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Retooling the Sustainability Standards in EU Free Trade Agreements

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ABSTRACT

The EU's weak promotional policy towards sustainability in its free trade arguments is up for revision. Labour and environmental standards need to be tightened. They were given a boost on balance by a remarkable panel ruling of January 2021 in the long-standing EU–Korea labour dispute. Compliance ought to be subject to regular dispute settlement between governments. Sanctions must be added to the EU's toolbox, going beyond trade retaliation. Private stakeholders should become more involved in monitoring and enforcement, both at the international and at the domestic level. All this will put an extra responsibility on the EU and its Member States to protect their labour force and the environment as well.

I. INTRODUCTION

For some 15 years now, the EU has been including labour and environmental standards in its free trade agreements (FTAs) with third countries. Since the 2011 FTA with Korea, these have been set out in a sustainability chapter. The EU's approach so far has been distinct from that followed by others. The EU has preferred what is often referred to as a 'promotional' approach, as opposed to a 'sanctions-based' approach notably favoured by the USA and Canada.

To date, the success of both approaches in making positive changes appears to have been modest at best. On the EU's side, notably the European Parliament, but also several Member States, stakeholders and scholars have been calling for better enforcement, including sanctions. The European Commission, supported by other stakeholders and scholars, has continued to defend the 'promotional' approach, albeit conceding that certain improvements are in order.

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The authors of the present study belong to the critical school of thought. In 2019, we published detailed proposals for improvement of the EU's framework regarding labour standards.[1] We update our critique in the present article, now also covering the environmental angle. To begin with, we propose that the EU firm up the sustainability standards in its FTAs. Further, the EU should meaningfully improve the administration of private complaints about infringements of these standards. Additionally, the separate and weaker international dispute settlement mechanism relating to sustainability standards in the EU's FTAs ought to be abolished; the regular mechanism is a better fit. Finally, to induce compliance with sustainability standards, we advocate the addition of various sanctions to the EU's toolbox.

In European debates one often hears concerns about a lack of sustainability in other countries. Yet, while they may be different, such concerns arise within the EU as well. FTA standards apply in both directions of course.

II. TIGHTENING AND CLARIFYING THE LEGAL STANDARDS

All recent EU FTAs contain chapters dedicated to sustainable development, which comprise a number of environmental and labour standards. These standards fall into three different groups: obligations based on existing international agreements, obligations related to existing domestic legislation, and more aspirational clauses referring to higher levels of protection.

A. Obligations based on existing international standards

The first group encompasses obligations regarding the ratification of international conventions on labour and environmental protection. Notably in respect of labour standards, FTAs may mandate that the parties *ratify* specific international conventions if they have not done so yet.[2] Sometimes this ratification commitment is only formulated as a best effort obligation.[3]

Experience has shown that best-efforts obligations to ratify international conventions can lead to unfortunate complications. Such language ('continued and sustained efforts') was included in the EU's FTA with Korea that entered into force in 2011.[4] Having fruitlessly raised concerns about various Korean labour practices for several years, the Commission finally resorted to dispute settlement proceedings in December 2018. This was the first ever dispute launched by the EU under any of its FTAs, and this particular one was initiated under the mechanism specific to the TSD chapter of the FTA (that the sustainability chapters of the EU's FTAs have dispute settlement

1 Marco Bronckers and Giovanni Gruni, 'Taking the Enforcement of Labour Standards in the EU's Free Trade Agreements Seriously', 56 Common Market Law Review 1591 (2019). This article contains a full set of references to primary and secondary sources regarding labour standards, which will not be repeated here.

2 Article 23.3(4) CETA; Article 13.4(3) EU–Vietnam FTA; Article 16.3(3) EU–Japan FTA; Article 4.4 EU–Mercosur FTA TSD; Article 12.3(4) EU–Singapore FTA; Article 3.4 EU–Mexico FTA TSD; Article 13.4 EU–Korea FTA.

3 Article 4 EU–Mercosur FTA TSD; Article 3.4 EU–Mexico FTA TSD; Article 12.3(4) EU–Singapore FTA; Article 13.4(3) EU–Vietnam FTA; Article 23.3(4) CETA.

4 Article 13.4 EU–Korea FTA.

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mechanisms that are separate from the general ones will be further discussed below, under section IV).

In its ruling of January 2021, the Panel rejected the EU's complaint that Korea had violated its 'continued and sustained efforts' obligation to ratify four of the eight core International Labour Organization (ILO) Conventions (two on forced labour and two on freedom of association). While the Panel found that the FTA imposes ongoing obligations on to make efforts,[5] it noted that Korea did not commit to any specific timeframe to ratify the ILO Conventions.[6] The ruling in this case indicates the limited value of these best-efforts obligations to ratify ILO conventions in the EU's current FTAs. This will likely also fuel concerns in the EU about a similar best-efforts obligation on China to ratify the ILO Convention on forced labour, in the recent investment deal concluded in December 2020.[7] Fixed ratification deadlines in FTAs would be preferable.

A political alternative meanwhile pursued by the EU, after the conclusion of an FTA, is to insist that its FTA partner ratify certain international conventions before the EU will ratify the FTA. This happened when concluding the FTA with Vietnam.[8] It may still happen for example with Brazil in connection with the ratification of the FTA with Mercosur[9] and with China before the EU ratifies the investment deal.

The best-efforts obligation in recent EU FTAs to ratify other international agreements relates to at least the eight core ILO Conventions on the freedom of association, collective bargaining, prohibition of child labour and forced labour, and non-discrimination. In contrast, no EU FTA includes an obligation to ratify environmental conventions. This might be explained by the fact that most of the Multilateral Environmental Agreements (MEAs) considered by the WTO to have relevance for international trade are widely ratified.[10] Nevertheless, not all EU FTA partners have ratified the entire list of such MEAs. For example, Colombia and Singapore have never ratified the United Nations (UN) Fish Stocks Agreement,[11] and Singapore has not signed the Cartagena Protocol to the UN Convention on Biological Diversity.[12] It is unclear why the EU does not routinely insist on the ratification of all these MEAs by its FTA partners.

5 Report, *Panel of Experts Proceeding Constituted under 13.15 of the EU-Korea Free Trade Agreement* (hereafter: *EU-Korea Panel Report*), adopted 20 January 2021, para 278.

6 Ibid, para 291.

7 See Section 7 of the EU–China Comprehensive Agreement on Investment (CAI), 'which for the time being is only an agreement in principle', https://trade.ec.europa.eu/doclib/press/index.cfm?id=2237 (the language used is again 'sustained efforts' towards ratification of the ILO convention on forced labour).

8 Vietnam ratified ILO Convention 98 on collective bargaining in June 2019. See European Commission, *Report on the Implementation of EU Trade Agreements, COM(2020) 705 Final*, adopted 12 November 2020, at 29.

9 This possibility was raised as Brazil has not yet ratified ILO Convention 87 on freedom of association. See Mauro Pucheta, Cesar Álvarez Alonso, and Carlos Ruiz, 'Food Security Measures and Labor Regulations in the EU-MERCOSUR Agreement: An Overview of the Legal Challenges', 8 Revista de la Secretaría del Tribunal Permanente de Revisión 224 (2020), at 240–41.

10 World Trade Organization, *Matrix on Trade Related Measures Pursuant Selected Multilateral Environmental Agreements*, WT/CTE/W/160/Rev.8, adopted 9 October 2017.

11 United Nations Treaty Collection, 'Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Status of Ratifications', https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXI-7&chapter=21&clang=_en.

12 For a list of the Parties to the Cartagena Protocol see https://bch.cbd.int/protocol/parties/.

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A second group of obligations commits the EU's FTA parties to *respect, promote, and realise* fundamental *principles*, even if a party has not ratified the convention that elaborates on a particular principle. This may initially have seemed more of a soft law obligation. Yet the panel in the aforementioned EU–Korea labour dispute in no uncertain terms construed such commitments as hard and binding obligations. The panel actually found that Korea in various ways had infringed the principle of freedom of association, inherent in ILO membership and in a key ILO Declaration.[13] For example, the panel faulted Korea for having excluded self-employed, dismissed, or unemployed workers from joining trade unions.[14] As we will see, the panel's findings in this respect can have important implications also in the environmental area.[15]

A third group obliges the parties in general terms to *effectively implement* the multilateral labour and environmental *conventions* which they did ratify. At other times, the FTAs refer to specific labour and environmental conventions the parties are obliged to implement.[16] For example, the proposed EU–Mercosur FTA,[17] EU–Japan,[18] EU–Mexico,[19] EU–Vietnam,[20] and EU–Singapore[21] contain the obligation to effectively implement the Paris Agreement on climate change.

1. Illustration: the Paris Agreement and Mercosur

The UN Paris Agreement on Climate Change is generally considered not to contain a result obligation beyond a requirement on States to report the actions taken to achieve nationally determined contributions (NDCs).[22] According to some the achievement of the NDCs themselves remains voluntary.[23] Yet others have affirmed that in this respect States have assumed an obligation of conduct, to engage in best efforts to achieve the goals they have set themselves in the NDCs.[24] What does the EU achieve by including an obligation in its FTAs to 'effectively implement' NDCs under the Paris Agreement?

