutrality by 2050.

Seven EU FTAs include provisions on pesticides and/or chemical, either in the TSD chapter or in an environmental chapter. These provisions may refer to the Parties' commitment to ratify and/or implement the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade⁷⁴ (see EU-Colombia/Peru/Ecuador Trade Agreement; EU-Central America Association Agreement) or cooperation to deal with environmental issues related to pesticides and/or chemicals (see Association Agreements with the three Eastern Partnership countries). The EU-Canada CETA refers to chemicals when defining 'environmental law' and includes several commitments concerning environmental law (i.e., non-derogation from environmental law; enforcement of environmental law). Similarly, the EU-UK TCA includes chemical substances in its definition of 'environmental levels of protection', and then includes several commitments to ensure certain environmental levels of protection (e.g., non-regression from environmental levels of protection).

Although air pollution is not addressed in any of the TSD chapters of the EU FTAs, five of them include provisions on air pollution in their environmental chapter⁷⁵. Air pollution is generally addressed through cooperation among the Parties. This is true for the three Association Agreements/DCFTAs with Eastern Partnership countries, as well as the EU-Central America Association Agreement. In the EU-UK TCA, the Parties agree to maintain their levels of protection related to air pollution, including specific targets.

Provisions for the protection of the ozone layer are provided in the TSD chapter of two EU FTAs and in the environmental chapter of three EU FTAs. It is also worth noting that in the current template of TSD chapter only protection of ozone layer is covered under provisions on Trade and Climate. Provisions on the ozone layer may refer to the Parties' commitment to implement the Montreal Protocol on Substances that Deplete the Ozone Layer (e.g., EU-Colombia/Peru/Ecuador Trade Agreement) or to the Parties' cooperation to address ozone layer depletion (e.g., EU-Central America Association Agreement).

Five EU FTAs include provisions on air pollution and/or the ozone layer. Air pollution is generally addressed through cooperation among the Parties. This is true for the three Association Agreements/DCFTAs with Eastern Partnership countries, as well as the EU-Central America Association Agreement. In the EU-UK TCA, the Parties agree to maintain their levels of protection related to air pollution, including specific targets. Moreover, provisions on the ozone layer may refer to the Parties' commitment to implement the Montreal Protocol on Substances that Deplete the Ozone Layer (e.g., EU-Colombia/Peru/Ecuador Trade Agreement) or to the Parties' cooperation to address ozone layer depletion (e.g., EU-Central America Association Agreement). Table 3 below provides an overview of the specific environmental issues addressed in the 11 EU trade agreements.

⁷⁴ *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, adopted on 10 September 1998, entered into force on 24 February 2004.*

⁷⁵ *The EU-Canada CETA was excluded from this list because it does not refer explicitly to air pollution. However, under Chapter 24 on Trade and environment, Article 24.1 defines environmental law as 'a law, including a statutory or regulatory provision, or other legally binding measure of a Party, the purpose of which is the protection of the environment, including the prevention of a danger to human life or health from environmental impacts, such as those that aim at (a) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants, [...]'. Pollutants or environmental contaminants could potentially refer to air pollution.*

Table 3: Specific environmental issues addressed in EU FTAs

Trade agreement	Climate change	Renewable energy	Air pollution	Ozone layer	Biodiversity	Fisheries	Forest conservation	Illegal trade in endangered species	Genetic resources ⁷⁶ incl. traditional knowledge	Pesticides and/or chemicals
EU-South Korea FTA	✓	✓	X	X	✓	✓	✓	X	✓	X
EU-Colombia / Peru / Ecuador Trade Agreement	✓	✓	X	✓	✓	✓	✓	✓	✓	✓
EU-Central America Association Agreement	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
EU-Ukraine Association Agreement	✓	✓	✓	X	✓	✓	✓	X	✓	✓
EU-Georgia Association Agreement	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
EU-Moldova Association Agreement	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
EU-Canada CETA	✓	✓	X	X	✓	✓	✓	✓	X	✓
EU-Japan EPA	✓	✓	X	X	✓	✓	✓	✓	✓	X
EU-Singapore FTA	✓	✓	X	X	X	✓	✓	✓	X	X
EU-Vietnam FTA	✓	✓	X	X	✓	✓	✓	✓	✓	X
EU-UK Trade and Cooperation Agreement	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

⁷⁶ The category 'Genetic resources, including traditional knowledge' does not include references to genetically modified organisms.

Explicit reference to MEAs

Of the eleven EU trade agreements reviewed, ten agreements refer to the UN Framework Climate Change Convention (UNFCCC) and/or the Kyoto Protocol, and four EU FTAs mention the Paris Agreement (with Japan, Singapore, Vietnam and the UK). The trade agreements contain different types of commitments, such as reaching the objectives of the UNFCCC and its Kyoto Protocol (e.g., EU-South Korea FTA), implementing the UNFCCC and the Paris Agreement (e.g., EU-UK Trade and Cooperation Agreement), or cooperating on the implementation of the UNFCCC, the Kyoto Protocol, and the Paris Agreement (e.g., EU-Vietnam FTA). Five EU trade agreements were signed prior to the Paris Agreement and thus cannot include specific references to this instrument. However, for the majority of these five agreements, the commitment to effectively implement the Paris Agreement is covered by the general commitment to effectively implement all MEAs that each Party has ratified. Three EU FTAs refer to the Montreal Protocol.

The Convention on Biological Diversity (CBD) is covered in nine EU trade agreements. In two of those agreements, references to the CBD can be found in the intellectual property chapter (e.g., EU-South Korea FTA; EU-Ukraine Association Agreement). Furthermore, the CBD's Nagoya Protocol is addressed in two EU FTAs, and the CITES is mentioned in nine EU agreements. Finally, two EU FTAs refer to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.

In general, references to MEAs in EU FTAs contain similar commitments, such as to ratify specific MEAs, to effectively implement the MEAs, protocols and amendments ratified by the Parties in the Parties' laws and practices, or to cooperate in the implementation of the MEAs or in relevant international fora. A more detailed analysis of the commitments to ratify MEAs can be found in Section 5.3.3. Table 4 below provides an overview of explicit reference to MEAs in the nine EU trade agreements.

Table 4: References to Multilateral Environmental Agreements in EU FTAs

Trade agreement	UNFCCC & Kyoto Protocol	Paris Agreement	Montreal Protocol	CBD	Nagoya Protocol	CITES	Basel Convention
EU-South Korea FTA	✓	Not relevant ⁷⁷	X	✓	X	X	X
EU-Colombia / Peru / Ecuador Trade Agreement	✓	Not relevant ⁷⁸	✓	✓	X	✓	✓
EU-Central America Association Agreement	✓	Not relevant ⁷⁹	✓	✓	X	✓	✓
EU-Ukraine Association Agreement	✓	Not relevant ⁸⁰	X	✓	X	X	X
EU-Georgia Association Agreement	✓	Not relevant ⁸¹	X	✓	X	✓	X

⁷⁷ The EU-South Korea FTA existed prior to the Paris Agreement.

⁷⁸ The EU-Colombia/Peru/Ecuador Trade Agreement was prior to the Paris Agreement.

⁷⁹ The EU-Central America Association Agreement was prior to the Paris Agreement.

⁸⁰ The EU-Ukraine Association Agreement was prior to the Paris Agreement.

⁸¹ The EU-Georgia Association Agreement was prior to the Paris Agreement.

Trade agreement	UNFCCC & Kyoto Protocol	Paris Agreement	Montreal Protocol	CBD	Nagoya Protocol	CITES	Basel Convention
EU-Moldova Association Agreement	✓	Not relevant ⁸²	X	✓	X	✓	X
EU-Canada CETA	X	X	X	X	X	✓	X
EU-Japan EPA	✓	✓	X	✓	X	✓	X
EU-Singapore FTA	✓	✓	X	X	X	✓	X
EU-Vietnam FTA	✓	✓	X	✓	✓	✓	X
EU-UK Trade and Cooperation Agreement	✓	✓	✓	✓	✓	✓	X

Environmental regulatory sovereignty and exceptions

All of the EU FTAs examined in this study include, in their TSD chapters, provisions recognising the Parties' right to determine their own levels of environmental protection, and/or to encourage high levels of protection, to modify their environmental laws and policies accordingly, provided they do not lower their environmental standards to encourage trade or investment, and provided their laws and policies are consistent with each Parties' international commitments.⁸³ Moreover, exceptions for the conservation of natural resources and for plant and animal life can be found in all EU FTAs analysed (however, such provisions are found in chapters on exceptions rather than in TSD chapters). Such exceptions can apply to trade, service, or investment-related measures.

Reference to international labour standards

All EU FTAs analysed refer, in their TSD chapters, to internationally recognised core labour standards as defined in the fundamental ILO Conventions, including freedom of association, the right to organise and collectively bargain, the elimination of forced labour, the abolition of child labour, and worker non-discrimination. Among other standards, seven agreements refer to occupational health and safety (e.g., EU-Ukraine Association Agreement; EU-Singapore FTA), while four EU FTAs contain TSD provisions on migrant workers (e.g., EU-Colombia/Peru/Ecuador Trade Agreement).⁸⁴ The EU-Canada CETA and the EU-UK TCA both mention a minimum wage and labour inspection. See Table 5 below.

⁸² The EU-Moldova Association Agreement was concluded prior to the Paris Agreement.

⁸³ As all 11 FTAs reviewed contain these provisions, a table is not provided.

⁸⁴ EU-Colombia/Peru/Ecuador Trade Agreement, Title IX Trade and Sustainable Development, Article 276 (Migrant Workers); EU-Canada CETA, Chapter 23 Trade and Sustainable Development, Article 23.3 (Multilateral labour standards and agreements); EU-Vietnam FTA, Article 13.14 (Working Together on Trade and Sustainable Development); EU-UK TCA, Article 399 (Multilateral labour standards and agreements).

Table 5: References to international labour standards in EU FTAs

<i>Trade agreement</i>	<i>Internationally-recognised labour standards</i>	<i>Freedom of association</i>	<i>Right to organise and collectively bargain</i>	<i>Elimination of forced labour (e.g., slavery)</i>	<i>Abolition of child labour</i>	<i>Non-discrimination among workers</i>	<i>Minimum wage</i>	<i>Occupational health and safety</i>	<i>Labour inspection</i>	<i>Rights of migrant workers</i>
EU-South Korea FTA	✓	✓	✓	✓	✓	✓	X	X	X	X
EU-Colombia / Peru / Ecuador Trade Agreement	✓	✓	✓	✓	✓	✓	X	✓	X	✓
EU-Central America Association Agreement	✓	✓	✓	✓	✓	✓	X	✓	X	X
EU-Ukraine Association Agreement	✓	✓	✓	✓	✓	✓	X	✓	X	X
EU-Georgia Association Agreement	✓	✓	✓	✓	✓	✓	X	✓	X	X
EU-Moldova Association Agreement	✓	✓	✓	✓	✓	✓	X	✓	X	X
EU-Canada CETA	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
EU-Japan EPA	✓	✓	✓	✓	✓	✓	X	X	X	X
EU-Singapore FTA	✓	✓	✓	✓	✓	✓	X	✓	X	X
EU-Vietnam FTA	✓	✓	✓	✓	✓	✓	X	X	X	✓
EU-UK Trade and Cooperation Agreement	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

Explicit reference to international labour instruments

All the eleven FTAs reviewed refer to ILO's 1998 Declaration, as well as the ILO fundamental conventions.⁸⁵ They typically include commitments in TSD chapters to meet the objectives, ratify and/or implement those instruments. Most EU FTAs refer to the ILO Decent Work Agenda by requiring or allowing Parties to reach its objectives. The section on Nature of Commitments contains a more detailed description of those commitments.

Other social commitments

All EU FTAs analysed include CSR/RBC commitments in TSD chapters. However, while earlier agreements tend to favour provisions in which the Parties seek to facilitate and promote trade in goods subject to CSR schemes (e.g., EU-South Korea FTA), more recent agreements generally promote CSR/RBC (e.g., EU-Colombia/Peru/Ecuador Trade Agreement), as well as relevant international instruments, including the OECD Guidelines for MNEs, the UN Global Compact, and the ILO Tripartite Declaration of Principles concerning MNEs and Social Policy. The EU-UK TCA includes an article dedicated to trade and responsible supply chain management that requires the Parties to support the adherence, implementation, follow-up, and dissemination of various international instruments, including the UN Guiding Principles on Business and Human Rights.⁸⁶ Box 1 introduces the EU's Sustainable Corporate Governance Initiative as one component of the EU's broader regulatory framework.

Six EU FTAs refer to gender in their TSD chapters and two other EU FTAs refer to gender in their chapters on labour (the latter two are the EU-Central America FTA and the EU-Ukraine FTA).

Table 6: References to other social commitments in EU FTAs

<i>Trade agreement</i>	<i>Gender</i>	<i>Promotion of CSR/RBC</i>
EU-South Korea FTA	✓	✓
EU-Colombia/Peru/Ecuador Trade Agreement	X	✓
EU-Central America Association Agreement	✓	✓
EU-Ukraine Association Agreement	✓	✓
EU-Georgia Association Agreement	✓	✓
EU-Moldova Association Agreement	✓	✓
EU-Canada CETA	X ⁸⁷	✓
EU-Japan EPA	X	✓
EU-Singapore FTA	✓	✓
EU-Vietnam FTA	✓	✓
EU-UK Trade and Cooperation Agreement	✓	✓

⁸⁵ As all 11 FTAs reviewed contain these provisions, a table is not presented.

⁸⁶ EU-UK TCA, Part 2, Title XI, Chapter 8, Article 406.

⁸⁷ However, in 2018, there was a recommendation of the CETA Joint Committee on Trade and Gender. Available at: https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157419....pdf#:~:text=To%20facilitate%20the%20cooperation%20and%20information%20exchanges%20on,contact%20details%20including%20information%20regarding%20the%20relevant%20officials

Box 1: The EU's Sustainable Corporate Governance Initiative: a quick look**The EU's Sustainable Corporate Governance Initiative**

The EU's Sustainable Corporate Governance Initiative (SCGI) intends to strengthen the EU's regulatory framework on company law and corporate governance. The Initiative intends to further embed sustainability within the corporate governance structure to align better the long-term interests of management, shareholders, stakeholders, and society. Effectively, the Initiative seeks to assist businesses by encouraging them to consider stakeholder interests, sustainability risks, dependencies, opportunities, and damaging consequences when developing strategy, making decisions, and overseeing operations.

The SCGI seeks to encourage corporations to contribute more to sustainability by formulating specific policy measures to spur companies to focus on their long-term development rather than short-term financial performance. These goals would be achieved by following specific objectives to strengthen their resilience and long-term performance through sustainable business models. The goal is to have businesses that can better manage sustainability-related matters in their operations and value chains relating to environmental issues, social and human rights (including workers and child labour) and climate change. This would create legal certainty and level the playing field concerning specific measures undertaken by companies in identifying, assessing, and mitigating adverse impacts in the value chain.

Labour regulatory sovereignty

All the EU FTAs include a domestic right to regulate in labour and social matters in TSD chapters, and provisions on non-derogation from domestic labour laws to promote trade or investment.⁸⁸

5.3.2 TSD provisions on implementation*Intergovernmental mechanisms*

All EU FTAs analysed establish an intergovernmental committee to assist in the implementation of TSD provisions. Depending on the terms of the agreement, such a body may be referred to as a committee,⁸⁹ sub-committee,⁹⁰ or board.⁹¹ Intergovernmental committees generally deal with both environmental and labour issues, and they are made up of high-level representatives from each Party's administration responsible for labour, environmental, and trade matters. They can perform a variety of functions, such as identifying actions to achieve TSD objectives, making recommendations for the proper implementation of TSD provisions, identifying areas of cooperation, assessing the impact of the agreement on labour and the environment, and resolving specific issues that arise from the application of TSD provisions. In some agreements, they may receive and consider public submissions on TSD matters (e.g., EU-Colombia/Peru/Ecuador Trade Agreement).

All the EU FTAs reviewed call for regulatory cooperation between the Parties on environmental, and labour and social issues. A close examination of the provisions on regulatory cooperation indicates that this usually includes activities such as the exchange of information on, for example, the Parties'

⁸⁸ As all 11 FTAs reviewed contain these provisions, a table is not presented.

⁸⁹ For example, EU-Canada CETA, Chapter 22, Article 22.4(1).

⁹⁰ For example, EU-Colombia/Peru/Ecuador Trade Agreement, Title IX, Article 280.

⁹¹ For example, EU-Central America Association Agreement, Title VIII, Article 294(2).and EU-Singapore Free Trade Agreement, Chapter 12, Section D, Article 12(15)2.

respective situations regarding ratification and implementation of labour conventions and/or MEAs. Regulatory cooperation may also include technical exchanges or sharing best practices. Three EU Association Agreements (i.e., with Georgia, Moldova, and Ukraine) call for the approximation of domestic environmental and labour measures. They provide for the regulatory approximation of Ukrainian, Georgian, and Moldavian with specific EU legal instruments in the fields of employment, social policy, and the environment.⁹²

Six EU FTAs include technical assistance and capacity-building provisions in labour matters, while three EU FTAs include such provisions in environmental matters. All EU FTAs signed with Eastern Partnership and developing countries include cooperation provisions on specific capacity building in the labour sector.⁹³ Three EU trade agreements with developing countries call for technical assistance and capacity building in the environmental area (i.e., EU-Central America Association Agreement, EU-Colombia/Peru/Ecuador trade agreement, and EU-Vietnam FTA). The EU-Central America Association Agreement, for example, explicitly recognises the importance of cooperation and technical assistance in the fields of trade and labour as well as trade and environment in achieving the TSD chapter's objectives.⁹⁴

Joint scientific cooperation is often foreseen in environmental matters (in eight EU FTAs). The EU-Canada CETA provides that cooperation "*shall take place through actions and instruments that may include technical exchanges, exchanges of information and best practices, research projects, studies, reports, conferences and workshops.*" (Article 24.12.2). In some EU FTAs, provisions may expressly refer to areas of international environmental law. For example, in the EU-Japan EPA, reference is made to cooperation on "*trade-related aspects of the international climate change regime, including on means to promote low-carbon technologies, other climate-friendly technologies and energy efficiency*" (Article 16.12 (h)). Please see Table 7 below for details.

⁹² This is because these association agreements are with EU neighbourhood countries, which puts them in a different position than other trade partners.

⁹³ EU-Ukraine Association Agreement, Article 420; EU-Georgia Association Agreement, Article 349; EU-Moldova, Article 32.

⁹⁴ For example, EU-Central America Association Agreement, Title VI, Article 63(1).

Table 7: Intergovernmental mechanisms in EU FTAs

<i>Trade agreements</i>	<i>Regulatory cooperation⁹⁵</i>	<i>Harmonisation and/or approximation of domestic measures</i>	<i>Technical assistance and capacity-building (environment)</i>	<i>Technical assistance and capacity-building (labour)</i>	<i>Intergovernmental committee</i>	<i>Joint scientific cooperation</i>
EU-South Korea FTA	✓	X	X	X	✓	X
EU-Colombia/Peru/Ecuador Trade Agreement	✓	X	✓	✓	✓	X
EU-Central America Association Agreement	✓	X	✓	✓	✓	✓
EU-Ukraine Association Agreement	✓	✓	X	✓	✓	✓
EU-Georgia Association Agreement	✓	✓	X	✓	✓	✓
EU-Moldova Association Agreement	✓	✓	X	✓	✓	✓
EU-Canada CETA	✓	X	X	X	✓	✓
EU-Japan EPA	✓	X	X	X	✓	✓
EU-Singapore FTA	✓	X	X	X	✓	X
EU-Vietnam FTA	✓	X	✓	✓	✓	✓
EU-UK Trade and Cooperation Agreement	✓	X	X	X	✓	✓

⁹⁵ This category includes cooperation activities, such as information exchange.

Role of international organisations

All EU FTAs reviewed call for international organisations, such as the ILO, or MEA bodies, to assist in the implementation of environmental, labour, and social provisions.⁹⁶ Several agreements require Parties to take into account the activities of international organisations in order, for instance, ‘to promote greater cooperation and coherence’ between the work of the Parties and those organisations.⁹⁷ Parties may establish cooperative arrangements with international organisations ‘to draw on their expertise and resources to achieve the objectives of’ labour and/or environmental provisions.⁹⁸

A role of international organisations is also found in the context of dispute settlement mechanisms, provided under TSD chapters. During government consultations, all EU FTAs reviewed allow or require Parties to seek information or views from international organisations. Parties may also be required to consider the activities of international organisations.⁹⁹ In most EU trade agreements, a panel or group of experts, usually tasked with examining matters that have not been satisfactorily addressed through consultations, should seek information and advice from international organisations.¹⁰⁰

Civil society participation

All EU FTAs in the analysis, except for one, include provisions for civil society participation in monitoring the implementation of TSD and/or environmental, and labour and social provisions at the national and transnational levels.

The majority of EU FTAs call for civil society participation in assessing the agreement's environmental, labour, and social impacts. The EU-Canada CETA and the EU-UK TCA explicitly call for the views of stakeholders to be taken into account when assessing the potential economic, social and environmental impacts of trade actions. The EU trade agreements with South Korea and the three Eastern Partnership countries include a commitment to assess the impact of TSD chapter implementation on sustainable development through the Parties' respective participative processes and institutions.

All EU FTAs analysed allow the general public or specific elements of civil society to submit comments and views on TSD matters or the implementation of TSD provisions. Public submissions can be made to the Parties themselves or the institutional mechanisms established under the TSD provisions. Under the EU-South Korea FTA, the views, opinions, or findings of the Civil Society Forum, an international civil society forum established under the FTA, can be submitted to the Parties directly or through the DAGs: this provision is part of TSD chapters in all FTAs since that Agreement and thus all the FTAs reviewed here.¹⁰¹ The EU-Colombia/Peru/Ecuador Trade Agreement provides that the Sub-Committee on TSD shall be open to receive and consider inputs, comments or views from the public on matters related to the TSD title.¹⁰² Furthermore, submissions may come from

⁹⁶ As this is the case for all 11 FTAs reviewed, a table is not presented.

⁹⁷ For example, EU-Canada CETA, Chapter 23, Article 23.8(6).

⁹⁸ For example, EU-Canada CETA, Chapter 23, Article 23.7(3).

⁹⁹ EU-Moldova Association Agreement, Title V, Chapter 13, Article 378(3).

¹⁰⁰ EU-Georgia Association Agreement, Title IV, Chapter 13, Article 242(3).

¹⁰¹ EU-South Korea FTA, Chapter 13, Article 13.13(3).

¹⁰² EU-Colombia/Peru/Ecuador Trade Agreement, Title IX, Article 280(7).

members of the general public or civil society bodies established under the TSD provisions. Under the EU-Central America Association Agreement, the Civil Society Dialogue Forum may express its views and opinions in order to promote dialogue on how to better achieve TSD objectives.¹⁰³ Moreover, advisory groups on TSD, which are domestic groups comprised of civil society actors and local public authorities, can be tasked with expressing views and making recommendation on trade-related aspects of sustainable development.¹⁰⁴

Public submissions can be part of those bodies' tasks or come from their own initiative (e.g., EU-Moldova or EU-Ukraine Association Agreement¹⁰⁵). The EU-Canada CETA states in its Chapter on Trade and Environment that each Party shall be open to receive and shall give due consideration to public submissions on trade and the environment matters, including communications on implementation concerns. Through specific consultative mechanisms, each Party shall inform its respective civil society organisations of those communications.¹⁰⁶ In some agreements, public submissions are indicated for specific aspects of TSD provisions. For example, the EU-UK TCA provides that the Parties must consider the views from representatives of workers, employers and CSOs for cooperation on trade-related aspects of labour policies and measures.¹⁰⁷ Moreover, they will consider views from the public or interested stakeholders for the definition and implementation of cooperation activities on trade-related aspects of environmental policies and measures.

Table 8: Civil society participation in implementation and monitoring of TSD provisions in EU FTAs

<i>Trade agreements</i>	<i>Monitoring of implementation at national level</i>	<i>Monitoring of implementation at transnational level</i>	<i>Participation in impact assessment</i>	<i>Public submission on TSD</i>
EU-South Korea FTA	✓	✓	✓	✓
EU-Colombia/Peru/Ecuador Trade Agreement	✓	✓	✓	✓
EU-Central America Association Agreement	✓	✓	X	✓
EU-Ukraine Association Agreement	✓	✓	✓	✓
EU-Georgia Association Agreement	✓	✓	✓	✓
EU-Moldova Association Agreement	✓	✓	✓	✓
EU-Canada CETA	✓	✓	✓	✓
EU-Japan EPA	✓	✓	✓	✓
EU-Singapore FTA	✓	✓	✓	✓
EU-Vietnam FTA	✓	✓	✓	✓

¹⁰³ EU-Central America Association Agreement, Part IV, Title VIII, Article 295(2).

¹⁰⁴ For example, EU-Central America Association Agreement, Part IV, Title VIII, Article 294(4).

¹⁰⁵ Articles 277(3) and 299(5) respectively.

¹⁰⁶ EU-Canada CETA, Chapter 24, Article 24.7(1).

¹⁰⁷ EU-UK CTA, Part 2, Title XI, Chapter 8, Articles 399(9) and 400(7).

Trade agreements	Monitoring of implementation at national level	Monitoring of implementation at transnational level	Participation in impact assessment	Public submission on TSD
EU-UK Trade and Cooperation Agreement	✓	✓	✓	✓

5.3.3 TSD provisions on enforcement

Nature of commitments

All of the EU FTAs analysed contain binding provisions on non-derogation from domestic laws¹⁰⁸, implying an obligation not to derogate from domestic environmental and labour law or to lower levels of protection to encourage trade or investment.

The EU-UK TCA contains explicit and innovative provisions on enforcement of non-regression from levels of protection (or non-derogation) in its labour and environment chapters.¹⁰⁹ Under its labour chapter, each Party shall have in place and maintain a system for effective domestic enforcement and an effective labour inspection system. It must also ensure the availability of administrative and judicial proceedings, as well as provide for appropriate and effective remedies. In relation to non-regression from environmental protection levels, the EU-UK TCA requires cooperation on the effective monitoring and enforcement of environmental and climate law.

The EU-Canada CETA also states that, for the purposes of upholding levels of protection afforded in the Parties' labour and environmental laws, the Parties must promote compliance with and effectively enforce labour law by maintaining a system of labour inspection, and they must ensure that their environmental authorities give due consideration to alleged violations of environmental law brought to their attention. They must also ensure that administrative and judicial proceedings, including appropriate remedies, are available for violations of such laws.¹¹⁰

All the TSD chapters of the FTAs reviewed here contain commitments regarding the ratification and/or implementation of fundamental ILO conventions and MEAs. The following two paragraphs provide an overview. The annex to this report summarises the specific provisions for this and provides additional information on elements of enforcement.

First, most EU FTAs have provisions on ratification of MEAs but without explicit obligation to ratify them. In six EU FTAs, the Parties commit to exchange information of their respective situations and progress toward ratification of MEAs, generally on a regular basis (e.g., EU-Moldova Association Agreement; EU-Japan EPA). In addition, five EU trade agreements require or allow Parties to cooperate in promoting the ratification of MEAs that are relevant or have an impact on trade (e.g., EU-South Korea FTA; EU-Singapore FTA).

In labour matters, all EU FTAs analysed include provisions for ratification of international labour conventions. Seven EU FTAs require their Parties to exchange information on their respective situations and progress in ratifying fundamental ILO conventions, other ILO conventions classified as up-to-date, or other relevant international instruments (e.g., EU-Georgia Association Agreement). Six EU FTAs require Parties to make continued and sustained efforts to ratify the fundamental ILO

¹⁰⁸ As these provisions are found in all Agreements, they are not presented in the table.

¹⁰⁹ EU-UK TCA, Part 2, Title XI, Chapter 6, Article 388 and Chapter 7, Article 395.

¹¹⁰ EU-Canada CETA, Chapter 23, Article 23.4 and 23.5 and Chapter 24, Articles 24.5 and 24.6.

conventions, as well as other ILO conventions (including up-to-date and priority conventions), if they have not already done so (e.g., EU-South Korea FTA). Parties must consider ratification of remaining ILO conventions and/or other up-to-date conventions in five EU trade agreements (e.g., EU-Ukraine Association Agreement). Parties to four EU FTAs may also cooperate in exchanging views and best practices, as well as sharing experience, on promoting ratification of fundamental, priority, and other up-to-date ILO conventions (e.g., EU-Singapore FTA).

Second, all EU FTAs mentioned include provisions on the implementation of international labour and environmental conventions. In environmental matters, under all the EU trade agreements, the Parties commit to effectively implementing in their laws and practices MEAs which each Party has ratified. In addition, under some agreements, the Parties may cooperate in exchanging information and best practices on promoting the effective implementation of relevant MEAs in a trade context.¹¹¹ In the EU-Canada CETA, they commit to consult and cooperate, including through information exchange, on the implementation of MEAs to which they are Parties.¹¹² Recent EU FTAs include commitments to effectively implement the UNFCCC and the Paris Agreement (e.g., EU-Japan EPA; EU-Singapore FTA; EU-Vietnam FTA; EU-UK TCA).

The Parties to the majority of EU FTAs commit to effectively implement the ILO conventions that they have ratified, or the fundamental ILO conventions. The EU-UK TCA goes a step further by committing its Parties to implementing the European Social Charter¹¹³. Furthermore, eight EU FTAs include a commitment by the Parties to respect, promote and realise, or effectively implement selected fundamental rights' principles or the internationally recognised core labour standards in the Parties' laws and practices, in accordance with the Parties' ILO membership obligations and the 1998 ILO Declaration on Fundamental Principles and Rights at Work (e.g., EU-Moldova Association Agreement). These principles and/or standards include freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation. Parties to several EU FTAs may cooperate to promote the effective implementation of ILO conventions, including through the exchange of information and best practices. Other references include the promotion of the ILO Decent Work Agenda objectives in the Parties' labour laws and practices (e.g., EU-Canada CETA), as well as efforts towards the effective implementation of the fundamental ILO conventions (e.g., EU-Singapore FTA).

Several EU FTAs also cite the Parties' commitment to cooperate in negotiations on future labour and/or environmental agreements that are of trade interest. The EU-Georgia Association Agreement, for example, states that the Parties 'commit to cooperate on the development of the future international climate change framework under the UNFCCC and its related agreements and decisions'.¹¹⁴

Beyond the core TSD provisions on enforcement, all EU agreements contain references to "essential elements" clauses, covering human rights and thus core labour standards. In the case of the EU-UK TCA the respect of the Paris Agreement is also identified as an essential element. Essential element

¹¹¹ *EU-Georgia Association Agreement, Title IV, Chapter 13, Article 239(e).*

¹¹² *EU-Canada CETA, Chapter 23, Article 24.4.*

¹¹³ *As the UK is a member of the Council of Europe and hence signatory to the European Social Charter.*

¹¹⁴ *EU-Georgia Association Agreement, Title IV, Chapter 13, Article 230(4).*

clauses are usually included in the political Framework/Partnership Agreements. The trade agreements refer to those clauses.

Dispute settlement mechanisms (DSMs)

All the EU trade agreements analysed include specific DSMs for issues arising from the application and/or implementation of the provisions in TSD chapters, as well as related labour and environmental provisions (e.g., non-compliance). They always include two steps: state-to-state consultation (also known as government consultations) and the panel or group of experts' procedure. The DSMs are not conditional on the alleged TSD violations affecting trade or investment between the Parties.

In the event of disagreement on matters covered by TSD provisions, all EU FTAs analysed require their Parties to, first, have recourse to government consultations. In some agreements, Parties may be permitted to request that the relevant TSD intergovernmental committee considers the matter (e.g., EU-Vietnam FTA).

If the dispute is not resolved during the government consultation, a panel (or group) of experts may be convened to assist the Parties in resolving the dispute. This panel will present a report containing recommendations, which must usually be published within a certain timeframe by the Parties. After the panel of experts has delivered its report, Parties may be required to '*make their best efforts to accommodate*' the panel of experts' advice or recommendations (e.g., EU-South Korea FTA; EU-Ukraine Association Agreement)¹¹⁵ or to '*discuss appropriate measures to be implemented taking into account the panel of experts' report and recommendations*' (e.g., EU-Georgia and EU-Moldova Association Agreements; EU-Singapore FTA).¹¹⁶ In some agreements, the Parties or the Party to which the recommendations are addressed may present an action plan (e.g., EU-Colombia/Peru/Ecuador Trade Agreement; EU-Central America Association Agreement; EU-Canada CETA).¹¹⁷ Furthermore, the Party to which the recommendations are addressed may be required to inform the TSD committee (e.g., EU-Central America Association Agreement)¹¹⁸ and/or domestic advisory groups (e.g., EU-Japan EPA; EU-Vietnam FTA)¹¹⁹ of how it intends to address the panel of experts' report.

In all EU FTAs analysed the TSD committee is in charge of monitoring the implementation of the panel of experts' recommendations or the measures that the Party has determined. In some agreements, advisory bodies or civil society bodies are permitted to submit observations to the TSD committee in this regard (e.g., EU-Moldova Association Agreement; EU-Canada CETA; EU-Vietnam FTA).¹²⁰

¹¹⁵ EU-South Korea FTA, Article 13.15(2); EU-Ukraine Association Agreement, Article 301(2).

¹¹⁶ EU-Georgia Association Agreement, Article 243(8); EU-Moldova Association Agreement, Article 379(8); EU-Singapore, Article 12.17(9).

¹¹⁷ EU-Colombia/Peru/Ecuador Trade Agreement, Article 285(4); EU-Central America Association Agreement, Article 301(3); EU-Canada CETA, Article 23.10(12) and Article 24.15(11).

¹¹⁸ EU-Colombia/Peru/Ecuador Trade Agreement, Article 285(4).

¹¹⁹ EU-Japan EPA, Article 16.18(6); EU-Vietnam FTA, Article 13.17(9).

¹²⁰ EU-Moldova Association Agreement, Article 379(8); EU-Canada CETA, Articles 23.10(12) and 24.15(11); EU-Vietnam FTA, Article 13.17(9).

Remedies and sanctions

EU trade agreements generally do not include provisions on trade remedies and/or sanctions, such as compensation, for non-compliance with or failure to implement TSD provisions.¹²¹ However, the EU-UK TCA is an exception,¹²² as it allows temporary remedies in disputes concerning the interpretation and application of the TCA's non-regression chapters on labour and social standards, as well as the environment and climate.¹²³ This reflects the TCA's focus on level playing field. Temporary remedies are not available for disputes involving the application of international instruments for TSD.¹²⁴ Furthermore, under certain conditions, the EU-UK TCA allows Parties to take 'appropriate rebalancing measures' to address the situation in which significant divergences between the Parties in labour, social, environmental or climate protection areas have material impacts on trade or investment.¹²⁵

5.3.4 *Implementation and enforcement provisions in EU FTAs in practice: a brief overview from Commission documents*

This section presents a brief overview of practice concerning EU trade agreements in force, focusing on implementation and enforcement of provisions in trade and sustainable development chapters. It is based on a review of Commission documents. This section intends to provide a summary based on the information in these documents: it is not intended to present a complete view. Specifically, information is taken from the European Commission's reports on implementation of EU trade agreements between 2017 and 2019 as well as the Staff Working Documents supporting these reports¹²⁶.

¹²¹ It should be noted that, under the EU's Generalised Scheme of Preferences, the EU can withdraw tariff preferences in a number of circumstances, e.g. in the event of serious and systematic violations of the core 15 UN and ILO Conventions by beneficiaries. European Commission (2020). *Trade/Human Rights: Commission decides to partially withdraw Cambodia's preferential access to the EU market (12 February 2020)*. Available at https://ec.europa.eu/commission/presscorner/detail/en/ip_20_229

¹²² This is due to the sui generis nature of the EU-UK TCA, given the unprecedented nature of the EU-UK relationship.

¹²³ EU-UK TCA, Part 2, Title XI, Chapter 6, Article 389(2); Part 2, Title XI, Chapter 7, Article 396(2); Part 2, Title XI, Chapter 9, Article 410(2) & (3); Part 6, Title I, Chapter 3, Articles 749 & 750.

¹²⁴ EU-UK TCA, Part 2, Title XI, Chapter 8, Article 407(2).

¹²⁵ EU-UK TCA, Part 2, Title XI, Chapter 9, Article 411.

¹²⁶ The following documents were consulted:

- Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the implementation of EU trade agreements 1 January 2019 - 31 December 2019, COM(2020) 705 final, 12.11.2020. available at: [https://ec.europa.eu/transparency/documents-register/api/files/com\(2020\)705_0/de0000000013388?rendition=false](https://ec.europa.eu/transparency/documents-register/api/files/com(2020)705_0/de0000000013388?rendition=false)
- Commission Staff Working Document individual reports and info sheets on implementation of EU free trade agreements accompanying the document Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on implementation of EU trade agreements 1 January 2019 - 31 December 2019, COM(2020)705, 12.11.2020. available at: [https://ec.europa.eu/transparency/documents-register/detail?ref=swd\(2020\)263&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=swd(2020)263&lang=en)
- European Commission, 2019 Report on implementation of EU free trade agreements 1 January 2018 - 31 December 2018, 2019. available at: https://trade.ec.europa.eu/doclib/docs/2019/october/tradoc_158387.pdf
- Commission Staff Working Document individual reports and info sheets on implementation of EU free trade agreements accompanying the document report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on implementation of free trade agreements 1 January 2018 - 31 December 2018, SWD/2019/370 final, 14.10.2019. available at: <https://eur-lex.europa.eu/legal-content/en/txt/?qid=1571409827886&uri=celex:52019sc0370>
- Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on implementation of free trade agreements 1 January 2017 - 31

The regular practical implementation of provisions in the TSD chapters occurs through *intergovernmental mechanisms*. TSD committees/sub-committees provide a regular forum for intergovernmental exchange between Parties on progress towards implementation of TSD chapters. There are regular meetings of these intergovernmental bodies for all the FTA agreements studied.

Provisions for the participation of *civil society* in the implementation of the TSD chapter are included in all the FTAs studied. This is achieved in practice through the establishment of civil society institutions and regular meetings of these groups. This includes the DAGs, established in each partner country and in the EU, who help to monitor, provide advice and recommendations on implementation at national level. The establishment of civil society forums creates a space for wider participation of civil society (not only members of both DAGs) in monitoring of TSD implementation at international level (in the case of the EU-Vietnam FTA, this requires agreement of the DAGs of both Parties). Moreover, under each free trade agreement, DAGs from the EU and from the partner country or countries meet typically once a year,¹²⁷ although in some cases the first meeting has sometimes only occurred several years following the start of agreement's application, as with Ukraine (first time in 2019).

The EU has provided *capacity building* projects to help the establishment of DAGs in partner developing countries, as in Colombia, Ecuador, Peru and Vietnam.

The use of a dedicated *dispute settlement mechanism* recently occurred under the TSD chapter in EU-South Korea FTA: the case is described in the box below.

Box 2: TSD dispute settlement mechanism under the EU-South Korea FTA

Use of a panel of experts under the EU's trade agreement with South Korea

Following lack of progress by South Korean authorities in their commitments to “*respect and realise in their laws and practices*” the fundamental ILO principles and rights at work, notably the freedom of association, and to ratify outstanding ILO conventions, the EU requested consultations with South Korea in December 2018¹²⁸. After these state-to-state consultations were unsuccessful

December 2017, COM(2018) 728 final. 31.10.2018, available at: [https://ec.europa.eu/transparency/documents-register/api/files/com\(2018\)728_0/de0000000119821?rendition=false](https://ec.europa.eu/transparency/documents-register/api/files/com(2018)728_0/de0000000119821?rendition=false)

- Commission Staff Working Document individual reports and info sheets on implementation of EU free trade agreements accompanying the document Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on implementation of free trade agreements 1 January 2017 - 31 December 2017. available at: [https://ec.europa.eu/transparency/regdoc/index.cfm?fuseaction=fmb&cl=en&language=en&doc=swd\(2018\)454/f2&cote=swd&coteid=10102&year=2018&number=454&version=f2&direction_gen=trade](https://ec.europa.eu/transparency/regdoc/index.cfm?fuseaction=fmb&cl=en&language=en&doc=swd(2018)454/f2&cote=swd&coteid=10102&year=2018&number=454&version=f2&direction_gen=trade)
- Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on implementation of free trade agreements 1 January 2016 - 31 December 2016, SWD(2017)364, 09.11.2017. available at: [https://ec.europa.eu/transparency/documents-register/detail?ref=com\(2017\)654&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=com(2017)654&lang=en)
- Commission Staff Working Document country reports and info sheets on implementation of EU free trade agreements accompanying the document report from the commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions on implementation of free trade agreements 1 January 2016 - 31 December 2016, SWD(2017)364, 09.11.2017. available at: [https://ec.europa.eu/transparency/documents-register/detail?ref=swd\(2017\)364&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=swd(2017)364&lang=en)

¹²⁷ Available at <https://trade.ec.europa.eu/doclib/press/index.cfm?id=1870>

¹²⁸ Available at https://trade.ec.europa.eu/doclib/docs/2018/december/tradoc_157586.pdf

in achieving progress, the EU took recourse to requesting the establishment of a panel of experts in July 2019¹²⁹, the next step in the DSM process.

The panel of experts was established at the end of 2019. A hearing with the panel of experts was due to take place in April 2020 but cancelled due to the COVID-19 pandemic, and was finally held in October 2020. In December 2020, the South Korean government submitted to the National Assembly of Korea (parliament) draft laws allowing for ratification of three of the four outstanding fundamental ILO conventions as well as reforms on freedom of association.

The panel of experts report, published in January 2021, found that South Korea should adjust labour laws to be consistent with the TSD Chapter in the FTA¹³⁰. South Korea ratified three fundamental ILO conventions on 20 April 2021 and they will enter into force on 20 April 2022 (No. 29 on Forced Labour, No. 87 on Freedom of Association and Protection of the Right to Organise and No. 98 on Right to Organise and Collective Bargaining). South Korea also adopted amendments to the Trade Union and Labour Relations Adjustment Act (TULRAA), which entered into force on 6 July 2021.

At the TSD Committee (TSDC) meeting in April 2021, the South Korean authorities explained progress in implementing the recommendations from the panel of experts report and outlined plans for a research project for a path to ratifying the final fundamental ILO convention No. 105 on Abolishment of Forced Labour¹³¹. In accordance with the 9th EU-Korea Trade Committee decision of April 2021, both sides followed with an *Ad hoc* Interim Meeting of the TSDC on 9-10 November 2021 to review the application of TULRAA and the progress made on research project to identify any inconsistent domestic legislation in view of the ratification of ILO convention No 105. The Parties agreed to meet again in early 2022, as soon as possible after the finalisation of the research project, to further discuss this matter.

International organisations

Finally, international organisations have played a role in the implementation of the TSD chapter provisions as partners in technical assistance and capacity-building projects. International organisations involved in the delivery of technical assistance projects have included the ILO, OECD, Office of the High Commissioner for Human Rights (OHCHR), United Nations Industrial Development Organisation (UNIDO) and the UN Food and Agriculture Organisation (FAO). For example, in the case of the ILO, projects in Colombia, Ecuador and Peru assist in furthering labour inspection, and projects in El Salvador and Guatemala support tripartite consultation mechanisms. Umbrella projects such as the Trade for Decent Work project¹³², signed in 2018, support ILO assistance in a range of partner countries. The ILO also holds meetings with the EU to discuss implementation of ILO conventions by trade partners. In the area of environmental protection, the European Commission has provided funding to UN Environment Programme (UNEP) and to the secretariats of multilateral environmental agreements to assist with the implementation of relevant Conference of the Parties (COP's) decisions, for example regarding trade in endangered species and waste.

¹²⁹ Available at https://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_157992.pdf

¹³⁰ Available at https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159358.pdf

¹³¹ Available at: https://trade.ec.europa.eu/doclib/docs/2021/may/tradoc_159567.pdf

¹³² Available at: https://www.ilo.org/global/standards/WCMS_697996/lang--en/index.htm

6 Comparative analysis of TSD provisions in third-country FTAs

This section provides a comprehensive and multidimensional picture of the scope of TSD provisions in the selected third-country FTAs with four objectives in mind:

- 1) Identifying the evolution and specificities of each country's definition of TSD provisions;
- 2) Comparing the scope of these provisions across countries;
- 3) Understanding the different scope between labour and environmental provisions;
- 4) Understanding best practices and avoidable pitfalls that are relevant to the EU's TSD approach and its 15-Point Action Plan on TSD.

The section is divided into two subsections, where the first provides an overview of different countries' approaches to TSD provisions. Thereafter, the second consists of a comparative analysis examining key aspects of FTA provisions, with a focus on their scope, levels of enforceability and the modalities and effects of pre-ratification processes. When relevant, the analysis distinguishes between TSD provisions applied in FTAs with developed countries from those implemented in developing or emerging countries.

While the consideration of all main FTA partners is important to discuss the evolution of the scope of TSD provisions and its logic, the analysis zooms in on a selection of trade agreements based on three criteria:

- **Deep integration:** the selection of FTAs is based on coverage of deep integration regional trade agreements (RTAs), with more comprehensive commitments on TSD provisions, which reflect the different approaches and trends of non-EU countries.
- **Recency:** most recent agreements logically reflect the lessons that different countries have drawn from their experience of TSD provisions. For instance, the USMCA's dispute settlement mechanism reflects lessons learned from the failure of the US-Guatemala labour dispute.
- **Explanatory value:** because of their specificities and/or the characteristics of the trading partners involved, **some FTAs can illustrate the costs and benefits of certain legal innovations or specific institutional mechanisms** – some of which will be discussed at greater length in the five case studies. For instance, the modernised Chile-Canada trade agreement can provide an interesting starting point for an analysis of trade and gender linkages.

Older-generation agreements are included in this analysis for the sake of providing not only a comprehensive picture of the alternative existing approaches, but also to account for the dynamic evolution over time of the TSD policy of main trading partners.

As explained earlier, the study does not incorporate bilateral investment treaties (BITs) because the scope and enforceability of TSD provisions in BITs differ substantially from FTAs and make them

less relevant to the EU's ongoing TSD review. The overview of TSD approaches will be followed by a fine-grained comparative study using the criteria displayed in the TSD comparative tables. Data collection for this section draws from the aforementioned databases on FTA provisions (TREND, LABPTA, DESTA and Deep Trade Agreements).

6.1 General review of third countries' TSD approaches

This section presents an **overview of the seven selected countries' (Australia, Canada, Chile, Japan, New Zealand, Switzerland, and the US) approaches to environmental and labour provisions** in trade agreements, **focusing on scope, implementation and enforcement.**

6.1.1 Australia

Australia long separated trade from sustainability issues such as environment and labour protection, and even today, **does not systematically include TSD provisions in its FTAs.**¹³³

Australia first incorporated labour and environmental provisions in its FTA with the US (entered into force in 2005). Their bilateral FTA provided limited scope for binding trade social and environmental linkages, requiring simply that each Party enforces its respective environmental laws and both sides cooperate and consult each other on sustainability issues. The Australia-Japan FTA (2015) did not include separate chapters on labour and the environment, nor did Australia's agreement with Indonesia, which entered into force in 2020.¹³⁴ Its trade agreement with Peru (2020), however, includes chapters on labour and environment, which will be reviewed in this study.¹³⁵

Although Australia's TSD institutional and policy framework for environmental provisions is less formalised than the EU's, the Australian Department of the Environment and Energy (DEE) has, in the past, addressed trade-related environmental issues by helping the Department of Foreign Affairs and Trade (DFAT) design a specific environment chapter (e.g., US-Australia FTA, CPTPP) and/or by advising trade negotiators on chapters directly impacting the environment, among which government procurement, services, TBT and SPS measures.¹³⁶ Australia's promotional approach to trade and environment in the US-Australia FTA dovetailed with the EU's proclivities for consultation and cooperation. The much greater social and economic disparities between CPTPP countries (with Australia and lower-middle income and middle-income countries like Vietnam and Malaysia), however, meant that TSD issues would be subject to a different approach reflecting not only strong US influence during the negotiation of the TPP and its proclivity for stricter enforcement mechanisms, but also a compromise between multiple trading partners (Canada, Chile, Japan and New Zealand) with different practices and experiences in this policy sphere. In many regards, **CPTPP's TSD chapters both build upon the framework developed by the US over the past two-and-a-half decades of FTA negotiations, while innovating it in several regards.** CPTPP's environment chapter calls for high levels of environmental protection and effective enforcement of environmental laws when failure to enforce them affects trade or investment between the Parties. Member countries

¹³³ Draper, Khumalo and Tigere (2017).

¹³⁴ Available at: <https://www.dfat.gov.au/trade/agreements/in-force/iacepa/iacepa-text/Pages/default>

¹³⁵ Available at: <https://www.dfat.gov.au/trade/agreements/in-force/pafta/full-text/Pages/fta-text-and-associated-documents>

¹³⁶ Australia Government. Department of the Environment and Energy. Trade and the Environment. Available at: <https://www.environment.gov.au/about-us/international/trade>.

pledge to work on global challenges, including climate change, illegal wildlife trade, protection of biological diversity, over-fishing and illegal, unreported and unregulated (IUU) fishing, and protection of the ozone layer.¹³⁷ CPTPP requires adoption and upholding of internationally recognised labour rights, includes provisions for labour inspection, and states that there cannot be derogations from labour laws for special trade areas such as export processing zones. Moreover, CPTPP creates a Labour Council of senior officials to discuss potential cooperative activities, refers to cooperation with international organisations, and establishes domestic stakeholder groups.

6.1.2 Canada

Given its joint negotiations with the US under successive trade agreements, namely NAFTA, TPP and the USMCA, Canada has also occupied a central role in the strengthening of trade linkages pertaining to labour rights and environmental protection. Over the past years, the Trudeau government has also sought to develop a policy framework for an “*inclusive trade policy*,” framed as a safeguard against the rise of populism in the West to maintain a system of open trade while responding to calls for greater fairness at home. **In many ways, the scope of Canada’s progressive policy agenda converges with the TSD approach promoted by the EU, including the protection of labour and environmental standards, and their shared commitment to an open and transparent decision-making process encouraging dialogue with civil society.** In addition to its environmental and labour standards, Canada’s new inclusive trade agenda includes commitments to policies targeting women, indigenous people, youth and small and medium enterprises (SMEs).¹³⁸

As with the US, the development of labour provisions in early Canadian FTAs (e.g., with Chile and Costa Rica) built upon NAFTA’s experiment under the North American Agreement on Labour Cooperation. Confronted to the shortcomings of NAFTA’s public submission process in the labour sphere, Canada sought to expand the scope and strengthen the enforcement of labour provisions in FTAs, starting with the Canada-Peru trade agreement, whose model was duplicated in subsequent FTAs (Colombia, Jordan, Panama, Honduras, South Korea). **The Canadian model can be described as a model combining cooperative mechanisms and the threat of trade sanctions in the event of non-compliance.** While widely influenced by the TSD approach of the US, TPP partly reflected this dual approach. On the one hand, cooperative labour consultations remain the first step in the case of a dispute settlement on labour issues. On the other, TPP includes provisions for sanctions – including the suspension of its benefits – as a last resort. Yet again, Canada has signed “peace clauses” with Vietnam in a side letter, under which benefits would not be suspended in the event of disputes in the first three years after the agreement’s entry into force.¹³⁹ EU-Canada CETA also reflects this preference for cooperation and arguably represents a compromise between

¹³⁷ Available at: <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpp/secteurs-secteurs/environnement-environnement.aspx?lang=eng>

¹³⁸ Dan Ciuriak (2018). “Canada’s Progressive Trade Agenda: NAFTA and Beyond”, C.D. Howe Institute, Commentary 516. Available at: https://www.cdhowe.org/sites/default/files/attachments/research_papers/mixed/Final%20June%2011%20Commentary_516.pdf; Stéphane Paquin and Hubert Rioux (2021). “L’agenda progressiste et les accords commerciaux de nouvelle génération”, *Revue Interventions économiques* [Online], 65, Online since 01 December 2020, connection on 26 June 2021. Available at: <http://journals.openedition.org/interventionseconomiques/12297>

¹³⁹ International Labour Organisation (2019). *Labour Provisions in G7 Trade Agreements: A Comparative Perspective*. Available at: https://www.ilo.org/global/publications/books/WCMS_719226/lang--en/index.htm

the EU and Canadian approaches to TSD enforcement.¹⁴⁰ While labour standards have occupied a central role in Canada's TSD debates, as illustrated by a recent country-wide consultation,¹⁴¹ the Canadian "inclusive trade policy" has underlined **two priorities that distinguish the Canadian approach from other third-country approaches: women's rights and indigenous people**. First, Canada has recently included a gender chapter in two of its FTAs (the modernised Canada-Chile FTA and the modernised Canada-Israel FTA) and included gender provisions in others (e.g., CETA).¹⁴² Second, while falling short of negotiating a chapter on indigenous rights in the USMCA, Canada included several provisions referring to the rights of aboriginal people, including a general exception for Indigenous People's Rights, as well as references in the environment and SME chapters (chapters 24 and 25). Other FTAs like CETA and the CPTPP also contain references to indigenous people.¹⁴³

6.1.3 Chile

While Chilean FTAs negotiated in the early 2000s do not include a TSD chapter, the US-Chile FTA includes an environment chapter, which outlines obligations and creates an Environment Affairs Council to discuss environmental issues that may occur between both Parties. The FTA also includes a labour chapter, which details three key provisions requiring both countries to protect workers and enforce relevant domestic laws. Moreover, current negotiations for the modernisation of the EU-Chile Association Agreement include discussions on novel sustainability provisions including on gender equality.

The 2002 EU-Chile Association Agreement, in its FTA part, included for the first time a reference to labour standards within the chapter on social cooperation, but Chile negotiated its first FTA with labour provisions in 1997 with Canada. Since then, the country's approach to including labour provisions has been successful in many ways. Almost half of the FTAs concluded by Chile include labour provisions, including with the US, Canada, China, Colombia, Panama, Peru, and Turkey. However, in contrast to a common desire for labour provisions reflected by numerous developing countries, Chile initially hesitated to include such obligations. While fears of abusing labour provisions for protectionism led to initial reluctance, the adoption of such measures became intertwined with the domestic transition to a democratic regime. The country provides a notable case study where external pressures for labour protection from the initial Canadian FTA led to domestic reforms, and eventually led labour matters and civil society needs to become important domestic policies for the Chilean government. Thereafter, Chilean trade policy has prioritised labour provisions, while remaining flexible in the obligations contained. These include those outlined by the

¹⁴⁰ Sylvain Zini (2020). "Le Canada et le commerce progressiste en matière de droits des travailleurs. Origines et impacts", *Revue Interventions économiques* [Online], 65. Available at:

<http://journals.openedition.org/interventionseconomiques/12561>

¹⁴¹ Sylvain Zini, Eric Boulanger, Michèle Rioux (2021). "Vers une politique commerciale socialement responsable dans un contexte de tensions commerciales. Québec : Presses de l'Université du Québec.

¹⁴² Government of Canada. *Trade and gender in free trade agreements: The Canadian approach*. Available at: https://www.international.gc.ca/trade-commerce/gender_equality-egalite_genres/trade_gender_fta-ale-commerce_genre.aspx?lang=eng

¹⁴³ Patricia M. Goff (2021). "Bringing Indigenous Goals and Concerns into the Progressive Trade Agenda", *Revue Interventions économiques* [Online], 65. Available at: <http://journals.openedition.org/interventionseconomiques/12777>; Risa Schwartz (2020). *Developing a Trade and Indigenous Peoples Chapter for International Trade Agreements*. In John Borrows and Risa Schwartz (editors). *Indigenous Peoples and International Trade: Building Equitable and Inclusive International Trade and Investment Agreements*. Cambridge: Cambridge University Press, pp. 248-273.

ILO Declaration on Fundamental Principles and Rights at Work, respect for decent work, and the requirement to enforce national legislations designed to fulfil such obligations.¹⁴⁴

While **Chile has consistently recognised the importance of labour commitments**, the country adopts certain measures to overcome **implementation challenges**. These include dialogue, knowledge exchange, and dispute resolution. **Mechanisms to settle disputes differ across Chile's trade agreements**, and while **sanctions are not typically part of Chilean trade policy**, the country has concluded some FTAs, which include them at the desire of the trading partner (e.g., US, and Canada).¹⁴⁵

6.1.4 Japan

Already in 1995, the Japanese Ministry of Environment issued a policy statement on harmonising environmental and trade policies.¹⁴⁶ Environmental provisions are seen in several agreements. Japan's 2005 agreement with Mexico includes text on environmental measures in investment and on development cooperation for environment.¹⁴⁷ Its 2011 agreement with India includes provisions on sustainable development, in particular on environment, while social issues are only mentioned in the preamble and labour issues are not mentioned.¹⁴⁸ Japan's 2011 free trade and economic partnership agreements with Peru cover sustainability issues in separate joint statements on trade and environment and on trade and biodiversity;¹⁴⁹ this is also the approach used in the Japan-Chile trade agreement.¹⁵⁰

On labour issues, five of Japan's 18 agreements in force – including CPTPP – contain labour provisions; these include its Economic Partnership Agreements with Switzerland (2008), the Philippines (2006) and Mongolia¹⁵¹ (2016), where labour provisions are included in the investment chapters.¹⁵² **Japan's agreements refer broadly to labour laws but only one – the 2006 agreement with the Philippines – refers specifically to internationally established rights.** In 2016, Japan issued a development strategy on gender equality and women's empowerment, though these issues were not tied specifically to its trade agreements.¹⁵³ Japan's 2020 agreement with the UK contains a chapter on trade and sustainable development that covers a range of issues including labour standards as well as environmental topics such as biodiversity, forestry and fisheries.¹⁵⁴ The chapter is almost identical to the equivalent chapter in the EU-Japan EPA, with references to the EU removed. Small differences include a slightly longer period (two years rather than one year) for the trade and sustainable development committee established by the UK-Japan agreement to adopt rules of procedure for the panel of experts. There is no Article 16.19 on opportunities to review the

¹⁴⁴ International Labour Organisation (2017). *Handbook on Assessment of Labour Provisions in Trade Arrangements*. Geneva: International Labour Office.

¹⁴⁵ *Ibid.*

¹⁴⁶ George (2014).

¹⁴⁷ Available at: <https://www.mofa.go.jp/region/latin/mexico/agreement/index.html>

¹⁴⁸ Draper, Khumalo and Tigere (2017).

¹⁴⁹ Available at: <https://www.mofa.go.jp/policy/economy/fta/peru.html>

¹⁵⁰ International Labour Organisation (2019). *Labour Provisions in G7 Trade Agreements: A Comparative Perspective*. Available at: https://www.ilo.org/global/publications/books/WCMS_719226/lang--en/index.htm

¹⁵¹ Available at: <https://www.mofa.go.jp/policy/economy/fta/mongolia.html>

¹⁵² International Labour Organisation (2019)

¹⁵³ *Ibid*

¹⁵⁴ Available at: <https://www.gov.uk/government/publications/ukjapan-agreement-for-a-comprehensive-economic-partnership-cs-japan-no12020>

implementation and operation of the institutional and consultation provisions for the panel of experts, government consultations or the Committee on Trade and Sustainable Development.

6.1.5 *New Zealand*

New Zealand has sought to include environmental provisions in its FTAs, based on a 2001 declaration on environment and trade agreements, which calls for trade and environmental policies to be mutually supportive but states that governments should have flexibility on environmental regulation ‘in accordance with national circumstances’.¹⁵⁵ Its broader approach to TSD provisions has become gradually institutionalised over the past decade. New Zealand’s 2009 FTA with Malaysia includes side agreements on labour and environment.¹⁵⁶ The New Zealand-Malaysia agreement on environmental cooperation mirrored in many regards the EU’s cooperative and consultative approach to trade linkages. With the New Zealand-Korea FTA (2015), trade linkages gained greater prominence. Instead of addressing environmental issues in a side agreement or on an *ad-hoc* basis in various provisions like SPS, TBT or investment, New Zealand committed to “*an integrated approach to sustainable development*” that dealt with TSD issues on par with other FTA chapters. Its 2015 FTA with Korea contains a chapter on environment that refers to the importance of multilateral environment agreements, though it does not require ratification or implementation of specific agreements (Art. 16.3). It also calls for the sustainable management of fisheries resources and its governance. It includes the right to regulate on environment in its investment chapter. The agreement does not contain, however, a chapter on labour. **With regard to the implementation of TSD provisions, New Zealand’s shift to stakeholder consultation** (“*Each Party may, where appropriate, provide an opportunity for its domestic stakeholders to submit views or advice*”) **and to a stricter commitment to seek external advice** (“*Each Party shall provide an opportunity for its domestic stakeholders to submit views or advice*”) is of particular interest to this study. In addition, **New Zealand reasserted its cooperative and consultative approach to sustainability issues by explicitly stating that environmental issues are not subject to dispute settlement mechanisms**.¹⁵⁷ With regard to labour standards, New Zealand’s 2011 agreement with Hong Kong included a side agreement on labour cooperation, as well as TPP.¹⁵⁸

In many regards, TPP’s environment chapter builds upon the framework developed by New Zealand over the past two-and-a-half decades of FTA negotiations. However, it innovates with regard to scope, implementation and enforcement, which led the Ministry of Foreign Affairs and Trade to declare that “*TPP’s labour and environment outcomes are the most comprehensive New Zealand has achieved in a Free Trade Agreement.*”¹⁵⁹

¹⁵⁵ George (2014).

