

## **European Union Trade and Climate Change Policy: Pursuing a “Cooperative Approach” to Promoting the Implementation of the Paris Agreement**

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The European Union is a stalwart supporter of climate change action and of open and fair international trade.<sup>1</sup> The region’s leaders regularly reaffirm their commitment to the 2015 Paris Agreement on climate change and to the World Trade Organization (WTO) as providing the international rules-based system for promoting a stable climate system and open markets. Both regimes indicate that trade and climate change policies should be mutually supportive and provide that if measures designed to address climate change affect international trade, they should do so in a rational and justifiable manner.<sup>2</sup>

There has been little opportunity, however, to negotiate multilaterally on how trade and climate change policies can be mutually supportive. While the WTO has hosted an ongoing “trade and environment dialogue,” WTO negotiations that might have helped to ensure that the trading system better supported global climate change action have stagnated over the last decade. In the meantime, the Paris Agreement has taken a *bottom-up* approach to climate change policy, allowing each of its Parties to nationally determine its own targets and programs. As governments enact climate change policies to accelerate the decarbonization of their economies—including through internationally traded goods, services, and capital—climate change strategies and policies governing international trade and investment have become increasingly intertwined.<sup>3</sup> An initial analysis of the *nationally determined contributions* under the Paris Agreement concludes that nearly half of these emissions reduction targets and plans contain a “direct reference to trade or trade measures.”<sup>4</sup>

For these reasons, the European Union and a growing number of its trading partners are turning to bilateral and regional free trade agreements and companion partnership agreements to deepen their cooperation on trade in a way that promotes action on climate change while avoiding and managing any tensions that might arise between trade and climate change policies. Europe and other regions are also experiencing a new wave of “populist” backlash against open markets and borders, bringing governments under growing pressure to demonstrate how free trade agreements can protect and promote domestic social and environmental standards. Most recently, this backlash unleashed calls for a new generation of European Union free trade agreements that strengthen their climate change-related provisions, as well as calls to make support for the Paris Agreement a pre-condition for any preferential trade with the European Union.

This paper reviews the European Union’s general approach to the design and negotiation of free trade agreements and companion partnership agreements that promote sustainable development, including climate change action. (*Companion partnership agreements* typically contain a general framework for bilateral economic relations that complement the specific rules in a free trade agreement.) After a brief review of the relevant substantive obligations of the most recent generation of European Union free trade agreements, we focus on the European Union’s approach to enforcing these provisions through dedicated *cooperative* dispute settlement procedures. We contrast the European Union approach with the more *sanctions-based* approach that the United States free trade agreement model takes. The paper concludes by anticipating that the debate on how best to promote climate change action through trade agreements will likely continue in the European Union and around the world, and that cooperative rather than coercive approaches have untapped potential for encouraging climate change action while keeping markets open and fair.

## **General Context and Policy Objectives Behind European Union Free Trade Agreements**

The European Union has been authorized to manage trade outside its borders on behalf of its Member States, and the European Commission leads this effort. In carrying out this work, Article 11 of the Treaty of Lisbon (2007) binds the Commission, providing that “[e]nvironmental protection requirements must be integrated in the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development.”<sup>5</sup>

Even prior to the Treaty of Lisbon, the European Commission’s 2006 “Global Europe Strategy” launched a generation of free trade agreements that sought to build on the WTO and prepare the ground for the next level of multilateral trade liberalization.<sup>6</sup> These free trade agreements are more comprehensive in scope, providing for substantial trade liberalization. They go beyond WTO disciplines on trade in products, services, and intellectual property rights—and address issues such as investment, public procurement, competition, and enhancing opportunities for enforcement. As the scope of these agreements expanded, so did their potential to affect social and environmental objectives. Consequently, these free trade agreements incorporate new cooperative provisions in areas relating to labor standards and environmental protection and include chapters dedicated to trade and sustainable development. By 2007, the European Union free trade agreements began to include trade and sustainable development chapters with more specific and mandatory provisions that include climate change as a distinct area of cooperation. The European Commission’s 2015 *Trade for All* Communication provided more recent guidance on free trade agreement negotiation. It was issued after the 2015 adoption of the United Nations Sustainable Development Goals, which aim to move sustainability and implementation to the core of European Union trade and investment policy.<sup>7</sup>

## **Trade and Sustainable Development Under the Most Recent European Union Free Trade Agreements and Partnership Agreements**

The European Union-Korea free trade agreement, which entered into force in 2010, is considered to be the first agreement in the most recent generation of European Union free trade agreements that include, among others, those between the European Union and Peru (2010), Central America (2012), Colombia and Peru (2012), and Canada (2016). The overall structure and content of the trade and sustainable development chapters in these free trade agreements are very similar, although not identical, because the European Union's approach evolved as a result of negotiations with different partners. In principle, the chapters seek to establish the minimum benchmark for environmental and labor standards with the European Union's trading partners and create institutional platforms for cooperation to improve these standards over time.