Take a topical example: in its NDC Brazil recorded its intention to achieve, in the Brazilian Amazonia, zero illegal deforestation by 2030, and to restore and reforest 12

13 Report, *EU-Korea Panel Report*, above n 5, paras 120–22, at 196–97.
14 Ibid, para 208–09.
15 See text, below n 27–28.
16 Articles 3.4, 4.2 EU–Mexico FTA TSD; Article 13.4 (4) EU–Vietnam FTA; Article 4.7 EU–Mercosur FTA TSD; Articles 13.4, 13.5 EU–Korea FTA; Article 270.2 EU–Colombia–Peru FTA.
17 Article 6.2 EU–Mercosur FTA TSD.
18 Article 16.4(4) EU–Japan FTA.
19 Article 5.2 EU–Mexico FTA TSD.
20 Article 13.6 EU–Vietnam FTA.
21 Article 12.6(3) EU–Singapore FTA.
22 Article 4(2) Paris Agreement on Climate Change ('Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve').
23 Article 4.2 Paris Agreement ('Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions'). Daniel Bodansky, 'The Legal Character of the Paris Agreement', 25 Review of European Comparative and International Environmental Law 137 (2016); James Crawford, 'The Current Political Discourse Concerning International Law', 81 Modern Law Review 1 (2018), at 21.
24 Benoit Meyer, 'Obligations of Conduct in the International Law on Climate Change: A Defence', 27 Review of European Comparative and International Environmental Law 130 (2018).

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million hectares of forests by 2030.[25] According to the EU's proposed FTA with Mercosur, Brazil accepted an obligation to 'effectively implement' the Paris Agreement.[26] What does this FTA language add to the intentions Brazil expressed under the Paris Agreement?

To begin with, by virtue of the FTA, any doubt has been removed that Brazil's NDC might be considered voluntary. The commitment in the Paris Agreement has been firmed up by the FTA. In respect of the EU at least Brazil would unambiguously accept that its NDC represents a binding commitment (and, vice versa, of course). The aforementioned panel ruling in the EU–Korea labour dispute lends support to this position.[27] While the nature of that commitment is probably not a result obligation, the obligation to *effectively implement* its NDC would at least require Brazil to make its best efforts to achieve its goals under the Paris Agreement. That would give Brazil some margin to argue by 2030 that the result of reforestation, for example, could not be achieved because of certain unforeseen or external obstacles. Brazil also has a choice in the means to achieve this goal. On the other hand, the best-efforts obligation arguably imposes an ongoing obligation on Brazil to demonstrate that it is moving towards its stated goal for 2030.[28] Furthermore, no matter how one reads Brazil's commitment to implement the Paris Agreement towards the EU, it does not depend on whether or not Brazil's environmental policies have an effect on trade with the EU.

Accordingly, it is conceivable that the EU, once Mercosur is ratified, could challenge Brazil's policies under the FTA's bilateral dispute settlement mechanism, claiming that Brazil is not working towards its stated goal and therefore not meeting its best-efforts obligation.[29] But Mercosur's sustainability arrangements are not ideal, as specifics on the implementation of the standards are lacking. Moreover, dispute settlement rulings issued under the mechanism specific to the sustainability chapter are not binding (see further below, under section IV). As a result, if hypothetically Brazil would not comply with a panel ruling, the FTA does not envisage that the EU could take sanctions (although this need not be the end of the story, as discussed further below under section V).

In October 2020, the EU Parliament expressed its opposition to this treaty when adopting a report on EU trade policy.[30] Certain Member States, such as France, are critical as well. Some want to renegotiate Mercosur. The Commission is not in favour of this, but is looking for assurances from Brazil prior to ratification that it is already, and will be, effectively implementing its NDC under the Paris Agreement.[31]

25 Brazil's NDC is available at https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Brazil%20First/BRAZIL%20iNDC%20english%20FINAL.pdf.
26 Article 6.2 EU–Mercosur FTA TSD chapter.
27 Report, *EU-Korea Panel Report*, above n 5, para 107.
28 Compare ibid, para 278.
29 Article 17 of the EU–Mercosur FTA TSD chapter.
30 *Amendment 36 to the 2018 Annual Report on the Implementation of the Common Commercial Policy*, A9-0160/36, https://www.europarl.europa.eu/doceo/document/A-9-2020-0160-AM-036-036_EN.pdf/.
31 Valdis Dombrovskis, 'Statement before the European Parliament during Confirmation Hearing as Commissioner for International Trade', https://ec.europa.eu/commission/commissioners/2019-2024/dombrovskis/announcements/european-parliament-evp-dombrovskis-speech-hearing-commissioner-designate-trade_en/.

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B. Obligations related to domestic legislation

The sustainability chapters of the EU's FTAs also contain clauses on domestic legislation. First, each party's right to regulate labour and environmental issues is confirmed upfront, subject to the proviso that such domestic laws and policies need to be consistent with that party's international commitments.[32] Second, each party is obliged not to lower the level of domestic labour and environmental protection. This is expressed in two ways: FTA parties must not weaken domestic labour or environmental laws (non-regression clause); and parties must not fail to enforce these laws (non-enforcement clause). Both these obligations are conditioned on intended or actual effects on trade and investment.[33] The formulation and operation of these two clauses need clarification.

What is clear is that both clauses are not adding an economic test to the international commitments of the EU's FTAs. In other words, *any* lowering of domestic labour and environmental standards that amounts to a failure to effectively implement the international commitments specified in the FTA (as discussed under A.) constitutes an infringement of the FTA. No link with trade or investment required. What the non-regression and non-enforcement clauses add is that *also* the lowering of domestic protection, even when this does not conflict with a party's international commitments, can be prohibited under the FTA. But then a link with trade or investment is required. Expressed differently, the non-regression and non-enforcement clauses resemble a regulatory safeguard clause: domestic measures or actions that otherwise comply with a party's international commitments can still be enjoined when they become injurious.

How much discipline is exercised by the non-regression and non-enforcement clauses depends on their formulation. Regression is usually characterized as a waiver or derogation from environmental or labour laws. Non-enforcement normally implies sustained or recurring actions or inactions. In addition, a link with trade or investment is required. Sometimes regression or non-enforcement, or both, are prohibited 'in a manner affecting trade'.[34] In other words, these obligations are triggered when trade or investment effects occur, presumably in the relation between the EU and its FTA partner. At other times, regression or non-enforcement, or both, are prohibited as 'an encouragement to trade.'[35] In that case, an intent to affect trade or investment is necessary, but actual effects need not be shown.[36] However, why one or the other link with trade or investment was chosen in respect of non-regression and non-enforcement clauses in a particular FTA is inexplicable.

Prohibiting the regression or non-enforcement of labour or environmental legislation merely on the basis of an *intent* to encourage trade or investment, without a

32 For example, Article 2(1) of the EU–Mercosur TSD chapter.
33 For example, Article 2(3) of the EU–Mercosur TSD chapter.
34 For example, Article 13.3(2) of the EU–Vietnam FTA (non-regression); Article 13.7(1) of the EU–Korea FTA (non-enforcement); Article 13.12 of the EU–Singapore FTA (non-regression and non-enforcement).
35 For example, Article 13.3(3) of the EU–Vietnam FTA (non-enforcement); Article 13.7(2) of the EU–Korea FTA (non-regression); Article 23.4 of the CETA (non-regression and non-enforcement).
36 Ruben Zandvliet, 'Trade, Investment and Labour: Interactions in International Law' (PhD thesis defended at the University of Leiden, Leiden), https://scholarlypublications.universiteitleiden.nl/handle/1887/68881 215.

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showing of appreciable effects or a violation of international commitments, could have a far-reaching impact (especially if the requisite intent would not need to be specifically focused on the relationship between the EU and its FTA partner). For example, in response to the corona crisis, countries such as Indonesia have overhauled labour laws, for example limiting severance payments, in order to attract foreign investment.[37] Yet in its proposal for a sustainability chapter in an FTA with Indonesia, the Commission included a non-regression clause with the intent language.[38] Accordingly, if Indonesia chose to grant temporary or industry-specific waivers or derogations from its general labour laws during the pandemic, this would be problematic under the proposed FTA language. It is not obvious why the EU should want to constrain trading partners who go through hard times, especially developing ones like Indonesia, that much.

On the other hand, having to prove that a lowering of labour or environmental protection actually has trade or investment *effects* may appear so formidable a condition as to render the disciplines of the non-regression and non-enforcement clauses illusory. One is reminded here of the unsuccessful challenge brought by the USA against Guatemala under the Central America Free Trade Agreement (CAFTA).[39] The USA complained notably that Guatemala did not effectively protect the rights of association, amongst others by failing to protect trade union leaders and members against violence. In a ruling issued in 2017 the panel in that case did fault Guatemala on various counts. Yet the panel ultimately found no infringement of CAFTA. The USA had not proven that Guatemala had failed to enforce its labour laws 'in a manner affecting trade' between the parties.[40]

It is notable though that the CAFTA panel did not formulate an exacting trade effects test. According to the panel, the USA should have shown that Guatemala's disputed practices had conferred 'some competitive advantage on an employer or employers engaged in trade with the United States.'[41] This would seem to be a rather low threshold, compared for example to an injury test in ordinary safeguard proceedings, which requires substantial industry-wide repercussions.[42] Yet the CAFTA panel found no evidence that any cost savings that might have accrued to Guatemalan exporters as a result of the alleged enforcement failures provided a competitive advantage.[43]

There is no guidance yet on how the trade or investment effects test in the non-regression and non-enforcement clauses of the EU's FTAs is to be interpreted (note that the aforementioned EU–Korea labour dispute did not involve a violation of the

37 Stefania Palma, 'Indonesia's Parliament Passes Sweeping Reform Bill', *Financial Times*, 5 October 2020.
38 EU-Indonesia FTA, 'Text of the EU proposal for a Sustainable Development Chapter Art. X.2', https://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156111.pdf.
39 See Kathleen Claussen, 'Reimagining Trade-Plus Compliance: The Labor Story', 23 Journal of International Economic Law 25 (2020), at 38–39.
40 Article 16.2.1(a) CAFTA–Dominican Republic FTA with the United States.
41 Dominican Republic—Central America—United States Free Trade Agreement, Arbitral Panel Established Pursuant to Chapter 20, *Guatemala—Issues Relating the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, para 190.
42 Compare, e.g., Article 4 of the WTO Safeguards Agreement.
43 CAFTA panel, para 463.