¹⁵⁶ Available at: <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/nz-malaysia-free-trade-agreement/>

¹⁵⁷ Available at: <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/nz-korea-free-trade-agreement/>

¹⁵⁸ International Labour Organisation (2019). *Labour Provisions in G7 Trade Agreements: A Comparative Perspective*. Available at: https://www.ilo.org/global/publications/books/WCMS_719226/lang--en/index.htm

¹⁵⁹ New Zealand Ministry of Foreign Affairs and Trade, “*Transpacific Partnership. Labour and Environment*”. Available at: https://www.tpp.mfat.govt.nz/assets/docs/TPP_factsheet_Labour-and-Environment.pdf.

6.1.6 Switzerland

Switzerland has committed to including specific provisions on social and environmental aspects of trade within new or updated FTAs since 2010, when it drafted the first template TSD chapter with other members of the European Free Trade Association. Thereafter, members updated the template between 2017 and 2020 to include additional provisions on various issues and further develop its dispute resolution mechanism. Since, Switzerland, as a member of EFTA, has negotiated agreements with Georgia (2018), the Philippines (2018), Indonesia (2018), and Ecuador (2020), as well as bilaterally with the UK (2021). EFTA likewise continues negotiations with several trade partners including Moldova, the Eurasian Customs Union,¹⁶⁰ Thailand, India, Vietnam, Malaysia, and Mercosur.¹⁶¹ **Beyond general principles on social and environmental protection, the new template includes new provisions on protecting workers' rights, climate protection, sustainable management of natural resources, preserving biodiversity, sustainable management of marine resources, sustainable agriculture, sustainable supply chains, responsible business conduct, and inclusive economic development/equal opportunities.** Moreover, the new template revises mechanisms to monitor compliance with sustainability regulations (SECO, 2021).

With regard to protecting workers' rights, EFTA members commit to implementing the ILO's principles of the fundamental rights at work and its Decent Work Agenda. The new provisions add requirements on social security, occupational health, fair wages, and implementing a labour monitoring system. Moreover, the **updated chapter outlines procedures to ensure effective remediation of any disputes that may arise.** On climate protection, additional provisions align the goals of Switzerland's FTAs with those of the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement. Similarly, **the revised template prioritises sustainable management of trade in forestry products, fish, and wildlife to decrease greenhouse gas emissions.** Beyond committing to effective implementation of forestry governance, the updated provisions commit EFTA members to employing **certification schemes to identify products from sustainably managed forests.** In order to align itself with the EU's Timber Regulation, Switzerland requires importers of timber to prove proper due diligence and provide details on the type and origin of timber (SECO, 2021).

The new template actively applies the CITES Convention with the aim of conserving biodiversity, but also reducing the spread of invasive species through trade. On marine resources, updated provisions detail requirements to curb illegal and unreported fishing. Suggested measures include national catch certification schemes, such as Switzerland's 2017 requirement to monitor the origin of imported fish products. On a related note, **the chapter's new provisions on sustainable agriculture highlight the need for dialogue and reporting on sustainable food systems.** The last two updates align the template text with instruments for responsible business to ensure inclusive economic development such as the OECD Guidelines for Multinational Enterprises, ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, and the United Nations Guiding Principles (UNGP) on Business and Human Rights (SECO, 2021). Finally, the

¹⁶⁰ Its founding states were Belarus, Kazakhstan and Russia, and in 2015 it was enlarged to include Armenia and Kyrgyzstan.

¹⁶¹ Available at:

https://www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/Freihandelsabkommen/partner_fha.html

EFTA-Indonesia FTA includes also innovative provisions linking preferential tariffs for palm oil with the respect of sustainability provisions, which is described in a text box in section 7.2.9.

Switzerland has established an FTA Joint Committee to monitor the country's implementation of sustainability regulations by collecting information from federal offices as well as civil society. Most notably, Switzerland's revised chapter includes a **panel of experts as a new mechanism for dispute settlement**, which draws on recognised experts to draft, implement, and monitor recommendations.¹⁶²

6.1.7 United States

The US has promoted trade linkages since NAFTA raised the prominence of both labour and environmental issues in trade policymaking. The scope, implementation and enforcement of labour and environmental provisions in trade agreements have been central to the stormy debates on trade liberalisation over the past thirty years. As a result, US trade negotiating objectives regarding environmental and social issues have expanded over successive trade reforms (most notably the Bipartisan Trade Promotion Authority Act of 2002¹⁶³), while US trade agreements have progressively given greater consideration to the scope and enforcement of labour and environmental standards. **TSD provisions in the US model have therefore shifted from side agreements (NAFTA) to dedicated labour and environmental chapters (US-Jordan FTA), first being subject to specific enforcement procedures, before being subject to the agreement's state-to-state dispute settlement mechanism on par with commercial provisions.** The US TSD model has three central features that continue to nurture both academic and policy debates on the implementation and enforcement of labour and environmental provisions in FTAs:

- 1) its focus on pre-ratification processes;
- 2) the ability of civil society actors to file complaints for a country's failure to enforce its labour and environmental obligations under an FTA;
- 3) its potential use of trade sanctions as an enforcement tool.

The enforcement of labour rights is embedded in the pre-ratification requirements, which include reforms in labour laws and practices before an agreement enters into force. As discussed in the literature review, the US has sought to maximise its economic leverage to foster domestic labour reforms with many of its negotiating partners, including Mexico, Bahrain, Columbia, Morocco, Oman, Panama, Cambodia, Vietnam and Malaysia.¹⁶⁴

The scope of labour provisions has evolved from an emphasis on the enforcement of domestic labour laws to the reference to international labour standards, including the 1998 ILO Declaration, as well as acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health in the USMCA, the latest FTA ratified by the US as of 2021. With

¹⁶² Available at:

https://www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/Freihandelsabkommen/nachhaltigkeit.html

¹⁶³ For an in-depth discussion on the significance of the Trade Promotion Authority Act of 2002, please refer to Section 6 on implementation and enforcement of environmental and labour provisions.

¹⁶⁴ The cases of TPP and the Cambodia Textile Trade Agreement are examined in section 7.

regard to enforcement, the **US experience provides useful takeaways when it comes to public submissions by non-state actors** (20 reviews issued by the US Department of Labour's Office of Trade and Labour Affairs),¹⁶⁵ their modalities and effects. Finally, the **mixed record of the US sanction-based model**, which was already acknowledged by a 2014 Governmental Accountability Office report,¹⁶⁶ invites further inquiry into the inner workings of its dispute settlement mechanism.

Likewise, the US approach to trade-environment linkages offers important insights into the challenges and promises of implementing and enforcing environmental provisions in FTAs. While environmental questions have been arguably less prominent than labour rights, they have likewise had implications beyond US trade politics. As explained in the literature review, the **US has played an important role in the diffusion of trade-environment standards in FTAs**. For instance, NAFTA's environmental side agreement has been shown to be especially influential in other countries' FTA design.¹⁶⁷ Of particular interest is the North American Commission for Environmental Commission (NACEC)'s Submission of Enforcement Matter (SEM) process, which allows civil society organisations to file complaints for non-compliance with environmental obligations under NAFTA. Other significant features of the US approach to the trade-environment nexus include the expanded scope of environmental provisions in TPP, duplicated in the USMCA (e.g., biodiversity, marine resources and fisheries) as well as new institutional reforms to improve the SEM process under the USMCA (e.g., shorter timeline, additional funding).¹⁶⁸ The comparative study indicates the key takeaways from the US case in the expanded overview of the US TSD model, the comparative analysis of TSD models performed and in some of *the case studies examined below*.

6.2 Comparative analysis of scope of TSD provisions in third countries' FTAs

Building upon the analytical framework, the cross-country analysis of TSD provisions in this section is centred on scope and pre-ratification processes. **With regard to scope, this analysis closely scrutinises the coverage of these provisions**. For labour provisions, the study carefully examines references to ILO (fundamental conventions, Decent Work Agenda) and the UN 2030 Agenda for Sustainable Development and other social commitments, as well as specific language on corporate social responsibility and responsible business conduct (Table 14).

For environmental provisions, the analysis examines references to trade-related MEAs and the main policy spheres associated with the trade-and-environment nexus (Table 9). This overview of TSD provisions is followed by a thematic analysis of the evolution of the scope of TSD provisions in third countries' FTAs. For certain specific issues of particular relevance to the EU, such as climate change, the study zooms in on certain provisions to provide a more fine-grained perspective on the scope of TSD provisions. **The analysis of pre-ratification processes examines the formal and informal practices that each country has undertaken to promote labour or environmental**

¹⁶⁵ Congressional Research Service (2022). "USMCA: Labour Provisions", Congressional Research Service. Available at: <https://crsreports.congress.gov/product/pdf/IF/IF11308>.

¹⁶⁶ Government Accountability Office (2014). "Free Trade Agreements. U.S. Partners Are Addressing Labor Commitments, but More Monitoring and Enforcement Are Needed", GAO-15-160, Washington, DC.

¹⁶⁷ Jean-Frédéric Morin, Joost Pauwelyn, James Hollway (2017). "The Trade Regime as a Complex Adaptive System: Exploration and Exploitation of Environmental Norms in Trade Agreements", *Journal of International Economic Law*, vol. 20(2): 365–90. For a comprehensive analysis of the US approach to environmental provisions in FTAs, see Sikinah Jinnah and Jean-Frédéric Morin (2020). "Greening Through Trade", Cambridge/London: MIT Press.

¹⁶⁸ Anne-Catherine Boucher (2020). "The USMCA Contains Enhanced Environmental Protection Provisions but Will They Lead to Substantive Environmental Protection Outcomes", *American Bar Association*, Available at https://www.americanbar.org/groups/environment_energy_resources/publications/ierl/20201120-the-usmca-contains-enhanced-environmental-protection-provisions/

reform ex ante. Here, the researchers have relied on the analysis of official sources (e.g., memoranda of understanding (MoU), side letters, labour action plans) and targeted interviews with government officials who participated in the negotiations (e.g., trade and labour negotiators who participated in CPTPP negotiations with Vietnam and Malaysia).

Table 9 illustrates the **scope of the specific environmental issues** covered by third countries. By design and scope, **different countries incorporate different environmental provisions. However, the recent USMCA appears to be the most extensive, covering all the categories listed. This is followed by the CPTPP**, which is also extensive, except that it does not have provisions on climate change. Other recent agreements concluded by Australia and New Zealand with Korea include similar provisions, namely climate change, renewable energy, biodiversity, fisheries, forest conservation and illegal trade in endangered species. Few agreements include provisions related to genetic resources, pesticides and chemicals, namely those by the US and Canada.

6.2.1 Overview and analysis of scope of environmental provisions in third countries' FTAs

There has been a general acceleration in the inclusion of environmental provisions in trade agreements over recent decades.¹⁶⁹ The United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 1992, also known as the Rio Summit, declared that the environment must be a part of the development process, that free trade agreements could make a positive contribution to sustainable development but that environmental considerations should not be used as a means of non-justified trade discrimination.¹⁷⁰ This reasoning is found in the 1994 GATT Article XX, whose paragraphs (b) and (g) set out a derogation from the agreement for policies necessary to protect human, animal and plant health, and policies relating to the conservation of exhaustible natural resources, on the condition that they do not '*constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade*'. These paragraphs set out a legal basis for environmental and climate action provisions in trade agreements.

Partly because of limited results at the multilateral level, the use of environmental provisions in trade agreements has gained increased importance.¹⁷¹ Environmental provisions have developed in scope and substance over recent decades and become more widespread following their inclusion by the US and EU in their FTAs. More basic environmental provisions include references to the environment or sustainable development in the preamble of the agreement text, a reference to GATT Article XX or GATS Article XIV¹⁷² or a commitment to environmental cooperation. Typically, more substantive environmental provisions insist on compliance with or adoption of new domestic environmental laws, require commitment by the Parties to ratify and implement multilateral environmental agreements or mention specific environmental issues. Whilst environmental provisions have historically been clustered around agreements with the US, Canada or the EU, they

¹⁶⁹ Jean-Frédéric Morin, Andreas Dür and Lisa Lechner (2018). "Mapping the trade and environment Nexus: Insights from a new data set", *Global Environmental Politics*, vol. 18(1), 122–139.

¹⁷⁰ United Nations Conference on Environment and Development (1992). *Agenda 21*. Available at: <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>

¹⁷¹ Clive George (2014). "Environment and Regional Trade Agreements: Emerging Trends and Policy Drivers", *OECD trade and environment working paper 2014/02*.

¹⁷² GATS Article XIV describes the general exceptions to the agreement. These include notably clause (b) excepting from the agreement measures 'necessary to protect human, animal or plant life or health'.

are now included in agreements in which neither are a Party, albeit following similar models. They have been included in all US trade agreements since NAFTA (1994).

Higher prioritisation of environmental commitments is reflected by greater prominence of environmental provisions within trade agreements themselves, for example in a dedicated chapter (e.g., CPTPP). A study by the OECD surveying member delegations concluded that one of the major drivers for the proliferation of more substantial environmental provisions appears to be a stronger political mandate for environmental and climate action, both in OECD countries themselves and their partner countries.¹⁷³ Countries have shifted away from being limited to references to sustainability in the preamble or referencing general exceptions from GATT, which accounted for a majority of environmental provisions prior to 2010.¹⁷⁴

FTAs increasingly include a chapter dedicated to environmental provisions. This practice was pioneered by the US in the early 2000s (US-Chile FTA, 2003, US-Singapore FTA, 2003)¹⁷⁵ and has now spread to other countries, including developed countries that had previously not included extensive provisions such as Japan, which has moved beyond commitments to environmental cooperation, and Australia, which had previously separated trade and environment issues (e.g. Japan-Peru, 2011, Australia-Peru, 2018, CPTPP). Chile and Colombia included an environmental chapter in their free-trade agreement (2006). Side letters have also been used by some countries such as Canada or Australia to affirm commitment to environmental considerations, as in the Australia-Malaysia agreement (2012),¹⁷⁶ although this may have now been superseded by environmental chapters. As shown in Table 10, the 2018 CPTPP agreement, to which Australia is a Party, shows a clear progression in the coverage of environmental provisions compared to its 2015 agreement with Korea, but as explained in Section 6.1.1, Australia still does not systematically include separate TSD chapters in its agreements.

Morin and Rochette point to **increasing convergence between the European and US models for environmental provisions in FTAs**. They highlight the US-Peru agreement (entering into force 2009) as being a turning point.¹⁷⁷ The agreement calls for *implementation* of a set of MEAs (including the CITES and the Montreal Protocol) and extends the dispute settlement mechanism from the commercial provisions to this environmental requirement. The agreement also contains rules on protection of biodiversity, including a side agreement on access to genetic resources and benefit sharing. This is significant, because the US has not signed the Convention on Biological Diversity, yet here included some of the Convention's principles in the trade agreement. **The level of enforceability of environmental provisions can vary greatly across agreements.** On the one hand, **the US and to some extent Chile and Canada have turned towards sanctions and dispute settlement as enforcement mechanisms** (US-Chile FTA, 2003, USMCA, 2018, CPTPP, 2018, as well as Canada-Chile FTA, 1996). On the other hand, New Zealand's approach has been more similar to the cooperative approach of the EU. These differences are explored in detail in Section 7. Provisions on transparency and public participation in environmental issues are included

¹⁷³ Draper et al. (2017).

¹⁷⁴ George (2014).

¹⁷⁵ Jinnah and Morin (2020).

¹⁷⁶ Malaysia-Australia (2012). Available at: <https://www.dfat.gov.au/sites/default/files/side-letter-environment-malaysia-to-australia.pdf>

¹⁷⁷ It is noted that changes were made in the year prior to the ratification of this agreement after the Democratic Party won control of both the House of Representatives and the Senate, with parts of the agreement, including the environmental provisions, revised.

to an increasing extent in RTAs.¹⁷⁸ Specific provisions on transparency may require Parties to commit to exchanging information through environmental cooperation, give advance notice of adoption of new environmental laws (Canada-Peru, 2008) and promote public awareness of environmental laws (US-Colombia, 2012), including a system allowing public submissions of non-compliance. As discussed in Section 6, provisions for public participation in environment matters may highlight the importance of public participation (US-Australia, 2004) or be linked to technical cooperation.

Environmental provisions: specific environmental issues covered by third-country FTAs

Whilst **MEAs are widely used as international standards across different FTAs**, different countries may prioritise different environmental policy areas in trade agreements according to their own priorities. Table 9 illustrates the scope of the specific environmental issues covered by third countries in trade agreements. The recent USMCA and CPTPP appear to be the most extensive, covering all the listed categories except for climate change.¹⁷⁹ They are the only agreements to cover genetic resources; it should be noted that none of the agreements selected for study here specifically refer to the Nagoya Protocol, which regulates access to and benefit sharing of genetic resources. **Climate change is covered by most agreements from 2009 onwards**, but is not covered by any of the cited agreements before then, suggesting a higher political prioritisation since then. **Biodiversity, forest conservation and illegal trade in endangered species are consistently covered by agreements across the period studied**, whereas pesticides were only covered by one agreement in the years between 2006 and 2018.

¹⁷⁸ Monteiro, J-A. 2016, *Typology of environment-related provisions in regional trade agreements*, WTO Working Paper ERSD.

¹⁷⁹ Article 20.15 of CPTPP, entitled “Transition to a Low Emissions and Resilient Economy” did not explicitly refer to climate change.

Table 9: Specific environmental issues addressed in the third-country FTAs reviewed

	<i>Climate change</i>	<i>Renewable energy</i>	<i>Air pollution</i>	<i>Ozone layer</i>	<i>Biodiversity</i>	<i>Fisheries</i>	<i>Forest conservation</i>	<i>Illegal trade in endangered species</i>	<i>Genetic resources incl. traditional knowledge</i>	<i>Pesticides and chemicals</i>
USMCA 2018	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
CPTPP 2018	×	✓	✓	✓	✓	✓	✓	✓	✓	✓
Australia-Peru 2018	✓	✓	×	×	✓	×	×	×	×	×
Switzerland-Georgia 2016	✓	✓	×	✓	×	✓	✓	✓	×	×
New Zealand-Korea 2015	✓	✓	×	✓	✓	✓	✓	✓	×	×
Australia-Korea 2015	✓	✓	×	×	✓	✓	✓	✓	×	×
Japan-Mongolia 2015	✓	×	×	×	×	×	×	×	×	×
New Zealand-Taiwan 2013	✓	×	✓	✓	✓	×	✓	✓	×	×
Switzerland-Central America 2013	✓	✓	×	×	✓	✓	✓	×	×	×
New Zealand-Hong Kong 2010	×	×	✓	×	✓	×	×	×	×	✓
Canada-Panama 2010	×	×	×	×	✓	×	×	✓	×	×
New Zealand-Malaysia 2009	✓	×	×	×	✓	✓	✓	×	×	×
Canada-Jordan 2009	×	✓	×	×	×	×	×	×	×	×
US-Panama 2007	×	×	×	×	×	×	×	✓	×	×
Japan-Thailand 2007	×	✓	×	×	×	✓	✓	×	×	×
US-Peru 2006	×	✓	✓	×	✓	×	✓	✓	×	✓
Chile-Colombia 2006	×	✓	×	×	✓	✓	✓	×	×	×
CAFTA-DR 2004	×	×	×	×	✓	×	×	✓	×	×
US-Chile 2003	×	×	×	✓	✓	×	×	✓	×	✓
Canada-Chile 1996	×	×	✓	×	✓	✓	✓	✓	×	✓
NAFTA 1994	×	×	✓	×	✓	×	×	✓	×	✓

Environmental provisions: reference to Multilateral Environmental Agreements in third-country FTAs

MEA provisions look to widen or reinforce pre-existing international environmental commitments by encouraging ratification by new countries or improved implementation. MEAs covered include the Convention on Biological Diversity (including the Cartagena Protocol on Biosafety and Nagoya Protocol on Access and Benefit Sharing), the CITES, the UNFCCC and Paris Agreement, the Montreal Protocol on Substances that Deplete the Ozone Layer, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal and the International Convention for the Prevention of Pollution from Ships (MARPOL). Provisions referencing MEAs go from recognising their importance and reaffirming obligations under them to ensuring that environmental laws are consistent with the MEAs and that adopted laws will fulfil obligations under MEAs (US-Colombia, US-Peru).

Research on the inclusion of MEAs in environmental provisions has found that **the impact of FTAs on increasing ratification of MEAs is marginal**. A study of 690 FTAs agreed between 1947 and 2016 found that in 84% of cases where the FTA included a provision on ratification of a major MEA, this MEA had already been ratified by the Parties beforehand.¹⁸⁰ Exceptions to this were a very limited number of agreements that involve developing countries: the 1993 Common Market for Eastern and Southern Africa (COMESA) Treaty and the 1989 Lomé Convention.

The study also found that **diffusion of environmental rules through FTAs was most effective in agreements involving developing countries**: the COMESA Treaty, the 1979 and 1989 Lomé Conventions and the 2000 Cotonou Partnership Agreement. It is important to highlight that this study considers the ratification of MEAs and inclusion of environmental rules in FTAs, and *not* their implementation. Inclusion of environmental provisions on MEAs with a requirement to implement may have a greater influence at implementation level if combined with a strong enforcement mechanism. Jinnah and Lindsay indeed trace a pathway between inclusion of environmental provisions in US trade agreements and diffusion of environmental norms into domestic policy of partner countries to the agreements.¹⁸¹

Table 10 below provides an overview of the MEAs in the selected countries. Some patterns in MEA provisions reveal different TSD approaches among the countries under consideration. Canada FTAs refer to at least the Montreal Protocol and CITES, sometimes also referring to the CBD, Basel Convention and in the CPTPP the UNFCCC and Paris Agreement. US agreements mostly refer to the Montreal Protocol, CITES and MARPOL. New Zealand does not include specific references to key agreements but tends to include them through general references to environmental institutions and their respective agreements, as does Chile, except for the agreements concluded with the US and Canada which refer to the Montreal Protocol, CITES and the Basel Convention. The MEAs appearing most often in the agreements cited in the table are CITES and the Montreal Protocol.

¹⁸⁰ Noémie Laurens and Jean-Frédéric Morin (2019), "Negotiating environmental protection in trade agreements: A regime shift or a tactical linkage?", *International Environ Agreements* 19, 533–556.

¹⁸¹ Sikina Jinnah and Abby Lindsay (2016). "Diffusion Through Issue Linkage: Environmental Norms in US Trade Agreements", *Global Environmental Politics*, vol.16(3), p. 41-61.

Table 10: References to Multilateral Environmental Agreements in third-country FTAs reviewed

	<i>UNFCCC & Kyoto Protocol</i>	<i>Paris Agreement</i>	<i>Montreal Protocol</i>	<i>CBD</i>	<i>Nagoya Protocol</i>	<i>CITES</i>	<i>Basel Convention</i>	<i>MARPOL</i>
USMCA 2018	✗	✗	✓	✗	✗	✓	✗	✓
CPTPP 2018	✓	✓	✗	✓	✗	✓	✗	✗
Australia-Peru 2018	✓	✗	✗	✓	✗	✓	✗	✗
Switzerland-Georgia 2016	General MEA references	✗	✗	✗	✗	✗	✗	✗
Korea-New Zealand 2015	General MEA references MEAs	✗	✗	✗	✗	✗	✗	✗
Japan-Mongolia 2015	General MEA references	✗	✗	✗	✗	✗	✗	✗
Australia-Korea 2014	General MEA references	✗	✗	✗	✗	✗	✗	✗
New Zealand-Taiwan 2013	General MEA references	✗	✗	✗	✗	✗	✗	✗
Switzerland-Central America 2013	✗	✗	✗	✓	✗	✓	✗	✗
New Zealand-Hong Kong 2010	General MEA references	✗	✗	✗	✗	✗	✗	✗
Canada-Panama 2010	✗	✗	✓	✓	✗	✓	✓	✗
New Zealand-Malaysia 2009	General MEA references	✗	✗	✗	✗	✗	✗	✗
Canada-Jordan 2009	Other MEA references	✗	✓	✗	✗	✓	✓	✗
US-Panama 2007	✗	✗	✓	✗	✗	✓	✗	✓
Japan-Thailand 2007	✓	✗	✗	✗	✗	✗	✗	✗
US-Peru 2006	✗	✗	✓	✗	✗	✓	✗	✓
Chile-Colombia 2006	General MEA references	✗	✗	✗	✗	✗	✗	✗
CAFTA-DR 2004	General MEA references	✗	✗	✗	✗	✗	✗	✗
US-Chile 2003	General MEA references	✗	✓	✗	✗	✗	✗	✗
Canada-Chile 1996	✗	✗	✓	✗	✗	✓	✓	✗
NAFTA 1994	✗	✗	✓	✗	✗	✓	✓	✗

Environmental provisions: regulatory sovereignty and exceptions

Another major category of environmental **provisions** defines the extent of regulatory space (as defined in Section 5.3.1), **allowing Parties to an agreement to retain the right to set domestic policy on environmental matters**. This might include **exceptions to commitments to liberalisation** made elsewhere in the agreement where those commitments might undermine environmental objectives. In NAFTA, for example, sustainable development is listed as a legitimate objective. In addition to ensuring the right to determine levels of protection, common provisions include commitments to enforce environmental laws (Canada-Peru), **agreements on non-derogation from domestic laws in order to attract investment** (NAFTA) and promotion of economic instruments to achieve environmental goals (Canada-Chile).

Table 11 gives an overview of inclusion of provisions on regulatory sovereignty and exceptions in the selected trade agreements. The table shows a general trend towards the US, Canada and Chile being particularly inclined to include provisions on regulatory space and exceptions for conservation of natural resources and animal and plant life. Almost all of the agreements listed below included a provision on the right to determine the level protection except for agreements concluded by Japan. Most of the FTAs include non-derogation provisions apart from those concluded by Australia and New Zealand (and the Columbia-Chile agreement). Exceptions for natural resources and plant and animal life appear in the majority of agreements, except those concluded by Australia and Japan.

In the case of chapters on investment and government procurement, environmental provisions often relate to exceptions that can be made for environmental purposes to the rules laid out in the chapter. All the agreements surveyed include exceptions for environmental purposes to the government procurement chapter, except for agreements concluded by Japan and some of the early agreements concluded by Canada. Few contain a general exception for the investment chapter (e.g. Australia-Peru and Korea-New Zealand).

Regarding regulatory sovereignty (as defined in Section 5.3.1), recent years have shown an evolution in the inclusion of investor-state dispute settlement (ISDS) provisions. Recent scholarship has argued that ISDS can create the possibility for litigation by investors that could bring about a 'chilling effect' on climate policies, thereby stalling action on climate change.¹⁸² Whilst ISDS has been included in many older generation FTAs, recent FTAs have reformed ISDS or removed it completely.¹⁸³ It was not included in USMCA provisions between the US and Canada and Mexico and Canada, and only under restricted conditions between the US and Mexico. CPTPP contains five bilateral opt-outs for ISDS.

Conclusions: environmental provisions

Inclusion of environmental provisions in free trade agreements has developed considerably and become increasingly widespread over recent decades. While the US and EU have historically had a pioneering role in extending environmental provisions, similar models are now included in agreements involving neither of them. FTAs increasingly include a chapter on environmental provisions rather than limiting them to the preamble of the agreement.

¹⁸² Kyla Tienhaara (2018). "Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement", *Transnational Environmental Law*, vol. 7(2), 229-250.

¹⁸³ UNCTAD (2019). "Reforming investment dispute settlement: a stocktaking", IIA issues note, March 2019.

The range of specific environmental issues has increased over time, with more recent agreements including references to climate change, genetic resources and renewable energy as well as topics that have been present since NAFTA (1994) such as biodiversity or illegal trade in endangered species. For example, the USMCA is the first US trade agreement to include provisions on air quality and marine litter. Since its agreement with Peru (2006), the US has begun ensuring a stronger commitment by requiring implementation of MEAs rather than simply ratification, and subject to the same enforcement conditions as the commercial provisions (e.g., US-Colombia, 2006 US-Panama, 2007, US-Korea, 2007, USMCA, 2018). Whilst the majority of the third countries studied include provisions on the right to determine the level of environmental protection and non-derogation from domestic laws, as well as exceptions for protection of natural resources and animal and plant life, Australia's and Japan's agreements are less ambitious when not partnered with more ambitious countries such as Canada (e.g., CPTPP). Contrary to other most developed countries, Japan does not include provisions on the right to determine level of protection in its agreement with Mongolia or Thailand, and neither Australia nor Japan include exceptions for plant and animal life in their respective agreements with Korea and Peru (Australia) and Mongolia and Thailand (Japan).

Table 11: Regulatory sovereignty and exceptions: environmental provisions in third-country FTAs reviewed

	<i>Right to determine level of protection</i>	<i>Non-derogation from domestic laws</i>	<i>Exception for the conservation of natural resources</i>	<i>Exception for plant and animal life</i>	<i>Investment: general exception on environmental purposes</i>	<i>Procurement: all exceptions for environmental purposes</i>	<i>Subsidies: all exceptions for environmental purposes</i>
USMCA 2018	✓	✓	✓	✓	×	✓	×
CPTPP 2018	✓	✓	✓	✓	×	✓	×
Australia-Peru 2018	✓	×	×	×	✓	✓	×
Switzerland-Georgia 2016	✓	✓	✓	✓	✓	✓	×
Korea-New Zealand 2015	✓	×	✓	✓	✓	✓	×
Japan-Mongolia 2015	No specific provision	✓	×	×	×	×	×
Australia-Korea 2014	✓	✓	✓	×	×	✓	×
New Zealand-Taiwan 2013	✓	×	✓	✓	×	✓	×
Switzerland-Central America 2013	✓	✓	×	✓	×	✓	×
New Zealand-Hong Kong 2010	✓	×	✓	✓	×	✓	×
Canada-Panama 2010	✓	✓	✓	✓	×	✓	×
New Zealand-Malaysia 2009	✓	×	✓	✓	×	✓	×
Canada-Jordan 2009	✓	✓	✓	✓	×	×	×
US-Panama 2007	✓	✓	✓	✓	×	✓	×
Japan-Thailand 2007	×	✓	×	×	×	×	×
US-Peru 2006	✓	✓	✓	✓	×	✓	×
Chile-Colombia 2006	✓	×	✓	✓	×	✓	×
CAFTA-DR 2004	✓	✓	✓	✓	×	✓	×
US-Chile 2003	✓	✓	✓	✓	×	✓	×
Canada-Chile 1996	✓	✓	✓	✓	×	×	×
NAFTA 1994	✓	✓	✓	✓	×	✓	×

6.2.2 Comparative analysis of labour provisions

Overview of labour provisions

Since the proliferation of free trade agreements in the 1990s, more and more free trade agreements have come to incorporate labour provisions. **To date, over 80% of all trade agreements worldwide now have labour provisions,**¹⁸⁴ either included as integral chapters within the body of the agreement (US-Colombia FTA, TSD chapter Switzerland-Montenegro) or contained in a side agreement (Canada-Honduras FTA). Despite this large percentage, **the incorporation of comprehensive labour measures is not universal; rather, it is limited to certain countries that have sustainable development commitments as part of their political mandates.**¹⁸⁵ All in all, labour provisions in most trade agreements indicate that many states entering into free trade agreements will either conventionally commit to labour instruments in one of two ways: commit to uphold and ratify ILO fundamental conventions or commit to implement (as well as not waiver from) their national labour laws. In many cases, states commit to both, as illustrated in Table 12 below.¹⁸⁶

These labour provisions are mostly supported by monitoring and cooperation provisions in the form of technical assistance, stakeholder participation, exchange of information, best practices, and training. In some cases, the option of dispute settlement with the possibility of unilateral sanctions is included. However, much variation remains across FTAs with respect to the scope and stringency as some FTAs include far-reaching and highly enforceable labour provisions, while others only make fleeting references to labour standards or even fully omit the topic.¹⁸⁷ Indeed, the tables below illustrate the different labour standards that the different states incorporate in the FTAs. Some studies on labour provisions find that most agreements apply aspirational language such as “shall endeavour, strive, maintain, or combat”. Despite these provisions being legally binding, they lack the backing of a strong dispute settlement mechanism.¹⁸⁸ Regardless of the approach taken, labour provisions in trade agreements have been evolving and increasing in number. While some studies have found empirical evidence that the majority of these clauses are copy-pasted,¹⁸⁹ there is also **evidence of innovative trade agreements that have influenced the way labour provisions are incorporated such as NAFTA and the CPTPP.**

Labour provisions in FTAs

Most FTAs promote international labour standards, either through direct references to ILO conventions, or by referring to the 1998 ILO Declaration. An analysis of the different labour provisions points to a convergence concerning the different types of labour standards and ILO instruments referenced. Particularly, they have similar characteristics concerning their general framework such as establishing labour obligations. Other common features in the FTAs relating to labour provisions

¹⁸⁴ Gaia Graselli et al. (2021). “Social clauses in Trade agreements: Implications and Action Points for the Private Sector in Developing Countries”, *Trade Lab Law*. Available at: <https://georgetown.app.box.com/s/on7fahebpi7kkq5m90g483hhjs21zfkj>

¹⁸⁵ Peter Draper, Nkululeko Khumalo, and Faith Tigere (2017). “Sustainability Provisions in Regional Trade Agreements: Can they be Multilateralised?”, *ICTSD*.

¹⁸⁶ Graselli et al. (2021)

¹⁸⁷ Damian Raess et al. (2018). “Protecting labour rights in preferential trade agreements: The role of trade unions, left governments and skilled labour”, *Review of International Organizations*, vol. 13, 143–162).

¹⁸⁸ Draper et al. (2017)

¹⁸⁹ Raess et al. (2018)

include (i) setting institutional arrangements or procedures for a social partner and civil society participation in the implementation of the agreement (see Section 7.1 on implementation provisions); and (ii) establishing rules for dispute settlement.¹⁹⁰

The strengthening of comprehensive chapters over time can be seen through many RTAs where states are going beyond general exceptions and preamble references to developing comprehensive and substantive trade and sustainability chapters. This is illustrated in Tables 12 and 13 that highlight the different provisions incorporated in FTAs on labour issues. Some RTAs have even gone further by incorporating trade and sustainable development provisions in other chapters, such as those in investment chapters (Canada-Peru FTA, Japan-Philippines FTA),¹⁹¹ and rules of origin (e.g. USMCA). While the US and Canada were among the pioneers to incorporate separate labour provisions through comprehensive dedicated chapters (US-Chile FTA) or side agreements (Canada-Peru FTA), others have followed suit. Countries such as Chile, Australia and New Zealand have similarly adopted specified labour chapters (Chile-Colombia FTA, Australia-Korea FTA, and New Zealand-Korea FTA)¹⁹² and side agreements in some of their RTAs (Chile-Canada FTA).¹⁹³ EFTA countries, including Switzerland, have also made the shift and incorporate their labour provisions through a TSD chapter in their FTAs (EFTA-Indonesia FTA). While Japan tends to incorporate their labour provisions within the text of the body through investment chapters (Japan-Mongolia FTA).¹⁹⁴

Labour and social provisions: reference to international labour instruments

One of the most important labour provisions that appear in most RTAs is the **reaffirmation and commitment to implement the ILO core labour standards**. Most FTAs include either reference to the **1998 ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up** or **the eight fundamental conventions and the ILO's Decent Work Agenda**. The ILO Declaration of 1998 applies to all states, independently of whether they have ratified the fundamental conventions. As a result, most countries will include references in their FTAs to the 1998 Declaration even without fully ratifying the eight fundamental conventions. A report by the ILO indicated that the 1998 Declaration was increasingly being used as a baseline for labour standards.¹⁹⁵ Indeed Table 14 indicates a **general trend to include references to the 1998 Declaration as a basis for labour standards**. This provision is most common among all the agreements analysed, particularly agreements concluded by the US, Canada, Chile, Switzerland, New Zealand, and Japan. Few agreements do not include references to the 1998 Declaration such as the New Zealand-Taiwan FTA, Japan-Mongolia FTA, Canada-Chile FTA and NAFTA.

Not all of the seven countries analysed have ratified the eight fundamental ILO conventions.

For example, Switzerland, Chile and Canada have ratified all eight fundamental Conventions. While

¹⁹⁰ International Labour Organisation (2019). *Labour provisions in G7 trade agreements: A comparative perspective*. Available at http://www.ilo.ch/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_719226.pdf

¹⁹¹ Draper et al.; Canada-Peru FTA 2008. Available at: <https://www.bilaterals.org/?canada-peru-fta-2008>; Japan-Philippines FTA 2006. Available at: https://www.bilaterals.org/IMG/pdf/JPEPA_2006_.pdf and Japan-Philippines FTA, available at <https://www.bilaterals.org/?japan-philippines-fta-jpepa-2006>.

¹⁹² Australia-Korea FTA 2014. Available at: <https://www.bilaterals.org/?korea-australia-fta-feb-2014> and New Zealand-Korea. Available at <https://www.bilaterals.org/?nz-korea-fta-2014>.

¹⁹³ Chile-Canada FTA 1997. Available at: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/chile-chili/fta-ale/index.aspx?lang=en&_ga=2.178066469.1258911209.1630776136-1262137522.1624553614

¹⁹⁴ Japan-Mongolia FTA 2016. Available at: <https://www.mofa.go.jp/files/000067716.pdf>

¹⁹⁵ International Labour Organisation (2016).

Australia has ratified seven, and Japan and New Zealand have ratified six, the US has ratified two ILO conventions (No. 105 on Abolition of Forced Labour and No. 182 on the Worst Forms of Child Labour), which appear in agreements such as the USMCA and Panama FTA. Because the US has not ratified all the ILO fundamental conventions, they do not include that provision in their FTAs. However, the Swiss FTAs contain a commitment towards ratification of ILO conventions. The Swiss FTAs call upon the Parties *“to effectively implement the ILO conventions which they have ratified and to make continued and sustained efforts towards ratifying the fundamental ILO conventions as well as the other conventions that are classified as “up-to-date” by the ILO”*.¹⁹⁶

The ILO Decent Work Agenda is another ILO instrument that has been incorporated by a few agreements. It focuses on productive employment and general precepts of decent global work. However, it does not feature in most of the agreements except for some of the agreements concluded by New Zealand, Australia and some of early agreements concluded by the US, Canada and Chile. However, the inclusion of the Decent Work Agenda among the different countries is not consistent as illustrated in Table 12 below.

¹⁹⁶ Switzerland-EFTA-Georgia FTA. Available at <https://www.efta.int/sites/default/files/documents/legal-texts/free-trade-relations/georgia/EFTA-Georgia-FTA-Main-Agreement.PDF>

Table 12: References to international labour instruments in the third-country FTAs reviewed

	<i>1998 ILO Declaration on Fundamental Principles and Rights at Work</i>	<i>ILO Fundamental Conventions</i>	<i>Commitment to ratify ILO conventions</i>	<i>Commitment to implement ILO conventions</i>	<i>ILO Decent Work Agenda</i>
USMCA 2018	✓	✓	×	✓	×
CPTPP 2018	✓	×	×	×	✓
Australia-Peru 2018	✓	✓	×	✓	×
Switzerland-Georgia 2016	✓	✓	✓	✓	✓
Korea-New Zealand 2015	✓	✓	×	✓	✓
Japan-Mongolia 2015	×	×	×	×	×
Australia-Korea 2014	✓	×	×	×	×
New Zealand-Taiwan 2013	×	×	×	×	×
Switzerland-Central America 2013	✓	✓	×	✓	✓
New Zealand-Hong Kong 2010	✓	×	×	×	×
Canada-Panama 2010	✓	✓	✓	✓	✓
New Zealand-Malaysia 2009	✓	×	×	✓	✓
Canada-Jordan 2009	✓	✓	×	✓	✓
US-Panama 2007	✓	✓	✓	✓	✓
Japan-Thailand 2007	No provisions on labour				
US-Peru 2006	✓	✓	×	✓	×
Chile-Colombia 2006	✓	✓	×	✓	×
CAFTA-DR 2004	✓	✓	×	✓	×
US-Chile 2003	✓	✓	×	✓	×
Canada-Chile 1996	×	✓	×	✓	×
NAFTA 1994	×	×	×	×	×

Labour and social provisions: references to international labour standards

Labour standards are not part of World Trade Organisation rules; **limited results at the WTO led several countries to include labour commitments in FTAs.**¹⁹⁷ Now across the board, **most FTAs include comprehensive provisions on labour rights and their protection.** This inclusion usually entails the Parties committing to maintain labour standards, labour law, cooperation on labour issues and ensure that domestic labour laws are enforced effectively. In addition, trade-related labour provisions take into consideration any standard, which addresses labour relations or minimum working terms or conditions, mechanisms for monitoring or promoting compliance, and/or a framework for cooperation.¹⁹⁸ An analysis of the FTAs concluded by Chile, Canada, US, Switzerland, New Zealand and Australia show **a general trend towards core labour standards and include references to core standards such as freedom of association, elimination of child labour, collective bargaining, eradication of forced labour and non-discrimination in employment and occupation.** Parties either made the commitment to implement or ratify ILO fundamental conventions referring to core labour standards.

Overtime, many studies have found that there has been a growing reference to labour standards in the FTAs signed worldwide.¹⁹⁹ Table 13 illustrates that the first trade agreement to provide binding labour provisions can be traced to NAFTA in 1994. On the one hand, most FTAs by Canada and the US go further and expand their commitments to occupational safety and health, right to strike, wages, labour inspections and protection of migrant workers. Canada and the US include specific obligations regarding public awareness of labour legislation and ensuring access to justice, remedies and procedural guarantees (e.g. CPTPP). On the other hand, New Zealand and Australia incorporate occupational safety and health and but excludes labour inspections, wages, rights of migrant workers. Switzerland incorporates the core labour standards but does not extend these commitments to wages, migrant workers' rights, occupational safety and health. While Japan FTAs contains no specific references to the core labour standards but tend to make general commitments not to lower labour standards. Overall, Table 13 illustrates a general trend to include core labour standards with certain countries like the US and Canada extending that scope a little further.

Conclusions: labour provisions

The analysis concludes that with the proliferation of trade agreements, **labour provisions have become inextricably linked with trade provisions.** The approaches by the US, Canada, Switzerland reflect that FTAs are moving beyond merely acknowledging the link (preamble and general references) but expanding on labour provisions to more substantive provisions. As a result, there is a steady strengthening of labour provisions, which can be seen in separate labour chapters or TSD chapters. This approach has also been adopted in some of the agreements concluded by Chile, Australia and New Zealand.

Despite the widespread inclusion of labour provisions in FTAs, variations with regards to scope and stringency remain. The US and Canada have similar approaches where labour provisions are subject to sanctions or penalties, while agreements by Switzerland, Australia, New Zealand, Chile and Japan have incorporated labour provisions as aspirational commitments. As regards scope, the agreements concluded in the early 2000s by the US, and Canada indicate that the ILO's 1998 Declaration on Fundamental Principles and Rights at Work has been used as a

¹⁹⁷ CSR (2020). *Labour enforcement issues in the US FTAs*. Available at: <https://sgp.fas.org/crs/row/IF10972.pdf>

¹⁹⁸ International Labour Organisation (2016).

¹⁹⁹ *Ibid.*

baseline reference for labour standards. The same is applicable to agreements by Switzerland and Australia, while the New Zealand approach is not consistent with some agreements not including any references to the 1998 Declaration. Japan's approach is different with no references in the agreements analysed. However, there is no consensus on the level of incorporation and commitments undertaken. While the ILO Declaration provides that fundamental labour principles are obligatory, independently from ratification of ILO conventions, the study of the FTAs analysed revealed that states only tend to include commitments to conventions which they have ratified. **Hence, the differences in levels of commitments.** In addition, the report also finds that the inclusion of comprehensive labour provisions is limited to the countries that have respective negotiating mandates. This is usually the case particularly for countries that have sustainable development commitments as part of their negotiating mandates, i.e. Switzerland, the US and Canada. The analysis also found that the **inclusion of labour provisions has been progressive with innovations** with recent new agreements concluded such as USMCA and the CPTPP. Other **similarities also indicate support mechanisms in the form of technical assistance and cooperation activities.**

Table 13: References to international labour standards in the third-country FTAs reviewed

	<i>Internationally recognised labour standards</i>	<i>Freedom of association</i>	<i>Right to organise and collectively bargain</i>	<i>Elimination of forced labour (e.g. slavery)</i>	<i>Abolition of child labour</i>	<i>Non-discrimination among workers</i>	<i>Right to strike</i>	<i>Minimum wage</i>	<i>Occupational health and safety</i>	<i>Labour inspection</i>	<i>Rights of migrant and contingent workers</i>
USMCA 2018	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
CPTPP 2018	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Australia-Peru 2018	✓	✓	✓	✓	✓	✓	✗	✗	✗	✗	✗
Switzerland-Georgia 2016	✓	✓	✓	✓	✓	✓	✗	✗	✗	✗	✗
Korea-New Zealand 2015	✓	✓	✓	✓	✓	✓	✗	✗	✓	✗	✗
Japan-Mongolia 2015	✗	General provisions	✗	✗	✗	✗	✗	✗	✗	✗	✗
Australia-Korea 2014	✓	✓	✓	✓	✓	✓	✗	✗	✓	✗	✗
New Zealand-Taiwan 2013	✓	✓	✓	✓	✓	✓	✗	✗	✓	✗	✗
Switzerland-Central America 2013	✓	✓	✓	✓	✓	✓	✗	✗	✗	✗	✗
New Zealand-Hong Kong 2010	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗
Canada-Panama 2010	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
New Zealand-Malaysia 2009	✓	✓	✓	✓	✓	✓	✗	✗	✓	✗	✓
Canada-Jordan 2009	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
US-Panama 2007	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Japan-Thailand 2007	✗	No provisions on labour									
US-Peru 2006	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Chile-Colombia 2006	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	✗
CAFTA-DR 2004	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓
US-Chile 2003	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	✓
Canada-Chile 1996	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
NAFTA 1994	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	✓

6.2.3 Comparative analysis of other social commitments

Overview

Trade agreements can have indirect and unintentional impacts on the enjoyment of human rights via social commitments – whether positive or negative. While social and human rights commitments are often linked, this section aims to focus on social commitments other than labour rights.

While labour provisions are covered in Section 6.2.2, and implementation/enforcement under Section 7, this section regards the inclusion of public participation provisions as a reference to human rights guaranteed by the right to participate in public affairs and/or society under Article 21 of the Universal Declaration of Human Rights (UDHR) of UN as well as Article 25 of the International Covenant on Civil and Political Rights (ICCPR).

Several FTAs make reference to **transparency and anti-corruption**, as well as **the right to public participation, gender rights, and the rights of indigenous people**. The literature suggests a trend to increasingly include such provisions, as more than 40% of trade agreements concluded since 2000 include anti-corruption and anti-bribery commitments.²⁰⁰

Other social commitments in FTAs

There are differences in commitments across the selected countries, which reflect the individual approaches of each trade partner. The cross-country analysis indicates that while a few countries have incorporated references to specific rights, these are often expressed through CSR with reference to gender-wage gaps and non-discrimination in the work place. Table 14 below illustrates that gender provisions are included in FTAs concluded by Canada, while the US only started incorporating gender references after the US-Panama FTA. Other countries including Switzerland, New Zealand, Australia and Chile include no reference.

While the US leverages its market power to encourage partner countries to strengthen domestic implementation of specific commitments, it is selective in the social issues it explicitly includes in its trade agreements.²⁰¹ The US was one of the first countries to incorporate **transparency and anti-corruption measures** into its trade agreements with the initial motivation of reducing concerns for firms trading with countries with a reputation of bribery risks. However, these initial concerns have since been reframed as important “human rights spill-overs”, as the anti-corruption provisions in the US are now regarded as best-practice.²⁰² The 2002 Trade Promotion Act (TPA) outlines wording – typically drawing on human rights language – for transparency and due process provisions that all post-2002 US FTAs include within a transparency chapter. Measures require partner countries to publish transparency regulations and procedures for the respective agreement in advance of finalizing it, including sections on review and appeal. Provisions cover a range of issues including adherence to international conventions on anti-corruption and bribery; domestic legislation

²⁰⁰ Iffat Idris (2017). *Human rights and governance provisions in OECD country trade agreements with developing countries*. K4D Helpdesk Report. Brighton, UK: Institute of Development Studies. Available at: <https://gsdrc.org/wp-content/uploads/2017/07/103-Human-Rights-and-Governance-Provisions-in-Trade-Agreements.pdf>.

²⁰¹ Susan Ariel Aaronson (2011). “Human Rights”. Available at: <http://siteresources.worldbank.org/INTRANETTRADE/Resources/C21.pdf>

²⁰² *Ibid.*

criminalizing active and passive bribery; enforcement mechanisms including dissuasive non-criminal sanctions where relevant; and protection for whistle-blowers.

Debarment has been found to be an effective form of dissuasive non-criminal sanctions when applied to government procurement. Across a few of its FTAs, the US has supported the inclusion of procedures for Parties to ban firms found to be engaging in illegal actions from tendering for procurement opportunities. However, while this is evident in the US-Colombia FTA, some argue that the inclusion of such provisions does not translate to their use in practice.²⁰³

Canada follows a similar approach to other social commitments across its FTAs, and focuses on a specific selection of issues. The country includes **transparency and due process provisions**, as well as anti-corruption measures, within chapters of its trade agreements.²⁰⁴ While Chile has also begun including text on anti-corruption measures across its 10 FTAs, they are less detailed in comparison to those included by the US and Canada.²⁰⁵ Moreover, while Japan features text on transparency and corruption across its FTAs to varying extents, New Zealand, and Australia seem to focus their FTAs on trade issues and less on non-trade issues, as the latter two do not include any text on transparency or other rights issues, such as public participation.

Several countries, on the other hand, have, more recently, increased efforts to include **public participation provisions** across their FTAs. The first instance of such provisions in a US agreement is presented by the 1992 NAFTA. However, the increase in public participation provisions was motivated by President George W. Bush's administration's efforts to build democratic institutions in the Middle East and Latin America in the early 2000s.²⁰⁶

Indeed, US FTAs increasingly respect the right to participate by adopting the post-2004 model requiring parties to ensure information on labour laws is publicly available and ensuring the public is educated on their content.²⁰⁷ Canadian trade agreements likewise include text on public participation—specifically within the transparency chapter, which requires parties to guarantee the ability for the public to comment, participate in, or challenge relevant regulations. The inclusion of such provisions is motivated by the idea that effective governance must be developed by a Party's informed public within the country rather than pushed by external trade partners.²⁰⁸

Models of public participation vary across trade agreements. Beyond North America, for example, the most elaborate model was first included in the 2004 Dominican Republic-Central America-Dominican Republic (CAFTA-DR) FTA. The CAFTA-DR required Parties to develop a mechanism for public petitions against specific provisions in the agreement with an emphasis on those related to the environment and labour rights.

²⁰³ Matthew Jenkins (2017). *Anti-Corruption and Transparency Provisions in Trade Agreements*. Transparency International. Available at: https://www.transparency.org/files/content/corruptionqas/Anticorruption_and_transparency_provisions_in_trade_agreements_2017.pdf

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*

²⁰⁶ Susan Ariel Aaronson (2017). "Governance Spillovers of Labour Provisions in Free Trade Agreements". Available at: <https://www2.gwu.edu/~iiep/assets/docs/papers/2017WP/AaronsonIIEPWP2017-2.pdf>

²⁰⁷ Aaronson (2011).

²⁰⁸ Idris (2017).

While isolating the causal effects of public participation provisions on democratic progress in partner countries would be a very complex and demanding task – if at all possible – scholars do agree on the opportunity such provisions can provide in nudging partner governments to expand capacity for citizens to engage with, and challenge, policy.²⁰⁹ Notably, several countries have implemented channels for civil society engagement in trade negotiations after signing FTAs with the US, including Chile, the Dominican Republic, Jordan, Kuwait, Mexico, and Morocco. However, the difference in language used has been argued to be comparatively weaker in Canadian FTAs, adopting aspirational text to encourage public participation rather than requiring the implementation of specific mechanisms (see Section 7.1 for more on implementation).

Nevertheless, Canada leads the way in **indigenous rights** by including specific text across its recent trade agreements to respect the cultural heritage of Canadian people, and committing Parties to “*preserve traditional knowledge, innovations, and practices of indigenous and local communities*”.²¹⁰ Specifically, Table 14 below demonstrates that the rights of indigenous people do not feature in most of the FTAs except for the recently concluded USMCA and the Canada-Panama FTA. Promotion of **corporate social responsibility** is common among the later FTAs concluded by the US and Canada. Australia also incorporates references to it in its latest FTAs, and references to CSR are included in most Swiss FTAs – either in the TSD Chapter or in FTA preambles. As of 2019, it is a standalone article in the revised EFTA model chapter on TSD. However, New Zealand, Japan, and Chile do not incorporate any CSR provision in other FTAs apart from the CPTPP.

Conclusions: other social commitments

The US and Canadian models reflect promotion of transparency, due process, and anti-corruption in trade agreements. While provisions have become increasingly robust with capacity building for compliance, monitoring, and enforcement in the US, language for public participation remains weaker than for other TSD issues – such as labour – in Canada. Meanwhile, Australia, Chile, and New Zealand lack common text across their trade agreements as emphasis tends to be dependent on the negotiating partner and on labour issues. All three reflect an overarching lack of focus on social commitments other than labour, prioritizing cooperation and aspirational language. While the US likewise prioritises specific social commitments, a few of Canada’s recent trade agreements cite the Universal Declaration of Human Rights and are explicit in naming particular human rights objectives.²¹¹

²⁰⁹ Aaronson (2011).

²¹⁰ Aaronson (2011).

²¹¹ *Idem* at 436.

Table 14: References to other social commitments in the third-country FTAs reviewed

	<i>Gender</i>	<i>Rights of indigenous peoples</i>	<i>Promotion of corporate social responsibility/responsible business conduct</i>
USMCA 2018	✓	✓	✓
CPTPP 2018	✓	×	✓
Australia-Peru 2018	×	×	✓
Switzerland-Georgia 2016	×	×	✓
Korea-New Zealand 2015	×	×	×
Japan-Mongolia 2015	×	×	×
Australia-Peru 2014	×	×	×
New Zealand-Taiwan 2013	×	×	×
Switzerland-Central America 2013	×	×	✓
New Zealand-Hong Kong 2010	×	×	×
Canada-Panama 2010	✓	✓	✓
New Zealand-Malaysia 2009	×	×	×
Canada-Jordan 2009	✓	×	✓
US-Panama 2007	✓	×	×
Japan-Thailand 2007	No provisions on labour		
US-Peru 2006	✓	×	✓
Chile-Colombia 2006	×	×	×
CAFTA-DR 2004	✓	×	×
US-Chile 2003	×	×	×
Canada-Chile 1996	✓	×	×
NAFTA 1994	×	×	×

6.2.4 *Labour and other social provisions: regulatory sovereignty and exceptions*

Finally, Table 15 below provides an overview of the regulatory features and exceptions in relation to social provisions. One of the most common provisions is the right to regulate. This clause is often included in agreements, mainly to grant policy space and to preserve Parties' right to regulate in order for states to achieve legitimate policy objectives without interference emanating from commitments they made. As a result, each Party retains the right to exercise discretion over regulatory matters. This is clearly illustrated in Table 15, where most of the FTAs have included clauses on the right to regulate and guaranteed regulatory sovereignty.

Similarly, Table 15 illustrates that most FTAs include obligations not to derogate from or waive national labour laws to encourage trade or investment. The provision entails that Parties will not lower their labour standards and effectively enforce their domestic laws consistent with certain labour rights and principles. **Studies by the ILO have found that in the great majority of trade agreements that include labour provisions, the Parties commit not to lower their labour standards or derogate from labour law with a view to boosting competitiveness.**²¹² This is done to ensure that each Party does not derogate from the agreement in a manner that would affect trade and investment between the Parties. Table 15 shows only a few agreements concluded by New Zealand, Japan and a few earlier agreements by the US and Canada that do not include provisions of non-derogation.

Table 15 also illustrates that most agreements do not refer to labour provisions in the investment chapters, apart from a few agreements by the US and Canada, while Japan has mostly incorporated their labour provisions within the text of the body in the investment chapters. In relation to the inclusion of human rights provisions in investment chapters, Table 15 shows that only two agreements by the US and Canada incorporate references to human rights in the investment chapter. Despite these similarities, there are distinctions in the approaches applied by the different states. Scholars have criticised the US for failing to reference human rights when granting its Executive Cabinet the ability to "fast track" the negotiations of a trade agreement under the 2002 Trade Promotion Act.²¹³

Conclusions: regulatory sovereignty and exceptions

The analysis above reflects that there is **a harmonised approach adopted by New Zealand, Switzerland, the US, Chile and Canada** in incorporating the right to regulate and the non-derogation provisions. However, the approach by Australia is not consistent as the provision is not present in some agreements, while Japan maintains a consistent approach with no provisions on regulatory sovereignty. The right to regulate effectively grants countries policy space with regard to the scope of labour provisions and their implementation. In addition, the non-derogation principle also ensures that Parties do not lower their standards to boost competitiveness. The provisions also affirm the linkages between trade and labour where the obligation is to comply with labour laws and standards without abandoning sustainable development provisions in favour of trade and investment. The analysis reveals that there is no harmonised approach regarding labour provisions in an investment chapter. The US only makes references in two agreements, while Canada only includes it in one agreement.

²¹² *International Labour Organisation (2016).*

²¹³ *Aaronson (2011).*

Table 15: Regulatory sovereignty and exceptions: labour and other social provisions in the third-country FTAs reviewed

	<i>Right to regulate</i>	<i>Non-derogation from domestic laws</i>	<i>Reference to labour protection in investment chapter</i>	<i>Reference to human rights protection in investment chapter</i>
USMCA 2018	✓	✓	✓	✓
CPTPP 2018	✓	✓	×	×
Australia-Peru 2018	No provision	✓	×	×
Switzerland-Georgia 2016	✓	✓	×	×
Korea-New Zealand 2015	✓	✓	×	×
Japan-Mongolia 2015	No provision	✓	✓	×
Australia-Korea 2014	✓	✓	×	×
New Zealand- Taiwan 2013	✓	✓	×	×
Switzerland-Central America 2013	✓	✓	×	×
New Zealand-Hong Kong 2010	✓	×	No investment chapter	No investment chapter
Canada-Panama 2010	✓	✓	✓	✓
New Zealand-Malaysia 2009	✓	×	×	×
Canada-Jordan 2009	✓	✓	No investment chapter	No investment chapter
US-Panama 2007	✓	✓	×	×
Japan-Thailand 2007	No provisions on labour	No provisions on labour	×	×
US-Peru 2006	✓	✓	✓	×
Chile-Colombia 2006	✓	✓	×	×
CAFTA-DR 2004	✓	✓	×	×
US-Chile 2003	✓	✓	×	×
Canada-Chile 1996	✓	×	×	×
NAFTA 1994	✓	×	×	×

7 Review of TSD implementation and enforcement provisions

This section builds upon the overview of other countries' TSD approaches and the comparative analysis of the scope of TSD provisions to examine their implementation and enforcement mechanisms. One of the objectives of the study is to map out the different institutional mechanisms related to TSD and determine which are more common in third-country FTAs. To do so, the study relies on a multidimensional "TSD Matrix" that is divided into different comparative tables, which guide the analysis of the different countries' approaches to TSD implementation and enforcement provisions and practices. For data collection, the team relies on the TREND, LABPTA, DTA and DESTA databases. This data collection is refined through legal analysis of TSD provisions in FTAs. Importantly, the analysis also includes policy and political context inquiring the reasons for those differences. The broader policy and political context is analysed using data collected through both secondary and primary research, and is complemented with interviews with key policymakers and stakeholders.

In the following sections, the discussion zooms in on **a selection of key trade agreements from the selected countries** based on the three criteria used for the analysis of the scope of TSD provisions, namely deep integration, recency and explanatory value. To go further in the comparative analysis of each country's TSD approach, the full list of FTAs concluded by all four countries – **Canada, Chile, New Zealand, and the US** – and their respective TSD provisions is attached in the Annex of the report.

To assess the effectiveness of FTA provisions, the study borrows from the OECD's methodological toolbox to distinguish between outputs, outcomes and impacts.²¹⁴ **Outputs** are understood as the direct products of TSD provisions, such as the creation of an intergovernmental committee or the publishing of an impact assessment of a specific trade agreement. **Outcomes** refer to short-term or medium-term effects of outputs, whether they be tangible (e.g., labour, human rights, or environmental reform) or intangible (increased visibility of an environmental standard, formation of a sustainable network of policy experts). **Impacts** consist of long-term effects (positive or negative) brought by TSD provisions, such as the effective improvement of freedom of association and collective bargaining.