For the purpose of this analysis, we make reference to the provisions of the most recent 2016 Comprehensive Economic and Trade Agreement and the companion Strategic Partnership Agreement with Canada.<sup>8</sup> Under the Comprehensive Economic and Trade Agreement, trade-related sustainability provisions, with special reference to labor rights and the protection of the environment, are grouped under three chapters (chapters 22 to 24). After recalling several multilateral declarations related to sustainable development, the Parties recognize that:

“economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development, and reaffirm their commitment to promoting the development of international trade in such a way as to contribute to the

objective of sustainable development, for the welfare of present and future generations.”<sup>9</sup>

The European Union and Canada reaffirm their commitments as members of the International Labour Organization and as Parties to multilateral environmental agreements, stressing “the need to enhance mutual supportiveness between trade and environment policies, rules, and measures.”<sup>10</sup> While these provisions do not create any new obligations, they are designed to ensure that the implementation of the free trade agreement does “no harm” to the implementation of existing obligations under these agreements. The European Union and Canada also commit to cooperate on a variety of core environmental issues, specifically including “trade-related aspects of the current and future international climate change regime, as well as domestic climate change policies and programmes relating to mitigation [reducing greenhouse gas emissions] and adaptation [to the impacts of climate change],” including issues related to carbon markets, energy efficiency, and climate change-friendly technologies.<sup>11</sup>

The Parties recognize each other’s sovereign right to develop regulations by establishing their own policies and protection standards, but in a way that remains consistent with their international labor and environmental commitments. An obligation to “uphold levels of protection” represents a further commitment to environmental protection.<sup>12</sup> The Parties commit not to “waive or otherwise derogate from, or offer to waive or otherwise derogate from” labor or environmental law and standards to encourage trade or investment.<sup>13</sup> In particular, Parties must effectively enforce their labor and environmental laws and may not, “through a sustained or recurring course of action or inaction,” refuse enforcement with the aim of favoring trade or investment.<sup>14</sup>

The Comprehensive Economic and Trade Agreement anticipates that its Parties may use unilateral trade measures to advance climate change policy objectives, as long as these

measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade. This “general exception” derives from the language in the WTO General Agreement on Tariffs and Trade and clarifies Parties’ right to use the Comprehensive Economic and Trade Agreement exception in relation to measures “taken pursuant to multilateral environmental agreements to which they are Party.”<sup>15</sup> This approach reaffirms the same principle provided for in the United Nations Framework Convention on Climate Change.<sup>16</sup>

As is current European Union practice, the European Union and Canada negotiated in parallel to the Comprehensive Economic and Trade Agreement a legally binding Strategic Partnership Agreement aimed at strengthening foreign policy and sectorial cooperation and advancing democratic principles, human rights, international peace and security, effective multilateralism, and the rules-based international order. Under this Agreement, the European Union and Canada cooperate on, among other global issues, sustainable development, energy security, environment, and climate change.

Between the conclusion of the Comprehensive Economic and Trade Agreement negotiations and the entry into force of the Paris Agreement, the European Union finalized in 2017 its most comprehensive and economically significant free trade agreement to date: the European Union-Japan Economic Partnership Agreement, alongside a Strategic Partnership Agreement. The European Union-Japan Economic Partnership Agreement, which will enter into force in 2019, builds substantially on the Comprehensive Economic and Trade Agreement approach to trade and sustainable development. Like the Comprehensive Economic and Trade Agreement, the Parties undertake to implement the Agreement in a manner that will “do no harm,” reaffirming they will effectively implement their existing commitments under environmental treaties.<sup>17</sup> (Unlike the Comprehensive Economic and Trade Agreement, the European Union-Japan Economic Partnership Agreement was adopted

in time to make specific reference to the Paris Agreement.) Beyond “doing no harm,” the Parties make the additional commitment under the Economic Partnership Agreement to “work together to take actions to address climate change” and achieve the purpose of the Paris Agreement.<sup>18</sup> Furthermore, they “cooperate to promote the positive contribution of trade to the transition to low greenhouse gas emissions and climate-resilient development.”<sup>19</sup> This stronger language regarding Paris Agreement implementation served as a model for other free trade agreements under negotiation with Vietnam, Singapore, and Mexico. The European Union-Japan trade and sustainable development chapter retains, however, the same *cooperative approach* of promoting implementation and avoiding and resolving disputes as in the Comprehensive Economic and Trade Agreement, as described below.

