

# COMPARATIVE ANALYSIS OF LABOUR AND ENVIRONMENT PROVISIONS IN REGIONAL TRADE AGREEMENTS

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# Table of Contents

<b>1. Introduction</b>	<b>1</b>
<b>2. Setting the Stage for Labour and Environmental Provisions</b>	<b>6</b>
2.1 Design of Labour Provisions in RTAs	6
2.2 Design of Environmental Provisions in RTAs	10
<b>3. Mapping A Sampling of Labour and Environment Provisions in RTAs</b>	<b>14</b>
3.1 Obligations	16
3.2 Cooperation and Monitoring	22
3.3 Enforcement	33
<b>4. Policy Recommendations</b>	<b>42</b>
<b>5. Conclusion</b>	<b>50</b>
<b>6. Bibliography</b>	<b>1</b>
<b>7. Annex</b>	<b>8</b>
Annex 1: Mapping of Labour and Environmental Provisions in RTAs	8
Annex 2: Ratification of International Standards by RTA Parties (Table 7/8/9)	9
Annex 3: Future Considerations	12

## Executive Summary

This project creates a comparative framework and policy recommendations to strengthen labour and environmental provisions within Regional Trade Agreements (RTAs).

There is a particular sense of urgency in the coordination of labour and environmental provisions. Forward thinking regional trade agreements must adapt to the overlapping exigency of environmental disasters and labour exploitation to compete in global trade. For example, climate change is already severely limiting the availability of natural resources, job conditions, and transportation of goods. Similarly, increasing global economic competition is putting pressure on the labour force. Therefore, it is of great importance for trade negotiators to address threats of trade distortion and avoid a race to the bottom in both labour and environmental arenas.

After demonstrating how labour and the environment are intricately interlinked, this report lays out key labour and environmental goals and standards. This report analyses six RTAs generally falling into a US-based approach (BTA, PTPA, USMCA, and CPTPP) and EU-based approach (EU-Vietnam, CETA, and KOREU). The report then compares RTA provisions focusing on the RTA elements of “obligations”, “monitoring and cooperation”, and “enforcement” provisions by examining US and EU approaches to trade agreements. Literature reviews and expert analysis on implementation were then used as guidance on how to strengthen the goals of labour and environmental protection, while advancing the goals of global and regional trade. The report concludes by proposing policy recommendations that could be adopted by Parties entering into RTA negotiations, in order to make use of the mutually compatible and reinforcing nature of labour and environmental standards.

Analysis and policy recommendations provide conclusions to this report's three guiding questions: (1) should labour and environmental provisions be combined in RTAs? (2) can labour and environmental protection

learn from each other? (3) how can coordination between labour and environmental provisions, or US and EU approaches, be enhanced in future RTAs?

First, we synthesize that, in general, future labour and environmental provisions should be linked, but not necessarily combined. Along the same lines, the US and EU approaches to RTAs should be linked and offer mechanisms for collaboration. However, unnecessary conflict could arise from selecting a superior option, such as choosing the US' arbitration panel or the EU's advisory panel for dispute settlement. As such, this report focuses on areas for potential collaboration, instead of the perceived need for choosing one path forward. Secondly, labour and environmental provisions can refer to and encompass similar elements; in effect, labour provisions can and should inform environmental provisions and vice-versa. Additionally, the US approach can learn from the EU and vice-versa. Third, future RTA trade negotiators should ensure there is coordination between labour and environmental provisions. The way forward to enhance such coordination is illustrated by elements of the current US and EU approaches.

This report concludes that removing the silos that typically separate labour and the environment in RTAs leaves significant room for mutually beneficial coordination and learning potential for all involved Parties.

## List of Abbreviations

ADR	Alternative Dispute Resolution
AFL-CIO	American Federation of Labour and Congress of Industrialized Organizations
BTA	US-Vietnam Bilateral Trade Agreement
CEC	Commission for Environmental Cooperation
CETA	EU-Canada Comprehensive Economic and Trade Agreement
CEPA	EFTA-Indonesia Comprehensive Economic Partnership Agreement
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CSO	Civil Society Organization
DAGs	Domestic Advisory Groups
DSM	Dispute Settlement Mechanism
ECA	Agreement on Environmental Cooperation among the Governments of the United States of America, the United Mexican States, and Canada
EDB	WTO's Environmental Database
EU	European Union
EU-Vietnam	EU-Vietnam Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
GHG Emissions	Greenhouse Gas Emissions
GSP	Generalised Scheme of Preferences
ILO	International Labour Organization
ISDS	Investor-State Dispute Settlement
JPAC	Joint Public Advisory Committee
KOREU	EU-South Korea Free Trade Agreement
LPHUB	ILO's Labour Provisions in Trade Agreements Hub
MEAs	Multilateral Environmental Agreements

MoUs	Memorandums of Understandings
NAFTA	North Atlantic Free Trade Agreement
NAAEC	North American Agreement on Environmental Cooperation Commission
NAALC	North American Agreement on Labour Cooperation
NDCs	Nationally Determined Contributions
NGOs	Non-Governmental Organizations
NTPOs	Non-Trade Policy Objectives
PTPA	US-Peru Trade Promotion Agreement
RRLM	Rapid Response Labour Mechanism (part of USMCA)
RTAs	Regional Trade Agreements
SDG	Sustainable Development Goal
SPS	Sanitary and Phytosanitary Measures
TIC	Treaty Implementation Cell
TPP	Trans-Pacific Partnership
TPR	Trade Policy Reviews
TREND	TRade & ENvironment Database
TSD	Trade and Sustainable Development
TSD Committee	Committee on Trade and Sustainable Development
TTIP	Transatlantic Trade and Investment Partnership
UNCTAD	United Nations Conference on Trade and Development
UNFCCC	United Nations Framework Convention on Climate Change
US	United States
USMCA	United States-Mexico-Canada Agreement (Also referred to as the Canada-United States-Mexico Agreement (CUSMA), and El Tratado entre México, Estados Unidos y Canadá (T-MEC))
USTR	United States Trade Representative
WTO	World Trade Organization



# 1. Introduction

This report creates a comparative framework to analyse labour and environmental provisions in Regional Trade Agreements (RTAs) for the purpose of strengthening the goals of global trade coupled with the goals of enhanced labour and environmental protection.

From 1958 to 2021, the number of RTAs in force increased exponentially. Today 350 RTAs have been notified to the World Trade Organisation (WTO).<sup>1</sup> As a key fixture in international relations, RTAs have not only risen in number, but in depth, complexity, and regulatory coverage.<sup>2</sup> Although the role of RTAs is to facilitate trade, since 1994, they have become platforms for social movements. The push for labour and environmental protections mirrors the rise in RTAs. Simultaneously advocating for sustainable development and human rights, these movements have applied considerable political pressure. This led to the first substantive measures on both labour and the environment appearing in the 1994 North Atlantic Free Trade Agreement (NAFTA).<sup>3</sup>

Since the 1990s, labour and environmental provisions have significantly increased in size and scope, mirroring the general rise in RTAs.<sup>4</sup> The stated aim of labour provisions in RTAs is to protect and promote workers rights through strengthening domestic governance over the labour markets. Meanwhile, the stated aim of RTA environmental provisions is to limit potential negative environmental externalities by strengthening the environmental commitments of each negotiating Party. Another key objective of both labour and environmental provisions is to avoid trade distortions by preventing or limiting the ability of trading partners to bypass international

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<sup>1</sup> "WTO | Regional Trade Agreements," accessed November 28, 2021, <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx>.

<sup>2</sup> "WTO | Regional Trade Agreements - Scope of Rtas," accessed November 28, 2021, [https://www.wto.org/english/tratop\\_e/region\\_e/scope\\_rta\\_e.htm](https://www.wto.org/english/tratop_e/region_e/scope_rta_e.htm).

<sup>3</sup> "WGEX\_EN.Pdf," accessed October 26, 2021, [https://www.ilo.org/weso-greening/documents/WGEX\\_EN.pdf](https://www.ilo.org/weso-greening/documents/WGEX_EN.pdf).

<sup>4</sup> TREND Analytics, "TREND analytics," accessed January 4, 2022, <https://klimalog.die-gdi.de/trend/table.html>;

commitments made in international labour conventions or multilateral environmental agreements.

Literature is replete with a myriad of siloed studies and dialogues of trade and labour, on one hand, and trade and the environment on the other. However, there is a dearth of analysis delving into the interdependency and interplay of these two types of clauses in RTAs.

Historically, labour and environmental provisions in RTAs were typically treated separately. For example, each type of provision has its own section in United States (US) RTAs, despite significant overlaps in several key provisions. However, such separate treatment is changing. In October 2021, the European Union (EU) adopted the review of its Trade and Sustainable Development (TSD) chapters, which were founded on the need to address the interrelated nature of economic, social, and environmental developments in the trade context. The

**An October 2021 adopted review of the European Union’s Trade and Sustainable Development chapters, which push for economic, social, and environmental development in trade agreements, stated that “all three dimensions of TSD are intertwined and must not be tackled in silos.”**

recent EU review of TSD chapters stated that “all three dimensions of TSD are intertwined and must not be tackled in silos.”<sup>5</sup> The EU has concluded that there is an interdependence between labour and environmental protections. Further, the EU presents these three concepts as necessary policy objectives for Parties to allow for simultaneously strengthening global markets, industries, workers, and consumers.

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<sup>5</sup> “Next Generation Trade and Sustainable Development – Reviewing the 15-Point Action Plan (Own-Initiative Opinion),” European Economic and Social Committee, March 31, 2021, <https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/next-generation-trade-and-sustainable-development-reviewing-15-point-action-plan-own-initiative-opinion>.

The ILO reports that around 1.2 billion jobs depend on the effective management and sustainability of a healthy and stable environment.<sup>6</sup> Today farmers are facing drought, fishermen are having to adapt to increasing ocean temperatures and acidity, foresters throughout the world are fighting fires, and the tourism industry is tackling coastal erosion from increasing sea levels, as well as extreme weather events. These jobs directly rely on limiting or reducing environmental hazards and maintaining environmental stability.

**With around 80% of global trade occurring over oceans, the UNCTAD 2020 Review of Maritime Transport highlights that taking climate into consideration is essential to avoid future disruptions in transportation.**

Additionally, many jobs rely directly on natural resources, the earth's capacity to absorb greenhouse gas (GHG) emissions, or ecosystem services, including agriculture, mining, and fossil fuel-based energy.<sup>7</sup> Further, with around 80% of global trade occurring over oceans, the United Nations Conference

on Trade and Development (UNCTAD) 2020 Review of Maritime Transport highlights that taking climate into consideration is essential to avoid future disruptions in transportation.<sup>8</sup> In sum, the productivity, occupational safety, and health of labourers cannot be decoupled from the environment.

Therefore, the economic and political sustainability of global markets, industries, workers, and consumers could be enhanced by RTA negotiators recognizing that labour and environment disciplines are mutually beneficial. The inter-linkages between these disciplines started from the days of labour and environmental organisations putting joint pressure on US President Bill Clinton and the US Congress to incorporate their priorities into NAFTA. The resulting environmental and labour provisions in NAFTA confirmed their

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<sup>6</sup> Ida Bastiaens and Evgeny Postnikov, "Greening up: The Effects of Environmental Standards in EU and US Trade Agreements," *Environmental Politics* 26, no. 5 (September 3, 2017): 847–69, <https://doi.org/10.1080/09644016.2017.1338213>.

<sup>7</sup> Bastiaens and Postnikov, 847.

<sup>8</sup> "Rmt2020\_en.Pdf," accessed January 4, 2022, [https://unctad.org/system/files/official-document/rmt2020\\_en.pdf](https://unctad.org/system/files/official-document/rmt2020_en.pdf).

important link to – and potential restraint on -- trade liberalization.<sup>9</sup> Indeed, NAFTA demonstrated that global trade does not exist in a vacuum. Propelled by the urgency created by climate change and accompanying ties to labour rights, future RTA negotiations will inevitably face the need to negotiate such provisions in a way that they can mutually support each other. This report concludes that labour and environment provisions operate in a mutually reinforcing manner to create long-term sustainable RTAs that enhance trade that is fair and sustainable, both economically and politically.

