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**Environmental provisions in EU and US Free Trade
Agreements**

By

Sarah Gondy

LL.M. Law in a European and Global Context
Catolica Global School of Law,
Faculdade de Direito, Universidade Catolica Portuguesa, Lisbon.

Supervisor: Piet Eeckhout.

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Introduction.

The need to protect the environment has emerged as one of the most important global concerns during the last decades. The UN Conference on Environment and Development (UNCED) held in Rio in 1992 is a good example of the growing international awareness over environmental issues and the need for international actions in this regard that developed at the time. During the same period, significant progress in trade liberalization occurred¹. Trade can lead to economic growth and be a tool to foster development. But trade flows, policies and agreements can have various effects on the environment. Conversely, environmental protection may impact on trade and possibly hinder it. Thus, in order to maximize the benefits of both policies, it is necessary to achieve an appropriate balance between trade liberalization and environmental protection and make sure that the two are mutually supportive.

The trade and environment debate is not new. At the multilateral level, the WTO has for long recognized the interactions between trade and environment. The original text of the GATT already encompassed² them through Article XX on General Exceptions that lays out a number of specific instances, including concerning environmental issues, in which members may be exempted from GATT rules³. Other WTO rules such as those included in the Agreement on Technical Barriers to Trade and the Agreement on Sanitary and Phytosanitary Measures also contain some provisions related to the trade and environmental protection nexus. Furthermore, since its entry into force in 1995, the WTO Dispute Settlement Body dealt with a number of cases concerning environment-related trade measures. Environmental issues have also been included in the current Doha Round of negotiations launched in 2001 with the

¹ The Uruguay Round of trade negotiations was completed in 1994 and reached to the Marrakech Agreement which led to the World Trade Organization's creation. The Agreement also led to a significant revision of the General Agreement on Tariffs which includes some environmental-related exceptions as well as the creation of the Trade and Environment Committee.

² Gracia Marin-Duran *'The Role of the EU in Shaping the Trade and Environment Regulatory Nexus: Multilateral and Regional Approaches'* in Bart Van Vooren, Steven Blockmans, and Jan Wouters (eds), *The EU's Role in Global Governance: The Legal Dimension*, Oxford University Press, 2013, Chapter 15

³ Paragraphs (b) and (g), available at WTO
http://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm

objective to enhance the mutual supportiveness of trade and environment⁴. Nevertheless, these negotiations have registered so far little progress.

As a complementary and WTO-compatible approach, countries have started to negotiate bilateral or regional Free Trade Agreements (FTAs). These ‘reciprocal Free Trade Agreements between two or more partners’, as defined by the WTO⁵, intend to go further in trade liberalization by eliminating tariffs, customs duties and other trade barriers. FTAs have also enabled to avoid lengthy multilateral negotiation processes.

The number of such agreements has significantly increased over the last years. Indeed, FTAs have become common and almost all WTO members have now signed at least one. As pointed out by a recent OECD Trade and Environment Working Paper⁶, the rate of notification of FTAs to the WTO continues to be high compared with the pre-1999 rate. After declining in the past three years, the number of notifications in 2012 has risen back again (See Figure 1⁷). As of 15 June 2014, the WTO had received some 585 notifications of FTAs. Of these, 379 were in force⁸.

While the purpose of many FTAs is to go further in trade liberalization, an increasing number of agreements also deal with other trade-related issues, such as labour and environment. Today, FTAs negotiated by most OECD members include some type of environmental provision⁹.

There are three main purposes for including environmental provisions in FTAs as identified by the OECD secretariat¹⁰:

⁴ An introduction to trade and environment in the WTO, WTO website, available at http://www.wto.org/english/tratop_e/envir_e/envt_intro_e.htm

⁵ WTO definition available at http://www.wto.org/english/tratop_e/region_e/rta_pta_e.htm

⁶ George, C. (2013), “Developments in Regional Trade Agreements and the Environment: 2012 Update”, *OECD Trade and Environment Working Papers*, 2013/04, OECD Publishing.

⁷ Ibid.

⁸ WTO website http://www.wto.org/english/tratop_e/region_e/region_e.htm

⁹ OECD, *Multilingual Summaries, Environment and Regional Trade Agreements*, OECD Publishing, 2007.

¹⁰ OECD, *Environment and Regional Trade Agreements*, OECD Publications, 2007
Available at <http://www.oecd-ilibrary.org/>

- “Promoting sustainable development and attaining high levels of environmental protection.
- Leveling the playing field in order to ensure fair competition and improving environmental cooperation. The basic premise here is that weak environmental rules and ineffective enforcement in one country can create unfair competitive advantages over its trade partners”. Environmental cooperation can encompass various purposes including addressing common environmental problems, capacity building.
- “Pursuing an international environmental agenda through trade agreements that may provide more efficient and faster results than actions at the multilateral level”.

The content and approach regarding environmental provisions in FTAs differ significantly from one country to another. Indeed they range from the inclusion of a comprehensive chapter or a side agreement on environment to a statement in the preamble or exception clauses such as those developed at the WTO level. Nevertheless, looking at these different purposes, environmental provisions in FTAs appear quite promising. They seem to possibly lead to various benefits such as promoting mutual supportiveness between trade and environment policies, raising the levels of environmental standards but also accelerating international environmental policies.

Among the most comprehensive environmental provisions in FTAs are the ones negotiated by the European Union and the United States. Indeed, both the EU and the US most recent FTAs include a robust chapter on environment or sustainable development. These practices result from several evolutions and are still fairly recent. The approach regarding trade and environmental provisions in EU FTAs has shifted in 2006 while the US one has evolved significantly in 2007. The recently concluded EU-Korea, Colombia/Peru, Singapore, Georgia and Moldova FTAs as well as the US-Peru, Colombia and Korea ones include these changes.

Nevertheless, it is interesting to see that, among the most comprehensive practices towards the inclusion of environmental provisions in FTAs, the US and EU approaches still differ in various and significant aspects. For example, the United States and the EU provide for different conflict resolution procedures for environmental matters as well as uneven lists of covered MEAs and thematic articles.

What are the main differences between the environmental provisions of agreements signed respectively by the European Union and the United States? In which context are they rooted? And what implications do they entail?

These questions, which will be the focus of this paper, aim at fostering exchanges and participating to the debate over the two models. Comparing EU and US environmental provisions in FTAs is all the more interesting as their respective experience with the actual implementation of environmental provisions in trade agreements remains relatively new and studies on this subject are still limited. Also, it is important to bear in mind that the United States and the European Union have launched in June 2013 negotiations for a Transatlantic Trade and Investment Partnership (TTIP). The first round of negotiations took place in Washington D.C. last July and the sixth round has been held recently¹¹ in Brussels. It is to be expected that a comprehensive chapter on environmental provisions or sustainable development will be part of the final agreement. The EU in its trade and sustainable initial position paper already called for a comprehensive and ambitious approach to those issues with the integration of a robust Trade and Sustainable Development (TSD) chapter to the Agreement¹². Comparing environmental integrated provisions of the US and EU FTAs will highlight current trade and environment challenges in these negotiations and provide some insights on the possible and preferable outcomes of the negotiations and their consequences. Indeed, the result of TTIP negotiations may, arguably, significantly impact on and shape future developments on trade and environment provisions in ongoing and future FTA negotiations. The EU has FTA negotiations under way with several countries such as India, Japan, Thailand and Vietnam while the US is currently negotiating with eleven countries from the Asia-Pacific region for the Trans-Pacific Partnership (TPP). Will the practices of both the EU and the US, as well as other countries, including developing ones, be affected by the outcome of TTIP negotiations?

¹¹ 14th of July – 18th of July

¹² EU initial position paper regarding Trade and sustainable development, EU-US Transatlantic Trade and Investment Partnership, 2013

The objective of this paper is not to discuss and compare with excessive detail each environmental provision of the EU and US FTAs but to give an accurate picture of their most recent practices and highlight the most relevant aspects. EU and US respective environment provisions in their recent FTAs will be first studied (I & II). To this end, this paper builds on the work of the OECD¹³, Sikina Jinnah and Elisa Morgera¹⁴ and develops a list of key elements that are usually integrated into the US and EU practices. The main differences and controversies they bring will be then explored (III). Finally, implications on bilateral trade negotiations as well as on environmental global governance will be considered. In this light, this paper will suggest some potential improvements of both approaches and attempt to envisage desirable outcomes for environmental provisions under TTIP (IV).

¹³ OECD Paper, Above n 10

¹⁴ S. Jinnah and E. Morgera, *Environmental Provisions in American and EU Free Trade Agreements: A Preliminary Comparison and Research Agenda*, RECIEL 22 (3), 2013, pp. 324 – 339.

I. The EU approach: comprehensive ‘Trade and Sustainable Development Chapters’ and ‘co-operation-based’ enforcement mechanisms.

A. Origin and evolution of environmental provisions in EU FTAs.

The EU has taken into account the trade and environment nexus since several years but it is not until recently that environmental provisions were considered a basic part of the foundation of EU trade relations with partner countries. The inclusion of environmental provisions in EU FTAs is thus the result of various evolutions and a still recent practice that has been anchored into several core EU policies documents.

The first communication on Trade and Environment from the European Commission was issued in 1996. It was issued shortly after the creation of the Committee on Trade and Environment within the WTO with the objective to develop the contribution of the EU to the debate on the issue of trade and environment in the multilateral context of the first Ministerial Conference of the WTO in Singapore, which was to be held a few months later. The Communication lied in three basic conclusions¹⁵:

- “Trade and environment can play a mutually supportive role in favour of sustainable development”¹⁶ and the EU is ‘committed to maintain high level of environmental protection and to an open, equitable and non-discriminatory trading system”.
- “Countries have a sovereign right to design and implement their own environment policies through the measures they consider appropriate to protect their domestic environment. Differences in environmental standards can be due to a variety of reasons (...) which constitute an entirely legitimate source of comparative advantage”.
- The EU and other countries should remain strongly committed to the multilateral approach as “the most effective way of dealing with (international environmental problems) is through international and multilateral agreements, not by unilateral trade measures”.

¹⁵ Marin-Duran, Above n 2.

¹⁶ EU Communication on Trade and Environment (1996)

At the time, the trade and environment nexus was thus to be addressed at the multilateral level and the European Commission did not seem to be concerned by a ‘race to the bottom’ on environmental standards. . Call for action by the Commission on trade and environment through unilateral and bilateral trade initiatives was deemed necessary only later on. The beginning of negotiations of bilateral and regional trade agreements was not simultaneous with the initiation of the inclusion of environmental provisions in these treaties. Indeed, before 2006, environmental provisions in EU FTAs were designed in general terms and were not systematically included in FTAs¹⁷. For example the EU-Mexico Economic Partnership Agreement¹⁸ only includes scarce and lose language on the environment. The preamble refers to the importance of implementing the principle of sustainable development¹⁹ and two articles under the Cooperation title are dedicated to cooperation on the environment and natural resources and cooperation on fisheries²⁰. Environmental issues are not mentioned under the Trade title.

Today’s the EU’s practice regarding the inclusion of environmental provisions in FTAs has significantly evolved.

Shortly after the Global Europe Communication²¹, the Sustainable Development Strategy of the European Union (EU SDS) was revised in 2006. It sets out a framework for a long-term vision of sustainability in which economic growth, social cohesion and environmental protection go hand in hand and are mutually supportive. The revised EU SDS refers to *‘stepping up efforts to see that international trade and investment are used as a tool to achieve genuine global sustainable development. In this context, the EU should be working together with its trading partners to improve environmental and social standards and should use the full potential of trade or*

¹⁷ R. Zvelc, *Environmental Integration in EU Trade Policy: The Generalised System of Preferences, Trade Sustainability Impact Assessments and Free Trade Agreements*, in: E. Morgera (ed.), *The External Environmental Policy of the European Union*, Cambridge University Press, 2012, pp. 174 – 205.

¹⁸ Economic Partnership Agreement, Political and Cooperation Agreement between the EU and Its Member States, on the One Hand, and Mexico on the Other [2001] OJ L276/45 (‘EU-Mexico EPA’)

¹⁹ EU-Mexico EPA, Preamble *“Mindful of the importance that both Parties attach to proper implementation of the principle of sustainable development, as agreed and set out in Agenda 21 of the 1992 Rio Declaration on Environment and Development”*.

²⁰ EU-Mexico EPA, respectively Articles 34 and 35.

²¹ Communication on "Global Europe: Competing in the World. A Contribution to the EU's Growth and Jobs Strategy" (2006)

cooperation agreements at regional or bilateral level to this end'. It seems that the Strategy was thus the impetus for the development of the EU's practice of including environmental provisions in its bilateral and regional free trade agreements.

The trade and sustainable development nexus was further reflected in the constitutional basis of the EU as well as in other EU core policy documents. As stated by Gracia Marin-Duran²², the EU treaty law provides 'a clear basis for the integration of environmental protection considerations in EU external trade policies'. Indeed, sustainable development has been set out in the Lisbon Treaty²³ as an overarching long-term goal of the EU, both domestically and in its relations with third countries. Furthermore, Article 11 of the Treaty on the Functioning of the European Union (TFUE) provides that "environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development". Moreover, article 21(2) TUE, which contains general provisions on the EU's external action, includes several references to the need for common policies and actions to ensure and foster sustainable development. Both these article are therefore to be applied to the EU's common trade policy which is laid down in article 207 TFUE and identified as part of the EU's external action.

The trade and environment nexus is thus reflected in the EU Treaties. TUE and TFUE have identified sustainable development as an over-arching goal of the EU that is also to be integrated into EU policies and actions including with regard to trade ones.

Finally, other core policy documents have built on the 2006 SDS and emphasized the need for an integrated approach with regard to trade and sustainable development. 'Europe 2020', the EU's growth strategy launched in 2010 aims at reaching a smart, sustainable and inclusive growth. In this context, the EU also issued in 2010 the Communication on 'Trade, Growth, and World Affairs' that outlines the contribution of trade to inclusive and sustainable growth in the EU and abroad. The importance of

²² Marin-Duran, Above n 2.

²³ See Article 3 TUE "In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter" and Article 11 TFUE.

trade and sustainable development for the EU is also expressed in the 2012 Communication on ‘Trade, Growth, and Development’ that highlights the specific value of sustainable development in a development context.

