

Greening trade agreements: A roadmap to narrow the expectations gap

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The European Commission has found itself in the midst of harsh controversies after it entered the process of negotiation of "new generation" agreements with the United States (TTIP, Transatlantic Trade and Investment Partnership), Canada (CETA, Comprehensive Economic and Trade Agreement) and Mercosur (EU-Mercosur). Opponents to these new generation "comprehensive" agreements put forward their likely negative consequences on the ability of European nations to sustain or improve social and environmental standards. The fear of a race to the bottom was compounded by the opacity of trade negotiation processes and the uncertainty surrounding environmental outcomes of Investor-to-State dispute settlements. The latter cruelly adduced, by comparison, the rather high standard of transparency and civil society inclusion in star multilateral environmental agreements (MEAs) such as the Paris Agreement on Climate Change. Well before the EU's Green Deal was on the table, expectations arose that the EU would embrace a radically new approach in the design of trade agreements, and would strive to make them irrefutably green. Now that the European Commission has delineated the means and objectives of the Green Deal, the question of what an EU Green Deal for trade policy and the environment should look like has become inescapable.

This study is an attempt to answer this question and to reconcile the ambition to green EU's bilateral free trade agreements (EU FTAs) and the realism of trade negotiations. Our main argument is that between seemingly conflicting views between "idealist greens" and "realistic negotiators", a ridge line exists which could bring EU trade policy far closer and supportive to its environmental commitments, within the given EU FTAs modus operandi.

KEY MESSAGES

Last European elections and the emphasis placed by the new European Commission on the Green Deal make it difficult for the European Commission to sign a FTA, which would not explicitly improve signatory countries' climate and environmental performance.

Against this backdrop, we argue that the poor environmental performance of EU FTAs lies as much in the absence of clear deliverables assigned to the dedicated sustainable development chapters as in the lack of sanction mechanisms. Assigning environmental substantive objectives to EU FTAs and transforming them into a performance-based vehicle is our first recommendation.

We secondly argue that there is some room and a political window to reform EU FTAs, so as to reconcile some of the propositions for greening EU FTAs with the historical EU approach. We lay out a logical order, starting from the definition of clear environmental objectives and deliverables, to the formulation of a detailed action plan, which include a specific investment treaty or investment chapter explicitly designed to perform on environmental accounts.

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1. HAS THE PEACE CLAUSE BETWEEN TRADE AND ENVIRONMENTAL AGREEMENTS COME TO AN END?

The trade-and-environment-linkage debate is old news and predates the creation of the World Trade Organization (WTO). It crystallised in the preparatory work for the negotiations of the North American Free Trade Agreement (NAFTA) in 1992, with the development, by academics, of an analytical framework intended to reconcile the environmental and business communities. This framework allows for tracking and measuring, through different channels, the consequences of trade on the environment. It posits that the effect of trade on the environment is an empirical issue, and can turn positive as long as trade i) contributes to save natural resources through (more) efficient allocation, ii) spreads green technologies across nations, and iii) increases the willingness to raise environmental standards through a rise in average income.

EU FTAs build on this premise, even though they are of different magnitude and ambition. For example, the 2018 agreement between the EU and the United States (which is essentially aimed at reducing tariffs on certain industrial products) can be qualified as "restricted", while CETA (EU-Canada) and EU-Mercosur are best described as comprehensive agreements, with provisions relating to trade in goods, services, intellectual property, public procurement and investment. This last type of agreement is qualified as "new generation agreement". The term started to be used in the EU during the negotiation of the Free Trade Agreement with South Korea in 2011. New generation agreements include a specific Trade and Sustainable Development (TSD) chapter, which commits both parties to uphold provisions contained in multilateral environmental agreements, including the Paris Agreement on Climate Change for those negotiated after 2015, and International Labour Organisation's conventions.

TSD provisions are not subject to enforceable dispute settlement procedures and there are no penalties for non-compliance.

Instead, EU TSD chapters create a monitoring committee (the "TSD Committee") and a consultative domestic advisory group. If either Party considers the other of breaking its TSD commitments, the EU or its partner can initiate government-to-government consultations with a view to resolving the problem. In case of failure, a panel of three independent experts can be convened to determine whether a Party is in breach of its obligations and suggest ways to resolve the issue. This dispute resolution mechanism, placed under the auspices of the TSD Committee, is specific to the TSD chapter. It is not covered by the trade sanction-based general dispute settlement chapter, contrary to US FTAs (for which the sanction mechanism is more formal than effective as we will see further below). It was for this reason heavily criticised for lacking "teeth" (Lowe, 2019).