To come to this conclusion, this report aims to conduct a comprehensive study with the goal of bridging gaps between labour and environment-related disciplines in RTAs. It will provide a comparative analysis of six selected agreements by examining the key elements in RTAs -- their **obligations** to adhere to world-wide agreed upon environmental and labour standards; their **monitoring** of compliance with such standards and the **cooperation** between Parties to RTA to address such standards; and finally, their **enforcement** provisions to level the playing field and ensure that Parties adhere to agreed upon environmental and labour standards in RTAs.

The report is also informed by the insights collected through interviews with practitioners, experts, academics, and related stakeholders. These individuals provided insights on a number of elements including industry and NGO motivations, political considerations, as well as practical implementation barriers and ideas for enhancements. The report concludes by offering policy recommendations for future RTAs to increase the effectiveness of labour and environmental provisions.

The remainder of the report is structured as follows. Section 2 presents the background of multilateral labour and environmental standards to set the stage for their incorporation into RTAs. Section 3 maps out labour and

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<sup>9</sup> "BP\_16.2017.Pdf," accessed January 4, 2022, [https://www.die-gdi.de/uploads/media/BP\\_16.2017.pdf](https://www.die-gdi.de/uploads/media/BP_16.2017.pdf).

environmental provisions through a sampling of six RTAs applying a thorough textual and literary review. Section 4 builds on Section 3 with expert interviews to propose feasible policy recommendations to simultaneously strengthen labour, the environment, and global trade. Further, section 4 also responds to the ultimate objective of this report through responses to the three guiding questions:

1. Should labour and environmental provisions be combined in RTAs?
2. Can labour and environmental protection learn from each other?
3. How can coordination between labour and environmental provisions, or US and EU approaches, be enhanced in future RTAs?

## 2. Setting the Stage for Labour and Environmental Provisions

### 2.1 Design of Labour Provisions in RTAs

It has been over a quarter of a century since labour provisions were first included in RTAs. While there are many approaches to these provisions in RTAs, this report defines them based on the ILO's report of Labour Provisions in G7 Trade Agreements with *mutatis mutandis*.<sup>10</sup> Labour provisions are both tools for the governance of labour markets, as well as regulations for protecting and/or promoting workers' rights. According to the ILO, labour provisions in RTAs can be deconstructed into three categories: (1) obligations, (2) monitoring and cooperation, and (3) enforcement.

**Obligations** refer to any principle, standard or rule which addresses labour relations or minimum working conditions and terms of employment.<sup>11</sup> It covers both aspirational statements and substantive commitments. Aspirational statements refer to labour-related commitments in the preamble or the objectives of an agreement. Substantive commitments in RTAs reflect multilateral agreements upon international labour standards (see Tables 1 and 2) and domestic law. Domestic law is an important factor because certain countries have not ratified international labour standards (see Annex 2: Tables 7 and 8). Domestic law commitments generally include the guarantee of a State's sovereignty to set and administer domestic labour laws, to prohibit the derogation of such laws through enforcement, and to provide recourse through domestic courts.

**Monitoring and cooperation** concerns any framework for cooperative activities that supports the implementation and monitoring of obligations through established bodies that facilitate consultations and/or regular

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<sup>10</sup> Internationale Arbeitsorganisation, *Labour Provisions in G7 Trade Agreements: A Comparative Perspective* (Geneva: International Labour Office, 2019), 11.

<sup>11</sup> Internationale Arbeitsorganisation, 11.

dialogue between Parties.<sup>12</sup> This includes the presence of any substantive labour-related commitments that are agreed by the Parties as issues over which they will cooperate.<sup>13</sup> Such bodies also refer to the establishment of contact points or labour councils to monitor and promote compliance with RTA obligations. A final important element in monitoring and cooperation is the engagement and facilitation of inputs from the public, including various stakeholder interest groups.<sup>14</sup>

Finally, under **enforcement**, this report focuses on consultations and dispute settlement mechanisms (DSM). There are also a variety of remedies available to enforce compliance, including trade sanctions, monetary compensation, and other appropriate measures.<sup>15</sup>

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<sup>12</sup> Internationale Arbeitsorganisation, 11.

<sup>13</sup> Damian Raess and Dora Sari, "Labor Provisions in Trade Agreements (LABPTA): Introducing a New Dataset," *Global Policy* 9, no. 4 (2018): 454, <https://doi.org/10.1111/1758-5899.12577>.

<sup>14</sup> Raess and Sari, 454.

<sup>15</sup> Raess and Sari, 454.

Table 1: Fundamental ILO Conventions Committed to by Selected RTAs								
Year	Convention	BTA	PTPA	CPTPP	USMCA	EU Vietnam	KOREU*	CETA
1948	1. Freedom of Association and Protection of the Right to Organise Convention	×	√	√	√	√	√	√
1949	2. Right to Organise and Collective Bargaining Convention	×	√	√	√	√	√	√
1930/2014	3. Forced Labour Convention	×	√	√	√	√	√	√
1957	4. Abolition of Forced Labour Convention	×	√	√	√	√	√	√
1973	5. Minimum Age Convention	×	√	√	√	√	√	√
1999	6. Worst Forms of Child Labour Convention	×	√	√	√	√	√	√
1951	7. Equal Remuneration Convention	×	√	√	√	√	√	√
1958	8. Discrimination (Employment and Occupation) Convention	×	√	√	√	√	√	√

\*For the purposes of this section, KOREU was added to the obligation provisions table for comparison.



Table 2: Other ILO Conventions Committed to by Selected RTAs								
Year	Convention	BTA	PTPA	CPTPP	USMCA	EU Vietnam	KOREU*	CETA
1947	Labour Inspection Convention	√	√	√	×	×	×	√
1970	Minimum Wage Fixing Convention	√	√	√	×	×	×	√
1975	Migrant Workers Convention	√	√	√	×	√	×	√
1981	Occupational Safety and Health Convention	√	√	√	×	×	×	√

Note: Further reference is often made to the 1998 Declaration on Fundamental Principles and Rights at Work and the 1999 ILO Decent Work Agenda.

\*For the purposes of this section, KOREU was added to the obligation provisions table for comparison.

## 2.2 Design of Environmental Provisions in RTAs

The first environmental provisions in a trade agreement dates back to the 1947 General Agreement on Tariffs and Trade (GATT). GATT's Article XX included exceptions for measures "(b) necessary to protect human, animal or plant life or health" and "(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."<sup>16</sup> However, the ensuing half of a century saw little more than soft references to the environment or Article XX in agreement preambles.<sup>17</sup> In 1994, NAFTA, and its side provision the North American Agreement on Environmental Cooperation Commission (NAAEC), became the first RTA with specific references to the environment.<sup>18</sup> By the 21st century, environmental provisions became more substantial, and between 2010 and 2012 more than half of the RTAs notified to the WTO contained environment provisions extending beyond supportive statements.<sup>19</sup> The Trade & Environment Database (TREND) now identifies almost 300 different types of environmental provisions across 730 trade agreements.<sup>20</sup>

There are no agreed typologies of environmental provisions in RTAs at the international level. In the Codebook of TREND, Dr. Jean-Frédéric Morin breaks down environmental provisions into 14 categories.<sup>21</sup> The

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<sup>16</sup> "WTO | Legal Texts - Marrakesh Agreement," accessed January 4, 2022, [https://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_02\\_e.htm#](https://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm#).

<sup>17</sup> Clive George and Shunta Yamaguchi, "Assessing Implementation of Environmental Provisions in Regional Trade Agreements" (Paris: OECD, March 28, 2018), <https://doi.org/10.1787/91aacfea-en>.

<sup>18</sup> Dale Colyer, "Environmental Provisions in Trade Agreements," n.d., 24.

<sup>19</sup> "Assessing Implementation of Environmental Provisions in Regional Trade Agreements | OECD Trade and Environment Working Papers | OECD iLibrary," accessed January 4, 2022, [https://www.oecd-ilibrary.org/environment/assessing-implementation-of-environmental-provisions-in-regional-trade-agreements\\_91aacfea-en](https://www.oecd-ilibrary.org/environment/assessing-implementation-of-environmental-provisions-in-regional-trade-agreements_91aacfea-en).

<sup>20</sup> Dominique Blümer et al., "Environmental Provisions in Trade Agreements: Defending Regulatory Space or Pursuing Offensive Interests?," *Environmental Politics* 29, no. 5 (July 28, 2020): 866–89, <https://doi.org/10.1080/09644016.2019.1703383>.

<sup>21</sup> Dominique Blümer et al., "Environmental Provisions in Trade Agreements: Defending Regulatory Space or Pursuing Offensive Interests?," *Environmental Politics* 29, no. 5 (July 28, 2020): 866–89, <https://doi.org/10.1080/09644016.2019.1703383>. 14 categories include: principles, level of environmental protection, law making and policy making, interaction between non-environmental issues and the environment, enforcement of domestic measures, means to encourage environmental protection, other cooperation on environmental measures, assistance, specific environmental issues, implementation of the agreement, institutions created dispute settlement mechanisms and relations with international institutions.

environmental dataset created by the Canada Research Chair in International Political Economy at the Université Laval in Quebec, Canada, comprises detailed data on the design of environmental provisions along nine dimensions.<sup>22</sup> The WTO Staff Working Paper lists 62 main types of environment-related provisions, which can be roughly categorized into: preamble, objectives, domestic environmental laws, MEAs, thematic obligations (e.g., biodiversity, natural resources, trade in environment-related goods, etc.), environmental governance and procedure (e.g., transparency and procedural guarantees), cooperation, institutional arrangements, consultation, and dispute settlement mechanism (DSMs).<sup>23</sup>

While existing typologies of environmental provisions seem to be more complex, it does not imply that environmental regulations are more fragmented than labour by nature. Environmental typologies are individual decisions of environmental experts, reflecting how environmental scholars measure environmental provisions. Experts may combine or separate out topologies based on objectives of projects. For instance, the WTO Staff Working Paper developed a comprehensive typology of environment-related provisions (62 categories) to track and assess environmental content in more detail.<sup>24</sup> However, these detailed and complicated environmental typologies are difficult to compare to the typologies of labour provisions.

In examining environmental standards, this report uses the ILO methodology that focuses on obligations, monitoring and cooperation, and enforcement. This approach facilitates the comparison of the similarities and differences between labour and environmental provisions. Accordingly,

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<sup>22</sup> Axel Berger et al., *Towards “Greening” Trade? Tracking Environmental Provisions in the Preferential Trade Agreements of Emerging Markets*, Discussion Paper / Deutsches Institut Für Entwicklungspolitik 2017, 2 (Bonn: Deutsches Institut für Entwicklungspolitik gGmbH, 2017), 13. Nine dimensions include: environmental goals in preamble, environmental exceptions, reference to MEAs, obligations to uphold environmental law, incorporation of the right to regulate in environmental matters, cooperation, transparency and public participation.

<sup>23</sup> “WTO | Research and Analysis - Working Paper: Trade Facilitation Provisions in Regional Trade Agreements Traits and Trends,” 12, accessed December 18, 2021, [https://www.wto.org/english/res\\_e/reser\\_e/ersd201613\\_e.htm](https://www.wto.org/english/res_e/reser_e/ersd201613_e.htm).

<sup>24</sup> WTO | Research and Analysis - Working Paper: Trade Facilitation Provisions in Regional Trade Agreements Traits and Trends,” 5.

environmental **obligations** refer to aspirational statements, domestic environmental laws, thematic obligations, and international environmental standards (See Table 3). **Cooperation and monitoring** covers environmental governance and procedure, national and international level monitoring, public submissions, and cooperation with stakeholders and institutions. Finally, **enforcement** covers consultation, DSMs, and remedies for non-compliance.

**Table 3: Multilateral Environmental Agreements Committed to by Selected RTAs**

Year	MEA	BTA	PTPA	CPTPP	USMCA	EU Vietnam	KOREU*	CETA*
1973	Convention on International Trade in Endangered Species of Wild Fauna and Flora	×	√	√	√	√	×	√
1987	Montreal Protocol on Substances that Deplete the Ozone Layer	×	√	×	√	×	×	×
1989	Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal	×	×	×	×	×	×	×
1992	Convention on Biological Diversity	×	×	√	×	√	√	×
1992	United Nations Framework Convention on Climate Change	×	×	√	×	√	√	×
1997	Kyoto Protocol to the United Nations Framework Convention on Climate Change	×	×	√	×	√	√	×
2010	Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity	×	NA	×	×	√	×	×
2015	Paris Agreement	×	NA	√	×	√	NA	×

\*For the purposes of this section, KOREU was added to the obligation provisions table for comparison.

\*\*CETA includes a general reference to MEAs.

