



# Trade and Sustainable Development:

A chance for innovative thinking

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## Executive Summary

Sustainable development has become one of the European Union's essential goals and is now a guiding principle for both its internal and external policies. As part of this ambition, the European Commission includes specific chapters on Trade and Sustainable Development in all free trade agreements (FTA) that it concludes with third country partners. The first so-called Trade and Sustainable Development chapter (TSD) was adopted as part of the EU-South Korea (EU-RoK) FTA in 2011.

Because of all the controversy surrounding trade in recent years [e.g., the Transatlantic Trade and Investment Partnership (TTIP) or the Comprehensive Economic and Trade Agreement (CETA)], the European Commission has started to recognise that there needs to be stronger coherence between trade and development policies. The TSD chapters could play a crucial role in this, but they currently have little impact, mainly because they do not contain any measures for redress. As things stand, there are no consequences if a third country does not comply with the TSD chapter of a trade deal concluded with the EU.

In July 2017, the European Commission published a discussion paper reviewing the trade and sustainable development (TSD) chapters. The purpose of the long-awaited paper was to start discussions on how to improve the implementation and enforcement of the TSD chapters.

The Commission's [non-paper](#) proposes two options to improve TSD implementation. The first alternative (Option 1) retains the current structure whilst proposing cosmetic changes; the second proposal (Option 2) looks at adopting a sanctions-based mechanism akin to the models in the United States or Canada. From what the non-paper states, it is clear that the European Commission would prefer Option 1, which would solely mean very limited improvements in the way TSDs are implemented and enforced.

In October 2015, T&E and ClientEarth published a report, *Sustainable development and environment in TTIP*, which examined how to include progressive policies in the ongoing EU-US TTIP negotiations. Although the recommendations were developed in the context of the TTIP, they are valid for all TSD chapters. As such, they should be included in the Commission's review of the TSD chapter implementation. The key recommendations of this report were to:

1. Subject environmental protection to state-to-state dispute settlement, in the same way that the other commercial chapters are.
2. Include an environmental essential elements clause, and make trade liberalisation *conditional* on the compliance with the sustainable development provisions.
3. Include a Generalised Scheme of Preferences (GSP+) + inspired Key Performance Indicator scorecard for all MEAs (Multilateral Environmental Agreements), as suggested in Annex I of this report.
4. Ensure that EU Trade Defence Instrument reforms incorporate environmental criteria such as GHG implications, land use, water and air quality and environmental dumping during investigations for the imposition of anti-dumping duties.
5. Support and facilitate closer collaboration between the World Trade Organisation (WTO) and MEA secretariats, to reinforce environmental action through trade.
6. Strengthen and spearhead a discussion and conclusion on negotiations to grant observer status to MEA secretariats.
7. MEA rules should be designed so that compliance is easy to verify, and enforcement is better facilitated.
8. Drive a reform of the WTO Anti-Dumping Agreement to include UN Sustainable Development Goals, including climate change criteria.
9. Push for the successful conclusion of the Doha Round.

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# 1. Introduction

Will 2017 be remembered as the year when we rejected globalisation? Or will it be remembered as the year when we finally started to talk openly and honestly about the winners and losers of globalisation? There exist endless debates, conferences, reports, publications and challenging textbook economics on the painfulness of exposure to trade. In April 2017, shortly after the Davos conferences, the Organisation for Economic Co-operation and Development (OECD) published *Fixing Globalisation: Time to Make it Work for All*. The paper focused on balancing the benefits with the negative impacts and on finding a solution to ensure that the benefits were more equally shared.<sup>1</sup> Similarly, the May 2017 European Commission *Reflection paper on Harnessing Globalisation* also acknowledged more concretely the negative impacts of globalisation and trade policy, particularly on employment, employment quality and the environment.<sup>2</sup> Most surprisingly, the World Trade Organisation's (WTO) September 2017 annual meeting, also known as its Public Forum, looked at *Trade: Behind the Headlines* promising to 'examine in detail the realities of trade – the opportunities it offers and the challenges it can bring'.<sup>3</sup> As explained by *New York Times* columnist and Nobel Prize winner Paul Krugman: 'We've made mistakes, we underestimated the amount of pain being caused, but it doesn't mean we should be turning our backs on the global economy now. The explosion in trade in some ways is already in the rear-view mirror, it's already plateaued, if we turn our backs on trade now it would be highly disruptive.'<sup>4</sup>