In a symmetric fashion, multilateral environmental agreements (MEAs) have been designed around the idea that non-environmental provisions (in this case, trade provisions) should be considered only when no "first-best" option is available (UNEP, 2007). Trade provisions are by far the exception more than the rule. About 20 MEAs—out of over 250 dealing with various environmental issues—include provisions to control trade in order to prevent damage to the environment, which means that less than 10% of MEAs now in force contain trade-related measures (WTO, 2017). These include: CITES (Convention on International Trade in Endangered Species of Wild Fauna and Flora), establishing a permitting system for the import and export of specimens of certain wild animals and plants to ensure international trade in those species does not threaten their survival; the Basel Convention, which contains provisions incorporating trade-related measures such as a prior informed consent mechanism, trade restrictions, and labelling and packaging requirements; the Montreal Protocol, which requires Parties to prohibit importing and exporting controlled substances from/to non-Parties, and stands as a good example of an agreement that achieved a large membership and important environmental goals (UNEP, 2007). The Paris Agreement on climate change falls among the 90% MEAs without trade-restricting measures.

An informal peace clause has hence been operating over the last decades between MEAs and trade agreements. This

implicit peace clause discourages WTO members and EU FTA signatory countries to sue other member countries for MEA-related trade restriction measures. It discourages would-be MEAs from including trade-restricting measures to their rulebook. The absence of trade provisions in the Paris Agreement can be read as the application of this informal peace clause between trade and environment agreements. The very marginal number of dispute cases brought to the WTO Dispute Settlement Body, which were linked to environmental protection taken in a broad sense, is another illustration that the peace clause has been effective in circumscribing environmental concerns in case law. In spite of fears that the Pandora box would be open by disputes touching upon process and production methods for the sake of environmental protection, the box has remained sealed and the winds of discords concealed, to date.

This peace clause is now questioned however, in the specific context of EU FTAs. Warnings arise on the limited capacity of star MEAs, like the Paris Agreement on Climate Change, to be self-enforcing. While strategic protectionism shows back the tip of its nose, the call for strengthening MEAs implementation with trade-sanction mechanisms resurfaces. The line of argument draws on the fact that in the very rare occasions when this informal peace clause was breached in the past, the outcome was a tremendous success as far as compliance and effectiveness of MEAs were concerned. The Montreal Protocol is a good case in this regard. It requires Parties to prohibit the import and export of various categories of ozone-depleting substances from/to non-Parties, making trade restrictions a critical incentive for countries to participate and to comply. Importantly, Montreal's trade restrictions have not been imposed: the threat to impose them, made credible by the leakage that would be avoided by the restrictions, has proved sufficient to change behaviour (Barrett, 2008: 249).

The mismatch between the fast pace of EU FTAs expansion and the slow progress in the implementation of the Paris Agreement has shifted the focus of environmental civil society organizations onto EU FTAs over years. This was fueled by an increasing awareness of the responsibility of OECD and emerging countries' imports in GHG and in deforestation. This mismatch led environmental NGOs to consider EU FTAs as a fallback option to enhance the participation to and compliance with the Paris Agreement, and to complete some of its provisions (as regards carbon border adjustment and international transport emissions in particular). Propositions for "greening" EU FTAs have hence flourished over the last five years, laying out more or less radical alternatives to the current approach of the EU to which we turn below.

2. THE EU "GREEN" APPROACH TO FTAs

To address the concerns of European citizens, the Commission has undertaken a revision of the TSD chapter in its FTAs over the last two years. In July 2017, the EC published a non-paper on this issue,¹ suggesting two options for reform. The first option consisted in more "assertive" use of the provisions on sustainable development (literally: "a more assertive partnership on TSD"), greater use of existing dispute settlement mechanisms, and strengthened collaboration with the International Labour Organisation (ILO) and MEAs. The second option encouraged the use of sanctions, and aimed to align the governance of agreements and sanction mechanisms with what is prevailing in US FTAs.