Possibly drawing on several studies²⁴ and looking at international best practices in this regard²⁵, the EU chose to develop a comprehensive approach to Trade and Sustainable Development (TSD) by making provisions on labour and environment, in its FTAs, a key element of its trade policy. This new approach has been pursued in all FTA negotiations launched after 2007. Indeed, all recently concluded Free Trade Agreements (Korea, Colombia/Peru, Central America, Singapore, Ukraine, Georgia and Moldova) include a separate TSD chapter, and this is part of all the EU ongoing negotiations.

The main environment-related features of the current EU approach are:

- Commitments to adherence to conventions and Multilateral Environmental Agreements (ratification, effective implementation in law and in practice).
- The pursuance of high levels of environmental protection, and the effective enforcement of and non-derogation from domestic laws in these areas, in order to prevent a ‘race to the bottom’ on environmental standards,
- Specific provisions encouraging trade practices and schemes that support and promote sustainable development goals, such as Corporate Social Responsibility, eco-labeling and fair trade initiatives, sustainable management and use of natural resources (forestry, fisheries, biodiversity etc),
- A dedicated institutional set-up, combining governmental and civil society involvement as means to foster accountability, dialogue and transparency,
- A tailored and TSD chapter-specific mechanism to address disputes involving the possibility of independent third party assessment but that does not include economic sanctions.

²⁴ J. Bourgeois, K. Dawar and S.J. Evenett, ‘*A Comparative Analysis of Selected Provisions in Free Trade Agreements*’ (2007), Commission by DG- Trade of the European Commission, as well as, OECD, *Environment and Regional Trade Agreements*, OECD Publications, 2007. These two studies were released shortly before the EU started to include TSD Chapters in its FTAs.

²⁵ Interview in Annex 1.

The EU's approach towards the inclusion of environmental provisions in EU FTAs has thus been developed under the broader banner of Sustainable Development, which also encompasses labour issues. Sustainable Development has developed gradually as an overarching goal of the EU that is, since 2007, the subject of a full and comprehensive chapter integrated in EU FTAs.

B. Environmental provisions in *new generation* EU FTAs

The EU has a general approach towards the inclusion of environmental provisions in its FTAs. Nevertheless, TSD Chapters are the outcome of different negotiation dynamics which depend on the context and the partner country. As explained by EU officials in charge of the negotiations of SD provisions in FTAs²⁶, the outcome of TSD Chapters does not vary a lot depending of the context but it can influence slightly the negotiations. For example, Association Agreements (AAs) create a framework for cooperation between the EU and a partner country. They have a broader scope than just trade issues and therefore could create more momentum for deeper commitments. Therefore it is important to keep in mind that there are several types of EU FTAs:

- Stand-alone bilateral free trade agreements such as the FTA between the EU and Korea.
- Free trade agreements integrated within the broader framework of Association Agreements such as the EU-CA, EU-Moldova and EU-Georgia Agreements²⁷.

For the purpose of this paper, the study of the EU approach will focus mainly on the EU-Colombia/Peru Trade Agreement (TA) and the EU-Central America Association Agreement (AA). EU-Colombia/Peru TA was signed on 26 July 2012 and has been provisionally applied with Peru since 1 March 2013 and with Colombia since 1 August 2013²⁸. The Association Agreement between the EU and Central America (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama) was signed in June 2012. The trade provisions of the agreement apply with Honduras, Nicaragua

²⁶ Ibid.

²⁷ Economic Partnership Agreements, which are trade and development agreements, will not be treated in this paper.

²⁸ The EU's bilateral trade and investment agreements – where are we?, DG TRADE website available at http://trade.ec.europa.eu/doclib/docs/2012/november/tradoc_150129.pdf

and Panama since 1 August 2013, with Costa Rica and El Salvador since 1 October 2013 and with Guatemala since 1 December 2013. Provisions in other EU FTAs which present substantive differences with those included in these two agreements will also be discussed.

a) Structure of environmental provisions in the FTA.

The EU deals with environmental provisions under the overarching heading of Sustainable Development. A whole specific chapter or title is dedicated to TSD²⁹. This practice ranks the EU among the most comprehensive approaches towards the inclusion of environmental provisions in FTAs.

The EU has its own rationale for treating trade-related environment and labour issues jointly. First it seems to enable to pursue an integrated approach towards the EU overarching and internationally recognized objective of Sustainable Development which stands on three mutually reinforcing pillars (economic development, social development and environmental protection). This approach avoids to focus on one pillar at the expense of the others and enables to advance both environment and labour issues together. EU officials in charge of negotiating environmental provisions in FTAs also mentioned the fact that trade-related environment and labour issues and initiatives have often a dual nature. For example, some fair-trade schemes are based on criteria that take into account both environmental and social aspects³⁰.

b) References to environment or SD in the preamble/ initial provisions and/or context-related article on the objectives of the FTA.

The EU refers to sustainable development in the Preamble of the FTA as well as in the initial provisions on the objectives of the treaty. Both Parties reaffirm or confirm their commitment to the pursuit and promotion of sustainable development and

²⁹ For example see: Association between the EU and Its Member States, on the One Hand, and Central America on the Other, [2012] OJ L346/3. ('EU-CA AA', Title VIII and Free Trade Agreement between the EU and Its Member States, of the One Part, and Colombia and Peru, of the Other Part, [2012] OJ L354/3 ('EU-COPE FTA'), Title IX

³⁰ OECD Paper, Above n 25

related areas³¹. Sustainable development is recognized as a guiding principle for the implementation of the Agreement.

An article on context in the TSD Title or Chapter also refers to relevant international developments of relevance for the concept of SD³² such as the Rio Declaration on Environment and Development and Agenda 21 of 1992 or the Johannesburg Plan on Implementation on SD of 2002. The provision continues by recognizing the need to promote ‘international trade in such a way as to contribute to the objective of SD’³³. The interdependency and mutually reinforcing effect of each component of SD is recognized in most EU recent FTAs³⁴.

These provisions function as scene setters³⁵, they express the willingness of the EU and its partner country to treat trade-related environmental and social issues jointly under the broader banner of SD. They are articulated in aspirational language and recall also the key international initiatives in which SD is rooted. The fact that the intrinsic linkages between the three components of SD are emphasized could be seen as a way of explaining the EU’s approach of dealing with SD in a trade context.

c) Right to adopt or maintain environmental laws or regulations and pursuance of high levels of environmental protection

The EU approach includes a dedicated article on the Parties’ regulatory sovereignty. Each Party is entitled to establish its own levels of protection, to set its own priorities and to adopt or modify accordingly its relevant laws and policies with regard to sustainable development³⁶.

This is an important provision of EU’s FTAs as it sets the right of each Party to decide for itself of its own level of environmental protection. Nevertheless this right is bound by the obligation to ensure consistency with international standards, and further

³¹ EU-CA AA, Preamble and Article 1.2

³² EU COLPE TA, Article 267 ‘Contexte and Objectives’

³³ EU COLPE TA Article 267 for example.

³⁴ Not mention in the EU-COLPE TA but is contained in the EU-CA AA as well as Free Trade Agreement between the EU and Its Member States, of the One Part, and the Republic of Korea, of the Other Part, [2011] OJ L127/6 (‘EU-Korea FTA’)

³⁵ R. Zvelc, Above 17

³⁶ EU- CA AA, Article 285.1 ; EU COLPE TA, Article 268.1

defined by the pledge to provide for and encourage high levels of environmental protection³⁷ – in some cases, with the additional requirements of not using them for economic protectionism or as a form of discrimination³⁸. The Parties are only required to use their best endeavors to pursue high levels of environmental protection but this provision contributes to establishing a level playing field between the EU and its trading partners.

The relationship between environmental standards and trade is addressed by two other provisions that complete the article on regulatory sovereignty to avoid that trade has an unintended negative effect on environmental protection as well as undue competitive advantage and ‘races to the bottom’³⁹.

d) Commitments to effectively enforce national environmental laws and not to lower environmental standards.

Other key provisions of EU TSD Chapters on environmental laws and standards are the ones related to the effective enforcement of domestic environmental laws. Pursuant to these provisions, Parties must not fail to effectively enforce their environmental legislation in a manner that affects trade⁴⁰ as well as not derogate from it in order to encourage trade or investment.⁴¹ This provision is drafted in strong mandatory language⁴² which is binding on the Parties. The Parties also recognize that it is inappropriate to encourage trade or investment by lowering the levels of protection afforded in domestic environmental.

Usually, these provisions are inspired by “a desire to reduce the potential race to the bottom”⁴³ in environmental areas. Indeed, one Party may have well-designed environmental laws, but if not effectively implemented, they will be of no use. It also enables to address concerns related to ‘pollution havens’ where countries “decides deliberately not to enforce or to reduce environmental protection afforded in their

³⁷ EU-COLPE TA Article 268.1 and EU-CA AA, Article 285-2

³⁸ Rok Zvelc, Above n 17.

³⁹ OECD 2007

⁴⁰ EU-CA AA, Article Art. 291.2 and EU-COLPE TA, Article 277.2. The elimination in recent EU TSD of the specification according to which it is the trade between the Parties that needs to be affected, is expanding the range of cases where failure to enforce the laws violates the provision.

⁴¹ EU-CA AA, Article 291.1 and EU-COLPE TA Article 277.1.

⁴² Marin-Duran, Above n 2

⁴³ OECD Paper, Above n 10

legislation in order to gain a competitive advantage”⁴⁴. Here the influence of the Global Europe Strategy is pregnant, environmental protection should not be weakened in order to encourage trade or investment. Therefore these provisions indicate that the EU also aims at creating a level playing field with its trade partners and avoiding a ‘race to the bottom’ in environmental regulation. It should be underscored this constitutes a slight shift in EU trade policy. Departing from the 1996 Communication⁴⁵, national differences are seen now as a legitimate source of comparative advantage only to a certain extent⁴⁶.

e) International environmental standards.

The Parties commit to implement in their laws and practices Multilateral Environmental Agreements (MEAs). The MEAs covered concern either all those binding on, respectively, the EU and its trading partner⁴⁷, either a close list of MEAs⁴⁸ or a combination of the two⁴⁹. International environmental principles are used as a “benchmark for assessing domestic environmental performance”⁵⁰ and the obligation to effectively implement them is formulated in legally-binding language.

These provisions also contribute to build a level of playing field between the participants as well as reiterate, in a bilateral context, the commitments the Parties have undertaken at the global level with regard to core MEAs⁵¹. The scope of these provisions is far-reaching. Indeed the ‘open list’ of MEAs, which is the preferred approach of the EU enables to include future ratification of specific agreements without having to amend the whole agreement⁵².

f) Relationship between the FTA and Multilateral Environmental Agreements (MEAs).

⁴⁴ R. Zvelk, Above n 17

⁴⁵ Above n 16

⁴⁶ Marin Duran, Above n 2

⁴⁷ EU-Korea FTA for example

⁴⁸ EU COLPE TA, Article 270.2

⁴⁹ EU CA AA, Article 287 pursuant to which the Parties “reaffirm the commitments to effectively implement in their laws and practice the MEAs to which they are parties including’ some MEAs that are specified.

⁵⁰ Marin Duran, Above n 2

⁵¹ Ibid.

⁵² Annex 1, Above n 25

The EU FTAs address the potential conflict of norms between the FTA provision and those of MEAs. The EU takes a preventive approach by providing that nothing in the FTA “shall be construed to prevent the adoption or enforcement of any measures” taken to implement MEAs which are referred to”⁵³ provided that those measures are not applied in a discriminatory way. This last obligation is a direct reference to the chapeau of article XX of the GATT.

It is important to note that the articulation between FTA provisions and MEAs ones was not included in the first new generation environmental provisions⁵⁴ but seems to be now part of the EU approach to TSD Chapters⁵⁵.

g) Mechanisms to Enhance Environmental Performance in Trade.

The EU TSD Chapters include some provisions referring in hortatory language the Parties' intention to promote and encourage trade and investment in environmental goods and services as well as public and private market-related policies and practices that pursue sustainability objectives⁵⁶ (e.g. such as eco-labeling, fair trade initiatives and corporate social responsibility practices.) Following the launch of the green goods initiative⁵⁷, it could be expected that the EU will push for, in ongoing and future negotiations, more visibility and substance to be included on trade and investment in environmental goods.

h) Co-operation and capacity building mechanisms in the field of environment.

The EU's approach to TSD chapter includes a provision on cooperation in the field of environmental matters⁵⁸. Pursuant to this soft-law provision, the importance of cooperation is recognized and an indicative list of areas of cooperation is provided.

⁵³ EU-CA AA, Article 287-5 ; EU-COLPE TA, Article 270.4.

⁵⁴ Not included in the EU-Korea FTA

⁵⁵ E.g. EU-CA AA, EU- COLPE TA, EU-Singapor FTA

⁵⁶ EU COLPE TA, Article 271, EU-CA AA, Article 288

⁵⁷ On 24 January 2014, 14 WTO Members (EU, US, Australia, China, Canada, New Zealand, Japan, Korea, Norway, Switzerland, Costa Rica, Chinese Taipei, Hong Kong, and Singapore) launched the green goods initiative in the WTO context with the aim to first eliminate tariffs on a broad list of green goods as well as to address other barriers to trade at a later stage.

⁵⁸ EU-CA AA, Article 302, EU-COLPE TA, Article 286

These areas cover trade-related aspects of sustainable development such as cooperation in relevant international fora, trade sustainability impact assessments, climate change, the promotion of low-carbon technologies, sustainable fishing practices, CSR, biodiversity. Mutual sharing of information and experience are identified as the principal modalities for implementing this article⁵⁹

Technical assistance and capacity building issues are usually addressed through another dedicated and horizontal title in the Agreement or in the corresponding political framework agreement.

It is to be noted that cooperation is also addressed in other thematic articles on specific sectors (e.g. climate change, biological diversity, marine resources, forest products etc).

i) Procedural guarantees and public submission processes to ensure enforcement of domestic environmental laws.