### 3. Mapping A Sampling of Labour and Environment Provisions in RTAs

Given the huge number of RTAs, it was essential to narrow the scope of RTAs examined for the purpose of this report. This selection process is reflected in a broader mapping (see Annex 1). The RTAs selected included both labour and environmental provisions to facilitate a comparative assessment. To create a comparative framework to analyze labour and environmental provisions, the selected RTAs are innovative and involve major players in the protection of labour and the environment, namely the US and EU. Accordingly, this report focuses on the United States-Mexico-Canada Agreement (USMCA),<sup>25</sup> Comprehensive and Progressive Agreement for Trans-Pacific (CPTPP),<sup>26</sup> and the EU-Canada Comprehensive Economic and Trade Agreements (CETA).<sup>27</sup>

Building off these landmark agreements, the report also considered trade agreements that involved a developing country to incorporate their perspectives and priorities, such as indigenous rights. While developed countries do exercise powers to include labour and environmental provisions in RTAs, less developed countries tend to have lower labour and environmental regulations. By contrast, Vietnam and Peru are examples of developing countries at the forefront of those negotiating RTAs with labour and environmental provisions. Vietnam was one of the first developing countries to take part in the new wave of “deeper” RTAs. The EU-Vietnam Free Trade Agreement (EU-Vietnam) incorporates a number of labour and environmental provisions.<sup>28</sup> Similarly, the US-Peru Trade Promotion Agreement (PTPA) was groundbreaking as the first RTA to subject labour and

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<sup>25</sup> USMCA entered into force in 2020

<sup>26</sup> CPTPP entered into force in 2019;

<sup>27</sup> CETA entered into force in 2017.

<sup>28</sup> EU-Vietnam entered into force in 2020; Axel Berger et al., *Deep Preferential Trade Agreements and Upgrading in Global Value Chains: The Case of Vietnam*, Studies / Deutsches Institut Für Entwicklungspolitik 92 (Bonn: Deutsches Institut für Entwicklungspolitik gGmbH, 2016), 8.

environmental provisions to enforcement.<sup>29</sup> For the purposes of comparison, the EU-South Korea (KOREU) Free Trade Agreement was also added to this study, in addition to the six primary RTAs, as it was the first to include these enforcement mechanisms on the EU side.<sup>30</sup>

To observe the evolution of labour and environmental provisions, one older RTA was chosen, the US-Vietnam Bilateral Trade Agreement (BTA).<sup>31</sup> However, this RTA will not be heavily addressed in this report as, after further examination, it was determined that it does not include labour or environmental provisions substantial enough for comparison. Finally, while it will not be included in this report's six primary RTAs, due to stalled negotiations, the Transatlantic Trade and Investment Partnership (TTIP) will be referenced as it relates to the merging of US and EU approaches.

There are two main approaches to labour and environmental regulations taken by the RTAs in question: the **US approach** and the **EU approach**. The US approach includes USMCA, CPTPP, PTPA, and BTA. Please note that even though the US is no longer a party to CPTPP, it heavily influenced the negotiation process and as such, the final agreement aligns more closely with the US approach. The EU approach includes EU-Vietnam, KOREU, and CETA. Finally, in the examination of these two approaches, there are notable overlaps that shed light on future cooperation through the lessons learned from TTIP.

After selecting and mapping out RTAs in Annex 1, first this section engages in a detailed textual review and comparison of US and EU approaches, using the ILO categories of **obligations, monitoring and cooperation, and enforcement**. This will include tables outlining key provisions for comparison. Secondly, an examination of the effectiveness of these policies in practice was conducted using literature reviews and are

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<sup>29</sup> PTPA entered into force in 2009.

<sup>30</sup> KOREU entered into force in 2009.

<sup>31</sup> BTA entered into force in 2001.

displayed below in green boxes (see Example 0.0). Literature reviews focus on *de jure* and *de facto* effects of the implementation of the labour and environmental provisions in RTAs. These reviews include reporting carried out by government entities, non-governmental organizations (NGO), academic researchers, and news agencies. The policy in practice examples provide critical background for the policy recommendations laid out in the next chapter, Chapter 4.

**- Example 0.0 -**

**(Country Approach) Name of Labour/Environmental Provision:**

Description of the provision in practice. Please note, the lessons learned and applications for future labour and environmental provisions in RTAs will be built on these examples and discussed further in Chapter 4.

**Conclusion/Relevance**

### **3.1 Obligations**

Based on the definition laid out in Section 2, obligations address the broad categories of aspirational statements, domestic labour and environmental laws, thematic obligations, and international labour standards and environmental standards.

Due to the large differences in the nature of labour and environmental obligations, it was decided not to consider thematic obligations, as well as aspirational statements, and instead focused on substantive obligations. These substantive obligations either refer to domestic law, international standards, or both. The substantive obligations were divided into four key areas for textual comparison. These include obligations on (1) effective enforcement of existing domestic regulation, (2) non-derogation of domestic standards, (3) conditionalities to reform and/or harmonize domestic law with



the obligations set out in the RTA, and (4) ratification of and compliance with existing multilateral obligations<sup>32</sup>.

Table 4, below, compares the six (plus KOREU) identified obligation provisions observed in RTAs. All of the identified areas are found in most selected RTAs. However, there are some small differences in the US approach, which puts more emphasis on domestic reform (especially on the labour side). Such “reform provisions” are only found in one newer EU RTA, EU-Vietnam. There are also some small differences within the EUs RTAs regarding remedies and procedural guidelines. Lastly, only some RTAs (USMCA, CPTPP, EU-Vietnam) also entail pre-ratification conditionalities as specific reform obligations, which are structured in an accompanying manner to the actual RTA and are only found in reference to labour law.

Finally, this report finds that (pre-ratification) conditionalities for domestic law reform, obligations to ratify international conventions, and improved specific targets and timeframes are key areas for improvement for labour provisions and especially for environmental provisions in RTAs. In general, specific obligations are more prevalent in labour provisions than in environmental provisions. This creates a one-sided mutual learning effect that will, amongst others, be reflected in the policy recommendations found in Chapter 4.

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<sup>32</sup> As of 2016, seventy-two percent of all trade-related labour provisions reference the ILO conventions and instruments. See: <https://publications.iadb.org/bitstream/handle/11319/6724/U.S.%20Free%20Trade%20Agreements%20and%20Enforcement%20of%20Labour%20Law%20in%20Latin%20America.pdf;jsessionid=ABB5D492E20B406323A4C7A6C3A50B54?sequence=1>

**Table 4: Obligations in RTAs on Labour and Environment**

Approach	RTA	Enforcement of existing domestic regulation	Non-derogation from existing domestic standards	Reform of domestic laws	Compliance with existing multilateral obligations*	Other obligations
Old Approach	BTA: Labour	×	×	×	×	×
	BTA: Environment	×	×	×	×	×
US Approach	PTPA: Labour	√	√	√	√	×
	PTPA: Environment	√	√	×	√	×
	CPTPP: Labour	√	√	√	√	Pre-ratification conditionalities
	CPTPP: Environment	√	√	×	√	×
	USMCA: Labour	√	√	√	√	Pre-ratification conditionalities
	USMCA: Environment	√	√	×	√	×
EU Approach	EU-Vietnam: TSD	×	√	√ (Labour)	√	Pre-ratification conditionalities
	KOREU: TSD	√	√	√ (Labour)	√	×
	CETA: Labour	√	√	×	√	×
	CETA: Environment	√	√	×	√	×

\*For a detailed analysis, see: Annex 2

\*\*For the purposes of this section, KOREU was added to the obligation provisions table for comparison.

**US/EU approach:** Throughout all the types of obligations examined, the US and the EU approach are fairly similar. As such, their provisions and implementation will not be examined as separate approaches.

In practice, one of the most notable obligations is RTAs' requirement for Parties to reform their domestic law. These provisions are especially vital in RTAs following a US approach, which prioritize efforts to improve national legal processes for the enforcement of labour rights.<sup>33</sup> This policy is seen in practice in Example 1.1.

**- Example 1.1 -**

**(US) Obligation to Reform Domestic Laws:**

US RTAs with Latin American countries show that RTAs can lead to significant improvements in Parties' labour laws and inspections system "in order to show their good faith in continuing out such behavior once the treaty was signed."<sup>34</sup>

However, this is not always the case. PTPA implementation shows that NGOs have highlighted that Peru's promised changes to domestic law were neither implemented *ex ante*, prior to the signing of PTPA, nor *ex post*, at a time when the US Congress no longer had leverage. Further, the monitoring of PTPA's implementation indicated that subcontracting and outsourcing was creating legal loopholes allowing child labour, forced labour, and an inability to unionize.<sup>35</sup> These were key concerns raised by US Congressional Democrats before PTPA went into force.<sup>36</sup>

As a consequence, in newer RTAs following the US approach, including USMCA and CPTPP, such obligations have changed their nature to become pre-ratification conditionalities.

<sup>33</sup> Ville - TTIP and Labour Standards.Pdf," accessed January 4, 2022, [https://www.europarl.europa.eu/RegData/etudes/STUD/2016/578992/IPOL\\_STU\(2016\)578992\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/578992/IPOL_STU(2016)578992_EN.pdf).

<sup>34</sup> Cayla D Ebert, "Effectiveness of Labor Provisions within Free Trade Agreements Between the United States and Latin American Countries" 27 (n.d.): 38.

<sup>35</sup> "Perufta-Oneyear.Pdf," accessed January 4, 2022, <https://www.citizen.org/wp-content/uploads/perufta-oneyear.pdf>.

<sup>36</sup> US-Peru FTA Should Not Be Certified Until Outstanding Issues Are Resolved," Ways and Means Committee - Democrats, January 14, 2009, <https://waysandmeans.house.gov/media-center/press-releases/us-peru-fta-should-not-be-certified-until-outstanding-issues-are>.

**Example 1.1 demonstrates the success of obligations to change domestic laws and lessons that can be learned from including pre-ratification conditionalities in RTA negotiations.**

In contrast to the US, the EU is putting particular emphasis on obligations to ratify international labour conventions. This is probably caused by the fact that most EU countries have ratified the fundamental ILO conventions, whereas the US has only ratified two (see Table 7/8 in Annex 2). However, in practice, simply listing an obligation to ratify ILO conventions is sometimes not enough, as Example 1.2 illustrates.

*- Example 1.2 -*

**(EU) Obligations to Ratify ILO Conventions/MEAs (as Pre-Ratification Conditionalities):**

The EU has identified efforts to secure the agreement of partner countries to ratify ILO Conventions as a key priority for future RTAs.<sup>37</sup> A successful example can be seen in the EU-Vietnam RTA. In this RTA, the EU included the ratification of ILO Conventions as a pre-ratification conditionality. During the pre-implementation phase of the EU-Vietnam RTA, Vietnam implemented substantive labour reforms. This included the ratification of certain ILO Conventions and the adoption of a new Labour Code aligned with international labour standards. Nevertheless, it should be noted that actual implementing regulations are still pending.<sup>38</sup>

Some observers have suggested that the EU has allowed its RTA negotiating partners to water down obligations for the ratification of conventions, like the freedom of association. However, Vietnam did update associated parts of its domestic labour law.<sup>39</sup>

Notably, the success of this type of obligation in the EU-Vietnam RTA is marked by their character as pre-ratification conditionalities. This

<sup>37</sup> Trade and Sustainable Development," n.d., 12.

<sup>38</sup> Comparative Analysis of TSD Provisions for Identification of Best Practices to Support the TSD Review," 19, accessed January 4, 2022, <https://www.lse.ac.uk/business/consulting/reports/comparative-analysis-of-tds-provisions-for-identification-of-best-practices>.

<sup>39</sup> The EU as a Promoter of Human Rights in Bilateral Trade Agreements: The Case of the Negotiations with Vietnam | Journal of Contemporary European Research," accessed January 4, 2022, <https://jcer.net/index.php/jcer/article/view/655>.

can be seen as a learning from the KOREU RTA, where obligations to ratify ILO conventions, despite being of the same legal nature, have not been followed by South Korea. After the ratification of the RTA, the pressure and incentives perceived by South Korea were much lower.<sup>40</sup>

In theory, obligations to ratify MEAs in environmental provisions could also be included in RTAs, but such obligations are nowhere to be found in the RTAs examined in the report. This might be caused by the fact that most MEAs relevant for trade (as per WTO definition) are already ratified by most states (see Table 9 in Annex 2).<sup>41</sup>

**Example 1.2 highlights the potential of specifically incorporating international agreements and their paraphrasing into domestic law as obligations of RTAs. Tangible results can be achieved by such provisions, especially as pre-ratification conditionalities.**

Pre-ratification conditionalities present one way of ensuring that words in obligations are also followed by deeds. In practice, another way could be defining firm goals or timeframes for implementation as Example 1.3 shows.