Since July, 11, 2017, EU Member States, the European Parliament, as well as civil society organisations including the Social Partners discussed the two options laid out by the Commission. After consultations, the Commission services privileged the first option, trusting that partnerships established in the context of trade agreements on sustainable development issues would have more impact than sanctions, all the more since there was no evidence to support the effectiveness of these in the case of US FTAs (EC, 2017). In February 2018, the EC published a non-paper on the "way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements" (EC, 2018). Endorsing the "assertive" option, it suggested a "set of 15 concrete and practicable actions to be taken to revamp the TSD" (EC, 2018). Box 1 summarises the EC 15-point action plan.

The objective of EU FTAs TSD chapters "is to strengthen the trade relations and cooperation between the Parties in ways that promote sustainable development, and is not to harmonise the environment or labour standards of the Parties" (EU-Japan FTA, Article 16.1.). The rationale of TSD chapters rests upon the assumptions that ILO core conventions and MEAs full enforcement are conditions for sustainable trade. On the one hand, greening trade rules without achieving full implementation of MEAs might still make trade harmful for the environment. While on the other hand, a loose implementation of MEAs confers a competitive advantage to the foot-dragging country. On this premise, TSD chapters operate as a call for stepping up cooperation efforts and policy dialogue on sustainable development, in order ultimately to limit both trade-induced environmental degradation and environment-led competition.

In its third report on the implementation of the EU's most significant trade agreements, the EC (2019) recalled that EU FTAs TSD chapters encompass *legally binding* commitments.² It confirms some findings of the 2018 implementation report

¹ Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs). Non-paper of the Commission services. 11.07.2017.

² The enforcement of which is overseen by TSD committees that meet once a year

BOX 1. EC ACTION PLAN TO REVAMP THE TSD

1. Strengthen the partnership with Member States and the European Parliament
2. Intensify work with the ILO and MEAs to strengthen a mutually beneficial relationship
3. Facilitate the monitoring role of civil society including the Social Partners
4. Extend the scope for civil society consultation, including the Social Partners, to the whole FTA
5. Reinforce responsible business conduct provisions
6. Tweak TSD chapter to partner-country specific priorities
7. Enforce more assertively the commitments under the TSD chapters, through dispute settlement mechanisms where appropriate
8. Encourage early ratification of core international agreements
9. Review the TSD implementation effectiveness
10. Step up awareness and facilitate the early implementation efforts with Handbook for implementation
11. Step up resources to support the implementation of TSD chapters
12. Support climate action through provisions (i) reaffirming a shared commitment to the effective implementation of the Paris Agreement, (ii) committing the Parties to close cooperation in the fight against climate change, (iii) and committing the Parties to agree on and carry out joint actions
13. Continue to include commitments on the effective occupational health and safety and labour inspection system in line with international standards
14. More actively communicate developments and results of EC work with partners on TSD
15. Time-bound response to TSD submissions

Source: EC (2018).

(EC, 2018b), according to which the strong engagement of the EU on TSD chapters is starting not only to deliver results, but also to hasten them. The 2019 implementation report quotes in particular the case of the EU-Korea Free Trade Agreement, under which South Korea committed to respect and realise in their laws and practices the fundamental rights of the ILO, notably the right of freedom of association and the right to collective bargaining. In the absence of progress, the EU decided to request consultations with South Korea. Due to the lack of sufficient efforts towards the ratification of the concerned ILO convention, the EU requested the establishment of a Panel on July 2019 (EC, 2019: 37). "This move shows the importance that the EU attaches to sustainable development in our trade agreements" then-Commissioner for Trade Cecilia Malmström rejoiced.³

In the case of Colombia, Ecuador, Peru, and Central America, the EC (2019) reported sound progress in implementing the TSD chapter, and the greater involvement of civil society, in accordance with the 15-points action plan. The new generation of preferential trade agreements is an "important instrument for promoting European values related to workers' rights and environmental protection, including climate change", the report concluded (EC, 2019: 38).

A key misunderstanding about TSD chapters relates to the consequences of it being not subject to enforceable dispute settlement. EC put forward the lack of effectiveness of sanction mechanisms in US FTAs, due to the mere impossibility to demonstrate a relationship between the violation of labour or environmental provisions and changes in trade flows. To be fair, there is no evidence to date that TSD provisions are better enforced in a sanction-based model (viz. US FTA) than in the case of the EU (EC, 2017; Lowe, 2019). Another counterargument lies in the many chapters of EU FTAs which are excluded from the formal dispute resolution mechanism. TSD is one exception among many others. In the example of the EU-Japan FTA, the chapters which were not covered by EU enforceable dispute settlement procedures include: global safeguard measures, anti-dumping and countervailing measures, part of the Sanitary and Phytosanitary (SPS) chapter, the Technical Barriers to Trade (TBT) chapter, the competition policy chapter, part of the subsidy chapter, part of the intellectual property chapter, the corporate governance chapter, good regulatory practices and regulatory cooperation, cooperation in the field of agriculture, and SMEs chapters (EC, 2019b). Nothing in EU FTAs prevents the complaining Party to lodge the dispute at the WTO Dispute Settlement Body, as it is clearly specified in the case of the EU-FTA TBT chapter, in the case of Japan. WTO Article on general safeguards (Article XX) in particular remains actionable for non-ILO issues. From a legal perspective, the move towards FTAs is no less sustainable than a move towards free trade under the auspices of the WTO.