The fascinating thread in all these debates amongst promoters of globalisation is the call for more action at national level to address, mitigate and resolve the negative impacts of globalisation, and that responsibility at the multilateral level is limited, and not desired. One of those measures is the long-awaited revision of the European Commission trade and sustainable development (TSD) chapter<sup>5</sup>, which was published in July 2017. The non-paper outlines two broad options: the first alternative looks at revising the current structure and the second option looks at adopting a sanctions-based mechanism, akin to the models in the United States or Canada.

T&E welcomes the opportunity to have a discussion on the role of the TSD chapter, but T&E is disappointed with the two vague options presented. T&E understands that this opportunity should be used as a chance to innovate the currently 'silo-based' approach, which at times feels like mere greenwashing. Despite multiple European constitutional ambitions and requirements for supporting evidence, as cited in the Treaty on the Functioning of the European Union (TFEU) and Treaty on European Union (TEU)<sup>6</sup>, EU trade policy has not given sufficient consideration to environmental protection and sustainable development. While many contemporary FTAs give a nod to the principle of sustainable development, the chapter in FTAs on trade and sustainable development lacks the legally enforceable provisions granted to commercial liberalisation. The latest European Commission 'non-paper' proposal misses the opportunity to bring into the debate the EU's Member States and their responsibility to both citizens and the environment. Where is the chance for innovative thinking?

In October 2015, T&E and ClientEarth published *Sustainable development and environment in TTIP*<sup>7</sup>, which examined alternative and progressive policies to include in the ongoing EU-US TTIP negotiations. This present report will further examine and develop our 2015 proposals to make reforms in how trade deals with the environment – not only in the sustainable development chapter, but also throughout the agreement.

The following report is divided into three sections:

- Strengthening and reviving international collaboration
- Enforcement: Sustainable development as an essential element
- Key Performance Indicators 'Scorecard'

## 2. Strengthening and reviving international collaboration

The EU is party to over 40 international environmental agreements, and actively seeks to promote solutions to environmental issues at both regional and international levels. Enforcement provisions in those agreements are generally weak, relying heavily on non-governmental organisations for monitoring and ‘naming and shaming’ to report incidents of non-compliance.<sup>8</sup>

EU action alone does not suffice to attain global sustainable development, such as the UN goals on Sustainable Development or the Paris Climate Accord. As with many trade issues, action at WTO level is desirable to ensure a level-playing field and optimal environmental protection. Among the over 250 multilateral environmental agreements (MEA), around 20 contain provisions that could affect trade, as trade in certain products is prohibited or restricted. However, the question of whether or not such measures are WTO compliant can always arise.<sup>9</sup>

It is for that reason that member states agreed at the 2001 Doha Ministerial to launch negotiations regarding the relationship between existing WTO rules and specific trade obligations (STOs) set out in MEAs.<sup>10</sup> In addition, granting MEA secretariats observer status to the WTO, besides the Trade and Environment Committee, is part of the negotiations. However, with the stall of the Doha Round, this endeavour is on ice for the moment. Climate change needs worldwide action and a relaunching of the negotiations to grant MEAs observer status is key. Trade and environmental policy are not at odds with each other; on the contrary, they can mutually support each other. Collaboration between the WTO and MEA secretariats can reinforce environmental action through trade.