Procedural rules on the domestic application and enforcement of environmental laws and public submissions processes to ensure the implementation of the chapter, including with regard to provisions on the enforcement of domestic environmental laws, are not part of the EU's approach to the inclusion of environmental provisions in its FTAs.

j) Institutions and to oversee the implementation of environmental provisions

EU TSD chapters set up dedicated governmental institutions to ensure their implementation and monitoring⁶⁰. The core elements of the EU's approach are:

- A contact point within each Party's administration for regular contacts with the other Party for all issues related to the implementation of the chapter.

⁵⁹ G. Marín Durán and E. Morgera, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions*, Hart, 2012, p. 380

⁶⁰ EU-COLPE TA, Article 280 ; EU- CA AA, Article 294.

- A dedicated government-to-government body, comprised of senior officials from each side's relevant governmental bodies which meet to oversee and monitor the implementation of the TSD chapters as well as provide impulse to activities to further its objectives, for instance through decisions and recommendations. The TSD government-to-government body or so-called 'Committee or Sub-committee' meets within the first year of the entry into force of the Agreement and thereafter as necessary to oversee the implementation of the TSD Title.

k) Public participation in the implementation of the agreement.

All concluded TSD chapters integrate some key principles and provide for an institutionalized dialogue with stakeholders. However, the technical features of the mechanisms enabling public participation depend on the outcome of the negotiation process and may therefore slightly differ according to the specificities of the EU trading partner.

At the domestic level, EU FTAs establish an obligation for each Party to consult existing, or create new domestic labour and environment or sustainable development committees or groups with the task of advising on the implementation of the TSD title. These domestic advisory groups (DAGs) are comprised of independent representatives of each Party domestic civil society in a balanced representation of economic, social and environmental interests⁶¹, following the three-pillar concept of sustainable development, such as employers and workers organizations, business associations or NGOs.

It is important to underline that the EU-COPE TA is the only new generation EU FTAs that does not specifically require the independence of the members of the DAGs. This may entail some consequences for the functioning of the DAG that will be addressed later on in this paper.

At the joint level, EU TSD Chapters establish a platform for a joint dialogue with a balanced representation of both sides' civil society and the public at large⁶² that is convened [by the Sub-committee (the government-to-government body responsible for

⁶¹ EU-COLPE TA, Article 281 ; EU- CA AA, Article 294

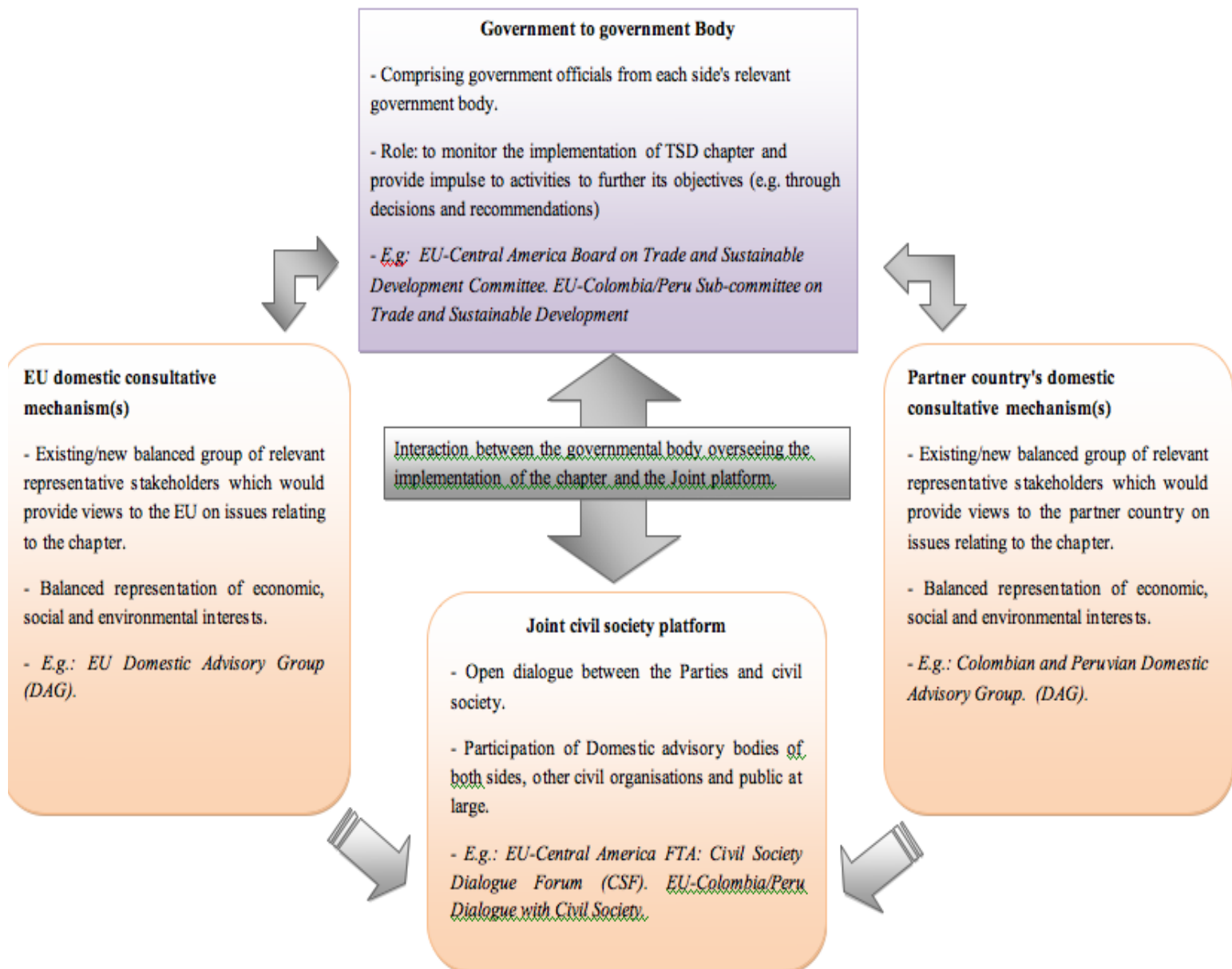
⁶² EU-COLPE TA, Article 282 ; EU- CA AA, Article 295

implementation of the TSD title)] at least once a year, unless otherwise agreed by the Parties. Procedures for such meetings, available on DG Trade website⁶³, are to be agreed by the Parties at the first meeting of the TSD Sub-committee.

The practice in the EU-Korea FTA differ from the one mentioned above as the Joint Civil Society Forum is only open to members of the DAGs and not the public at large. Due to the need for broader civil society involvement, in conjunction with the 2013 joint platform, the Korean DAG also hosted a “labour workshop”, as agreed by the respective DAGs. The labour workshop was also attended by other stakeholders, outside of the membership of the two respective DAGs such as the Federation of Korean Trade Unions (FKTU). It may be argued that the practice in agreements negotiated after 2012 of having an open civil society forum has been also influenced by the experience with the implementation of the EU-Korea FTA.

⁶³ Sustainable Development on DG Trade Website available at <http://ec.europa.eu/trade/policy/policy-making/sustainable-development/>

Flowchart on the institutional set-up for the implementation of Trade and Sustainable Development chapters – general structure.



l) Dispute settlement mechanisms with respect to environmental obligations (consultations, third-party panel, non-compliance measures, etc).

One other important feature of post-2006 EU FTAs is the introduction of a special mechanism distinct from the general dispute settlement mechanisms⁶⁴ of the Agreement that deals specifically with the provisions of the TSD Chapter.

In case of disagreement over any matter arising under the TSD Chapters, including on environmental issues, an initial phase of consultations between the Parties is provided for. The Parties shall make “every attempt to arrive at a mutually satisfactory solution of the matter”⁶⁵ first between themselves and, at the request of any Party, through the summoning of the government to government body in charge of overseeing the implementation of the TSD chapter for consideration of the matter. Provisions in EU FTAs require Parties to take into account the activities of multilateral environmental organizations and bodies, from which the Parties may seek advice or assistance. They may also seek advice from any person or body they deem appropriate including the DAGs. If a mutually satisfactory solution is found, it is made public.

When Parties do not reach such a resolution within the timeframe established in the Agreement, any Party may request that a Panel of Experts be convened to examine the matter and issue a final report containing recommendations to solve the dispute. Panel experts are required to be independent including from DAGs and should seek advice from DAGs as well as competent international organizations. However, the panel is tasked with issuing recommendations for the solution of the matter and not binding-rules. The Parties only have an obligation to “take into account the report and the recommendations of the Panel of Experts”⁶⁶ and inform the government-to-government body in charge of overseeing the implementation of its intention as regards to the recommendations. The monitoring of the Parties’ follow-up actions to the report is entrusted to the government-to-government body.

⁶⁴ EU-COLPE TA, Article 283 ; EU- CA AA, Article 296 to 301

⁶⁵ EU- CA AA, Article 296

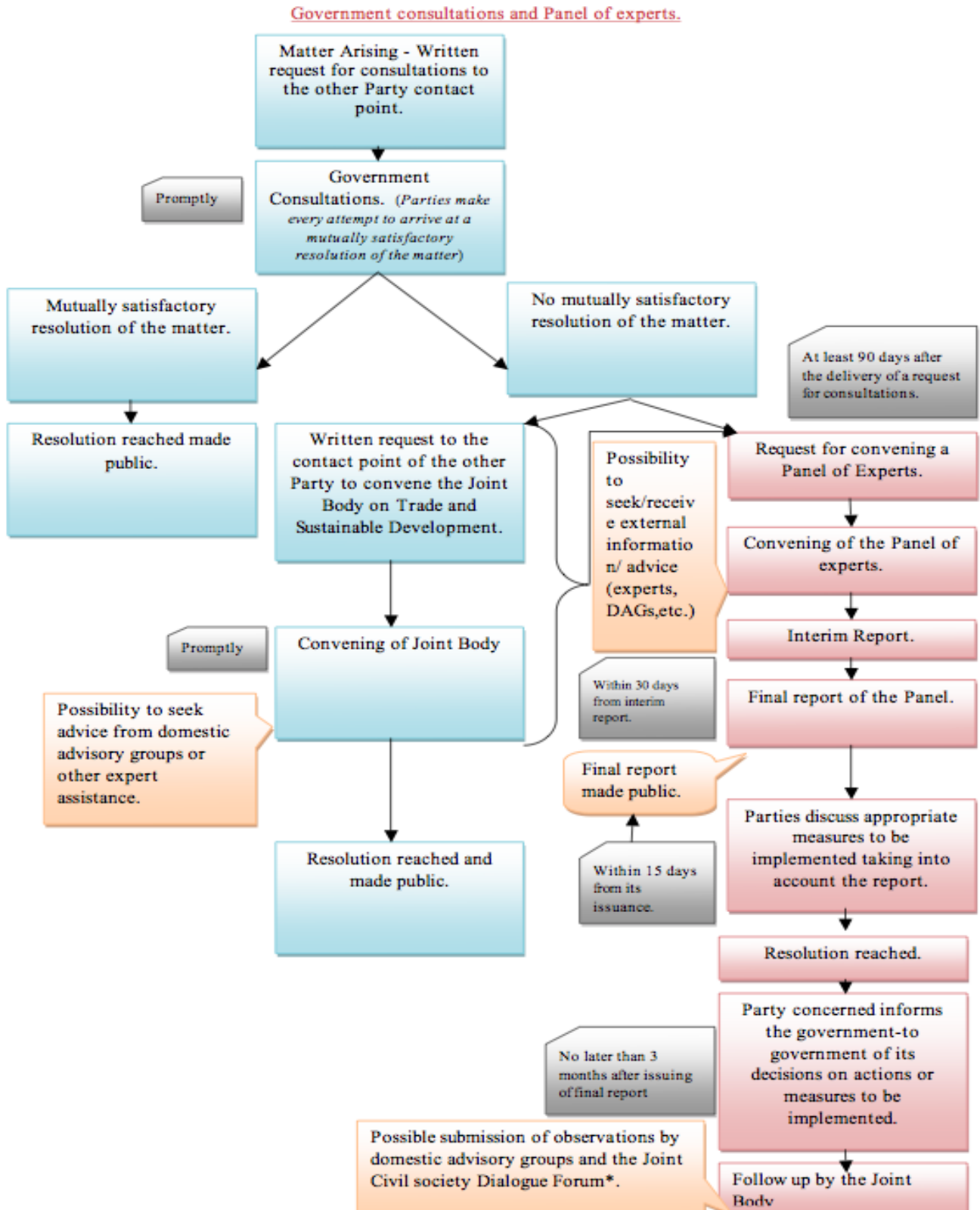
⁶⁶ EU- CA AA, Article 301(2)

To sum up, as Rok Zvelc⁶⁷ underlines, “the special and distinct Dispute Settlement in TSD chapter is based on consultations and cooperation between the Parties and includes a strong role for civil society” through the role given to the DAGs. The procedures can lead to the setting-up of a Panel of experts that issues non-binding recommendations, the implementation of which is monitored by a joint body at senior official level.

⁶⁷ R. Zvelc, Above n 17

Flowchart on the EU general framework for Government consultations and Panel of Experts Procedures.

*Textual provisions in this regard are only included in some recent EU FTAs (e.g EU-Singapore)FTA).



m) Other (Specific thematic articles, scientific information, precautionary principle, environmental assessments etc).

EU TSD chapters also include further substantive provisions. A provision on scientific information⁶⁸, albeit in soft law terms, is usually part of EU FTAs. The Parties recognize the importance to take into account scientific and technical information as well as relevant international standards, guidelines or recommendations, while, on the other hand, acknowledging the precautionary principle⁶⁹.

The Parties also commit to review and monitor the contribution of the implementation of the FTA to sustainable development⁷⁰. However, this commitment is sometimes softened, like in the EU-Colombia and Peru TA, by additional contextualizing language such as “as it deems appropriate”.

The EU usually adds a provision on transparency in its TSD Chapters, highlighting its relevance in a TSD context.

Finally, some TSD Chapters in EU FTAs also contain articles on specific environmental issues such as trade in forest products, trade in fish products, climate change and biodiversity⁷¹. All these provisions usually combine binding commitments with some best-endeavor and aspirational language.

⁶⁸ EU-CA AA, Article 292 ; EU-COLPE TA, Article 278.