Furthermore, a much clearer weakness seems to lie in the absence of clear deliverables. TSD chapters assemble broad commitments to "effectively implement the UNFCCC and the Paris Agreement" (EU-Mercosur TSD Chapter Article 6), "promote the positive contribution of trade" and "cooperate, as appropriate, on trade-related climate change issues" (id.)—and that is it. What is exactly expected from trade, and what parties are committed to achieve exactly, is not specified, making TSD a reminder of the existence of MEAs, rather than a lever to implement them.

³ <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2044>

3. “ENVIRONMENT FIRST”: THE CRITICS OF THE EU APPROACH TO TRADE AND SUSTAINABLE DEVELOPMENT

The “environment first” approach puts forward the magnitude of the threat posed to the Earth system and the stability of our societies by the unabated plundering of the Earth’s natural resources, and the exponential rise of associated emissions, pollutions and biodiversity loss. Taking on the notion of “Anthropocene”—this new geological era marked by the unprecedented and critical impact of human activity on the Earth system—it reminds us that our collective handling of environmental problems is not consistent with the existential challenges we are facing (Henry and Tubiana, 2018).

Second, it reminds us of the undeniable economic success of export-led growth strategies in major middle-income countries (like China, India, Brazil, South Africa and Indonesia), and in some low-income countries alike since the beginning of this century. It concludes that it impossible for the world trading system to earn its laurels for these successes, and at the same time to discard any responsibility for the associated environmental damages. To take just one example, the fact that China became in 2006 the first emitter of greenhouse gases cannot be delinked from its resolute export-led strategy embraced in the early 1990s and culminating with its accession to the WTO in 2000. It recalls that trade-led increases in agricultural and timber prices have led to increases in deforestation in Mexico, Tanzania, Thailand, Brazil, Costa Rica, Australia and Brazil to name a few (Robalino and Herrera, 2010). It emphasizes that between 2000 and 2011 the production of beef, soy, palm oil and wood products in just seven exporting countries (Argentina, Bolivia, Brazil, Paraguay, Indonesia, Malaysia and Papua New Guinea) was responsible for 3.8 million hectares of forest loss annually—leading to 1.6 billion tons of carbon dioxide emissions per year (Henders, Persson, and Kastner, 2015). Evidence now piles up on the responsibility of trade in Amazon deforestation (Fournier, 2019). Globalisation through liberalised trade makes economies so intertwined that it is now almost impossible to separate trade from domestic economic drivers in any particular issue, this approach contends, against the dominating tenet of trade economics (Lamy, Pons, Leturcq, 2019). Trade is not a simple “magnifier” of domestic economies’ strengths and weaknesses; and neither is it an epiphenomenon of unsustainable behaviors deeply rooted in capitalistic domestic accumulation models. Trade is consubstantial to contemporary sustainable development challenges, and consequently, trade agreements should be radically overhauled to become part of the solution.

Last but not least, proponents for greener FTAs recall that despite of all its laudable efforts, the EU has failed to deliver sustainable trade. In their compelling review of EU FTAs environmental performance, Kettunen *et al.* (2020) conclude that “the existing evidence demonstrates that a net positive contribution of the EU trade to sustainable development—going beyond the economic and addressing also the environmental and social

aspects—is as yet far from being achieved. There is an urgent need to find ways to make EU trade and its impacts on global value chains more sustainable (...) in order to deliver the vision put forward by the Green Deal” (Kettunen *et al.*, 2020: 4).