MEA rules should be designed in such a way that compliance and enforcement are easy to both verify and facilitate. However, this is not always straightforward. MEA rules require governments to alter their behaviour and actions by a private agent rather than via governmental authorities.<sup>11</sup> In accordance with the United Nations Environment Programme (UNEP) and MEA secretariats,<sup>12</sup> compliance is defined as ‘the fulfilment of a party’s obligations under a MEA’<sup>13</sup>, whilst enforcement refers to ‘the full range of procedures and actions available to States to promote national compliance with domestic law, to deter non-compliance and to address instances of non-compliance.’<sup>14</sup>

In general, all countries that have signed and ratified MEAs have the duty to comply with and to enforce the rules according to the principle *pacta sunt servanda* (agreements must be kept). However, non-compliance and non-enforcement is widespread across many MEAs<sup>15</sup>. Whether or not a country complies with and enforces the rules of an MEA is subject to interpretation and can be a contentious issue. What is remarkable is that treaty language tends to be vague and ambiguous. Additionally, it is also clear that countries may comply with and enforce certain rules within an MEA, but may fail to respect other elements.

## 3. Enforcement: Sustainable development as an essential element

The new generation of EU trade agreements still excludes the use of state-to-state dispute settlement for the sustainable development chapters. Currently, a Party cannot effectively address and sanction the other Party for violations of environmental commitments in these agreements. The EU’s recent FTAs with Canada, South Korea, Colombia and Peru serve as clear examples in which these environmental chapters are relegated to a lower tier compared to other areas, and where commitments are virtually toothless. Even in the case of the EU-RoK FTA, where the promotion of sustainable development is an explicit objective, the TSD chapter is still not afforded the same legal representation as others.<sup>16</sup>

The European Commission revision provides a unique opportunity to make environmental protection provisions subject to binding dispute settlements, and it should be possible to do so for the entirety of the trade and sustainable development chapter commitments. The revision should also ensure that either

Party can suspend concessions and/or obligations in the event of non-compliance, via a ruling of the dispute settlement panel. Furthermore, it should incorporate, and not inhibit, the monitoring mechanisms established in various international environmental agreements, which can even be used to strengthen claims brought under dispute settlement procedures in the EU's trade agreements. In addition, the European Commission should ensure the effectiveness of the dispute settlement procedure with transparent and inclusive public stakeholder consultation, prior to launching a dispute settlement procedure. Such an approach is in full alignment with the European Parliament's resolution calling upon the European Commission to ensure that dispute settlement in TTIP 'applies to the whole agreement'.<sup>17</sup>

This opportunity, if grasped, will not only demonstrate the EU's willingness to put its commitments on sustainable development on an equal footing to its commercial interests, but it will also reinforce and complement the EU's external environmental policies. Only if empowered with real and effective enforcement mechanisms can the EU's collaborative and multilateral efforts on sustainable development make meaningful progress.

In May 2017, the European Court of Justice (ECJ) delivered its landmark Opinion 2/15 on the powers to conclude the EU-Singapore FTA (EUSFTA).<sup>18</sup> The ECJ ruled that sustainable development is an integral part of the common commercial policy.<sup>19</sup> While this alone is already a big step, the judgment contains an intriguing paragraph (para. 161) on the enforcement of environmental and labour provisions in trade agreements. Civil society and academics have long argued that non-compliance with the above provisions should have consequences.<sup>20</sup> The European Union has, however, opted for a cooperative approach, through consultations and non-binding recommendations, and has so far rejected more punitive methods.<sup>21</sup> Nevertheless, the ECJ has now essentially confirmed that an FTA can potentially suspend the agreement for a breach of the sustainable development provisions.<sup>22</sup>

The ECJ recognises that sustainable development 'plays an essential role in the agreement'<sup>23</sup> and states that the liberalisation of trade under an agreement is *conditional* on the compliance with the sustainable development provisions.<sup>24</sup> This statement is quite significant, as it comes close to recognising sustainable development as an 'essential element' of an FTA and to introducing conditionality in these provisions. This approach can be found in recent association agreements (AA) with Ukraine, Moldova and Georgia, as well as in the Cotonou Agreement,<sup>25</sup> where respect for human rights is an essential element and violation constitutes a material breach of the agreement.

Given the ECJ's ruling, it seems clear that all European FTAs should include an 'essential elements' clause ensuring that either Party can suspend the application of the agreement when the other Party fundamentally undermines the objectives of the sustainable development chapter.