### **European Union’s “Cooperative Approach” to Promoting Implementation and Settling Disputes Under the European Union’s Free Trade Agreements**

Free trade agreements are more effective when institutional arrangements that oversee Parties’ performance back them. Under European Union free trade agreements, these arrangements are cooperative in nature in that they do not punish Parties found to be in non-compliance. Instead, they encourage compliance by focusing government and civil society attention to the implementation of the agreement; reviewing impacts; avoiding disputes through regulatory cooperation; and seeking to resolve disputes, when they do arise, through consultation and the engagement of third-party expertise.

#### *Committee on Trade and Sustainable Development*

Under the Comprehensive Economic and Trade Agreement, the European Union’s “cooperative approach” to promoting implementation and settling disputes begins with the Committee on Trade and Sustainable Development. The Committee oversees the

implementation of the trade and sustainable development chapters, including “cooperative activities and the review of the impact of this agreement on sustainable development.”<sup>20</sup> It is tasked with “address[ing] in an integrated manner any matter of common interest to the Parties in relation to the interface between economic development, social development and environmental protection.”<sup>21</sup> The Committee is asked to promote transparency and participation by presenting updates on the implementation of the Agreement to a Civil Society Forum, composed of representatives of civil society organizations based in the Parties’ territories. The Comprehensive Economic and Trade Agreement provides for the establishment of consultative mechanisms or domestic advisory groups by each Party, composed of representatives of civil society organizations. These advisory groups may submit opinions and make recommendations concerning any aspect of the Trade and Labor and Trade and Environment chapters.

#### *The Regulatory Cooperation Forum Under the Comprehensive Economic and Trade Agreement*

Chapter 21 of the Comprehensive Economic and Trade Agreement provides for a mechanism, the Regulatory Cooperation Forum, to develop further voluntary regulatory cooperation between the Parties on a variety of matters, such as regulatory measures related to technical barriers to trade, phytosanitary measures, cross-border trade in services, trade and sustainable development, trade and labor, and trade and environment.

The objectives of regulatory cooperation contribute to the protection of human life, health or safety, animal or plant life, or health and the environment; enhance mutual understanding of regulatory governance; promote the exchange of expertise to avoid and reduce unnecessary regulatory differences; and facilitate bilateral trade, investment, and competitiveness by reducing unnecessary duplication and related compliance costs.



The work of the Regulatory Cooperation Forum is based on voluntary endeavors and is not intended to limit the Parties in developing their own regulatory, legislative, and policy activities. Parties aim to exchange information of ongoing or planned regulatory projects in their areas of responsibility and to voluntarily share information particularly in the area of non-food product safety.

*“Cooperative” Trade and Sustainable Development Dispute Settlement Procedure*

Even as the substantive content of the trade and sustainable development chapters has grown, the European Union free trade agreements have thus far maintained a cooperative dispute settlement procedure for these provisions that is separate from the sanctions-based procedure used to enforce the agreements’ binding obligations on trade and investment. Nevertheless, these cooperative procedures have evolved and strengthened over time beyond the pure dialogue approach of earlier free trade agreements.<sup>22</sup>

The Comprehensive Economic and Trade Agreement maintains the two-stage *ad hoc* framework for dispute resolution that the European Union-South Korea free trade agreement first introduced. For both trade and sustainable development chapters on labor and environment, the Comprehensive Economic and Trade Agreement process begins with a government consultation procedure through which any matter arising under said chapters may be addressed. In the context of such consultations, Parties may request the intervention of the Committee on Trade and Sustainable Development, which, in its endeavor to solve the matter, can seek the advice of the Parties’ domestic advisory group.

If the consultation phase ends with no satisfactory solution, Parties may request that an independent *Panel of Experts*, composed of three panelists with relevant experience in the area of labor or environment, be convened to examine the matter in light of the relevant provisions of the trade and sustainable development chapter and to make recommendations

for its resolution. The Agreement encourages the Panel to seek information from the International Labour Organization or from bodies established under multilateral environmental agreements to which the countries are Parties and receive submissions from experts in the field.

Following an interim report, on which the Parties may comment, the Panel will issue a final report that chronicles its findings, determinations, and recommendations. If the final report finds that a Party is in violation of its obligations, the provision calls on the Parties to engage in discussions aimed at identifying appropriate measures or an action plan. Specifically, the Parties are to inform each other and their respective domestic advisory groups on the actions or measures to be implemented, while the Committee on Trade and Sustainable Development is in charge of monitoring the follow up to the final report and can receive recommendations from the domestic advisory groups and Civil Society Forum. In alignment with the previous free trade agreements, the Comprehensive Economic and Trade Agreement clearly restates that the obligations under the Trade and Sustainable Development chapters are exclusively enforceable through the procedures. Hence, the Panel of Experts does not issue a judgment but rather seeks to assist the Parties in the adoption of a shared solution to the problem. The Committee will keep the implementation of the Panel's recommendations under review.

