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Is Sustainable the new Trade?

The effectiveness of Trade and Sustainable Development chapters in recent EU Free Trade Agreements

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Statutory Declaration

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Abstract

After almost seven years of implementation of ‘Trade and Sustainable Development’ (TSD) chapters, and in the context of debates on a potential reform, this paper researches the reasons which have led to the inclusion of a dedicated chapter on environmental and labour provisions in European Union (EU) Free Trade Agreements (FTAs) and whether these chapters have been effective.

We consider that TSD chapters constitute a new form of political conditionality since FTAs are used as an incentive to manipulate the cost-benefit calculation of third countries: there can be no EU FTA without its TSD chapter. Analysing first the reason of including dedicated TSD chapters, we find that the link between trade and sustainable development is well-founded. The inclusion of sustainable development in the EU’s constitutive values and the European Parliament’s activism were integral to the inclusion of TSD chapters in EU FTAs, and more determining factors than economic reasons. The structure of these chapters follows a strategy of cooperation which is the opposite of the strategy of coercion in human rights conditionality. They differ in terms of legal force, monitoring, and enforcement.

Moving secondly to the assessment of the TSD chapters’ effectiveness, we analyse the degree up to which the EU has attained its goals on a scale ranging from Low to Medium and High. A close reading of the EU’s policy documents reveals that the EU aims at strengthening labour and environmental protection and compliance, as well as to promote cooperation, public participation and transparency. We assess goal-attainment on three case studies: South Korea, Colombia and Ukraine. With the results by objectives and by countries being detailed in the study, we find that the overall effectiveness of TSD chapters ranges as Medium, with an average equal performance for South Korea and Colombia. Comparing effectiveness with the TSD chapters’ capability, we find that a higher effectiveness cannot be achieved without remediating the shortcomings of TSD chapters.

Having identified the shortcomings in our empirical assessment, we make thirteen policy recommendations for improving the TSD chapters’ capability and effectiveness. They range from the inclusion of an implementation roadmap in the negotiations to aligning the TSD dispute settlement mechanism with the one of the FTA; and from granting Domestic Advisory Groups (DAG) the possibility to send public questions to the committee on TSD to the expansion of the European Economic and Social Committee’s role of secretariat for EU DAGs to one of secretariat of both EU and partner countries’ DAG.

Keywords

Trade and Sustainable Development chapters

Effectiveness

Political conditionality

Environment

Labour

European Union

Free Trade Agreements

Sustainable development

Human rights clauses

Common Commercial Policy

Capability

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List of Abbreviations

CETA	Comprehensive Economic and Trade Agreement
CJEU	Court of Justice of the European Union
CSR	Corporate Social Responsibility
DAG	Domestic Advisory Group
DG Trade	Directorate-General for Trade
EC	European Community
EESC	European Economic and Social Committee
EP	European Parliament
EU	European Union
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
InforMEA	United Nations Information Portal on Multilateral Environmental Agreements
ISDS	Investor State Dispute Settlement
MEA	Multilateral Environmental Agreement
ITUC	International Trade Union Confederation
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TSD	Trade and Sustainable Development
TTIP	Transatlantic Trade and Investment Partnership
UN	United Nations
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

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1 Introduction

“To defend and improve the human environment for present and future generations has become an imperative goal for mankind”.

Preamble of the International Labour Organisation (ILO) Constitution, 1919.¹

“The failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve conditions in their own country”.

Stockholm Declaration, 1972.²

The phenomenon of globalisation appears to have accelerated the pace of the world and downsized our planet. The increased flows of communication, commerce and people which characterises globalisation has brought our societies closer together and driven considerable economic growth. As a result, interconnection has become the master word for grasping the complexities of the world. Issues have become transnational and countries have lost grip over the economic and social frame in which their citizens evolve.

For several decades now, globalisation has sparked not only excitement but controversy. Massive demonstration disturbing the 1999 World Trade Organisation (WTO) Seattle conference are an illustration of the growing belief that constant liberalisation had not brought about the expected benefits.³ Some of the concerns include fears that the constant quest for growth would hamper social protection of workers or environmental protection. Global trade has come under a “crisis of legitimacy”.⁴

¹ International Labour Organisation (ILO), “The Constitution of the International Labour Organisation”, *Part XIII of Treaty of Versailles*, Versailles, 28 June 1919.

² United Nations (UN), “Declaration of the UN Conference on the Human Environment”, *Report of the UN Conference on the Human Environment*, Stockholm, 16 June 1972.

³ M. Dee, *The European Union in a Multipolar World: World Trade, Global Governance and the Case of the WTO*, London, Palgrave Macmillan, 2015, p. 73.

⁴ R. Abdelal, S. Meunier, “Managed globalization: doctrine, practice and promise”, *Journal of European Public Policy*, vol. 17 no. 3, April 2010, p. 350.

Against this background, the concept of sustainable development received considerable attention. Recognised at the international level by the 1987 Brundtland Report of the UN World Commission on Environment and Development, it is defined as the ability to “mee[t] the needs of the present without compromising the ability of future generations to meet their own needs”.⁵ Sustainable development aims at the inclusion of environmental and social concerns in all policies, including those pertaining to economic development. Trade policy is no longer expected to *only* bring about economic benefits but also to mitigate fears of a ‘race to the bottom’ of social and environmental standards.

In reflection to the growing importance of sustainable development, the European Union (EU) has started integrating this concept into the objectives of its common commercial policy in the form of environmental and labour provisions. In line with the ‘Lamy doctrine’, the EU advocated for the empowerment of international institutions and the regulation of trade in a rules-based international order.⁶ Along with the United States, it sought recognition of labour standards at the WTO during the Uruguay Round as part of the so-called ‘Singapore issues’.⁷ However, the attempt was unsuccessful.⁸

With the multilateral level and the Doha round showing little results, the EU Trade Commissioner Peter Mandelson opted in 2006 for a “step-change”.⁹ The following EU ‘Global Europe’ Strategy pointed to the practice of negotiating so-called ‘new generation’ FTAs, which are “comprehensive and ambitious in coverage”.¹⁰ The EU’s aim is to use FTA negotiations and the attractive perspective of tariffs liberalisation as an incentive instrument for the promotion of sustainable development in third countries. The EU specifically seeks

⁵ UN General Assembly, “Report of the World Commission on Environment and Development”, *Note by the Secretary-General, A/42/427*, New-York, 4 August 1987, para 27.

⁶ Abdelal, Meunier, *op. cit.*, p. 352.

⁷ V. A. Leary, “The WTO and the Social Clause: Post-Singapore”, *European Journal of International Law*, vol. 8, no. 1, 1 January 1997, pp. 118-119.

⁸ J. Orbie, O. Babarinde, “The Social Dimension of Globalization and EU Development Policy: Promoting Core Labour Standards and Corporate Social Responsibility”, *European Integration*, vol. 30, No. 3, 16 July 2008, pp. 461-462. See also S. Velluti, “The EU’s social dimension and its external trade relations” in A. Marx, J. Wouters, G. Rayp, L. Beke *Global governance of labour rights: assessing the effectiveness of transnational public and private policy initiatives*, Leuven Global Governance Series, Edward Elgar, 2015, p. 54.

⁹ Speech by Peter Mandelson, EU Commissioner for Trade, “Trade Policy and Decent Work Intervention”, EU Decent Work Conference on Globalisation, Brussels, 5 December 2006, p. 2.

¹⁰ European Commission “Communication: Global Europe: competing in the world: a contribution to the EU’s Growth and Jobs Strategy”, *Official Journal of the European Union*, COM/2006/0567 final, Brussels, 4 October 2006, p. 9.

to increase the interest of its negotiating partners to pursue sustainable development by conditioning the FTA to their adherence to sustainable development provisions. As we argue in our framework for analysis, this policy-choice is a form of political conditionality.

The signature of the EU and South Korea (Korea) FTA in 2010 marked the first inclusion of a dedicated ‘Trade and Sustainable Development’ (TSD) chapter in a EU trade agreement.¹¹ Since then, the EU has vigorously claimed that it was pursuing a trade policy “focusing not only on economic aspects, but also furthering social and environmental objectives”.¹² But almost seven years after the entry into force of the first TSD chapters, the choice to include sustainable development in trade and in FTAs is still questioned, a fortiori through a new model of political conditionality whose structure is very different from the human rights sanction-based model conditionality. There are doubts as to whether TSD chapters are really an effective contribution to sustainable development or not.¹³

This research will analyse why the EU has inserted TSD chapters based on a new political conditionality model in its recent FTAs and to what extent these chapters have been effective. These two questions are especially relevant in the current context of a debate launched by the European Commission on a potential reform of TSD chapters designed to improve their implementation.¹⁴ Several stakeholders, including EU Member States, have suggested the inclusion of coercive mechanisms in TSD chapters, hereby bringing them closer to the human rights political conditionality model which relies on threats of unilateral suspension of trade preference in case of non-compliance.¹⁵ We find that the inclusion of sustainable development chapters in EU FTAs is the consequence of the presence of the sustainable development objectives in the EU treaties and of the political activism of the

¹¹ Council of the European Union, “Council Decision (2011/265/EU) of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part”, *Official Journal of the European Union*, L127/1, 14 May 2011, pp. 1-4.

¹² European Commission, *Communication: A Balanced and Progressive Trade Policy to Harness Globalisation*, COM(2017) 492 final, Brussels, 13 September 2017.

¹³ J. Orbie, D. Martens, M. Oehri & L. Van den Putte, “Promoting sustainable development or legitimising free trade? Civil society mechanisms in EU trade agreements”, *Third World Thematics: A TWQ Journal*, vol. 1, no. 4, 2016, p. 530.

¹⁴ European Commission, *Trade and Sustainable Development (TSD) Chapters in EU Free Trade Agreements (FTAs)*, Non-paper of the Commission Services, 11 July 2017, p. 2.

¹⁵ A. Young, “Liberalizing trade, not exporting rules: the limits to regulatory co-ordination in the EU’s ‘new generation’ preferential trade agreements”, *Journal of European Public Policy*, vol. 22, no. 9, 29 May 2015, p. 1269.

European Parliament (EP), supported in a lesser extent by economic reasons. This political conditionality model relies on cooperation and it has no structural similarity with human rights conditionality. Overall, we rate the effectiveness of TSD chapters as Medium and we argue that there are little chances that this result improves unless we remedy their shortcomings.

Our developments will be structured as follow. The second chapter will qualify TSD chapters as a new model of political conditionality and detail our empirical model for assessing their effectiveness. We will then investigate in chapter three the reasons for the EU to include sustainable development in its FTAs in the form of dedicated chapters which follow a complete new form of political conditionality. Chapter fourth conducts an empirical analysis of the effectiveness of TSD chapters on three case studies: South Korea, Colombia and Ukraine. It also compares our findings and evaluates whether the TSD chapters' effectiveness matches their capability. Finally, chapter five suggests ways to improve effectiveness in light of the shortcomings we identified.

2 Framework of Analysis

In this chapter, we argue that TSD chapters represent a new model of political conditionality in comparison to another model of political conditionality included in FTA: human rights clauses. We then present a framework for assessing the effectiveness of TSD chapters.

2.1.1 TSD chapters as a *sui generis* mechanism of political conditionality

The EU's decision to systematically include human rights conditionality in EU FTAs and Partnership and Cooperation Agreements (PCA) can be traced back to the mid-1990s.¹⁶ The Lomé IV Convention is a particularly well-known example of the EU's recourse to human rights clauses.¹⁷ Given the colonial history between several EU Member States and countries members of this convention, the critic that this model of conditionality furthers a teacher-student relationship is vivid.

The EU has adopted a different approach in relation to sustainable development provisions in its FTAs through their inclusion in a different and self-standing chapter. This policy choice contrasts with the apparent conceptual overlap between human rights on one hand and sustainable development on the other, the latter being understood as encompassing core labour rights and environmental issues.

¹⁶ Council of the European Union, *Resolution of the Council and of the Member States meeting in the Council on human rights, democracy and development*, 24 Bull. EC no. 11, 1991 pp. 122-123, 28 November 1991, para. 10; European Commission, *Communication from the Commission on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries*, COM(95), 216 final, Brussels, 23 May 1995, para. 3-4.

¹⁷ "Agreement amending the fourth ACP-EC Convention of Lomé signed in Mauritius on 4 November 1995", *Official Journal of the European Communities*, L156, Brussels, 29 May 1998, Art. 5-1(a) and 366a-3.

This definition will adopt Koch's broad definition of political conditionality as:

an incentive instrument in the relationship between two actors, in which one actor aims at changing the behavior of the other by setting up conditions for the relationship and by manipulating its cost–benefit calculation by using (positive and negative) material incentives.¹⁸

The 'incentive instruments' mentioned by Koch relate in our study to EU FTAs. The 'conditions for the relationship' we focus on are TSD chapters, and human rights clauses to a lesser extent. These two elements specifically aim at 'changing the behaviour' of the EU's partner countries in relation to sustainable development and to human rights. They add a perspective of preferential trade conditions with the EU in these countries' calculation of the benefits for respecting and furthering labour, environmental, human rights, rule of law and democratic principles. Under this reasoning, the FTA can only be contemplated as the 'incentive instrument' if the EU's negotiating partner perceives that it will only be able to enjoy the benefits of the FTA if it also accepts clauses relating to human rights or to TSD chapters.

This interpretation of TSD chapters as a form of political conditionality is supported by an interview with a Commission official who argued that reduction of tariffs is a "bargaining chip" for the improvement of sustainable development standards (among others) in the partner country, without which the EU would not be able to exert pressure.¹⁹ This statement is also in line with the rhetoric of the current Commissioner for Trade, for which "trade has never been just about goods – it is about values too" – and also with the constant EU practice since the 2006 Renewed EU Sustainable Development Strategy to include sustainable development chapters along with human rights clauses in its FTAs.²⁰ The EP, which holds since the Lisbon treaty a veto power for the adoption of FTAs, has also expressed many times its attachment to the practice of including legally binding provisions on human rights and on sustainable development herein.²¹ The perception that a FTA between the EU and a

¹⁸ S. Koch, "A Typology of Political Conditionality Beyond Aid: Conceptual Horizons Based on Lessons from the European Union", *World Development*, vol. 75, 2015, p. 99.

¹⁹ Interview with a EU Commission official, Brussels, 1 February 2018.

²⁰ Speech by Cecilia Malmström, EU Commissioner for Trade, "From earning profits to earning trust", Sustainability in EU trade policy, Amfori conference, Brussels, 12 March 2018; Council of the European Union *Review of the EU Sustainable Development Strategy (EU SDS)*, 10917/06, Brussels, 26 June 2006, p. 21.

²¹ European Union, "Consolidated Versions of the Treaty on European Union [hereafter: 'TEU'] and of the Treaty Establishing the European Community [hereafter: 'TFEU'] of 26 February 2001", *Official Journal of the European Union*, C321E, 29 December 2006, art. 218-6 TFEU; See for example European Parliament,

partner country must include these two topics is hence integral to this ‘change of behaviour’. At this stage, we conclude that human rights clauses and TSD chapters are both characterized as a form of political conditionality.

But the two models of political conditionality on which human rights and sustainable development rely differ on the use of ‘material incentives’. In his Typology, Koch distinguishes four types of conditionality, depending on whether they use positive or negative incentives and whether the conditions must be met before (ex ante) or after (ex post) the incentive instrument is adopted.²² Human rights are used in EU FTAs as a political conditionality tool through the threat of “(temporary) withdrawal of benefits in order to achieve compliance”²³. The so-called ‘essential elements clause’ indeed permits the unilateral suspension of the benefits of the agreement after gross and persistent human rights violations have occurred.²⁴ Such mechanism hence belongs to the category of ex post negative conditionality.²⁵

TSD chapters rely on a different model of political conditionality. The aim is to change the behaviour of the partner country by enhancing the gains in pursuing sustainable development, but the lines are blurred on whether the conditionality model being used is positive or negative, ex ante or ex post. Before the agreement enters into force, there is no attempt from the EU to secure policy change on sustainable development. Ex post, there is no increase nor removal of trade benefits made conditional to the respect of the obligations contained in TSD chapters. TSD chapters appear as a promise, made *at the conclusion of the agreement*, to strengthen labour and environmental commitments and to enhance cooperation between the parties on their trade-related implications. Moreover, the absence of mechanism designed to ensure compliance with these obligations makes it difficult to consider this political conditional model as relying on ‘negative’ incentives. Still, the above-mentioned perception that the EU would not consent to a FTA without the inclusion of sustainable development obligations translates into a degree of pressure exerted on the

Resolution of 25 November 2010 on human rights and social and environmental standards in international trade agreements, P7_TA(2010)0434, 25 November 2010, para. 12-13.

²² Koch, *op. cit.*, p. 100.

²³ *Ibid.*, p. 99.

²⁴ S. Gstöhl, D. De Bièvre, “*The Trade policy of the European Union*”, Bruges, Basingstoke, Palgrave Macmillan, 2018, p. 192.

²⁵ Koch, *op. cit.*, pp. 102-103.

partner country. It is not useful in this research to try to fit the TSD chapters' conditionality model into Koch's typology. It suffices to show – which we have endeavoured to do – that TSD chapters constitute a form of political conditionality, and that this political conditionality model is different from the one on which human rights clauses rely.

We are hence confronted on the one hand to a relatively known and identified political conditionality model applied to human rights, and on the other hand to a more recent and less identifiable model of political conditionality which may lie at the intersection between the four types of conditionality identified by Koch. In this sense, one may qualify this latter model of political conditionality as *sui generis*. This research will attempt to understand the reasons for discarding the human rights conditionality model for the topic of sustainable development, but also how the two models relate and whether the newer model has learnt from the shortcomings of the older one.

2.1.2 A framework for assessing the effectiveness of TSD chapters in recent EU FTAs

After analysing the reasons for including sustainable development provisions in EU FTAs in the form of a new political conditionality model, this research will undertake an assessment of the effectiveness of TSD chapters.