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FTA's non-regression clause, but of that agreement's international commitments[44]). However, this test may well become a live issue sooner rather than later.

1. Illustration: the EU–UK Trade and Cooperation Agreement

When negotiating its recent trade agreement with the UK, following Brexit, the EU became quite concerned about the UK's new freedom to adopt diverging labour and environmental standards. It was essential for the EU to maintain a level playing field. With this in mind, the EU–UK agreement contains a list of international labour and environmental agreements that are relatively long, compared to the enumeration normally found in the EU's regular FTAs.[45] Nevertheless, such multilateral agreements, including the ILO's conventions, will often leave considerable margin to a developed economy like the UK (or the EU for that matter) to vary or even lower its domestic standards without risking illegality.[46]

To address any remaining concerns the EU and UK included non-regression clauses.[47] In some ways, these clauses are broader in scope than the ones found in regular FTAs. They cover *any* weakening or reduction in domestic levels of labour and environmental protection (i.e. not just waivers or derogations from laws, or sustained or recurring non-enforcement).[48] Another important difference in the EU–UK agreement, compared to regular FTAs, is the remedy stipulated in case a party believes the other has violated a non-regression clause. In such a case, the EU (and, vice versa, the UK) can take far-reaching 'rebalancing measures', i.e. trade or investment-related sanctions. As will be further discussed below, this is a fundamental break with the EU's traditional, softer approach to handling violations of sustainability obligations by its trading partners.[49]

Still, before being authorized to impose rebalancing measures (or countermeasures) the EU would have to demonstrate that the UK's diverging sustainability levels cause trade effects. That test is formulated in the same way as the EU's regular FTAs, as well as the above-mentioned CAFTA ('in a manner affecting trade').[50] While that test's interpretation may not have been an urgent concern so far for the EU in its relations with regular FTA partners, the intensity of its new relationship with the UK will likely demand a resolution. In an early assessment, a leading UK think tank posited that the trade effects test incorporated in the new agreement sets 'a very high bar' for either party when challenging the lowering of labour and environmental standards of the other

44 Report, *EU-Korea Panel Report*, above n 5, para 92.
45 See Title XI, chapter 8 of the EU–UK Trade and Cooperation Agreement (TCA).
46 This remains true, even if the list of international conventions to which the EU–UK agreement refers is relatively long. See Title XI, chapter 8 TCA.
47 Articles 6.2 and 7.2 Title XI TCA. Note that this agreement's 'non-regression clauses' cover both non-regression *stricto sensu* and non-enforcement.
48 Though the parties do retain some discretion regarding the allocation of labour and environmental enforcement resources. See Articles 6.2.3 and 7.2.3 TCA. For similar provisions see Article. 277(3) EU–Colombia–Peru FTA., and Articles 2(5) Sub-sec 2 and 3 Sec IV CAI.
49 See text, below n 97.
50 See above n 34.

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through the non-regression clauses.[51] That is not what one would expect, if the EU–UK agreement is to be interpreted like the above-mentioned CAFTA agreement, which has the same language and sets a relatively low bar.[52]

C. Aspirations towards higher levels of protection

The EU's FTAs also include a range of vaguer provisions to raise the standards of labour and environmental protection.[53] Supposedly, the lack of sanctions has allowed the EU to incorporate more aspirational language in its FTAs.[54] However, there is no evidence that this broader set of aspirations in the EU's FTAs has produced better, more meaningful results than the supposedly narrower set of enforceable norms in the FTAs concluded by the USA and Canada.[55]

It has also been said that because the sustainability obligations in the EU's FTAs are often less clear compliance is more difficult. This would justify their lack of enforceability.[56] The implications of this argument are troubling. Why would it not possible to design robust labour and environmental standards? Making that a priority is commensurate with the attention sustainability deserves. The discussion above of the reference to the Paris Agreement in the EU's FTA with Mercosur shows that the commitments under an international convention can be firmed up through their incorporation in an FTA. If anything is to be added in FTAs it is detail, to make these existing commitments stronger.

And if the presence of weaker provisions is thought to affect the enforceability of more robust norms in the sustainability chapter, the former are best put elsewhere (in an annex or political declaration accompanying the FTA). In case they have not really been found useful, these weaker provisions might also be removed entirely from the FTAs. Once the labour and environmental standards in the EU's FTAs have thus been tightened, this unfortunate objection against their enforceability can be put aside too.

III. IMPROVING PRIVATE INVOLVEMENT

It is increasingly recognized that private stakeholders have a useful role to play in the implementation and enforcement of the sustainability standards governments agree to in international treaties like FTAs.

51 Marley Morris, 'The Agreement on the Future Relationship: A First Analysis' (London: Institute for Public Policy Research, December 2020), at 7.

52 See text, above n 41–43. Then again, the context of the non-regression clause in the EU's regular FTAs, and in the EU–UK agreement, may be different from that of the clause as it appears in CAFTA. See Report, *EU-Korea Panel Report*, above n 5, para 93.

53 For example, Art 22.3 CETA ('… strive to promote trade and economic flows and practices that contribute to enhancing decent work and environmental protection, including by encouraging …').

54 See European Commission, 'Feedback and Way Forward on Improving the Implementation and Enforcement of Trade and Sustainable Development Chapters in EU Free Trade Agreements' (non-paper, 26 February 2018), at 3.

55 See the Commission's annual reports on the implementation of the EU's FTAs, the most recent one relating to 2019 (European Commission, *Report on the Implementation*, above n 8).

56 Denise Prévost and Iveta Alexovicová, 'Mind the Compliance Gap: Managing Trustworthy Partnerships for Sustainable Development in the European Union's Free Trade Agreements', 6 International Journal of Public Law and Policy 236 (2019), at 249; Swedish National Board of Trade, Implementation and Enforcement of Sustainable Development Provisions in Free Trade Agreements—Options for Improvement (2016), at 13.

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A. The international level

The sustainability chapters in the EU's FTAs have established innovative structures to enhance civil society participation in the implementation of labour and environmental standards at the international level. Apart from a governmental Committee on Trade and Sustainability, each FTA establishes a Civil Society Forum, open to participation from both sides. On each side, Domestic Advisory Groups (DAGs) are set up as well. In the EU, they are composed of representatives of the European Economic and Social Committee, labour unions, employer federations, and other civil society organizations.

The operation of these institutions has met with considerable criticisms, focusing on a lack of transparency and accountability.[57] A particular problem related to situations where dialogue and collaboration stagnate, and serious concerns about compliance with the international standards in the treaty partner remained unresolved. A notorious example was the Commission's reluctance to pursue complaints about Korea's labour practices. It took the Commission almost 5 years, until December 2018, to act upon the EU DAG's request and initiate panel proceedings under the FTA with Korea.[58]

In November 2020, the Commission came up with several initiatives to improve its enforcement of the EU's rights under trade agreements. This included a new 'single entry point' at the Commission for businesses and NGOs to raise their complaints about treaty violations by the EU's trading partners.[59] These initiatives are generally positive. They underline that enforcement, also of sustainability standards, has moved up a few notches on the Commission's trade policy agenda.[60]

Regrettably though, while the Commission facilitates the entry of private petitions, for the time being it maintains full discretion to dispose of them. In other words, procedural safeguards, such as those granted to private industry in respect of the EU's trade and intellectual property rights in the EU Trade Barriers Regulation (TBR), are still missing for a broader group of private stakeholders in respect of FTA sustainability standards. We have shown how the TBR could be amended to include these standards.[61]

For private petitioners, TBR complaints offer procedural guarantees, such as a right to time-limited responses, in depth-investigations by the Commission, and judicial control by the European Courts of certain legal assessments. This is especially important for private complaints that are technically complex, present evidentiary problems, or are politically sensitive, and are therefore not readily taken up by the Commission. As the aforementioned, long-standing complaint about Korea's labour practices illustrates, these factors easily play a role regarding private complaints about infringements of FTA labour and environmental standards.

57 For a careful, detailed analysis see Prévost and Alexovicová, ibid, at 244–48.
58 See Report, *EU-Korea Panel Report*, above n 5.
59 European Commission, Operating guidelines for the Single Entry Point and complaints mechanism for the enforcement of EU trade agreements and arrangements (16 November 2020).
60 European Commission, 'Working Approaches to the Enforcement and Implementation Work of DG Trade', (16 November 2020), at 5.
61 For the current version of the TBR, see Regulation 2015/1843, OJ 2015 L 272/1. We proposed detailed amendments in Bronckers and Gruni, above n 1, at 1598–609.

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B. The domestic level

Monitoring and enforcement of labour and environmental standards should not only take place at the international level. It is normally doable for governments to determine whether the domestic laws of their treaty partners correspond with international standards. And in many cases the law on the books does not raise particular problems. The devil often is in the practical application of these laws. This may be more difficult to assess at an international level. Furthermore, inter-governmental complaints involve diplomatic costs.