Propositions for reforming EU FTAs from an “environment first” perspective cover a wide spectrum of provisions. The common goal can be best described as the design of a “performance-based” agreement, outperforming the current FTAs on environmental criteria. Under this common goal, some propositions delineate the main norms and principles of what is closer to a trade-and-climate regime, in the general sense of international relations theory, than to a green FTA per se. Others dive into the detail of the enforcement mechanisms, clauses and chapters of green FTAs. Table 1 focuses on the latter, and sort out some key propositions for green FTAs according to the performance criteria, and the mechanism they intend to insert or amend when compared to business-as-usual EU FTAs.

TABLE 1. FTAs proposals breakdown according to performance criteria*

Performance criteria	Mechanism	Key proponent
Enforce participation to MEAs	Suspension clause in case of withdrawal from MEAs	FNH-Veblen (2019)
	Environmental conditionality for new trade negotiations, including refraining from trade agreements with developed countries that do not have an effective carbon price	Kettunen <i>et al.</i> (2017)
	Environmental veto at ISDS	Angot <i>et al.</i> (2017)
	Suspension clause in case of infringement** of MEAs	Dupuy <i>et al.</i> (2018)
	Rendez-vous clause conditioning further liberalisation	FNH-Veblen-RAC (2018)
	PPM-based trade discrimination incl. Carbon border adjustment	Cottier (2015) Trade Justice Movement and Transport & Environment (2017)
	Tariff modulation or gradation	Hufbauer <i>et al.</i> (2016)
Complement MEAs provisions	Uniform import tariff on low-ambition countries' exports	Bureau <i>et al.</i> (2017)
	Minimum, time-bound targets for the reduction of fossil fuel subsidies	OECD 2018
	A trade dispute peace clause and consistent rules on the use of clean energy subsidies	Bacchus (2018)
	Common energy efficiency standards for government procurement.	Bacchus (2016)
	Accompanying measures supporting the uptake of environmental standards across parties to the agreement	Kettunen <i>et al.</i> (2017)

*: We have limited the number of key proponents to one per line, not to overload the table. Many propositions displayed in the table are actually supported by more proponents than the one mentioned as “key proponent”.

** : “infringement” is to be understood in a broad sense. For instance, delays in implementing nationally determined contributions (NDCs) or in improving NDCs are broadly speaking infringement of the Paris Climate Agreement according to propositions such as Dupuy *et al.* (2018), even though this can be contested in legal terms.

This suggests several observations:

- First, trade restrictions appear as a common ground across the propositions reviewed. These trade restrictions espouse quite diverse forms, ranging from border adjustment to tariff modulation and market access suspension (meaning a return to pre-FTA most favoured nation tariff level).
- Second, product differentiation on the basis of process and production methods (PPMs) appears as the second major requirement for green FTAs. PPM-based trade differentiation would be required to switch trade and production altogether towards deforestation-free, carbon mitigation technologies and CO₂ energy-priced products.
- Third, there seems to be some room for provisions complementary to current MEAs and FTAs. These are behind-the-border measures for most of them. Pretty much underused in current EU FTAs, they could find their way through the "comprehensive" new generation EU FTAs, the realm of which covers a series of behind-the-border measures such as standards and regulations, subsidies, or public procurement specifications.

4. THE CRITICAL ROLE OF INVESTMENT IN THE GREENING OF NORTH-SOUTH FTAs

Starting in the early 1990s at the time of the NAFTA negotiations, economists have developed a conceptual framework to track the consequences of free trade agreements on the environment. In its most simple version, this framework identifies three channels through which freer trade could affect the environment, either in positive or negative way. The first channel is scale: freer trade is supposed to increase efficiency in resource allocation across sectors, and eventually lead to an increase in output among the countries which are parties to the agreement. All else equal, and in particular without technological change, the "scale effect" is expected to be harmful for the environment. The second channel is the transformation of the input-output matrix. Freer trade leads to relative price changes, which affect in turn the composition of the aggregate output of trading countries. Output X could increase while output Y would decrease in a given country, based on its comparative advantage within the new price system. This "composition effect" can be positive or negative for the environment, depending on the pollution/emission intensity of the sector the country specializes in. Last, technology matters: the technology is expected to change under free(r) because of an increasing willingness to pay for environmental protection (this willingness to pay being correlated to an expected rise in their average income). The relationships here is indirect, contrary to what happens with the two first channels. A rise in the average income raises the willingness to pay, which in turn will translate into more stringent environmental regulation, and at the very end, into a shift in technology bundles towards greener technologies enabling firms to abide by this new regulation. The "technology effect" for this reason is expected

to be good for the environment. The sum of the three effects can be positive or negative and remains an empirical question (Antweiler, Copeland, Taylor, 2001). A key answer lies in the sign of the composition effect and the magnitude of the technology effect.