⁶⁹ The precautionary principle is referred to either directly by including the term in the provision, either indirectly by including its definition (“when there are threats of serious or irreversible damage, the lack of full scientific certainty shall not be used as reason for postponing protective measures”).

⁷⁰ EU-CA AA, Article 293; EU-COLPE TA, Article 279.

⁷¹ E.g. EU COLPER TA Articles 272 and 275

II. The US approach: full-scale Environment Chapters and sanction-based enforcement mechanisms.

A. **Origin and evolution of environmental provisions in US FTAs.**

The United States has free trade agreements in force with 20 countries, most of which include some kind of provisions on environmental protection. The US is among the countries that addressed the earliest the trade and environment nexus in its trade policies. The US-Israel FTA, which was the first entered into by the US and signed in 1985, did not address the trade and environment nexus. Nine years were to pass to see the inclusion of environment considerations in FTAs. Concomitantly with the multilateral developments on the relationship between trade and environment⁷², the first US trade-related environmental provisions were included in the North American Free Trade Agreement (NAFTA) concluded in 1994 between the US, Canada and Mexico. Nevertheless, the US approach towards the inclusion of environmental provisions in their FTAs has know several evolutions from NAFTA and three main periods can be identified.

The first period runs from 1994 to 2001. The environmental provisions included at the time in NAFTA as well as in following FTAs were relatively weak. NAFTA provisions almost limited to reiterating GATT environmental-related exceptions as well as including a list of MEAs that should prevail over NAFTA in case of a conflict. NAFTA side agreement contained further environment-related provisions such as non-derogation and public complaint mechanisms. This approach remained until 2002⁷³. In November 1999, the executive order 13141 was issued by the President Bill Clinton. It asked for environmental reviews to be carried out for every US FTAs and also stated that FTAs should contribute to the broader objective of Sustainable Development. This slight shift towards a broader inclusion of environmental issues into trade policy was followed by the adoption of the Trade Act⁷⁴ in 2002 by the US Congress under the G.W. Bush administration which resulted in significant changes in the US approach.

⁷² See introduction.

⁷³ Except for the US-Jordan FTA that includes only one environmental-related provision in the core text of the agreement.

⁷⁴ Bipartisan Trade Promotion Authority Act of 2002

The second period runs from 2002 to 2008. The Trade Act of 2002 – and in particular the Trade Promotion Authority therein - initiated a new era with regards to the inclusion of environmental provisions in US FTAs. As explained by the OECD 2007 paper⁷⁵, the Trade Act gives the US President trade promotion authority, also called “the Fast-track mechanism” according to which future FTAs are subject to an approving or disapproving vote without the possibility for Congress to introduce amendments. In return of what, the administration needs to follow some negotiations guidelines listed in the Trade Act. These negotiating guidelines include the following objectives:

- “to ensure that a Party to a trade agreement with the US does not fail to enforce its environmental laws in a manner affecting trade
- to strengthen trading partners’ capacity to protect the environment through the promotion of sustainable development.
- To seek market access for US environmental technologies, goods and services; and
- To ensure that environmental policies and practices of the Parties to trade agreements with the US do not arbitrarily or unjustifiably discriminate against US exports or serve as a disguised barriers to trade”⁷⁶.

US FTAs concluded under the 2002 Trade Act⁷⁷ therefore developed a practice of including a number of innovative provisions in the FTA itself that would serve as a template until 2007 for the inclusion of environmental provisions in US FTAs. New features of this template included the gathering of environmental provisions under a ‘full-scale’⁷⁸ dedicated Chapter on Environment integrated in the FTA that builds on NAFTA’s and contains provisions on consultation procedures to resolve matters arising under the chapter, the creation of an Environment affairs council to oversee implementation of the Chapters, enhanced requirements for public participation including with regards to public submissions, and provisions related to the relationship between FTA and MEAs but without listing to them. Dispute settlement procedures

⁷⁵ OECD Paper, above n 10

⁷⁶ Ibid

⁷⁷ Chile (2004), Singapore (2004), Australia (2005), Morocco (2006), DR-CA (2006), Bahrain (2006) and Oman (2009) FTAs with the US.

⁷⁸ Jinnah and Morgera, Above 14

were still differing from one FTA to another in this era. Some FTAs excluded Environment Chapters from the general dispute settlement mechanism established under the Agreement, leaving the resolution of matters to government consultations only⁷⁹ while others⁸⁰ foresaw its application in case of a party's failure to enforce its environmental laws. In this case, and contrary to what was provided for commercial provisions, the remedy was limited to "15 million US dollars and required to be used in specific ways such as to improve environmental law enforcement"⁸¹.

The year 2007 marked the beginning of a new and still ongoing era for environmental chapters in US FTAs. In 2006, the Democrats took over the US Congress and induced some shifts into trade policy. This and the fact that the 2002 TPA expired in 2007⁸², lead significant developments in US Environment Chapters. Indeed, the new US approach was shaped by an agreement between Congress and the White House in 2007 (Bipartisan Trade Deal⁸³, often referred to as the "10 May agreement") which stipulated that US FTAs must require partner countries to fulfill their obligations under seven MEAs⁸⁴, explicitly listed. The Bipartisan Trade Deal also provided for the enforcement of environmental obligations on the same basis as commercial obligations under the general dispute settlement chapter of the FTA with access to "the same remedies, procedures and sanctions". All subsequent FTAs, such as the ones with South Korea and Colombia, follow this template, which is still currently *applied*.

The current US approach has thus been the result of a series of evolutions and political debates. The main environment-related features of US FTAs, which will be detailed in the following section, are⁸⁵:

- The pursuance and encouragement of high levels of environmental protection,

⁷⁹ E.g. US-Morocco FTA

⁸⁰ E.g. US-Bahrain FTA

⁸¹ Jinnah and Morgera. Above 14

⁸² TPA has not been renewed since. Its expiration before FTAs with Peru, Colombia, South Korea and Panama went to Congress lead to the renegotiation of these agreements.

⁸³ May 10 Bipartisan Trade Agreement on Trade Policy (also know as 'Bipartisan Trade Deal' or 'May 10 Agreement').

⁸⁴ The Convention on International Trade in Endangered Species (CITES), Montreal Protocol on Ozone Depleting Substances, Convention on Marine Pollution, Inter- American Tropical Tuna Convention (IATTC), Ramsar Convention on Wetlands, International Whaling Convention (IWC), and Convention on Conservation of Antarctic Marine Living Resources (CCAMLR).

⁸⁵ George, C. (2011), "Regional Trade Agreements and the Environment: Monitoring Implementation and Assessing Impacts: Report on the OECD Workshops", OECD Trade and Environment Working Papers, 2011/02, OECD Publishing

- The effective implementation of domestic laws as well as obligations under a close list of MEAs,
- Non-derogation of environmental laws in a manner affecting trade in the Parties,
- A dedicated institutional set-up with the creation of a Joint Committee to oversee the implementation of the Chapter,
- The promotion of public awareness and participation,
- The submission of Environment Chapters' provisions to dispute settlement procedures provided for in the Agreement on an equal footing with commercial provisions.

B. Recent environmental provisions in US FTAs.

Environment Chapters in the 'current era' of US FTAs vary very little from one to another. Therefore, some studies⁸⁶ are referring to an US *template* on Environmental Chapters in FTAs.

For the purpose of this paper, as for the EU section, the study of the US approach will focus mainly on two FTAs' Environment Chapters: the US-South Korea and US-Colombia ones. The US-South Korea FTA and the US-Colombia Trade Promotion Agreement respectively entered into force in March and May 2012. American environment chapters in FTAs will be examined according to the same list of key elements that has been used in section (I).

a) Structure of environmental provisions in the FTA.

Environmental provisions in recent US FTAs are incorporated into a 'full scale' Chapter in the text of the FTA⁸⁷ which places the US, like the EU, among the most comprehensive approaches to the inclusion of environmental provisions in its FTAs. Although the US is referring to the concept of sustainable development in the FTA Preamble, labour and environment provisions are dealt with separately and each is the subject of a different Chapter. Indeed, the post-Bipartisan Trade Deal FTAs confer a different treatment to environment and labour issues. For example, the American

⁸⁶ Gallagher, P. and Y. Serret (2010), "Environment and Regional Trade Agreements: Developments in 2009", OECD Trade and Environment Working Papers, 2010/01, OECD Publishing

⁸⁷ Chapter 20 US-Korea FTA, Chapter 18 US- Colombia TA

approach towards Labour Chapters can be seen as narrower as no reference is made to core international conventions in this regard (ILO Conventions) and provisions on ‘the right to regulate’ are not included. These different approaches may be part of the rationale for having two separate Chapters.

b) References to environment or SD in the preamble, initial provisions and context-related article on the objectives of the FTA.

American FTAs’ Preamble contains references to both environmental protection and conservation as well as sustainable development. Indeed the Parties state that they are *resolved to* implement the agreement consistently with environmental protection and conservation⁸⁸. In some FTAs the desire of the Parties to “strengthen the development and enforcement of (...) and environmental laws and policies, (...) and sustainable development”⁸⁹ is also included.

The fact that environment protection is included in the Preamble, which gives an overview of the Parties’ objectives with regard to the Agreement and therefore provides useful interpretative guidance, is significant of the increased attention that has been accorded to the trade and environment nexus in US politics.

Initial Provisions of US FTAs do not include references to environment protection. Provisions on the objectives of the Environment Chapter are not systematically included⁹⁰ in Environment Chapters. When such provisions exist, as in the US-Colombia FTA, the need to “ensure that trade and environment policies are mutually supportive” and the promotion of “the optimal use of resources’ are identified as objectives of this chapter.

c) Right to adopt or maintain environmental laws or regulation and pursuance of high levels of environmental protection.

⁸⁸ US-Korea FTA and US-Colombia TA Preambles

⁸⁹ US-Colombia TA Preamble

⁹⁰ US-Korea FTA

The US approach includes a provision on the Parties regulatory sovereignty with regards to domestic environmental laws, policies and priorities. This is however curtailed by language⁹¹ on the need to provide for and encourage high levels of environment protection which are to be improved upon on a continuous basis⁹². The Parties are only required to use their best endeavors to this end, but this is a contribution, albeit small, to establishing a level playing field on environmental protection between the Parties.

The relationship between environmental standards and trade is addressed by two other provisions that complete this article on regulatory sovereignty and aim at establishing a level playing field among the trading partners.

d) Effective enforcement of national environmental laws and non-lowering of environmental standards.

The Parties commit pursuant to the Environment Chapter not to fail to ‘effectively enforce their environmental laws (...)’ in a manner affecting trade as well ‘not to wait or derogate from, or offer to derogate from’ their environmental laws.⁹³

These provisions are key and usual in the practice to include environmental provisions in FTAs. It is important to note that, according to the Bipartisan Trade Deal, the ‘non-derogation obligation for environmental laws has been altered from a “strive to” to a “shall”⁹⁴ which shows the US’ willingness to include more prescriptive language on environmental protection.

Nevertheless, it is important to highlight that a violation of the ‘effective enforcement’ is limited to certain conditions. Indeed, a Party must have fail to enforce its laws through a sustained course of action or inaction that does not reflect a reasonable, articulable *bona fide* of such discretion or result from a reasonable, *bona fide* decision regarding the allocation of such resources.

⁹¹ US-Colombia TA, Article 18.1 ; US-Korea FTA 20.1

⁹² J. Bourgeois, K. Dawar and S.J. Evenett, ‘*A Comparative Analysis of Selected Provisions in Free Trade Agreements*’ (2007), Commission by DG- Trade of the European Commission

⁹³ US-Colombia TA, Article 18.3 on ‘enforcement of environmental laws’ and US-Korea FTA 20.3 on ‘application and enforcement of environmental laws’.

⁹⁴ http://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf

Moreover, the ‘non-derogation’ obligation does not apply in the event that ‘the waiver of derogation’ does not violate the Party’s obligations under the seven MEAs covered by the Chapter.

e) International environmental standards.

Finally, the provisions detailed in c) and d) on environmental laws and standards are completed by a third one, quite innovative in the US practice, which include commitments to “adopt, maintain, and implement laws, regulations, and all other measures to fulfill”⁹⁵ the Parties obligations under a list of seven MEAs to which the US is a signatory⁹⁶. This approach has been taken following the Bipartisan Trade Deal and reveals the new importance given to the role of international environmental governance and sends the message that the US is ‘taking seriously its obligations under these MEAs’⁹⁷.

These provisions contribute to build a level playing field between the Parties and to avoid undue competitive advantage, as well as give importance to the commitments that the US has undertaken at the global level with regard to a rather short list of seven MEAs.

f) Relationship between the FTA and Multilateral Environmental Agreements (MEAs).

American Environment Chapters address the hypothesis of conflict between MEAs and FTAs⁹⁸ and highlight that a Party shall not be precluded ‘from taking a particular measure to comply with its obligations under the covered agreement’ provided it is not a disguised form of protectionism.

This, alongside to soft law language on the recognition of the role of MEAs in protecting the environment shows an unprecedented attention to global environmental governance in the US approach so far.

⁹⁵ US-Korea FTA, Article 20.2, US-Colombia TA, Article 18.2.

⁹⁶ Above n 13

⁹⁷ Above n 86

⁹⁸ US-Korea FTA, Article 20.10, US-Colombia TA, Article 18.13z

g) Mechanisms to Enhance Environmental Performance in Trade.

The US Environment Chapters include a dedicated article⁹⁹ to ‘mechanism to enhance environmental performance in Trade’. The contribution of such mechanisms (‘flexible, voluntary and incentive-based initiatives’) to environmental protection is recognized and Parties are required in mandatory language to ‘encourage (their) use and development’. A few examples are given but without referring to specific initiatives such as Corporate Social Responsibility or Fair trade labeling.

h) Co-operation and capacity building mechanisms in the field of environment.

An article is dedicated to co-operation in environmental matters in US FTA Environment Chapters¹⁰⁰. Pursuant to this provision, in which the ‘Parties commit’ to undertake cooperative environmental activities related to the implementation of the Chapter, the importance of cooperation is recognized. The environmental cooperation provision is not much detailed but it refers to Environmental Cooperation Agreements (ECAs) concluded between the US and its trading partner, that are negotiated in parallel to the FTAs¹⁰¹ and specify areas for cooperation.