*- Example 1.3 -*

**1.3 (EU) Obligations Involving Specific Targets/Time Frames instead of “Best Efforts”:**

As KOREU has demonstrated, it is important to ensure that the obligations listed in the TSD chapter can stand on their own and not only in a manner relying on the “best efforts” of Parties. A dispute settlement panel was initiated by the EU regarding an allegation against South Korea for violating KOREU’s TSD chapter. The panel found that even though KOREU imposes ongoing obligations to make efforts, South Korea did not commit to any specific time frame, but only to a “best efforts” type of provision.<sup>42</sup>

<sup>40</sup> “Panel of Experts Proceeding Constituted under Article 13.15 of the Eu-Korea Free Trade Agreement,” accessed January 7, 2022, [https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc\\_159358.pdf](https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159358.pdf).

<sup>41</sup> “WTO | WTO Matrix on Trade-Related Measures Pursuant to Selected Multilateral Environmental Agreements (MEAs),” accessed January 4, 2022, [https://www.wto.org/english/tratop\\_e/envir\\_e/envir\\_matrix\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/envir_matrix_e.htm).

<sup>42</sup> “Panel of Experts Proceeding Constituted under Article 13.15 of the Eu-Korea Free Trade Agreement.”

However, the EU may in some cases be unable to insist that RTA partners ratify certain international conventions before the EU will ratify the RTA (see Example 1.2 above). Where the EU's RTA partners may not agree to such pre-ratification conditionalities, the EU could adopt the alternatives of listing specific targets and timeframes for obligations in an RTA. Such a solution could be a more direct solution to the problem caused by relying only on "best-efforts" based provisions.

**Example 1.3 underlines the need for specific targets/time frames instead of "best efforts" types of provisions when Parties want to see tangible actions to the agreed upon commitments.**

Obligations in labour and environmental provisions in RTAs can be very useful and effective means to achieve fruitful results for both labour and the environment. This is especially the case when obligations are intended to lead to the adaptation of domestic law and/or concrete domestic policy actions. This can be done either directly with specific obligations, through a commitment to ratify international agreements, or by defining concrete goals and timetables for actions. Obligations as pre-ratification conditionalities have proven to be particularly fruitful, as the incentives to comply with obligations are the highest during negotiations, before ratification. This is of particular relevance for the EU approach, as it does not provide for the possibility of enforceable sanctions, as is the case for RTAs following a US approach.

### **3.2 Cooperation and Monitoring**

This section examines how RTAs support or ensure the implementation of labour and environmental obligations through cooperation and monitoring. Cooperation and monitoring activities and mechanisms are essential elements for ensuring the implementation of the key obligations and goals of an agreement. As laid out in Table 5, below, the framework of cooperation and monitoring provisions is broken down into (1) cooperative

activities, (2) technical assistance and capacity building, (3) the establishment of mutual contact points, (4) setting up of joint working councils/committees, (5) establishment of domestic advisory groups, and (6) additional mechanisms.

**Cooperative activities** refer to regulatory cooperation, the international and domestic sharing of information, as well as scientific cooperation such as dialogue, training, seminars, and joint studies. **Technical assistance and capacity building** refers to the process of developing and strengthening the skills, abilities, processes and resources to effectively implement RTA provisions. The **contact point** (or focal point) refers to a domestic authority nominated by a Party for communication with the other Party regarding labour or environmental issues (including requests for consultations and requests for information) or evaluating written submissions from individuals.<sup>43</sup> The **council/committee**, composed of senior government representatives or their designees, is a forum to oversee the implementation of an RTA's labour or environment chapter.<sup>44</sup> The **domestic advisory group** is a consultative committee, including civil societies, to seek views on matters related to the implementation of the labour or environmental chapters.<sup>45</sup> Finally, **additional mechanisms** refer to commissions for environmental cooperation and voluntary mechanisms to enhance environmental performance.

Table 5 also examines whether the six categories of cooperation and monitoring activities and mechanisms exist in the labour chapters or environmental chapters. This step aims to determine whether monitoring and

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<sup>43</sup>“Codebook\_0.Pdf,” 53, accessed December 18, 2021, [https://www.chaire-epi.ulaval.ca/sites/chaire-epi.ulaval.ca/files/publications/codebook\\_0.pdf](https://www.chaire-epi.ulaval.ca/sites/chaire-epi.ulaval.ca/files/publications/codebook_0.pdf); “Labour Rights Protection and Its Enforcement under the USMCA: Insights from a Comparative Legal Analysis | World Trade Review | Cambridge Core,” 18, accessed December 18, 2021, <https://www.cambridge.org/core/journals/world-trade-review/article/labour-rights-protection-and-its-enforcement-under-the-usmca-insights-from-a-comparative-legal-analysis/C24881E4D72CDEAD0A78463875C5CE8C>.

<sup>44</sup> “Codebook\_0.Pdf,” 56.

<sup>45</sup> Deborah Martens, Diana Potjomkina, and Jan Orbie, “DOMESTIC ADVISORY GROUPS IN EU TRADE AGREEMENTS,” n.d., 9.

cooperative activities and mechanisms in labour and environmental chapters share the same structure. Third, the table is separated by the six examined RTAs through three different approaches (the old approach, US approach, and the EU approach).<sup>46</sup>

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<sup>46</sup> It is notable that as there are no related mechanisms in the BTA, this section does not analyse this old approach.



**Table 5: Cooperation and Monitoring Provisions in RTAs on Labour and Environment**

Approach	RTAs	Cooperative Activities	Technical Assistance and Capacity Building	Contact Point	Council/ Committee	Domestic Advisory Group	Additional Mechanisms
Old Approach	BTA: Labour	×	×	×	×	×	×
	BTA: Environment	×	×	×	×	×	×
US Approach	PTPA: Labour	√*	√	√	Council	√	×
	PTPA: Environment	√*	√	√	Council	√	1) Commission for Environmental Protection 2) Mechanisms to Enhance Environmental Performance
	CPTPP: Labour	√	√	√	Council	√	×
	CPTPP: Environment	√	√	√	Committee	√	1) Voluntary Mechanisms to Enhance Environmental Performance
	USMCA: Labour	√	√	√	Council	√	×
	USMCA: Environment	√	√	√	Committee	√	1) Commission for Environmental Protection 2) Voluntary Mechanisms to Enhance Environmental Performance
EU Approach	EU-Vietnam: TSD	√	√	√	TSD Committee	√	×
	CETA: Labour	√	×	√	TSD Committee	√	×
	CETA: Environment	√	×	√	TSD Committee	√	×

\* Cooperative activities in PTPA are quite limited and differ slightly between labour and environmental provisions.

**US Approach:** As shown in Table 5, the labour chapters and environmental chapters of PTPA, CPTPP and USMCA are separate and each establish individual mechanisms to conduct cooperative and monitoring activities. Labour and environmental mechanisms typically follow a three-layer structure, consisting of a Contact Point, Labour Council/Environmental Committee, and Domestic Advisory Group. However, the US approach goes significantly further by focusing more on environmental provisions than labour provisions.

As evident in the last column of Table 5, US environmental chapters create two additional mechanisms: (1) the Commission for Environmental Cooperation (as in PTPA and USMCA), and (2) voluntary mechanisms to enhance environmental performance (as in PTPA, CPTPP, and USMCA).

First, the **Commission for Environmental Cooperation (CEC)** in the side-agreements of PTPA and USMCA constitute the main differences between the labour and environment chapters. The current structure of the CEC can be broken down into three main parts: **the Council, Joint Public Advisory Committee (JPAC), and Secretariat.**<sup>47</sup>

The **Council**, composed of high-level environmental authorities (cabinet-level or equivalent) from RTA Member States, is the governing body of the Commission.<sup>48</sup> Major tasks of the Council are overseeing and providing instructions to the Secretariat and JPAC. In USMCA, the **JPAC** is composed of nine citizens representing non-governmental organizations, academia, the private sector, indigenous peoples, private citizens, and youth. It aims to promote continental cooperation in ecosystem protection and sustainable economic development, and to ensure active public participation.<sup>49</sup> As a group of volunteer citizens, JPAC sees itself as a

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<sup>47</sup> Agreement on Environmental Cooperation USMCA, Article 5.

<sup>48</sup> Agreement on Environmental Cooperation USMCA, Article 7.

<sup>49</sup> Agreement on Environmental Cooperation USMCA, Article 6.

microcosm of the public: independent individuals who contribute diverse, but rich institutional experience and cultural perspectives.”<sup>50</sup>

The **Secretariat** is headed by an Executive Director, chosen by the Council. Its activities are carried out by professional staff from Member States. The Secretariat has two primary functions: (1) supporting the work of Council and (2) **providing factual records of public submissions on enforcement matters**. PTPA and USMCA empower stakeholders to make submissions related to either labour or environmental obligations. However, the Secretariat is obliged to provide factual records of public submissions, if necessary, only in the environment chapter. A similar mechanism does not exist in the labour chapter. The purpose of a factual record is to provide an objective presentation of the facts relevant to the assertion set forth in the submission, and to allow readers to draw their own conclusions regarding a Party’s environmental law enforcement.<sup>51</sup>

In practice, the Commission for Environmental Cooperation (CEC) has been applauded as enhancing cooperation between RTA Parties, as evident in Example 2.1.

**- Example 2.1 -**

A ten-year review and assessment commissioned by the Council of CEC found that the Joint Public Advisory Committee (JPAC) has successfully promoted citizen engagement on environmental issues and the Secretariat has increased government accountability towards enforcement of environment laws by providing factual records.<sup>52</sup>

<sup>50</sup> ERDb | The Joint Public Advisory Committee of the North American Commission for Environmental Cooperation,” accessed January 4, 2022, <http://environmentalrightsdatabase.org/the-joint-public-advisory-committee-of-the-north-american-commission-for-environmental-cooperation/>.

<sup>51</sup> Mireille Pasos, “CEC Recommends Investigation of Sumidero Canyon II Submission and Delivers Factual Record for Environmental Pollution in Hermosillo II Submission,” Commission for Environmental Cooperation (blog), accessed December 18, 2021, <http://www.cec.org/media/media-releases/cec-recommends-investigation-of-sumidero-canyon-ii-submission-and-delivers-factual-record-for-environmental-pollution-in-hermosillo-ii-submission/>.

<sup>52</sup> The North American Agreement on Environmental Cooperation: Has It Fulfilled Its Promises and Potential? An Empirical Study of Policy Effectiveness, 132.

### **(US/EU) Environmental Advisory Bodies with Civil Society and Private Sector Actors:**

The Joint Public Advisory Committee (JPAC) is distinctive in the US RTAs' environmental chapters. The labour chapter in US RTAs only contains Domestic Advisory Groups (DAGs). Comparatively, EU RTAs do not establish a JPAC, only DAGs for labour and environmental protection. Both the JPAC and DAGs have representatives from civil society and the private sector. The key differences are that JPAC is one forum that all Party countries contribute representatives to, whereas a separate DAG is set up in each Party country. Secondly, JPAC is a long-standing forum, whereas DAG only meets on average twice a year. DAG has been criticised as insufficient to enable DAGs to serve as a platform for meaningful dialogue.<sup>53</sup> By comparison, JPAC meets up consistently to strengthen the linkage of each Party and enhance overall efficacy.

### **(US) Public Submission on Environment/Factual Records:**

The Secretariat is obligated to provide factual records of public submissions on enforcement matters. Although a factual record does not contain recommendations, it is expected to outline the history of the environmental enforcement issues raised in the submission, the relevant legal obligations of the Party, and the actions of the Party in fulfilling those obligations, thus serving as a valuable information-sharing tool. The factual records are also a type of soft law aimed at resolving potential areas of conflicts, without going to formal dispute settlements.<sup>54</sup> In the Villa Veranda case, the local community submitted that the El Salvadorian state and central government did not consult with them on the housing project (Villa Veranda) that negatively impacted their homes.<sup>55</sup> After the submission, the Secretariat drafted and published the factual record. Through the factual record, the community was able to provide missing information. As a result, the government agreed to establish a fund for the affected communities for damage due to the construction of the housing project.