Although no explicit non-execution clause<sup>26</sup> exists in the Singapore FTA, or any other FTA, the ECJ in Opinion 2/15 refers to Article 60 (1) of the Vienna Convention on the Law of Treaties (VCLT)<sup>27</sup>, which is the authoritative guide regarding the formation and effects of treaties. This article allows for the suspension or termination of an agreement due to a material breach.<sup>28</sup> If one Party fails to fulfil its obligations under the sustainable development chapters in a way that can be considered a repudiation of the FTA, the other Party can suspend the agreement.

The above judgement is significant, as it can increase the enforceability of sustainable development chapters and create an incentive to comply with sustainable development provisions in FTAs. Laudable as it may seem, there remains one major problem. The current sustainable development chapters contain very weak and vague language. In the recent CETA agreement, the Parties 'aim to promote sustainable development'<sup>29</sup>. This affirmation does not imply a strong obligation. As long as these provisions remain weak, any new-found enforceability mechanism will remain toothless. It is not clear when and how Parties can suspend the treaty. Is a mere notification sufficient? Would one need a court judgment? Or merely

simple consultations? The current EU approach seems to suggest that there is an obligation on the Parties to first enter into consultations, to solve the problem.<sup>30</sup> The chances currently look slim<sup>31</sup> Similarly, the May 2017 European Commission *Reflection paper on Harnessing Globalisation* also acknowledged more concretely the negative impacts of globalisation and trade policy, particularly on employment, employment quality and the environment.<sup>32</sup> Most surprisingly, the World Trade Organisation's (WTO) September 2017 annual meeting, also known as its Public Forum, looked at *Trade: Behind the Headlines* promising to 'examine in detail the realities of trade – the opportunities it offers and the challenges it can bring'.<sup>33</sup> As explained by *New York Times* columnist and Nobel Prize winner Paul Krugman: 'We've made mistakes, we underestimated the amount of pain being caused, but it doesn't mean we should be turning our backs on the global economy now. The explosion in trade in some ways is already in the rear-view mirror, it's already plateaued, if we turn our backs on trade now it would be highly disruptive.'<sup>34</sup>, as the EU has never initiated consultations over social or environmental concerns, nor has it ever suspended a trade agreement even in cases of human rights violations (which, it must be noted, unlike for environmental concerns, already benefit from clause and conditionality essential elements).

In its non-paper, the European Commission did not refer to the ECJ's interpretation on the enforcement of sustainable development chapters. This omission is regrettable because it touches upon the core issue that civil society has long called for: meaningful enforcement instead of a toothless tiger. Coupled with an essential elements clause and a stronger, more transparent dispute settlement mechanism, the European Commission could significantly improve the current situation.

### 3.1. Environmental dumping

FTAs enable producers to relocate their production facilities between signatories without any significant costs. This possibility creates a phenomenon wherein producers reduce costs via seeking out weaker regulations, without sacrificing market access to their former home country. At the same time, the introduction of strict and costly environmental and social regulations incentivise a flight to jurisdictions where such rules are less strict; the so-called pollution havens. As a result, countries experience competition for investment from other countries with low levels of environmental and social protection. This situation not only creates economic pressure on the introduction or maintenance of robust environmental and social standards, but it can also jeopardise the effectiveness of EU regulations. For instance, the threat of carbon leakage has already resulted in the free allocation of emission allowances to industries exposed by international competition.<sup>35</sup>

Trade can offer another mechanism to deal with environmental dumping: anti-dumping duties.<sup>36</sup> This solution can be tackled at WTO and regional levels. While action at WTO would be preferred, to avoid fragmentation, the stall of the Doha Round makes a fast progress in that direction unlikely. A reform of the WTO Anti-Dumping Agreement<sup>37</sup> is necessary. For example, a climate change criterion test should be applied for anti-dumping duties on unsustainable goods with high GHG emissions, should they be challenged.<sup>38</sup> The lesser duty rule<sup>39</sup>, i.e. duties at a level lower than the margin of dumping, should not be applied either with regard to unsustainable products, as the deterrent effect would not be high enough.