US FTAs also contain a specific section on Trade Capacity Building¹⁰² which sets up a body, referred as the Committee, in charge of reviewing and supervising cooperation and capacity building activities. Areas for cooperation are not provided but the Committee is to ‘seek the prioritization of trade capacity building projects’¹⁰³.

i) Procedural guarantees and public submissions processes to ensure enforcement of domestic environmental laws.

⁹⁹ US-Korea FTA, Article 20.5, US-Colombia TA

¹⁰⁰ US-Korea FTA, Article 20.8, US-Colombia TA, Article 18.10

¹⁰¹ On the US-Korea ECA, see <http://www.state.gov/r/pa/prs/ps/2012/01/182351.htm>

¹⁰² US-Colombia Ta, Chapter 20, Section B.

¹⁰³ US-Colombia TA, Article 20.4

The US current approach also includes some provisions¹⁰⁴ to secure procedural guarantees in cases of breaches in domestic environmental standards. Indeed, the Parties are to ensure that these breaches ‘can be sanctioned or remedied in judicial, quasi-judicial, or administrative proceedings’¹⁰⁵.

Public submissions are also included in some US FTAs Environment Chapters¹⁰⁶. They foresee that ‘any person of a Party’ can ‘file a submission asserting that a Party is failing to effectively enforce its environmental laws’. The article establishes criteria to determine whether a submission will be considered. If the different criteria are fulfilled, a factual record is prepared and made publicly available. It is important to note that this provision is rather ‘weak in terms of enforcement power’¹⁰⁷ as it can only reach, as just mentioned, to the issuance of a factual record that is made public.

These provisions are very innovative and aim, as put by the OECD, “to strengthen the environmental regulatory regime of the agreement’s trading Parties, and to level the playing field for competing industries by ensuring that, at a minimum, the environmental laws on the books are effectively enforced”¹⁰⁸. Therefore one can see these provisions as completing and reinforcing the ones on the effective enforcement of and non-derogation to environmental laws.

j) Institutions to oversee the implementation of environmental provisions.

US FTAs’ Environment Chapters set up dedicated institutions¹⁰⁹ to oversee their implementation:

- An office in each Party’s administration is to be designated to serve as a contact point for the implementation of the relative chapter
- Joint "Environmental Affairs Council" that includes senior level officials from both the US and its trading Partner, explicitly including officials with environmental responsibilities, is to be established.

¹⁰⁴ US-Korea FTA, Article 20.4, US-Colombia TA, Article 18.4

¹⁰⁵ OECD Paper, Above 10

¹⁰⁶ US-Colombia TA, Articles 18.8 and 18.9, not included in the US-Korea FTA

¹⁰⁷ Jinnah and Morgera, above 14

¹⁰⁸ OECD Paper, Above 10

¹⁰⁹ US-Korea FTA, Article 20.6, US-Colombia TA, Article 18.6

The Council meets within one year after the entry into force and thereafter annually, unless otherwise decided by the Parties.

k) Public participation in the implementation of the agreement.

Recent US FTAs include reinforced commitments for the Parties for public participation under Environment Chapters¹¹⁰. Each Party is responsible for promoting public participation regarding its “environmental laws, enforcement and matters related to the implementation’ of the Environment Chapter. Moreover these articles also develop ‘procedures for interested persons to request investigations of alleged violations of such laws’¹¹¹.

Public participation is also to be promoted in the work of the Council and "unless the Parties agree otherwise" meetings of the Council shall include a public session.

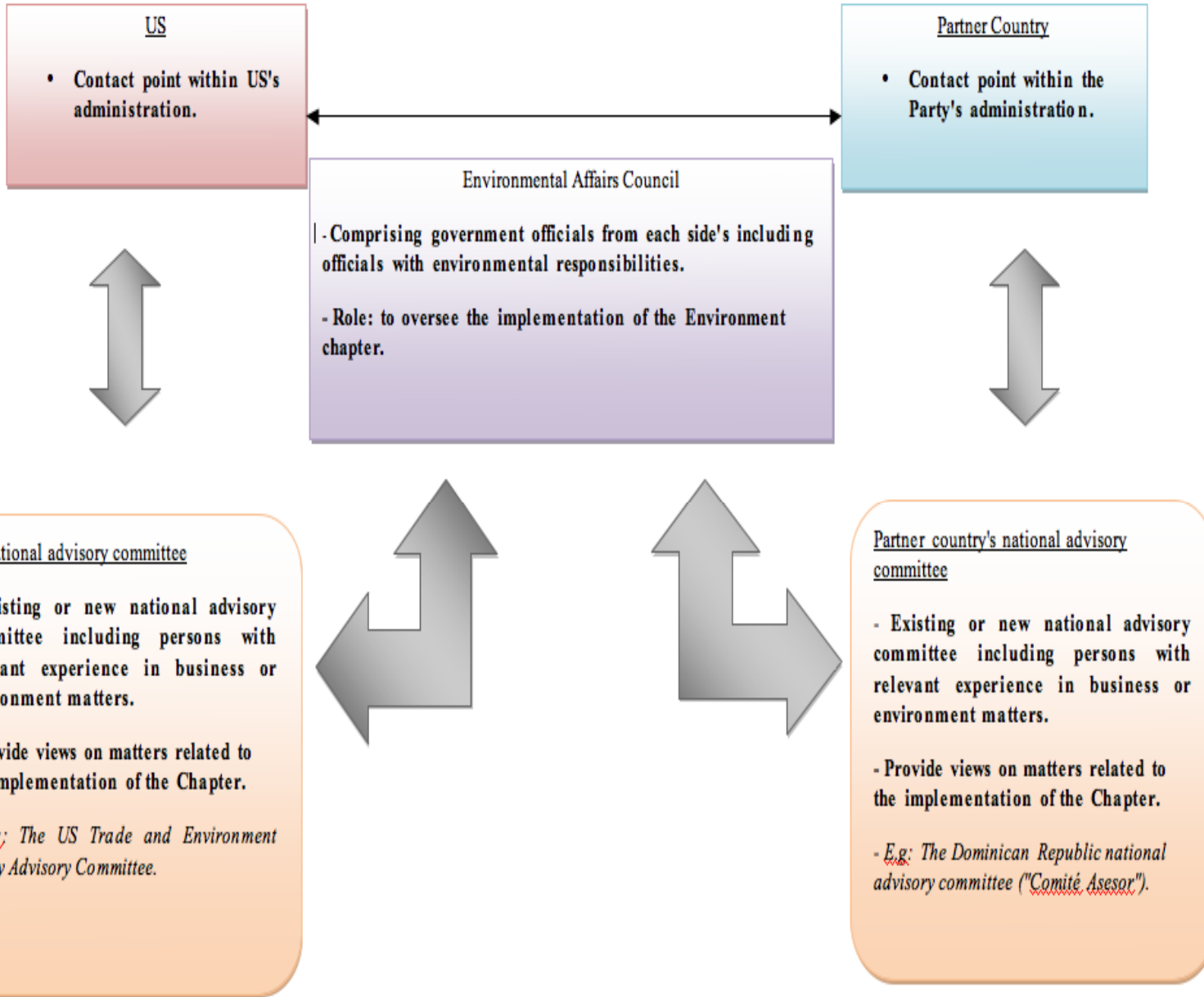
Finally, specific institutional arrangements are provided for public participation with regards to the implementation of the agreement. In the most recent FTAs¹¹², the parties commit to ‘convene a new, or to consult an existing, national consultative or advisory committee, comprising members of its public, including representatives of business and environmental organizations, to provide views on matters related to the implementation of the (Environment) chapter’.

¹¹⁰ US-Korea FTA, Article 20.7, US-Colombia TA, Article 18.7

¹¹¹ OECD Paper 2012, above n 5

¹¹² US FTAs with Colombia, Costa Rica, the DR CAFTA, Korea, Panama and Peru.

-Flowchart on the institutional set-up for the implementation of Environment Development chapters – general structure.



l) Dispute settlement mechanisms with respect to environmental obligations.

Since the May 10 2007 Bipartisan Trade Deal all US FTAs' environmental obligations are enforced on the same basis as the commercial provisions of the FTA including with regards to 'remedies, procedures, and sanctions'. This was an unprecedented addition to US Environmental Chapters.

Pursuant to the provisions related to dispute settlement in Environment Chapters¹¹³, Parties may request consultation for any matter arising under the Environment Chapter. If consultations at this stage fail to resolve the matter and no mutually satisfactory solution can be found, any Party may request the Environmental Affairs Council, the government-to-government body in charge of overseeing the implementation of the Chapter, to be convened. During these procedures, Parties and the Council may respectively seek advice from any person or body they deem appropriate or consult governmental or other experts. If the dispute relates to a Party's obligations under covered MEAs, they Parties are required to address first the matter through the consultative mechanisms or other procedures under the MEAs.

If the Parties do not reach a mutually satisfactory resolution of the matter, they may have recourse to the general dispute settlement procedures of the FTA, that may result in the suspension of trade preferences under the FTA, the so-called 'trade sanction-based approach'.

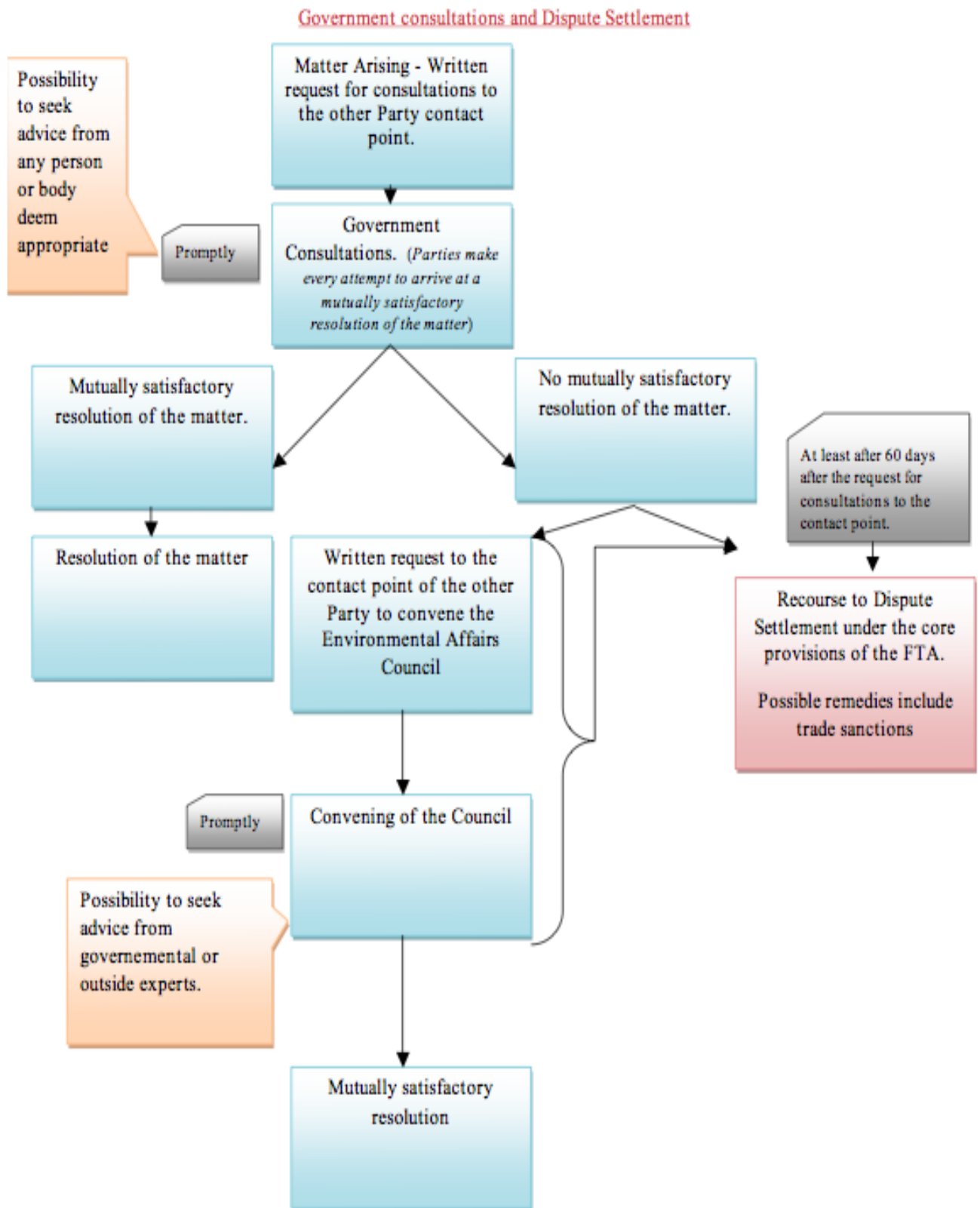
The US Bipartisan Trade Deal highlights: *"we have agreed that all of our FTA environmental obligations will be enforced on the same basis as the commercial provisions of our agreements – same remedies, procedures, and sanctions. Previously, our environmental dispute settlement procedures focused on the use of fines, as opposed to trade sanctions, and were limited to the obligation to effectively enforce environmental laws"*¹¹⁴.

These new provisions, by putting environmental provisions on an equal footing with trade ones with regard to their enforcement, gives another and unprecedented dimension to the Environment Chapters which potential consequences will be outlined in further sections of this paper.

¹¹³ US-Korea FTA, Article 20.9, US-Colombia TA, Article 18.12

¹¹⁴ May 10 Bipartisan Trade Deal, Above n 86

Flowchart on the US general framework for Dispute Settlement Procedures.



m) Others (Specific thematic articles, scientific information, precautionary principle, environmental assessments etc).

The US approach contains only a few other environment-related provisions.

An article included in both the US-South Korea and US-Colombia FTAs¹¹⁵ provides definitions of several concepts such as ‘environmental laws’ or ‘statute or regulation’.

Thematic articles are extremely scarce in US Environment Chapters. The US-Colombia FTA contains an article on *Biological Diversity*. Even if the inclusion of such provision may appear encouraging¹¹⁶, the provision is drafted in non-enforceable and aspirational language that only refer to the promotion and encouragement of the sustainable use of biodiversity. The US-Peru FTA contained a more substantive annex on forest governance that is also subject to Dispute Settlement but no other thematic articles are to be found on climate changes or fisheries for example.