Section 7.1 and 7.2 focus on **implementation and enforcement provisions**. These provisions, in a given country context, depend specifically on the processes and institutions that are established by the text of the labour and environmental provision. Therefore, the study conducts **a comparative analysis of the key elements included in FTAs, with an emphasis on intergovernmental mechanisms, civil society participation and the role of international organisations**. Moreover, **to assess enforcement provisions, the study dissects the main tools used including dispute settlements, sanctions and other remedies**. The **public submission process** is scrutinised to reveal the specific requirements and processes of each TSD model, as well as the substantive standards used to determine if a complaint can be advanced to dispute settlement procedures.

Section 7.3 examines **implementation and enforcement practices** zooming in on four selected countries – Canada, Chile, New Zealand, and the US. The analysis examines what kinds of dispute

²¹⁴ OECD (2010). *Glossary of Key Terms in Evaluations and Results Based Management*. OECD (2002), re-printed in 2010. Available at <https://www.oecd.org/dac/results-development/what-are-results.htm>; see also RESPECT (2021).

settlement and/or consultation processes have been triggered in different FTAs, most notably through public submissions, complaints, consultations, and arbitration. To provide a more granular description of enforcement practices, the study examines each country's approach separately, distinguishing between labour and environmental issues.

7.1 Implementation provisions

7.1.1 Implementation provisions: Country-based approaches

Australia

Australia's approach to **implementation of TSD provisions can be described as cooperative**. It includes mostly consultation provisions for any matters relating to TSD provisions. Trade and TSD provisions are not on an equal footing in Australian FTAs. The analysis of FTAs concluded by Australia found that Australia tended to focus more on trade issues than TSD provisions in most of its FTAs. **In the recent agreements it has concluded, including the Australia-Peru FTA and the Australia-Korea FTA, Australia included separate TSD chapters. While the provisions create binding legal obligations on the Parties, they are not enforceable either through sanctions or penalties. The main implementation mechanisms are established through national focal contact points.** The focal points are mainly responsible for facilitating communication between the Parties. The analysis found that **Australian FTAs do not establish joint committees for TSD provisions**. However, in the FTA with Korea, Australia includes a provision for an *ad hoc* committee. The main responsibility of the *ad hoc* committee is to discuss matters related to labour and environmental issues. The committee consists of senior officials from the two Parties. It is only established at the request of one of the Parties. Other agreements, however, do not contain separate TSD provisions, hence they have no implementation mechanisms (e.g. Australia-Malaysia FTA).

Canada

Canada's approach to implementation contains **similarities with the US approach, characterised by strict implementation mechanisms**. For example, **labour rights chapters are legally binding, and failure to comply could lead to monetary penalties**. This is reflected in trade agreements such as the Canada-Colombia FTA and Canada-Peru FTA, where it applies binding obligations for labour commitments. **Until recently, environmental clauses were not subject to dispute settlement but are now an integral part of the Canadian enforcement model**. Some studies argue that Canada's approach can be characterised as cooperative through its incorporation of institutional mechanisms that promote dialogue, i.e. intergovernmental joint committees and approaches to environmental provisions. This is because **monetary penalties are applied as a last resort for non-compliance**. Thus far, Canada has not applied any sanctions for non-compliance in labour provisions. **The main implementation mechanisms include intergovernmental joint committees**. These committees are tasked mainly with monitoring and implementing TSD provisions. They are mainly constituted by representatives from the two Parties. For example, in the Canada-Peru FTA, there is a joint Committee on the Environment. This joint committee is replicated in other FTAs concluded by Canada to monitor the implementation of labour and environmental provisions. In addition to the intergovernmental committees, Canada also has the National Administration Office and Environment Canada, which are responsible for implementing and monitoring progress on labour and environmental issues. The agreements also provide for national contact points for implementation issues that may arise between the Parties.

Chile

When it comes to the implementation of TSD provisions, **Chile applies a cooperative approach, which mainly entails exchange of information, cooperation in regional and multilateral for a dialogues, seminars, and private sector cooperation.** For example, Chile's labour provisions use cooperation as their main approach, in that Parties undertake to cooperate on TSD issues and consultations in the event of a dispute.²¹⁵ In most of the FTAs concluded by Chile, the main institutional mechanisms to facilitate implementation include **intergovernmental cooperation committees** (Chile-Australia FTA, Chile-Thailand FTA) **and national contact points** (China-Chile FTA, Chile-Singapore FTA). For example, the Chile-Australia FTA establishes a joint FTA committee composed of senior government officials from both Parties. Their responsibilities entail reviewing the general functioning of the FTA, supervising the work committees and implementing the agreements. The national contact points are responsible for facilitating communication between the Parties. The joint committee meets once after the agreement enters into force and thereafter, meetings are agreed upon by the Parties. **TSD provisions in Chile FTAs mainly create soft obligations on the Parties.** For example, most of the TSD provisions (except for the FTAs with the US and Canada) are not subject to any sanctions or monetary penalties.

On stakeholder participation mechanisms, Chile applies a country-based approach, which varies from agreement to agreement. Public participation is mainly used as an instrument for cooperation and to identify areas for potential cooperation. The analysis of FTAs' institutional mechanisms indicates that some agreements contain no provisions for stakeholder participation (Chile-China FTA), while others contain some level of participation but without the provisions being explicit (Chile-Australia FTA) and others with explicit provisions for stakeholder participation (CPTPP).

Japan

Japan's **approach can also be described as cooperative.** Even though most of its agreements do not contain specific implementation mechanisms, these can be gleaned from **joint cooperation statements with third Parties.** These statements mostly indicate that the Parties will cooperate on issues of trade and sustainable development. As a result, most of the agreements concluded by Japan focus on the implementation of trade issues rather than TSD provisions. As mentioned in previous chapters, Japan tends to incorporate its TSD provisions in investment chapters. In other agreements like the CPTPP or the EU-Japan FTA, the strong influence exerted by other partners shaped the design of implementation mechanisms.

New Zealand

New Zealand's approach to implementation has also evolved from side agreements to chapters. This **approach is primarily cooperative and promotional, emphasising dialogue and cooperation.** The environment chapters retain this approach but as the commitments have become more specific and stringent and subject to enforcement, implementation also includes an examination of partner countries' adherence to the commitments (e.g., reform of environmentally harmful subsidies). In the sample of FTAs examined in this report, New Zealand incorporates **intergovernmental mechanisms** such as the Joint Commission for Environmental Cooperation with national contact points (New Zealand-Korea FTA, New Zealand-Thailand FTA) or a labour

²¹⁵ *International Labour Organisation (2016). Assessment of Labour Provisions in trade and investment arrangements. International Labour Office. Geneva.*

committee (New Zealand- Korea FTA). The committees are constituted by senior representatives from the relevant ministries from each Party. These are mainly responsible for overseeing and agreeing on co-operative activities, dialogues, reviews and the implementation of TSD chapters. The committees meet within the first year of the agreement entering into force and thereafter, determined by the Parties. The **national focal points** are responsible for facilitating communication between the Parties on TSD matters. Some FTAs also contain institutional mechanisms that promote dialogue with civil society on environmental issues (New Zealand-Thailand FTA).

Switzerland

Switzerland started incorporating TSD provisions in FTAs in 2010. All FTAs concluded since 2010 include such provisions. Switzerland and its EFTA partners reviewed and strengthened their TSD approach in 2017 to include additional provisions on various issues and further develop its dispute resolution mechanism. Switzerland's FTAs establish **intergovernmental institutions in the form of joint committees**. Switzerland has reviewed TSD provisions with Montenegro (2012), Hong Kong China (2017) and Serbia (2018). The joint committees are constituted by senior officials from both Parties. The joint committees are responsible for overseeing the correct implementation of the agreements and their possible further development as well as for resolving disputes of interpretation and application of the agreement. They also have the authority to establish sub-committees and working groups to assist them in accomplishing their tasks. The joint committees shall meet at regular intervals or whenever necessary upon request of a Party. In addition to consultations under the joint Committees, Parties can also use parts of the **mechanisms foreseen under the Dispute Settlement chapters of the FTAs** (good offices, conciliation, mediation, consultations, but not arbitration). In this context, the Parties can seek advice from relevant organisations, bodies or experts. If a dispute cannot be solved through the abovementioned mechanisms, the revised EFTA model chapter on TSD foresees the possibility to establish a **panel of experts**. The panel issues a report with recommendations towards the resolution of the dispute. The panel's report shall be publicly available and follow-up actions monitored by the joint committees.

With regard to monitoring and implementation, the EFTA States decided in 2017 to engage in a review of the TSD model provisions and their monitoring processes. This was the result of numerous factors, including calls from civil society and Members of Parliaments for greater transparency and better monitoring of the implementation of TSD provisions; global trends towards strengthening monitoring and implementation of such provisions; as well as practical aspects of the existing monitoring procedures. The revised monitoring mechanisms, for which information will become available in the near future, has the following pillars:

- Ensuring **better information gathering** through the **engagement of multiple stakeholders**, including by mobilising EFTA States' Embassies, strengthening contacts with the secretariats of the competent organisations/instruments (ILO, MEAs) and liaising with local organisations; the mechanism will also rely on strengthened liaison with the EFTA Advisory Bodies, NGOs, social partners and business associations to feed in information on different aspects of the FTA. The information gathered provides the basis for discussions during the Joint Committee meetings.
- Ensuring **follow-up actions** where necessary. Measures can take the form of technical cooperation, formal consultations or the establishment of a panel of experts where applicable. The panel issues a public report with recommendations towards the resolution of

any issue that may arise (panel of experts provisions are to be negotiated with all new FTA partners)

- Increased **transparency of the work of the Joint Committees** by publishing the agenda for the meetings as well as summaries of the discussions held in the meetings.

United States

The US approach to implementation of TSD provisions is **a combination of conditional elements with a strong emphasis on pre-ratification requirements (core labour provisions and MEAs)**, and cooperation focusing on post-ratification activities such as **capacity building and monitoring activities**. For example, when it comes to environmental provisions, the US adopts a strict legal approach, creating binding obligations that compel Parties to enforce their own laws and regulations (US-Peru FTA). They also put trade and environmental issues on an equal footing²¹⁶ with commercial provisions in the agreement by subjecting them to the same state-to-state dispute settlement mechanism.²¹⁷ In most of its agreements, **the main implementation mechanism is an intergovernmental institution** in the form of a Joint Committee (US-Singapore FTA), Labour Affairs Council (US-Chile FTA) or Environmental Affairs Council (US-Panama) comprised of high-level representatives of the Parties. This also serves as a national contact point. Their responsibilities entail overseeing implementation, cooperation activities and reviewing progress in relation to labour and environmental issues. This includes the activities of the Labour Cooperation Mechanism (US-Chile FTA, US-Panama FTA, USMCA) which focuses on issues including child labour, labour inspections, working conditions, migrant workers, and gender, among others. The Labour Affairs Council and other joint committees often meet once within the first year of the agreement and other meetings are determined by the Parties.

7.1.2 Intergovernmental mechanisms

Most FTAs containing provisions on trade and sustainable development also contain mechanisms for their implementation. These implementation mechanisms are mainly in the form of institutional frameworks established by the Parties to oversee the specific implementation of TSD provisions. While there are differences in the design and implementation standards, most institutional frameworks for implementation in FTAs are largely two-fold: at the governmental level by government officials; and at the civil society level, through civil society organisations. Governmental frameworks in FTAs are mainly in the form of intergovernmental joint councils or committees composed of official representatives of the parties, usually at the ministerial level. Most agreements establish a national focal point, which is the primary mechanism for communication between the general public and the government. These intergovernmental bodies establish different mechanisms for regulatory cooperation, technical assistance and capacity building, joint scientific cooperation, harmonization of domestic standards and pre-ratification processes through MoUs) and action plans. **The most prevalent intergovernmental mechanisms across the FTAs analysed are intergovernmental committees and mechanisms for capacity building and technical assistance.** Some of the main features for capacity-building and technical assistance provisions include establishing a Labour Cooperation and Capacity Building Mechanism and a Committee on Trade Capacity Building. The Labour Cooperation and Capacity Building Mechanism ensures that activities are consistent with each Party's national programmes, development strategies, and

²¹⁶ *Environmental provisions are subject to dispute settlement as other trade commitments in US FTAs.*

²¹⁷ *Draper et al. (2017).*

priorities. The Committee's main activities entail monitoring and assessing progress in implementing trade capacity building projects; prioritisation of trade capacity building projects at the national or regional level; and working with other committees or working groups, in support of the development and implementation of trade capacity-building projects. These mechanisms can be found in the FTAs concluded by Canada, Chile, and the US.

Table 16 provides a comparative analysis of implementation provisions for the **protection of workers' rights** among the seven selected countries. Commitments to cooperation activities are the most prevalent form of intergovernmental mechanism in the selected trade agreements, and are often **facilitated by the creation of an intergovernmental committee**. Like the EU, the US, Canada and Chile systematically resort to this mechanism. Establishing state-to-state institutions to cooperate on labour rights has also become increasingly common for Switzerland and Australia, whose TSD approaches did not include such provisions until recently.²¹⁸ Japan and New Zealand have been less committed to these intergovernmental mechanisms, whose adoption depends on FTA partners.

Explicit references to technical assistance and capacity-building programmes are much less common among the seven countries. They primarily feature in Canadian and US FTAs, but are also included in some agreements signed by Australia (e.g., 2018 Australia-Peru FTA, 2014 Australia-Korea), New Zealand (2013 New Zealand-Taiwan FTA) or Switzerland (2013 Switzerland-Central America FTA). Unexpectedly, the economic development level of a trade partner country is not the only factor driving the inclusion of technical assistance and capacity-building provisions. Indeed, not only can these clauses be included in so-called "North-North" agreements (e.g., 2013 New Zealand-Taiwan FTA or 2014 Canada-Korea FTA) but they are sometimes not incorporated in "North-South" agreements (e.g., 2013 Canada-Honduras FTA, 2012 Australia-Malaysia FTA). A distinctive feature of the Canada's approach to TSD is the inclusion of commitments to the harmonization of domestic labour measures, a rare occurrence in non-Canadian FTAs (with the exception of the 2007 US-Korea FTA).

Intergovernmental mechanisms in the environmental sphere are very similar to those pertaining to labour rights. As shown in Table 17, regulatory cooperation activities are among the most frequent provisions and are often coordinated through intergovernmental committees. Joint scientific cooperation on environmental matters is also a common form of intergovernmental mechanism in TSD provisions, especially in FTAs signed by the US, Canada, New Zealand, Australia and Chile. Like technical assistance and capacity building, they can be included with both developed and developing countries. Less common are references to the harmonization of domestic environmental measures, which, with a few exceptions, are primarily included in FTAs signed by New Zealand (New Zealand-Malaysia, New Zealand-Taiwan, CPTPP) and the US (US-Peru, US-Korea, US-Panama). Given the frequency of intergovernmental mechanisms designed to be implemented for multiple trade agreements, one may wonder how countries use these policy instruments in practice and to what effect.

Most FTAs in the sample entail some form of governmental mechanism, either through a joint committee or joint council, mainly comprised of government officials at the cabinet or ministerial level, and possibly a subcommittee in charge of overseeing labour and/or environmental issues, as

²¹⁸ Switzerland began incorporating references to an intergovernmental committee in its FTAs in 2011, while Australia added such provisions after 2014 (2014 Australia-Korea FTA, 2018 Australia-Peru FTA).

in the US and Swiss cases. **These are established at the pre-ratification stage of the respective agreement.** Their responsibilities range from monitoring and overseeing the implementation of the agreement, to cooperation activities and the exchange of information on TSD issues. The norm is to meet once within the year the agreement was concluded and thereafter, the Parties decide when to meet. For US, Chilean, Canadian and New Zealand agreements, joint councils or committees are the norm. However, **due to implementation challenges in many agreements, some governments go beyond the Joint Committees to form independent governmental bodies tasked with monitoring and implementation of labour and environmental provisions** (see US approach). Such bodies operate at the grassroots levels and can bridge the implementation gaps that are often a challenge under most agreements. Other intergovernmental mechanisms are established under regulatory cooperation. For example, under CETA, there is the Regulatory Cooperation Forum to implement and facilitate cooperation between the EU and Canada.

Table 16: Intergovernmental mechanisms in the third-country FTAs reviewed – labour²¹⁹

	<i>Regulatory Cooperation.²²⁰</i>	<i>Harmonization and or approximation of domestic labour measures</i>	<i>Technical assistance and capacity-building</i>	<i>Intergovernmental committee</i>
USMCA 2018	✓	✓	✓	✓
CPTPP 2018	✓	×	✓	✓
Australia-Peru 2018	✓	×	✓	×
Chile-Argentina 2017	✓	×	✓	✓
Chile-Uruguay 2016	✓	×	✓	✓
Switzerland-Georgia 2016	✓	×	×	✓
Switzerland-Philippines 2016	✓	×	×	✓
Canada-Ukraine 2016	✓	×	✓	✓
Korea-New Zealand 2015	✓	×	✓	✓
Japan-Mongolia 2015	×	×	×	×
Australia-Korea 2014	✓	×	✓	✓
Canada-Korea 2014	✓	✓	✓	✓
New Zealand-Taiwan 2013	✓	×	✓	×
Switzerland-Central America 2013	✓	×	✓	✓
Switzerland-Bosnia Herzegovina 2013	✓	×	×	✓
Canada-Honduras 2013	✓	×	×	✓
Australia-Malaysia 2012	×	×	×	×
Switzerland-Montenegro 2011	✓	×	×	✓
Switzerland-Hong Kong 2011	✓	×	×	×
New Zealand-Hong Kong 2010	✓	×	×	×
Canada-Panama 2010	✓	×	×	✓
New Zealand-Malaysia 2009	✓	×	×	✓
Canada-Jordan 2009	✓	✓	✓	✓
Canada-Colombia 2008	✓	✓	✓	✓
Canada-Peru 2008	✓	✓	✓	✓
US-Panama 2007	✓	×	✓	✓
US-Korea 2007	✓	✓	×	✓
Japan-Thailand 2007	×	×	×	×
US-Peru 2006	✓	×	✓	✓

²¹⁹ Joint scientific cooperation is not applicable under labour provisions but under environmental provisions.

²²⁰ This category includes cooperation activities, such as information exchange.

	<i>Regulatory Cooperation.²²⁰</i>	<i>Harmonization and or approximation of domestic labour measures</i>	<i>Technical assistance and capacity-building</i>	<i>Intergovernmental committee</i>
US-Colombia 2006	✓	×	✓	✓
Chile-Colombia 2006	×	×	×	✓
US-Oman 2006	✓	×	×	✓
US-Bahrain 2005	✓	×	×	✓
New Zealand-Thailand 2005	×	×	×	×
Trans-Pacific Strategic EPA 2005	✓	×	×	×
CAFTA-DR 2004	✓	×	✓	✓
Australia-US 2004	✓	×	✓	✓
US-Morocco 2004	✓	×	✓	✓
US-Chile 2003	✓	×	×	✓
Canada-Costa Rica 2001	✓	×	✓	✓
US-Jordan 2000	✓	×	✓	✓
Canada-Chile 1996	✓	✓	✓	✓
NAFTA 1994	×	×	✓	✓

Sources: LABPTA, DTA.

Table 17: Intergovernmental mechanisms in the third-country FTAs reviewed - environment

	<i>Regulatory Cooperation activities</i>	<i>Harmonization of domestic labour measures</i>	<i>Technical assistance and capacity-building</i>	<i>Intergovernmental committee</i>	<i>Joint scientific cooperation</i>
USMCA 2018	✓	✓	✓	✓	✓
CPTPP 2018	✓	✓	✓	✓	✓
Australia-Peru 2018	✓	×	✓	×	×
Chile-Argentina 2017	✓	×	✓	✓	×
Chile-Uruguay 2016	✓	×	✓	✓	✓
Switzerland-Georgia 2016	✓	×	×	✓	×
Switzerland-Philippines 2016	✓	×	×	✓	×
Canada-Ukraine 2016	✓	×	×	✓	×
Korea-New Zealand 2015	✓	✓	×	✓	✓
Japan-Mongolia 2015	✓	×	✓	✓	×
Australia-Korea 2014	✓	×	×	✓	×
Canada-Korea 2014	✓	×	×	✓	×
New Zealand-Taiwan 2013	✓	✓	×	✓	✓
Switzerland-Central America 2013	✓	×	✓	✓	×

	<i>Regulatory Cooperation activities</i>	<i>Harmonization of domestic labour measures</i>	<i>Technical assistance and capacity-building</i>	<i>Intergovernmental committee</i>	<i>Joint scientific cooperation</i>
Switzerland-Bosnia Herzegovina 2013	✓	×	×	✓	×
Canada-Honduras 2013	✓	×	✓	✓	✓
Australia-Malaysia 2012	✓	×	✓	×	×
Switzerland-Montenegro 2011	✓	×	×	✓	×
Switzerland-Hong Kong 2011	✓	×	×	×	×
New Zealand-Hong Kong 2010	✓	×	×	✓	✓
Canada-Panama 2010	✓	×	✓	✓	✓
New Zealand-Malaysia 2009	✓	✓	×	✓	✓
Canada-Jordan 2009	✓	×	×	✓	✓
Canada-Colombia 2008	✓	×	✓	✓	✓
Canada-Peru 2008	✓	×	✓	✓	✓
US-Panama 2007	✓	✓	✓	✓	✓
US-Korea 2007	✓	✓	×	✓	✓
Japan-Thailand 2007	✓	×	✓	✓	✓
US-Peru 2006	✓	✓	✓	✓	✓
US-Colombia 2006	✓	×	×	✓	×
Chile-Colombia 2006	✓	×	×	✓	✓
US-Oman 2006	✓	×	✓	✓	✓
US-Bahrain 2005	✓	×	✓	✓	✓
New Zealand-Thailand 2005	×	×	×	✓	×
Trans-Pacific Strategic EPA 2005	×	×	×	✓	✓
CAFTA-DR 2004	✓	×	✓	✓	✓
Australia-US 2004	✓	×	✓	✓	✓
US-Morocco 2004	✓	×	✓	✓	✓
US-Chile 2003	✓	×	✓	✓	✓
Canada-Costa Rica 2001	✓	×	×	✓	✓
US-Jordan 2000	✓	×	✓	✓	×
Canada-Chile 1996	✓	✓	✓	✓	✓
NAFTA 1994	✓	✓	✓	✓	✓

Sources: TREND, DTA.

Technical assistance and capacity-building

Most agreements with environmental and labour chapters recognise the need for technical assistance and capacity building. **These provisions tend to be incorporated in agreements where the trading partners have different levels of economic development and regulatory frameworks.** Generally, technical assistance and capacity-building provisions reaffirm their TSD commitments and objectives, commit to undertake activities in compliance with national programmes, development strategies and priorities, provide opportunities for public participation, and strengthen the capacity of the parties as well as exchange of information.

However, each Party has a set of TSD objectives, which help define policy priorities for technical assistance. For example, technical assistance and capacity-building activities in the US are mainly informed by the objectives of the Trade Promotion Act which stipulates that one of the main goals of the US government is “to address and maintain US competitiveness in the global economy.” As such, the President has the power to direct the heads of relevant Federal agencies to work to strengthen the capacity of US trading partners to carry out obligations under FTAs by consulting with any country seeking an FTA with the US concerning that country’s laws relating to customs and trade facilitation, SPS measures, TBT, IP rights, labour, and the environment; and to provide technical assistance to that country if needed.²²¹ This serves as the foundation for all US technical assistance provisions.

These provisions are either incorporated as a separate chapter (CAFTA-DR-Labour Cooperation and Capacity Building Mechanism) or as integral chapters in an FTA (US-Peru FTA). As illustrated in the US objectives, the provisions are designed to cover compliance gaps and challenges associated with implementing TSD through strengthening the capacity of the third Parties. **The scope and content of technical assistance provisions differ from agreement to agreement but mostly entail technical assistance programmes, including the provision of human, technical, and material resources to strengthen institutions and introduce reforms.** For example, under NAFTA, areas of focus for technical assistance and capacity-building include provisions designed to minimise environmental impacts on trade, labelling, financing, and purchasing of environmentally friendly products, while the US-Peru FTA focuses on reducing mining pollution, training to reduce pollution and cooperation on emissions.²²² Thus depending on the priorities of the parties, the scope and areas of cooperation will always be on case-by-case basis.

Most agreements concluded by the US and Canada, include provisions on the establishment of a Labour Cooperation and Capacity Building Mechanism (US-Peru FTA, US Singapore FTA). This mechanism ensures that activities are consistent with each Party’s national programmes, development strategies, and priorities. Parties are also responsible for establishing priorities, developing specific cooperative activities, and for exchanging information (conferences, collaborative research) related to TSD provisions. For environmental issues, some provisions contain a priority list of focus areas for cooperation activities with a work programme. For example, under CAFTA-DR, areas of cooperation include strengthening each Party’s environmental management systems, including reinforcing institutional and legal frameworks and the capacity to develop, implement, administer and enforce environmental laws, regulations, standards and policies.

²²¹ *Bipartisan Congressional Trade Priorities and Accountability Act of 2015*. Available at: <https://www.congress.gov/bill/114th-congress/senate-bill/995>

²²² *The World Bank (2009). Environmental provisions in regional trade agreements: lessons for China*. Available at: <https://documents1.worldbank.org/curated/en/217811468011419020/pdf/513160v20white1nt1Policy1Note1final.pdf>

Under the US-Peru FTA, cooperation activities entail strengthening the institutional capacity of labour administrations and tribunals; establishment and strengthening of alternative labour dispute resolution mechanisms; improvement of social dialogue among workers; cooperation on occupational safety and ensure health compliance; mechanisms and best practice to protect and promote the rights of migrant workers; programmes for social assistance and training.

For Canada under CPTPP, cooperation areas include the ozone layer, pollution of the marine environment and conservation of the environment. The agreement includes cooperation activities through dialogues, workshops, seminars, conferences, collaborative programmes and projects; technical assistance to promote and facilitate cooperation and training; the sharing of best practices on policies and procedures; and the exchange of experts. Similarly, cooperation activities under CPTPP are not so different from activities under the USMCA. However, the latter goes into further detail and provides a list of areas for cooperation including labour laws and practices and their implementation, forced labour, child labour, violence against workers, human trafficking, occupational safety and health, labour inspections and gender, among others.

However, **technical assistance and capacity-building are often optional, and agreements do not normally specify a budget that will be dedicated to technical assistance and capacity-building activities** (see discussion on budget for technical assistance and capacity under 7.2.6). Rather the agreements include provisions on the implementation of cooperation activities, which include but are not limited to technical assistance programmes. However, this is only found in US agreements, while other agreements such as CPTPP include a waiver that the implementation of cooperative activities is subject to the availability of funds and of human and other resources.

Such technical assistance has led to tangible outcomes in specific cases. For example, the US has provided technical assistance and capacity-building assistance to government entities: commonly cited case studies where capacity-building and technical assistance led to positive institutional and legal reforms include the US-Cambodia textile trade agreements, the US-Peru FTA and the CAFTA-DR.

Regulatory harmonisation/mutual recognition

Most trade agreements include provisions for mutual or unilateral recognition of conformity assessment procedures and mandatory technical regulations as part of regulatory cooperation activities. This mostly relates to sector-specific commitments in respect of good regulatory practices, use of international standards, encouraging or implementing mutual recognition or more closely aligning the regulatory approaches of the partners. However, **not many trade agreements outside the EU agreements have incorporated regulatory harmonisation of environmental provisions.**²²³ There are a few exceptions such as NAFTA, the US-Korea FTA, the Canada-Chile FTA and the CPTPP. The US-Korea agreement is one of the first FTAs to include a provision on regulatory harmonization in the environmental field.²²⁴ While most countries excluded regulatory harmonisation provisions in their agreements, recent agreements have subsequently been incorporating harmonisation provisions particularly relating to environmental standards (New Zealand-Korea FTA, Canada-Chile FTA, and USMCA among others).

²²³ Morin and Rochette (2017).

²²⁴ *Ibid.*

7.1.3 The role of international organisations in implementing TSD provisions

International organisations have been at the forefront and initiators of sustainable development issues at the international level. The different conventions and agreements have laid the general frameworks for sustainability objectives across the globe. Key international organisations include the OECD (sustainability policy-making), ILO (labour), WTO (trade liberalisation), as well as the UN and its agencies including the United Nations Development Programme (UNDP), the United Nations Conference on Sustainable Development (UNCSD), the United Nations Environment Programme (UNEP), as well as the United Nations High Commissioner for Refugees (UNHCR) for various activities on the environment and sustainable development issues. By signing and ratifying the different conventions and treaties, some countries have committed to implementing the policies and principles embodied, while others have abstained from signing international treaties often for financial or ideological reasons. With more and more trade agreements incorporating references to international conventions or multilateral environmental agreements, trade partner countries who have not implemented them are incentivised to come on board. However, the responsibility of implementation poses a challenge for many developing countries. As a result, international organisations are often called upon to assist when trade agreements incorporate environmental and labour provisions.

Generally, international institutions like the ILO can provide assistance to countries with legal clarifications of labour provisions, compliance assessments, facilitate ratification, implementation and dispute resolution among others. Through these activities, the ILO strengthens the capacity of many countries towards a universal standard of labour rights and protections. Also prior to ratification of FTAs, the ILO plays a critical role in assisting parties to comply with ILO standards through introducing labour reforms and ratifying outstanding ILO conventions. As a result, some trade agreements have crafted a role for the ILO in the administration of their social provisions under the TSD or labour chapters to either provide technical assistance, advisory services, or capacity building activities. **While not many trade agreements create a role for international organisations, it appears that the norm is to involve them mainly through references relating to technical assistance and capacity building activities for labour provisions.** In addition, international organisations may also play a role when it comes to dispute settlement related to ILO instruments.

Many agreements contain provisions allowing for consultations with relevant experts and entities such as the ILO.²²⁵ This is particularly prevalent in the US FTAs, that allow the institutions established under the agreement to request ILO assistance regarding the overall implementation of the labour provisions or, in the case of certain agreements (e.g., those concluded by Canada), authorise the Parties to “*establish cooperative arrangements*” with the ILO as well as other organisations.²²⁶ Most of the agreements concluded by the US contain pre-ratification requirements of ILO conventions. For example, in line with US pre-ratification requirements, Chile ratified eight ILO fundamental conventions and enacted significant reforms to its labour code, which were drafted with technical assistance from the ILO.²²⁷ An analysis of most of the agreements concluded by the US indicates that enabling the participation of international organisations in trade agreements strengthens capacity and increases transparency in trading partner countries. Countries that have

²²⁵ Agustí-Panareda et al. (2014).

²²⁶ *Ibid.*

²²⁷ Rogowsky and Chyn (2007).

implemented reforms through trade agreements with the US include Jordan, Singapore, and the Parties to the Dominican Republic-Central America Free Trade Agreement, Australia, and Morocco.²²⁸ The prevalence of the ILO with regard to labour rights contrasts with the environmental field, where no international organisation fulfils this advisory role.

7.1.4 Civil society participation

Over the past two decades, the proliferation of deep trade agreements with consequences for businesses, workers and citizens in many regulatory spheres has raised public demands to democratise the trade policy process. Governments have responded by seeking to increase transparency in trade negotiations and by giving greater leeway for civil society²²⁹ to participate in trade policymaking at different stages of the decision-making process. To understand the institutional mechanisms of civil society participation, the study starts by examining the following question: who participates and who does not?

Among civil society actors, labour unions were long the most common non-business stakeholder in civil society mechanisms, reflecting the greater prominence of workers' rights in the implementation of TSD provisions. However, the **expanding scope of TSD provisions beyond workers' rights has brought in new actors, among which environmental, human rights, consumer, indigenous rights and women's rights organisations.** Civil society membership has often evolved as a result of domestic pressure pushing for new trade linkages (e.g., the creation of the US Trade and Environment Policy Advisory Committee (TEPAC) in 1994),²³⁰ as a response to government officials' will to open the policy process and/or their will to prioritise certain issues. Thus, while recent EU trade policy debates have seen increased participation among digital rights' organisations and animal welfare advocates, Canada's "inclusive trade policy" has encouraged input from women's rights organisations, indigenous communities and environmental NGOs thanks to civil society mechanisms that are dedicated to specific issues.

With regard to eligibility criteria for membership, other countries have, like the EU, committed to a "balanced" set of interests represented in civil society committees.²³¹ In the US, the requirement that advisory committees be "*fairly balanced in terms of point of view*"²³² has been subject to litigation by civil society actors, leading them to obtain additional seats in certain industry trade advisory committees (e.g., committees focused on the chemical industry, as well as the lumber and wood industry committees). Certain TSD committees, like TEPAC (the US Trade and

²²⁸ *Ibid.*

²²⁹ This study uses the definition of the World Bank, which defines civil society as "non-governmental and not-for-profit organizations that have a presence in public life, expressing the interests and values of their members or others, based on ethical, cultural, political, scientific, religious or philanthropic considerations. Civil Society Organizations (CSOs) therefore refer to a wide array of organizations: community groups, non-governmental organizations (NGOs), labour unions, indigenous groups, charitable organizations, faith-based organizations, professional associations, and foundations." World Bank (2013). *Defining Civil Society* <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/0,,contentMDK:20101499~menuPK:244752~pagePK:220503~piPK:220476~theSitePK:228717,00.html>

²³⁰ Tamara Kay and R.L. Evans (2018). "Trade Battles. Activism and the Politicization of International Trade Policy", Oxford University Press.

²³¹ See e.g. Commission of the European Communities (2002). *Communication from the Commission: Towards a reinforced culture of consultation and dialogue – general principles and minimum standards for consultation of interested parties by the Commission, COM (2002) 704, cited in Drieghe et al. (2021).*

²³² This is under the 1972 Federal Advisory Committee Act (FACA).

Environment Policy Advisory Committee), explicitly forbid the participation of registered lobbyists.²³³ Despite these attempts to codify civil society participation, appointments in US trade advisory committees have not been immune to politicization, as revealed by a 2002 report by the Government Accountability Office, which provided evidence that the administration of George W. Bush sought to exclude non-business interests from trade advisory committees.²³⁴ Beyond institutional design and partisanship, common factors of exclusion from civil society mechanisms pertain to the financial costs of consultation, opposition on ideological grounds,²³⁵ as well as technical barriers pertaining to the technicalities of trade law.²³⁶

Table 18 provides an overview of specific civil society committees dedicated to the implementation of TSD provisions in seven selected countries. It shows that stakeholder selection is primarily FTA-specific and issue-driven.

²³³ *Federal Register* (2019). "Notice of Continuation and Request for Nominations for the Trade and Environment Policy Advisory Committee". Available at: <https://www.federalregister.gov/documents/2019/10/04/2019-21669/notice-of-continuation-and-request-for-nominations-for-the-trade-and-environment-policy-advisory>

²³⁴ *Government Accountability Office* (2002), p. 61-64.

²³⁵ Some distinguish insiders from outsiders in trade policy debates, the latter engaging with trade officials to reform the policy process, while the others contest the logic of globalization and are more prone to direct action to mobilize against trade agreements. Jean-Baptiste Velut (2021). "Rapport d'étape sur l'altermondialisme américain", *Politique Américaine*, n°15, 2009-2020, 97-213. Scholte defines four different types of civil society organisations in their relation with the global economy: "conformist" organisations, which are satisfied with the status quo, "reformist" groups, that accept globalisation but want to reform it, "rejectionists," who want to eliminate the global economy altogether, and "transformists," who want to use the global economy to bring about a social revolution. Jan Aart Scholte (2004). "Democratizing the Global Economy: The Role of Civil Society", Coventry (UK), Center for the Study of Globalisation and Regionalisation.

²³⁶ For a discussion of the Canadian case, see Robert Wolfe (2007). "Transparency and public participation in the Canadian trade policy process", in Mark Halle & Robert Wolfe (eds.), *Process Matters: Sustainable Development and Domestic Trade Transparency*, Earthprint Library, 21-72.

Table 18: Who participates? Civil society inclusion for the implementation and enforcement of TSD provisions

	Civil society mechanisms	Issues	Level	Membership	Scope: FTA-specific or cross-FTAs
EU	Domestic Advisory Groups	Social and environmental issues	EU-level	Unions, NGOs, business	FTA-specific
	Civil Society Forum	Social and environmental issues	Transnational	Unions, NGOs, business	FTA-specific
US	National advisory committee	Labour	National	Unions, NGOs, business, academic experts	Cross-FTAs
Canada	Issue-based mechanisms, including for CETA DAG and Civil Society Forum (CSF)	Social and environmental issues	National for DAG, transnational for CSF	In CETA DAG: Unions, NGOs, business, academic experts	FTA-specific
New Zealand	No formal civil society mechanism (ad hoc consultations)	Social and environmental issues	National	Unions, NGOs, business, academic experts etc.	FTA-specific
Chile	No formal civil society mechanism (ad hoc consultations)	Social and environmental issues	National	Unions, NGOs, business, academics etc.	FTA-specific
Australia	No formal civil society mechanism (ad hoc consultations)	Social and environmental issues	National	Unions, NGOs, business, consumer organisations, academics	FTA-specific
Switzerland	EFTA Consultative Committee (and broader ad hoc consultations)	Labour and social issues	Regional (EFTA countries)	Unions, business	Cross-FTAs, but not trade specific
Japan	No formal civil society mechanism, except for EU-Japan DAG and Civil Society Forum (CSF)	Social and environmental issues	National for DAG, transnational for CSF	Unions, business, NGOs	FTA-specific

Table 18 above reveals that **with the exception of the US, civil society participation is largely FTA-specific**. Or, to put it differently, **it is rarely institutionalised across several FTAs**. Although

many countries openly support the participation of non-state actors in trade policymaking,²³⁷ they tend to resort to **ad hoc consultations on the implementation of trade agreements instead of formal civil society committees like EU domestic advisory groups**. The US and Switzerland do have dedicated civil society committees across FTAs. For instance, the National Advisory Committee for Labour Provisions in US Free Trade Agreements is composed of 12 members divided between public experts, trade union members and business representatives. Other countries like Canada or Japan do not have permanent cross-FTA civil society mechanisms but have experimented more institutionalised forms within the framework of their FTA with the EU. Civil society organisations also participate in enforcement mechanisms, most notably via public submissions for non-compliance. The latter are discussed in the next section.

Table 19: Civil society participation in implementation and monitoring of TSD provisions in third-country FTAs - Labour

Trade agreements	Monitoring of implementation at national level	Monitoring of implementation at transnational level	Participation in impact assessment	Public submission on TSD
USMCA 2018	✓	✓	×	✓
CPTPP 2018	✓	✓	×	✓
Australia-Peru 2018	✓	✓	×	×
Chile-Argentina 2017	✓	×	×	×
Chile-Uruguay 2016	✓	×	×	×
Switzerland-Georgia 2016	×	×	×	×
Switzerland-Philippines 2016	×	×	×	×
Canada-Ukraine 2016	✓	✓	×	✓
Korea-New Zealand 2015	✓	×	×	×
Japan-Mongolia 2015	×	×	×	×
Australia-Korea 2014	×	×	×	×
Canada-Korea 2014	✓	×	×	✓
New Zealand-Taiwan 2013	✓	✓	×	×
Switzerland-Central America 2013	×	×	×	×
Switzerland-Bosnia Herzegovina 2013	×	×	×	×
Canada-Honduras 2013	✓	✓	×	✓
Australia-Malaysia 2012	×	×	×	×
Switzerland-Montenegro 2011	×	×	×	×
Switzerland-Hong Kong 2011	×	×	×	×
New Zealand-Hong Kong 2010	✓	×	×	×

²³⁷ See e.g. Government of Canada, "Trade Policy 101" and especially "Canada's inclusive approach to trade", available at: https://www.international.gc.ca/trade-commerce/trade_topics-domaines_commerce/policy_101_fondements_politique.aspx?lang=eng; European Free Trade Association (EFTA), "Trade and Sustainable Development: EFTA's Experience and Outlook", November 2020, available at https://www.efta.int/sites/default/files/documents/free-trade/EFTA-Sustainable-Development_%20EFTAs-experience-and-Outlook_Website-report.pdf

<i>Trade agreements</i>	<i>Monitoring of implementation at national level</i>	<i>Monitoring of implementation at transnational level</i>	<i>Participation in impact assessment</i>	<i>Public submission on TSD</i>
Canada-Panama 2010	✓	×	×	✓
New Zealand-Malaysia 2009	✓	×	×	×
Canada-Jordan 2009	✓	×	×	✓
Canada-Colombia 2008	✓	×	×	✓
Canada-Peru 2008	✓	×	×	✓
US-Panama 2007	✓	×	×	✓
US-Korea 2007	✓	×	×	✓
Japan-Thailand 2007	×	×	×	×
US-Peru 2006	✓	×	×	✓
US-Colombia 2006	✓	×	×	✓
Chile-Colombia 2006	✓	✓	×	×
US-Oman 2006	✓	×	×	✓
US-Bahrain 2005	✓	×	×	✓
New Zealand-Thailand 2005	×	×	×	×
Trans-Pacific Strategic EPA 2005	×	×	×	×
CAFTA-DR 2004	✓	×	×	✓
Australia-US 2004	✓	×	×	✓
US-Morocco 2004	✓	×	×	✓
US-Chile 2003	✓	×	×	✓
Canada-Costa Rica 2001	✓	✓	×	×
US-Jordan 2000	×	×	×	✓
Canada-Chile 1996	✓	×	×	✓
NAFTA 1994	✓	×	×	✓

Table 20: Civil society participation in implementation and monitoring of TSD provisions in the third-country FTAs - environment

<i>Trade agreements</i>	<i>Monitoring of implementation at national level</i>	<i>Monitoring of implementation at transnational level</i>	<i>Participation in impact assessment</i>	<i>Public submission on TSD</i>
USMCA 2018	✓	✓	×	✓
CPTPP 2018	✓	✓	×	✓
Australia-Peru 2018	×	×	×	×
Chile-Argentina 2017	✓	×	×	×
Chile-Uruguay 2016	✓	×	×	×
Switzerland-Georgia 2016	×	×	×	×
Switzerland-Philippines 2016	×	×	✓	×
Canada-Ukraine 2016	✓	✓	✓	✓

<i>Trade agreements</i>	<i>Monitoring of implementation at national level</i>	<i>Monitoring of implementation at transnational level</i>	<i>Participation in impact assessment</i>	<i>Public submission on TSD</i>
Korea-New Zealand 2015	✓	✓	✓	✗
Japan--Mongolia 2015	✓	✗	✗	✗
Australia-Korea 2014	✗	✗	✗	✗
Canada-Korea 2014	✓	✓	✓	✓
New Zealand-Taiwan 2013	✓	✗	✗	✗
Switzerland-Central America 2013	✗	✗	✗	✗
Switzerland-Bosnia Herzegovina 2013	✗	✗	✗	✗
Canada-Honduras 2013	✓	✗	✗	✓
Australia-Malaysia 2012	✗	✗	✗	✗
Switzerland-Montenegro 2011	✗	✗	✗	✗
Switzerland-Hong Kong 2011	✗	✗	✗	✗
New Zealand-Hong Kong 2010	✓	✗	✗	✗
Canada-Panama 2010	✓	✗	✓	✓
New Zealand-Malaysia 2009	✓	✗	✓	✗
Canada-Jordan 2009	✓	✓	✓	✓
Canada-Colombia 2008	✓	✗	✗	✓
Canada-Peru 2008	✓	✗	✓	✓
US-Panama 2007	✓	✓	✗	✓
US-Korea 2007	✓	✓	✓	✓
Japan-Thailand 2007	✗	✗	✗	✗
US-Peru 2006	✓	✓	✗	✓
US-Colombia 2006	✓	✓	✗	✓
Chile-Colombia 2006	✓	✗	✓	✓
US-Oman 2006	✓	✗	✗	✓
US-Bahrain 2005	✓	✗	✗	✓
New Zealand-Thailand 2005	✓	✗	✗	✗
Trans-Pacific Strategic EPA 2005	✓	✗	✗	✗
CAFTA-DR 2004	✓	✓	✓	✓
Australia-US 2004	✓	✗	✗	✓
US-Morocco 2004	✓	✗	✗	✓
US-Chile 2003	✓	✓	✓	✓
Canada-Costa Rica 2001	✓	✗	✗	✓
US-Jordan 2000	✓	✗	✗	✓
Canada-Chile 1996	✓	✓	✓	✓
NAFTA 1994	✓	✓	✗	✓

7.1.5 *Conclusions on implementation provisions in the selected countries' FTAs*

The comparative analysis of TSD provisions across the seven selected countries shed light on **four important dimensions** of implementation mechanisms. First, the most **common institutional mechanism** to deploy FTAs consists of joint committees and/or national contact points typically comprised of government officials at the cabinet or ministerial level. These institutions often deal with labour and environmental issues jointly, although there are cases of specific subcommittees in charge of overseeing labour or environmental issues. The creation of independent governmental bodies to monitor TSD provisions as in the NAFTA case are an exception to the rule.

Second, **even for sanction-based enforcement models like in Canada and the US, cooperation remains the watchword for the implementation of TSD provisions**, as illustrated by the prevalence of cooperation provisions in the selected FTAs' labour and environmental provisions. Explicit references to technical assistance and capacity-building programmes are much less common among the seven countries. They primarily feature in Canadian and US FTAs, but are also included in some recent agreements signed by Australia, New Zealand and Switzerland. Unexpectedly, the **economic development level of a trade partner country is not the only factor driving the inclusion of technical assistance and capacity-building provisions**, to the extent that "North-North" FTAs can include such provisions, whereas "North-South" FTAs may not. Commitments to regulatory harmonisation is even less common outside US and Canadian FTAs.

Third, the comparative analysis of TSD provisions shows that **references to international treaties are common for labour, social and environmental standards in most selected FTAs, but that the most frequent international organisation referred to remains the ILO**. Many agreements contain provisions allowing for consultations with the ILO, whether for assistance with ILO conventions at the pre-ratification stage, or more marginally during labour disputes (see enforcement section). In practice and as Section 6.2 illustrates, ILO assistance has been particularly effective to push developing countries to ratify ILO conventions at the pre-ratification stage. **The pre-eminence of the ILO for the implementation of labour standards contrasts with the environmental field, where no international organisation fulfils a comparable advisory function.**

Fourth, among the seven countries under study, **civil society participation is rarely institutionalised and harmonised across several FTAs**. Although many countries openly support the participation of non-state actors in trade policymaking, **they tend to resort to ad-hoc consultations on the implementation of trade agreements instead of formal civil society committees like EU domestic advisory groups.**

7.2 Enforcement provisions

The enforcement mechanisms of TSD provisions have often been at the centre of policy debates, at times obscuring important implementation questions discussed in the previous section. The following section presents a granular analysis of the legal mechanisms under which trade agreements are enforced. In this prospect, this section examines the seven selected countries' approach to enforcement with respect to both environmental and labour provisions.

7.2.1 Enforcement provisions: Country-based approaches

Australia

The three agreements to which Australia has been Party with significant labour provisions are the Australia-US Free Trade Agreement (AUSFTA) (2002), the CPTPP, and the Australia-Peru FTA. The first two were templates that Australia signed onto. The Australia-Peru FTA represents Australia's own negotiated version of labour and environmental chapters, which rely substantially more on consultation and soft obligations.

The AUSFTA's provisions are consistent with the Generation Three agreements of the US.²³⁸ That is, it contains language that each Party shall strive to ensure that it recognises ILO rights and principles at work; and strive to ensure that it does not derogate its labour laws as an encouragement for trade with the other Party. It also contains the obligation that each Party shall not fail to effectively enforce its labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade.

The CPTPP adopts the US model of enforceable provisions, including the commitments to “*adopt and maintain in its statutes, practices thereunder*” the core ILO rights; a non-derogation clause that also explicitly applies to Export Processing Zones (EPZs); and a requirement that “*No Party shall fail to effectively enforce its labour laws [and environmental] laws through a sustained or recurring course of action or inaction.*” Violations of the core obligations must be in a manner affecting trade or investment between the Parties.

The CPTPP also subjects the provisions of the labour and environmental chapters to the standard dispute settlement procedures that are applicable to other chapters. These entail, in the case of labour that the Parties first enter into labour consultations upon the request of another Party. If consultations under the labour chapter fail to resolve the matter, the Parties may proceed to the CPTPP's dispute settlement process. **In the case of environmental disputes, there are three levels of consultations that must be completed before the dispute settlement chapter can be utilised.**²³⁹ The dispute settlement process includes the establishment of a panel of experts that issues a report based on its findings. **If the respondent Party does not eliminate the non-conformity identified by the panel, the complaining Party can seek other remedies. Remedies include compensation by the respondent Party, if it can be agreed upon, or suspension of benefits if it cannot be.** These might include raising tariffs, preferably on the same “subject matter” as was implicated in the complaint.

The CPTPP is an enhanced version of Generation Four of US agreements. It contains the standard enforcement provision that is enhanced in that it explicitly includes provisions on forced labour, as well as a provision encouraging corporate social responsibility on the part of firms in signatory countries.

The Australia-Peru FTA provides that the Parties shall “*endeavour to adopt and maintain in their labour laws and practices thereunder, the principles as stated in the ILO Declaration*”;²⁴⁰ that “*Neither*

²³⁸ See *supra*.

²³⁹ These include “*environmental consultations*,” “*senior representative consultations*,” and finally “*ministerial consultations*.” See *TPP Agreement (as incorporated into CPTPP Agreement) Arts 20-22*.

²⁴⁰ *Australia Peru FTA Art 18.3*.

Party shall fail to effectively enforce its labour laws”, including those related to the ILO Declaration and its Follow Up, “*through a sustained or recurring course of action or inaction, in a manner substantially affecting trade or investment between the Parties*”;²⁴¹ and that neither Party derogates from its labour laws implementing the ILO core rights.²⁴² Finally, it provides that each Party will provide procedural guarantees to its citizens that they have access to impartial tribunals to enforce their labour laws with due process of law.²⁴³

In addition to these agreements, Australia has concluded a workplace placement training MoU with Indonesia as part of its Comprehensive Economic Partnership Agreement to enable short-time skills training,²⁴⁴ and has included a labour mobility provision in Pac Agreement on Closer Economic Relations (PACER Plus) (concluded on 20 April 2017).

With regards to the enforcement of environment provisions, the environment chapter in the AUSFTA reflects the Generation Three environmental provisions discussed in the US Section.²⁴⁵ The agreement provides that “*neither Party shall fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties...*” Only this provision is subject to the dispute settlement chapter.

The CPTPP’s core obligation is that no Party shall fail to effectively enforce its environmental laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties, after the date of entry into force of this Agreement for that Party.²⁴⁶ In addition, “*a Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental laws in a manner that weakens or reduces the protection afforded in those laws in order to encourage trade or investment between the Parties.*”²⁴⁷ Finally, the Parties also commit to “take measures” to control production and consumption of ozone damaging substances,²⁴⁸ and prevent the pollution of the marine environment from ships.²⁴⁹

The Peru-Australia FTA has relatively non-binding commitments. It provides that each Party shall “*strive to ensure*” that its environmental laws and policies encourage high levels of environmental protection and continue to improve its respective levels of environmental protection,²⁵⁰ and a non-derogation clause subject to the sovereign rights of each Party that it “*is inappropriate to encourage trade or investment by weakening or reducing the protection afforded in their respective environmental laws*”.²⁵¹

Public submission

The AUSFTA requires that the Parties include procedures for “*interested persons to request the Party’s competent authorities to investigate alleged violations of its environmental laws.*”²⁵² The

²⁴¹ *Id* at Art 18.4.1.

²⁴² *Id* at Art 18.4.2.

²⁴³ *Id* at Art 18.5.

²⁴⁴ See *Indonesia-Australia Comprehensive Partnership Agreement (2020)*.

²⁴⁵ See *supra*.

²⁴⁶ CPTPP Art 20.3.

²⁴⁷ *Id* at Art 20.6.

²⁴⁸ *Id* at Art 20.5.

²⁴⁹ *Id* at Art 20.6.

²⁵⁰ *Australia Peru FTA Art 19.3.4.*

²⁵¹ *Id* at Art 19.3.3.

²⁵² AUSFTA, Art 19.3.4.

CPTPP provides that each Party shall provide a mechanism for the “*receipt and consideration of written submissions from persons of that Party regarding its implementation of this Chapter*”.²⁵³ The chapter also provides that “*if a submission asserts that a Party is failing to effectively enforce its environmental laws and following the written response to the submission by that Party*”, then a Party can make a request to the Committee on Environment to discuss the submission and to consider whether the matter would benefit from cooperative activities. The Australia-Peru FTA has no explicit public submission procedures.

Dispute settlement

In the AUSFTA, the same dispute settlement procedures apply to the environmental chapter as to other chapters. The dispute may proceed to those procedures only after environmental consultations between the Parties have failed to resolve the matter. A monetary assessment is the primary remedy available. As is consistent with other third-generation US FTAs, the monetary assessment, capped at \$15 million dollars adjusted for inflation, is the sole remedy available for labour and environmental matters. The assessment is based on a set of criteria specified in the dispute settlement chapter.²⁵⁴

The CPTPP provides for an **escalating set of consultations** beginning with “environmental consultations”, escalating to Senior Representative Consultations, and then Ministerial Consultations.²⁵⁵ Only then, can the Parties resort to the Dispute Settlement Chapter, where remedies are available including suspension of benefits. The Australia-Peru FTA does not provide for any dispute settlement procedures,²⁵⁶ only for consultations and an “*every attempt to arrive at a mutually satisfactory resolution*” standard.²⁵⁷

Canada

Canada follows a model that is somewhat similar to the US model, but that remains more closely aligned with the original North American Agreement on Labour Cooperation framework, and contains fewer enforceable obligations. Canada’s approach utilises “Labour Cooperation Agreements,” which then morphed into Labour Chapters of free trade agreements. The primary enforceable components of most Canadian labour agreements require the Parties to ensure that its labour law and practices embody and provide protection for the following internationally recognised labour principles and rights, particularly bearing in mind their commitments as members of the ILO to the 1998 ILO Declaration on Fundamental Principles and Rights at Work:

- a) freedom of association and the effective recognition of the right to collective bargaining;
- b) the elimination of all forms of forced or compulsory labour;
- c) the effective abolition of child labour and, for the purposes of this Chapter, a prohibition on

²⁵³ *Id* at Art 20.9.

²⁵⁴ AUSFTA, Art 21.12.2. These include:

- (a) the bilateral trade effects of the Party’s failure to effectively enforce the relevant law;
- (b) the pervasiveness and duration of the Party’s failure to effectively enforce the relevant law;
- (c) the reasons for the Party’s failure to effectively enforce the relevant law;
- (d) the level of enforcement that could reasonably be expected of the Party given its resource constraints;
- (e) the efforts made by the Party to begin remedying the non-enforcement after the final report of the panel; and
- (f) any other relevant factors.

²⁵⁵ CPTPP Articles 20.20-20.22.

²⁵⁶ Australia-Peru FTA Art 19.6.

²⁵⁷ Australia-Peru FTA, Art 19.5.

- the worst forms of child labour;
- d) the elimination of discrimination in respect of employment and occupation;
- e) acceptable minimum employment standards, such as minimum wages and overtime pay, for wage earners, including those not covered by collective agreements;
- f) the prevention of occupational injuries and illnesses, and compensation in cases of injuries or illnesses; and
- g) non-discrimination in respect of working conditions for migrant workers.

These rights are explicitly derived both from the 1998 ILO Declaration, as well as the ILO's Decent Work Agenda. These are more expansive than those listed in the US FTAs.

The agreements also contain non-derogation clauses, which provide that each Party “*shall not, as a means to encourage trade or investment, waive or otherwise derogate from its labour laws in a manner that weakens or reduces adherence to*” the principles and rights enumerated in the agreement. Finally, the agreements also generally provide, under the heading of “government enforcement action,” that each Party shall promote compliance with and effectively enforce its labour law through appropriate government action.

Dispute settlement

Generally, **the agreements provide for an escalating process starting with consultations.** Sometimes there is an article that provides for “labour consultations,”²⁵⁸ sometimes for ministerial consultations²⁵⁹, and sometimes for both.²⁶⁰ The highest-level consultations are to be completed within 180 days.

Then **the Parties have the right to request a review panel**, which is generally composed of three panellists. The panel first reviews if the matter is “trade related,” and if so then proceeds to the merits of the case. Parties may request a review based on the claim that another Party has violated its obligations described earlier. The panel is to conduct a hearing that is open to the public, unless the Parties agree otherwise. Thus, there is a presumption of transparency, but the Parties can choose to make the proceedings closed.

Remedies

The panel has 90 days to issue an initial report, which it gets comments back on from the Parties. Then it has 60 days to issue a final report. If the panel determines there has been non-compliance, the Parties may develop a “*mutually satisfactory action plan to remedy the non-compliance.*”²⁶¹ If the Parties are unable to decide on an action plan, or if there is a failure to implement the action plan, one of the Parties can request to the national contact point that the panel be reconvened to determine if there should be a monetary assessment.

²⁵⁸ See *Canada-Korea Art 18.3.*

²⁵⁹ See e.g. *Canada-Ukraine Art 13.14.*

²⁶⁰ See e.g. *Canada-Israel.*

²⁶¹ See e.g. *Canada-Israel Art 12.14.5.*

The monetary assessment is the sole remedy available, and is to reflect “a *determination of the estimated costs of implementing the action plan or, in the absence of an action plan, other appropriate measures to remedy the non-compliance.*”²⁶²

Jurisdiction and applicability

It is worth noting that because of Canada’s federal system of labour law, Canada is to submit a list of provinces that opt in to the agreement, that such a panel may not be requested if the matter relates to a labour law in a province that has not opted to be bound by the agreement.²⁶³

Public submissions

The agreements provide for “public communications,” that allow for submissions by nationals of each Party to submit communications and complaints related to the obligations undertaken by each Party.²⁶⁴ The agreements also provide for a set of criteria that are to be followed and promulgated for the submission and receipt of public communications.²⁶⁵ Canada has published those procedures on its government’s website.²⁶⁶ The primary criteria for a submission to be received are that a Canadian national:

- 1) explains how the “*matters complained of may constitute non-compliance,*” and specifically: “*describe the failure by the Party being complained against to effectively enforce its labour law or that its labour laws and practices thereunder do not embody and provide protection for the internationally recognised labour principles and rights,*” and
- 2) indicate that relief has been sought under the domestic laws of the Party being complained of.

Once the submission is received, **the National Administrative Office has 60 days to decide whether or not to accept it for review based on the extent to which it meets the criteria. If it is accepted for review, the NAO aims for a report within 180 days.** The timeline contributes to establishing expectations about when actions shall be taken. The guidelines specifically note that the examination could include meetings with the submitters and other interested parties, public meetings or consultations, appointment of an independent reviewer, and requests for additional information. This could include information from experts, academics, constants and other interested individuals or organisations. Notably, the NAO shall make a list of all public communication - accepted or declined - made publicly available.

CPTPP

Canada is a Party to the CPTPP, which was highly influenced by the US approach to labour chapters, despite the fact that the US eventually withdrew from the agreement. The CPTPP adopts the US model of enforceable provisions, including the commitments to “adopt and maintain in its statutes, practices thereunder” the core ILO rights; a non-derogation clause that also explicitly applies to

²⁶² *Id at Annex 12.14.2.*

²⁶³ *Id at Annex 13-D Extent of Obligations.*

²⁶⁴ *See e.g. Id at Art 12.10.*

²⁶⁵ *Id at Annex 12.10 Public Communications Procedures.*

²⁶⁶ Available at <https://www.canada.ca/en/employment-social-development/services/labour-relations/international/agreements/guidelines.html>

EPZs; and a requirement that “No Party shall fail to effectively enforce its labour laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment.” The agreement also includes a separate Article on forced and compulsory labour.²⁶⁷

Finally, the CPTPP is perhaps most notable for the fact that **the signatories had all agreed to a dispute settlement system that was potentially applicable to the entire labour chapter**. This is a unique instance for all the signatories, including Canada, which arguably has a more enforceable set of dispute settlement procedures than other signatories do.

Canada’s approach to enforcement and dispute settlement in its environmental chapters is one primarily of cooperation without recourse to trade remedies. Its dispute settlement processes are not designed to result in confrontational arbitration, but rather to compel the Parties to arrive at a mutually satisfactory result based on consultations, and then if necessary a panel review and report.

Public submissions

The ability to receive public submissions varies by agreement. For example, CETA provides that there be a public submission process in which “Each Party shall be open to receive and shall give due consideration to submissions from the public on matters related to this Chapter, including communications on implementation concerns. Each Party shall inform its respective civil society organizations of those communications through the consultative mechanisms referred to in Article 24.13.5.”²⁶⁸

However, the Canada-Ukraine agreement (2017), for example, provides for a seemingly lesser level of consideration, providing that “An interested person residing in or established in the territory of either Party may submit a written question to either Party through its National Contact Point, indicating that the question is being submitted pursuant to this Article regarding a Party’s obligations under this Chapter. The Party receiving the question shall acknowledge the question in writing, forward the question to the appropriate authority and provide a response in a timely manner.”²⁶⁹

Enforcement processes

The enforcement provisions in the environmental chapters of Canada’s trade agreements vary in some small ways, but generally rely on two central prongs. First, there is a consultation process. At the lowest level, consultations may begin between the Parties upon written request to the national contact point of the other Party.²⁷⁰ If those consultations do not resolve the matter, a Party may request consultations at the Ministerial level. Those consultations are to be completed within 120 days.

