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Stepping Up the Enforcement of Trade and Sustainable Development Chapters in the European Union's Free Trade Agreements: Reconsidering the Debate on Sanctions

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Executive Summary

Starting with the Free Trade Agreement (FTA) concluded with South Korea in 2011, the EU's FTAs include 'Trade and Sustainable Development Chapters' (TSD Chapters), pursuant to which a number of commitments concerning labour and environmental standards are undertaken, in addition to those relative to economic liberalisation. However, the mechanisms for the settlement of disputes concerning TSD Chapters currently in force do not allow the winning Party to impose sanctions upon the defeated Party to incentivise compliance, contrary to what is envisaged in respect of other parts of the EU's FTAs. This has prompted a heated scholarly and political debate, wherein, most recently, the position supporting the current, 'promotional' model renouncing sanctions in the TSD domain appears to dominate. This paper analyses the arguments advanced by the opponents of sanctions, identifying two main strands thereof: the argument that sanctions are ineffective, and that 'soft' pressure based on litigation is more successful at inducing compliance; and the view that sanctions are counterproductive, since they cause economic harm which is detrimental to sustainable development, and/or they hamper cooperative processes which are needed to bring about changes in social and environmental regulations. The paper contends that the ineffectiveness argument is ill-founded, because it overlooks the fact that sanctions are more effective when they are threatened than when they are applied, and that the availability thereof in the abstract is a key component for litigation to succeed in inducing compliance in turn. It further argues that the counterproductivity argument is artificial, since sanctions are still available for FTA provisions other than those contained in TSD Chapters, as well as under the EU's unilateral Generalised System of Preferences. Accordingly, this paper urges a reconsideration of the possibility to make sanctions available for the enforcement of TSD Chapters, with a view to enhancing the implementation of sustainability commitments in the EU's FTAs.

List of Abbreviations

CCP	Common Commercial Policy
CETA	Comprehensive Economic and Trade Agreement
CFREU	Charter of Fundamental Rights of the European Union
CFSP	Common Foreign and Security Policy
DSU	Dispute Settlement Understanding
ECJ	European Court of Justice
EP	European Parliament
EPA	Economic Partnership Agreement
FTA	Free Trade Agreement
GSP	Generalised System of Preferences
ILC	International Law Commission
ILO	International Labour Organisation
IMF	International Monetary Fund
MFN	Most Favoured Nation
MS	Member State(s)
OJ	Official Journal
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
US	United States
VCLT	Vienna Convention on the Law of Treaties
WB	World Bank
WTO	World Trade Organisation

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1. Introduction: The EU's FTAs and Sustainable Development

In an era of increasing environmental degradation and mounting social inequalities, the faith in globalisation as a tool to tackle these challenges has been overshadowed by a looming fear that it rather upscale them. Against this background, the sustainable development agenda promoted by the UN[1] succeeded in establishing itself as a universal normative ideal, capable of making policy-makers sensitive to the demands of environmental protection and social justice along with the needs of economic growth.[2] The contemporary ethos, heeding the call made since the very early days of the concept of sustainable development,[3] now appears to be fully aware of the importance of viewing international economic relations in the light of the transformative commitment thereof.

The EU stands on fertile ground for engagement with such attitude. Its primary law firmly enshrines a comprehensive web of references to the notion of sustainable development, to which European policies must be informed; this includes the EU's external action, and henceforth the EU's role as an actor of international economic law.[4] The relevance of sustainable development to, in particular, the EU's CCP was confirmed by the ECJ in its landmark Opinion 2/15.[5] The Opinion provided constitutional backing for the systematic practice of EU negotiators, ever since the 2011 EU-South Korea FTA,[6] to include 'Trade and

[1] United Nations General Assembly, 'Transforming Our World: the 2030 Agenda for Sustainable Development' (A/RES/70/1).

[2] See John Drexhage and Deborah Murphy, 'Sustainable Development: From Brundtland to Rio 2012' (September 2010), Background Paper prepared for consideration by the High Level Panel on Global Sustainability at its first meeting, 19 September 2010 <https://www.e-education.psu.edu/emsc302/sites/www.e-education.psu.edu.emsc302/files/Sustainable%20Development_from%20Brundtland%20to%20Rio%202012%20%281%29.pdf> accessed 27 April 2021. For a diachronic analysis of the intellectual struggle between UN-backed ideals now compounded into the sustainable development agenda, on the one hand, and IMF/WB-supported neo-liberal development policies, on the other hand, see Richard Jolly, 'Underestimated Influence: UN Contributions to Development Ideas, Leadership, Influence, and Impact', in Bruce Currie-Alder and others (eds), *International Development – Ideas, Experience, and Prospects* (Oxford University Press 2014).

[3] See The World Commission on Environment and Development, *Our Common Future* (Oxford University Press 1987), also available online at <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf> accessed 27 April 2021, in particular at p 23 of this online edition.

[4] On the EU and sustainable development in general, see the Preamble to the TEU, Art 3(3) TEU, Art 11 TFEU, and Art 37 CFREU. On the complex relationship between Art 11 TFEU and Art 37 CFREU, see Elisa Morgera and Gracia Marín Durán, 'Article 37 – Environmental Protection', in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014), 987-989 and 992-994. As regards in particular the EU's external action, see Art 3(5) TEU, Art 21(2)(d) TEU, and Art 21(2)(f) TEU.