To sum-up, Post-May 10 Bipartisan Trade Deal US FTAs provide for full-scale Environment Chapters that includes provisions on the effective enforcement and FTA’s provisions compliance with a list of seven covered MEAs as well as the possibility to enforce environmental provisions under the FTA general dispute settlement system¹¹⁷.

¹¹⁵ US-Korea FTA, Article 20.11, US-Colombia TA, Article 18.14

¹¹⁶ S. Jinnah and J. Kennedy, *Environmental Provisions in US Trade Agreements: A New Era of Trade-Environment Politics*, Whitehead Journal of Diplomacy and International Relations (2011), 19, at 20.

¹¹⁷ Jinnah et Morgera, Above n 14

III. Environmental provisions in EU and US FTAs: substantial resemblance but important differences.

After having drawn a picture of the EU and US' approaches with regard to the inclusion of environmental provisions in FTAs, some similarities as well as main differences can be identified.

As Jinnah and Morgera specify, “there is much overlap among American and EU environmental provisions”¹¹⁸. Indeed, it is important to insist on the fact that both approaches are among the most comprehensive ones to the inclusion of environmental provisions in FTAs¹¹⁹, with a specific Chapter dedicated to environment¹²⁰. Many countries are far from the level of commitments included in both the EU and US environmental provisions, with some of them not addressing the issue or limiting themselves to reiterating article XX GATT 1994 exceptions. Significant commonalities between the two approaches include a reference to sustainable development and/or environmental protection in the FTA preamble, provisions on regulatory sovereignty for environmental laws or standards, provisions on effective enforcement of and non-derogation from environmental laws as well as on the relationship between FTA and MEAs' obligations. Both the EU and the US also provide for a dedicated institutional set-up for overseeing the implementation of the Chapter with civil society participation, and a cooperation clause. The exact features of each provision differ in some aspects between EU TSD Chapters and US Environment ones but the underlying approach are quite similar¹²¹.

Having mentioned this, it is fundamental to underline that there are some key differences between the EU and the US approaches. They lie in two main aspects which will be detailed below:

- The scope of the provisions relating to MEAs as well as to thematic articles,
- The mechanisms relating to the enforcement of environmental provisions.

¹¹⁸ Ibid

¹¹⁹ OECD Paper, Above n 10

¹²⁰ With the EU's specificity of treating environment together with social issues under the broader banner of Sustainable Development.

¹²¹ For example, the US obligation to enforce domestic environmental laws contains some exceptions (see section II.B.d) that arguably weaken the provision compared to the EU language in this regard.

A. Relationship to MEAs and thematic articles: discrepancy in scopes.

There is a consistent gap between the scopes of the provisions related to MEAs and other thematic articles between the EU and the US approach. It has been recognized by several observers that the EU FTAs contain more ambitious language¹²² than the US on a significant number of environmental provisions.

First of all, the EU TSD Chapters cover a wider range of MEAs. Both Parties commit to the effective implementation in law and practice of a *broad set* of MEAs. In most recent EU FTAs the commitment in this regard refers to all MEAs binding on the Parties, without listing them. The EU-CA FTA complements the general commitment with an open, non-exhaustive list which identifies some specific MEAs covered by the provision. One of the main aims of this approach seems to be to enable future ratifications of specific agreements can be covered without an amendment to the whole agreement. This open list covers: the Montreal Protocol on Substances that Deplete the Ozone Layer adopted on 16 September of 1987, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal adopted on 22 March 1989, the Stockholm Convention on Persistent Organic Pollutants adopted on 22 May 2001, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) signed on 3 March 1973, the Convention on Biological Diversity (CBD) adopted on 5 June 1992, the Cartagena Protocol on Biosafety to the CBD adopted on 29 January 2000, the Kyoto Protocol to the United Nations Framework Convention on Climate Change adopted on 11 December 1997 ("Kyoto Protocol") and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade adopted on 10 September 1998.

All these Conventions have been ratified by the Member States of the EU and/or the EU itself. They encompass all major MEAs that have “close to universal membership”¹²³ and are of relevance in the trade and environment context.

Contrastingly, the list of covered MEAs that have to be implemented¹²⁴ in US FTAs is rather short and leaves out a number of Conventions that are specifically important in

¹²² See inside US TRADE and the analyses of the position paper of the EU in TTIP negotiations.

¹²³ Jinnah and Morgera, Above n 14

a trade and environment context. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, the Stockholm Convention on Persistent Organic Pollutants, the CBD, the Cartagena Protocol on Biosafety to the CBD, the Kyoto Protocol as well as the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade are not covered MEAs. Of those MEAs covered by the EU, either through a specific list or through a reference to MEAs ratified by the Parties, only the Montreal Protocol and CITES are also covered by the US Environment Chapter. Some Protocols or Conventions that are in the US approach are not explicitly referred to in EU's clauses but they are of minor relevance to the trade and environment nexus and are included in covered MEAs if the EU or its Member-states have ratified them¹²⁵.

The US rationale for not including an extended list (or no list at all) of covered MEAs seems to be linked to US environment-related international stances. Indeed, the US has so far not ratified these MEAs¹²⁶. Their non-inclusion is nonetheless regrettable as they are key environmental international instruments that are of relevance in a trade context and benefit from wide international support. It could be argued, that without requiring the US to ratify some MEAs, some inspirational language, stressing the role of key MEAs or commitments on the core objectives of key MEAs could still be opted for.

Moreover, the EU includes detailed thematic provisions that address climate change, biodiversity, trade in fishing products as well as articles on a precautionary approach that are almost completely absent¹²⁷ from the US FTAs¹²⁸. Although these provisions contain some strong aspirational language where Parties recognize the need to address these issues in order to achieve sustainable development¹²⁹ - which is often not part of US environmental provisions - they also contain some more substantive engagements

¹²⁴ Precising language on the fact that MEAs have to be implemented *in law and in practice* is not included in US Environment Chapter.

¹²⁵ Which is the case for most of the Conventions.

¹²⁶ The Kyoto Protocol, the Rotterdam Convention, the CBD and the Cartagena Protocol.

¹²⁷ An article on biodiversity has been included in the US-Peru TA as well as US-Colombia one but its scope is extremely limited.

¹²⁸ Jinnah and Morgera, Above n 14

¹²⁹ E.g. US- Colombia TA, Article 275.1 "the Parties recognize that climate change is an issue of common and global concern that calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, for the benefit of present and future generations of mankind."

where the Parties agree to promote some mechanisms or instruments that are relevant in the context of dealing with the specific mentioned issue.

Provisions on reviewing the impact of the implementation of the Agreement on environment are also not part of the US approach.

Therefore it can be argued that these differences stress the shortcomings of US Environment Chapters in terms of ambition compared to EU TSD Chapters with regards to their scope. In this regard, EU TSD Chapters go one step further by covering a substantive list of relevant MEAs as well as some language on core trade-related key environmental concerns (climate change/ trade in fish products/biodiversity).

B. Enforcement of environmental provisions: confrontational versus participative approaches.

1. Enforcement procedures and mechanisms: a key difference between the EU and the US approaches.

The other key difference between the EU and the US approach lies in mechanisms relating to the enforcement of environmental provisions.

Matters arising under both US Environment and EU TSD Chapters have first to be addressed through consultations procedures that are quite similar. If these consultations have not led to a mutual satisfactory resolution of the matter, another phase starts and this is where the EU and US approaches differ greatly.

Pursuant to EU TSD Chapters, the matter may be referred to a TSD Chapter-specific Panel of experts. The Panel of experts' recommendations are not *per se* legally binding upon the Parties and cannot result in trade-sanctions under the Agreement¹³⁰. The Parties, taking into account the final report containing the recommendations of the Panel of experts, will decide on the appropriate measures to take. The implementation of these measures is monitored by the Joint government-to-

¹³⁰ Please refer to section I.B. on the EU's approach

government Committee. Public scrutiny, inputs from domestic Advisory Groups, attention to the activities of relevant MEAs or bodies as well as assistance from these organizations and bodies are included in the EU's approach.

On the other hand, the US Environment Chapters provide for the application of the remedies, procedures and sanctions under the Dispute Settlement provisions of the FTA. As for any other commercial provisions of the US FTAs, non-compliance with environmental provisions may therefore result in trade sanctions. As highlighted in section II, these provisions give an unprecedented dimension to the Environment Chapters. As Jinnah and Morguera¹³¹ emphasize, this gives an unequalled depth to the obligations of US Environment Chapters compared to the EU TSD ones.

Moreover, US Environment Chapters foresee citizen enforcement provisions¹³² as well as provisions on procedural guarantees to ensure enforcement of domestic environmental law that are not found in EU TSD Chapters. They contribute to building a complete set-up to ensure the enforcement of environmental provisions under US FTAs.

Even if - as it will be discussed later - the EU's approach to the enforcement of TSD provisions may include some significant advantages, EU environmental provisions in FTAs are strictly legally speaking not enforceable.

2. Stakeholders' criticism.

This core difference between the US and EU has created much debate among various stakeholders. As also recognized by EU officials, albeit with some caveats¹³³, some environmental NGOs as well as members of the European Parliament (EP) are pushing for the inclusion of trade sanctions or other penalties for the enforcement of environmental provisions.

¹³¹ Jinnah and Morgera, Above n 14

¹³² Please refer to section II. B. i

¹³³ Annex I, Above n 25

The EP, which gained a stronger role with regard to trade policy with the Lisbon Treaty by disposing of veto for the ratification of FTAs¹³⁴, has been advocating for “penalty-based enforcement mechanisms”¹³⁵ to be developed for EU TSD Chapters in FTAs. In its report on "Human rights and social and environmental standards in international trade agreements" adopted in 2010¹³⁶, the EP indicates a series of improvements for FTAs TSD Chapters. Among other things the EP suggests to develop “*a recourse to dispute settlement mechanism on an equal footing with other parts of the agreement, with provisions for fines to improve the situation in the sectors concerned, or at least a temporary suspension of certain trade benefits provided for under the agreement, in the event of an aggravated breach of these standards*”.

There seems to be an on-going reflection in some EU Member States about the enforcement of environmental provisions through trade sanctions. The French Directorate General of the Treasury (DG Trésor) of the Ministry for Finance and Public Accounts and Ministry for the Economy, Industrial Renewal and Digital Affairs Ministry seems to advocate for a reinforcement of enforcement mechanisms and to be willing to consider the introduction of some kind of sanctions¹³⁷.

Looking beyond EU stakeholders, some NGOs have taken a very critical position towards the EU’s approach. For example, an American environmental advocate has stressed that the ‘lack of binding dispute settlement mechanism undercuts the EU’s expansive aims with regard to environment’ and that without such mechanism even the commitment to enforce MEAs would lack meaning’¹³⁸. This is however not the opinion of all stakeholders; a study commissioned by the European Commission in 2007¹³⁹ states that “among non-business representatives of civil society, cooperative or incentive-based mechanisms rather than sanctions were favoured”.

¹³⁴ R. Zvelc, Above n 17

¹³⁵ Marin-Duran, Above n 2

¹³⁶ Report of the European Parliament on EU human rights and social and environmental standards in international trade agreements (2009/2219(INI)), Committee on International Trade, Rapporteur Tokia Saifi, 8.11.2010.

¹³⁷ Etienne Oudot de Dainville, Sous-directeur Politique commerciale et investissement, La dimension sociale dans les accords de libre-échange, DG Trésor, Ministère de l’Economie et des Finances, Ministère du Commerce Extérieur, September 2013

¹³⁸ Inside U.S. Trade. (2013), ‘EU Labor, Environment Paper Sets Sights High, but without Enforcement’, World Trade Online 31

¹³⁹ J. Bourgeois, K. Dawar and S.J. Evenett, Above 95

3. Participative versus confrontational approaches.

The differences between enforcement mechanisms for environmental provisions have also been the focus of some scholarly studies, which have conceptualized both approaches using different terminology.

For example, the ILO's work on social provisions in FTAs, which is also relevant for environmental ones, distinguishes between conditional versus promotional approaches. Conditional approaches represent situations where "requirements are linked to economic consequences, in the form of sanctions or, less frequently, incentives, which concern trade or other benefits, including development and technical cooperation"¹⁴⁰. On the other hand, promotional approaches combine "bidding or non-bidding commitments with cooperative activities dialogue, and monitoring"¹⁴¹. The US is ranged in the conditional category whereas the EU - although recognized to include comprehensive institutional and procedural framework to ensure implementation - is classified in the promotional one.

The OECD study refers to carrot/carrot versus carrot/stick approaches. The carrot-carrot approach is identified as softer and based "on confidence-building aimed at raising awareness and persuading the trade partner of the importance of dealing with environmental issues"¹⁴². This is designated as the approach chosen by the EU, which, in OECD's words "includes environmental issues in trade agreements mainly through provisions focusing on co-operation and capacity building"¹⁴³.

Finally, scholars such as Jinnah, Morguera or Marin Duran¹⁴⁴ use the punitive or confrontational versus cooperative approach distinction highlighting that EU's TSD Chapters are not "fully-enforceable legal obligations"¹⁴⁵ and rather seek to promote compliance with environmental provisions¹⁴⁶. This last terminology seems quite well

¹⁴⁰ International Institute of Labour Studies, International Labour Organization, *Social dimensions of free trade agreements*, Geneva: ILO, 2013

¹⁴¹ Ibid

¹⁴² OECD Paper, Above n 10

¹⁴³ Ibid

¹⁴⁴ Jinnah and Morgera above n 14, Marin-Duran Above n 2 and n 62

¹⁴⁵ Marin-Duran Above n 62

¹⁴⁶ Marin-Duran Above n 2

suitable to the EU/US differences regarding enforcement aspects of environmental provisions in FTAs. However, according to the interviewed EU officials, the term ‘cooperative is too weak’ and gives the impression that EU TSD Chapters ‘foresee only environmental cooperation provisions’. They suggested that "engagement-based" would reflect better the nature of the EU approach.