In the absence of rapid progress at WTO level, the EU needs to be an early mover in a necessary reform. The EU needs to incorporate environmental criteria such as GHG implications, land use, water and air quality and environmental dumping during its investigations for the imposition of anti-dumping duties. To this end, a broader group of stakeholders must be invited to voice their opinion and to give valuable expert input on environmental concerns. Higher duties could then be imposed on goods if the exporting country does not take action to protect environmental standards or mitigate climate change, as demanded under MEAs, such as the Paris Agreement. If a trade remedies chapter is foreseen for an FTA, this approach must be clearly reiterated there.



The European Parliament has called for similar considerations in its 2014 position on trade defence reform (2013/0103(COD)).<sup>40</sup> Recently, the inclusion of environmental requirements for the purpose of the damage calculation method was adopted in a broad compromise by the European Parliament's Committee on International Trade (INTA).<sup>41</sup> The file is still under negotiation in co-decision. This action could have a spill-over effect, encouraging other countries to take environmental concerns into account when imposing anti-dumping duties, or even revive the discussion at WTO level. Trade in unsustainable goods would ultimately decrease due to the resulting higher prices.

#### 4. Key Performance Indicators ‘Scorecard’

Inspired by the environmental MEAs included in GSP+, Annex I of this report (*List of international environmental agreements*) includes 20 fundamental MEAs that all parties signing an FTA with Europe should seek to engage in and ratify correctly. As each MEA has its own conditions, rules, monitoring and enforcement, the process is less straightforward than with labour conventions. However, as we have seen in issues associated with social dumping, we also see issues of environmental dumping. Environmental dumping not only hurts the environment and affected communities, but it also increases the risk of a regulatory race-to-the-bottom in the guise of increased competitiveness. The EU has made application of its Generalised Scheme of Preferences (GSP+) with developing partners conditional on their acceptance of, and adherence to, a number of core environmental and labour agreements.<sup>42</sup>

To ensure effective implementation and monitoring of Annex I, a similar approach to the GSP+ scorecards could be implemented. To ensure continued liberalised tariffs and market access, an annual KPI TSD scorecard could be published.<sup>43</sup>

In order to meet its monitoring responsibility, the parties would agree to a pre-prepared list of KPIs, to measure and assess compliance. Parties would publish annual scorecards, structured in such a way as to demonstrate both the successes and failures of each party. This approach would also enable parties to work together to identify and address shortcomings by the monitoring bodies of the relevant core international conventions. Similarly to the GSP+ score cards, the following KPIs metrics would help with monitoring:

- Proof of national implementation and ratification
- Ensurance of effective implementation
- Compliance with reporting requirements
- Proof of no national reservation prohibited by conventions
- Conclusions on monitoring bodies under convention, with particular focus on any serious failures
- Acceptance of regular monitoring in accordance with the conventions in coordination with Domestic Advisory Groups (DAGs)
- Cooperation between parties to provide all necessary information.

The KPIs scorecard would be scrutinised before publication by the DAGs, to monitor and verify information. Both the European Council and the European Parliament, including equivalent entities to FTA partners, would be invited to scrutinise the KPI scorecards to ensure full democratic scrutiny.

#### 5. Conclusions and Policy recommendations

WTO Director General Azevêdo has declared on multiple occasions ‘(...) that trade is essential for growth, development and jobs...’. This bold statement leads us to inherently trust that classical school trade-thinking model that all trade is good, will lead to growth, will lead to increasing jobs, and that with increased jobs will come increased wages and spending power. On the other hand, one hears trade experts complain that

‘trade cannot solve it all (...) and that trade is asked to resolve a lot of unresolved ongoing issues.’ These statements lead citizens to rightly ask: ‘So what is it? Is trade the silver bullet, or not?’ By way of trying to counter the voices of populism, the political middle ground has rallied in defence of hyper-globalisation, which could end up being disastrous. As a result, we observe a polarised debate, where both the positive and negative impacts of globalisation are hyper-inflated.

Does the argument of ‘trade is good for growth’ still hold any truth? What is the prospect for an alternative political and trade agenda that wishes to advance an egalitarian project?

In certain areas, a partial de-globalisation and re-regionalisation of economic activities, respectively, such as public services, seems warranted. In contrast to right-wing populism, such a project would thus be principled with respect to democracy, instrumental with respect to globalisation and realistic with respect to issues touching upon national sovereignty.