Previous research has illustrated the difficulty for social science to assess the effectiveness of the EU's external action, with authors relating this notion to concepts of actorness, coherence, or unity.²⁶ We will understand effectiveness merely as reflecting one's ability to achieve its objectives. In other words, we will assess effectiveness by analysing the extent to which the EU's objectives have translated into reality. Our ambition is not to measure the "actual EU influence" in the achievement of its objectives – such endeavour appears

²⁶ The debate is summarised in A. Nieman, C. Bretherton, "EU external policy at the crossroads: The challenge of actorness and effectiveness", *International Relations*, vol. 27, no. 3, 2013, pp. 267-268.

extremely risky given the proportion of external factors – but the extent to which the European Union has effectively completed the objectives it has set for itself.²⁷

In his evaluation of the EU's role as a foreign policy actor, Hill uses the notion of “expectations” to describe “the various functions which [the EU] performs, and might need to perform” according to the judgement of “many influential insiders and outsiders”.²⁸ Such a large definition of the objectives set for the EU leads him to conclude that the number and degree of expectations held of the EU is often “irrational”²⁹. For the purpose of our research, we will understand the notion of ‘objectives’ much more narrowly, as reflecting the various goals that the EU sets for itself when inserting TSD chapters in FTAs. These objectives may hence differ from those of third countries. They are to be identified in EU policy documents, and we will assess their attainment using empirical data.

Although various EU documents mention sustainable development in relation to trade, no agreed language sets the objectives of TSD chapters. These chapters clearly respond to a call to mainstreaming sustainable development in all EU policies, and even to make it a “central objective of all sectors and policies”³⁰. But few documents mention specific and identifiable contributions that TSD chapters would make to sustainable development. In a review of the EU Sustainable Development Strategy in 2006, the Council affirmed that international trade and investment can be used “as a tool to achieve genuine global sustainable development”.³¹ A few months later, the Commission considered in its Global Europe Strategy “incorporating [in FTAs] new co-operative provisions in areas relating to labour standards and environmental protection”.³² The Commission also reported in 2009 progress in “mainstreaming the SDS [Sustainable Development Strategy] agenda into its external

²⁷ S. Oberthür, L. Groen, “Explaining goal achievement in international negotiations: the EU and the Paris Agreement on climate change”, *Journal of European Public Policy*, vol. 25, no. 5, 2017, p. 710.

²⁸ C. Hill, “The Capability-Expectations Gap, or Conceptualizing Europe's International Role”, *Journal of Common Market Studies*, vol. 31, no. 3, 1993, pp. pp. 310-315.

²⁹ *Ibid.*, p. 315.

³⁰ European Commission, *Communication: A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development*, COM/2001/0264 final, 15 May 2001, p. 6.

³¹ European Council, *Review of the EU Sustainable Development Strategy*, *op. cit.*, p. 21.

³² European Commission “Global Europe”, *op. cit.*, p. 12.

policies, for example through Sustainability Impact Assessment”.³³ It advocated in 2010 to use FTAs to “encourage our partners to promote the respect of human rights, labour standards, the environment, and good governance”.³⁴ These general mentions of trade and sustainable development remain rather vague. Further details can be found in the 2015 Trade for all Strategy, which mentions a dual objective of “maximis[ing] the potential of increased trade and investment to decent work and to environmental protection” and of “engag[ing] with partner countries in a cooperative process fostering transparency and civil society elements”.³⁵ These two elements – increased labour and environment protection through trade; and cooperation – are the first hints of specific objectives of TSD chapters. As part of its commitment to multilateralism, the EU is keen on asserting its desire to achieve the first of these two general elements, which also translate into a “better enforcement of existing agreements and rules in such areas as trade, labour standards, climate and environmental protection”.³⁶ But cooperation with the partner country is also a very important feature of TSD chapters, and a Commission non-paper on TSD chapters mentions a will to ensure both “ambitious commitments on labour rights and environmental protection” and an “active role of civil society, in current and future FTAs”.³⁷ A second non-paper adds a reference to three pillars: “binding commitments by Parties to a range of multilateral environmental agreements and conventions of the International Labour Organisation, structures to involve civil society organisations in the implementation of those commitments and a dedicated dispute settlement mechanism”.³⁸

³³ European Commission, *Communication: Mainstreaming sustainable development into EU policies: 2009 Review of the European Union Strategy for Sustainable Development*, COM(2009) 400 final, 24 July 2009, p. 4.

³⁴ European Commission, *Communication: Trade, Growth and World Affairs. Trade Policy as a Core Component of the EU's 2020 Strategy*, COM(2010) 612, Brussels, 9 November 2010, p. 15.

³⁵ European Commission, *Communication: Trade for all, Towards a more responsible trade and investment policy*, COM(2015)497, Brussels, 14 October 2015, p. 14.

³⁶ European Commission, *Communication: Reflection paper on harnessing globalisation*, COM(2017) 240, 10 May 2017, p. 15, retrieved 18 March 2018.

³⁷ Non-paper of the Commission Services, 11 July 2017, *op. cit.*, p. 2.

³⁸ 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 of the Commission Services, 26 February 2018, p. 1.

These aforementioned policy documents can be summarised in four clear objectives that the EU pursues through TSD chapters:

Commitments:

1. To strengthen labour and environmental **protection** in the partner country;
2. To strengthen **compliance** with the partner country's labour and environmental commitments;

Cooperation:

3. To promote **dialogue and cooperation** between the parties on trade-related aspects of labour and environmental policies;
4. To promote **public participation and transparency**.

We can verify the qualification of these elements as EU objectives by confronting them to the text of recently negotiated FTAs. The Commission's proposal for the Transatlantic Trade and Investment Partnership (TTIP)'s chapter on TSD includes a self-standing article scoping the objectives of the agreement.³⁹ The seven items of this article purport to "strengthen the positive contribution" to sustainable development, including through "enhancing the mutual supportiveness [of] labour, environment and trade" and the formulation and implementation of "policies that contribute to the achievement of sustainable development goals" (1.).⁴⁰ The aim to "uphold the Parties' environmental and labour protection objectives" (2.) is also mentioned, as well as "dialogue and cooperation among the Parties on environmental and labour matters of relevance in a trade and investment context" (3.).⁴¹ The article ends with a mention to "businesses, social partners, environmental groups and other civil society organisation" and to the promotion of "public consultation and participation in the discussion of sustainable development issues arising under this Agreement" (4.).⁴²

³⁹ European Union, *EU Textual Proposal: Trade and Sustainable Development Chapter*, EU-US TTIP Negotiations, art. 2, 6 November 2015.

⁴⁰ *Ibid.*, art. 2(a), (b), and (d).

⁴¹ *Ibid.*, art. 2(c), and (e).

⁴² *Ibid.*, art. 2(f) and (g).

Similar objectives can be extracted from a reading of the negotiated text of the Comprehensive Economic and Trade Agreement (CETA).⁴³ Its article 22-1.3 includes the promotion of “sustainable development through the enhanced coordination and integration of their respective labour, environmental and trade policies and measures” (1).⁴⁴ It also mentions the aims “to upholding [the Parties’] environmental and labour objectives” and to “enhance enforcement” (2.), as well as to “promote dialogue and cooperation between the parties” (3.).⁴⁵ The final sub-paragraphs refer to “impact assessment and stakeholder consultations” and to the promotion of “public consultation and participation in the discussion of sustainable development issues that arise under this Agreement” (4.).⁴⁶

As part of bilateral FTAs, TSD chapters are formulated as a reciprocal obligation, which commits the two sides to respecting them. However, the EU’s four aforementioned objectives are only directed to the partner country. When pushing for TSD chapters in trade negotiations, the EU does not aim at reinforcing its own action on sustainable development but only at increasing the action of its negotiating partners, and this despite their potential reluctance.⁴⁷ For this reason, our assessment of the effectiveness of TSD chapters is conducted – in line with the four EU’s objectives – only in relation to the EU’s partner countries and not in relation to EU Member States.

In order to assess effectiveness, we must now split our four objectives into measurable indicators. Each indicator was developed after a comparative reading of the TSD chapters’ provisions of our three case studies, and the strong similarity between TSD chapters negotiated by the EU makes it possible to use them also in relation to other EU FTAs. Each indicator refers directly to specific provisions in the TSD chapters, and since we define effectiveness as goal-achievement, we postulate that the more the TSD chapters’ objectives are achieved, the more effective they are. The division of our objectives into indicators allows us to measure the extent up to which each of the EU’s objectives has been attained in practice. The degrees of effectiveness in our evaluation range from Low to Medium and to High. For each of these variable, a code is formulated. The confrontation of each code with

⁴³ European Union, *CETA Text of the Agreement*, art. 22-1.3, 29 February 2016.

⁴⁴ *Ibid.*, art. 22-1.3(a).

⁴⁵ *Ibid.*, art. 22-1.3(b) and (c).

⁴⁶ *Ibid.*, art. 22-1.3(d) and (e).

⁴⁷ Interview with a EU Commission official, *op. cit.*

the actual performance of the studied country will indicate the degree of effectiveness of our indicators.

We then aggregate our indicators for each objective. Each indicator is considered to have the same weight, and the variable scored for the majority of indicators constitutes the average effectiveness for each objective. For the purpose of the calculation, the variable High can be considered as worth two Medium (for example, if an objective contains a variable Low and a variable High, the average will be Medium). In case of equality, the two variables will be retained (for example, if an objective contains two variables Low and two variables Medium, the average will be Low to Medium). After having deduced the average effectiveness for each objective, we aggregate again the variables following the same rules in order to find the overall effectiveness of the TSD chapter in relation to each case study. Finally, we aggregate the overall effectiveness of our case studies following again the same rules in order to deduce the overall effectiveness of TSD chapters.

Table 8.1 (Annex 1) operationalises the effectiveness of TSD chapters in EU FTAs. It includes the list of indicators and describes the coding for each variable. This empirical study uses several databases – such as NORMLEX and the UN Information Portal on Multilateral Environmental Agreements (inforMEA) – to determine the number of ratification of ILO conventions and of Multilateral Environmental Agreements (MEAs).⁴⁸ We also use the International Trade Union Confederation (ITUC)'s Global Rights Index 2014-2018 to evaluate labour protection in each case study.⁴⁹ The Environmental Performance Indexes (EPIs) similarly help us score the levels of environmental protection.⁵⁰ Finally, the joint statements of the dedicated committee on TSD and the Civil Society Forum reports made available by the European Economic and Social Committee (EESC) help us determine the degree of dialogue and public participation to the TSD bodies.

⁴⁸ International Labour Convention website, *NORMLEX*; UN website, inforMEA.

⁴⁹ ITUC, *ITUC Global Rights Index: The World's worst countries for workers*, Brussels, 2014. See reference for the following years in the bibliography. The ratings range from 1 (irregular violation of rights) to 5+ (No guarantee of rights due to the breakdown of the rule of law).

⁵⁰ Yale Center for Environmental Law & Policy, Center for International Earth Science Information Network, Columbia University, "2010 Environmental Performance Index", *Environmental Performance Index*. See reference for the following years in the bibliography. Since the methodology evolves over the years, the EPI score per country cannot be compared over time. We therefore assess the degree of effectiveness by comparing the progression of the countries' rank, while acknowledging that it is not an optimal indication of progression in environmental protection.

2.1.3 Selection of case studies and limitations of the research

We will assess the effectiveness of TSD chapters in relation to three case studies: South Korea, Colombia, and Ukraine. Apart from these examples, the EU has negotiated TSD chapters in its existing FTAs with Canada, Central American countries (Honduras, Nicaragua, Panama, Costa Rica, El Salvador, Guatemala), Georgia, and Moldova. FTAs concluded with Japan, Singapore and Vietnam also contain TSD chapters, but they are not yet in force. The selection of case studies was conducted with due attention to the length of implementation as well as to geographic diversity and economic disparities. We hope that a representation of countries situated in Asia, America and Europe with different levels of economic development can help generalise our framework for further analysis and draw comparisons between each situation.

This work is supported by academic literature and EU official documents on TSD chapters. Six interviews were conducted to gather the views of institutional and society stakeholders. There have been previous attempts to analyse whether TSD chapters improve environmental legislations in EU partner countries, or whether they affect labour.⁵¹ But commentators have generally pointed out a lack of empirical data.⁵² By undertaking an empirical assessment of the effectiveness of TSD chapters, we aim to fill a gap in the literature.

We must however highlight the limits of our research. The oldest TSD chapter has been in force for less than seven years, which may be considered as a short period to reliably assess its effectiveness. The lack of measurable data during this short period is a second limit of our study, as it has reduced the number and quality of indicators. For example, the absence of a full list of environmental goods and services in the Combined Nomenclature (CN) classification made it impossible to measure the trade increase of environmental goods and

⁵¹ See for example I. Bastiaens, E. Postnikov, “Greening up: the effects of environmental standards in EU and US trade agreements”, *Environmental Politics*, vol. 26, no. 5, 2017, p. 848; International Institute for Labour Studies, “Social Dimensions of Free Trade Agreements”, *International Labour Organization*, 6 November 2013, p. 22.

⁵² A. Marx, L. Brecht Lein, N. Brando, “The protection of labour rights in EU Bilateral Trade Agreements: The Case of the EU-Colombia Agreement”, *Journal of world trade*, vol. 50, no. 4, 2016, p. 588.

services between the EU and the partner countries.⁵³ Other missing data includes a list of incentive-based mechanisms such as fair and ethical trade schemes, and a list of incentives adopted to promote the prudent and rational utilisation of natural resources. A third limit of this research is the lack of a causal relationship between the achievement of the EU's goals and the actual impact of TSD chapters on the realisation of such achievement. The selection of three case studies does not ensure that our findings can be generalised with certainty, and our coding would need to be updated in order to be used in the next years. The time dedicated to the research, in the framework of a one-year master's degree, and the word count are further limitations. With these limits in mind, we will now analyse the *rationale* and structure of the TSD chapter's political conditionality model.

⁵³ See European Union, "Commission implementing Regulation (EU) 2015/2174 of 24 November 2015 on the indicative compendium of environmental goods and services, the format for data transmission for European environmental economic accounts and modalities, structure and periodicity of the quality reports pursuant to Regulation (EU) No 691/2011 of the European Parliament and of the Council on European environmental economic accounts", *Official Journal of the European Union*, L307, 25 November 2015, pp. 17-22. See also Eurostat, *EGSS list of environmental products based on CPA and CN*, June 2016.

3 Reasons for the introduction of Trade and Sustainable Development chapters in the EU's recent Free Trade Agreements

The link between Trade and sustainable development may not appear self-evidence if one conceives trade policy as the simple liberalisation of tariffs. But the General Agreement on Tariffs and Trade (GATT) and WTO negotiation rounds are no longer the major focus of the EU's trade policy, and the trade agenda has broadened to include a substantial number of other issues: trade-related aspects of intellectual property, investments, subsidies, the mutual recognition of professional qualifications, electronic commerce, competition, public procurement, etc. However, the mere historic enlargement of trade agenda is not a satisfactory response to the question of why the EU has inserted sustainable development provisions in its recent FTAs, and why it has chosen to do so through a new model of political conditionality. We will endeavour to respond to this question in this chapter. We will first examine the reasons for the EU to insert sustainable development in its FTAs (part 1). Secondly, we will enquire why the EU has done so through self-standing TSD chapters by comparing this new model of political conditionality with the human rights political conditionality model, and by analysing whether the new model learnt from its elder (part 2).

3.1 Mixing trade and sustainable development: Political and economic considerations

Several arguments have led to the inclusion of sustainable development in the EU's FTAs. At the political level, the inclusion in the EU treaties of sustainable development to the EU's values as well as the EP's activism were important factors. But the EU's trade policy may also be concerned by economic factors and it is interesting to assess how they relate to sustainable development.

3.1.1 Sustainable development on the EU's political agenda

The EU's action is guided by its founding treaties. But political will through the EP is also just as important.

3.1.1.1 The competence to promote sustainable development externally

The first argument which comes in mind when considering the Union's action in a given policy field is competence. The EU only acts in a certain way if it is entitled to do so by its founding treaties. The principle of sustainable development is mentioned in the TEU, the TFEU, and in the Charter of Fundamental Rights, which enjoys the same legal force of a treaty.⁵⁴ As part of its values, the EU shall promote sustainable development "in its relations with the wider world", and it shall in particular "foster the sustainable economic, social and environmental development of developing countries".⁵⁵ This attachment to promoting sustainable development can also be related to the EU's commitment to furthering international law and multilateral cooperation.⁵⁶ The EU would need to promote sustainable development in multilateral arenas to be consistent with its values. The ILO and the UN Environment Programme are logical choices for doing so, but the former has limited powers to ensure the enforcement of labour standards and the latter has also difficulties to assert itself as a fully-fledged UN specialised agency.⁵⁷ The WTO could prove a stronger norm-setter, but the EU failed to uphold labour standards in this arena.⁵⁸

Nevertheless, recourse to the EU's trade policy to promote sustainable development was an excellent idea, as it surely constitutes the strongest tool of global influence at the EU's

⁵⁴ Preamble, art. 3-3, 3-5, and 21-2(f) TEU; art. 11 TFEU; European Union, "Charter of fundamental rights of the European Union" [hereafter 'Charter'], *Official Journal of the European Union*, C364, 18 December 2000, preamble and article 37. See also art. 6 TEU for a reference to the legal force of the Charter.

⁵⁵ Art. 3-5 and 21-2(d) TEU.

⁵⁶ Art. 3-5, 21-1 and 21-2(h) TEU.

⁵⁷ Velluti, "The EU's social dimension", *op. cit.*, p. 44; T. Delreux, "The EU and Multilateralism in the Environmental Field: UNEP Reform and External Representation in Environmental Negotiations", in E. Drieskens, L. van Schaik, *The EU and Effective Multilateralism: Internal and External Reform Practices*, London, Routledge, 2014, pp. 177-178.

⁵⁸ Leary, "The WTO and the Social Clause: Post-Singapore", *op. cit.*, pp. 118-119.

disposal. It is also a means for the EU to gain exclusive competence on a topic for which it would otherwise enjoy limited competence. Indeed, the shared nature of the EU's competence in the field of the environment generally involves the Member States' presence alongside the EU in a treaty-negotiations.⁵⁹ Equally, social policy is a shared competence and labour standards are also to be negotiated at the international level alongside Member States.⁶⁰ The EU's common commercial policy is however an exclusive competence and the Lisbon treaty introduced values in its realm by indicating that "the common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action".⁶¹

As the CJEU recently stated, the such 'principles and objectives' permit the mainstreaming of labour (art. 9 TFEU) and of environmental protection (art. 11 TFEU) within the EU's exclusive common commercial competence.⁶² Sustainable development has been legally included in the EU's trade policy, thereby allowing the EU to use FTAs as a vehicle for promoting these values. This is an important perspective since the EU can now promote sustainable development beyond its borders through its exclusive competence whereas it only enjoys a shared competence to promote the same subject matter in its own Member States.