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<sup>53</sup> Deborah Martens, Diana Potjomkina, and Jan Orbie, "DOMESTIC ADVISORY GROUPS IN EU TRADE AGREEMENTS," n.d., 74.

<sup>54</sup> Commission for Environmental 'Cooperation of North America, Art. 15(1) Notification to Council that Development of a Factual Record is warranted, available at, [http://www.cec.org/sites/default/files/submissions/1995\\_2000/6064\\_97-2-adv-e.pdf](http://www.cec.org/sites/default/files/submissions/1995_2000/6064_97-2-adv-e.pdf).

<sup>55</sup> This case is submitted under the Dominican Republic-Central America FTA. Procedures of providing factual records are the same in Dominican Republic-Central America FTA and UMCA.

**Example 2.1 demonstrates the success of JPAC and factual records in enhancing environmental protection. Given that these mechanisms are not included for labour provisions, policy recommendations for the expansion of these provision will be discussed in Chapter 4.**

Second, the environment chapter in all three US RTAs establishes additional **voluntary mechanisms to enhance environmental performance**.<sup>56</sup> Voluntary mechanisms include voluntary auditing, audit reporting, and voluntary sharing of information. Voluntary mechanisms enhance private sector engagement, similar to corporate social responsibilities (CSR). CSR is a mechanism that facilitates the engagements of private-sector entities to audit and report on implementation.<sup>57</sup> There are two separate provisions in USMCA regulating CSR and voluntary mechanisms respectively (Article 24.13 of USMCA provides for CSR and Article 24.14 of USMCA stipulates voluntary mechanisms). Environmental CSR promotes the responsibility of private entities, aiming to reduce any damaging effects on the environment from business processes.<sup>58</sup> Meanwhile, voluntary mechanisms emphasize the positive engagement of private entities in environmental protection. By adopting voluntary mechanisms, to follow CSR's example, private sector entities can contribute more to the achievement and maintenance of high levels of environmental protection and complement domestic regulatory measures.<sup>59</sup>

In practice, voluntary mechanisms have received criticism for their effectiveness in environmental protection, as evident in Example 2.2.

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<sup>56</sup> PTPA, Article 20.1; CPTPP, Article 20.11.

<sup>57</sup> USMCA, Article 24.14.

<sup>58</sup> "Corporate Social Responsibility: Environmental Impact | Nibusinessinfo.Co.Uk," accessed December 18, 2021, <https://www.nibusinessinfo.co.uk/content/corporate-social-responsibility-environmental-impact>.

<sup>59</sup> USMCA, Article 24.14.

- Example 2.2-

**(US) Voluntary Mechanisms to Enhance Environmental Performance:**

Voluntary mechanisms in the environmental chapters are innovative through the positive engagements of private-sector entities and NGOs.<sup>60</sup> The main advantages of voluntary approaches are their flexibility.<sup>61</sup> The World Economic Forum also confirms that the use of such voluntary measures is likely to increase in the future as new, greener business models become mainstream. This will be further complemented by the growing awareness of environmental imperatives among consumers.<sup>62</sup>

However, the voluntary approach has received criticism for being inadequate in achieving an optimal level of environmental protection.<sup>63</sup> In particular, there is a risk that some producers will seek to free-ride on environmental protection measures undertaken by others. Similar to some economic instruments, voluntary mechanisms also lack predictability and are ill-suited to deal with uncertainty and irreversibility. Finally, voluntary approaches can also be expensive to operate and administer. The incentives necessary to encourage participation can impose a significant burden on stakeholders and taxpayers.

**Example 2.2 illustrates the failure of voluntary mechanisms to enhance environmental performance. Although the labour chapter does not establish this mechanism, this paper does not recommend RTAs incorporating similar voluntary mechanisms to enhance labour performance. Detailed suggestions will be discussed in Chapter 4.**

In conclusion, the structure of cooperation and monitoring mechanisms in labour and environmental chapters in the US Approach are similar, with the exception of the CEC and voluntary mechanisms. They both establish a Contact Point, a Council/Committee and domestic advisory

<sup>60</sup> “ERDb | The Joint Public Advisory Committee of the North American Commission for Environmental Cooperation,” 21.

<sup>61</sup> Clive Hamilton et al., “Environmental Protection and Ecology ☆,” in *Encyclopedia of Ecology* (Second Edition), ed. Brian Fath (Oxford: Elsevier, 2019), 319–26, <https://doi.org/10.1016/B978-0-12-409548-9.11125-X>.

<sup>62</sup> “WEF\_White\_Paper\_Whats\_in\_and\_whats\_new.Pdf,” 22, accessed January 4, 2022, [https://www3.weforum.org/docs/WEF\\_White\\_Paper\\_Whats\\_in\\_and\\_whats\\_new.pdf](https://www3.weforum.org/docs/WEF_White_Paper_Whats_in_and_whats_new.pdf).

<sup>63</sup> Hamilton et al.

groups. However, the US environmental chapters go further in establishing the CEC, which includes JPAC and factual records, and voluntary mechanisms to enhance environmental protection. These do not exist in labour provisions.

**EU Approach:** EU RTAs adopt the same three-layer structure as the US. However, EU RTAs establish one Contact Point and one Domestic Advisory Group (DAG) in each country, as well as one TSD Committee to implement both labour and environmental obligations. In the EU's proposal for a legal text on institutional provisions in TTIP, the EU suggested adopting the same mechanisms. Compared with US RTAs, the EU approach did not establish any separate commission for labour or environmental protection. EU RTAs also did not allow for public submission on enforcement matters. CETA is unique in its adoption of both the US' separate labour and environmental chapters, as well as the EU' combined Trade and Sustainable Development (TSD) chapter. However, it largely follows the EU approach as within its TSD chapter it creates separate Contact Points and Domestic Advisory Groups for both labour and environment.

In practice, the EU has been praised for changing the rhetoric and linking labour and environment with sustainable development through one multi-purpose TSD committee. However, such a combination of labour and environmental protection has received criticism, as evident in Example 2.3.

*- Example 2.3 -*

**(EU) Trade and Sustainable Development (TSD) Committee:**

The TSD committee has been complimented for breaking down traditional “labour”, “environment”, and “sustainable development” silos and

interlinking economic, environmental, and social concerns.<sup>64</sup> TSD may also provide an efficient solution when disputes arise that involve both labour and environmental issues.<sup>65</sup>

Scepticism remains on the effectiveness of combining labour and environmental provisions in a single TSD chapter, without a separate chapter for each. TSD is not a simple merging of both labour and environment provisions, as it has inherently different goals and dynamics.<sup>66</sup> Without keeping labour and environment separate, the TSD committee may focus on tackling multi-purpose issues and not giving as much weight to either labour and environment.<sup>67</sup>

**Example 2.3 demonstrates the effectiveness of the TSD Committee in the EU RTAs and related scepticism received. Given that the US approach treats labour and environmental protection separately, and establishes the individual labour council and environmental committee, additional provision ideas will be discussed in Chapter 4.**

This section demonstrates that the US and EU approach both adopt a three-layer structure to establish institutional mechanisms. It also confirms that the US approach separates labour and environmental mechanisms, while the EU RTA's integrates both labour and environmental mechanisms. Finally, US RTAs establish additional environmental institutional mechanisms to facilitate input and monitoring by concerned citizens and NGOs. Monitoring and cooperation is essential for both labour and environmental protection. This is the area with the largest learning potential between labour and environment trade approaches, as well as the US and EU approaches. Building off the analysis above, Chapter 4 will provide detailed policy

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<sup>64</sup> "Next Generation Trade and Sustainable Development – Reviewing the 15-Point Action Plan (Own-Initiative Opinion) | European Economic and Social Committee," accessed January 4, 2022, <https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/next-generation-trade-and-sustainable-development-reviewing-15-point-action-plan-own-initiative-opinion>.

<sup>65</sup> Interview with Katheen Claussen.

<sup>66</sup> Interview with Katheen Claussen.

<sup>67</sup> Interview with Katheen Claussen.



recommendations on how to improve labour and environmental protection through monitoring and cooperation.

### 3.3 Enforcement

Enforcement provisions have grown exponentially in coverage and binding nature since the inclusion of labour and environmental clauses in RTAs. As indicated in Table 6 below, the key elements of enforcement are (1) consultations, (2) dispute settlement mechanisms (DSM), and (3) remedies for non-compliance. Consultation refers to the process by which Parties consult each other, and in some cases a secondary advisory council, to resolve labour or environmental disputes. DSM is categorised as “hard” DSM (or arbitration panels) and “soft” DMS (or advisory panels, referred to as a “Panel of Experts”).<sup>68</sup> Third, some RTAs include remedies for non-compliance, covering a range of technical assistance, fines, or sanctions.<sup>69</sup>

Based on these key elements, RTAs can generally be divided into a US and a EU approach. The breakdown set out below details the main differences between these approaches and how they have innovated since trade agreements like BTA were negotiated in 2001. The early RTAs typically contained no enforcement mechanisms specific to labour or the environment.<sup>70</sup> It was not until the late 2000s that RTAs first incorporated relevant enforcement mechanisms. This shift marked a fundamental change in approach, when countries began to take these provisions, and their impacts on trade, seriously.

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<sup>68</sup> “Comparative Analysis of TSD Provisions for Identification of Best Practices to Support the TSD Review,” 26.

<sup>69</sup> “Dispute Settlement Under the U.S.-Peru Trade Promotion Agreement: An Overview,” accessed January 4, 2022, [https://www.everycrsreport.com/reports/RS22752.html#\\_Toc301331710](https://www.everycrsreport.com/reports/RS22752.html#_Toc301331710).

<sup>70</sup> “US-VietNam-BilateralTradeAgreement.Pdf,” accessed January 4, 2022, <https://ustr.gov/sites/default/files/US-VietNam-BilateralTradeAgreement.pdf>.

Table 6: Enforcement Provisions in RTAs on Labour and Environment							
Approach	RTA	Party Consultation	Secondary Consultations	“Hard” DSM: Arbitration Panel	“Soft” DSM: Advisory “Panel of Experts”	Rapid Response Mechanism	Remedies
Old Approach	BTA: Labour	×	×	×	×	×	×
	BTA: Environment	×	×	×	×	×	×
US Approach	PTPA: Labour	√	√	√	×	×	√
	PTPA: Environment	√	√	√	×	×	√
	CPTPP: Labour	√	√	√	×	×	√
	CPTPP: Environment	√	√	√	×	×	√
	USMCA: Labour	√	√	√	×	√	√
	USMCA: Environment	√	√	√	×	×	√
EU Approach	KOREU: TSD*	√	×	×	√	×	×
	EU-Vietnam: TSD	√	×	×	√	×	×
	CETA: Labour	√	×	×	√	×	×
	CETA: Environment	√	×	×	√	×	×

\*For the purposes of this section, KOREU was added to the enforcement provisions table for comparison.

**US Approach:** In 2009, PTPA became the baseline for US RTAs as the first to enforce labour and environmental provisions.<sup>71</sup> PTPA involved separate, but similar, labour (Chapter 17) and environmental (Chapter 18) chapters. Both chapters included provisions for initial Party consultations, followed by secondary consultations through an established advisory council. If the multi-step consultation process failed, disputes moved to an arbitration panel under Chapter 21. This is the same general DSM chapter that applies to all other RTA provisions, and can subject disputes to technical assistance, fines, or sanctions.<sup>72</sup> In practice, the first step of party consultations has proved successful for both labour and environmental disputes, as evident in Example 3.1.

*- Example 3.1 -*

**(US) Environmental Consultation:**

This first successful resolution using the environmental consultation mechanism in PTPA was decided in 2019. The case began in December 2018, when the Peruvian government restructured their agency responsible for forestry laws, potentially threatening the agency's independence and effectiveness. In January 2019, using Article 18.12.1 of the PTPA Environment Chapter, the US requested consultations regarding the decision. This resulted in Peru allowing the agency to remain independent.

<sup>73</sup>

**(US) Labour Consultation:**

PTPA's Annex on Forest Sector Governance requires audits over timber producers, exporters, and shipments coming from Peru to the US. It also creates an Interagency Committee on Trade in Timber Products to monitor Peruvian companies. This annex provided the basis for cooperation leading the US to contribute \$90 million in technical support to Peru to

<sup>71</sup> "Asset\_upload\_file127\_11319.Pdf," accessed January 4, 2022, [https://ustr.gov/sites/default/files/uploads/factsheets/2007/asset\\_upload\\_file127\\_11319.pdf](https://ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf).