In this context, we need to think of the roles that industrial policy, automation and global value chains play, especially in relation to jobs and growth. It should be clear what can and cannot be expected from trade agreements. The new debate must be on what type of trade agreements we want for Europe, a debate guided by the fundamental principles of complete transparency; trade to enable political priorities such as decarbonisation of our economies; and sound dispute resolution for all that respects the rule of European law.

Trade should positively contribute towards healthy citizens and communities, long-term high-quality jobs, and should contribute positively to stopping climate change. Trade that does not contribute to these values should not be considered. Our recommendations to the European Commission are therefore to:

1. Subject environmental protection to state-to-state dispute settlement, as in the other commercial chapters.
2. Include an environmental essential elements clause and make trade liberalisation *conditional* on the compliance with the sustainable development provisions.
3. Include a Generalised Scheme of Preferences (GSP+) inspired Key Performance Indicator scorecard for all MEAs, as suggested in Annex I of this report.
4. EU Trade Defence Instrument reforms should incorporate environmental criteria such as GHG implications, land use, water and air quality and environmental dumping during its investigations for the imposition of anti-dumping duties.
5. Support and facilitate closer collaboration between the World Trade Organisation (WTO) and MEA secretariat to reinforce environmental action through trade.
6. Strengthen and spearhead a discussion and conclusion on negotiations to grant observer status to MEA secretariats.
7. MEA rules should be designed so that compliance and enforcement are easy to verify and facilitate.
8. Drive a reform of the WTO Anti-Dumping Agreement, to include UN Sustainable Development Goals including climate change criteria.
9. Push for the successful conclusion of the Doha Round.

# Annex I: List of international environmental agreements

## Priority list

- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (1989)
- Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (1998)
- Convention on Biological Diversity (1992)
- Cartagena Protocol on Biosafety (2000)
- Protocol on Liability and Redress to the Cartagena Protocol on Biosafety (2010)
- Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of the Benefits Arising from their Utilisation to the Convention on Biological Diversity (2010)
- Stockholm Convention on persistent Organic Pollutants (2001)
- UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1998)
- Convention on Transboundary Effects of Industrial Accidents (1992)
- Convention on Environmental Impact Assessment in a Transboundary Context (1991)
- The United Nations Framework Convention on Climate Change (1992 / Kyoto 1997 / Paris 2016)

## Additional list

- Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973)
- Montreal Protocol on Substances that Deplete the Ozone Layer (1987)
- Kyoto Protocol to the United Nations Framework Convention on Climate Change (1998)
- Convention on the Law of the Non-Navigational Uses of International Watercourses (1997)
- Convention on the Conservation of Antarctic Marine Living Resources (1980)
- Convention on Long-Range Transboundary Air Pollution (1979)
- Minamata Convention on Mercury (2013)
- International Tropical Timber Agreement (1994)
- Convention on the Conservation of Migratory Species of Wild Animals (1979)

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<sup>1</sup> Fixing Globalisation: Time to Make it Work for All (retrieved 04/09/2017) <http://www.oecd.org/social/fixing-globalisation-time-to-make-it-work-for-all-9789264275096-en.htm>

<sup>2</sup> 'Reflection paper on Harnessing Globalisation' (retrieved 04/09/2017) [https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-globalisation\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-globalisation_en.pdf)

<sup>3</sup> Public Forum 2017 — "Trade: Behind the Headlines" (retrieved 04/09/2017) [https://www.wto.org/english/forums\\_e/public\\_forum17\\_e/public\\_forum17\\_e.htm](https://www.wto.org/english/forums_e/public_forum17_e/public_forum17_e.htm)

<sup>4</sup> Public Forum 2017 — "Trade: Behind the Headlines" (retrieved 27/09/2017) [https://www.wto.org/english/news\\_e/news17\\_e/pf17\\_26sep17\\_e.htm](https://www.wto.org/english/news_e/news17_e/pf17_26sep17_e.htm)

<sup>5</sup> 'Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs)' (retrieved 04/09/2017) [http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc\\_155686.pdf](http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf)