### *Resolving Issues Under the Strategic Partnership Agreements*

As has been described, *Strategic Partnership Agreements*—legally binding treaties that identify areas of political and sectorial cooperation between Parties—accompany recent European Union free trade agreements. Both the European Union-Canada and the European Union-Japan Partnerships identify climate change as an area for strengthened cooperation. Under the European Union-Canada Partnership, the obligation to take “general or specific

measures required to fulfil their obligations under this Agreement” underpins these commitments.<sup>23</sup> A Joint Cooperation Committee oversees implementation. Should any questions or differences arise in the implementation or interpretation of the Agreement, a Party may refer to the Committee for further discussion, study, and resolution through a “thorough examination of the facts, including expert advice and scientific evidence as appropriate, and effective dialogue.”<sup>24</sup> Unlike the Comprehensive Economic and Trade Agreement Panels, the Joint Cooperation Committee is a political body composed of Party representatives. Nonetheless, these Partnership arrangements for resolving differences between Parties are, like those under the free trade agreements, largely cooperative in nature. These arrangements can, however, under limited circumstances, lead to very substantive and serious consequences. Where the Joint Cooperation Committee cannot resolve differences between Parties over “a particularly serious and substantial violation” of certain “essential elements,” either Party may decide to suspend the provisions of the Partnership.<sup>25</sup> Such a situation could also serve as grounds for the termination of the related free trade agreements.<sup>26</sup> The potential application of these “essential elements” clauses to climate change-related issues is addressed in section 6, below.<sup>27</sup>

### **A Comparative Perspective on Trade and Sustainable Development Chapters**

The European Union’s cooperative approach contrasts sharply with the sanctions-based approach that the United States takes. Some sustainable development advocates in European civil society as well as the European Parliament have called upon the European Union to take a more sanctions-based approach. While the experience in implementing either approach is limited, we note that the United States’ approach has not yet demonstrated the results for which its advocates have hoped.

*The Sanctions-Based Approach of U.S. Free Trade Agreements and the Comprehensive and Progressive Agreement for the Trans-Pacific Partnership*

Critics of the European Union's cooperative approach to settling trade and sustainable development-related disputes often express a preference for the sanctions-based approach in recent U.S. free trade agreements. The environmental chapter of the United States-Australia free trade agreement, entered into force in 2005, provides one example. Its primary substantive obligation, which is similar to the language in European Union free trade agreements on upholding levels of protection, prohibits Parties from "fail[ing] to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties."<sup>28</sup> The United States-Australia free trade agreement establishes a Joint Committee, comprising government officials of each Party, to supervise the implementation of the Agreement including the environment chapter.

If a Party considers that the other Party has failed to effectively enforce its environmental laws, it may trigger a series of consultations, beginning with bilateral consultations, escalating to a Subcommittee on Environmental Affairs, and then to the Joint Committee itself. If the Joint Committee has not resolved the matter within 60 days, the complaining Party may refer it to the free trade agreement's general dispute settlement procedures. An *ad hoc* dispute settlement panel, comprising three expert panelists will, in circumstances of non-compliance, produce recommendations aimed at bringing the Party back into conformity with its obligations to enforce its laws. If that Party does not conform to the Panel's recommendations, the complaining Party may seek compensation. As with any other trade-related dispute, this compensation will be calculated on the basis of the trade-related benefits the complaining Party could reasonably have expected to accrue under the Agreement that are being "nullified or impaired" as a result of the non-compliance (in this case the failure to enforce environmental laws).<sup>29</sup> If Parties fail to agree on a level of

compensation, the complaining Party can reconvene the Panel to calculate and to impose an annual monetary assessment on the other Party.

The United States has succeeded in effectively, if inadvertently, “regionalizing” this approach to setting and enforcing environmental standards through the negotiations of the Trans-Pacific Partnership. Although the Trump Administration withdrew from that process, the Trans-Pacific Partnership text was incorporated, almost in full, in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, signed in March 2018 between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.

The new Trans-Pacific Agreement’s environment chapter provides that “no Party shall fail to effectively enforce its environmental laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties,” and it is subject to a dispute settlement system modeled on the United States-Australia model described above.<sup>30</sup> If the Parties are unable to resolve a matter through the consultation procedure under the environment chapter, they may request the establishment of a dispute settlement panel. The Panel, in making its findings and determinations, shall also consider written submissions from non-governmental entities. If the Panel finds that the measure at issue is inconsistent with the obligations under the Agreement, that a Party has otherwise failed to carry out its obligations in the Agreement, or that the measure at issue is causing nullification or impairment of an expected benefit, the Party must remedy this immediately or within a reasonable time period. If, after a reasonable period of time, Parties continue to disagree, a mutually acceptable compensation must be negotiated. If such compensation is not agreed upon in 30 days, or if the responding Party has failed to observe the compensation agreement, the complaining Party may finally suspend benefits.