Accordingly, we would urge that the EU's sustainability chapters always include an obligation on State parties to ensure effective enforcement of their labour and environmental obligations at the domestic level. This is not to say that the EU should change its opposition to 'direct effect' of international agreements, a position shared by all of its FTA partners to date.[62] Instead, the FTA parties should make administrative or judicial remedies available to private stakeholders regarding violations of *domestic* environmental laws. Such private remedies can contribute indirectly to effective implementation of an international standard. They are envisaged in the EU's Comprehensive Economic and Trade Agreement with Canada (CETA).[63] Unfortunately, EU–Mercosur and other EU FTAs do not yet include a similar obligation.

Such an obligation that reaches into domestic enforcement was introduced in considerable detail in the TRIPS Agreement in 1994.[64] Building on TRIPS, the sections on intellectual property of the EU's FTAs, including the proposed agreement with Mercosur, provide for extensive obligations to ensure, for instance, that provisional and precautionary measures, injunctions, and damages are available in the domestic judicial or administrative system to enforce intellectual property rights.[65] In comparison, the lack of detail regarding domestic enforcement of the sustainability standards in FTAs is striking.[66] Admittedly, unlike intellectual property, not much groundwork is available globally in the environmental area. Still, the European Aarhus Convention, albeit a regional convention, could be a source of inspiration.[67] It is true that the EU itself has been found not to comply with the Aarhus convention, by restricting access to administrative and judicial review of measures having an impact on the environment.[68]

62 For example, Article 30.6 of the CETA. On the EU's policy choice, see Aliki Semertzi, 'The Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements', 51 Common Market Law Review 1125–58 (2014).

63 Article 24(6)(1)(b) of the CETA.

64 See Part III of the TRIPS.

65 See, for instance, Section C of the CETA on Enforcement of Intellectual Property Rights, starting at Article 20.32.

66 Compare Section C of the EU–Mercosur FTA proposal on Enforcement of Intellectual Property Rights, starting at Article X.44.

67 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, entered into force on 30 October 2001, and currently has 47 signatories (including the EU). See Ludwig Kramer, 'Citizens' Rights and Administration Duties in Environmental Matters: 20 Years of the Aarhus Convention', 1 Revista Catalana de Dret Ambiental 1 (2018).

68 UNECE, Findings and recommendations of the Compliance Committee with regard to communication CCC/C/2008/32 (part II) concerning compliance by the European Union, 17 March 2017.

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But the Commission is trying to remedy this situation.[69] In sum, obligations on the domestic enforcement of labour and environmental standards should henceforth be incorporated in all EU FTAs.

Finally, improving their involvement in sustainability standards is not only a matter of granting monitoring or enforcement rights to private stakeholders. The EU may also require them to assume obligations under those standards (see further below, under section V.C).

IV. INTEGRATING DISPUTE SETTLEMENT REGARDING ALL FTA COMMITMENTS

For the time being, the arrangements for settling disputes arising under the EU FTAs' sustainability chapters are separated from the disputes arising under the FTAs' other chapters, notably covering trade liberalization and intellectual property protection. There is a growing consensus, at least in scholarship, that this is undesirable.[70] It weakens the credibility of the sustainability standards.[71]

As already pointed out, the argument that labour and environmental standards are less clear and that compliance is therefore more difficult to assess is misplaced.[72] One should be careful not to underestimate what has already been achieved, and how these multilateral commitments can be firmed up bilaterally.[73] Furthermore, as discussed below, the EU presently is considering mandatory sustainability requirements, with sanctions, in respect of EU-based companies and their foreign suppliers.[74] It makes little sense to claim that these requirements are too vague for governments but sufficiently exacting for private stakeholders.

In this connection it is noteworthy as well that a panel, established under the regular dispute settlement mechanism of the bilateral EU–Ukraine Association Agreement, considered in general terms the latter's TSD chapter. The panel noted that many of this chapter's provisions appeared to have a promotional or programmatic character.[75] Nevertheless, it ruled that this chapter provided relevant 'context' to assess the legality of a trade restriction.[76] Moreover, the panel in the EU–Korea labour dispute, specifically established under a sustainability chapter, found a month later that the promotional

69 See the Commission's proposal for an amendment of the Regulation implementing the Aarhus Convention, COM(2020) 642 final, 14 October 2020; Commission Communication on Improving access to justice in environmental matters in the EU and its Member States, 14 October 2020. See Ioanna Hadjiyanni, 'Access to Justice in Environmental Matters in the EU Legal Order – Too Little Too Late?', European Law Blog, 4 November 2020.

70 Marianne Kettunen et al., 'An EU Green Deal for Trade Policy and the Environment: Aligning Trade with Climate and Sustainable Development Objectives' (Brussels/London: Institute for European Environmental Policy, January 2020), at 20.

71 See 'Non-paper from the Netherlands and France on Trade, Social Economic Effects and Sustainable Development', https://nl.ambafrance.org/Non-paper-from-the-Netherlands-and-France-on-trade-social-economic-effects-and, at 20–21.

72 See text, above n 56.

73 See text, above n 24–29.

74 See text, below n 137–39.

75 Final Report of the Arbitration Panel, *Restrictions Applied by Ukraine on Exports of Certain Wood Products to the European Union*, adopted 11 December 2020, para 241.

76 Ibid, para 251.

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character of these commitments did not deprive them of binding force.[77] Accordingly, there is really little or no difference overall in the legal nature of a sustainability chapter compared to the other chapters in an FTA that are subject to regular dispute settlement.

There is also no great difference between the current method of settling disputes on trade-related commitments as opposed to labour and environmental standards in the EU's FTAs. Sometimes, the procedural provisions on trade-related dispute settlement even apply *mutatis mutandis* to disputes under the sustainability chapters.[78] In both mechanisms the dispute is referred to independent experts. In both mechanisms, these experts are supposed to make findings on the compatibility of the disputed measure (or lack thereof) with the treaty standard. In both mechanisms, an infringement of the relevant international standards does not require a showing of trade effects.

The key difference is what happens after the experts have made their findings. An infringement finding in respect of sustainability standards is not binding, but merely an element in the parties' ongoing attempts to conciliate their dispute.[79] Sometimes these rulings may not even be published, or only with considerable delay.[80] The lack of binding effect downgrades the impact of the panel's ruling. There is no good reason to muzzle independent third party adjudication where sustainability standards are at stake.

Another related difference with regular dispute settlement is that if the defendant country refuses to bring itself into compliance with the sustainability standards, no sanctions are envisaged. This EU policy is misguided.

V. ADDING SANCTIONS TO LABOUR AND ENVIRONMENTAL STANDARDS

A variety of old and newer arguments against any kind of sanctions in respect of violations of labour and environmental standards have been raised recently.[81] Before addressing these in more detail, a few misconceptions need to be highlighted upfront. In our view, adding sanctions to the EU's sustainability chapters does not mean a rejection of the 'management' or 'promotional' approach so far favoured by the EU. The USA as well, though identified with a sanctions-based preference by some, is very much involved with managing the labour commitments of its trading partners through close cooperation. There is, according to one former participant, near constant engagement

77 See above n 13–14.

78 Prévost and Alexovicová, above n 56, at their footnote 147.

79 For example, Article 17 (11) of the EU-Mercosur FTA TSD chapter.

80 Some FTAs do not prescribe publication of the reports of panels of experts asked to rule on a dispute regarding labour or environmental standards. Prévost and Alexovicová, above n 56, at 251.

81 See notably Gracia Marín Durán, 'Sustainable Development Chapters in EU Free Trade Agreements: Emerging Compliance Issues', 57 Common Market Law Review 1031 (2020), at 1058–65. Prévost and Alexovicová, above n 56, at 242, are opposed to sanctions as well. And so are Katerina Hradilová and Ondrej Svoboda, 'Sustainable Development Chapters in the EU Free Trade Agreements: Searching for Effectiveness', 52 Journal of World Trade 1019 (2018), at 1021.

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with foreign partners by USTR and the US Department of Labor (DOL) on these matters.[82]

Sanctions are not an alternative, but a complement to the dialogue and cooperation inherent in the promotional approach towards sustainability commitments.[83] That approach can be strengthened, for instance by offering technical assistance to promote labour and environmental standards notably by developing countries. Reinforcing joint monitoring, including shaming, mechanisms following a dispute settlement ruling could be useful as well.[84] Sanctions only come into play when dialogue and cooperation have failed to produce results. They add an extra layer in the treaty to secure compliance.[85] There may still be cases where even sanctions do not produce change. But that is no reason not to add sanctions in respect of standards that both treaty parties agree to be binding. Sanctions are an improvement, not a guarantee towards compliance.

The Montreal Convention is an example from the environmental area that supports this proposition. In case one of its parties fails to comply with its obligations, various amicable incentives (including technical assistance) have been provided to encourage compliance.[86] Should these not produce the desired result, however, the membership can collectively decide to impose trade sanctions, i.e. to restrict trade in the substances covered by the Protocol. This arrangement seems to have worked in several cases.[87] It is of note that the EU and its Member States are a party to the Montreal Convention, and on this occasion did accept a range of compliance inducement measures, including both incentives and sanctions.

Another misconception is that in respect of labour and environmental standards sanctions are inappropriate because, contrary to a trade norm, it would be difficult to calculate the damage caused by their violations.[88] However, if the EU were to impose a sanction against a non-complying treaty partner (or vice versa), the objective is not to obtain 'reparation' or compensation in public international law terms. The objective of a sanction, that is a temporary 'reprisal' or countermeasure, is to induce the recalcitrant treaty partner into compliance. Such a countermeasure needs to be proportional. Proportionality can be expressed in a number of factors, but it does not only depend

82 Claussen, above n 39, at 33. For a comparison between stakeholder involvement in the EU, Canada and the US see also ILO, *Assessment of Labour Provisions in Trade and Investment Agreements* (2016), 130–55 (describing stakeholder involvement during the negotiation and implementation stages of labour standards in FTAs negotiated by the three jurisdictions).