<sup>6</sup> : In the preamble of the Treaty on European Union (TEU). Article 3 (3) TEU. Article 3 (5) TEU. Article 207 (1) TFEU. Article 21 (2) (d) TEU. Article 11 of TFEU),

- <sup>7</sup> 'Sustainable development and environment in TTIP' (retrieved 04/09/2017) [https://www.transportenvironment.org/sites/te/files/publications/2015\\_10\\_Environment\\_in\\_TTIP\\_equal\\_consideration\\_report\\_FINAL\\_new\\_logo.pdf](https://www.transportenvironment.org/sites/te/files/publications/2015_10_Environment_in_TTIP_equal_consideration_report_FINAL_new_logo.pdf)
- <sup>8</sup> Sinkna Jinnah and Elisa Morgera, 'Environmental Provisions in American and EU Free Trade Agreements: A Preliminary Comparison and Research Agenda' (2013) 22 RECIEL 324
- <sup>9</sup> So far no formal dispute concerning a measure under an MEA has been brought. However, the Chile- Swordfish case ([WT/DS193/3](#))
- <sup>10</sup> Para. 31 Doha Declaration WT/MIN(01)/DEC/1, 20 November 2001
- <sup>11</sup> (Mitchell 1996, p17)
- <sup>12</sup> It is important to mention that UNEP merely supports MEA secretariats. Some of them are housed within UNEP, but none of them is accountable to UNEP, since MEA secretariats have their own rules and procedures laid down in their pertinent treaties. For more information see Bharat H. Desai, International Environmental Governance: Towards UNEPO, Hotei Publishing; Basic Information on Secretariats of Multilateral Environmental Agreements Mission, Structure, Financing and Governance, available at <http://www.un.org/ga/president/60/summitfollowup/060612d.pdf> (retrieved 18.9.2017)
- <sup>13</sup> UNEP (2001a): Draft guidelines on options for enhancing compliance with Multilateral Environmental Agreements, Nairobi: United Nations Environment Programme <http://staging.unep.org/delc/Portals/119/UNEP.Guidelines.on.Compliance.MEA.pdf>
- <sup>14</sup> (UNEP (2001b): Draft guidelines for effective national environmental enforcement, international cooperation, and coordination in combating violations of Multilateral Environmental Agreements, Nairobi: United Nations Environment Programme.)
- <sup>15</sup> Such as: The Montreal Protocol; Convention on Long-range Transboundary Air Pollution (CLRTAP); Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); The Aarhus Convention
- <sup>16</sup> Free trade agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [2011] OJ L 127/6
- <sup>17</sup> European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) 2014/2228(INI) at 2. (d) (iv)
- <sup>18</sup> Opinion 2/15: Opinion of the Court (Full Court) of 16 May 2017
- <sup>19</sup> Opinion 2/15 para. 147
- <sup>20</sup> Steve Charnovitz, Free Trade, Fair Trade, Green Trade: Defogging the Debate, Cornell International Law Journal, Volume 27, Issue 3, Symposium 1994
- <sup>21</sup> See also Non-paper on Trade and Sustainable Development (TSD) chapters in EU free trade agreements (FTAs), p. 8
- <sup>22</sup> Paragraph 161 reads: Finally, the link which the provisions of Chapter 13 of the envisaged agreement display with trade between the European Union and the Republic of Singapore is also specific in nature because a breach of the provisions concerning social protection of workers and environmental protection, set out in that chapter, authorises the other Party — in accordance with the rule of customary international law codified in Article 60(1) of the Convention on the law of treaties, [...] — to terminate or suspend the liberalisation, provided for in the other provisions of the envisaged agreement, of that trade
- <sup>23</sup> Para. 162
- <sup>24</sup> Para. 166: It follows from all of those factors that the provisions of Chapter 13 of the envisaged agreement are intended not to regulate the levels of social and environmental protection in the Parties' respective territory but to govern trade between the European Union and the Republic of Singapore by making liberalisation of that trade subject to the condition that the Parties comply with their international obligations concerning social protection of workers and environmental protection.