## **The Sanction-Based Dispute Settlement in Practice**

No disputes have been brought, as of today, with regard to breaches of the environmental commitments under a U.S. Free Trade Agreement.<sup>31</sup> An analysis of an arbitral decision in a case involving labor rights may nonetheless be helpful in moving beyond a theoretical discussion of the environment chapters as labor and environment matters are treated similarly throughout the various agreements.

The United States' case against Guatemala under the Dominican Republic-Central America-U.S. Free Trade Agreement represents the first time a labor rights dispute was filed under a U.S. free trade agreements' dispute settlement system.<sup>32</sup> The United States initiated the case in 2010 following domestic and Guatemalan labor unions' complaints concerning Guatemala's alleged violation of the Central American free trade agreements, under which Parties commit not to fail "to effectively enforce [their] labour law through a sustained course of action or inaction, in a manner affecting trade between the parties."<sup>33</sup>

The arbitration panel provided important guidance on the meaning and hallmarks of "effective enforcement of labor laws" (which is the standard set in every U.S. free trade agreement since the 1994 North American Free Trade Agreement), as well as on the evidence needed to prove that a Party has violated its labor-related obligations: (i) not to fail to effectively enforce labor laws, (ii) through a sustained or recurring course of action or inaction, (iii) in a manner affecting trade between the Parties.<sup>34</sup>

The Panel found that the United States' evidence supported the conclusion that Guatemalan labor courts had failed to effectively enforce labor laws, regarding in particular the case of reinstatement orders of workers issued more than four years before. Nonetheless, demonstrating that a member state has failed to effectively enforce its labor laws is only the first stage in proving a breach of Article 16.2.1(a) of the Central American free trade agreement. In fact, the proof of such factual element must be followed by the demonstration

that the failure consisted of a “sustained or recurring course of action or inaction,” which has to be intended as either: (a) repeated and sufficiently similar behavior or (b) prolonged behavior—a connected series of acts or omissions—by a labor law enforcement institution.<sup>35</sup>

The crucial point of the arbitral decision lies in the interpretation of the clause “in a manner affecting trade between the parties.”<sup>36</sup> According to the Panel, alleged violations of the obligation to effectively enforce can only be deemed relevant under the Agreement if evidence is given that there has been a systematic failure of enforcement which results in “some competitive advantage” to domestic employers versus their foreign competitors in the context of trade between the Parties.<sup>37</sup>

The Panel’s analysis on whether Guatemala’s failure to effectively enforce labor laws conferred a competitive advantage on the employers in question is threefold: “(i) whether the employers exported to one or more Dominican Republic-Central America-U.S. Free Trade Agreement member states in a competitive market or competed with imports from another Dominican Republic-Central America-U.S. Free Trade Agreement Party; (ii) the effects the failures to enforce had on those companies; (iii) whether the effects conferred competitive advantage on the companies in question.”<sup>38</sup> The arbitral decision concluded that the evidence that the United States brought was insufficient to prove that the failure to enforce court orders against shipping companies had given a competitive advantage to these companies and, consequently, to the Guatemalan exporters. The reality is rather that “[i]nadequate procedural rules made it difficult for the Panel to analyze the sufficiency of the evidence the parties had provided.”<sup>39</sup>

In conclusion, the Panel acknowledged the importance of labor rights enforcement in the context of competing markets and found that in a number of circumstances Guatemala had failed in effectively enforcing the labor standards that the Free Trade Agreement protects. However, as the United States was not able to meet the rigorous evidentiary standards the

Panel required under Article in question, the episodes where Guatemala had failed to enforce its labor laws could not be deemed “a sustained or recurring course of action or inaction” that had been operated “in a manner affecting trade.”<sup>40</sup>

The United States-Guatemala dispute lasted for more than seven years and ended with the Panel rejecting the United States’ claim. This decision has come to illustrate the legal and practical challenges of proving the causal connections between a failure to enforce a labor standard and a specific trade effect, as well quantifying those trade effects for the purposes of authorizing sanctions. Addressing these implementation challenges will likely require future negotiations and future panelists to explore ever-narrower definitions of what kind of “action or inaction” should be subject to sanctions. The uncertainty surrounding these malleable definitions ultimately impairs the power of the sanctions in deterring failures to effectively promote sustainable development objectives through key issues such as labor rights and environmental protection. For these reasons, the European Union and its trading partners have, for now, continued to pursue a broader scope and a more cooperative approach to promoting sustainable development through trade instruments.