<sup>72</sup> "Dispute Settlement Under the U.S.-Peru Trade Promotion Agreement."

<sup>73</sup> "USTR Successfully Resolves Concerns Raised in First-Ever Environment Consultations Under the U.S.-Peru Trade Promotion Agreement (PTPA) | United States Trade Representative," accessed January 4, 2022, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/april/ustr-successfully-resolves-concerns>.

create an electronic log tracking system.<sup>74</sup> It has been argued that this annex served as a precursor to USMCA's Rapid Response Labour Mechanism (RRLM).<sup>75</sup> The success of this annex and the later innovation of RRLM suggest the benefit and efficiency of specific cooperative mechanisms within labour or environmental provisions.

**Example 3.1 sheds light on the success of party consultations and how these successes are already leading to improved mechanisms in sequential RTAs.**

Today the US continues to innovate through USMCA's use of a cooperative labour dialogue procedure as an informal alternative to the general DSM.<sup>76</sup> USMCA also brought forth a new Rapid Response Labour Mechanism (RRLM) to resolve denials of free association and collective bargaining, or the "Denial of Rights."<sup>77</sup> In practice, RRLM has proven successful for fast-tracking labour disputes, as evident in Example 3.2.

**- Example 3.2 -**

**(US) Rapid Response Labour Mechanism (RRLM):**

In May 2021 the American Federation of Labor and Congress of Industrialised Organisations (AFL-CIO) filed the first complaint under Annex 31-A, the RRLM of USMCA.<sup>78</sup> The AFL-CIO stated that this would "test whether Mexico's labour reforms and USMCA's Rapid Response Mechanism can deliver for Mexican workers denied their fundamental right to organize and bargain for better wages and working conditions."<sup>79</sup> In September 2021 this became the first successfully concluded course of

<sup>74</sup> "Trade's Experimental Compliance Mechanisms by Kathleen Claussen: SSRN," accessed January 4, 2022, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3627364](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3627364).

<sup>75</sup> "Trade's Experimental Compliance Mechanisms by Kathleen Claussen: SSRN."

<sup>76</sup> USMCA, Article 23.13.

<sup>77</sup> Nina M Hart, "USMCA: Legal Enforcement of the Labor and Environment Provisions," n.d., 30.

<sup>78</sup> "International: First Labor Complaints Filed through United States-Mexico-Canada Agreement Rapid Response Labor Mechanism," web page, Library of Congress, Washington, D.C. 20540 USA, accessed January 6, 2022, <https://www.loc.gov/item/global-legal-monitor/2021-06-03/international-first-labor-complaints-filed-through-united-states-mexico-canada-agreement-rapid-response-labor-mechanism/>.

<sup>79</sup> "AFL-CIO, SEIU, SNITIS And Public Citizen Announce Filing of First USMCA 'Rapid Response Mechanism' Labor Case to Fight for Mexican Workers Denied Independent Union Representation | AFL-CIO."

remediation under RRLM.<sup>80</sup> While not all issues were addressed, as workers were still dismissed, the compensation and commitment to a "a proper union election" is significant, as observed by AFL-CIO trade specialist Eric Gottwald. He went on to say that "in our eyes, that's progress...They were able to deliver something tangible ... and in record time."<sup>81</sup>

**Example 3.2 shows the success of RRLM for the specific labour provisions of free association and collective bargaining rights. There could be interest in expanding this labour mechanism to future RTAs, depending on the Parties involved. However, after discussion with experts, this fast-tracked resolution for specific cases may be difficult to expand to environmental provisions, as they are generally less defined.<sup>82</sup>**

Finally, CPTPP generally follows the US model, although some labour and environmental provisions were relaxed once the US pulled out of the agreement.<sup>83</sup>

**EU Approach:** By 2010, the EU followed suit and established their template for labour and environment enforcement with the introduction of the EU-South Korea Free Trade Agreement (KOREU). Instead of separate chapters, labour and environment provisions were combined into one legally binding sustainable development chapter, the Trade and Sustainable Development (TSD) chapter (Chapter 13).<sup>84</sup> The first step, similar to the US, is party consultation. If this fails, it is followed by "soft" dispute settlement

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<sup>80</sup> "Statement of Trade Representative Katherine Tai, Secretary of Labor Marty Walsh Applaud Successful First Course of Remediation under USMCA's Rapid Response Mechanism | U.S. Department of Labor," accessed January 4, 2022, <https://www.dol.gov/newsroom/releases/ilab/ilab20210922>.

<sup>81</sup> "U.S. Reaches Deal with Mexican Auto Parts Factory in USMCA Labor Complaint | Reuters," accessed January 4, 2022, <https://www.reuters.com/business/us-reaches-deal-with-mexican-auto-parts-subsiary-tridonex-2021-08-10/>.

<sup>82</sup> Interview with Kathleen Claussen.

<sup>83</sup> "What's Next for the Trans-Pacific Partnership (TPP)? | Council on Foreign Relations," accessed January 4, 2022, <https://www.cfr.org/backgrounder/what-trans-pacific-partnership-tpp#chapter-title-0-6>.

<sup>84</sup> Camilla Adelle, Katja Biedenkopf, and Diarmuid Torney, eds., *European Union External Environmental Policy: Rules, Regulation and Governance Beyond Borders*, Softcover reprint of the original 1st ed. 2018 edition (Place of publication not identified: Palgrave Macmillan, 2018).

containing only an advisory “Panel of Experts.” Finally, instead of being subject to sanctions, disputes are encouraged to result in a mutual understanding.<sup>85</sup> In practice, although it is still too early to fully assess and this mechanism has not yet been used in an environmental dispute, the Panel of Experts has proven successful for labour disputes, as evident in Example 3.3.

- Example 3.3 -

**(EU) Panel of Experts:**

The EU’s cooperative approach receives criticism for being inadequate for resolving disputes in the event of a violation.<sup>86</sup> The argument is that the absence of the threat of meaningful sanctions translates into a limited deterrent effect.<sup>87</sup> However, after discussing this issue with experts in the field, it is evident that this approach is inclusive and, if enough countries are involved, could be more impactful than the US’ arbitration approach.

In January 2021 the first recommendation came down from a Panel of Experts. The panel, established under KOREU, uncovered labour violations by South Korea regarding the freedom of association under Article 13.4.3, within the TSD chapter.<sup>88</sup> Since the recommendation is not legally binding, its implementation will be monitored by the Committee on Trade and Sustainable Development established by the TSD chapter. While it is too early to tell if the recommendations will be fully implemented, South Korea has already proposed bills to ratify ILO conventions on freedom of association.<sup>89</sup>

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<sup>85</sup> Camilla Adelle, Katja Biedenkopf, and Diarmuid Torney, eds., *European Union External Environmental Policy: Rules, Regulation and Governance Beyond Borders*, Softcover reprint of the original 1st ed. 2018 edition (Place of publication not identified: Palgrave Macmillan, 2018).

<sup>86</sup> James Harrison, “The Labour Rights Agenda in Free Trade Agreements,” *The Journal of World Investment & Trade* 20, no. 5 (October 28, 2019): 705–25, <https://doi.org/10.1163/22119000-12340153>.

<sup>87</sup> “Comparative Analysis of TSD Provisions for Identification of Best Practices to Support the TSD Review,” 12.

<sup>88</sup> “Panel of Experts Confirms Republic of Korea Is in Breach of Labour Commitments under Our Trade Agreement - Trade - European Commission,” accessed January 4, 2022, <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2238>.

<sup>89</sup> “The ‘Trade-Related’ Conundrum of the EU–Korea FTA Expert Panel: Are FTAs a Novel Forum to Enforce Sustainable Development Goals? – Investment Treaty News,” accessed January 4, 2022, [https://www.iisd.org/itn/en/2021/10/07/the-trade-related-conundrum-of-the-eu-korea-fta-expert-panel-are-ftas-a-novel-forum-to-enforce-sustainable-development-goals/#\\_ftn3](https://www.iisd.org/itn/en/2021/10/07/the-trade-related-conundrum-of-the-eu-korea-fta-expert-panel-are-ftas-a-novel-forum-to-enforce-sustainable-development-goals/#_ftn3).

**Example 3.3 illustrates the success achieved by the Panel of Experts over labour disputes. However, time will tell if these recommendations are fully implemented. Further, this process has not yet been tested on environmental disputes.**

As previously noted, CETA differs as it is a convergence of the US and EU approaches, containing both a TSD chapter and separate labour and environment chapters. Similar to the US, CETA's enforcement mechanisms are placed in separate labour and environment chapters. However, while Canada typically follows a US approach, CETA dispute settlement follows the same pattern as other EU agreements, with an advisory Panel of Experts and no access to sanctions.<sup>90</sup> As in other EU RTAs, instead of being subject to sanctions, disputes are encouraged to result in a mutual understanding. One notable difference in the case of the CETA is that dispute resolution shall also conclude with a specific "Action Plan" set forth for resolving the underlying causes of the dispute in a step-by-step manner. This innovation, as with previously discussed enforcement mechanisms, should be further evaluated as it stands the test of time.

**US Approach vs EU Approach:** In addition to comparing labour and environmental policies within various RTAs, comparisons between US and EU approaches provide guidance for future trade negotiations incorporating labour and environmental provisions. This could ease negotiation between countries that follow a US or EU approach, as well as any potential resurgence of a transatlantic trade agreement. In practice, these benefits have already been recognized by the parties involved in TTIP negotiations, as evident in Example 3.4.

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<sup>90</sup> "The Trade-Related' Conundrum of the EU-Korea FTA Expert Panel: Are FTAs a Novel Forum to Enforce Sustainable Development Goals? – Investment Treaty News.

- Example 3.4 -

**(US vs EU) Separate Chapters for Labour and Environment/Lessons from TTIP:**

On the EU side, labour and environmental provisions are already enforced together through TSD chapters. On the US side, while labour and environmental provisions are subject to separate consultation processes, these processes mirror each other and both feed into the same general DSM that all other RTA provisions are subject to.

It is notable that while discussions on TTIP stalled, the U.S.-EU High Level Working Group (HLWG) on Jobs and Growth's final report recommended that the two sides "explore opportunities to address these important issues [labour and the environment], taking into account work done in the Sustainable Development Chapter of EU trade agreements and the Environmental and Labour Chapters of U.S. trade agreements."<sup>91</sup>

**Example 3.4 highlights the recognized benefit of the US and EU working together to set the agenda on labour and the environment, and learning from one another innovations.**

One key learning opportunity is the use of remedies for non-compliance. In practice, remedies are already in use in the US and are now under discussion by the EU, as evident in Example 3.5.

- Example 3.5 -

**(US v EU) Remedies for Non-Compliance:**

The possibility of sanctions for non-compliance has been a topic of debate for the European Union. Reports suggest the benefit of sanctions in ensuring compliance, especially amid the recent breakdown of the WTO's dispute settlement mechanism.<sup>92</sup> The European Commission is also currently conducting a review of its recent action plan to improve TSD

<sup>91</sup> Shayerah Ilias Akhtar and Vivian C Jones, "Transatlantic Trade and Investment Partnership (TTIP) Negotiations," n.d., 50.

<sup>92</sup> "Retooling the Sustainability Standards in EU Free Trade Agreements | Journal of International Economic Law | Oxford Academic," accessed January 4, 2022, <https://academic.oup.com/jiel/article/24/1/25/6146679>.



chapters, which will include the possibility of sanctions for non-compliance.

<sup>93</sup>

If remedies are introduced, it would also be important to note that they should include clarifications, as demonstrated by CPTPP's environmental provision. This provision clearly points out that each Party should provide for sanctions or remedies for violating environmental law, and lists the forms of sanctions.<sup>94</sup> It is also noteworthy that CPTPP does not include such clarifications in the labour chapter.

**Example 3.5 demonstrates the learning potential between the US and EU in enforcement mechanisms such as remedies for non-compliance.**

While the US and EU approaches vary, with the exception of RRLM and some untested mechanisms, there are significant similarities between labour and environmental enforcement. The varying approaches highlight the success of party consultations across labour and environment, unclear future for the US' new RRLM, initial success but untested follow through of the EU's Panel of Experts, need for increased US-EU collaboration, and the interest in expanding remedies for non-compliance.