3.1.1.2 The political will to uphold sustainable development standards in EU FTAs

"Trade is heavily controversial today".⁶³ The rejection of the Comprehensive Economic and Trade Agreement (CETA) by a regional parliament in Belgium in 2016 illustrates this statement.⁶⁴ Prior to this, the Commission had received about 145 000 replies – 97%

⁵⁹ Art. 4-2(e) TFEU; See also T. Delreux, "Multilateral Environmental Agreements: A Key Instrument of Global Environmental Governance", in C. Adelle, K. Biedenkopf, D. Torney, *European Union External Environmental Policy: Rules, Regulation and Governance Beyond Borders*, Palgrave Macmillan, 2018, p. 24.

⁶⁰ Art. 4-2(b) TFEU; Court of Justice of the European Union [hereafter 'CJEU'], "Opinion delivered pursuant to the second subparagraph of Article 228(1) of the EEC Treaty - Convention N° 170 of the International Labour Organization concerning safety in the use of chemicals at work", *Opinion 2/91*, 19 March 1993, ECR I-01061, para. 15, 31-32, 39.

⁶¹ Art. 3-1(e) TEU; art. 207 TFEU.

⁶² CJEU, "Opinion pursuant to Article 218(11) TFEU", *Opinion 2/15*, 16 May 2017, para. 145-147.

⁶³ Interview with Hiddo Houben, Head of Unit E1 (USA and Canada) at DG Trade, Brussels, 30 January 2018.

⁶⁴ M. De la Baume, "Walloon parliament rejects CETA deal", *Politico*, 14 October 2016, retrieved 26 April 2018.

negative – to its consultations about the investor-state dispute settlement (ISDS) system in the Transatlantic Trade and Investment Partnership (TTIP).⁶⁵ Many of the concerns raised against these trade agreements relate to a fear of reduction of European standards in the areas of health, labour or the environment as a consequence of liberalisation. A 2013 ILO study indicates:

An important part of the debate about making globalization more socially sustainable deals with the question of how to ensure that trade liberalization upholds or improves labour standards, rather than puts them at risk.⁶⁶

In echo of these popular concerns, the EP has overwhelmingly supported the inclusion of sustainable development in the EU's FTAs.⁶⁷ This policy choice may very well constitute a trump card: sustainable development is not only a popular topic among the European population, it is also a field in which the EU has acquired a strong reputation. The EU has ratified the major MEAs, and its Member States have all ratified the core ILO conventions.⁶⁸

The Lisbon treaty has conferred the EP a *de facto* veto power over the conclusion of trade agreements by requiring its consent.⁶⁹ This power has not only translated into a 'yes' or 'no' vote after the negotiation. Instead, it has "affected the negotiating dynamics" and contributed to the politicisation of trade negotiations.⁷⁰ Indeed, the EP does not see its consent to a FTA as a request to approve the result of a negotiation between the Commission and a negotiating partner, but rather as the logical consequence of whether its voice has been heard.⁷¹ For the EP, a values-based trade policy must ensure that European companies do not indirectly contribute to violations of human rights or environmental standards.⁷² The

⁶⁵ European Commission, DG Trade, "Report presented today: Consultation on investment protection in EU-US trade talks", *News archive*, Brussels, 13 January 2015.

⁶⁶ International Institute for Labour Studies, "Social Dimensions of Free Trade Agreements", *op. cit.*, p. 5.

⁶⁷ L. Van den Putte, "Divided we stand: the European Parliament's position on social trade in the post-Lisbon era", in A. Marx, J. Wouters, G. Rayp, L. Beke "Global governance of labour rights : assessing the effectiveness of transnational public and private policy initiatives", Cheltenham: Edward Elgar, 2015, p. 65.

⁶⁸ Delreux, "Multilateral Environmental Agreements", *op. cit.*, pp. 20-21; ILO, *The ILO and the EU, partners for decent work and social justice: Impact of ten years of cooperation*, Report, Geneva, November 2012, p. 8

⁶⁹ Art. 218-6 TFEU.

⁷⁰ M. Frenhoff Larsén, "The Increasing Power of the European Parliament: Negotiating the EU-India Free Trade Agreement", *International Negotiation*, vol. 22, 7 June 2017, p. 17; L. Richardson, "The Post-Lisbon Role of the European Parliament in the EU's Common Commercial Policy: Implications for Bilateral Trade Negotiations", *College of Europe: EU Diplomacy Papers*, May 2012, p. 17.

⁷¹ Interview with Felix A. Lutz, Administrator at the European Parliament's INTA Committee, Brussels, 31 January 2018.

⁷² *Ibid.*

underlying goal is to only retain the ‘good sides’ of globalisation: to increase trade flows with negotiating partners, including developing countries, but without encouraging products produced in violation of core international labour and environmental standards. The normative perspectives of FTAs are extremely powerful, as they constitute a formidable opportunity to “define what passes for ‘normal’” in terms of environmental and labour standards in third countries.⁷³ As such, the US withdrawal from the Trans-Pacific Partnership is a lost opportunity to push for the increase of labours’ rights in Southeast Asia in countries such as Brunei, Malaysia, and Vietnam.⁷⁴

In 2010, 2011 and in 2016, the EP has called on the Commission to “systematically include a chapter on sustainable development” which is “comprehensive, enforceable and ambitious” in its negotiated FTAs.⁷⁵ Non-binding resolutions constitute an interesting opportunity for the EP to indicate its preferences and to put pressure on the negotiator. The EP’s has used them to push for stronger sustainable development provisions in FTA which were under negotiation, including the ones with Vietnam or India.⁷⁶ A notable example of the EP’s activism in support of sustainable development standards is its 2012 resolution on the EU-Colombia FTA. Months before the vote on the agreement, the EP called directly “on the Andean countries” to establish “a transparent and binding road map on human, environmental and labour rights” designed to better enforce environmental and labour legislation.⁷⁷ Against this interference in the negotiation process between the Commission

⁷³ I. Manners, “Normative Power Europe: A Contradiction in Terms”, *Journal of Common Market Studies*, vol. 40, no. 2, 2002, p. 236.

⁷⁴ C. Cimino-Isaacs, “Labour Standards in the TPP”, in C. Cimino-Isaacs, J. J. Schott, *Trans-Pacific Partnership: An Assessment*, Peterson Institute for International Economics, 2016, p. 262. The Trans-Pacific Partnership is now referred to as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership.

⁷⁵ European Parliament, *Resolution of 25 November 2010*, *op. cit.*, para. 13; European Parliament, *Report on the external dimension of social policy, promoting labour and social standards and European corporate social responsibility*, PE 454.428v02-00, 20 April 2011, para. 40; European Parliament, *Resolution of 5 July 2016 on implementation of the 2010 recommendations of Parliament on social and environmental standards, human rights and corporate responsibility*, P8_TA(2016)0298, 5 July 2016, para. 21.

⁷⁶ European Parliament, *Resolution of 17 April 2014 on the state of play of the EU-Vietnam Free Trade Agreement*, P7_TA(2014)0458, Brussels, 17 April 2014, para. 20; European Parliament, *Resolution of 11 May 2011 on the state of play in the EU-India Free Trade Agreement negotiations*, P7_TA(2011)0224, Brussels, 11 May 2011, para. 6 and 29.

⁷⁷ European Parliament, *Resolution of 13 June 2012 on the EU trade agreement with Colombia and Peru*, P7_TA(2012)0249, Brussels, 13 June 2012, para. 15.

and Colombia, the latter simply complied, and the EP consented to the conclusion of the FTA.⁷⁸

This firm position of the EP has reduced the flexibility of the negotiator – usually the Commission – in relation to trade and sustainable development. The Commission’s hands are tied since it is now well aware that it cannot present an FTA to the EP without it containing a TSD chapters.⁷⁹ Even in case of a reluctance from the negotiating partner to mix trade with sustainable development, the agreement would not pass the ratification process. The European Parliament has hence played a decisive role in favour of the systematic inclusion of TSD chapters in EU FTAs.

With the EU having the legal competence to promote sustainable development in its external relations the common commercial policy constitutes the adequate tool to pursue the EU’s objective. In a context of growing public concerns over the effects of globalisation, the EU’s trade policy needs to win the hearts of EU citizens and safeguard environmental and labour standards. The EP has echoed these concerns and ensured the systematic inclusion of TSD chapters in EU FTAs. But economic considerations may also have played a part.

3.1.2 Economic motives: A price on values?

The EU’s trade policy and FTAs constitute powerful tools for the promotion of sustainable development. But for the EU’s negotiating partners to be enticed to include non-commercial issues in FTAs, there would need to be a link with trade. And as a result of this link, it becomes interesting to wonder whether the EU has an economic interest to pursue a sustainable development agenda.

⁷⁸ B. Lange, “EU-Colombia/Peru trade agreement”, *Group of the Progressive Alliance of Socialists & Democrats in the European Parliament, Plenary Session*, 10 December 2012; European Parliament, *Legislative resolution of 11 December 2012 on the draft Council decision on the conclusion of the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part*, P7_TA(2012)0481, Brussels, 11 December 2012.

⁷⁹ Interview with a EU Commission official, *op. cit.*

3.1.2.1 The economic link between trade and sustainable development

When trying to grasp the connection between trade and sustainable development, it is important to agree on the meaning of the very broad notion of ‘sustainable development’. The EU has equated this concept in TSD chapters to labour and environmental protection. Yet the ‘ability of future generations to meet their own needs’ which sustainable development is supposed to preserve could also cover notions such as the end of poverty or the reduction of inequalities.⁸⁰ The DG Trade’s website itself sustains a confusion, by mentioning that:

EU law requires all relevant EU policies, including trade policy, to promote *sustainable development*. So EU trade policy aims to ensure that economic development goes hand in hand with:

- *social justice*
- *respect for human rights*
- *high labour standards*
- *high environmental standards* (emphasis added).⁸¹

Taken together, the topics of labour and of the environment do not share much in common, with labour rights forming part of the second generation of economic, social and cultural rights⁸² and environmental standards not being integrated in the human rights framework, although one could argue that the right to a healthy environment may belong to the third generation of collective rights. The reason for the union of the environmental and labour topics under the heading ‘sustainable development’ may very well be the risk that trade has negative externalities on both labour and environmental standards. For a utility reason, they would be included in FTAs within a self-standing chapter and would be protected by dedicated bodies.

⁸⁰ Respectively Sustainable Development Goals 1 and 10. UN General Assembly, “Transforming our world: the 2030 Agenda for Sustainable Development”, *Resolution A/70/L1*, New York, 21 October 2015, p. 14.

⁸¹ DG Trade website, “Sustainable Development”, *European Commission*, 9 April 2018.

⁸² UN General Assembly, “International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights”, *Resolution A/RES/21/2200*, New York, 16 December 1966. See art. 8 of the International Covenant on Economic, Social and Cultural Rights.

The impact of trade liberalization on labour is difficult to assess, but it was nevertheless subject to numerous studies.⁸³ One could expect that a trade increase would lead to an increased growth, thereby raising employment. But “economic benefits do not automatically translate into benefits for workers”.⁸⁴ There is a long-lasting fear that trade liberalisation would increase competition, and therefore lead in reaction to a lowering of labour standards to compete against rivals.⁸⁵ FTAs, among other trade liberalisation tools, would lead to a ‘*race to the bottom*’ of social standards.⁸⁶ This theory however lacks empirical evidence.⁸⁷

The impact of trade liberalization on the environment is equally, or perhaps even more difficult, to assess due to the all-encompassing nature of the two notions. Two hypotheses can nevertheless be retained to illustrate the potential risks of free trade on the environment. First, economists have described three kinds of impacts that trade liberalisation would have on global levels of pollution: a scale effect induced by an increased economic activity, a composition effect caused by the specialisation in sectors in which countries have a competitive advantage, and a technique effect, through the modernisation of the production process.⁸⁸ The combination of these impacts may have negative effects on the environment. Secondly, with the increase in competition induced by trade liberalisation, developing countries may be tempted not to increase environmental standards in order to specialise in the export of polluting products, hereby creating “pollution heavens”.⁸⁹ However, and as for labour standards, the potential negative impact of trade liberalisation on the environment is still very much debated⁹⁰.

⁸³ A summary of these studies is mentioned in International Institute for Labour Studies, “Social Dimensions of Free Trade Agreements”, *op. cit.*, pp. 11-16.

⁸⁴ ILO, “World Employment Social Outlook: The changing nature of jobs”, *International Labour Office*, Geneva, 2015, p. 140.

⁸⁵ Orbie, Martens, Oehri & Van den Putte, “Promoting sustainable development or legitimising free trade?”, *op. cit.*, p. 529.

⁸⁶ J-M. Siroën, D. Andrade, “Trade Agreements and Core Labour Standards”, *Nopoor Policy Brief*, no. 5, March 2016, p. 1.

⁸⁷ Cimino-Isaacs, “Labour Standards in the TPP”, *op. cit.*, p. 265.

⁸⁸ G. M. Grossman, A. B. Krueger, “Environmental Impacts of a North American Free Trade Agreement”, *National Bureau of Economic Research, Working Paper no. 3914*, Cambridge (US), November 1991, pp. 3-5.

⁸⁹ A. Levinson, S. Taylor, “Unmasking the Pollution Haven Effect”, *International Economic Review*, vol. 49, no. 1, 2008, p. 249. pp. 223-254.

⁹⁰ For a critic of the first hypothesis, see W. Antweiler, B. Copeland, S. Taylor, “Is Free Trade good for the Environment?”, *National Bureau of Economic Research, Working Paper no. 6707*, August 1998. For a critic of the second hypothesis, see J. A Tobey, “The effect of Domestic Environmental Policies on Patterns of World Trade: An Empirical Test”, *Kyklos*, vol. 43, no. 2, pp. 191-209.

There is hence an economic link between trade and labour and between trade and the environment. To ensure that free trade does not lead to the reduction of labour and environmental standards, it appears justified to include their protection in EU's FTAs. Through this objective, the EU may also serve its own economic interests.

3.1.2.2 The EU's economic interest to advance sustainable development

At first sight, it may appear counter-intuitive to argue that additional protection of sustainable development in EU FTAs would render an economic benefit. They would in fact rather constitute an obstacle to trade liberalisation. For many developing countries, the proposition to include labour standards to the WTO's agenda back in the 90s amounted to 'hidden protectionism'.⁹¹ The EU has never used a protectionist rhetoric to support the inclusion of TSD chapters in its FTAs, instead putting forward the selfless interest of safeguarding human rights and environmental standards internationally.⁹² TSD chapters themselves state that environmental and labour standards "should not be used for protectionist trade purposes".⁹³ And yet TSD chapters may have an equivalent effect. As a result of the EU's high environmental and labour standards, developing countries' less stringent regulations constitute a comparative advantage which fosters their competitiveness against the EU's market. With the FTA eliminating most of the tariffs between the EU and its negotiating partners, there are fears that European exporters face an unfair competition from cheaper products. TSD chapters would remedy the situation by increasing labour and environmental standards in the partner country, thereby partly filling the gap between the EU's stringent standards and the developing countries' lower standards. The adjustment costs of the partner country to international standards may furthermore provide a temporary advantage to European competitors.⁹⁴

A second argument is that the restriction of labour rights for competition purposes, or 'social dumping', has detrimental effects on both the EU's negotiating partners and the EU itself.

⁹¹ Leary, *op. cit.*, p 120. See also Velluti, "The EU's social dimension", *op. cit.*, p. 44.

⁹² L. Van den Putte, J. Orbie, "EU Bilateral Trade Agreements and the Surprising Rise of Labour Provisions", *International Journal of Comparative Labour Law and Industrial Relations*, vol. 31, no. 3, 2015, p. 275.

⁹³ See for example art. 12-2.2 of the EU-Colombia/Peru FTA, or art. 13-2.2 of the EU-Korea FTA.

⁹⁴ Young, "Liberalizing trade, not exporting rules", *op. cit.*, p. 1258.

Several studies underline the long-term positive effect of core labour standards on a country's economy.⁹⁵ Their adoption is likely to increase demand for labour and to correct the adverse economic effect of discrimination on the national market.⁹⁶ The economic benefits of the commercial partner would then trickle down on EU's exports.

A third potential economic benefit of TSD chapters for the EU could be a *de facto* improvement of European companies' corporate social responsibility (CSR). With production being outsourced internationally through global supply chains and with consumers becoming increasingly aware of their ecological, and to some extent social, footprint, companies have adopted more responsible business conducts. International campaign such as the one against Nike's sweatshops in the 1990s have changed corporate behaviours.⁹⁷ Nowadays, customers expect companies to take responsibility for the conduct of their suppliers and sub-contractors. Businesses have hence started devoting resources to monitoring social standards and environmental performance of their sub-contractors.⁹⁸ In this context, TSD chapters' provisions on CSR may have a positive impact on the EU negotiating partners' labour legislation.⁹⁹ This top-down approach could make it easier for European companies to reach a higher standard of social responsibility, and therefore constitute an economic advantage.

Finally, a fourth argument relates to the EU's capacity to use its market power to export its standards.¹⁰⁰ Factors such as market size, regulatory capacity or preference for stricter rules confer the EU a "global regulatory capacity".¹⁰¹ As a result of tariffs liberalisation induced by the FTA, foreign companies may be enticed to adopt the EU's higher production standards in order to export in EU market. If TSD chapters increase partner countries' environmental and labour production, these companies would *anyway* have to adapt their

⁹⁵ F. Arestoff-Izzo, R. Bazillier, C. Duc & C. Granger-Sarrazin, *The Use, Scope and Effectiveness of Labour and Social Provisions and Sustainable Development Aspects in Bilateral and Regional Free Trade Agreements*, Report, DG Employment, European Commission, Contract VC/2007/0638, 15 September 2008, pp. 39-40.

⁹⁶ *Ibid.*, p. 40.

⁹⁷ S. Birch, "How activism forced Nike to change its ethical game", *The Guardian*, 6 July 2012.

⁹⁸ Interview with a business association representative, Brussels, 15 March 2015.

⁹⁹ See for example art. 271-3 EU-Colombia FTA or art. 293-3 EU-Ukraine DCFTA.

¹⁰⁰ C. Damro, "Market power Europe", *Journal of European Public Policy*, vol. 19, no. 5, 1 March 2012, pp. 686-687.