- <sup>25</sup> Szilárd Gáspár-Szilágyi, Human Rights Conditionality in the EU's Newly Concluded Association Agreements with the Eastern Partners, Defending Human Rights and Democracy in the Era of Globalization p. 50 -79; Nicolas Hachez, 'Essential elements' clause in in EU trade agreements making trade work in a way that helps human rights?, Working Paper No.158 - April 2015, Leuven Centre for Global Governance Studies, KU Leuven
- <sup>26</sup> Such a 'non-execution' clause permits either party to take 'appropriate measures', including suspension in whole or in part of any obligations resulting out of the FTA, if the other party violates the essential elements clause.
- <sup>27</sup> Vienna Convention on the Law of Treaties (VCLT), 23 May 1969, available at <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf> (retrieved 21.8.2017)
- <sup>28</sup> Art 60 (1) VCLT reads: "A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part." Art 60 (3) VCLT: "A material breach of a treaty, for the purposes of this article, consists in: (a) a repudiation of the treaty not sanctioned by the present Convention; or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty."
- <sup>29</sup> Art 22 (1) (3), Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part *OJ L 11, 14.1.2017*
- <sup>30</sup> See for example Art 13.16 and 13.17 EUSFTA: Art 13.13, 13.14 and 13.15 EU- Korea FTA (Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ L 127, 14.5.2011
- <sup>31</sup> Fixing Globalisation: Time to Make it Work for All (retrieved 04/09/2017) <http://www.oecd.org/social/fixing-globalisation-time-to-make-it-work-for-all-9789264275096-en.htm>
- <sup>32</sup> 'Reflection paper on Harnessing Globalisation' (retrieved 04/09/2017) [https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-globalisation\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-globalisation_en.pdf)
- <sup>33</sup> Public Forum 2017 — "Trade: Behind the Headlines" (retrieved 04/09/2017) [https://www.wto.org/english/forums\\_e/public\\_forum17\\_e/public\\_forum17\\_e.htm](https://www.wto.org/english/forums_e/public_forum17_e/public_forum17_e.htm)
- <sup>34</sup> Public Forum 2017 — "Trade: Behind the Headlines" (retrieved 27/09/2017) [https://www.wto.org/english/news\\_e/news17\\_e/pf17\\_26sep17\\_e.htm](https://www.wto.org/english/news_e/news17_e/pf17_26sep17_e.htm)
- <sup>35</sup> See most recently, Commission Decision determining, pursuant to Directive 2003/87/EC, a list of sectors and subsectors which are deemed to be exposed to a significant risk of carbon leakage, for the period 2015 to 2019 [2014] OJ L 308/114.
- <sup>36</sup> We have proposed this approach in our study "Will European trade undermine the EU's move to clean biofuels? The urgent need for EU trade policy coherence and the transition towards cleaner biofuels" available at <https://www.transportenvironment.org/publications/will-european-trade-undermine-eu%E2%80%99s-move-clean-biofuels> (retrieved 25.8.2017)
- <sup>37</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement)
- <sup>38</sup> See also Melendez-Ortiz, Ricardo, Enabling the Energy Transition and Scale-up of Clean Energy Technologies: Options for the Global Trade System, E15 Expert Group on Clean Energy Technologies and the Trade System, International Centre for Trade and Sustainable Development (ICTSD)
- <sup>39</sup> Art 9 Anti-dumping Agreement

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<sup>40</sup> European Parliament legislative resolution of 16 April 2014 on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1225/2009 on protection against dumped imports from countries non-members of the European Community and Council Regulation (EC) No 597/2009 on protection against subsidised imports from countries non-members of the European Community 2013/0103(COD)

<sup>41</sup> New TDI method vote: MEPs set to push back on European Commission plans, available at <http://borderlex.eu/new-tdi-method-vote-meps-set-push-back-commission-plans/> (retrieved 20.6.2017)

<sup>42</sup> Regulation 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 [2012] OJ L 303/1

<sup>43</sup> 'European Union's GSP+ scheme' (retrieved 04/09/2017) [http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc\\_155235.pdf](http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155235.pdf)