This framework has been extensively used over the last two decades to predict the likely consequences of bilateral free trade agreement on the environment. Most not to say all Trade Sustainability Impact Assessments (Trade SIAs) launched by the European Commission have adopted it, in addition to sector or pollution specific analytical tools. This framework proves useful, and particularly telling in the case of North-South free trade agreements, where environmental standards and regulation gaps can be large among countries, and the race to the lowest standard a legitimate concern for the "greenest" trade partner.

This is typically the case of EU-Mercosur FTA. The abundant production factor in Mercosur is land, while it is capital in the EU. EU-Mercosur FTA should hence increase "embedded" land exports – namely, agricultural products –, while the EU should increase export of industrial goods and services whose production is more capital intensive. The composition effect is the result of these two adjustments. Early assessments show that it is likely to be negative for the environment, with technology left unchanged. To achieve a positive environmental outcome, bearing in mind that the scale effect is unequivocally negative, the challenge is to get a technology effect overriding the two others. And this where investment comes in.

At stake then is the capacity of FTA to trigger investors behavioural change. Without such a change and the subsequent greening of technologies, the ultimate effect of North-South FTA similar to EU-Mercosur is likely to be negative. At first approximation, the following conditions would need to be met.

- The willingness to pay (through taxes and/or higher prices) for environmental protection through more stringent regulation and policies must be supported by the trade agreement. This means for instance that the "policy dialogue" set up by the FTA could be explicit on the level of environmental ambition. This could also mean that investor-to-state-dispute-settlement (ISDS) be unequivocally designed for the ultimate objective of environment protection.
- Any new public regulation or policy set up after the ratification of the agreement and affecting the sectors covered by the agreement cannot be regressive from an environmental standpoint. This to avoid "backsliding" and the watering down of the technology effect expected from public regulation.
- A set of environmental/climate investment provisions, focusing on the technology effect, should be added to the FTA, either as a companion bilateral investment treaty (BIT) or as an investment chapter, with the explicit view to more than compensate the negative composition and scale effects in the long-run (see Box 1).
- For environmental concerns like biodiversity losses, for which neither the technology nor investment could plausibly make a significant difference to the level of environmental degradation, the technology effect is likely to be limited.

This means that the last resort option to have a green FTA across the three effects would be either to curb the negative scale effect (limited liberalisation) and/or distort the composition effect in such a way that exports and imports

of embedded pollution/degradation would be constrained. Alternatively, green production methods and processes would need to be positively discriminated.

BOX 1. THE MOMENTUM FOR GREENING INTERNATIONAL INVESTMENT TREATIES

Provisions on investment in international (trade) agreements typically aim at three different objectives: investment promotion, investment protection, and investment liberalization, with the full or partial application of the non-discrimination principle (National treatment and Most favoured nation) in the pre-admission and/or the post-admission phase. They define what constitute an 'investment', a 'foreign' investor, and the scope of protection offered by the treaty; they set several standards of investment protection (e.g. protection against expropriation, fair and equitable treatment standards, non-discrimination standards, etc.); and they include a dispute settlement mechanism, often providing foreign investors the possibility to bring claims against the host State before an international private tribunal (arbitration tribunal) formed for each specific dispute for violation of one or more standards of investment protection (PAGE, 2018).

The number of publicly known investment disputes with 'environmental components' has risen steeply since the 2008-09 financial crisis (Viñuales, 2018), raising concerns over the use of dispute mechanisms by foreign investors to seek excessive protection against normal and legitimate regulatory changes (PAGE, 2018). These disputes arose within "new generation" international investment agreements, particularly investment chapters in FTAs, aimed at liberalizing and promoting investment, while also incorporating flexibilities for public policy (e.g. protection of the environment, references to fundamental labour principles and human rights, compliance with social corporate responsibility standards) (Crawford and Kotschwar, 2018).

Source: Based on PAGE (2018).