83 A similar conclusion was reached following an analysis of the environmental provisions in US FTAs. See Yillt Vanessa Pacheco Restrepo, 'Enforcement Practice Under Preferential Trade Agreements: Environmental Consultations and Submissions on Environmental Enforcement Matters in the US-Peru TPA', 46 Legal Issues of Economic Integration, 247 (2019) at 262.

84 This was emphasized by Prévost and Alexovicová, above n 56, at 250.

85 For a different, in our view mistaken, hypothesis see ibid, at 242 ('sanction mechanisms seem to aim more at appeasing public opinion in the short term than at improving TSD [trade and sustainable development] implementation in the long term').

86 Montreal Protocol, Annex II: Non-compliance procedure (1998); Annex V: Indicative list of measures that might be taken by a Meeting of the Parties in respect of non-compliance with the Protocol.

87 See Anna Huggins, 'Administrative Procedures and Rule of Law Values in the Montreal Compliance System', in Christina Voigt (ed.), *International Judicial Practice on the Environment: Questions of Legitimacy* (Cambridge: Cambridge University Press, 2019) 339–63.

88 Marín Durán, above n 81, at 1063.

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on the damage caused by the violation. Examples can be found in the financial penalties imposed on EU Member States that fail to bring themselves into compliance with European Court rulings. These penalties concern infringements of various EU laws, including environmental norms.[89] The USA in some of its FTAs, for instance with Peru, already envisages monetary assessments in response to persistent violations of environmental standards by either party.[90]

A final misconception worth mentioning relates to the difficulties that have been encountered in enforcing labour norms through dispute settlement, which would render illusory any thought of trade sanctions.[91] The single case always cited in this respect is the recent, unsuccessful challenge by the USA about certain labour practices in Guatemala.[92] However, this case does not demonstrate that dispute settlement or sanctions work less well in respect of labour (or environmental) standards compared to trade rules. What this case demonstrates is that the trade effects test as part of a sustainability standard may be difficult to meet in practice.

A. Trade retaliation

The traditional mechanism to induce compliance with a trade agreement has been retaliation against the offending country, i.e. the suspension of a trade concession set forth in that agreement (i.e. raising tariffs, or imposing other restrictions normally prohibited by the agreement). It is by now well recognized, however, that retaliatory measures are far from ideal. They are not really effective in the hands of smaller or weaker countries seeking compliance from a bigger treaty partner. They impose a cost on the retaliating treaty partner itself (e.g. a tariff increase makes the supplies from the offending country more expensive, and imposes costs on companies, workers, and/or consumers in the retaliating country that have nothing to do with the underlying dispute about trade, labour, or environmental standards).[93]

Nevertheless, it is noteworthy that the EU does envisage trade sanctions in the event certain developing countries, to which it has granted unilateral trade preferences, violate multilateral human rights, labour, or environmental standards. In such cases, the EU reserves the right to withdraw benefits under the so-called Generalised System of Preferences (GSP) .[94] The EU has proven to be very reluctant to do so, however. A rare example in respect of labour standards is the Commission's recent, partial withdrawal of GSP preferences from Cambodia, which entered into force in August 2020. In this case, the Commission found that Cambodia had engaged in a serious and systematic

89 For example, CJEU, Case C-261/18, *Commission v. Ireland* (2019) ECLI:EU:C:2019:955 (Ireland to pay a lump sum fine of €5 million, and a penalty of €15.000 for each day until compliance with earlier Court ruling regarding failure to conduct environmental impact assessment regarding a wind farm project).

90 See Pacheco Restrepo, above n 83, at 255.

91 Hradilová and Svoboda, above n 81, at 1037.

92 For a discussion see text, above n 39–51.

93 Marco Bronckers and Freya Baetens, 'Reconsidering Financial Remedies in WTO Dispute Settlement', 16 Journal of International Economic Law 281 (2013); Marín Durán, above n 81, at 1059–60.

94 See Article 19(1)(a) Regulation (EU) No 978/2012 (the 'GSP Regulation'), OJ 2012 L 303/1.

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violation of, amongst others, principles of core ILO Conventions.[95] A complaint by labour unions that the Commission should also have considered a similar action against Bangladesh, responding to the latter's failure to respect fundamental labour and human rights, was recently rejected by the European Ombudsman.[96]

Outside the context of GSP, the EU for a long time did not provide for trade sanctions in response to violations of sustainability standards by its trading partners. As explained above though, this has now changed with the advent of the new EU–UK Trade and Cooperation Agreement. Trade and investment sanctions can be imposed in the event one of the parties lowers its labour or environmental levels of protection in a manner that affects trade or investment.[97]

With the renewed emphasis of the Von der Leyen Commission on enforcement of trade agreements, the EU has been paying increasing attention to the possibilities it has to retaliate and take countermeasures against treaty violations of other countries. Concerns about worsening trade relations with the USA and China are an explanation. The crisis in the WTO and its dispute settlement mechanism has sharpened the EU's focus.[98] In a recent amendment to its so-called Enforcement Regulation, the Commission has been given additional powers to take countermeasures and to do so unilaterally notably when WTO dispute settlement is being frustrated by one of its trading partners.[99] However, the amended Enforcement Regulation does not yet envisage the Commission taking countermeasures in the event an FTA partner is seen to contravene its sustainability commitments.

1. Excluded by FTA law?

The softer dispute settlement mechanism, as well as the lack of sanctions, in the EU's sustainability chapters may have led many stakeholders to believe that countermeasures are not an option. In legal terms, a sustainability chapter with its own dispute settlement mechanism may appear to constitute a *lex specialis,* excluding the general rules on state responsibility, including countermeasures.[100] To us this seems a step too far.

It is one thing to say that the dispute settlement mechanism of the TSD chapters is a *specialis* in respect of, and therefore excludes, the FTA's general dispute settlement mechanism. It is quite another thing to say that the dispute settlement mechanism of

95 Commission Delegated Regulation (EU) 2020/550, OJ 2020 L 127/1 (currently on appeal before the General Court, Case T-454/20 *Garment Manufacturers Association in Cambodia/Commission*).

96 European Ombudsman, Decision in cases 1056/2018/JN and 1369/2019/JN on the European Commission's actions regarding the respect for fundamental labour rights in Bangladesh in the context of the EU's Generalised Scheme of Preferences (24 March 2020).

97 See text, above n 47–49.

98 For example, Marco Bronckers, 'Trade Conflicts: Whither the WTO?', 47 Legal Issues of Economic Integration 221 (2020); Ignacio Garcia Bercero, *What Do We Need a World Trade Organization For? The Crisis of the Rule-Based Trading System and WTO Reform* (Gütersloh: Bertelsmann Stiftung, 2020).

99 Regulation 2021/167, OJ 2021 L49/1. For a discussion of a draft of the amendment see Wolfgang Weiss and Cornelia Furculita, 'Assessing the Proposed Amendments to Trade Enforcement Regulation 654/2014', 23 Journal of International Economic Law 865 (2020).

100 Weiss and Furculita, ibid, at 882.

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the TSD chapters is a *specialis* in respect of international law generally. We see no reason to assume that the TSD dispute settlement mechanisms implicitly exclude all or unspecified parts of international law.

When analysing the *general* dispute settlement chapters of the EU's FTAs, it has been noted that they rarely, if ever, contain an explicit exclusivity provision like the WTO.[101] Because countermeasures under public international law have not been explicitly excluded in these chapters, the argument is then made that the EU has the choice between taking countermeasures and initiating FTA dispute settlement proceedings.[102] That the same silence on countermeasures in the *TSD* dispute settlement chapters would have to be interpreted differently, and block them, is unconvincing.

Now the wording of some of the EU's TSD chapters might suggest that the parties specifically intended to exclude countermeasures, as is the case with the WTO. This occurs when the dispute settlement mechanism of a particular sustainability chapter provides that disputes can 'only' be submitted under the specific dispute settlement arrangement set out in that chapter.[103] Still, rather than excluding countermeasures, this wording might not imply more than that recourse to the FTA's general dispute settlement chapter is excluded for disputes about the FTA's labour or environmental norms. One would have expected more elaborate language if the parties had intended to exclude the application of public international law on remedies generally.[104] This also goes back the point just made: the FTAs' general dispute settlement mechanism is not considered to contain an exclusivity provision. One really hangs too much weight then on one word, 'only', in the TSD mechanism to exclude not just the general mechanism but also public international law generally.

In any event, other FTAs (such as the proposed EU–Mercosur treaty) do not include this 'only' language and offer firmer ground for the EU to take countermeasures.

2. Excluded by international law?

The general rules on state responsibility do give the EU a choice: unless several conditions are met, an injured party remains free to impose countermeasures against the wrongdoing state (once it has called upon the wrongdoer to cease the offending conduct and has offered to negotiate to avoid countermeasures).[105] The initiation of dispute settlement proceedings by itself, let alone the mere existence of a dispute settlement mechanism, does not exclude the right to countermeasures. The offending act also needs to be withdrawn. Moreover, international law imposes further conditions

101 Article 23 of the WTO Dispute Settlement Understanding, pursuant to which the WTO Members have relinquished their right to take unilateral countermeasures regarding WTO violations.