One could then prefer the term ‘participative’ to better describe the EU’s enforcement procedures for TSD provisions. Participative means *something that implies an active participation of protagonists in an action or an activity*¹⁴⁷. Therefore participative would seem particularly appropriate to describe the EU’s approach to the enforcement of TSD provisions. Indeed, the specific dispute settlement provisions foresee the participation of various entities whose interactions are to provide for non-sanction-based but adequate and efficient enforcement of TSD provisions:

- the Parties are active participants in case of the resolution of a dispute, throughout the consultations processes but also with regard to the follow-up to the Panel’s recommendations.
- Civil society has also an important role to play with regard to the enforcement of TSD provisions either through institutionalized dialogues or less formal forms of participation. The DAGs are generally entitled to submit their views on their own initiative to the Joint Committee¹⁴⁸ including during consultations or experts’ panel processes. In some FTAs, their inputs throughout the consultations phases as well as on the final report of the panel of experts are explicitly foreseen.¹⁴⁹ Moreover, the final report is made public, which provides the opportunity for civil society at large to share its views on the recommendations. Institutional channels for civil society participation also provide for adequate fora where views on the implementation of measures designed to resolve a matter could be shared with the Parties and the Joint Committee.

¹⁴⁷ Definition of ‘participatif’, participative in French found at http://www.larousse.fr/dictionnaires/francais/participatif_participative/58371

¹⁴⁸ EU-COLPE TA, Article 281

¹⁴⁹ EU- Georgia AA, Article 243.8: The follow-up to the report and the recommendations of the Panel of Experts shall be monitored by the Trade and Sustainable Development Sub-committee. The advisory bodies and the Joint Civil Society Dialogue Forum may submit observations to the Trade and Sustainable Development Sub-Committee in this regard.

- The Panel of experts is key in providing recommendations that are not *per se* legally-binding upon the Parties but which will provide useful guidance. Therefore experts in environmental issues participate in the enforcement of the provisions and provide, through their report, an unbiased basis for dialogue and discussion on ways to solve the matter.
- Finally, relevant MEAs organizations' activities are to be taken into account and the Parties may seek assistance from them. Key international instruments have thus a role to play, and their inputs could provide guidance for the Parties.

While the EU environmental provisions are more ambitious compared to US ones with regard to their scope, they are not fully-legally enforceable. The EU does not lean on general dispute settlement mechanisms and trade sanctions to provide incentive for and ensure the enforcement of environmental obligations. Instead, and for the same purposes, the EU relies on a participative approach that includes open and inclusive contributions of different entities.

Both EU and US experiences regarding the implementation and enforcement of TSD and Environment Chapters are still very recent and more insight will be needed to evaluate their respective effectiveness. Nevertheless, some early conclusions can be drawn on the impact these approaches may have on global environmental governance as well as on ongoing and future negotiations.

IV. Broader potential impacts and possible improvements.

The key differences between the US and the EU's approach to environmental provisions in FTAs, namely the scope of provisions on MEAs and thematic articles and the way environmental provisions are to be enforced, have some impacts on both environmental global governance as well as ongoing and future negotiations. After focusing on these implications, some potential areas for improvement of both approaches will be discussed in this section.

A. Implications for environmental global governance.

Including environmental provisions in FTAs with commitments to respect MEAs creates specific implications for environmental global governance. These practices have the potential of “enhancing the effectiveness of international environmental treaties”¹⁵⁰.

Jinnah explains this phenomenon using the concept of ‘strategic linkages’ and more particularly the one of ‘regulatory transference’. According to this specific type of linkage, “a weaker environmental agreement borrows the enforcement power of a stronger economic one”¹⁵¹.

Both the EU and the US approaches enable some kind of regulatory transference for the covered MEAs¹⁵². Nevertheless, it may be argued that the US Environment Chapter, as fully legally enforceable, is providing for a stronger linkage as it combines the provisions on the implementation of MEAs with “the enforcement power of the FTA’s (sanction-based) dispute settlement mechanism”¹⁵³. This mechanism seems to be a powerful and promising way for implementation of MEAs, which are often considered to have weak enforcement power.

¹⁵⁰ Jinnah and Kennedy, Above n 119

¹⁵¹ Jinnah, *Strategic Linkages: The Evolving Role of Trade Agreements in Global Environmental Governance*, Journal of Environment and Development 20, 2011, pp. 191-215

¹⁵² Jinnah and Moregra, Above n 14

¹⁵³ Jinnah, Above n 154

Jinnah¹⁵⁴ gives as an example the US-Peru Trade Promotion Agreement (TPA), which linked substantive provisions in the Annex on Forest Governance containing CITES requirements to the general dispute settlement procedures of the TPA. Therefore, the pressure of possibly using sanction-based dispute settlement mechanisms in case of non-compliance was used to foster compliance with CITES provisions contained in the Forest Governance Annex in Peru.

Nevertheless, using this kind of trade pressure to improve international environmental governance, though promising from an environmental point of view, does not come without downsides, as suggested by the US-Peru TPA experience¹⁵⁵.

First of all, regulatory transference can in some circumstances induce some unintended consequences. In Peru, pressure to comply with the FTA's requirements and to implement the Annex on Forest Governance in a short timeframe played a role in the introduction of quick legislative reforms by the Peruvian government without proper public participation. The decrees passed were highly controversial and led to violent protests¹⁵⁶. The environmental impact of the Peruvian reforms has been also controversial as it may result in environmental deterioration in the long-run. Although the FTA has been recognized as a catalyst for reform with regards to Peru's compliance with its CITES commitments which "resulted in important improvement in CITES effectiveness's"¹⁵⁷, it also induced some important unintended social consequences as well as possible negative environmental impacts.

Moreover, some legitimacy concerns may arise from such an approach. Is the US legitimate in *drafting law* for Peru? Indeed, the Annex on Forest Governance "contained numerous provisions dictating specific policy changes related to the implementation and enforcement"¹⁵⁸ of CITES. The way Peru's should implement its obligations under CITES was not left to its discretion.

¹⁵⁴ Jinnah, above n 154

¹⁵⁵ Ibid and Jinnah and Kennedy, Above n 119

¹⁵⁶ It is important to note that it has been recognized that not all the controversial aspects of the 99 decrees were related to provisions implementing the FTA's provisions. The Peruvian government may have used the FTA to also pass other contested legislation.

¹⁵⁷ Jinnah, Above n 154

¹⁵⁸ Ibid.

Is this approach violating Peru's sovereign right to use its natural resources in accordance with its international commitments? As Jinnah and Kennedy highlight, what happened in Peru raises significant concerns about "the ability of a major economy to coerce a contextual environmental policy development in a smaller economy through direct trade pressure"¹⁵⁹. Peru certainly did not have the same leverage to induce some environmental policy changes in the US. The Forest Governance Annex is quite significant in this regard as it is unilaterally directed to Peru. This practice may appear questionable in the bilateral context of an FTA.

This is all the more important as the list of covered MEAs as well as requirements on thematic environmental issues provided under US Environment Chapters is limited. Why did the US focus on forest governance in Peru and not on other environmental issues as well? It can be argued that this is not a cautious approach as it may contain the risk of omitting other important environmental goals.

Finally, such linkages may have a "chilling effect on future MEAs negotiations"¹⁶⁰ and ratifications; countries may be less keen on making environmental commitments if they know that they may be enforced in the future through FTAs with sanction-based remedies.

Thus, regulatory transfers from FTAs to MEAs have the interesting potential to induce and accelerate environmental domestic law and policy reforms in trading partners. Nevertheless, it remains unsure whether this process is the best way to achieve implementation of MEAs as well as global environmental objectives since it raises some important legitimacy concerns. It may also induce, if not designed carefully and comprehensively, some unintended social consequences and even negative impacts on environmental protection.

B. Implications for ongoing and future trade negotiations including the US-EU Trans-Atlantic Trade and Investment Partnership.

¹⁵⁹ Jinnah and Kennedy, Above n 119

¹⁶⁰ Jinnah, Above n 154

Both approaches also inform ongoing and future trade negotiations. The EU and the US are currently under trade negotiations with each other for the Trans-Atlantic Trade and Investment Partnership (TTIP) as well as with other countries¹⁶¹. This raises the question of whether one of the two approaches should be preferred with regard to the scope of provisions relating to covered MEAs and thematic articles, the participative versus confrontational enforcement mechanisms, as well as how the negotiations may resolve frictions between the respective practices. This is obviously a question that will require some time and hindsight to be properly and fairly answered.

First of all, the possible legitimacy issues as well as possible unintended short- and long-term consequences of regulatory transfers from US FTAs to covered MEAs call for caution if following a similar approaches in future FTAs.

Secondly, as Rok Zvelc mentions¹⁶², taking a confrontational approach to environmental provisions enforcement in FTAs could ‘increase the resistance among trading partners’ to include substantive language in these provisions. This ‘could result in weaker substantive obligations’ or even turn into a contentious point in trade negotiations. It is important to mention that substantive and comprehensive provisions coupled with participative enforcement procedures may prove to be at least as efficient, if not more, for environmental protection than narrower provisions and a sanction-based dispute settlement mechanism (also taking into account that in practice this has never been used so far). By encompassing open and inclusive contributions of different entities, EU-style enforcement mechanisms may introduce a more flexible and inclusive approach towards the enforcement of sensitive and delicate environmental issues.

Therefore, the EU’s approach, in Marin Duran’s words, is a “welcome step given the inherent limitations of enforcing environmental standards through trade sanctions and particularly when countries at different levels of development (and thus economic strength) are involved. TSD chapters have the potential to act as a laboratory for an

¹⁶¹ Currently the EU has FTA negotiations ongoing with countries such as Canada, Malaysia, Thailand, Japan or Morocco. The US is also pursuing Trans-Pacific Partnership (TPP) negotiations with Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.

¹⁶² R. Zvelc, Above n 17

alternative, less controversial, model (than the US) to address the prescriptive dimension of trade and environment (...) nexus within RTAs”¹⁶³.

Finally, it is important to highlight that TTIP negotiations will be a time for confronting and questioning both approaches but also for mutual learning¹⁶⁴. The negotiations being still in early stages, no evidence is available yet on what could be the possible result as far as environmental provisions are concerned. Finding common grounds on the key differences that have been mentioned in this paper will likely turn out to be challenging. However, it may be argued that TTIP has the potential to set a gold standard, and thereby shape both approaches and impact greatly on future negotiations. TTIP might be a springboard for a new era in the inclusion of environmental provisions in EU and US FTAs. Indeed, if TTIP succeeds in reaching a higher level of ambition than previous trade deals concluded by both the EU and the US, and domestic constituencies of both sides approve this outcome, it is unlikely they would allow governments to take different and less ambitious approaches in following negotiations. Nevertheless, it is dubious whether both countries the EU and the US will be willing to endorse comprehensive and wide environmental commitments that include a large list of MEAs and address core environmental issues in combination with effective enforcement mechanisms. In this regard, as it has been suggested in this paper, the US confrontational approach does not seem ideal and EU provisions in this regard may appear too soft for some stakeholders. It is to be hoped that TTIP negotiators from both sides will be in a position to develop and agree on creative and innovative ways of addressing the trade and environment nexus.

C. Suggested improvements for both approaches.

Taking into account the advantages and disadvantages that have been mentioned for each approach, some suggestions for improvements can be made.

First of all, both the US and the EU could improve their capacity-building and technical assistance within the framework of FTAs¹⁶⁵, especially when negotiating

¹⁶³ Marin-Duran, Above n 2

¹⁶⁴ Jinnah and Morgera, Above n 14

¹⁶⁵ Jinnah and Morgera Above, n 14 ; J. Bourgeois, K. Dawar and S.J. Evenett, Above n 95

with developing countries. Moving from non-compliance to compliance with international environmental standards generate significant costs and can represent in the short- to medium-term a heavy burden for some partners. Therefore, if the US and EU want to ensure a genuine level-playing field with regard to environmental protection, improved commitments on capacity-building and technical assistance will be key to get trade partners onboard and ensure the effective implementation commitments.

US Environment Chapters could be mainly improved in two ways. First, the scope of environmental provisions could be expanded. A Gallagher¹⁶⁶ suggests, the US could “expand upon the (...) list of MEAs that the Parties are to implement” in order to cover core international agreements such as the Kyoto Protocol. The US should also further include or develop some substantive provisions on key environmental issues such as climate change, biodiversity or trade in fishery products. This would enable the US to take a comprehensive approach to environmental provisions that includes, not only areas of interest for the US, but also other areas where there is an international consensus. Secondly, if the US wants to pursue its goal to “contribute to the implementation of international norms in areas where domestic ratification of MEAs has been difficult”¹⁶⁷ by enshrining in FTAs detailed action plans for reform in the partner country, there is a need for introducing mitigating measures that address potential negative unintended consequences. The inclusion of provisions ensuring that enough “time and outreach is allotted for public participation” as well as on the “prohibition to backtrack on other environmental protections under the guise of accomplishing FTA-required actions”¹⁶⁸ are possible options. Besides, the link between social provisions and environmental ones in US FTAs could be reinforced in order to ensure that environment and social actions are mutually supportive.

Finally, the drafting of MEAs-mirroring obligations in the Environment Chapter should be made with a reciprocal perspective. They should not be just designed in order to address environmental concerns with regard to the partner country but to improve the US practices as well.

¹⁶⁶ K.P. Gallagher, *Reforming U.S. FTAs for environmental protection: lessons from Mexico and beyond*, in Wilson Center Reports on the Americas No. 26: A New Trade Policy for the United States: Lessons from Latin America, October 2010, pp. 55- 64.

¹⁶⁷ Jinnah and Morgera, Above n 14

¹⁶⁸ Jinnah and Kennedy, Above n 154

On the EU side, TSD Chapters may present room for improvement mainly regarding the enforcement of TSD provisions. Without turning to a more adversarial system such as a sanction-based dispute settlement mechanism, the EU could enhance the *participative* aspect of its approach by strengthening the role of the different entities. For example, interactions with MEAs secretariats could be reinforced by providing for systematic and compulsory request for their assistance.

Specific attention should also be given to the development of civil society participation including with regards to the role of the DAGs.

First of all, the EU should ensure that DAGs are independent and representative in all EU FTAs. This is the case in all TSD Chapters to date but the EU-Colombia/Peru one¹⁶⁹. The EU's participative approach cannot proclaim its efficiency and legitimacy from civil society's active involvement if the independence of institutionalized civil society exchanges is not guaranteed.