²⁶⁷ TPP as incorporated into CPTPP Art 19.6. The article provides that: “Each Party recognises the goal of eliminating all forms of forced or compulsory labour, including forced or compulsory child labour. Taking into consideration that the Parties have assumed obligations in this regard under Article 19.3 (Labour Rights), each Party shall also discourage, through initiatives it considers appropriate, the importation of goods from other sources produced in whole or in part by forced or compulsory labour, including forced or compulsory child labour.”

²⁶⁸ CETA Art 24.7.

²⁶⁹ Canada-Ukraine FTA (2017) at Art 12.13.

²⁷⁰ See e.g. Canada-Ukraine FTA. Art 12.21.4.

Notably, consultations at both levels are assumed to be confidential.²⁷¹ A notable difference in the CETA agreement is that the results of consultations are to be made public, and there is no explicit requirement that consultations themselves remain confidential.²⁷²

In more recent agreements,²⁷³ if those consultations do not resolve the matter, then the requesting Party may request the formation of a review panel. The review panel is empowered to “*issue a report making recommendations for the resolution of the matter.*”²⁷⁴ The review panel is to be chosen.

In the Canada-Honduras Agreement, a panel may be formed if a Party “*considers the consultations have not satisfactorily addressed the matter and that: (a) there is a persistent pattern of failure by the other Party to effectively enforce its environmental law in accordance with Article 4 (Compliance with and Enforcement of Environmental Law); or (b) there is a breach of Article 5 (Non-derogation).*”²⁷⁵

The Canada-Ukraine agreement does not limit the panel’s review to violations of the failure to enforce or non-derogation clauses, but rather more generally, any matters from the “relevant provisions” of the environmental chapter.²⁷⁶ CETA also follows this more general model.²⁷⁷

At the panel review process level, the panel is required to not only receive written and oral submissions from the Parties,²⁷⁸ but also to ensure that “*a non-governmental organization, institution, or person in the territory of either Party with information or expertise relevant to the matter at issue has the opportunity to provide written submissions to the Review Panel,*”²⁷⁹ and that at least one public hearing be held before the panel.²⁸⁰

After providing opportunity for comment and response, a panel issues its final report on its finding of fact and its determination if a Party has violated its obligations under the agreement, the timelines of which are prescribed. The final report is to be made public.

Chile

When it comes to the enforcement of TSD provisions, Chile’s trade agreements differ both in accordance to trade partners, as well as with respect to labour provisions versus environmental provisions. With regards to the latter, the Canada-Chile FTA of 1995 includes reference to most enforceability tools and dispute settlement mechanisms. Interestingly, while it includes a commitment to implement MEAs, it does not include a commitment to ratify MEAs, and conserves the right of non-derogation from domestic laws. However, provisions are included for enforcement via a specific dispute settlement mechanism designed for environmental issues. Moreover, the agreement allows for public submissions for non-compliance, state-to-state consultation and legal

²⁷¹ *Id* at Art12.21.3.

²⁷² See CETA Art 24.14.

²⁷³ See e.g. Canada-Honduras, Canada-Ukraine, CETA.

²⁷⁴ *Id* 12.21.9.

²⁷⁵ Canada-Honduras Art 16.8.

²⁷⁶ Canada-Ukraine, Art 12.21.9. “*To examine, in light of the relevant provisions of Chapter 12 (Environment) of the Canada–Ukraine Free Trade Agreement, the matter referred to in the request for the establishment of the Review Panel, and to issue a report making recommendations for the resolution of the matter.*”

²⁷⁷ CETA Art 24.15.8.

²⁷⁸ *Id* at 12.21.10(a).

²⁷⁹ *Id* at 12.21.10(b).

²⁸⁰ *Id* at 12.21.10(c).

arbitration. It employs a panel of experts and calls for sanctions in the case of non-compliance as well as remedies to those impacted by the lack of compliance.

However, over time Chile's FTAs have included less enforcement provisions for environmental issues. For example, the US-Chile FTA of 2003 was similar to its agreement with Canada, except for the exclusion of legal arbitration or remedies for those impacted by failure to comply with environmental provisions. In 2006, Chile completed negotiations for an agreement with Colombia, only including a commitment to implement MEAs (but not ratify), public submissions for non-compliance, state-to-state consultations, and the use of a panel of experts. It did not mention either sanctions or remedies for failure to comply, any specific DSM, or legal arbitration. However, the two most recent of the selected FTA's - its agreement with Uruguay (2016) and Argentina (2017) - both include identical enforcement provisions. Namely, non-derogation from domestic law, commitments to implement MEAs (but not ratify), a specific DSM for environmental provisions, state-to-state consultations, and the use of a panel of experts.

With regards to the enforcement of labour provisions, Chile's approach is similar to its enforcement of environmental provisions. Its first 1995 agreement with Canada includes reference to most enforceability tools and a commitment to implement ILO conventions (but not ratify them). Moreover, it includes a specific DSM, state-to-state consultations, public submissions for non-compliance, the use of a panel of experts, and legal arbitration. However, it does not reference non-derogation from domestic law, and while it provides remedies to those impacted by non-compliance, it does not include provisions on the use of sanctions. Similarly, Chile's agreement with the US is identical to that with Canada, except for it maintains non-derogation from domestic law, and does not include the capacity for public submissions on non-compliance. Finally, Chile's approach to the enforcement of labour issues in its agreement with Colombia reflects the least provisions as it only includes non-derogation from domestic law.

Japan

Between the two selected FTAs that Japan has negotiated between 2007 and 2015, there has been little progress in its approach to enforcement of both environmental and labour provisions. In fact, with regards to the latter, its 2007 FTA with Thailand included none of the enforcement provisions discussed in this section, and its 2015 FTA with Mongolia further included a provision on non-derogation from domestic law. However, enforcement with regards to environmental provisions was more prominent in the 2007 Japan-Thailand FTA with a commitment to implement MEAs (but not ratify), state-to-state consultations, and the use of a panel of experts, while maintaining non-derogation from domestic law. The 2015 Japan-Mongolia FTA likewise committed to both the implementation of MEAs as well as non-derogation from domestic law, but excluded any specific DSM, public submissions for non-compliance with labour provisions, the capacity for state-to-state consultations, the use of sanctions, and the provision of remedies.

New Zealand

New Zealand's approach to enforcement differs both in accordance to trade partners, as well as with respect to labour provisions versus environmental provisions, where the latter tends to reflect a greater number of enforcement provisions. The 2005 New Zealand-Thailand FTA, for example, includes commitments to implement MEAs (but not ratify), a specific DSM for environmental issues, state-to-state consultation, the use of a panel of experts, and remedies for those impacted by non-compliance with environmental provisions. However, the same trade agreement does not include

any of the same enforcement provisions when it comes to labour issues. However, the 2009 FTA with Malaysia includes the equivalent enforcement provisions for both environmental and labour issues. Namely, commitments to implement MEAs and ILO conventions (but not ratify), state-to-state consultations, and the use of panel experts for issues on compliance with environmental and labour provisions.

With regards to enforcement of environmental provisions, the 2010 New Zealand-Hong Kong FTA only commits the trade partners to implement MEAs, while the 2013 agreement with Taiwan commits both Parties to implement MEAs, includes provisions for state-to-state consultation, the use of a panel of experts and remedies for those impacted by a failure to comply with environmental provisions. The 2015 Korea–New Zealand FTA goes further by including commitments to implementing MEAs, a specific DSM for environmental provisions, public submissions for non-compliance, state-to-state consultations, the use of a panel of experts, as well as remedies.

While the approach to enforcement of labour provisions in the 2010 New Zealand-Hong Kong FTA includes state-to-state consultations and the use of a panel of experts, it does not commit both Parties to implementing the ILO conventions, provide a specific DSM, allow for public submissions of non-compliance, or implement sanctions or remedies in the case of non-compliance. Finally, the 2013 New Zealand-Taiwan FTA and the 2015 New Zealand-Korea FTA are similar in their scope of enforcement provisions for labour issues as both reference non-derogation from domestic law, provide for state-to-state consultations, and the use of a panel of experts. However, 2015 FTA with Korea also commits both Parties to implement the ILO conventions.

Switzerland

Unlike the other selected countries, Switzerland employs the same enforcement provisions across its trade agreements with different trading partners, and does not distinguish between labour and environmental provisions.

With regards to the enforcement of environmental provisions, Swiss FTAs between 2011 and 2016 commit both Parties to implement MEAs (but not ratify), maintain non-derogation from, and effective enforcement of, domestic law and either provide for a specific DSM for compliance with environmental provisions, including state-to-state consultations or – in more recent FTAs – submit the environmental provisions to the horizontal dispute settlement provisions of the FTA, with the exception of arbitration. In addition, the revised EFTA model chapter on TSD foresees the possibility to establish a panel of experts. However, trade agreements do not allow for public submissions for non-compliance with environmental provisions, legal arbitration, sanctions for non-compliance or remedies for those impacted.

With regards to the enforcement of labour provisions, Switzerland's FTAs between 2011 and 2016 stand out in their inclusion of a provision committing trade partners to both effectively implement ILO conventions they have ratified and to undertake continuous and sustained efforts to ratify fundamental and other up-to-date ILO conventions. Switzerland's FTAs also maintain non-derogation from, and effective enforcement of, domestic law. They likewise either provide for a specific DSM for compliance with labour provisions including state-to-state consultations or – in more recent FTAs - submit the labour provisions to the horizontal dispute settlement provisions of the FTA, with the exception of arbitration. In addition, the revised EFTA model chapter on TSD foresees the

possibility to establish a panel of experts. They do, however, not allow for public submissions on non-compliance, legal arbitration, sanctions, or remedies for those impacted.

United States

To understand the evolution of labour and environment chapters in US and other trade agreements, this section begins with an overview of NAFTA, and its labour side agreement, the North American Agreement on Labour Cooperation (NAALC), as well as its environmental agreement, the North American Agreement on Environmental Cooperation (NAAEC). It follows with a description of the 2002 Trade Promotion Act, the May 10th Agreement, the 2015 TPA, and finish with the USMCA (Figure 1).

Figure 1: Evolution of labour provisions



Source: Congressional Research Service

First generation: the NAFTA model

NAFTA was the first trade agreement to include **labour and environmental provisions** as part of the overall negotiated agreement. These were included **not as integral elements of the agreement, but rather as side agreements with their own procedures**. Because these agreements created a framework set of language and institutional processes, it is worth spending some time reviewing them here.

The NAALC's primary obligations called on the Parties to broadly ensure that its labour laws and regulations provide for "*high labour standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light.*"²⁸¹ Furthermore, each government was "*to promote compliance with and effectively enforce its labour law through*

²⁸¹ NAALC Art 2.

*appropriate government action.*²⁸² Labour law was broadly defined to encompass 11 specified areas of labour regulation.²⁸³

However, whereas these were substantive obligations of the agreement that could be the subject of consultations, the NAALC dispute settlement provisions were limited to occupational safety and health, child labour, or minimum wage technical labour standards. For these provisions, the enforcement provisions were different from that of the main agreement. Here, the standard to have been met is an “*alleged persistent pattern of failure by the Party complained against to effectively enforce its occupational safety and health, child labour or minimum wage technical standard that is 1) trade-related,*²⁸⁴ and 2) covered by mutually recognised labour laws”.²⁸⁵ The limited access to dispute settlement processes and the limitations of its scope would become a significant point of contention and change in subsequent FTAs.

With regards to the enforcement process, the starting point was consultations between the Parties, beginning at the national level. The NAALC established a Commission for Labour Cooperation (CLC), which was comprised of a Ministerial Council (Council), and a Secretariat made up of a full-time staff. Each Party also had a National Administrative Office (NAO) that provided for mechanisms for third parties to submit complaints, called “public communications.” These could be used as a basis to start the consultation process on labour matters. If lower-level consultations were not successful, the Parties could request a Ministerial Consultations. Ministerial Consultations could relate to any matter within the broad scope of the agreement.²⁸⁶ If Ministerial Consultations failed, a Party could request that there be convened an “*evaluation committee of experts (ECE)*” composed of three outside experts. However, at this level, examinations were limited to an analysis of “*patterns of practice by each Party in the enforcement of its occupational safety and health or other technical labour standards.*²⁸⁷” These were a subset of labour issues that excluded freedom of association, the right to bargain collectively, and the right to strike.²⁸⁸ When a Party has requested the Council to convene an ECE, the Council is required upon request of a Party to select an independent expert that would rule on whether the matter is trade-related or covered by mutually recognised labour laws.²⁸⁹

Once this report was issued, the dispute settlement process between Parties was permitted to move forward if requested. The NAALC provided that a Party could initiate this process with the request of

²⁸² *Id.* at Art 4.

²⁸³ *Id.* at Art 49. These include: freedom of association and protection of the right to organize; the right to bargain collectively; the right to strike; prohibition of forced labour; labour protections for children and young persons; minimum employment standards, such as minimum wages and overtime pay, covering wage earners, including those not covered by collective agreements; elimination of employment discrimination on the basis of grounds such as race, religion, age, sex, or other grounds as determined by each Party's domestic laws; equal pay for men and women; prevention of occupational injuries and illnesses; compensation in cases of occupational injuries and illnesses; protection of migrant workers.

²⁸⁴ *Id.* at Art 49 provides that “trade-related means related to a situation involving workplaces, firms, companies or sectors that produce goods or provide services:

1. traded between the territories of the Parties; or
2. that compete, in the territory of the Party whose labour law was the subject of ministerial consultations under Article 22, with goods or services produced or provided by persons of another Party.”

²⁸⁵ *Id.* at Art 29.

²⁸⁶ The Council was composed of the labour ministers of the three parties.

²⁸⁷ *Id.* at Art 23. An interesting aspect of the consultation process was that third parties that consider it “has a substantial interest” in the matter was entitled to participate in the consultation [Art 27(3)].

²⁸⁸ See Art 49.

²⁸⁹ *Id.* at Annex 23.

a consultation “regarding whether there has been a persistent pattern of failure by that other Party to effectively enforce such standards in respect to the general subject matter addressed in the report.”²⁹⁰ The agreement further qualified this standard by noting that a Party had not failed to effectively enforce its occupational safety and health, child labour or minimum wage technical labour standards; or to fail to effectively enforce labour laws if the action reflected a “reasonable exercise” of regulatory discretion, or resulted from a good faith decision to allocate resources based on higher priorities.²⁹¹ This qualification, as many noted, was a significant caveat that vitiated the effectiveness of the already delimited standard.

If Ministerial Consultations were not successful, the Ministerial Council would be required to convene and try to resolve the matter promptly. It may call on technical advisers or expert groups, try and mediate, or make recommendations, which can be made public.²⁹² If after 60 days there was no resolution, the Council was required, upon written request of a Party and a two-thirds vote, to request the convening of an arbitral panel. Some commentators have suggested that the two-thirds requirement made the convening of a panel difficult to realise.²⁹³

The arbitral panel was to determine the matter where an “alleged persistent pattern of failure by the Party complained against to effectively enforce its occupational safety and health, child labour or minimum wage technical standard is 1) trade-related; and 2) covered by mutually recognised labour laws”.²⁹⁴ Again, only matters relating to child labour, minimum wage, and health and safety could rise to this level. Remedies available included possible monetary fines of no more than \$20 million if a Party did not comply with an action plan within the first year, and then any subsequent assessment was to be no greater than 0.007 percent of total trade in goods between the Parties in question.²⁹⁵ However, as some critics noted, those monetary fines were to be then spent on improving the labour law enforcement of the Party that was found in violation. **Thus, the funds were to be spent effectively on programmes of the Party paying it, potentially undermining the incentives for countries to comply.** Finally, if a Party was found not to be paying an assessed monetary fine, a Party could be authorised by a panel to suspend benefits by means of tariff increases at an amount comparable to the level of the assessed fine.²⁹⁶ The result of the NAALC’s institutional process was that no case ever moved beyond the initial state of Ministerial Consultations despite there having been some 40 cases filed with NAO offices.²⁹⁷

²⁹⁰ *Id.* at Art 27.

²⁹¹ *Id.* at Art 49.

²⁹² *Id.* at Art 28.

²⁹³ David A. Gantz, *The US-Mexico-Canada Agreement: Labour Rights and Environmental Protection*, Baker Institute Report, June 13, 2019, available at <https://www.bakerinstitute.org/media/files/research-document/62174e56/bi-report-061319-mex-usmca-4.pdf>

²⁹⁴ *Id.* at Art 29.

²⁹⁵ *Id.* at Annex 39.

²⁹⁶ *Id.* at Art 41.

²⁹⁷ Department of Labour, *Submissions on NAALC*, accessed at https://www.dol.gov/agencies/ilab/submissions-under-north-american-agreement-labour-cooperation-naalc-print?combine=&field_naalc_office_target_id=All&field_status_target_id=All&field_issue_target_id=All&items_per_page=10&page=3

As it did with labour matters, US Congress has made environmental provisions a principal negotiating objective in US trade policy.²⁹⁸ **Similarly, to the construction of its labour provisions, US FTAs currently provide that a Party shall:**

- 1) *“not fail to effectively enforce its environmental laws in a manner affecting trade and investment;*
- 2) *Not waive or derogate from environmental laws to promote trade or investment;*
- 3) *Adhere to certain multilateral environmental agreements;*
- 4) *Develop mechanisms to enhance environmental performance;*
- 5) *Retain the right to exercise “reasonable” or bona fide” exercises of discretion in enforcement.”*²⁹⁹

With regards to environmental provisions, these core components of US FTAs have evolved since the NAAEC. As the name suggests, the NAAEC emphasised cooperative activities, although it did also contain a dispute settlement process similar to the labour process that could levy a monetary assessment, with a trade remedy as a last resort.

Second Generation: post NAFTA

While the NAALC stayed in effect until NAFTA’s replacement by the USMCA in 2020, US labour provisions changed in subsequent agreements, partly in response to the critiques of the NAALC model.

The next agreement to include labour provisions was not an FTA, but rather a more limited bilateral textile trade agreement with Cambodia. The exceptional nature of this agreement, its quota-based incentive system, and the factory-monitoring programme that it created are addressed in Box 2. A 2001 FTA with Jordan, however, was unique in that it included the first labour provision to be directly incorporated into a US FTA.

The language used in the case of Jordan and in several subsequent FTAs adopted the fairly weak obligation that the parties “*shall strive to ensure*.”³⁰⁰ Specifically, the agreement calls on the Parties to “*strive to ensure*” that they would a) recognise the core ILO rights and principles at work, as well acceptable conditions of work including minimum wages, hour of work, and health and safety; and b) that the Parties’ laws provide for labour standards consistent with those rights and to improve them³⁰¹. However, there is no specific material requirement that ILO conventions be ratified or reflected in each Party’s laws. The agreement also requires each Party to “*strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws*

²⁹⁸ TPA 2015. The objective is “to ensure that trade and environmental policies are mutually supportive and to seek to protect and preserve the environment and enhance the international means of doing so, while optimizing the use of the world’s resources” 19 USC 4201(5).

²⁹⁹ See CRS, 2021, at 1.

³⁰⁰ See Don Wells. ‘Best Practice’ In *The Regulation Of International Labor Standards: Lessons Of The U.S.-Cambodia Textile Agreement*, 27 *Comparative Labor Law & Policy Journal* 357, 259 (“This requirement may be ‘more than hortatory,’ but lacks any binding obligation”.)

³⁰¹ US-Jordan FTA, Article 6(3).

as an encouragement for trade with the other Party.”³⁰² The FTA also contains more obligatory language that “[a] Party shall not fail to effectively enforce its labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties”³⁰³ Labour laws are defined to be those statutes and regulations that are directly related to internationally recognised labour rights³⁰⁴.

With regards to the enforcement of environmental provisions, the NAAEC was followed by the US-Jordan FTA, which included a provision that required that “A Party shall not fail to effectively enforce its environmental laws,³⁰⁵ through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties”.³⁰⁶ The provision was subject to the same dispute settlement procedures as the rest of the agreement.

Third Generation FTAs: Trade Promotion Act 2002

Following the FTA with Jordan, which was negotiated during the Clinton administration, **a third generation of agreements was negotiated based on the negotiating objectives spelled out in the Trade Promotion Authority Act of 2002.** These included seven FTAs concluded with 12 countries.³⁰⁷ In these agreements, the “strive to ensure” language was retained. But an important change was that the provision that “[a] Party shall not fail to effectively enforce its labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement,”³⁰⁸ would become subject to a specialised dispute settlement process, starting with the US-Chile FTA (2004). Labour laws were defined in the agreements to be a Party’s statutes or regulations that were “directly related” to: the right of association; the right to organise and bargain collectively; a prohibition on the use of any form of forced or compulsory labour; a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labour; and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.³⁰⁹

The dispute settlement process was a compromise between the NAALC model and the Jordan model. Labour disputes were to be preceded by specialised consultations provided for in the labour chapters at lower-level governmental levels, and then at the ministerial level before dispute settlement procedures could be resorted to. The labour chapters provided that a specialised roster of labour specialists would be appointed in case there would be a labour chapter dispute,³¹⁰

³⁰² *Id.* at 6(2).

³⁰³ *Id.* at 6(4)(a).

³⁰⁴ These included: (a) the right of association; (b) the right to organize and bargain collectively; (c) a prohibition on the use of any form of forced or compulsory labour; (d) a minimum age for the employment of children; and (e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

³⁰⁵ Environmental Laws were defined to be those whose “primary purpose... is the protection of the environment, or the prevention of a danger to human, animal, or plant life or health, through:

(a) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants;

(b) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto; or

(c) the protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas in the Party’s territory, US-Jordan FTA Art 5(4).

³⁰⁶ US-Jordan FTA Art 5(2).

³⁰⁷ These include Chile, Singapore, Australia, Morocco, Bahrain, Oman, and the six CAFTA-DR countries.

³⁰⁸ See e.g. US Chile FTA Art 18.2, 18.6(7).

³⁰⁹ See e.g. US CAFTA-DR, Art 16.8.

³¹⁰ See e.g. US-Chile 18.7.

which also included the standard consultations. Finally, should the dispute rise to an arbitral panel, the remedies are limited to a monetary assessment with a maximum of \$15 million, like in the NAALC, to be paid towards labour initiatives.³¹¹ Only if the monetary assessment were not paid could a Party resort to other suspensions of benefits.³¹²

The 2002 Trade Promotion Authority provided that all trade agreements were to include an environmental provision that included the language, “A Party shall not fail to effectively enforce its environmental laws,³¹³ through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties”.³¹⁴ At the same time, this requirement was modified by the right of each Party to exercise discretion and to make *bona fide* decisions regarding allocations of resources.³¹⁵ The Agreements also contain “*strive to ensure*” obligations to not “*waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws as an encouragement for trade with another Party, or as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.*”

Generation Four: post May 10 Agreement FTAs

A significant turning point in TSD provisions in US trade agreements occurred in 2007, when a bipartisan agreement between Congress and the Executive, known as the May 10 Agreement, called for **changes in future trade agreements that, in the view of critics of previous labour chapters, would address some of the main complaints of advocates for strong trade and labour enforcement provisions.** These changes included making more of the provisions legally enforceable, and strengthening the obligatory language by removing the “*strive to ensure*” construction.³¹⁶ The US FTAs with South Korea, Peru, Colombia, Panama, as well as the USMCA all incorporate its changes.

First, the agreement called for an enforceable commitment that the Parties adopt and maintain the core labour principles of the 1998 ILO Declaration (although not the follow-up).³¹⁷ Second, it required the labour chapters included an enforceable non-derogation clause, prohibiting signatories from lowering their labour standards.³¹⁸ Third, the May 10 Agreement established limitations on the prosecutorial and enforcement discretion that had been permitted in previous agreements.³¹⁹ Finally,

³¹¹ See e.g. *US-Chile*.

³¹² *Id.* at Art 22.16.

³¹³ *Environmental Laws* were defined to be those whose “primary purpose... is the protection of the environment, or the prevention of a danger to human, animal, or plant life or health, through:

(a) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants;

(b) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto; or

(c) the protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas in the Party's territory, *US-Jordan FTA Art 5(4)*.

³¹⁴ *US-Jordan FTA Art 5(2)*.

³¹⁵ See *CAFTA-DR Art 7.2(2)*.

³¹⁶ *Id.* at 23.5.3.

³¹⁷ See e.g. *US-Peru FTA Art 17.2.1*.

³¹⁸ See e.g. *Id Art 17.2.2*. “Neither Party shall waive or otherwise derogate from, or offer to waive or otherwise derogate from, its statutes or regulations implementing paragraph 1 in a manner affecting trade or investment between the Parties, where the waiver or derogation would be inconsistent with a fundamental right set out in that paragraph.”

³¹⁹ See e.g. *id* at 17.3(b) “A decision a Party makes on the distribution of enforcement resources shall not be a reason for not complying with the provisions of this Chapter.”

the agreement called for the same dispute settlement procedures and remedies be applied to labour complaints as were applied to non-labour provisions.³²⁰

Violations of the ILO commitments as well as other provisions were still subject to the same requirement to demonstrate that the violation be in a manner affecting trade or investment, which a footnote made clear was **to be demonstrated by the complaining Party**. Notably, the limitation that dispute settlement was only applicable to the failure of a Party to enforce its own labour laws was now removed, and instead all elements and obligations set forth in the labour chapter were now subject to dispute settlement.

With regards to environmental provisions, the May 10 Agreement saw Congress and the executive branch agree to the following for environmental chapters:

- 1) A specific list of multilateral environmental agreements would be incorporated into the FTAs, and those commitments would be subject to dispute settlement.
- 2) The non-derogation obligation would remove the “shall strive to ensure that [a party] does not waive or otherwise derogate from” its environmental laws to a “neither Party shall waive or otherwise derogate from” standard.
- 3) All FTA environmental obligations would henceforth be subject to standard dispute settlement procedures, as well as remedies and sanctions.³²¹

All FTAs entered into after this agreement reflect these requirements.³²²

Generation Five: USMCA

The US-Mexico-Canada Agreement (USMCA) is the most recent and most expansive iteration of the US approach to labour provision enforcement. While built on the same framework and scaffolding of the post-May 10 Agreement FTAs, the USMCA adds some important norms and institutions. Building off the TPP model that the US was highly influential over, before pulling out of the agreement in January 2017,³²³ the **USMCA model will also likely serve as a new model for US labour provisions**.

First, unlike previous agreements, it **explicitly bans the importation of goods made by forced labour**. This prohibition applies to imports from any sources.³²⁴ Second, it explicitly requires that “*no Party shall fail to address violence or threats of violence against workers*”³²⁵...” Third, in an important evolution, the agreement calls for each Party to “*ensure that migrant workers are protected under its labour laws*,” regardless of nationality.³²⁶ This is a matter particularly relevant to the US and Mexico context. Fourth, it **adds a separate enforceable article on workplace discrimination**, requiring that the Parties shall “*implement policies that it considers appropriate to protect workers against*

³²⁰ See Mary Jane Bolle (2016). *Overview of Labour Enforcement Issues in Free Trade Agreements*, Congressional Research Service, Feb 22, 2016.

³²¹ See USTR Trade Facts, *Bipartisan Trade Deal*, May 2007.

³²² These include FTAs with South Korea, Peru, Colombia, Panama, as well as the USMCA.

³²³ The CPTPP is examined in the section dedicated to Canada’s TSD approach.

³²⁴ USMCA Art 23.6.

³²⁵ USMCA Art 24.7.

³²⁶ USMCA Art 23.8.

employment discrimination on the basis of sex...,” with an explicit listing of several protected categories, including sexual orientation.³²⁷ Fifth, it specifies that the non-derogation obligations also apply to Export Processing Zones.³²⁸ Given the special labour law exceptions granted to EPZs in a number of countries, this is a move towards greater coverage.

The Parties’ **labour laws remain key enforceable provisions of the USMCA**, requiring that “No Party shall fail to effectively enforce its labour laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties”.³²⁹ However, this obligation remains limited by the right to exercise reasonable enforcement discretion and to make *bona fide* decisions regarding the allocation of enforcement resources across labour enforcement activities related to fundamental labour rights.

An important substantive addition **for the purposes of enforcement is several footnotes that define the meaning of “sustained or recurring course of action or inaction,”** several terms that were the subject of much discussion and dispute in the Guatemala case.³³⁰ The footnotes clarify what the words “sustained” and “recurring” mean³³¹, as well as the terms “*course of action or inaction in a manner affecting trade or investment between the Parties*”³³². It also clarifies that **in dispute settlement that a panel is to presume that a failure to enforce is in a manner affecting trade unless the responding Party demonstrates otherwise. In other words, the burden is shifted to the responding Party.**³³³

The Agreement also includes **some new institutional enforcement mechanisms**. First, it includes an Article on “*cooperative labour dialogue*,” which provides a form of engagement that is less formal than Consultations.³³⁴ Unlike Consultations, third parties do not have a right to participate, although there is to be a means of “receiving and considering the views of interested persons.”³³⁵

Perhaps the most noted addition of the USMCA is a new enforcement institution called the Facility-Specific Rapid-Response Labour Mechanism. The RRM provides for the US and Canada to “*ensure remediation of a Denial of Rights*” that relate to collective bargaining,³³⁶ specifically as they relate to a set of agreed upon labour law reforms delineated in the labour chapter.³³⁷ **What makes the RRM unique, is that it is designed to address facility-specific claims of freedom of association and collective bargaining violations** that are specific to the context of Mexico.³³⁸

³²⁷ USMCA Art 23.9. This was nullified with a footnote due to Republican opposition in Congress.

³²⁸ *Id.* at 23.4(b).

³²⁹ *Id.* at Art 23.5.1.

³³⁰ See Section 7 for details.

³³¹ See e.g. footnote 10.

³³² See e.g. footnote 11.

³³³ See footnote 12.

³³⁴ *Id.* at Art 23.13.

³³⁵ *Id.* at Art 23.13.3.

³³⁶ USMCA Art 313-A.3(2).

³³⁷ USMCA Annex 23-A.

³³⁸ A Covered Facility is defined to be “a facility in the territory of a Party that: (i) produces a good or supplies a service traded between the Parties; or (ii) produces a good or supplies a service that competes in the territory of a Party with a good or a service of the other Party, and is a facility in a Priority Sector.” A priority sector includes manufacturing, services, or mining. USMCA Article 31-A.15.

Once a set of conditions precedent for remediation are met,³³⁹ a panel can be requested. The panel is empowered not only to review petitions and documents submitted by the Parties, but also to conduct its own independent investigation, including an “*on-site verification*.”³⁴⁰ **If the panel determines there has been a violation of the agreement, the complaining Party can impose proportional remedies that might include suspension of preferential tariff treatment for goods manufactured at the Covered Facility, or the imposition of penalties on goods manufactured at or services provided by the Covered Facility.**³⁴¹ The RRM is discussed more extensively below under enforcement practices.

The USMCA also includes an obligation in its section on labour rights that each Party shall adopt and maintain statutes and regulations governing **acceptable conditions of work with respect to minimum wages, hour of work, and safety and health.**³⁴² This was an extension of the rights obligations in previous agreements that identified only those from the ILO Declaration 1998. The inclusion of these rights is notable, but it should be emphasised that no specific substantive standards are prescribed.

Following the 2015 Trade Promotion Authority with expanded environmental negotiation objectives, including terms of the May 10 Agreement, **the USMCA represents the most extensive environmental chapter negotiated by the US.** Its core obligation is that “*no Party shall fail to effectively enforce its environmental laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties.*”³⁴³ **Like in the labour agreements, a dispute panel is to presume that a failure is in a manner affecting trade or investment, unless the responding Party demonstrates otherwise.**³⁴⁴ Thus, the burden of proof shifts to the respondent.

However, **the USMCA retains substantial discretion for the Parties in enforcement**, noting that each Party retains the right to exercise discretion and make decisions regarding invitations, compliance, and allocation of resources. Specifically, a Party will be deemed to *not* have failed to effectively enforce its environmental laws if the decision to do so was made in good faith and was a reasonable exercise of discretion.³⁴⁵

In addition, the Parties agree to make various process commitments to transparency, cooperation, encouragement, promotion, adoption, and/or implementation of various policies around 15 different issues including protection of the ozone layer, ship pollution, air quality, CSR, biodiversity, fisheries, forest management, and clean technologies.

Any “person of a Party” may file a submission asserting that a Party is failing to effectively enforce its environmental laws with the Secretariat of the North American Commission for Environmental Cooperation.³⁴⁶ The submission must meet certain procedural and substantive standards. Procedurally, the NACEC must find that the submission:

³³⁹ USMCA Annex 31-A.4.

³⁴⁰ USMCA Annex 31-A7.7.

³⁴¹ USMCA Annex 31-A.10.

³⁴² USMCA Art 23-3.2.

³⁴³ USMCA Art 24.4.1.

³⁴⁴ *Id.* at FN 5.

³⁴⁵ *Id.* at Art 24.4.2.

³⁴⁶ USMCA Art 24.27.

- a) is in writing in English, French, or Spanish;
- b) clearly identifies the person making the submission;
- c) provides sufficient information to allow for the review of the submission including any documentary evidence on which the submission may be based and identification of the environmental law of which the failure to enforce is asserted;
- d) appears to be aimed at promoting enforcement rather than at harassing industry; and
- e) indicates whether the matter has been communicated in writing to the relevant authorities of the Party and the Party's response, if any.³⁴⁷

If the submission meets these criteria, then the NACEC can move to the substantive merits to determine whether to request a response from the complained against Party. Here, the NACEC shall be guided by whether:

- a) the submission alleges harm to the person making the submission;
- b) the submission, alone or in combination with other submissions, raises matters about which further study would advance the goals of this Chapter;
- c) private remedies available under the Party's law have been pursued; and
- d) the submission is not drawn exclusively from mass media reports.³⁴⁸

If after the Parties are given an opportunity to respond, at least two members of the three-member Council, which is made up of the highest-ranking environmental ministers from each country, vote to move forward with a factual record, the NACEC Secretariat will prepare one with the input from an array of possible public sources.³⁴⁹

The Parties may request informal consultations through national contact points on any matter, which should commence within 30 days of a request.³⁵⁰ These consultations escalate in seniority before the dispute settlement process can be utilised. If lower-level informal consultations are unsuccessful, the Parties may request "senior representative consultations," which involve members of the Environment Committee, who are representatives from the consulting Parties' senior levels.³⁵¹

If those two levels of consultations are unsuccessful (Environment Consultations and Senior Representative Consultations), they then escalate to Ministerial Consultations.³⁵² Only if those fail, can the Parties request a panel be formed according to the dispute settlement chapter.³⁵³ The same

³⁴⁷ *Id.* at 24.27(2)

³⁴⁸ 24.24.2.3.

³⁴⁹ *Id.* at Art 24.28.

³⁵⁰ *Id.* at Art 24.29.

³⁵¹ *Id.* at Art 24.30.

³⁵² *Id.* at Art 24.31.

³⁵³ *Id.* at 24.32

remedies are available to environmental matters as are available to other matters covered in the agreement.

Table 21: Enforcement of labour provisions in third-country FTAs

	Enforceability			Dispute settlement mechanism					Sanctions and remedies	
	Non-derogation from domestic laws	Commitment to ratify ILO conventions	Commitment to implement ILO conventions	Public submission for non-compliance	State-to-state consultations	Specific DSM for labour provisions	Panel of experts	Legal arbitration	Suspension of benefits or trade sanctions for failure to enforce	Remedies of compensation for failure to enforce
USMCA 2018	✓	X	✓	✓	✓	✓	✓	X	✓	✓
CPTPP 2018	✓	X	X	✓	✓	✓	✓	✓	✓	X
Australia-Peru 2018	✓	X	✓	X	X	X	X	X	X	X
Chile-Argentina 2017	✓	X	✓	✓	✓	X	✓	✓	✓	✓
Chile-Uruguay 2016	✓	X	✓	✓	✓	X	✓	✓	✓	✓
Switzerland-Georgia 2016	✓	✓	✓	X	✓	✓	✓	X	X	X
Switzerland-Philippines 2016	✓	✓	✓	X	✓	✓	✓	X	X	X
Canada-Ukraine 2016	✓	X	✓	X	✓	✓	✓	X	X	✓
Korea-New Zealand 2015	✓	X	✓	X	✓	X	✓	X	X	X
Japan-Mongolia 2015	✓	X	X	X	X	X	X	X	X	X
Australia-Korea 2014	✓	X	✓	X	✓	✓	✓	X	X	X
Canada-Korea 2014	✓	X	✓	X	✓	✓	✓	X	X	✓
New Zealand-Taiwan 2013	✓	X	X	X	✓	X	✓	X	X	X
Switzerland-Central America 2013	✓	✓	✓	X	✓	✓	✓	X	X	X
Switzerland-Bosnia Herzegovina 2013	✓	✓	✓	X	✓	✓	✓	X	X	X
Canada-Honduras 2013	✓	X	✓	✓	✓	✓	✓	X	X	✓

	Enforceability			Dispute settlement mechanism					Sanctions and remedies	
	Non-derogation from domestic laws	Commitment to ratify ILO conventions	Commitment to implement ILO conventions	Public submission for non-compliance	State-to-state consultations	Specific DSM for labour provisions	Panel of experts	Legal arbitration	Suspension of benefits or trade sanctions for failure to enforce	Remedies of compensation for failure to enforce
Australia-Malaysia 2012	✓	X	✓	X	✓	X	✓	X	X	X
Switzerland-Montenegro 2011	✓	✓	✓	X	✓	✓	✓	X	X	X
Switzerland-Hong Kong 2011	✓	✓	✓	X	✓	✓	✓	X	X	X
New Zealand-Hong Kong 2010	X	X	X	X	✓	X	✓	X	X	X
Canada-Panama 2010	✓	✓	✓	X	✓	✓	✓	✓	X	✓
New Zealand-Malaysia 2009	X	X	✓	X	✓	X	✓	X	X	X
Canada-Jordan 2009	✓	X	✓	✓	✓	✓	✓	X	X	✓
Canada-Colombia 2008	✓	X	✓	✓	✓	✓	✓	X	X	✓
Canada-Peru 2008	✓	X	✓	✓	✓	✓	✓	X	X	✓
US-Panama 2007	✓	X	✓	X	✓	✓	✓	✓	X	✓
US-Korea 2007	✓	X	✓	✓	✓	✓	✓	X	X	X
Japan-Thailand 2007	X	X	X	X	X	X	X	X	X	X
US-Peru 2006	✓	X	✓	X	✓	✓	✓	✓	X	✓
US-Colombia 2006	✓	X	✓	X	✓	✓	✓	✓	X	✓
Chile-Colombia 2006	✓	X	X	X	X	X	X	X	X	X
US-Oman 2006	✓	X	✓	X	✓	✓	✓	✓	X	✓
US-Bahrain 2005	✓	X	✓	X	✓	✓	✓	✓	X	✓

	Enforceability			Dispute settlement mechanism					Sanctions and remedies	
	Non-derogation from domestic laws	Commitment to ratify ILO conventions	Commitment to implement ILO conventions	Public submission for non-compliance	State-to-state consultations	Specific DSM for labour provisions	Panel of experts	Legal arbitration	Suspension of benefits or trade sanctions for failure to enforce	Remedies of compensation for failure to enforce
New Zealand-Thailand 2005	X	X	X	X	X	X	X	X	X	X
Trans Strategic Pacific EPA 2005	✓	X	X	X	X	X	X	X	X	X
CAFTA-DR 2004	✓	X	✓	X	✓	✓	✓	✓	X	✓
Australia-US 2004	✓	X	✓	X	✓	✓	✓	✓	X	✓
US-Morocco 2004	✓	X	✓	X	✓	✓	✓	✓	X	✓
US-Chile 2003	✓	X	✓	X	✓	✓	✓	✓	X	✓
Canada-Costa Rica 2001	X	X	✓	✓	✓	✓	✓	✓	X	✓
US-Jordan 2000	✓	X	✓	X	✓	✓	✓	✓	X	✓
Canada-Chile 1996	X	X	✓	✓	✓	✓	✓	✓	X	✓
NAFTA 1994	X	X	X	✓	✓	✓	✓	✓	✓	X

By far the most common enforceable provisions in the included FTAs is a ban on derogating from existing labour laws in a manner affecting trade, or as a means of encouraging trade or investment, and a commitment to implement ILO conventions, although there is generally not an obligation to ratify those conventions. Public submission processes are the exception rather than the rule, while state-to-state consultations are a preferred method of dispute resolution for labour chapters. The FTAs provide for panels of experts to review disputes and issue reports, while recourse to legal arbitration remains far less common. Suspension of benefits is the exception, while compensation is more common, existing as a remedy in the majority of reviewed FTAs (20 of 34).

Table 22: Enforcement of environmental provisions in third-country FTAs

	Enforceability			Dispute settlement mechanism					Sanctions and remedies	
	Commitment to ratify MEAs	Non derogation from domestic laws	Commitment to Implement MEAs	Specific DSM for environmental provisions	Public submission for non-compliance	State-to-state consultation	Panel of experts	Legal arbitration	Suspension of benefits or trade sanctions for failure to enforce	Remedies of compensation for failure to enforce
USMCA 2018	X	✓	✓	✓	✓	✓	✓	✓	✓	✓
CPTPP 2018	X	✓	✓	✓	✓	✓	✓	✓	✓	✓
Australia-Peru 2018	X	X	✓	✓	X	✓	✓	X	X	X
Chile-Argentina 2017	X	✓	✓	✓	X	✓	✓	✓		✓
Chile-Uruguay 2016	X	✓	✓	✓	X	✓	✓	✓		✓
Switzerland-Georgia 2016	X	✓	✓	✓	X	✓	✓	X	X	X
Switzerland-Philippines 2016	X	✓	✓	✓	X	✓	✓	X	X	X
Canada-Ukraine 2016	X	✓	✓	✓	✓	✓	✓	✓	X	✓
Korea-New Zealand 2015	X	X	✓	✓	✓	✓	✓	X	X	✓
Japan-Mongolia 2015	X	✓	✓	X	X	X	X	X	X	X
Australia-Korea 2014	X	✓	✓	✓	X	✓	✓	X	X	X
Canada-Korea 2014	X	✓	✓	✓	✓	✓	✓	✓	X	✓
New Zealand-Taiwan 2013	X	X	✓	X	X	✓	✓	X	X	✓
Switzerland-Central America 2013	X	✓	✓	✓	X	✓	✓	X	X	X
Switzerland-Bosnia Herzegovina 2013	X	✓	✓	✓	X	✓	✓	X	X	X
Canada-Honduras 2013	X	✓	✓	✓	✓	✓	✓	✓	X	✓

	Enforceability			Dispute settlement mechanism					Sanctions and remedies	
	Commitment to ratify MEAs	Non derogation from domestic laws	Commitment to Implement MEAs	Specific DSM for environmental provisions	Public submission for non-compliance	State-to-state consultation	Panel of experts	Legal arbitration	Suspension of benefits or trade sanctions for failure to enforce	Remedies of compensation for failure to enforce
Australia-Malaysia 2012	No enforcement provisions									
Switzerland-Montenegro 2011	X	✓	✓	✓	X	✓	✓	X	X	X
Switzerland-Hong Kong 2011	X	✓	✓	✓	X	✓	✓	X	X	X
New Zealand-Hong Kong 2010	X	X	✓	X	X	X	X	X	X	X
Canada-Panama 2010	X	✓	✓	✓	✓	✓	✓	✓	✓	✓
New Zealand-Malaysia 2009	X	X	✓	X	X	✓	✓	X	X	X
Canada-Jordan 2009	X	✓	✓	✓	✓	✓	✓	✓	X	✓
Canada-Colombia 2008	X	✓	✓	✓	✓	✓	✓	✓	X	✓
Canada-Peru 2008	X	✓	✓	✓	✓	✓	✓	✓	X	✓
US-Panama 2007	X	✓	✓	✓	✓	✓	✓	✓	✓	X
US-Korea 2007	X	✓	✓	✓	✓	✓	✓	X	✓	X
Japan-Thailand 2007	X	✓	✓	X	X	✓	✓	X	X	X
US-Peru 2006	X	✓	✓	✓	✓	✓	✓	✓	✓	X
US-Colombia 2006	X	✓	✓	✓	✓	✓	✓	X	✓	X
Chile-Colombia 2006	X	X	✓	X	✓	✓	✓	X	X	X
US-Oman 2006	X	✓	✓	✓	✓	✓	✓	X	✓	X
US-Bahrain 2005	X	✓	✓	✓	✓	✓	✓	X	✓	X

	Enforceability			Dispute settlement mechanism					Sanctions and remedies	
	Commitment to ratify MEAs	Non derogation from domestic laws	Commitment to Implement MEAs	Specific DSM for environmental provisions	Public submission for non-compliance	State-to-state consultation	Panel of experts	Legal arbitration	Suspension of benefits or trade sanctions for failure to enforce	Remedies of compensation for failure to enforce
New Zealand-Thailand 2005	X	✓	✓	✓	X	✓	✓	✓	X	✓
Trans Strategic Pacific EPA 2005	X	✓	✓	✓	X	✓	✓	X	X	X
CAFTA-DR 2004	X	✓	✓	✓	✓	✓	✓	X	✓	X
Australia-US 2004	X	✓	✓	✓	✓	✓	✓	X	✓	X
US-Morocco 2004	X	✓	✓	✓	✓	✓	✓	X	✓	X
US-Chile 2003	X	✓	✓	✓	✓	✓	✓	X	✓	X
Canada-Costa Rica 2001	X	✓	✓	✓	✓	✓	✓	✓	✓	X
US-Jordan 2000	X	✓	✓	✓	✓	✓	✓	X	✓	X
Canada-Chile 1996	X	✓	✓	✓	✓	✓	✓	✓	✓	✓
NAFTA 1994	X	✓	✓	✓	✓	✓	✓	✓	✓	✓

The FTAs included here generally do not require that signatories ratify MEAs. They do on the other hand require that the Parties commit to implementing them, regardless of their ratification status. With the exception of New Zealand, non-derogation provisions are also generally included, which generally forbid signatories from weakening their environmental regulations, or not enforcing existing regulations, as a means of attracting investment or increasing trade. Most of the agreements also provide for specialised dispute settlement provisions for environmental matters, with the exceptions of New Zealand and Japan. Public submission mechanisms for non-compliance are more mixed in frequency, with about half (25 of 43) agreements including them. The inclusion of state-to-state consultation, and drawing on expert panels to examine issues, on the other hand, are consistently included. However, the incorporation of arbitration mechanisms to resolve disputes is less frequent (16 of 43). Consistent with the low levels of legal arbitration, remedies in the form of suspension of benefits and/or compensation through monetary fines are also less common.

7.2.2 Conclusions on enforcement provisions in third countries' FTAs

Environmental and labour enforcement provisions in the **FTAs of Australia, Canada, Chile, Japan, New Zealand, Switzerland, and the US** generally include or choose from several broad categories of elements. These include:

- a) Obligations to implement international standards based on international commitments, although not necessarily ratify international conventions;
- b) Requirements to effectively enforce one's labour and environmental laws;
- c) A non-derogation clause;
- d) A public complaint or submission mechanism;
- e) A consultation process between the Parties;
- f) A dispute settlement; and
- g) A remedy.

Some countries include all elements in their agreements, while some selectively draw upon them. Adherence to international standards, when included, invariably rely on the 1998 ILO Declaration on Fundamental Principles and Rights at Work, and in the international context, multilateral environmental agreements. **None of the agreements reviewed require ratification of international conventions.** In some agreements, the obligations are expanded to commitments to acceptable conditions of work. The obligations to enforce one's labour and environmental laws are also often included in TSD provisions. **The level of enforceability of those standards varies.** They may include a relatively weak "*strive to ensure*" standard that can be found in earlier generations, for example, of US agreements, or in the Australia-Peru FTA. Alternatively, they might include a more stringent "*shall not fail to effectively enforce*" standard, as found in US and New Zealand's agreements, or an even more stringent "*shall promote compliance with and effectively enforce*" its labour and environmental laws, as found in Canadian agreements. **Recent FTAs, such as the USMCA, have gone further, requiring that the Parties ban the importation of goods produced with forced labour and protect migrant rights, likewise specifying a range of environmental obligations and commitments.** Furthermore, **when obligations are enforceable, violations of obligations are generally required to have affected trade or investment between the Parties.** This requirement can be a matter of contention in consultations and, potentially, dispute settlement as to what actions are in a manner affecting trade. While this can be minimised if the agreement provides specific details on the process of how terms are to be defined by the Parties, or by a panel of experts, greater specificity simultaneously risks excluding some measures.

Non-derogation clauses, which are very prevalent, specifically require that no Party shall weaken or derogate from their extant labour or environmental laws as a means of increasing trade or attracting investment. This is key, given that a central obligation is not to fail to effectively enforce laws that are in force. Weakening those existing laws to accrue an economic advantage would be counter to the intent of the agreements.

Public complaint processes also vary in their availability and their procedures. The provisions range from having no public submission process at all, such as for agreements concluded by

Switzerland for example, to having quite robust ones, such as in the cases of the US and Canada. Public submissions in the US and Canada can give rise to detailed reports that establish a factual record if the US or Canada receives a complaint from a national about another Party. One question is what the relationship between public submissions and dispute settlement procedures should be. **A good practice is that the process be transparent, consistent, and clear.**

Most agreements provide for a consultation process between the Parties. These consultations might form part of a dispute settlement process that lead to some form of arbitration or panel of experts (see e.g., US, Canada, Chile); or consultations might be the only recourse (see e.g., Australia-Peru). Dispute settlement processes, when they exist, can include consultations, a panel of experts that produces a report and a plan of action, up to legal arbitration. Arbitration processes can be specifically tailored to the labour and environmental chapters, or can be the same processes as the regular dispute settlement procedures, albeit with panellists that are experts in the field. Recourse to arbitration is most prominent in US FTAs, but also exists in the CPTPP's labour and environmental chapters, which were highly influenced by the US model, even though the US is not a Party. **USMCA's Rapid Response Mechanism on Freedom of Association has been uniquely designed to address and remedy factory-level freedom of association violations in a more immediate manner than state-to-state arbitrations that address failure to enforce domestic laws by states.**

Finally, for those FTAs that include dispute settlement procedures with remedies, those remedies generally include either monetary assessments, or full recourse to dispute settlement procedures that will provide the remedy of suspension of benefits in accordance with the dispute settlement rules. Interviewees from government and civil society in the US and Canada supported the utility of dispute settlement procedures with available remedies as a means of compelling the Parties to follow through with their commitments.

7.3 Implementation and enforcement practices

This section presents implementation practices, followed by enforcement practices across **Canada, Chile, New Zealand, and the US** - drawing on legal foundations and political underpinnings.

7.3.1 Implementation practices

With regards to implementation processes, three methodological issues need to be taken into consideration. First, it is in effect **difficult to differentiate foreign aid programmes designed to protect workers' rights and environmental standards from similar programmes under TSD provisions.** For instance, funding for the ILO-International Programme on the Elimination of Child Labour (ILO-IPEC) may not be considered as direct financial resources for the implementation of labour standards in trade agreements but plays an important role in helping developing countries' enforce their commitment to ILO Convention No. 182 on the Worst Forms of Child Labour. This methodological problem is common to all TSD approaches. Second, **technical assistance and capacity-building programmes do not always explicitly involve civil society actors in trade** but may rely on support from community organisations on the ground. Thus, the study of legal provisions must be supplemented with empirical analysis of implementation practices and the role that civil society play in theory *and* practice. Finally, the **distinction between capacity-building and monitoring programmes may be blurred.** For instance, the development of data collection on species as part of the North American Agreement on Environmental Cooperation may involve

training of Mexican, Canadian or American officials that may not be directly flagged as capacity building.

7.3.2 Country-based approaches to implementation

Canada

The Canadian approach to public participation is quite similar to that of the US, with a few differences. Accordingly, Canada has a **voluntary-based stakeholder participation mechanism, which means that stakeholders have a platform where they may consult** or establish working groups to participate in the implementation of the agreement on a voluntary basis. Canada also includes a Ministerial Council or Labour Council (as in CPTPP), which, in addition to the monitoring functions, explicitly provides for the establishment of committees, working groups or expert groups.³⁵⁴

Similarly, Canada has **mechanisms where stakeholders can file public submissions or ‘complaints’** in case of a perceived lack of compliance with labour commitments.³⁵⁵ For example, Canada has the National Administrative Office as a national contact point for labour law issues. This office serves as a first point of interaction between civil society or the general public and the parties at the national level. Canada also has a national office for environmental issues. These offices can receive public submissions from stakeholders, which may trigger thorough investigation or initiate further dialogue. For example, once the office receives a complaint, they analyse the case and produce a NAO report, which they publish and which is accessible to the public. The report also contains recommendations to the Minister, who can either accept or reject them. Based on the decision of the Minister, it triggers the next process. If the minister accepts the recommendations, then consultation with the other Party starts.

Chile

Chile follows a **cooperative approach**, with main implementation activities including seminars (with most of the trade partners), exchanges of information, and visits to discuss topics such as migration (Chile-Peru FTA), public participation (CPTPP), social security (Chile-China FTA), employment policies (Chile-EU FTA) and occupational safety health (Chile-Canada FTA).³⁵⁶

In practice, **for civil society participation, Chile has implemented what they call an ‘adjunct room’ process.** The adjunct room serves as a forum where the government meets business associations, academia, unions, civil society and companies engaged in international trade for their input in ongoing negotiations. Initially, the adjunct room was only open to private businesses and companies, before opening up to civil society, unions, academia and any citizen interested in the negotiations. In addition, the Chilean Ministry of Foreign Affairs created a mechanism for civil society participation called the Civil Society Council. This Council has been established on a permanent basis with representatives from academia, civil society, unions and companies. However, the representatives in the Council are appointed by government on a sectoral basis. Concretely this inclusive approach has allowed civil society groups to participate in negotiations, whereas they did not have any input in the FTA negotiation process before.

³⁵⁴ *International Labour Organisation (2019).*

³⁵⁵ *Ibid,*

³⁵⁶ *International Labour Organisation (2016).*

New Zealand

Until recently, New Zealand's approach to public participation was not harmonised but FTA-specific. The government could consult civil society organisations at the national level, although these were not usually involved in the implementation of FTAs. For example, **in most of the FTAs concluded by New Zealand analysed in this report** (see Tables 18 and 19 above), **there is no mechanism for public participation**. There are few exceptions in some of the agreements, but the approach is not consistent across all trade agreements.

The Trade for All policy of the government of New Zealand responded to a number of concerns among New Zealanders, including the need for trade policy to take into account a wider range of social and environmental concerns. The Trade for All public consultation phase in 2018 included written feedback as well as face-to-face engagement around New Zealand through 15 meetings for the public and 11 focusing on Māori. The process was accompanied by a report written by the Trade for All Advisory Board (TFAAB), which made a series of recommendations on FTA engagement (Trade for All Advisory Board Recommendations)³⁵⁷.

As a result, the Ministry of Foreign Affairs and Trade has taken steps to implement an FTA engagement best practice guide. This codifies the recommendations from the TFAAB on "*FTA engagement with Māori, business and civil society representatives and establishes a new (more comprehensive) baseline for engagement on free trade agreements*" (Ibid).

According to interviews conducted with representatives from government and non-government organisations, FTA negotiation processes have also been updated to include greater civil society engagement. NZ-EU and NZ-UK FTA negotiators have offered briefings for civil society stakeholders. Officials working on trade and environment issues across a range of negotiations also held detailed civil society consultations on trade and environment issues. However, respondents also indicate limited resources to engage fully in some of these consultations (Ibid).

In short, **New Zealand has moved from a limited formal civil society mechanism to a clear strategy on domestic consultation, particularly with the Māori on International Treaties**.

United States

To supplement the joint intergovernmental mechanisms to monitor implementation, the US also establishes **implementation mechanisms at the national level**. In practice, the US under the USMCA Implementation Act established a separate committee – the Interagency Labour Committee (ILC), responsible for the overall monitoring and implementation of labour provisions. The Committee comprised of government officials from different agencies and Congress, in turn, established the Independent Mexico Labour Expert Board to monitor and evaluate Mexico's implementation of labour reforms and compliance with its labour obligations. The Board serves as an additional mechanism to assist in the monitoring and evaluate the implementation results of labour provisions. In addition, the Board also identifies and provides recommendations for areas of cooperation where capacity building might be needed to support compliance and implementation. Through annual reporting, the Board's role in the implementation process seems to bridge the implementation gap and provides

³⁵⁷ Trade for All Advisory Board Recommendations (2021). Proactive Release. 22 July 2021. Available at: https://www.mfat.govt.nz/assets/Uploads/PR-2021-0084-Trade-for-All-Advisory-Board-Recommendations_Redacted.pdf

primary information upon which Congress can act, such as offering concrete recommendations on the type of technical assistance and support required to ensure compliance.

To promote public participation in the implementation process, the US also provides an **opportunity to consult or establish stakeholder advisory groups on a voluntary basis**. For example, there are provisions for submissions by members of the public to the Environmental Commission or Secretariat on non-compliance with environmental obligations. In some agreements (US-Singapore FTA, US-Chile FTA), this takes the form of a National Labour Advisory Committee comprising members of the public to advise on the implementation of the TSD chapters. Under the US-Jordan FTA, the National Labour Committee released a report detailing labour rights violations in the Jordanian Qualified Industrial Zone factories.³⁵⁸ This report resulted in action being taken by the government of Jordan.

7.3.3 *Pre-ratification processes and “ex-ante implementation”*

The prospect of FTA ratification can lead to domestic labour or environmental reforms during the negotiating or pre-negotiating phase. As discussed in the literature review, this process has been common in US FTAs, and documented for a number of US trading partners with regard to labour law. This was the case for labour reforms in Bahrain, Colombia, Morocco, Oman, and Panama before ratification of their respective FTAs with the US; Vietnam, Malaysia and Brunei under CPTPP; and Mexico within the framework of the USMCA. Likewise, the US used its bargaining leverage to push for environmental reform in Peru.³⁵⁹ These negotiations seemed particularly effective with developing countries, arguably more inclined to undertake domestic reforms to gain access to the US market. While at first sight, these results may be interpreted as the product of assertive but effective negotiations, they gradually became formalised through a little-known institutional mechanism known as **presidential certification of FTA compliance**. This process is a unique form of “**ex-ante implementation**” among the selected countries, whose modalities and effects deserve to be examined.

As many tools in US trade policy, **this procedure is based on a compromise between the executive and legislative branch**.³⁶⁰ Initially, it appeared in the “Final provisions” of US FTAs. For instance, the text of CAFTA-DR stated that the agreement would “*enter into force on January 1, 2005, provided that the United States and one or more other signatories notify the Depositary in writing by that date that they have completed their applicable legal procedures.*”³⁶¹ For subsequent FTAs, however, the US Congress explicitly granted the President with considerable discretion to determine whether a partnering country has complied with the terms of the trade agreement and therefore, when the FTA would enter into force. For instance, the implementation legislation of the US-Panama FTA states: “*At such time as the President determines that Panama has taken measures necessary to comply with those provisions of the Agreement that are to take effect on the date on which the Agreement enters into force, the President is authorised to exchange notes with the Government of Panama providing for the entry into force, on or after January 1, 2012, of the*

³⁵⁸ Rogowsky and Chyn (2007).

³⁵⁹ The cases of CPTPP and the US-Peru FTA are analyzed in greater details in case studies 4 and 5, respectively.

³⁶⁰ For a review of interbranch mechanisms, see Jean-Baptiste Velut (2021). “Inter-branch relations in US trade policymaking: balance of power or authoritarian drift?”, *Interventions économiques/Papers in Political Economy*, vol. 65. Available at: <https://doi.org/10.4000/interventionseconomiques.12616>

³⁶¹ Chapter 22, Art. 22.5, paragraph 1a.