¹⁰¹ A. Bradford, "The Brussels Effect", *Northwestern University Law Review*, vol. 107, no. 1, 2012, pp. 5-6.

production standards. There is hence a chance that they find it interesting to directly upgrade their production standards to the EU's level, both to produce nationally and for the EU market.¹⁰²

This latter argument as well as previous ones have two flaws. First, they largely overestimate the regulatory effect of TSD chapters, as we will see in chapter 4. Secondly, TSD chapters do not harmonise standards. In fact, they “largely preserve existing differences with respect to environmental and labour regulation”.¹⁰³ The economic benefit for the EU appears rather indirect and the EU would retain *anyway* a competitive disadvantage because its standards are much higher than international standards promoted by TSD chapters.¹⁰⁴ If there are any economic benefits for the EU to pursue sustainable development through FTAs, this has not been considered by the EU as a reason for the inclusion of TSD chapters.

Political considerations are a better explanation for the inclusion of TSD chapters in EU FTAs than economic benefits. But the two lines of arguments are not contrary. The ‘competitive’ and ‘values’ frames can both be considered valid reasons, just like the respect of the EU treaties and the EP’s support, for the EU to include TSD chapters in its FTAs.¹⁰⁵ The question which remains to examine is why the EU has chosen to depart from the existing human rights conditionality model and to create a new model of political conditionality for sustainable development.

3.2 *A new cloth for political conditionality: Lessons learnt from the human rights conditionality model?*

We have mentioned previously the proximity between labour and human rights, which raises the question as to whether TSD chapters are the appropriate format for protecting sustainable development in EU FTAs. Critics were voiced that the environment and labour would be too

¹⁰² *Ibid.*, pp. 17-18.

¹⁰³ Young, “Liberalizing trade, not exporting rules”, *op. cit.*, p. 1266.

¹⁰⁴ *Ibid.*, p. 1268.

¹⁰⁵ L. Van den Putte, “Divided we stand”, *op. cit.*, p. 68.

different to be “combine[d] in one oversight mechanism”.¹⁰⁶ While the EU considers human rights, rule of law and democratic principles as “preconditions for sustainable development and stability”, it has chosen to adopt a different political conditionality model for sustainable development.¹⁰⁷

Contrary to the human rights conditionality sanction-based approach, TSD chapters rely on purely cooperative mechanisms. This overarching difference is reflected in the legal structure of these two political conditionality models, which differ significantly. We will compare the two legal structures and see why the human rights conditionality model was discarded. We will also see if the two models relate and whether the EU has drawn lessons from the advantages and drawbacks of human rights clauses.

3.2.1 Differences in legal force: human rights are ‘essential’, sustainable development is not

What is perhaps the starkest difference between human rights clauses and TSD chapters is their legal force. Human rights clauses are characterised as “essential elements” of the treaty.¹⁰⁸ In legal terms, an ‘essential element’ is a “provision essential to the accomplishment of the object or purpose of the treaty”, which is generally considered as decisive to the choice of a state to enter into the agreement.¹⁰⁹ The importance of this clause necessitates that, in case of a breach, the other party be entitled to unilaterally terminate or suspend, in whole or in part, the agreement.¹¹⁰ Under customary international law, either the EU or its negotiating partner would be entitled to suspend the benefits of the agreement for a violation of democratic principles, fundamental human rights, or the rule of law.¹¹¹ This

¹⁰⁶ Van den Putte, Orbie, “EU Bilateral Trade Agreements”, *op. cit.*, p. 282.

¹⁰⁷ European Parliament, Council, European Commission, “Joint statement: The new European Consensus on Development: ‘Our World, Our Dignity, Our Future’”, *Official Journal of the European Union*, C210/01, 30 June 2017, p. 32.

¹⁰⁸ See for example art. 1 EU-Colombia/Peru FTA.

¹⁰⁹ UN, *Vienna Convention on the Law of Treaties of 23 May 1969* [hereafter: ‘VCLT’], United Nations Treaty Series, no. 11232, Vol. 1155, 1-18232, 27 January 1980, art. 60-3(b).

¹¹⁰ Art. 60-1 VCLT.

¹¹¹ The EU is not a signatory to the VCLT. However, its article 60 was recognised as part of customary international law in International Court of Justice, “Case concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia)”, *Judgment, ICJ Reports 1997 p. 7*, 25 September 1997, para. 46, 99.

possibility is further reiterated in the agreements themselves, where a clause explicitly mentions the possibility to “adopt appropriate measures in accordance with international law in case of violation by another Party of the essential elements”.¹¹² Human rights clauses hence benefit from the upmost legal protection that a treaty can provide.

On the contrary, the provisions contained in TSD chapters enjoy a very weak legal force. As Bartels puts it, “the principle of sustainable development has never been treated as a concrete obligation in itself”, in the sense that there is no provision to commit the parties to respecting sustainable development in general.¹¹³ But we nonetheless do not agree that TSD chapters are “largely aspirational and programmatic”.¹¹⁴

It is true that for most of them, TSD obligations are written in a way that does not imply much commitment from the parties. Typical examples include a requirement under which the parties “shall strive to ensure” high levels of environmental and labour protection, or that they will make “continued and sustainable efforts” for ratifying international.¹¹⁵ The use of the verb ‘shall’ does indicate a legally binding clause, but it is complemented to an obligation of best efforts, as opposed to an obligation of result.¹¹⁶ The clause nevertheless implies that measures taken to safeguard the environment or labour standards do not violate the agreement.¹¹⁷ The TSD dedicated dispute settlement mechanism is another example of very weak legal provision: a party is not obliged to enter into consultations nor to follow the report of the Panel of Experts which only has the power to *recommend* a solution to the dispute.¹¹⁸

However, other TSD obligations which are formulated in a much more binding way are not given enough attention. The obligation for the parties to cooperate on matters related to trade

¹¹² See for example art. 8-3 of the EU-Colombia/Peru FTA.

¹¹³ L. Bartels, “Human Rights and Sustainable Development Obligations in EU Free Trade Agreements”, *Legal Issues of Economic Integration Law*, vol. 40, no. 4, p. 306.

¹¹⁴ N. Meyer-Ohlendorf, C. Gerstetter, I. Bach, “Regulatory Cooperation under ECTA: Implications for Environmental Policies”, *Ecologic Institute*, 1 November 2016, p. 21.

¹¹⁵ See for example art. 13-3 and 14-4.3 EU-Korea FTA or art. 268 EU-Colombia/Peru FTA.

¹¹⁶ S. Biniarz, “Comma but Differentiated responsibilities: punctuation and 30 other ways negotiators have resolved issues in the international climate change regime”, *Michigan Journal of Environmental & Administrative Law*, vol. 6, no. 1, 2016, p. 58.

¹¹⁷ Interview with Stéphane Lambert, Head of Trade section of the Mission of Canada to the EU, Brussels, 30 January 2018.

¹¹⁸ See for example art. 283-285 EU-Colombia/Peru FTA.

and sustainable development enjoy a relatively strong legal protection: “the Parties will dialogue and cooperate as appropriate”, or “the Parties commit to initiating cooperative activities”.¹¹⁹ A large list of cooperative activities generally follow in an annex or sometimes in the form of self-standing provisions. They cover areas such as biological diversity, trade in forest and fish products, climate change, corporate social responsibility, migrant workers, or the ILO Decent Work Agenda.¹²⁰

Finally, a third set of clauses enjoys a strong legal protection. It first includes a compulsory review of sustainability impact: each party “commit[s] to review, monitor and assess the impact of the implementation of this agreement on labour and environment”.¹²¹ Secondly, the clauses asking the parties to set up monitoring and civil society structures – namely a dedicated committee on TSD, a Dispute Advisory Group (DAG) for each party, and an Expert Group for the dispute settlement mechanism – are binding. A third strong legal obligation of TSD chapters is to effectively implement, in law and in practice, the MEA and ILO convention the parties have ratified.¹²² Such a commitment extends the general obligation of a party to respect a convention it has ratified (*pacta sunt servanda*) into a bilateral and reciprocal commitment under the FTA to respect these environmental and labour conventions. A fourth important legal commitment under the TSD chapter is one not to reduce labour or environmental standards in a manner affecting trade or investment.¹²³ This latter ‘upholding levels of protection’ clause can be compared to the broader and nascent principle of non-regression in international environmental law, under which the parties commit not to reduce the global level of environmental protection under their national law.¹²⁴

Although the binding character of several clauses contained in TSD chapters could be strengthened, it is hence not fair to say that they are merely declaratory. Their legal force varies, which contrasts with human rights conditionality. The two political conditionality

¹¹⁹ Art. 269-2 EU-Colombia/Peru FTA; art. 13-11 EU-Korea FTA.

¹²⁰ See for example art. 272-276 EU-Colombia/Peru FTA, or annex 13 EU-Korea FTA.

¹²¹ Art. 279 EU-Colombia/Peru FTA. See also for example art. 13-10 EU-Korea FTA.

¹²² See for example art. 13-4.3 EU-Korea FTA.

¹²³ See for example art. 13-7 EU-Korea FTA, or art. 277 EU-Colombia/Peru FTA.

¹²⁴ See for example Le Club des juristes, *Preliminary Draft, Global Pact for the Environment*, Sorbonne University, 24 June 2017, art. 17.

models seem not to share any similarity, apart from the hypothesis that labour provisions may be included in the ‘essential element clause’ and therefore enjoy stronger legal protection.¹²⁵ A potential lesson learnt from human rights conditionality could be that nuances in legal force provide more flexibility for the parties to implement the TSD chapter, which could further cooperation. But in the end, the legal force of these provisions only matters insofar that they are properly applied, and monitoring mechanisms are particularly relevant.

3.2.2 Differences in monitoring: Dedicated organs for sustainable development

Human rights clauses and TSD chapters somehow have opposite characteristics: the former enjoys a large enforcement potential but lacks monitoring mechanism whereas the latter possess the monitoring bodies but is hardly enforceable.¹²⁶ Indeed, human rights matters are not discussed in a dedicated organ in the FTAs.¹²⁷ They can potentially be discussed in the Trade Committee which convenes yearly to supervise the implementation of the entire agreement.¹²⁸

By contrast, TSD obligations are monitored by a dedicated committee established directly by the FTA and which oversees the implementation of the entire chapter.¹²⁹ This committee on TSD is supported in its work by Domestic Advisory Groups (DAGs) which are designated or established by each party.¹³⁰ The two DAGs work autonomously and they also hold a joint meeting, generally called ‘Civil Society Forum’ to discuss the implementation of the chapter with the public.¹³¹

¹²⁵ N. Hachez, “‘Essential Elements’ clauses in EU Trade Agreements: Making trade work in a way that helps human rights?” *Leuven Centre for Global Governance Studies, Working Paper 158*, Leuven, April 2015, p. 16.

¹²⁶ Gstöhl, De Bièvre, “*The Trade policy of the European Union*”, *op. cit.*, p. 193.

¹²⁷ Bartels, “Human Rights and Sustainable Development Obligations”, *op. cit.*, p. 301.

¹²⁸ See for example art. 15-1 EU-Korea FTA, or art. 12 EU-Colombia/Peru FTA.

¹²⁹ See for example art. 15-2.1(e) EU-Korea FTA, or art. 280-2 EU-Colombia/Peru FTA.

¹³⁰ See for example art. 13-12.4 EU-Korea FTA or art. 281 EU-Colombia/Peru FTA.

¹³¹ See for example art. 13.13 EU-Korea FTA, or art. 282 EU-Colombia/Peru FTA.

The sophisticated monitoring structure of TSD chapters illustrates the cooperative approach of this political conditionality model. Their aim is to commit the negotiating partner to enforcing himself sustainable development provisions.¹³² This soft approach is meant to empower developing countries' civil society and to provide them with the tools to pressure their government.¹³³ It also permits the exchange of information, expertise and know-how on topics which can be prove very technical. Unlike human rights conditionality, TSD chapters do not use threats of sanctions to ensure compliance but they rather institutionalise dialogue both at the national and at the civil society levels. They aim for a long-term impact whereas human rights clauses are specifically triggered in direct reaction to one particular violation. This lack of continuity between the two political conditionality models may indicate that the EU learnt that something is be done to encourage compliance before the nuclear option of triggering 'essential elements' clauses. TSD chapters have a much more complex design which allows for more subtlety in the EU's action.

3.2.3 Differences in dispute settlement: Showing teeth or lacking them

Dispute settlement is another point where the two political conditionality models are opposed. Human rights are not subject to a specific dispute settlement mechanism. Under the general dispute settlement mechanism of the FTA, consultations may be started and lead to the establishment of an arbitration panel.¹³⁴ Without further nuance, a party can also unilaterally suspend the agreement in case a violation. So far, these 'essential elements' were only activated under the Lomé and Cotonou Agreements.¹³⁵ The critic is common that the EU has not triggered these clauses as much as it could, or should, have.¹³⁶ It has also only done so in reaction to political coup, as opposed to other violations of democratic principles or human rights.¹³⁷

¹³² Interview with a EU Commission official, Brussels, 1 February 2018.

¹³³ Bastiaens, Postnikov, "Greening up", *op. cit.*, p. 853.

¹³⁴ See for example art. 14-3 and 14-5 EU-Korea FTA or art. 301 and 303 EU-Colombia/Peru FTA.

¹³⁵ Gstöhl, De Bièvre, "*The Trade policy of the European Union*", *op. cit.*, p. 192.

¹³⁶ Bartels, "Human Rights and Sustainable Development Obligations", *op. cit.*, p. 305.

¹³⁷ Gstöhl, De Bièvre, "*The Trade policy of the European Union*", *op. cit.*, p. 192.

Ironically, TSD chapters do not suffer these inconsistency issues. They enjoy a specific dispute settlement mechanism, which also follows the logic of consultations and recourse to a third party: the Panel of Experts. However, the recommendations of the panel are not binding. The cooperative mechanisms provided by the TSD chapters are expected to increase socialisation and to prevent dispute. If a party refuses to solve a disagreement, “there is nothing further to be done”.¹³⁸ This policy choice contrasts with other EU trade policy instruments. For example, a country which does not respect a MEA could potentially lose trade benefits under the GSP+ scheme, but he would not face such a risk under an FTA.¹³⁹ Opening up one’s market would hence lead to a more advantageous political conditionality mechanism.

One may deplore the lack of proximity between the two political conditionality models on dispute settlement. Human rights use the general dispute settlement mechanism of the FTA which provides for binding recommendations. The nuclear option of suspending trade preferences may have too much teeth and have its own shortcomings, but the TSD chapters’ option of a non-binding dispute settlement overly relies on cooperation. One could argue that a binding and coercive mechanism of dispute settlement may derail the TSD chapters’ strategy of socialisation, but in the meantime the current system lacks teeth.

This part has investigated the reasons for the inclusion of sustainable development in EU FTA, and in the form of a new political conditionality model. We found that the reasons are mainly political, and follow both EU values and competence to promote sustainable development and the need to remedy the backlash against globalisation perceived both by the public opinion and by the EP. In terms of structure, the new political conditionality model shares no similarity with human rights conditionality. It is unsure that the adoption of an opposite model contains any ‘lessons learnt’, especially given the lack of clear of TSD dispute settlement mechanism. However, TSD chapters are much more nuanced instruments,

¹³⁸ S. J. Vogt, “The Evolution of Labor Rights and Trade - A Transatlantic Comparison and Lessons for the Transatlantic Trade and Investment Partnership”, *Journal of International Economic Law*, Vol. 18, No. 4, 2015, p. 850.

¹³⁹ Interview with Dr. San Bilal, Head of Programme ‘Economic Transformation: Trade, Investment and Finance’, European Centre for Development Policy Management (ECDPM), 31 January 2018.

and it plays entirely the strategy of cooperation and dialogue. Being now familiarised with the TSD chapters' structure, we will analyse whether these chapters have been effective.

4 Empirical analysis

In its ‘Trade for All’ Strategy, the European Commission emphasized the need to “make sure that the provisions on trade and sustainable development are implemented and used effectively”.¹⁴⁰ Implementation has become an important concern in the last years, which is likely to grow with the increasing number of FTAs under negotiations. A sign of the growing interest in the FTA’s effectiveness is the launch of an annual report on implementation, starting with the year 2016.¹⁴¹ Yet effectiveness is notoriously difficult to assess, and perhaps even more when the analyses focuses on complex topics such as environmental and labour protection.

As the International Institute for Labour Studies explains:

Opinions differ as to the effectiveness of labour provisions in trade agreements. Considered as a panacea for improving labour standards and working conditions by some, others criticise them as window dressing.¹⁴²

The same comment could be made in relation to environmental provisions. We will hence endeavour to assess the effectiveness of TSD chapters by measuring the degree up to which the EU has achieved its objectives. The EU particularly seeks an effect on commitments – the levels of protection and compliance with environmental and labour standards – and on cooperation – through dialogue and public participation and transparency. We will comment our findings for our three case studies.

¹⁴⁰ European Commission, *Trade for All*, *op. cit.*, p. 17.

¹⁴¹ European Commission, *Country reports and info sheets on implementation of EU Free Trade Agreements, 1 January 2016 - 31 December 2016*, Commission Staff Working Document, SWD(2017) 364 final, Brussels, 9 November 2017, p. 4.

¹⁴² International Institute for Labour Studies, “Social Dimensions of Free Trade Agreements”, *op. cit.*, p. v.

4.1 Case Study 1: South Korea

The EU-Korea TSD chapter has been provisionally applied since 1 July 2011.¹⁴³ The agreement is the first of the ‘new generation’ of FTAs as the negotiations have started about one year after the EU ‘Global Europe’ Strategy. It was clear from the beginning that the agreement would include provisions on sustainable development.¹⁴⁴ When signed in signature in September 2016, the agreement was considered “the most ambitious trade agreement ever negotiated by the EU”.¹⁴⁵ Yet the implementation of the agreement may have been more controversial. In a 2017 resolution, the EP emphasises both that “the Agreement has led to a significant growth” but that “progress made by Korea on the objectives enshrined in the Trade and Sustainable Development chapter is not satisfactory”.¹⁴⁶

Table 8.2 displays our assessment of the effectiveness of the TSD chapters in the EU-Korea FTA. In almost seven years of implementations, we find that effectiveness is mostly Low for the first two objectives related to commitments, but that the performance improves significantly for the objectives linked to cooperation, which reach Medium and High degrees of effectiveness.