In summary, obligations for labour and environmental provisions can be of significant leverage if they include specific targets, timeframes, jurisdictions, and commitments to implement or change domestic law. Second, the US and EU approaches both adopt a three-layer structure to establish cooperative and monitoring mechanisms. While the US approach sets up individual labour and environmental mechanisms, the EU RTAs integrate both labour and environmental mechanisms. Environmental protection in US RTAs go further, with additional environmental institutional mechanisms such as the Commission for Environmental Protection and

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<sup>93</sup> Open Public Consultation on the Trade and Sustainable Development (TSD) Review - Trade - European Commission," accessed January 4, 2022, [https://trade.ec.europa.eu/consultations/index.cfm?consul\\_id=301](https://trade.ec.europa.eu/consultations/index.cfm?consul_id=301).

<sup>94</sup> CPTPP, Article 20.8 (5) and (6).

voluntary mechanisms to enhance environmental protection. Third, enforcement demonstrates the benefits to both the US' hard DSM and the EU' soft DSM, as well as the need for increased US-EU collaboration and use of best practices, including remedies. Based on the textual analysis and examples of these policies in practice, the next section will provide policy recommendations for future labour and environmental provisions.

## 4. Policy Recommendations

This chapter of the report synthesizes the comparative labour/environment analysis with the assistance of expert interviews and additional literature reviews. This analysis leads to policy recommendations highlighting ways that labour and environmental provisions can be mutually strengthened in trade agreements.

**Obligations:** In general, labour and environmental provisions in RTAs have more similarities than differences. Both are built on similar structures found in the legal texts of RTAs. While both could be broadly categorized as “fruit”, they can also be as different as apples and oranges. Their inherent differences in priorities and constituencies are reflected in their obligations. Nevertheless, as explained below, this report finds that future RTAs should include obligations on domestic laws, a mix of voluntary and mandatory obligations, and non-US/EU trade priorities. Such labour and environmental obligations undertaken by Parties to RTAs would be mutually beneficial.

### **Policy Recommendations – Obligations:**

- 1. Conditionalities to Enact, Reform and Enforce Domestic Labour and Environmental Laws:** The US approach set out in Section 3.1 imposes the obligation on contracting Parties to implement domestic reform of labour protection as a condition for the US ratification of the agreement. This approach has been properly praised as a powerful means to encourage Parties to ratify labour and environmental

provisions, and to further enact domestic laws that will allow enforcement of obligations imposed by the RTA itself. The US model of pre-ratification conditionality has been taken into consideration in the reform of the EU TSD model and in newer EU RTAs (like EU-Vietnam).<sup>95</sup> While these currently exist only for labour, the same obligations could also be undertaken in relation to domestic environmental laws. We recommend that the same pre-ratification conditionality could also act as leverage during trade negotiations to change domestic environmental laws before an RTA enters into force.

**2. A Mix of Voluntary and Mandatory Obligations:** Many experts question the effectiveness of voluntary mechanisms and corporate social responsibility (CSR). However, research has shown that the existence of a strong and credible threat of regulation could enhance the effectiveness of the voluntary approaches. For example, the existence of an appropriate threat of regulation increases the incentive for polluters to participate in the implementation process and bolsters the bargaining position of regulators. It can also reduce the financial incentives needed to ensure participation, which can improve the cost-effectiveness of the program. Therefore, we recommend that Parties mix voluntary and mandatory obligations together to promote labour and environmental protection.

**3. Non-US/EU Trade Priorities: Process and Production Methods (PPMs):** PPMs are not a novelty in trade law in itself, but it was not until 2021 that PPM-based provisions were introduced in a preferential trade agreement, with the EFTA-Indonesia Comprehensive Economic Partnership Agreement (CEPA). The CEPA is an RTA of the EFTA states (Iceland, Liechtenstein, Norway and Switzerland) with Indonesia. It is the first trade agreement that entails a regulatory distinction between

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<sup>95</sup> Harrison, Barbu, Campling, Ebert, Martens, Marx, Orbie, Richardson, and Smith (2019) 'Labour Standards Provisions in EU Free Trade Agreements', 649.

conventional and sustainable production, by only providing preferential tariffs to palm oil producers meeting certain sustainability criteria based on private sustainability standards. The CEPA is the first trade agreement elevating a private sustainability standard to a binding requirement for preferential treatment. Experts say that it “creates a template for binding, enforceable sustainability preferences in trade agreements – a regulatory precedent with the potential to become a new sustainability standard.”<sup>96</sup> We recommend that this preferential treatment obligation can be considered in future RTAs for both labour and environmental provisions.

**Monitoring and Cooperation:** As described in detail in Section 3 above, monitoring and cooperation is the area with the largest learning potential between labour and environment trade approaches, and US and EU approaches. This includes (Policy Recommendation 4, below) establishing commissions for labour or environmental protection, (6) establishing channels for conducting inter-ministerial consultation to address overlapping labour and environmental issues, (7) strengthening stakeholder engagement by codifying it, (8) promoting engagement with private sectors, and (9) public-private cooperation. On the contrary, please note that recommendation 5 suggests not incorporating voluntary mechanisms for either labour or environmental performance.

**Policy Recommendations – Monitoring and Cooperation:**

- 4. Strengthening and Using the US Model of the Commission for Environmental Cooperation for both Labour and Environmental Protection:** As analysed in Section 3.2, the Commission for Environmental Protection (CEC) (including the Council, Secretariat and

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<sup>96</sup> “Is the Future of Preferential Trade in Sustainable Production Only? — TradeExperettes,” accessed January 4, 2022, <https://www.tradeexperettes.org/blog/articles/is-the-future-of-preferential-trade-in-sustainable-product-ion-only>.

Joint Public Advisory Committee) has produced tangible results. This model could be adapted for both labour and environmental provisions:

- a. First, the US' successful implementation of the **Joint Public Advisory Committee** (JPAC) could serve as a model for establishing a similar group for the US labour chapter – as is currently used in environmental provisions. Such a committee could function as an ongoing constant communicating forum. Such a model would overcome the criticisms of the Domestic Advisory Group (DAG), including their limited involvement in labour and environmental issues and low frequency of meetings.
- b. Second, the EU TSD Chapter could create a joint public advisory group, as the EU currently only creates a domestic advisory group. A JPAC, similar to the US, in future EU RTAs could increase cooperation between labour and environmental actors.
- c. Third, the Secretariat of any future RTA could facilitate the public awareness of environment and labour enforcement issues by providing **factual records**.

We recommend that a Commission for Labour/Environmental Protections (including both JPAC and the Secretariat) should be adopted or strengthened for both US labour and environmental chapters. Further, the EU should follow the US' JPAC model and use of factual records.

- 5. RTAs' Provisions should not adopt Voluntary Mechanisms to Enhance Labour or Environmental Performance:** As discussed in Section 3.2, RTAs provide for voluntary cooperation mechanisms to enhance environmental protection. However, these mechanisms

received wide-spread criticism for being ineffective.<sup>97</sup> Thus, future negotiators may wish to avoid the use of such voluntary mechanisms and instead adopt some sort of mandatory mechanisms. We recommend that negotiators should learn from the ineffective experience of voluntary mechanisms in the environmental field by not adopting such mechanisms in either labour or environmental provisions.

**6. Inter-Ministerial Consultation to Address Overlapping Themes:**

Experience has shown regular meetings between labour, environmental, and trade-related ministers could be an effective mechanism to address developments in implementing labour and environmental provisions. There should be a set mechanism mandating that ministers have periodic discussions on any topics of concern to examine potential overlaps in obligations, monitoring or enforcement. In addition, the use of contact or focal points for each RTA trading partner can enhance the addressing of any environmental and labour implementation issues. For example, any issues arising out of the development of electric vehicles in Mexico should be discussed by the Labour Contact Point and intergovernmental Commission for Environmental Cooperation together. We recommend that inter-ministerial consultations and the establishment of contact points be mandated to address overlapping labour and environmental issues.

**7. Codifying Stakeholder Engagement:** We recommend that stakeholder engagement be codified in the text of RTAs as it would ensure there is representation at the table. This would include the labour and environmental constituencies that played a pivotal role in

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<sup>97</sup> “Corporate Social Responsibility and the Failure to End Labour Exploitation,” Delta 8.7 (blog), September 3, 2019, <https://delta87.org/2019/09/corporate-social-responsibility-failure-end-labour-exploitation/>.

ensuring these provisions were included in RTAs in the first place, dating back to NAFTA.

**8. Engagement with the Private Sector:** Under the SDGs and the 2030 Agenda, the private sector is seen as a critical interest group in labour and environmental implementation efforts. To remain effective and constructive, it is essential that the private sector be well-informed and given the opportunity to participate in an ongoing dialogue. This would allow private actors to play a key role in creating and maintaining a business-friendly environment, and pushing for a level playing field for all players. However, this is not a one-way street: private sector funding and expertise could significantly leverage the implementation of needed reforms, particularly in partner countries with significant labour and environmental challenges.<sup>98</sup> We recommend an improved role for the private sector in implementing labour and environment provisions.

**9. Alignment of Public-Private Cooperation:** Experience has demonstrated that it is essential to develop good working relationships between public and private actors through such mechanisms as public private initiatives, like joint working groups. We recommend the improved alignment between public and private actions, as it enhances the possibility of public-private investment and engagement in sustainable projects benefiting both labour and the environment.

**Enforcement:** In contrast to the different labour and environmental obligations in RTAs, this report finds significant similarities between labour and environment enforcement provisions. There are, however, notable differences between US and EU approaches. While both approaches recognize the need for enforcement mechanisms on labour and environment,

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<sup>98</sup> Karolina Zurek, "From 'Trade and Sustainability' to 'Trade for Sustainability' in EU External Trade Policy," in *The European Union in a Changing World Order: Interdisciplinary European Studies*, ed. Antonina Bakardjieva Engelbrekt et al. (Cham: Springer International Publishing, 2020), 115–43, [https://doi.org/10.1007/978-3-030-18001-0\\_5](https://doi.org/10.1007/978-3-030-18001-0_5).

the US leans toward “hard” arbitration-based dispute settlement mechanisms, while the EU leans towards a “soft” advisory board. However, at their core, both approaches carry the same goals. There are merits to both systems depending on the Parties involved. As discussed below, one key area of future collaboration builds on the EU’s recent strategy to link trade benefits with the implementation of the European Green Deal objectives and restoration of dispute settlement.<sup>99</sup>

### **Policy Recommendations – Enforcement:**

**10. More Collaboration to Increase Transatlantic Trade:** The US and EU approaches to enforcement have their own merits and choosing a superior method would create unnecessary tensions in trade negotiations. Instead, there should be proactive discussions on how they could work together. This would ease negotiations for future trade deals among Parties that tend to follow a US or EU approach, including any potential resurgence of a transatlantic trade deal. The collaboration can build off TTIP negotiations. As noted in Section 3.3, this collaboration was a key recommendation of TTIP’s U.S.-EU High Level Working Group (HLWG) on Jobs and Growth’s final report.<sup>100</sup> We recommend increased collaboration between the US and EU to pave the way for future cooperation on trade, labour, and the environment.

**11. RTAs Should Create Remedies for Non-Compliance:** The long-term sustainability of any trade agreements reached in RTAs will be enhanced through the adoption of labour and environmental obligations that are enforced by remedies for non-compliance. For example, following significant debate on the enforceability of the recommendations that come down from the EU’s Panel of Experts, in comparison to the US’ financial penalties, the possibility of sanctions

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<sup>99</sup> “EU Trade Policy,” Text, European Commission - European Commission, accessed January 6, 2022, [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_644](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_644).

<sup>100</sup> Shayerah Ilias Akhtar and Vivian C Jones, “Transatlantic Trade and Investment Partnership (TTIP) Negotiations,” n.d., 50.



for non-compliance is currently under review by the European Commission.<sup>101</sup> We recommend that future RTAs include clearly defined remedies to enforce environmental and labour obligations set out in RTAs.

**Synthesis:** Building off the similarities, differences, and effectiveness in practice summarised within this Section and Section 3, this report puts the above policy recommendations into a larger context by coming back to the three guiding questions:

1. Should labour and environmental provisions be combined in RTAs?
2. Can labour and environmental protection learn from each other?
3. How can coordination between labour and environmental provisions, or US and EU approaches, be enhanced in future RTAs?

**1. Labour and environment should be linked, but not necessarily combined, potentially leading to unnecessary conflict.** For example, it is not particularly important that the US' approach to RTAs has separate labour and environment chapters and the EU has one TSD Chapter. What is important is that both the US and the EU broadly address *both* environment and labour obligations in their RTAs.