[5] Opinion 2/15 The Free Trade Agreement with Singapore [2017] ECLI:EU:C:2017:376. A detailed, yet concise account of the Opinion can be found in Christine Kaddous, 'Cour de justice, ass. Plenière, 16 mai 2017, Avis 2/15, ECLI:EU:C:2017/376', in Fabrice Picod (ed), *Jurisprudence de la CJUE 2017: Décisions et commentaires* (Bruylant 2018), 686-695. At more length, and reflecting on the Opinion's implications for EU constitutional law, see Marise Cremona, 'Shaping EU Trade Policy post-Lisbon: Opinion 2/15 of 16 May 2017' (2018) 14 European Constitutional Law Review 231.

[6] 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 L127/1, of which see Chapter 13. To be sure, commitments regarding sustainability had already been included in the Economic Partnership Agreement between the CARIFORUM

Sustainable Development Chapters' (TSD Chapters) in the bilateral FTAs with third countries through which, given the stalemate of negotiations in the WTO, the EU currently pursues its international economic liberalisation agenda.[7]

TSD Chapters are the flagship tool by which the Commission abides by its commitment, solemnly undertaken in 2015 with the 'Trade for All' strategy,[8] to pursuing 'a trade and investment policy based on values'.[9] They complement the trade concessions made by the contracting Parties with obligations concerning environmental and labour standards, in order to ensure that progress in the economic field be coupled with advancements in the protection of such concurring interests.[10] Typically, TSD Chapters lay down three layers of substantive provisions: an obligation to ratify and effectively implement multilateral instruments on core environmental and labour standards; commitments not to lower domestic levels of protection and/or not to fail to enforce them as a trade leverage; and aspirational undertakings to progressively raise overall levels of protection.

The following does not delve deep into the substance of the regulatory model thus emerging – this is excellently done elsewhere.[11] It rather aims at addressing the problem of the enforcement of TSD Chapters. In fact, and in contrast with other components of the EU's FTAs, it is not possible to ultimately resort to countermeasures (often, and so in the following,

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States, of the one part, and the European Community and its Member States, of the other part [2008], OJ L/289/I/3 (see, in particular, Chapters 4 and 5 of Title III of Part II, respectively dealing with the 'environment' and 'social aspects'). Such latter instrument did not, however, present yet the specific traits of modern TSD Chapters, which will be discussed below.

[7] See EU-Canada CETA (provisionally entered into force in 2017), Chapter 22; EU-Mexico FTA (agreement in principle reached in 2018), draft Chapter 27; EU-Japan EPA (2019), Chapter 16; EU-Singapore FTA (2019), Chapter 12; EU- Mercosur FTA (agreement in principle reached in 2019) still unnumbered Chapter on 'Trade and sustainable development'; EU-Vietnam FTA (2020), Chapter 13. Official names of the FTAs and references to the OJ are omitted for space reasons (see, however, the following footnotes for many of those, and the Bibliography below for the others). The text of the Agreements can be retrieved at <https://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/> accessed 27 April 2021. The strategic importance of FTAs in the face of stagnation of dialogue at the WTO was first underlined in the milestone document, European Commission, 'Global Europe: Competing in the World' COM(2006) 567 final 8-10.

[8] European Commission, 'Trade for All: Towards a More Responsible Trade and Investment Policy' COM(2015) 497 final.

[9] COM(2015) 497 final 14-20. See, however, already COM(2006) 567 final 9.

[10] Reflecting the concept of sustainable development as founded on the three 'pillars' of 'economic development, social development, and environmental protection', as famously defined in World Summit on Sustainable Development, 'Johannesburg Declaration on Sustainable Development' (A/CONF.199/20), para 5.

[11] See, instead of many others, Marco Bronckers and Giovanni Gruni, 'Retooling the Sustainability Standards in EU Free Trade Agreements' (2021) 24 Journal of International Economic Law 25, 26-33; Gracia Marín Durán, 'Sustainable Development Chapters in EU Free Trade Agreements: Emerging Compliance Issues' (2020) 57 Common Market Law Review 1031, 1034-1043. Much of the conceptualisation of TSD Chapters is indebted to the seminal analysis carried out in Lorand Bartels, 'Human Rights and Sustainable Development Obligations in EU Free Trade Agreements' (2013) 40 Legal Issues of Economic Integration 297.

referred to as 'sanctions') to enforce the provisions of such Chapters. This has prompted a heated debate on whether the EU has put in place appropriate tools to implement them. The controversy is far from being settled. The first arbitral award on a TSD Chapter of an EU FTA, delivered in the long-standing EU-Korea labour dispute in January 2021,[12] will arguably rather further fuel the discussion. Whereas this will provide a case study, capable of imbuing research on this topic with empirical evidence which is, at present, difficult to collect rigorously,[13] it is therefore useful to assess where the debate has come so far.