### **A Next Generation of European Union Free Trade Agreements?**

Concerns that the negotiation of a Transatlantic Trade Partnership with the United States and the conclusion of the Comprehensive Economic and Trade Agreement might lead to an erosion of European Union labor and environment standards have led to calls for further strengthening the content of future trade and sustainable development chapters of Agreements, as well as the stronger enforcement mechanisms. The European Parliament, in a 2016 resolution, called for the introduction of dispute settlement procedures into trade and sustainable development chapters and for the involvement of independent advisory groups at



various stages of the negotiation and implementation of European Union free trade agreements.<sup>41</sup>

Based on its experience with negotiating and implementing the most recent round of free trade agreements and its assessment of the United States experience with a sanctions-based approach, the staff of the Commission developed and published a “way forward” on improving the implementation and enforcement of the trade and sustainable development chapters.<sup>42</sup> The document rejects a sanctions-based approach to dispute settlement for being incompatible with the European Union’s objective of engaging its trading partners in a broad partnership on trade and sustainable development. It observes, on the basis of the United States experience, that reaching agreement with partners on what would constitute a “material breach” of a social or environmental standard in the context of a sanctions-based approach would require much narrower definitions of proposed areas of cooperation.<sup>43</sup>

Instead, the Commission staff recommends a number of actions to strengthen the cooperative approach to dispute settlement.<sup>44</sup> These recommendations include working through multilateral environmental agreements to promote compliance with their terms, in order to avoid compliance-related issues from arising. Future agreements will follow the example set in the European Union-Japan free trade agreement and make specific reference to a shared commitment to effectively implement the Paris Agreement, and may spell out areas for trade and climate change cooperation including increasing trade in renewable energy and energy efficient goods and services. Civil society within the European Union and in its partner countries should be supported to participate more actively and effectively in the cooperative mechanisms provided for in existing free trade agreements such as the domestic advisory groups. Furthermore, the scope of the advisory groups should be expanded (as is currently being negotiated in the European Union-Mexico and European Union-Mercosur free trade agreements) to include not only advice on the implementation of the trade and

sustainable development chapters but on all substantive aspects of the free trade agreement. Finally, the Commission will pursue more “assertive enforcement” through the various mechanisms under its cooperative approach to enforcement, including, where justified, the use of the independent panel procedure of the dispute settlement process. Consistent with this strategy, in 2018 the European Union launched its first government consultations on a trade and sustainable development chapter of a trade agreement. This raised questions about Korean implementation of its commitments to multilateral labor standards and agreements.<sup>45</sup> The Commission has also begun working with other European Union institutions to maintain effective implementation under regular review, implicitly preserving the option of strengthening bilateral commitments in future generations of free trade agreements.

France has proposed combining a sanctions-based approach to dispute settlement with the inclusion of references to the Paris Agreement in the “political clauses” of European Union free trade agreements to strengthen their role in promoting compliance with climate change policy.<sup>46</sup> Since 2009, the Commission has pursued a “common approach” to the inclusion of such clauses in agreements with third states, including free trade agreements. The clauses “aim at promoting the European Union’s values and political principles which constitute the basis for its external relations and can provide a specific tool which the European Union can use to implement some of its most important external policy objectives.”<sup>47</sup> This approach is reflected in the Comprehensive Economic and Trade Agreement and the accompanying Strategic Partnership Agreement negotiated in parallel to the former and described above. As was noted, in the political clauses of the Strategic Partnership Agreement, the Parties “recognise that a particularly serious and substantial violation of human rights or non-proliferation [of weapons of mass destruction...] could also serve as grounds for the termination” of the Comprehensive Economic and Trade Agreement.<sup>48</sup> The Strategic Partnership Agreement provides specific examples of a situation

to constitute a “particularly serious and substantial violation,” indicating that “its gravity and nature would have to be of an exceptional sort such as a coup d’État or grave crimes that threaten the peace, security and well-being of the international community.”<sup>49</sup>

Under the French proposal, the European Union would similarly “include compliance with the Paris Agreement among the key provisions of cooperation and political dialogue agreements that are concluded in parallel to the trade agreements, which could be withdrawn from or suspended in case of proof that these key provisions have been violated, as per customary international law.”<sup>50</sup> France has also proposed that the European Union not engage in preferential trade agreements with governments that have not joined or that have withdrawn from the Paris Agreement. While these proposals have proved controversial, they demonstrate that the debate in the European Union continues on how best to ensure “the mutual supportiveness” of its trade and climate change policies.<sup>51</sup>