For the same reasons, the different **US and EU approaches to RTAs can easily co-exist without any declaration of which approach may be superior.** Both approaches have benefits depending on the situation, and choosing a superior option may unnecessarily complicate RTA negotiations.

**2. Based on the distinctiveness and efficacy of labour and environmental provisions, this paper highlights areas where labour and environmental provisions can learn from each other.** It includes setting a pre-ratification condition as an ex-ante approach for the environment and a similar

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<sup>101</sup> "Open Public Consultation on the Trade and Sustainable Development (TSD) Review - Trade - European Commission," accessed January 6, 2022, [https://trade.ec.europa.eu/consultations/index.cfm?consul\\_id=301](https://trade.ec.europa.eu/consultations/index.cfm?consul_id=301).

Commission for Labour Cooperation. As a secondary step, this report also finds potential areas where the **EU and US approaches can learn from each other** including remedies for non-compliance and intergovernmental consultations.

3. Building off different labour and environmental provisions, and different US and EU approaches in RTAs, **there are several ways they could coordinate for stronger, mutually beneficial outcomes.** Highlighted in the above policy recommendations, this includes the codification of stakeholder engagement, need for better engagement with private sector partners, alignment of public-private cooperation, mix of voluntary and mandatory obligations, and the incorporation of non-US/EU trade priorities to advance the goals of labour and the environment.

## 5. Conclusion

This report creates a comparative framework and policy recommendations to strengthen labour and environmental provisions within Regional Trade Agreements (RTAs).

There is a particular sense of urgency to coordinate labour and environmental provisions in RTAs and other multilateral trade agreements. Forward thinking trade agreements must adapt to the immediate demands of climate change. Compounding its direct impacts, climate change also has major implications for the future of the labour force and the need to adapt to new professions. Trade agreements must reflect these two keys, so-called non-trade issues of labour and environment because both are distinctly “trade” issues. Increasing world-wide political pressure is making it gradually more difficult for trade negotiators to ignore the distorting and negative trade effects of RTA Members failing to adhere to fundamental labour rights and multilaterally negotiated environmental agreements.

Future trade agreements cannot hope to secure long-lasting political support unless RTAs effectively establish labour and environmental measures that codify levels of enforceability. There is a real danger if RTA negotiators fail to develop applicable mechanisms to strengthen labour and environmental provisions. RTA Members negatively affected by unfair trade practices, such as the failure to adhere to agreed labour provisions, will inevitably be pushed by domestic and transnational political forces to take unilateral trade actions. In the future, this could lead to a downward spiral of increasing levels of retaliation. In short, RTA negotiators can no longer sweep labour and environment provisions under the proverbial “rug” if they hope to make an RTA sustainable and mutually beneficial to RTA parties, and acceptable to private sector and civil society actors.

This report offers substantive policy recommendations that seek to harmonize and synthesize labour and environmental provisions in RTAs. The report recognizes that there are considerable differences between labour and environmental provisions. This is not surprising since they address distinct – if not entirely unrelated – effects on trade. However, the report also establishes that there are important similarities and overlaps between the two areas. The recommendations set out in the above Section 4 offer suggestions on how labour and environmental provisions can learn from each other. This report concludes that removing the silos that typically separate labour and the environment in RTAs leaves significant room for mutually beneficial coordination and learning potential between labour and environmental provisions.

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## **7. Annex**

- 7.1 Annex 1: Mapping of Labour and Environmental Provisions in RTAs**
- 7.2 Annex 2: Ratification of International Standards by RTA Parties (Table 7/8/9)**
- 7.3 Annex 3: Future Considerations**

## 7.2 Annex 2: Ratification of International Standards by RTA Parties (Table 7/8/9)

Table 7: Ratification of Fundamental ILO Conventions, Selected Countries										
Year	Convention	US	GE	FR	CA	ME	PE	VI	AU	JP
1948	1. Freedom of Association and Protection of the Right to Organise Convention	×	√	√	√	√	√	×	√	√
1949	2. Right to Organise and Collective Bargaining Convention	×	√	√	√	√	√	√	√	√
1930/ 2014	3. Forced Labour Convention	×	√	√	√	√	√	√	√	√
1957	4. Abolition of Forced Labour Convention	√	√	√	√	√	√	√	√	×
1973	5. Minimum Age Convention	×	√	√	√	√	√	√	×	√
1999	6. Worst Forms of Child Labour Convention	√	√	√	√	√	√	√	√	√
1951	7. Equal Remuneration Convention	×	√	√	√	√	√	√	√	√
1958	8. Discrimination (Employment and Occupation) Convention	×	√	√	√	√	√	√	√	×

Table 8: Ratification of other ILO conventions, selected countries										
Year	Convention name	US	GE	FR	CA	ME	PE	VI	AU	JP
1947	Labour Inspection Convention	×	√	√	√	×	√	√	√	√
1970	Minimum Wage Fixing Convention	×	×	√	×	√	×	×	√	√
1975	Migrant Workers Convention	×	×	×	×	×	×	×	×	×
1981	Occupational Safety and Health Convention	×	×	×	×	√	×	√	√	×

*Note: Further reference is often made to the 1998 Declaration on Fundamental Principles and Rights at Work and the 1999 ILO Decent Work Agenda.*

**Table 9: Ratification of Multilateral Environmental Agreements, Selected Countries**

Year	MEA	US	GE	FR	CA	ME	PE	VI	AU	JP
1973	Convention on International Trade in Endangered Species of Wild Fauna and Flora	√	√	√	√	√	√	√	√	√
1987	Montreal Protocol on Substances that Deplete the Ozone Layer	√	√	√	√	√	√	√	√	√
1989	Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal	√	√	√	√	√	√	√	√	√
1992	Convention on Biological Diversity	√	√	√	√	√	√	√	√	√
1992	United Nations Framework Convention on Climate Change	√	√	√	√	√	√	√	√	√
1997	Kyoto Protocol to the United Nations Framework Convention on Climate Change	√	√	√	√	√	√	√	√	√
2010	Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity	×	√	√	×	√	√	√	√	√
2015	Paris Agreement	√	√	√	√	√	√	√	√	√

## 7.3 Annex 3: Future Considerations

While drafting this report, several ideas outside of the scope of this project arose and could be explored in subsequent analysis. These include environment and labour provisions in Investor-State Dispute Settlement (ISDS), gender provisions, animal welfare, low carbon economy provisions, technical assistance and capacity building for developing countries, and reluctance from developing countries such as China.

**ISDS:** While this field is developing, expert interviews conducted throughout the course of this project highlighted that people are becoming more attuned to labour and environmental provisions overlap with ISDS, which is typically located under a separate investment chapter within RTAs. For example, an ISDS case decided in September of 2021 involving Canadian mining company Eco Oro Minerals against the Republic of Colombia highlights that investment treaties can compromise environmental protections.<sup>102</sup>

**Gender Provisions:** Building on labour and environmental provisions call for increased attention to social issues in trade agreements, gender provisions present another path for further exploration. Gender provisions in RTAs are not new, but follow a similar, albeit slightly trailing, trend line to labour and environmental provisions. They increased in quantity as the number of RTAs increased exponentially in the late 1990s and early 2000s. However, provisions tended to be limited in scope and vary significantly across RTAs.<sup>103</sup>

The number of gender provisions has been on a consistent upward trend since Chile-Uruguay became the first RTA to include a gender chapter

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<sup>102</sup> “The False Hopes and Empty Promises of Investment Treaty Modernization,” *The Monitor*, accessed January 7, 2022, <https://monitormag.ca/articles/the-false-hopes-and-empty-promises-of-investment-treaty-modernization>.

<sup>103</sup> “GENDER-RELATED PROVISIONS IN REGIONAL TRADE AGREEMENTS,” accessed January 7, 2022, [https://www.wto.org/english/res\\_e/reser\\_e/ersd201815\\_e.pdf](https://www.wto.org/english/res_e/reser_e/ersd201815_e.pdf).

in 2016.<sup>104</sup> Canada became the first G20 nation to include a gender chapter in a trade agreement with their 2017 modernization of the Canada-Chile RTA.<sup>105</sup> There is broad support for this effort, as in 2017, 118 WTO members supported the “Joint Declaration on Trade and Women’s economic empowerment,” which calls for trade policy to be responsive to gender.<sup>106</sup> Similar to this report’s analysis of provision implementation, now that gender provisions and gender chapters in RTAs have been in practice for a few years, it would be interesting to examine their effectiveness in the field through obligations, monitoring and cooperation, and enforcement.

Outside of RTAs, the “Generalised Scheme of Preferences” (GSP) presents another path for gender advocacy through global trade. Using GSP, the EU leveraged preferential trade treatment in return for Pakistan’s established “Treaty Implementation Cells” (TICs). TICs were created to monitor the implementation of human rights treaties, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). “According to an EU Commission report in 2018, these TICs ‘provide a useful forum for discussion and coordination which did not exist before.’”<sup>107</sup>

**Animal Welfare Provisions:** For the first time ever in an RTA, albeit not yet enforced, the EU-Mercosur RTA includes specific provisions on

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<sup>104</sup> Bomin Ko, “Analysis of Gender Chapters in Five Free Trade Agreements and Its Lessons for Korea,” *Journal of Korea Trade* 24, no. 6 (2020): 82–100, <https://doi.org/10.35611/jkt.2020.24.6.82>.

<sup>105</sup> Global Affairs Canada, “Trade and Gender in Free Trade Agreements: The Canadian Approach,” GAC, January 8, 2019, [https://www.international.gc.ca/trade-commerce/gender\\_equality-egalite\\_genres/trade\\_gender\\_fta-ale-commerce\\_genre.aspx?lang=eng](https://www.international.gc.ca/trade-commerce/gender_equality-egalite_genres/trade_gender_fta-ale-commerce_genre.aspx?lang=eng).

<sup>106</sup> “GENDER-RELATED PROVISIONS IN REGIONAL TRADE AGREEMENTS.”

<sup>107</sup> Gráinne de Búrca, *Reframing Human Rights in a Turbulent Era*, Collected Courses of the Academy of European Law (Oxford: Oxford University Press, 2021), <https://doi.org/10.1093/oso/9780198299578.001.0001>.



animal welfare.<sup>108</sup> As part of these new provisions, the Parties commit to “establish a structured dialogue and exchange of information.”<sup>109</sup>

**Low Carbon Economy Provision:** The low carbon economy is considered crucial in decarbonising the global economy, which is why novel RTAs like the UK-Australia emphasize the role of the low-carbon economy by having separate provisions and zero tariffs on low carbon exports. This should increase investment incentives in and the growth potential of the low carbon economy, benefiting both the environment and jobs.<sup>110</sup>

**Technical Assistance and Capacity-Building in Developing Countries:** As visible in Table 4 all recent US and EU agreements analysed in this report contain almost identical cooperative activities. US and EU trade agreements with developing countries typically include the provision of technical assistance and capacity building. By contrast, RTAs between developed countries generally do not contain such elements. This discrepancy could be an area of future research.

**China:** Concluding the negotiations with China on the Comprehensive Agreement on Investment (CAI) is a key priority for European businesses. However, China has yet to ratify the ILO Labour Inspection Conventions, 1947 (No. 81) and the Labour Inspection Convention (Agriculture), 1969 (No. 129). The issue of forced labour remains a controversial point in negotiations. China does not prioritize labour protection and blocks efforts to address this in the course of trade and investment agreements. Therefore, different trade priorities hinder the EU and China from entering into an agreement.

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<sup>108</sup> “EU Implements First Animal Welfare-Based Condition in Trade Agreement – EURACTIV.Com,” accessed January 7, 2022, <https://www.euractiv.com/section/agriculture-food/news/eu-implements-first-animal-welfare-based-condition-in-trade-agreement/>.

<sup>109</sup> “RESPECTING EUROPE’S FOOD SAFETY STANDARDS,” accessed January 7, 2022, [https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc\\_157956.pdf](https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157956.pdf).

<sup>110</sup> “Uk-Australia-Free-Trade-Agreement-Fta-Sustainability-and-Inclusion-Explainer.Pdf,” accessed January 7, 2022, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1040959/uk-australia-free-trade-agreement-fta-sustainability-and-inclusion-explainer.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040959/uk-australia-free-trade-agreement-fta-sustainability-and-inclusion-explainer.pdf).