To this end, Section 2 analyses the model enforcement mechanism of TSD Chapters and sketches the debate on its current state and prospects for reform, which recently appears to be dominated by the opponents of sanctions. Section 3 then critically assesses the arguments most commonly put forward by such latter authors, ultimately finding them to be inconclusive. Section 4 briefly concludes.

2. The Enforcement of TSD Chapters in the EU's FTAs

The EU's FTAs are subject to a dispute settlement mechanism (DSM) which, in its broad guidelines, is modelled after the WTO's DSU.[14] TSD Chapters, however, have a separate mechanism which is only applicable to disputes concerning their own provisions, to the exclusion of the general one in turn.[15] While also sticking, in general, to the WTO model, this

[12] See Panel of Experts Proceeding Constituted under Article 13.15 of the EU-Korea Free Trade Agreement, Report of the Panel (20 January 2021) <https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159358.pdf> accessed 27 April 2021. Note that this dispute is remarkable also from the perspective of international economic law more generally: outside of the EU context, in fact, the only other known award up to now in which a TSD Chapter was adjudicated is Arbitral Panel Established pursuant to Chapter Twenty of the Dominican Republic-Central America-United States FTA, *Report of the Panel* (14 June 2017) <http://www.sice.oas.org/tpd/usa_cafta/Dispute_Settlement/final_panel_report_guatemala_Art_16_2_1_a_e.pdf> accessed 27 April 2021.

[13] For an interesting analysis of the methodological challenges thereby entailed, and for the proposal of a solid theoretical framework to tackle them, see Jonas Aissi, Rafael Peels, and Daniel Samaan, 'Evaluating the Effectiveness of Labour Provisions in Trade Agreements: An Analytical and Methodological Framework' (2018) 157 International Labour Review 671.

[14] An important and obvious difference is, however, that, in the FTA context, there is no equivalent to the Appellate Body. For an account of the WTO's DSM which, nowadays, still stands firm as a powerful picture critically putting the DSU into historical context, see Andreas Lowenfeld, *International Economic Law* (2nd edn,, Oxford University Press 2008) 161-212. For an equally authoritative account which is, perhaps, more legally systematic, and makes detailed references to the most recent case law, see Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (4th edn, Cambridge University Press 2017) 164-304.

[15] See, for instance, Art 16.17 of the Agreement between the European Union and Japan for an Economic Partnership [2018], OJ L330/3, providing that '[i]n the event of disagreement between the Parties on any matter regarding the interpretation or application of this Chapter, the Parties shall only have recourse to the procedures set out in this Article and Article 16.18. The provisions of this Chapter shall not be subject to dispute settlement under Chapter 21'.

enforcement system differs in one important respect at the final stage of the procedure – namely that of sanctions.

When disputes concerning 'the interpretation or application' of an EU's FTA arise, the complaining Party may request consultations with the alleged breacher, with a view to reaching a mutually satisfactory solution.[16] If a consensual settlement cannot be reached, the complaining Party can bring a claim before an arbitral Panel, called upon to make the necessary determinations of law and fact.[17] At this point, the two DSMs drift apart. If the Panel rules against the defendant in cases not involving TSD Chapters, the violating Party is to be given a 'reasonable period for compliance' to remedy the breach. Upon expiry of such period, the complaining Party can be authorised by the Panel to suspend obligations arising under the FTA (that is, to adopt sanctions) if certain conditions are fulfilled.[18] Sanctions are temporary, and intended to exert economic pressure upon the breacher to incentivise it to remedy the violation. On the contrary, no such option is available once the Panel establishes that a breach of a TSD Chapter has occurred. In this case, FTAs typically only envisage that '[t]he Parties shall make their best efforts to accommodate advice or recommendations of the Panel of Experts on the implementation of [the TSD] Chapter',[19] and no separate provision on any subsequent step is laid down. This, coupled with the exclusion of the applicability of the general DSM, means that, if any disagreement arises as to whether the arbitral award has been complied with, the complaining Party is prevented from adopting countermeasures to push for compliance.[20] The underlying attitude has been described as a 'promotional approach' to TSD issues:[21] the EU renounces sanctions, assuming that sustainable development is better

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[16] See, for instance, Arts 13.14 (TSD Chapter) and 14.3 (rest of the FTA) of the EU-South Korea FTA (n 6).

[17] See, for instance Arts 12.17 (TSD Chapter) and 14.4 (FTA in general) of the Free Trade Agreement between the European Union and the Republic of Singapore [2019], OJ L294/3.

[18] These are either that the defeated Party failed to notify within the reasonable period for compliance any measure adopted to abide by the Panel's findings, or that the Panel satisfies itself, upon request from the complaining Party, that any measure adopted to that end is insufficient to restore legality under the FTA. See, for instance, Arts 15.12-15.15 of the Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam [2020], OJ L186/3.

[19] Art 13.15.2, EU-South Korea FTA (n 6). See, similarly, Art 12.17.9 EU-Singapore FTA (n 17) and Art 16.18.6 EU-JapanEPA (n 15).