It is interesting to find that the effectiveness of indicator 1.1 on additional ratification of ILO conventions is ranked as Medium although Korea has been widely criticised for not putting enough efforts in the ratification of such conventions. While the EP considers that Korea has failed to comply with its obligation of best efforts to ratify fundamental ILO conventions, the ratification by Korea of four Technical conventions and of the Maritime Labour Convention has gone unnoticed.¹⁴⁷ The national levels of labour protection (indicator 1.3)

¹⁴³ European Commission, “European exporters to benefit from the Free Trade Agreement between EU and South Korea from 1 July”, *Press Release, IP/11/811*, Brussels, 30 June 2011.

¹⁴⁴ Speech by Peter Mandelson, EU Commissioner for Trade, “Comments regarding the EP report on motion for a resolution on the trade and economic relations with Korea”, European Parliament, Strasbourg, 13 December 2007.

¹⁴⁵ European Commission, “European Commission statement: Council authorises signature of EU-Korea Free Trade Agreement”, *News Archive*, Brussels, 16 September 2010.

¹⁴⁶ European Parliament, *Resolution of 18 May 2017 on the implementation of the Free Trade Agreement between the European Union and the Republic of Korea*, P8_TA(2017)0225, Strasbourg, 18 May 2017, para. 2, 5.

¹⁴⁷ European Parliament, *Resolution of 18 May 2017*, *op. cit.*, para. 5.

have not increased, which is not surprising in light of several alleged past violations by the Korean government of the trade union's rights to freedom of association and to collective bargaining. On this regard, the EU DAG has advised twice the Trade Commissioner to formally open consultations with the Korean government, but without result.¹⁴⁸ We also find a significant improvement in the levels of environmental protection (indicator 1.4), although there is room for improvement given Korea's level of development and its rank as 60th in the 2018 EPI ranking.¹⁴⁹

Regarding the second objective, Korea's issues with trade unions has led to complaints under the ILO Committee on Freedom of Association (indicator 2.1). Although Korea has not ratified only 27 ILO conventions, we see that it nevertheless encountered difficulties to ensure compliance.¹⁵⁰ It is also interesting to note that the committee on TSD has barely mentioned implementation issues in relation to labour, focusing instead on environmental standards (indicator 2.3). The joint statement of the fifth meeting of March 2017 only carefully states that "the EU side, while understanding the sensitivities of Korea, highlighted the importance of making progress on labour issues and that these were a focus of attention from European stakeholders".¹⁵¹

The absence of additional ratification of Fundamental ILO conventions did not however hamper dialogue and cooperation between the EU and Korea. The two parties even engaged in a cooperative project designed to compare the implementation of an ILO convention on labour discrimination in the EU and in Korea (indicator 3.1).¹⁵² However, dialogue has not yet turned into action. On the last meeting of the committee on TSD, Korea only discussed Fundamental ILO conventions to "inform of no particular action" undertaken to ratify

¹⁴⁸ Letter from the Chair of the EU-Korea DAG to the European Commissioner for Trade, "Serious Violations of Chapter 13 of the EU-Korea FTA", *DB-REX/2014/D/109*, Brussels, 13 January 2014, p. 2; Letter from the Chair of the EU-Korea DAG to the European Commissioner for Trade, "Government Consultations Pursuant to the EU-Korea FTA", *Ref. Ares(2016)7116167*, Brussels, 16 December 2016, p. 2.

¹⁴⁹ Yale Center for Environmental Law & Policy, Yale University; Center for International Earth Science Information Network, Colombia University, "2018 Environmental Performance Index", *Environmental Performance Index*, p. 4.

¹⁵⁰ "Ratifications for Korea", *NORMLEX*, *op. cit.*

¹⁵¹ Council of the European Union, *EU-Korea FTA - report of the 5th meeting of the Committee on Trade and Sustainable Development*, WK 4651/2017 INIT LIMITE, Brussels, 24 April 2017, p. 1.

¹⁵² European Commission, DG Trade, *A Comparative Study of the implementation of ILO Convention 111 in the Republic of Korea and the Member States of the European Union*, FWC FPI/PSF/2015 Lot 4 RFS: 2016 / 373754/1 Study, Brussels, May 2017.

them.¹⁵³ This dialogue was most probably eased by the existing structures under the TSD chapter to promote public participation and transparency through the DAGs and Civil Society Forums (indicators 4.1 and 4.2). In relation to this fourth objective, the effectiveness of the chapter would have scored even higher had the 2016 Civil Society Forum not been cancelled by the Korean government.¹⁵⁴

4.2 Case Study 2: Colombia

The EU-Colombia FTA provisionally entered into force on 1 August 2013.¹⁵⁵ Before the agreement was signed, a large attention was devoted to human rights and labour concerns in spite of Colombia's prior ratification of the eight Fundamental ILO conventions.¹⁵⁶ In 2012, the EP requested that Colombia produces a roadmap on the improvement of human rights and sustainable development.¹⁵⁷ Comparatively, less attention was given to environmental protection, both in the roadmap and in Commission's promotion of the FTA. For example, the Trade Commissioner's speech to the EP a few weeks prior to the vote emphasised that rejection of the FTA "would do no service to human or labour rights" but it barely mentioned environmental standards.¹⁵⁸

Table 8.3 displays our assessment of the effectiveness of the TSD chapter after almost five years of implementation. We find that the effectiveness of TSD chapters varies only between Low and Medium, with the score Medium being awarded to a short majority of indicators.

It can appear as a paradox that Colombia shows low records of additional ratification of ILO convention (indicator 1.1) whereas being a founding member of the organisation and being

¹⁵³ Council of the European Union, "EU-Korea FTA - report of the 5th meeting", *op. cit.*, p. 3.

¹⁵⁴ Letter from the Chair of the EU-Korea DAG, 2016, *op. cit.*, p. 1.

¹⁵⁵ European Commission, *EU-Colombia trade agreement takes effect on 1 August*, Press Release, IP/13/749, Brussels, 26 July 2013.

¹⁵⁶ "Ratifications for Colombia", *NORMLEX*, *op. cit.*

¹⁵⁷ European Parliament, "*Resolution of 13 June 2012*", *op. cit.*, para. 15.

¹⁵⁸ Speech by Karel De Gucht, EU Commissioner for Trade, "Trade agreement between the EU and Colombia and Peru", European Parliament, Strasbourg, 22 May 2012, p. 3.

a party to 54 of its conventions.¹⁵⁹ In fact, it could be more difficult for the EU to achieve its objective with partners already performing well. Still, we notice that this high record of ratification has not translated into an improvement of workers' rights in Colombia: the 2017 ITUC Global Rights Index ranks Colombia among the ten worst countries in this regard (indicator 1.3).¹⁶⁰ We also find that Colombia's roadmap on human, environmental and labour rights was never mentioned in any meeting of the parties. While the political focus was on labour rights prior to the conclusion of the agreement, we notice no improvement in environmental protection since the entry into force of the FTA (indicator 1.2). However, this indicator does not count the Paris agreement which Colombia has not yet formally ratified due to a lengthy ratification process involving the Parliament, the Constitutional Court and the President of the Republic. It is also worth noting that the Latin American and Caribbean countries recently signed an important and binding regional environmental agreement which is likely to raise environmental protection in the longer term.¹⁶¹

On the second objective, we notice a slight but nonetheless positive decrease in the number of cases filed before the ILO (indicator 2.1). Furthermore, recent Supreme Court decisions advanced environmental protection in the country by granting rights to entities such as the Atrato river and the Amazon forest, hereby safeguarding them from environmental degradation and deforestation.¹⁶² The indicators do not record such development because of the difficulty to assess the evolution of national labour and environmental protection.

It is also noteworthy that discussions on environmental and labour matters were very balanced in the Sub-committee on TSD (indicator 3.2). It seems that four meetings have taken place but we found no public record of the fourth one held in Lima on 22-23 November 2017. Although CSR was discussed in the three meetings (indicator 3.3), it was extremely briefly mentioned in joint statements. Finally, the EU suggested several cooperative

¹⁵⁹ "Ratifications for Colombia", *NORMLEX*, *op. cit.*

¹⁶⁰ ITUC, *ITUC Global Rights Index: The World's worst countries for workers*, Brussels, 2017, p. 10.

¹⁶¹ UN, *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean*, Escazú, adopted on 4 March 2018.

¹⁶² N. Mount, "Can a river have legal rights? A different approach to protecting the environment", *The Independent*, 13 October 2017; P. Stublely, "Colombian government ordered to protect Amazon rainforest in historic legal ruling", *The Independent*, 6 April 2018.

activities on environmental and labour matters, so we may expect positive developments in the coming years.

The effectiveness of the EU's fourth objective is Low to Medium, which reveals that the civil society structures were not adequately set up. Colombia has not shared any information on its DAG, and neither its composition nor its functioning are clear (indicator 4.1).¹⁶³ It has been asserted that Colombia was relying on existing national entities as DAG.¹⁶⁴ This raises questions on the balanced representation of civil society, which were echoed by a so-called 'meetings of civil society representatives and participants' to the TSD chapter where the participants requested that Colombia "acknowledge[s] the status of civil society bodies acting as DAGs as official interlocutors, and enable them to operate".¹⁶⁵

4.3 Case Study 3: Ukraine

The EU-Ukraine DCFTA, part of the larger Association Agreement, has been provisionally applied since 1 January 2016.¹⁶⁶ This agreement has played an incredible importance in the EU's foreign policy towards the Eastern Neighbourhood. The former Ukrainian head of state Viktor Yanoukovich's attempt to suspend the signature of the agreement led to national demonstrations which led him out of office and of the country.¹⁶⁷ With only two years and a half of implementation, the DCFTA is the most recent of our case studies. As the 2016 annual report on the implementations of FTAs points out, an important part of this time was

¹⁶³ Vogt, "The Evolution of Labor Rights", *op. cit.*, p. 856.

¹⁶⁴ Orbie, Martens, Van den Putte, *CLEER Papers 2016/3*, *op. cit.*, p. 16.

¹⁶⁵ EESC, "Summary of the discussion and key messages of civil society representatives and participants from the EU, Colombia and Peru (Trade and Sustainable Development Title of the EU-Colombia and Peru Trade Agreement)", *EESC-2016-06883-00-00-TCD-TRA (ES)*, Brussels-Lima-Bogotá, 7 December 2016.

¹⁶⁶ European Commission, *The trade part of the EU-Ukraine Association Agreement becomes operational on 1 January 2016*, Press Release, IP/15/6398, Brussels, 31 December 2015.

¹⁶⁷ N. Bentzen, J. Parks, "Ukraine's on-going reform process Progress and challenges since Euromaidan", European Parliamentary Research Service, Briefing PE 608.632, July 2017, p. 2.

dedicated to the establishment of the TSD bodies.¹⁶⁸ For example, the TSD Sub-Committee was only established in the end of May 2017.¹⁶⁹

Table 8.4 indicates our findings on the effectiveness of the TSD chapter. The short length of implementation has made it difficult to assess effectiveness. This factor has most probably impacted the results, which are Low in regard to a large majority of indicators except for the third objective, where they mostly rank as Medium.

Such a short implementation period has made the degree of effectiveness of the indicators less reliable than for previous case studies. One month before the entry into force of the agreement, Ukraine ratified two environmental Protocols on strategic environmental assessment and on pollutant release.¹⁷⁰ Had they been ratified one month later, they would have upgraded Ukraine's ranking for the indicator 1.2 from Low to Medium. The conflict following Russia's annexation of Crimea in 2016 have also affected the indicators. For example, the 2014 ITUC Global Rights Index indicated that Ukraine had "no guarantee of rights due to the breakdown of the rule of law", a conjectural situation which subsequently improved.¹⁷¹

As for the second objective, we find a Low effectiveness of TSD chapter on the evolution of the number of ILO Freedom of Associations cases filed (indicator 2.1), but only because no such complaint was filed in the observed time frame. If no subsequent complaint is filed, the indicator will become High in the next two years and a half, which suggests that TSD

¹⁶⁸ European Commission, "implementation of EU Free Trade Agreements, 1 January 2016 - 31 December 2016", *op. cit.*, p. 26.

¹⁶⁹ EU-Ukraine Trade and Sustainable Development Sub-Committee, "Decision No 1/2017 of the EU-Ukraine Trade and Sustainable Development Sub-Committee of 30 May 2017 adopting its Rules of Procedure [2018/235]", *Official Journal of the European Union*, L45/44, 17 February 2018, p. 1.

¹⁷⁰ United Nations Economic Commission for Europe (UNECE), *Kyiv Protocol on Pollutant Release and Transfer Registers*, 8 October 2009; UNECE, *Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context*, Extraordinary meeting of the Parties to the Espoo Convention, Ministerial 'Environment for Europe' Conference, Kyiv, 21 May 2003.

¹⁷¹ ITUC, *ITUC Global Rights Index: The World's worst countries for workers*, Brussels, 2014, p. 38.

chapters would need to be in force for about five years for our indicators to be fully efficient.¹⁷²

Since the entry into force of the DCFTA, only one meeting of the TSD Sub-Committee was held.¹⁷³ The effectiveness score of our third objective is hence based on a single joint statement.

Finally, an interesting feature of the DCFTA which was not underscored by our indicators is a new structure which added up to the Civil Society Forum. It consists in a ‘Civil Society Platform’ specific to DCFTA. It gathers civil society members of the two parties every six months to monitor progress in the implementation of the entire agreement.¹⁷⁴ This platform may prove useful for sustainable development, and it has already called three times on the Ukrainian government to establish the DAG.¹⁷⁵

This empirical analysis has showed differences in the effectiveness of TSD chapters’ objective depending on each study. While the EU’s objectives were partly achieved with Korea and Colombia, Ukraine has been less effective. In the following section, we compare and analyse the overall results of our objectives and case studies.

¹⁷² “Ratification for Ukraine”, *NORMLEX*, *op. cit.* See in particular Cases no. 2890 (22 July 2011) and 2843 (22 March 2011).

¹⁷³ Ukraine-EU Trade and Sustainable Development Sub-Committee, “Joint Statement to the Joint Civil Society Forum”, *1st Meeting*, Brussels, 30 May 2017.

¹⁷⁴ See art. 299.4 EU-Ukraine DCFTA.

¹⁷⁵ EU-Ukraine Civil Society Platform, “Joint Declaration”, Brussels, 12 April 2018, para. 1.17.

5 Comparisons and conclusions on the effectiveness of Trade and Sustainable Development chapters

We have assessed the effectiveness of TSD chapters' in relation to Korea, Colombia and Ukraine by analysing goal-attainment of the EU's objectives. Following the rules mentioned in our framework for analysis, the table below aggregates the average effectiveness of each objective for each case study in order to deduce the overall effectiveness of TSD chapters per case study and then the overall effectiveness.

Table 5.1: Overall effectiveness of the TSD chapters in the EU Korea, Colombia and Ukraine (DC)FTA

Effectiveness of TSD chapters	Korea	Colombia	Ukraine
Objective 1: Strengthening labour and environmental protection in the partner country.	<i>Medium</i>	<i>Low</i>	<i>Low</i>
Objective 2: Strengthen compliance with the partner country's labour and environmental commitments.	<i>Low</i>	<i>Medium</i>	<i>Low</i>
Objective 3: Promoting dialogue and cooperation between the parties on trade-related aspects of labour and environmental policies.	<i>Medium</i>	<i>Medium</i>	<i>Low</i>
Objective 4: Promoting public participation and transparency.	<i>Medium to High</i>	<i>Low to Medium</i>	<i>Low</i>
<i>Overall effectiveness per case study</i>	<i>Medium</i>	<i>Medium</i>	<i>Low</i>
<i>Overall effectiveness</i>	<i>Medium</i>		

We find that the overall effectiveness of TSD chapters is Medium for Korea, Medium for the Colombia, and Low for the Ukraine. The overall effectiveness of TSD chapters is Medium.

In order to analyse our findings, we first compare the overall attainment of the different objectives and then draw comparisons among our case studies. Finally, we research if the TSD chapters' effectiveness is related to their capability.

5.1 Comparisons between the attainment of each objective

Objective 3:

It is interesting that of the four EU's objectives, the third on dialogue and cooperation obtains one of the highest scores of effectiveness. One would expect the fourth objective to receive a higher score, as the creation of the DAG and the organisation of Civil Society Forum are conditions for dialogue and cooperation to take place. It is also striking that the results for the third objective are Medium in all cases except in respect to indicator 3.1 for Korea and 3.3 for Ukraine. The parties managed to discuss most of the topics in dedicated committees on TSD, and especially the increase in levels and standards of labour and environmental protection (indicator 3.2). However, cooperative activities have not yet taken place between the parties, with the exception of the joint study on the effectiveness of the ILO Convention C111 between the EU and Korea.¹⁷⁶

Objective 1:

It is tempting to look for a relation between the effectiveness of the third and the first objective. It would follow the cooperative logic of TSD chapters that an increase in effectiveness of the third objective leads over time, through socialisation, to the partner country increasing the effectiveness of the first objective. Korea has the longest length of implementation and it has scored Medium in the two objectives. Colombia has scored a Medium in the third objective but not yet in the first: it may happen in a few additional years of implementation. The connection between these objectives would deserve to be better explored, as we could even suppose that a High effectiveness in relation to the first objective could only be achieved through a prior High rating in relation to the third one.

¹⁷⁶ A Comparative Study of the implementation of ILO Convention 111, *op. cit.*

The effectiveness of the first objective is Low for almost every indicator, with the exceptions of Korea for indicators 1.1 and 1.4 and Ukraine for indicator 1.3. The EU has failed to increase the number of ratification of both ILO convention and MEAs. Korea did ratify five additional ILO Technical conventions, but it seems that the EU was mostly pushing for the ratification of Fundamental ILO conventions.¹⁷⁷ Interestingly, a lack of progress in the ratification of new environmental or labour convention (indicators 1.1 and 1.2) does not impede the strengthening of the levels of labour and environmental protection in practice (indicators 1.3 and 1.4), as illustrated by the findings for Korea.

Objective 2:

It is unfortunate that the fragmentation of international environmental law and the general lack of monitoring of the respect of MEA by the conventions bodies did not allow us to find empirical data on compliance. Although indicator 2.2 could not be assessed, we retained it in our tables to reflect its importance for assessing compliance with environmental commitments.