*Agreement with respect to the United States.*³⁶² **This process of certification takes place in three stages:**

- The USTR and other agencies like the State, Agriculture, Treasury departments, review the relevant laws, regulations and administrative practices of the trading partner;
- The FTA partner is advised of any shortcomings in its legislative and regulatory framework, and the US administration consults with the other country accordingly; if requested, the US may provide assistance to help its partner;
- Once the President has determined that the partnering country has taken the measures necessary to comply with the provisions of the FTA, he can authorise the FTA to enter into force.³⁶³

As noted by both civil society stakeholders and government officials interviewed for this study, **this institutional mechanism has provided considerable leverage for the US government to extract additional concessions from trading partners after FTAs were signed.** In some cases, this prompted partnering countries to undertake tangible social and environmental reforms. Such was the case with the far-reaching legislation adopted by the Peruvian government to reform its forest governance. Here, **it also played a role in increasing US funding for environmental reform.**³⁶⁴ Likewise, presidential certification of compliance helped shape the terms and accelerate the passage of Mexico's labour law reform protecting Mexican workers' rights to unionise and ratify collective bargaining agreements – with congressional ratification occurring only a few months before the USMCA entered into force. Conversely, according to a veteran USTR official, the US withdrawal from CPTPP eliminated the prospect of presidential certification and left the monitoring of Vietnam's labour law reforms uncertain, especially with regard to the right to form independent unions. In short, **in many cases, this form of *ex-ante* implementation helped the US government to achieve tangible results with regard to both labour and environmental laws.**

However, **what might be regarded as a forceful practice aiming at improving environmental and labour standards remains controversial in several regards.** First, owing to its function *after* the signature of FTAs, and **its non-reciprocal nature**, this procedure has been criticised for its intrusive nature. Second, and in conjunction, US certification of compliance is by no means confined to labour and environmental issues and has been used to extract a wide range of domestic reforms from copyright and intellectual property laws in Panama to tariff rate quotas (TRQs) for rice and pork in Central America. In some cases, like CAFTA-DR or the US-Peru FTA, **some reforms were hastily imposed on partner countries without any consultation of local stakeholders**, and more specifically indigenous communities.³⁶⁵ Third, **this procedure can lead to significant delays in an agreement's entry into force.** For instance, the Peruvian government had to go through a long series of reforms before the agreement entered into force in February 2009, i.e. 15 months after US congressional ratification and nearly two years after Peruvian ratification. Last, but not least, **this mechanism has been subject to selective or uneven implementation.** For instance, in the case of the US-Peru FTA, the George W. Bush administration decided to certify compliance despite

³⁶² Title I, section 101, paragraph b).

³⁶³ International Trade Administration (2007). "FTA Compliance", November. Available at: <https://legacy.trade.gov/fta/fta-compliance.pdf>

³⁶⁴ See the US-Peru case study for more details.

³⁶⁵ In the former case, CAFTA-DR's patent law reforms conflicted with the rights of Costa Rica's indigenous communities. In the latter case, the reforms of Peru's forest governance were carried out with consulting indigenous communities.

persistent doubts about the potential risks of labour rights violations arising from domestic reforms on small and medium companies.

In short, by leveraging access to the US market, presidential certification of compliance has yielded considerable leverage to US negotiators to gain concessions in both labour and environmental fields. Admittedly, the scope of this mechanism is not confined to TSD provisions. In some cases, it was used to impose economic reforms on trading partners outside of TSD objectives; in others, certain TSD standards were ignored to speed up an agreement's entry into force. On the other hand, it remains one of the most effective institutional mechanisms to bring domestic reforms before an agreement comes into effect.

7.3.4 Regulatory cooperation

Over time, trade agreements have been increasingly used as a vehicle to promote regulatory policy and cooperation.³⁶⁶ Most agreements integrate regulatory cooperation through specific provisions, annexes and chapters. While not many agreements incorporate separate chapters, the trend is shifting as many trade agreements by the sampled countries have become increasingly detailed and ambitious, to the extent of including standalone chapters focused on specific policy areas.³⁶⁷ Some studies have found that **the most far-reaching examples of cooperation are between homogeneous players.**³⁶⁸ While these chapters appear under different titles (Regulatory Cooperation (CETA), Regulatory Coherence (CPTPP, Chile-Uruguay FTA), Good Regulatory Practices (USMCA) and Regulatory Improvement (Pacific Alliance)), they ultimately share the same goal. This trend has been mainly adopted in recent agreements concluded by the US (USMCA), Canada (CPTPP), Chile (Chile-Uruguay FTA, Chile-Brazil FTA), and New Zealand (New Zealand-Korea).

Mostly, regulatory cooperation activities include the exchange of technical information (New Zealand-Korea FTA), **or/and dialogue, data and research agendas** among others (Canada-Peru FTA). According to a study by the OECD, countries with diverging degrees of implementation of good regulatory practices commit to endorse a minimum level of regulatory management tools (CPTPP), while agreements involving economies with more mature regulatory policy frameworks contain more advanced forms of regulatory cooperation.³⁶⁹ Another difference can be seen also in the scope of regulatory measures covered. Some agreements have a strong trade focus, such as CETA, while others are broader, such as the USMCA. In CETA, the regulatory cooperation chapter covers all trade-related aspects, such as the TSD chapter, labour and trade, the environment and trade. In contrast, the USMCA applies a broader definition that extends to the planning, design and implementation of regulation. In addition, some agreements do not contain a pre-set definition of regulatory measures covered (CPTPP, Brazil-Chile and Chile-Uruguay FTA and Pacific Alliance) but

³⁶⁶ OECD (2021). *Good regulatory practices and co-operation in trade agreements*. Available at: https://www.oecd-ilibrary.org/governance/good-regulatory-practices-and-co-operation-in-trade-agreements_cf520646-en

³⁶⁷ *Ibid.*

³⁶⁸ Petros C. Mavroidis (2016). *Regulatory cooperation: Lessons from the WTO and the world trade regime. E15 Task Force on Regulatory Systems Coherence – Policy Options Paper. E15 Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum*. Available at:

http://www3.weforum.org/docs/E15/WEF_Regulatory_Cooperation_Lessons_WTO_WTR_report_2015_1401.pdf

³⁶⁹ OECD (2021).

rather follow a positive-list approach where Parties are unilaterally allowed to define the regulatory measures to which their obligations will apply.³⁷⁰

To ensure regulatory cooperation, **some agreements also establish regulatory cooperation committees to oversee the regulatory cooperation activities.** Although these agreements establish committees, the provisions are not binding, and **most are best endeavour clauses.** Last, but not least, some FTAs, such as CPTPP, CETA or the USMCA include standalone “good regulatory practices” chapters that encourage consultation of domestic stakeholders, including consumer groups. In line with the discussion on civil society inclusion (see below), early results of these civil society provisions under CETA show the potential benefits for consumers.³⁷¹

7.3.5 *The role of international organisations in implementing TSD provisions*

In practice, the implementation of TSD commitments is not always straightforward. In most cases, there is an awareness gap between commitment and implementation by the Parties incorporating TSD provisions. Indeed, most trade agreements tend not to include concrete suggestions on how successful implementation of TSD provisions might be achieved. It is for these functions that international organisations such as the ILO interventions have provided a crucial source of assistance to Parties. These ILO interventions provide trade partners with opportunities to implement their commitments and technical assistance to realise their social targets, particularly for developing countries. Such ILO interventions are normally requested by the Parties to the agreement either to provide technical advice (US-Korea), technical guidance (Mexico-USMCA) on the chapter and provisions, or to oversee or monitor labour union elections (USMCA context).³⁷² For example, **critical intervention by ILO at the invitation of a Party is illustrated in Mexico under the USMCA,** where the ILO was asked to assist through monitoring union level elections. As a result, the outcomes of the elections were accepted by all the unions.

Interviews with ILO representatives indicated that **advice provided at early stages** had proven critical for Parties to implement labour reforms and ILO ratifications. Mainly, **capacity building and technical assistance provided in the context of an ongoing trade negotiation has been most impactful** as it gives momentum to the Parties. Concretely, ILO interventions through technical assistance and independent, neutral monitoring mechanism provide impetus for reform as witnessed in Vietnam, Mexico, Korea, and Canada, among others. Moreover, these interventions allow the ILO to have an observer role and monitor and ensure compliance with ILO standards. Specific examples of ILO technical assistance that led to countries introducing labour reforms and ratifying ILO conventions include Mexico under the USMCA, Vietnam under the CPTPP,³⁷³ training the judiciary and developing best practice guides (Vietnam, CPTPP).

These interventions have resulted in a win-win situation where collaboration brings about positive outcomes. Thus, given its widely acknowledged authority on labour standards, **the ILO acting within its own mandate and objectives can create synergies with trade policy, which play a valuable mediating function** not only between two FTA Parties, but also between multinational firms,

³⁷⁰ *Ibid.*

³⁷¹ *Id. at Annex A.*

³⁷² *Despite the requests by the third parties, the ILO does not have an obligation to respond to those requests.*

³⁷³ *Under the CPTPP, in 2019, Vietnam introduced a new labour code, which recognised the rights of workers to engage in collective bargaining. Vietnam also ratified the ILO Convention of collective bargaining and forced labour in 2020.*

government officials and local workers, as witnessed in the US-Cambodia Textile Trade Agreement (see Box 3).

Another practice has been implementing reforms through cooperation activities with the ILO. From an ILO perspective, cooperation is an essential tool for implementation in trade agreements. **ILO officials interviewed for this study saw ILO cooperation programmes as more effective in practice than sanctions.** For them, **this is particularly relevant when it comes to introducing reforms in developing countries.** In practice, there is sometimes resistance to implementing labour provisions from the individual countries, making it challenging to implement a trade agreement. For ILO, without the Parties' consent for new reforms, **the combination of cooperation and incentives has worked best as they also allow partners to engage by increasing pressure and establishing clear timelines to achieve specific outcomes.**

While the assistance provided by international organisations on FTA implementation is largely imbalanced between labour and environmental issues, multilateral environmental agreements, through their conferences and meetings of the Parties, non-compliance mechanisms, capacity-building programmes and reporting mechanisms, have provided new avenues for Parties to implement their commitments. In addition, FTA chapters also include provisions to build the capacity of other countries to implement and enforce CITES. For example, this can be achieved by providing training and assistance with the assistance of the CITES Secretariat. This was the case in the CAFTA-DR FTA, where capacity-building programmes were included in the agreement for the Central American states. **Connecting CITES with capacity-building activities cosponsored by CITES Secretariat can help address the detrimental effects of illegal trade of preserved resources.** For example, in the US-Peru FTA, the US was able to bring a claim for the contravention of the CITES as part of the commitments undertaken to encourage effective implementation of the agreement.

From the perspective of international organisations, engaging with civil society actors has played an increasingly important role in the implementation of TSD provisions. The participation of civil society can contribute significantly to sustaining TSD outcomes and follow-up to assess TSD objectives. However, according to ILO officials, **bringing civil society like labour unions to the table and having them meaningfully engage has been a constant challenge.** For civil society actors to maximise their participation in implementing TSD provisions, they need to have a proper understanding of the issues at stake. Here, **the ILO can engage in activities that seek to strengthen civil society groups' capacity** (business communities, unions, employers and workers organisations) to meaningfully participate in the TSD discussions either bilaterally or with their governments. For example, through ILO intervention, some civil society groups can participate meaningfully through capacity-building initiatives that equip them with the necessary capacity to fully participate either through monitoring or public submissions. **Having an informed, enlightened and engaged civil society can provide considerable leverage in monitoring, public submissions, and add pressure on implementing TSD provisions. By playing a mediating role between Parties and multiple stakeholders, international organisations can help enhance civil society participation.**

Box 3: Monitoring of labour standards in FTAs by the ILO: Lessons from the US-Cambodia Textile Trade Agreement

Born amidst stormy debates over the scope and enforceability of labour standards in US trade policy, the 1999 U.S.-Cambodia Textile Trade Agreement (USCTTA) was designed to create incentives for the Cambodian garment industry to strictly enforce international labour standards under Cambodian law. Although not a deep trade agreement, this neglected agreement in the recent history of US trade policy constitutes a noteworthy policy experiment to promote workers' rights in trade agreements. Several innovative features stood out from other trade agreements and provide important takeaways for contemporary debates on the implementation and enforcement of labour provisions in FTAs: the incentive-based model of the agreement, its factor-level monitoring processes, and the role played by business and civil society organisations to design this sectoral trade agreement. These institutional features also provide important context to understand the singular role played by the ILO in the implementation of the USCTTA, and from a broader perspective the lessons that can be drawn on the potential role of international organisations in monitoring, capacity-building, technical assistance and enforcement.

The USCTTA's incentive-based enforcement model

The USCTTA was based on economic incentives or “carrots” and as such, departed from the debates on trade sanctions or “sticks” that polarised Congress on labour enforcement. Under the agreement, if the US government determined that the Cambodian garment industry “substantially comply” with “internationally recognised core labour standards through the application of Cambodian labour law,” it could increase Cambodia's textile quotas on 12 categories of textile and apparel exports up to 14% per year on top of the standard 6% annual increase. In December 2001, the agreement was renewed for three years and the quota incentives were raised to 18% (Kolben, 2004).

Factory-level monitoring

The USCTTA set a first precedent in **targeted factory-level monitoring** applied to the garment industry long before the US government established company-level verification to fight against illegal logging in Peru, or its “facility-specific” rapid response mechanism to help Mexican workers unionise as part of the USMCA. All participating factories¹ would be inspected six times a year on average.

Funding

Under the USCTTA, funding from the US government was supplemented by financial contributions by the Cambodian government, the Garment Manufacturers Association and the ILO.

Role of the ILO

The singular role that the ILO played in the implementation of the USCTTA is arguably one of the most institutional innovations of the agreement. In fact, the ILO was closely associated with the US for the design of the US-Cambodia monitoring programme and played an even larger role than the Cambodian government itself or the Cambodian garment industry, let alone Cambodian unions, despite its efforts to consult with these stakeholders. Indeed, the ILO submitted its own proposal to the US government, outlining its role in capacity-building and technical assistance, in line with its traditional expertise. The US proposal, however, envisioned a greater role for the ILO in monitoring at the factory level and, therefore, managed to convince ILO officials to adopt a more

assertive role in the implementation of the agreement. Once the USCTTA expired, the ILO continued to work with the Cambodian government to provide stronger certification of compliance, most notably with Better Factories Cambodia (supported by the ILO and the World Bank's International Finance Corporation).

Effects of the USCTTA

Many experts of trade and labour linkages have praised the USCTTA for being successful in improving employment, wage and working conditions in Cambodia's textile factors. During the period when the USCTTA was in force, from 1999 to 2005, Cambodia's apparel production increased five-fold to \$1.9 billion.¹ Additionally, special attention given to Cambodia by the US government and the ILO attracted foreign investment, including among large multinational firms like Nike and Disney that had left Cambodia in the mid-1990s. This surge in trade and investment translated into increased employment, higher wages and notable improvements in labour standards. First, according to sectoral statistics from the Ministry of Commerce, employment in the garment industry tripled from 19,000 direct employees in 1998 (before the USCTTA entered into force) to 270,000 in 2004, with thousands more employees in supplying sectors like packaging. Second, increased trade led to wage gains in a sector where workers are, on average, better paid than other workers in Cambodia, including civil servants. To the extent that the vast majority of workers in the garment industry are young women, these positive employment and wage effects in the garment industry contributed to empower women workers in a context of persistent gender inequality. Last, but not least, ILO reports showed notable progress in compliance with labour standards, including freedom of association and collective bargaining, which were at the top of the US trade and labour agenda in Cambodia. Analysts of the USCTTA have interpreted these tangible impacts as the result of **factory-level compliance**, its innovative **incentive-based system**, the **monitoring role of the ILO**, and the pressure of international firms demanding certification from their suppliers in the aftermath of the program (Wells, 2006).

Further reading

Kevin Kolben (2004), "Trade, Monitoring, and the ILO: Working to Improve Conditions in Cambodia's Garment Factories", *Yale Human Rights & Development Law Journal*, vol. 7, art. 3.

Sandra Polaski (2004). "Cambodia Blazes a New Path to Economic Growth and Job Creation," *Carnegie Endowment for International Peace, Carnegie Papers No. 51, 2004*.

Denis Wells (2006), "Best Practice' in the Regulation of International Labor Standards: Lessons of the U.S.-Cambodia Textile Agreement", *Comparative Labor Law & Policy Journal*, vol. 27(3).

7.3.6 Technical assistance, capacity-building and monitoring

As previously discussed, a challenge in assessing technical assistance and capacity-building programmes lies in differentiating measures directly related to the implementation of FTAs' TSD provisions from official development assistance. This is all the more difficult because, among the four selected countries, the implementation of labour and environmental provisions and its *ad hoc* funding fall outside of trade agencies. **Leveraging institutional resources across government agencies allows to supplement the limited funding that might be granted to trade agencies for implementation, in both small and large countries.** For instance, when it comes to trade linkages, the New Zealand government uses a "whole of government" approach to FTA negotiations and implementation, whereby the Ministry of Business, Innovation and Employment, the Ministry for

the Environment and the Ministry for Māori Development closely collaborate with the Ministry of Foreign Affairs and Trade. For example, the implementation of New Zealand-Taiwan FTA's indigenous rights chapter and its annual review depends on the budget allocated to that Ministry. According to one New Zealand official, this **decompartmentalised approach to TSD implementation is designed to avoid silo effects across government agencies**. This is also the case for larger countries like Canada or the US. Even in the implementation of CETA's TSD chapter, whose institutional format (DAGs, TSD Secretariat) was largely shaped by the EU, Canada can mobilise the resources of other departments, which have taken part in consultations and the annual CETA Civil Society Forum meeting. For the implementation of the USMCA, the Employment and Social Development Ministry set aside \$30 million for technical assistance, a third of which are reserved for union-led technical projects.

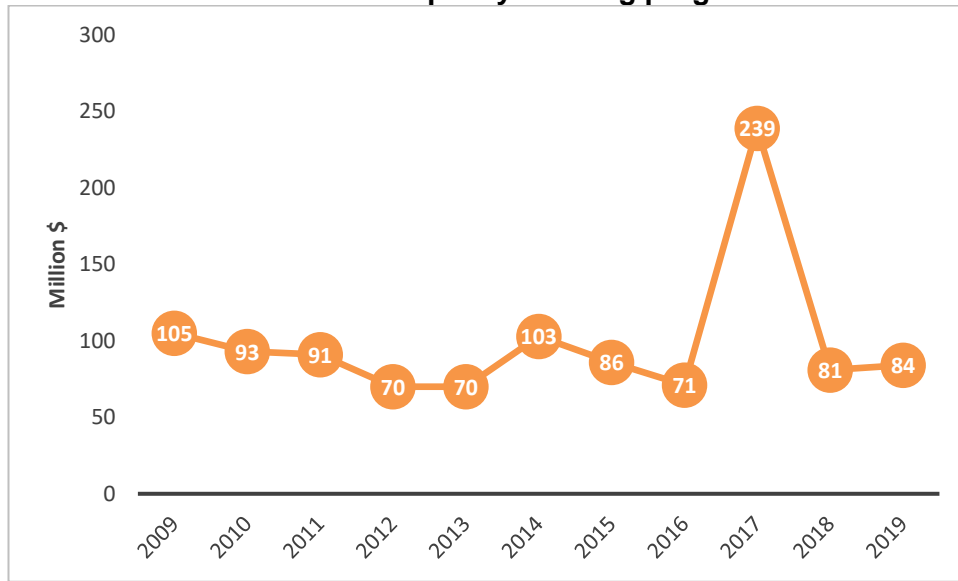
In the US, the resources of the Department of Labour (DOL) and its Bureau of International Labour Affairs (ILAB) are crucial to compensate for the relatively limited resources of the USTR, which remains a small government agency. As a matter of comparison, the budget of the USTR in 2021 amounted to \$73 million compared with 739 times more for the overall budget of the Department of Labour at a pre-pandemic level of \$54 billion (2019).³⁷⁴ The ILAB, the international division of the DOL in charge of international labour rights programmes received \$67 million, a budget close to the entire budget of the USTR. This makes it the largest funding provided to the enforcement of labour rights, although not all of them are related to trade. This substantial trade-capacity budget allows the ILAB to conduct a variety of sectoral trade capacity and monitoring programmes every year, from the Mexican auto sector to the Dominican sugarcane industry. In 2020, according to the Congressional Research Service, ILAB engaged with 48 countries through technical assistance and other collaborative programmes and monitored and reported on labour conditions in over 150 countries. In 2021, active ILAB-funded projects were estimated at a total of \$230 million.

Likewise, the implementation of trade agreements through capacity-building programmes draws heavily on funding from the US Agency of International Development (USAID). Indeed, in recent years, trade and labour capacity-building activities have received considerable financial support. At USAID, the trade and labour capacity-building budget has hovered between \$70 and 100 million a year, with a peak of \$239 million in 2017 (Figure 2). Trade capacity-building generally includes 1) improving workers' rights; 2) ensuring gender equity; 3) building capacity for civil society including unions; 4) reducing forced and child labour; 5) approving labour law compliance and governance; and 6) assisting with workforce training.³⁷⁵

³⁷⁴ The increase in unemployment benefits during the Covid-19 crisis led to a dramatic increase of the DOL budget (\$656 billion in 2021). Office of the USTR (2021), *Fiscal Year Budget 2021*, retrieved from <https://ustr.gov/sites/default/files/foia/USTR%20FY%202021%20Congressional%20Budget%20Submission.pdf>; USA Spending, "Department of Labor", Available at <https://www.usaspending.gov/agency/267>

³⁷⁵ This paragraph draws heavily from Cathleen D. Cimino-Isaacs (2021), "Worker Rights Provisions and US Trade Policy", Congressional Research Service, Washington, DC, retrieved from <https://crsreports.congress.gov/product/pdf/R/R46842>

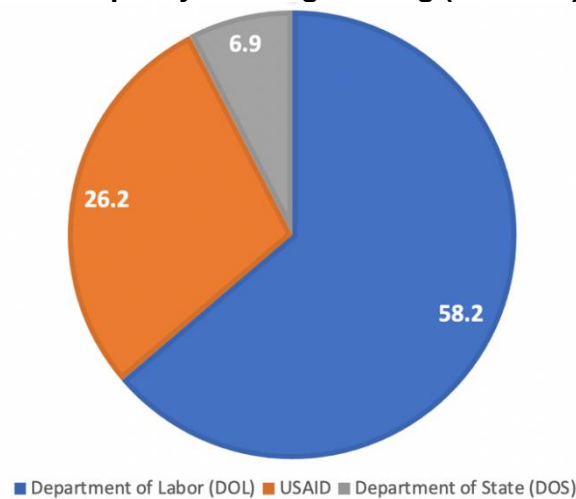
Figure 2: Evolution of trade and labour capacity-building programmes at USAID (million \$)



Source: USAID, Trade Capacity Building: <https://tcb.usaid.gov/>

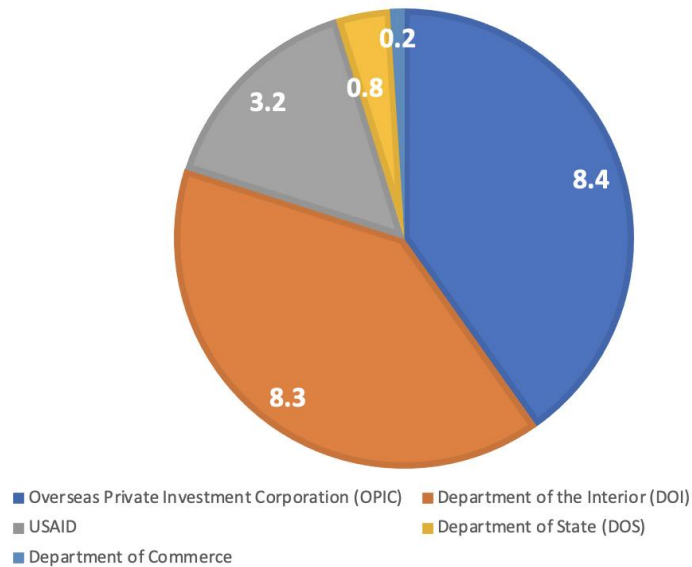
In 2019 (latest available figures), trade-and-labour capacity-building amounted to \$91.3 million, nearly two thirds (64%) of which were provided by the US Department of Labor, while another third (29%) was funded by the Department of State (7%) (Figure 3). Despite having resources dedicated to trade and labour, the USTR did not directly engage in trade capacity activities.

Figure 3: Labour-related trade capacity-building funding (million \$)



Source: USAID, Trade Capacity Building: <https://tcb.usaid.gov/>

Capacity-building programmes related to trade and environmental standards are substantially less funded than labour programmes but, here again, combine funding from different agencies. In 2019, they amounted to a total of \$20.9 million, with 40% of funding provided by the Overseas Private Investment Corporation and 40% from the Department of the Interior, 15% by USAID, 4% by the State Department and 1% by the Department of Commerce.

Figure 4: Environment-related trade capacity building funding (million \$)

Source: USAID, *Trade Capacity Building*: <https://tcb.usaid.gov/>

Admittedly, not all these trade capacity-building programmes are related to trade agreements. For instance, a close analysis of ILAB’s grant records over the 2015-2021 period reveals that out of 68 grants allotted by the US Department of Labour, ranging from \$500,000 to \$28.8 million, 35 concerned programmes implemented in US FTA partners.³⁷⁶ In fact, a recent synthesis review of ILAB grants highlighted the importance of aligning project activities with trade status goals (e.g., GSP) but noted that “whether the target country had a free trade agreement (FTA) with the U.S. did not have an apparent relationship with project effectiveness.”³⁷⁷ This conclusion would seem to legitimise greater cooperation across government agencies, and therefore the **decompartmentalised approach to technical assistance and capacity-building** when it comes to trade, labour and environmental provisions. At the same time, a “whole-of-government” approach to TSD implementation should not obscure the massive investment needed to develop durable labour or environmental programmes with sustained engagement with civil society engagement. For instance, the US spent \$90 million through different government agencies for environmental protection in Peru between 2009 and 2018. In other cases, US implementation bills have allocated dedicated budget, e.g. \$30-40 million per year for DR-CAFTA countries, \$30 million for four years for labour enforcement in the USMCA.

7.3.7 Civil society participation

Stakeholder selection in practice

While governments promoting social and environmental objectives in trade policy generally agree that civil society has a key role to play to achieve these goals, their respective approach to stakeholder consultation and public participation can vary considerably. Before delving into the modalities of civil society participation in the implementation of FTAs, the study addresses one question that is often neglected in policy and academic debates on civil society and which pertains to **the selection of stakeholders in civil society mechanisms, be it strictly regulated or loosely defined**. Here, it is important to note that this selection process can be as multifaceted as the modes

³⁷⁶ Author’s analysis of ILAB’s grant database.

³⁷⁷ Josh Meuth Alldredge and Sarah Liuzzi (2020). “ILAB Synthesis Review”. Washington, DC: Mathematica.

of public participation in trade policymaking. Thus, civil society organisations may be appointed to a formal committee composed of civil society representatives, participate in an open round of stakeholder consultation related to a country's trade or a specific trade agreement, or simply be part of an informal network of advisers to trade officials. A series of consultations organised around a country (e.g. the 2017 PanCanadian consultation on Canada's socially responsible trade policy or the 2018 *Trade for All* consultation in New Zealand) may allow for wide public participation involving a broader range of actors from different fields and different regions, but may leave participants frustrated by the lack of feedback or by the limited impact that they might have on the actual orientation of trade policy.³⁷⁸ **Formal civil society committees offer more sustained engagement with government officials but are no guarantee for influencing the implementation of trade agreements.**

In the Canadian case, Gender-Based Analysis Plus (GBA+) applied to trade policy seeks to assess the potential impact of trade measures on "diverse groups of people, taking into account gender and other identity factors" (the "plus" of GBA) including "indigenous heritage, age, education, language, religion, culture, ethnicity, geography (urban, rural, remote, Northern), socio-economic status, family status, sexual orientation, and disability."³⁷⁹ As such, it seeks input from experts and potentially affected populations before trade agreements are signed. This new "inclusive trade agenda" of the Canadian government, fits into a broader reflection undertaken by Canada, Chile, New Zealand and Mexico within the framework of the Inclusive Trade Advisory Group (ITAG). This joint initiative aims at "*sharing experiences and best practices in order to develop inclusive trade provisions (e.g., on women's economic empowerment, gender equality, indigenous peoples, SMEs, labour, and the environment) and to promote their use in bilateral, regional, and multilateral negotiations*" and constitutes an important step to broadening the range of stakeholders considered in trade policymaking. In Canada, these issues are not yet subject to the same implementation and enforcement but are already linked to TSD provisions (e.g. ILO Conventions No. 100 on Equal Remuneration and No. 111 on Discrimination (Employment and Occupation)). **This is a notable policy development in the broadening of social and environmental provisions beyond traditional TSD provisions, but one that needs to be approached pragmatically.** As one Canadian interviewee argued, to design an effective inclusive agenda, one needs to set clear policy objectives and distinguish the domestic agenda from international trade linkages.

During the implementation phase, the Canadian government appoints civil society representatives to environment advisory committees within the framework of several environmental cooperation agreements linked to FTAs, including NAFTA, CETA and the Chile-Canada trade agreement.³⁸⁰ No formal committee exists for the implementation of labour issues, except for the CETA labour DAG, which includes representatives from Canada's labour unions. In the US, stakeholder selection has

³⁷⁸ On the importance of feedback, see Robert Wolfe (2007). "Transparency and public participation in the Canadian trade policy process", in Mark Halle & Robert Wolfe (eds.), *Process Matters: Sustainable Development and Domestic Trade Transparency*, Earthprint Library, 21-72.

³⁷⁹ Government of Canada (2021). "Overview: Trade Policy and Gender-Based Analysis Plus". Available at: https://www.international.gc.ca/trade-commerce/gender_equality-egalite_genres/gba_plus-acs_plus.aspx?lang=eng

³⁸⁰ In the case of CETA, The Canadian Environment Domestic Advisory Group (CEDAG) is a public advisory committee comprised of 10 experts appointed by the Minister of Environment and Climate Change, representing environmental NGOs, indigenous organizations, business associations and think tanks. Government of Canada, "Canadians appointed to environment international advisory committees," 2019, retrieved on August 24, 2021 from: <https://www.canada.ca/en/environment-climate-change/corporate/international-affairs/canadian-appointed-advisory-committees.html>

largely been shaped by the divide of TSD provisions between labour and environmental issues, both during the negotiating phase (with the US Trade and Environment Policy Advisory Committee comprised of environmental NGOs and the Labour Advisory Committee (LAC) for labour unions) and the implementation and enforcement phase (with separate mechanisms for the enforcement of FTAs' labour and environmental chapters). New Zealand has specific consultation processes to engage with its Māori community.

As in the EU's DAGs, other countries tend to include both business and non-business representatives. The presence of industry members can create internal tensions within stakeholder consultation mechanisms as to the ends and means of TSD provisions.³⁸¹ On the other hand, concentrating civil society organisations in specific advisory groups runs the risks of “caging in” non-business interests, a form of institutional exclusion that can be detrimental to a cross-cutting TSD approach. This partly explains why US civil society organisations opposed the Obama administration's attempt to create a new Public Interest Trade Advisory Committee (PITAC) that would regroup experts on a broader range of trade linkages such as public health, development, and consumer safety.³⁸² Several interviewees, including members of CETA DAGs have highlighted the **need to preserve more open, ad hoc consultation channels that allow for greater public participation. This means that beyond formal civil society groups, a multi-pronged approach to civil society participation is important to maximise stakeholders' input.**

Channels and modalities of civil society participation

While many countries have sought to institutionalise the participation of civil society organisations to promote social and environmental objectives in trade agreements, **the exact functions performed by non-business actors can vary greatly** from one TSD model to another, and even within the same model, from one FTA to another. These organisations participate at different stages of the trade policy process and may only play an indirect role in the implementation, e.g. by highlighting potential risks and opportunities as part of an impact assessment. Table 23 presents an overview of civil society inclusion under the selected countries' TSD approaches across different channels of participation.

³⁸¹ On EU's DAGs, see Lotte Drieghe et al. (2021). “Participation of Civil Society in EU Trade Policy Making: How Inclusive Is Inclusion?” *New Political Economy*, pp. 1–16.

³⁸² Jean-Baptiste Velut (2016). “What Role for Civil Society in Cross-Regional Mega-Deals? A comparative analysis of EU and US trade policies”. *Interventions économiques*, vol.55.

Table 23: How do civil society organisations participate? Modalities of public participation under trade agreements

	Pre-negotiation and negotiation consultation	Cooperation, technical assistance and capacity-building provided to civil society*	Monitoring	Enforcement
EU	Formal consultation under impact assessments (<i>ex-ante</i> assessment and sustainability impact assessment) <i>Ad hoc</i> public consultations Civil Society Dialogue Publication of negotiating texts	Exchange of information through DAGs; Capacity building for NGOs formalised in some association agreements, not explicitly in FTAs.	Exchange of information through DAGs; Consultation for <i>ex-post</i> impact assessment; Civil Society Dialogue	Public submissions centralised in Single Entry Point since 2020
US	Trade Advisory Committees (LAC and TEPAC); Environmental reviews conducted by the EPA International Trade Commission (ITC) impact assessment	Trade capacity-building projects for both labour-related and environment-related standards	Monitoring through Labour Affairs Council and Environmental Affairs Council; Congressional hearings on specific FTAs or trade-relations Evaluation of project performance (e.g. ILAB Synthesis Review)	Public submission process for both labour and environmental issues; Consultation as part of DSM (incl. <i>amici curiae</i>)
Canada	Formal consultation under environmental assessments (AEs) and Gender-Based Analysis Plus (GBA+) <i>Ad-hoc</i> public consultation rounds	Union-led technical projects Environmental trade capacity-building programmes Gender-based capacity-building activities for trade	Environmental commissions (NAFTA, Chile-Canada FTA) Monitoring of labour provisions under NAFTA/USMCA	Public submission process for both labour and environmental issues in some FTAs
New Zealand	<i>Ad-hoc</i> public consultations	Cooperation through dialogue (e.g. NZ-Thailand)	No formal mechanism	No formal mechanism

* This category describes explicit references to funding non-state actors in TSD provisions but does not exclude the existence of technical assistance and capacity-building programmes relying primarily on state-to-state cooperative activities.

Sources: TREND database, USTR, Global Affairs Canada, MFAT, and EU Commission.

At the pre-negotiating and negotiating phase, civil society actors can be consulted in three ways. First, all selected countries commonly organise *ad hoc*, open public consultations on specific trade agreements that can either be online surveys (e.g., US TPP consultation) or stakeholder events (as is often the case in Canada). Second, governments also engage with civil society stakeholders as part of their impact assessments. These are systematic in Canada and include economic impact assessments, environmental reviews and more recently, Gender-Based Analyses+ (GBA+). According to one Canadian interviewee, **social and environmental impact assessments paired with civil society consultations are important both to identify specific problems and anticipate key questions related to implementation.** In the US, the International Trade Commission is in charge of conducting an impact assessment of negotiated agreements. This, however, does not require consultation of civil society actors,³⁸³ unlike the environmental reviews that were institutionalised in 1999 and provide explicit guidelines for public participation.³⁸⁴

Despite conducting research papers on trade and inclusiveness, **New Zealand has not established formal impact assessments with public participation outside of its consultation mechanisms.** Third, civil society groups can participate in trade advisory groups, such as the Trade and Environment Political Advisory Committee and the Labor Advisory Committee in the US, or the Gender Trade Group and the Indigenous Working Group in Canada. Additionally, civil society representatives also commonly provide expertise to trade negotiators in a more informal manner. Interviews confirm that this is common among Canadian trade negotiators, who draw on an informal pool of civil society and academic experts as well as US negotiators. In fact, interviews reveal that three of the most innovative agreements with regard to TSD provisions – the US-Cambodia Textile Trade Agreement, the US-Peru FTA, and the USMCA – were designed with significant input from civil society stakeholders.

With regard to capacity-building and monitoring, the US and Canada provide ample opportunities for civil society organisations to participate in the implementation of trade-related labour and environmental projects through grants that are funded by other agencies (e.g., the Department of Labour in the US, the Canadian Ministry of Employment and Social Development). Given the wide variety of trade capacity-building projects across policy spheres and trading partners, drawing firm conclusions about the effectiveness of civil society participation can be daunting. This is also linked to the **very limited pool of studies comparing trade capacity-building projects across trade agreements.** One notable exception is a recent analysis commissioned by the US Office of Trade and Labour Affairs to evaluate the performance of 19 projects in 12 countries and the factors that contributed to the success or failure of such trade capacity-building programmes.³⁸⁵ The study assessed three types of factors contributing to project effectiveness and drew the following findings:

³⁸³ Sec. 105(c) of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015.

³⁸⁴ The guidelines for the implementation of Executive Order 13141. Available at at : <https://www.federalregister.gov/documents/2000/07/11/00-17418/request-for-public-comment-draft-guidelines-for-implementation-of-executive-order-13141#h-12>

³⁸⁵ Josh Meuth Alldredge and Sarah Liuzzi (2020). "ILAB Synthesis Report", submitted by Mathematica to the US Department of Labor, International Labor Affairs Bureau, Office of Labor Affairs. Available at https://www.dol.gov/sites/dolgov/files/ILAB/research_file_attachment/ILAB_synthesis_review_report_public_final.pdf

1. Factors that the funding agency could influence:

- Projects with longer periods of action and larger budgets were among the most effective in achieving their goals.³⁸⁶
- Projects primarily targeting government agencies, such as ministries of labour, were among the less effective projects.
- Projects that directly targeted employers, workers, or were fully tripartite, were more effective.
- Better Work (BW) projects were moderately effective in achieving their goals, and the most successful inputs of those programmes were 1) training and technical assistance with factory managers and 2) factory-level committees with workers and factory managers.

2. Factors that the implementer could influence

- Not surprisingly, projects that were well-managed and revealed a well-designed template for social change and translated into greater effectiveness. Projects that showed a greater understanding of the complexities of tripartite collaboration (government, workers and employers) were generally more successful.
- Projects that anticipated risks and were more flexible in their implementation were more effective.

Additionally, the study concluded that contextual factors were less likely to have an impact on project effectiveness. For the purpose of the present report, the lessons for civil society participation in trade capacity-building are two-fold. First, **intergovernmental cooperation on TSD issues with meaningful civil society engagement is more likely to bring tangible results than projects merely targeting government agencies**. Second, and as confirmed by the US-Peru FTA case study, **TSD capacity-building programmes tend to be most effective with sustained engagement with civil society actors** which, according to the report, **requires commensurate funding**. The importance of civil society engagement as a way to buy in domestic interests has also been underlined by a recent study.³⁸⁷

Furthermore, **the OTLA synthesis review comparing several technical assistance and capacity-building programmes in different countries is by itself a practice** that allows to assess the factors contributing to improving the implementation of TSD provisions on the ground. Indeed, at a broader level, the on-the-ground effects of TSD provisions can be hard to assess. In fact, a recent study did not find robust evidence of causal effects between the inclusion of TSD provisions in EU FTAs and the achievement of non-trade policy objectives on the ground.³⁸⁸ This confirms the importance of case studies that can provide a more granular picture of the dynamics of implementation and enforcement.³⁸⁹

³⁸⁶ According to the report, OTLA's "projects are diverse in their strategies and implementing environments, but all aim to improve the capacity of governments, workers, and or employers to enforce and improve labor protections."

³⁸⁷ Alessandro Ferrari et al. (2021). "EU Trade Agreements and Non-Trade Policy Objectives", EUI Working Papers RSC 21/48.

³⁸⁸ Ibid.

³⁸⁹ See section 8 for case studies.

Finally, **civil society actors can participate in enforcement mechanisms**. The most common case is **by submitting complaints for non-compliance with TSD provisions**. Other forms of participation include consultation once a case has been accepted, or in the form of *amici curiae*. These forms of civil society participation in enforcement are most developed under the Canadian and US approaches to TSD enforcement, to which the next section turns.

7.3.8 *Conclusions on implementation practices*

The comparative analysis of implementation practices provides a number of important takeaways regarding *ex-ante* implementation, the role of international organisations, technical assistance, capacity-building and monitoring, as well as civil society participation.

Ex-ante implementation

The pre-ratification period allows to focus on domestic reforms, whether this relates to labour or environmental standards. The US certification of compliance that occurs after ratification but before entry into force is a **form of “ex-ante implementation” coordinated by the executive and legislative branches that has been particularly impactful**.

Role of international organisations

Engaging with the ILO on labour issues at the negotiation stage has delivered tangible outcomes like the ratification of ILO conventions. Concretely, **ILO interventions through capacity-building, technical assistance and independent, neutral monitoring mechanisms provide impetus for reform in both developed and developing countries as witnessed in Vietnam, Mexico, South Korea, and Canada, among others**. This shows that TSD provisions can deliver policy outcomes in *both* developing *and* developed countries.

ILO technical assistance can also yield tangible results for monitoring processes. This includes targeted missions like scrutinizing union-level elections, as witnessed in the implementation of the USMCA. Thus, given its widely acknowledged authority on labour standards, **the ILO can play a valuable neutral function not only between two FTA Parties, but also with multinational firms, government officials, NGOs, and local workers**.

The combination of cooperation and incentives can also be very effective as it allows partners to engage by increasing pressure and establishing clear timelines to achieve specific outcomes. This is illustrated by the unique role the ILO played in the monitoring of the US-Cambodia Textile Trade Agreement.

While engagement with MEA Secretariats has been much less common than ILO technical assistance, **connecting TSD implementation with capacity-building activities co-sponsored by MEA Secretariats can help address detrimental effects** of illegal trade of preserved resources (e.g. US-Peru FTA and CITES).

Having an informed, enlightened and engaged civil society can provide considerable leverage in monitoring, public submissions, and add pressure on implementing the provisions. By taking on a neutral role between Parties and multiple stakeholders, **international organisations can help enhance civil society participation**.

Trade capacity-building, technical assistance and monitoring

Leveraging institutional resources across government agencies allows to supplement the limited funding granted to trade agencies for implementation of labour and environmental provisions, in small and large countries alike. In all selected countries, labour and environmental ministries and agencies are engaged at both negotiating and implementing phases through various interagency processes.

Civil society participation

A notable policy development has been the broadening of social and environmental provisions beyond traditional TSD provisions under an “inclusive trade agenda” that includes among others, gender and indigenous rights, as witnessed in Canada, Chile and New Zealand. These issues are not yet subject to the same implementation and enforcement but are already linked to TSD provisions (e.g. ILO Conventions No. 100 on Equal remuneration and No. 111 on Discrimination (employment and Occupation)).

A multi-pronged approach to civil society participation can maximise stakeholders’ input at various stages of the trade policy process:

- **At the pre-negotiation stage**, social and environmental **impact assessments** paired with civil society consultations have helped countries identify specific problems and anticipate key questions related to implementation.
- **At the implementation stage**, while formal civil society mechanisms are important, several interviewees have highlighted the **benefits of open, ad hoc consultation channels**.
- **Intergovernmental cooperation on TSD issues with meaningful civil society engagement is more likely to bring tangible results than projects merely targeting government agencies**, as revealed by the analysis of multiple trade-and-labour capacity building programmes across different regions.
- **TSD capacity-building programmes tend to be most effective with sustained engagement with civil society actors, which requires commensurate funding**, as illustrated by the Canada-Colombia FTA or the US-Peru FTA.
- **Comparing technical assistance and capacity-building programmes in different countries** allows assessing cross-cutting factors contributing to improve the implementation of TSD provisions on the ground.

*7.3.9 Enforcement practices***Canada**

Canada has only published one set of submissions, as well as a full report on a set of complaints against Colombia. In addition, Canada has filed three submissions against Mexico under the NAAALC, and one against the US. Of the three submissions against Mexico, one is under review, in

one there has been a report issued, and one has resulted in a report as well as a ministerial agreement.³⁹⁰ Two other submissions were declined for review.

Because the Colombia public submission is the most extensive enforcement practice undertaken thusfar by Canada, a very brief synopsis follows here. However, an extensive and in-depth discussion of the public submission and Canada's enforcement practices can be found in the case study on the Canada-Colombia Public Submission and subsequent review and report. The issues in the Canada-Colombia submission concerned matters related to lack of enforcement by the Colombian government of labour law including freedom of association and collective bargaining; the derogation of labour laws to encourage trade and investment; and a lack of timely access to labour justice. The complaint used, as examples, two companies in particular: an extractive company, and a sugar producing and processing company. Both companies were alleged to have misused subcontracting, and of engaging in systematic anti-union practices, including the use of violence. These practices were attributed to the broader program of inadequate protection of fundamental labour rights in the law, and a failure to effectively enforce the existing labour law.³⁹¹ The report concluded by recommending:

*"In particular, the Colombian government's profession of urgency must now translate into concrete and ambitious actions to: (a) ensure that Colombian labour law embodies and provides protection for internationally recognised labour rights, and that such law is effectively enforced, as required by Articles 1 and 3 of the Canada-Colombia Agreement on Labour Cooperation; and (b) ensure that Colombian workers have appropriate access to fair, equitable and transparent proceedings before a tribunal to seek appropriate sanctions or remedies for violations of labour law"*³⁹²

The Parties subsequently entered into an action plan that contained highly specific steps that Colombia agreed to take in the time frame of 2018-2021.³⁹³ Because of the uniquely challenging human rights context in Colombia, the Parties also entered into an agreement in which each Party would write annual reports on the impact of the Canada-Colombia FTA on human rights in both territories. Some critics have argued that both the labour side agreement and the human rights agreement are overly accommodating of investors rights while having weak enforcement mechanisms to hold states accountable, and provide for no accountability for investors.³⁹⁴

Canada has not used the environmental chapter dispute settlement procedures, such as they exist, in its environmental chapters. **However, the utilisation of the specialised environmental Secretariat in some of the FTAs that include it has been extensive, creating a strong body of research and factual records that can be used by civil society and governments to help propel**

³⁹⁰ Congressional Research Service (CRS), *Workers Rights Provisions and U.S. Trade Policy* (Jul 16, 2021).

³⁹¹ Government of Canada, *Review of Public Communication CAN 2016-1*, p. iii.

³⁹² Government of Canada, *Review of Public Communication CAN 2016-1*, p. 35.

³⁹³ Employment and Social Development Canada, *ACTION PLAN 2018-2021 Under the Canada-Colombia Agreement on Labour Cooperation*, available at <https://www.canada.ca/content/dam/esdc-edsc/documents/services/labour-relations/canada-colombia-action-plan-en.pdf>

³⁹⁴ See Gus Van Harten, *The Canada-Colombia Free Trade Agreement, in Profits, Security, and Human Rights in Developing Countries: Global Lessons from Canada's Extractive Sector in Colombia* (James Rochlin ed., Routledge 2015).

enforcement.³⁹⁵ For a study, see the Sumidero Canyon II case study, and for another example of a case with Chile, see the discussion of Chile below.

Chile

Both the Canada-Chile Agreement on Environmental Cooperation (CCAEC) and the US-Chile FTA (USCFTA) require Parties to effectively enforce domestic environmental and labour law. While the CCAEC provides for a citizen submission process similar to that of the NAAEC, the USCFTA Environment Chapter allows interested persons and NGOs to submit requests for consultations, but the process is not required to continue beyond an initial consultation as it does not require the development of a factual record. However, interviews conducted for this project provided an example of how the citizen submission process under the CCAEC is, in practice, enforced differently across trading partners. The interviewee explained that in his role within Chile's NGO sector in the late 1990s, he participated in one of the first submissions to the Secretariat regarding the environmental impacts of a Canadian aluminium company based in Patagonia. At the time of submission, the team approached the Ministry of Environment, which responded to return the next day. Doing so, the team realised that the Secretariat had not yet been established, but set up rapidly in order to receive the submission. However, the Canadian counterparts already had an established Secretariat office. While the process was effective in the end, the interviewee's anecdote demonstrates differences in institutional capacity that only come to light in practice, rather than when drafting relevant provisions.

While the USCFTA includes both labour and environmental chapters with numerous relevant provisions, in practice, the only labour and environmental provisions in the USCFTA that can be enforced by the dispute settlement process concern a Party's failure to effectively enforce its own laws. Thus, in order to assess whether the USCFTA effectively enforces the protections it aspires to apply, scholars have examined domestic Chilean labour and environmental law to the extent that it is enforceable under the USCFTA's dispute settlement process³⁹⁶.

Chile undertook an extensive overhaul of its environmental regime in the mid-1990s, suggesting that it was encouraged to improve its environmental standards in anticipation of the USCFTA negotiations. In fact, **interviews conducted for this study confirm that Chile conducted an internal stock taking exercise of its environmental and labour laws prior to the negotiations in order to establish an acceptable baseline on both labour and environmental law.**

This overhaul established the Environmental Framework Law (EFL), which strengthened and organised a set of existing and new regulations. The framework allows individual citizens and civil society to call companies to court for environmental harm, and strengthened the National Commission on the Environment (CONAMA) by granting it federal agency status. A particularly relevant element of the EFL for the USCFTA is the creation of the Environmental Impact Assessment (EIA) system, which lists types of projects that must conduct an environmental impact assessment and be pre-approved by CONAMA. The EFL lays out broad protection and enforcement requirements that support its compliance with the USCFTA's Environment Chapter. However, the USCFTA excludes regulations that aim to manage the exploitation of natural resources from its definition of "environmental law", which means that natural resource issues in Chile may not benefit from the agreement's dispute settlement process. Thus, in practice, if Chile fails to effectively enforce

³⁹⁵ This is illustrated by the large number of submissions and reports under the NAAEC. See <http://www.cec.org/submissions-on-enforcement/registry-of-submissions/>

³⁹⁶ Available at <http://arizonajournal.org/wp-content/uploads/2015/11/Sagar-Note-rev.pdf>

its domestic laws regarding other conservation efforts that the USCFTA includes in its definition of “environmental law”, then the dispute settlement process can be triggered, however, if Chile fails to effectively enforce domestic law regarding the exploitation of natural resources—which via mining is Chile’s most environmentally harmful sector—then it is not eligible under the USCFTA’s dispute settlement process.

Moreover, the USCFTA’s Environment Chapter specifically addresses pollution havens by restricting both Parties from weakening domestic environmental laws to attract investment. However, the commitment is also not enforceable through the agreement’s dispute settlement process.

The Labour Chapter of the USCFTA requires both Parties to “*strive to ensure*” that labour rights under the fundamental ILO conventions are protected by domestic law. Similarly to the unwritten pre-ratification environmental law reforms in the hopes of making itself a more compatible trade partner, **Chile ratified the remaining five of the eight ILO fundamental conventions it had not yet ratified prior to the USCFTA negotiations in 1999-2000.**

Chile’s Constitution and Labour Code include protection with regards to trade union participation, minimum wage, occupational health and safety, and collective bargaining. In 2001, Chile increased compliance with the labour standards outlined in the USCFTA by approving a Labour Code reform package. While enforcement provisions under the USCFTA require both Parties to comply with independently established domestic labour laws, in practice, compliance with the Labour Chapter’s provisions is dependent on the strength of such laws as the dispute settlement process will only address a Party’s failure to effectively enforce its own laws.

In this light, without a citizen enforcement mechanism as seen in the CCAEC, the USCFTA lacks the ability to strike a balance between state sovereignty and public interest for environmental protection. Both the USCFTA and the CAAEC allow each trade partner to define the level of environmental protection it will be required to enforce via its domestic environmental laws. However, a 2010 review of Chile’s FTAs makes the case that in practice, states are less incentivised to use state-to-state dispute settlement processes because of the threat of sanctions.³⁹⁷

Moreover, the dispute settlement process of the USCFTA reflects a prohibitively high burden of proof. The process requires Chile and the US to demonstrate first that there is a continuous pattern of non-enforcement and, second, that the pattern affects trade between the two countries. While the first requirement may be particularly challenging in the Latin American context with inconsistent patterns of enforcement, the second requirement is often cited as barring states from using the dispute settlement process. Proving a causal relationship between the complainant’s concern and an impact on trade between Chile and the US demands high levels of capacity, data, and resources.³⁹⁸

Finally, for enforcement mechanisms such as state-to-state dispute settlement processes to be effectively implemented, countries are dependent on available resources for continuous monitoring of each other’s enforcement activities. Citizen submission processes, however, have lower resource

³⁹⁷ Rachel T. Kirby (2010). “Giving Power to the People: Comparing the Environmental Provisions of Chile’s Free Trade Agreements with Canada and the United States.” *Sustainable Development Law & Policy*, Fall 2009, 65-68, 91-93.

³⁹⁸ *Ibid.*

demands on trade partners. The CAAEC's citizen submission process provides a mechanism through which residents are able to report concerns of non-enforcement in their own communities. Given that non-enforcement of labour or environmental provisions often has direct (and often harmful) implications for nearby residents, such a process leverages off of individual incentives to monitor and report on compliance failures.³⁹⁹

New Zealand

The approach to TSD enforcement varies across countries—reflected by the use of sanctions for non-compliance in some countries such as the US, while others, such as New Zealand, rely on dialogue and remedies for those impacted.⁴⁰⁰ Interviews conducted by the OECD (2018) reveal that New Zealand's incentive-based approach has been perceived as successful—recognising that while useful as backstops, dispute settlements do not properly incentivise enforcement of environmental provisions. Rather, certain practices enable efficient use of enforcement provisions, including sufficient funding, senior level support, adequate clarity and specificity, and regular monitoring and review of activities.⁴⁰¹ Beyond efficient enforcement provisions, other practices have been highlighted as valuable indicators of compliance with environmental provisions including increased trade in environmentally friendly goods and technologies as well as strengthened multilateral environmental governance (especially when provisions require implementation but not ratification of MEAs).

The environment chapter of the New Zealand-China FTA, which includes research on dairy effluent disposal, has been underlined as a good example of the need for specificity in defining issues to be enforced. Moreover, New Zealand has established Environment Committees across its bilateral FTAs as well as the RTA with Chile, Singapore, and Brunei. While assigning staff responsible for the enforcement of environmental provisions should be sufficient, in practice, capacity for enforcement across the functions of environmental provisions is stronger via multilateral platforms such as the Environment Committees. The introduction of staff responsible for the enforcement of environmental provisions allows for an exchange of ideas, as well as the ability to monitor progress and highlight bottlenecks across spatial boundaries.⁴⁰²

While the country's recent FTAs, such as the 2015 Korea-New Zealand agreement, include provisions to comply with MEAs, a specific DSM for environmental provisions, public submissions for non-compliance, state-to-state consultations, the use of a panel of experts, as well as remedies, in practice, New Zealand does not actively monitor the actions of partner countries. Enforcement of commitments is rather passive as it is activated by reports of breaches by those impacted—perhaps due to a general decrease in resources throughout the 2010s. The consultation processes have not been employed in the past decade as there have not been reports of non-compliance.⁴⁰³

United States

Enforcement practices of labour provisions

With regards to the enforcement of labour provisions, despite the increasing prominence given to complaints and dispute resolution in the US approach, **there have been relatively few submissions that have been accepted for review**, and only one case that has been subject to

³⁹⁹ *Ibid.*

⁴⁰⁰ *Postnikov and Bastiaens (2020).*

⁴⁰¹ *George and Yamaguchi (2018).*

⁴⁰² *Ibid.*

⁴⁰³ *Ibid.*

arbitration. Rather, the US approach to enforcement practices has been to work proactively with partner countries outside of dispute settlement to resolve labour related problems. The chart below indicates the history of enforcement practices since NAFTA.

Table 24: US enforcement practices

Country	Years filed	Petitions	Status
Mexico	1994–2020	13	*12 reports issued; 8 ministerial agreements
Guatemala	2008	1	*Panel decision in 2017
Peru	2010; 2015	2	*Reports issued in 2012 and 2016
Bahrain	2011	1	*Consultations in 2014
Dominican Republic	2011	1	*Report issued in 2013
Honduras	2012	1	*Monitoring and action plan adopted in 2015
Colombia	2016	1	*Report issued and consultations with contact points held in 2017

Source: Congressional Research Service (CRS): *Labour Enforcement Issues in US FTAs (2020)*; *Workers Rights and US Trade Policy (2021)*.

As Table 24 above shows, there have been a limited number of petitions (20) accepted for review by the Office of Trade and Labour Affairs⁴⁰⁴, despite significant interest expressed by interested stakeholders in enforcing the labour provisions through dispute settlement.⁴⁰⁵ Of the petitions accepted for review, only one has proceeded to dispute settlement arbitration, the Guatemala case, which will be the subject of a case study in Section 8.

The reluctance to utilise dispute settlement dates to NAFTA. In the NAALC, no case ever moved beyond the initial state of ministerial consultations despite there having been some 40 cases filed with NAO offices.⁴⁰⁶ **However, according to scholars, meaningful progress came of the ministerial consultations even without arbitration.** In Mexico, some of the changes noted by scholars include “the transparent publication of union registries, the end of pregnancy testing for female job applicants, and the use of secret ballots in elections.” In the US, important changes included the separation of migration and labour rights enforcement duties, and changes to the H2A and H2B workers visa systems to prevent abuses.⁴⁰⁷

Some scholars have argued that perhaps the most important consequence of the NAALC and its submissions process was the increase in transnational cooperation between North American unions.⁴⁰⁸ Notably, a number of the cases that were filed were results of collaborations

⁴⁰⁴ OTLA is a sub-division within the International Labour Affairs Bureau, which is in turn a division of the US Department of Labour.

⁴⁰⁵ See DOL, *Submissions under the Labour Provisions of Free Trade Agreements*, accessed at <https://www.dol.gov/agencies/ilab/our-work/trade/fta-submissions>. This issue will be one of the areas examined through interviews of relevant actors in the final report.

⁴⁰⁶ Department of Labour, *Submissions on NAALC*, accessed at https://www.dol.gov/agencies/ilab/submissions-under-north-american-agreement-labour-cooperation-naalc-print?combine=&field_naalc_office_target_id=All&field_status_target_id=All&field_issue_target_id=All&items_per_page=10&page=3

⁴⁰⁷ Kimberly A. Nolan García (2017). *Labour Rights Enforcement under the NAFTA Labour Clause: What Comes Next under a Potential Renegotiation?*. Wilson Centre,

⁴⁰⁸ Tamara Kay (2011).

between Mexican and American unions and workers' organisations. That meant that rather than framing their relationship as being one of opposing interests, trade unions conceived of themselves as sharing interests and goals in a global economy, perhaps reducing conflict and resistance to global integration. The NAALC also spurred unions to develop international departments, and required American unions to address head on racist attitudes that were held about Mexican workers.⁴⁰⁹

Reluctance to utilise dispute settlement is also evidenced in the US-Jordan FTA, which included recourse to the same dispute settlement mechanisms for labour and other provisions in the agreement. An exchange of letters between the US Trade Representative and the Jordanian Ambassador reportedly agreed to resolve any potential disputes without resort to trade sanctions.⁴¹⁰ Thus, despite the existence of the dispute settlement mechanism, which had long been a tool advocated for by American unions that were displeased by the alternative labour dispute mechanism utilised in NAALC, it, too, has never been used. This despite the fact that in 2006, Jordan was subject to a scathing expose by a US labour rights NGO of its working conditions for migrant workers in its garment industry. Indeed, the AFL-CIO, along with the National Textile Association, filed a complaint with the US Department of Labour on multiple issues relating to non-enforcement of International and Jordanian Labour Law in a manner affecting trade between the parties, but the case was not accepted.⁴¹¹

However, of greater interest for the purposes of this analysis are the results and reports that were achieved from the processes provided for in the enforcement provisions prior to arbitration. What resulted were in-depth, high quality reports by the full-time, professional staff of the Office of Trade and Labour Affairs. Officials not only conducted desk reviews of submissions, but conducted primary research, meeting with and interviewing relevant stakeholders including workers, trade unionists, employers, and other organisations. These reports in themselves generated significant amounts of information that could be used by government officials in negotiations over changes in law and practice.

In most instances, the reports were deemed sufficient to compel action in the other Party, and the Parties arrived at an agreed set of actions to remedy the problems investigated in the reports. In others, the US government chose to proceed to consultations, such as in the case of Bahrain, basing the official consultations on the OTLA report's findings. Consultations took place, and the US Department of Labour (DOL) reported progress in addressing a number of concerns raised in the complaint and the reports, while also indicating areas for improvement.⁴¹²

Analysis of the public submission criteria

The US has promulgated a set of federal regulations that stipulate the procedures for a public submission for a complaint.⁴¹³ As noted, an important element of the enforcement process is the submissions of interested third parties. The submission must include information proving that there

⁴⁰⁹ *Id.* at 3.

⁴¹⁰ Mary Jane Bolle (2016). "Overview of Labour Enforcement Issues in Free Trade Agreements", *Congressional Research Service*, Feb 22, 2016, p.3.

⁴¹¹ See Kevin Kolben (2013). "Trade, development, and migrant garment workers in Jordan, *Middle East Law and Governance*", vol.5 195-226.