Moreover, the role of the DAGs in consultations, panel of experts procedures, monitoring of the panel of experts' recommendations as well as actions taken by the Parties to solve the matter should be made more visible and systematic. The EU-Georgia AA already includes some language in this line by providing that: "*the follow-up to the report and the recommendations of the Panel of Experts shall be monitored by the Trade and Sustainable Development Sub-committee. The advisory bodies and the Joint Civil Society Dialogue Forum may submit observations to the Trade and Sustainable Development Sub-Committee in this regard*"¹⁷⁰. Building on this, the EU could step up its approach by including language requiring the Parties to formally demand the DAG's and members of Joint Forum's view on the Parties' follow-up actions to the report of the Panel of Experts.

Taking example on solutions that have been put forward to address democratic deficits¹⁷¹, enhanced and integrated participation of different entities, including civil society, could possibly address in a creative and innovative way what can be

¹⁶⁹ EU-COPE TA, Article 281

¹⁷⁰ EU-Georgia AA, Article 243 'Panel of experts'.

¹⁷¹ D. M. Driesen, Environmental Protection, *Free Trade, and Democracy*, Annals of the American Academy of Political and Social Science, Vol. 603, Law, Society, and Democracy: Comparative Perspectives, Jan. 2006, pp. 252-261.

considered as an '*enforcement deficit*' of environmental provisions in EU's FTAs. Building an innovative and fully-effective alternative to sanction-based systems, through the development of participative enforcement mechanisms, will require political will, resources and may present organizational challenges but it brings the promise to put the EU at the forefront of addressing the trade and environment nexus in FTAs.

V. Conclusion.

The US and the EU's approaches to the inclusion of environmental provisions are among the most comprehensive ones. The US dedicates a full-scale chapter to the Environment in its FTAs while the EU includes environmental provisions in a comprehensive TSD Chapter. Both approaches overlap in a significant number of features such as provisions on the effective enforcement of environmental laws or in the provision of a dedicated institutional set-up to overview the implementation of the Chapters. Nevertheless, there are some key differences between the EU and the US approaches. On the one hand, the EU environmental provisions are more ambitious compared to US ones with regard to their scope. On the other hand, they are not fully legally enforceable, while US Environment Chapters are subject to the same remedies, procedures and sanctions as any FTA commercial provision.

At first sight, it may be appealing to prefer the US approach over the EU one especially with regard to the possibility to use trade leverage to induce enhanced environmental governance in the partner country, including with regard to the respect of (some) MEAs. Nevertheless, reality is far more complex. A number of downsides may arise from this *confrontational* approach such as legitimacy issues or unintended social negative consequences.

Against this background, the EU, in order to provide incentives for and ensure the enforcement of environmental obligations, relies on a *participative approach* that includes open and inclusive contributions of different entities. By developing some improvements and notably by reinforcing avenues for civil society contributions, these *participative mechanisms* could reveal promising in addressing the EU 'enforcement deficit' of environmental provisions and particularly qualified to address the trade and environment nexus in FTAs.

In the light of these developments, one would recommend TTIP negotiators to be cautious and not rush for a "trade sanctions" system, as well as to aim at a broad scope for the substantive obligations. This is all the more important as the outcome of the negotiations could shape the future trade and environment policy developments in

both the EU and the US as well as other countries. One could hope for the creation of creative solutions that will lead to the inclusion of comprehensive environmental provisions as well as innovative dispute settlement mechanisms.

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- Association Agreement the EU and Its Member States, on the One Hand, and Georgia on the Other, setting up a bilateral Deep and Comprehensive Free Trade Area between them, signed in June 2014 [not yet entered into force] ('EU-Georgia AA')

US FTAs

- North American Free Trade Agreement (San Antonio, TX, 17 December 1992 ; in force 1 January 1994) ('NAFTA')
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- ### - **United-States**
- Executive Order 13141, Environmental Review of Trade Agreements (1999), available at <http://www.gsa.gov/portal/content/101566>
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- May 10 Bipartisan Trade Agreement on Trade Policy (also known as ‘Bipartisan Trade Deal’ or ‘May 10 Agreement’), available at http://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf

ANNEXES

- Annex 1: Interview of Monika Hencsey, Urszula Stepkowska and Silvia Formentini, respectively, Head of Unit, Policy Officer and Policy Co-ordinator in Unit D.1 Trade and Sustainable Development, Generalized System of Preferences - DG TRADE, European Commission (Friday 18th July).

1. What are the EU primary reasons for including environmental provisions in Free Trade Agreements with partner countries?

The EU is at the forefront of environmental protection. The EU intends to promote this value at different levels and FTAs represent a good opportunity to discuss these issues with our main trading partners.

In this regard, it is important to highlight that Sustainable Development (SD) is a core value of the European Union as enshrined in the Lisbon Treaty, and before that already set in the Sustainable Development Strategy of the European Union (EU SDS). All EU policies and actions need to contribute towards this aim, including external action. There are different ways to integrate SD concerns into free trade negotiations and agreements. For example, it can be done through the inclusion of some provisions on market access but also through the inclusion of dedicated provisions.

Finally, including environmental provisions in EU FTAs is a way to mitigate the potential negative effects that increased trade-liberalization could have on the environment. The EU looks at the environmental impact of each major trade initiative through the conduct of Impact Assessments and Sustainable Impact Assessments. Identified potential negative effects can be addressed through flanking measures but also through provisions in the agreement itself.

2. Is it a way to pursue an international environmental agenda through the inclusion such provisions?

No EU external action happens completely in isolation. The EU’s environmental concerns or specific areas of interest are reflected into EU FTAs’ environmental provisions. For example, the EU includes a dedicated provision on climate change in Trade and Sustainable Development (TSD) Chapters. It can be seen as reflecting the broader engagement of the EU to combat climate change.

Furthermore, depending on which country we are negotiating with, the inclusion of environmental provisions can be a way to take stock of the progress at the

multilateral level and go beyond them (in terms of scope, depth, or legal nature) or to get the partner country's support on some multilateral issues.

3. Why is the EU dealing with labour and environmental trade-related issues jointly (over the overarching heading of Sustainable Development)?

Sustainable Development (SD) is an overarching policy objective of the EU. There is an international consensus that SD stands on three interdependent and mutually reinforcing pillars: economic development, social development and environmental protection. It is important to pursue an integrated approach in order to avoid to focus on one pillar at the expense of the others and to be able to advance the three of them together.

Indeed, if one looks at countries which address environment and labour separately in their FTAs, one chapter is often more far-reaching than the other one. Furthermore, the need to address environment and labour issues together is not an EU isolated approach, it is also reflected in current private actors' practices. For example, nowadays, some private initiatives such as 'fair-trade' labeling or certifications schemes are based on criteria that take into account both environmental and social aspects.

4. Do you consider the EU approach to be inspired by the US one, as Rok Zvelc is mentioning in one of his paper? If so, what are the most important influences?

In FTAs launched with the 2006 "Global Europe" Communication, the EU started to build its own approach towards the inclusion of labour and environmental provisions in FTAs. The EU based itself first and foremost on the EU Treaties and core EU policy documents (EU SDS 2006, Europe 2020, 2012 Communication on Trade, Growth, and Development). Nevertheless, the EU looked also at international best practices. The EU took some elements from the US approach – similarities can be found on provisions creating a level of playing field between the trade partners for example. But the EU built on those elements driven by its broader value agenda. Finally it is important to mention that the EU's approach is an always-evolving one due to interactions with our trading partners.

5. According to you, do TSD provisions contain some WTO similar language?

Yes, some provisions contain similar language:

- The Marrakech Agreement's Preamble recognizes the link between Trade and Sustainable Development. This link is at the very basis of EU TSD Chapters.
- Article XX of the GATT 1994 (on general exceptions) is repeated in general provisions that apply to the whole FTA. But the principle of non-discrimination and no disguised protectionism is also repeated in TSD Chapters.

6. What is the rationale for including a reference to Multilateral Environmental Agreements (MEAs)? Is it a way to build alliances with a view to influence ongoing MEAs negotiations?

There are different rationales for including a reference to MEAs in TSD Chapters. First, it is a way to support international governance. International instruments are the starting point for environmental protection. There is also a need for international benchmarks as TSD Chapters contain some provisions on a minimum level of playing field with regard to environmental and labour standards. Finally there is also a need to articulate commitments under the FTA and those under MEAs.

7. In some agreements (for example EU-COLPE one article 270 (2) – or EU-CA AA article 287 (2) to “Parties reaffirm their commitment to effectively implement (...) the MEAs to which they are parties including”) a list of MEAs is referred to. On which basis is this list drafted?

Each trade negotiation is the result of its own dynamic but the EU prefers an open approach referring to all conventions that the EU and its trading partner are Parties to, rather than to have a list of MEAs. The latter necessitates to amend the agreement in case one new conventions needs to be referred to. In the examples referred above, the fact that partner countries had been GSP+ beneficiaries may explain why partner countries have asked for such list and serve as a basis to draft it.

8. Do you agree the EU has a cooperative approach with regard to environmental provisions in FTAs?

‘Cooperative’ is too weak, as it is normally intended as an approach which foresees only environmental cooperation provisions. Indeed, EU recent FTAs contain robust and ambitious Trade and Sustainable Development chapters which include some aspirational language but also binding commitments. An effective monitoring, based on transparency, dialogue and cooperation with the involvement of civil society, and dedicated dispute settlement procedures is also provided. Therefore, "engagement-based" would reflect better the nature of the EU approach.

9. Do you feel there is a push from different stakeholders (environmental NGOs, Member-States, the European Parliament) to include trade sanctions to enforce TSD provisions?

There is a push from some NGOs and the European Parliament – but not the Member-States - to include trade sanctions to enforce TSD provisions. Nevertheless, it is important to mention that this has to be seen in context. These calls are made for the current scope of application of TSD Chapters. We do not think that EU stakeholders will be in favour of limited TSD Chapters in terms of scope that would be enforceable through trade sanctions. Also, it seems that stakeholders see trade sanctions as beneficial because of their potential incentive power. It is not sure that they will be keen on actually using trade sanctions.

10. Which EU TSD Chapter do you consider the most robust and comprehensive?

We believe all recently concluded FTAs contain robust and comprehensive TSD Chapters. At the same time, the EU practice on "thematic issues" (e.g. forestry, fisheries) is also evolving over time, and more recent chapters present a more articulated approach to these areas. Additionally, negotiations dynamics with Moldova and Georgia (trade provisions under an Association Agreement), which are

neighbor countries of the EU and therefore part of a broader integration process, may have enabled to reach agreement on slightly deeper TSD provisions.

11. Does the outcome of TSD Chapters vary a lot depending on the context in which negotiations take place (i.e. Association Agreement/Partnership Agreement/ Bilateral FTA)?

The outcome does not vary a lot but the context can influence slightly the negotiations. For example, Association Agreements (AAs) create a framework for cooperation between the EU and a partner country. It has a broader scope than just trade issues and therefore could create more momentum for deeper commitments. Nevertheless, it could also be seen the other way around, partner countries may be reluctant to include some environmental provisions under the trade section on the grounds that similar issues are already addressed under other sections of the AA.

12. Are developing countries generally keen on including environmental provisions in FTAs?

It depends. Each country we are negotiating with has its particular interests and priorities. Some developing countries have taken a very cautious position during the negotiations, while others have been very keen on introducing some provisions on specific areas of interest (e.g. Biodiversity in the EU-COLPER trade agreement).

13. Have implementation mechanisms under the EU TSD Chapter enabled to reach the EU's objectives for the inclusion of environmental provisions in FTAs?

The EU experience relating to the implementation of new FTA generation TSD Chapters is very recent. The EU-Korea Free Trade Agreement, the 1st EU new generation FTA, entered into force in July 2011. The FTA with members of the Andean region, Colombia and Peru, has been provisionally applied with Peru since March 2013 and with Colombia since August 2013. Trade provisions under the EU-Central America AA only apply since the end of 2013. The EU-Moldova and EU-Georgia AAs have been signed, and the EU-Singapore initialed, but none of them is applied yet. Therefore, more hindsight is needed to be able to fully determine whether EU TSD Chapters enable to reach the objectives for the inclusion of such provisions. That being said, EU FTAs SD dedicated chapters are strong, comprehensive and include a dedicated implementation mechanism based on the principles of accountability, dialogue and transparency. The first meetings in June 2012 and September 2013 of the dedicated mechanisms under the EU-South Korea FTA gave positive signals that TSD Chapters provide for an appropriate framework for dealing with trade-related environmental and labour issues.

- Annex 2: May 10 Bipartisan Trade Deal on Environment.
(also available at http://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf)

Environment

- The Administration and Congress have agreed to incorporate a specific list of multilateral environmental agreements (MEAs) in our FTAs.
- The list includes (with abbreviated titles) the Convention on International Trade in Endangered Species (CITES), Montreal Protocol on Ozone Depleting Substances, Convention on Marine Pollution, Inter- American Tropical Tuna Convention (IATTC), Ramsar Convention on Wetlands, International Whaling Convention (IWC), and Convention on Conservation of Antarctic Marine Living Resources (CCAMLR).
- The United States is a signatory to all of these agreements. The United States takes seriously its obligations under these MEAs. We have nothing to fear from taking on FTA commitments for these agreements as well and subjecting those commitments to the FTA dispute settlement process where trade or investment are affected.
- We have also agreed to alter the non-derogation obligation for environmental laws from a “strive to” to a “shall” obligation, with allowance for waivers permitted under law as long as it does not violate the MEA. For the United States, this obligation is limited to federal laws and should not affect our implementation of these laws.
- Finally, we have agreed that all of our FTA environmental obligations will be enforced on the same basis as the commercial provisions of our agreements – same remedies, procedures, and sanctions. Previously, our³ environmental dispute settlement procedures focused on the use of fines, as opposed to trade sanctions, and were limited to the obligation to effectively enforce environmental laws.
- In connection with the Peru FTA, we have agreed to work with the Government of Peru on comprehensive steps to address illegal logging, including of endangered mahogany, and to restrict imports of products that are harvested and traded in violation of CITES.