[20] For the view that countermeasures would still be allowed under general public international law, as reflected in the ILC's Draft Articles on State Responsibility, see, however, Bronckers and Gruni (n 11) 39-44. The ECJ itself, in Opinion 2/15, took the stance, different in the reasoning, but functionally similar in the outcome, that liberalisation commitments might be suspended pursuant to Art 60 of the VCLT: see *The Free Trade Agreement with Singapore* (n 5), para 161. The point is, however, controversial: see Marín Durán (n 11) 1046-1048. Note that the Commission has recently committed to expressly qualifying respect of the Paris Agreement as an 'essential element' of FTAs for the purposes of Art 60 VCLT: see European Commission, 'European Green Deal' COM(2019) 640 final 21.

[21] ILO, 'Social Dimensions of Free Trade Agreements' (2013, Revised edn 2015) ILO Studies on Growth with Equity, 21

promoted through dialogue and cooperation than through conflict and confrontation. From this perspective, intergovernmental dialogue is expected to follow the handing down of the award, through which the complaining Party would exercise soft power upon its counterpart to bring the latter's behaviour in conformity with the award. Further, FTAs set up a number of institutional bodies (some of which are explicitly to deal with TSD Chapters, and some of which also involve civil society actors) called upon to oversee the implementation of the FTA, including the follow-up to the dispute in turn.[22] This is expected to engender sufficient political pressure on the defeated Party for it to conform to the Panel's findings.

This model has been challenged on both theoretical and empirical grounds, ranging from the assumption that, without sanctions, there is not a sufficient incentive for the defeated Party to comply with the award,[23] to a critique of the operational shortcomings affecting the working in the concrete of civil society mechanisms.[24] Overall, dissatisfaction with this model as it currently stands seems ubiquitous, and the present work takes the need to reform it as a given. The debate has, however, polarised on whether to refine the current model without questioning it as such, or rather to introduce a sanctions-based model which would, basically, extend the FTA's general DSM to TSD Chapters.[25] The confrontation reached the institutional level. Reportedly, the Commission instigated a dialogue with stakeholders in 2017,[26] at the conclusion of which it produced a further document, in 2018, deeming there not to be sufficient consensus for sanctions to be introduced to enforce TSD Chapters, and pointing to a

<http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_228965.pdf> accessed27 April 2021.

[22] For an analysis of the institutional constellation set up by the EU's FTAs, addressing both the intergovernmental and the civil society components thereof, see Denise Prévost and Iveta Alexovičová, 'Mind the Compliance Gap: Managing Trustworthy Partnerships for Sustainable Development in the European Union's Free Trade Agreements' (2019) 6 International Journal of Public Law and Policy 236, 244-251.

[23] See, for instance Bronckers and Gruni (n 11) 37-50. The same authors have repeatedly taken this stance in their works, while cautioning that creative solutions should also be considered (for instance, resorting to financial penalties or targeted sanctions instead of crude trade restrictions): see eg Marco Bronckers and Giovanni Gruni, 'Taking the Enforcement of Labour Standards in the EU's Free Trade Agreements Seriously' (2019) 56 Common Market Law Review1591, 1610-1618. Also see Bartels (n 11) 311-313.

[24] See, for instance, the literature surveyed in Jan Orbie and others, 'Promoting Sustainable Development or Legitimising Free Trade? Civil Society Mechanisms in EU Trade Agreements' (2016) 1 Third World Thematics 526, 528-529. Also see Prévost and Alexovičová (n 22) 251-255.

[25] Interestingly, the EU-CARIFORUM EPA (n 6), predating the new generation of FTAs, actually envisaged, in principle, such a 'unitary' DSM: see Arts 206-223. However, Art 213.2 also clarified that, in respect of social and environmental commitments, 'appropriate measures [to be authorised by the Panel to induce compliance] shall not include the suspension of trade concessions under this agreement', so that it is not entirely clear (nor has the case law elucidated this point, since there has never been litigation thereupon) what kind of measures could be adopted to force the defeated party into compliance.

[26] See European Commission, 'Non-paper of the Commission Services – Trade and Sustainable Development (TSD)Chapters in the EU Free Trade Agreements (FTAs)' (July 2017) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1689> accessed 27 April 2021.

streamlined promotional model as the way forward.[27] This is reflected in the EU's most recent treaty practice.[28] On the other hand, the EP[29] and EU MS alike[30] have expressed unease with the promotional approach, and urged the EU to move to the sanctions model. Whereas this dichotomy has been criticised as false, obfuscating the existence of further possible solutions,[31] gathering political consensus on any alternative to the current model seems possible, if at all, only in respect of the sanctions approach. The following Section therefore takes issue with the most common critiques thereto, arguing that they are unsound and that a unitary sanctions-based DSM, encompassing TSD Chapters, should be considered for the EU's FTAs.

[27] See European Commission, 'Non-paper of the Commission Services – Feedback and Way Forward on Improving the Implementation and Enforcement of Trade and Sustainable Development Chapters in EU Free Trade Agreements' (February 2018) <https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf> accessed 27 April 2021.

[28] While not an FTA proper, the recently published draft EU-China Comprehensive Agreement on Investment (CAI) does, in fact, differentiate between the DSM for the 'Investment and sustainable development' Chapter (see Section IV, sub-Section 4), on the one hand, and the DSM available to adjudicate other parts of the CAI (see Section V), on the other hand, with sanctions only being available under the latter. The text of the agreement in principle, reached in December2020, can be found at <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2237> accessed 27 April 2021.