⁴¹² See USDOL, *Standing Up for Workers: Protecting Labour Rights Through Trade* (2015) pp 14-16, Available at: <https://ustr.gov/sites/default/files/USTR%20DOL%20Trade%20-%20Labor%20Report%20-%20Final.pdf>

⁴¹³ *Federal Register* Vol 71 No. 245 76694-77696 (F), accessed at <https://www.govinfo.gov/content/pkg/FR-2006-12-21/pdf/E6-21837.pdf#page=1>.

has been harm, and that the actions or inactions constitute a violation of the terms of the agreement.⁴¹⁴ The Department of Labour through OTLA has 60 days from submission to determine whether it will accept the submission for review. If the review is accepted, the DOL is to keep the submitter updated on its progress, and information related to the review is to be placed in a public file.⁴¹⁵ DOL must provide a means for information submission to the public, and can conduct a public hearing, if it decides, which is to be notified to the public in advance.⁴¹⁶ The final report is to be submitted 180 days from the time the submission is accepted. These reports are publicly shared on a special page on the USTR website, along with any public submissions, request for consultations, and other public documents related to labour chapters in trade agreements.⁴¹⁷

According to the Federal Regulations, OTLA at the end of the process has the power to recommend that the Secretary of Labour request Cooperative Labour Consultations with another Party, which are the first step towards a dispute settlement arbitration.⁴¹⁸ Similarly, if those consultations are unsuccessful, OTLA is also directed to make a recommendation regarding instituting dispute settlement procedures, but only after engaging in consultations with other relevant US agencies, such as the USTR and Department of State.⁴¹⁹ **The ability and duty of the reviewing administrative body to make recommendations at the ministerial level as to whether or not consultations should begin is deemed a possible best practice to help ensure that the political process of consultations is grounded in a fact finding and bureaucratic process that is partially insulated from political considerations.**

Notably, a similar process exists, although in different form, in Canada. There, a complaint is submitted to the National Administrative Office, which decides whether or not to accept the submission and write a factual report, which is made public. It then makes a recommendation to the labour minister as to whether or not a complaint should be filed.⁴²⁰

Enforcement practices of environmental provisions

Thus far, there have been no environmental cases in the US that have gone to dispute settlement panels. **However, the utilisation of the specialised environmental Secretariat in some of the FTAs that include it has been extensive, creating a strong body of research and factual records that can be used by civil society and governments to help propel enforcement.**⁴²¹

Some scholars have argued that while there has not been recourse to these dispute settlement procedures, they are important elements of an effective overall environmental strategy that is supportive of cooperative approaches.⁴²² An example of the extent to which the US Government uses the *threat* of dispute settlement as a means of catalysing compliance with specific wildlife trafficking elements is evidenced by an Annex to the US-Peru agreement, rather than resorting to its dispute settlement mechanisms. **Jinnah and Morin credit the obligatory “shall” language of the enforcement provisions for creating clear mandatory obligations that were**

⁴¹⁴ *Feder Register Vol 71 No. 245 76695 (F).*

⁴¹⁵ *Id. p. 76696, section H(2).*

⁴¹⁶ *Id.*

⁴¹⁷ USTR, *Issue Areas, Labor, Bilateral and Regional Trade Agreements*, accessed at <https://ustr.gov/issue-areas/labor/bilateral-and-regional-trade-agreements>

⁴¹⁸ *Federal Register Vol 71 Np. 245 at 76696.*

⁴¹⁹ *Id.*

⁴²⁰ *Interview with Government Official.*

⁴²¹ This is illustrated by the large number of submissions and reports under the NACEC. See <http://www.cec.org/submissions-on-enforcement/registry-of-submissions/>

⁴²² See Jinnah and Morin (2020).

backed up by potential trade remedies. What's more, as Jinnah and Morin argue, "*even if formal dispute settlement is unlikely for violation of environmental provisions, the threat of this possibility can catalyse important diplomatic approaches to dispute resolution that may not have otherwise been possible.*"⁴²³

Whereas all the agreements provide for a public submission mechanism, in some agreements,⁴²⁴ a specific institutional channel is created whereby public submissions can be submitted for review by a specially created Secretariat. This is an institution originally created in the NAAEC, which has received praise from scholars and commentators for its constructive work and institutional structure.⁴²⁵

If those submissions meet a set of criteria, the Secretariat determines if it is worthy of requesting a response by the other Party. It then decides whether the complaint merits reference to the Environmental Affairs Council (the Council), which is a body composed of ministerial level officers.⁴²⁶ The Council then decides as to whether the Secretariat should then compile a factual record.

However, it should be noted that the public submission process is not formally connected to the state-to-state dispute settlement process. However, while this process is not a required precursor for a dispute settlement process to be instituted, it was envisioned to be the first step.

Like in the labour provisions, the pre-May 10 Agreement FTAs only provide for a monetary assessment capped at \$15 million annually (adjusted for inflation) to be spent towards a fund for environmental initiatives, with suspension of benefits only as a last recourse in case of non-payment. The USMCA, in contrast, applies the same dispute settlement procedures.

Rapid Response Mechanism

Since the ratification of the USMCA, there have been three labour complaints submitted. The first was a complaint under the Labour chapter, submitted to the Mexican government by a US NGO regarding migrant workers' rights, and specifically discrimination against women migrant workers in the US agricultural sector entering under H2 visas.⁴²⁷ The other two complaints were filed under the Rapid Response Mechanism on Freedom of Association: one by a coalition of unions and NGOs, and the third one self-initiated by the US Government. Here below, the latter two complaints under the RRM are discussed.

Case one: Tridonex

The first complaint was filed by a cross-border, and cross-organisational coalition, including: the American Federation of Labour and Congress of Industrial Organisations, the Service Employees International Union, the independent Mexican union SNITIS (Sindicato Nacional Independiente de Trabajadores de Industrias y Servicios), and Public Citizen, which is an American NGO that focuses on trade issues. At the core of the complaint was a claim that the Mexican Federal Conciliation and Arbitration Board denied workers at the auto parts manufacture, Tridonex, located in the state of

⁴²³ *Id.* at 81.

⁴²⁴ See e.g., *US CAFTA-DR, US-Peru, USMCA, US-Colombia FTA.*

⁴²⁵ See e.g. David E. Gantz (2019). *The US-Mexico-Canada Agreement: Labour Rights and Environmental Protection*, Baker Institute, p.8.

⁴²⁶ See CAFTA-DR Art 17.5

⁴²⁷ *Centro de los Derechos del Migrante, Amended Petition On Labor Law Matters Arising In The United States (March 23, 2021)*, available at https://cdmigrante.org/wp-content/uploads/2021/03/USMCA-Amended-Peition-and-Appendices_March-23-2021_reduced.pdf

Matamoros, their rights to vote for a union of their choice.⁴²⁸ Importantly, Tridonex is an auto parts manufacturer located in Mexico that is a subsidiary of the closely held American company, Cardone. The complaint was not made public, as the petitioners have the right to request that it remain confidential.⁴²⁹

The issues started in 2019 with successful wildcat strikes for higher wages at the plant.⁴³⁰ Activists worked to replace the incumbent union with an independent one that they believed would better represent the interests of the workers. In 2020, some 400 workers, according to reports, protested outside the labour courts to win this right. Soon, a number of workers were fired from the plant, which according to SNITIS was in retaliation for the union drive. Later, the leader of SNITIS, lawyer Susan Prieto, was arrested and jailed for inciting violence at a protest, but was only released “hours after” the USMCA came into force, on 21 July 2020, drawing the attention of US lawmakers and unionists.⁴³¹

The coalition’s complaint was submitted on 10 May 2021, and the US submitted a request for review to the Mexican Government on 9 June, once it was considered and approved by the Interagency Labor Committee that makes the determination.⁴³² The request for review specifically included “all actions or failures to act” related to the workers’ efforts to affiliate with SNITIS and disaffiliate with the incumbent union; and all actions or failure to act related to the workers’ ability to exercise their rights of free association and collective bargaining. Finally, the US also requested that the review consider the firings of “*union-eligible workers.*” Notably, “*the actions or failures to act encompassed by this review include those of any person or entity, including but not limited to the Company*” and the incumbent union.⁴³³

On 10 August, approximately two months after the initial complaint, the US announced a resolution not with Mexico, as would typically be the case, but with the company Tridonex.⁴³⁴ The company agreed in a lengthy action plan to support a “*personal, free, and secret vote*” by employees, including taking a neutral position in any election; to take several steps to ensure respect for collective bargaining and freedom of association rights; and to pay full severance and six months of back pay to 154 workers that were identified as meriting such treatment.⁴³⁵ The parent company, Cardone,

⁴²⁸ Public Citizen, *New Lawsuit Filed Against Mexican Tridonex Subsidiary of U.S. Autoparts Maker Targeted in First USMCA Labor Case Brought by Unions*, Public Citizen (Press Release July 23, 2021), available at <https://www.citizen.org/news/new-lawsuit-filed-against-mexican-tridonex-subsidiary-of-u-s-autoparts-maker-targeted-in-first-usmca-labor-case-brought-by-unions-public-citizen/>

⁴²⁹ Federal Register/Vol. 85, No. 126 (June 30, 2020), pg. 39260.

⁴³⁰ Daina Beth Solomon, *In Mexico Autos Town, Labor Rights Falter Despite U.S. Trade Deal* (Reuters, May 2, 2021), available at <https://www.reuters.com/article/mexico-labor-id/INKBN2CK0SG>.

⁴³¹ Daina Beth Solomon, *Mexican labor activist released from jail as trade deal takes effect*, (Reuters, Jul 1, 2020), available at <https://www.reuters.com/article/us-usa-trade-usmca-mexico-labor/mexican-labor-activist-released-from-jail-as-trade-deal-takes-effect-idUSKBN2427JC>

⁴³² *United States Request for Review Addressed to Mexico* (June 9, 2021), Available at <https://ustr.gov/sites/default/files/enforcement/USMCA/Tridonex%20Request%20for%20Review%202021-06-09%20for%20web%20posting.pdf>

⁴³³ *Id.*

⁴³⁴ See *United States Reaches Agreement with Mexican Auto Parts Company to Protect Workers’ Rights* (Press Release, Aug 10, 2021), available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/august/united-states-reaches-agreement-mexican-auto-parts-company-protect-workers-rights>.

⁴³⁵ *Id.*

according to a statement by its attorneys, admitted no fault or liability with respect to the matters raised in the petition and did not believe that a denial of workers' rights had occurred at the facility.⁴³⁶

Case two: Silao (GM Case)

The second Rapid Response Mechanism case concerned a General Motors supplier in Silao, in the state of Guanajuato, Mexico. This request for a review by the US was unique in that it was self-initiated by the government, whereas prior dispute settlement procedures had always commenced as a result of third-party submissions. This signalled that the administration was ready to use the RRM proactively, even against factories owned by firms headquartered in the US. Simultaneously, USTR sent a request to the Treasury Secretary that U.S. Customs and Border Protection (USCPB) suspend liquidation of goods emanating from that factory; meaning that any goods entered into customs not be processed or released into commerce.

The request for review to the Mexican government claimed that workers at the facility were being denied the right of free association and collective bargaining. Specifically, the issues arose from events related to an April 2021 vote to approve a collective bargaining agreement between General Motors de México, and the Union. The request noted that the original vote was suspended by the Mexican Ministry of Labour because the Ministry claimed that there were irregularities and destruction of ballots. The request for review specified the Article of law that was implicated, Article 390 of the Labour Code, which concerned representation, and thus legitimacy, of a union representing the workers. The process to confirm representation is to be undertaken by secret and free voting.⁴³⁷ The importance of representation is underscored by the fact that according to Mexican labour officials, some 75% of collective bargaining agreements are "protection contracts," which are contracts signed between employer-dominated unions and employers, often without the knowledge of the workers.⁴³⁸

The Mexican government granted the request, agreeing that a violation had occurred. On 13 July 2021, the US Government and the Mexican Government agreed to a remediation plan that provided for a number of steps that the Parties would take to ensure a free and fair election on the collective bargaining agreement that was negotiated by the incumbent union.⁴³⁹ The agreement stipulated, *inter alia*, that a new legitimization vote would take place, workers would receive accurate information about their rights, that investigations would be launched about the suspension of the previous vote, and that the ILO would observe the new election. On 18 August 2021, the election took place, and the workers voted to reject the proposed collective bargaining agreement. The rejection will likely lead to a vote for a different union to represent the workers.⁴⁴⁰ On 21 September 2021, USTR

⁴³⁶ Hogan Lovells, *Hogan Lovells advises Cardone Industries in voluntary action plan agreement with USTR after USMCA labor petition* (Press Statement, Aug 10, 2021), available at <https://www.hoganlovells.com/en/news/hogan-lovell-advices-cardone-industries-in-voluntary-action-plan-agreement-with-ustr-after-usmca-labor-petition>

⁴³⁷ See *Maquila Solidarity Network (2019). Comparisons Of Mexico's Obligations Under T-Mec/Usmca And The Reform Of The Federal Labour Law*. Available at: https://www.maquilasolidarity.org/sites/default/files/resource/Comparison_Chart_TMEC-USMCA-MSN_June_2019.pdf

⁴³⁸ *Independent Mexico Labor Expert Board, Interim Report*, (Dec 15, 2020), pgs 3-4.

⁴³⁹ See *Course of Remediation between the United States and Mexico*, (July 13, 2021), available at <https://ustr.gov/sites/default/files/enforcement/USMCA/Silao%20Course%20of%20Remediation%20FINAL%207.13.2021.pdf>.

⁴⁴⁰ *US Department of Labor, Mexican Laborers' Vote on Future of Collective Bargaining Agreement at Silao General Motors' Plant is a Win for Labor Protections* (News Release, Aug 20, 2021).

requested the order to suspend liquidation of goods be lifted by USCBP, as provided for in the implementing legislation of the USMCA. The legislation created a right for USTR to request suspension of liquidation from the Treasury Department, and specified the conditions that had to be satisfied for resumption of liquidation.⁴⁴¹

The inclusion of the Rapid Response Mechanism was highlighted by several interviewees as being a highly innovative and important addition to the USMCA, making the USMCA an unusually well-supported agreement, even among typically trade-sceptical stakeholders. For example, Senator Sherrod Brown, who is credited with developing the RRM with Senator Ron Wyden, voted for the USMCA in part because of the inclusion of this provision. It was the first time the Senator had ever voted in favour of a trade deal.⁴⁴² For individual cases and rights violations, interviewees observed that state-to-state dispute settlement procedures can be lengthy to address underlying rights violations.⁴⁴³ The rapid response mechanism was described as a “surgical intervention” that should be included in all FTAs⁴⁴⁴ because it “allows for consequences to be delivered at the firm level”.⁴⁴⁵ The fact that the US chose to self-initiate one of the complaints opens the door for other Parties to the USMCA to do the same.⁴⁴⁶

The two successful examples demonstrate that a rapid response, factory-specific, on-site verification mechanism can be effective, particularly when there is a cooperative counterparty. Notably, both cases were resolved without resorting to a panel or remedies. It is too soon to determine whether there will be broader systemic impact, but the hope of RRM supporters is that it will serve as an incentive for other firms to comply with the labour law. Another important aspect of the Silao case was the involvement of the ILO as an election monitor. The use of international organisations can lend legitimacy, objectivity, and expertise to the process. Finally, the use of the RRM in these cases is highly salient because they were used to remedy practices in the vertically integrated supply chains of US-lead firms. An important critique of extant TSD provisions is that they are uniquely focused on state law and enforcement, and have not been as useful in addressing the labour rights abuses that occur in the supply chains that FTAs facilitate. The RRM facility, and the willingness of the USMCA signatories to use it, could be an important tool to pragmatically improve adherence to the labour rights commitments found in the agreement.

On the other hand, **there are possible limitations and downsides of utilising an RRM-type mechanism** to be considered. First, **it is costly**. Panellists are to be retained, and they might have to make **on-site visits**. Second, relatedly, **bureaucratic burdens might be high**. Complaints and requests for review might be numerous, and the Secretariat does not have discretion to determine whether or not petitions have merit. Third, while the dispute settlement procedure is ostensibly -- state-to-state, in fact it is a private actor located in another country’s jurisdiction whose interests are directly implicated. The complaining country has the right to withhold the release of that private Party’s goods from customs until there is a resolution of the dispute, which might significantly injure that Party in the interim. Finally, the private Party has an indeterminate right to present its side of the case to the panel, thus putting into question whether it is afforded due process. The lack of due

⁴⁴¹ See 19 USC 4692, *United States-Mexico-Canada Agreement Implementation Act (Jan 29, 2020)*.

⁴⁴² Sherrod Brown, Brown, Wyden Stand With Workers In First Usmca “Rapid Response” Labor Case (Press Release, May 10, 2021), available at <https://www.brown.senate.gov/newsroom/press/release/brown-wyden-stand-with-workers-in-first-usmca-rapid-response-labor-case>

⁴⁴³ Interview with Doug Molof.

⁴⁴⁴ Interview with Jeff Vogt.

⁴⁴⁵ Interview with Kevin Banks.

⁴⁴⁶ Interview with anonymous government official.

process was raised by interviewees as a potential problem with the way the RRM is currently structured. In this sense, the RRM creates an atypical form of state-to-state adjudication that should be carefully considered.

Box 4: Certification as enforcement: EFTA-Indonesia CEPA

Certification as enforcement: EFTA-Indonesia Comprehensive Economic Partnership Agreement and sustainable palm oil

The Comprehensive Economic Partnership Agreement (CEPA) between the EFTA States and Indonesia was signed in Jakarta on 16 December 2018. The Swiss State Secretariat for Economic Affairs (SECO) has made concessions regarding the import of palm oil but has ensured the inclusion of provisions to improve sustainability standards. This is done via accompanying measures providing clear requirements for sustainable palm oil trade (SECO, 2020; 2021; Interview Switzerland).

The domestic processes of import control and governance in Switzerland are established in a separate ordinance, moving responsibility for enforcement to Swiss authorities (Human rights in Context, 2021; Interviewee Switzerland; SECO, 2021). According to the ordinance, four established certification systems are approved as evidence, which have been identified in a comparative study as the best certification systems available on the market (see Swiss Federal Council Ordinance in German).

An importer who is certified according to one of these systems can submit an application for preferential rights to SECO. If this application is approved, they will be given the opportunity to preferentially import palm oil from Indonesia. When declaring customs, the importer undertakes that its goods are certified by the relevant certification system for each shipment. The customs authorities will automatically check the possession of a valid preferential authorisation for each import as well as the actual certification within the scope of random samples (SECO, 2021).

In this way, Chapter 8 on TSD introduces binding obligations with regard to the extra-territorial application of non-product related process and production methods (Human rights in Context, 2021). Finally, if Switzerland deems that the palm oil wasn't really produced sustainably, it could refuse to apply the lower tariffs. Indonesia could appeal to the arbitration panel to enforce the tariff concessions, whose panel would then have to determine whether the requirements were met. According to the Centre for Development and Environment (CDE) (2021), "*Appealing to the arbitration panel would only be a last resort; the initial focus is on a partnership-oriented approach*". Indonesia has approved the sustainability requirements and is to benefit from financial and technical assistance, but according to CDE, this is not yet quantified in Switzerland's implementation ordinance or in the accompanying explanatory report.

In short, EFTA's sustainable palm oil certification programme is **another example of a sectoral company-level, incentive-based mechanism guaranteeing strict environmental standards**. In other words, it is a new form of enforceable responsible business conduct applied to a specific sector under strict regulatory requirements.

7.3.10 Conclusions on enforcement practices

Enforcement practices have varied across environmental and labour chapters. On the **environmental front, the most developed set of practices have been not through state-to-state dispute settlement, but through the submission processes** of the North American Agreement on Environmental Cooperation, and now continuing via the USMCA. The lengthy record of reports has provided important data and factual records. Other than the extensive work of the North American Commission for Environmental Cooperation (NACEC), there have not been any environmental disputes initiated in the countries studied. However, the environmental agreements have provided opportunities for providing the impetus to reform domestic environmental laws, as

demonstrated in the discussion of Chile. Further, while there has not been recourse to these dispute settlement procedures, they are important elements of an effective overall environmental strategy that is supportive of cooperative approaches.

Labour enforcement practices centred on dispute settlement and state-to-state mechanisms, on the other hand, **have been more extensive**. This is perhaps because of there not being the equivalent of a NACEC in the labour context. In that regard, the US has the most extensive record with utilizing labour enforcement mechanisms. To date, the US has accepted 13 petitions for review. As a result, 12 reports have been issued, and eight ministerial agreements entered into force. One proceeded all the way to dispute settlement. These petitions must meet specific criteria established in the labour chapters themselves, but that are also elaborated in administrative regulations promulgated by the relevant ministries. Because of the sensitivity of the matter, submitters have the right to keep submissions confidential. The thorough and resource-intensive reports by the Department of Labor have potentially proved to be one of the most helpful tools in labour chapter enforcement. This is because they serve much of the same purpose as do human rights organisation reporting: generating a record around which governments base consultations on, and advocates can campaign. The dispute settlement processes have also provided opportunities for cross-border organizing and cooperation, which has been a significant benefit for labour advocates and unions.

Nevertheless, a significant critique of enforcement practices has been the long process involved in instituting them, and the limitations of state-to-state processes with its focus on public law and enforcement. Because of the extensive efforts and resources often required to make changes to law, and particularly enforcement, advocates, political representatives, and government officials have advocated for firm-level response mechanisms that are time sensitive. This has been realised in the inclusion of a facility-specific Rapid Response Mechanism that has on-site verification with specialised panels. Within less than two years, the RRM has resulted in two effective on-site remediations. While there are potential challenges and downsides to the RRM – including implementation costs, bureaucratic burdens, financial risks borne by private actors and concerns over due process – it stands for an innovative approach that combines state-to-state dialogue with on-the-ground, site-specific remedies, and can lead to concrete improvements for workers producing traded goods and services.

8 Case studies

Based on the findings from the previous tasks and in discussions with the European Commission, the team selected five case studies to cover the dimensions of the study: labour and environment, implementation and enforcement, as well as potential impact of the TSD practices. The following cases are analysed:

- The US-Guatemala labour dispute: procedural challenges to the sanction-based model
- Trilateral cooperation for environmental justice: the North American Commission on Environmental Cooperation (NACEC) and the Sumidero Canyon II case
- Canada's first public submission under the Canada-Colombia Agreement on Labour Cooperation
- A merger of TSD approaches: the CPTPP and its consistency plans
- How far can pre-ratification processes go and how long can they hold? Environmental reforms in the US-Peru Trade Agreement.

8.1 The US-Guatemala labour dispute: procedural challenges to the sanction-based model

In 2007, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and six Guatemalan unions collaborated to bring a complaint against the Guatemalan government for its failure to “*effectively enforce*” its labour laws, specifically with respect to freedom of association, rights to organise and bargain collectively, and acceptable conditions of work.⁷⁵ The complaint brought under CAFTA-DR by the US against Guatemala was the first trade and labour submission that the US Department of Labour accepted other than complaints brought under the North American Agreement on Labor Cooperation. It remains the only submission outside of the NAALC (which is now defunct) that proceeded through the entire enforcement and dispute settlement process, which took about nine years. During the process, the Parties suspended the consultations and agreed to a labour law enforcement plan. However, the US determined that the Guatemalan government did not abide by the enforcement plan, and proceedings continued. In 2017, an arbitral panel ruled in favour of the Guatemalan government, determining that the US was unable to show that the actions of Guatemala in question were both “*sustained or recurring*” and “*in a manner affecting trade*.” These were the legal standards agreed to by the Parties, with the burden of proof falling on the plaintiff to demonstrate that the violations of labour law met these standards. To address the panel's interpretation of the language, and lower the burden of proof in future arbitrations, the US amended the USMCA's labour and environmental chapters to make it a rebuttable presumption that a measure in question affects trade and investment, unless it can be demonstrated otherwise by the respondent country. The text clarified and arguably expanded the definition of what constitutes in “a manner affecting trade”. In addition, the USMCA included a novel special investigatory and dispute settlement process that specifically addresses freedom of association violations in specific workplaces. The development of this instrument is in part a result of the weaknesses of the institutions in the US-Guatemala case.

This case study is particularly helpful as a study of a “legalistic” approach to enforcement and dispute settlement. It provides the first full-scale observation of how a labour complaint in a trade agreement proceeds. In this case, the complaint went through a *prima facie* review by the US Department of Labour, was approved, proceeded to consultations, was advanced to an arbitral panel, was subject to negotiation to avoid further arbitration, which failed, and finally after 9 years, resulted in an arbitral decision. However, the results of the case left many stakeholders normally interested in using trade to improve working conditions, including Guatemalan stakeholders, dissatisfied.

The Guatemala Case is the sole extant example of a labour provision with recourse to dispute settlement with sanctions that has gone through the dispute settlement process.⁴⁴⁷ For the purposes of this report, the US approach to labour and environmental disputes is highly “legalised,” in that they are potentially subject to a process that closely resembles court litigation, and more specifically an arbitration process in which the Parties are legally bound.

The results of the Guatemala Case are illustrative of the extremely high bar that a complainant had to meet in order to prevail in a dispute related to labour rights in US FTAs. The high bar is a function of both the language in the labour chapter of the CAFTA-DR; the complex nature of labour and human rights issues; complex institutional and regulatory questions about what constitutes a failure by a regulatory agency to enforce the law in a sustained way; impact on trade flows (to be demonstrated by the complaining Party).

The US was highly selective in its choice of disputes to bring, despite a number of complaints and issued reports in other trade agreements. Yet, despite its access to a great deal of resources, both material and human, **the US failed in its effort to impose trade remedies on Guatemala** for the latter failure to enforce its labour laws.

It is important to note that the CAFTA-DR agreement only provided for a maximum penalty of \$15 million. Thus, the potential penalty was small. But clearly, both countries believed it worth the expense and effort to litigate the manner aggressively over a long period of time

8.1.1 Methodology

This case study reviews the legal arguments based on the FTA’s text that led to a decision in favour of Guatemala. However, to better understand the ways in which the dispute proceeded, including its background political context, the reasons for the alleged failure of Guatemala to adhere to the Enforcement Plan, and how it led to changed text in the USMCA. It can also be read in light of, and in contrast to, the EU-Korea Report of the Panel of Experts (2021), and its interpretation of the EU-Korea FTA’s language on the application of the trade and sustainability chapter to “*trade-related aspects of labour*⁸⁴ and *environmental issues*”... “*except as otherwise provided...*”⁴⁴⁸

The US-Guatemala dispute (Guatemala Case) is an important test case for the US “sanction-based” approach to the enforcement of TSD provisions. The analysis therefore delves into the minutiae of this dispute to examine the wording of TSD provisions (especially Article 16.2.1a of the CAFTA-DR), the design of public submission processes (e.g. burden of investigation imposed on the complaint), the resources allocated to the arbitrary panel etc. To better understand the lessons to draw from this

⁴⁴⁷ The EU-Korea Report of the Panel of Experts is the result of another, recent dispute settlement process.

⁴⁴⁸ EU-Korea FTA Art 13.2.

case, a subsection of this case study discusses the extent to which the design of the USMCA's labour provisions and its Rapid Response Labour Mechanism have sought to address some of the shortcomings of the US enforcement model. To do so, this case study relies on legal analysis and interviews with experts and stakeholders in the US Trade Representative, the Department of Labour, Guatemalan government, as well as labour organisations in the US and, if feasible, Guatemala.

8.1.2 Critical Review

History

The Guatemala Case began on April 23, 2008, when the AFL-CIO together with five labour unions and a Guatemalan union federation filed a petition with the US Department of Labour's Office of Trade and Labour Affairs (OTLA).⁴⁴⁹ The petition argued that the government of Guatemala had violated several terms of the CAFTA-DR labour chapter including:

- 1) Article 16.1, the statement of shared commitment, by not "*striving to ensure*" that the labour rights and principles derived from the 1998 ILO Declaration were recognised and protected by its law;
- 2) Article 16.2, enforcement of labour laws, because it violated its commitment to "*not fail to effectively enforce its labour laws through a recurring course of action or inaction in a manner affecting trade between the Parties*"; and
- 3) Article 16.3, its commitment to ensure that persons have appropriate access to tribunals for the enforcement of the Party's labour laws.

Specifically, the petition claimed that various employers from three industries: shipping, agriculture, and garments, had violated laws related to freedom of association and collective bargaining, through *inter alia*:

- Failing to bargain in good faith,
- Unlawfully dismissing union members and failing to reinstate them even after a judicial order,
- Murder and assassinations of union officials,
- Refusing to bargain with legally recognised unions,
- Illegal suspensions and dismissals of elected officials,
- Blacklisting and dismissing worker representatives who participated in a factory compliance program,
- Dismissing founding members of workers' coalitions,
- And failure to contribute to a social security fund.

To make its *prima facie* case, the AFL-CIO highlighted five cases in which domestic labour laws were violated "*together and individually*" in a "*recurring course of action or inaction on the part of the*

government.” The complaint also made the claim, without evidence presented, that the “*failure to effectively enforce labour laws also affects trade between the United States and Guatemala.*”⁴⁵⁰

OTLA accepted the case for review seven weeks later, on June 12, 2008. The announcement was made in the US Federal Register, which officially documents regulatory decisions and regulations, stating that it had considered the six criteria provided for in the federal regulations, and that it had accepted the submission for several reasons that were delineated in the ruling.

The core takeaway is that under the OTLA’s process, as published in the Register, there was no preliminary fact determination, but rather OTLA determined that *if true*, the allegations would constitute a violation of the Labour chapter.⁴⁵¹ This triggered OTLA’s obligation to “*gather information to assist OTLA to better understand and publicly report on the issues raised by the submission.*”⁴⁵² The review was to be completed, and a public report issued within 180 days.

The 2009 Report of the Office of Trade and Labour Affairs

On January 16, 2009, OTLA issued a 34-page report on the issues raised. The process was labour and resource intensive. It conducted two visits to Guatemala, meeting with a large number of stakeholders. The report analysed the claims made in each of the five companies that were subjects in the complaint. It made a number of findings, including:

- Administrative issues: a lack of ability of the Ministry of Labour to exercise its authority to conduct labour inspections, and a lack of authority to sanction labour law violations;
- Judicial measures: a lack of power of the courts to enforce judicial orders;
- Impunity for perpetrators of trade union killings;
- Lack of inter-agency coordination.

Accordingly, it made a number of fine-tuned and specific recommendations for improving the effective enforcement of labour laws.⁴⁵³ These included:

- Increased criminal prosecution and investigations of trade unionist killings;
- Improving the Ministry of Labour’s ability to conduct labour inspections;
- Enforcing court orders to reinstate dismissed workers;
- Develop and publicly disseminate guidelines to clarify the right to reinstate illegally fired workers who have accepted severance payments;
- Issuing guidelines on elements of the labour law and social security; and
- Promoting effective information sharing across ministries.⁴⁵⁴

⁴⁵⁰ See *Public Submission to the Office of Trade and Labour Affairs submitted by AFL-CIO et al*, Apr 23, 2008.

⁴⁵¹ *Id.* at 34794.

⁴⁵² *Id.*

⁴⁵³ See OTLA, *Public Report of Review of Office of Trade and Labour Affairs US Submission 2008-01 (Guatemala)*.

⁴⁵⁴ *Id.* at 33-34.

Notably, OTLA did not recommend that the Parties begin the consultation process, noting that OTLA would continue the informal intergovernmental process, but that it would reassess the situation six months after release of the report.⁴⁵⁵

Subsequent steps

On July 30, 2010, approximately a year and a half later, the US Trade Representative and Secretary of Labour wrote a joint letter to the Guatemalan Minister of Economy and the Minister of Labour and Social Protection, requesting that the consultation process begin. The letter described that “*over the last 11 months, the United States has conducted an extensive examination of Guatemala’s compliance with its obligations*” under the CAFTA-DR.⁴⁵⁶ Specifically, the letter argued that the government was in violation of its obligation to effectively enforce Guatemalan labour laws, specifically with regards to freedom of association and collective bargaining rights. The letter also highlighted labour-related violence, which was described as “*serious and... apparently deteriorating*.”⁴⁵⁷ Notably, nowhere in the letter did the US government claim that the violations were in a manner affecting trade or investment between the Parties.

Subsequently, after several months of discussions and two formal meetings in 2010, on May 16, 2011 the US exercised the second required step in the dispute settlement process, and requested a meeting of the Free Trade Commission, pursuant to the dispute settlement chapter of the CAFTA-DR. That meeting took place on June 7, 2011, but it also failed to resolve the matter. Accordingly, on August 9, 2011 the US Government filed a formal request that a Labour Dispute Panel be established. This letter, and how it was written, would become an important issue in preliminary proceedings of the Panel. The Panel was established, over a year later, on November 30, 2012. In the meantime, the Parties requested that the Panel be suspended a number of times.

During that time, the Parties continued negotiations, and terms of agreement were memorialised in an enforcement action plan (the Plan) signed on April 25, 2013. It was also agreed between the Parties that the dispute settlement request would be deferred for at least six months, with provisions as to what the conditions would need to be for the Panel to resume its work. The Plan was highly prescriptive and specific, calling for 13 action points including interagency information exchange, police assistance and allocation of resources for Ministry of Labour inspectors, enforcement of labour court orders, transparency of law enforcement statistics, and capacity building support from the US, among others.

Despite the highly detailed and prescriptive enforcement agreement, 17 months later, and after several further suspensions of the Labour Dispute Panel request, the US requested that the Panel move ahead with the arbitration because the Parties were unable to resolve the matter.⁴⁵⁸

⁴⁵⁵ *Id.*

⁴⁵⁶ Letter from The US Government to the Guatemalan Government requesting labour consultations (July 30, 2010, available at <https://www.dol.gov/sites/dolgov/files/ILAB/legacy/files/20100730-Letter.pdf>

⁴⁵⁷ *Ibid.*

⁴⁵⁸ USTR, *United States Proceeds with Labour Enforcement Case Against Guatemala (Sept 2014)*, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/September/United-States-Proceeds-with-Labour-Enforcement-Case-Against-Guatemala>

8.1.3 Arbitration

The Panel resumed work on September 19, 2014. On June 2, 2015, a hearing was held in Guatemala City. It would not be until September 27, 2016, that the Panel submitted its initial report. On December 12, 2016, both Parties had submitted comments on the report. The final 288-page Report of the Panel, nine years after the initial complaint and about three years after the establishment of the Panel, was finally issued on June 14, 2017.

Legal issues

The Panel's Report is long and complex, and engages in a fine-tuned analysis of the CAFTA-DR text. In doing so, it draws upon the Vienna Convention on the Law of Treaties (VCLT), WTO decisions, and other arbitrations with CAFTA countries. The following summary focuses on key aspects that are relevant for the purposes of this report.

Jurisdictional issues

The first issues the Panel addressed were jurisdictional. In its original complaint in 2011, the US cited violations of the Labour chapter's provisions that "*A Party shall not fail to effectively enforce its labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.*"⁴⁵⁹

In the request letter, the US raised the following issues: "*The United States has identified a number of significant failures by Guatemala to effectively enforce labour laws, including: (i) the failure of Guatemala's Ministry of Labour to investigate alleged labour law violations; (ii) the failure of the Ministry of Labour to take enforcement action after identifying labour law violations; and (iii) the failure of Guatemala's courts to enforce Labour Court orders in cases involving labour law violations.*"⁴⁶⁰

However, in its initial written submission in the dispute process, the US added a third issue: that Guatemala had failed to register unions or institute conciliation processes with the time required by law.⁴⁶¹

Guatemala made several arguments as to why the initial Panel request should be dismissed. The Panel, drawing in part on WTO law and the dispute settlement rules specific to CAFTA-DR,⁴⁶² dismissed most of Guatemala's arguments for dismissal, however, it did uphold an objection to the addition of the third issue regarding union registration because it was not specifically referenced in the initial Panel request.⁴⁶³

Interpretive issues

The interpretive issues in the Guatemala Case were a kind of *terra nova* for the Panel, as there had never been a dispute settlement process that interpreted the terms of the US labour chapter template. In some ways, the EU language and US template language with regard to labour

⁴⁵⁹ See Panel Decision. Available at https://www.trade.gov/sites/default/files/2020-09/Guatemala%20%E2%80%93%20Obligations%20Under%20Article%2016-2-1%28a%29%20of%20the%20CAFTA-DR%20%20June%2014%202017_1_0.pdf

⁴⁶⁰ *Ibid*

⁴⁶¹ *Id.*, at Art 60.

⁴⁶² See CAFTA-DR Art 20.10.

⁴⁶³ Panel Decision, at 103.

enforcement are similar, such that the Guatemala decision has instructive value. But in other ways they differ, which could lead to different interpretations of key terms. Addressing every issue is beyond the scope of this report, thus it addresses some key interpretive terms.

First, the Panel addressed the meaning of “*not fail to effectively enforce*.” The Panel held that this clause “*imposes an obligation to compel compliance with labour laws (or, more precisely, not to neglect to compel or be unsuccessful in compelling such compliance) in a manner that is sufficiently certain to achieve compliance that it may reasonably be expected that employers will generally comply with those laws, and employers may reasonably expect that other employers will comply with them as well*”.⁴⁶⁴

Second, a “*sustained or recurring course of action or inaction*” means “a line of connected, repeated or prolonged behaviour by an enforcement institution or institutions.”⁴⁶⁵ The Panel pointedly rejected Guatemala’s claim that such action had to be intentional in nature.⁴⁶⁶ Perhaps the most pertinent interpretive decision by the Panel was its interpretation of “*In a manner affecting trade between the Parties*.”⁴⁶⁷ It is on these grounds that many of the claims, in the end, failed.

In formulating a definition, the Panel took a middle ground between the expansive definition argued for by the US, and the highly restrictive one argued for by Guatemala. The US argued that a failure to enforce labour that in a manner affecting trade is one “*that has a bearing on, influences or changes cross-border economic activity, including by influencing conditions of competition within and among the CAFTA-DR Parties*.”⁴⁶⁸ The US attempted to analogise interpretations of GATT Article IV’s reference to “*affecting trade*,” but the Panel found that effort of minimal help.

Guatemala on the other hand argued for a highly exacting test, whereby there must be an “*unambiguous showing that the challenged conduct has an effect on trade between the Parties*.”⁴⁶⁹ This means essentially affecting prices and quantities sold.⁴⁷⁰ But the Panel rejected this, too, arguing it was too restrictive.

The Panel, in developing its interpretation of “*in a manner affecting trade between the Parties*,” chose to rely heavily on the larger context and objectives of the FTA.⁴⁷¹ It specifically relied on a provision in the Agreement’s initial provisions that provided that an objective of the agreement was to promote conditions of fair competition in the free trade area.⁴⁷² The Panel then observed that a failure to enforce labour laws very well could affect such conditions of fair competition. As a result, the Panel held that:

“*a failure to effectively enforce a Party’s labour laws through a sustained or recurring course of action or inaction is “in a manner affecting trade between the Parties” if it confers some competitive advantage on an employer or employers engaged in trade between the Parties.*”

⁴⁶⁴ *Id.* at Art 139.

⁴⁶⁵ *Id.* at 152.

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.* at Art 155.

⁴⁶⁹ *Id.* at Art 159.

⁴⁷⁰ *Id.* at Art 176.

⁴⁷¹ *Id.* at Art 169. “To understand what “in a manner affecting trade” means in Article 16.2.1(a), we must examine how this phrase fits into the Article, and how this provision fits into the broader Agreement.”

⁴⁷² Art 171 (citing Art 1.2 of CAFTA-DR).

For the avoidance of doubt, we affirm that this determination does not depend upon the weight or significance of that employer within its particular economic sector.”⁴⁷³

This holding is significant, because it grounds the definition of “a manner affecting trade between the Parties” in one of competitive fairness. Arguably, the definition would have been different had this objective not been included in the preamble, if it had been explicitly disassociated from the Labour chapter, or if the Panel had focused on the preamble objectives that more explicitly referenced labour matters, such as to “enforce basic workers’ rights” and to “build on their respective international commitments in labour matters.”⁴⁷⁴ Kevin Banks, one of the panellists, in an interview and in a forthcoming academic article,⁴⁷⁵ argues that labour chapters do not have to be framed in this conception of competitive fairness. He argues, for example, that the USMCA in fact can be interpreted differently than the CAFTA-DR agreement because the footnotes asserting that a manner affecting trade is assumed to take place unless shown otherwise, and because the preamble of the USMCA can be read to support a different interpretation of affecting trade and fair competition.⁴⁷⁶ Indeed, according to the EU-Korea panel of experts, context matters. As they wrote,

“that there are important differences between the texts of the CAFTA-DR Agreement and the EU-Korea FTA which would require careful examination. Most notably, the CAFTA-DR Agreement’s Chapter 16, which contains the provision upon which the United States of America made its complaint against Guatemala, does not have the same contextual setting of sustainable development as the EU-Korea FTA, nor does it refer to the range of multilateral and international agreements and declarations which the Parties have included in the EU-Korea FTA.”⁴⁷⁷

Grounding an agreement’s TSD provisions in purposes other than competitive fairness, such as sustainable development for example, provides an opportunity to interpret its terms in light of purposes that are tailored to the objectives of the TPSD chapters. Indeed, competitive fairness is not an articulated objective of EU trade agreements, and thus might not be used as a means of interpreting terms of the agreement. Rather, anti-competitive practices are explicitly referred to in, for example, sections on competition law⁴⁷⁸, in their own subject chapters. It does not frame the whole purpose of the agreements.

Application of the standards

In applying the text as interpreted to the facts, the Panel addressed each of the two claims. First, that the Guatemalan government failed to compel compliance with court orders to reinstate and compensate workers unlawfully dismissed in relation to union organisation; and second, that it repeatedly failed to conduct proper inspections in response to *bona fide* complaints by workers about employers’ violations of labour laws.⁴⁷⁹

⁴⁷³ *Id.* at Art 190.

⁴⁷⁴ See CAFTA DR Agreement.

⁴⁷⁵ See Kevin Banks, “Fit for Purpose? The Extent and Enforcement of International Trade Agreement Labor Obligations After the Guatemala-Labor Obligations Decision” (Forthcoming, Vol 52 *Georgetown Journal of international Law*).

⁴⁷⁶ USMCA, Chapter 23, fns 5, 9, 12, 14.

⁴⁷⁷ Panel of Experts Proceeding Constituted Under Article of the EU-Korea Free Trade Agreement, Report of the Panel of Experts (2021), Art 93.

⁴⁷⁸ See e.g. EU-Korea, Art 11.1.

⁴⁷⁹ *Id.* at Art 219.

In beginning its analysis, the Panel complained about the difficulty of completing its task given the lack of rules of evidence.⁴⁸⁰ This was a particularly challenging issue because much of the evidence was presented in a manner that concealed the identity of the people whose testimony it relied on. Moreover, challenges presented themselves as much of the information and identification of interviewees was redacted and kept confidential from the Panel. The Panel had no power to order the Parties to un-redact the information,⁴⁸¹ nor did it have the power to review documents *in camera*, or ask a third party to do so.⁴⁸²

Moreover, although NGOs and third parties are able to submit briefs, the Panel is bound by the Rules of Procedure to only allow to take those into account to the extent that they support the legal or factual issues raised by the complaining Party. In addition, in this instance, the Panel claimed that none of the supporting briefs had addressed the specific issues at hand, but rather discussed the larger political, economic, and social context of the dispute.⁴⁸³ This made the public submissions largely superfluous to the dispute.

On the matter of non-enforcement of court orders, the Panel found that the Guatemalan labour courts indeed failed to effectively enforce the law in “every instance” that was addressed.⁴⁸⁴ However, despite passing this test, the US complaints did not pass the “*in a manner affecting trade test*”. The Panel applied a three-part test to determine if the failure to effectively enforce labour laws was in a manner affecting trade:

- 1) At the relevant time the enterprises in question exported to one or more of the CAFTA-DR Parties in a competitive market or competed with imports from one or more of the CAFTA-DR Parties;
- 2) What effects, if any, failures to effectively enforce labour laws had on any of those enterprises;
- 3) Whether any such effects conferred some competitive advantage on any such enterprise or enterprises⁴⁸⁵.

In applying the test to the shipping companies in question, the court found that the US did not meet its burden to show that “one or more exporters obtained a competitive advantage from failures to effectively enforce labour laws against the shipping companies.”⁴⁸⁶ The Panel appeared receptive to receiving evidence on the issue, but it found that the US presented “no evidence, even approximate, about the relative importance of stevedoring costs in total costs for the enterprises exporting from the Port of Quetzal to CAFTA-DR Parties, or for exporters shipping from a comparable port elsewhere,” or that any cost savings for shipping companies would have affected conditions of competition for Guatemalan exporters.⁴⁸⁷

⁴⁸⁰ *Id. at Art 232.*

⁴⁸¹ *Id. at Art 240.*

⁴⁸² *Id. at Art 261-262.*

⁴⁸³ *Id. at 234.*

⁴⁸⁴ *Id. at Art 426.*

⁴⁸⁵ *Id. at Art 449.*

⁴⁸⁶ *Id. at Art 455.*

⁴⁸⁷ *Id. at Art 464.*

In other words, it appears that the US assumed that a failure to enforce would almost automatically lead to a determination that it was in a manner affecting trade. But the Panel wanted actual evidence as to how a particular market worked to affect competitive advantage, such that a failure to enforce labour laws would benefit those companies. And the US presented none according to the Panel.

The Panel then addressed the cases of garment companies that exported to the US that had dismissed workers after a request for collective bargaining. The issue here focused on whether the dismissal of employees for attempting to organise a union and bargain collectively necessarily affects trade. Here, the Panel again laid down a rule for these situations:

*“To prove its case a complainant will generally be required to introduce evidence of the extent and duration of effects of the failure to enforce on the ability of workers to exercise their rights to organize.”*⁴⁸⁸

In the case of the garment workers, the Panel found that in one factory where union leaders were dismissed, that it could be inferred, despite lack of evidence presented, that Guatemala’s failure to effectively enforce the law “*necessarily conferred some competitive advantage...*”⁴⁸⁹ But in the other instances, where it was rank and file union members that were dismissed, such an inference could not be made.⁴⁹⁰

In the case of a rubber company named in the complaint, the Panel found that there was no evidence that the company was engaged in CAFTA-DR trade at all. The US argued that even if the company was not a direct exporter, impunity for the company creates spill-over effects that make the industry more competitive because it suppresses union rights. However, the Panel did not accept this argument, because there was no evidence presented by the US to support it,⁴⁹¹ nor evidence provided on what the costs saved to the company were by avoiding a union.⁴⁹²

In sum, it appears that the Panel would have been receptive to some minimal amount of evidence addressing the ways in which the activity in question affected trade, and specifically how it affects the competitive advantage of the firm. However, none was proffered. In the end, the Panel found that because there was only one instance of a failure to effectively enforce the law in a manner affecting trade, that this instance could not be deemed “sustained or recurring.”⁴⁹³

In the case of the second issue, the failure to conduct proper inspection and the failure to impose penalties, the US was presented with another challenge: lack of evidence to prove the claims, due in no small part to the anonymity of the declarations contained in the US submissions.⁴⁹⁴ The Panel noted that with little detail and no corroborating evidence, it could not know the motivations of the declarants, how the declarations were created, and thus if they were spontaneous recollections.⁴⁹⁵ Finally, in one other instance regarding a subject of the complaint, the Panel simply found that the

⁴⁸⁸ *Id.* at Art 485.

⁴⁸⁹ *Id.* at Art 487.

⁴⁹⁰ *Id.* at Art 488.

⁴⁹¹ *Id.* at Art 495.

⁴⁹² *Id.* at Art 496.

⁴⁹³ *Id.* at Art 504.

⁴⁹⁴ *Id.* at Art 535.

⁴⁹⁵ *Id.* at 535.

Ministry of Labour did *not* fail to effectively enforce the law, and that it took in fact took reasonable actions in the circumstances.⁴⁹⁶

The issues presented by the Panel and the challenges faced by the US are likely to be issues faced in labour and human rights dispute settlement procedures more generally. That is, how can evidence be presented to a Panel when the complaint wishes to protect the identities of vulnerable populations. The Panel here was unwilling to give full benefit of the doubt to anonymous declarations without other corroboration. The Panel suggested that rules of evidence would help, as would discretion to the panel to conduct its own unreacted review, or appoint outside parties of its choosing. These are factors to consider in future dispute settlement procedures.

8.1.4 Discussion and concluding points

The Panel decision left many labour advocates, as well as some government officials on both sides, unsatisfied.⁴⁹⁷ Not surprisingly, US officials, but according to one former US official, also some Guatemalan officials from the Ministry of Labour, were disappointed, as they had hoped to get support from a decision favourable to the US.⁴⁹⁸ Some critics argued that the evidentiary standards and interpretations of manner affecting trade would be too high a burden for most litigants to meet.⁴⁹⁹ Particularly in matters of labour rights violations, obtaining non-anonymous declarations could prove to be problematic, and one interviewee argued that such cases would be better pursued not by trade lawyers, but rather by labour lawyers. He argued that if the Department of Labor had taken the lead rather than USTR, the result might have been different.⁵⁰⁰ In other words, a labour law framework differs from a trade law framework, and therefore, in the interviewee's view, it is vital that labour ministries take the lead in these kinds of disputes rather than trade ministries.

Others, including a former USTR official in charge of labour affairs, reflected on whether or not there was too much ambiguity in the text of the agreement. He noted, "*I thought we were clear, but maybe we were not.*"⁵⁰¹ He also made the observation about how difficult it could be to show a failure to enforce labour law because the information was in the hands and control of the Party against whom the complaint had been brought. And particularly in developing country environments where such information is poorly recorded or not made available, and where the complainants will not have subpoena power, the challenges are even greater.⁵⁰² In the mind of this official, it was obvious that the violations in question had an effect on trade, because "*why are these products produced in Guatemala? Because of lack of labour law enforcement.*"⁵⁰³

However, when the text of the agreement becomes a matter of legal interpretation, the outcome can take a different turn. In this case, the purposes of the agreement were taken into particular account by the Panel in interpreting the meaning of the Labour chapter. This is perhaps a warning that **TSD chapters cannot be drafted in isolation from the rest of the agreement**. They are integrated documents. The purposes and objectives must be carefully aligned with the TSD chapters, such that the objectives of the sustainability and development goals are made clear to the Parties, and for

⁴⁹⁶ *Id.* at Art 585.

⁴⁹⁷ Interview with Lewis Karesh, Former Assistant US Trade Representative for Labor.

⁴⁹⁸ *Id.*

⁴⁹⁹ See for example Lance Compa, *Trump, Trade and Trabajo: Renegotiating NAFTA*

⁵⁰⁰ Interview with Jeff Vogt, Rule of Law Director, Solidarity Center.

⁵⁰¹ Interview with Lewis Karesh.

⁵⁰² *Id.*

⁵⁰³ *Id.*

panellists that might be interpreting them. Consistent with this, it should be considered what is meant and intended by the condition, “*in a manner affecting trade.*” This language, as demonstrated in the Guatemala case, is perhaps vaguer than drafters might have intended. To address this problem, the drafters of the USMCA included a definition of a failure or action to be “*in a manner affecting trade*”:

*“if it involves: (i) a person or industry that produces a good or supplies a service traded between the Parties or has an investment in the territory of the Party that has failed to comply with this obligation; or (ii) a person or industry that produces a good or supplies a service that competes in the territory of a Party with a good or a service of another Party.”*⁵⁰⁴

Furthermore, the text places the burden on the respondent Party to show that an action is not in a manner affecting trade. **TSD drafters might consider clarifying the meaning of “*in a manner affecting trade and investment between the Parties*” to provide signatories and panels a clear guidepost to what it is intended by the language.**

8.2 Trilateral cooperation for environmental justice? The North American Commission on Environmental Cooperation and the Sumidero Canyon II Case

This case study is an important example of the potential benefits as well as the concrete challenges of public submission processes for the enforcement of environmental provisions in FTAs. It is of particular interest on several grounds that are particularly relevant to the TSD review: the absence of sanctions in the North American Agreement on Environmental Cooperation (NAAEC), the independence of the Secretariat *vis-à-vis* Parties to the agreement; the empowering effects that the North American Commission for Environmental Commission can have on civil society organisations; and the linkages between trade, the environment and human rights.

8.2.1 Methodology

The case study first details the enforcement mechanisms foreseen under NAFTA’s environmental side agreement / NAAEC. It then presents a detailed analysis of the NACEC’s Submission of Enforcement Matter (SEM) process that builds upon the comparative analysis performed. It offers a thorough analysis of the case, mapping out the different institutional actors (supranational, national, local) and policy stakeholders (community organisations, private actors) involved in this case, taking into consideration the complex political factors that led to the closure of the limestone factory, to assess the extent to which it was caused by the case. Similarly to the US-Guatemala case study, the team assesses – to the extent possible – whether the outcome influenced environmental enforcement provisions contained within the new US-Mexico agreement. To do so, the study relies on legal analysis, desk research and interviews with North American experts on the case, including at the NACEC.

8.2.2 Critical Review

Background on the NAAEC and its enforcement mechanisms

Throughout the negotiations for the North American FTA, civil society raised significant concerns regarding possible environmental impacts. Namely, concerns highlighted the risks of creating pollution havens in Mexico as liberalised trade could encourage industries to take advantage of

⁵⁰⁴ USMCA, Chapt 23, fn 4.

Mexico's weaker enforcement of environmental laws. Beyond exploitation of natural resources and general increases in pollution due to trade, civil society likewise particularly feared a downward harmonisation of environmental standards, and that trade regime rules would be used to challenge domestic environmental standards as non-tariff barriers (NTBs). While the three negotiating partners first attempted to ease concerns by including environmental provisions within NAFTA, they were not enough for environmentalists to support NAFTA, and thus they negotiated the NAAEC and created the NACEC as a trilateral commission in 1993.⁵⁰⁵

The NACEC has authority to support enforcement of environmental law across the three countries, and to a certain extent, conduct independent investigations. However, the elements of the NAAEC which garnered most attention include the state-to-state dispute resolution process as well as the Submission of Enforcement Matter process, also referred to as the citizen submission process.⁵⁰⁶

Given that the NACEC was established to ease significant environmental concerns, it was allocated numerous powerful mandates including 1) voluntary initiatives to promote environmental cooperation; 2) preparing independent reports (Article 13); 3) administration of the citizen submission process (Articles 14 and 15), state-to-state consultation, and dispute resolution process; and 4) coordinating with the NAFTA Free Trade Commission. While the dispute resolution and citizen submission processes have gathered most attention, the majority of the NACEC's budget has been allocated to voluntary environmental cooperation since its establishment in 1994. Specifically, 50-60% is allocated to these activities, while 6-7% is allocated to the citizen submission process.

The NACEC is composed of a tripartite bureaucratic structure which includes the Council of Ministers, a Secretariat, and a Joint Public Advisory Committee (JPAC). The Secretariat oversees the citizen submission process, while the Council - made up of cabinet-level officials from the NAFTA countries - acts as the gatekeeper for the Secretariat's work and also oversees the state-to-state dispute resolution process. Finally, the JPAC, which includes five representatives from each of the three countries, advises both the Council and Secretariat on their respective work.

NACEC's Submission of Enforcement Matter process

The SEM process allows private citizens to submit complaints outlining where a government is failing to effectively enforce its environmental laws. From start to end, the process is complex and involves numerous actors. Allegations are first submitted to the Secretariat, which then reviews the submission to decide whether it complies with the criteria under Article 14 of the NAAEC, and if so, then it reviews it further to decide whether a response from the concerned government is merited. If this is the case, then the Secretariat reviews the response of the concerned government, and if the response is insufficient in countering the allegations, then the Secretariat may notify the Council that it considers the submission requires the development of a factual record.⁵⁰⁷ The Council must then vote in favour of the factual record by a two-thirds vote in order to instruct the Secretariat to prepare it.⁵⁰⁸ In this case, the factual record seeks to highlight the objective facts of the enforcement issue at hand. Rather than direct requirements for government action, the factual record is meant to bring public attention onto a possible enforcement issue, which then creates pressure for the relevant

⁵⁰⁵ Allen (2012).

⁵⁰⁶ *Ibid.*

⁵⁰⁷ See Art 15 of the NAAEC.

⁵⁰⁸ See NACEC processes, (2015).

government to respond. However, the factual record is not immediately published for public access, as it first provides the partner countries with a chance to comment.⁵⁰⁹

The submission process has received significant attention since its creation because of the controversial interpretations throughout implementation of Articles 14 and 15 of the NAAEC. Because the three countries were unable to come to consensus on the roles played by the various decision-making authorities during negotiation of the NAAEC, the provisions resulted in ambiguous language. While the three governments then drafted guidelines to support the interpretation, allocated responsibilities still remained unclear. Despite protests from some governments, the Secretariat has since worked to interpret remaining uncertainties on Articles 14 and 15 left by the guidelines. Some of the three governments tried numerous times to amend the original guidelines, but many have seen these attempts as undermining the Secretariat's independence. Examples of ambiguity include whether the scope of factual records can be narrowed by the Council, the definition of sufficient information for the Secretariat to deem a submission worthy of review, or whether the Secretariat can direct information collection for a factual record without the approval of the Council.⁵¹⁰

While intending to be a strong and inclusive provision, in practice, the SEM process was not only controversial with regards to interpretation, but also when it comes to implementation. Allegations of controversial behaviour associated to the process have been displayed by governments - such as delayed and selective information disclosure - but also by the Secretariat, such as losing objectivity and providing comments in the factual records that are dangerously close to recommendations or conclusions. Nevertheless, stakeholders continued to perceive the Secretariat as providing robust justification for accepting or rejecting a submission for further review.⁵¹¹

While Secretariat's decisions have been perceived as robust, the process has been continuously criticised for its lack of transparency, long timelines, and for being inaccessible to non-legal professionals—particularly to smaller grassroot organisations, which lack necessary resources to productively engage. In fact, until the Sumidero Canyon II Case, the process had been mostly used by larger and well-funded NGOs. Between 1995 and 2010, the Secretariat approved and completed sixteen different factual records. However, according to Dr Allen, they had little influence on enforcement actions in their respective countries.⁵¹² For example, Canada may have been encouraged to improve water management to enforce the Fisheries Act by the BC Hydro and Power Authority factual record. Similarly, remediation of brownfield sites along the US-Mexico border may have been initiated in response to the Metales y Derivados factual record, and marine resources near Cozumel may have been better managed as a result of the Cozumel factual record. However, Dr Allen found that outcomes of such cases served submitters most by validating their claims in front of the accused perpetrators, but that they had little impact on resolving their actual enforcement concerns.⁵¹³

⁵⁰⁹ Allen (2012).

⁵¹⁰ *Ibid.*

⁵¹¹ *Ibid.*

⁵¹² *Ibid.*

⁵¹³ *Ibid.*

Detailed overview of the Sumidero Canyon Case II

The submission process⁵¹⁴

In November 2011, the Comité Pro-Mejoras de la Ribera Cahuaré (CPMRC), a community organisation based in the Chiapas region in Mexico, filed a submission to the NACEC Secretariat (Sumidero Canyon I), asserting that the Mexican government was failing to effectively enforce its environmental laws with regard to the extracting activities of a limestone quarry—“Cales y Morteros” - operating in the Sumidero Canyon National Park. In its submission, the non-governmental organisation claimed that the company’s operations were not only causing damage to the Canyon and affecting biodiversity in a protected area but also impairing air quality, leading to respiratory health problems in the community of Ribera Cahuaré.⁵¹⁵

However, in May of 2012, the submission was found ineligible by the Secretariat as it did not meet the criteria under Article 14(1) of the NAAEC. A month later, and following Article 6.2 of the Guidelines for Submissions on Enforcement Matters under Articles 14 and 15, CPMRC re-submitted a revised version (SEM-11-002 Sumidero Canyon II), which the Secretariat found eligible. In this light, the NACEC requested a response from the Mexican government, which was received two months later (November 2012), and advised against further investigation on the matter.

The Secretariat spent almost a full year reviewing Mexico’s response, and found that it left numerous issues outstanding. First, the issuance of air emissions approvals to Cales y Morteros was left unresolved. Second, issues remained regarding noise emissions from the company. The company also failed to receive approval of an environmental impact assessment for its modifications and expansions. Moreover, it did not implement necessary safety measures to mitigate risk of harm to natural resources and the surrounding environment, including the impact of pollution on ecosystems as well as on public health. The Secretariat also found that Mexico’s response did not sufficiently address the activities permitted in Sumidero Canyon National Park or the establishment of acceptable changes to carrying capacity and use of natural resources in the park. Overall, the Secretariat found that Mexico’s response failed to provide any kind of management plan for the National Park, and as such, decided that the matter justified the publication of a “factual record” written by independent experts. The Secretariat informed the Council in November 2013, and provided the above justification. In response, in June 2014, the Council unanimously voted (therefore surpassing the necessary 2/3rds majority) in favour of the preparation of a factual record for the SEM-11-002 Sumidero Canyon II Case and instructed the Secretariat to prepare one.⁵¹⁶

Scope of the factual record

The scope of the factual record was defined and approved by the Council under Resolution 14-05, where it voted unanimously to instruct the Secretariat to develop the factual record. It reviews the effective enforcement of numerous provisions under Mexico’s environmental laws including 1) Article 155 of the Mexican Environmental Protection Act; 2) NOM-081-Semarnat-1994 which, establishes noise emissions measurement methods and the maximum allowable limits; 3) Article 80 of the

⁵¹⁴ *Sumidero Canyon Case II Factual Record*. Available at <http://www3.cec.org/islandora/en/item/11635-sumidero-canyon-ii-factual-record-en.pdf>

⁵¹⁵ See NACEC (2015).