We mentioned previously that the parties discuss most topics in the dedicated committee on TSD. A potential downside is that the EU may be holding requests for progress in order to maintain good relations and dialogue with the negotiating partner. The example of Korea's issues with labour unions being barely mentioned in the TSD committee's joint statements is telling. Another option could be that the discussions in the TSD committee are actually frank but that the joint statements soften the discourse. We noticed that the EU annual reports on implementation of the FTA are sometimes more detailed than the joint statements. For example, one of those reports mentioned additional implementation issues for Colombia on "labour issues raised by the ILO supervisory system" and illegal trade of "crocodile and caiman skins" under the Convention on International Trade in Endangered Species of Wild.¹⁷⁸

¹⁷⁷ Interview with a business association representative, *op. cit.*

¹⁷⁸ European Commission, "Third Annual Report on the Implementation of the EU-Colombia/Peru Trade Agreement", *COM(2017) 585 final*, Brussels, 10 October 2017, pp. 9-10.

Objective 4:

While the EU abides by relatively high standards of public participation and transparency – it publishes its negotiation mandates and negotiation proposals and organises public consultations – the disparate degrees of effectiveness for the EU’s fourth objective shows that this is not the case of all third countries. The EU tries to foster dialogue among civil societies and to empower them, but it appears difficult to achieve a significant result in countries in which the ‘civil society’ is much more constrained and less developed. We notice that whereas the EU-Korea FTA provides for the *creation* of DAGs, the FTAs with Colombia and Ukraine include the possibility to *designate* existing structures as DAGs. There is no requirement in the FTAs to make public the composition or the reports of the DAGs, and the EU’s negotiating partner generally does not have a permanent Secretariat comparable to the EESC to ensure transparency. The consequence is that these civil society structures enjoy little recognition, and the summary of Civil Society Forums are sometimes not available. While EU DAGs are useful in amplifying the voice of the European civil society, the relevance of DAGs in their current form may be questioned in third countries.¹⁷⁹ Civil society empowerment is however a lengthy learning process, and one may expect progress over time.¹⁸⁰

5.2 Comparisons between the EU’s negotiating partners

Our selection of case studies aimed to reflect the diversity of the EU’s negotiating partners in terms of length of implementation, geographic location and of economic development. We find that Ukraine has the lowest record of effectiveness and that this short length of implementation – two years and three months – may have affected this result. However, there is an overall same level of effectiveness between Colombia – with four years and eight months of implementation – and Korea – with six years and ninth months of implementation. It seems that after a certain length of implementation, which could be of five years, effectiveness is no longer affected by the duration of the agreement.

¹⁷⁹ Interview with a business association representative, *op. cit.*

¹⁸⁰ Bastiaens, Postnikov, “Greening up”, *op. cit.*, p. 853.

The comparable overall effectiveness between Korea and Colombia also indicates that economic development is not a factor of goal attainment. With a Gross Domestic Product (GDP) five times the size of Colombia's, Korea's TSD chapter has not proven more effective.¹⁸¹ Rather than economic development, political will may be a factor of effectiveness. We have previously explained that TSD chapters were principally pushed by the EU and that the negotiating partner cannot oppose them without jeopardising the conclusion of the entire agreement.¹⁸² In this context, third countries which were initially reluctant to take sustainable development commitments may achieve less results than motivated partners.

The influence of the partner country's perception of the TSD chapter on the attainment of the EU's objectives was not assessed by our empirical analysis. Yet it may constitute an influential factor. The establishment by Colombia of a roadmap on human, environmental and labour rights may reveal a certain interest for sustainable development, despite the EP's pressure. In contrast, Korea has adopted a more defensive attitude in relation to the labour rights. The question of the extent to which the EU can impose sustainable development improvements through political conditionality deserves more attention. This issue is especially relevant that we fail to grasp the extent up to which the EU as a global actor has directly impact the effectiveness of TSD chapters: it is possible that the relative completion of the EU's goals was caused by factors unrelated to TSD chapters.

5.3 A link between effectiveness and the TSD chapters' capability

In his seminal article, Hill investigates the 'expectations' held of the European Community (EC) before comparing them to its capabilities, which are determined by the EC's 'ability to agree', its 'resources', and the 'instruments at its disposal'.¹⁸³ He finds a capability-expectations gap which translates into an excess of expectations held by observers of the EC compared to its actual capabilities.¹⁸⁴ Our overall assessment of the effectiveness of TSD

¹⁸¹ World Bank website, "GDP (current US\$), All Countries and Economies", *Data 2016*, 2018.

¹⁸² Interview with a EU Commission official, *op. cit.*

¹⁸³ Hill, "The Capability-Expectations Gap", *op. cit.*, p. 315.

¹⁸⁴ *Ibid.*, p. 318.

chapters showed that they attain at best the EU's objectives to a Medium extent. To determine these chapters' capability will allow us to determine whether there is an 'effectiveness-capability gap' or whether the effectiveness of TSD chapters matches their capability.

In terms of ability to agree, TSD chapters only provide for soft mechanisms of cooperation. There are no means to compel a party to improve its environmental or labour standards, nor to hold civil society dialogues. Should a dispute arise, there is only an obligation of best efforts to find a solution through government consultations and to implement the recommendations of the Panel of Experts. We do not believe that the EU would trigger the 'essential elements' clause for a potential breach of labour rights. It is true that the parties are required to set up cooperative bodies which will foster mutual progress, but in the end the parties' ability to agree only depends on their goodwill.

As for resources, there are significant differences between the EU's resources and those at the disposal of the negotiating partner. While the EESC acts as a permanent secretariat to administer the TSD chapters' bodies, the EU's partners have no similar structure. The existing administrative structures of the EU and of the negotiating partners can cover their own costs, but TSD chapters do not specifically mention resources to be dedicated to their implementation or to the management of their bodies. In fact, compliance with improved labour and environmental standards drains resources.¹⁸⁵ Equally, the administration of DAGs and civil society dialogues represent a financial burden for stakeholders.¹⁸⁶ Both the EU Commissioner and academia have pointed out the need to provide further logistical resources.¹⁸⁷

¹⁸⁵ International Institute for Labour Studies, "Social Dimensions of Free Trade Agreements", *op. cit.*, p. 102.

¹⁸⁶ Zvele, Rok, "Environmental Integration in EU Trade Policy: The Generalised System of Preferences, Trade Sustainability Impact Assessment and Free Trade Agreements", in E. Morgera, *The External Environmental Policy of the European Union: EU and International Law Perspectives*, Cambridge University Press, 2012, p. 200.

¹⁸⁷ Speech by Cecilia Malmström, EU Commissioner for Trade, "Trade and Sustainable Development", *Civil Society Dialogue with EU Trade Commissioner*, Brussels, 6 October 2017, p. 4; Orbie, Martens, Van den Putte, *CLEER Papers 2016/3*, *op. cit.*, p. 22.

Finally, the instruments created by the TSD chapters are quite ambitious. The dedicated committee on TSD oversees the implementation of the chapter, assisted by DAGs composed of a balanced representation of civil society organisations. A Civil Society Forum meets annually to discuss the progress made, and a pool of experts is constituted after the entry into force of the agreement for the potential constitution of an *ad hoc* dedicated dispute settlement body. But again, none of the decisions or recommendations of these bodies is binding upon the parties, which sharply undermines these instruments' potential.

The capability of TSD chapters is hence lukewarm. The ability to agree, the resources and the instruments reflect an undeniable potential for action, but they are also constrained by the factors aforementioned. The effectiveness of TSD chapters was found Medium in average, which seems to correspond to their capability. There is hence no effectiveness-capability gap.

The TSD chapters' capability matches their effect. For the EU to reach a higher degree of effectiveness, it will need to increase their capability. In the following part, we will precisely provide recommendations for the improvement of the TSD chapters' capability and effectiveness.

6 Policy recommendations for future Trade and Sustainable Development chapters

*“The work on TSD has yet to realise its full potential. Further efforts will have to be made to further improve labour and environmental policies, while respecting international commitments and aiming at a high level of protection”.*¹⁸⁸

This research has provided a framework for analysing the effectiveness of TSD chapters in relation to EU’s objectives. We found that the average effectiveness of TSD chapters ranks as Medium, which suggests that the EU’s objectives were not completely achieved. At the same time, there is no gap between the effectiveness of the chapters and their capability. In order to improve effectiveness, we must hence improve the TSD chapters’ capability.

Our analysis takes place at a moment of intense debate about the future of TSD chapters. In July 2017, a non-paper of the Commission described its actual approach on TSD and suggested two options for further reform. The first option, “a more assertive partnership”, suggested to do more of the same: strengthening collaboration and the role of civil society, stepping up monitoring, identifying cooperative activities, etc.¹⁸⁹ Although we agree with this approach, we deplore the lack of operational details. The second option, “A model with sanctions”, suggests the integration of negative material incentives in TSD chapters, which would bring them closer to human rights conditionality.¹⁹⁰ We have previously discussed the shortcomings of this approach, and we also observed that the TSD chapters’ conditionality model relies on a purely cooperative mechanism. The inclusion of sanctions may simply torpedo any perspective of dialogue and socialisation.

This first non-paper was followed by a public consultation which polarised the debate on the question of sanctions. In a second non-paper, the Commission indicated “the way forward”:

¹⁸⁸ European Commission, “implementation of EU Free Trade Agreements, 1 January 2016 - 31 December 2016”, *op. cit.*, p. 28.

¹⁸⁹ Non-paper of the Commission Services, 11 July 2017, *op. cit.*, pp. 5-6.

¹⁹⁰ *Ibid.*, pp. 7-8.

without sanctions and through a list of fifteen broad items designed to step-up TSD chapters.¹⁹¹ While we agree with these suggestions, we also find them distant from concrete proposals which could be directly incorporated in the wording of the agreement. For this reason, we have listed below policy recommendations directly aimed at increasing the TSD chapters' capability and effectiveness. The result of our empirical analysis on specific case-studies have identified shortcomings which, if corrected, may increase the degree of attainment of the EU's objectives in relation to all TSD chapters.

Objective 1: Strengthening labour and environmental protection in the partner country.

1. To condition the provisional entry into force of the agreement to the ratification of a number of Fundamental ILO conventions and essential MEAs.

For the EU to truly 'change the behaviour' of its negotiating partner, it must obtain concessions while it still holds its bargaining chip: before the conclusion of the FTA. The cooperative strategy on which TSD chapters rely on seeks to influence the negotiating partner after the entry into force of the agreement, and it therefore lacks *ex ante* mechanisms which would further increase the incentives for strengthening sustainable development. The choice of the conventions to be ratified should however be left to the negotiating partner and take into account its specific situation.

2. To systematically include in the TSD chapter negotiations a roadmap for implementing sustainable development provisions.

The EP's request that Colombia produces a roadmap on human rights, environmental and labour rights prior to the conclusion of the agreement constituted a *hard* tool which does not combine well with the EU's *soft* approach.¹⁹² However, a roadmap discussed during the negotiations will help schedule commitments at a stage where the EU still enjoys a large influence over the negotiating partners.

¹⁹¹ Non-paper of the Commission Services, 26 February 2018, *op. cit.*, pp. 2-12.

¹⁹² European Parliament, *Resolution of 13 June 2012*, *op. cit.*, para. 15.

3. To provide technical expertise after the ex-ante Sustainability Impact Assessment to help the negotiating partner improve its labour and environmental standards both in law and in practice.

Within a roadmap or in the course of the periodic reviews of the implementation of the agreement, the EU should offer technical expertise to help the negotiating partner reach its sustainability targets. Such efforts may be coordinated by the EU Delegation in the country.

Objective 2: Strengthen compliance with the partner country's labour and environmental commitments.

4. To increase the legal force of TSD provisions, including through the generalisation of the word 'shall' and of obligations of result.

A stronger phrasing of TSD provisions in terms of legal force may give further impetus for compliance. Formulations such as 'strive to improve' could be reinforced to reflect the need for the parties to constantly improve sustainable development.

5. To merge the TSD dispute settlement mechanism with the general FTA dispute settlement mechanism, or at least to enhance the alignment of the two mechanisms.

Such proposition has already been formulated in previous EP resolutions.¹⁹³ The TSD dispute settlement mechanism in its current form is weaker than the one applied to the rest of the agreement. A salient difference between the two is that the recommendations of the Panel of Experts in TSD chapters are not binding whereas the arbitral panel ruling in the rest of the agreement must be implemented.¹⁹⁴

¹⁹³ European Parliament, *Resolution of 25 November 2010, op. cit.*, para. 22(c); European Parliament, *Resolution of 5 July 2016, op. cit.*, para. 21(b).

¹⁹⁴ See for example art. 14.8 of the EU-Korea FTA or art. 308 of the EU-Colombia/Peru FTA.

6. To have the EU run independent assessment of the effectiveness of all its FTAs based on identical, transparent and measurable objectives.

This research has deduced the EU's objectives in relation to TSD chapters and it has assessed their attainment. But the importance of the search of effectiveness is such that the EU should ensure an independent, transparent and identical assessment for each of its FTAs. This would help monitor progress in the implementation of the agreement and therefore compliance.

Objective 3: Promoting dialogue and cooperation between the parties on trade-related aspects of labour and environmental policies.

7. To increase the number of self-standing provisions in the TSD chapter which provide for areas of cooperation.

It is useful to specifically include in the agreement provisions on the most important areas of cooperation. Such provisions will be at heart of the work of the DAGs and can lay the foundation of further cooperative projects between the parties either in the framework of FTAs or in international fora.

8. To grant DAGs the possibility either to set part of the agenda for discussion of the dedicated committee on TSD or to ask questions for the committee to answer during its meetings.

There are critics that DAGs have no impact on the implementation of the TSD chapter.¹⁹⁵ A way to empower them is to allow them to set the discussion on matters they feel are important to address. After having been heard, they will effectively channel both the issues and the successes of implementation to the public.

¹⁹⁵ European Parliament, *Resolution of 5 July 2016*, *op. cit.*, para. 22; Orbie, Martens, Van den Putte, *CLEER Papers 2016/3*, *op. cit.*, p. 22.

9. *To include a provision in the TSD chapter which commits the parties to cover financially the DAGs logistic needs.*

DAGs need the adequate resources to fully take part in the monitoring of the agreement and to assist the dedicated committee on TSD. The Commission has committed resources in 2018 to support civil society involvement.¹⁹⁶ Such funds should be institutionalised in the FTA.

10. *To systematically specify in TSD chapters that DAGs should be independent and comprise, inter alia, representants of business organisations.*

The wording of past TSD chapters such as the one contained in the EU-Colombia FTA has not consistently underscored the need for the DAGs to be fully separated from governmental entities. Furthermore, business organisations are often overlooked in the text of the agreement although they play a major role in trade, labour and environmental issues. Their contribution in fields such as corporate social responsibility is very precious.

Objective 4: Promoting public participation and transparency

11. *To assign to the EESC the mission to serve as secretariat of both the EU's and the partner country's DAGs if no such secretariat exists.*

We noticed in our research that several summaries of the joint meetings of the DAG or reports of the Civil Society Forums are not publicly accessible. Furthermore, no report of the partner countries' DAG meetings or activities is available. If no entity serves as a secretariat for the partner countries' DAG, the EESC should assume this role.

¹⁹⁶ European Commission, DG Trade, “*Management Plan 2018*”, Ref. Ares(2018)585324, 31 January 01 2018, p. 17.

12. *To include in the TSD chapter an obligation for the dedicated committee on TSD to publish a report or the minutes of its meetings.*

Our empirical analysis showed that the ‘joint statements’ of the dedicated committees on TSD failed to transcribe with sufficient details the content of the meetings. Besides, some TSD chapters do not include a transparency requirement. These reports would be useful to pressure the parties to cooperate and to implement the agreement.

13. *To ensure that the selection process and the composition of the Civil Society Forum is transparent and publicly available.*

The composition of the Civil Society Forum is often not available. For these events to be meaningful, they need to be disseminated to civil society and to interested stakeholders.

TSD chapters are a living instrument. They have experienced constant evolution since their creation with a gradual increase of their legal force and of monitoring and civil society bodies.¹⁹⁷ In light of the current debate on the reform of these chapters, it is important to seek to increase their capability and effectiveness. But for these reforms to be seriously undertaken, the Commission should no longer limit itself to non-papers. Future communication on the evolution of TSD chapters should take the form of official EU documents.

¹⁹⁷ Van den Putte, Orbie, “EU Bilateral Trade Agreements”, *op. cit.*, p. 265.

7 Conclusion

This research has qualified TSD chapters as new model of political conditionality designed to influence the behaviour of the EU's negotiating partner by adding the perspective of an FTA in the balance of their benefits for pursuing sustainable development. We analysed the reasons for including sustainable development provisions in EU FTAs and in a self-standing chapter based on a new political conditionality model. We also assessed the effectiveness of TSD chapters, a difficult endeavour which nevertheless constitutes an original addition to the existing literature. We then drew conclusions on our findings and compared the effectiveness of TSD chapters with their capability. Finding no gap between the two, we concluded that the effectiveness of TSD chapters could only improve if the shortcomings we identified were corrected. We hence made thirteen policy recommendations to improve both the TSD chapters' capability and effectiveness. We hope that they will contribute to the current discussions on a potential reform of these chapters.

Linking trade to non-commercial interests such as sustainable development remains somehow controversial today.¹⁹⁸ But trade has increasingly wide implication on non-commercial topics. The constant quest for trade liberalisation has given rise to fears that increased competition will translate into a decrease of the protection afforded to workers or to the environment. At the EU level, the link between trade and non-commercial issues is further illustrated by the fact that high levels of environmental and trade protection create a competitive disadvantage against third countries, and that European companies bear the responsibility of their sub-contractors' social and environmental performance. But the factors which led to the inclusion of sustainable development in EU FTAs are primarily political. "The EU is a political project pursued through economic instruments", and the choice to mainstream sustainable development in the EU's trade policy was made in the treaties themselves.¹⁹⁹ The public concerns and the EP's determination to include binding and ambitious sustainable development chapters in EU FTAs have tied the hands of the European Commission: FTAs can no longer be concluded without TSD chapters.

¹⁹⁸ L. Van den Putte, "Divided we stand", *op. cit.*, p. 63.