[29] The EP's campaign is long-standing, and still ongoing: for instance, when, in December 2019, the Commission proposed an amendment to Regulation 654/2014 (so-called Trade Enforcement Regulation: official name and reference to the OJ only included in the Bibliography below for space reasons), to enable the suspension of trade concessions when trading partners act in bad faith to block dispute settlement procedures, the EP's International Trade Committee attempted to include therein a provision which would have enabled such suspension also in the event of breach of a TSD Chapter. For an excellent account of the legislative debate, see Wolfgang Weiß and Cornelia Furculita, 'The EU in Search for Stronger Enforcement Rules: Assessing the Proposed Amendments to Trade Enforcement Regulation 654/2014' (2020) 23 Journal of International Economic Law 865. Note, however, that the amendment ultimately entered into force without the EP's proposal finding its way into the act: see Regulation (EU) 2021/167 of the European Parliament and of the Council of 10 February 2021 amending Regulation (EU) No 654/2014 concerning the exercise of the Union's rights for the applicationand enforcement of international trade rules [2021], OJ L49/1.

[30] See French Government, 'Mise en œuvre du CETA : Le plan d'action du gouvernement' (November 2017) 16 <https://www.gouvernement.fr/sites/default/files/document/document/2017/10/plan_action_ceta_du_gouvernement.pdf> accessed 27 April 2021. Note, however, that France itself later moved towards a more nuanced position, arguably taking note of the Commission's unwillingness to move to the sanctions model: in a non-paper jointly published with the Netherlands in 2020 (French Government and Dutch Government, 'Non-paper from the Netherlands and France on Trade, Social Economic Effects and Sustainable Development' (April 2020) <https://nl.ambafrance.org/Non-paper-from-the-Netherlands-and-France-on-trade-social-economic-effects-and> accessed 27 April 2021), France proposed to 'incentivize effective implementation by rewarding partner countries that live up to TSD commitments', *inter alia* through 'staged implementation of tariff reduction linked to the effective implementation of TSD provisions (…), including the possibility of withdrawal of those specific tariff lines in the event of a breach of those provisions'.

[31] See James Harrison and others, 'Labour Standards Provisions in EU Free Trade Agreements: Reflections on the European Commission's Reform Agenda' (2019) 18 World Trade Review 635, 647-654.

3. The Debate on Sanctions Reconsidered

Whereas some years ago commentators generally appeared to be critical of the failure to introduce sanctions to enforce TSD Chapters,[32] more recently a new generation of scholarly thinking has emerged, which rather upholds the current promotional practice and criticises the sanctions approach.[33] The conceptual critique thereof can be roughly divided into two main strands, which are separately addressed in the following.[34]

3.1. Sanctions Are Not Effective (and Litigation Is)?

The first and most traditional argument is that sanctions are ineffective, i.e. they are not capable of inducing the behavioural change they aim at.[35] A seminal study published by Hufbauer and others in 1985, empirically surveying US practice, in fact concluded that

[32] Limiting the references to works addressing the issue in general (but many other pieces of research reiterate the argument in relation with distinct FTAs, taken as case studies) see, besides the articles referenced in n 23, Franz Christian Ebert, 'Labour Provisions in EU Trade Agreements: What Potential for Channelling Labour Standards-Related Capacity Building?' (2016) 155 International Labour Review 407, 410-411; recently, Billy Melo Araujo, 'Labour Provisions in EU and US Mega-Regional Trade Agreements: Rhetoric and Reality' (2018) 67 International and Comparative Law Quarterly 233, 252-254. Note that all these authors repeatedly stress that the availability of sanctions should not be understood as implying giving up altogether other, more cooperative means of implementation, but should rather be regarded as a measure of last resort. Also in this sense, the dichotomy between sanctions and the promotional approach is actually a false one (n 31), as is also shown by what existing knowledge tells us about the actual impact of sanctions on compliance (see Section 3.1 below).

[33] Marín Durán (n 11); Prévost and Alexovičová (n 22); Kateřina Hradilová and Ondřej Svoboda, 'Sustainable Development Chapters in the EU Free Trade Agreements: Searching for Effectiveness' (2018) 52 Journal of World Trade 1019. Kathleen Claussen, 'Reimagining Trade-Plus Compliance: The Labor Story' (2020) 23 Journal of International Economic Law 25 goes even further, and questions the suitability to the enforcement of TSD Chapters of litigation as such (and that of sanctions only by implication).