### **Conclusion: Untapped Potential of European Union Trade and Sustainable Development Provisions for the Implementation of the Paris Agreement**

In conclusion, as this debate continues, the trade and sustainable development provisions in the most recent generation of European Union free trade agreements, which now refer explicitly to the Paris Agreement, continue to hold significant untapped potential. As the implementation of climate change commitments of the Paris Agreement begins in earnest, the European Union and its trading partners will likely turn with increasing frequency to these existing provisions in their free trade agreements to:

- Promote regulatory cooperation; for example, by increasing transparency, collaborating on research and risk assessment, and exchanging information on contemplated regulatory actions;

- Avoid and discourage trade-related disputes by enhancing cooperation with partners on trade-related aspects of climate change policy and other environmental policies;
- Recognize, in the context of any trade dispute that may arise over a climate change-related measure, that such measures when taken pursuant to the Paris Agreement may be eligible for environmental “exceptions”;
- Reinforce partners’ legal obligations under the Paris Agreement with commitments to “effectively implement” this treaty and other multilateral environmental agreements;
- Prohibit partners from failing to effectively enforce their environmental laws “through a sustained or recurring course of action or inaction” to encourage trade or investment;
- Require partners to provide recourse to domestic administrative or judicial proceedings for persons affected by infringements of its environmental law;
- Hold partners accountable for implementing these obligations, through the oversight of high-level government-to-government bodies under the free trade agreements (Committee on Trade and Sustainable Development, Trade Committee), dedicated but “cooperative” trade and sustainable development dispute settlement mechanisms, as well as other bodies created under the framework and partnership agreements linked to free trade agreements.

Thus, the European Union will seek to ensure in an ever clearer and more convincing manner that its trade policies reinforce—not undermine—actions to implement the 2015 Paris Agreement.

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## Notes

<sup>1</sup> European Commission, “Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs)” (Non paper of the Commission Services, July 11, 2017).

<sup>2</sup> “United Nations Framework Convention on Climate Change,” entered into force March 21, 1994, FCCC/INFORMAL/84, art. 3.5; World Trade Organization, “General Agreement on Tariffs and Trade 1994,” signed October 30, 1997, art. XX.

<sup>3</sup> Daniel Bodansky, Jutta Brunnée, and Lavanya Rajamani, *International Climate Change Law* (Oxford: Oxford University Press, 2017), 327-349.

<sup>4</sup> Clara Brandi, *Trade Elements in Countries’ Climate Contributions under the Paris Agreement*, (Geneva: International Centre for Trade and Sustainable Development (ICTSD), 2017), vii.

<sup>5</sup> Wybe Th. Douma, “The Promotion of Sustainable Development Through EU Trade Instruments,” *European Business Law Review* 28, no. 2 (2017): 198.

<sup>6</sup> European Commission, “Global Europe Strategy: competing in the world: A Contribution to the EU’s Growth and Jobs Strategy,” 2006, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0567:FIN:en:PDF>.

<sup>7</sup> European Commission, “Trade for all: Towards a more responsible trade and investment policy,” 2015, [http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc\\_153846.pdf](http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf).

<sup>8</sup> European Commission, “Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, entered into force provisionally on September 21, 2017,” [http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf)

<sup>9</sup> European Commission, “Comprehensive Economic and Trade Agreement (CETA),” art. 22.1.

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<sup>10</sup> European Commission, “Comprehensive Economic and Trade Agreement (CETA),” art. 24.4.1.

<sup>11</sup> European Commission, “Comprehensive Economic and Trade Agreement (CETA),” art. 24.12.e.

<sup>12</sup> European Commission, “Comprehensive Economic and Trade Agreement (CETA),” art. 23.4.

<sup>13</sup> European Commission, “Comprehensive Economic and Trade Agreement (CETA),” art. 24.5.2.

<sup>14</sup> European Commission, “Comprehensive Economic and Trade Agreement (CETA),” art. 23.4.3 and 24.4.3.

<sup>15</sup> European Commission, “Comprehensive Economic and Trade Agreement (CETA),” art. 24.4.4.

<sup>16</sup> “United Nations Framework Convention on Climate Change,” art. 3.5.

<sup>17</sup> European Commission, “EU-Japan Economic Partnership Agreement, signed July 17, 2018,” <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018PC0192#document2>, art. 16.4.2.

<sup>18</sup> European Commission, “EU-Japan Economic Partnership Agreement, signed July 17, 2018,” art. 16.4.4

<sup>19</sup> “European Commission, EU-Japan Economic Partnership Agreement, signed July 17, 2018,” art. 4.2, 4.4.

<sup>20</sup> European Commission, “Comprehensive Economic and Trade Agreement (CETA),” art. 22.4.