⁵¹⁶ *Ibid.*

Protected Natural Areas Regulation⁵¹⁷ (RANP) with regards to the acceptable changes to carrying capacities and use of natural resources; and 4) the Chapeau of RANP Article 81, which addresses Cales y Morteros' ability to generate benefits for local residents, and whether these benefits are in accordance with environmental zoning plans of a Protected Natural Area.⁵¹⁸

Factual record

Given that the Council Resolution 14-05 required the Secretariat to produce a factual record of objective information relevant to CPMRC's allegations, this summary provides facts on the protection accorded to Sumidero Canyon National Park, the history and activities of Cales y Morteros, the environmental impacts of its activities, history of complaints by local residents, and implications with Mexican environmental law.⁵¹⁹

The Sumidero Canyon National Park, along with its biodiverse community of birds, mammals, and fauna, was declared a Protected Natural Area (PNA) by the Mexican Government in 1980, as well as a Wetland of International Importance under the Ramsar Convention, a Priority Terrestrial Region, and finally an Important Bird Conservation Area by the National Biodiversity Commission. However, Cales y Morteros began their limestone quarrying activities in the area fifteen years before it was declared to be Sumidero Canyon National Park - in 1965 - and has not been compensated for the expropriation of its land. Post 1980, the National Protected Natural Areas Commission has been continuously vocal about the fact that the company's activities are incompatible with the protection allocated to Sumidero Canyon. In fact, it has stated that protecting, enhancing, and preserving natural resources and their ecosystems are the only permissible activities in the national parks it oversees. While these activities can be implemented in various ways including research, recreation, tourism, and environmental education, the rock quarrying activities of Cales y Morteros do not fall under such categories.⁵²⁰

While the company began taking measures to control the pollution and noise emissions of its equipment in 2000, it also significantly scaled up its rock quarrying activities in 2002. This led residents of Ribera Cahuare - the neighbouring community - to file complaints on pollution, noise, and explosions with the Office of the Federal Attorney for Environmental Protection (Procuraduría Federal de Protección al Ambiente - PROFEPA), the main federal environmental authority responsible for enforcing PNA legislation. Thereafter, the Ribera Cahuare community continuously submitted complaints to numerous institutions including the Office of the Attorney General, Semarnat, the Ministry of National Defense, SSa-Chiapas, the Civil Protection Branch of the Chiapas State Ministry of Public Security and Civil Protection, Semahn (the Chiapas State Institute of Natural History and Ecology), Comisión Nacional de Áreas Naturales Protegidas (CONANP), the Chiapas state government, the Municipal Council of Chiapa de Corzo, and the State Human Rights Council. 16 meetings have been recorded in the decade between 2002 and 2012 to resolve the matter - ten of which were interinstitutional meetings between PROFEPA, the above-mentioned institutions, the Chiapas State Ministry of Health, Chiapas State Environmental Attorney, and the management of Cales y Morteros.⁵²¹

⁵¹⁷ *Reglamento de la ley General del Equilibrio Ecológico y la Protección al Ambiente en Materia de Áreas Naturales Protegidas (2014)*. Available at http://www.diputados.gob.mx/LeyesBiblio/regley/Reg_LGEEPA_ANP.pdf

⁵¹⁸ See NACEC, 2015.

⁵¹⁹ *Ibid.*

⁵²⁰ *Ibid.*

⁵²¹ *Ibid.*

The various institutions worked to conduct impact assessments in relation to the various concerns - noise, seismic activity, pollution, and public health - with SSA-Chiapas robustly identifying an association between negative impacts suffered by the residents of Ribera Cahuare, and the activities of Cales y Morteros. Specifically, the study found that residents suffered respiratory and dermatological health concerns as well as anxiety, sleep disruption, and damage to their homes as a consequence of the limestone dust, vibrations, and noise from the company's activities. Reviewing the numerous studies, the factual record summarises the activities of Cales y Mortales having four key impacts: 1) land use change which leads to species loss, increased runoff, and poorer subsoil quality; 2) ambient pollution which settles on the surrounding vegetation and affects its growth; 3) water pollution with effects on the surrounding fauna; and 4) vibrations which may have caused cracking on the Sumidero Canyon.⁵²²

While the public complaints led Profepa and Semahn to bring numerous proceedings against Cales y Morteros, only some ended with the company being required to pay fines or change their processes, while others were overturned in their favour. The public complaints submitted to the various institutions within Mexico faced particular administrative and enforcement difficulties with regards to jurisdiction. For example, Mexico's Mining Act is a matter of federal jurisdiction, however, the extraction of rock materials for construction - such as limestone quarrying - is not considered a mining activity, and as such it is the responsibility of the Chiapas state government. However, it is the federal government, not state governments that has the power to approve activities taking place in Protected Natural Areas.⁵²³

Another example involves an administrative proceeding in 2004 - while CONANP considers Cales y Morteros to be inside of the Sumidero Canyon National Park boundaries, PROFEPA stated that it is based outside of the boundaries. Moreover, there are no defined limits to the acceptable level of change to the carrying capacity linked to limestone quarrying in Sumidero Canyon National Park, but in its response to SEM-11-002, the Government of Mexico stated that it does not consider the company's activities to be compatible with those acceptable in its Protected Natural Areas. The declaration of Sumidero Canyon as a PNA in 1980 required a regulation to be created to address such issues, but it was not drafted.⁵²⁴

The municipal authorities of Chiapas granted Cales y Morteros the land use permit, which led the company to file applications on environmental impact and land use change before the federal government. However, in 2013, it halted its blasting and quarrying operations, although it continued to process rock material on site.⁵²⁵

8.2.3 *Discussion and concluding points*

Prior to being published in 2015, the factual record was submitted for comments to the three NAFTA members. The final report was then presented to the National Human Rights Commission, which recommended the closure of the company. At the end of 2019, the company finally closed its doors after more than fifty years of operations in the region. This case has three particularly interesting take-aways:

⁵²² *Ibid.*

⁵²³ *Ibid.*

⁵²⁴ *Ibid.*

⁵²⁵ *Ibid.*

- **Evidenced linkages between trade, environment, and human rights.** The fact that the Ribera Cahuare community had to file complaints with over 15 institutions for over a decade, participating in 16 meetings, without having their concerns addressed is a potential indicator to the added power of the NAAEC citizen submission process and of trilateral enforcement of environmental and human rights via trade agreements more generally.
- **The added value of the independence of the Secretariat *vis-à-vis* Parties to the agreement.** Relative to the domestic and unilateral enforcement institutions existing in Mexico, the SEM process did not face the same kind of jurisdiction challenges reflected by the Mining Act as well as municipal versus federal governance. While interpretations of Article 14 and 15 led to initial difficulties, the SEM has the added advantage of delineating relatively clear responsibilities, and acting independently - while still benefiting from the checks of a trilateral structure.
- **The empowering effects of the NACEC on civil society action.** The factual record has the purpose of equipping civil society to further advocate for change by providing an independent collection of objective facts. The ability to raise public awareness of possible enforcement issues allows civil society to use “mobilisation of shame” tactics, which intentionally employ pressure as a tool to push government responses.⁵²⁶

With regards to linkages between the original NAAEC under NAFTA and the new USMCA, the latter has been recognised for drawing on the experiences of NAFTA and strengthening the NACEC and SEM processes. The USMCA includes specific provisions on fisheries management, ozone protection, endangered species, and marine pollution. The USMCA is also expected to address timeline critiques to the NACEC’s work by committing all three countries to fund the NACEC with enough resources to implement its work effectively. As described above, when the NAAEC was first negotiated, certain provisions were drafted ambiguously, and allocation of responsibilities remained slightly uncertain. **The USMCA improves on this by incorporating administrative reforms directly into the text of the side agreement, imposing specific timelines, transparency, and disclosure requirements. According to the Director of Legal Affairs of the NACEC, establishing clear timelines for submission processes is of utmost importance, a lesson that the NACEC has learned in more than twenty-five years of experience.**

While text is included directly into the agreement, the USMCA also includes an updated side agreement – the Environmental Cooperation Agreement (ECA), which supports the work of the NACEC and SEM process in enforcing the USMCA’s environmental provisions. **The ECA aims to address difficulties with information requests from the three governments originally seen under NAAEC during the development of factual records by making it a specific requirement.**⁵²⁷ The reform of information requests and the potential establishment of new timelines will be a central focus of the NACEC’s synthesis report on the SEM process to be published in 2022.

⁵²⁶ Robert F. Drinan (2001). *The mobilization of shame: A world view of human rights*. Yale University Press.

⁵²⁷ Tracy Hester (2019). *Still Standing: The New U.S.-Mexico-Canada Agreement and the Fate of the Commission on Environmental Cooperation*. 50 *Trends*, vol.6, 2018-2019.

8.3 Canada's first public submission under the Canada-Colombia Agreement on Labour Cooperation

The public communication submitted in 2016 in the framework of the Canada-Colombia Agreement on Labour Cooperation (Canada-Colombia LCA) illustrates a mechanism for stakeholders to bring issues to the attention of national authorities. The case sheds light on this institutional mechanism provided in Canadian labour cooperation agreements and in the labour chapters of Canada's free trade agreements, and provides an example of its implementation. It shows how the public communication mechanism led to an investigation of allegations that Colombia had failed to meet its labour obligations in the agreements, including obligations to implement international standards, and to an accord between the parties on an action plan to address the issue.

The public communication mechanism constitutes a formal approach to addressing non-compliance under labour provisions. This specific mechanism, through which employees, businesses, and other relevant stakeholders can raise concerns about potential non-compliance with labour provisions, aims not only to deter, but also to remedy non-compliance by one of the partner countries.

When investigating public communications, NAO officials must discuss with labour officials in the partner country.⁵²⁸ These discussions are an opportunity for the partner country against which a public communication has been submitted to take steps to address the issue and avoid going forward through the formal process.

In reviewing a public communication, the role of the NAO is to make recommendations on whether to engage in the next steps, regarding issues that could not be resolved during this stage. It is worth noting that the labour provisions establish procedures for the review of obligations comprised of successive steps.⁵²⁹ As an initial step, the Parties can request consultations between labour officials and/or ministers.⁵³⁰ Following this first step, if consultations were not sufficient to reach a mutually satisfactory agreement, the Party that requested the ministerial consultations can request a review panel.⁵³¹ In the event of non-compliance with the final report of this panel, there is the possibility of a monetary assessment.⁵³²

Public Communication CAN 2016-1 was addressed through ministerial consultations and did not progress past this stage.

To this day, no in-depth study has been published describing the impact that Canada's public communication process might have had on its trading partner. The case of Colombia is particularly interesting as it follows bilateral cooperation to help improve the enforcement of workers' rights, not

⁵²⁸ See Annex 2, 1.b., of the Canada-Colombia LCA.

⁵²⁹ See Part 3 of the Canada-Colombia LCA.

⁵³⁰ See Article 12 of the Canada-Colombia LCA.

⁵³¹ See Article 13 to 21 of the Canada-Colombia LCA.

⁵³² International Labour Organisation (2017). *Handbook on Assessment of Labour Provisions in Trade Arrangements*. Geneva: International Labour Office; International Labour Organisation (2019). *Labour Provisions in G7 Trade Agreements: A Comparative Perspective*. Geneva: International Labour Office.

only by Canada but also by the US and by the EU. Moreover, a parallel US-Colombia case occurred at the same time, and it helps to better understand the Canadian approach.⁵³³

8.3.1 Methodology

This case study explores the effectiveness of the Canadian model of cooperation and sanctions and how it contributes to improved labour conditions. The Canada-Colombia case also sheds light on key aspects of the public communication process provided in Canada's LCAs and FTAs chapters on labour including: the communication strategy with civil society stakeholders; the relatively short period between the NAO review and the publication of its report; the resources allocated to such disputes at the NAO.

This case study has been conducted through desk research, stakeholder interviews, and legal analysis. However, as this case is relatively recent, literature on the subject is rather limited. A key source of information for this case study was the very well-documented official website of the Government of Canada.⁵³⁴ Two interviews were also carried out with Canadian experts (one official and one academic) to collect more in-depth information on the case. Colombian stakeholders from the Government and civil society were contacted but unfortunately, they did not reply.

The case study reviews the public communication mechanism, particularly its legal basis, before focusing on Public Communication CAN 2016-1 to highlight the key takeaways of this mechanism.

8.3.2 Critical Review

Background

To address the labour dimensions of economic integration and to promote respect for fundamental labour principles and rights, Canada has negotiated labour cooperation agreements (LCAs) alongside specific chapters on labour in its FTAs. All of Canada's LCAs and labour chapters in FTAs provide for a mechanism to submit complaints, also known as "public communications".⁵³⁵

On 21 November 2008, the Canada-Colombia Free Trade Agreement was signed, in parallel with two cooperation agreements, respectively on labour and environment. These agreements came into effect on 15 August 2011.⁵³⁶

Under Chapter 16 of the Canada-Colombia FTA, the Parties affirmed their obligations as members of the ILO and their commitments to the 1998 ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up. Chapter 16 sets out objectives and obligations for both Parties and provides for cooperative activities.

⁵³³ The report of review of US Submission 2016-02 is available here: [PublicReportofReviewofUSSubmission2016-02_Final.pdf \(dol.gov\)](#)

⁵³⁴ See [Canada-Colombia Agreement on Labour Cooperation - Canada.ca](#).

⁵³⁵ *Negotiating and Implementing International Labour Cooperation Agreements Available at <https://www.canada.ca/en/employment-social-development/services/labour-relations/international/agreements.html>*

⁵³⁶ It is worth noting that given the human rights context in Colombia, Canada and Colombia also entered into an agreement in which each Party would write annual reports on the impact of the Canada-Colombia FTA on human rights in both countries.

The Canada-Colombia side Agreement on Labour Cooperation complements the provisions on labour of the Canada-Colombia FTA. It provides for obligations for the partner countries and sets out institutional mechanisms and procedures to ensure the respect of these obligations.⁵³⁷ Under this agreement, Canada and Colombia committed to effectively enforcing their labour legislation, cooperating on labour matters, and promoting certain key labour principles.

In 2016, the Canadian Labour Congress and five Colombian labour organisations submitted a public communication to the Canadian National Administrative Office (NAO), the contact point for all of Canada's LCAs and labour chapters of FTAs, alleging the failure of the Colombian Government to comply with its labour commitments under the Canada-Colombia LCA (Public Communication or Public Communication CAN 2016-1).⁵³⁸ The case was accepted by the Canadian NAO for review. Six months later, the Canadian NAO issued its report confirming "*serious and systemic precarious labour conditions for Colombia workers*", and consultations at the ministerial level were requested

The public communication mechanism

Legal basis

Article 10 (1) of the Canada-Colombia LCA on "Public communications" provides that "*Each Party shall provide for the submission, acceptance and review of public communications on labour law matters that:*

- a) are raised by a national or by an enterprise or organization established in the territory of the Party;*
- b) arise in the territory of the other Party; and*
- c) pertain to any matters related to this Agreement."*

This mechanism allows natural persons (citizens and permanent residents) and legal persons (businesses and organisations established in the territory) to voice any concern they may have regarding any matter of the Canada-Colombia LCA occurring in the territory of the other Party.

Regarding the procedure itself, each partner country shall provide for a system enabling to submit the complaint, as well as organise how it will be accepted and reviewed. The review of the public communication is done by the Party where the public communication is submitted but the other Party must be consulted.

Article 10 (2) provides that "*Each Party shall make such communications publicly available upon acceptance for review and shall accept and review such matters in accordance with domestic procedures as provided for in Annex 2.*". Although each Party must accept and carry out the review of public communications under its domestic procedure, Annex 2 of the Canada-Colombia LCA provides guidance on the criteria that shall be indicated by public communications procedures.

⁵³⁷ Part 2 of the Canada-Colombia LCA on "Institutional mechanisms" provides, in particular, for the creation of a Ministerial Council in each Party, in charge of reviewing the operation and effectiveness of the LCA (Article 7). A National Labour Committee shall also be created, comprising members of the public, as well as a Point of Contact, the NAO (Article 8). Finally, Article 11 provides for the organisation of general consultations between the parties.

⁵³⁸ ESDC Public communication CAN 2016-1 (Colombia) - Accepted for review. Available at, <https://www.canada.ca/en/employment-social-development/services/labour-relations/international/agreements/2016-1.html>

Firstly, Annex 2 sets out that domestic public communication procedures shall indicate the criteria for the acceptance of public communications, including: (i) “normally relief before domestic tribunals shall have been attempted or pursued and that any public communication related to such pending proceedings will not be accepted, provided that the proceedings conform to Article 5”; (ii) “matters pending before an international body will normally not be accepted”; (iii) “communications that are trivial, frivolous or vexatious will not be accepted”; and “that any public communication related to such pending proceedings will not be accepted, provided that the proceedings conform to Article 5”. Domestic procedures shall also provide for the early consultation with the other Party and indicate that the final report of the NAO will be based on relevant information provided by both Parties as well as other interested Parties. It shall specify how to have access to this information. Finally, domestic procedures shall indicate that the public notification of the acceptance for review of the public communication as well as of the release of the final report will indicate how to obtain access to any response of the other Party.

National Administrative Organisations

Article 8.2 of the Canada-Colombia LCA requests that “Each Party shall establish a Point of contact within its governmental department responsible for labour affairs and provide to the other Party its contact information”. This point of contact is the NAO in charge of public communications. The functions of the Point of Contact are not limited to public communications and include, among others, the coordination of cooperative activities and programmes, as well as the provision of information to the other partner country or relevant stakeholders. Canada and Colombia both set up an NAO. The Canadian NAO is housed within the Labour Program of Employment and Social Development Canada.

Box 5: The EU Single Entry Point and the public communication mechanism of Canada-Colombia LCA

The EU Single Entry Point

A parallel can be drawn between the public communication mechanism provided by the Canada-Colombia LCA and the new system for reporting market access barriers and breaches of TSD commitments in EU FTAs recently launched by the European Commission, the Single Entry Point (SEP).

The substantive coverage is very different. While the Canada-Colombia LCA is limited to labour matters only for the specific agreement, the EU Single Entry Point receives complaints on all market access issues or non-compliance with the commitments under Trade and Sustainable Development chapters or with requirements of the unilateral Generalised Scheme of Preferences (GSP).

As with the public communication mechanism, the EU’s system is open to individual companies, business/trade associations, civil society organisations and citizens and to EU Member States’ authorities. However, only EU-based complainants can file a complaint through the SEP.

Under both systems, **guidelines set out the eligibility criteria to submit a complaint** (i.e., who can submit the complaint and the content of the complaint) as well as formal and technical requirements. However, the focus of the two guidelines is slightly different. As stated in the EU guidelines, the latter

aim to "help interested parties understand the functioning of this mechanism"⁵³⁹. The Canadian guidelines⁵⁴⁰, although also addressed to Parties that would like to submit a public communication and providing them with rules on how to do so, define the procedures and criteria that the Canadian NAO should follow for the submission, acceptance, and review of public communications.

In particular, the Canadian guidelines set out a detailed step-by-step process. For instance, part 4 of the Canadian guidelines deals with "When a Public Communication is received" and part 5 deals with "When a Public Communication is accepted for review". Moreover, the Canadian guidelines set indicative time limits in days for every step of the procedure (with a possibility to extend the deadlines). Finally, the guidelines also provide for certain transparency requirements, such as the publication of the list of public communications accepted and rejected for review, and the publication of NAO reports and relevant information throughout the process, subject to privacy considerations. The EU Single Entry Point system on the other hand respects the European Code of Good Administrative Behaviour. In this sense, the EU system can provide a substantial degree of certainty as to the timelines to review the complaints received.

The main difference between the EU Single Entry Point and the Canadian system is that the Canadian mechanism is established on a "contractual basis", i.e. it flows from the provisions of either the agreement or the labour provisions side agreement, while the EU Single Entry Point is a mechanism proactively established by the European Commission without a contractual character, given it currently covers agreements and obligations established prior to its creation.

Public communication CAN 2016-1

Case overview

On 20 May 2016, the Canadian Labour Congress⁵⁴¹ and five Colombian labour organisations⁵⁴² submitted a public communication to the Canadian NAO pursuant to Article 10 and Annex 2 of the Canada-Colombia LCA. The complainants alleged that the Government of Colombia failed to meet its obligations under the Canada-Colombia LCA, in particular as regards:

- 1) the freedom of association and the right to collective bargaining including protection of the right to organise and the right to strike as articulated in the 1998 ILO Declaration (Article 1 of the Canada-Colombia LCA);
- 2) derogation from labour laws in order to encourage trade and foreign investment (Article 2);
- 3) enforcement of labour laws (Article 3 and 4 of the Canada-Colombia LCA); and
- 4) timely access to labour justice (Article 5 of the Canada-Colombia LCA).

⁵³⁹ The operating guidelines for the Single Entry Point and complaints mechanism for the enforcement of EU trade agreements and arrangements are available here: https://trade.ec.europa.eu/access-to-markets/en/form-assets/operational_guidelines.pdf

⁵⁴⁰ Guidelines for Public Communications. Available at <https://www.canada.ca/en/employment-social-development/services/labour-relations/international/agreements/guidelines.html>

⁵⁴¹ The Canadian Labour Congress is the largest labour organisation in Canada. It brings together national and international unions, provincial and territorial federations of labour and community-based labour councils.

⁵⁴² Central Unitaria de Trabajadores (CUT), Confederación de Trabajadores de Colombia (CTC), Corporación Colombiana para la Justicia y el Trabajo (COLJUSTICIA), Sindicato Nacional de Trabajadores de la Industria Agropecuaria (SINTRAINAGRO) et Unión Sindical Obrera (USO).

Two cases of alleged violations supported their allegations: (i) Pacific Rubiales and (ii) Ingenio La Cabaña. Pacific Rubiales is the name of an oil extractive company for which reported events occurred in its oil fields between 2011 and 2013. Ingenio La Cabaña is a sugar production and processing company, and this case concerned events that occurred between 2013 and 2015 in its sugar plantations and mill.

According to Public Communication CAN 2016-1, the “*misuse of subcontracting, systematic anti-union practices and the climate of violence that still prevails in the country have had a negative impact on workers’ rights generally and particularly on the exercise of their rights to freedom of association and collective bargaining*”.⁵⁴³ The problems were attributed to (i) inadequate legal protection for these fundamental rights and (ii) failure to effectively enforce the existing labour law.

Acceptance of the Public Communication

The Canadian NAO determined that the Public Communication met the eligibility and technical requirements in accordance with the procedures established by Canada's Guidelines for Filing Public Communications.⁵⁴⁴ These guidelines describe the procedures and criteria to be followed by the Canadian NAO for the submission, acceptance, and review of public communications on labour law matters. It is to be noted that the same guidelines apply to all past, present, and future LCAs and labour chapters of FTAs with Canada.

On 15 July 2016, the Canadian NAO accepted the Public Communication for review.

Consultation with relevant stakeholders

The review process involved gathering information from different sources, as required by Annex 2 of the Canada-Colombia LCA. The Canadian NAO went to Colombia two times to evaluate the situation and the alleged violations of the Canada-Colombia LCA's obligations. The Canadian NAO and the Colombian Government collaborated closely during the whole process, from the very beginning (i.e., the submission of the Public Communication) to the last stage (i.e., the preparation and adoption of the Action Plan). For instance, the Colombian Government facilitated the exchanges of the Canadian NAO with relevant stakeholders such as the employers, trade unions, labour organisations, solidarity centres etc. Similarly, the Canadian Labour Congress and the five Colombian labour organisations were consulted, as required by Annex 2. The US Department of Labour, which had received a similar complaint on labour, was also consulted (see Box 6 below).

Box 6: Public submissions under the US-Colombia Trade Promotion Agreement

Submissions under US-Colombia TPA

A similar mechanism of “submissions” exists under Chapter 17 on labour of the United States-Colombia Trade Promotion Agreement (US-Colombia TPA). On 16 May 2016, the American Federation of Labor and Congress of Industrial Organizations and the five Colombian organisations involved in the Canada-Colombia public communication filed a public submission with the Office of Trade and Labor Affairs (OTLA) of the United States Department of Labor on the same grounds as the one they submitted a few days later to the Canadian NAO. On 15 July

⁵⁴³ Review of public communication CAN 2016-1 Report issued pursuant to the Canada-Colombia Agreement on Labour Cooperation. Available at <https://www.canada.ca/en/employment-social-development/services/labour-relations/international/agreements/2016-1-review.html>

⁵⁴⁴ *Id.*

2016, the OTLA accepted to review the public submission. The Canadian and US authorities coordinated on this case and exchanged information on the two complaints.

However, it should be underlined that **the outcome of the two processes was not the same. In the US case, the submission led to a list of recommendations made to Colombia with a focus on the need for labour inspections. In the Canadian case, the public communication led to ministerial consultations and the preparation of an action plan. Canada took a more systemic approach and considered that the main issue was that the Colombian legal framework did not adequately protect labour rights.**

NAO's report

The Canadian NAO prepared its report based on information collected on the two cases presented in the Public Communication. In particular, the Canadian NAO used a report transmitted by the Colombian NAO on measures adopted by the national competent authorities to deal with the labour issues in the two cases. It also used other resources such as information from OECD reports.⁵⁴⁵

In January 2017, the Canadian NAO submitted its report responding to Public Communication CAN 2016-1. The report concluded by recommending: *"In particular, the Colombian government's profession of urgency must now translate into concrete and ambitious actions to: (a) ensure that Colombian labour law embodies and provides protection for internationally recognised labour rights, and that such law is effectively enforced, as required by Articles 1 and 3 of the CCOALC; and (b) ensure that Colombian workers have appropriate access to fair, equitable and transparent proceedings before a tribunal to seek appropriate sanctions or remedies for violations of labour law"*.⁵⁴⁶

To address the labour issues identified, the Canadian NAO made four general recommendations directed to the Colombian Government:

- 1) *"Remove legal vehicles used to undermine workers' fundamental rights to freedom of association and collective bargaining..."*, including *"the elimination of union contracts"* which *"have become a platform for abusive labour practices and bad faith bargaining"* as well as collective pacts and ending the misuse of short-term contracts.
- 2) *"Strengthen compliance with and enforcement of labour law through a labour inspectorate..."*.
- 3) *"Strengthen efforts to fight impunity and violence by bringing those responsible to justice..."*.
- 4) *"Evaluate and report on efforts to promote freedom of association and free collective bargaining in the country."*⁵⁴⁷

Following the Canadian NAO's report, the Ministry of Labour of Canada requested ministerial consultations with its Colombian homologue under Article 12 of the Canada-Colombia LCA, which provides that *"a Party may request in writing consultations with the other Party at the ministerial level regarding any obligation under this Agreement. The Party that is the object of the request shall*

⁵⁴⁵ At the time, Colombia was in the accession process to become a member of the OECD. As explained in the official website of the OECD, between October 2013 and March 2018, 23 OECD substantive committees and their subsidiary bodies conducted technical reviews of Colombia. This includes information on Colombia's policies and practices. This information was used by Canada's NAO to document the labour situation in Colombia.

⁵⁴⁶ *Id.* Review of public communication CAN 2016-1 Report

⁵⁴⁷ *Ibid.*

respond within 60 days of receiving the request, or within such other period as the Parties may agree”.

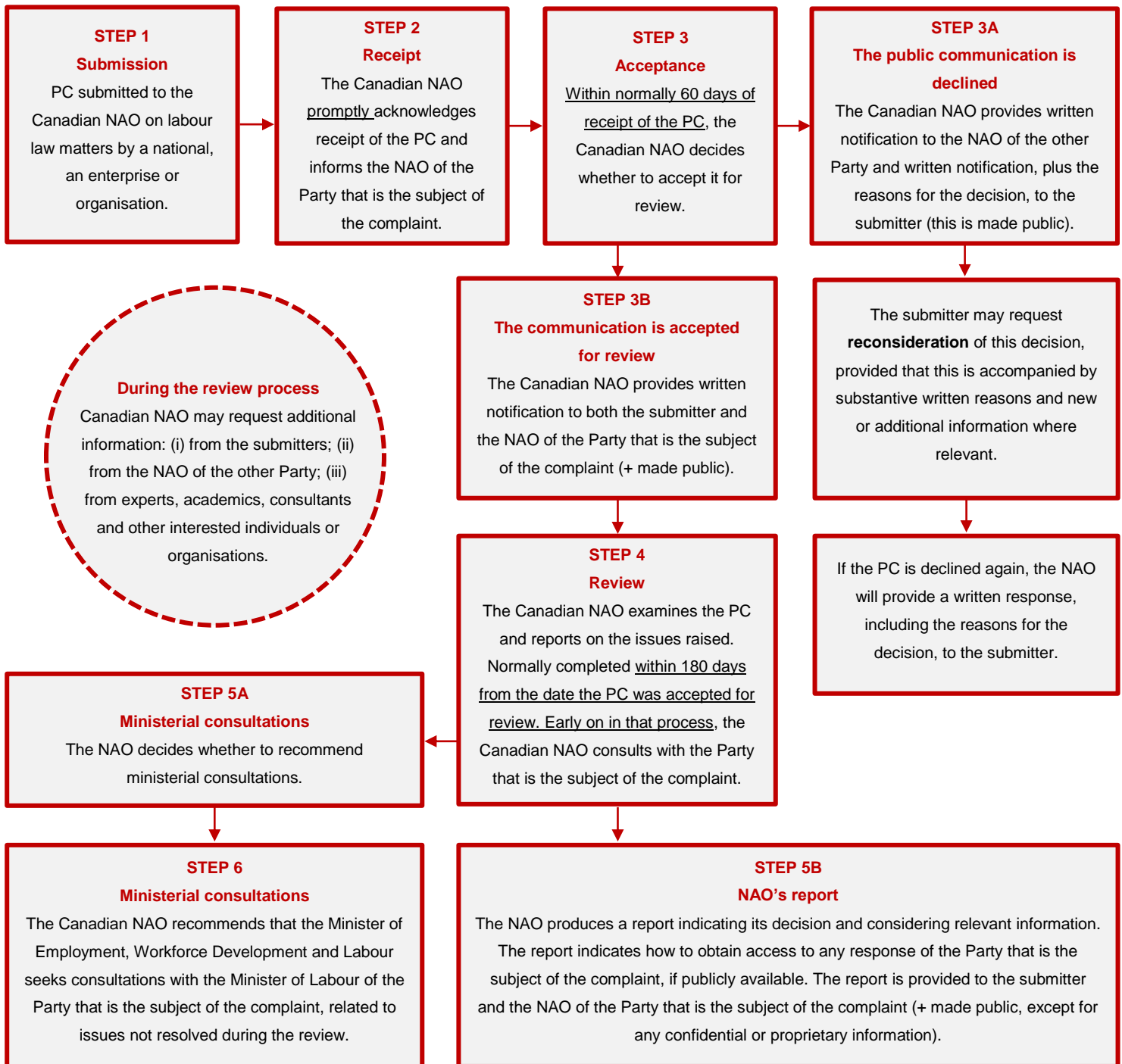
These ministerial consultations were aimed at designing and adopting an action plan based on the Canadian NAO’s recommendations. In total, six meetings took place between March and December 2017 between the two partner countries. **These ministerial consultations led to important achievements regarding the Pacific Rubiales and Ingenio La Cabana cases.** In the Pacific Rubiales case, union organisations and collective bargaining practices were strengthened, which resulted in a significant increase in the number of unionised workers. In the Ingenio La Cabana case, sanctions were imposed by the competent Colombian authority on the company.⁵⁴⁸

As part of these ministerial consultations, the Government of Colombia reiterated its commitment to continue its efforts as regards labour rights protection and recognised the importance of protecting Colombian workers’ rights. For its part, the Government of Canada committed to assessing the progress made by the Government of Colombia.⁵⁴⁹

⁵⁴⁸ *Action Plan under the Canada-Colombia Agreement on Labour Cooperation - 2018-2021. Available at <https://www.canada.ca/en/employment-social-development/services/labour-relations/international/agreements/colombia-action-plan.html>*

⁵⁴⁹ *Ibid.*

Figure 5: Public Communication mechanism under the Canadian guidelines



Source: Author's elaboration, based on the Canadian Guidelines for Public Communication.⁵⁵⁰

⁵⁵⁰ See Guidelines available at <https://www.canada.ca/en/employment-social-development/services/labour-relations/international/agreements/guidelines.html>

Action Plan

Following the recommendations of the Canadian NAO's report, the Parties subsequently entered into an action plan that contained highly specific steps that Colombia agreed to take within the time frame of 2018-2021 (Action Plan).⁵⁵¹ This multi-year Action Plan was structured around the four general recommendations and set out actions that should be taken by the Colombian Government. Under each of the four recommendations, there is a list of comprehensive actions that should be taken to address specific labour issues. For instance, the first recommendation of the Canadian NAO was to remove legal vehicles used to undermine workers' fundamental rights to freedom of association and collective bargaining.⁵⁵² This included, for instance, the elimination of union contracts considered as detrimental to workers in the two cases complained of (Pacific Rubiales and Ingenio La Cabaña).⁵⁵³ Pursuant to this recommendation, the Government of Colombia had, before the conclusion of the Action Plan, adopted a ministerial resolution to monitor the use of union contracts. In this regard, the Action Plan sets out clear objectives for the Government of Colombia to ensure compliance with this ministerial resolution, including collecting data on the issue, conducting investigations and inspections. Consequently, the Action Plan does not simply set general objectives but rather provides for specific actions (taking also into account the measures already adopted) to improve the Colombian labour situation.

8.3.3 Discussion and concluding points

Overall, the Canada-Colombia case demonstrates that **the mechanism of public communication provided in Article 10 and Annex 2 of the Canada-Colombia LCA enables close cooperation between the partner countries to address labour-related issues**. However, although the public communication seems to be a useful mechanism for the parties to find and implement solutions, the analysis of Public Communication CAN 2016-1 also highlighted some of its limits. Prior to discussing the strengths and weaknesses of this mechanism, it is worth noting that, before Public Communication CAN 2016-1 was filed in 2016, aside from the public submissions filed under the NAFTA's side agreements, **no other Canadian FTA had been used by stakeholders for the purpose of public communications**.⁵⁵⁴

One of the main strengths of this mechanism is that it is clearly defined. All steps of the process are carefully detailed, both in Article 10 and Annex 2 of the Canada-Colombia LCA as well as in the Parties' respective guidelines for submission, acceptance, and review of public communications. **Therefore, the Parties know, in advance, what to expect from this mechanism which provides strong procedural certainty.** The entire process is then expected to be completed quickly.

Moreover, **this mechanism is relatively open** as Article 10 of the Canada-Colombia LCA refers to "*any matters related to this Agreement*" **and the range of stakeholders who can submit a public communication is very broad** as it includes NGOs, businesses, and citizens in general. Nevertheless, only nationals of Party A can file complaints in Party A about labour rights violations in Party B. This somehow limits the benefit of allowing a large number of stakeholders to submit a public communication, as national stakeholders of Party B have no way of exposing violations of their labour rights violations to the other Party, other than via stakeholders from Party A, which

⁵⁵¹ *Id.* Action Plan.

⁵⁵² *Ibid.*

⁵⁵³ *Ibid.*

⁵⁵⁴ International Labour Organisation (2017). *Handbook on Assessment of Labour Provisions in Trade Arrangements*. Geneva: International Labour Office; International Labour Organisation (2019). *Labour Provisions in G7 Trade Agreements: A Comparative Perspective*. Geneva: International Labour Office.

implies that they must have the necessary connections with stakeholders of Party A. In the case of Public Communication CAN 2016-1, it was indeed submitted by the Canadian Labour Congress, the largest labour organisation in Canada together along with the five Colombian organisations.

Another strength of the public communication mechanism relates to procedural aspects. **The NAO does not exclusively rely on evidence brought by the complainants** but must, as provided in Annex 2 of the Canada-Colombia LCA conduct an investigation to determine whether the allegations are true. It must also take into account information provided by interested parties. As far as Canada is concerned (and as provided in its guidelines), for a public communication to be eligible for review, it must “*describe the failure by the Party being complained against to effectively enforce its labour law or that its labour laws and practices thereunder do not embody and provide protection for the internationally recognised labour principles and rights set out in the relevant LCA or LCFTA*”.⁵⁵⁵ Therefore, the complainants are required to describe facts rather than having to prove that there was, indeed, non-compliance, which could limit complainants’ ability to have their communication reviewed effectively. It is worth mentioning that, as defined in the Canadian guidelines, the public communication must fulfil other specific requirements, including technical requirements. One of them is that it must be submitted in English or French.

The questions of the timeline and the resources should also be stressed. The overall process for Public Communication CAN 2016-1 went relatively quickly. Pursuant to Article 10 of the Canada-Colombia LCA, the Canadian NAO had 180 days to submit its report as of the date of acceptance of the Public Communication. This is a rather short period to collect information on the case and the alleged violations and issue a report, but it can also be perceived as a guarantee for, in this case, workers. Although the Canada-Colombia LCA provides for the possibility of extension of this deadline, the Canadian NAO did not use this option. Having said that, the timing could be considered quite long, particularly for the workers whose rights were violated, given that the events on which the Public Communication was based began in 2011.⁵⁵⁶

The question of the resources allocated can be pointed out as a limit. One of the interviewees stated that the process required significant resources on the part of the Canadian NAO. The process for Public Communication CAN 2016-1 included several staff missions to Colombia, meeting stakeholders to collect information, having several staff members dedicated to the case over the period required to prepare the report, and organising ministerial consultations between Canada and Colombia.

Another potential limit could be the follow-up of the impact of the public communication mechanism on labour protection. As the Action Plan was concluded in 2018, at the time of writing, no information was found to assess the effectiveness of this mechanism to improve labour conditions on the ground. However, it should be stressed that the Canadian NAO’s report did have an impact. Between the publication of the report and the conclusion of the Action Plan, some legislative changes were already undertaken by Colombia. For instance, the Canadian NAO’s report recommended to “*Repeal Decree 583 (which has, in practice, enabled the subcontracting of permanent core business functions) and replace it with a legal instrument that unambiguously authorizes labour inspectors to combat the abuse of intermediation and subcontracting*”: in April 2018, the Government of Colombia repealed this Decree.

⁵⁵⁵ *Id.* Guidelines for Public Communications.

⁵⁵⁶ In the new Canada-United States-Mexico Agreement entered into force on 1 July 2020, the partner countries went further by providing an ambitious “rapid-response” labour mechanism. This dispute settlement mechanism provides for expedited enforcement of workers’ free association and collective bargaining rights at the facility level.

On a general note, the Canadian NAO concluded in its report that there was a violation of labour obligations from Colombia and recommended specific actions. Canada requested ministerial consultations which pressed Colombia to cooperate to find a solution to avoid a dispute between the two countries. **In that sense, the Canadian NAO's report, while not legally binding, had real-world consequences because both parties were compelled to find a solution. The transparency of this mechanism can be underlined.** In the Canada-Colombia case, the acceptance for review of Public Communication CAN 2016-1, the NAO's report, and the final Action Plan were all released to the public. The ILO has concluded that, because of their transparency, public submissions processes can be useful in raising awareness and promoting labour standards.⁵⁵⁷ Finally, although not part of the public communication mechanism, **Canada chose to cooperate with the US**, exchanging information concerning the parallel case under the US-Colombia TPA.

8.4 A merger of TSD approaches? The CPTPP and its consistency plans

The Trans-Pacific Trade Partnership (TPP), later renamed Comprehensive and Progressive Agreement for Trans-Pacific Trade Partnership (CPTPP), after the Trump administration withdrew from the TPP, was once described as containing “*the strongest labour provisions of any trade agreement in history.*”⁵⁵⁸ As discussed in the previous sections, the CPTPP's labour and environmental provisions went further than the TSD commitments that Australia, New Zealand, the US, Japan, Canada and Chile had made in previous trade negotiations. Yet, a major part of its innovative TSD design was not to be found within the text of the agreement, but rather in the side “*labour consistency plans*” (LCPs) negotiated by the US as direct agreements with some of the countries with the most serious records of human rights and labour rights violations: Vietnam, Malaysia and Brunei. These consistency plans outlined the legal and institutional reforms that each country needed to adopt before they could join the CPTPP. Thus, Vietnam's consistency plan focused on freedom of association and the right to collective bargaining, protection against employment discrimination and forced labour; Malaysia's reform agenda was also designed to address freedom of association, along with the rights of migrant workers; while Brunei was asked to stop interfering with union registration, end child labour, protect migrant workers and put in place a minimum wage. When the US withdrew from the TPP, the LCPs were not included in the text of the CPTPP.

8.4.1 Methodology

These three labour consistency plans constitute three case studies in one, with a primary focus on Vietnam, to understand the impact that trade negotiations can have at the pre-ratification phase under different cultural and political systems. Through legal analysis, process-tracing based on desk research and targeted interviews with experts and former officials, this analysis helps to understand the extent to which these reforms actually took place and whether the protection of workers' rights in these countries has been effectuated in practice. In this prospect, the minutiae of pre-ratification processes is scrutinised with an emphasis on the timeline of negotiations and reforms and the framework established for monitoring during the negotiating phase. The analysis also discusses the future of the CPTPP labour consistency plans, i.e. whether they continue to be enforced and under

⁵⁵⁷ International Labour Organisation (2017). *Handbook on Assessment of Labour Provisions in Trade Arrangements*. Geneva: International Labour Office; International Labour Organisation (2019). *Labour Provisions in G7 Trade Agreements: A Comparative Perspective*. Geneva: International Labour Office.

⁵⁵⁸ USTR (2016).

what conditions. This is also an important case to determine whether Vietnam's recent labour reforms were driven by TPP negotiations, the prospect of ratifying the EU-Vietnam FTA, or both. In the latter case, this could provide evidence that TSD reforms can be most impactful when trade negotiations are conducted not as part of an "FTA race" but as parallel or joint approaches by TSD advocates like the US, Canada, New Zealand, Japan, Chile and the EU.

8.4.2 Critical Review

Labour Consistency Plans

A significant institutional innovation of the CPTPP that distinguishes it from labour chapters found in agreements of the EU, Canada, and other nations is the inclusion of country-tailored Labour Consistency Plans. These LCPs were individually negotiated by the USA with Vietnam,⁵⁵⁹ Malaysia,⁵⁶⁰ and Brunei.⁵⁶¹ Some policymakers and scholars have argued that, for FTA labour chapters to be effective, they must be context specific.⁵⁶² That is, they need to be crafted not as one size fits all boilerplate provisions, but rather they should address particular institutional and regulatory gaps specific to partner countries.⁵⁶³ The US had negotiated similar agreements in its own FTAs with Colombia (The Colombia Labor Action Plan, 2011), and has made negotiated agreements with countries such as Oman (2006), Jordan (2013), as well as pre-ratification negotiated labour law reforms with other countries, including Bahrain, Morocco, Peru, and Panama.⁵⁶⁴ The flexibility and ability to contour agreements to the particular labour regulatory environments of partner countries make regional and bilateral agreements potentially fruitful arenas for experimentation.⁵⁶⁵

The LCPs were negotiated with that objective – to publicly identify and agree on specific ways that *de jure* law had to be amended, and institutions be reformed in order to enforce those laws such that the countries in question would be in greater compliance with their obligations contained in the CPTPP's labour chapter, particularly the obligations to adopt and maintain in its statutes and practices the rights articulated in the 1998 ILO Declaration. Importantly, effectuation of the LCPs were pre-conditions for the CPTPP to be ratified by the US⁵⁶⁶ - with some leniency made in the case of Vietnam for implementation of the legalization of umbrella organisations of grassroots unions.⁵⁶⁷ The plans are structurally similar to each other and organised into several sections with some variation, including: Legal Reforms,⁵⁶⁸ Institutional Reforms and Capacity Building,⁵⁶⁹ Transparency and Sharing of Information,⁵⁷⁰ Review (Government to Government Mechanism in the Malaysia LPC), Technical Assistance, Implementation, and Review of Implementation (Vietnam). **While the LCPs are no longer in effect due to the withdrawal of the USA, they serve as a useful study**

⁵⁵⁹ *United States-Viet Nam Plan for the Enhancement of Trade and Labour Relations, U.S.-Viet., Feb. 4, 2016 [hereinafter Vietnam LCP].*

⁵⁶⁰ *Labour Consistency Plan, Malay.-U.S., Feb. 4, 2016 [hereinafter Malaysia LCP].*

⁵⁶¹ *Labour Consistency Plan, Brunei-U.S., Feb 4, 2016 [hereinafter Brunei LCP].*

⁵⁶² See, for e.g., Kevin Kolben, *The WTO Distraction*, 21 *STAN. L. & POL'Y REV.* 461, 489 (2010).

⁵⁶³ See *id.*

⁵⁶⁴ ILO, *Social Dimensions of Free Trade Agreements* (2015), p. 37.

⁵⁶⁵ See Kolben, *above n. 562*, at 462.

⁵⁶⁶ See *Vietnam LCP*, *supra* note 95, at VII; *Malaysia LCP*, at VII; *Brunei LCP*, at VII.

⁵⁶⁷ See *Vietnam LCP*, at VII(2).

⁵⁶⁸ *Id.* at II; *Malaysia LCP*, at II; *Brunei LCP*, at II.

⁵⁶⁹ *Vietnam LCP*, at III; *Malaysia LCP*, at III; *Brunei LCP*, at III.

⁵⁷⁰ *Vietnam LCP*, *supra* note 95, at IV; *Malaysia LCP*, at IV; *Brunei LCP*, at IV.

of how leverage can be used on a country-by-country, context-specific basis to compel finely specified improvements in labour law and enforcement.

Vietnam

The Vietnam LCP **specifically targets the problem of restrictions on the rights to freedom of association and collective bargaining**. Similar to China, Vietnam had required unions to be affiliated with the ruling Communist Party's union.⁵⁷¹ Under the TPP's LCP, independent, or so-called "grassroots," labour unions were to be permitted to form, and their administrative autonomy had to be guaranteed - both of which constitute significant advances.⁵⁷² Moreover, they were not to be required to join the Vietnam General Confederation of Labour (VGCL), and were to be allowed to form coalitions across enterprises and sectors.⁵⁷³ As Tran et al. put it, the intent of the LCP is to eliminate the VGCL's monopoly on worker representation, and to create a legal environment in which the 'grassroots' unions, or independent, non-party affiliated, unions formed at the enterprise level can function without state interference.⁵⁷⁴ The agreement also calls for specific amendments to Vietnamese law on forced labour and discrimination law, ensuring that discrimination based on colour, race, and national extraction is not permitted.⁵⁷⁵

In a section on capacity-building, the LCP provides for a) a revision of internal inspection and other enforcement procedures for the relevant labour ministries and units; and b) improved capacity for Vietnam's labour inspectorate, including a specified increase in the number of labour inspectors to 1200 by the end of 2020.⁵⁷⁶ In the section on transparency and information sharing, the LCP calls for the government to release data on the status and final outcomes of applications for union registration.⁵⁷⁷ It also calls for a Technical Assistance Program, administered by the ILO to support the labour inspectorate and issue reports on its progress.⁵⁷⁸ Finally, the LCP calls for the creation of a labour expert committee to issue independent reports on Vietnam's application and implementation of the legal and institutional reforms provided for in the plan.⁵⁷⁹

The original LCP called for the legal reforms and institutional reforms to be completed before ratification of the overall trade agreement, but provided that Vietnam had five years to enact the requirement that grassroots labour unions have the right to form or join organisations of workers, including across enterprises and across sectors and regions.⁵⁸⁰ Notably, this post-ratification provision would be reviewed for implementation after five years, and if the US did not accept that Vietnam had made the required changes in its labour code, it would have the right to suspend further tariff reductions.⁵⁸¹ The AFL-CIO critiqued this provision as being too weak to have any teeth, given

⁵⁷¹ See United States Department of State, Vietnam (2015). Human Rights Report 48-49. —

⁵⁷² *Vietnam LCP*, at II(A)-(B).

⁵⁷³ *Id.* at II(A)(2).

⁵⁷⁴ Angie N. Tran et al (2017)., *Forcing Change from the Outside? The Role of Trade-Labour Linkages in Transforming Vietnam's Labour Regime*, 21 *COMPETITION & CHANGE* 397, 404..

⁵⁷⁵ *The AFL-CIO criticized the limitation of the LCP to these categories, and not expanding them, for example, to religion, political opinion, immigration status and sexual orientation/gender expression. AFL-CIO, A Gold Standard for Workers?: The State of Labour Rights in Transpacific-Partnership Countries 10 (2016).*

⁵⁷⁶ *Id.* at III(C)(3).

⁵⁷⁷ *Id.* at IV(B)(3).

⁵⁷⁸ *Id.* at V(A)(1).

⁵⁷⁹ *Id.* at IV(B)(3).

⁵⁸⁰ *Id.* at II(A)(2).

⁵⁸¹ *Id.* at VIII.

that most of the tariff reductions envisioned under the agreement would already be in place.⁵⁸² However, an interviewed government official commented that garment and textile tariffs were in fact back loaded in the agreement, thus making such a clause potentially quite effective had the US stayed in the TPP.

The LCP required that the legal and institutional reforms specified in the agreement were to be implemented prior to the date of entry into force of the TPP Agreement between the US and Vietnam.⁵⁸³ The Parties agreed to several review mechanisms: including a senior officials committee made up of both trade and labour officials from both governments,⁵⁸⁴ as well as a bilateral review that would take place three times (in the case of Vietnam) over the span of 10 years. The review appears from the text to have primarily served the purpose of informing the US on Vietnam's compliance. Additionally, the LCP calls for supporting mechanisms to assist in the review process, including a technical assistance programme (TAP) that was explicitly to be administered by the ILO, which was to support implementation of the LCP reforms. The TAP was to publish bi-annual reports for eight years that would contain information and data relevant to assessing that implementation. Additionally, a Labour Expert Committee made up of three members not affiliated with a government would be created that would produce public reports every two years on Vietnam's application and implementation of the legal and institutional reforms called for in the LCP.⁵⁸⁵ In sum, a number of independent review institutions were created to monitor Vietnam's progress and help inform the US and the public as to Vietnam's progress. This, for the first few years of the agreement, would also help inform whether or not the US would further lower tariffs as per the TPP's commitments.

In anticipation of and prior to the negotiation of TPP and the LCP, US Department of Labour funded a project to improve the capacity of the Vietnamese labour ministry that was intended to realise and facilitate the goals set in the LCP.⁵⁸⁶ The programme continued despite the US withdrawal from the agreement. But an analysis of the programme found that in the first two years, the programme rolled out very slowly and that there was significant underspending of the budget. This was due in part to necessary readjustments after the US withdrawal.⁵⁸⁷ This suggests that the programme would have potentially been much more effective had the US stayed in, which would have also meant it would be operating in the context of an enforceable agreement that set specific benchmarks to be met.

Notably, another programme funded by the US since 2011 that was intended to improve trade union capacity was deemed to have been very successful in an independent review of the programme. This programme was carried out by Better Work Vietnam, an ILO and International Finance Corporation joint project. The review found that the programme's capacity-building efforts "*significantly strengthened the skills and confidence of GTU members on PICC to effectively participate in the bipartite social dialogue process.*"⁵⁸⁸ Moreover, it greatly improved industrial relations by strengthening the capacity of union leaders to engage in social dialogue.⁵⁸⁹ This analysis

⁵⁸² AFL-CIO, *A Gold Standard for Workers?*, above n. 575, at 10.

⁵⁸³ *Id.* at VII(1).

⁵⁸⁴ *Id.* at V(A).

⁵⁸⁵ *Id.* at V(B)(3).

⁵⁸⁶ See, *Independent Multi-Project Evaluation Improving Labour Laws and Labour Administration Within The New Industrial Relations Framework (Nirf) and Better Work Vietnam, Union Capacity Development Component (BWV-UCD)*. Available at https://www.dol.gov/sites/dolgov/files/ILAB/evaluation_type/other/Final_Evaluationin_Report_BWV-UCD_Vietnam_without-PII_30-July-2018_0.pdf

⁵⁸⁷ *Id.* at 9.

⁵⁸⁸ *Id.* at 11.

⁵⁸⁹ *Id.*

suggests that significant work can be carried out with well-designed and well-funded programmes that function at the enterprise level.

Another conclusion is drawn from scholarly research and interviews with government officials. Some analysis indicates the Vietnam LPC represented a significant pressure point on Vietnam to improve its Labour Code. In an analysis of draft codes before and after the withdrawal of the US from the TPP, Tran et al. argue that the draft revision post-TPP was in several ways less strong than an initial draft, concluding that: “*Differences between the two drafts offer strong evidence for the binding labour provision in [regional trade agreements] as a mechanism for labour reforms. Given that the EVFTA also commits Vietnam to respect core labour rights, the weakening of the draft code suggests that the Vietnamese government is not particularly concerned about these obligations – or at a minimum, that the government does not believe it needs to implement, for the Europeans, the kind of domestic reforms spelled out in the U.S. consistency plan.*”⁵⁹⁰

Yet, after the recent 2021 Labour Code reform, the Vietnamese government has yet to issue regulations on the registration of enterprise-level unions. What’s more, while non VGCL-affiliated worker representative organisations have been legalised in the labour reforms, there has been no legalisation of coalitions of independent unions across enterprises. This has led some commentators to argue that there was a squandered opportunity for using economic pressure to achieve legal and political change consistent with international labour law. As one former USTR official noted, **once the US left the TPP, a great deal of leverage was lost because the US would not have ratified the agreement unless the conditions were deemed to be satisfied by the executive branch.**⁵⁹¹ A government official from another country also lamented the fact that the US carried the greatest economic weight, and its departure struck a blow to the ability to place pressure on countries that had signed the LPCs.⁵⁹²

Malaysia

In Malaysia, trade union rights, forced labour, and migrant rights violations were of particular concern to the US. Accordingly, the LPC section on legal reforms contained significant commitments to amend the labour laws to *inter alia* bring Malaysian law into compliance with international standards of freedom of association and collective bargaining rights, ban the withholding of passports from workers,⁵⁹³ and change laws regarding foreign worker recruitment practices⁵⁹⁴ such as banning the payment of recruitment fees by workers.⁵⁹⁵ The LPC also called, albeit weakly, for the Malaysian government to “*ensure that the use of subcontracting or outsourcing is not used to circumvent the rights of association or collective bargaining.*”⁵⁹⁶ Another notable provision was the requirement that a ban on women working in certain industries be lifted.⁵⁹⁷

⁵⁹⁰ Tran et al. above n574, at 412.

⁵⁹¹ Interview with Lewis Karesh, Former U.S. Assistant Trade Representative for Labour.

⁵⁹² Interview with government official (request to remain anonymous).

⁵⁹³ *Id.* at II(B)(1).

⁵⁹⁴ *Id.* at II(B)(2).

⁵⁹⁵ *Id.* at II(B)(2)(b).

⁵⁹⁶ *Id.* at II(A)(20)(a).

⁵⁹⁷ *Id.* at II(D).

But again, like in Vietnam, the path to Malaysian labour reform has been slow.⁵⁹⁸ Whereas the LCP required that Malaysia make concrete legal changes as a condition of US ratification, once the LCP was not effective due to US withdrawal, there was far less pressure on Malaysia to comply. Labour law reform remains stalled, and reports on workers' rights in the country testify to a number of problems that remain in freedom of association, forced labour, and child labour.⁵⁹⁹

Brunei

The Brunei LCP is far less detailed, reflecting the fact, perhaps, that its almost sole export industry is gas and petroleum, and that its primary export destination is Japan, with about 31% of the country's exports going.⁶⁰⁰ Nevertheless, the LCP contains some notable requirements, such as *inter alia* the implementation of non-discrimination laws,⁶⁰¹ enactment of a minimum wage,⁶⁰² elimination of the prohibition on international affiliation by unions,⁶⁰³ and enforcement of the law banning the withholding of passports from migrant workers.⁶⁰⁴ Again, there has been little if any change to Brunei's labour laws. According to the US State Department's Human Rights Report of 2020, the country remains out of compliance in many ways with its obligations under international law, and by implication with its CPTPP obligations. For example, there still is no minimum wage in Brunei; the laws against forced or compulsory labour are not effectively enforced; migrant workers face debt bondage; there is no explicit ban on discrimination with respect to employment; and affiliation with international labour organisations is banned unless consented to by government ministries.⁶⁰⁵

8.4.3 *Discussion and concluding points*

The LCPs are an important new development in explicitly requiring specific language of the law to be changed and in requiring mechanisms, including transparency, reporting, specific goals for the hiring of inspectors, and third-party review of progress to be implemented. These developments are notable. However, such an approach requires a committed counterparty, or counterparties, that are willing to exert pressure in what might be deemed a confrontational way to actively seek to amend labour laws, and requires specific resource commitments and institutional change by trading partner countries. **Much of the potential for change exists at the pre-ratification stage.**

Notably, in the cases of Vietnam, Malaysia, and Brunei, despite being signatories to the TPP agreement that would arguably require those countries to have amended their laws to a great extent, without the leverage of the US requiring that those changes be made prior to ratification, there appears to have been much less pressure on those countries to make effective changes. As described above, many of the requirements of the LPCs that were a condition of US ratification have not been met in the years subsequent to the ratification of CPTPP. This is despite the fact that the LPCs are supposed to be clear articulations of the ways in which the signatory countries are out of compliance with the core obligations in the body of the chapter to adopt and maintain in its statutes and regulations, and practices the fundamental rights contained in the ILO Declaration. In the case

⁵⁹⁸ See NG Yap Hwa (2021). *Whither Labour Law Reform in Malaysia, New Mandala*. Available at <https://www.newmandala.org/whither-labour-law-reform-in-malaysia/>.

⁵⁹⁹ See United States Department of State 2020 Country Report on Human Rights, Malaysia, section 7.

⁶⁰⁰ See World Integrated Trade Solution. Available at <https://wits.worldbank.org/countrysnapshot/en/BRN>.

⁶⁰¹ Brunei LCP, at II(D).

⁶⁰² *Id.* at II(E).

⁶⁰³ *Id.* at II(A)(2).

⁶⁰⁴ *Id.* at II(B).

⁶⁰⁵ US State Department Human Rights Report Brunei (2020), Section VII.

of Vietnam, it is possible that the EU-Vietnam FTA (EVFTA) exerted some influence on Vietnam to engage in labour code improvements. Although, as noted, some scholars have argued otherwise. Follow-up research would be necessary to determine the relative effectiveness of both agreements, although it is difficult to untangle causality. Finally, the LCPs are a continuation of the public law improvement strategy that is pursued in many countries' labour provisions. A number of interviewees and critics have argued that a more effective approach would be to focus tools and resources on remedying significant firm-level violations through mechanisms such as the USMCA's Rapid Response Mechanism.

8.5 How far can pre-ratification processes go and how long can they hold? Environmental reforms in the US-Peru Trade Agreement

The implementation of the US-Peru FTA is an important case study illustrating the promises and the limitations of far-reaching environmental reforms negotiated during the pre-ratification phase. It also sheds light on the distinction between output, outcome and impact, and on the challenges of monitoring the implementation of trade-induced domestic reforms over time. It highlights **the potential impacts of a tailored and multi-stakeholder approach to TSD enforcement**, supported by a number of institutional mechanisms involving both Parties, including both executive and legislative branches, international organisations (the CITES Secretariat), civil society actors and private actors.

8.5.1 Methodology

This case study first provides a critical review of the EU-Peru FTA to highlight the pre-ratification phase negotiations of environmental reforms. Thereafter, it provides a discussion on the opportunities as well as limitations of pre-ratification processes. To do so, this case study relies on desk research and legal analysis as well as interviews with experts and stakeholders.

8.5.2 Critical Review

On 10 May 2007, the new Democratic majority in the US Congress negotiated a bipartisan agreement with the Republican administration of President George W. Bush with the aim of promoting "fully enforceable labour and environmental standards in [US] trade agreements."⁶⁰⁶ Although covering a very wide scope with regard to trade-negotiating objectives, the so-called "May 10 Agreement" drew a list of very specific provisions to revise the US-Peru FTA negotiated by the Bush administration a few years earlier, with a focus on strengthening its environmental provisions.⁶⁰⁷ Preceding the US ratification of the agreement, these reforms not only entailed strict compliance with MEAs, including CITES, but also specific prescriptions for the drafting of a far-reaching, non-reciprocal annex on the protection of forest. Capitalizing on its bargaining leverage, the US government incorporated a far-reaching "Annex on Forest Sector Governance" in the

⁶⁰⁶ US Ways & Means Committee, "May 10th Agreement", Trade Resource Centre., Available from: <https://waysandmeans.house.gov/media-center/tpp-focus>

⁶⁰⁷ See section D on "Logging (Peru)" in the May 10th agreement. Available at <https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/Concept%20Paper%20Final%205%2010%2007.pdf>

environmental chapter of the US-Peru FTA.⁶⁰⁸ Under this agreement, the Peruvian formally agreed, within 18 months after the entry into force of the US-Peru FTA, to take the following actions:⁶⁰⁹

- a) **Increase the number of Peruvian forest management personnel** in national parks, concessions and “indigenous protected” areas **and implement anti-corruption programmes** to improve the enforcement of domestic laws and regulations related to the harvest of and trade in timber products;
- b) **Bring criminal and civil liability to adequate deterrent levels** for actions undermining the sustainable management of Peru’s forest resources;
- c) **Impose criminal and civil penalties** to deter violations of the laws and regulations related to Peruvian timber products;
- d) **Adopt and implement policies to monitor the extent and condition of tree species** within the framework of CITES;⁶¹⁰
- e) **Finalise and adopt a strategic plan of action to regulate the trade of bigleaf mahogany** under Appendix 2 of CITES, and “endeavour to provide financial resources adequate to carry out the plan;”
- f) **Establish an annual export quota for bigleaf mahogany**, at a level consistent with Article IV of CITES;
- g) **Improve the administration and management of forest concessions**, most notably by putting in place inspections of areas designed for the extraction of CITES-listed tree species under the supervision of OSINFOR (*Organismo Supervisor de los Recursos Forestales Maderables*), established as an independent body in charge of overseeing forest resources;
- h) **Strengthen regulatory controls and verification mechanisms relating to the harvest of, and trade in timber products**, taking into account the views of local and indigenous communities, NGOs and business stakeholders;
- i) **Strengthen, protect and increase the capacity of indigenous communities to manage their lands for commercial timber production;**
- j) **Identify protected areas and concessions.**

⁶⁰⁸ According to Peinhardt et al., despite the importance of US domestic politics in the decision to renegotiate the US-Peru FTA, deforestation had emerged as a consensual issue during consultations with domestic constituencies carried out by both US and Peruvian negotiators. Clint Peinhardt, Alisha A. Kim, Viveca Pavon-Harr (2019), “Deforestation and the United States–Peru Trade Promotion Agreement”, *Global Environmental Politics* 19 (1): 53–76.