[34] To these, one might add a further strand, which opposes sanctions on grounds which are practical, rather than conceptual in nature. Space reasons preclude here an analysis of this line of thought, which is however rather heterogeneous. Views therein range from the proposition that trading partners would be unwilling to simultaneously commit to the broad scope of TSD Chapters' substantive provisions and a sanctions-based DSM (European Commission n 27 3, Marín Durán n 11 1062-1063), to the contention that it would be legally impractical to measure the appropriate amount of sanctions if we continued to adhere to the current approach, based on equivalence with the level of nullification or impairment of trade benefits (Marín Durán n 11 1063). The latter argument in particular seems, however, rather fallacious, *inter alia* because it assumes an intrinsic, purely compensatory function of sanctions which is, at least, dubious: see, for the debate held in the WTO context in this respect, Joost Pauwelyn, 'The Calculation and Design of Trade Retaliation in Context: What Is the Goal of Suspending WTO Obligations?', in Chad P. Bown and Joost Pauwelyn (eds), *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement* (Cambridge University Press 2010). Further, it does not even consider the possibility that future FTAs lay down distinct arrangements for TSD sanctions, eliminating the 'equivalent level' language. Also fallacious is the line of thought which infers from the high evidentiary standard applied in the US-Guatemala case (n 12), based on the wording of so-called non-regression clauses which are also used in the EU's FTAs, the lack of effectiveness of the sanctions approach. This amounts to conflating substantive issues (on the crafting of the non-regression clause) with procedural questions (on the appropriateness of sanctions). Examples of this fallacy can be found in Hradilová and Svoboda (n 33) 1036-1037 and, partially along the same lines, in Claussen (n 33) 36-39.

[35] That is, in this case, of inducing compliance with environmental and labour commitments enshrined in TSD Chapters. See European Commission (n 26) 8-9; Marín Durán (n 11) 1058-1059.

sanctions had seldom accomplished the aim pursued,[36] and much of the current debate still appears to be influenced by that finding. This intertwines with the (undisputed) fact that sanctions are also costly for the Party imposing them, since they hinder trade flows from the 'target' country to the 'sender' country.[37] From a rational choice perspective, therefore, a measure which imposes costs without bringing any benefit is unwarranted, and should be renounced.[38] On the other hand, Chayes and Chayes influentially contended in 1995 that States would 'naturally' be pushed to comply with their obligations by the mere prospect of being regarded by the international community as unreliable partners in the event they did not.[39] Accordingly, ascertaining a violation through litigation and then exercising 'soft' pressure for compliance would be most effective. This is predicated to explain why, in the WTO context, where 'reputational costs' for breachers are maximised thanks to the WTO's multilateral institutional setting, rulings are usually abided by with no need to retaliate, save for exceptional cases.[40]

This argument lends itself to criticism. Evidence has been provided that the research of Hufbauer and others suffered a severe selection bias: by exclusively addressing cases where sanctions had actually been imposed, it missed the point that the mere threat to apply them is a most significant leverage to induce behavioural change. If one broadens the scope of their analysis to encompass threat cases, they will find that, in many instances, change in the target country's attitude was achieved without having to actually resort to the sanctions threatened.[41] From this perspective, the mere availability of sanctions in the abstract would be critical in

[36] See, in the most recent edition, Gary Clyde Hufbauer and others, *Economic Sanctions Reconsidered* (3rd edn,, PetersonInstitute for International Economics 2007).

[37] Also known as the 'shooting oneself in the foot' argument. See, for a critical introduction to this point, Chad P. Bownand Joost Pauwelyn, 'Trade Retaliation in WTO Dispute Settlement: A Multi-disciplinary Analysis', in Bown and Pauwelyn(n 34), 4-9.

[38] The point has been particularly debated in connection with the Global South issue, since developing countries have often pointed out that their poor economic record exacerbates the disproportionality between the benefits expected and the costs incurred. See Hunter Nottage, 'Evaluating the Criticism that WTO Retaliation Rules Undermine the Utilityof WTO Dispute Settlement for Developing Countries', in Bown and Pauwelyn (n 34), 320-323.

[39] See Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1995) 22-28 (on exclusion from the international community as a critical compliance-inducing factor) and 92-98 (on the negative cost-benefit analysis of sanctions). Note, however, that Chayes and Chayes' theory also includes a bias *against* adjudication, regarded as, again, inherently confrontational, and consequently inefficient: see Ibid. 205-207 (subject, however, to qualification at 224-225). The role of adjudication as providing a legitimate statement of the legally required conduct, which can be capitalised upon through political pressure, has rather been affirmed by liberal institutionalist theories, further developing Chayes and Chayes' insights: see, e.g., the literature surveyed in Tim Stephens, *International Courts and Environmental Protection* (Cambridge University Press 2009) 105-115.

[40] See Pauwelyn (n 34) 58-60; Nottage (n 38) 325-327.

[41] Daniel W Drezner, 'The Hidden Hand of Economic Coercion' (2003) 57 International Organization 643.

enforcing obligations, although in practice it would often not be necessary to actually introduce them; and, incidentally, this should also be taken into account in assessing the WTO's case.[42] Furthermore, in an FTA context, reputational costs are less burdensome than in the WTO, because of the lack of multilateral fora to blame recalcitrant breachers: consequently, the pressure exercised by litigation as such is likely to be insufficient.[43] Overall, excluding sanctions a priori on effectiveness grounds seems unwarranted, and risks downgrading the impact of the very same tools which the promotional approach predicates to be pivotal.