<sup>21</sup> European Commission, “Comprehensive Economic and Trade Agreement (CETA).”

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<sup>22</sup> “Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Union and its Member States, of the other part, 2008,” <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:289:0003:1955:EN:PDF>.

<sup>23</sup> “Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada, of the other part, April 13, 2015,” <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=JOIN:2015:0010:FIN>, art. 28.

<sup>24</sup> “Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada, of the other part, April 13, 2015,” art. 27.

<sup>25</sup> “Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada, of the other part, April 13, 2015,” art. 28.3.

<sup>26</sup> “Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada, of the other part, April 13, 2015,” art. 27.

<sup>27</sup> “Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada, of the other part, April 13, 2015,” explanatory memorandum.

<sup>28</sup> “U.S.-Australia Free Trade Agreement,” signed May 18, 2004.  
[https://ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset\\_upload\\_file148\\_5168.pdf](https://ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file148_5168.pdf), art.19.2.

<sup>29</sup> “U.S.-Australia Free Trade Agreement,” signed May 18, 2004 .

<sup>30</sup> “Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), signed March 2018,” <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text/#chapters>, art. 20.3.4.

<sup>31</sup> Office of the United States Trade Representative, “All FTA Disputes,” accessed February 15, 2019, <https://ustr.gov/issue-areas/enforcement/dispute-settlement-proceedings/fta-dispute-settlement/all-fta-disputes>.

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<sup>32</sup> ICTSD, “Trade Dispute Panel Issues Ruling in US-Guatemala Labour Case,” *Bridges Weekly* 21, no. 24 (2017), <https://www.ictsd.org/bridges-news/bridges/news/trade-dispute-panel-issues-ruling-in-us-guatemala-labour-law-case>.

<sup>33</sup> “Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA), signed August 5, 2004,” <https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text>, art. 16.2.1.

<sup>34</sup> Tequila J. Brooks, “US-Guatemala Arbitration Panel Clarifies Effective Enforcement Under Labor Provisions of Free Trade Agreement,” *International Labour Rights Case Law* no. 4 (2018): 45-51.

<sup>35</sup> “Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA),” art. 16.2.1.

<sup>36</sup> “Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA).”

<sup>37</sup> Brooks, “US-Guatemala”, 48.

<sup>38</sup> Brooks, “US-Guatemala”, 49.

<sup>39</sup> Brooks, “US-Guatemala.”

<sup>40</sup> Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA), art. 16.2.1.

<sup>41</sup> In its 2010 resolution on human rights and social and environmental standards in international trade agreement, the EP recommended that future TSD chapters include a complaints procedure open to social partners; a procedure of appeal to an independent body to settle disputes concerning social and environmental issues; and recourse to a sanctions-based dispute settlement system to address breaches of certain labor or environmental standards.



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<sup>42</sup> 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, February 26, 2018).

<sup>43</sup> European Commission, “Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements,” 3.

<sup>44</sup> European Commission, “Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements.”

<sup>45</sup> European External Action Service, “EU and the Republic of Korea launch government consultations over labour commitments under the trade agreement,” Bruxelles, Seoul, January 21, 2019, [https://eeas.europa.eu/delegations/south-korea/56833/eu-and-republic-korea-launch-government-consultations-over-labour-commitments-under-trade\\_en](https://eeas.europa.eu/delegations/south-korea/56833/eu-and-republic-korea-launch-government-consultations-over-labour-commitments-under-trade_en).

<sup>46</sup> EurActiv Network, “Climate action should be a condition for future EU trade deals,” last modified June 25, 2018, <https://www.euractiv.com/section/climate-environment/opinion/climate-action-should-be-a-condition-for-future-eu-trade-deals/>.

<sup>47</sup> Council of the European Union, “Common approaches on the use of political clauses,” 10491/1/09. June 2, 2019, <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2010491%202009%20REV%201%20EXT%202>, 3.

<sup>48</sup> “Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada, of the other part,” art. 28.7.

<sup>49</sup> “Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada, of the other part,” art. 28.3.

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<sup>50</sup> Ministère de l'Europe et des Affaires étrangères, Ministère de l'Économie et des Finances, Ministère de la Transition écologique et solidaire, Ministère de l'Agriculture et de l'Alimentation, *Mise en œuvre du CETA: Le plan d'action du gouvernement*, October 25, 2017, [https://www.diplomatie.gouv.fr/IMG/pdf/plan\\_action\\_ceta\\_du\\_gouvernement\\_cle0c5b74.pdf](https://www.diplomatie.gouv.fr/IMG/pdf/plan_action_ceta_du_gouvernement_cle0c5b74.pdf)

<sup>51</sup> EurActiv Network, “Climate action should be a condition for future EU trade deals.”