102 Weiss and Furculita, above n 99, at 878–79.

103 See Article 12.16(1) EU-Singapore FTA. See Marín Durán, above n 81, at 1047.

104 Compare, for instance, the detail of the exclusivity provision in Article 23 of the DSU.

105 James Crawford, *Brownlie's Principles of Public International Law,* ninth ed. (Oxford: Oxford University Press, 2019), 573; Danae Azaria, *Treaties on Transit of Energy via Pipelines and Countermeasures* (Oxford: Oxford University Press, 2015) 163–65; Weiss and Furculita, above n 99, at 874–75.

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on dispute settlement proceedings (such as their bindingness), before they could nullify an injured party's right to take unilateral countermeasures.[106] As discussed above, at present the dispute settlement mechanisms relating to the sustainability chapters in various FTAs of the EU (such as the proposed agreement with Mercosur) lack a binding character.[107]

With respect to multilateral conventions on environmental protection, notably those protecting the global commons such as the Montreal Convention (or the Paris Agreement), it has been argued that under international law states would be entitled to react to a breach of the treaty with demands for cessation and assurances, and guarantees of non-repetition. Yet individual parties would not be able to take countermeasures to reinforce their demands for cessation and assurances or guarantees, if they were denied. The reason given is that no individual state (or international organization) could be deemed to be an injured party in these circumstances.[108] Be that as it may, by incorporating such multilateral conventions in an FTA, the obligations regarding the global commons would be owed to each of the FTA parties individually. For example, incorporating the Montreal Convention in the EU's FTAs adds bilateral monitoring and enforcement to the Convention's collective arrangements,[109] including the possibility for each FTA party to take countermeasures.

One might still hesitate though, as countermeasures are subject to a proportionality principle: they must be commensurate with the injury suffered by the offended state or international organization.[110] As it is difficult to measure the injury suffered by an individual country resulting from interference with the global commons, this might be seen to preclude the right to take countermeasures. However, it is not necessary to assess proportionality only in quantitative terms. Qualitative factors, such as the importance of the interest protected and the seriousness of the breach, must also be taken into account.[111] This is in fact how the European Court of Justice assesses the proportionality of financial penalties in response to persistent obligations of an environmental obligation by an EU Member State.[112]

3. Excluded by WTO law?

A final objection to imposing trade sanctions by way of countermeasures, in response to violations of a sustainability chapter, is that such sanctions could violate WTO law.

106 See Article 52(3) ILC, Draft Articles on State Responsibility (2001), as well as the ILC Commentary on this provision, para 8. See also Federica Paddeu, 'Countermeasures', in Anne Peters (general ed.), *Max Planck Encyclopedias of International Law* (Oxford: Oxford University Press, 2015), para 37 (listing the cumulative conditions to be met for the exclusion of countermeasures).

107 See text, above n 79.

108 See Article 49ff of the ILC Draft Articles on State Responsibility (2001) (referring to an 'injured state'); Jacqueline Peel, 'New State Responsibility Rules and Compliance with Multilateral Environmental Obligations: Some Case Studies of How the New Rules Might Apply in the International Environmental Context', 10 Review of European, Comparative and International Environmental Law 82 (2002), at 86 and 92.

109 Compare text, above n 27–29.

110 Article 51 of the ILC, Draft Articles on State Responsibility (2001); see also Article 54 of the ILC, Draft Articles on the Responsibility of International Organizations (2011).

111 See ILC Commentary on Article 51 ILC, Draft Articles on State Responsibility (2001), notably para 6.

112 See text, above n 89.

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Raising preferential tariffs in respect of a non-complying FTA partner back to MFN levels, bound in the GATT, is normally WTO legal.[113] Such tariff increases might rebalance the trade effects caused by the lowering of domestic levels of labour and environmental protection (see above, under section II.B). On the other hand, raising tariffs above bound levels, or imposing an import ban, in order to induce an FTA partner to comply with its international labour or environmental commitments (see above, under section II.A) would be more problematic. Such measures do infringe WTO law.[114]

Even if these GATT-inconsistent measures would only apply to the FTA partner, they might not be covered by the exception for FTAs.[115] WTO precedent suggests that such a trade restriction enforcing an FTA's bilateral standards could not be justified under the GATT's public policy exception for enforcement measures either.[116] If the banned goods themselves were not implicated in the violation of the labour or environmental standards (e.g. were not made with forced labour), but were merely chosen to exert pressure on the FTA partner to bring itself into compliance, they would not be covered by the GATT's other public policy exceptions (for instance, regarding the protection of the importing country's public morals[117]).

But the question is whether any particular justification under WTO law is needed. This gets us to the fraught relationship between WTO and non-WTO law. We submit the following view. The countermeasures discussed here are twice removed from the WTO: they are connected to a violation of another international agreement, and in respect of obligations (labour or environmental standards) that are outside of the scope of WTO law. Accordingly, a WTO panel might decide that the dispute is inextricably linked to another treaty for which the Panel does not have substantive jurisdiction.[118] Such an objection to a WTO panel's jurisdiction could be stronger if a countermeasure was taken following recourse to an FTA's bilateral dispute settlement mechanism.[119] But this is not the case where an FTA party, dissatisfied with its

113 Unless the tariff increases would cover so many products that the FTA overall no longer meets the requirement that its tariff preferences cover 'substantially all the trade.' See Article XXIV(8)(b) GATT.

114 Articles I, II or XI, XIII GATT.

115 Article XXIV GATT, as interpreted by WTO Appellate Body Report, *Turkey—Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, adopted 22 October 1999, paras. 57-58, and echoed in WTO Appellate Body Report, *Peru–Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/R, adopted 27 November 2014, paras. 5.114-116. See Gregory Shaffer and Alan Winters, 'FTA Law in WTO Dispute Settlement: Peru–Additional Duty and the Fragmentation of Trade Law', 16 World Trade Review 303 (2017), at 320–22.

116 Article XX(d) GATT, as interpreted by WTO Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 6 March 2006, para 77–79.

117 Article XX(a) GATT, as recently interpreted by WTO Panel Report, *United States—Tariff Measures on Certain Goods from China,* WT/DS543/R, adopted 15 September 2020, para 7.178ff (US tariffs on wide range of goods faulted for not having sufficient nexus with the public morals invoked by the USA).

118 Joost Pauwelyn, 'How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law', 37 Journal of World Trade 997 (2003), at 1027–28. But see Lorand Bartels, 'Jurisdiction and Applicable Law in the WTO' (SIEL Working Paper No. 2016/18, 2016), paras 2.3.3 and 3.5 (who does not seem to recognize this limitation on the jurisdiction of WTO panels).

119 This could perhaps be seen as a 'mutually agreed solution' within the meaning of Article 3.7 of the DSU. See Michelle Q. Zang, 'When the Multilateral Meets the Regionals: Regional Trade Agreements at WTO Dispute Settlement', 18 World Trade Review 33 (2019), at 43–45 (being sceptical that the mere existence of a bilateral dispute settlement mechanism qualifies).

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FTA partner's sustainability record, resorts to a unilateral countermeasure bypassing the bilateral mechanism.

While accepting jurisdiction, a WTO Panel could still reject a WTO law complaint about such a unilateral countermeasure on the merits. Recalling that WTO law does not operate in clinical isolation from public international law,[120] the Panel ought to assess whether any WTO violation might be extinguished by the law on countermeasures of international law. Admittedly, the Appellate Body has shown great reluctance to accept FTA-based justifications of WTO violations.[121] Yet this reluctance to recognizing FTA law has been criticized with reference to the conflict rules in public international law.[122]

Applying non-WTO law is even more compelling in a case where the trade restriction is a countermeasure linked to the FTA's sustainability rules. These rules do not modify the WTO; they fall outside its remit. In such a case the Panel should at least *prima facie* assess the labour or environmental claims underlying the countermeasure. If these sustainability-related claims appear well founded, then a countermeasure would normally be justified under international law.[123] This defence, which is unlike 'adjudication' of self-standing FTA or sustainability claims,[124] ought to be recognized in WTO litigation. Otherwise, a party that has not breached directly relevant international law would be condemned by the WTO. To date, no litigant has squarely presented these questions to a WTO Panel or the WTO Appellate Body.[125]

In sum, trade retaliation is by no means ideal as a compliance inducement measure. This is not only true in respect of the sustainability standards but regarding the other chapters of the FTA as well. Still, in the absence of alternatives, trade retaliation can be a necessary enforcement option in case all other efforts to promote compliance with the FTA's rules have failed. For that hopefully exceptional situation, the Commission should receive powers to impose trade sanctions by way of countermeasures also against violations of FTA sustainability standards. A further amendment to the EU's Enforcement Regulation is in order.[126]

120 WTO Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline,* WT/DS2/AB/R, adopted 29 April 1996, para 17.

121 See above n 115.

122 Shaffer and Winters, n 115, at 320–21 (notably referring to *inter se* modifications envisaged in Article 41 VCLT); Pieter Jan Kuijper, 'Does the World Trade Organization Prohibit Retorsions and Reprisals: Legitimate "Contracting Out" or "Clinical Isolation" Again', in Merit E. Janow et al. (eds), *The WTO: Governance, Dispute Settlement & Developing Countries* (Huntington, NY: Juris Publishing, 2008), 695, 704 and 706–07 (notably referring to *lex posterior* and *lex specialis* principles).

123 Unless the conditions, blocking countermeasures under international law, are met. See Article 52(3) Draft Articles on State Responsibility (2001), discussed above, text, above n 106.