3.2. Sanctions Are Counterproductive?

The second main line of thought maintains that sanctions are counterproductive, i.e. they negatively affect sustainable development more than they serve it. This is either because they cause economic distress, which exacerbates problems in complying with environmental/labour standards due to resource scarcity;[44] or because they adopt a confrontational approach, which disrupts the cooperative process needed to bring about the regulatory changes necessary to raise those standards.[45]

Both arguments seem prima facie compelling.In particular the former should be carefully reflected upon, especially relative to FTAs with developing countries. Although it seems to rest upon an unarticulated neo-liberal assumption that advancements in non-economic interests are a function of free trade, which is at least questionable,[46] the controversial precedent of UN sanctions against Iraq undoubtedly calls for caution.[47] However, the main problem with this argument is its consistency with the CCP as a whole. If we renounce

[42] Olivier De Schutter, *Trade in the Service of Sustainable Development: Linking Trade to Labour Rights and Environmental Standards* (Hart Publishing 2015) 10-11.
[43] Geraldo Vidigal, 'Why Is There So Little Litigation under Free Trade Agreements? Retaliation and Adjudication in International Dispute Settlement' (2017) 20 Journal of International Economic Law 927. This is especially so if one considersthat, as regards the EU's FTAs, also bilateral arrangements through which political pressure could be exercised upon the recalcitrant government have frequently not been properly operationalised, and some also contend that they should be recrafted altogether: see n 24 and accompanying text, as well as Ebert (n 32) 411-413.
[44] Prévost and Alexovičová (n 22) 241; Marín Durán (n 11) 1061-1062.
[45] Prévost and Alexovičová (n 22) 241-243; European Commission (n 26) 9.
[46] For such an explicitly neo-liberal critique of sanctions, see Alan O. Sykes, 'International Trade and Human Rights: An Economic Perspective' (2003) John M. Olin Program in Law and Economics Working Paper No 188, 13-14 <https://chicagounbound.uchicago.edu/law_and_economics/279/> accessed 27 April 2021.
[47] For an overview of the Iraqi problem, see Simon Chesterman, Ian Johnstone, and David M Malone, *Law and Practiceof the United Nations: Documents and Commentary* (2nd edn, Oxford University Press 2016) 369-370 and 375-380, as well as Lowenfeld (n 14) 871-878.

sanctions to enforce TSD Chapters because they detrimentally affect sustainable development, why do we accept them to enforce other FTA Chapters? This would entail, in effect, an assumption that the economic interests advanced by Chapters other than TSD ones, e.g. the protection of intellectual property, liberalisation of public procurement, or tariff reductions, are superior to the social and environmental interests protected by TSD Chapters themselves: the Parties are prepared to take the risk of hampering the latter to enforce the former, but not to protect the effective implementation of labour/environmental standards themselves. This understanding is, however, clearly unacceptable to the current sustainable development thinking.[48]

When viewed from the perspective of harming cooperative processes, the argument may have some more merit,[49] but it is ultimately contradictory for the same reason: FTAs are unitary regimes, which cannot be implemented but holistically, and, if one accepts that sanctioning the counterpart compromises bilateral relations, this is so irrespective of the reason why sanctions are imposed. In other words, the counterproductivity argument, rigorously understood, should either oppose sanctions as such (but its proponents do not appear to question them as a tool to enforce economic commitments), or maintain that TSD Chapters rank lower than purely commercial provisions in FTAs (but this would be at odds with the contemporary, holistic conception of sustainable development put forward, *inter alia*, in Opinion 2/15). Moreover, it seems hard to reconcile this position with the EU's GSP, which allows for the withdrawal, on a number of sustainable development-related grounds, of trade preferences unilaterally granted by the EU to developing countries.[50] Such withdrawal is

[48] See n 10 and accompanying text.

[49] For a conceptual analysis from the point of view of international law in general, see Chayes and Chayes (n 39) 98-106.

[50] Regulation (EU) No 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 L303/1 (hereinafter: Regulation 978/2012). See, in particular, Arts 15 and 19, respectively enabling on (*inter alia*) those grounds the withdrawal of so-called GSP+ preferences (benefits additional to those accrued under the GSP in general, granted to incentivise ratification and effective implementation of a number of multilateral instruments, concerning environmental and labour standards and good governance) and the withdrawal of 'general' preferences or the "EBA arrangement" (the most advantageous set of concessions, available only to Least-Developed Countries and eliminating tariffs on "everything but arms"). Space precludes here an in-depth analysis of the GSP scheme. For good accounts thereof, see De Schutter (n 42) 110-123 and Thomas Lebzelter and Axel Marx, 'Is EU GSP+ Fostering Good Governance? Results from a New GSP+ Compliance Index' (2020) 54 Journal of World Trade 1, 2-7. This far, preferences have been withdrawn four times: in three cases (Myanmar in 1997, Belarus in 2007, and Cambodia in 2020) based on Art 19 or its antecedents, so thatthe target countries slid back to access to the EU market on standard MFN terms, and once (Sri Lanka in 2010) on what is now Art 15, so that the target country still retained the preferential general GSP rate. For an overview of the practical operation of the system, see Ionel Zamfir, 'Human Rights in EU Trade Policy: Unilateral Measures' (January 2017), European Parliamentary Research Service's Briefing PE 595.878 <https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2017)595878> accessed 27 April 2021. For specific focus on the cases of Myanmar and Belarus (although the inferences made by the

a sanction in everything but its name,[51] and is even more problematic than sanctions under FTAs: it is adopted unilaterally by the Commission, rather than pursuant to an ascertainment through adjudication that an international obligation has been breached, with the result that delicate legitimacy questions arise.[52] Should the EU, then, also get rid of the GSP? Taking the counterproductivity argument seriously seems to imply renouncing the whole range of economic levers available to the EU as a global actor – but this would come close to renouncing the whole range of levers available thereto altogether.[53]