¹⁹⁹ Interview with Hidde Houben, Head of Unit E1, *op. cit.*

In terms of structure, the form of a self-standing chapter on sustainable development was retained despite doubts on the relation between the environment and labour. Labour protection seems to share more proximity with human rights, already protected in EU FTAs by the ‘essential elements’ model of political conditionality. Yet, with environmental and labour protection sharing a common risk of being affected by the negative externalities of trade, a utility argument justifies their inclusion into a common and specific mechanism of political conditionality. This mechanism is based on cooperation whereas human rights conditionality relies on sanctions. TSD chapters’ provisions enjoy lower and variable legal force. However, they contain dedicated monitoring bodies which aim at building capacity, expertise and strong civil societies to pursue sustainable development. A final major difference with human rights clause is the lack of teeth of TSD chapters, which may overly rely on cooperation to ensure the implementation of the agreement.

We ran an empirical study of the effectiveness of TSD chapters in relation to three case studies: South Korea, Colombia and Ukraine. We assessed the attainment of the EU’s four objectives in relation to TSD chapters, and we found different levels of effectiveness of the TSD chapters’ objective depending on the country studied. We found that the effectiveness of the two objectives focused on cooperation – the promotion of dialogue and of public participation – was higher than the objectives of strengthening protection and compliance with labour and environmental standards. Furthermore, a higher effectiveness in cooperation may increase protection and compliance. We also found that TSD chapters had an overall similar effectiveness for Korea and Colombia, showing that economic development and the length of implementation are not determining factors for effectiveness. Instead, we suppose that the countries’ political will may have a greater influence on effectiveness.

The overall effectiveness of TSD chapters is considered Medium. This result shows that TSD chapters are not mere aspirations with no effect on sustainable development. But on the other hand, the TSD chapters’ capability – based on their capacity to agree, resources and instrument – is considered lukewarm. For effectiveness to increase and to reach our variable ‘High’, it is probably necessary to increase capability. We develop thirteen policy-recommendations in this respect. We suggest for example to develop *ex ante* mechanisms to further strengthen TSD chapters, through the ratification of environmental and labour conventions before the entry into force of the agreement, or the inclusion of an

implementation roadmap in the FTA negotiations. We also recommend an increase in the legal force and in the number of cooperative provisions in TSD chapters, as well as an alignment of the dispute settlement mechanism on the one which applies to the other chapters of the FTA. Finally, we also suggest to increase the role of the DAGs, for example by enabling them to set part of the agenda or to ask public questions to the dedicated committee on TSD; or by assisting them with a Secretariat such as the EESC.

While we argue that TSD chapters have attained the EU's objectives to a Medium extent, we have not proved that this result was caused by the existence of these chapters. It cannot be excluded that the EU's negotiating partners would have pursued sustainable development objectives in exactly the same way had TSD chapters not existed. This paradox raises interesting questions relating to the partner countries' perception of TSD chapters, which were not explored in this research. The partner countries' political will has probably played an important role in the fulfilment of the EU's objectives, and the paradox is that political conditionality is a double-edged instrument of influence: while the use of positive material incentives can increase the partner countries' willingness to pursue sustainable development, the use of negative material incentives may very well, if they fail, have adverse effects on sustainable development. It would hence be interesting to analyse whether the EU's negotiating partners' perception of TSD chapters is positive or negative.

This question of perception somehow relates to the EU's market power. With 90% of the global economic growth expected to be generated outside Europe in the next decade, the EU may be over-estimating the attraction of its market.²⁰⁰ The extent to which the EU can use its trade policy to shape norms in third countries is questionable. This is especially the case that the EU lacks the legal competence to implement the very changes that it expects of its negotiating partner. For example, the EU is only an observer in the ILO and it is unable to ratify any ILO convention.²⁰¹ One can question the EU's legitimacy to promoting social standards in third countries when its own Member States do not entirely respect ILO

²⁰⁰ European Commission, DG Trade, *Strategic Plan 2016-2020 - Trade*, Brussels, 19 July 2016, p. 6.

²⁰¹ Orbie, Babarinde, "The Social Dimension of Globalization", *op. cit.*, p. 460.

Conventions.²⁰² The same issue applies with the environment, a shared competence of the Union, in a context where EU Member States as developed countries have a historic responsibility of carbon emitters.²⁰³

Opinion 2/15 of the Court of Justice of European Union recently stated that TSD chapters “are intended not to regulate the levels of social and environmental protection in the Parties’ respective territory but to govern trade” and that they hence form part of the EU’s exclusive competence in common commercial policy.²⁰⁴ In doing so, the Court may have raised a double paradox. The first is that the EU’s perception that TSD chapters are a tool to foster sustainable development protection in third countries does not resist the analysis of its own court. The second is that the inclusion under EU law of TSD chapters within the EU trade policy may be confronted to the opposite perception of the EU’s negotiating partners for which ‘trade is only about trade’. The main objective of the EU would then become to persuade its negotiating partners that sustainable is the new trade.

²⁰² Velluti, “The EU’s social dimension”, *op. cit.*, p. 60.

²⁰³ Art. 4-2(f) TFEU.

²⁰⁴ CJEU, *Opinion 2/15*, *op. cit.*, para. 166-167.

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ANNEX(ES)

ANNEX I: Operationalisation of the effectiveness of Trade and Sustainable Development chapters in EU FTAs

Table 8.1 (Annex I): Operationalisation of the effectiveness of Trade and Sustainable Development chapters in EU FTAs

Indicators	Dependent variable	Coding
<i>Objective 1. Strengthening labour and environmental protection in the partner country</i>		
1.1 There is an increase in the number of up-to-date ILO conventions ratified by the partner country ²⁰⁵ .	<i>High</i>	There is an increase in the number of ratification of at least one ILO Fundamental convention or one ILO Governance or ten other ILO up-to-date conventions.
	<i>Medium</i>	There is an increase in the number of ratification of three to nine ILO up-to-date Conventions, excluding ILO Fundamental or Governance conventions.
	<i>Low</i>	There is an increase of less than three ILO up-to-date Conventions, excluding ILO Fundamental or Governance conventions.
1.2 There is an increase in the number of multilateral environmental agreements ratified by the partner country ²⁰⁶ .	<i>High</i>	There is an increase in the number of ratification of at least six multilateral environmental agreements according to inforMEA.
	<i>Medium</i>	There is an increase in the number of ratification of three to five multilateral environmental agreements according to inforMEA.
	<i>Low</i>	There is an increase in the number of ratification of less than three multilateral environmental agreements according to inforMEA.

²⁰⁵ Treaty objective stipulated in art. 14-4.3 EU-Korea FTA; art. 269.3 EU-Colombia/Peru FTA; and art. 291.2 EU-Ukraine DCFTA.

²⁰⁶ Treaty objective stipulated in art. 13-5.1 EU-Korea FTA; art. 270.1 EU-Colombia/Peru FTA; and art. 292.1 EU-Ukraine DCFTA.

1.3 The national levels of labour protection have increased in the partner country ²⁰⁷ .	High	The ITUC Global Rights Index shows an improvement of workers' rights of at least two clusters.
	Medium	The ITUC Global Rights Index shows an improvement of workers' rights of one cluster.
	Low	The ITUC Global Rights Index shows a worsening or no improvement of workers' rights.
1.4 The national levels of environmental protection have increased in the partner country. ²⁰⁸	High	The comparison between the EPI before implementation of the FTA and the most recent EPI shows an upgrading in rank of more than twenty places.
	Medium	The comparison between the EPI before implementation of the FTA and the most recent EPI shows an upgrading in rank of more than four places but less than twenty.
	Low	The comparison between the EPI before implementation of the FTA and the most recent EPI shows an upgrading in rank of less than five places.
Objective 2. Strengthening compliance with the partner country's labour and environmental commitments		
2.1 The number of complaints for violations of ILO conventions has decreased in the partner country. ²⁰⁹	High	The number of ILO Freedom of Association cases filed since the implementation of the agreement has decreased by more than 40% compared to the number of cases filed during the same amount of time preceding the implementation of the agreement.
	Medium	The number of ILO Freedom of Association cases filed since the implementation of the agreement has decreased by between 5% to 40% compared to the number of cases procedures filed during the same amount of time preceding the implementation of the agreement.

²⁰⁷ Treaty objective stipulated in art. 13-3 and 13-7.1 EU-Korea FTA, art. 268 and art. 277.2 EU-Colombia/Peru FTA; art. 290.1 and 296.1 EU-Ukraine DCFTA.

²⁰⁸ *Ibid.*,

²⁰⁹ Art. 13-4.3 EU-Korea FTA; art. 269.3 EU-Colombia FTA; art. 291.3 EU-Ukraine DCFTA.

	Low	The number of ILO Freedom of Association cases filed since the implementation of the agreement has decreased by less than 6% or has remained the same compared to the number of cases filed during the same amount of time preceding the implementation of the agreement.
2.2 The number of implementation or compliance issues in multilateral environmental agreements has decreased in the partner country. ²¹⁰	High	The number of implementation or compliance issues reported since the implementation of the agreement by the convention bodies of the multilateral environmental agreements listed on inforMEA has decreased by more than 40% compared to the number of alleged breaches reported during the same amount of time preceding the implementation of the agreement.
	Medium	The number of implementation or compliance issues reported since the implementation of the agreement by the convention bodies of the multilateral environmental agreements listed on inforMEA has decreased by between 5% to 40% compared to the number of alleged breaches reported during the same amount of time preceding the implementation of the agreement.
	Low	The number of implementation or compliance issues reported since the implementation of the agreement by the convention bodies of the multilateral environmental agreements listed on inforMEA has decreased by less than 6% or has remained the same compared to the number of alleged breaches reported during the same amount of time preceding the implementation of the agreement.
2.3 The dedicated committee on TSD reports positive steps on the respect and implementation of the TSD chapter in the partner country. ²¹¹	High	The reports from the committee on TSD explicitly highlight the partner country's success in respecting and implementing the TSD chapter in the partner country, as well as no pending difficulty.
	Medium	The reports from the committee on TSD raised no difficulty in the respect and implementation of the TSD chapter in the partner country or the difficulties were subsequently resolved.
	Low	The reports from the committee on TSD raised difficulties in the respect and implementation of the TSD chapter in the partner country which were not subsequently resolved.

²¹⁰ Art. 13-5.2 EU-Korea FTA; art. 270.2 EU-Colombia FTA; art. 292.2 EU-Ukraine DCFTA.

²¹¹ Art. 13-12.4 EU-Korea FTA; art. 280.6 EU-Colombia FTA; art. 300.1 EU-Ukraine DCFTA.

<p><i>Objective 3. Promoting dialogue and cooperation between the parties on trade-related aspects of labour and environmental policies</i></p>		
<p>3.1 The dedicated committee on TSD discusses and engages in cooperative activities related to the ratification and effective implementation of ILO conventions and multilateral environment agreements in the partner country.²¹²</p>	<p><i>High</i></p>	<p>The Committee on TSD discussed the ratification and effective implementation of both ILO conventions and multilateral environmental agreements in the partner country in more than half of its meetings and engaged in at least one related cooperative activity.</p>
	<p><i>Medium</i></p>	<p>The Committee on TSD discussed the ratification and effective implementation of both ILO conventions and multilateral environmental agreements in the partner country in at least half of its meetings.</p>
	<p><i>Low</i></p>	<p>The Committee on TSD discussed the ratification and effective implementation of both ILO conventions and multilateral environmental agreements in the partner country in less than half of its meetings.</p>
<p>3.2 The dedicated committee on TSD discusses and engages in cooperative activities related to the increase in levels and standards of labour and environmental protection in the partner country.²¹³</p>	<p><i>High</i></p>	<p>The Committee on TSD discussed ways to increase the levels and standards of both labour and environmental protection in the partner country in more than half of its meetings and engaged in at least one related cooperative activity.</p>
	<p><i>Medium</i></p>	<p>The Committee on TSD discussed ways to increase the levels and standards of both labour and environmental protection in the partner country in at least half of its meetings.</p>
	<p><i>Low</i></p>	<p>The Committee on TSD discussed ways to increase the levels and standards of both labour and environmental protection in the partner country in less than half of its meetings.</p>

²¹² Annex 13(c) EU-Korea FTA; art. 286(b) EU-Colombia FTA; art. 302 EU-Ukraine DCFTA.

²¹³ Annex 13(e), (f), (j), (k) EU-Korea FTA; art. 286(c), (e), (k) EU-Colombia FTA; art. 302 EU-Ukraine DCFTA.

3.3 The dedicated committee on TSD discusses and engages in cooperative activities related to good practices of corporate social responsibility in the partner country. ²¹⁴	High	The Committee on TSD discussed ways to develop good practices of corporate social responsibility in the partner country in more than half of its meetings and engaged in at least one related cooperative activity.
	Medium	The Committee on TSD discussed ways to develop good practices of corporate social responsibility in the partner country in at least half of its meetings.
	Low	The Committee on TSD discussed ways to develop good practices of corporate social responsibility in the partner country in less than half of its meetings.
Objective 4. Promoting public participation and transparency		
4.1 The partner country has established a Domestic Advisory Group (DAG) which comprises a balanced representation of relevant civil society stakeholders. ²¹⁵	High	The partner country has established a Domestic Advisory Group and its composition reflects a balanced representation of relevant stakeholders.
	Medium	The partner country has established a Domestic Advisory Group but its composition does not reflect a balanced representation of relevant stakeholders.
	Low	The party country has not established a Domestic Advisory Group.
4.2 A civil society forum convenes at least once a year, it comprises a balanced representation of relevant civil society stakeholders and a summary of the meetings is available to the public. ²¹⁶	High	The three propositions are fulfilled: (i) the Civil Society Forum was convened at least once a year; (ii) it comprises a balanced representation of relevant civil society stakeholders; (iii) a summary of the meetings is available to the public.
	Medium	One of the three propositions is not fulfilled: (i) the Civil Society Forum was convened at least once a year; (ii) it comprises a balanced representation of relevant civil society stakeholders; (iii) a summary of the meetings is available to the public.

²¹⁴ Annex 13-6.2 and 13(d) EU-Korea FTA; art. 271-3 and 286(j) EU-Colombia FTA; art. 293-3 EU-Ukraine DCFTA.

²¹⁵ Art.13-12.4 and .5 EU-Korea FTA; art. 281 EU-Colombia FTA; art. 299.1 and .2 EU-Ukraine DCFTA.

²¹⁶ Art.13-13.1 to .3 EU-Korea FTA; art. 282.1 and .2 EU-Colombia FTA; art. 299.3 and .5 EU-Ukraine DCFTA.

	<i>Low</i>	Two of the three propositions are not fulfilled: (i) the Civil Society Forum was convened at least once a year; (ii) it comprises a balanced representation of relevant civil society stakeholders; (iii) a summary of the meetings is available to the public.
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ANNEX II: Assessment of the effectiveness of the Trade and Sustainable Development chapter in the EU-Korea FTA

Table 8.2 (Annex II): Assessment of the effectiveness of the Trade and Sustainable Development chapter in the EU-Korea FTA

Indicators	Dependent variable	Coding
Objective 1. <i>Strengthening labour and environmental protection in the partner country</i>		
1.1 There is an increase in the number of up-to-date ILO conventions ratified by the partner country.	<i>Medium</i>	South Korea has ratified five ILO up-to-date conventions. ²¹⁷
1.2 There is an increase in the number of multilateral environmental agreements ratified by the partner country.	<i>Low</i>	South Korea has ratified two additional multilateral environmental agreements. ²¹⁸
1.3 The national levels of labour protection have increased in the partner country.	<i>Low</i>	The ITUC Global Rights Index shows no improvement of workers' rights. ²¹⁹
1.4 The national levels of environmental protection have increased in the partner country.	<i>High</i>	The comparison between the EPI before implementation of the FTA and the most recent EPI shows an upgrading in rank of 34 places. ²²⁰

²¹⁷ International Labour Convention website, "Ratifications for Republic of Korea", *NORMLEX*. Since the entry into force of the FTA, Korea has ratified the Technical Conventions C002- Unemployment Convention, 1919 on 7 November 2011; C047 Forty-Hour Week Convention, 1935 on 7 November 2011; C115- Radiation Protection Convention, 1960 on 7 November 2011; C139- Occupational Cancer Convention, 1974 on 7 November 2011; and the Maritime Labour Convention, 2006 on 9 January 2014.

²¹⁸ UN website, inforMEA, "Korea: Party Status". Since the entry into force of the FTA, Korea has ratified the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity of 29 October 2010 on 19 May 2017; and the Paris Agreement of 12 December 2015 on 3 November 2016.

²¹⁹ The ITUC Global Rights Indexes from 2014 to 2017 rank Korea in cluster 5, accounting to "no guarantee of rights".

²²⁰ The Environmental Performance Index indicates a rank for Korea of 94 in 2010 and of 60 in 2018, which represents an upgrading of 34 places.

<p>Objective 2. Strengthening compliance with the partner country's labour and environmental commitments</p>		
<p>2.1 The number of complaints for violations of ILO conventions has decreased in the partner country.</p>	<p>Low</p>	<p>The number of ILO Freedom of Association cases filed between the time of implementation of the agreement, from 1 July 2011 to 1 April 2018 (6 cases), has increased by 20% compared to the number of cases filed in the same amount of time preceding implementation, from 1 October 2004 to 30 June 2011 (5 cases).²²¹</p>
<p>2.2 The number of implementation or compliance issues in multilateral environmental agreements has decreased in the partner country.</p>	<p>N/A</p>	<p>On 1 April 2018, South Korea was a party to fourteen multilateral environmental agreements.²²² However, the limited number of conventions undertaking a review of compliance and the limited access to these reports made it impossible to assess whether the number of breaches has evolved.</p>
<p>2.3 The dedicated committee on TSD reports positive steps on the respect and implementation of the TSD chapter in the partner country.</p>	<p>Low</p>	<p>Overall, the committee on TSD raised difficulties in the respect and implementation of the TSD chapter in the partner country which were not subsequently resolved.²²³</p>

²²¹ From 1 July 2011 to 1 April 2018 (six years and ninth months), cases no. 3262 (16 January 2016), 3237 (1 November 2016), 3227 (2 September 2016), 3238 (30 August 2016), 3138 (18 June 2015) 3047 (5 December 2013) were filed against Korea. From 1 October 2004 to 30 June 2011 (six years and ninth months), cases no. 2829 (10 January 2011), 2707 (8 April 2009), 2620 (18 December 2007), 2602 (10 October 2007), 2569 (20 May 2007) were filed against Korea.

²²² UN website, InforMEA, "Korea: Party Status", *op. cit.*,

²²³ The joint statements of the 4th meeting of the Committee on TSD mentions difficulties relating to importation and trading of illegally harvested timber and derived products (p. 4). The report of the 5th meeting (2017) mentions difficulties relating to illegal trade in eels (p. 4), and to the respect of nationally determined contribution under the Paris agreement (p. 5).