124 Self-standing claims can only be based on a 'covered agreement', per Article 1.1 of the DSU.

125 Kuijper, above n 122, points out that Mexico chose not to argue these fundamental points of public international law in the Appellate Body Report, *Mexican Soft Drinks* case, above n 116, a point highlighted as well by Gabrielle Marceau and Julian Wyatt, 'Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO', 13 Journal of International Economic Law 67 (2010), at 74 (their view being that removing countermeasures from the scope of WTO law probably runs counter to the original intentions of the WTO Members). The Appellate Body Report, *Peru* case, above n 121 does not settle these questions either.

126 See text, above n 99. In particular, preamble 10 of Regulation 2021/167 is in need of adaptation and implementation.

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B. Financial penalties

For some time now, alternatives are being explored to avoid the disadvantages of trade sanctions. Financial penalties have become more prominent as a compliance inducement mechanism. Canada proposed to include them as a sanction in CETA, but this was rejected by the EU.[127] The CPTPP, which includes many of the EU's preferential trading partners, also provides for the payment of a monetary penalty in lieu of trade sanctions in its dispute settlement mechanism.[128] The European Parliament endorsed the possibility of including financial penalties as an inducement mechanism in the EU's FTAs already in 2010. Yet the Commission did not even discuss this possibility in its non-paper of 2018.[129]

Commentators have raised various criticisms regarding the inclusion of financial penalties in the EU's FTAs. One suggestion has been[130] that the EU would never accept having to pay larger penalties in case of non-compliance than a smaller or weaker treaty partner. This speculation is unfounded. Such differentiation is part of the EU's own traditions. When financial penalties are established in respect of EU Member States that refuse to bring themselves into compliance with EU obligations following a European Court ruling, ability to pay off the offending country (notably, its GDP), and duration and severity of the infringement are key factors.[131]

That it is not clear yet how such factors would apply in relation to third countries is unsurprising, as the EU to date has rejected financial penalties in its FTAs. Questions have been raised in particular regarding labour standards of Member States, in respect of which the EU has no competence. Could a Member State be held responsible by the EU for a labour law that violates the EU's FTA?[132] Any doubt on that score was recently removed by the European Court, holding that Hungary infringed EU law by imposing restrictions on universities that fell within its competence, but that were inconsistent with WTO law.[133]

On a more practical level, another question that has been raised is whether financial penalties imposed by a FTA tribunal would have to come out of the collective budget of the EU.[134] Suffice it to say that similar questions have arisen in respect of investment protection agreements concluded by the EU under its exclusive competence, in the event a Member State measure violates an investment standard. These questions

127 Billy Melo Araujo, 'Labour Provisions in EU and US Mega-regional Trade Agreements: Rhetoric and Reality', 67 International and Comparative Law Quarterly 233 (2018), at 242; Thomas Fritz, 'Analysis and Evaluation of the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada' (Hans-Böckler-Foundation Project Number 2014-779-1, 26 January 2015), at 29.

128 Article 28.20(7) of the CPTPP. This trade agreement includes a large number of countries with which the EU already has FTAs in place (Canada, Chile, Japan, Peru, and Singapore), or is still negotiating or finalizing FTAs (Australia, Mexico, New Zealand, and Vietnam).

129 See above note n 54; Bronckers and Gruni, above n 1, at 1614 and 1616–17.

130 Marín Durán, above n 81, at 1061.

131 *Commission v. Ireland*, above n 89, para 133. For the Commission's latest Communication on the calculation of financial penalties see OJ 2019, C 309/1.

132 Marín Durán, above n 81, at 1051.

133 CJEU, Case C-66/18, *Commission v Hungary* (2020) ECLI:EU:C:2020:792, para 81ff.

134 Marín Durán, above n 81, at 1061.

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have been resolved through legislation. Unless the Member State measure is required by Union law, the Member State shall bear financial responsibility.[135]

In short, there is no ground to suggest, *a priori*, that the EU in relation to FTA partners would not accept a system of differentiated financial penalties. On the contrary, if financial penalties become the regular inducement towards compliance with labour and environmental norms, an important principled objection to sanctions in the context of sustainability would be addressed. As the Commission's Director General for Trade, Sabine Weyand, recently cautioned, trade measures cannot make up for all the weaknesses in the governance of international climate policy for instance.[136]

C. Targeted sanctions

The EU is also contemplating a variety of more targeted measures. The difference with the trade sanctions discussed above is that the EU leaves the trade concessions granted to its FTA partner in place. Instead, individualized shipments of goods, or entities, implicated in the violation of sustainability standards will be targeted for restriction. For these targeted sanctions to apply, it does not appear to be a prerequisite that the multilateral conventions on labour or the environment have been incorporated in a bilateral FTA.

To begin with, targeted sanctions may be added by the EU in new legislation mandating *EU-based companies* across-the-board to respect sustainability requirements throughout their supply chain. In the consultations initiated by the Commission in October 2020, a range of options has been put on the table. For instance, companies might be fined or become liable with respect to human rights or environmental harm caused by their subsidiaries or supply chain partners located in a third country.[137] France already enacted a law, imposing certain due diligence requirements on large French-based companies and their foreign subsidiaries, in 2017.[138]

As part of its Green Deal project, the Commission is now also reconsidering sectoral legislation. For example, according to a new proposal the Commission wants to regulate the entire supply chain of batteries and is considering imposing new sustainability requirements.[139] Some Member States as well have taken action to enforce international sustainability standards in selected sectors. The Netherlands, for instance, can exclude timber from public procurement whenever the bidder is unable to demonstrate

135 See Article 3 of the Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the EU is party, OJ 2014 L 257/121.

136 Editorial Comment, 'Week in Brussels: Cyber, Ireland, Paris Agreement, Netherlands, Cocoa', Borderlex, 25 September 2020 (reporting on remarks of Sabine Weyand at webinar on the EU's trade policy review).

137 Commission consultations on Sustainable Corporate Governance, notably at Question 19, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/. The EU already established a reporting obligation regarding certain sustainability issues in Directive 2014/95/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ 2014 L 330/1.

138 For an analysis of the first years of application of this law, see Conseil général de l'économie, 'Evaluation de mise en œuvre de la Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre', January 2020.

139 See the Commission's draft for a new Batteries Regulation, COM(2020) 798/3 (10 December 2020).

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that its timber has been harvested in compliance with various international sustainability standards, including a number of ILO Conventions as well as CITES—even when the harvesting country has not ratified them.[140]

Furthermore, one could think of sanctions targeted at *foreign individuals or companies*, responsible for egregious violations of labour or environmental standards.[141] In respect of labour standards, one proposal took a leaf out of the sanctions applied by virtue of the EU's Common and Foreign Security Policy in response to human rights violations. Blacklisted individuals have seen their assets in the EU frozen and are subject to travel restrictions. The same or a similar procedure could be envisaged in respect of those accountable for systematic and repeated labour standard violations.[142] Sanctions in response to human rights violations are becoming mainstream. They recently found a regular legal basis in the EU, and no longer need to be taken each time on an *ad hoc* basis.[143] Nevertheless, the adoption of human rights–related restrictions requires unanimity amongst the 27 EU Member States, which can be quite an obstacle.[144]

An alternative would be to impose targeted restrictions on *imports of goods* made with forced labour. Of interest in this connection is the 'entity list' the USA has established. US Customs will deny entry to goods from companies (entities) employing forced labour.[145] The Canada and the United Kingdom also adopted legislation early in 2021 to curb imports of goods made with forced labour.[146] The EU as well could adopt 'targeted sanctions' in respect of such goods, with reference to the ILO's core conventions.[147] As sustainable development forms an integral part of the EU's commercial policy, and reference would be made to existing international conventions to

140 See the Dutch Timber Procurement Policy, August 2014, https://www.tpac.smk.nl/Public/TPAC%20documents/DutchFrameworkforEvaluatingEvidenceofCompliancewithTimberProcurementRequirements_AUG2014FINAL.pdf. The Dutch system goes beyond the requirements presently envisaged in the EU Timber Regulation (Regulation 995/2010, OJ 2010 L 295/23) and the EU Procurement Directive (Directive 2014/24, OJ 2014 L 94/65).

141 Bronckers and Gruni, above n 1, at 1617–18.

142 Clara Portela, 'Enforcing Respect for Labour Standards with Targeted Sanctions', Core Labour Standards Plus Project (Singapore: Friedrich-Ebert-Stiftung, 2018), https://www.fes-asia.org/news/enforcing-respect-for-labour-standards-with-targeted-sanctions/, at 10–14.

143 See Council Regulation (EU) 2020/1998, and Council Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses, OJ 2020 L 410I. For an early commentary see Yuliya Miadzvetskaya, 'Habemus a European Magnitsky Act', European Law Blog, 13 January 2021.

144 See Article 5 of Council Decision (CFSP) 2020/1999.

145 Aime Williams, 'US Pivot to Forced Labour Sanctions has Implications for Western Companies', *Financial Times*, 22 July 2020; Congressional Research Service, 'Section 307 and Imports Produced by Forced Labour', IF11360, 20 July 2020.

146 Jasmine Cameron-Chileshe, 'UK Companies Face Fines over "Slave Labour" China Suppliers', *Financial Times*, 12 January 2021.

147 ILO Forced Labour Convention 1930; ILO Freedom of Association and Protection of the Right to Organise Convention 1948; ILO Right to Organise and Collective Bargaining Convention 1949; ILO Equal Remuneration Convention 1951; ILO Abolition of Forced Labour Convention 1957; ILO Discrimination Convention 1958; ILO Minimum Age Convention 1958; ILO Worst Forms of Child Labour Convention 1999.