4. Conclusions

Sanctions as a means of enforcement of TSD Chapters in the EU's FTAs are not faring well. They are neglected by existing treaties ,[54] and their political and scholarly backing is shrinking. However, the arguments most commonly advanced to oppose them are misconceived: the ineffectiveness argument does not consider the crucial importance of the mere availability of sanctions in the abstract, and the counterproductivity argument is

authors on the system in general are far from being convincing), see Weifeng Zhou and Ludo Cuyvers, 'Linking International Trade and Labour Standards: The Effectiveness of Sanctions under the European Union's GSP' (2011) 45 Journal of World Trade 63.

[51] De Schutter (n 42) 104.

[52] See, again, the detailed procedures laid down by Regulation 978/2012 (n 50), Arts 15 and 19. This is only partially countered by the fact that, in deciding to withdraw the preferences on grounds of non-compliance with multilateral instruments concerning sustainable development standards or human rights, the Commission is instructed 'to seek all information it considers necessary, including, *inter alia*, the conclusions and recommendations of the relevant monitoring bodies' and henceforth to 'assess all relevant information' (Regulation 978/2012, Arts 15.6 and 19.6). Note, however, that empirical research shows that, in the labour domain, the EU is, at least to a certain extent, influenced by the findings of the ILO: see Jan Orbie and Lisa Tortell, 'The New GSP+ Beneficiaries: Ticking the Box or Truly Consistent with ILO Findings?' (2009) 14 European Foreign Affairs Review 663. On the problem of legitimacy of unilateral sanctions, see Chayes and Chayes (n 39) 106-108.

[53] Yet, CFSP sanctions adopted under Art 215 TFEU (e.g. those currently in force against Russia pursuant to Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilizing the situation in Ukraine [2014], OJ L229/1 – hereinafter: Regulation 833/2014) would arguably resist even such line of reasoning. This is because they generally put in place either State-based embargoes of general application, which are, however, carefully aimed at exports in sectors such as dual use, military, or torture-related goods (see eg Regulation 833/2014, Art 2), or 'smart sanctions', targeting politically influential individuals or entities (see eg Regulation 833/2014, Art 5). Whereas the former only aim at preventing the flow of goods capable of being used to breach human rights towards unstable countries, and do not appear to be able to harm the economy thereof at large, the latter are by definition crafted in such a way as to be able to maximise political pressure while minimising collateral damage on the target country's population (and note that, as a matter of practice, smart sanctions are absolutely prevalent). Therefore, in both cases, the impact of sanctions is unlikely to be of such magnitude as to detrimentally affect the availability of resources needed to implement sustainability programmes, albeit that the concern relative to cooperation might still be present. For a systematic overview of the legal problems entailed by the use of Art 215 TFEU, also underlining the prevalence of smart sanctions in practice, see Christina Eckes, 'The Law and Practice of EU Sanctions', in Steven Blockmans and Panos Koutrakos (eds), *Research Handbook on the EU's Common Foreign and Security Policy* (Edward Elgar Publishing 2018).

[54] Save, at least in part, for the EU-CARIFORUM EPA: see n 6 and n 25.

artificial, insofar as it singles TSD Chapters out of FTAs (and the CCP) as a whole. The present paper does not propose that the EU systematically sanction its trading partners: it rather urges it not to preclude the possibility to (threaten to) do so in cases where this would be warranted. Excluding such possibility *a priori* seems unjustified, and might hamper the effectiveness of the promotional model in turn.[55] (Re)introducing sanctions, on the other hand, might help the EU in delivering on its ambitious commitments to using the CCP to promote its values on the global stage: a much needed outcome, at a time when the challenges identified by the sustainable development agenda become ever more pressing.

[55] Note, moreover, that there is a clear consensus that the EU should approach flexibly the issue of TSD Chapters in its FTAs, rather than sticking to its current 'one size fits all' approach (see James Harrison and others, 'Governing Labour Standards through Free Trade Agreements: Limits of the European Union's Trade and Sustainable Development Chapters' (2019) 57 Journal of Common Market Studies 260, 270-272), as also acknowledged by the Commission (European Commission n 27 7; COM/2019/640/FINAL 20). If this is the case, the EU's rigid *a priori* exclusion of sanctions in its FTAs seems even more unjustified, given that an aprioristic stance is, by definition, unreceptive to the nuances of specific bargaining arrangements potentially reached with each individual country. That it is the EU which willfully decides at the outset not to include sanctions in its FTAs is, as forcefully pointed out by Melo Araujo (n 32), 241-242, made evident by the fact that sanctions are excluded even in negotiations with countries such as Canada and the US, which have a long record of including sanctions to enforce TSD Chapters in their own FTAs. Incidentally, note that this also casts doubt upon the Commission's stance that a factor playing a role in preventing the move towards the sanctions model be resistance from trading partners (see n 34).

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