<p><i>Objective 3. Promoting dialogue and cooperation between the parties on trade-related aspects of labour and environmental policies</i></p>		
<p>3.1 The dedicated committee on TSD discusses and engages in cooperative activities related to the ratification and effective implementation of ILO conventions and multilateral environment agreements in the partner country.</p>	<p><i>High</i></p>	<p>The Committee on TSD discussed the ratification and effective implementation of both ILO conventions and multilateral environmental agreements in the partner country in 80% of its meetings and engaged in one related cooperative activity.²²⁴</p>
<p>3.2 The dedicated committee on TSD discusses and engages in cooperative activities related to the increase in levels and standards of labour and environmental protection in the partner country.</p>	<p><i>Medium</i></p>	<p>The Committee on TSD discussed ways to increase the levels and standards of both labour and environmental protection in the partner country in half of its meetings.²²⁵</p>
<p>3.3 The dedicated committee on TSD discusses and engages in cooperative activities related to good practices of corporate social responsibility in the partner country.</p>	<p><i>Medium</i></p>	<p>The Committee on TSD discussed ways to develop good practices of corporate social responsibility in the partner country in all its meetings.²²⁶</p>

²²⁴ Discussions relating to the ratification and effective implementation of ILO conventions are mentioned in the joint statements of the 1st (p. 2), 2nd (p. 2), 3rd (p. 2, 4), 4th (p. 2), and 5th (p. 2, 3) meetings of the Committee on TSD. Cooperative activities relating to the ratification and effective implementation of multilateral environment agreements are mentioned in the joint statements of the 3rd (p. 2), 4th (p. 4) and 5th (p. 3-4) meetings of the Committee on TSD. Furthermore, the joint statement of the 5th meeting mentions a cooperation project on ILO convention C111 on discrimination in employment and occupation (p. 4-5).

²²⁵ Discussions relating to ways to increase the levels and standards of labour protection are not mentioned in any joint statement. Discussions relating to ways to increase the levels and standards of environmental protection are mentioned in the joint statements of the 1st (p. 3), 2nd (p. 2), 3rd (p. 2-5), 4th (p. 3-4), and 5th (p. 4-5) meetings of the Committee on TSD.

²²⁶ Discussions relating to good practices of corporate social responsibility are mentioned in the joint statements of the 1st (p. 3), 2nd (p. 3), 3rd (p. 4), 4th (p. 3), 5th (p. 5) meetings of the Committee on TSD.

<i>Objective 4. Promoting public participation and transparency</i>		
4.1 The partner country has established a Domestic Advisory Group which comprises a balanced representation of relevant civil society stakeholders.	<i>High</i>	The partner country has established a Domestic Advisory Group and its composition reflects a balanced representation of relevant stakeholders. ²²⁷
4.2 A civil society forum convenes at least once a year, it comprises a balanced representation of relevant civil society stakeholders and a summary of the meetings is available to the public.	<i>Medium</i>	The Civil Society Forum comprises a balanced representation of relevant civil society stakeholders and a summary of the meetings is available to the public. However, it was not convened once a year. ²²⁸

²²⁷ All previous meetings of the Committee on Trade and Sustainable Development have mentioned the Korean DAG as existing. Furthermore, the list of members of the Korea DAG as of 2017 provided by the EESC shows a balanced representation of NGOs, trade unions, businesses, and academics.

²²⁸ The Civil Society Forum has convened in 2012, 2013, 2014, 2015 and 2017. It comprises a balanced representation of relevant civil society stakeholders according to Rule 1-4 of the Rules of Procedure of the Civil Society Forum adopted at its second meeting in 2013. The Conclusions of each Forum is available to the public on the EESC website.

Annex III: Assessment of the effectiveness of the Trade and Sustainable Development chapter in the EU-Colombia FTA

Table 8.3 (Annexe III): Assessment of the effectiveness of the Trade and Sustainable Development chapter in the EU-Colombia FTA

Indicators	Dependent variable	Coding
<i>Objective 1. Strengthening labour and environmental protection in the partner country</i>		
1.1 There is an increase in the number of up-to-date ILO conventions ratified by the partner country.	<i>Low</i>	Colombia has ratified one ILO up-to-date convention. ²²⁹
1.2 There is an increase in the number of multilateral environmental agreements ratified by the partner country.	<i>Low</i>	Colombia has not ratified any additional multilateral environmental agreement. ²³⁰
1.3 The national levels of labour protection have increased in the partner country.	<i>Low</i>	The ITUC Global Rights Index shows no improvement of workers' rights. ²³¹
1.4 The national levels of environmental protection have increased in the partner country.	<i>Low</i>	The comparison between the EPI before implementation of the FTA and the most recent EPI shows a downgrading in rank of 15 places. ²³²

²²⁹ International Labour Convention website, "Ratifications for Colombia", *NORMLEX*. Since the entry into force of the FTA, Colombia has ratified the Technical Convention C189- Domestic Workers Conventions, 2011 on 9 May 2013.

²³⁰ UN website, inforMEA, *Colombia: Party Status*.

²³¹ The ITUC Global Rights Indexes from 2014 to 2017 rank Colombia in cluster 5, accounting to "no guarantee of rights".

²³² The EPIs indicate a rank for Colombia of 27 in 2012 and of 42 in 2018, which represents a downgrading of 15 places.

<p>Objective 2. Strengthening compliance with the partner country's labour and environmental commitments</p>		
<p>2.1 The number of complaints for violations of ILO Conventions has decreased in the partner country.</p>	<p>Medium</p>	<p>The number of ILO Freedom of Association cases filed between the time of implementation of the agreement, from 1 August 2013 to 1 April 2018 (32 cases), has decreased by 20% compared to the number of cases filed in the same amount of time preceding implementation, from 1 December 2008 to 31 July 2013 June 2011 (40 cases).²³³</p>
<p>2.2 The number of implementation or compliance issues in multilateral environmental agreements has decreased in the partner country.</p>	<p>N/A</p>	<p>On 1 April 2018, Colombia was a party to fourteen multilateral environmental agreements.²³⁴ However, the limited number of conventions undertaking a review of compliance and the limited access to these reports made it impossible to assess whether the number of breaches has evolved.</p>
<p>2.3 The dedicated committee on TSD reports positive steps on the respect and implementation of the TSD chapter in the partner country.</p>	<p>Medium</p>	<p>Overall, the reports from the Sub-committee on TSD raised no difficulty in the respect and implementation of the TSD chapter in the partner country.²³⁵</p>

²³³ From 1 August 2013 to 1 April 2018 (four years and eight months), cases no. 3309 (8 December 2017), 3295 (26 May 2017), 3282 (23 March 2017), 3281 (17 April 2017), 3280 (17 March 2017), 3260 (19 January 2017), 3254 (31 October 2016), 3230 (27 May 2016), 3223 (1 June 2016), 3218 (7 June 2016), 3217 (6 April 2016), 3216 (1 March 2016), 3213 (11 April 2016), 3208 (18 March 2016), 3157 (9 October 2015), 3131 (9 April 2015), 3150 (6 April 2015), 3149 (10 June 2015), 3144 (6 April 2015), 3137 (10 June 2015), 3133 (3 June 2015), 3112 (9 December 2014), 3114 (4 November 2014), 3092 (5 June 2014), 3097 (4 June 2014), 3088 (30 May 2014), 3074 (30 May 2014), 3103 (16 May 2014), 3090 (16 May 2014), 3087 (13 May 2014) 3063 (4 March 2014), 3061 (2 December 2013) were filed against Colombia.

From 1 December 2008 to 31 July 2013 (four years and eight months), cases no. 3034 (2 May 2013), 3027 (28 February 2013), 3020 (14 February 2013), 2995 (15 November 2012), 2993 (15 August 2012), 2974 (26 June 2012), 2960 (5 June 2012), 2954 (28 May 2012), 2958 (25 May 2012), 2950 (30 March 2012), 2935 (31 March 2012), 2933 (6 March 2012), 2946 (10 February 2012), 2924 (1 August 2011), 2877 (14 June 2011), 2895 (3 June 2011), 2880 (27 May 2011), 2852 (24 March 2011), 2849 (17 March 2011), 2845 (17 March 2011), 2846 (13 January 2011), 2853 (9 December 2010), 2830 (13 November 2010), 2835 (13 October 2010), 2823 (4 October 2010), 2822 (22 July 2010), 2804 (21 July 2010), 2824 (16 July 2010), 2801 (16 June 2010), 2791 (14 June 2010), 2790 (11 June 2010), 2796 (3 June 2010), 2793 (24 May 2010), 2761 (8 February 2010), 2730 (6 July 2009), 2720 (10 June 2009), 2721 (29 May 2009), 2731 (21 May 2009), 2710 (4 May 2009), 2719 (3 February 2009) were filed against Colombia.

²³⁴ UN website, InforMEA, *Colombia: Party Status, op. cit.*

²³⁵ The joint statements of the 1st (2014), 2nd (2015) and 3rd (2016) meetings of the Sub-committee on TSD neither expressly highlighted Colombia's success in respecting and implementing the TSD chapter nor mention any difficulty.

<p><i>Objective 3. Promoting dialogue and cooperation between the parties on trade-related aspects of labour and environmental policies</i></p>		
<p>3.1 The dedicated committee on TSD discusses and engages in cooperative activities related to the ratification and effective implementation of ILO conventions and multilateral environment agreements in the partner country.</p>	<p><i>Medium</i></p>	<p>The Sub-committee on TSD discussed the ratification and effective implementation of both ILO conventions and multilateral environmental agreements in the partner country in half of its meetings.²³⁶</p>
<p>3.2 The dedicated committee on TSD discusses and engages in cooperative activities related to the increase in levels and standards of labour and environmental protection in the partner country.</p>	<p><i>Medium</i></p>	<p>The Sub-committee on TSD discussed ways to increase the levels and standards of both labour and environmental protection in the partner country in all its meetings.²³⁷</p>
<p>3.3 The dedicated committee on TSD discusses and engages in cooperative activities related to good practices of corporate social responsibility in the partner country.</p>	<p><i>Medium</i></p>	<p>The Sub-committee on TSD discussed ways to develop good practices of corporate social responsibility in the partner country in all its meetings.²³⁸</p>

²³⁶ Discussions relating to the ratification and effective implementation of ILO conventions are mentioned in the joint statements of the 1st (p. 2) and 3rd (p. 2) meetings of the Sub-committee on TSD. Discussions relating to the ratification and effective implementation of multilateral environment agreements are mentioned in the joint statement of the 1st (p. 4) meeting.

²³⁷ Discussions relating to ways to increase the levels and standards of labour protection are mentioned in the joint statements of the 1st (p. 6), 2nd (p. 2), and 3rd (p. 3-4) meetings of the Sub-committee on TSD. Discussions relating to ways to increase the levels and standards of environmental protection are mentioned in the joint statements of the 1st (p. 6), 2nd (p. 1), and 3rd (p. 4) meetings.

²³⁸ Discussions relating to good practices of corporate social responsibility are mentioned in the joint statements of the 1st (p. 6), 2nd (p. 4), and 3rd (p. 3) meetings of the Sub-committee on TSD.

Objective 4. Promoting public participation and transparency		
4.1 The partner country has established a Domestic Advisory Group which comprises a balanced representation of relevant civil society stakeholders.	Medium	Colombia has established a Domestic Advisory Group, but its composition does not reflect a balanced representation of relevant stakeholders. ²³⁹
4.2 A civil society forum meets at least once a year, it comprises a balanced representation of relevant civil society stakeholders and it makes its views available to the Parties and to the public.	Low	No annual session with civil society organisations was organised. ²⁴⁰

²³⁹ See J. Orbie, D. Martens, L. Van den Putte, “Civil Society Meetings in European Union Trade Agreements: Features, Purposes, and Evaluation”, *CLEER Papers 2016/3*, 2016, p. 16. Colombia uses national bodies as DAG, thereby not include a balanced representation of civil society members. In reaction, civil society organisations have organised joint meetings with the EU DAG.

²⁴⁰ The EESC does not report any civil society dialogue.

Annex IV: Assessment of the effectiveness of the Trade and Sustainable Development chapter in the EU-Ukraine DCFTA

Table 8.4 (Annexe IV): Assessment of the effectiveness of the Trade and Sustainable Development chapter in the EU-Ukraine DCFTA

Indicators	Dependent variable	Coding
<i>Objective 1. Strengthening labour and environmental protection in the partner country</i>		
1.1 There is an increase in the number of up-to-date ILO conventions ratified by the partner country.	<i>Low</i>	Ukraine has ratified one ILO up-to-date convention. ²⁴¹
1.2 There is an increase in the number of multilateral environmental agreements ratified by the partner country.	<i>Low</i>	Ukraine has ratified one multilateral environmental agreement. ²⁴²
1.3 The national levels of labour protection have increased in the partner country.	<i>Medium</i>	The ITUC Global Rights Index shows an improvement of workers' rights of one cluster during the time of implementation of the FTA. ²⁴³
1.4 The national levels of environmental protection have increased in the partner country.	<i>Low</i>	The comparison between the EPI before implementation of the FTA and the most recent EPI shows a downgrading of 14 places. ²⁴⁴

²⁴¹ International Labour Convention website, "Ratifications for Ukraine", *NORMLEX*. Since the entry into force of the FTA, Ukraine has ratified the Technical Convention C102- Social Security (Minimum Standards), 1952 on 6 June 2016.

²⁴² UN website, inforMEA, *Ukraine: Party Status*. Since the entry into force of the FTA, Colombia has ratified the Paris Agreement of 12 December 2015 on 19 September 2016.

²⁴³ The ITUC Global Rights Index 2014 ranked Ukraine in cluster 5+ which account to "no guarantee of rights due to the breakdown of the rule of law". The following ITUC indexes until 2017 rank Ukraine in cluster 5, accounting to "no guarantee of rights".

²⁴⁴ The EPIs indicate a rank for Ukraine of 95 in 2014 and of 109 in 2018, which represents downgrading of 14 places.

<p><i>Objective 2. Strengthening compliance with the partner country's labour and environmental commitments</i></p>		
<p>2.1 The number of complaints for violations of ILO conventions has decreased in the partner country.</p>	<p><i>Low</i></p>	<p>There have been no ILO Freedom of Association cases filed between 1 October 2013 and 1 April 2018.²⁴⁵</p>
<p>2.2 The number of implementation or compliance issues in multilateral environmental agreements has decreased in the partner country.</p>	<p><i>N/A</i></p>	<p>On 1 April 2018, Ukraine was a party to twenty-three multilateral environmental agreements.²⁴⁶ However, the limited number of conventions undertaking a review of compliance and the limited access to these reports made it impossible to assess whether the number of breaches has evolved.</p>
<p>2.3 The dedicated committee on TSD reports positive steps on the respect and implementation of the TSD chapter in the partner country.</p>	<p><i>Low</i></p>	<p>Overall, the TSD Sub-Committee raised difficulties in the respect and implementation of the TSD chapter in the partner country which were not subsequently resolved.²⁴⁷</p>

²⁴⁵ From 1 January 2016 to 1 April 2018 (two years and three months), no Freedom of Association cases were filed against Ukraine. From 1 October 2013 to 31 December 2015 (two years and three months), no Freedom of Association cases were filed neither.

²⁴⁶ UN website, InforMEA, *Ukraine: Party Status, op. cit.*.

²⁴⁷ The joint statement of the 1st TSD Sub-Committee meeting mentions difficulties relating to sustainable forest management and the wood export ban (p. 1), and compliance with ILO Governance conventions C081- Labour Inspection Convention, 1947, and Technical convention C121- Employment Injury Benefits Convention, 1964 (p. 1).

<p><i>Objective 3. Promoting dialogue and cooperation between the parties on trade-related aspects of labour and environmental policies</i></p>		
<p>3.1 The dedicated committee on TSD discusses and engages in cooperative activities related to the ratification and effective implementation of ILO conventions and multilateral environment agreements in the partner country.</p>	<p><i>Medium</i></p>	<p>The TSD Sub-Committee discussed the ratification and effective implementation of both ILO conventions and multilateral environmental agreements in the partner country in its first and only meeting.²⁴⁸</p>
<p>3.2 The dedicated committee on TSD discusses and engages in cooperative activities related to the increase in levels and standards of labour and environmental protection in the partner country.</p>	<p><i>Low</i></p>	<p>The TSD Sub-Committee only discussed ways to increase the levels and standards of environmental protection in the partner country in its first and only meeting.²⁴⁹</p>
<p>3.3 The dedicated committee on TSD discusses and engages in cooperative activities related to good practices of corporate social responsibility in the partner country.</p>	<p><i>Low</i></p>	<p>The TSD Sub-Committee did not discuss ways to develop good practices of corporate social responsibility in the partner country in its first and only meeting.²⁵⁰</p>

²⁴⁸ Discussions relating to the ratification and effective implementation of both ILO conventions and MEAs are mentioned in the joint statement of the 1st (pp. 1-2) meeting of the TSD Sub-Committee.

²⁴⁹ Discussions relating to ways to increase the levels and standards of labour protection are not mentioned in the joint statement. Discussions relating to ways to increase the levels and standards of environmental protection are mentioned in the joint statement of the 1st (p. 1) meeting of the TSD Sub-Committee.

²⁵⁰ Discussions relating to good practices of corporate social responsibility are not mentioned in the joint statement of the 1st meeting of the TSD Sub-Committee.

<i>Objective 4.TSD chapters promote public participation and transparency</i>		
4.1 The partner country has established a Domestic Advisory Group which comprises a balanced representation of relevant civil society stakeholders.	<i>Low</i>	Ukraine has not established a Domestic Advisory Group. ²⁵¹
4.2 A civil society forum meets at least once a year, it comprises a balanced representation of relevant civil society stakeholders and it makes its views available to the Parties and to the public.	<i>Low</i>	A Civil Society Forum was convened, but there is no information regarding its composition and a summary of the meeting is not available to the public. ²⁵²

²⁵¹ The joint statement of the 1st meeting of the TSD Sub-Committee mentions that Ukraine has not yet appointed members of the DAG (p. 1).

²⁵² The joint statement of the 1st meeting of the TSD Sub-Committee mentions that a Civil Society Forum was held in May 2017 (p. 1), but no additional information is available.