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which the EU and/or its Member States are a party, the EU could impose such targeted sanctions as a unilateral trade policy measure. This would allow decision-making by qualified majority.[148]

Having to go through the ordinary legislative procedure to impose such import restrictions on an *ad hoc* basis is cumbersome though. Accordingly, an enabling regulation would be welcome. Since 2010, the European Parliament has been asking the European Commission to come up with a proposal to ban imported goods made with forced labour more easily.[149] Yet the Commission has been reluctant to do so. In January 2021, the Commission's Director General for Trade, Sabine Weyand, indicated informally she wanted to fully use, if not expand, the EU's toolbox. She referred to the EU's new human rights legislation, as well as the Commission's above-mentioned legislative proposals, imposing obligations on EU-based companies to verify the compliance of their supply chain partners with labour standards. She indicated that the idea of import restrictions was now under consideration as well.[150] This was confirmed, yet without a further legislative proposal, when the Commission's released its new Communication on trade policy in February 2021.[151]

One might ask whether 'targeted sanctions' do not violate WTO law, to the extent imports of goods are restricted. If such a restriction is imposed by a company exercising its corporate governance responsibilities for its supply chain, without specific government instruction, a WTO violation is unlikely.[152] On the other hand, an import restriction imposed by a government, in response to a violation of an international obligation by a trading partner, might be justified as a countermeasure under public international law that needs no additional justification under WTO law.[153] Alternatively, import restrictions targeted on goods that are implicated in a sustainability violation stand a better chance of being justified under the public policy exceptions of the WTO than countermeasures generally.[154]

A final reflection: a push for sanctions in the EU on companies involved in sustainability violations, coupled with the EU's long-standing insistence that governmental violations of these same sustainability standards in FTAs should not be sanctioned, does appear incongruous.

148 Article 207(2) of the TFEU, jo. Article 16(3) of the TFEU. See CJEU, *Opinion 2/15* (2017) ECLI:EU:C:2017:376, para 139ff.

149 See European Parliament, 'Ban on Import of Goods Produced Using Modern Forms of Slavery and Forced Labour, Including that of Children', https://www.europarl.europa.eu/legislative-train/theme-europe-as-a-stronger-global-actor/file-ban-on-import-of-goods-produced-using-modern-forms-of-slavery.

150 Sabine Weyand (Remarks during 'Trade Talks Podcast' of 17.01.2021 sponsored by the Peterson Institute for International Economics at 19:20ff), https://www.tradetalkspodcast.com/podcast/148-the-eus-new-trade-policy-with-sabine-weyand-of-dg-trade/.

151 See European Commission Communication, Trade Policy Review–An Open, Sustainable and Assertive Trade Policy (18 February 2021), at 13-14.

152 See text, above n 137–40.

153 See text, above n 113–25.

154 See text, above n 117.

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D. Newest proposals

During the course of 2020 two more proposals were made to counter violations of the sustainability standards.

The Dutch and French governments proposed an alternative compliance inducement mechanism in their non-paper of April 2020 on sustainability.[155] Instead of sanctions, these governments suggested that the EU should incentivize effective implementation by rewarding FTA partners that live up to their sustainability commitments. The tariff reductions envisaged in the FTA should be staged and linked to the effective implementation of labour and environmental standards. The promotion of these standards through incentives is a good idea. Yet making tariff reductions dependent on compliance with the FTA's sustainability standards is not.

First, this option would only exist for a limited period of time. What about non-compliance after (most) tariffs have been fully eliminated, which is the goal of any FTA in order to satisfy WTO law requirements?[156] Of course, if the idea is to suspend already implemented tariff reductions in the event of non-compliance, we would be back at square one: ordinary trade sanctions. Second, are all tariff reductions to be suspended in every case of non-compliance with any standard, or would such suspension somehow need to be proportional to the seriousness of the infringement and be limited to certain tariff lines? Third, the objections to trade retaliation also apply to suspensions of proportional tariff reductions (they are not really effective in the hands of smaller or weaker FTA partners of the EU, they impose a cost on the suspending country including the EU, and they damage innocent bystanders). Fourth, as the Commission's Director General for Trade, Sabine Weyand has warned, one loses focus when using the same tool (trade measures) to achieve different policy objectives (creating economic growth and encouraging implementation of environmental standards) at the same time.[157]

More recently, when appearing in October 2020 before the European Parliament to be confirmed as the new Commissioner for Trade, Executive Vice President (EVP) Dombrovskis announced a new idea in respect of the Paris Agreement. In future treaties the Commission will propose that compliance with the Paris Agreement is to be considered an 'essential element.'[158] This proposal does underline the importance which the EU attaches to climate change. It may appear as being more symbolic than practical, as the EU has rarely invoked the 'essential elements' clause in the past.[159] Still, it is noteworthy that EVP Dombrovskis' proposal does recharacterize at least one sustainability standard (the Paris Agreement) as an 'essential element' of the EU's treaties. Since CETA, the sustainability standards no longer seemed to be considered as such.[160]

155 See above n 71.
156 See Article XXIV(8) of the GATT.
157 Editorial comment, above n 136.
158 Statement of Dombrovskis before European Parliament, above n 31.
159 Bronckers and Gruni, above n 1, at 1613–14.
160 See notably Article 28(3) and (7) of the 2016 Strategic Partnership Agreement between the EU and Canada, discussed in Lorand Bartels, 'Human Rights, Labour Standards and Environmental Standards in CETA', in Stefan Griller, Walter Obwexer, and Erich Vranes (eds), *Mega-Regional Agreements: TTIP, CETA, TiSA: New Orientations for EU External Economic Relations* (Oxford: Oxford University Press, 2017), 202.

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A list of key environmental and labour conventions could become a standard 'essential element' of all FTAs and other major agreements of the EU.

In any event, the suspension or termination of the entire FTA in response to a violation of the 'essential elements' clause is, of course, far-reaching; it presupposes a particularly serious and substantial violation.[161] Accordingly, characterizing key environmental and labour standards as 'essential elements' does not replace the need for regular, proportional sanctions in respect of occasional or less fundamental violations of the Paris Agreement and other sustainability standards.

To summarize, trade retaliation (or a suspension or termination of the entire FTA) may be an option in exceptional circumstances to counter far-reaching instances of non-compliance by an FTA partner. But financial penalties or targeted sanctions are usually more suited to counter instances of non-compliance with sustainability standards, if other more amicable or rule-based efforts have failed.

A last point: as we have said from the beginning, any sanctioning mechanism should be reciprocal. Of course, EU treaty partners being concerned about persistent violations by the EU or its Member States of labour or environment standards should also have access to such a mechanism.[162] We acknowledged the possibility that the EU's resistance to sanctions stems from unease that the EU or some of its Member States may not always be in compliance with the internationally agreed labour or environmental standards.[163] In our view, accepting sanctions would perhaps be the best way for the EU to remove any doubt that it is committed to upholding the sustainability standards itself.

VI. CONCLUSION

In the foregoing analysis we have developed various proposals to strengthen the labour and environmental standards in the EU's FTAs around four themes. We highlight a few of them here. These proposals merit incorporation not only in respect of new FTAs but also in the on-going modernization of the existing ones.

First, as to the substance of these standards, rather than tacking on vague aspirations or soft law, the focus of sustainability chapters in EU FTAs should be on firming up existing *international* commitments (such as those found in the Paris Agreement on climate change for example). If anything is to be added, it is detail to make these commitments stronger. In addition, so-called non-regression and non-enforcement clauses prohibit the lowering of protection under *domestic* sustainability laws, provided this encourages or affects trade or investment. However, the formulation of these clauses is not consistent. As they also appear in the recent EU–UK trade agreement, following Brexit, the need for a proper interpretation will likely become more urgent.

161 For example, Article 45(3) and (4) of the EU–Korea FTA (envisaging the right of a party to take appropriate measures unilaterally in cases of 'special urgency'). In a Joint Interpretative Statement covering this provision, the EU and Korea agreed that a 'particularly serious and substantial violation' of human rights, being an 'essential element' would constitute a case of 'special urgency'.

162 Bronckers and Gruni, above n 1, at 1618.

163 Ibid, at 1613. See, e.g., Araujo, above n 127, at 236 ('The EU, Canada and the US, for example, have been shown to be in violation of a significant number of ILO standards').

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Second, in the EU, private stakeholders involved in monitoring the implementation of labour and environmental standards in FTAs should receive petition rights to request in-depth investigations of any violations they have identified, both by the EU itself and by the EU's trading partners. The governmental administration of these petitions should be subject to procedural disciplines, including time limits and judicial review. It is disappointing that such disciplines are presently missing.

Third, labour and environmental obligations are not second class. The remarkable panel report issued in January 2021 in the EU–Korea labour dispute demonstrated that the legal nature of many sustainability standards does not differ from other FTA norms that are subject to regular dispute settlement. Consequently, all FTA disputes should be resolved through the same mechanism and result in binding rulings.

Fourth, as far as sanctions are concerned, they complement rather than contradict the EU's promotional approach towards sustainability. We do not favour trade retaliation. Its drawbacks are well known. Still, even when not explicitly envisaged, the EU may be justified to retaliate. Having said that, we recommend that the EU include financial penalties in its future FTAs as the primary compliance inducement mechanism. In addition, the EU should add targeted sanctions to its toolbox, restricting supplies implicated in labour and environmental transgressions.

To be sure, strengthening and enforcing sustainability standards works both ways. It will put an extra responsibility on the EU and its Member States as well to protect their labour force and the environment.

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