To address these concerns, NGOs, think tanks and academia have developed and refined propositions for "sustainable" or "green" international investment treaties or FTA's investment chapters. A pioneer work was made by IISD and its Model International Agreement on Investment for Sustainable Development (IISD Model) dating back to 2005. A few years later, UNEP and IISD jointly developed a 'Sustainability Toolkit for Trade Negotiators,' which contains a number of sustainable development clauses included in investment chapters of FTAs. Other initiatives have been launched by the investment arbitration community. This is the case of the 'Stockholm Treaty Lab' launched in 2017 by the Stockholm Chamber of Commerce (SCC). It is an innovation contest that challenged different teams to draft a model investment treaty capable of encouraging investment in climate change mitigation and adaptation. "What is noteworthy about this ongoing initiative", Viñuales wrote in his policy note, "is that it reflects the extent to which the legal services sector is aware of the need to reform international investment agreements (IIAs) to make them more suitable for the environmental challenges that the world faces today" (PAGE, 2018: 7).

Let's quote last UNCTAD 'Investment Policy Framework for Sustainable Development' (IPFSD) which aims at bringing together investment policies and the economic, social and environmental aspects of development. The IPFSD was revised in 2015 and complemented by another policy tool, the "Road Map for International Investment Agreements (IIA) Reform", which focused on key priority areas such as safeguarding the right to regulate in the public interest and investment dispute settlements.

5. A ROADMAP TO NARROW EXPECTATIONS GAP OVER EU GREEN FTAs

In the previous sections, we have accounted for the underpinnings of EU approach to trade and environment, consisting in a series of reminder to implement MEAs and broad calls for cooperation. Deemed inefficient to actually deliver sustainable trade, this approach faces counter-propositions from a wide variety of actors. These counter-propositions delineate the contours of performance-based EU FTAs—something current EU FTAs cannot claim to be. The technical and legal feasibility, and the political traction, much vary across proposals. Their legal and political assessment would deserve a study on its own. We limit ourselves to advancing four steps that would help the EC and proponents for greening EU FTAs find a common ground for designing a new type of trade agreement which would perform better on environmental accounts than current FTAs.

Step 1: Clarify MEAs-related objectives assigned to FTAs

What are the non-trade objectives that green FTAs are supposed to achieve, or contribute to? What is the value added of FTAs in this respect? Answers to these questions in current FTAs are either lacking or much too laid-back. The mention of signatory countries commitment to MEAs and the quite general engagement for “cooperation” and “working together” raise legitimate concerns over the environmental ambition of current EU-FTAs. Between the status quo on the one hand, and the objective to use EU FTAs as enforcement mechanism of MEAs on the other (Table 1), there is a range of intermediary objectives which could all provide answers to the call for environmental performance-based trade agreements. The definition of environmental deliverables and timeframe (the legal status of which should be subject to a separate discussion) is one such intermediary option.

Step 2: Elaborate an action plan consistent with the environmental objectives assigned to FTAs

Whatever the stringency of enforcement/dispute mechanisms, EU FTAs would gain traction among civil society groups and MEPs by substantiating the means and measures thanks to which they are intended to deliver the expected (green) changes. An action plan detailing such means and measures would go beyond the quite general propositions of the EC regarding the revamping of TSD chapters (cf. Box 1). The action plan would pick up some of (or discard) the measures to enforce participation and compliance, as well as the complementary measures listed in Table 1.

Enforcing mechanisms such and PPM-based trade discrimination is likely to be an easy sell to the MEPs, but much less likely so to the EC. The issue for the EU is that partner countries (and foot-dragging ones more specifically) might read these mechanisms as unilateral requirement, boiling down to a suspicion clause. What could the EU offer/be asked in exchange of trade restriction and PPM-based discrimination, should these be retained as part of EU green trade package? Unless a clear

answer is brought to this question, these measures would disregard the reciprocity principle consubstantial to trade negotiations. They might as such gain limited traction within the European Commission.

The bottom line could be the inclusion of complementary measures to existing EU-FTAs, such as the ones put forward in the open-ended box at the bottom of Table 1. In the particular case of the Paris Agreement, they could make up a “Trade Action Agenda”, in reference to the “Action Agenda” engaging non-governmental parties to meet the 1.5/2°C target. These should be laid out without prejudging any specific compliance mechanism, in the logic of existing EU FTAs.

Step 3: Lay out the mechanisms securing the effectiveness of the action plan

To give more teeth to the environmental provisions inserted in the EU FTAs is a shared concern among proponents of green FTAs. The overwhelming majority of the propositions we have examined put forward the need to integrate implementation of the TDS Chapters under the more stringent overall FTA dispute settlement mechanism. Coming as a third step, the inclusion—or not—of a sanction-based dispute settlement mechanism might not be a pre-requisite to greening EU FTAs. The two previous steps would allow significant improvement to business-as-usual EU FTAs, making them much greener, even without a sanction based dispute settlement.