⁶⁰⁹ US-Peru Trade Promotion Agreement, Annex 18.3.4 on Forest Sector Governance. Available at: https://ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file953_9541.pdf

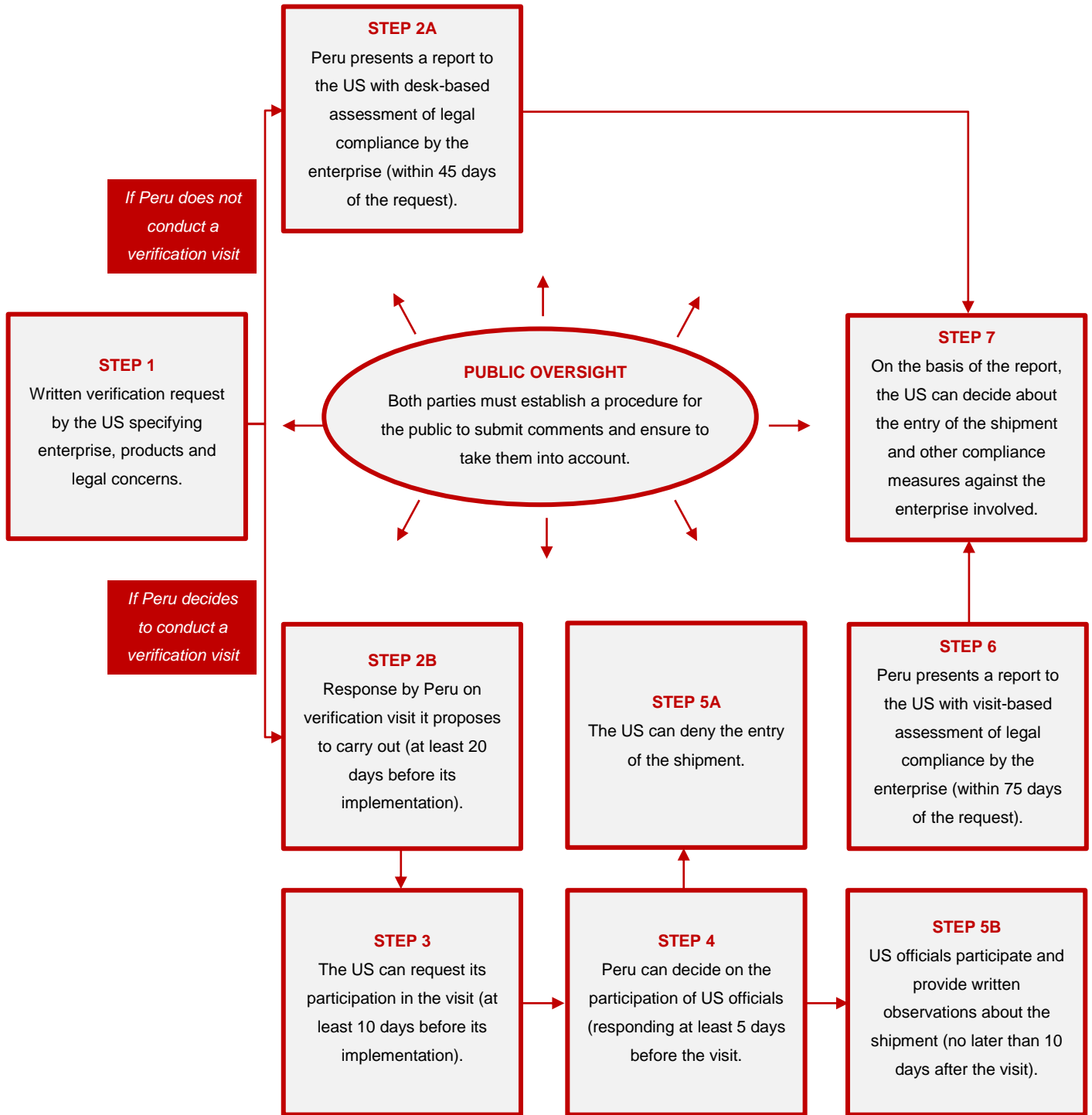
⁶¹⁰ A good example of the high level of specificity of the Annex on Forest Governance are the concrete actions that this provision entailed: “Conducting a comprehensive inventory including analysis of the populations of these tree species to determine their geographic distribution, density, size, age-class structure and regeneration dynamics, as well as threats to their survival; (ii) Conducting technical studies to determine product yields for the purpose of calculating accurate conversion factors and informing decisions on export quotas; and (iii) Providing for technical review and periodic updating of these inventory and product yield studies and making their results publicly available.”

The extremely detailed nature of the Annex on Forest Sector Governance marked a new precedent in the US approach to trade and environment linkages, leading two leading trade-environment scholars to describe the forest annex as “the most far-reaching environmental provision in any trade agreement globally”.⁶¹¹ At first sight, the US-Peru FTA did not contain significantly more environmental provisions than other trade agreements negotiated by other countries with Peru.⁶¹² However, the agreement provided several innovative features designed to make the implementation and enforcement of environmental provisions more effective. First, what distinguished the US agreement was the degree of specificity of its Annex on Forest Sector Governance, which departed from previous environmental chapters in US FTAs. The implementation of this agreement is to be monitored by an interagency committee regrouping both trade and environmental officials. Second, the Peruvian government’s commitments with regard to forest governance were all the more significant since, like the rest of the US-Peru FTA, they would be subject to dispute settlement mechanisms on par with other chapters of the agreement. Fourth, civil society participation was also an important part of the process, as witnessed by several references to the consultation of indigenous communities in the forest annex. Fifth, the US-Peru FTA implementation legislation went beyond the Forest Annex to empower the subcommittee on forest governance to play an instrumental role in implementation. Title V, section 501 of the FTA implementation law grants the subcommittee with the power to request audits of a particular producer or exporter of timber. The subcommittee may also request to participate in verification visits and may detain the shipment that is subject to verification during the procedure.

⁶¹¹ *Sikina and Morin (2020), p. 67.*

⁶¹² *Using the TREND database, Peinhardt et al. (2019) note that the US-Peru FTA included 105 provisions, against 99 for the Colombia-Peru FTA, and 88 in the Canada-Peru and for Korea-Peru agreements.*

Figure 6: Verification mechanisms of timber products under the US-Peru FTA Forest Annex



Source: Del Gatto et al. (2009).⁶¹³

⁶¹³ Filippo Del Gatto, Bernardo Ortiz-von Halle, Braulio Buendía and Chen Hin Keong (2009). "Trade liberalization and forest verification: Learning from the US-Peru Trade Promotion Agreement," Verifor/Traffic Briefing Paper, February, Available at <https://cdn.odi.org/media/documents/4482.pdf>

Figure 6 depicts the procedure outlined under the Forest Annex and the US-Peru FTA implementation legislation, confirming its far-reaching nature. Finally, and in conjunction with this point, the Forest Annex marked a shift from an enforcement approach focusing primarily on state-to-state dialogue on government practices to a more decentralized, commercial enforcement model targeting companies. In essence, the newly established inspection system could lead to the confiscation of goods deemed in violation of the agreement and the prosecution of non-compliant companies. This company-level enforcement approach was a new form of **targeted due diligence** combining inspections with the threat of fines for companies. It would serve as a template for the USMCA's labour provisions a decade later. In short, on the face of it, the Forest Annex was a clear attempt to improve the effectiveness of environment linkages that arose from rising concerns about deforestation, formulated by civil society stakeholders. The US-Peru FTA's unique institutional design – an innovative “output” in impact assessment parlance⁶¹⁴ – led to positive yet contested policy outcomes.

Short-term effects: from innovative output to mixed policy outcomes

From 2007 to 2009, the Peruvian government of Alan García undertook sweeping domestic reforms with regard to forest governance and land use. These were driven by a will to revitalise the Peruvian economy and comply with the terms of the US-Peru FTA and its Forest Annex. Several reforms were directly related to the prescriptions of the Forest Annex, and played an important role in Peru's environmental institutional building. These included:

- **creating a Ministry of Environment** for the conservation and sustainable use of natural resources, biological diversity and protected areas in 2008, with an investigatory arm, OEFA (*Organismo de Evaluación y Fiscalización Ambiental*) in charge of monitoring compliance with environmental legislation;⁶¹⁵
- **creating an independent forestry oversight body**, OSINFOR (*Organismo de Supervisión de los Recursos Forestales y de Fauna Silvestre*) in 2008, to conduct audits and physical inspections of forestry concessions;
- **establishing a new National Forest and Wildlife Service** (SERFOR) in 2013, with greater autonomy and control than its predecessor with to implement Peru's new Forestry and Wildlife Law;
- **amending Peru's penal and criminal code** to raise penalties for illegal activities.⁶¹⁶

⁶¹⁴ As explained in the discussion of methodology, to assess the effectiveness of TSD provisions, the research team distinguishes outputs from outcomes and impact. Outputs are understood as the direct products of TSD provisions, such as the creation of an intergovernmental committee or the publishing of an impact assessment of a specific trade agreement. Outcomes refer to short-term or medium-term effects of outputs, whether they be tangible (e.g., labour, human rights, or environmental reform) or intangible (increased visibility of an environmental norm, formation of a sustainable network of policy experts). Impacts consist of long-term effects (positive or negative) brought by TSD provisions, such as the effective improvement of freedom of association and collective bargaining.

⁶¹⁵ According to a report by the United States Trade Representative, by 2015, the OEFA had carried out “more than 5,500 non-forestry sector environmental inspections and issued over 900 fines for failure to comply with environmental law”. See *infra x*.

⁶¹⁶ United States Trade Representative (2013), “2013: Progress under the Forest Annex”: <https://ustr.gov/sites/default/files/UNITED-STATES-PERU-TRADE-PROMOTION-AGREEMENT-strengthening-forest-sector-governance.pdf>; United States Trade Representative (2015), “Standing Up for the Environment. Trade for a Greener World”: <https://ustr.gov/sites/default/files/USTR-Standing-Up-for-the-Environment-2015-Report.pdf>; See also Peinhardt et al., *ibid* and Sikina Jinnah (2011), “Strategic Linkages: The Evolving Role of Trade Agreements in Global Environmental Governance”, *The Journal of Environment & Development*, Vol. 20 (2): 191-215.

This ambitious set of reforms was dictated by the terms of the agreement and its implementation legislation in the US, which conditioned the FTA's entry into force to presidential certification of compliance.⁶¹⁷ The latter procedure was once again instrumental in the *ex-ante* implementation of the environmental provisions of the agreement. In all, the Peruvian government invested considerable energy and resources to reform its environmental legislation to comply with the terms of the US-Peru FTA and its Forest Annex.

However, several analyses have confirmed that among nearly 100 decrees passed by Peruvian President Alan García over 18 months under a "fast track" procedure, many were not related to, and sometimes went even *against* the provisions of the Forest Annex. Not only was forestry legislation adopted without adequate public participation, especially among indigenous communities – ignoring Art. 3, paragraphs h and i of the Forest Annex – but some controversial land-use decrees undermined communal tenure of land by recentralizing land property in the hands of the local government. For instance, Decree 1090 granted the Peruvian government greater freedom to reclassify forestland for agricultural purposes. This lack of consultation of local stakeholders triggered a wave of indigenous protests and road blockades in the Bagua region that resulted in armed conflicts leading to the deaths of nearly 40 casualties among indigenous people and 23 among police officers.⁶¹⁸ In this case, the resentment of indigenous communities had less to do with the shortcomings of the Annex than with the Peruvian government's reform process of forest governance, and arguably with the pressure imposed by the US government to carry out these reforms.

Another notable development was the series of measures adopted by the Peruvian government to regulate timber production and trade within the framework of CITES. These steps included a decision to implement bigleaf mahogany trade controls as well as action on cedar protection that went beyond CITES requirements under Appendix III.⁶¹⁹ Here, it must be noted that both the US and the Peruvian governments requested technical guidance from the CITES Secretariat in 2008 to finalise its legislation implementing the convention in connection with the US-Peru FTA. This shows that international institutions can also play a role in the enforcement of environmental provisions, as the ILO has done in the labour sphere. Peru's legislative reforms helped it attain Category 1 status, which means, that after decades of resistance against regulation, Peru's CITES implementation legislation was deemed to meet the official requirements under the convention.

To undertake these ambitious reforms, Peru also benefited from technical assistance from US government agencies. First, the US helped Peru to establish the National Environmental Certification Service (SENACE), in charge of reviewing and approving environmental impact assessments, and developing the Peruvian Ministry of Environment's capacity to analyse and manage impact assessments. Second, the US Agency for International Development (USAID) and the US Forest Service helped the Peruvian government to develop an electronic timber tracking system to prevent

⁶¹⁷ As stated in Title I, section 101, paragraph b, "At such time as the President determines that Peru has taken measures necessary to comply with those provisions of the Agreement that are to take effect on the date on which the Agreement enters into force, the President is authorized to exchange notes with the Government of Peru providing for the entry into force, on or after January 1, 2008, of the Agreement with respect to the United States."

⁶¹⁸ Jinnah (2011). For a more critical perspective on the failure to consult indigenous communities, see Peinhardt et al. (2019) and Stetson: Stetson, George. 2012. 'Oil Politics and Indigenous Resistance in the Peruvian Amazon: The Rhetoric of Modernity Against the Reality of Coloniality'. *Journal of Environment and Development* 21 (1): 76–97.

⁶¹⁹ An official of the CITES Secretariat commented on these reforms in those terms: "I have never seen a penal code that was reformed in such a short time. It was required by a trade agreement so they did it." Cited in Jinnah (2011).

illegal exports in compliance with CITES. USAID also worked with the Peruvian Office of Environmental Affairs (FEMA) to implement a satellite monitoring system for deforestation and illegal logging in the Ucayali region, one of the most deforested regions in Peru. Finally, US government agencies including USAID, the US Forest Service and the Department of Justice trained a wide range of Peruvian personnel, including environmental prosecutors, police officers, community park guards and government officials to raise awareness on the enforcement of environmental legislation. All in all, between 2009 and 2015, the US government claimed to have spent \$73.7 million to fund environmental reforms in Peru,⁶²⁰ a sum that was estimated at \$90 million in 2018.⁶²¹ To the extent that this amount includes funding by USAID and other non-trade agencies, it is difficult to assess whether this funding was directly related to FTA enforcement. In fact, in 2006, the US Trade and Environment Advisory Committee (TEPAC), composed of business and civil society experts initially bemoaned the absence of dedicated funding in the US-Peru and other FTAs.⁶²²

Medium- and long-term impact of the US-Peru FTA

While domestic reforms pointed to improvement of *de jure* environmental standards in Peru, the results with regard to *de facto* standards were more mixed. In 2018, in contradiction with the Forest Annex of the US-Peru FTA, the Peruvian government took steps to put an end to the independence of the forest auditor OSINFOR. According to a letter from the House of Representatives' Committee on Ways and Means⁶²³ to USTR Robert Lighthizer, this move came after several years of measures undermining the environmental commitments made under the Forest Annex including:⁶²⁴

- a 2014 regulatory reform package allegedly rolling back environmental protections to attract foreign investment;
- the abrupt firing of the OSINFOR Director Rolando Navarro in January 2016, under the pressure from domestic industry following the seizure of Peruvian wood by the US;

⁶²⁰ See USTR (2015).

⁶²¹ Glenn Thrush (2018). "In Overture to Democrats, Trump Administration May Challenge Peru on Deforestation", *The New York Times*, December 19, 2018, retrieved from <https://www.nytimes.com/2018/12/19/us/politics/us-peru-forest-trade.html>

⁶²² According to the TEPAC's report on Peru TPA in 2006: "As with other agreements, the majority would strongly prefer that Congress provide a dedicated funding source to ensure that the potential inherent in the Memorandum of Agreement is realised. Without a funding source, achievement of the goals of the Memorandum of Agreement is at best ephemeral. This issue is becoming increasingly significant as more FTAs are executed. Each FTA has contained capacity building provisions, but no funds have been set aside. Soon, these agreements will be competing with each other for scarce funds. A majority believes there is too much competition for funds and too often environmental projects are not afforded appropriate priority. A majority of TEPAC believes that this and future FTAs should contain provisions for dedicated funding and technical assistance from governments and international financial institutions as well as funding commitments for public/private sector ventures. This is necessary to both ensure adequate funding of projects to be implemented in the short- and medium-term as well as projects to be developed over the long term."

⁶²³ The House Ways and Means Committee is, with the Senate Finance Committees, the most powerful committee working on trade policy in the United States. Their authority on international trade stem from their constitutional prerogatives and the fact that until the creation of the federal income tax (1913) and the US historical shift from protectionism to reciprocal trade liberalization (1934 Reciprocal Trade Agreements Act), tariffs remain a main source of government revenues in the United States. For a historical discussion, see Douglas Irwin (2017). *Clashing Over Commerce. A History of US Trade Policy*. Chicago: University of Chicago.

⁶²⁴ Committee on Ways and Means of the House of Representatives, Letter to Ambassador Robert E. Lighthizer, December, 19, 2018, retrieved from: <https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/12.19.18%20USTR%20Peru%20letter.pdf>

- the failure to complete (or provide evidence of the completion of) audits of wood producers and exporters to the US as required by Paragraph 6a of the Forest Annex.⁶²⁵

These policy shortcomings were aggravated by persistent corruption on the ground, which allowed illegal logging to continue. At times, US customs agents denied entry to lumber imports after receiving evidence from their Peruvian counterparts that they were harvested illegally, as in Houston in 2015.⁶²⁶

In the face of these degrading conditions and more specifically the decree undermining OSINFOR's independence, the US House Ways and Means Committee demanded that the Peruvian government reverse its decision on OSINFOR and that the USTR take action to ensure compliance with the US-Peru FTA. In January 2019, Robert Lighthizer announced that he was seeking formal consultations with Peru to resolve concerns about its decision to curtail the authority of OSINFOR. This was the first time that the USTR requested consultations on environmental matters under an FTA. Meanwhile, a Peruvian nongovernmental development organisation called "KENÉ" (*Instituto de Estudios Forestales y Ambientales*) issued a submission to the Secretariat under the FTA's SEM process on that very same matter.⁶²⁷ These actions prompted bilateral consultations, before the matter was referred to the FTA's Environmental Affairs Council in February. Behind the curtains, however, the US Embassy informed the Peruvian government that the US government was preparing to bring a full dispute under the state-to-state dispute settlement mechanism. In early April 2019, Peru's Council of Ministers (PCM) annulled the original Peruvian decree to return OSINFOR to its previous position in the PCM, i.e. reporting directly to the Prime Minister, and established a timeline to hire the next head of OSINFOR.⁶²⁸ This policy reversal confirmed the importance of the framework established by the US government under the US-Peru FTA's Forest Annex and its influence on Peru's forestry policies. Yet, the persistent challenges faced by Peruvian and US officials in the regulation of timber production and trade were also indicative of the distinction between institutional output, positive policy outcomes and tangible impacts.

Beyond notable efforts to reform Peru's forest governance, is there any quantitative evidence that the US-Peru FTA had an impact on forest governance in Peru? Data on Peru's exports in mahogany trade confirms the US administration's claims on the significant effects that the two countries' cooperation had on the reduction of timber exports for this sensitive product. Between 2007, when Peru ratified the US-FTA, and 2019, Peruvian exports of mahogany (*Swietenia*) dropped from \$4.45 million to \$344,000, a 92% decline. While there were some reports of trade diversion, confirmed by interviews with US government officials, this phenomenon did not have a significant impact on Peru's mahogany exports to the rest of the world, which followed a similar downward trend (-89%). Given

⁶²⁵ "Peru shall conduct periodic audits of producers and exporters in its territory of timber products exported to the United States, and verify that exports of those products to the United States comply with all applicable laws, regulations, and other measures of Peru governing the harvest of, and trade in, timber products including, in the case of tree species listed in CITES Appendix II, relevant chain of custody requirements."

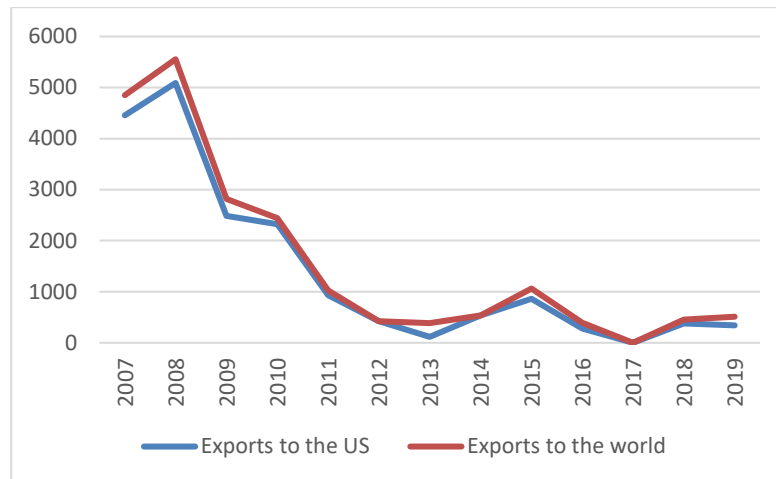
⁶²⁶ Voice of America, "AP Investigation Shows Peru Backsliding on Illegal Logging," April 19, 2017, retrieved from <https://www.voanews.com/a/peru-illegal-logging/3816922.html>

⁶²⁷ Yilly Vanessa Pacheco Restrepo (2019). "Enforcement Practice under Preferential Trade Agreements: Environmental Consultations and Submissions on Environmental Enforcement Matters in the US-Peru TPA", *Legal Issues of Economic Integration* 46, no. 3 : 247-262.

⁶²⁸ USTR (2019). "USTR Successfully Resolves Concerns Raised in First-Ever Environment Consultations Under the U.S.-Peru Trade Promotion Agreement (PTPA)" April 9, retrieved from <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/april/ustr-successfully-resolves-concerns>

that CITES compliance for mahogany production and trade was a primary focus of the Forest Annex, this is clear evidence that the US-Peru FTA was effective in this regard.

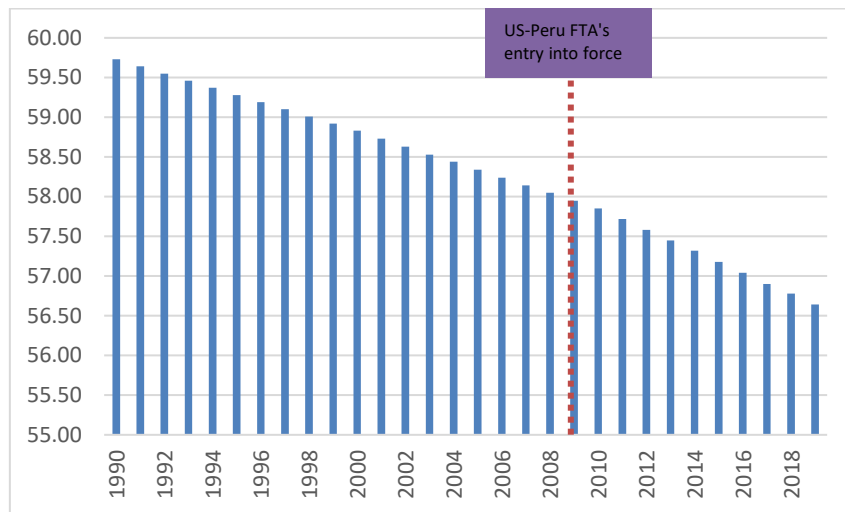
Figure 7: Peru's exports of Mahogany products (\$ thousands)



Source: International Trade Center, TradeMaps

Beyond timber exports, did the US-Peru FTA help Peru reduce the pace of deforestation, which had motivated the inclusion of the Annex on forest governance in the first place? The answer to this question is much more complex to the extent that many other factors other than trade contribute to deforestation. However, given the significant policy reforms undertaken by the Peruvian government as well as the US financial investment in Peru's forest governance, one might have expected trends in deforestation to slow down after the US-Peru FTA went into force. Figure 8 shows, however, that the national trends in deforestation continued even under the scrutiny of US government officials under the Forest Annex. These results are in line with the conclusions of Peinhardt et al, who showed that trends in deforestation in different Peruvian regions followed the trends of other regions in Bolivia, Brazil, Colombia and Ecuador.⁶²⁹ To a broader extent, they are also in line with the aggregate results of the RESPECT project, which found no causal relationship between the inclusion of "NTPO" provisions in FTAs and improvement in non-trade indicators. This means that while far-reaching environmental provisions can push trading partners to undertake ambitious domestic reforms, impacts on the ground are subject to a multitude of other factors.

⁶²⁹ See Peinhardt et al., .

Figure 8: Peru's forest land (%)

Source: FAO.

8.5.3 Discussion and concluding points

This case study of the US-Peru FTA and its Annex 18.3.4 on Forest Sector Governance provides insights into the scope, implementation and enforcement of environmental provisions in FTAs both at the pre-ratification stage, or more specifically before the entry into force of the agreement, and at the implementation and enforcement stage. With regard to scope, **it remains to this day one of the most ambitious trade agreements with regard to forest protection**. This is due to the unique nature of its Forest Annex, a text that can be interpreted as either ambitious or intrusive, but which provided an unprecedentedly detailed list of domestic reforms to be undertaken by the Peruvian government. While the US did support Peru through funding, training, and cooperation, the implementation of these reforms fell on the Peruvian government, who, from 2007 to 2009 achieved a significant set of environmental reforms related to forest governance. Despite the persistence of illegal logging and deforestation in Peru, it is hard to contest that **the US-Peru FTA led to significant legislative outcomes in the realm of forest governance**. At the same time, the US-Peru FTA and its Forest Annex prioritised one particular field that Parties deemed most urgent, as opposed to undertaking reforms in all environmental areas commonly covered by the environmental chapter of US FTAs. This made implementation easier for both the US and Peruvian governments. This **tailored approach to TSD implementation and enforcement** is in sync with the EU Commission's emphasis on "country priorities" (Point 6 of the 15-Action Plan) but is compatible with the broad scope of the US-Peru FTA's environmental chapter, which remains subject to trade sanctions. Hence, countries can incorporate a wide-range of environmental provisions under a template environmental chapter enforceable through trade sanctions, while devoting greater resources to the implementation and enforcement of country-specific provisions like the Forest Annex.

From an institutional standpoint, the process of **presidential certification of compliance**, which conditioned the entry into force of the US-Peru FTA, exerted considerable pressure on the Peruvian government. **This confirms that "ex-ante implementation" is an effective institutional mechanism that leverages access to the US market in order to obtain reforms from trading partners after ratification but before the official entry into force of a trade agreement**. This mechanism seems endemic to the US institutional apparatus, where both branches interact to formulate US trade policy.

While the executive branch played a central role in overseeing compliance with the Forest Annex, the US **Congress was also instrumental in monitoring this reform process** through the 2010s. As discussed, the House Ways and Means Committee brought noncompliance grievances to the desk of the Trump administration, which would ultimately prompt executive action. This was partly due to the constitutional role that the US Congress is expected to play in implementation. However, the dynamics at play went beyond the sharing of powers inherent to US trade policymaking. In fact, both interviews and media reports reveal that the Trump administration's unexpected interest in environmental protection in Peru stemmed from its attempt to court progressive Democrats in the context of the USMCA negotiations and the anticipated ratification of the agreement.

Another notable institutional feature of the US-Peru FTA that, according to interviewees, had a tangible impact on the practices of the timber industry was the adoption of firm-level enforcement mechanisms through verification. According to one interviewee closely involved in these debates, this was an important development that allowed to confront entrenched commercial interests without compromising the cooperative efforts undertaken by the US and Peruvian government: "In an FTA with a partnering country, the goal should be cooperative to improve the situation. (...) The timber producers are a key part of the Peruvian economy. Our goal is not to beat up the government, but to get leverage on them." Both the Obama and Trump administrations initiated audits of Peru's largest exporters and at times denied entry of wood products. These companies were dependent on the US market and, therefore, invested to bring their production and exports to compliance with the US-Peru FTA. Admittedly, deforestation and illegal logging continue to be rampant in Peru. Yet, under this form of **targeted due diligence**, Peru's timber exports to the US are now closely monitored and can be subject to verification and commercial sanctions in case of noncompliance.

Finally, **civil society participation at several stages of the trade policy process also contributed to make the US-Peru FTA a vehicle for domestic reforms and improved business practices.** At the negotiating stage, American NGOs like the National Resources Defense Center played an important advisory role for the negotiations of the US-Peru FTA and the drafting of its Forest Annex. Once the agreement went into force, the Environmental Investigation Agency worked with local organisations and Peruvian officials to provide crucial intelligence on the origins of timber products – as in the case of the 2016 audit that resulted in the denial of entry in the Houston port. The SEM process also provided opportunities for NGOs to submit cases to the US-Peru FTA Secretariat, but the effects of these submissions seem more limited. The first two cases did not yield any tangible results. The impact of the third one was likely overshadowed by the efforts undertaken by the House Ways and Means Committee and the USTR's decision to request consultations with the Peruvian government. Thus, in this case, civil society participation was most impactful at the negotiating and monitoring stages, not necessarily through the formal SEM mechanism.

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Annex 1: Ratification and implementation of MEAs and labour conventions

Table 1a: Ratification and implementation of MEAs and labour conventions

Trade agreements	Commitment to ratify MEAs	Commitment to implement MEAs	Commitment to ratify labour conventions	Commitment to implement labour conventions
EU-South Korea FTA	Cooperation to promote the ratification of MEAs with an impact on trade ⁶³⁰	Commitment to the effective implementation of MEAs in Parties' laws and practices ⁶³¹	Make continued and sustained efforts towards ratifying the fundamental ILO Conventions and other up-to-date ILO conventions ⁶³²	In accordance with their ILO membership obligations and the 1998 ILO Declaration, commitment to respecting, promoting and realising, in the Parties' laws and practices, the principles concerning the fundamental rights ⁶³³ Commitment to effectively implementing the ILO conventions that Korea and the EU Member States have ratified respectively ⁶³⁴
EU-Colombia/Peru/Ecuador Trade Agreement		Commitment to effectively implement in their laws and practices specific MEAs ⁶³⁵	Exchange of information on the Parties' respective situation and advancements regarding the ratification of priority ILO conventions and other up-to-date ILO conventions ⁶³⁶	Commitment to the promotion and effective implementation in the Parties' laws and practice and in their whole territory of internationally recognised core labour standards as contained in the fundamental ILO conventions ⁶³⁷
EU-Central America	Ensure the ratification of the amendment to	Commitment to effectively implement in their	Exchange of information on the Parties'	Commitment to effectively implement in the Parties' laws and practice the

⁶³⁰ EU-South Korea FTA, Chapter 13, Article 13.11; Annex 13, Point 1(c).

⁶³¹ EU-South Korea FTA, Chapter 13, Article 13.5(2).

⁶³² EU-South Korea FTA, Chapter 13, Article 13.4(3).

⁶³³ The following fundamental rights are listed: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.

⁶³⁴ EU-South Korea FTA, Chapter 13, Article 13.4(3).

⁶³⁵ EU-Colombia/Peru/Ecuador Trade Agreement, Title IX, Article 270(2). This provision cites the following MEAs: the Montreal Protocol, the Basel Convention, the Stockholm Convention on Persistent Organic Pollutants, CITES, the CBD, the Cartagena Protocol on Biosafety to the CBD, the Kyoto Protocol to and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade. Article 270(3) provides that the Trade Committee may recommend the extension of the application of paragraph 2 to other MEAs following a proposal by the Sub-committee on TSD.

⁶³⁶ EU-Colombia/Peru/Ecuador Trade Agreement, Title IX, Article 269(4).

⁶³⁷ EU-Colombia/Peru/Ecuador Trade Agreement, Title IX, Article 269(3).

Trade agreements	Commitment to ratify MEAs	Commitment to implement MEAs	Commitment to ratify labour conventions	Commitment to implement labour conventions
Association Agreement	Article XXI of CITES and the Rotterdam Convention ⁶³⁸	laws and practice specific MEAs ⁶³⁹	respective situation and advancements as regards the ratification of the other ILO conventions ⁶⁴⁰	fundamental ILO conventions contained in the 1998 ILO Declaration ⁶⁴¹
EU-Ukraine Association Agreement		Commitment to the effective implementation in the Parties' laws and practices of the MEAs to which they are party ⁶⁴²	Consider ratification and implementation of other up to date ILO conventions ⁶⁴³	Promote and implement in the Parties' laws and practices the internationally recognised core labour standards ⁶⁴⁴ Commitment to effectively implement the fundamental and priority ILO conventions that the Parties have ratified and the 1998 ILO Declaration Consider ratification and implementation of other up to date ILO conventions ⁶⁴⁵
EU-Georgia Association Agreement	Regular exchange of information on the Parties' situation and advancements regarding MEAs ratifications ⁶⁴⁶ Parties may cooperate in exchanging views and best practices on promoting the ratification of MEAs	Commitment to effectively implement in the Parties' law and practice the MEAs to which they are party ⁶⁴⁸ Parties may cooperate in exchanging views and best practices on promoting the effective implementation of	Consider ratification of the remaining ILO priority and other up-to-date conventions Regular exchange of information on the Parties' respective situation and	In accordance with their ILO membership obligations and the 1998 ILO Declaration, commitment to respecting, promoting and realising in the Parties' laws and practices and in their whole territory the internationally recognised core labour standards, as embodied in the

⁶³⁸ EU-Central America Association Agreement, Part IV, Title VIII, Article 287(3) & (4).

⁶³⁹ EU-Central America Association Agreement, Part IV, Title VIII, Article 287(2) & (4). These provisions cite the following MEAs: the Montreal Protocol the Montreal Protocol, the Basel Convention, the Stockholm Convention on Persistent Organic Pollutants, CITES, the CBD, the Cartagena Protocol on Biosafety to the CBD, the Kyoto Protocol to and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade.

⁶⁴⁰ EU-Central America Association Agreement, Part IV, Title VIII, Article 286(3).

⁶⁴¹ EU-Central America Association Agreement, Part IV, Title VIII, Article 286(2).

⁶⁴² EU-Ukraine Association Agreement, Title IV, Chapter 13, Article 292(2).

⁶⁴³ EU-Ukraine Association Agreement, Title IV, Chapter 13, Article 291(3) & (4).

⁶⁴⁴ EU-Ukraine Association Agreement, Title IV, Chapter 13, Article 291(2). The following fundamental rights are listed: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.

⁶⁴⁵ EU-Ukraine Association Agreement, Title IV, Chapter 13, Article 291(3).

⁶⁴⁶ EU-Georgia Association Agreement, Title IV, Chapter 13, Article 230(3).

⁶⁴⁸ EU-Georgia Association Agreement, Title IV, Chapter 13, Article 230(2).

Trade agreements	Commitment to ratify MEAs	Commitment to implement MEAs	Commitment to ratify labour conventions	Commitment to implement labour conventions
	of relevance in a trade context ⁶⁴⁷	MEAs of relevance in a trade context ⁶⁴⁹	developments in this regard ⁶⁵⁰ Parties may cooperate in exchanging views and best practices on promoting the ratification of fundamental, priority and other up-to-date ILO conventions ⁶⁵¹	fundamental ILO conventions ⁶⁵² Commitment to effectively implement in the Parties' law and practice the fundamental, the priority and other ILO conventions they ratified ⁶⁵³ Parties may cooperate in exchanging views and best practices on promoting the effective implementation of fundamental, priority and other up-to-date ILO conventions ⁶⁵⁴
EU-Moldova Association Agreement	Regular exchange of information on the Parties' situation and advancements as regards ratifications of MEAs ⁶⁵⁵ Parties may cooperate in promoting the ratification of MEAs of relevance in a trade context ⁶⁵⁶	Commitment to effectively implement in the Parties' law and in practice the MEAs to which they are party ⁶⁵⁷ Parties may cooperate in promoting the effective implementation of MEAs of relevance in a trade context ⁶⁵⁸	Consider the ratification of the remaining ILO priority and other up-to-date conventions ⁶⁵⁹ Parties may cooperate in promoting the ratification of fundamental, priority and other up-to-date ILO conventions ⁶⁶⁰	In accordance with their ILO membership obligations and the 1998 ILO Declaration, commitment to respecting, promoting and realising in the Parties' laws and practices and in their whole territory the internationally recognised core labour standards, as embodied in the fundamental ILO conventions ⁶⁶¹ Commitment to effectively implement in the Parties' law and in practice the

⁶⁴⁷ EU-Georgia Association Agreement, Title IV, Chapter 13, Article 239(e).

⁶⁴⁹ EU-Georgia Association Agreement, Title IV, Chapter 13, Article 239(e).

⁶⁵⁰ EU-Georgia Association Agreement, Title IV, Chapter 13, Article 229(4).

⁶⁵¹ EU-Georgia Association Agreement, Title IV, Chapter 13, Article 239(e).

⁶⁵² EU-Georgia Association Agreement, Title IV, Chapter 13, Article 229(2). The provisions cites: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.

⁶⁵³ EU-Georgia Association Agreement, Title IV, Chapter 13, Article 229(3).

⁶⁵⁴ EU-Georgia Association Agreement, Title IV, Chapter 13, Article 239(e).

⁶⁵⁵ EU-Moldova Association Agreement, Title V, Chapter 13, Article 366(3).

⁶⁵⁶ EU-Moldova Association Agreement, Title V, Chapter 13, Article 375.

⁶⁵⁷ EU-Moldova Association Agreement, Title V, Chapter 13, Article 366(2).

⁶⁵⁸ EU-Moldova Association Agreement, Title V, Chapter 13, Article 375.

⁶⁵⁹ EU-Moldova Association Agreement, Title V, Chapter 13, Article 365(4).

⁶⁶⁰ EU-Moldova Association Agreement, Title V, Chapter 13, Article 375.

⁶⁶¹ EU-Moldova Association Agreement, Title V, Chapter 13, Article 365(2). The provisions cites: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.

Trade agreements	Commitment to ratify MEAs	Commitment to implement MEAs	Commitment to ratify labour conventions	Commitment to implement labour conventions
				fundamental, the priority and other ILO conventions they ratified ⁶⁶² Parties may cooperate in promoting the effective implementation of fundamental, priority and other up-to-date ILO conventions ⁶⁶³
EU-Canada CETA	Commitment to consult and cooperate, including through information exchange on each Party's respective views on becoming a Party to additional MEAs. ⁶⁶⁴	Commitment to effectively implement in the Parties' law and practices, in their whole territory, the MEAs to which they are party. Commitment to consult and cooperate, including through information exchange on the implementation of MEAs to which a Party is party. ⁶⁶⁵	Make continued and sustained efforts to ratify the fundamental ILO conventions if the Parties have not yet done so. Exchange of information on their situations and advances regarding the ratification of the fundamental as well as priority and other ILO conventions that are classified as up to date by the ILO ⁶⁶⁶	Commitment to respect, promote and realise the fundamental principles and rights at work in accordance with ILO membership obligations and the 1998 ILO Declaration ⁶⁶⁷ Ensure that the Parties' labour law and practices promote specific objectives of the ILO Decent Work Agenda ⁶⁶⁸ Commitment to effectively implement in the Parties' law and practices in their whole territory the fundamental ILO conventions that they have ratified respectively ⁶⁶⁹
EU-Japan EPA	Exchange of information on the Parties' situation and advancements regarding ratification, acceptance or approval of, or accession to, MEAs,	Commitment to effectively implement in the Parties' law, regulations and practices the MEAs to which they are party.	Make continued and sustained efforts on its own initiative to pursue ratification of the fundamental ILO conventions and other ILO	Respect, promote and realise in the Parties' laws, regulations and practices the internationally recognised principles concerning the fundamental rights at work

⁶⁶² EU-Moldova Association Agreement, Title V, Chapter 13, Article 365(3).

⁶⁶³ EU-Moldova Association Agreement, Title V, Chapter 13, Article 375.

⁶⁶⁴ EU-Canada CETA, Chapter 23, Article 24.4.

⁶⁶⁵ EU-Canada CETA, Chapter 23, Article 24.4.

⁶⁶⁶ EU-Canada CETA, Chapter 23, Article 23.3(4).

⁶⁶⁷ EU-Canada CETA, Chapter 23, Article 23.3(1). The provisions cites: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.

⁶⁶⁸ EU-Canada CETA, Chapter 23, Article 23.3(2). The following objectives are cited: health and safety at work, establishment of acceptable minimum employment standards for wage earners, and non-discrimination in respect of working conditions.

⁶⁶⁹ EU-Canada CETA, Chapter 23, Article 23.3(4).

Trade agreements	Commitment to ratify MEAs	Commitment to implement MEAs	Commitment to ratify labour conventions	Commitment to implement labour conventions
	including their amendments, which each Party considers appropriate to be bound by. ⁶⁷⁰	Exchange of information on implementation of MEAs Commitment to effectively implement the UNFCCC and the Paris Agreement. ⁶⁷¹ Cooperate on trade-related aspects of MEAs, including through the exchange of views and information on the implementation of CITES and through technical and customs cooperation. ⁶⁷²	conventions which each Party considers appropriate to ratify. Exchange of information on the Parties' situations as regards the ratification of ILO conventions and Protocols, including the fundamental ILO conventions. ⁶⁷³	Commitments to effectively implement in the Parties' laws, regulations and practices ILO conventions ratified by the Parties. ⁶⁷⁴
EU-Singapore FTA	Parties may initiate cooperative activities of mutual benefit in area of cooperation with a view to promoting the ratification of MEAs with relevance to trade. ⁶⁷⁵	Effectively implement, in the Parties' respective laws, regulations or other measures and practices in their territories, the MEAs to which they are party. Commitment to effectively implement the UNFCCC, its Kyoto Protocol, and the Paris Agreement. ⁶⁷⁶ Parties may initiate cooperative activities, such as cooperation with a view to promoting the effective implementation of	Make continued and sustained efforts towards ratifying the fundamental ILO conventions, and information exchange in this regard. Consider the ratification of other ILO conventions, taking into account domestic circumstances, and information exchange in this regard. ⁶⁷⁸ Parties may initiate cooperative, such	In accordance with ILO obligations and the 1998 ILO Declaration, commitment to respect, promote and effectively implement the principles concerning the fundamental rights at work. ⁶⁸⁰ Commitment to effectively implementing the ILO conventions that the Parties have ratified. Make continued and sustained efforts towards effectively implementing the fundamental ILO conventions, and information exchange in this regard.

⁶⁷⁰ EU-Japan EPA, Chapter 16, Article 16.4.

⁶⁷¹ EU-Japan EPA, Chapter 16, Article 16.4.

⁶⁷² EU-Japan EPA, Chapter 16, Article 16.12.

⁶⁷³ EU-Japan EPA, Chapter 16, Article 16.3.

⁶⁷⁴ EU-Japan EPA, Chapter 16, Article 16.3.

⁶⁷⁵ EU-Singapore FTA, Chapter 12, Article 12.10.

⁶⁷⁶ EU-Singapore FTA, Chapter 12, Article 12.6.

⁶⁷⁸ EU-Singapore FTA, Chapter 12, Article 12.3(4).

⁶⁸⁰ EU-Singapore FTA, Chapter 12, Article 12.3(3). The provisions cites: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.

Trade agreements	Commitment to ratify MEAs	Commitment to implement MEAs	Commitment to ratify labour conventions	Commitment to implement labour conventions
		MEAs with relevance to trade. ⁶⁷⁷	as the exchange of views on the promotion of the ratification of fundamental ILO conventions and other conventions of mutual interest, as well as on the effective implementation of ratified conventions. ⁶⁷⁹	Consider the effective implementation of other ILO conventions, taking into account domestic circumstances, and information exchange in this regard. ⁶⁸¹ Parties may initiate cooperative, such as the exchange of views on the promotion of the ratification of fundamental ILO conventions and other conventions of mutual interest, as well as on the effective implementation of ratified conventions. ⁶⁸²
EU-Vietnam FTA	In the Committee on Trade and Sustainable Development and on other occasions, exchange of information and experiences on the Parties' respective situation and progress with regard to the ratification of MEAs or their amendments. ⁶⁸³ Parties may work together in sharing experience on promoting the ratification and implementation of MEAs of relevance to trade. ⁶⁸⁴	Commitment to effectively implement in the Parties' domestic law and practice the MEAs to which they are a party. ⁶⁸⁵ Commitment to effectively implementing the UNFCCC, the Kyoto Protocol, and the Paris Agreement. Cooperate on the implementation of the UNFCCC, the Kyoto Protocol and the Paris Agreement. ⁶⁸⁶ Adopt and implement appropriate	Make continued and sustained efforts towards ratifying, to the extent it has not yet done so, the fundamental ILO conventions. Consider the ratification of other ILO up-to-date conventions, taking into account its domestic circumstances. Exchange of information with regard to the ratifications of fundamental and	In accordance with ILO obligations and the 1998 ILO Declaration, commitment to respect, promote and effectively implement the principles concerning the fundamental rights at work. ⁶⁹¹ Commitment to effectively implement in the Parties' domestic laws and regulations and practice the ILO conventions they ratified. ⁶⁹² Parties may work together in sharing experience on promoting the ratification and implementation of fundamental, priority and other up-to-date ILO conventions. ⁶⁹³

⁶⁷⁷ EU-Singapore FTA, Chapter 12, Article 12.10.

⁶⁷⁹ EU-Singapore FTA, Chapter 12, Article 12.4.

⁶⁸¹ EU-Singapore FTA, Chapter 12, Article 12.3(4).

⁶⁸² EU-Singapore FTA, Chapter 12, Article 12.4.

⁶⁸³ EU-Vietnam FTA, Chapter 13, Article 13.5(3).

⁶⁸⁴ EU-Vietnam FTA, Chapter 13, Article 13.14(1)(d).

⁶⁸⁵ EU-Vietnam FTA, Chapter 13, Article 13.5(2).

⁶⁸⁶ EU-Vietnam FTA, Chapter 13, Article 13.6.

⁶⁹¹ EU-Vietnam FTA, Chapter 13, Article 13.4(2). The provision cites: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.

⁶⁹² EU-Vietnam FTA, Chapter 13, Article 13.4(4).

⁶⁹³ EU-Vietnam FTA, Chapter 13, Article 13.14(1)(d).

Trade agreements	Commitment to ratify MEAs	Commitment to implement MEAs	Commitment to ratify labour conventions	Commitment to implement labour conventions
		<p>effective measures consistent with the Parties' commitments under international treaties leading to a reduction of illegal trade in wildlife.⁶⁸⁷</p> <p>Parties may work together in sharing experience on promoting the ratification and implementation of MEAs of relevance to trade.⁶⁸⁸</p>	<p>other ILO conventions.⁶⁸⁹</p> <p>Parties may work together in sharing experience on promoting the ratification and implementation of fundamental, priority and other up-to-date ILO conventions.⁶⁹⁰</p>	
<p>EU-UK Trade and Cooperation Agreement</p>	<p>Exchange of information on the Parties' situations regarding the ratification and implementation of MEAs, including their protocols and amendments and each Party's respective views on becoming a Party to additional MEAs.⁶⁹⁴</p>	<p>Commitment to effectively implement the MEAs, protocols and amendments ratified by the Parties in their law and practices.⁶⁹⁵</p> <p>Commitment to effectively implement the UNFCCC and the Paris Agreement.⁶⁹⁶</p> <p>In line with relevant MEAs, including CITES, implement effective measures to combat illegal wildlife trade, including with respect to third countries.⁶⁹⁷</p>	<p>Make continued and sustained efforts to ratify the fundamental ILO conventions if the Parties have not yet done so.⁶⁹⁸</p> <p>Exchange of information on the Parties' situations and progress regarding the ratification of ILO conventions or protocols classified as up-to-date by the ILO and of other relevant international instruments.⁶⁹⁹</p>	<p>In accordance with the ILO Constitution and the 1998 ILO Declaration, commitment to respect, promote and effectively implement the internationally recognised core labour standards, as defined in the fundamental ILO conventions.⁷⁰⁰</p> <p>Commitment to implementing all the ILO conventions ratified by the Parties and the different provisions of the European Social Charter.⁷⁰¹</p> <p>Continue to promote, through its laws and practices, the ILO Decent Work Agenda and in accordance with relevant ILO conventions and</p>

⁶⁸⁷ EU-Vietnam FTA, Chapter 13, Article 13.7(3)(a).

⁶⁸⁸ EU-Vietnam FTA, Chapter 13, Article 13.14(1)(d).

⁶⁸⁹ EU-Vietnam FTA, Chapter 13, Article 13.4(3).

⁶⁹⁰ EU-Vietnam FTA, Chapter 13, Article 13.14(1)(d).

⁶⁹⁴ EU-UK TCA, Part 2, Title XI, Chapter 8, Article 400(3).

⁶⁹⁵ EU-UK TCA, Part 2, Title XI, Chapter 8, Article 400(2).

⁶⁹⁶ EU-UK TCA, Part 2, Title XI, Chapter 8, Article 401(2).

⁶⁹⁷ EU-UK TCA, Part 2, Title XI, Chapter 8, Article 402.

⁶⁹⁸ EU-UK TCA, Part 2, Title XI, Chapter 8, Article 399(3).

⁶⁹⁹ EU-UK TCA, Part 2, Title XI, Chapter 8, Article 399(4).

⁷⁰⁰ EU-UK TCA, Part 2, Title XI, Chapter 8, Article 399(2). The provision cites: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.

⁷⁰¹ EU-UK TCA, Part 2, Title XI, Chapter 8, Article 399(5).

Trade agreements	Commitment to ratify MEAs	Commitment to implement MEAs	Commitment to ratify labour conventions	Commitment to implement labour conventions
				other international commitments. ⁷⁰² Cooperation in trade-related aspects of implementation of fundamental, priority and other up-to-date ILO conventions. ⁷⁰³

⁷⁰² EU-UK TCA, Part 2, Title XI, Chapter 8, Article 399(6). The provision cites: decent working conditions for all, with regard to, *inter alia*, wages and earnings, working hours, maternity leave and other conditions of work; health and safety at work, including the prevention of occupational injury or illness and compensation in cases of such injury or illness; and non-discrimination in respect of working conditions, including for migrant workers.

⁷⁰³ EU-UK TCA, Part 2, Title XI, Chapter 8, Article 399(8).

Annex 2: Summary of methods and data sources

Like the widely used concept of sustainable development, the notion of *trade and sustainable development* may encapsulate a wide-range of policy areas related to environmental, labour and human rights. The present study uses the EU's definition of TSD as a starting point for its comparative analysis. Thus, the notion of "TSD provisions" used throughout this report refers to environmental and social clauses included in the TSD, environmental and labour chapters of EU and third-country FTAs. Given the selected countries' efforts to make these issues cross-cutting, some additional language related to environmental and social issues can be found in other chapters (e.g., investment). Additionally, the list of social and environmental priorities varies from one country to another and is an ongoing policy debate. For methodological purposes, the present study prioritised the comparative analysis of environmental and labour chapters in third countries' FTAs, while providing scope to additional social and human rights provisions that may be not inherent to EU FTAs.

Scope and case study selection

This report compares different approaches used by third countries to implement and enforce TSD provisions in FTAs with that of the EU, with the aim of identifying both institutional mechanisms and on-the-ground practices to maximise the social and environmental benefits of TSD provisions. **Implementation** is defined as a set of processes underpinned by specific clauses and institutional mechanisms that allow to put an FTA into practice after its entry into force. **Enforcement** refers more specifically to the set of provisions and practices designed to prevent or settle disputes when conflicting interpretations over the terms of FTA arise. In practice, there is overlap between these two concepts. For instance, public submission processes are an important lever of enforcement, while they may also be considered as a routine form of civil society participation inherent to implementation mechanisms. In this study, they are examined under enforcement mechanisms in the light of the role they may play in reconciling conflicting interpretations of TSD provisions. Additionally, not all policy tools are fully captured by these two concepts. Indeed, in a strict sense, pre-ratification processes would neither fit under implementation, nor under enforcement. Here, they are dealt with under implementation processes.

The countries selected for the comparative analysis of TSD approaches are **Australia, Canada, Chile, Japan, New Zealand, Switzerland and the US**. These seven countries were chosen in accordance with the European Commission's Terms of References, in the light of their advanced reflection on environmental and labour standards, their experience with FTA negotiations and ratification, and their geographical diversity – the seven countries representing five continents. These countries are among the most ambitious proponents of environmental and labour standards in trade agreements. It should be noted that despite the widely acknowledged proliferation of social and environmental norms in FTAs, many countries continue to exclude TSD provisions in their trade agreements.

The present study compares different TSD approaches using the criteria displayed in the TSD comparative tables. The analysis zooms in on a selection of trade agreements based on three criteria:

- **Deep integration:** the selection of FTAs is based on coverage of deep integration RTAs, with more comprehensive commitments on TSD provisions, which reflect the different approaches and trends of non-EU countries.
- **Recency:** most recent agreements logically reflect the lessons that different countries have drawn from their experience with TSD provisions. For instance, the USMCA's dispute settlement mechanism reflects lessons learned from the US-Guatemala labour dispute.
- **Explanatory value:** because of their specificities and/or the characteristics of the trading partners involved, some FTAs can illustrate the costs and benefits of certain legal innovations or specific institutional mechanisms – some of which are discussed at greater length in the five case studies.

Older-generation agreements are included in this analysis for the sake of providing not only a comprehensive picture of the alternative existing approaches, but also to account for the dynamic evolution over time of the TSD policy of main EU trading partners.

The cross-country analysis of TSD provisions is centred on the overall scope, as well as the implementation and enforcement provisions contained in third-country FTAs. With regard to scope, this study identifies key policy issues for labour, social and environmental provisions to compare TSD approaches across FTAs. For labour provisions, the study carefully examines references to ILO (Fundamental Conventions, Decent Work and the 2030 Agenda for Sustainable Development) and other social commitments, as well as specific language on Corporate Social Responsibility (CSR) and Responsible Business Conduct (RBC). For environmental provisions, the analysis examines references to trade-related MEAs and the main policy spheres associated with the trade-and-environment nexus. This overview of TSD provisions is followed by a thematic analysis of the evolution of the scope of TSD provisions in third countries' FTAs. For certain specific issues of particular relevance to the EU, such as climate change, the study zooms in on certain provisions to provide a more fine-grained perspective on the scope of TSD provisions.

In close consultation with the European Commission, the team selected five case studies with the aim of identifying good practices and shortcomings to overcome in the implementation and enforcement of labour and environmental provisions in FTAs. The Terms of References required: an in-depth analysis of the US-Guatemala labour dispute and its consequences; two case studies on public submission processes and two on pre-ratification processes. The case study selection was designed to find a balance between environmental (NACEC's Sumidero case, US-Peru FTA) and labour cases (Canada-Colombia FTA, CPTPP's labour consistency plans).

Methods and sources

The study draws on the following quantitative and qualitative tools and methods to compare practices across FTAs and their effects on third countries:

FTA provision datasets: Three databases were used to map out the scope, implementation and enforcement of TSD provisions in the selected third countries' FTAs: the Trade and Environment Database (TREND), a fine-grained database of environmental provisions in FTAs developed by

Morin, Dür & Lechner (2018)⁷⁰⁴; the Labour Provisions in Trade Agreements (LABPTA) database developed in Raess & Sari (2018)⁷⁰⁵; and the World Bank's Deep Trade Agreements (DTA) database, which analyses the provisions of deep trade agreements.

Legal analysis: Data collection for FTA provisions was combined with a finer analysis of the text of trade agreements, first, to complement missing data in databases, and second, to zoom in on specific clauses and enforcement mechanisms. In some cases, like the US-Guatemala labour dispute (case study 1), the present report analysed the wording of TSD provisions and its interpretation by dispute settlement bodies, relying on the legal expertise of the team.

Data collection from official sources: Beyond FTA datasets, data from both national and international sources were used to analyse both processes and outcomes of TSD practices. With regard to processes, the report analysed the budget allocated by different agencies to the promotion of environmental and labour standards in a trade-related context. In other cases, official data was used to assess the on-the-ground impact of TSD provisions. For instance, FAO data on deforestation was used to assess the potential effects of the US-Peru FTA and its Forest Annex.

Targeted interviews: Interviews were conducted with nearly 40 state officials and civil society stakeholders. These include former and current officials from trade, labour and environmental ministries or agencies in the selected countries, civil society organisations, as well as policy experts from the academic and non-academic spheres. In addition to the seven selected countries, interviews were conducted with experts from trading partnering countries in Mexico and Peru to shed light on implementation and enforcement practices, and more specifically for the Sumidero Canyon and US-Peru FTA case studies.

A wide-ranging consultation process, as detailed in the open public consultation results, thereby ensuring a high degree of transparency and the engagement of all relevant stakeholders in the conduct of the TSD review inside the EU.

Feedback from the international advisory board of LSE Consulting, composed of five academic experts on trade, labour and environmental issues.

Table 2a: Third-Party FTAs

United States	Canada	New Zealand	Chile
USMCA 2018	Modernised Chile FTA 2019	CPTPP 2018	Modernised Canada FTA 2019
Korea 2007	CPTPP 2018	Korea 2015	CPTPP 2018
Panama 2007	USMCA 2018	Taiwan 2013	Indonesia 2017
Peru 2006	Ukraine 2016	Chinese Taipei 2013	Argentina 2017
Oman 2006	CETA 2016	Hong Kong 2010	Uruguay 2016
Colombia 2006	Korea 2014	Malaysia 2009	Pacific Alliance 2014
Bahrain 2005	Honduras 2013	ASEAN 2009	Thailand 2013

⁷⁰⁴ Morin, JF, Dür A., Lechner, L. (2018). "Mapping the trade and environment nexus: Insights from a new dataset", *Global Environmental Politics*, vol. 18(1).

⁷⁰⁵ Raess, D. and Sari, D. (2018), "Labour Provisions in Trade Agreements (LABPTA): Introducing a New Dataset", *Global Policy*, vol. 9: 451-466.

CAFTA-DR 2004	Panama 2010	AANZFTA 2009	Hong Kong 2012
Morocco 2004	Jordan 2009	China 2008	Vietnam 2011
Australia 2004	Peru 2008	Trans Pacific Strategic Economic Partnership 2005	Malaysia 2010
Singapore 2003	Colombia 2008	Thailand 2005	Turkey 2009
Chile 2003	Costa Rica 2001		Japan 2007
Jordan 2000	Chile 1996		Colombia 2006
US-Cambodia Textile Trade Agreement	Israel 1996		Trans Pacific Strategic Economic Partnership 2005
NAFTA 1994	NAFTA 1994		China 2005
			US 2003
			Korea 2003
			Mexico 1998
			Canada 1996

Links to FTAs

- Australia-Korea FTA – <https://www.dfat.gov.au/trade/agreements/in-force/kafta/official-documents/Pages/full-text-of-kafta>
- Australia-Peru FTA – <https://www.dfat.gov.au/trade/agreements/in-force/pafta/full-text/Pages/fta-text-and-associated-documents>
- Japan-Mongolia FTA – https://www.mofa.go.jp/a_o/c_m2/mn/page3e_000298.html
- Canada-Chile FTA – <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/chile-chili/fta-ale/index.aspx?lang=eng>
- Canada-Jordan FTA – <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/jordan-jordanie/fta-ale/index.aspx?lang=eng>
- Canada-Panama FTA – <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/panama/fta-ale/index.aspx?lang=eng>
- CPTPP – <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text-and-resources/>
- Chile-Colombia FTA – http://sice.oas.org/Trade/CHL_COL_FTA/CHL_COL_ind_s.asp
- NAFTA – <http://sice.oas.org/trade/nafta/naftatce.asp>
- New Zealand-Hong Kong FTA – <https://www.mfat.govt.nz/assets/Trade-agreements/Hong-Kong-China-CEP/NZ-HK-CEP.pdf>
- New Zealand-Korea FTA – <https://www.mfat.govt.nz/assets/Trade-agreements/Korea-NZ-FTA/NZ-Korea-FTA-consolidated-text.pdf>
- New Zealand-Malaysia FTA – <https://www.mfat.govt.nz/assets/Trade-agreements/Malaysia-NZ-FTA/mnzfta-text-of-agreement.pdf>
- Switzerland-Central America FTA – <https://www.efta.int/media/documents/legal-texts/free-trade-relations/central-america/EFTA-Central-America-free-trade-agreement.pdf>
- Switzerland-Georgia FTA – <https://www.efta.int/sites/default/files/documents/legal-texts/free-trade-relations/georgia/EFTA-Georgia-FTA-Main-Agreement.PDF>
- US-CAFTA DR FTA – <https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text>
- US-Chile FTA – <https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text>
- US-Panama FTA – <https://ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text>
- US-Peru FTA – <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>
- USMCA – <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>