This said, it is very likely that a sanction-based TSD dispute settlement mechanism would win public opinion and MEP backing, sending the signal that the EU takes care of stepping-up TSD capacity to deliver. We must insist here on the fact that this would require a different wording of most of environmental provisions we can read in existing EU FTAs, so as to make them enforceable, and to make trade sanction actionable. For instance, TSD committing countries to “cooperate to promote the positive contribution of trade to the low-carbon transition” and « to work together in climate action to achieve the objectives of the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement» (EU-Japan, Article 16.4 §4) would not deliver much more with a sanction-based TSD.

Our view is that the move toward sanction-based mechanisms could be considered as a second-range priority, when compared to steps 1 and 2 above, and as a fall-back option when all the consultation and conciliation procedures have failed. It is worth recalling that it would require parties to agree to be complained against, should they not meet some specific MEAs to be included in the TSD chapters. Cooperation underpins a sanction-based system: like the mast to which Ulysses tied his hands to resist the sirens' call, a sanction-based mechanism is something that cooperative parties should ask for themselves to guard against backsliding and to “deliver” sustainable changes in a coordinated manner. Further, it would require parties to agree on specific commitments or deliverables without which a sanction-based dispute settlement procedure would have gained gum but still not much teeth. TSD chapters would gain strength and convincing power from the inclusion of these specific commitments and deliverables, something step 1 and step 2 are supposed to achieve.

Step 4: Include a sustainable investment chapter or sustainable investment treaty in the FTA package

Last but not least, investment is critical to overturn possible environmental losses due to harmful scale and composition effects into environmental net improvement. At stake is to ensure that IIAs or FTAs attract the “right” (green) type of investments, and deter the wrong ones – the state of play being that such a distinction is not made in existing IIAs and investment chapters. We build on PAGE (2018) analysis and propositions to give an idea of the various means by which international investment treaties or FTA chapters could play a key role in achieving sustainable development outcomes:

- i) Define investment as a means towards the goal of sustainable development, as is the case for example in the Morocco-Nigeria bilateral investment treaty signed in December 2016. This implies that the protection of IIAs would be granted only to investments that contribute to sustainable development (through investment definition and legality clauses);
- ii) Practically, this requires to define sustainability performance criteria for investments, enabling to distinguish investment that contributes to sustainable development from investment that is socially and environmentally harmful;
- iii) Use carve-out clauses excluding sustainable development policies from the scope of certain investment protection standards;
- iv) Clarify and strengthen investor obligations regarding environmental protection and climate action;
- v) Step-up the reform of investor-state-dispute-settlement (ISDS) to ensure that IIAs can only be used to challenge unfair action from the host country rather than legitimate regulation.

6. CONCLUSION

The main argument of this study is that there is a room for reconciling some of the propositions for greening EU FTAs with the current EU approach. Two conditions are required for this. The first is to acknowledge that the current approach of the EU, in spite of laudable efforts, has failed to deliver sustainable trade, so that the demand for greener trade has yet to be responded to. This is all the more urgent as FTAs are to multiply in the future according to current plans. The second condition is for stakeholders and parties to the negotiation to adopt a logical order to reform EU FTAs, starting from the definition of clear environmental objectives and deliverables, to the formulation of a detailed action plan, which include a specific investment treaty or investment chapter explicitly designed to perform on environmental accounts. This four-step approach would allow to transform EU FTAs' and companion investment treaties or chapters into environmental performance-based agreements, independently from the outcome of the uneasy discussion about the reforms of enforcement and compliance mechanisms.

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Greening trade agreements: A roadmap to narrow the expectations gap

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The Institute for Sustainable Development and International Relations (IDDRI) is an independent think tank that facilitates the transition towards sustainable development. It was founded in 2001. To achieve this, IDDRI identifies the conditions and proposes the tools for integrating sustainable development into policies. It takes action at different levels, from international cooperation to that of national and sub-national governments and private companies, with each level informing the other. As a research institute and a dialogue platform, IDDRI creates the conditions for a shared analysis and expertise between stakeholders. It connects them in a transparent, collaborative manner, based on leading interdisciplinary research. IDDRI then makes its analyses and proposals available to all. Four issues are central to the institute's activities: climate, biodiversity and ecosystems, oceans, and sustainable development governance.

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